

At trial in a civil case arising out of a car accident, the plaintiff has called the investigating police officer to testify regarding a statement that the officer overheard the defendant make at the scene admitting that he had failed to see the stop sign. However, while on the stand, the officer is unable to recall the exact words that the defendant used. The plaintiff proposes to refresh the officer's recollection with a police report written by a fellow officer who was also at the scene and wrote down the defendant's statement. The defendant has objected to the use of this report to refresh the testifying officer's memory.

Should the court permit this use of the report?

- A. No, because the report is hearsay not within any exception.
- B. No, because the report was not written or adopted by this witness.
- C. Yes, because the report fits the public record exception to the hearsay rule.
- D. Yes, because the report may be used to refresh recollection without regard to its admissibility.

Explanation:

Present recollection refreshed v. Past recollection recorded

Refreshing recollection	Any item may be used to refresh witness's memory <i>regardless of admissibility</i> if: (FRE 612) witness once knew but is now unable to recall fact or event <i>and</i> item will help witness recall that information
Recorded recollection	Record is <i>admissible</i> hearsay if it: (FRE 803(5)) contains information witness once knew but cannot recall well enough to testify fully & accurately was made or adopted by witness when matter was fresh in his/her mind <i>and</i> accurately reflects witness's knowledge at time record was made

FRE = Federal Rule of Evidence.

A witness is permitted to view **any item** (usually a writing) to **refresh his/her recollection** when:

the witness **once had personal knowledge** of a fact or event but is **now unable to recall** it *and*

the writing or other item will **help the witness recall** that information.

Since the item is merely being used to refresh the witness's memory, it **need not be admissible** for substantive purposes (ie, to prove its contents).

Here, the investigating officer was unable to recall the exact words he overheard the defendant use at the scene of the accident, so the plaintiff sought to refresh the officer's memory with a report written by another officer. Since the investigating officer once had personal knowledge of the statement, the report may be used to refresh his memory without regard to its admissibility. Therefore, the court should permit this use of the report.

(Choices A & C) Hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein and is inadmissible absent an [exception](#). And though police reports are typically hearsay, they may be admissible in civil cases under the [public records exception](#). But here, the report's admissibility is irrelevant since the plaintiff is not seeking to introduce it into evidence.

(Choice B) Unlike a recorded recollection, an item used to refresh a witness's memory (eg, the other officer's report) need not have been written or adopted by that witness.

Educational objective:

A witness who once knew but cannot recall a fact or event can view any item (often a writing) to refresh his/her memory—regardless of whether that item is admissible for substantive purposes.

References

Fed. R. Evid. 612 (refreshing recollection).

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