

EVIDENTIARY  
FOUNDATIONS

SEVENTH EDITION

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LexisNexis

ground that the exhibit is hearsay.

P Your Honor, may we approach the bench?

J Yes.

P Your Honor, I concede that the exhibit is hearsay, but I submit that I've laid a complete foundation for the official record exception to the hearsay rule.

O In general, that's true. However, an additional requirement is that the entry offered be factual. Page 10 of the report has a lot of conclusory opinions. I want to know whether the plaintiff's counsel intends to read that page to the jury.

J (To the proponent) What is your intention?

P I want the witness to read one of the measurements listed on page seven.

O Very well, I have no objection to that.

J Then the exhibit will be received, and you have permission to have the witness read that portion of page seven to the jury. I won't let the exhibit go to the jury because it contains inadmissible opinion.

P Mr. Justin, please read the first measurement on page seven to the jurors.

W The report reads, "While at the scene, I measured the slope of the curve. I determined the angle to be 19 degrees."

§ 10.07 PAST RECOLLECTION RECORDED AND PRESENT RECOLLECTION REFRESHED OR REVIVED

[1] PAST RECOLLECTION RECORDED

The next documentary hearsay exception is the past recollection recorded doctrine. Suppose that the witness on the stand cannot recall a particular fact or event. The witness's inability to recall supplies necessity for resorting to hearsay evidence. If at the time of the event, the witness had made a record of the fact or event, the record would be a reliable substitute for the witness's present recall. The recognition of this necessity and reliability led to the development of the past recollection recorded doctrine.

Federal Evidence Rule 803(5) states the doctrine succinctly: "A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly."

If the proponent can show that the exhibit satisfies the doctrine, the real evidence is the document. In many jurisdictions, since the real evidence is the document, the judge formally admits the document and permits it to be submitted

to the jury. Other courts take a different position. They reason that the document is the functional equivalent of oral testimony and that it would place undue emphasis on that evidence to permit the jury to examine the document. This reasoning partially persuaded the drafters of the Federal Rules of Evidence. Federal Rule 803(5) provides that “[i]f admitted, the . . . record may be read into evidence but may not itself be received as an exhibit. . . .”

The foundation for this hearsay exception includes these elements:

1. The witness formerly gained personal knowledge of the fact or event recorded.
2. The witness subsequently prepared a record of the facts. All courts accept the foundation if the witness personally prepared the record. Most courts accept the record if a third party prepared it but the witness verified it while the events were still fresh in the witness’s memory. Some courts also accept cooperative past recollection recorded; witness #1 gives an accurate oral report to witness #2, and witness #2 testifies that he or she accurately transcribed the oral report. The cooperative theory necessitates that both witnesses appear at trial and testify. (Most jurisdictions now recognize the present sense impression exception codified in Federal Rule 803(1). If the judge is willing to apply that exception to witness #1’s statement, witness #2’s live testimony should suffice to justify the admission of the record.)
3. The witness prepared the record while the events were still fresh in his or her memory. The courts have interpreted Rule 803(5) as liberalizing this timing requirement. In *United States v. Patterson*, 678 F.2d 774 (9th Cir. 1982), the court found a declarant’s memory sufficiently fresh despite a ten-month time lapse. See also *United States v. Senak*, 527 F.2d 129 (7th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (a three year delay).
4. The witness can vouch that when he or she prepared the record, the record was accurate. Ideally, the witness will recall the very occasion on which he or she prepared the document. Alternatively, the witness may testify that he or she habitually records that type of information and that their habit is to record the information carefully. A police officer assigned to the traffic detail could give that type of testimony about measurements at accident scenes. Finally, in some jurisdictions, it is acceptable if the witness at least recognizes his or her handwriting on the document. In this last situation, in reality the witness is vouching for his or her own honesty; they are really testifying that they are an honest person and would not knowingly record false data.
5. At trial, the witness cannot completely and accurately recall the facts even after reviewing the document. The early view was that the witness had to completely forget the event. In other words, the witness had to “draw a complete blank.” Most modern courts are of the view that it is

sufficient if the witness's memory is partial or hazy. In the words of Federal Rule 803(5), the witness cannot remember "fully and accurately."

On the one hand, Rule 803(5) can be interpreted as permitting the formal admission of the exhibit. On the other hand, the rule forbids physically submitting the exhibit to the jurors for their inspection. *Maggipinto v. Reichman*, 607 F.2d 621 (3d Cir. 1979) (construing similar language in Rule 803(18)).

Our fact situation is a bank robbery prosecution. The government charges that Mr. Gary Vincent robbed the First National Bank in downtown Phoenix. The witness is Ms. Jane Millot. Ms. Millot has already identified herself. She has testified that she works as a teller at the First National Bank. The prosecution is the proponent.

- P Ms. Millot, WHERE were you on the morning of February 14, 2007? (1)
- W I was at work at the bank.
- P WHAT happened that morning? (1)
- W The bank was robbed.
- P HOW were the robbers dressed? (1)
- W They all had masks on. That's why I can't identify any faces.
- P WHAT happened immediately after the robbers took the money? (1)
- W They made their getaway.
- P HOW did they make their getaway? (1)
- W In a white car parked in front of the bank.
- P WHAT was the car's license number? (1), (5)
- W I can't remember. I saw it, but I can't remember it now.
- P WHAT, if anything, might help you remember? (2)
- W I made a note on a slip of paper I had at the time.
- P WHAT did you note on this slip of paper? (2)
- W The license number of the getaway car.
- P WHO prepared this slip? (3)
- W I did it myself.
- P WHEN did you prepare this slip? (3)
- W Right after the car got away.
- P HOW many minutes passed between the time the car left and the time you wrote on the slip? (3)
- W One or two. Not any more than that. I had the slip of paper and a pen in the pocket of my dress.

- P HOW clear was your memory of the license number when you wrote the number down? (3), (4)
- W I don't remember making any mistakes. I looked at it carefully, and it seemed O.K. at the time.
- P Your Honor, I request that this be marked prosecution exhibit five for identification.
- J It will be so marked.
- P Please let the record reflect that I am showing the exhibit to the opposing counsel.
- J It will so reflect.
- P Ms. Millot, I now hand you prosecution exhibit five for identification. WHAT is it?
- W It's the slip of paper I mentioned.
- P HOW can you recognize it?
- W I recognize my handwriting.
- P Please read the exhibit silently to yourself. (*Pause.*) Have you done so?
- W Yes.
- P Now please hand it to me. (*The witness does so.*) Your Honor, please let the record reflect that I am holding the exhibit away from the witness and out of her view.
- J It will so reflect.
- P Ms. Millot, you've had a chance to read the exhibit and refresh your memory. Now, without relying on the exhibit, WHAT was the car's license number? (5)
- W I still can't remember apart from the exhibit.
- P WHY can't you remember? (5)
- W I have a bad memory for numbers. I can't honestly say that I now remember the license number.

*In jurisdictions prohibiting the introduction of the exhibit:*

- Please read the slip of paper to the jury.
- W It reads, "USC 247."
- P WHAT does that stand for?
- W That's the license number of the getaway car.

*In jurisdictions permitting the introduction of the exhibit:*

- P Your Honor, I now offer prosecution exhibit number five for identification into evidence as prosecution exhibit five.

- J It will be received.  
 P Ms. Millot, please read the exhibit to the jurors.  
 W It reads, "USC 247."  
 P WHAT does that stand for?  
 W It's the license number of the getaway car.

## [2] PRESENT RECOLLECTION REFRESHED OR REVIVED

In past recollection recorded, even after viewing the document, the witness cannot recall the relevant fact or event. Suppose that viewing the document refreshed the witness's recollection. Then the witness may testify from his or her revived recollection. The courts use the expressions, "present recollection refreshed" or "present recollection revived" to describe the use of exhibits to refresh present memory. Under this theory, the real evidence is the witness's oral testimony, and the exhibit serves only as a memory aid or jogger. A few courts apply the foundational requirements for past recollection recorded to documents used to refresh recollection. However, most courts draw a clear distinction between the two doctrines and permit the proponent to use any document to refresh recollection. Some courts even broadly permit the proponent to use photographs or songs to revive a witness's memory.

Federal Rule of Evidence 612 governs this practice in federal courts:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code (the Jencks Act), if a witness uses a writing to refresh memory for the purpose of testifying, either —

- (1) while testifying, or
- (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

If the jurisdiction does not apply the past recollection recorded requirements to present recollection revived, the foundation for present recollection refreshed or revived is quite simple:

1. The witness states that he or she cannot recall a fact or event.
2. The witness states that a certain writing or object could help refresh his or her memory. Most jurisdictions do not require this showing as a formal element of the foundation, but many trial attorneys think that it is good practice to have the witness first mention the writing or object.
3. The proponent tenders the writing or object to the witness.
4. The proponent asks the witness to silently read the writing or study the object.
5. The witness states that viewing the document or object refreshes his or

her memory.

6. The witness then testifies from revived memory.

On this theory, the evidence is the witness's oral testimony, and the proponent does not formally offer the writing or object into evidence. For purposes of making a good record, many trial judges prefer that the proponent at least mark the writing or object as an exhibit for identification.

We can use the same robbery hypothetical to illustrate present recollection refreshed. In this variation of the hypothetical, Ms. Millot has a better memory for numbers.

- P WHAT was the getaway car's license number? (1)
- W I can't honestly remember right now.
- P WHAT, if anything, might help you remember? (2)
- W I wrote the number down on a slip of paper.
- P Your Honor, I request that this be marked prosecution exhibit number five for identification.
- J It will be so marked.
- P Please let the record reflect that I am showing the exhibit to the opposing counsel.
- J It will so reflect.
- P I request permission to approach the witness.
- J Granted.
- P Ms. Millot, I now hand you prosecution exhibit number five for identification. (3) WHAT is it? (2)
- W It's the slip of paper I mentioned.
- P HOW can you recognize it? (2)
- W I ought to know my own handwriting style.
- P Please read the exhibit silently to yourself. (4) *(Pause.)* Have you done so?
- W Yes.
- P Now hand it to me. *(The witness does so.)* Your Honor, please let the record reflect that I am holding the exhibit away from the witness and out of her view.
- J It will so reflect.
- P Ms. Millot, you've had a chance to read the exhibit to refresh your memory. Now without relying on the exhibit, can you remember the license number? (5)
- W Yes.

P WHAT was the license number? (6)  
 W USC 247.

Many experienced trial attorneys use the following combination of past recollection recorded and present recollection refreshed. As soon as a witness states that he or she cannot recall a fact or event, the proponent lays elements one through four of the past recollection recorded foundation. The proponent then tenders the writing to the witness in an attempt to revive present recollection. If the attempt is successful, the witness testifies from present, refreshed memory. If the attempt is unsuccessful, the witness's inability to recall lays the last element of the past recollection recorded foundation. Questioning the witness in this sequence puts the proponent in a "no loss" situation; whichever response the witness gives, the proponent can elicit the desired testimony.

**§ 10.08 EXCITED OR STARTLED UTTERANCES**

**[1] THE DOCTRINE**

In the last three sections, we analyzed documentary hearsay exceptions resting primarily on a showing of reliability. In each case, the showing is based on testimony describing the trustworthy manner in which the document was generated. The next four sections address other hearsay exceptions recognized principally because of an inference of reliability. In these exceptions, however, the inference of reliability has a different basis; each exception in this category is a variation of the old *res gestae* doctrine and rests on an inference of the declarant's sincerity. This category includes excited utterances, present sense impressions, declarations of bodily condition, and statements of mental condition.

The exception for excited utterances illustrates the common rationale of the exceptions in this category. A startling event occurs, an observer becomes excited, and the observer then makes a spontaneous statement about the event. The statement's spontaneity is the circumstantial guarantee of the declarant's sincerity. Federal Evidence Rule 803(2) describes the doctrine in this fashion: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

**[2] ELEMENTS OF THE FOUNDATION**

The foundation for an excited utterance includes the following elements:

1. An event occurred. Most jurisdictions, including the federal courts, do not require any independent, corroborating evidence that the event occurred; these courts accept the declarant's assertion of the event's occurrence at face value. A minority of jurisdictions requires independent evidence as part of the foundation. However, even in these jurisdictions, the quantum of required corroboration is usually slight. For example, if the declaration refers to an assault on the declarant and, at the time, the

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