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A. WHEN CAN A WITNESS REFER TO A DOCUMENT?

1. Generally

The general rule is that witnesses give their testimony relying on their memory and without reference to any document. A witness may not give testimony by reading prepared notes. Sometimes this rule is relaxed for a self-represented party who is acting as both advocate and witness because in the role of advocate he or she would normally be entitled to rely on prepared notes.

An expert witness is exempted from this general rule (see **Chapter 41: Expert Witnesses, section D**).

A witness may be permitted to access a document while giving testimony if:

- the witness or counsel explains the purpose of the referral;
- the witness or counsel explains the nature and authenticity of the document; and
- the trial judge finds that the use of the document is proper.

Documents for this purpose may include audio, video and other electronic recordings: *The Law of Evidence in Canada*, 3rd ed., paras. 16.84–16.111; also John Wigmore, *Wigmore on Evidence*, Chadbourne Revision (Boston: Little, Brown Co., 1970) Vol. 3, c. 28, section 744.

If the witness is merely using the document as an aid, the evidence is still the witness's present oral testimony. The document, therefore, does not become an exhibit.

Where a witness is seen to be referring to a document, the trial judge should immediately ask the witness to identify the document, and ask counsel or the witness to explain what use is proposed to be made of it. The trial judge is always entitled to examine such a document.

2. Can Opposing Counsel See the Document?

- See **section B** (below)

Opposing counsel is entitled to see any documents the witness refers to while in the witness box and can later conduct cross-examination in light of what a document might disclose: *R. v. Vallillee*, [1954] O.J. No. 610, 107 C.C.C. 405 (C.A.); *R. v. Morgan*, [1993] O.J. No. 653, 80 C.C.C. (3d) 16 (C.A.); *The Law of Evidence in Canada*, 3rd ed., at para. 16.111; R.E. Salhany, *Cross-examination: The Art of the Advocate*, 2nd ed. (Toronto: Butterworths, 1999) at 17. However, the production of documents may be limited to those that are relevant to the evidence given by the witness and to the issues upon which the witness is testifying: *R. v. Monfils*, [1971] O.J. No. 1725, [1972] 1 O.R. 11 (C.A.).

Counsel should assume that any document in the possession of a witness on the stand may be seen by the opposing counsel and/or the judge, and could find its way into evidence, even if counsel did not intend to introduce it.

Witnesses who provide some, but not all, of the documents that form part of a file may well be asked to explain the absence of the missing documents. They may also be asked or ordered to bring them to court.

When a witness first refers to a document, opposing counsel should ask the judge for permission to examine the document before the witness is examined further "in-chief" if:

- counsel is concerned that it is not appropriate to permit the witness to refresh their memory from the document; or
- counsel has not seen the document before and wishes to know its content before the witness testifies.

The following script provides an example:

Counsel:	*Your Honour, before my friend continues, I would ask for permission to examine the document.*
Judge:	*Very well* [witness] *please show counsel that document.*

Counsel:	[approaches the witness box, obtains the document from the witness and stands there and reads the document] *Your Honour, this document is 12 pages. I would ask for a brief recess while I read it.*
Judge:	*We will take a 15-minute recess.*

3. Is the Jury Entitled to See the Document?

If a document is not evidence or an exhibit, the jury should not be entitled to examine the document: *R. v. Donovan*, [1991] O.J. No. 957, 65 C.C.C. (3d) 511 (C.A.).

As a general rule, documents used to refresh memory do not become exhibits because they are not primary evidence. The revived memory of the witness is the evidence: *R. v. Pleich*, [1980] O.J. No. 1233, 55 C.C.C. (2d) 13 (C.A.). See also *Thomas (Committee of) v. Bell Helmets Inc.*, [1999] O.J. No. 4293, 126 O.A.C. 353 (C.A.).

However, whether a document used to refresh memory becomes an exhibit depends upon the circumstances. If the testimony reveals that the document is admissible as evidence of the facts stated (*e.g.*, a business record) or is relevant to prove another fact (*e.g.*, that this is the information conveyed to another witness) then it would be marked as an exhibit.

There is some old and confusing case law indicating that it may be necessary to make a document an exhibit if on cross-examination the questions asked by opposing counsel refer to parts of the document beyond what was relied on by the witness to refresh his or her memory: *The Law of Evidence in Canada*, 3rd ed., at para. 16.103.

As a general rule, previous written statements used solely to impeach the credibility of a witness will not be marked as exhibits, but the trial judge has a discretion to make them exhibits: *R. v. Betker*, [1997] O.J. No. 1578, 115 C.C.C. (3d) 421 at 430 (C.A.).

4. Production Before Witness Testifies

(a) Obtaining Documents from Witnesses Before They Testify

- See **Chapter 37: Calling Witnesses, section H.2**
- See **Chapter 15: Exhibits, section B**

(b) In Criminal Trials

In criminal trials the Crown's obligation to disclose all relevant information in the possession of the prosecution, subject to the rules of

privilege or to protect an informer, ensures that the defence will have an opportunity, before trial, to inspect most documents to be used by Crown witnesses.

The documentary disclosure obligation on the Crown pertains only to documents in its possession or in the possession of their investigating agency, which is usually the police. Information residing with third parties such as boards and agencies (*e.g.*, a Children's Aid Society) is not under the control of the Crown. See *R. v. McNeil*, [2009] S.C.J. No. 3, [2009] 1 S.C.R. 66.

Generally, the defence is under no obligation to disclose a document to the prosecution prior to calling the witness who produces it. An exception would occur if it is sought to introduce evidence of an expert through a report which must first be given to the other side together with reasonable notice of the intent to produce it. The court may still require the expert to appear before the court for examination or cross-examination: *Criminal Code* (R.S.C. 1985, c. C-46) section 657.3.

Section 28 of the *Canada Evidence Act* (R.S.C. 1985, c. C-5) requires notice of intention to produce certain records before they can be admitted into evidence.

Although there is no statutory requirement to do so, if it is intended to produce a document in support of a defence of alibi, such documents should be disclosed so as to permit Crown counsel an opportunity to test the alibi. Failure to do so may affect the weight given to the evidence: *R. v. Cleghorn*, [1995] S.C.J. No. 73, [1995] 3 S.C.R. 175.

In order to ensure a fair trial, the trial judge may grant the Crown an adjournment to review any documents produced at trial by a defence witness, depending upon the complexity of what is produced and whether the Crown might reasonably have anticipated that the document would be produced.

B. PRESENT MEMORY REVIVED: USING DOCUMENTS TO REFRESH MEMORY

1. Generally

The most frequent use of a document by a witness is to "revive" or "refresh" a present memory.

Often, witnesses cannot recall facts about which they testified or reported on an earlier occasion, such as in a written statement, at an examination for discovery or at a preliminary hearing.

If this occurs, counsel should first ask questions to demonstrate that the witness truly cannot remember. Once it has been proven that

C. PAST RECOLLECTION RECORDED

A different situation arises when, instead of having an incomplete or foggy recollection of events that requires some refreshing, a witness has no present memory of an event or circumstances. In cases where the witness has no present memory, the witness may testify by referring to:

- a writing made by the witness at or near the time of the event;
- a writing made by another person recording events heard or seen by the witness, as long as the witness testifying previously verified the accuracy of the record made by that other person.

As discussed below, the trial judge has the discretion to make the document an exhibit.

In this situation, where counsel wish to have a witness refer to a record he or she made, the counsel calling the witness must:

- establish that the information was recorded in a reliable manner;
- establish that at the time the record was made, the witness's memory of the events was sufficiently fresh and vivid to be probably accurate;
- have the witness affirm that the record was true when made; and
- use the original statement itself, if it is available: *R. v. Eisenhauer*, [1998] N.S.J. No. 28, 123 C.C.C. (3d) 37 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 144.

Because most of the comments made in relevant cases were made in the context of specific sets of circumstances, it is difficult to cite a general set of considerations to apply. Nevertheless, two prerequisites to admissibility stand out as common to all cases:

- proof that the statement was made with sufficient contemporaneity to the facts mentioned; and
- proof that the statement accurately reflected the knowledge of the witness at the time.

It would appear that the first is an objective criterion of reliability based on the circumstances, and the second is a subjective criterion based on the witness's view: *The Law of Evidence in Canada*, 3rd ed., at paras. 16.87–16.103.

There is no maximum period which defines what is sufficient contemporaneity and it seems that the essence of this requirement is that the court be satisfied that the statement was made at a point in time when it could be expected that a person in the same circumstances would accurately remember the same type of fact. In general, the more

technical or specific the information in question, the shorter the acceptable period would be.

1. Steps to Admit Previously Recorded Statement

When determining whether to admit a previously recorded statement the judge should:

- review the statement;
- ask counsel proffering the statement for any evidence relied upon to support the admission of the document;
- ask opposing counsel if they have any evidence;
- consider issues of contemporaneity and whether the statement accurately reflects the knowledge of the witness at the time; and
- determine if the document will be admitted as an exhibit as evidence of the facts stated. The judge has a discretion with respect to making the document an exhibit, particularly in a jury trial: *The Law of Evidence in Canada*, 3rd ed., at para. 16.102.

Examples of past recollection recorded would include police officer's notes of the speed shown on a radar machine or a transcript of a prior hearing where the witness had no independent memory beyond testifying.

It is not always clear whether a document is being used by a witness to refresh a memory or whether the document is being relied upon to the extent that the document becomes evidence of past recollection recorded. In general, however, the more the witness has to refer to the document in giving evidence, the more likely the conclusion becomes that it is past recollection recorded and the evidence is restricted to the document. The fine line between memory refreshed and past recollection recorded is illustrated by the common example of the use of notes by a police officer during testimony.

To a large extent the issue is only of theoretical interest.

D. POLICE OFFICERS' NOTES

The most common example of using a document to "refresh memory" occurs when a police officer wishes to refer to a notebook. When police officers testify they almost always use their notebooks to refresh their memories.

It is an interesting point of evidence law as to whether their testimony is technically testimony which is refreshed, or the content of the notes, which is past recollection recorded, in which case a professor might ask why the notes are not put in as evidence.

notes and the testimony of the officer, or to show that they were altered or for some other reason that may affect the testimony. This is also rare.

E. UNREPRESENTED LITIGANTS

- See **Chapter 9: Self-represented Litigants**

Opposing counsel should assist both the court and the witness, be it the unrepresented party or another litigant, to ensure the appropriate use of documents.

The rule against witnesses using prepared notes to help them remember what to say is relaxed in the case of unrepresented litigants since if the witness had counsel, that counsel could use the notes to ask questions of the witness to prompt the witness's memory.