

Refresh vs. impeach: know the difference

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Witnesses give bad answers all the time. They forget things, they make mistakes, they lie. We talked in earlier columns about impeaching a witness on cross-examination after an inconsistent statement or problematic answer.

But lawyers too often confuse — or conflate — the different approaches to different types of bad answers. A witness's lack of memory or innocent mistake can be as harmful to your case as a deliberately inconsistent statement, but they aren't the same thing.

To begin, there are three distinct evidentiary concepts that you need to keep straight: (1) refreshing a witness's present memory, (2) using a witness's "past recollection recorded," and (3) impeaching a witness's testimony.

The first is refreshing a witness's memory. People often forget things under the pressure of the courtroom setting. If a witness says she can't remember, the lawyer is permitted under Fed. R. Evid. 612 to show her something to refresh her memory. She then testifies from memory, her memory having been refreshed.

The second is past recollection recorded. If the witness still can't remember, even when she's shown a document, the lawyer may be permitted under Fed. R. Evid. 803(5) to read the past statement (verbatim) to the jury.

The third is impeachment by prior inconsistent statement. When the witness says something different, the lawyer is permitted to confront her with a prior contradictory statement. Under the federal rules, the prior statement can be admitted for its truth (under Fed. R. Evid. 801(d)(1)) if made under oath. That's not true under Massachusetts law; the prior statement only comes in to impeach the witness.

Lawyers confuse these things all the time, and sometimes confuse judges in the process. One way to help keep them straight is to remember what you're trying to do.

As a general matter, with a friendly witness on direct, you're trying to help the witness remember. So most of the time, on direct examination, you want to refresh the witness's memory (or read past recorded recollection if the witness cannot remember).

With an unfriendly witness on cross, you're not trying to help; you're trying to rub her nose in it. So most of the time, on cross-examination, you want to impeach.

You can only refresh a witness's memory if there's a failure of memory. The witness needs to say something like, "I don't remember." (If the witness looks confused or gives you a blank stare, you can usually ask: "Are you having trouble remembering?")

But if the witness doesn't say that she can't remember, you can't "refresh" her memory. For example:

Q: *What color was the light when you saw the car go through the intersection?*

A: *The light was green.*

Q: *Let me show you this statement, to refresh your memory.*

Opposing Counsel: *Objection. Lack of foundation.*

Court: *Sustained. Next question, please.*

It's also confusing to the judge if you conflate the two concepts. Don't try to impeach someone by confronting her with an inconsistent statement and asking her whether it "refreshes her memory as to what really happened." If you haven't established any lack of memory, there's nothing to refresh, and the judge might sustain an objection to an otherwise-valid question.

The process for refreshing memory is relatively simple. Essentially, there are five steps.

1. **Confirm lack of memory.** The first step is to establish that the witness doesn't remember. If the witness answers a question with a simple, "I don't recall," that's fine. But that's not always easy for a witness to say, in a room full of strangers. If she doesn't, you may need to prod her.
2. **Ask what might help.** The second step is to have the witness confirm that there is something out there that might help her memory:

Is there something that might help you remember?

If that doesn't work, you may need to lead a little:

Would it help you to see the report that you signed on the day of the accident?

Occasionally, you may want to ask a few questions to explain that document and show why it's a reliable source.

3. **Show the witness the document.** Go through the normal process for putting a document in front of the witness. Mark what you intend to show the witness, for identification. Show it to opposing counsel (or tell them what it is). Ask to approach the witness (or acknowledge the authority of the court). Show it to the witness and ask her to read it silently to herself. Ask her to look up, or otherwise let you know, when she's done.
4. **Take the document back.** Once the witness is done reading the document, either take it back or have her physically turn it over, to clearly demonstrate she's no longer relying on it.
5. **Ask the witness the question.** Ask the witness if her memory is now refreshed. If so, now ask your original question again. If she still doesn't remember, ask to read it to the jury as past recollection recorded.

What if you get a bad answer from a witness on direct that's just a screw-up, not the product of a failure of memory? If it's a minor misstatement on an uncontroversial matter, you can usually just lead the witness to the right answer: (*You said March 2016. Did you mean to say March 2017?*)

You can try to treat a bad answer on direct as a misunderstanding of a bad question (*I'm sorry, Ms. Witness, but I may have asked that badly. Let me rephrase it ...*). Which, of course, it may well be.

Sometimes, though, you may be stuck. As a general rule, you want to avoid impeaching a favorable witness on direct examination. It can be confusing to a jury, and set the wrong tone, to see a lawyer impeaching or contradicting his own witness. But you may need to correct the record, and you may have to make a difficult judgment call as to what to do.

The way to avoid this, of course, is to prepare your witnesses properly. Don't just go over the expected testimony; prepare the witness for the likelihood that the witness will forget something or get it wrong, and when that happens how you are going to try to handle it.

We all forget things every day. Don't panic; prepare. Prepare your witness, and prepare yourself to deal with problems effectively. And that starts with knowing the difference between refreshing and impeaching.

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