

6.09. Refreshing Recollection

(1) A witness may use any writing or other matter to refresh the witness’s memory while testifying.

(2) If a witness, while testifying, uses a writing or other matter to refresh the witness’s memory, an adverse party is entitled to inspect the writing or other matter and to cross-examine the witness about the writing or other matter.

Note

Subdivision (1). The rule stated in subdivision (1) is derived from *Huff v Bennett* (6 NY 337, 339 [1852] [A witness “is permitted to assist his memory by the use of any written instrument, memorandum or entry in a book, and it is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection”]); *Howard v McDonough* (77 NY 592, 593 [1879] [“A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed”]); and *People v Ferraro* (293 NY 51, 56 [1944] [“These statements were regarded as more strongly indicative of defendant’s guilt than the statements given by the witnesses on the trial. It was proper to use such statements to refresh the recollection of the witness”]).

As the writing is only being used to refresh recollection, the writing is not admitted nor are its contents disclosed to the jury except as provided by subdivision (2). (*Howard*, 77 NY at 593 [noting that when the witness’s “memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence”]; *see also* CPL 60.35 [3].) Whether the writing may be used for substantive evidence will turn upon whether it is otherwise admissible, e.g., admissible under Guide to New York Evidence rule 8.25, as a past recollection recorded.

The foundation for invoking this rule is a showing that the witness is having difficulty recalling a fact that the witness had perceived. (*See People v Gezzo*, 307 NY 385, 390 [1954] [police inspector testified he had “no independent recollection” of his interview of the defendant]; *People v Oddone*, 22 NY3d 369, 377 [2013] [“When a witness, describing an incident more than a year in the past, says that it ‘could have’ lasted ‘a minute or so,’ and adds ‘I don’t know,’ the inference that her recollection could benefit from being refreshed is a compelling one”].)

Whether objects or matters other than a writing can be used to refresh a witness’s recollection has not been addressed by the Court of Appeals. The First

and Second Departments have upheld the use of sound recordings to refresh a witness's recollection. (See *People v Reger*, 13 AD2d 63, 70 [1st Dept 1961]; *Seaberg v North Shore Lincoln-Mercury, Inc.*, 85 AD3d 1148, 1151 [2d Dept 2011].)

The court retains discretion to control the refreshing recollection process. (See *McCarthy v Meaney*, 183 NY 190, 193-194 [1905].) This discretion is to be exercised in determining whether the witness's recollection has in fact been refreshed and whether the witness is not just relating what he or she has just read or perceived. (*Id.* at 193-194.)

Subdivision (2). The rule stated in subdivision (2) is derived from *People v Gezzo* (307 NY at 393-394 [“ ‘The right of a party to protection against the introduction against him of false, forged or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth. It is too valuable to be trifled with, or to permit the court to enter into any calculation as to how far it may be encroached upon without injury to the party’ . . . ‘The defendant had the right to see, and to use on cross-examination, any memorandum or writing which had served to refresh the memory of the witness on his direct examination. . . . As the conversation was material, the defendant might possibly have been prejudiced by this limitation upon his cross-examination’ ” (quoting *Tibbetts v Sternberg*, 66 Barb 201, 203 [Sup Ct, NY County 1870], and *Schwicker v Levin*, 76 App Div 373, 375 [2d Dept 1902])).

Whether, as provided in Federal Rules of Evidence rule 612 (a), this production rule extends to writings used by the witness to refresh the witness's recollection before testifying has not been addressed by the Court of Appeals, albeit relevant writings of a witness are subject to pretrial disclosure in criminal proceedings. (See CPL 240.44, 240.45; *People v Rosario*, 9 NY2d 286 [1961], and its progeny.) Appellate Division decisions consistently hold that the right of inspection extends to writings or objects used by a witness prior to testifying. (See *e.g. Merrill Lynch Realty Commercial Servs. v Rudin Mgt. Co.*, 94 AD2d 617 [1st Dept 1983]; *Doxtator v Swarthout*, 38 AD2d 782 [4th Dept 1972].)

The Court of Appeals has also not addressed the issue of whether the use of a privileged writing for refreshing recollection purposes affects a waiver of the privilege otherwise applicable to the writing. Appellate Division decisions addressing this issue are conflicting. (Compare *Grieco v Cunningham*, 128 AD2d 502 [2d Dept 1987] [“any” privilege waived], with *Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 171 [1st Dept 2012] [attorney work product privilege not waived].)

For a discussion of the issues relating to the application of the refreshing recollection rule to writings used by a witness to refresh the witness's recollection before testifying, and privilege waiver resulting from the use of a privileged writing to refresh recollection, either while testifying or before testifying, see Michael J.

Hutter, *Review by Witness of Privileged Documents At and Before Trial and Deposition in New York, When, If Ever, Will the Privilege Be Lost* (38 Pace L Rev __ [2018]).