

Alabama Rules of Evidence

Article VI. Witnesses

Rule 612.

Writing used to refresh memory.

(a) *General rule.* Any writing may be used to refresh the memory of a witness.

(b) *Production of writing used to refresh memory.* If while testifying a witness uses a writing to refresh his or her memory, then an adverse party is entitled, upon request, to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions of it relating to the witness's testimony. If it is claimed, in opposition to such a request, that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not delivered pursuant to order under this rule, the court shall make any order justice requires, except that in a criminal case if the prosecution does not comply, the order shall be one striking the testimony of the witness whose memory was refreshed or, if the court in its discretion determines that the interests of justice so require, the order shall be one dismissing the indictment or other charging instrument or declaring a mistrial.

Advisory Committee's Notes

Section (a). General rule. Section (a) is intended to adopt the traditional American rule that any writing may be used to refresh the memory of a witness. The writing need not possess any particular characteristics – such as having been written by the witness, having been seen by the witness, or having been executed while the matter dealt with in the writing was fresh in the witness's mind. The writing itself need not be admissible. See *United States v. Scott*, 701 F.2d 1340 (11th Cir.), reh'g denied, 707 F.2d 523 (11th Cir.), cert. denied, 464 U.S. 856 (1983) (holding that even an inadmissible writing may be used to refresh). It is left to the broad discretion of the trial judge to decide whether the witness possesses a present recollection that needs refreshing. See *United States v. Rinke*, 778 F.2d 581, 587 (10th Cir.1985). If the witness possesses insufficient recollection to testify fully and accurately, then the writing may be admitted under the separate doctrine of past recollection recorded. See Ala.R.Evid. 803(5).

Section (a) permits the use of any writing for refreshing a witness's memory. This differs from, and supersedes, the preexisting Alabama practice by which a writing used to refresh, under the doctrine of "present recollection revived," was required to meet the same prerequisites as were required of a document admitted under the doctrine of "past recollection recorded." See *Connell v. State*, 55 Ala. 462, 318 So.2d 710 (1974) (Justice Jones, writing in dissent, attacks Alabama requirements that, if a writing is used to refresh, the witness must first be shown to have seen the writing and to have verified its correctness at a time when the

matter recorded was fresh in the witness's mind); M. Walker, *Present Recollection Revived and Past Recollection Recorded*, 6 Cumb.L.Rev. 471 (1975); C. Gamble, *McElroy's Alabama Evidence* §§ 116.01, 116.02, 116.03 (4th ed. 1991). See also *Ex parte Moore*, 540 So.2d 706 (Ala.1988).

Section (b). Production of writing used to refresh memory. When a writing is being used to refresh a witness's memory, the adverse party has the right to have the writing produced, to inspect it, to cross-examine the witness on it, and to introduce those portions of the writing that relate to the witness's testimony. Recognition of this right is consistent with preexisting Alabama law. *Johnson v. State*, 460 So.2d 244 (Ala.Crim.App.1984) (recognizing that this right to see and examine may have reasonable discretionary limits placed upon it); *Cooks v. State*, 50 Ala.App. 49, 276 So.2d 634, cert. denied, 290 Ala. 363, 276 So.2d 640 (1973); *Riley v. Fletcher*, 185 Ala. 570, 64 So. 85 (1913); *Acklen's Ex'r v. Hickman*, 63 Ala. 494 (1879).

This rule rejects that provision of Fed.R.Evid. 612(2) under which the opponent is permitted access to those writings that will be used to refresh the witness's memory prior to testifying. The committee considers that federal provision to provide an additional and unnecessary tool of discovery.

When the adverse party requests that the writing be produced, if the party using the writing to refresh a witness's memory claims that it contains matter unrelated to the testimony of the witness, then the court is to conduct an in camera examination of the writing, excise any portion containing unrelated matters, and order delivery of the remainder to the party requesting it. See Fed.R.Evid. 612 advisory committee's note.