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Timothy G. Westman

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PAST RECOLLECTION RECORDED: THE "FORWARD-LOOKING" FEDERAL RULES OF EVIDENCE LEAN BACKWARDS

The admission into evidence of a witness's "past recollection recorded" has long been recognized as an exception to the rule against hearsay¹ by the great majority of federal and state courts that have considered the question.² It occurs when a written memorandum³ describing past events previously known to the witness fails to refresh his memory of those events, yet renders an accurate account of them; in effect, the memorandum, ratified by the witness's guarantee of its accuracy, serves as a substitute for his present memory and is admissible as a present evidentiary statement.⁴

However, to guard against an imprudent increase in the use of such hearsay evidence and a concomitant abridgment of the right of cross-examination,⁵ traditional judicial policy has limited the applicability of the past recollection recorded exception by imposing the following prerequisites to admissibility: (1) The witness must have had firsthand knowledge of the events described in the writing;⁶ (2) he must have made or subscribed to the written statement at or near the time of the events described or while his memory of them was fresh and accu-

1 The following definition of hearsay appears in C. McCORMICK, EVIDENCE § 246 (2d ed. 1972) [hereinafter cited as McCORMICK]:

Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court assertor.

See also FED. R. Ev. 801 (1975):

(a) Statement. A "statement" is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by him as an assertion.

....

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

....

2 J. C. Penney Co. v. NLRB, 384 F.2d 479, 484 (10th Cir. 1967); United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965) (citing cases); Papalia v. United States, 243 F.2d 437 (5th Cir. 1957); United States v. Riccardi, 174 F.2d 883 (3d Cir. 1949), cert. denied, 337 U.S. 941 (1949); Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied, 373 U.S. 944 (1963); McCORMICK §§ 299-303; 3 J. WIGMORE, EVIDENCE § 736 (J. Chadbourne rev. 1970) [hereinafter cited as WIGMORE]; Annot., 82 A.L.R.2d 473, 520 (1962).

It is also well established that the use of a past recollection recorded does not result in a violation of the defendant's sixth amendment right of confrontation in criminal cases. Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970); Pointer v. Texas, 380 U.S. 400 (1965); Stein v. New York, 346 U.S. 156, 196 (1953); United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965) (citing cases); State v. Scott, 31 Ohio St. 2d 1, 285 N.E.2d 344 (1972); McCORMICK § 252.

3 The courts unanimously agree that the proffered past recollection must be in writing. *But cf.* WIGMORE § 744, for an exception permitting the admission of former oral testimony in special circumstances, the most notable of which being cases of blind or illiterate witnesses.

4 *E.g.*, J. C. Penney Co. v. NLRB, 384 F.2d 479, 484 (10th Cir. 1967); United States v. Riccardi, 174 F.2d 883, 887 (3d Cir. 1949), cert. denied, 337 U.S. 941 (1949); State v. Contreras, 105 R.I. 523, 253 A.2d 612 (1969); Maupin v. Moberge State Bank, 38 S.D. 331, 161 N.W. 332 (1917); State v. Gross, 31 Wash. 202, 214, 196 P.2d 297, 305 (1948).

5 Kinsey v. State, 49 Ariz. 201, 219, 65 P.2d 1141, 1149 (1937).

6 *See, e.g.*, Kinsey v. State, 49 Ariz. 201, 65 P.2d 1141 (1937); State v. Easter, 185 Iowa 476, 170 N.W. 748 (1919); McCORMICK § 299.

rate;⁷ (3) the memorandum must be an original one, if procurable;⁸ (4) the witness must lack a present recollection of the events;⁹ and (5) he must testify to the accuracy of the memorandum.¹⁰ These requirements clearly indicate, and the courts have frequently remarked, that the trustworthiness of the writing and the necessity for its use are the variables that trigger the operation of the exception.¹¹

The draftsmen of the newly enacted Federal Rules of Evidence¹² have for the most part followed the above guidelines in their formulation of Federal Rule 803(5),¹³ the "Recorded Recollection" hearsay exception. And yet, one provision of this rule departs from settled doctrine by prohibiting the admission of a recorded recollection as an evidentiary exhibit "unless offered by an adverse party."¹⁴ Moreover, a second provision ignores a growing judicial tendency to abandon the requirement that a witness lack a present recollection of the events in question; instead, it insists that he must have "insufficient recollection to enable him to testify fully and accurately"¹⁵ about the events. Taken together, these two provisions do much to undermine the modern movement towards

7 *Jordan v. People*, 151 Colo. 133, 137, 376 P.2d 699, 702 (1962), *cert. denied*, 373 U.S. 944 (1963); *Rigor v. Howard Liquors, Inc.*, 10 Ill. App. 3d 1004, 1011, 295 N.E.2d 491, 496 (1973); *Hall v. State*, 223 Md. 158, 162 A.2d 751 (1960); *State v. Scott*, 31 Ohio St. 2d 1, 6, 285 N.E.2d 344, 348 (1972); *State v. Sutton*, 253 Ore. 24, 450 P.2d 748 (1969); *Simms v. School Dist. Number 1*, 13 Ore. App. 119, 132, 508 P.2d 236, 243 (1973); *McCORMICK* § 299; *WIGMORE* § 745.

8 *Redfearn v. United States*, 375 F.2d 767 (5th Cir. 1967); *American Express Co. v. United States*, 332 F. Supp. 191 (Cust. Ct. 1971); *Fisher v. Swartz*, 333 Mass. 265, 130 N.E.2d 575 (1955); *Annot.*, 82 A.L.R.2d 473, 534 (1962); *McCORMICK* § 299; *WIGMORE* § 749. However, if the original is lost or unavailable, a copy may be used if it is verified as a true copy of the original, *Papalia v. United States*, 243 F.2d 437 (5th Cir. 1957); *State v. Masse*, 24 Conn. Supp. 45, 186 A.2d 553 (1962); *Annot.*, 82 A.L.R.2d 473, 532, 537 (1962); *McCORMICK* § 299; *WIGMORE* § 749 n.1 (citing cases).

9 *Vicksburg & Meridian R.R. v. O'Brien*, 119 U.S. 99, 102 (1886) (dictum); *J. C. Penney Co. v. NLRB*, 384 F.2d 479, 484 (10th Cir. 1967); *Rigor v. Howard Liquors, Inc.*, 10 Ill. App. 3d 1004, 1011, 295 N.E.2d 491, 496 (1973); *Jaxon v. Detroit*, 379 Mich. 405, 151 N.W.2d 813 (1967); *Garmo v. General Motors Corp.*, 45 Mich. App. 703, 207 N.W.2d 146 (1973); *State v. Contreras*, 105 R.I. 523, 253 A.2d 612 (1969); *Miesen v. Insurance Co. of N. America*, 1 Wash. App. 185, 460 P.2d 292 (1969), *rehearing denied*, (1970); *ИДАННО КОДЕ* § 9-1204 (1947); *MONT. REV. CODES ANN.* § 93-1901-6 (1947); *N.J. RULES EV., RULE* 63(1)(b), *N.J. STAT. ANN.* § 2A:84A (1973).

10 *J. C. Penney Co. v. NLRB*, 384 F.2d 479, 484 (10th Cir. 1967); *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937); *Jordan v. People*, 151 Colo. 133, 137, 376 P.2d 699, 702 (1962), *cert. denied*, 373 U.S. 944 (1963); *Johnson v. State*, 253 A.2d 206, 208 (Del. 1969); *Hall v. State*, 223 Md. 158, 162 A.2d 751 (1960); *State v. Sutton*, 253 Ore. 24, 450 P.2d 748 (1969); *Simms v. School Dist. Number 1*, 13 Ore. App. 119, 132, 508 P.2d 236, 243 (1973).

11 *J. C. Penney Co. v. NLRB*, 384 F.2d 479, 484 (10th Cir. 1967); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 484 (5th Cir. 1963); *United States v. Riccardi*, 174 F.2d 883, 887 (3d Cir. 1949), *cert. denied*, 337 U.S. 941 (1949); *Ettelson v. Metropolitan Life Ins. Co.*, 164 F.2d 660, 667 (3d Cir. 1947); *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937); *WIGMORE* § 738.

12 After a delay of more than two years, the Federal Rules of Evidence were finally enacted by Congress on January 2, 1975, Pub. L. No. 93-595 (Jan. 2, 1975). The Rules were to go into effect one hundred and eighty days after their enactment.

13 *FED. R. EV.* 803(5) (1975). This rule provides that the following evidence is not excluded by the hearsay rule:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

14 *Id.*

15 *Id.*

relaxation of the hearsay rule and practical, consistent admission of relevant evidence;¹⁶ they should therefore be updated and amended in accordance with that movement.

I. Reading v. Writing

It is clear that a properly established record of past recollection is admissible in evidence; what is unclear is the *extent* to which it is admissible. Generally speaking, courts take one of three positions on the evidentiary value of the record:

(1) The majority view: The memorandum is admissible as an exhibit—it may go to the jury.¹⁷

(2) The minority view: The witness may *read* the memorandum aloud as part of his testimony, but the jury may not see it.¹⁸

(3) The compromise view: The memorandum may go to the jury, but it is not “independent substantive evidence”;¹⁹ it may be considered as “merely auxiliary to the testimony of the witness.”²⁰

To complicate matters further, Federal Rule 803(5) follows a still different tack: Under the inspiration of the California Evidence Code, it allows a writing to be read into evidence but not received into evidence “unless offered by an adverse party.”²¹

Obviously, these interpretations do not differ to a great extent; each provides in some fashion for the introduction into evidence of the memorandum's contents.²² However, a brief analysis of the variations will show that the majority rule, favoring outright admission of the memorandum as an exhibit, gives the trier of fact the most accurate account of a witness's past observations, as well as a sufficient guarantee of trustworthiness. This practical approach should replace the unduly restrictive one taken in Federal Rule 803(5), and thereby become the standard of uniformity for all courts, state as well as federal.

During the nineteenth century and the early part of the twentieth, the minority view on admissibility held sway: the recorded recollection could be read to the jury but not presented to it. The rule was based on a judicial preference for *memory* over *writing* as a means of preserving evidence.²³ According to the strict dictates of the hearsay rule at that time, the testimony of an available witness was far more desirable than a writing of his that fell within a hear-

16 See, e.g., McCORMICK §§ 326-27; Note, *Abolish the Rule Against Hearsay*, 35 U. PRR. L. REV. 609 (1974).

17 See note 32 *infra*.

18 See note 27 *infra*.

19 WIGMORE § 754, at 118. See note 31 *infra*.

20 Pickering v. Peskind, 43 Ohio App. 401, 413, 183 N.E. 301, 305 (1930).

21 FED. R. EV. 803(5) (1975), *supra* note 13; CAL. EV. CODE § 1237(b) (West 1966). This part of Rule 803(5) is based on the California rule, which states that “the writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.” To date, California is the only state to adhere to this variation of the admissibility rule.

22 Hawaii is the only state that prohibits the admission of the memorandum under any circumstances. *Hawaii v. Toyotaro*, 11 Hawaii 195, 196 (1897). However, this decision is quite dated, and the Supreme Court of Hawaii is likely to reverse it should the question present itself again.

23 Cf. *Heart v. Hummel*, 3 Pa. 414, 415 (1846).

say exception.²⁴ Hence, the courts admitted into evidence the hearsay contents of a recorded recollection only if they were grafted onto the witness's testimony:

[T]he paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the witness, and the paper itself . . . is excluded.²⁵

Judges adhering to the minority rule also were loath to send a memorandum to the jury for another reason: they did not want to foster excessive reliance on a hearsay exception for the proof of questions of fact. Their fear was that juries would place a premium on written evidence instead of oral testimony and give greater weight to the former. As one commentator has remarked, "As a matter of trial tactics, especially in those jurisdictions where exhibits are taken to the jury room, the tangible, unforgettable memorandum may have a distinct advantage over the oral recitation of its contents."²⁶ It has such a distinct advantage, in fact, that it has prompted most jurisdictions to abandon the minority view in favor of a more liberal one. At the present time, only 11 states do not allow the memorandum to go to the jury.²⁷

The chief complaint against the minority rule on admissibility was that it was artificial. Many courts began to realize what a subterfuge it is to assimilate a recorded recollection to a witness's present testimony, which, if left unaided by the writing, would be devoid of any reference to its contents.²⁸ Unfortunately, some of them replaced this polite fiction with one that was not so polite—the compromise view that the memorandum is "admissible" but not substantive evidence by itself.

Apparently, the jurisdictions adopting this middle course recognized that it is often expeditious to prefer a reliably written record to oral testimony based on a hazy recollection (or none at all); hence their approval of the memorandum's going to the jury. However, it is likely that they were still mesmerized by the exalted position traditionally accorded to oral testimony and that this prevented them from admitting the recorded recollection as substantive evidence itself, free from the apron strings of the witness's testimony. Out of this dilemma emerged

24 McCORMICK § 245; WIGMORE § 754.

25 *Curtis v. Bradley*, 65 Conn. 99, 110, 31 A. 591, 594 (1894).

26 Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712, 720 & n.8 (1927).

27 *Arkansas*: *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S.W. 959 (1896); *Colorado*: *Jordan v. People*, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied, 373 U.S. 944 (1963); *Indiana*: *Higgins v. State*, 157 Ind. 57, 60 N.E. 685 (1901); *Kentucky*: *Wireman v. Commonwealth*, 211 Ky. 495, 277 S.W. 822 (1925); *Mississippi*: *Pearson v. State*, 176 Miss. 9, 167 So. 644 (1936); *Montana*: *State v. Jones*, 143 Mont. 155, 387 P.2d 913 (1963); *Spurgeon v. Imperial Elevator Co.*, 99 Mont. 432, 43 P.2d 891 (1935); *Nebraska*: *Welch v. Adams*, 87 Neb. 681, 127 N.W. 1064 (1910); *New Jersey*: N.J. RULES EV., RULE 63(1)(b)(iii), N.J. STAT. ANN. § 2A:84A (1973); *New Mexico*: *Territory v. Harwood*, 15 N.M. 424, 110 P. 556 (1910); *North Carolina*: *Bryan v. Moring*, 94 N.C. 687 (1886) (*semble*); *Virginia*: *Grady v. Fauls*, 189 Va. 565, 53 S.E.2d 830 (1949).

The most significant thing about the above cases is their longevity. As with the *Toyotaro* decision, they may well have escaped overrulings simply because past recollection recorded questions have not risen recently in these states.

28 *Curtis v. Bradley*, 65 Conn. 99, 109, 31 A. 591, 594 (1894); *State v. Brady*, 100 Iowa 191, 201, 69 N.W. 290, 292-93 (1896); *Heart v. Hummel*, 3 Pa. 414, 415 (1846).

the classic formulation of the compromise rule: "[T]he memorandum is admitted, not as substantive evidence by itself, but as merely auxiliary to the testimony of the witness."²⁹

The obvious difficulty with this rule is that it fails to define the evidentiary status of the memorandum. What kind of evidence is that which is dependent upon the witness's testimony and "merely auxiliary" to it, having no probative value of its own? Is it evidence at all? Or does the rule simply assert, as Wigmore suggests, that "the probative force of the written statement depends upon the credibility of the person who has made it—in this case the witness"?³⁰ There are no easy answers to these questions, but, happily, there is no great need for any. Only three states presently adhere to the compromise view;³¹ elsewhere, it is generally regarded as an abandoned way station to the majority view, advocating full admissibility of the recorded recollection.

If the minority and compromise rules on the admissibility of a past recollection recorded reflect a tendency to honor tradition by means of artificial constructs, the majority position, on the other hand, is a tribute to judicial realism and practicality. Under this theory, the writing stands on its own as a record of facts which the witness once knew but now has forgotten. Its probative value simply cannot be enhanced by symbolically grafting it onto the witness's testimony; as long as he vouches for the authenticity and accuracy of the writing, it deserves to be treated as what in fact it is—an independent documentary record of facts which can be obtained from no other source. Such treatment, of course, is that which is given to all typical documentary evidence: marking as an exhibit, formal admission into evidence, and possible transmission to the jury room with other exhibits.

At the present time, 29 states, as well as most federal courts, follow the majority rule on admissibility.³² They do so, it should be added, despite the gen-

²⁹ *Pickering v. Peskind*, 43 Ohio App. 401, 413, 183 N.E. 301, 305 (1930).

³⁰ WIGMORE § 754, at 118.

³¹ *Oklahoma*: *Century Ins. Co., Ltd. v. Rice*, 193 Okla. 418, 144 P.2d 953 (1944); *Vermont*: *State v. Williams*, 94 Vt. 423, 111 A. 701 (1920); *Nelson & Wallace v. Gibson*, 90 Vt. 423, 98 A. 1006 (1916); *Bates v. Sabin*, 64 Vt. 511, 24 A. 1013 (1892); *Williams v. Wager*, 64 Vt. 326, 24 A. 765 (1892); *Wisconsin*: *Graton & Knight Co. v. Mayville Shoe Corp.*, 247 Wis. 11, 18 N.W.2d 359 (1945); *Dahl v. Crook*, 208 Wis. 506, 243 N.W. 426 (1932).

³² *Federal*: *Ruch v. Rock Island*, 97 U.S. 693, 695 (1878) ("The living witness may use his notes taken contemporaneously with the testimony to be proved, in order to refresh his recollection, and, thus aided, he may testify to what he remembers; or if he can testify positively to the accuracy of his notes, they may be put in evidence.") (dictum); *United States v. Davis*, 487 F.2d 112, 123 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974) (citing cases); *United States v. Randolph*, 443 F.2d 729, 732 (D.C. Cir. 1970); *Solino v. United States*, 387 F.2d 354 (5th Cir. 1968); *J. C. Penney Co. v. NLRB*, 384 F.2d 479, 484 (10th Cir. 1967); *United States v. Riccardi*, 174 F.2d 883, 887 (3d Cir. 1949), cert. denied, 337 U.S. 941 (1949); *United States v. FMC Corp.*, 306 F. Supp. 1106, 1137 (E.D. Pa. 1969); *Maloney v. United States*, 246 F. Supp. 694, 697 (D. Hawaii 1965); *Thomes v. Atkins*, 52 F. Supp. 405, 411-12 (D. Minn. 1943); *Alabama*: *Gulf Refining Co. v. First Nat'l Bank*, 270 Ala. 351, 119 So.2d 1 (1960) (by implication); *Franklin v. State*, 38 Ala. App. 274, 82 So.2d 316 (1955); *Arizona*: *State v. Polan*, 80 Ariz. 129, 293 P.2d 931 (1956) (by implication); *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937); *Connecticut*: *State v. Vennard*, 159 Conn. 385, 270 A.2d 837 (1970) (by implication); *Curtis v. Bradley*, 65 Conn. 99, 31 A. 591 (1894); *Delaware*: *Johnson v. State*, 253 A.2d 206 (Del. 1969); *Grossman v. Delaware Elec. Power Co.*, 34 Del. 521, 155 A. 806 (1929); *District of Columbia*: *Hamilton v. Blankenship*, 173 A.2d 737 (D.C. Mun. App. 1961); *Florida*: *United Sand & Material Corp. v. Florida Indus. Comm'n*, 201 So.2d 451 (Fla. 1967); *Montgomery Ward & Co. v. Rosenquist*, 112 So.2d 885

erally sounded criticism that the admission of the memorandum itself as independent evidence dispenses with time-honored judicial preference for oral testimony. The net result of such a liberal policy, so its opponents argue, is to burden lawyers with the irresistible temptation to prepare carefully written statements by their clients and witnesses, and to attempt to introduce these into evidence in place of oral testimony. The critics feel that increased recourse to this practice will eventually shift the function of the jury from that of evaluator of witnesses' integrity and reliability to that of inspector of attorney-inspired written documents. Moreover, they fear that it will severely circumscribe the right of cross-examination, one of the keystones of the adversary system, by inducing the witness to retreat behind the writing when questioned by the opposing party. Such developments, in their view, will do little to preserve the traditional Anglo-American trial-by-jury scheme.³³

Some of the majority jurisdictions have confronted and dispelled this argument, however, by noting that the admission of a past recollection recorded is to be limited to cases in which the judge's discretion tells him that the writing is backed by a sufficient guarantee of trustworthiness, and, most importantly, that its admission into evidence is *necessary*.³⁴ In the words of the Supreme Court of Connecticut:

It seems to us to be pressing the use of a legal fiction too far for a court to permit the statement made by such paper to be read as evidence, while

(Fla. App. 1959); *Georgia*: Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936); *Illinois*: People v. Greenspaw, 346 Ill. 484, 179 N.E. 98 (1931); Healy v. Chicago, 109 Ill. App. 2d 6, 248 N.E.2d 679 (1969); *Iowa*: Ruth v. O'Neill, 245 Iowa 1158, 66 N.W.2d 44 (1954); Antes v. Consumers' Consol. Coal Co., 203 Iowa 485, 210 N.W. 767 (1926); *Kansas*: Anness Supply Co. v. Case, 116 Kan. 520, 227 P. 257 (1924) (*semble*); *Louisiana*: State v. Grayson, 225 La. 142, 72 So.2d 457 (1953); *Maryland*: Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); Purviance v. State, 185 Md. 189, 44 A.2d 474 (1945); Owens v. State, 67 Md. 307, 10 A. 210 (1887); *Massachusetts*: Catania v. Emerson Cleaners, Inc., 286 N.E.2d 341 (Mass. 1972); Fisher v. Swartz, 333 Mass. 265, 130 N.E.2d 575 (1955); *Michigan*: Bliss v. Kaplan, 369 Mich. 293, 119 N.W.2d 533 (1963); People v. Hobson, 369 Mich. 189, 119 N.W.2d 581 (1963); Rice v. Fidelity & Cas. Co., 250 Mich. 398, 230 N.W. 181 (1930); *Minnesota*: Walker v. Larson, 284 Minn. 99, 169 N.W.2d 737 (1969); *Missouri*: State v. Patton, 255 Mo. 245, 164 S.W. 223 (1914); S & H Concrete Constr. Co., 384 S.W.2d 816 (K.C. App. 1964); *Nevada*: State v. Helm, 66 Nev. 286, 209 P.2d 187 (1949) (*semble*), *cert. denied*, 339 U.S. 942 (1950); *New Hampshire*: Bartis v. Warrington, 91 N.H. 415, 20 A.2d 642 (1941); Lawrence v. Farwell, 86 N.H. 59, 163 A. 115 (1932); *New York*: Wisniewski v. New York Cent. R.R. Co., 228 App. Div. 27, 238 N.Y.S. 429 (1930); Douler v. Prudential Ins. Co. of America, 143 App. Div. 537, 128 N.Y.S. 396 (1911); *Ohio*: State v. Scott, 31 Ohio St. 2d 1, 285 N.E.2d 344 (1972); *Oregon*: State v. Sutton, 253 Ore. 24, 450 P.2d 748 (1969); Simms v. School Dist. Number 1, 13 Ore. App. 119, 508 P.2d 236 (1973); *Pennsylvania*: Christian Moerlein Brewing Co. v. Rusch, 272 Pa. 181, 116 A. 145 (1922); Commonwealth v. Marino, 213 Pa. Super. 88, 245 A.2d 868 (1968); Commonwealth v. Butts, 204 Pa. Super. 302, 204 A.2d 481 (1964); *Rhode Island*: State v. Contreras, 105 R.I. 523, 253 A.2d 612 (1969); *South Carolina*: Leonard v. People's Tobacco Warehouse Co., 128 S.C. 155, 122 S.E. 678 (1924); Gwathmey v. Foor Hotel Co., 121 S.C. 237, 113 S.E. 688 (1922); *South Dakota*: Huwe v. Moulton, 48 S.D. 205, 203 N.W. 457 (1925) (*semble*); Maupin v. Moberidge State Bank, 38 S.D. 331, 161 N.W. 332 (1917); *Tennessee*: Bolden v. State, 140 Tenn. 118, 203 S.W. 755 (1918); Hughes v. Taylor, 29 Tenn. App. 548, 198 S.W.2d 337 (1946) (by implication); *Texas*: Inland Waterways Pipe Line Co. v. Lipstate, 78 S.W.2d 240 (Tex. Civ. App. 1934); *Utah*: Matson v. Matson, 56 Utah 394, 190 P. 943 (1920); Sagers v. Int'l Smelting Co., 50 Utah 423, 168 P. 105 (1917); *Washington*: State v. Bailey, 71 Wash. 2d 191, 426 P.2d 988 (1967) (by implication); State v. Benson, 58 Wash. 2d 490, 364 P.2d 220 (1961) (by implication); *West Virginia*: State v. Legg, 59 W. Va. 315, 53 S.E. 545 (1906).

³³ See text accompanying notes 23-26 *supra*.

³⁴ Grossman v. Delaware Elec. Power Co., 34 Del. 521, 155 A. 806 (1929).

holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted.

.....
 [B]ut the evidence of the document was so clearly essential to a fair and just trial that its use in some form seemed also imperative.

.....
 If the writing admitted in evidence clearly tends to prove nothing but the fact that it was admitted to prove, it should go to the jury. If, by reason of peculiar circumstances, it clearly may be treated by the jury as evidence of other facts not admissible, it should not go to the jury. Between the two extremes, the question is largely one of discretion in the trial judge.³⁵

The Supreme Court of Minnesota has also stated that records of past recollection are admitted into evidence because they are

often essential to the discovery of truth at trial and generally much more reliable than oral testimony. . . . Thus, to exclude such a record when honestly made would be to reject the best and frequently the only means of arriving at the truth. . . . Always the trustworthiness of the record received in evidence is of paramount concern.

.....
 We have said that the trial judge is in the best position to pass on all the facts and circumstances regarding the reliability of records of past recollection and that his discretion should be questioned only when its abuse is clearly shown.³⁶

Finally, the abridgment of cross-examination caused by the application of the majority rule is not as serious as the critics would indicate. It is obvious that all attacks upon a witness's truthfulness center upon one of three things: (1) His honesty and integrity; (2) his ability to make accurate observations at the time of the events in question; and (3) his ability to accurately recollect those events.³⁷ Even if a past recollection recorded is admitted into evidence, the witness can *still* be cross-examined on the first and second points mentioned above. Certainly,

[h]e cannot well be cross-examined on the third point, but this is unnecessary, for he has already stated that he has *no* independent recollection of the event, which is all that could be brought out by the most rigid cross-examination on this point when the witness testifies from his present recollection, independent or revived.³⁸

Despite such persuasive reasoning, the majority view on admissibility has not found its way into the Federal Rules of Evidence. Federal Rule 803(5)³⁹ instead follows the unique California rule, which, as mentioned earlier, only permits the witness to read the contents of a recorded recollection to the jury; the document itself is inadmissible "unless offered by an adverse party."⁴⁰ Presumably, this rule

35 *Curtis v. Bradley*, 65 Conn. 99, 109, 110, 113, 31 A. 591, 594, 596 (1894).

36 *Walker v. Larson*, 284 Minn. 99, 105, 108, 169 N.W.2d 737, 741, 743 (1969); *see also* *Commonwealth v. Pickles*, 305 N.E.2d 107, 111 (Mass. 1973).

37 *Kinsey v. State*, 49 Ariz. 201, 220, 65 P.2d 1141, 1150 (1937).

38 *Id.*

39 *See* note 13 *supra*.

40 *See* note 21 *supra*.

is another attempt at compromise: the preference for oral testimony is maintained unless the opposing litigant himself desires to throw tradition to the winds and get the writing before the jury.

In reality, though, Federal Rule 803(5) merely represents the minority view with an ameliorative provision tacked on. Its main thrust is to allow only the *reading* of the recorded recollection, since the instances are likely to be few when the adverse party will wish to introduce the document into evidence. It stands, therefore, as a rule which the majority of states already has seen fit to reject, and which, ironically enough, has been discarded by most federal courts—the same tribunals whose duty it is to apply the Federal Rules of Evidence.⁴¹

In short, Federal Rule 803(5) should be amended to include the majority rule on admissibility of a past recollection recorded. The safeguards are there. As long as the trial judge, in his discretion, feels that there is necessity for the admission of the document and that he can procure a sufficient guarantee of trustworthiness from the witness, the document should go to the jury. With these strictures, the majority rule does much to facilitate fact-finding at trial at no expense to the trial-by-jury system. It could do more if it were formally ratified by Congress and adopted into the Federal Rules.

II. Present Recollection

The foregoing discussion chides the Federal Rules of Evidence for embracing an outdated minority rule. The present discussion takes them to task for adopting an outdated *majority* rule. Federal Rule 803(5) follows the generally accepted view that a past recollection recorded is not admissible unless the witness lacks a present recollection of the facts contained therein.⁴² Its exact wording prohibits admissibility except where the witness has "insufficient recollection to

41 See note 32 *supra*.

42 At the time of this writing 28 states and the majority of federal courts adhere to the majority view requiring a lack of present recollection: *Federal*: *Nees v. SEC*, 414 F.2d 211 (9th Cir. 1969); *J. C. Penney Co. v. NLRB*, 384 F.2d 479 (10th Cir. 1967); *Washington v. Washington, Virginia & Maryland Coach Co.*, 250 F. Supp. 888 (D.D.C. 1966); *Alabama*: *Bennefield v. State*, 281 Ala. 283, 202 So.2d 55 (1967); *Alaska*: *ALAS. R. Civ. P.* 43(g)(9)(b) (1962) ("no recollection of the particular facts"); *Arizona*: *State v. Polan*, 80 Ariz. 129, 293 P.2d 931 (1956); *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937); *Arkansas*: *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S.W. 959 (1896); *California*: *CAL. EVID. CODE* § 1237 (West 1966); *Connecticut*: *Katsonas v. Sutherland Bldg. & Contracting Co.*, 104 Conn. 54, 132 A. 553 (1926); *State v. Masse*, 24 Conn. Supp. 45, 186 A.2d 553 (1962); *Florida*: *United Sand & Material Corp. v. Florida Indus. Comm'n*, 201 So.2d 451 (Fla. 1967); *Montgomery Ward & Co. v. Rosenquist*, 112 So.2d 885 (Fla. 1959); *Georgia*: *GA. CODE ANN.* § 38-1707 (1974); *Idaho*: *Idaho Code* § 9-1204 (1947); *Illinois*: *Rigor v. Howard Liquors, Inc.*, 10 Ill. App. 3d 1004, 295 N.E.2d 491 (1973); *Louisiana*: *State v. Grayson*, 225 La. 142, 72 So.2d 457 (1953); *Maine*: *Cope v. Seigny*, 289 A.2d 682 (Me. 1972); *Willey v. Maine Cent. R.R. Co.*, 18 A.2d 316 (Me. 1941); *Michigan*: *Jaxon v. Detroit*, 379 Mich. 405, 151 N.W.2d 813 (1967); *Garmo v. General Motors Corp.*, 45 Mich. App. 703, 207 N.W.2d 146 (1973); *Minnesota*: *Walker v. Larson*, 284 Minn. 99, 169 N.W.2d 737 (1969); *Montana*: *MONT. REV. CODES ANN.* § 93-1901-6 (1947); *New Hampshire*: *Russell v. Croteau*, 98 N.H. 68, 94 A.2d 376 (1953); *New Jersey*: *N.J. RULES EV.* 63(1)(b), *N.J. STAT. ANN.* § 2A:84A (1973); *New York*: *Bloodgood v. Lynch*, 293 N.Y. 308, 56 N.E.2d 718 (1944); *People v. Weinberger*, 239 N.Y. 307, 146 N.E. 434 (1925); *Ohio*: *State v. Scott*, 31 Ohio St. 2d 1, 285 N.E.2d 344 (1972); *Oregon*: *ORE. REV. STAT.* § 45.580 (1971); *Pennsylvania*: *Miller v. Borough of Exeter*, 366 Pa. 336, 77 A.2d 395 (1951); *Commonwealth v. Kendig*, 215 Pa. Super. 139, 257 A.2d 354 (1969); *Rhode Island*: *Raposa v. Turgeon Constr. Co.*, 109 R.I. 277, 284 A.2d 75 (1971); *State v. Contreras*, 105 R.I. 523, 253 A.2d

enable him to testify fully and accurately. . . ."⁴³ This policy also stems from the preference for oral testimony and a desire to avoid excessive and unwarranted reliance upon written statements.

However, a modern approach developed within the past decade by a small number of states opts for the position that a witness need *not* lack a present recollection of the events recorded in the document before it can be admitted under the recorded recollection exception to the hearsay rule.⁴⁴ This view would dispense with the "no recollection" requirement as long as the necessity for the writing's admission is present, as well as a guarantee of its trustworthiness and accuracy. Although it is a distinctly minority position, it can, when properly invoked, be more effective in more circumstances for fact-finding purposes than the general rule prohibiting any present recollection. It should not, therefore, remain a minority position any longer.

The Advisory Committee's Note on Federal Rule 803(5) recognizes the modern trend towards the allowance of a witness's present recollection but explains why the Federal Rules follow the majority rule:

If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. . . . Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters.⁴⁵

Why this concern with the proliferation of written evidentiary statements prepared under the aegis of the lawyer? The reasons are the same as those which are said to militate against the outright admission of the writing into evidence, as discussed in the previous section: the desires to ensure that as much testimony as possible will be oral, to preserve the right of cross-examination to the full, and to discourage reliance on hearsay testimony.

612 (1969); *Tennessee*: Hughes v. Taylor, 29 Tenn. App. 548, 198 S.W.2d 337 (1946); *Texas*: Moreno v. State, 170 Tex. Crim. 410, 341 S.W.2d 455 (1960); *Utah*: State v. Hett, 64 Utah 505, 231 P. 838 (1924); *Vermont*: Maryland Cas. Co. v. Heald, 125 Vt. 116, 211 A.2d 177 (1965) (by implication); *Washington*: State v. Benson, 58 Wash. 2d 490, 364 P.2d 220 (1961); *State v. Gross*, 31 Wash. 2d 202, 196 P.2d 297 (1948); *Miesen v. Insurance Co. of N. America*, 1 Wash. App. 185, 460 P.2d 292 (1969); *Wisconsin*: Cox Bros. & Co. v. Milbrath, 110 Wis. 499, 86 N.W. 174 (1901) (by implication).

⁴³ Fed. R. Ev. 803(5) (1975).

⁴⁴ Seven states, the District of Columbia, and one federal court of appeals follow the minority rule and do not require impairment of memory: *Federal*: NLRB v. Tex-Tan, Inc., 318 F.2d 472 (5th Cir. 1963); *Colorado*: Reed v. People, 174 Colo. 43, 482 P.2d 110 (1971); *Jordan v. People*, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied, 373 U.S. 944 (1963); *District of Columbia*: Killen v. United States, 224 A.2d 302 (D.C. App. 1966); *Maryland*: Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); *Massachusetts*: Commonwealth v. Pickles, 305 N.E.2d 107 (Mass. 1973); *Missouri*: State v. Harris, 334 Mo. 38, 64 S.W.2d 256 (1933); *Nebraska*: Fields v. State, 125 Neb. 290, 250 N.W. 63 (1933); *Oklahoma*: Lay v. State, 461 P.2d 1021 (Okla. Crim. 1969); *State v. Rule*, 11 Okla. Crim. 237, 144 P. 807 (1914); *South Dakota*: Muschelwicz v. Tidrick, 40 S.D. 435, 167 N.W. 499 (1918).

It should also be noted that, although Oregon's statute on recorded recollection, *supra* note 42, follows the majority rule, Oregon courts have expressed disagreement with it and have endorsed the minority rule. *State v. Sutton*, 253 Ore. 24, 450 P.2d 748 (1969); *Simms v. School Dist. Number 1*, 13 Ore. App. 119, 508 P.2d 236 (1973).

⁴⁵ Advisory Committee's Note, Fed. R. Ev. 803(5) (R.D. 1971). For an example of the condemnation of "carefully prepared statements," see *NLRB v. Federal Dairy Co.*, 297 F.2d 487 (1st Cir. 1962).

Apparently, Congress and the jurisdictions favoring the majority view feel that the above goals are too precious to be sacrificed for a mere increase in the accuracy and reliability of a witness's testimony. Indeed, one could foresee that the acceptance of the modern rule might encourage parties and witnesses to record all their impressions on paper, to get these introduced as substantive evidence, and to hide behind these documents as a way of frustrating effective cross-examination by opposing counsel.

However, these anxieties are exaggerated. It must be remembered that *fact-finding* is the *raison d'être* of our trial-by-jury system; and obviously, the more accurate the means of getting to the facts, the better will that overriding purpose be fulfilled. As the Maryland Court of Appeals stated nearly one hundred years ago:

Few men are so gifted with the powers of memory as to be able to recall the details of past transactions with perfect accuracy . . . and therefore the best recollections, and the greatest degree of self-reliance in the statement of past facts may derive force and reliability from truthful *memoranda* made at the time of the transaction; and the law always prefers that evidence which insures the greatest degree of certainty in the establishment of truth.⁴⁶

The Supreme Court of Colorado also noted more recently that

a written record is constant for all time. Such a record, accurately made by a witness or under his direction at the time of the event or shortly thereafter, would be more reliable than the memory of the witness. In achieving justice, that which is more reliable is more desirable.⁴⁷

Both of these courts held that it is not necessary for a witness to lack a present recollection of the events described in the memorandum before it can be admitted as a past recollection recorded.

It is clear, then, that a written memorandum will in most cases be the most accurate statement of the facts in question, even where the witness *retains* an independent recollection of those facts. But it is not true, as the majority arguments needlessly fear, that the desire for accuracy alone can and should be enough to dispense with, or dilute the importance of, oral testimony and the right of cross-examination. What must also be present is the *necessity* for the extra reliability provided by the writing.⁴⁸ Thus, if both the accuracy and the need for it exist, as well as a guarantee of trustworthiness, which can only be supplied by the witness himself, the record should be sent to the jury regardless of the witness's independent recollection or lack thereof.

The crucial inquiry will be what factors point to the necessity for an unconditional admission of a recorded recollection. An important one is the occupation of the particular witness: "Courts have recognized the difficulties which

⁴⁶ *Owens v. State*, 67 Md. 307, 316, 10 A. 210, 213 (1887).

⁴⁷ *Jordan v. People*, 151 Colo. 133, 139, 376 P.2d 699, 703 (1962), *cert. denied*, 373 U.S. 944 (1963).

⁴⁸ WIGMORE § 738.

persons in certain occupations would have in remembering occurrences which are part of their routine duties."⁴⁹ Thus, police officers,⁵⁰ bookkeepers and accountants,⁵¹ and court reporters⁵² are the types of professionals who might be expected to independently recall events in question at trial, but whose written records are certain to contain more accurate renderings of the facts.

The more crucial determinant of necessity, though, is the discretion of the trial judge. If he deems the admission of the recorded recollection important enough to outweigh the preferences for oral testimony and full cross-examination, he should permit it, notwithstanding the fact that the witness still has an independent recollection to some degree. Not a few courts follow the reasoning of the Supreme Court of Minnesota, which has decided

not to be bound by technical rules of exclusion and to grant the trial judge wide discretion. Other courts have seen fit to allow the author to call to his aid his moral attitude and have held a memorandum of past recollection to be properly verified upon the witness' testimony that he recognizes his signature and would not have signed if the memorandum had not been a true record of the facts.⁵³

Some courts have gone even further, stating that the judge's discretion gives him the power to blur the lines between the technical doctrines of past recollection recorded and present memory refreshed—in effect, providing for the introduction into evidence of *any* record that promises to be more reliable than the witness's testimony, as long as no prejudice results. Consider the rule enunciated by the Supreme Court of Massachusetts:

The judge was not required to distinguish between "present recollection revived" and "past recollection recorded" unless there was some difference in legal consequence. Whether or not the notes created a present recollection by the officer, the judge in his discretion could permit him to incorporate them in his testimony.⁵⁴

Whether this radical attempt to widen the cracks in the hearsay rule by blending the lines of revived and recorded recollections is desirable or not is beyond the scope of this discussion. What is clear, however, is that there are certain situations that justly demand the admission of a written memorandum, regardless of the witness's independent recollection or lack of it. And when demands are made in justice, they must be met.

⁴⁹ *Jordan v. People*, 151 Colo. 133, 138, 376 P.2d 699, 702 (1962), *cert. denied*, 373 U.S. 944 (1963).

⁵⁰ *Taylor v. United States*, 19 F.2d 813 (8th Cir. 1927); *People v. Griswold*, 405 Ill. 533, 92 N.E.2d 91 (1950).

⁵¹ *Rohrig v. Pearson*, 15 Colo. 127, 24 P. 1083 (1890).

⁵² *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937).

⁵³ *Walker v. Larson*, 284 Minn. 99, 110, 169 N.W.2d 737, 744 (1969); *see also United States v. Riccardi*, 174 F.2d 883, 888 (3d Cir. 1949), *cert. denied*, 337 U.S. 941 (1949); *Killeen v. United States*, 224 A.2d 302 (D.C. App. 1966).

⁵⁴ *Commonwealth v. Pickles*, 305 N.E.2d 107, 111 (Mass. 1973). *See also Oil Screw Noah's Ark v. Bentley & Felton Corp.*, 322 F.2d 3, n.9 (5th Cir. 1963); *Killeen v. United States*, 224 A.2d 302, 306 (D.C. App. 1966).

III. Conclusion

Rule 803(5) of the Federal Rules of Evidence runs counter to the modern, more rational application of the hearsay rule by prohibiting, for all practical purposes, a recorded recollection's outright admission into evidence and by insisting on an impaired memory on the part of the witness before the writing can even be read to the jury. This rule, as the state requirements on which it is based, would forego more liberal admission of relevant, accurate evidence in order to preserve the traditional reverence for oral testimony and fully effective cross-examination. In so doing, however, it fails to recognize that the modern view can and does preserve this reverence through the safeguards of documentary trustworthiness, necessity, and judicial discretion.

In summary, the quest for accuracy and reliability often overshadows other considerations at trial. When it is necessary that this be so, there should be rules to ensure that it will be so. Federal Rule 803(5) is one of these rules. It should be amended to provide that a past recollection recorded is admissible as substantive evidence and that the trial judge, in his discretion, can admit it whether or not the witness has an independent recollection of the facts contained therein. The Federal Rules of Evidence have recently become the evidentiary guidelines for the entire nation—to redirect their course on this point so early in their history is one small way in which they can prove worthy of such leadership.

Timothy G. Westman

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