RULE 612. WRITING USED TO REFRESH MEMORY

RULE 613. PRIOR STATEMENTS OF WITNESSES (IMPEACHMENT)

There are two, and probably only two, uses for prior statements. You may use prior statements to refresh a witness's recollection or to impeach the witness's testimony. There are ground rules under either procedure, but you must be aware of the nuances in the use of the statement.

WRITING USED TO REFRESH MEMORY, RULE 612

It is important to emphasize that, when using a writing or prior statement to refresh a witness's testimony, the writing can be used only to refresh his memory. The writing does not become evidence, nor can the witness read from the writing to testify. So, it is simply a matter of handing the writing to the witness and asking the witness to review the writing. The document then is taken away from the witness and the witness must then testify on the basis of his own memory, having refreshed is memory from a review of the document.

So, you might approach the witness in the following manner:

> Question: Before I ask you further questions, do you need to review your prior statement to refresh your memory?
> Answer: Yes, I do.

You then hand the witness the prior statement and let him review it. After you take the statement away from him, be sure to ask your questions based upon his memory of the event and not upon what he has just read in the statement. In *Young v. State* 746 N.E. 2d 920, the court analyzed whether a witness had been properly presented with his prior statement during the trial. The court discussed the meaning of "refresh recollection". In doing so, it quoted Indiana Practice by Robert Lowell Miller, Jr. as follows:

> "If the witness replies that the writing has refreshed his memory, he may be examined on the subject but may not testify from the writing itself".

In the instance of using the statement to refresh recollection, the statement does not go into evidence.

If the prior statement is consistent with the witness's memory of the event, it cannot be offered in evidence, as it does not meet the exception under the Hearsay Rule 801(d). A statement is not hearsay if it is inconsistent with the declarant's testimony and was given under oath; or it is consistent with the declarant's testimony, and offered to rebut an express or implied charge against the declarant of recent fabrication, etc. In other words, a general rule is that any statement being properred to the witness to refresh his memory cannot be offered into evidence.

Finally, a prior consistent statement cannot be offered to the witness for any purpose unless he needs it to refresh his recollection. Nor can the interrogator start off by questioning a witness, using his prior statement. Unless it is being used for refreshment or impeachment, the prior statement is generally hearsay.

IMPEACHMENT BY PRIOR INCONSISTANT STATEMENT, RULE 613

If a witness is testifying to something that is inconsistent with his prior statement, whether under oath or not, and whether it is extrinsic, it can be used to impeach the witness's inconsistent testimony. However, the statement cannot be used to prove the truth of the matter asserted within it. Proof of the prior statement is admissible, but not to prove the truth of it. It is admissible solely to show that the witness's trial testimony may be a fabrication. So, the proper technique is as follows:

> Question: Did you give a prior written statement to the police?
> Answer: Yes I did.
> Question: In that statement did you say that "....."?

In an instance that this prior statement is offered into evidence, the attorney who called the witness may want the court immediately to instruct the jury that the statement is not being offered for the truth of the matter asserted therein, but solely to show the inconsistency of the testimony.