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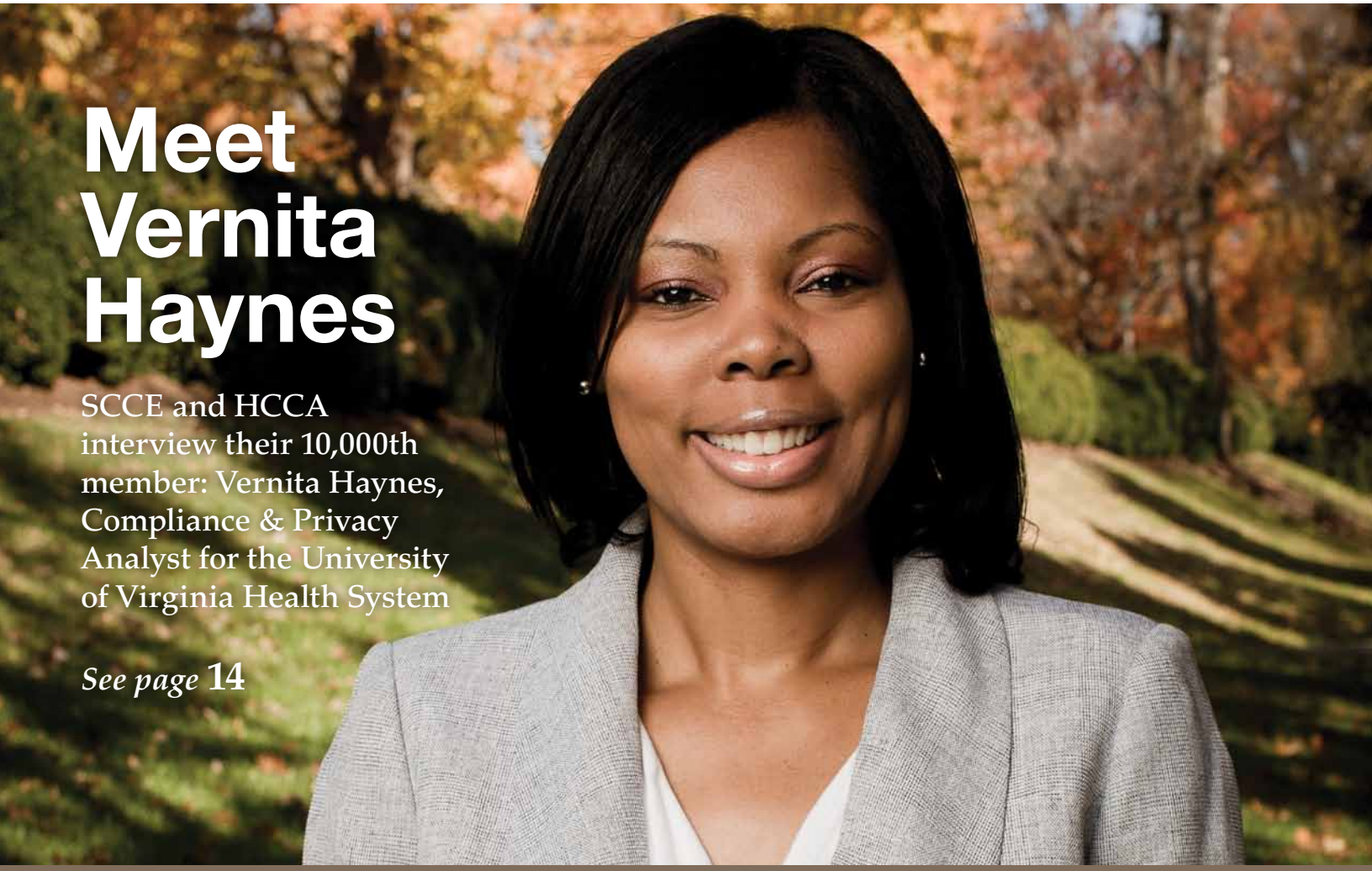

Meet Vernita Haynes

SCCE and HCCA interview their 10,000th member: Vernita Haynes, Compliance & Privacy Analyst for the University of Virginia Health System

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SCCE & HCCA reach 10,000th member

by Dan Small and Robert F. Roach

Powerful witness preparation

» Your organization's success in any contested matter will depend heavily on the credibility of your witnesses
» "This is not a conversation!" Why and how being a witness is so different
» Prepare witnesses for testimony by giving them a challenging "dry run"
» Slow down. The court transcript looks the same, no matter how fast you answer

In this series of articles, lead author and seasoned trial attorney Dan Small sets forth ten time-tested rules to assist you in the critical task of preparing witnesses. Robert F. Roach assisted Dan in this series by providing additional "in-house" perspective and commentary. This is Part 1 of the series.

Preface: Critical advice for critical times

By Robert F. Roach

As a compliance officer and an in-house attorney, my primary function is to help my organization steer clear of danger. By developing and implementing an "effective" compliance program my goal is to avoid or at least mitigate the possibility of legal and regulatory risks. However, the old saying "Bad things happen to good people" applies equally to organizations. Indeed, the US Federal Sentencing Guidelines for Organizations on effective compliance programs assume this to be true. As noted in the *Commentary* in Chapter 8 of the US Federal Sentencing Guidelines Manual:

> The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

So what happens if, despite your best prophylactic efforts, your organization becomes the subject of a government audit or inquiry, criminal investigation or prosecution, or civil litigation? Clearly the organization's finances, reputation and even its very existence may be at risk. Also, corporate officers and key personnel may face fines or incarceration. Such risks demand a carefully planned, prepared and executed response. Unfortunately, witness preparation is one key area of planning and preparation that is sometimes overlooked or poorly executed, even by otherwise talented legal counsel. Ultimately, your organization's success in any contested matter will depend heavily on the credibility of your witnesses who must communicate your case to the trier of fact, whether judge, jury, or arbitrator, and sometimes prosecutors or opposing counsel in the settlement process.


Small


Roach

Introduction: "You guys were much tougher"

By Dan Small

Those are the words every lawyer should hope to hear from a client they have prepared as a witness, after their actual testimony or interview. Yet too many lawyers—including some very good ones—do not prepare witnesses adequately, because they fail to understand how dramatically different being a witness is from anything else

the client has experienced. Testimony is not a conversation. Much of what makes for a good conversation, makes for bad testimony. And what it takes to be a good witness is often contrary to our normal experiences.

When I work with a witness to prepare for a deposition or an investigation, they often express surprise at the length of the process, saying something like: "I was deposed before, and my lawyer just told me to meet him an hour before the deposition and we'd prepare." That's not preparation: that's malpractice. True witness preparation is an extensive—and intensive—multi-step process. It demands a high level of time, energy, and effort from *both* client and counsel. One of the keys to that process is a realistic "dry run" that is at least as challenging as the real thing, hopefully more so.

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Some years ago, I had a traumatic experience: I had to help teach my twin girls to ride a bicycle, with all the scrapes and bruises and tears that came with that process. Try as I might, I could not teach them to ride a bicycle by just talking to them. Sooner or later, they had to try it themselves. All I could hope for was to be there to help cushion the blow when they fell, and console and teach them when it happened. The same is true for teaching someone to be a better witness.

No amount of discussion can fully explain the question and answer process. Like anything difficult and unnatural, doing it right takes practice. The best approach is to do a dry run, so your client can experience the process firsthand. It doesn't need to be formal or cover all the possible topics, so long as it gives a clear sense of the process. However, the tougher and more realistic it is, the more helpful it will be to the client in the long run. I often have another lawyer in my office ask the questions, both to make it less awkward for everyone in role-playing and to show witnesses how I might act in representing them.

Do a dry run with every witness and you will be amazed at how productive it is. After you've gone through all the background information, reviewed the facts and the ten rules we'll discuss in this series of articles, they can now see it in practice. Ideally, a dry run should be recorded in some fashion, if practical, and if covered by the privilege. This does not need to be any more elaborate or expensive than the case or client allows. Borrow a tape recorder or video camera. Find someone who works at home to type up the tape. It can be that simple. Or, use a court reporter.

Adapt the dry run to the proceeding. If you are preparing a witness for a deposition, you may want to have a transcript of the dry run prepared, since the goal of a deposition is to produce a clear and accurate transcript. This will emphasize the strengths and weaknesses of their testimony, allow them to appreciate the final product, and address any weaknesses. Most clients have never seen their spoken words in print. It's a revelation. If you're preparing someone for videotaped or live testimony, the transcript isn't quite as important, but the appearance is. The dry run may be videotaped. The important thing is to record the testimony in whichever way it will help you and your witness.

The witness environment is terribly unfair and deceptive. It has all the appearances of the questioner being in control. If the

witness—and counsel—accept that deception, they have lost. This is, after all, the *witness's* testimony. True witness preparation is all about leveling the playing field, helping the witness to take control, and understanding this very unnatural environment. In upcoming articles, we will review the ten rules for helping someone become a better and more comfortable witness. At the end of the whole process, the words "You guys were much tougher" in the dry run, is a sign of success, and high praise. Make it happen.

"If the old saying is true, that he who writes the rules wins the game, then the first rule for any witness is to take your time. This is the rule from which all else flows."

Rule 1: Take your time

If the old saying is true, that he who writes the rules wins the game, then the first rule for any witness is to take your time. This is the rule from which all else flows. There are no shortcuts: The faster you try to go, the longer it will take. The harder you try to move things along and "be helpful," the harder it will be.

Question, answer, question, answer. Like a volley in tennis, the faster it goes, the sooner someone will make a mistake. But in tennis, whoever makes the first mistake loses the point. In testimony, if the questioner makes the first mistake, it matters little. If the witness makes the first mistake, it lives forever, under oath and duly recorded. What could be more grotesquely unfair? The first way to lessen that unfairness is to slow down.

When you tell a witness to slow down, you often get three reactions: First, "It's hard to do." Second, "It will look bad." Third, "It will make my testimony take longer."

It's hard to do

Yes, it is hard to do. Normal conversation is fast-paced and free-flowing. We interrupt each other, finish each other's sentences, go where we think others want to go—everything that is inappropriate and dangerous as a witness. Slowing down is uncomfortable and unnatural, so we have to do it almost mechanically.

Right from the *first* question, repeat the question silently to yourself, or simply pause and silently count out a good five seconds after *every* question before answering. Don't wait until the middle of the testimony to do this—it will be much harder. Remember, it's *your* oath and *your* testimony: *You* should control the pace. The written record looks the same whether you take a minute or a second to formulate your answer, but your answer will be better for the extra thought.

- It will keep you from feeling rushed. People in a hurry make mistakes.
- It will give you time to listen with the intensity and thought required to make sure you really understand the question—the *entire* question.
- It allows you to be careful and disciplined enough to think about the best, most truthful, and most precise answer. Often the "first thing that pops into your head" is the last thing you want to have pop out of your mouth.
- It will give your lawyer time to speak or object, if appropriate.

It will look bad

People sometimes worry that if they take their time, this will make a bad impression on the judge or jury. However, you will never hear this from a juror or a judge, only from lawyers. Everyone else in the courtroom understands

how important testimony is. As long as "taking your time" is done consistently, from the very first question, and for the right reasons, it will look fine.

Several years ago, author Dan Small represented a contractor called to testify before a federal grand jury investigating a developer for fraudulent practices. When Dan met with him to prepare, it was clear that he liked to talk, and he talked too fast for a good witness. With preparation, he finally understood the significance of taking his time before responding. He went into the grand jury room, and because the lawyer for the witness is not allowed in the room, Dan had to wait outside.

Some time later, Dan was able to see a transcript of his testimony and, to his pleasant surprise, he could clearly sense that the contractor was going slowly and deliberately. You could also sense the growing frustration of the questioner, who wasn't getting the snappy, sloppy answers that he wanted. Halfway into the testimony, the questioner said, with obvious frustration, "I've noticed that you're pausing after each question. Is there a reason why you're doing something like that?" Dan's witness responded, "Because this is the most important thing I've ever done, and I want to give you the most accurate answer that I possibly can." Exactly. Do it for the right reasons.

"Everyone else in the courtroom understands how important testimony is. As long as "taking your time" is done consistently, from the very first question, and for the right reasons, it will look fine."

It will make it take longer

The first response is, "So what?" This is important. If it takes a little longer to do it properly, that is time well spent. The second response, though, is equally important. As in so many other ways, being a witness is unnatural and counterintuitive. In many situations, the reality is that the *slower* the witness goes, the *sooner* his or her deposition or other testimony will be over. Why? Lots of reasons, but most often it is because the questioning lawyer really is not seeking carefully considered responses to simple questions. The lawyer is fishing for the quick hit, the sound bite, the sloppy answer, the mistake. Once they realize they are facing a careful, disciplined witness, they lose interest.

Taking control as a witness does not necessarily mean anything adversarial or unpleasant. On the contrary, you will generally want to avoid being too biased or one-sided. What it does mean is understanding that your role as a witness requires taking the time to make sure that you do it right, whether or not that results in a pace that someone else considers too slow. Take your time. ✳

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