If you don’t remember, just say so

By: Daniel I. Small  March 12, 2014

One of the most obvious rules for witnesses is also one of the most difficult for people in everyday life: If you don’t remember, say so.

A witness can testify only to what he clearly remembers, but that’s not what we’re used to. In our normal conversations, rarely do we say, "I don’t recall," and simply stop there.

We try hard to keep the conversation moving — often, too hard. We guess and assume to help keep it going and maybe to make ourselves look smarter.

Don’t let a witness do it in testimony. Make sure he knows that if the memories are not clear and precise, he should just say, “I don’t recall,” and stop.

A deposition is intended, in part, for discovery. To explore and push the boundaries of a witness’s knowledge in a question-and-answer environment requires asking questions until the witness no longer recalls or knows the answers, and then to keep going just to be sure. Memory becomes a key factor and a key point of conflict.

The mind is an amazing instrument, and even today experts do not fully understand (and in some areas are fiercely debating) how memory works. Without getting caught up in those debates, there are a few things that science, common sense and experience tell us that are critically important here.

1) What’s important for one is not important for all.

Most investigations, litigation or disputes in which people are questioned are very narrow. They often focus on a single incident, transaction, practice, person or entity.

The problem is that what the questioner is narrowly and intently focused on may not have been particularly interesting, unusual or significant to the witness at the time.

Whether or not it has become important for the questioner does not change the fact that it was not important then. However much the questioner might wish it, his focus does not change your memory.

2) The tougher the issue, the tougher the memory.

For better or worse, and sometimes both, the flip side of the last principle is not necessarily true: Important does not always mean memorable. That is particularly so when it comes to remembering things that were either physically or psychologically difficult.

The easiest examples relate to physical pain and trauma. A woman who has successfully given birth to a baby may, particularly over time, block out much of the memory of the pain of even a very difficult labor; an accident victim may block out the moments before, during or after the crash.

A questioner may push by emphasizing how dramatic or "memorable" he thinks a matter must have been. Whether or not the questioner is right does not mean a witness "must" remember the details clearly.

3) Memory fades quickly.

The pace of investigations and litigation today means that questioning often doesn’t take place until months or even years after the events at issue. That’s not your witness’s fault.
A witness can testify only to what he precisely remembers. Your own experience tells you that after just a few weeks (sometimes less!) your memory falls off dramatically. Don't try too hard.

4) **Faded memory becomes random and anecdotal.**

It would be easier for a witness if memory loss over time was absolute: We remembered everything back to a certain date and nothing beyond it. But that’s not how memory works. As our memory fades, we forget things unevenly. We may randomly forget recent happenings but remember events from long ago.

I may be able to tell you what I had for lunch on a particular Thursday back in first grade, but not what I had for lunch last Thursday. One is fixed in my mind, for whatever reason, while the other is not. We may also remember, or forget, bits and pieces, leaving us with partial or anecdotal memory.

Far too often, witnesses get into trouble because they remember only one piece of an incident or issue, but when pushed by the questioner, try too hard to remember more.

No matter what a questioner may say or imply about what one “should” or “must” remember, it’s perfectly normal to remember some bits and pieces, but not others.

Tell your witness: Don't worry about what you don't remember.

5) **Anecdotal memory becomes reconstructed memory.**

The real danger of not being comfortable with an imperfect and partial memory is venturing into the dangerous waters of reconstructed memory.

Reconstructed memory is not based on what one actually recollects, but what one is pushed to infer, guess and conclude from everything else. It is speculation — “could have, would have, should have, must have” — expressed as fact. Think about the five classic fact questions, when questioned about a meeting:

**WHO:** Bob would have been there; he usually came to those staff meetings.

**WHAT:** We only could have talked about Bob’s budget if he was there.

**WHEN:** The meeting must have been in November because it was cold outside.

**WHY:** There must have been a problem with Bob’s budget for it to come up at the meeting.

**WHERE:** A meeting that size should have been in the conference room.

No one likes to come across as uncertain, so too often those inferences come out as statements of facts: “Last November, Bob attended a meeting we had in the conference room to go over problems with his budget.”

But suppose it turns out (or someone else testifies) that on an unseasonably cold day in September, on one of Bob’s rare sick days, the staff meeting was held in the cafeteria and Bob’s budget was used as a good example for others. What has happened? Inferences have been stated as facts, and the facts are wrong — or at least have created unnecessary conflicts. Now, instead of a simple “I don’t recall,” the entire process has been made more difficult, and more dangerous, for all concerned.

Anything can refresh a memory. A document, name, description — almost anything can help someone remember something previously forgotten. If a lawyer simply asks a witness if he has exhausted the memory banks and gets a “yes,” the attorney has a clear opportunity to show the witness something that might help serve as a refresher.

Still, nothing and no one should actually re-create a memory. If looking at documents or being asked questions does not refresh one’s memory of what actually happened, don’t stretch to assumption. The difference is terribly important: In one case, a witness has truly remembered something; in the other, you’ve made something up.

6) **“I don’t know” versus “I don’t recall”**

In a normal conversation, there is often very little difference between “no,” “I don’t know” and “I don’t recall.” For a witness, it can matter a great deal.

- **Details** — Every day, we see or hear so many details and then they’re gone. Tell a witness: Don't try too hard. When asked about such details, be careful about just saying “no.” The next thing you know, they may pull out a document that you saw that references it. Err, if at all, on the side of caution: “I don’t recall” is the most truthful answer. Then, if the document shows up, it refreshes your memory, not contradicts your sworn testimony.
Fundamentals — On the other hand, if something is fundamental and wrong, don’t let a witness hide the truth behind memory. If a witness is clear that something, even long ago, never happened, make sure the response is “No,” not “I don’t recall.” Deny what needs to be denied. “I don’t recall” opens the door for someone else to say that it happened, however falsely, without fear of contradiction.

A witness’s memory lapse creates difficulties not encountered in daily conversation. In a normal conversation, saying “I don’t remember” is usually a conversation-stopper, or at least a subject-changer. The other person may try to help you remember, but will fairly quickly move on. Lack of memory is rarely interesting.

In the artificial world of being a witness, the opposite is often the case. An “I don’t recall” answer may be only the beginning of a long parade of questions on the subject. They may be aimed at refreshing a witness’s memory, pulling a fuller answer or just wearing him down.

Telling “nothing but the truth” often means spending as much time making clear what you don’t remember as confirming what you do recall. That’s perfectly appropriate.

When “I don’t recall” is the clearest and most truthful answer, a witness should never feel uncomfortable about giving it — as many times as necessary.

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