

Compliance & Ethics Professional

January/February
2013



A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org



Why the hero gets to break all the rules

an interview with Jon Turteltaub

Hollywood director of *While You Were Sleeping*,
Cool Runnings, *Phenomenon*, *National Treasure*,
National Treasure 2: Book of Secrets,
and many more

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by Dan Small and Robert F. Roach

Powerful witness preparation: If you don't remember, say so

- » A deposition is intended, in part, to discover what the witness knows with certainty.
- » Unless the incident in question was important to you when it happened, you probably won't remember the details.
- » "I don't know" and "I don't remember" mean different things on the witness stand.
- » Deny what needs to be denied, if you're sure it didn't happen.
- » If you don't recall, say so—as many times as necessary.

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. The first installment of this series was published in our January/February 2012 issue.

Rule 6: "If you don't remember, say so"

One of the most obvious rules for witnesses is also the most deceptively difficult: If you don't remember, say so. A witness can only testify to what he or she precisely remembers. This is not what we're used to: in our normal conversations, we rarely just say "I don't recall," and stop. We try hard to keep the conversation moving, but the reality is that we often try *too* hard. We guess and assume to help keep the conversation going (and maybe to make ourselves look smart). *Don't do it in testimony.* If you do not have a clear and precise memory, just say "I don't recall," and stop.

The problem arises from the essential structure of the witness environment, particularly a deposition. The purpose of a conversation is to have an interesting, easy-flowing exchange between two people. Anything one person doesn't know or remember is an obstacle to that flow, to be avoided

or worked around. A deposition, by contrast, is intended, in part, to discover what the witness knows. To explore—and push—the boundaries of that 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.

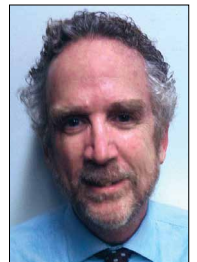
What's important for one is not important for all

Most investigations, litigation, or disputes in which people are questioned are actually 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 *today* may not have been particularly interesting, unusual, or significant to the witness at the time. Whether or not it has now become important for the questioner does not change the fact that it was *not* important then.

Without some special significance to you *at the time*, the chances that you will remember it now are much less. This new interest and focus are not your problem; it does not and should not change what you remember. However much the questioner might wish



Small



Roach

it, his or her focus does not change yours and should not change your memory.

Faded memory becomes random and anecdotal

It would make it easier for a witness if our memory loss over time was absolute, that we remembered everything back to a certain date and nothing beyond it. That is not how memory works. As our memory fades, we forget things unevenly. We may randomly forget recent events, but remember long past ones. I may be able to tell you what I had for lunch on a particularly special Thursday way 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. Think of the classic fact questions “who, what, when, where, and why.” For any faded memory (beyond a few weeks), you have probably forgotten one or more of these component facts. You may vividly remember that family quarrel at Thanksgiving some years ago, but not which year it was. You may remember a conversation you had with your spouse while driving, but not your destination.

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 you “should” or “must” remember, it is perfectly normal to remember some bits

and pieces, but not others. Talk about what you *do* clearly remember, and don’t worry about what you *don’t* remember.

I don’t know vs. 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 in our mail, conversations, work, email, names, events, entities, projects. Whatever it is, we see or hear it—and then it’s gone. Don’t try too hard. When asked about such details, be careful about just saying no, you don’t know, or you never heard of it. 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:

It would make it easier for a witness if our memory loss over time was absolute, that we remembered everything back to a certain date and nothing beyond it. That is not how memory works.

“I don’t recall” is the most truthful answer. Then, if the document shows up, it refreshes your memory, but does not contradict your sworn testimony.

Fundamentals

On the other hand, if something is fundamental and wrong—you would never have done or said that—don’t hide the truth behind memory. If you’re clear that something—even long ago—never happened, say *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.

Memory guilt

In a normal conversation, “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 to something else. Lack of memory is rarely interesting. In this 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 your memory, pulling a fuller answer out of you, or just wearing you down. Do not give up. No matter how many different times or ways a question is asked, the answer remains the same.

The discomfort, or “memory guilt,” comes in the repetition. A witness testified for a full day before a government agency on a matter she remembered very little about. She did an excellent job of making clear what she did and did not know or remember, which meant she

had to say “I don’t recall” hundreds of times. During a break late in the day, she described the problem very well: “I’ve never been asked so many questions about so many things I know so little about.” By preparing her to understand why this process was so different, it made it easier for her to understand why her answers had to be so repetitive.

Telling “nothing but The Truth” often means spending as much (or more) time making clear what you do *not* remember, as telling what you do recall. That’s perfectly appropriate. When “I don’t recall” is the clearest and most truthful answer, you should never feel uncomfortable about giving it, as many times as necessary. *

Dan Small (dan.small@hklaw.com) is a Partner with Holland & Knight in Boston and Miami. His practice focuses on complex civil litigation, government investigations, and witness preparation. He is the author of the ABA’s manual, Preparing Witnesses (Third Edition, 2009).

Robert F. Roach (robert.roach@nyu.edu) is Chief Compliance Officer of New York University in New York City and Chair of the ACC Corporate Compliance and Ethics Committee.

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