

Compliance & Ethics Professional

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Powerful witness preparation: Don't guess

- » A witness must be absolutely certain about factual details such as dates, times, numbers, etc.
- » If a questioner asks you to speculate, don't.
- » Opinions based on logic or reasoning are just opinions, not facts.
- » Remember the Golden Rule when answering hypothetical questions.
- » Don't let your need to appear "smart" override the need to tell the truth.

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 7: Don't guess

Could have/could be, should have/should be, would have/would be. Ah, guessing, we love it so. We judge ourselves—and each other—on how well we do it. Yet, in the unnatural world of a witness, it is an invitation to disaster. There are three basic kinds of guessing: factual details, inferences, and hypotheticals. Let's consider each in turn.

Factual details

Guessing at even the most minor factual details like dates, times, names, numbers, and so on, is an easy way for a witness to get into trouble. If you are not absolutely sure, say so. Just say "I don't know" or "I don't want to guess" and stop. This is unnatural, but critical. In our everyday conversations, we guess, estimate, or do whatever seems reasonable to keep the conversation flowing, knowing that we will never be cross-examined or held to our precise statement.

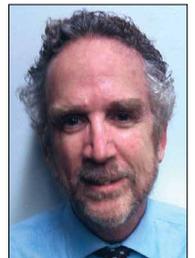
The problem is that whenever you guess, there is always a chance you will guess wrong. That's usually okay in a casual setting. Everything changes when you become a witness. What we think of casually as being "wrong" really means false, and when false is under oath and on the record, or anything close to it, you have a serious problem. As a witness, you can only be as precise as you are precisely and absolutely certain.

Sometimes a questioner will want you to guess and will push you to do it, asking for your "best recollection" or some such thing. They may think this will push you to say more, or lead to other questions, or give them something that they can then use in questioning other witnesses. Whatever their motive, your job is the difficult one of making and keeping clear what you do *not* know, not just what you *do* know. In this context, this means:

- ▶ make it clear that you don't know;
- ▶ if pushed, make it clear that you would be "guessing" and
- ▶ give yourself (and others) plenty of extra room.



Small



Roach

Inferences

Every day, every hour, in virtually every conversation we have, we draw inferences from what is around us. Not only is it common and natural, it's part of what we pride ourselves on as intelligent beings. We may call it different names: conclusions, inferences, opinions, presumptions, deductions. Generally, however it may be phrased, it is in some way an answer to a "why?" question. Why did someone do/say/write something? What did they mean by it?

If we are talking about a subject with which we are familiar, we take pride in the fact that our inferences are often correct. Therein lies the problem. By congratulating ourselves on the high chance that we are right, we are both recognizing that what we are really doing is guessing, and acknowledging the real possibility, however small, that we are wrong. Words like "inference" are really only fancy ways of saying "guess."

Avoiding this kind of guessing can be one of the most difficult tasks faced by a witness, for two principal reasons: The curse of the intelligent witness and the pressure of inference guilt.

The curse of the intelligent witness

The more intelligent and talkative witnesses are, the more accustomed they are to thinking that they have all the answers. Lawyers often make the worst witnesses because they are used to giving opinions on almost anything, and almost always based (they believe) on logic or reasoning. The challenge of being a witness is to discipline yourself to put these natural tendencies aside. In most witness situations, you are not there to impress anyone with how smart you are. The more you try to impress, the longer and more unpleasant your time as a witness is likely to be.

Inference guilt

A questioner's efforts to use our natural desire to appear smart and helpful to get more out of a witness brings out inference guilt. It is basically trying to embarrass the witness into guessing: "Wouldn't it be logical that..." "Surely it makes sense that..." "Doesn't it appear from what you've said that..." and "I know you don't want to guess, but you understood that..." These are all ways to try to use guilt to push the witness to say things he/she doesn't really know. However, you should never feel embarrassed or defensive about telling the truth in a precise way. That's the job of a witness, whether or not it fits with what the questioner wants.

Hypotheticals

Look up the word "hypothetical" in a thesaurus, and the synonyms that appear include "guessed," "assumed," and "imaginary." Lawyers are used to hypotheticals as a teaching device. The old Socratic method involved endless succeedingly tougher hypotheticals to explore legal principles. However, this is not an academic environment. As a witness, hypotheticals can be a dangerous trap. More important, they are the worst form of guessing—using hindsight and foresight, in either the "attack hypothetical" or the "meteor hypothetical."

The attack hypothetical

The most common type of hypothetical in many cases is the attack hypothetical. This involves the questioner putting forward some assumed facts, and then asking what the witness—or someone else—would, should, or could have done. It is an attack hypothetical, because it is not being asked out of curiosity. It is being asked to use the witness's answer to attack someone else—to criticize what they did or did not do under those facts. Of course, the witness was not there, not involved, and not aware of everything that the reality of the

situation depended on at the time. It is guessing, and it is inappropriate.

The best way for the witness to think about attack hypotheticals is to remember the Golden Rule: "Do unto others as you would have others do unto you!" If the situation were reversed, if the questioner was asking someone else a hypothetical to try to use them to attack you, wouldn't you want that person to know a lot more than any questioner can put into a hypothetical? Wouldn't you want that person to not guess, not pass judgment in hindsight, not base a critical opinion on insufficient facts? You would, so don't do these things yourself. A truthful answer would depend on far more information and inputs than even the best questioner can squeeze into a short, clear, and fair question.

The meteor hypothetical

With the meteor hypothetical, the questioner tries to make a point of some kind by asking a question about something that has never happened. Often, they are trying to create

some rule or standard by which other people, or other events, should be judged. But if it never happened, and there is no hard and fast rule anticipating it, any answer to the question is pure speculation, pure guessing. It's a meteor question: "If a meteor came crashing through the roof of your building, what are the first three things Bob Smith should do?" Who knows? It's never happened, it probably never will, there are no clear rules for it, and it would depend on the circumstances. It's guessing. Don't do it. Just say, "It's never happened, and I don't want to guess!"

We all want to look smart in front of others. It's natural. But in this very unnatural environment, trying too hard to look smart is a dangerous luxury. Don't do it. *

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