

# Compliance & Ethics Professional

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by Dan Small and Robert F. Roach

# Powerful witness preparation: Don't volunteer

- » Free-flowing conversations move through a series of connections to seemingly unrelated topics.
- » Testimony should stick to the question at hand and stay on a narrow path.
- » The questioner's job is to ask clear questions, not lead the witness into volunteering information that is inadmissible, irrelevant, or just off track.
- » Don't fill the silence—use it to prepare for what lies ahead.
- » Volunteer information only if it will clear up a misunderstanding or emphasize a key theme.

*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.*

*Dan and Robert will be speaking about investigations at SCCE's Higher Education Conference, June 2–5, in Austin, TX.*

## Rule 8: Don't volunteer

**“Q**uestion, pause, answer, stop.” That is the unnatural but essential rhythm of an effective witness. We've talked about each of these first three steps, now we must talk about the “stop.” Don't volunteer. Like so much of being a witness, this is contrary to what we are used to—and what our goal is—in a free-flowing conversation.

The essence of conversation is connections. One thought leads to another, and the conversation “flows.” Depending on the setting and the people, it can meander slowly for hours or flow swiftly to a conclusion, but it always continues by means of connections. If you are chatting over lunch and your companion

asks if you saw a recent movie, your response will probably not be a simple yes or no. Rather, you will go on to talk about whatever interests you that's connected to the original question, or whatever follows:

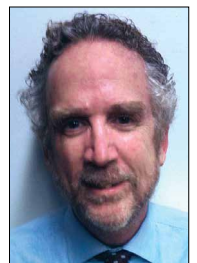
Q: Did you see movie X with actor Smith?

A: Yes, but you know I really liked him better in movie Y. The acting was better. Of course, it may just be that the night I saw that movie was really memorable, since Mark almost got arrested on the way home. The movie went longer than we thought, so he was really speeding on the way home and saw this police car just in time. He's such a crazy driver; I'm really worried he's going to get in an accident someday.

And so on. A conversation that started with a simple question about movie X has quickly flowed along to Mark the dangerous driver, through a series of understandable connections, one subject to another. No one asked about Mark, or even movie Y; but in a conversation,



Small



Roach

that kind of volunteering is all right. As a witness, it is *not* all right.

In the unnatural world of being a witness, connections are not the goal. Your job as a witness is generally to insist on clear and fair questions; answer carefully, briefly, and precisely; and then go home. “Question, pause, answer, stop.” The questioner’s job is to ask the right questions to get at the information he or she wants. It should not be the questioner’s job to put words in your mouth. Nor should it be your job to volunteer information beyond the narrow lines of the question.

Connections mean you are volunteering. Don’t do it. You may think that it will somehow help or shorten your time as a witness, but it will not. Wait for a clear and simple question, keep your answer as short, simple, and narrow as possible, and then stop. If a questioner does not follow up with more questions, and thereby misses other information, that’s not your problem. Your volunteered addition may be inadmissible, irrelevant, or just off track.

Think about what this same movie discussion might look like with a careful witness who does not volunteer:

- Q: Did you see movie X with actor Smith?  
A: Yes.  
Q: Did you like it?  
A: Yes.  
Q: Have you seen any other movies with actor Smith?  
A: Yes.  
Q: Which ones?  
A: Movie Y.  
Q: Which movie did you like better, X or Y?  
A: I’m not sure.

And so on. Each question is answered truthfully, but you have not done the questioner’s job for him or her: You have not volunteered. You have *broken* the chain of connections. “Question, pause, answer, stop.”

There are no “shortcuts” here. Answer each question at its most basic level. Do not try to help the process along or anticipate where it might be going. Too often that means going off that straight and narrow path forward. Those kinds of side-steps can take much more time in the long run and greatly add to the difficulty of being a witness. Your goal should be to give the questioner nowhere to go but forward, toward the end.

### A case in point

Some time ago, author Dan Small represented an investment manager in testimony before the Securities and Exchange Commission (SEC). Through a long day of questioning, he did an excellent job of listening carefully and keeping his answers precise and simple. Finally, late in the afternoon, he faltered. He answered a question, stopped, and then thought of something connected to his answer that he wanted to say.

The SEC lawyer, tired of having to deal with a careful witness, picked up on his hesitation and pushed him to say more. Although it was actually an insignificant point, the questioner was so intent on pursuing something that came out spontaneously, that testimony ended up going on and on about this new topic for half an hour, before it petered out and the questioner got back to the original line of questions.

At the next break, Dan’s client looked sheepishly and said, “You don’t have to say anything, I know what I did wrong.” In an effort to help things along, he had only added to the process. His “shortcut” had wasted half an hour that would have been saved by silence.

### The value of silence

Not volunteering means realizing that silence is okay. This is a hard adjustment. In our normal lives, silence between people in a conversation makes us uncomfortable, and we try to fill in the gaps. We all know viscerally what “uncomfortable silence” is. We don’t like it. Experienced questioners know this. They know that silence

can be a very effective tool, by playing off that natural discomfort. A questioner may use silence by simply waiting at the end of your answer, as if surely you cannot be finished, surely there is more. Don't play that game. Answer the question simply, then stop and wait for the next question. Use the silence to prepare for what is ahead, not to volunteer more of what has passed.

### Exceptions to the rule

There are two general exceptions to "do not volunteer" that a witness and his/her lawyer might want to discuss. The first is the "simple misunderstanding" exception. If the questioner and you are not communicating and becoming bogged down because of a clear and simple misunderstanding over a basic fact, it may be worthwhile to volunteer to correct the error.

The second exception is for "core themes." Every matter has a few key themes that you

as a witness may wish to get across. The more involved a witness is with the matter, particularly as a party, the more important these themes become. If witness and lawyer agree on these themes, the two of you may also want to think about whether and when you want to go beyond the simple answer to a question and volunteer information to support it.

Testimony is serious business. Everyone in the room has a job to do. Many of these rules are aimed at disciplining the questioner to do his job right—to make him/her ask clear and fair questions. "Don't volunteer" is aimed at disciplining witnesses to do *their* job right—answer the question, then stop. \*

*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.*

## Your Guide to Becoming an Effective Investigator

### The First Information Is Almost Always Wrong: 150 Things to Know About Workplace Investigations

By Meric Craig Bloch, Esq., CCEP, PCI, CFE

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