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by Dan Small and Robert F. Roach

Powerful witness preparation: Be careful with documents (Part 1)

- » Good witness preparation includes knowing how to respond to questions about a document.
- » Unless the witness wrote the document, he/she can't testify as to when or why it was written or what it means.
- » Documents are only as accurate as the knowledge, bias, or beliefs of the writer.
- » The context of a document may be as important as its content.
- » Just because the witness is "cc'd" on a document, it doesn't mean they received, read it, or will recall it.

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 9: Be careful with documents

The witness is just settling into their deposition, starting to sense that there may be light at the end of the tunnel, when the questioner pulls out the first document. She waves it around with great flair, asks a few "Isn't it true" type questions, slaps it down on the table, and even the most intelligent, articulate witness is lost. "OMG," they think. "She's got a document. I'm in trouble now." All witnesses need to be prepared to deal with documents—both to be careful with them, and to *not* be afraid of them. Not an easy task.

With any document, there are three basic issues:

- ▶ **1. Credibility:** Is the document accurate? But really, more importantly, does the witness *know* if it's accurate?
- ▶ **2. Language:** Language means just that. Is the questioner quoting the document accurately—the exact words, the full

sentence or paragraph—and is it relevant to the question being answered?

- ▶ **3. Context:** Even if the questioner quoted the language correctly, did he/she put it in the correct *context*. What else does the document say on this subject?



Small

This article will only address the first document issue, credibility. We'll come back to the next two challenges in the next article.

The magic of documents

The dictionary defines credibility as, "worthiness of belief." To a careful mind, that process of judging whether something is truly worthy of your belief—particularly under oath and on the record—ought to involve a rigorous examination. Yet, we all tend to place magic into documents. "If it's written, it must be true." Even the most firmly-held memories or beliefs waver in the face of mere ink on paper. It makes no sense, but it happens all the time.

The question is simple: Does the witness *know* whether or not the document is accurate? If you don't know, don't assume anything! No document can change your reality. Documents



Roach

are just mechanical ways of putting what we think on paper, and they are only as accurate as the knowledge, bias, or beliefs of the writer. If the writer is the witness, perhaps the witness remembers the document, and perhaps the witness remembers whether what it says is accurate. If the witness did *not* write the document, there is little that he/she can truthfully say about it.

An illustrative point

In January, 2006, author Dan Small was traveling, working late to get ready to meet with a witness and counsel. He had the TV on in the background, and heard something about a mining disaster in West Virginia, where miners were trapped. The next morning, Dan was running late for the meeting, so did not listen to the radio or watch TV. However, as he left his hotel room, there was a copy of *USA Today* on the doorstep, with the dramatic headline, “12 Miners Found Alive.” It even had a picture of the joyous faces of the family members. Walking into the meeting, he exclaimed to all, “Wow, great news about those miners!”

Except that it wasn’t true, and everyone else in the room knew it. For a brief period late that night (that happened to coincide with the deadline for *USA Today*’s hotel edition), there was a report that they were alive—thus, the dramatic headline. But it was a false report, a mistake. By the time everyone else in the room got later newspaper editions or TV or radio news that morning, it was clear that it wasn’t true. All the miners were dead.

Dan has kept that headline and shown it to virtually every witness he has worked with since. There it is, an impressive document. No one was trying to lie or deceive. On the contrary, they thought they were sharing wonderful news. And yet, it was false. Dan shows that headline to every witness in the hope that they will think of it every time they are shown a document, and ask first, “Do I know whether this is credible?”

Kinds of documents

The problems of credibility relate to a wide range of documents. Some of the most common examples include the following.

The “courtesy copy”

A common challenge involves documents that were written by someone else, but indicate in some way (for instance, cc on e-mail) that they were sent to you. You can only testify from your current memory—and it’s your memory, not a “cc” mark on someone else’s document, that controls what you can say. The “cc” may have been carried out, or it may not have been; it doesn’t matter. If you now remember receiving the document, you can say that. Otherwise never allow someone to push you into an assumption like, “I must have seen it, because I’m cc’d.” If you don’t recall receiving it, just say so.

Memory

How much, if anything, do you remember about it? A document that may be important to a questioner now, may have been unimportant to you when you wrote it months or years ago. It may be little more than a blur to you now. Just think about the numbers. Let’s say that you generate just 30 “documents” (including emails) a day, about 250 days per year. If a questioner asks you about something you wrote only a year and a half ago (in some matters, the gaps can be much longer), that means you have written about 12,000 documents since then. When put in this context, it’s much easier to understand why you might not remember one particular document clearly. That may not be what the questioner wants to hear, but it’s the truth.

Forms

We are often confronted with forms or form language that limit how we can express ourselves. You have to choose which box to check, which line best describes your situation—when really none of them do it well. Don’t be defensive. You

were doing your best, trying to make a disclosure or convey information, but you were given a choice of poor options dictated by others.

Certification

More and more today, we have to sign documents with a certification that they are true, often under oath. And yet, more and more, we rely on others to prepare those documents. We delegate that responsibility to someone we believe is qualified to fulfill it. Every year, we review and sign our tax returns, yet there are significant portions of it that we may not fully understand. We rely on the expertise of our tax preparers. What did we do to try to “make sure” what they did is correct? We hired a good expert and gave him everything he needed. Most of us wouldn’t think of duplicating everything he did after he did it.

Conclusion

Take the magic out of documents, and examine them for what they are. If you did not write the document, there is very little you can say about it that’s not guessing. The truth, as a witness, is what you *saw*, *heard*, or *did*. If you remember reading it, you saw something. If you remember discussing it, you heard something. If you took some action as a result, you did something. Anything else (who wrote it, why it was written, what it means, and so on) is guessing. Don’t do it. *

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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