

Compliance & Ethics *Professional*

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by Dan Small and Robert F. Roach

Powerful witness preparation: The pure and simple truth

- » The need to tell the truth does not lessen the need to prepare the witness to testify.
- » If you make a mistake, stop and fix it. The jury will understand.
- » Deal with the bad stuff up front. Being defensive or trying to cover it up will only make things worse.
- » Witnesses should include positive aspects about themselves as part of telling the truth.
- » Witnesses should concentrate on what they saw, heard, or did and avoid speculation.

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 issue.

There is great wisdom in the quote, adopted from Mark Twain, “Always tell the truth. It makes it easier to remember what you said the first time.” Real witness preparation is an intensive and challenging process. However, it must begin and end with one fundamental principle: Always tell the truth. The witness must be clear and comfortable that at no time is the lawyer telling him/her what to say, other than to say the truth.

The need to tell the truth, though, does not lessen the need to prepare. On the contrary, it only heightens it. To quote a very different author, Oscar Wilde, “The pure and simple truth is rarely pure and never simple.” The goal of good witness preparation is to get to the truth and bring it out effectively in this difficult environment. Truth is often the first casualty of poor preparation.

Rule 3: Tell the Truth

No witness takes an oath to “tell the truth.” That is a myth. The oath at the beginning

of testimony is to “tell the Truth, the whole Truth, and nothing but the Truth.” Like many things in our normal lives, we tend to blur it all together into one image. Like many things in the precise and artificial world of being a witness, we need to examine the *entire* statement and make sure that we understand and consider all three parts.

1. “The Truth”

Witnesses should understand that this is not only a rule of law; it is a rule of self-preservation. Lying, or stretching the truth, as a witness may not only be a crime. It’s foolish.

Witnesses should understand, to be blunt about it, that they are not as good at lying as they think they are. That’s because they are used to getting away with it relatively easily. In normal conversations, certain kinds of social “white lies” are generally accepted or ignored. Even more serious lying is rarely directly challenged, and never with the kind of intensity and expertise you will experience if you try it as a witness.

The consequences of telling a lie are often worse than whatever it was the questioner was asking about in the first place. It is what



Small



Roach

we used to call the “Watergate Syndrome,” perhaps now the “Martha Stewart Syndrome”: people getting caught and prosecuted for covering up, not for the initial subject matter being investigated. Don’t do it. Tell the truth.

There are no shortcuts here. The truth of what you saw, heard, or did, and remember, is a narrow, precise line. No matter how often or hard someone tries to get you to veer off that line, resist the “oh, what the heck” tendency. Once you’re off track, it becomes harder and harder to get back on. No matter how many times a question is asked, and in however many different ways, the truth—and your truthful answer—must remain the same.

As prosecutors, we used the acronym BOBS: Bring Out the Bad Stuff. Whatever the issues are, you and your lawyer can deal with them. It will be much harder if they only come out after you’ve tried to cover up or gloss over the problems.

“The Truth” also includes honest mistakes

In a witness environment, the setting, the oath, and the court reporter all combine to make people feel that they cannot make a mistake. So, when they inevitably do, they panic and either ignore it or try to mold and shape it into something else. Don’t do it! When you make a mistake, which every witness does at some point, keep two things in mind.

First, remember the Law of Holes: “When you’re in a hole, stop digging!” Trying to work around a mistake will ultimately only make it worse. As soon as you realize you made a mistake—however that happens—stop and fix it.

The goal is a clear and accurate record, so stop and *clarify* any mistakes.

Second, don’t worry about it. You should *not* expect to be perfect. Juror #6 doesn’t expect it either. He’s nervous, too. He knows he would make mistakes, and he does not want robots talking to him. Your mistake draws you closer to him, not further away.

2. “The whole Truth”

The “whole truth” means both the good stuff and the bad stuff. Both need to come out, and in many situations, the witness must take the lead in bringing them forward.

The bad stuff

None of us is perfect, and most of us have things in our past that are embarrassing or difficult. The Internet, and its search engines, can make those things live forever. As a witness, some of those things may become relevant, or the questioner will try to make them relevant. The key is to avoid making the situation worse by trying to hide or be defensive about these things. As prosecutors, we used the acronym BOBS: Bring Out the Bad Stuff. Whatever the issues are, you and your lawyer can deal with them. It will be much harder if they only come out after you’ve tried to cover up or gloss over the problems.

The good stuff

Just as a witness must take responsibility for bringing out the bad stuff, they must also bring out the good stuff about themselves, their work, those involved in the litigation, or other matters. The questioner will not ask. It must come from the witness. For example, a wide range of healthcare professionals get up in the morning, get dressed, have some breakfast, go to work—and then spend the day saving lives or helping those in need. After a while, to them, it’s just what they do every day, nothing special to talk about. But to Juror #6,

it is amazing, wonderful work, *if* it's truthfully described.

That can only come from the witness. Every witness, in every profession and all walks of life, has good stuff to talk about. An important goal of preparation is to find it and convince the witness that, for this one day, it is not "vanity" to talk about it. It is an essential part of telling the whole truth.

3. "Nothing but the Truth"

In this environment, truth has a different and more precise meaning than it does in a normal conversation. Truth in a conversation is what you believe. But "belief" includes guesses, inferences, and all kinds of other things that stretch a precise definition of the truth. Truth in the witness environment is strictly limited to what the witness *saw, heard, or did*. Anything beyond that is speculation. Thus, a witness can testify to something if they:

- ▶ saw it—witnessed it, read it, etc.;
- ▶ heard it—heard someone say it, whether to them or others; or
- ▶ did it—wrote it, said it, took some action.

Everything else is a guess. So much of what makes us intelligent, interesting, intuitive people, and so much of what makes us good conversationalists, is based on our view of what's in someone else's head. Why did someone do something? What did they mean when they said something? How did they react to something/someone? It's all guessing. We do it every day in normal conversation, and take pride in it. Don't do it as a witness.

"The Truth, the whole Truth, and nothing but the Truth" is hard work, but essential. *

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COMPLIANCE & ETHICS INSTITUTE PREVIEW

SESSION 204: Complying with Global Anticorruption Laws: A Case Study

MONDAY, OCTOBER 15, 2012, 1:30 PM–2:30 PM

Government enforcement of anti corruption laws is increasing around the world. Although companies are aware of the risks presented in this area, they aren't always able to effectively mitigate the risks.

This case study will explore how a global company in the medical device and pharmaceutical industry evaluated its risks and worked with its managers to develop a set of tools for managers to use to comply with local laws and significantly mitigate the corruption risks in their areas.



SUSAN ROBERTS, Executive VP and Chief Compliance Officer, Bausch & Lomb Inc.

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