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by Dan Small and Robert F. Roach

Powerful witness preparation: Be careful with documents (Part 2)

- » The questioner has had the luxury of time to search the documents for one word or idea with which to confront the witness.
- » If the document in question is not in front of you, ask to see it before answering any more questions about it.
- » As a witness, you must read and understand the whole document before answering any questions about it.
- » Never volunteer the existence of a document.
- » Remember the three-step process: Ask to see the document, read it, then ask for the question again.

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

Virtually every case these days has documents, sometimes thousands of them. And virtually every witness tends to give those documents a magic or a power they don't deserve. It's only natural. We all do it. “If it's written, it must be true.” The lawyer's job in preparation is to help the witness overcome that illusion and understand that a document is just a mechanical way of recording what someone believed at the time.

With any document, there are three basic issues:

1. **Credibility:** Is the document accurate? Really, more importantly, does the witness *know* if it's accurate?
2. **Language:** Is the questioner quoting the document accurately: the exact words, the full sentence or paragraph, 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?

We discussed credibility in the last article in this series. This time, we'll address the other two issues: language and context.

The goal here is to level the playing field. The questioner has gone through hundreds, thousands, and in some cases, tens of thousands of documents in advance to pick out the one line or one word he/she wants to use with the witness. The witness may not know what that is, which puts him/her at terrible disadvantage. The key is to learn a process and discipline that allows you to take your time, consider the language and context, and answer precisely.

Remember, a document is simply a mechanical way of putting something on paper. *Treat it mechanically.* There is a very simple protocol for dealing with a document—any document. It is only three steps, and you should follow it absolutely.



Small



Roach

The Protocol

Anytime you are asked a question the answer to which is contained in or relates to a document, follow this protocol.

Step 1. Ask to see it

Documents are like questions: You must make sure that you understand the whole thing. You would never (or certainly should never) answer a question when you only heard a part of it. Similarly, you should not answer questions about a document until you have read and understood all of it. Never volunteer the existence of a document. However, if you are asked a question about a document (or about something that is contained in a document), the first step is to ask to see it. Do not assume someone else's description is accurate, and don't guess about what it says.

It is amazing how often witnesses—and their counsel—allow themselves to be drawn into a debate with a document that is not in front of them. How absurd—and unfair. How can witnesses possibly win that debate? They cannot. The best they can do is tie, and eventually lose. Do not get drawn into such a debate. Ask to see the document!

Understand that in most forums, the questioner is not required to show the witness a document. However, if the questioner chooses not to show you the document, he/she has chosen to allow you to guess, because that is the most you can do regarding a document that is not in front of you. Don't guess.

Step 2. Read it

If you are allowed to see a document, pick it up, block out everything else in your mind, and examine the document as if it were your first time. Read the entire document carefully, no matter how long it takes, and regardless of whether you saw it in preparation for your testimony. Remember:

- ▶ It is generally none of the questioner's business what you did in preparation, and if you prepared with your own lawyer, your discussions were privileged and confidential;
- ▶ Every time you read a document, you will see something new, something you missed before, so it's always worthwhile to read it again; and
- ▶ You are now reading the document with the advantage of having heard some of the questions.

Understand that some questioners will try to discourage such a thorough review. They are often only interested in the particular section, page, or line that helps their position, not the full context. Thus, the questions may go something like:

Q: Let me show you what has been marked as Exhibit 66. Do you recognize these documents?

A: Yes, I do.

Q: In fact, isn't this a set of about 25 documents relating to your company's transaction with the ABC Company?

A: Yes, it is.

Q: Turning to the second page of the fifth document, the page stamped with the number 386, looking at the middle of the page, what is meant by the word "transitional"?

A: I believe that it means...

Remember, this is your testimony. You are in control, and you have a right to clear and fair questions. Picking a piece of a document out of context is not fair, at least until you have reviewed and considered the entire document (or set of documents).

Step 3: Ask for the question again

Once you have given the whole document (or set of documents) careful consideration,

put it down, and ask to have the question again. Now you can focus not just on the words the questioner may have picked out, but on the whole portion of the document related to that issue. With this careful discipline, and by limiting your answers with precision, the same exchange might look more like this:

Q: Didn't the company describe this as "transitional"?

A: May I see what document you're referring to?

Q: Let me show you what has been marked as Exhibit 66. Do you recognize these documents?

A: They look familiar.

Q: In fact, isn't this a set of about 25 documents relating to your company's transaction with the ABC Company?

A: They appear to be.

Q: Turning to the second page of the fifth document, the page stamped with the number 386, at the middle of the page, what is meant by the word "transitional"?

A: May I see the document?

Q: OK, here it is. Now what's the answer?

A: May I read the entire exhibit?

Q: Well, if you must. [Witness reads]

A: I'm sorry, would you give me the question again?

Q: On page 386, what does the word "transitional" mean?

A: Well, I see that I didn't write that document, and I don't want to guess what someone else wrote.

Q: What's your understanding of what it meant?

A: Well, eight pages earlier, at page 378, there's a letter from Mr. Jones that explains what he meant.

Q: And what is that?

A: Well, according to the letter...

You are the witness and you have to take responsibility for—and control over—your testimony. Be careful with documents. Ask to see it, read it, and ask for the question again. *

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.

COMPLIANCE & ETHICS INSTITUTE PREVIEW

SESSION W14: People Powered Compliance: Comprehensive Approach

WEDNESDAY, OCTOBER 9, 2013, 10:00–11:45 AM

Prepare to supercharge your compliance program with "people power": people bring a culture of compliance and ethical business conduct to life and people drive tone at the top. Consider how the five pillars of people-powered compliance – empowerment, responsibility, resilience, integrity and measures – support culture and tone and enhance compliance skills. Explore high impact, low cost strategies to build and strengthen those pillars and manage compliance risks. Develop qualitative measures to assess compliance program performance.



MARY-JAMES YOUNG
Senior Compliance &
Regulatory Counsel,
Vectren Corporation

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Visit www.complianceethicsinstitute.org for more information.