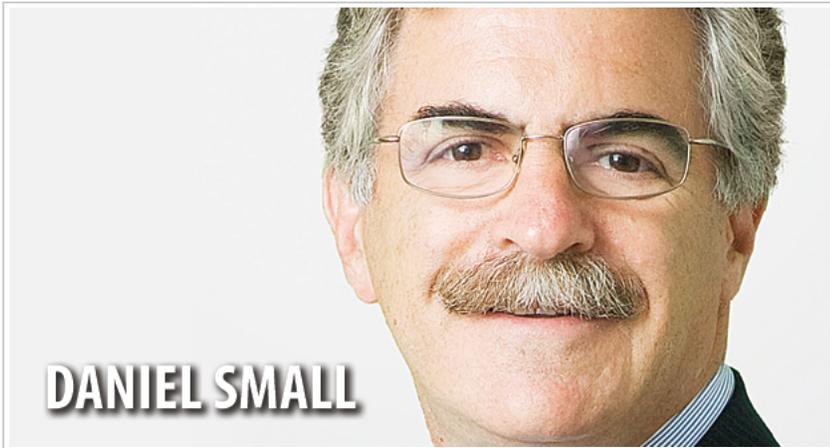


The witness's Golden Rule: Take your time

By: Daniel I. Small © November 14, 2013



If the old saying is true — that he who writes the rules wins the game — then the No. 1 rule for any witness is to take your time. That's the rule from which all else flows. Follow it and the rest will be much easier. There are no shortcuts for a witness. The faster you try to go, the longer it will take; the harder you try to move things along and "be helpful," the harder it will be.

It's all about multi-tasking and fairness. No witness can do

everything he needs to do to be effective by doing it quickly. Make sure the witness has heard the question clearly, understands it fully, considers it carefully and formulates a clear, thoughtful answer.

Question/answer, question/answer: Like a volley in tennis, the faster it goes, the sooner someone will make a mistake. In tennis, that's fair: whoever makes the first mistake loses the point. But in testimony, one of the players is invincible — if the questioner makes the first mistake, it doesn't matter — he or she is not under oath. If the witness makes the first mistake, it lives forever: under oath and duly recorded. What could be more grotesquely unfair? The first way to lessen that unfairness is to slow down.

Every witness has the opportunity, the right and the responsibility to control the pace of testimony. No one else in the room is interested in slowing it down. If the witness doesn't do it, it won't happen. When I tell witnesses to slow down, I often get three reactions: "It's hard to do," "It will look bad" and "It will make my testimony take longer." Let's look at all three concerns.

1) "It's hard to do"

Yes, it is. Normal conversation is fast-paced and free-flowing. We interrupt each other, finish each other's sentences and go where we think others want to go, all to make it fun and interesting. Yet all that is inappropriate and dangerous for a witness.

Slowing down is uncomfortable and unnatural. To do it right, we have to do it mechanically. Tell a witness, right from the first question: Pause and silently count out a good five seconds after every question before answering. Don't wait until the middle of the testimony — it will be much harder and you'll forget. Remember, it's your oath and your testimony. You should control the pace, whether it makes someone else happy or not. The written record looks the same whether you take a minute or a second to formulate your answer, but your answer will be better for the extra thought.

Pausing after every question helps the witness in several ways. People in a hurry make mistakes. Lawyers know that, and some may try to push a witness to go faster for that reason. If anyone questions the delay, a witness can respond that he's just trying hard to tell the truth.

A simple pause also affords the witness time to listen with the intensity and thought required to make sure he really

understands the question. Among other things, it forces him to listen to the entire question. Too often in a normal conversation, we think we know where the conversation is headed, so we start our answer — or just stop listening — before the other person has even finished the question. As a witness, that's confusing and even dangerous. The last words of the question may not be what was expected. Thus, a witness may give the wrong answer or respond to a question that was never asked.

Pausing also helps avoid saying the first thing that pops into your head, which is often the last thing you want to have pop out of your mouth. "The Curse of the Intelligent Witness" is that many people are used to thinking they know where the conversation is going and being in too much of a hurry to help it get there.

Taking a pause also gives a witness's lawyer time to speak — or object, if appropriate. Advise your witness: In case of an objection, stop, listen, think about what is being said and wait until you are advised to continue.

2) "It will look bad"

People sometimes worry that if they take their time, it will make a bad impression on a judge or jury. In my many years as a litigator, I have had many opposing lawyers complain that my witnesses were going too slow — but I've never heard it from a juror or from a judge.

Everyone else in the courtroom or hearing room understands how important the testimony is and that the importance of the testimony warrants the witness taking his or her time. As long as it is done consistently from the very first question, reasonably and for the right reasons, the witness should not worry about creating a bad impression.

Several years ago, I represented a contractor who was called to testify before a federal grand jury investigating a developer for fraudulent practices. When I met with him to prepare, it was clear the No. 1 rule was particularly important, as he talked too fast for a good witness. With preparation, he finally understood the significance of taking his time before responding. He went into the grand jury room while I waited outside. I didn't really know how successful he was going to be.

Sometime later, I was able to see a transcript of his testimony and, to my pleasant surprise, I could sense that he was going slowly and deliberately. It read like a transcript should: full questions, without interruption, answered with clear and careful responses. I could also sense the growing frustration of the questioner, who wasn't getting the snappy, sloppy, helpful answers that he wanted out of his witness.

About an hour and a half into the three-hour testimony, the questioner said on the record, with obvious frustration, "I've noticed that you're pausing after each question. Is there a reason why you're doing something like that?" My witness responded, after another pause, "Because this is the most important thing I've ever done and I want to give you the most accurate answer that I possibly can."

That was the end of that.

3) "It will make it take longer"

First response: So what? This is important. If it takes a little longer to do it properly, that's time well spent. The second response, though, is equally important: Many depositions or other testimony situations will actually be over sooner if the witness takes his time.

Why? Lots of reasons, but most often it is because questioning lawyers really aren't seeking deliberate and carefully considered responses to questions. They are fishing for the quick hit — the sound bite, the sloppy answer, the mistake. Once they realize they are facing a careful, disciplined witness, they lose interest. Time is money — there may be more productive places to fish. Or maybe they just start thinking of the pile of papers back in their office that requires their attention. I've seen it happen time and again. The slower you go, the shorter your deposition will be.

Tell your witness: Taking control does not necessarily mean an adversarial or unpleasant experience; on the contrary, you will generally want to avoid being too biased or one-sided. Understanding one's role as a witness requires taking the time to make sure that it's done right, whether or not that results in a pace that someone else considers too

slow. The first step towards taking control of witness testimony is to take control of the pace. Take your time.

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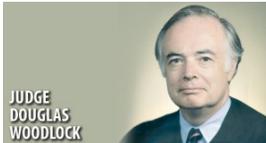


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