# "I Don't Recall"
## Overcoming a Witness with Selective Memory

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No one remembers everything. Still, some deposition witnesses, often it seems with the guidance of counsel, appear troubled to recall even the most obvious facts.

"I don't recall" and "I can't remember" become the go-to answers to any potentially challenging question. Incredibly, showing the witness emails, contracts, and other exhibits does nothing to refresh the missing recollection. This gamesmanship can frustrate even the most seasoned of trial attorneys.

Don't fret. Properly armed, you too can help overcome a deposition witness's selective recall.

Preparation is the key. Come armed with appropriate and strategic initial and follow-up questions. A good question or series of questions will cover the intended topic completely to nail down the answer. Poorly worded questions open the door for the witness to offer different or "refreshed" testimony later.

If the answer is incomplete or the witness's response suggests less than full confidence in the answer, follow up. Are there any documents or other items that would help? Is there someone else at the company better positioned to answer? Why else does the witness lack confidence in the answer? Ultimately, the questions should elicit answers that establish that the witness is the right person to respond and is unaware of any materials that would change or refine the answer.

Regardless of your questions, though, the witness answers with no memory. What to do?

### Tactics

First, try to refresh the forgetful witness's memory through the use of exhibits and related questions. Later impeachment efforts will be more effective if you can show that, during the deposition, you made every effort to revive the witness's memory. Confronting the witness using relevant exhibits will help to preclude her from later claiming that those very documents refreshed her failed memory.

If your efforts to refresh the witness's memory are not fruitful, lock in her answer. Preserve the "I don't recall" response through a series of follow-up questions designed to neutralize and eliminate the witness, as much as possible, from being a factor at trial or summary judgment. Those questions may include the following: "Why don't you remember?" "Is there anything that would refresh your memory on this?" "Are there any documents that could help you remember?" "Who might know the answer?" "How would you get the answer to this question?" "Do you have any reason to dispute that [fill in the blank]?"

Those follow-up questions and the responses to them may prompt some further follow-up of their own. For instance, if the witness identifies something that may refresh her recollection, explore what it is and why it was not reviewed before the deposition. If the item was not identified or produced in discovery, but should have been, have the witness explain the omission. If

the omission concerns a critical area of the witness's testimony, perhaps continue the deposition to give you the chance to flush out and investigate the new information before going forward.

Push the forgetful witness until all avenues have been exhausted. Let the witness's answers confirm that there is nothing left to pursue before moving on. Jar the witness's memory if you can; always better to hear the answer at deposition than to be blindsided at trial.

Having locked in the witness's lack of knowledge on a topic, use that admitted ignorance to your client's benefit. The most obvious opportunities to do so are in connection with a motion for summary judgment and during cross-examination at trial.

On summary judgment, the moving party, of course, bears the initial burden of demonstrating the absence of a genuine issue of fact; then the opposition must show that a genuine issue of material fact does exist. If the opposition's key witness already has exhibited an utter lack of knowledge on those same facts at deposition, opposing counsel may have a difficult time doing so.

## The Sham Affidavit Rule

Still, it is far too common for an attorney to submit a declaration or affidavit from the very same witness endeavoring to create a triable issue of fact on the very same subject that the witness

could not recall at deposition. But most courts prohibit that type of conduct through what is commonly referred to as the "sham affidavit rule."

In federal court, a party cannot create an issue of fact by an affidavit contradicting the party's prior deposition testimony. In *Yeager v. Bowlin*, 693 F.3d 1076 (9th Cir. 2012), the Ninth Circuit explained that the sham affidavit rule extends to those instances when a witness testifies at deposition that he cannot recall certain facts and then later recalls those facts in a declaration. Under those circumstances, the witness is still contradicting his prior testimony by changing it from "I don't recall" to "Now I remember."

In *Yeager*, the court found that the plaintiff's inability to recall facts at deposition amounted to a "total refusal to provide substantive answers," while his subsequent declaration recalled those same events with "perfect clarity." *Id.* at 1080. Both the trial court and the Ninth Circuit found the plaintiff's explanation for his newfound clarity to be "weak."

According to the Ninth Circuit, "[t]his sham affidavit rule prevents 'a party who has been examined at length on deposition' from 'rais[ing] an issue of fact simply by submitting an affidavit contradicting his own prior testimony,' which 'would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.'" *Id.* In *Yeager*, in light of the plaintiff's later contrasting declaration testimony, the court struck the plaintiff's declaration from the record.

Although the sham affidavit rule had a profound effect in Y*eager*, the rule is limited and does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony. For the rule to apply, the court must make a factual determination that the contradiction is actually a sham and conclude that the inconsistency is clear and unambiguous. A declaration that "elaborates upon, explains, or clarifies prior testimony" won't be excluded under the sham affidavit rule. *Id.*

Most state courts apply a sham affidavit rule similar to that described in *Yeager*. For instance, in California the rule is known as the *D'Amico* rule, named for the California Supreme Court decision in *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 20–22 (1974). But like federal courts, California courts have shown an unwillingness to 'exclude declaration testimony when other evidence is presented and credibly explains or contradicts the deponent's inconsistent statements.

Most crafty or skilled attorneys attempt to skirt the sham affidavit rule by identifying documents that were used to refresh the witness's memory in preparing the declaration. Try to preempt that. During the deposition, use all of the relevant documents available to you in your efforts to refresh the witness's memory. Your inability to refresh the witness's memory using the same exhibits should undermine opposing counsel's contrary result and may justify the application of the rule.

## Impeaching Inconsistent Testimony

The witness's convenient loss of memory at deposition also should be used to impeach the witness's inconsistent trial testimony. Impeachment through prior inconsistent statements has three basic steps—confirm, credit, confront.

First, get the witness to confirm the inconsistent testimony you seek to impeach. This step places the inconsistent testimony front and center for the trier of fact before drawing the contrast. Questions such as "Today you said that . . ." or "Earlier you testified that . . ." should suffice.

Second, build credibility for the deposition testimony that is about to be introduced. You want the jury to believe that the witness was telling the truth at deposition, and not telling the truth now on direct examination. This step serves two primary goals: It shows that the deposition testimony was reliable and accurate, and it helps to establish a foundation that will allow you to introduce the deposition testimony as extrinsic evidence of the prior inconsistent statement.

To achieve that second step, emphasize at a minimum when and where the deposition was taken, the deposition attendance of the court reporter and counsel for the witness, the witness's knowledge that the testimony was given under oath subject to penalty for perjury, the fact that the witness had an opportunity to review and confirm the accuracy of the transcript after the deposition, and the fact that the witness either did not make any changes or made some changes but left the rest of the transcript intact.

Third, confront the witness by reading the inconsistent deposition testimony into the record. Before reading from the transcript, ask the court for permission to read the portion of the witness's deposition testimony containing both the question and the answer. Language such as "Your Honor, I request permission to read page 56, lines 10 to 15, of the witness's deposition testimony" should elicit court approval for you to read aloud that portion of the transcript into the trial record. After reading the testimony, move on.

In the event you have to call the witness on direct, the procedure for emphasizing the witness's lack of recall at deposition is a little different. In those situations, try to elicit a response *consistent with* that of the witness's deposition testimony. For instance, ask: "You don't recall any discussions with ABC Corp. before signing the contract, correct?" If the witness responds in the affirmative, stop. If the witness answers with anything less than a complete confirmation, read the witness's inconsistent deposition testimony—both the question and the answer—out loud in court after obtaining permission from the judge to do so. Same technique; different circumstance. And as before, include some questions to build credibility for the deposition testimony.

Use the same question to impeach the witness at trial as the question asked at the deposition that elicited the "I cannot recall"

response. Any variation, even slight, *may* prompt a different response from the witness and *will* prompt an objection from opposing counsel. The grounds? That the questions are different and therefore do not support proper impeachment.

Knowing how to impeach an adverse witness's direct testimony by methodically introducing to the jury the witness's prior lack of knowledge on the same subject can be incredibly effective. Done well, it can even change the outcome of the case.

## Using Motions

When the witness deliberately fails to recall even the most basic facts, it may be necessary to bring that discovery abuse to the court's attention immediately. That's especially true when the witness's anticipated testimony, if extracted, is needed to advance your client's position. Under those circumstances, consider filing a motion to compel and accompanying request for monetary sanctions.

If your questions were proper both in form and in substance, if you made a clear effort to refresh the witness's memory, and if it is evident in the transcript that the witness was intentionally evading the questions, a motion to compel should succeed. That will allow you to resume the deposition later, after the witness and counsel are chastised by the court for giving evasive answers.

Additional relief in the form of monetary sanctions for the cost of having to bring the motion to compel is fairly routine, so long as provided for in the court's rules. After all, evasive discovery responses such as "I don't recall" have been described by the courts as "an open invitation to sanctions." *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 783 (1978); *see also Stein v. Hassen*, 34 Cal. App. 3d 294, 300 n.6 (1973).

Unlike an award of monetary sanctions, evidentiary and terminating sanctions are far more difficult to achieve and typically require a history of discovery abuse by opposing counsel. For instance, under California law, a legal prerequisite for granting dispositive sanctions is willful violation of a court order coupled with a history of abuse. Although California law does not require an earlier violation of a discovery order before an evidentiary sanction can issue, the moving party still must show that the offending party has engaged in a pattern of willful discovery abuse that renders evidence unavailable. The evasive responses of a witness at a single deposition would not likely give rise to those heightened sanctions.

Another litigation tool unlikely to deliver the desired result is the motion in limine. In advance of trial, some practitioners use in limine motions to ask the court to preclude a witness from testifying contrary to the witness's deposition, on the grounds that it would prejudice the moving party because that testimony was not identified during discovery, impermissibly contradicts a party admission, or both.

Although that type of motion may be a useful tool to educate the judge, it is unlikely to be granted. Also, a pretrial report or statement is likely a more appropriate mechanism to highlight for the court those types of anticipated issues for trial.

The court in *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383 1991 U.S. Dist. LEXIS 14651, at *2 (N.D. Ill. Oct. 15, 1991), put it simply:

> It is true that a corporation is "bound" by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be "bound" by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue. Deposition testimony is simply evidence, nothing more. Evidence may be explained or contradicted.

The court further explained that any trial testimony offered in contrast to that offered at deposition is subject to impeachment, not a motion in limine. *Id.* For this reason, a motion in limine is not the most useful tool in preventing a forgetful witness from altering deposition testimony at trial.

Well handled, evasive deposition testimony can bolster your client's position.

No witness can remember every aspect of an event, experience, or business relationship, or all of the details of the related conversations or activities. But the "I don't recall" response should be accepted only after pressing the witness to remember proves futile. If the witness's convenient inability to recall is a means to avoid answering critical questions at deposition, it is up to you to neutralize those evasive responses.

So lock in and take advantage of the witness's "I don't remember" answers. Well handled, evasive deposition testimony can bolster your client's position. Next time your deposition questions provoke the response "I don't recall," consider it a gift and use it to your client's advantage. ■