



WIT0505

Checklist: When the Witness says: "I Don't Remember."

In some depositions, there comes a time when the adverse witness says "I don't know" or "I don't remember." Beware of simply taking the answer and moving to a different question. "I don't know" or "I don't remember" allow the witness to appear at trial with a refreshed memory and a new answer that surprises you at the trial.

Moreover, some insurers and attorneys have been known to engage in the shady practice of educating a witness to say "I don't know" to any questions of present location or occurrences. For example, the drill once taught to one insurer's employees in preparation for their being deposed on issues of bad faith went like this.

"Mary, don't you understand that even if you parked your car in the parking lot when you came in here, your car may have been stolen. Therefore the correct answer is 'I don't know' if the plaintiff's attorney asks you where your car is. Now let's talk about your answer to "Where are company files on refused claims.....")

In short, don't let any witness fool you about what they really do know. Moreover, even if this witness really does not know the information, she may know how to get the information you want.

Therefore - every time a witness says, "I don't know" or "I don't remember," there is a series of questions to ask. This is the series of questions to ask if you want to find more information. It's also a good set of questions to lessen changes of an adverse witness mouse-trapping you with a miraculous attack of memory recovery a day before trial, because he took a look at something that refreshed his/her memory.

Print out the following list. Put in your trial notebook where you can find it quickly during the deposition of any adverse witness.

(If the witness answers: "I don't know", ask the following questions.)

Did you once know [the answer]?

If you once knew: when did you learn the answer?
Who did you tell?

Why don't you know the answer now?

What could you do to find out [the answer]?

(If the witness answers: "I don't remember", ask the following questions.)

Why don't you remember?

What might bring back your memory, or refresh your recollection?

[If witness says "nothing"]
Are you sure there is nothing that could make
you remember [this question's subject]?

[If witness says something might refresh recollection]
Is there any reason why you could not [look at
that, talk to that person, et cetera] *before* the
court reporter asks you to review your
deposition to see if your testimony of what
happened is correct?

(Then, in addition, if the witness answers either "I don't know" or "I don't remember," add the following questions.)

Who does know?

Who might know?

Who might know where to find the answer to the question?

What have you heard about [content inquired about]?

What documents have the information?

Were any records or memoranda made?

If so: Who made them?
Who has them?
When did you last see them?

What could you do to find out where the information might be?

You want your deposition testimony about events to be correct, don't you?

Will you agree with me to [look at that, talk to that person, et cetera] before the court reporter asks you to review your deposition to see if it is correct?

If your memory is refreshed before the court reporter has you review your deposition, or if you know your answer no longer tells correctly what happened, will you correct your deposition answer from "I don't know" - "I don't remember" to let us know the correct events?

If at any time, your memory is refreshed so your answer of "I don't know" - "I don't remember" know is no longer correct, will you tell the attorney for _____ . His/her name is _____ and his/her phone number is _____ . It will be in the deposition the court reporter will give you to review.

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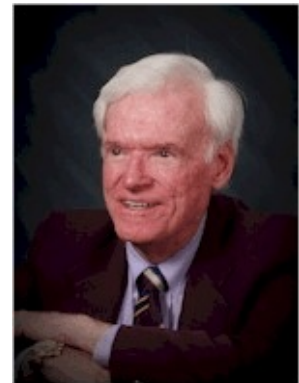
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