



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I just took yet another deposition in which the otherwise successful, intelligent businessperson being deposed appeared to have the memory of an old Commodore 64—she said “I don’t know” or “I don’t remember” to just about every question. And for those few questions she answered, she rephrased absolutely everything. For example, I asked her if it was in the scope of her duties to review and approve contract terms such as the one at issue? She said, “I don’t know what you mean by review and approve, but if you are asking if I did sometimes read them, the answer is yes. But I don’t remember whether I did so in this instance.” She had obviously been coached by her counsel to within an inch of her life. And I’d bet money that when it comes to summary judgment briefing or trial, her memory will have been “refreshed” and then she will remember a version of the facts favorable to her employer.

I’m thinking I’m playing out of the wrong playbook when it comes to witness preparation. Is there any ethical guidance on what’s in bounds and out of bounds?

A: I feel your pain. We’ve all dealt with that type of witness. Yes, there is some really good guidance on the rules of witness preparation in *The Ethics of Witness Preparation*, ABA Formal Opinion 508 (Aug. 5, 2023). It contains a bullet point list of 14 categories of witness preparation subjects or categories that are permissible, a list that is a useful part of any lawyers’ checklist for preparing a witness.

Perhaps ironically, a part of this list is that it is alright to remind a witness that it is acceptable and advisable to say “I don’t know” or “I don’t remember: when that in fact is the truth of the matter, as it can avoid presenting testimony that is a false memory or a guess. The important thing is to always tie that and other types of preparation to the anchor point of presenting a truthful story, with an accompanying speech about the consequences of not doing so, ranging from perjury to being caught in an inconsistency to various unintended consequences and testimony that is not credible that can damage a case, e.g., a witness who should know or remember a variety of key facts who claims not to. The Opinion also contains good discussion about conduct that crosses the line, both before and during testimony.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 134 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.