

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U. S. Army

Coping with the Forgetful Witness (The One-Two Punch)

You are questioning a key witness. Things are going well. You have developed a good rapport and the witness is effectively relating information to the panel. An important part of the witness's testimony is the license plate number of the get-away car. You ask the witness the license plate number and she says, "I don't remember." You feel your face getting flushed. Beads of sweat start dripping down your forehead. The knot in your stomach gets even tighter. You pause and then you ask, "Don't you remember that the license plate number is . . ." "Objection, leading," shouts the opposing counsel. The judge sustains the objection. You try another tactic. "Don't you remember in my office yesterday when you told me that the license plate number was . . ." "Objection, leading and hearsay," shouts opposing counsel. The judge sustains the objection. Now what do you do? You feel trapped. The witness looks at you, wide-eyed and helpless. You cannot seem to get critical information out and any rapport that you had with this witness and the panel is now lost.

Forgetful witnesses are common. In spite of solid pre-trial preparation, this situation cannot always be avoided. If you are prepared for it and know the rules, you can glide over these rough spots quickly and easily without missing a beat. When a witness forgets, you have two options: (1) You can try to refresh the witness's memory, or (2) you can attempt to introduce documents containing the forgotten information as a past recollection recorded. You should view this as a two-step process.

If your witness forgets something, you should first try to refresh the witness's recollection. Attempting to refresh a witness's recollection is important for three reasons. First, the process is fairly simple. Second, a witness who testifies from a refreshed memory is more persuasive and credible than a witness that cannot remember the information. Third, and most important, by attempting to refresh the witness's recollection, you can lay much of the foundation to introduce the document if the witness's memory cannot be refreshed.

Using the example above, assume that the witness made a statement to the police on the day of the crime, and in the statement, she included the license plate number of the get-away car. On the stand, she cannot remember the number. You can now use her statement to refresh her recollection. Here is how you do it. First, ask her if the sworn statement she made would help refresh her memory. If she says yes, have the statement

marked, show it to opposing counsel and then take it to the witness. Next, ask her to read the pertinent part of the statement silently to herself. Once she is done, retrieve the statement from the witness, and ask her if her memory is refreshed. If she says yes, ask her the license plate number.¹ See Appendix 1 for a list of sample questions.

This is a simple process but it is important to keep a few things in mind. Military Rule of Evidence 612² states that if you use a document to refresh a witness's recollection, the judge may require you to provide a copy of the document to opposing counsel. Opposing counsel can then inspect the document, cross-examine the witness with the document, and even introduce relevant portions of the document. Always have a copy for opposing counsel so that you can easily satisfy this requirement.

You must remember to retrieve the document from the witness before you ask her to testify about the information. If you do not retrieve the document first, the witness is not testifying from a refreshed recollection, she is testifying right from the document, which will probably draw a hearsay objection. Likewise, when you hand the document to the witness, be very clear that she is to read the document silently. This instruction will help to prevent her from simply reading the contents aloud.

Unfortunately, some witnesses are too nervous, or the information is so complex, that refreshing the witness's recollection may not work. Do not give up hope. Military Rule of Evidence 803(5)³ provides a method to introduce the document itself as a hearsay exception when the witness cannot completely or accurately recall the facts even after reviewing the document.

Back to our example. The witness simply cannot remember the license plate number even after you attempt to refresh her recollection. To introduce the document as a past recollection recorded, here is what you need to do. First, ask the witness if she had personal knowledge of the license plate number at one time. Next, ask if she recorded that information in her statement. Third, you must establish that the events were still fresh in her mind when she made the statement. Fourth, ask the witness if the license plate number recorded in her statement is accurate. Get the witness to explain why she was able to remember the license plate number and the steps she took to make sure that information was accurately recorded in her statement. Finally, show that the witness cannot completely and accurately recall the license plate even after looking at her statement. Once you lay the foundation and get the document

1. EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 348 (4th ed. 1998).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 612 (1998).

3. *Id.* MIL. R. EVID. 803(5).

entered into evidence, you can have the witness read the license plate number off the document. The document itself, however, does not go back with the members during deliberations.⁴ See Appendix 1 for a list of sample questions.

As you can see from this example, introducing the document instead of a refreshed memory will probably not be as persuasive. You may, however, have no choice, and it is certainly better than not getting important information to the fact finder. Some important points to remember. The witness does not have to personally write the information, provided she acted to adopt it. In this case, the police officer likely prepared the statement. As long as the witness signed the document, she adopted it.

Remember to have the witness explain how she knew that her statement was accurate when she made it although she cannot accurately remember the information now. This can be a challenge. You will need to focus on the steps the witness took to ensure the accuracy of the information at the time she made the recording. To preserve the witness's credibility, you should

also have the witness explain why her memory cannot be refreshed.

To ensure the smoothest use of these tools with a forgetful witness, use the refreshed recollection and past recollection recorded in a one-two combination. As soon as the witness says she does not remember, lay the first four foundational elements of a past recollection recorded. Then show the document to the witness and attempt to refresh her recollection. If this fails, the witness's inability to recall the information lays the last of the foundation and now you can get the document entered into evidence.

This two-step process will ensure a smooth presentation of evidence, even when you have a forgetful witness. Applying these skills, you can confidently cope with the forgetful witness. Not only will you develop important evidence, you will maintain your rapport with the witness and the panel. Major Hansen.

4. IMWINKELRIED, *supra* note 1, at 344-45.

Appendix

Sample Questions

Q. Ms. Jones what was the license plate number of the car you saw drive away?

A. I do not remember.

Q. What, if anything, would help you remember?

A. I made a statement to the police after the incident, and I told the officer the license plate number.

Q. How soon after the incident did you make the statement?

A. About ten minutes.

Q. How clear was your memory when you gave the license plate number to the police officer?

A. Very clear, I wrote the number down on my hand as the car was driving away, and then read the number off my hand to the police officer.

Q. Was the statement you made to the police written down?

A. Yes, the officer wrote down the all the information I gave him, and then I read over it, checked it for accuracy, and signed the statement.

Q. Did the statement accurately reflect the information you gave to the officer?

A. Yes.

At this point request that the statement be marked as a prosecution or defense exhibit for identification and show it to opposing counsel.

Q. Ms. Jones I am showing you prosecution/defense exhibit __ for identification, do you recognize it?

A. Yes, this is the written statement I gave to the police officer.

Q. How do you recognize it?

A. From the information in the statement, and I recognize my signature at the bottom of the page.

Q. Please read paragraph 1 of the statement silently to yourself and look up when you are done.

Retrieve the document from the witness.

Q. Does this refresh your memory?

A. Yes.

Q. What is the license plate number?

A. KLR666.

Note, if the witness says she still cannot remember, proceed with the final steps to get the document introduced.

Q. Does this refresh your memory?

A. No, I still can't remember.

Q. Why can't you remember?

A. I am very nervous, and I do not have a good memory of numbers under pressure, and I do not want to say the wrong number.

At this point, you have met the last element you need to admit the document as a past recollection recorded under Military Rule of Evidence 803(5). Now you can move to admit the document as prosecution or defense exhibit and then ask:

Q. Ms. Jones, please read out loud the license plate number in paragraph 1.

A. KLR666.

The Advocacy Trainer, A Manual for Supervisors

“Nothing is more important than military justice, whether effectively and fairly prosecuting cases or ardently and ethically defending fellow soldiers. The training in this book is performance-oriented, designed to develop and hone the central skills of trial advocacy for counsel of all skill and experience levels.”

From the Foreword to The Advocacy Trainer.

In October 1997, The Criminal Law Department, The Judge Advocate General’s School, United States Army, (TJAGSA) published *The Advocacy Trainer, A Manual for Supervisors (The Advocacy Trainer)*. *The Advocacy Trainer* is a comprehensive supervisor’s guide to training judge advocates of all experience levels in the fundamentals of trial advocacy. Its tabular design allows supervisors to conduct long-term building block training, or short-term targeted “deficiency” training. Recognizing the demands and time constraints of supervisors and counsel, *The Advocacy Trainer* provides a ready package of easily digested and executed training vignettes that enhance critical litigation skills.

The Advocacy Trainer contains five principal chapters, subdivided into training modules.⁵ Each module provides an easily digested training session on a specific trial skill, such as impeachment with a prior inconsistent statement or laying the foundation for a photograph. Every module contains a Supervisor’s Guide, Skill Drills (the actual training vignettes), Counsel Handouts, and Sample Solutions.

The Supervisor’s Guide is the trainer’s “cheat-sheet.” It covers the fundamental substantive aspects of the relevant skill, and pragmatic advocacy practice pointers. The Skill Drills follow the Supervisor’s Guide and are the “meat” of *The Advocacy Trainer*. In this section, short factual scenarios are followed by

a series of drills for counsel. This section also provides the necessary evidence for use in the drills, such as lab reports, photographs, or bad checks. A Counsel Handout that alerts the trainee to the subject of the upcoming training, the fact pattern(s) involved, relevant law and practical tips follows the Skill Drills. The last section of every module is a sample solution that is given to the student at the conclusion of each training session.

In addition to providing supervisors a “soup-to-nuts” training plan that covers almost every aspect of the trial process, *The Advocacy Trainer* removes the typical deterrents to training: (1) not enough time to plan training, (2) supervisors are unsure of the substantive law, and (3) sterile discussions and theoretical classes that do not give students a chance to practice. *The Advocacy Trainer* answers all three concerns. First, planning is already done by *The Advocacy Trainer* authors who drafted the training scenarios, removing the need for busy supervisors to create training scenarios. Second, providing the law and practical advice to supervisors defeats a supervisor’s disinclination to teach and coach. Third, *The Advocacy Trainer* is practice-oriented, so counsel pay attention and profit from *doing*. They learn from the productive pressure generated from being on their feet at each training session. The sample solution gives them something to carry away, file, and review when they are ready to put these skills to the test in court.

The Advocacy Trainer will be updated and supplemented annually by the Criminal Law Department, TJAGSA. The manual is now available electronically. You can access *The Advocacy Trainer* under the Publications listing on TJAGSA’s home page at <<http://www.jagcnet.army.mil/tjagsa>>.

For more information about *The Advocacy Trainer*, contact Major Martin Sitler, Criminal Law Department, The Judge Advocate General’s School (TJAGSA) at phone: (804) 972-6343 or e-mail: Martin.Sitler@hqda.army.mil. Major Sitler.

5. The five principal chapters are (1) Learn the Skill, (2) Apply the Skill, (3) Develop the Skill: Impeachment, (4) Develop the Skill: Foundations, and (5) Hearsay.