

Business

Former Enron CEO Jeff Skilling pauses as he answers a question about his sentence as he leaves the federal courthouse after being sentenced to 292 months in federal prison Monday, Oct. 23, 2006 in Houston. Skilling was convicted in May of 19 counts of fraud, conspiracy, insider trading and lying to auditors. (AP Photo/David J. Phillip)

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The truth, the whole truth and I forget ...

Lawyers recall many witnesses like Gonzales

By MARY FLOOD
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When U.S. Attorney General Alberto Gonzales testified before Congress this week, a man in the audience held up a legal pad keeping count of every time the nation's top lawyer said he did not recall something. By day's end, Gonzales' memory had failed more than 70 times.

An unofficial scorekeeper is unusual, but the problem of a forgetful witness is common to sworn testimony, be it before a legislative panel, a jury or in depositions taken before trial, several lawyers said Friday.

"It's a major challenge to our justice system. We tell stories in trial through witnesses. The issue of memory is key," said Boston lawyer Daniel Dain, who has co-authored a book on questioning witnesses, including advice on how to handle the forgetful and the evasive.

Dain said he and his co-author wrote the book, which focuses on pre-trial depositions, "because most lawyers believe the other side is prepared to answer questions often in a not 100 percent truthful way."

He said Gonzales, questioned about fired U.S. attorneys, is certainly not alone in being forgetful.

But he is likely the only such witness to have spectators taunt him by calling out: "He's too young to have senior moments."

Skilling and Lay

Other well-known witnesses who didn't always recall facts in testimony include former Enron executives Jeff Skilling and the late Ken Lay. In final arguments, prosecutors said the pair said they did not recall "key issues" more than 200 times between them. Former President Reagan was also famously forgetful, as were some of his advisers, when questioned about the Iran-Contra affair.

Sean Berkowitz, the former Enron prosecutor who questioned Skilling, said it is not an unusual phenomenon.

"People who have done things they don't have an explanation for fall back on a convenient lack of recollection," said Berkowitz, now a defense lawyer in Chicago. "It can be very frustrating."

He said lawyers can use other evidence, e-mails and documents to prod the forgetful into recalling things.

Berkowitz said since jurors know that people actually do forget things, the forgetful witness may not always lose credibility. But one instance that can hurt is "where there is very specific recall of specific instances helpful to them but they don't remember the similar thing that is harmful," Berkowitz said.

Lee Kaplan, a Houston lawyer who has tried many cases, said juries are pretty demanding of witnesses and expect them to remember a lot. So he thinks it fair for lawyers to refresh their own clients' and witnesses' memory with documents and emails.

"But sometimes it sounds like lawyers are encouraging their witnesses not to remember," Kaplan said. "I have heard lawyers say they are not going to try to press someone on 'such and so' so the person doesn't really have to go into that if they don't remember."

'Obstruction of justice'

It's of course not ethical for a lawyer to encourage a witness to say he can't recall what he really remembers.

"That's obstruction of justice," said New York City lawyer David Greenwald, who wrote a law review article on dealing with forgetful witnesses. "It is a crime to assert a lack of recollection when one does in fact remember."

But, Greenwald noted, it is entirely ethical to tell clients that if in fact they do not remember, they should not speculate.

"Human beings forget things, it's a natural human neurological process," he said. "Standing by itself," there is no reason to assume it's an evasive tactic, Greenwald said.

Adam Gershowitz, a South Texas College of Law professor, said forgetfulness has to be taken in the context of the entire testimony.

He said he handled a case of a police officer questioned about a brutality complaint. The officer recalled numerous specifics like badge numbers but suddenly became forgetful when it came to the details of the actual incident in question.

"You just don't believe that," he said.

Gershowitz said juries expect people to remember important things.

"There is a hierarchy of the kinds of things you remember. You remember your wife's birthday ... and you remember that you fired U.S. attorneys when there are only 93 in the whole country," he said.

How it hurts

Gershowitz said Gonzales may be hurt by two aspects of his memory lapses.

"To say he doesn't remember 70 times hurts his credibility at the outset," Gershowitz said. "But to say he doesn't remember so much makes it look like he lacks managerial skills."

Dain said occasionally a lawyer is happy that a witness for the other side can't recall.

"Sometimes you want to pin them down, but sometimes it suits your purposes that they can't remember. There's a lot of strategy involved," he said.

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Michelle Mittelstadt in Washington, D.C., contributed to this story.

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reader426 wrote:

This story failed to get to the real point. The Democrat strategy is to discredit the Bush Administration by "criminalizing" those who have done nothing illegal. This is done by taking an issue that is not illegal, such as the firing of the U.S. Attorneys, and then holding hearings on it. If they catch Gonzales saying anything that can be refuted by other testimony, then they will declare that Gonzales is guilty of perjury. They got Libbey with this tactic, but Gonzales is smart enough to say that he doesn't know when he is not absolutely certain. This is aggravating the Democrats, but to do otherwise would be to fall into the trap. This story above, while entertaining, failed to get to the point of WHY Gonzales is saying he doesn't remember.

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