

Ignorance Is Not Bliss: 'Sham Affidavit' In 9th Circ.

Law360, New York (October 29, 2012, 11:58 AM ET) -- "I don't recall ... I don't recall ... I don't recall."

Any lawyer who has taken a deposition has no doubt had a witness answer a question or a series of questions this way. As the examiner, we expect to hear this phrase from time to time, though on occasion it becomes the bothersome stock response that never fails to draw our ire. We know opposing counsel has advised the witness never to speculate and to rely on his or her best recollection to formulate a response that avoids a costly admission, yet meets the witness's oath to tell the truth.

After unsuccessfully trying to refresh the witness's recollection with documents, our simmering consternation with the "I don't recall" response can boil over into silent frustration: How can this witness possibly not recall these basic facts even after I have shown the witness all of these exhibits?

Frustrated examiners can take comfort that the Ninth Circuit recently strengthened a weapon for combating the forgetful witness. The "sham affidavit" rule states that "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."^[1] In the context of summary judgment, the rule prevents a party from supporting or opposing the motion with a declaration attesting to facts that contradict the witness's deposition testimony.

But when a nonmoving party witness testifies at deposition that he does not recall a particular fact, can the sham affidavit rule prevent that same witness from later recalling those facts in a declaration supporting or opposing summary judgment? Recently, the Ninth Circuit answered this question in the affirmative, holding the rule may apply when the forgetful witness suddenly remembers significant events in his or her declaration.

Yeager v. Bowlin^[2]

The Yeager case involved Chuck Yeager, renowned test pilot and aviation industry luminary. Yeager sued Ed and Connie Bowlin, his former friends who owned a company specializing in the sale of aviation-related memorabilia, alleging that the Bowlins exceeded the scope of his limited consent to use his name and likeness to sell Chuck Yeager memorabilia. Yeager asserted that the Bowlins sold a number of items without his permission and, in many instances, without adequate compensation.

During his deposition, Yeager responded “I don’t recall” to approximately 185 questions. Many of these questions focused on prominent events central to the litigation, including Yeager’s business dealings with the Bowlins, the Bowlins’ alleged misrepresentations underlying his fraud claim, and the existence and terms of any oral or written agreements underlying his breach of contract claims.

Yeager also testified that he could not remember other significant events one would expect him to recall, including his attendance at a charitable event, the nature of a civil action he had brought against his own children, and his involvement in a plane crash in the Bowlins’ aircraft. During the deposition, the Bowlins’ counsel attempted to refresh Yeager’s recollection through numerous exhibits, but Yeager stood pat with his “I don’t recall” responses.

Three months after his deposition, the Bowlins moved for summary judgment, relying largely on Yeager’s “I don’t recall” deposition testimony. In opposition to the motion, Yeager submitted a declaration in which he recounted many of the facts he could not recall during his deposition. Absent from the declaration was a detailed explanation for this sudden recall of past facts and events, other than a single statement that he had reviewed several documents (not attached to his declaration) that refreshed his memory.

The Bowlins moved to strike portions of Yeager’s declaration under the sham affidavit rule, arguing that Yeager’s deposition amounted to a “total refusal to provide substantive answers” and that his incredible ability to now remember facts exposed his declaration as a sham.

The district court agreed with the Bowlins and struck the vast majority of Yeager’s declaration and granted summary judgment in favor of the Bowlins. The district court partly relied on authority outside of the Ninth Circuit applying the sham affidavit rule to affidavits containing material facts the witness apparently could not recall during deposition.[3]

In concluding that Yeager’s declaration was “far more questionable” than the affidavits the other courts excluded, the district court noted that “where the deponent remembers almost nothing about the events central to the case during his deposition, but suddenly recalls those same events with perfect clarity in his declaration in opposition to summary judgment without any credible explanation as to how his recollection was refreshed, the disparity between the affidavit and deposition is so extreme that the court must regard the differences between the two as contradictions.”[4]

In affirming, the Ninth Circuit found that the district court did not abuse its discretion in striking Yeager’s declaration because the declaration constituted a 180-degree turnaround from Yeager’s deposition testimony and Yeager’s explanation for his new found mental acuity was “weak.” According to the Ninth Circuit, “it is implausible that Yeager could refresh his recollection so thoroughly by reviewing several documents in light of the extreme number of questions to which Yeager answered he could not recall during his deposition and the number of exhibits used during the deposition to try to refresh his recollection.”[5]

But the Ninth Circuit cautioned that courts should not disavow a declaration as a sham for minor contradictions between the deposition and declaration if the declarant reasonably explains those contradictions (i.e., minor inconsistencies that result from an honest mistake, newly discovered evidence, or credibly refreshed recollection). The Ninth Circuit reiterated two important limitations on district courts before applying the rule: (1) that the district court makes a “factual determination that the contradiction was actually a sham,” and (2) the “inconsistency between a party’s deposition testimony and subsequent affidavit must be clear and unambiguous.”[6]

The first limitation requires a judicial determination whether or not a patent inconsistency exists between deposition testimony and the subsequent declaration. Where the subsequent declaration clarifies, rather than contradicts the deposition testimony, the court will not apply the rule.[7]

If the court determines inconsistencies pervade between the deposition testimony and declaration that rise to the level of an actual sham (a case-by-case analysis to be sure), the second limitation prevents the court from striking the declaration unless such inconsistencies are clear and unambiguous. In other words, the rule will not block a declaration that the court “reasonably construed as simply explaining unclear deposition testimony.”[8]

Witness equivocation in response to deposition questions can be addressed through impeachment at trial and not through an overly broad application of the sham affidavit rule.[9] These limitations give the party submitting the declaration the opportunity to explain, in detail, the reasons for any discrepancies, the basis for any mistakes in the deposition testimony, and what specific documents the witness reviewed that refreshed his or her recollection.

Lessons from Yeager v. Bowlin

The Yeager holding should guide all litigators when preparing a witness for deposition or preparing to take a deposition. Historically, courts applied the sham affidavit rule to instances of clear-cut contradictions between a witness’s deposition testimony and subsequent declaration, such as a remarkable change in describing the number of times a particular event occurred or a radical shift in the witness’s understanding of a word or phrase.[10] Under Yeager, more subtle distinctions may be subject to similar scrutiny.

The sham affidavit rule continues to require a finding that a party’s declaration constitutes a “contradiction” of prior deposition testimony in an effort to create a genuine, disputed material fact to defeat summary judgment. Yeager makes clear that a “contradiction” now may include testimony changed from “I don’t recall” to “now I remember.” Witness preparation is therefore paramount.

A witness should come ready to discuss those happenings, events and transactions of which he or she has knowledge. “I don’t recall” responses should come only after a focused effort to remember proves futile. Yeager also informs us that an elderly witness does not get a free pass for his or her faulty memory at deposition (an argument the 86-year-old Yeager raised on appeal, which the Ninth Circuit summarily rejected).

Yeager also serves as a reminder for counsel taking the deposition to examine the witness further after an “I don’t recall” response to explore any excuses the witness could later use to justify a newfound recollection of events, including whether the witness has had prior lapses in memory, what documents the witness would ask for if he or she wanted to refresh his or her recollection, and what efforts the witness made to prepare for the deposition, including identification of all documents reviewed. If counsel is defending the deposition of a witness who repeatedly answers “I don’t recall” or does so on a key point, ask pointed redirect questions at the deposition.

Yeager also provides guidance for parties submitting a declaration that arguably contradicts prior deposition testimony. Such declarations must provide a “sufficiently reasonable” explanation for any inconsistencies with prior deposition testimony. Yeager provided no specifics about the documents he purportedly used to refresh his recollection, did not attach those documents to his declaration, and did not provide any other explanation for his initial inability to remember key facts (for example, testimony from a medical expert that Yeager’s advanced age was the root cause of his earlier memory loss).

The district court found Yeager’s effort to explain his newfound memory “weak” and “unbelievable,” concluding that Yeager’s deposition testimony was not the result of misunderstanding or memory loss, but “instead one where Yeager repeatedly refused to answer hundreds of material questions.”[11]

In the aftermath of Yeager, counsel’s most useful safeguard against the application of the sham affidavit rule is to produce a thoroughly prepared and competent witness at deposition, ready to deliver substantive testimony that not only serves your client’s strategy and goals, but satisfies the deposing counsel’s right to seek discoverable information.

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[1] Van Asdale v. Int’l Game Tech., 577 F.3d 989, 998 (9th Cir. 2009)

[2] Yeager v. Bowlin, 693 F.3d 1076 (9th Cir. 2012)

[3] Mitchael v. Intracorp Inc., 179 F.3d 847, 854-55 (10th Cir. 1999).

[4] Yeager v. Bowlin, No. CIV. 2:08-102 WBS JFM, at *5 (E.D. Cal. Jan. 6, 2010).

[5] 693 F.3d at 1081.

[6] Id. at 1080 (quoting Van Asdale, 577 F.3d at 998-99).

[7] *Lintz v. Potter*, No. 2:09-cv-01907 GEB KJN PS, at *11-*12 (E.D. Cal. July 23, 2012) (reasoning deposition testimony and a declaration were not actually inconsistent when the deponent could not remember the date she received a mailing during examination, but was able to provide an approximate date in her declaration, citing to various methods she used to refresh her recollection after the deposition).

[8] *Winding v. Allstate Ins. Co.*, No. 2:09-cv-03526 KJM KJN PS, at *8 (E.D. Cal. Nov. 1, 2011).

[9] *Id.* (“Although plaintiff’s deposition testimony is equivocal and might ultimately be used at trial to undermine plaintiff’s credibility, none of the excerpts of his deposition testimony cited by Allstate clearly and unambiguously contradicts the later-filed declaration.”)

[10] See, e.g., *Stevens v. County of San Mateo*, 267 Fed. Appx. 684, 685 (9th Cir. 2008) (holding that the district court did not err in limiting a party to his deposition testimony when his declaration in opposition to summary judgment amounted to a sham by contradicting many of the details of his prior testimony).

[11] *Yeager v. Bowlin*, at *4.