

To forget is human, but lapses in memory for facts and events can spell major implications for the accuracy and completeness of a client's case. This article gives a broad insight into how memory functions and provides some handy interview tips to get the most, and best, out of a client's recollection of events past.

Memory and the Law: Helping Clients Remember Better



Simon Shereshevsky was a journalist who never quite fit in. In an era where voice recording and digital transcription functions were not available to the common man, his fellow reporters and journalists scribbled copious notes at interviews to retain the rapid stream of facts, quotes, and contacts they would need to file their stories. But Shereshevsky did none of that. He simply watched, listened and thereafter recalled, to an incredible level of detail, every word and fact said. When subsequently tested by neurologist Alexander Luria, Shereshevsky registered an uncanny ability to remember. Complex mathematical formula, poetry in a foreign tongue, extensive lists of random numbers, and even strings of nonsense syllables were memorised in a matter of minutes and reproduced with amazing precision, even after decades. Luria would go on to study Shereshevsky for the next 30 years, writing a book¹ about him and aptly branding him as "the man who never forgets".

Memory and the Law

For the rest of us normal humans, forgetting is but a prevalent facet of life we have grown accustomed to. Try

recalling what you had for lunch or what you wore to the office three days ago – few of us can readily bring that information to mind without at least some modicum of effortful recall. While we have internalised the process of forgetting as being part and parcel of normalcy, lapses in human memory have implications for the practice of the law in more ways than one. A Lawnet search of the simple phrase "cannot remember" returned with 466 results.² Parties and witnesses have found themselves unable to remember routine matters such as whether or when they have written out a cheque,³ whether a particular discussion took place,⁴ or more technical matters such as whether or not a handrail was erected.⁵ Simple, and perhaps even mundane, as such matters may be, the difference between recalling and forgetting can bear down hard on the case at hand. Indeed, it is often the most mundane details that elude our memory, leaving parties and counsel belabouring under a disconcerting cloud of uncertainty.

A witness who constantly claims to have forgotten salient details while being examined on the stand suffers detriment to his reliability and credibility. A client who does the same when interviewed by his own counsel presents with equally worrying concerns. The inability of a client to recall certain crucial events or facts is by no means a distant concept, and can, at times, impede counsel's construction of a sound case theory. The ramifications become more pronounced when witnesses from both parties share a common experience or encounter (eg attend a meeting) and the client is unable to recall it, thereby omitting the event from his account of the facts, while the same event is built into the other side's case. Under such circumstances, there is no value in counsel accusing his own client of lying or withholding information. Rather, priority should be given to encouraging the client to recall as much and as accurately as possible.

The intersection of law and psychology is by no means a fortuitous one, considering how the practice of law encompasses, largely, working with people and dealing

with the nuances of human behaviour. While psychological research in human memory has found practical applications in the legal setting, it is safe to say that these are not usually a topic of considerable interest among academics and practitioners of the law in Singapore. The intended purpose of this article is twofold – first, to share a selection of techniques premised on psychological science that lawyers can adopt during client interviews to help foster as complete and accurate a recall of facts and events as possible. Second, it is hoped that this article will give lawyers a flavour of how the pragmatic, and more human-oriented, aspects of legal practice can be informed and shaped by learnings from a gamut of other disciplines, in this case, psychology and memory science.

How We Remember (and Forget)

An exposition of recall enhancement techniques cannot be complete without a quick primer on how the human memory works. Without delving into too much detail, the formation of a memory takes place through three processes that occur brain-wide – encoding, storage, and finally retrieval. Take, for instance, the memory of a particular person, Joe Tan, having been present at a board meeting six months ago. At the time of the meeting, your visual system would likely have registered the physical features of Joe – his height, the colour of his tie, where he was seated (next to the potted plant) etc. Your auditory system may have picked up the sound of his voice. If you were seated near Joe, you might even have noticed the smell of his cologne or the aroma from the cup of coffee he was drinking. The brain encodes each of these separate perceptions into one single experience associated with Joe Tan. To properly encode a memory, one must first be paying attention. If you have not at all noticed Joe in the meeting room or paid enough attention to what he was doing, you may likely never remember his attendance at the meeting. The encoded memory is then stored as a network of electrical signals and neurochemical pathways within the brain. Six months later, when you are trying to recall the people present at the board meeting, you will be engaging in retrieval – the **conscious** process of actively accessing the stored network of encoded memories. Whether you remember (or forget) Joe's presence at a meeting of six months ago would be contingent on whether a memory of him was encoded, properly stored, and then effectively retrieved.

Lawyers interview clients months, and sometimes even years, after events in question have taken place. For obvious reasons, we are, therefore, unable to influence the client's encoding or storage of a particular memory. Interview techniques that promote recall are mostly premised upon maximising effective retrieval (provided the memory was properly encoded in the first place).

Enhancing Retrieval: The Importance of Contextual Cues

Memories are never encoded and stored singularly in a compartmentalised manner. If you were unable to readily recall what you had for lunch three days back, look back at your diary to determine who you had lunch with – it may very well become immediately apparent that you had a serving of fish and chips in the company of a fellow associate at the café a few blocks down. The initial difficulty in remembering what you ate three days ago was certainly not due to improper encoding – finishing a plate of battered fish required that you at least paid it some conscious attention. Rather, the difficulty was caused by ineffective retrieval. Subsequently calling to mind that you had lunch with an associate acted as a cue that promoted retrieval of the fact that you had fish and chips. Retrieval cues are perceptions and states of mind encoded and “latched” together with the target memory in question such that when accessed later, act as a cue for effective recall. Likewise, together with your perception of Joe being present at the board meeting, you would have unconsciously encoded a number of other perceptions associated with the meeting such as the weather at that time (it was storming heavily, as seen through the meeting room's window), the setting in which the meeting took place (the walls of the room were painted a gaudy green – a colour you did not approve of), or the refreshments that were served up (hot coffee and some cold curry puffs). The different memories encoded in respect of a particular event tend to act as retrieval cues for each other. To such an extent, even your emotional state of mind during the meeting (you were feeling excited from having just received news of a promotion earlier that morning) can act as a cue for retrieving the memory of Joe's presence.⁶

Practical takeaway: It helps, when interviewing a client, to encourage him or her to mentally reinstate the environmental and personal contexts associated with the event to be remembered. Take for example, a client who cannot remember whether or not a contract was signed at a particular meeting. Ask the client to form a mental picture of the environment he or she was in when the meeting took place. This mental imagery can include the placement of objects such as furniture in the meeting room, where the windows were, the lighting in the room, the weather outside the window, the people at the meeting, or even how the client was feeling at that time. When interviewing clients, the tendency is for lawyers to rush headlong into directed questions (“did you sign the contract?”) accompanied by repeated and insistent prompts (“the signing of the contract was a significant event so you must have remembered it, try harder”). There is an equally dominant inclination to avoid “peripheral” and “unimportant” aspects such as the

client's emotional state at the time in question, let alone make mention of seemingly trivial and irrelevant details concerning weather, beverage type and the colour of the walls. However, these details, individually and collectively, can function as cues that aid the retrieval, of a fact or event of interest. Avoid rushing through an interview marked by repeated, directed questioning. Instead, allow the client time to consider the context in which the event in question took place and encourage the client to include whatever facts come to mind when recounting an event, even those that do not seem immediately relevant or important. This approach might take up a little more time, but should also yield more accurate and complete recollections.

The Blind Should Never Lead the Blind

In a seminal memory experiment, participants were shown a videotape of a car accident and then asked to describe what they had witnessed.⁷ They were then queried about the speed of one of the cars involved. One group of participants was asked "about how fast were the cars going when they hit each other?" Other groups of participants were posed the same question, but the word "hit" was replaced by either "smashed", "collided", "bumped", or "contacted." Participants who received the question with the word "smashed" reported the highest estimates of speed, followed by those who received the words "collided", "bumped", "hit" and then "contacted." Participants who received the word "smashed" were also more likely to report "seeing" broken glass (there was none in the video) than those who were asked the question with the word "hit." These results speak for themselves – the choice of words used in an interview, especially emotive ones, can sometimes yield the disclosure of inaccurate memories, or worse, completely false ones (as in the case of the broken glass).⁸

Imagine a client who approaches you for advice after she sustained a serious fall while exiting the doorway of a country club. She claims that, at that time, the club was in the midst of carrying out addition and alteration works near the exit. Asking the client "did you fall because you tripped over some construction equipment near the door" as opposed to simply asking "how or why did you fall" can potentially elicit vastly different answers. For one, the client's fall might have been caused by a pothole in the doorway that the club failed to fill up, but she was unable to recall that being the case. In light of the client's limited recollection of the then ongoing construction works, your leading question hinting at the possibility of her having tripped over construction equipment may then be used by her to conveniently plug the gaps in her memory. Such erroneous recall can mean a negligence suit being brought (wrongfully) against the contractor rather than the club itself (for having failed to repair the pothole).

Practical takeaway: Be wary when a client's account of facts is punctuated by pauses, hemming and hawing, self-doubt and uncertainty – these are telling signs of a fuzzy memory in respect of the event in question. Under such circumstances, it is important that the lawyer commences the interview with general, open-ended questions. Avoid asking questions based on faulty, speculative or unknown premises. Having once handled a negligence matter wherein a woman fell over unkept construction equipment should not, and cannot, be the basis on which a leading question alluding to the same is asked in a future similar matter. A client interview should never proceed, or be guided along, on the basis of the lawyer's past experiences. Generally, asking leading or specific questions early in an interview can limit the range of information obtained, prompt the client to respond uni-directionally, decrease accuracy, and perhaps even create mistaken suppositions and memories. While leading questions are inevitably deployed at certain junctures in the client-lawyer interaction, they should seldom be used to interject a client who is providing a narrative of the overall facts.

Lawyers should also be careful when using documents to aid a client's recall. When used too early in the interview, documents may have the same effect as leading questions. It is recommended that clients be interviewed once without the use of documents, and then again using the relevant documents. While more time consuming, this approach is likely to yield more accurate memories.

Law and (the) Order (of Things)

Make a list from 30 randomly chosen words, memorise the list, and try to recall the words (in any order) an hour later. The words that come to mind more easily will probably be those at the beginning and the end of the list you made.⁹ Psychologists label this phenomenon the serial positioning effect. Numerous studies have shown that people are more likely to forget facts that occur midway through a chain of events while maintaining better recall for those at the beginning (the primacy effect) or end (the recency effect) of the event chain, especially if the fact in question is temporal in nature.

Practical takeaway: Imagine a client who attended a shareholders' meeting a year back. She vaguely remembers some mention being made during the meeting of someone intending to dispose of his or her shares, but cannot now confirm whether such a thing was indeed said, and if it was, who said it. Should you find yourself faced with a client who encounters gaps in his or her memory for a sequence of events, encourage the client to recount the entire sequence in two narrative orders – first from beginning to end, then in

reverse from the end to the beginning. A sequential recall in forward chronological order leverages on the primacy effect – facts at the outset of an event chain (eg: the meeting started late, there were not enough chairs and people were standing around, etc.) are more easily recalled, and these may in turn act as retrieval cues that increase the odds of the more elusive mid-event facts being brought to mind. Likewise, moving on to narrate the event in reverse chronological order, starting with the most recent (and, therefore, more accessible) facts (eg: a heated discussion on issuing more shares took place near the end) and then working backwards leverages on the recency effect to further increase the number of retrieval cues that in turn promote the recall of other more obscure facts. Returning to our random word list exercise, you will likely note that after recalling the words from near the start and end of the list, those from midway down the list may slowly come to mind. Both the primacy and recency effects operate under the stratum of our active consciousness – while not apparent to us, they are very real and well-researched phenomena used by the likes of professional mnemonists and police interviewers to help aid recall.

It has been said that “neither law nor human nature is an exact science.”¹⁰ Surely many lawyers would agree. Nonetheless, the study of human nature has much to contribute to the art of lawyering, especially in aspects where lawyers deal with clients, witnesses and perhaps even the Court. It is admitted that psychology offers no surefire answers to deal with the gamut of interpersonal dynamics that characterise legal practice. It is hoped, however, that by reminding lawyers of how other disciplines work at improving accuracy, procedural propriety and ultimately fairness and justice in the law, practitioners will grow to appreciate, and perhaps even utilise, the range of insights and tools that can help augment and refine the art of lawyering.

► **Fong Wei Li***

Associate

Michael Hwang Chambers

E-mail: fong.weili@mhwang.com

* B.Soc.Sci (Psychology (Hons), Communications and New Media) [NUS] J.D. [SMU]

Notes

- 1 Luria Aleksandr Romanovich, *The Mind of a Mnemonist: A Little Book About a Vast Memory* (Basic Books, 1968).
- 2 As of 11 September 2013.
- 3 *Lim Geok Swan v Lim Shook Luan* [2012] SGHC 18, *Christian Schuler v New Era of Networks (Singapore) Pte Ltd* [2002] SGHC 220.
- 4 *AMS Securistes (S) Pte Ltd v Thio Gwan Choon* [2001] SGHC 35.
- 5 *Liau Kim Choon v KTC Civil Engineering & Construction Pte Ltd* [2012] SGDC 160.
- 6 This is known as mood-state dependent memory. If one is in the same mood during

the retrieval process as he or she was in during the encoding process, one will present with better recall of the encoded memories. See generally Bower Gordon H, “Mood and Memory” *American Psychologist* 1981; 36(2): 129-148.

- 7 Elizabeth F Loftus & John C. Palmer, “Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory”, (1974) *Journal of Verbal Learning and Verbal Behavior* 13, pp 585-589.
- 8 This is known as the misinformation effect and has been studied extensively by psychologist Elizabeth Loftus. See generally Elizabeth F. Loftus, “Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory”, (2005) 12 *Learning and Memory* 4, pp 361-366. The implications of the misinformation effect for criminal law and policing, especially in the field of eyewitness testimony, are numerous and weighty.
- 9 A variation of this experiment was carried out by psychologist Bennet Murdock. The results, as described, were obtained. See Bennet B. Murdock, “The Serial Position Effect of Free Recall”, (1962) 64 *Journal of Experimental Psychology* 5, pp 482-488.
- 10 George W. Keeton, *Harris’s Hints on Advocacy* (Universal Law Publishing Co., 18th Edition, 2009).

