IADC Committee Newsletter

PRODUCT LIABILITY

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IN THIS ISSUE

Creighton Magid and Joseph Perkovich depart from the usual discussion of substantive product liability law to discuss how to deal with manipulation of witness testimony by opposing counsel. The article discusses the dangers of manipulated testimony, detecting efforts to influence witness testimony improperly, and suggesting remedies when witness manipulation is discovered.

Witness Manipulation in Product Liability Litigation

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Although unscrupulous attorneys can undermine the legal process in any type of litigation, product liability cases provide disproportionate opportunities for attorneys who wish to manipulate witness testimony. The problem first garnered attention in the late 1990s in the mass tort context, but persists in many types of product liability cases. This article describes the problem, discusses how to identify coached or manipulated testimony, and suggests actions that can be taken when altered testimony is discovered.

In 1997, defense counsel discovered the existence of a document entitled "Preparing for Your Deposition" that had been created by the law firm of Baron & Budd and used by that firm to prepare plaintiffs for deposition in asbestos litigation around the country. The document advised plaintiffs that identification of asbestos-containing products at the plaintiffs' workplaces was critical to determining whether a defendant "will want to offer you a settlement." Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Policy Rev. 243, 276 n.102 (2001); Lester Brickman & Ronald Rotunda, *When Witnesses Are Told What to Say*, Washington Post, Jan. 13, 1998, at A15. The document described the asbestos-containing materials used at specific work sites and described how the product was used. Brickman, *supra*, at 276 n.102. Paralegals would show plaintiffs photographs of bags or boxes containing specific manufacturers' asbestos-containing materials and would highlight testimony of co-workers identifying certain products at the plaintiff's jobsite. *Id*. at 275-76. The document then advised plaintiffs to fill out and study a "work history sheet" identifying the products to which the plaintiff was allegedly exposed and to memorize the details of the products' labels, which the law firm furnished. *Id*.

Courts had very different reactions to Baron & Budd's tactics and to "Preparing for Your Deposition." Some courts concluded that use of the document constituted improper coaching and imposed sanctions, such as jury instructions adverse to the plaintiffs. *See, e.g., Abner v. Elliot*, 706 N.E.2d 765, 767-68 (Ohio 1999). Other courts concluded that the document was protected by the attorney-client privilege and not improper, absent evidence that testimony had actually been altered. *See, e.g., In re Brown*, 1998 WL 207793 (Tex.App. – Austin 1998).

Witness manipulation is often more subtle than the approach allegedly used by Baron & Budd. For example, in a matter recently defended by one of the authors, the plaintiff alleged that he was run over by a truck as a result of a faulty parking brake, and sought to establish that the parking brake had been inoperative for some time. Plaintiff's counsel approached several prior drivers of the truck. In each case, plaintiffs' counsel began by showing the witness gruesome photographs of the plaintiff's injuries. Counsel then showed the witness unflattering photographs of the underside of the truck, including the parking brake (which plaintiff's expert had photographed after removing the brake drum, all prior to commencement of litigation), informed the witness that the parking brake was defective, and explained plaintiff's contention of how the accident occurred. Counsel also directed the witness to websites critical of the truck's lessor, and made derogatory comments regarding the defendant's operations and maintenance. After this exercise, counsel drafted an affidavit for the witness to sign. Although the effect on each of the witnesses could not be proven, one witness who had told a defense investigator shortly after the accident that he had experienced no problem with the parking brake testified after later meeting with plaintiff's counsel that the parking brake did not operate properly.

Courts differ on the propriety of such tactics. Courts (and the ethics rules) are generally in agreement that witness coaching is impermissible where the coaching lawyer *knows* that the coaching will result in false testimony. *See* Model Rule of Prof. Conduct 3.3(a)(3). Courts have had a much more difficult time evaluating the propriety of manufacturing testimony when the attorney does not "know" that

the resulting testimony is "false." *See, e.g., Resolution Trust Corp. v. H.R. "Bum" Bright*, 6 F.3d 336, 341 (5th Cir. 1993); *see also* D.C. Ethics Op. 79 (1979) ("[A] lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may – indeed, should – do whatever is feasible to prepare his or her witnesses for examination.").

The emphasis on Rule 3.3(a)(3)'s knowledge requirement is too narrow. Model Rule of Prof. Conduct 3.4(b) prohibits a lawyer from "assist[ing] a witness to testify falsely." Unlike Rule 3.3(a)(3), Rule 3.4(b) is not limited to testimony that the lawyer *knows* is false; the rule also precludes a lawyer from encouraging testimony that may be false. This includes asking questions or providing documents to which the witness did not previously have access (as opposed to documents used solely to refresh recollection), which "can affect the witness's ability to recount accurately what he did perceive." Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 10 (1995). Although a party certainly may interview non-party witnesses, "[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it." *Geders v. United States*, 425 U.S. 80, 90 n. 3 (1976). More specifically, an attorney "must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses." *State v. Earp*, 319 Md. 156, 171, 571 A.2d 1227, 1235 (1990) (*quoting State v. Papa*, 32 R.I. 453, 80 A. 12, 15 (1911)). Testing or refreshing the recollection of a witness is generally permissible, "but in so doing the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be." *Id*. In short, although an attorney may inquire about a witness's knowledge and may attempt to *refresh* the witness's recollection, efforts designed to *color* a witness's recollection are improper.

Discovering whether witness testimony has been improperly influenced begins with detailed questions to the witness concerning statements made to the witness by opposing counsel and documents shown to the witness by opposing counsel. Because the witness manipulation may have been carried out by an agent for opposing counsel, it is important to identify everyone who provided information or documents to the witness. Counsel must be careful to differentiate between efforts by opposing counsel merely to refresh the witness's recollection and efforts to influence or "create" recollection. Where it appears that the information imparted to the witness has gone beyond legitimate attempts to trigger recollection, counsel should be prepared to take the depositions of the attorney, paralegal, or investigator who has provided information to the witness. Such depositions can provide valuable insights into both the means and motive of the opposing party's contact with witnesses.

What remedies are available to a litigant who discovers that the opposing party has improperly influenced witness testimony? Traditionally, many courts have assumed that improper coaching can be remedied through cross-examination. *See, e.g., Geders*, 425 U.S. at 89-90 (1976). Cross-examination, however, is an inadequate remedy. If opposing counsel has employed any subtlety at all in influencing the witness's testimony, the witness may well believe that his recollection is accurate and will so testify. *See* Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. at 10-11. Opposing counsel can easily defuse the suggestion of improper coaching by inquiring on redirect (usually with a tone of incredulity) if the witness's testimony was truthful – the answer to which is almost certainly yes. Moreover, actions that might seem egregious to attorneys do not always seem particularly improper to jurors. More effective are orders excluding the witness's testimony or jury instructions adverse to the offering party. Motions for such orders are more likely to succeed if counsel emphasizes the impropriety of witness manipulation for the reasons set froth in *Geders* and *Earp*, and also explains that

improperly "created" memory is a bell that cannot be un-rung. Where manipulated witness testimony so permeates a case as to render a fair trial impossible, a sanctions motion seeking dismissal of the case is warranted.

Manipulated testimony puts at risk the fairness of – and for the litigant, outcome of – a litigated matter. It is important to be alert to the possibility of "created" memory and other improperly influenced testimony, and to take the actions necessary to expose and counteract such manipulation.

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