Is Your Plaintiff “Over Coached?”
Symptoms of Undue Influence on Testimony, Review of Applicable Ethical and Discovery Rules, and How to Combat Over Coaching In Asbestos Cases

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I. Abstract

Plaintiffs’ counsel and experts who work with them are effective at making every mesothelioma case asbestos-related and finding a solvent target to sue for that injury. Yet the scientific evidence is that not every tumor called “mesothelioma” is caused by asbestos exposure. For those that may be, the chances are slim that the entity responsible for those exposures is still viable after over forty years of litigation. But several converging forces allow asbestos litigation to continue, including: (1) coaching of plaintiffs to identify only the solvent companies as responsible parties; (2) experts who will opine that any exposure identified was a substantial factor; (3) inertia of large dockets that keep defense counsel and courts from adequately challenging improper practices by plaintiffs’ counsel; and (4) immense financial incentive to keep these practices alive. This paper examines the practice of coaching an asbestos plaintiff, including practices designed to maximize the effect of coached testimony. It then explores the ethical rules relating to witness preparation and discovery rules involved to shield preparation tactics. Finally, the paper offers some suggestions on how to address the problem of over-coaching in asbestos cases.

II. Introduction

Recently, in a California state court trial, the plaintiff swore that the defendants’ products were the only asbestos products he recalled ever working with. On cross, however, defense counsel confronted him with a stack of sworn statements he had filed with bankruptcy trusts. The plaintiff admitted he signed the statements at his lawyers’ direction, but insisted that he hadn’t heard of any of the bankrupt entities or worked with any of their products. How can this happen?

For many years in asbestos litigation there has been evidence of efforts to influence plaintiff testimony and signs that those efforts are all too successful. For example, a 1988 letter from one plaintiff counsel to another instructed on what to “have witnesses say” to maximize the plaintiff’s exposure to brake dust. Similarly, a 1997 memo used by a plaintiffs’ firm to prepare witnesses for depositions instructed plaintiffs to “be sure to say you saw the name on the bag” and “it is important to maintain that you never saw a warning” among other directives. Despite claims that these were isolated documents and not evidence of widespread testimony fabrication, there are plenty of clues that these practices are rampant in asbestos litigation today.

Over the last three decades, the type of companies targeted in asbestos litigation has evolved from insulation manufacturers to any company that made, or used, any of the thousands of products that had asbestos-containing components. Plaintiffs have claimed alleged asbestos exposure to everything from lawn mower gaskets to hard molded plastic products like pot handles and crayons.

One reason these cases persist is the ability to coach a plaintiff to testify about products he did not actually encounter. A number of factors combine to make improperly-influenced testimony not only possible but common. First, there is immense financial incentive. There is no more valuable search term on the internet than “mesothelioma.” See Dionne Searcey, With Billions at Stake in Asbestos Lawsuits, the Search For Mesothelioma Clients Intensifies on TV, Web, WALL ST. J., May 5, 2013, http://online.wsj.com/article/SB10001424127
Mesothelioma cases commonly settle for $2,000,000 to $3,000,000, and some settle for more than $10,000,000.

Second, counsel who improperly influence testimony have little reason to expect negative consequences. With liberal resort to the attorney-client privilege to shield the witness-preparation practices, and a general judicial indifference to even testimony that is proved to be false, the worst that usually happens to a plaintiff caught in a contradiction is that he or she must dismiss the case—but only as to the defendant who discovered the contradiction. It would be highly unusual for a judge in a civil matter to address the issue of possible perjury.

Third, the whole case is now built on subjective testimony, not physical or documentary evidence. Paid experts for the plaintiff will testify that every mesothelioma is asbestos-related and every exposure was a substantial factor in causing that disease. All plaintiffs’ counsel has to provide is a “history of exposure.” Proof of “a history of exposure” has gone from concrete to subjective in a way that allows the targeting of nearly anyone in asbestos litigation. Twenty years ago, plaintiffs’ counsel used documents such as purchase, maintenance, equipment, and other records to prove the presence of products at work sites and lung fiber burden analysis to prove exposure and causation. Now, they rely solely on their clients’ subjective testimony and experts to prove both.

This paper examines the practice of coaching plaintiffs in asbestos litigation, including evidence of how persuasive it is and methods commonly used. It notes that procedural mechanisms, like use of “work history sheets,” and allowing plaintiffs’ counsel to go first in depositions, are often used to maximize coaching effects. It then explores the ethical rules governing witness preparation. Next it addresses discovery rules that can shield witness preparation and the crime fraud exception to that privilege. Finally, it offers some suggestions on how to address the problem of over-coaching and unfair procedures that maximize its effects.

A. With the Right Coaching, There Is Almost Always a Viable Target

Rarely do we get a glimpse of what a plaintiff truly remembers about the work he did and products used before lawyers have a chance to influence that recollection. It is virtually impossible to find out in discovery what the plaintiff actually knew before meeting with counsel. In a deposition, any time the questioning gets close to the deposition-preparation process, plaintiffs’ counsel assert the attorney-client communication privilege. Yet it is likely that attorney coaching has influenced virtually all testimony about product identification and use. “Influence” need not be a direct instruction to lie. It is relatively easy for counsel to prepare the client in a way that causes the client to “remember” something that never actually happened. If presented with a plausible scenario, and reinforced with assurances like “other workers have told us” or “the companies admit,” then the witness can acquire a “memory” of something that never occurred.

Memories are not static snapshots in time. Charles A. Weaver III, et al., Evaluating the Reliability of Eyewitness Memory in Product Identification Cases, SM038 ALI-ABA 709, 716 (2006). They can be distorted during the retrieval process—such as with leading questions—and influenced by events or information learned later. Id. Post-event information has its greatest effect when there is a relatively-long delay between the event and post-event information and a short delay between the information and the test. Id. at 727. Once this happens, it is difficult for witnesses to distinguish post-event information from real-event information, a phenomenon known as the “knew-it-all-along effect.” Id.

Suggestive techniques used to “refresh” memory can also often have the effect of creating memories for events that never happened. See Elizabeth F. Loftus, Creating False Memories, 277 Sci. Am. 70-75 (Sept. 1997). Psychology and memory experts have studied the process by which a person recalls events or creates a memory of something that never occurred. Certain conditions are conducive to memory creation, such as
financial incentive to recall (you have to remember product names to recover); being supplied the information to recall (here are the names other people have recalled form that location, do you remember them too?); assurance that no one will catch you if you recall it (these lawyers weren’t there and do not know); and moral motive (these companies knew their products were killing people). See id.; Elizabeth F. Loftus, Our Changeable Memories: Legal and Practical Implications, 4 Sci. & Soc’y 231-233 (Mar. 2003).

Lastly, repetitive preparation can form a script to follow in “recalling” events. Paul J. Heald & James E. Heald, Mindlessness and Law, 77 Va. L. Rev. 1127 (1991). Thus, by the time the discussions between the plaintiffs’ counsel or paralegals and the client are complete, it might be impossible to separate what the client recalled before he hired a lawyer and what his new recollection is.

To determine the extent of the attorney influence, it would be necessary to know what the client actually recalled about his jobs, work sites, and products he worked with or around before he discussed those topics with his counsel. Asking the plaintiff what he knew before hiring a lawyer does not request communication between attorney and client. Also, if the sole basis for the testimony is instructions from counsel to testify in a certain way about information the plaintiff did not have before meeting with the attorney, the communication between attorney and client may not be privileged.

Some preparation of a witness to testify is, of course, appropriate. But preparation that causes a witness to testify about “recollections” he never had beforehand may be impermissible influence on the substance of what a witness will say. If you don’t believe thatplaintiffs’ counsel would attempt to create “memories,” consider the following quote from prominent plaintiffs’ asbestos attorney Fred Baron: “Do we implant memories? Yeah, probably we do. Is that something that is wrong? I don’t believe it is.” (Christine Biederman, et al., Toxic Justice, Dallas Observer, Aug. 13, 1998, available at http://www.dallasobserver.com/1998-08-13/news/toxic-justice/). Or consider the following advertisement on one plaintiffs’ firm’s website:

Your memory doesn’t have to be perfect. Our Exposure Database stores information taken from thousands of witnesses about job sites, the working conditions at those sites, names and locations of buildings (including new construction, renovation and demolition sites), co-workers at job sites, the companies that made or distributed asbestos products and the brand and trade names of asbestos products.


**B. Evidence That Over-Coaching Is Prevalent**

Documentary evidence exposing over-coaching occasionally surface but are very rare. But there is plenty of evidence today that the practice of coaching a witness to make factual assertions not based on the witness’s own knowledge is still common and the rule rather than the exception.

**1. Witness preparation memos**

In 1997, a plaintiff in an asbestos case appeared for his deposition with his “file” that he produced to defense counsel. It contained a memo titled “Preparing for your Deposition” that contained explicit instructions on what he was to say, and not to say, in his deposition. A web search for “Witness Preparation Memo” yields plenty of discussion of the use of the memo. The memo was even discussed before Congress during a debate in 2003 over the Fairness in Asbestos Injury Compensation Bill. S. Rep. No. 108-118 (July 21, 1993), Fairness in Asbestos Injury Resolution Act, at 85–95.

The memo included detailed descriptions of various asbestos products and how they were packaged along with explanations of which types of workers used the product, for what purposes, and in what places. The descriptions were so detailed that it would “allow any person to credibly testify that he worked with the
product.” It also repeatedly reminded the reader how important it was to memorize all of the product information and implored the reader to study his work history sheets: “You will be required to do all this from MEMORY, which is why you MUST start studying your Work History Sheets NOW! . . . Have a family member quiz you until you know ALL the product names listed on your Work History Sheets by heart.” It also instructed the reader how to answer any questions on warning labels regardless of the truth: “You will be asked if you ever saw any WARNING labels on containers of asbestos. It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER.”

The law firm’s official position was that this memo was used on a very limited basis by a “rogue para-legal” who signed an affidavit to that effect, but was never questioned under oath.

2. Testimony about bankrupt companies

In 2000, there was a “Bankruptcy Wave” in which dozens of primary asbestos defendants filed for bankruptcy reorganization. See Marc C. Scarcella & Peter R. Kelso, The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010, 12 MEALEY’S ASBESTOS BANKR. REP. 1 (Oct. 2012) [“Philadelphia Story”]. “Typically, one would think that when a majority of defendants in a tort exit the litigation through bankruptcy reorganization the defendant pool is reduced and the number of defendants in future lawsuits decreases. However following the Bankruptcy Wave in asbestos litigation, the opposite was true.” Id. at 2.

As these primary defendants disappeared, new ones emerged to take their place. When the bankrupt entities’ bankruptcy trusts for future asbestos claims became viable, it created a dual-compensation system in which plaintiffs could independently be compensated by both administrative trust payments and settlements of tort claims. Id.

One attorney and scholar who has followed the evolution of asbestos filings discovered massive inconsistencies between what plaintiffs claim caused their disease in the tort system and who they blame when filing bankruptcy trust claims. See Testimony of Mark Behrens Before the Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association’s Tort Trial and Insurance Practice Section, Partner, Shook, Hardy & Bacon, LLP, in Washington D.C. (June 6, 2013), available at http://www.shb.com/news/events/2013/AsbestosTaskForceTestimony.pdf. Behrens discovered that there were inconsistencies not only with product identification but exposure years and work sites as well. Id. In many cases, plaintiffs were telling one story in a court case and a completely contradictory one to the bankruptcy trusts.1 Id.

When one considers the types of inconsistencies between statements made to bankruptcy trusts and in civil litigation, it is certainly consistent with the deposition-preparation memo’s admonition to “make sure you mention only products on your work history sheets.” Proving these inconsistencies, however, can be difficult. Plaintiffs’ counsel routinely fail to mention any bankruptcy trust claims they have made in sworn discovery responses and, along with bankruptcy trusts which they highly influence, take the position that bankruptcy trust claims are privileged and should never be discovered.

Courts have held that claims with allegations of exposure are discoverable. See, e.g., Volkswagen of Am., Inc. v. Superior Court 139 Cal.App.4th 1481, 1492 (Cal. Ct. App. 2006) (holding that documents containing material information signed by plaintiff or his attorney were discoverable and admissible against the plaintiff); Shepard v. Pneumo-AbeX, LLC, 2010 WL 3431633, at *1 (E.D. Pa. Aug. 30, 2010) (holding that bankruptcy trust claim forms were discoverable). But if the plaintiff is coached to say that there were no claims, and the trusts will not reveal the claim information, then it is very difficult to prove the inconsistency.2

Additionally, most bankruptcy trusts have adopted a three year statute of limitations from time of diagnosis for filing claims. Because nearly all states have a two year statute of limitation for a tort claim, this
gives plaintiffs an extra year or more to resolve any bankruptcy trust claim. This allows them to honestly say they have not yet filed a bankruptcy trust claim even though they are aware of the ones they will file and have sometimes already had their client sign the claim form.

### 3. Coaching revealed on face of testimony

Sometimes, it is obvious from the face of the testimony that there has been extensive coaching. For example, in a 2012 California case the plaintiff’s lawyer asked in deposition 113 times about the “conditions in the air” when plaintiff worked with each defendants products. In response to all 113 questions the answer was identical: “dusty and dirty.” This included during the removal of what he admitted was wet packing.

Another example of coaching evident from the face of the testimony was when two different plaintiffs, represented by the same lawyer, gave identical testimony about working with a product that never existed. One plaintiff was from Claremont, New Hampshire, and the other was from San Antonio, Texas. They were deposed two weeks apart. The lawyer built the nonexistent product name into his exposure questions and used it roughly twenty-five times in each deposition. Both plaintiffs testified that they regularly worked with this nonexistent product and responded affirmatively to every one of their lawyer’s questions about it.

When the defendant filed motions for summary judgment with affidavits stating it never made such a product, both cases were voluntarily dismissed. How could two different men swear they saw the name on a product that never existed? Is this reminiscent of the deposition preparation memo instruction to “be sure you say you saw the name on the product?”

### 4. Strategic use of “I don’t recall”

Because asbestos litigation deals with some events that occurred decades ago, it is likely that there will be many events that the witness honestly does not recall. But it would be improper for an attorney to tell the witness to say “I don’t recall” any time he does not want to answer a question. For example, in the late 1980s and early 1990s, Owens Corning Fiberglass decided it was absorbing an unfair share of asbestos liability and assembled what was known affectionately by other defendants as the “OCF Picture Book.” This book contained photos of products and packages that an OCF lawyer would use at a deposition to try to get the witness to identify products not made by OCF.

There was enough litigation over the products of 100 companies in the book to cause them to file bankruptcy. Their products were the most prevalent ones that contained asbestos. Yet a surprising number of plaintiffs today will disavow any knowledge of even the largest of them, Johns Manville. Worse, as discussed above, those same plaintiffs have often filed claims with bankruptcy trusts, stating under oath that they were exposed to asbestos from those products.

### 5. Filing two separate lawsuits against different defendants

There have been reports of this occurring two different ways. First, there are instances in which the plaintiff filed a case in the 1980s or 1990s for a non-malignant disease and then more recently filed another case for cancer. Bates White Economic Consulting reports on one case study of a worker who filed a lawsuit for non-malignant disease in 1981 and then another one for cancer in 2010. *Philadelphia Story*, at 6. The first case was solely against thermal insulation manufacturers. The second case named over 40 new defendants and was based on weekend automotive work and home construction. There are dozens of examples of these kinds of cases filed in Philadelphia and San Francisco.

More recently, some plaintiffs’ counsel have been filing two separate cases, one in federal court and one in state court, virtually simultaneously. In one such case, the plaintiff sued all Navy defendants in one case and then sued all non-Navy defendants in the other. In dismissing the second case, the court noted that the
plaintiff’s claims in both cases were identical; he just simply sought to impose liability on a different selection of defendants in each one.

C. Procedural Mechanisms that Maximize Effect of Coached Testimony

1. The “work history sheet” a.k.a. the testimony script

Several decades ago, many plaintiffs began answering interrogatories that asked what products they worked with, how, when, how often, etc., with a form developed by their own lawyers called a “work history sheet.” (See Exhibit A.) This form became an outline for the plaintiff to use at a deposition. These were not the plaintiffs own notes reflecting personal recollections. They were forms filled out by plaintiffs’ counsel and given to the plaintiff to study before his deposition. In fact, the coaching memo discussed above specifically instructed plaintiffs to only mention products listed on the work history sheet: “Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case.”

2. Noticing the client’s deposition so that plaintiff’s counsel can question the plaintiff first

In most jurisdictions, plaintiffs’ counsel get away with noticing their own clients’ deposition and conducting a leading direct examination before defendants get the chance to ask any discovery questions. This practice is integral to getting the right story told because it allows plaintiffs’ counsel to take his client through a script before defense counsel is allowed to ask any questions that might disrupt the story. Leading questions abound. Plaintiffs’ counsel has a checklist of each defendant and asks the same questions for each one. A typical direct goes:

Q. Did you work with xyz products?
A. Yes.
Q. How often?
A. Many, many times.
Q. What were the conditions in the air?
A. Dusty.
Q. Did you breath that dust?
A. Yes.
Q. On few or many occasions?
A. Many.

The many battles fought in the Los Angeles Superior Court over the last five years about who is entitled to go first in a deposition indicates how valuable this practice is to plaintiffs. Some plaintiffs’ firms have even begun noticing their client’s deposition along with filing their original complaint. Using this script, plaintiffs’ counsel can create a fact issue on exposure with any product that might have contained asbestos. If defense counsel were allowed to go first, there would be less chance that plaintiffs’ counsel could influence the testimony. If anyone doubts how important it is for plaintiffs to go first in a jurisdiction that allows this, file a motion to go first and see if there is ever an issue on which you have seen plaintiffs fight so vociferously.

D. Ethical Rules Governing the Deposition Preparation Process

Witness preparation has been called the “dark secret” of the legal profession because it is neither taught in law school nor directly regulated, and it is rarely litigated or even discussed in scholarly literature.
See John S. Applegate, Witness Preparation, 68 Tex. L. Rev. 277, 279 (1989). But there are ethical rules prohibiting the kind of witness preparation that creates a memory that the plaintiff did not have before interaction with his lawyer (including paralegals and other staff).

For instance, Model Rule of Professional Conduct 3.4 prohibits a lawyer from “unlawfully obstruct[ing] another party’s access to evidence or unlawfully alter[ing] . . . or falsify[ing] evidence . . . or assist[ing] a witness to testify falsely . . . .” Rule 3.3 prohibits a lawyer from offering evidence to a court that it knows to be false: “If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” And Rule 4.1 prohibits a lawyer from “(a) mak[ing] a false statement of material fact or law to a third person; or (b) fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

In Geders v. United States, the Supreme Court stressed that “an attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it” in deposition preparation. 425 U.S. 80, 91 n.3 (1976). Stated differently, “attorneys are well-advised to heed the sage advice to excise 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, 571 A.2d 1227, 1235 (Md. Ct. App. 1990).

Most lawyers would agree that they cannot just write a script that would give them the best chance to prevail and then give it to the client with instructions to memorize and later recite it under oath. The gray area with these rules occurs when the witness may not recall any products that he worked with or around when he first talks to his lawyer but he “remembers” them after some preparation of unknown content.

Plaintiffs’ counsel might argue that just because the plaintiff does not recall a product when he first hires a lawyer, does not mean that he might not “recall” it later when shown photographs or when told what others have said about that work site. Under this theory, whatever the client testifies about at his deposition would be a “recollection” and not a knowing false statement. But depending on the extent and content of the witness’s preparation, the “recollection” may be a “false memory” created through plaintiffs’ counsel’s coaching. See Weaver, et al., supra, at 716, 727; Loftus, Creating False Memories, supra, at 70-75. If the “recollection” is really a newly created memory, it would be a clear violation of the rules.

### E. Offensive Use of Privilege to Shield Witness Preparation

Plaintiffs’ counsel commonly assert that all witness preparation is protected by the attorney-client privilege. At first glance, this seems reasonable and nearly always backs defense counsel off from even asking questions about how plaintiff acquired the knowledge he is testifying about in a deposition. But the privilege is not a prohibition on asking questions. Instead it is an objection that may be asserted to a specific inquiry. The privilege was never intended to shield an effort to perpetuate a crime or fraud. United States v. Zolin, 491 U.S. 554, 563 (1989). The crime-fraud exception’s purpose is to assure that the “seal of secrecy . . . between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.”

The most common use of the crime-fraud exception is to allow discovery of communication from a client to a lawyer seeking advice on the commission of a crime or fraud. But it would also apply if the attorney were communicating with the client to tell him to say something false to improve their position in a case. See Whetstone v. Olson, 732 P.2d 159, 162 (Wash. Ct. App. 1986) (applying crime-fraud exception and permitting in camera review of taped witness preparation session). The ethical rules listed above prohibit a lawyer from...
counseling a client to give false testimony. Thus, any such instruction should not be protected by the attorney-client privilege.

Further, intentionally giving false testimony, including claiming not to remember a fact that the witness actually does, may constitute the crime of perjury. See 18 U.S.C. §1621; United States v. Barnhart, 889 F.2d 1374, 1376-77, 1380 (5th Cir. 1989); Note, Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial, 18 REV. LITIG. 135, 150-51 (1999). And advising someone to give false testimony is the crime of subornation of perjury. See 18 U.S.C. §1622. This, however, may be a purely academic point. In civil litigation generally and asbestos litigation in particular, there seems to be no consequence to violating the oath to tell the truth “under the penalty of perjury.” In twenty-five years of handling asbestos cases, seeing plenty of examples of witnesses caught in a fabrication under oath, the author is not aware of any judge ever referring a case to a grand jury or district attorney to investigate a perjury charge. They seem to view impeachment as an adequate response. It is not.

One exception was Kananian v. Lorillard Tobacco Co., No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 17, 2000) in which Judge Hannah disciplined a plaintiffs' firm by revoking pro hac vice privileges based on misrepresentations about trust claims. Former Judge Peggy Ableman of the Delaware Superior Court also testified to a Congressional committee in March of 2013 that it was common for plaintiffs to tell one story in bankruptcy claim forms and an entirely different one in a civil case. See Testimony of Mark Behrens Before the Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association's Tort Trial and Insurance Practice Section, Partner, Shook, Hardy & Bacon, LLP, in Washington D.C. (June 6, 2013), available at http://www.shb.com/newsevents/2013/AsbestosTaskForceTestimony.pdf. Yet, relaying stories of false testimony or even sanctions involving pro hac vice revocations are a far cry from referral to a grand jury or district attorney to investigate criminal charges for giving false testimony under oath in an attempt to make financial gain.

Ignoring false testimony seems to be the norm, unless the offender is famous or lied to congress. As one commentator has observed: “I challenge you or any of the pundits on the air to find me a case of civil perjury that has been pursued criminally at the federal level in the last 100 years. I dare say they cannot.” William H. Ginsburg, NBC's “Today,” Feb. 24, 1998. Perhaps there are cases where a trial judge has pursued perjury charges when a civil litigant is caught in a “factual contradiction” but it certainly seems that someone has to be famous, like Martha Stewart, or accused of lying about something really important, like steroids in baseball, to get prosecuted for perjury.

Yet because the communication is presumed confidential, how does one get the evidence to remove that shield and discover the communication? The burden is on the party asserting that the privilege does not apply. The party seeking discovery must make a prima facie case of contemplated fraud by showing a relationship between the communication for which the privilege is challenged and the proof offered. See In re Grand Jury Investigation, 352 Fed. Appx. 805, 808 (4th Cir. 2009); In re Spalding Sports Worldwide, Inc. (Spalding Sports), 203 F.3d 800, 805 (Fed. Cir. 2000); United States v. Bauer, 732 F.3d 504, 509 (9th Cir. 1997).

When the testimony necessary to prove a plaintiff’s case was completely unknown to the plaintiff when he first saw a lawyer, that fact should be made known. Plaintiffs’ counsel can argue that the ways they provided the information were proper. But it is improper to use the attorney-client privilege offensively to cloak a process that, if courts were aware of, would be prohibited.

F. Possible Responses to the Over-Coaching Problem

There are several steps that those who deal with asbestos litigation but do not profit from it—courts, corporate defendants, and insurance companies—can take. First, they should acknowledge there is a problem with plaintiffs giving testimony that they never would have given if not coached a certain way and change
their attitudes towards these practices. Second, they need to challenge the practice by plaintiffs’ attorneys of taking their own clients’ depositions first and using a “work history sheet” as a script. Third, defendants should always request and fight for all bankruptcy trust claim forms signed by plaintiff. Finally, some record needs to be made of what the plaintiff knew before he talked to his lawyer.

1. **Changing attitudes about witness over-coaching—it is not “victimless”**

Corporate defendants are generally reluctant to deal with anything as distasteful as possibly having to investigate whether witnesses are being told to remember their products. Insurance companies likewise usually want to resolve the cases as economically as possible. There is no clear end game when you start investigating the scope of improper witness preparation so most do not routinely invest in any such investigation. Plus, it is common for plaintiffs’ firms to threaten to “target” anyone who steps out of line in asbestos litigation. This threat is sufficient to keep most defendants from questioning the source or validity of testimony.

Further defendants know if they did try to make an issue of false testimony, they face an extremely tough battle because of aggressive use of the attorney-client privilege and courts’ reluctance to examine ethical issues in asbestos cases. Judges seem to think that false testimony in civil cases, at least those involving asbestos, is a matter for the parties to resolve.

But that is not true for several reasons. First, the court requires the witness to tell the truth, and when the witness violates that oath there should be some consequence. Second, with asbestos litigation, most defendants have dozens if not hundreds or thousands of cases. Some courts exert immense pressure to settle cases just because a defendant is sued. If plaintiffs know there is no consequence to coaching a witness to give false testimony, then there is no way for a defendant to get out of any case. If the witness can remember the testimony, then the defendant is stuck in the case.

Most of the time, the witness-preparation process will be shielded by the attorney-client privilege, and the defendant will have little or no extrinsic evidence of the falsity of the testimony. But where there is evidence, like contradictory statements in bankruptcy claims forms, courts should not turn a blind eye. There is real damage to the system, to the defendants, and to the economy when courts allow plaintiffs’ lawyers to force settlement with false testimony.

2. **Defendants need to challenge the tactics plaintiffs’ counsels use for coaching their clients**

Defendants should always file motions to question the plaintiff first at his deposition and should notice the plaintiff’s deposition first whenever possible. Some courts are beginning to realize the extreme advantage plaintiffs’ counsel have if they can take their own client’s video deposition before defendants get to ask questions. They realize that no defendant can do a meaningful trial cross examination minutes after hearing the plaintiff testify for the first time with no opportunity to investigate what he said on direct or confer with their clients or experts. Going first is a huge advantage, and plaintiffs will fight viciously to maintain that edge.

Defendants should also always object to the use of work history sheets both as responses to discovery requests and as a tool to refresh the witness’s recollection during his deposition. These sheets are not responsive to discovery requests and are not a proper document for refreshing a plaintiff’s recollection. Instead, it is a testimony aide for plaintiffs to refer back to as a way to “remember” what products to identify. It is important to establish that the witness cannot answer questions without reference to the writing. It is also critical to examine all circumstances concerning the creation of the work history sheet. Who wrote it; when; after reviewing what; and were products identified that are not on the list? Why? Defense counsel must ask each question, draw the objection and, presumably an instruction not to answer. There must be a record of the
exact questions and objections for the court to rule on. Do not let a blanket privilege objection terminate all questioning.

3. Defendants should always request and fight for all bankruptcy trust claim forms signed by plaintiff

As noted earlier, both plaintiffs’ counsel and the bankruptcy trusts themselves generally claim that these forms are not discoverable and seek to hide them from defendants. Defendants should aggressively pursue the production of all bankruptcy trust claims, as they contain material facts relating to plaintiffs’ cases. Defendants should be very specific, however, about requesting all bankruptcy trust form claims signed, not just those that have been filed. Plaintiffs’ counsel will often have their clients sign bankruptcy trust claim forms early in their cases—sometimes even before their deposition—but hold off on filing them until after the civil tort claim has resolved.

4. Courts should require that a plaintiff write out what he actually knows about his past work and exposures on a standard intake form before he meets with his attorney

Although witness preparation is an expected, widespread practice in the United States, in some countries such as England, witness preparation is prohibited to ensure that the witness’s testimony is the “testimony of the witness and not the result of the advocate’s interrogation of the witness in circumstances in which the witness is liable to seek to adopt the advocate’s perception of the events rather than his own recollection.” Michael Hill, Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices, 7 Geo. J. Legal Ethics 865, 869 (1994). Courts should heed this concern and require that a plaintiff write out what he actually knows about his past work and exposures on a standard intake form before he meets with his attorney.

Plaintiffs’ counsel used to voluntarily do this by asking their clients to fill out a product identification sheet. But that was before the bankruptcy wave when they were sure the plaintiff would name solvent defendants. They wouldn’t dare have their clients fill these sheets out now because they might only name bankrupt entities.

The busiest states such as California, New York, and Illinois have consolidated asbestos dockets and have issued standing or general orders governing discovery and various common procedures. These courts could easily adopt an order requiring that a plaintiff write out what he actually knows about his past work and exposures on a standard intake form. That form would ask pre-approved questions about the client’s knowledge about where he worked, what he did, and what products he remembered.

The presumption would be that the intake form is privileged. But, if there were other evidence that the client’s testimony was false or incomplete, like a dozen bankruptcy trust forms swearing to insulation exposure when the plaintiff’s sworn discovery responses deny any such exposure, then a court could require that the intake form be produced in camera. Courts should also consider requiring plaintiffs’ counsel to produce a copy of all materials shown to the witness during preparation relating to works sites, type of work, products worked with or around, or knowledge of possible hazards of asbestos in these situations. It has long been the law that materials used to refresh a witness’ recollection are discoverable. See, e.g., Fed. R. Evid. 612.

Plaintiffs’ lawyers might cry foul, but if they are not engaging in anything improper regarding witness preparation, why would they mind recording what the client knows to begin with? Wouldn’t that help show that cynics are wrong and the client is really testifying from his own knowledge?
III. Conclusion

People who are sick from asbestos-related disease deserve compensation from those who harmed them if they are legally liable. But the legal system was not intended to serve as a vehicle for the plaintiffs’ bar to find “the next solvent bystander” and create both the factual testimony and the pseudo science necessary to exact millions in verdicts or settlements. See Testimony of Mark Behrens Before the Task Force on Asbestos Litigation and Bankruptcy Trusts of the American Bar Association’s Tort Trial and Insurance Practice Section, Partner, Shook, Hardy & Bacon, LLP, in Washington D.C. (June 6, 2013), available at http://www.shb.com/newsevents/2013/AsbestosTaskForceTestimony.pdf. Sometimes there just is not someone to sue that actually had a role in causing the harm.

Endnotes

1 That the defendant may have at one time used, or even made a product that contained asbestos does not mean it had a role in causing the plaintiff’s injury. Plaintiffs ignore that 100 companies that caused asbestos exposures are now unavailable to be sued in the civil courts. They may still blame some of them in secret bankruptcy proceedings, but in the civil cases their story is that those companies had no role in causing the injury but the present defendants did. If this problem of over-coaching is not addressed, asbestos litigation will continue, for many more years, to be as big of a problem for corporate America, the courts, and the economy as it has been over the last three decades.

Garlock Sealing Technologies is currently prosecuting a civil action against plaintiffs’ firm Williams Kherkher Hart Boundas, LLP for fraud based on discrepancies between what they stated in a civil court action versus what they stated in bankruptcy trust claims. The court has denied Williams Kherkher Hart Boundas, LLP’s motion to dismiss, and, as of the date of this paper, Garlock’s claims are being tried in bankruptcy court in Charlotte, North Carolina.

2 Plaintiffs’ counsel will often have another firm or another department in their firm handle the bankruptcy claims and then claim that the lawyers handling the civil case did not know about the bankruptcy trust claims. As legally unsupportable as this is, factually it does not explain why the plaintiff himself does not disclose the same alleged exposures in his civil case as he has in his sworn statements to get trust money.

3 Some courts, such as the Federal District Court in Los Angeles, have prohibited this practice and issued an order that the defendants are entitled to go first.

4 Plaintiffs ask their experts to rely on this testimony for causation opinions to survive summary judgment. Even if defendants lodge the proper objection to leading, it is almost impossible to get a ruling on that objection short of being in the middle of trial when plaintiff actually offers it. And if the plaintiff comes to testify at trial, then the objection never gets heard and the testimony serves the purpose of creating a fact question for trial.

5 The existence and scope of the privilege and its exceptions are governed by state law. See, e.g., Lange v. Young, 869 F.2d 1008, 1012 n. 2 (7th Cir. 1989).
### AMENDED WORK HISTORY SHEET

**CLIENT’S NAME:** Jimmie Bell

**NICKNAMES:**

**EMPLOYERS:** Various (See Attached Exhibit “A”)

**SUPERVISOR:**

**JOB SITE:** Various (See Attached Exhibit “A”)

**CITY:** Various Cities

**STATE:**

**DATE(S) OF JOB:** 1956-1977

**LENGTH OF JOB:** Various

**MY DUTIES AT THIS JOB SITE:** Various

**ON THIS JOB SITE WERE YOU EXPOSED TO ANY OF THE FOLLOWING:**

<table>
<thead>
<tr>
<th>WAS JOB</th>
<th>CHEMICALS</th>
<th>FUMES</th>
<th>GASES</th>
<th>CHROMIUM</th>
<th>CADMIUM</th>
<th>ANY OTHER</th>
<th>PRODUCT LIST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repair Work</td>
<td>YES</td>
<td>NO</td>
<td>X</td>
<td>DON'T KNOW</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Construction</td>
<td>YES</td>
<td>NO</td>
<td>X</td>
<td>DON'T KNOW</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indoors</td>
<td>YES</td>
<td>NO</td>
<td>X</td>
<td>DON'T KNOW</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Outdoors</td>
<td>X</td>
<td>YES</td>
<td>NO</td>
<td>DON'T KNOW</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>BOTH</td>
<td>X</td>
<td>BOTH</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**DID YOU WEAR A RESPIRATOR, MASK OR OTHER PROTECTIVE DEVICE ON THIS JOB TO AVOID INHALATION OF ANY DUST OR FUMES INCLUDING ASBESTOS DUST?**

- YES
- NO

**MATERIALS THAT MAY HAVE CONTAINED ASBESTOS USED ON THIS JOB:**

(See Attached Exhibit “B”)

Amended Work History Sheet for Jimmie Bell

Page 1
EXHIBIT “A”

PLAINTIFF’S EXPOSURE TO ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS OCCURRED AT VARIOUS LOCATIONS AND JOBSITES INCLUDING, BUT NOT LIMITED TO:

<table>
<thead>
<tr>
<th>Employer</th>
<th>Location of Exposure</th>
<th>Exposure Dates</th>
<th>Job Title</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Vandenberg Air Force Base, Lompoc California</td>
<td>1956-1972</td>
<td>Air Force Electrician</td>
</tr>
<tr>
<td></td>
<td>Vandenberg Air Force Base, Lompoc California</td>
<td></td>
<td>Civilian Electrician</td>
</tr>
</tbody>
</table>

Amended Work History Sheet for Jimmie Bell
EQUIPMENT, PRODUCTS AND/OR MATERIALS THAT MR. BELL WORKED WITH AND/OR AROUND THAT MAY HAVE CONTAINED ASBESTOS USED ON JOBS:

**ENGINES & GENERATORS**
CLEAVER BROOKS
FOSTER WHEELER

**HVAC**
BURNHAM
LENNOX

**TURBINES**
GENERAL ELECTRIC
WESTINGHOUSE
INGERSOL-RAND

**PACKING/GASKETS**
CRANE
JOHN CRANE

**VALVES**
CRANE
EDWARD
ITT
WEIR
YARWAY

**BOILERS**
AMERICAN STANDARD
BURNHAM
FOSTER WHEELER

**PUMPS**
GARDNER DENVER
GENERAL ELECTRIC
INGERSOLL-RAND
WESTINGHOUSE

**FIBER SUPPLIERS**
UNION CARBIDE

**ELECTRICAL PRODUCTS**:
CUTLER HAMMER
GENERAL ELECTRIC
ALLEN-BRADLEY
SQUARE D
BULLDOG ELECTRIC