



## **Does Refreshing Recollection Create Memories? The Legal and Scientific Basis for Evaluating Witness in Memory Litigation**

Governo Law Firm partner Bryna Misiura recently co-presented with Charles Weaver, Ph.D. at the 2014 Annual Conference of the Emerging and Environmental Claims Managers Association (EECMA) in early May on the topic “Does Refreshing Recollection Create Memories? The Legal and Scientific Basis for Evaluating Witness in Memory Litigation.” They discussed



widely-held misconceptions that jurors and lay people have with respect to memory, as well as the types of cases where working with memory experts have the real potential to change the outcome of a case. For example, they discussed how deposition or trial preparation can alter the so-called “memory” of an eyewitness without even the witness recognizing the change. Thus, memory expert testimony has the ability to explain why a witness’ testimony may seem credible, yet still be flawed. Finally, Ms. Misiura discussed how to combat legal challenges to this testimony, as well as useful practice tips for working with memory experts.

Following is the full content of her presentation.

## Does Refreshing Recollection Create Memories?

### The Legal and Scientific Basis for Evaluating Witness Memory in Litigation



Bryna Rosen Misiura, Esq.  
Governo Law Firm LLC  
Two International Place  
Boston, MA 02110  
(617) 737-9045  
www.governo.com

"[I]n a thousand courts at a thousand places all over the world, witnesses every day affirm by oath . . . mixtures of truth and untruth, combinations of memory and of illusion, of knowledge and of suggestion, of experience and wrong conclusions."

Hugo Musterberg, Ph.D.,  
*On the Witness Stand:*  
*Essays on Psychology and Crime, 1908*

## Asbestos Litigation

- Longest running mass tort in American history (Rand, 2005)
- Nearly all of the major manufacturers were bankrupt by 2000.
- Yet –
  - Witnesses used to identify all the biggest manufacturers – E.g., Johns Manville
  - Witnesses now "remember" smaller companies and do not identify the biggest manufacturers
  - And, most witnesses **seem like they are trying to be truthful!!**
- What is happening?



## Criminal Cases – "The Innocence Project"

"Eyewitness identification is the single greatest cause of wrongful convictions nationwide, playing a role in nearly 75% of convictions overturned through DNA testing."

<http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>

## Eyewitness Misidentification



<http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>

## We were always taught....



The more you prepare....

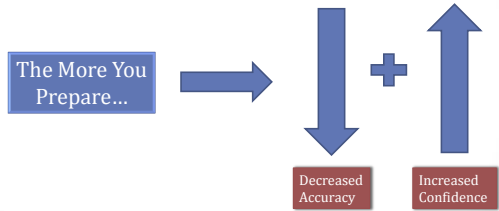


The better you do.

## Most Witnesses Want to Do a Good Job

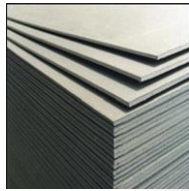


## But, Memory is Counter-Intuitive...



## Preparation...

- Plaintiff was 17 in the 1970's when her father did home improvements
- She testifies that she "remembers" the products her father used
- She is a well-educated
- She testifies confidently
- She did her "homework" – internet research
- No corroborating testimony or documents



## Remembering More..

- Plaintiff testifies he cannot recall the names of two boilers at a particular jobsite
- Plaintiff's counsel terminates questioning for the day
- The next morning, plaintiff testifies that he "thought about it overnight," and that the two boilers were made by ABC Co.



## Common Threads

- Past events (latency issues)
- Witness remembers key information (product)
- No corroborating evidence
- Witness "memory" sole identification in case
- Witness saw photographs, performed research, or was otherwise prepared

## Memory Science Useful in...

- Criminal cases
- Custody cases
- Toxic tort cases (asbestos, benzene, silica, etc.)
- Automobile cases
- Product liability
- Next case.....

## What Do Memory Experts Do?

- De-mystify the Memory Process
- Educate Jurors on Misconceptions:
  - Memory does not work like a video recorder or computer
  - Small details are often not recorded, and thus, not recoverable, no matter how hard you try



## What do Memory Experts Do?

- Explain how memory has the potential to be altered.

### confabulation

In psychology, **confabulation** (verb: confabulate) is a memory disturbance, defined as the production of fabricated, distorted or misinterpreted memories about oneself or the world, without the conscious intention to deceive.

**Confabulation - Wikipedia, the free encyclopedia**  
 en.wikipedia.org/wiki/Confabulation Wikipedia =



## Correct Widely-Held Misconceptions

Misunderstanding	Scientific Understanding
Memory stores information perfectly	Memory is highly selective, encoding and storing only certain elements.
Trivial details of events are as well remembered as important details	Details which are central to an event are much more likely to be recalled than events that are peripheral.
Retrieval of information from memory is complete and accurate	Memories can be distorted in many ways during the retrieval process, such as with leading questions.
Forgetting is usually the result of an inability to recall information, rather than a failure to store it	Much of what is commonly believed to be "forgetting" is more accurately portrayed as a failure to encode the information to begin with.

Charles A. Weaver, et al., "Evaluating Reliability of Eyewitness Memory in Product Identification Cases," ALI-ABA Course Materials (2006) (citations omitted).

## More Misconceptions

Misunderstanding	Scientific Understanding
Refreshing recollection produced unbiased memories	When suggestive techniques are used to "refresh" memory, they often have the effect of creating memories for events that never transpired.
Memories are stable over time.	Memory changes over time as the result of a number of factors such as retrieval context, newly acquired information, and misinformation presented after the original event.
When remembering episodes and facts, retain the source of the information, as well as the content	The phenomenon of "source confusion" exerts powerful effects on eyewitness reliability. Witnesses often retain the context of newly learned information, but they misattribute the source.

Charles A. Weaver, et al., "Evaluating Reliability of Eyewitness Memory in Product Identification Cases," ALI-ABA Course Materials (2006) (citations omitted).

## More Misconceptions

Misunderstanding	Scientific Understanding
Confidence is a reliable indicator of accuracy in eyewitness memory	The relationship between confidence and accuracy in eyewitness memory is modest at best. Factors influencing eyewitness confidence and eyewitness accuracy are not necessarily the same. As a result, questioning practice can inflate confidence without improving accuracy.
Careful witnesses can eliminate the possible effects of suggestive questioning	Clear warnings about possible misinformation do not always eliminate their effects.

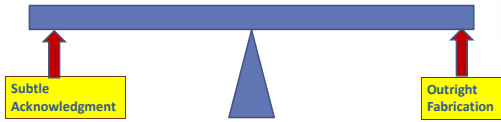
Charles A. Weaver, et al., "Evaluating Reliability of Eyewitness Memory in Product Identification Cases," ALI-ABA Course Materials (2006) (citations omitted).

## Deposition Preparation

- Internet Research
- Pictures
- Power of suggestion
  - Many people like you...
- Power of questions
  - "Smashed"
  - "Collided"
  - "Came in contact"



## Spectrum



## What Else do Memory Experts Do?

- Testify about factors known to compromise reliability of memory, and offer opinions as to the presence or absence of factors in the case
  - Memory Loss (E.g., Alzheimer's/Dementia)
  - Prescription Medications
  - Drug and alcohol use

### Medical Records

*After the patient's second and subsequent seizures, patient reports no changes since having Thoracostasis. He denies any shortness of breath, cough, chest tightness or wheezing. He is currently doing all normal activities without difficulty. He is currently being treated for Clinical Depression (etiology to be determined). He has a history of Hypertension, GERD and Memory Loss. He is compliant in all prescribed medications.*

## What Memory Experts DON'T Do:

- Testify if a witness is being truthful or credible
  - Expert not present to observe first hand?

## Post-Trial Interviews



- Memory experts are persuasive in deliberations
- Show fallibility of witness memory following leading questions
- Scientifically established factors that affect memory of brands, exposures, and products
- On a scale of 1 to 10, jurors rank memory experts in the range of 7 to 10 with respect to their importance in rendering a verdict.

G. Huelsmann, "Memory Experts in Toxic Tort Litigation," *DRI Today*, 2011

## Challenges by Plaintiffs' Counsel

- "You distrust the veracity of my sick or dying plaintiff?"
- "So-called" memory experts "invade the province of the jury"
- Information within the jury's "common knowledge"
- "Usurp the jury's role" by commenting on credibility
- Presumption that memories fade over time, and newer ones more reliable



## Legal Standard

- Varies by jurisdiction
- But, most jurisdictions leave **broad discretion** to the trial judge to assess whether:
  - An expert is qualified
  - The testimony is relevant to a question at issue
  - The testimony is grounded in scientific reasoning or methodology
- See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

## Memory Science Well Established

- Memory and cognition are valid scientific areas of study in the field of psychology
- Many peer reviewed journals reporting research in the field
- Memory and cognition have been funded by the National Science Foundation and other federal agencies
- Major universities offer courses in this area
- Nobel Prize in area of human cognition
- More than 50 members of the National Academy of Science are experimental psychologists

## Other Ideas...

- **Consider videotaping** your depositions
- **Ask memory questions** that are **verifiable**
  - Children's names and addresses
  - Street intersections
  - Navy ship captain, ports of call, ship characteristics
- **Know your case law** regarding deposition breaks
- **Review medical records** for memory diagnoses or prescription medications for memory loss

## Opportunity.....

- Generally admissible in criminal cases
- Challenged frequently in toxic tort cases, but admitted in most instances
- Next cases.....

## Memory Experts

- Allow defendants to **challenge** the claimed memories of a plaintiff **without arguing that the ill plaintiff is lying**
- **Give juries the tools** to understand why a witness can look credible, but be mistaken
- **Questions?**



### Jurisdictions

- Connecticut
- Maine
- Massachusetts
- New Hampshire
- New York
- Rhode Island

### Practice Areas

- Asbestos
- Coverage
- Construction
- Data Privacy & Cyber Risk
- Environmental Insurance Defense
- Product Liability
- Reinsurance
- Toxic Torts



Founded in 1995, Governo Law Firm has earned an outstanding reputation as an elite law firm with the talent, determination, and resources to deliver superior results. Our 18 attorneys specialize in the defense of cases involving complex, technical, scientific, medical and legal issues. Our comprehensive risk management counseling is based on a thorough, nuanced, multi-dimensional approach rooted in sophisticated legal analysis and practical problem-solving. We hold Martindale-Hubbell's highest rating (AV) and many of our attorneys have received the prestigious honor of being selected as New England Super Lawyers and Rising Stars. Our team includes attorneys with diverse backgrounds, outstanding experience and achievements. We are united by a bold and creative spirit and are committed to serving our clients.