

The Expert Witness Who Will Explode

By **Bruce Gerstman**

Law360, New York (May 26, 2017, 11:24 AM EDT) --

When a party to litigation employs an expert witness, one should not assume that the best approach is to challenge their testimony without possessing adequate background information on them. An investigation into an expert witness's background may turn up serious impeachment material.

For instance, during a 2013 Arkansas medical malpractice trial, the defense presented an expert witness, a surgeon, who testified on cross-examination that he had been sued once before for medical malpractice, more than 15 years earlier. He also testified that hospitals have never revoked his privileges.



Bruce Gerstman

It turned out he lied about both claims — a former patient sued him just two years earlier and his privileges at his current hospital were revoked at the time due to his failure to maintain liability insurance, repeated problems with pre-operative judgment, failure to request help from senior colleagues when life-threatening complications occurred, failure to properly supervise residents and concerns about post-operative complication rates.

Before these facts came to light, a jury awarded the plaintiff \$400,000. When the defense learned of the false testimony that certainly could have shaped the outcome of the case, the case was already on appeal. Subsequently, the witness was charged with perjury.

Although an extreme example, such cases highlight the importance of prioritizing due diligence on expert witnesses — in some situations, a case may hinge on a single expert. If you choose the wrong one, it not only provides ample opportunity for the opposing party to execute a “gotcha” moment on a valuable witness, but it certainly may jeopardize the credibility of the entire case.

From the perspective of challenging an expert witness, a due diligence investigation provides an opportunity to attack the witness's credentials and experience, the reasons given for the opinion, and their overall credibility as a witness. Since jurors often view expert testimony as highly important in guiding their decision-making, striking a blow to an expert's credibility can tip the balance of a case in favor of your client.

Given the importance of conducting a due diligence investigation, what does a thorough investigation look for?

Covering the Basics

Establishing the basic materials for impeachment is a solid starting point, such as seeking material from lawsuits and criminal proceedings — as long as you go beyond Lexis, Westlaw and other common databases, which capture only a small portion of the lawsuits.

For instance, a database search for lawsuits filed in 2015 against a Michael Jones in St. Louis County reveals one matter, while direct research at the courthouse shows at least nine lawsuits against a person with this name.

If your witness has served as an expert in the past, it is important to review his or her declarations in prior cases for consistent versions of their employment history. If your witness stated in the past what they currently say on their resume, the opposing counsel has no argument with the order of their career history.

However, if it is not the same, the witness's basic credibility gets called into question: which time were they telling the truth?

Divorce proceedings rarely contain material that casts anyone's reputation in a positive light. While some cases include pre-arranged agreements that simply divide assets and time spent with children, others provide details about an individual's professional life that may not appear elsewhere. For instance, the witness' former spouse might have stated the witness lost his or her job at an employer when that fact is missing from their resume.

Not Just Any College Degree

First, verify the expert's degree directly from the school. But more valuable information exists beyond confirming a traditional college degree.

A witness's resume might include a master's degree or a Ph.D. from a school that sounds completely unfamiliar. Further searches into the school may reveal that it is online-only, and accepts anyone who pays. Or that the school has a name similar to a legitimate school, but is not.

For instance, Columbus University, which sounds like the legitimate Georgia-based Columbus State University, is nothing more than a "diploma mill" investigated for fraud on numerous occasions and accredited by an organization unrecognized by the U.S. Department of Education.

As for accreditation, deeper research into any suspected school can determine its legitimacy. Real accreditors include the U.S. Department of Education or the Council for Higher Education Accreditation.

Diploma mills often get their accreditation from unrecognized organizations with names such as Accrediting Commission International or the International Commission for Higher Education. Sometimes, the diploma mills even create their own fake accreditors to accredit themselves.

Real or Fake Employment

A review of an expert witness' resume may reveal a two-year tenure at an unknown company. Is it really a company at all? Perhaps the witness did not work anywhere during the two-year period she claims to have served as vice president of a company called, for instance, Universal Traffic Visibility Inc.

Has this company ever registered as a corporation or DBA anywhere? If it has, is there any proof it actually conducted any real business?

In this example, deeper research shows the witness was the person who registered Universal Traffic Visibility's website, and archived versions of the site show its business address was simply her residence. Universal Traffic Visibility might be no more than a resume-filler after being fired from her previous job.

The Ultimate Turn-Off: Embellished Military Service

For expert witnesses who cite military service, confirmation that he or she served in the military should certainly be done, but don't stop there. Obtain his or her entire publicly-available military record. The smallest fib about military service commonly feels like a betrayal to jurors and judges.

What at first glance appears as a slight embellishment, or even an overlooked mistake, may under scrutiny be viewed as a misstatement or outright falsehood that can speak directly to an expert witness's credibility.

For example, the expert stated on his resume that he left as a Lance Corporal, but his record says he was a Private. Why is there a difference?

Or, even a smaller detail: the witness' record says he left the military in 1995, but he said on his resume that he left in 1996: why the extra year of service? A few minor missteps may assist in building a larger argument against their lack of credibility.

Esteemed Coursework, or Baloney?

Confirm the legitimacy of each professional certificate or extra coursework listed on the expert's resume. For instance, a witness can give the impression he or she did masters-level work at a well-regarded school, such as Stanford University Graduate School of Business, after enrolling in a one-week or one-month executive education program at the school.

Lastly, the witness might claim a certificate with an impressive name, such as The American Board of Diabetes or the American Academy of Oncology, but deeper research can show that anyone can get such a certificate for taking a 5-hour online course and paying \$500.

With any professional who needs a license to practice — from a doctor, accountant or lawyer to a stock broker, real estate agent or therapist — seek out disciplinary records from the state agencies that oversee the licenses.

If it's your witness, confirm the state has never filed a complaint against them. If the witness is set to testify for the other side, a record of discipline helps impeach them.

Financial Troubles

The witness is a certified public accountant and is set to testify that an executive was presenting misleading financial information to a board, or the witness conducted forensic research and determined that a company funneled money to unauthorized accounts. If this is your witness, even a small bankruptcy or tax lien in their background gives ammunition to the opposing party. They can discredit

him or her in front of the jury or prior to trial.

Without a stellar personal financial background, the witness must provide a compelling explanation for why he or she owed a debt to the Internal Revenue Service. However, if this is the opposing party's witness, you have the opportunity to show that their testimony comes from someone unable to understand and control his or her own personal finances.

Consulting the Grapevine

A deeper look into your expert witness often reveals no impeachment material to use against him. But ultimately, how will a jury perceive him?

Determine which attorneys have worked with him in the past and contact them as references. The biggest surprise can turn out to be a thoroughly vetted witness, offering valuable testimony — whom jurors simply do not like.

Bruce Gerstman is the director of investigations and founder of Waterfront Intelligence Inc.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2017, Portfolio Media, Inc.