New York Law Journal

Preparing For and Defending Against the Collateral Attack: Challenging the Credentials and Qualifications of the Expert Witness

By Ben Rubinowitz and Evan Torgan

When selecting an expert to testify at trial, consideration should be given to his or her stature not just from the standpoint of formal classroom education and training, but also from the aspect of his or her ability to communicate credibly and effectively to the jury. The abilities of the expert to honestly and fairly analyze and interpret evidence, organize his or her ideas and express them clearly to the jury are significant stepping stones to victory. Too often, however, trial attorneys fail to fully evaluate their own expert's credentials and opinions prior to putting the expert on the stand. While it may not be possible to completely neutralize a collateral attack on your expert, the attack may be minimized on direct if you know your expert's potential weaknesses. The failure to take any steps to scrutinize your own expert's credentials and to challenge the basis for his or her opinions may be disastrous to your case.

It is not sufficient to simply ask your expert for a copy of his or her curriculum vitae. Blind reliance on the information contained therein without challenging the veracity of that information is a sure road to failure as it leaves you unprepared for a collateral attack. Similarly, blind reliance on the veracity of the credentials and qualifications set forth in the curriculum vitae of your adversary's expert can be a missed opportunity at undermining those qualifications. The better approach is to conduct independent research and verification to substantiate or refute the truthfulness of the information contained within the curriculum vitae. The failure to conduct such research and instead to blindly rely on what may be considered the expert's self-serving document will, at times, deprive you of fertile grounds for attack or allow your adversary to conduct a devastating collateral attack on your expert.

Imagine the scenario in which a bio-medical engineering expert is called to the witness stand by your adversary. As part of the CPLR 3101(d) expert witness exchange, that expert witness's curriculum vitae was provided. Although the expert has claimed to have written more than 100 articles on bio-medical engineering, independent research revealed that the expert has never formally attended medical school nor has he ever been educated or trained in the reading of x-rays and CT scans. He has testified, however, in the past that he is an expert in reading and interpreting x-rays and evaluating medical proof.

To start the collateral attack the cross-examiner should carefully set the witness up for failure. Having the expert admit that he has reviewed the x-rays, is fully familiar with all of the medical proof and that he has conducted a full, fair, thorough, and complete evaluation of the case is essential to success:

Q: Dr. Sadman,[1] you conducted a full bio-medical evaluation in this case, true?

Q: You conducted a fair evaluation, correct?

Q: Your evaluation was a thorough one?

Q: And it was a complete evaluation, right?

Q: To the extent that you didn't conduct a full evaluation that would be improper, right?

Q: One of the things that you have told us is that in doing this full, fair, thorough and complete evaluation is that you had asked for and reviewed various records, correct?

Q: Among them were the depositions of the parties and witnesses, true?

Q: You reviewed the police accident report?

Q: You reviewed the medical records?

Q: You reviewed the x-rays and CT's, right?

[1] Although the name of the expert has been changed, the questions herein were taken from an actual cross-examination of an expert at trial.

Q: That's how we know that the opinion you just rendered was a complete and honest one, true?

Next, the witness must be locked into the opinion he just rendered on direct examination. All avenues of escape must be closed off. You must commit the witness to the opinion he just gave and reiterate the basis for the opinion before attacking:

Q: The opinion you just rendered was based on many factors, true?

Q: It was based on the factual data you gleaned from reviewing the file, correct?

Q: It was based on your review of the physical evidence, right?

Q: It was based on your visit to the scene of the accident?

Q: It was also based on your knowledge of medicine, true?

Q: It was based on your review of the medical records, right?

Q: It was based on your review of the x-rays, correct?

Q: And what you did to come up with a valid opinion was to collect all of the factual data and then apply that data to your vast engineering and medical knowledge in order to render a credible opinion, right?

Once the setup is complete and all avenues of escape are closed off the collateral attack can begin. There is no need to yell at the witness. A cool, calm and methodical approach to the attack works best:

Q: Dr. Sadman, let's focus on your medical education for a moment. After all, you would agree your medical knowledge and experience played a large role in the opinion you just told us about on direct examination, true?

Q: It is true, though, that you never graduated from medical school, correct?

Q: It is also correct that you only took one course at a medical school, true?

Q: That course lasted only a number of weeks, am I right?

Q: And you never formally enrolled in that class, true?

Q: What you did was audit the class, true?

Q: Unlike the other students in the class you never even took one test in that class, right?

Q: You never received a grade in that class, true?

Q: Other than that one class which you say you attended you never had any formal classroom education at a medical school, true?

A: Yes, but I also took a SAE course in medicine.

Next, the attack should continue with a focus on the lack of the witness's training and experience on reading and interpreting x-rays. Comparing and contrasting this witness's experience with that of a board certified radiologist will bring the point home:

Q: You once again mentioned the SAE course that you took, correct?

Q: That's where you gained additional knowledge and experience in medicine and in reading x-rays, right?

Q: SAE stands for the Society of Automotive Engineers, right?

Q: You are aware that board certified radiologists have a significant amount of training, correct?

Q: They have gone through four years of medical school, correct?

Q: In fact, not only have they gone through four years of medical school but they have taken an additional four-year course of study known as a medical residency, correct?

Q: And many of these radiologists go through additional years of study after the residency known as a fellowship program, right?

Q: That's how radiologists learn to read x-rays, true?

Q: But your course was slightly different than the training a radiologist receives, correct?

Q: Your course – the SAE course – lasted a total of two days, correct?

Q: And that's how you learned to read x-rays?

Q: At an automotive course not at a medical school, right?

A: But a medical doctor taught us how to read x-rays.

Q: What part of that course devoted to x-rays was taught by a medical doctor?

A: One-half day.

Q: So correct me if I am wrong. You learned how to read x-rays and interpret them in a half day course, right?

Q: You realize that for a radiologist to become board-certified they have to pass a multipart examination, true?

Q: The examination alone for radiologists lasts a number of days, correct?

Q: In total, the SAE course that you took lasted two days?

Q: Would you agree with me that a doctor who has studied for at least eight years regarding the reading and interpretation of x-rays and CT scans has far more knowledge about that field than you who learned how to read them in a half-day course?

Q: Yet you feel qualified to come before our jury and tell them that you have sufficient medical knowledge to render a credible opinion, right?

It is often the case that a professional testifier will deliberately try to enhance his curriculum vitae by listing associations, societies and memberships that are, at best, questionable. It is worth the time to independently contact and research these associations, societies and memberships to determine whether or not they are meaningful, valid or simply listed to exaggerate the qualifications of the expert. Here, the cross-examiner should focus directly on those portions of the curriculum vitae that are questionable. Once again the setup of the expert becomes important:

Q: Dr. Sadman, your many associations and memberships are listed on your curriculum vitae, true?

Q: You wouldn't deliberately try to enhance your qualifications with those associations and memberships, would you?

Q: You wouldn't deliberately try to exaggerate the depth of your qualifications, would you?

Q: That would be totally inappropriate wouldn't it?

Q: One of the things that is written on your curriculum vitae is that you are a member of the National Society of Inventors, correct?

Q: You would agree with me that the National Society of Inventors is just a club, right?

Q: Isn't it true that there are no qualifications to become a member of this club?

Q: There is no certification, right?

Q: There is no test?

Q: You simply pay $50 a year and you are a member, correct?

Q: The Association for the Advancement of Automotive Medicine is also listed on your curriculum vitae, right?

Q: There is no test to become a member of that organization either, right?

Q: And that organization also has yearly dues that must be paid as a requirement to remain a member, true?

Q: But there is one organization within your field that actually does have a test, correct?

Q: There is one organization that actually screens engineers before allowing them to become a member, true?

Q: That organization is known as the Accreditation Commission for Traffic Accident Reconstruction, often referred to as ACTAR, true?

Q: And you're not a member of ACTAR, true?

Q: And you never once took the test to become a member of ACTAR, true?

Often the professional testifier can make a huge amount of money to render a report and come to court. Professional testifiers often create preprinted price lists for attorneys or other materials promoting their expertise for the purposes of litigation. These materials can be powerful weapons to undermine the expert's credibility. Jury verdict reporters and prior courtroom testimony are also extremely helpful in providing the basis for this line of collateral attack. Not only will the monetary amounts made by the expert provide fodder for cross-examination, but the sheer number of times the expert has appeared in court will, oftentimes, offend the jury. If done properly, the jury will see, in short order, that the witness is far more devoted to litigation that he is to his own field of practice.

Q: Dr. Sadman this isn't the first time you have appeared in court, correct?

Q: You have been testifying for more than 25 years?

Q: You have been working with law firms in many different states, true?

Q: You've testified between three and six times per year, correct?

Q: And you've testified for (law office) alone two times a year for the last seven years, correct?

Q: It's quite a lucrative business, isn't it?

A: That depends on what you mean by lucrative.

Q: Well let's see, you make a specific salary at City College correct?

Q: How much do you make per day at City College?

A: I don't know.

Q: But you do know how much you make for one day of testifying in court, right?

Q: You make at least $3,000, true?

Q: In fact you testify so often that you even have a preprinted price list for lawyers, right?

Q: And in that price list you have a mandatory minimum of $3,300 for any part of one day in court, true?

Q: You even have a mandatory minimum to evaluate a case for lawyers, true?

Q: For new accounts you even demand an upfront payment of $2,500, correct?

Q: So let's compare your teaching salary to your testifying salary. We can agree can't we that litigation is far more lucrative than teaching, right?

Often the professional testifier will skimp on the work that should have been done to form the basis of his opinion. While he might know that there were many depositions taken in the case, often times he will not review all of them or only review them in a cursory manner. By challenging the expert's lack of familiarity with the deposition testimony the expert can be further discredited. With this approach, the cross-examiner can test the waters to see whether the witness is fully familiar with the pretrial depositions. One of the easiest ways to proceed is to start by asking low-risk open ended questions:

Q: You've told us you reviewed the pretrial depositions, correct?

Q: How many depositions in total were taken of the various witnesses?

Q: How many times was the plaintiff deposed?

A: I'm not sure.

Q: Did you ever check to make sure you had all the depositions before rendering your opinion?

Q: How many times was the construction foreman deposed?

A: I'm not sure.

Q: Who was the construction foreman?

Q: Who was the city representative in this case?

A: I'm not sure.

Q: But, of course, you conducted a full, fair, thorough and complete evaluation, right?

Conclusion

Challenging the credentials of an adverse expert witness while being prepared for the collateral attack on your own expert requires thorough independent research. Too often attorneys will accept as true, noteworthy and reliable the stated qualifications on an expert's curriculum vitae. The qualifications of the expert, the groups, associations and societies to which he or she belongs, as well as the adequacy of the research and preparation done by the expert must be scrutinized and challenged. Failing to perform even the most basic independent inquiry into the qualifications and background of an expert witness is a missed opportunity at developing fertile material for a collateral attack at trial. Similarly, the failure to perform that research on your

own witness could leave you susceptible to a disastrous collateral attack that could have been minimized on direct.

Ben Rubinowitz *is a partner at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz. He also is an Adjunct Professor of Law teaching trial practice at Hofstra University School of Law and Cardozo Law School. GairGair.com; speak2ben@aol.com*

Evan Torgan *is a member of the firm Torgan & Cooper, P.C. TorganCooper.com; info@torgancooper.com*

Peter J. Saghir*, an associate at Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, assisted in the preparation of this article;* psaghir@gairgair.com