



By Nicholas Peck & Michael J. Ramos

Impeaching the Credibility of a Government Witness

In most criminal trials, the testimony of a cooperating witness is a key, if not essential, part of the government's case. No one knows the facts of a criminal conspiracy better than a participant in that conspiracy, or so the government argues at each trial in which a conspirator—most likely, a cooperating witness—testifies. Accordingly, as much of the government's case typically rests on the testimony of cooperating witnesses, undermining the credibility of a cooperator can, by extension, undermine the prosecution's entire case. Typically, the government will ask a cooperating witness during direct examination about his prior bad acts, but prosecutors may not know everything about their cooperators. What the government does not know will come back to haunt them. For that reason, defense counsel routinely hire us to conduct in-depth background investigations to uncover the type of information necessary to impeach the credibility of an adversarial witness. That information has been used to gain acquittals. Even better, in a number of notable cases, information we uncovered was used pre-indictment to persuade the government to drop the charges against defendants before trial or convince the prosecutor not to charge in the first instance.

To that end, our witness investigations seek to identify, among other things, undisclosed past criminal or regulatory actions, prior inconsistent statements, and false statements in applications, affidavits, testimony, or depositions. Should the witness have committed prior bad acts, so much the better. Common sense dictates that it is difficult to credit the word of someone who has maintained a pattern of unethical or illegal business practices. Does the witness have any conflicts of interest or maintain any undisclosed relationships with other subjects or witnesses that might call into doubt his pledge to give complete and truthful testimony? Are there any problematic postings or associations reflected in the witness's social media accounts? The details matter. Frequently, we develop evidence that a witness has omitted, fabricated, or exaggerated information concerning his education or professional qualifications. If someone is going to lie about the small things, can he be trusted to tell the truth about the big things?

What about his assets? What might a jury think of the testimony of an individual who enjoys unexplained wealth? Direct examination testimony about how the cooperator has forfeited the fruits of his crimes will be undone if defense counsel can elicit admissions about unaccounted-for assets. Challenges to

his credibility not only paint the cooperating witness as a liar but also invite the jury to question the thoroughness and reliability of the prosecutors and investigating agents bringing the case.

Identifying such information takes a combination of extensive open source research, intense review of material obtained through discovery, and skillful interviews of relevant parties. While it varies by case, open source research typically includes, among other things, a review of federal and state criminal and civil litigation, and judgments, liens, and bankruptcies, if any. Corporate filings are a frequently overlooked source of information on individuals. As many now understand, social media can offer a trove of information about a given subject. Something as basic as a review of the personal identifying information used by someone can deliver dramatic results. Has a witness ever used a name, date of birth, or social security number different from the one he is using now? If so, why? What caused him to switch? Is that tied to a troubled educational or employment history? The thorough investigator also checks seemingly unimportant records such as internet domain registrations to find leads. This type of detailed review can help identify the obvious—such as multiple civil fraud claims that establish a pattern of unethical business practices or a false education record—as well as the subtle—a historical domain registration linking a witness to companies targeted by regulators for employing fraudulent accounting practices. Knowing where to look is important, but understanding how to interpret findings makes all the difference when, for example, one needs to establish that a witness’s claimed “oversight” is actually part of a pattern to intentionally deceive.

And what of relatively new research tools, such as those that allow research on the “deep” web—the unindexed part of the internet that is inaccessible to conventional search engines—as well as the “dark” web—the portion of the internet that hosts online criminal communities? Such research can develop information such as usernames, email addresses, and other personal information that may have been exposed through data breaches, hacking, or other illicit online activity. This otherwise hidden data can open new avenues of investigation or tie subjects to behavior they had assumed would remain hidden. For example, dark web inquiries in several of our matters have confirmed one surprising finding: many American men are amateur sociologists. What other conclusion can be drawn given the number who joined—strictly for research purposes—AshleyMadison, the dating website marketed to married people with the famous slogan, “Life is short. Have an affair.”?

Open source research is only one part of the process. Discovery and 3500 material frequently includes a variety of records, some rich with data in their own right, others with potential investigative leads. The competent investigator knows that travel and expense reports, telephone records, and computer hard drives are potentially some of the most valuable sources of information in a case. For example, a review of travel records can identify inconsistencies in prior testimony regarding activities that occurred on certain dates. Telephone record analysis can identify undisclosed contacts between key parties. When the witness’s electronic devices are available to the defense for inspection, digital forensic examination can provide evidence that a witness erased certain records on a crucial date or, as in one of our cases, made incriminating internet searches such as “Document Shredders Near Me,” “How to Wipe Data from a Hard Drive,” or “Countries Without Extradition Treaties with the US.” These are just the most obvious examples of the type of information that can be gleaned from a review of discovery materials. Depending on the circumstances of the case, the inquisitive investigator can develop much more.

The third part of the process, which is frequently the most important part, particularly when relevant records are limited, involves interviewing those with personal or professional knowledge of the witness. Such parties include ex-spouses, former business partners and professional colleagues, current or former neighbors, and former litigation adversaries. Some may have direct knowledge of events that undermine the witness’s credibility—such as information about ongoing bad acts—while others may be able to provide valuable context to information found during other phases of the investigation—such as explaining the significance of individuals who, according to telephone records, were contacted on a consistent basis. It is commonly held that “No man is a hero to his valet.” Our experience has shown that a corollary is “Woe to the cooperating witness who mistreated a long-serving executive assistant!” When

correctly approached, these witnesses can provide impeachment information, down to a map of where the figurative bodies are buried.

Given the resources, investigators can conduct a methodical and exhaustive examination of a government witness's life and provide counsel the ammunition to unleash devastating broadsides against the witness, if not the prosecution as a whole. For example, to the prosecutor bringing the tax case, the expert witness seemed credible, if not the premier expert in his field: a man who had provided expert testimony at numerous trials and whose background had never been challenged. It was only after we conducted a full background investigation in the US and in his home country that the true picture emerged: that of a long-time hustler whose former business partner was the personal lawyer for, and partner of, an infamous fugitive wanted for tax evasion. We found out the expert served on the boards of numerous investment funds incorporated offshore by a law firm known for assisting foreigners in sheltering wealth from tax authorities. We established that while serving as a government expert, he simultaneously partnered with individuals and companies that were associated with tax evasion. Using the intelligence we developed, the defense argued that the expert was merely a hired gun and the defendant was acquitted of all charges.

In another matter, our research eviscerated a cooperating witness's claim that his testimony was motivated by the poor health of his purportedly invalidated wife. After learning through research that his wife was an avid and active tennis player, we visited her tennis club and found she had been either club champion or held second place in women's doubles each of the prior five years. A visit to her workplace found that she climbed five floors of stairs to get to her office every morning. Defense counsel mounted a withering cross-examination of the cooperator and the defendant was acquitted of all charges.

It is a peculiarity of US law that the government's relationship to its cooperators is contractual and both parties are bound by the cooperation agreement. A thorough investigation of a cooperator's background can provide the defense with the ammunition to blow up that contract and, with it, the government's case.

Contact

Nicholas Peck

Senior Managing Director
+1 212 537 5300
npeck@nardelloandco.com

Michael J. Ramos

Senior Managing Director,
Chief Risk & Compliance Officer
+1 212 537 5300
mramos@nardelloandco.com

