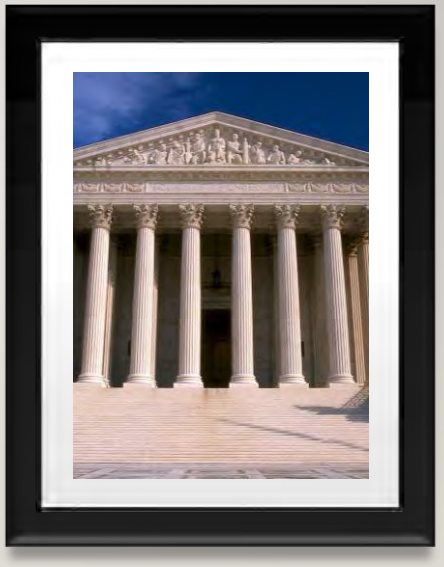
ILLINOIS RULES OF EVIDENCE RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) make the interrogation and presentation effective for the ascertainment of the truth,

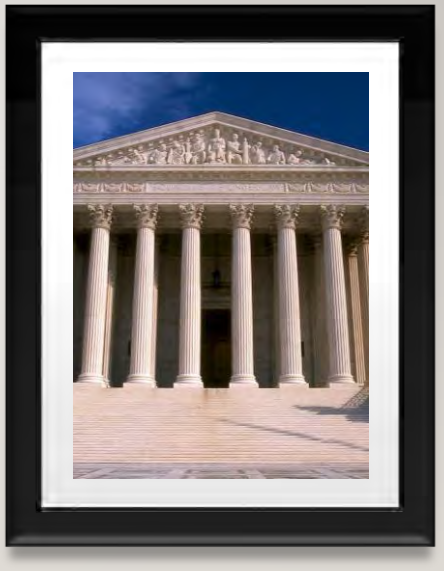
(2) avoid needless consumption of time, and

(3) protect witnesses from harassment or undue embarrassment.



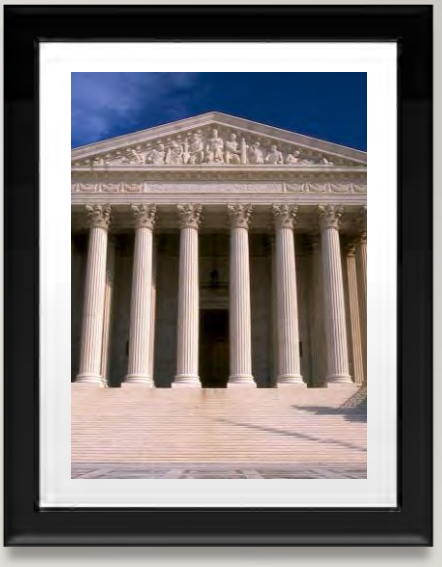
ILLINOIS RULES OF EVIDENCE RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(b) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness, which include matters within the knowledge of the witness that explain, qualify, discredit or destroy the witness's direct testimony. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.



ILLINOIS RULES OF EVIDENCE RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile or an unwilling witness or an adverse party or an agent of an adverse party as defined by section 2-1102 of the Code of Civil Procedure (735 ILCS 5/201102), interrogation may be by leading questions.



ILLINOIS RULE OF EVIDENCE RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

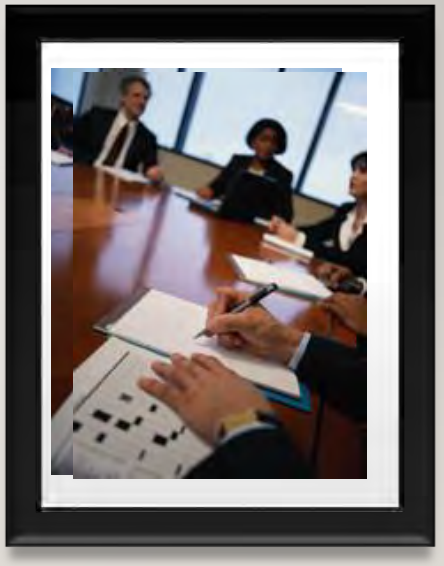
a) Rationally based on the perception of the witness, and

b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and

c) Not based on specific, technical, or other specialized knowledge within the scope of Rule 702.

ILLINOIS RULE OF EVIDENCE
RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based ins sufficient established to have obtained general acceptance in the particular field in which it belongs.

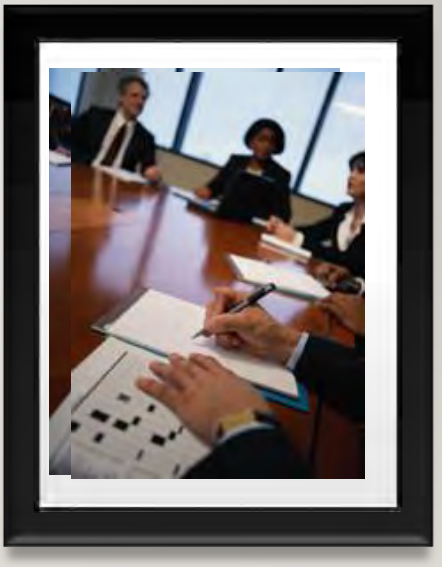


ILLINOIS RULE OF EVIDENCE
RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject, the facts or data need not be admissible in evidence.

ILLINOIS RULE OF EVIDENCE RULE 704. OPINIONS ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.



ILLINOIS RULE OF EVIDENCE RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclosure the underlying facts or data on cross-examination.

ILLINOIS RULE OF EVIDENCE
RULE 706. COURT-APPOINTED EXPERT WITNESSES

a) Appointment process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

ILLINOIS RULE OF EVIDENCE
RULE 706. COURT-APPOINTED EXPERT WITNESSES

b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

ILLINOIS RULE OF EVIDENCE
RULE 706. COURT-APPOINTED EXPERT WITNESSES

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

ILLINOIS RULE OF EVIDENCE
RULE 706. COURT-APPOINTED EXPERT WITNESSES

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

1) In a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

2) In any other civil case, by the parties in the proportion and at the time that the court directs – and the compensation is then charged like other costs.

ILLINOIS RULE OF EVIDENCE
RULE 706. COURT-APPOINTED EXPERT WITNESSES

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Expert. This rule dies not limit a party in calling its own experts.

CIVIL PRACTICE & PROCEDURE
ISBA
May 2017

Preparing for and Cross Examining Opinion Witnesses

I have tried to cobble together my views, as well as those of a lot of lawyers and judges, on the topic of opinion witnesses in trial litigation. Naturally, this is based on the Illinois Rules of Evidence, doing this for three decades, and perhaps a little insight.

Several things must be remembered. Everyone has opinions. But to be worthwhile, an opinion, yes, a perspective, is only worthwhile if it is purposeful, credible and based on critical facts of your case. Only then will it become persuasive.

My final admonition in this area is twofold. First, you must prepare, prepare, put your work aside, and prepare again. Lastly, you must recognize that humility is a virtue, not a sign of weakness. An attribute to internalize in everything you do.

I hope these materials are useful.

OPINION WITNESSES

- Qualifications (IRE 611) (IRE 702)
- Use subpoenaes/enforce them
- Has the opinion witness obtained the highest certification in the field.
  Kinnally Witnesses Statements & Depositions, pp. 3-4
- No experience in the field/various interests. Jack of all trades!
- Actually, expertise is focused in a different area.
- Money from testifying?
  How much?
  When? How long?
  Percentage of income
- Who hired him?
- Prior testimony?
  Plaintiff? Defendant?
  Particular law firm?
- You have never published anything in this area.
  What assumptions were made? They may be wrong.
- Data relied upon
  Insert 3. Scheid, Expert Witnesses Rule 703
  What did he review? What did he not review?
  Completeness
  Impeachment
- What independent investigation did he undertake?
  Report?
  Disclosure
- Prior inconsistent statements v. Consistent statements
- Learned treatises
- Use opposing expert to build up your expert.
- Ultimate issue (IRE 704)
- Independent v. Court appointed (IRE 706)
- Opinion witnesses can disagree
- Offers of Proof

Post Script:

- How Judges Influence Advocacy - Flaherty & Kinnally

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

[redacted])
)
Plaintiffs,)
v.) Case No. [redacted]
)
[redacted])
)
Defendants.)

NOTICE OF ISSUANCE OF SUBPOENA
FOR DISCOVERY DEPOSITION & RECORDS

To:

PLEASE TAKE NOTICE that on August 4, 2016, I caused to be issued a Subpoena for Deposition t[redacted], a copy of which is attached hereto and served upon you.

Patrick M. Kinnally (#03126201)
Kinnally Flaherty Krentz Loran Hodge & Masur, P.C.
2114 Deerpath Road
Aurora, IL 60506
Phone: (630) 907-0909
Fax: (630) 907-0913

AFFIDAVIT OF SERVICE

The undersigned on oath states that on August 4, 2016, I served this Notice by mailing, or other method as indicated above, a copy to each person to whom it is directed.

Chandra Shannon

SUBSCRIBED and SWORN TO before me
this 4th day of August, 2016.

NOTARY PUBLIC

OFFICIAL SEAL
LAURIE A GONZALEZ
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:01/08/19

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

[redacted])
)
Plaintiffs.)
v.) Case No. [redacted]
)
[redacted])
)
Defendants.)

SUBPOENA FOR DISCOVERY DEPOSITION & RECORDS

TO: *Via Certified Mail; Return Receipt #:* **7013 2630 0000 7096 8851**
[redacted]
c/o

1. **YOU ARE HEREBY COMMANDED** to appear and give your discovery deposition and give your testimony before a Notary Public at **2114 Deerpath Road, Aurora, IL 60506 at 2:00 p.m. on August 17, 2016,** in the above matter and with respect to the documents and tangible things you are to produce for inspection listed in the following Paragraph 2.

2. **YOU ARE FURTHER COMMANDED** to produce the following documents and tangible things in your possession or control:

- **SEE ATTACHED EXHIBIT "A" FOR DOCUMENTS AND TANGIBLE THINGS TO PRODUCE AND EXHIBIT "B" FOR INSTRUCTIONS & DEFINITIONS.**

SUBPOENA ISSUED BY:

Patrick M. Kinnally

YOUR FAILURE TO RESPOND TO THIS SUBPOENA MAY SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF THIS COURT

PROOF OF SERVICE

I, Patrick M. Kinnally, an attorney, on oath state that on August 4, 2016, I served this Subpoena by emailing in accordance with Illinois Supreme Court Rules 11, 12, and 204(a)(2), to the person whom directed at the address at the address set forth above by regular mail, postage pre-paid.

Patrick M. Kinnally
KINNALLY FLAHERTY KRENTZ
LORAN HODGE & MASUR, P.C.
2114 Deerpath Road
Aurora, IL 60506
P: (630) 907-0909
F: (630) 907-0913
Pkinnally@kfkllaw.com

YOUR FAILURE TO RESPOND TO THIS SUBPOENA MAY SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF THIS COURT

EXHIBIT A
RECORDS AND TANGIBLE THINGS TO BE PRODUCED

The documents, objects and tangible things t[redacted]s to produce for inspection, prior to the initiation of the deposition, no later than August 15, 2016, include the following documents and tangible things in your possession and control in accordance with the Instructions & Definitions attached as Exhibit "B":

(1) Your complete original file pertaining to this matter including, but not limited to, all deposition transcripts, records, documents, correspondence, notes, worksheets, calculations and electronically stored data that have been reviewed or created by you.

(2) Your current curriculum vitae or professional resume.

(3) All texts, treatises, authoritative writings, rules, regulations, ordinances, statutes or any similar material consulted or reviewed by you in connection with this case or used/relied upon to support any of your opinions.

(4) All billing invoices for work performed by you in connection with this matter.

(5) All records maintained by you regarding the number and frequency of referrals received by you as an expert or opinion witness and all financial benefits derived therefrom in the last five (5) years.

(6) Any other records, statements, photographs, physical evidence, demonstrative exhibits or any other tangible thing reviewed or created by you in connection with this case or relied upon in support of any -opinions held by you.

(7) A list of cases regarding jurisdiction and docket number where you have given deposition or trial testimony over the past five (5) years.

(8) Any and all additional materials given to you for review by the attorney retaining you.

If you claim any requested document or intangible thing was destroyed, discarded, lost, for any reason become unavailable, or is otherwise not capable of bring produced through your reasonable efforts, see Instruction F in the attached Exhibit B.

Your production must be made in accordance with the Illinois Supreme Court Rules, including the Rules concerning the production of electronic or digitally stored information, and the Illinois Code of Civil Procedure.

you must provide a list specifying each such document and setting forth the following information:

(1) The identity of each Person who authored or contributed to the document (and, if different, the signer(s));

(2) The identity of each Person who was the addressee or who received, viewed, or had possession, custody or control of the document or any copies thereof;

(3) The nature of the document (e.g., letter, memorandum, chart, etc.);

(4) As detailed a description as possible of the substance and contents of the document; and

(5) A statement of the circumstances under or by which the document was destroyed, discarded, lost became unavailable, or is otherwise incapable of being produced.

G. Documents in Your Control or Reasonably Available to You. You are further to produce documents not in your possession, but within your control, such as documents in the possession of any employees, attorneys, or other agents or documents which you can electronically access or retrieve, for example, using the Internet. You are also to produce documents that you can retrieve or obtain from third parties with reasonable effort, such as, for example, tax documents from the Internal Revenue Service, bank account statements from a local branch or customer service line, etc.

H. Response to Ambiguous Requests. If you perceive any ambiguities in a request to produce or these instructions or a definition, you must still produce the documents requested, set forth the matter deemed ambiguous, and state the construction used when producing documents.

I. Duty to Seasonably Supplement. Under the Illinois Supreme Court Rules, you have a duty to seasonably supplement or amend any prior production response whenever (i) new or additional information subsequently becomes known or available to you; (ii) new or additional Documents, objects or tangible things subsequently come into your possession or control or become known to you; or (iii) you learn or become aware that any information, Documents, objects, or tangible things are false, erroneous, incorrect, misleading, or otherwise would not constitute a proper response.

J. Objections. All objections to production, regardless of the basis for the objection, must be made within the 28 day time for responding and otherwise in accordance with the Illinois Statues and Supreme Court Rules governing discovery. If you withhold any information or documents on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, things, or information not produced or

EXHIBIT B
INSTRUCTIONS & DEFINITIONS FOR RESPONDING TO A REQUEST FOR PRODUCTION OR A SUBPOENA FOR DOCUMENTS

INSTRUCTIONS

A. Relevant Date Range. You are to produce any Documents or Tangible things requested that were in your possession, unless a different time frame is specified or if the request for Documents asks for documents existing "at any time," "ever," "whenever," "at all times," or such similar language eliminating any time scope.

B. Production of Paper and Electronic Documents. When producing "documents" (as defined below) you are required to produce both written tangible documents as well as any retrievable information in computer storage or digital format (i.e. electronic data). Retrievable information in computer storage or digital format should be produced in both printed format and in the original electronic format with all file data and metadata intact if the complete set of retrievable information, data, and all metadata transport, and recipient data (including "blind copy recipients" (so called bcc. recipients) displayed or intact, then the email should be produced in electronic format with such data. As a further example, if database records cannot be printed with all record fields displayed or intact (such as index numbers, last accessed or updated ID, date and other audit or transaction field information: or related (i.e. relational or join) records or fields), then the database should also be produced in electronic format.

C. Production in Adobe Document or Other Standard Format. The requestor encourages you to produce all documents in standard electronic formats for review by the requestor, such as Adobe Acrobat PDF, Microsoft Word, etc. ***along with*** any electronic files or date in their original computer format. However, please contact the requestor's attorney to discuss the scope and nature and receive specific consent to any such production in lieu of printed formats.

D. Original, Final, and Non-Conforming Drafts or Mark-ups. Unless specifically requested, you may product legible copies in lieu of original documents ***unless*** the original is specifically requested. You are to produce all final documents, as well as all drafts, summaries, versions, mark-ups, or copies of thereof which are not in every respect identical to an original or final documents.

E. Production of Entire Document. If any portion of any part of a document is responsive to any request, the entire document must be produced.

F. Currently Unavailable Documents. If any document or information responsive to these request once existed, but has been destroyed, discarded, lost, for any reason become unavailable, or is otherwise not capable of being produced through your reasonable efforts,

you must provide a list specifying each such document and setting forth the following information:

(1) The Identity of each Person who authored or contributed to the document (and, if different, the signer(s));

(2) The identity of each Person who was the addressee or who received, viewed, or had possession, custody or control of the document or any copies thereof;

(3) The nature of the document (e.g., letter, memorandum, chart, etc.);

(4) As detailed a description as possible of the substance and contents of the document; and

(5) A statement of the circumstances under or by which the document was destroyed, discarded, lost became unavailable, or is otherwise incapable of being produced.

G. Documents in Your Control or Reasonably Available to You. You are further to produce documents not in your possession, but within your control, such as documents in the possession of any employees, attorneys, or other agents or documents which you can electronically access or retrieve, for example, using the Internet. You are also to produce documents that you can retrieve or obtain from third parties with reasonable effort, such as, for example, tax documents from the Internal Revenue Service, bank account statements from a local branch or customer service line, etc.

H. Response to Ambiguous Requests. If you perceive any ambiguities in a request to produce or these instructions or a definition, you must still produce the documents requested, set forth the matter deemed ambiguous, and state the construction used when producing documents.

I. Duty to Seasonably Supplement. Under the Illinois Supreme Court Rules, you have a duty to seasonably supplement or amend any prior production response whenever (i) new or additional information subsequently becomes known or available to you; (ii) new or additional Documents, objects or tangible things subsequently come into your possession or control or become known to you; or (iii) you learn or become aware that any information, Documents, objects, or tangible things are false, erroneous, incorrect, misleading, or otherwise would not constitute a proper response.

J. Objections. All objections to production, regardless of the basis for the objection, must be made within the 28 day time for responding and otherwise in accordance with the Illinois Statues and Supreme Court Rules governing discovery. If you withhold any information or documents on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, things, or information not produced or

disclosed and the exact privilege which is being claimed in accordance with Illinois Supreme Court Rule 201 (n).

K. Not Limiting Language. All requests for production which are stated in the conjunctive are to be read as if stated in the disjunctive and vise-versa (i.e., answer each request as if requiring an and/or response).

L. Affidavit of Completeness. You are required to produce an Affidavit of Completeness stating whether the production is complete. If you have received a subpoena for documents and choose to appear on the date for production, you will be sworn under oath to testify that the production is complete.

M. Organization and Manner of Production. All documents must be produced in the order in which they are kept in the usual course of business or organized ***and*** labeled to correspond with categories in the request. The failure to organize the requested documents constitutes a discovery abuse subject to sanctions.

DEFINITIONS

As used herein, terms are to be given their ordinary and plain meaning; however, without limitation thereof, the following terms and phrases as used herein shall include, but are not limited to, the following specific definitions:

1. "You" and "your" means:
   a. You [redacted] and/or [redacted], LLC;
   b. Any non-publically traded entity (e.g., corporation, partnership, limited liability company, association, trust, co-operative, etc.), in which you, your spouse, or your minor children have any income, ownership, beneficial, signature, controlling, or similar interest; and
   c. Any employee, servant, attorney, independent contractor, accountant, or other agent acting under the control or direction of, or acting on behalf or for the benefit of, you and/or [redacted], LLC.

2. The word "Documents" are used herein "includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, communications and all retrievable information in computer storage" as set forth in Illinois Supreme Court Rule 201(b)(1) and (ii) further, without limitation to Rule 201, includes telegrams, reports, invoices, bills, contracts, notes, studies, reports, ledgers, statements speeches, charts, diaries, calendars, journals, and audio or video tapes or electronic files. Retrievable information in computer storage includes word processing documents, emails, databases, spreadsheets, blog posts, html, xml or similarly encoded web pages and any other computer or electronic files, whether stored on a hard disk drive, laser disk, floppy disk, magnetic tape, solid state memory

storage, or otherwise.

3. The word "Person" shall mean any natural person or any entity, including, but not limited to, any corporation, limited liability company, limited liability partnership, limited partnership, and government or subdivision thereof.

4. The words "referring", "relating", or "concerning" (and any derivations thereof) shall mean all information, facts and / or documents that directly, indirectly, or in any other way constitute, evidence, reflect, support, negate, bear upon, touch upon, incorporate, affect, include, pertain to and / or are otherwise connected with the subject matter about which a request or interrogatory is being made.

5. The term "interest" includes all rights, titles, claims, benefits, control, or legal shares, whether, vested, contingent, remainder, equitable, legal, beneficial, partial, individual, or joint, and whether claimed to be held as a trustee, nominee, or some other representative capacity.

ILLINOIS STATE BAR ASSOCIATION™

TRIAL BRIEFS

The newsletter of the ISBA's Section on Civil Practice & Procedure

Reprinted with permission.

August 2016, vol. 61, no. 2

Witnesses, statements and depositions: A few new thoughts

By ***Patrick M. Kinnally***

I have been taking statements and depositions from people since 1975. First, it was in the context of working for a federal agency where sworn statements were used in enforcement proceedings before a federal administrative law judge. Many of these statements were in the Spanish language. This made me listen to what was said. Later, when I became a lawyer, statements were taken for the purpose of investigating a case and depositions were conducted formally for court proceedings. These experiences helped me decide whether or not what was said was material, accurate, and credible; or maybe should a statement be recorded at all. What is said, counts. What is unsaid may be more important.

This training taught me to consider three things prior to taking statements or depositions. First, in order to appreciate a witness' story, you must know why you are doing it. In short, is it purposeful? Does it help you achieve the theory of your case? Next, what are you going to do with the statement or deposition? Is it evidentiary? Do you want to limit the story, learn facts, and/or make a record? Third, how are you going to take the statement or deposition? This question has two components. Initially, will you "go after" the witness or will you use a style that puts the witness at ease? Finally, will you take the statement by oral question, ask the witness to write it out longhand, take your own notes, record it for your own advantage, or use the formal discovery devices provided by our Supreme Court Rules? Hopefully, this article may provide some insights.

Deposition is a curious word. Literally, it means to take one from a position. It's one of the words, like interrogatory, that lay people do not understand. There is a little mystery to it. Your job is to remove the shroud of what a deposition may connote to your client. Strip it down. Make it the sworn statement it actually is.

Depositions are part of the discovery process of a lawsuit. They did not used to be. Historically, depositions were not routine exercises. Leave of court was required. This is still true for some medical professionals (735 ILCS 5/2-1003, S.Ct.R. 204(c)); and in ordinance and small claims cases (S.Ct.R. 287, S.Ct.R. 201(b)). In arbitration cases, depositions are basically limited to the parties and treating physicians (S.Ct.R.222). Liberal rules of discovery were promoted because judges and legislators felt that surprise by testifying witnesses was not resulting in the promotion of the truth-seeking process we aspire to as justice. Now depositions occur in almost every civil case. Lawyers make money doing them. Remember, there is no requirement that you take a deposition. Nonparty, lay witness statements can serve the same function. Also, they are less expensive and can be taken *ex parte* in certain circumstances.

The rules that pertain to depositions in the discovery process have been laid out extensively by the Illinois Supreme Court (S.Ct.R. 201). The rules provide the purpose for which depositions may be taken in a pending action (S.Ct.R. 203), how to take a deposition before a suit is filed (S.Ct.R. 217), to perpetuate testimony (735 ILCS 5/8-2301) and to compel the appearance of a deponent in this state, as well as other states (S.Ct.R. 204). The rules provide where the deposition may be taken (S.Ct.R. 203), who it may be taken in front of (S.Ct.R. 205), how it is to be conducted—orally (S.Ct.R.206) or in writing (S.Ct.R.210), what you do with the deposition once it is over (S.Ct.R. 207), and who pays for it (S.Ct.R. 208). Finally, the rules provide how you can object (S.Ct.R. 211), what you can use a deposition for (S.Ct.R. 212 and 191, 735 ILCS 2/1005), and what happens if you do not show up for a deposition (S.Ct.R. 209,219).

So, you need to know the rules. If you are in state court, these maxims are different than those in federal tribunals. Also, they may be different for arbitrations and mediations. In federal court, a deposition transcript can be used with greater ease than in an Illinois trial court (Fed Rule Civ. Proc. 32(d); S.Ct.R. 212). In other words, a party cannot wait until trial to bring up objections which could have been addressed during the deposition. Illinois Supreme Court Rules, on the other hand, list the type of objections that may be made at deposition. Full disclosure is required. Objections as to the form of the question, privilege, and that the question will not lead to the discovery of evidence admissible at trial are the only reins on this philosophy. So, you need to read the rules. As to the federal rules, obtain a copy of David Malone's *Deposition Rules.* It is a small book with a lot of good information. Also, Tom Mauet's books, *Fundamentals of Trial Techniques and Trials* and *Pretrial* have good analyses of taking witness statements and depositions[1]. And, James McElhaney's Trial Notebook (2005) is insightful about asking simple questions, among other topics.

Six questions are applicable to the taking of any statement or deposition. You learned them a long time ago. They are: what, where, why, when, who and how. That may sound simple. It is not. Those inquiries cover a lot of ground. If you keep these questions in mind throughout your examination of the witness, you will simplify things. The deposition transcript will be much more understandable.

When you talk to your client, put yourself in her position. Witnesses are anxious. They do not know what to expect. They think they have to know something because they are the focus of your interest. Witness preparation varies not only by the individual but also by the theory of recovery. A "stoic" and a "whiner" present different problems, as does the surviving spouse and a child in wrongful death litigation. Five minutes before the deposition is not enough. Make house calls. See how people experience their lives. Doctors used to do it. Why? Because people know you are interested in them when you call them at their homes. That promotes trust.

Explain to your client how the deposition proceeds in terms of examination. Tell your client what to expect in terms of your opponent's examination. Make sure your witness understands the question and that she can request clarification of any question at any time. Instill in your client a wariness of questions that start with "Don't you agree with me?," or "Isn't it true? " that such and such happened. Explain what objections are at a deposition. Tell him why you make or don't make objections and what to do when you do make an objection. Remember, you client wants to know why you are instructing her to not answer a question. Describe not only your theory or the case, but also the burden of proof and its quantum. Discuss changing an answer, signing the deposition, and what happens to the transcript. Be sure your witness understands what use(s) can be made of his/her testimony. The importance of the impression that your client makes at the deposition cannot be overemphasized. Cast her in a favorable light. It is your job not just to turn that light bulb on, but to illuminate your client as both likable and credible.[2]

Witness statements and depositions have two purposes. First, they are used to gather information. You need information to not only assess your opponent's theories, but also because the witness probably knows more about the facts of the case than you do. In this regard, taking a witnesses deposition can provide links to other witness testimony you have not discovered which produces new proof, corroborates your client's theory, or discredits the opponent's defense. Most importantly, you need information to assess the viability of your own position.

Another purpose of the deposition is to seal the witness into a position which he cannot change materially. In short, you must make the witness "take a stand" with respect to their own testimony. Although much of a deposition contains open-ended questioning, there comes a time during the deposition that you need to push the witness into a corner from which he cannot emerge without contradiction. This is not merely an exercise in logistics. More importantly, it has do with credibility. A person can only say "I do not remember" so many times before she loses any persuasive force as to having knowledge on the topic about which she is being questioned. Similarly, if a witness takes an inconsistent or vague position on a topic of which he is supposedly knowledgeable, he is either feigning, not disclosing for a reason, or ill-informed. This happens often with opinion witnesses such as physicians or appraisers, who always want to know the other side's theory of the case before disclosing their views. Be persistent. Make them take a specific position. You are fixing one's belief in a given array of facts. You will use that at trial to possibly show mistake, inconsistency, or impeachment. You set the stage now in clear, precise utterances from the witness.

Some lawyers take depositions for long periods of time. This is understandable in some cases, but they are a singular minority. Most cases where depositions are taken are car wrecks and divorces. In Illinois, we have a rule that depositions must be completed within three hours unless you obtain permission from the court for a longer period of time. This is a good rule. Depositions should not rival root canal dentistry. Generally, you do not need three hours to understand a witness's view of what happened as he approached the open intersection and a collision occurred. Focus your inquiry.

If your opponent is using three hours to take such a deposition, be wary. Your opponent is probably beefing up his billable hours, trying to show how knowledgeable he is, or trying to tire your witness so she makes an admission she might not otherwise have made. Lawyers are great at covering ground they have plowed twice before. Do not permit this to happen. Instruct your witness about this before it happens. There is nothing wrong with your witness saying, "I already answered that." If the lawyer persists, which she can, then the witness can say she stands by her earlier answer and does not have anything to add since she thinks her original answer was accurate. This should suffice. Generally, I ask my opponent before the deposition starts how long he thinks it will take. If you do not get a straight answer, then take time with your witness before the deposition starts to alert her.

Remember, during a deposition, there is nothing wrong with taking breaks. You should encourage your witness to do that. Don't talk to the witness during the break about her testimony. I will address this later in this article. Tell the witness to go for a five-minute walk and move around. Keep a clear head. Tell him not to agonize over his testimony and, for certain, do not evaluate his testimony during the deposition. This is not a time to be handing out report cards.

The above rules apply to all witnesses, but there are special rules that apply to opinion witnesses. There are a few points you need to remember. First, with an opinion witness, you must prepare, prepare, and then prepare some more. Next, appreciate that an opinion witness may be (and probably is) smarter than you are about the topic of her opinions. This not a sign of inefficacy on your part but, more importantly, respect. This type of witness truly believes he knows all. And he or she is making money doing it. It is your job to test the witness' view. The witness' opinion is only a part of a trial's mosaic. Yet, you are the artist who places or arranges the mosaic's tiles in an understandable, simple form. There are very few opinion witnesses who have the mettle to say their opinion is the only correct one. Reasonable persons, as well as reasonable opinion witnesses, can differ as to a given set of facts, regardless of their pedigree. Remember that. Use it to your advantage.

Opinion witnesses can be condescending. This is a trait you want an opposing opinion witness to flaunt. Let her puff, strut, or manifest her importance. People, like jurors, generally do not like this. Humility is a virtue with which most people identify. It is the utmost factor in establishing witness credibility. Imbue that notion in you own opinion witnesses and your trial tapestry will be more successful.

Try to elicit some of the following information from any opinion witness:

• What significance does the witness have to the elements of proof in the case? Is her testimony relevant and material? Is it accurate not only as to philosophical integrity but as people understand it as it applies to the facts of your case?

• Read the witness' resume. Determine where his expertise rests. Obtain his written materials. Has he given any speeches? Read them.

• Obtain the witness' prior depositions, trial testimony, and any reports introduced into evidence. Opinion witnesses often waffle on giving up past testimony. Don't let them.

• Is the witness a teacher? Look at the courses he teaches. Talking with his students might be worthwhile.

• Determine what materials the opinion witness is relying upon and get his working papers and notes. Carefully craft Rule 213 interrogatories and use subpoenas.

• Get copies of all correspondence between the opposing party and any attorney with this particular witness.

• Determine the amount of independent analyses or testing performed by the witness. Are you in a *Daubert* or *Frye* jurisdiction?[3]

• Accentuate the fact that the witness has no first hand contact with the topic or person about whom she is testifying.

• Ascertain the amount of income the witness obtains from being an opinion witness and whether he has been employed by your opponent or persons with similar interests as your opponent before.

• Limit his area of expertise. Make him concede that other knowledgeable experts in the field have different opinions and reinforce that with recognized professional literature.

• Read the transcript and determine whether or not the witness will hurt you based on his expertise, the reliability of his analysis, and his credibility.[4]

Finally, I think you will find the following 12 maxims for witness preparation useful in taking statements or depositions.

1. TELL THE TRUTH

There is no substitute for this. But remember, truth is based on knowledge, not supposition or what the witness thinks she ought to know. Also, truth is not the platitude we learned in law school or Sunday school. Truth is based on one's perception, which is as different for your witness as it is for you. Perception centers on one's ability to distinguish fact from figment. Factors such as environment, mores, and personal and physical attributes color one's perception. Perceptions have varying accuracy, but they become "truth" based on one's belief in the "truth" of what is perceived. This is reinforced by rationality. Don't assume that "It had to be that way," or "that's the only way it makes sense." What is objectively reasonable may be persuasive but is not necessarily true. DNA testing has taught us this. Truth is seldom black and white; in fact, it is usually gray. No one likes that, but you must accept it and address it with your witness.

2. DON'T BE SOMEONE ELSE

If you do otherwise, you will not be sincere; if you are not sincere, the examiner or jury will see through this. This will be held against you or your witness, or both. Speak your own language. If you try to use words that you are unfamiliar with--being someone else--you might as well be speaking Pashto. You will not create interest but thwart it because of misunderstanding. This is as true for a witness as it is for a lawyer. The witness becomes hollow and thus incredible. A witness's world view cannot be changed, but her attitude can be altered. Shaping behavior and recognizing the

undesirable habits of your witness is critical. Instruct, do not preach to your witness how he can change his persona.. A witness's flaws must be addressed with candidacy, at the outset. Forgiveness is not given; it is earned. You accomplish this by displaying fault at the first opportunity.

3. DON'T BE PRESIDENTIAL

Admit what you know; do not admit what you do not know. As Americans, we think we have to know the answer; otherwise, we have failed. Others will think we are uninformed or not intelligent. Failure, instead of being an opportunity to learn, often creates rebuke or reprimand. There is a lot of guilt in American society. It promotes cover-ups. That leads to deception. We learned this from Richard Nixon and Bill Clinton. Most guilt is learned behavior. Guilt, unlike true sorrow, has no place at a deposition. Nor should you permit blame to become arrogance in your witness or you. The latter is an unappealing attribute. It promotes evasiveness. Questions that are answerable by your witness should be done directly. Don't equivocate. "Is" means "is".

4. RECOGNIZE LIMITATIONS

A witness who thinks he is more crucial or dignified with respect to an issue or person only deceives himself. Humility is a virtue, not a sign of weakness. The opposing examiner must be respected with a wary ear and eye, but this caution does not equate with incivility. This requires the ability to listen to the question asked, not only in its words, but its tone and manner. One human condition is aging. With it comes an affect on memory. Again, people's memories are shaped on not only what they want to remember or forget, but also what they think others think they should remember. The latter has no place in witness preparation. Memories fade. Using pre-marked documents and exhibits to assist your witness is the key.

5. VOLUNTEERING IS ANATHEMA

Again, as Americans, we are quintessential volunteers. It is part of our American heritage. There are "1000 points of light" in the United States. At least, we believe that. The truth of that proposition is not significant. We want to help. We need to help. If we do not, it becomes a moral failure. You must instruct your witness against this attribute when testifying. The other prong of volunteering addresses knowledge. A witness thinks he has to have an answer; otherwise he has failed. Let's face it, we think we know it all. These attitudes have no place at a deposition. Morality, other than telling the truth, has no place in witness preparation. Nor does helping or volunteering. This is the most difficult cultural trait to overcome in preparing a witness for a deposition. Witnesses do not like this. They fight it.

6. TEACH LISTENING

It is difficult for us to listen because we think we have to say something to have any impact. Also, because we think we have something to say, we are always formulating our answers while the person with whom we are conversing is talking. We used to call it "making a point." People think this is the way depositions proceed; she who can make her point, wins. This is wrong thinking. The purpose is to display facts. To make a word picture. To display a perspective. To make a favorable presentation. In other words, to expand, as well as limit, depending on whom you represent. You can do neither unless you listen. You must also be vigilant in your view of the speaker's tone, body language, and when he does not speak. Silence can be telling. Observe it.

7. DO NOT ADVOCATE CHARITY

Once the deposition commences, the rules apply. Adhere to them to the letter. A deposition or trial is a process for reaching a decision, not an exercise. You need to have a rhythm more than a flow. Don't let your opponent talk to the witness once the deposition starts. Don't let her make long-winded, oral objections. Discovery depositions are extremely wide ranging under Illinois law. Do not let your witness speculate if a document can be used as a prompt. Make the opponent produce it. Documents should be reviewed during preparation but not necessarily given to the witness to review. Make the witness answer specific questions. Try to reinforce with the witness that guessing at questions only hurts. Do not let your witness get lazy with her answers.

8. SHIFTING GEARS

Don't be afraid to tell a witness to change his testimony if it needs to be corrected. Making a mistake is human. So is changing a wrong answer. We all did it in school and were encouraged to do so. Likewise, at a deposition, if the question is not understandable, it should be made so. During every deposition your witness can never comprehend every question. Make sure your witness requests clarification of questions. Many lawyers ask questions with words that are unintelligible and stilted. Your client must be reminded that these questions should be and will be changed at her request. Your witness needs to know that asking an examiner to re-phrase a question is a good thing. It shows intelligence, not its antonym. It shows she is listening. If your client does not do this in her deposition, you should be disappointed. Remember, your witness knows more about the event in which she is being deposed than the examiner. Otherwise, the deposition wouldn't be occurring.

9. EXPLAIN THE PLAYERS AND THEIR PURPOSE

You need to tell the witness who the judge, the court reporter, and the other lawyers are. More importantly, you need to describe what their purposes and roles are. It is not enough to say what a transcript is and how it is prepared. What happens to it once it is prepared? Is this a discovery deposition or an evidence deposition? Who reads it? Why? Is it evidence? What is an objections's effect? What does the witness do when someone objects? Explain applicable privileges like attorney-client, work product and whether medical or psychiatric records will be produced and how that happens. As to your opponent's lawyer, who does he really represent? Does he get paid by the insurance company? Why is he taking your client's deposition, and what is his purpose? Explain the dichotomy of expected styles of the "nice guy lawyer" or the "aggressive advocate". Make sure your witness understands that your opponent is not only prying but also appraising credibility. Ninety-five percent of all cases are settled. Your witness needs to know that before his deposition is taken. Spend time with your witness before the day of the deposition, not just 15 minutes beforehand. If you try the case, take your witness to the courthouse so she can understand the layout of the bench, bar, and jury box. This will help your witness talk to and make eye contact with the jury or the court instead of locking in on your opponent's examination.

10. WOODSHEDDING

When I began practicing law, the concept of witness preparation was foreign. It was not taught in law school. Suborning perjury is not on the bar exam. It should be. Many lawyers do not understand it. Woodshedding has two components: preparation of direct examination and anticipation of cross-examination. Although the latter is always highlighted the former is usually more important. This is because it is your client's story. She has to tell it, not you. If it is not understandable, the impression she makes will be unfavorable. Simplicity and credibility must be the hallmarks of what is said. Everyday words, that provide reasons to believe a proposition is more likely true than not, must be used. The most important thing about cross-examination is cross-examining your own witness before the deposition and accentuating her weak points. By doing this, you can address these low-points in direct. The witness can then get the idea. As to your own cross-examination, the point is realizing that sometimes you do not need to do it. My partner, Bill Murphy, taught me this 25 years ago. It took a while for me to understand this. Limit yourself. Learn to sit down. This requires the jury or examiner to focus not on you, but on what the witness says. Woodshedding is about providing leadership to your client without taking the lead role. The latter will only get you in trouble. You are the guide, not the witness. Don't carry the latter's baggage. Spend time with your witness not only before but after the deposition is over. Explain the theory of the case and the role of the witness in that theory. After a deposition your client will invariably ask, "How did I do?" This should be expected. Do not ignore the question. Be objective. Deal with the problems or warts in your case as well as its high points. Sugar-coating leads to unrealistic client expectations. When those are not met, you will be blamed. This only leads to trouble for you with the client. Every case has peaks and valleys. Recognize and explain that. You want to keep your case on the diagonal going up, not down; and that will not be vertical--no real case or witness ever is.

11. WITNESS LYING

Lying in the business of lawyering is common. Witnesses do this. You cannot ignore this behavior. The Rules of Professional Conduct discusses the topic. Read them. Let me provide an example. You have agreed to represent

Maria. Maria has made a misrepresentation in her immigration law case where she has submitted an untrue affidavit to an immigration court. She wants you to correct this. What do you do?

Historically, an appropriate course of action was simply to withdraw from representation. This no longer is appropriate. Illinois Rule of Professional Conduct Rule 3.3 (Candor to the Tribunal) (RPC) states a lawyer shall not:

> ***
>
> (a) offer evidence that the lawyer knows to be false: If a lawyer, the lawyer's client, or 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. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> ***

The Rule casts a wide net. It applies to all venues where contested decision making results. That is not just courts: but all administrative settings where fact finding and adjudication occurs. It imposes on the attorney the obligation to rectify fraud even if it occurred prior to the attorney's representation. Significantly, it does not only apply to the attorney's client, but to *persons* whom have engaged or intend to engage in fraudulent conduct related to the adjudicative proceeding.

For the attorney this has been in effect since 2010 so it is not a new rule. The point is not what we as attorney's know; it is what our clients know. So in our hypothetical Maria must understand the limitations this rule mandates. Talk to her about it. The attorney client privilege shields from the eyes or ears of others what our clients tell us in confidence. This Rule, like the crime fraud exception, is a very clear departure from the attorney client privilege. The point being, that at the outset of your representation you need to have a discussion with your client about this rule.

12. TALKING TO YOUR CLIENT DURING THE DEPOSITION

A final rule has to do with whether you can talk to your client once the deposition starts. Two views of whether you can do so are apparent. Which school of thought you adhere to is important: but what is more significant is you have to discuss it with your client. They expect it. So you need to have a consistent perspective.

Two views on whether you can talk to you client-witness during a deposition prevail. One is based on the idea the lawyer has a right to consult and advise a client of privileges available. The other is unqualified, based on the lawyer's duty to the client. A very good article exists on the topic at least in the federal context. "But , we were on a Break" Lovelette and Hallaj, ISBA *The Public Servant* (June 2014, Vol. 15 No. 4) Take a look at it. (See also, *Geders v. United States* **425 U.S. 80** (1976) and *LM Insurance Corp v. ACEO Inc.* 275 F.R.D. 490 (N.D. Ill. 2011).

It seems to me in the to me in the civil context the right to confer during a deposition is limited to inform a client of applicable privileges. Of course, this is a conversation you should have already had during witness preparation. The ultimate point is: talk to your client about discussions that might occur between the two of you during the upcoming deposition before it begins. Than a problem will not occur.

CONCLUSION

Preparing yourself and witnesses for statements and depositions requires forethought and recognition that, as Americans, we think we possess an incredible intellect, are very compassionate, and know more than most about the

world and our neighbors. That is a troubling recipe. If you address its ingredients, recognizing its limitations, you will take a statement or deposition which is persuasive, believable, and purposeful.

---

1. Malone. Deposition Rules (National Institute for Trial Advocacy 2001); Thomas Mauet Pretrial (8th Ed. 2012) Trial Evidence (5th Ed. 2011) Trial Techniques and Trials (9th Ed. 2013)

2. Hegland. Trial and Practice Skills. (West, 2002). pp. 80-93.

*3. See Daubert v. Merrill Dow Pharmaceuticals (1993) **509 US 579**. Frye v. United States (D.C. Cir. 1923) **293 F 1013**. See also Donaldson v. Central Illinois Public Service (2002) **199 Ill.2d 63**, 82).*

4. See Clancy, Michael W. "A Primer on Selection and Management of an Expert Witness." Chicago Daily Law Bulletin. March 28, 2003. Tanford, J. Alexander. The Trial Process: Law Tactics and Ethics (3rd Edition 2002). pp. 338-348. Thomas Mauet Pretrial (8th Ed. 2012) Trial Evidence (5th Ed. 2011) Trial Techniques and Trials (9th Ed. 2013)

« **Back to the August 2016 Newsletter**

Member Comments

ILLINOIS STATE BAR ASSOCIATION™

Illinois Bar Journal

September 2012 • Volume 100 • Number 9 • Page 492

The Magazine of Illinois Lawyers

Expert Witnesses

A Short Guide to Using Cross-Examination to Impeach Experts

By Hon. James M. Varga

This article looks at some of the dos, don'ts, and special rules that apply to impeaching expert witnesses by way of cross-examination.

For witnesses giving opinion testimony about matters requiring special knowledge or skill, judges instruct the jurors with IPI 3.08,[1] stating in part that they are not required to accept the testimony and they should give it whatever weight they think it deserves. Skillful impeachment can help you reduce an expert's influence.

This article looks at some of the dos, don'ts, and special rules that apply to using cross-examination to impeach expert witnesses. Although the majority of cases cited here involve medical negligence, they provide a solid general framework to confront expert evidence in civil trials through pre-trial motions in limine as well as objections throughout trial. (For more on this topic, see Illinois Rules of Evidence 703: The Expert's Way to Avoid the Hearsay Rule by Justin D. Scheid in the May 2012 IBJ.)

Hearsay evidence and the "Trojan Horse" factor

A key piece of advice about expert impeachment and hearsay speaks to what you may *not* do. Experts may not be impeached with hearsay statements that are being used as a "Trojan Horse" to slip otherwise inadmissible evidence into the trial.

Two of the best cases explaining this error are *Rios v. City of Chicago*[2] (improper cross-examination of structural engineer on hearsay statements in deposition of bystander re: weather conditions of streets, sidewalk, and alley), which cites *Jager v. Librett*[3] (improper cross-examination of plaintiff's treating physician on emergency room records and ambulance report generally relied upon by physicians but not relied upon by plaintiff's treating physician).

In accord with *Rios* and *Jager*, facts, data, and opinions not properly admitted into evidence, reviewed by an expert, or reasonably relied upon by another expert may not be used to impeach an expert. An expert may be cross-examined on reports he or she did not review or rely upon, but only if the reports are proper cross-examination tools and not an attempt to slip inadmissible hearsay evidence into trial.

Cross-examiners of experts can *alter facts or subtract facts* to test the bases of an expert's opinion but *cannot add inadmissible facts*. The cross-examination should test the expert's opinion by asking if *other* facts, data, or opinions would *alter* his or her opinion.

Note that the limiting instruction IPI 2.04 ("Expert Testifies to Matters Not Admitted in Evidence")[4] is designed to stop opponents from using non-admitted facts in your expert's testimony as substantive evidence in opening statements, direct and cross-examinations, and closing arguments. Make sure you ask the judge to give it if you are using expert testimony. If jurors are not given IPI 2.04, they are free to base their deliberations upon inadmissible hearsay.

Authoritative texts, articles, and treatises

Although authoritative texts, articles, and treatises are hearsay and cannot be introduced as substantive evidence, they can be used for impeachment.[5] A foundation must be established that the materials are authoritative. That foundation need not be established by the witness being cross-examined (although the witness may concede the foundation) but may be established by another witness with expertise in the subject matter or by judicial notice.[6]

The foundation-establishing question does not have to contain the word "authoritative;" substitute words have been found sufficient (e.g., "standard," "well-respected," "a very good book," a "standard book," and a "good source").[7]

Expert's personal practices

Although personal practices of an expert physician cannot form the basis of his or her opinion on the standard of care in a medical negligence case, to the extent those practices are *inconsistent* with the standard of care they may be relevant to test the credibility of that witness and may be a subject for cross-examination.[8]

Scope of cross-examination

In general, the scope of cross-examination is limited to the scope of direct examination. It may, however, extend beyond the material raised on direct examination to information within the witness's knowledge that explains, qualifies, discredits, or destroys the witness's direct testimony.[9]

The scope of cross-examination is not bound by the actual material discussed during direct examination but is controlled by the subject matter of the direct.[10] To test the credibility of the witness, cross may go outside the scope of direct.[11]

Supreme Court Rule 213

For cross-examination of an opposing party's expert, Rule 213 disclosure requirements simply do not apply.[12] An opinion to establish the authoritative foundation of materials upon which an expert intends to base his or her opinions must be disclosed under Rule 213,[13] but this is not true for cross.

This freedom to cross-examine specifically stated in Rule 213 does contain a restriction on cross-examination in cases involving multiple parties and multiple representation: "In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination."[14]

Despite the mandatory language in Rule 213, undisclosed opinions may be admitted if an attorney opens the door during cross-examination. That attorney cannot then claim prejudice by any redirect examination raised on that testimony.[15]

Interest, bias, qualifications, and experience

Traditional grounds for impeachment are an expert's interest, bias, qualifications, and experience.

Bias/interest. As discussed in *Keating v. Dominick's Finer Foods, Inc.*,[16] cross-examination of an expert is permitted in the areas of the amount and percentage of income from testifying, the frequency of such testimony, and the party for which the testimony is offered, citing the two leading cases of *Sears v. Rutishauser*[17] (fee, prior testimony for same party, financial interest in outcome, but not cases with no relationship to litigation) and *Trower v. Jones*[18] (annual income serving as an expert and frequency of testimony for a particular side, but not nature of testimony from other referrals).

Cross-examination on consulting activities, in distinction to practicing, is also subject to impeachment.[19] At the 2012 Illinois Judicial Conference, McHenry County Judge Michael T. Caldwell insightfully recommended an *in camera* inspection by the judge of an expert's tax returns obtained through discovery to remove irrelevant personal information, citing *New v. Pace Suburban Bus Services*.[20]

An expert's retention by opposing attorneys in another case is subject to impeachment,[21] but cases split on permitting cross-examination on an expert's original retention by an opposing attorney in the same case.[22] The relationship between the plaintiff's attorney and plaintiff's expert is also a subject for impeachment.[23]

Reprimand or discipline. Cross-examination on current reprimands or restrictions (not pending proceedings) on an expert's medical license is proper impeachment. In *Cetera v. DiFilippo*,[24] a standard of care expert was cross-examined on a letter of reprimand issued a year before trial. The *Cetera* opinion cites *Creighton v. Thompson*[25] (standard of care expert cross-examined on current restrictions) and distinguishes *O'Brien v. Meyer*[26] (cross-examination of medical expert with Florida license barred on previous failures to pass Illinois licensing examination), and *Poole v. University of Chicago*[27] (reversal where jury was informed of disciplinary proceedings pending against expert).

The *Cetera* opinion rejects the plaintiffs' argument that there must be a relevant link between the expert's reprimand and his or her opinions but also concluded any error would have been harmless. The reprimand reflects on the expert's qualifications and has some tendency to lessen his or her credibility.[28]

In light of the "harmless error" comment, your impeachment is on more solid ground if you can show a nexus between the disciplinary action and the subject matter of the expert's testimony. For example, state discipline of an expert for his past record-keeping practices has little, if any, relevance to his testimony on the surgical procedure at issue and has a questionable relation to the expert's qualifications and credibility as they relate to the surgical procedure.

In *Somers v. Quinn*,[29] the majority opinion holds that the failure to hold a medical license does not bar a medical expert from testifying in a medical negligence case but is a factor for the trial judge to consider in his or her discretion, citing the Expert Witness Standards statute[30] and interpreting *Sullivan v. Edward Hospital*.[31] In support, the majority relies upon *Thompson v. Gordon*,[32] addressing the Illinois engineering license requirement. Cross-examination would address the expert's failure to hold a medical license. The concurring opinion, however, interprets *Sullivan* to require an expert to have a medical license to testify in a medical negligence case and is an exception to the general rules governing the admission of expert testimony.[33]

Board certification. Board certification may be a subject for cross-examination of medical experts. In *Kurrack v. American District Telegraph Company*,[34] the appellate court upheld an examination into an expert's failure to pass a board certification exam because it bears on the witness's credibility on the subjects in which he claimed expertise.

However, if the expert is certified at time of the plaintiff's treatment and trial, impeachment based on his or her past failures to pass the exam may be barred.[35]

If a medical defendant testifies as an expert, his or her board certification may also be a subject for cross-examination. The issue of "testifying as an expert" is addressed in *Rockwood v. Singh*:[36] the failure to become board certified, although admitted by defendant and referred to in plaintiff's counsel's opening statement and closing argument, was properly barred because the defendant's testimony was limited to what occurred before, during, and after the surgery, and not to the broader standard of care associated with the surgery.

Although the defendant physician testified as an expert in *McCray v. Shams, M.D.*,[37] the failure to inform the jury that he did not pass board certification was not reversible error because the plaintiff's expert testified the standard of care is the same for board-certified physicians and non-certified physicians. The opinion in *Jones v. Rallos*[38] provides an analysis of these two cases addressing the issues of board certification failures and a defendant physician's expert testimony by comparing and distinguishing the differing opinions. The professional experience of an expert is also proper subject for cross-examination (see *Brown v. Moawad*[39]).

Agency and admissions, abandonment and missing-witness instruction, and work product

An expert witness is not an agent of the party calling him or her and therefore cannot make admissions against that party.[40] As an additional rule, the missing-witness instruction[41] may be properly given unless a party gives notice of abandonment of an expert in a reasonable time before trial.[42] In general, the advice of an expert to an attorney is not exempted from discovery by the work-product privilege; a motion for a protective order can be filed if a danger of disclosure of work product arises.[43]

Medical negligence - IPI Civil 105.01

Trial attorneys in medical negligence cases are familiar with the history of the medical negligence instruction. In *Studt v. Sherman Health Systems*,[44] the Illinois Supreme Court held IPI 105.01 (2006) does not accurately state the law. A post-*Studt* instruction is posted on the Illinois Courts official website.[45]

The same standard of care applies to all professionals: they must possess and use the knowledge, skill, and care ordinarily used by a reasonably careful professional under circumstances similar to those shown by the evidence.[46] Therefore, in professional negligence cases involving professionals other than physicians, the same evidentiary and procedural rules should apply.

Best practices

To effectively impeach experts, trial attorneys first must master the law governing impeachment of experts and related issues of cross-examination. A good practice is to copy the relevant cases, organize them either by the categories covered in this article or your own organizational scheme, and bind them in your trial notebooks.

It's also a good idea to have copies of the cases for the judge. Depending on the judge's preference, attorneys should consider highlighting the headnote or paragraph number and the text in the opinion. Doing so saves time for the judge and jury and ensures a sound record for the proceedings.

Judge James M. Varga presides over jury trials in the Law Division of the Circuit Court of Cook County. He has written for the CBA Record Online and the ISBA Bench and Bar newsletter.

1. IPI Civil (2011) No. 3.08.

2. 331 Ill.App.3d 763, 772-74, 771 N.E.2d 1030, 1038-39 (1st Dist. 2002).
3. 273 Ill.App.3d 960, 962-66, 652 N.E.2d 1120, 1122-24 (1st Dist. 1995).
4. IPI Civil (2011) No. 2.04 (see Comment on *Wilson v. Clark*, 84 Ill.2d 186, 192-94, 417 N.E.2d 1311, 1326 (1981).
5. *Walski v. Tiesenga*, 72 Ill.2d 249, 258-59, 381 N.E.2d 279, 283-84 (1978).
6. *Bowman v. University of Chicago*, 366 Ill.App.3d 577, 587-88, 852 N.E.2d 383, 392 (1st Dist. 2006), citing *Darling v. Charleston Community Memorial Hospital*, 33 Ill.2d 326, 336, 211 N.E.2d 253, 259 (1965).
7. *Bowman*, 366 Ill.App.3d at 587, 852 N.E.2d at 392.
8. *Taylor v. The County of Cook*, 2011 IL App (1st) 093085, ¶ 26-29, 957 N.E.2d 413 (no abuse of discretion in granting motion in limine seeking to bar consistent personal practices not compromising witness's credibility); *Schmitz v. Binette*, 368 Ill.App.3d 447, 454-62, 857 N.E.2d 846, 853-58 (1st Dist. 2006) (error in barring inconsistent personal practices).
9. *Beard v. Barron*, 379 Ill.App.3d 1, 17, 882 N.E.2d 1062, 1076 (1st Dist. 2008), citing *Leonardi v. Loyola University of Chicago*, 168 Ill.2d 83, 105, 658 N.E.2d 450, 460 (1995).
10. *Beard*, 397 Ill.App.3d at 17-18, 882 N.E.2d at 1076, citing *Neal v. Nimmagadda*, 279 Ill.App.3d 834, 840, 665 N.E.2d 424, 428 (1st Dist. 1996).
11. *Neal*, 279 Ill.App.3d at 842, 665 N.E.2d at 429.
12. Ill. S. Ct. R. 213; *Stapleton ex rel. Clark v. Moore*, 403 Ill.App.3d 147, 156-57, 932 N.E.2d 487, 497-98 (1st Dist. 2010).
13. *Iser v. Copley Memorial Hospital*, 288 Ill.App.3d 408, 410-13, 680 N.E.2d 747, 748-51 (3d Dist. 1997).
14. Ill. S. Ct. R. 213(g).
15. *Bryant v. LaGrange Memorial Hospital*, 345 Ill.App.3d 565, 577-78, 803 N.E.2d 76, 86-87 (1st Dist. 2003).
16. 224 Ill.App.3d 981, 985, 587 N.E.2d 57, 60 (2d Dist. 1992).
17. 102 Ill.2d 402, 466 N.E.2d 210 (1984).
18. 121 Ill.2d 211, 520 N.E.2d 297 (1988) but see *Moore v. Centreville Township Hospital*, 246 Ill.App.3d 579, 587-88, 616 N.E.2d 1321, 1327-28 (5th Dist. 1993) (no abuse of discretion to allow examination of expert on other litigants' Rule 215 reports showing similar negative findings).
19. *Aquinaga v. City of Chicago*, 243 Ill.App.3d 552, 566, 611 N.E.2d 1296, 1307 (1st Dist. 1993).
20. 398 Ill.App.3d 371, 923 N.E.2d 310 (1st Dist. 2010) (although the opinion discusses an expert's tax returns, the appellate issue is contempt).
21. *Shaheen v. Advantage Moving and Storage, Inc.*, 369 Ill.App.3d 535, 543-44, 860 N.E.2d 375, 382-83 (1st Dist. 2006).
22. *Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill.App.3d 99, 111, 812 N.E.2d 389, 400 (1st Dist. 2004) (not permitted); *The County of St. Clair v. Wilson*, 284 Ill.App.3d 79, 85-87, 672 N.E.2d 27, 30-32 (5th Dist. 1996) (in general, permitted but not on facts of the case); *Akers v. Atchison, Topeka and Santa Fe Railway Company*, 187 Ill.App.3d 950, 955-58, 543 N.E.2d 939, 942-45 (1st Dist. 1989) (permitted).
23. *Flores v. Cyborski*, 257 Ill.App.3d 119, 128-29, 629 N.E.2d 74, 80-81 (1st Dist. 1993).
24. 404 Ill.App.3d 20, 33-36, 934 N.E.2d 506, 518-21 (1st Dist. 2010).
25. 266 Ill.App.3d 61, 639 N.E.2d 234 (1st Dist. 1994).
26. 196 Ill.App.3d 457, 554 N.E.2d 257 (1st Dist. 1989).

27. 186 Ill.App.3d 554, 542 N.E.2d 746 (1st Dist. 1989).
28. *Cetera*, 404 Ill.App.3d at 35-36, 934 N.E.2d at 520-21, citing *LaSalle Bank, N.A. v. C/HCA Development Corp.*, 384 Ill.App.3d 806, 822, 893 N.E.2d 949, 964 (1st Dist. 2008) (relevant evidence making a fact of consequence more probable).
29. 373 Ill.App.3d 87, 90-96, 867 N.E.2d 539, 543-47 (2d Dist. 2007).
30. 735 ILCS 5/8-2501 (West 2004 and West Supp. 2005).
31. 209 Ill.2d 100, 806 N.E.2d 645 (2004).
32. 221 Ill.2d 414, 851 N.E.2d 1231 (2006).
33. *Somers*, 373 Ill.App.3d at 99-105, 867 N.E.2d at 550-55.
34. 252 Ill.App.3d 885, 899-902, 625 N.E.2d 675, 684-87 (1st Dist. 1993).
35. *Gossard v. Kalra*, 291 Ill.App.3d 180, 684 N.E.2d 410 (4th Dist. 1997) (barring evidence of defendant physician's prior failures for defendant who was certified at the time of plaintiff's treatment and trial).
36. 258 Ill.App.3d 555, 557-58, 630 N.E.2d 873, 875-76 (1st Dist. 1993).
37. 224 Ill.App.3d 999, 1002-04, 587 N.E.2d 66, 68-70 (2d Dist. 1992).
38. 384 Ill.App.3d 73, 89-91, 890 N.E.2d 1190, 1204-06 (1st Dist. 2008) (although defendant physician's testimony was more similar to Dr. Singh in *Rockwood* than that of Dr. Shams in *McCray*, any error in denying defendant's motion to bar questions on defendant's board certification failure would not be reversible error in light of trial court's consideration of briefs and cases cited in appellate opinion and defendant's testimony of little experience in area of medicine at issue and lack of understanding of some results).
39. 211 Ill.App.3d 516, 526-27, 570 N.E.2d 490, 497 (1st Dist. 1991).
40. *The County of St. Clair v. Wilson*, 284 Ill.App.3d 79, 85-87, 672 N.E.2d 27, 30-32 (5th Dist. 1996).
41. IPI Civil (2011) No. 5.01.
42. *Taylor v. Kohli*, 162 Ill.2d 91, 94-98, 642 N.E.2d 467, 468-70 (1994); *Schaffner v. Chicago & North Western Transportation Company*, 129 Ill.2d 1, 21-24, 541 N.E.2d 643, 651-52 (1989) (proper to read answer to interrogatory identifying expert as an anticipated witness and adverse comment on expert's absence).
43. *Akers v. Atchison, Topeka and Santa Fe Railway Company*, 187 Ill.App.3d 950, 955-58, 543 N.E.2d 939, 942-45 (1st Dist. 1989).
44. 2011 IL 108182 at ¶ 41, 951 N.E.2d 1131, 1140-41; IPI Civil (2006) No. 105.01.
45. Illinois Courts, www.state.il.us/court/.
46. IPI Civil (2011) No. 105.01; for cases involving a registered nurse, dentist, engineer, attorney, architect, social worker, accountant, veterinarian, and surveyor, see IPI Civil (2011) No. 105.00 (Introduction) pp. 311-13 (West 2011).

Member Comments

ILLINOIS STATE BAR ASSOCIATION™

Illinois Bar Journal

May 2012 • Volume 100 • Number 5 • Page 260

The Magazine of Illinois Lawyers

Expert Witnesses

Illinois Rule of Evidence 703: The Expert's Way to Avoid the Hearsay Rule

By Justin D. Scheid

New Rule 703 permits an expert witness to base an opinion on inadmissible facts if they are reasonably relied on by experts in the field. Though the expert may only disclose the facts as a basis for his opinion, not as substantive evidence, can jurors really be expected to draw that line?

It had been a long trial, but your cross examination of the opposing valuation expert appeared to be going well. The opposing expert, a certified public accountant, admitted that he failed to consider two significant revenue items in forming an opinion on the company's value.

These revenue items supported your position on the proper value. The company's officers testified about the items during your case in chief. Your cross methodically demonstrated the flawed basis for the opposing expert's opinion, slowly building to your final question. After pausing for effect, you confidently inquired, "So, your opinion as to the value of the company is too low because you failed to consider the two revenue items, correct?"

The question wasn't perfect, but you certainly did not anticipate the harm it could cause. Not surprisingly, the opposing expert defended the accuracy of his valuation opinion. But as the expert continued to explain, you were shocked as he told the jury that his opinion was based on the inadmissible report of an independent consultant that would not testify at trial. To make matters worse, he went on to recite facts taken from the inadmissible consultant's report that formed the basis for his valuation opinion.

He was interrupted only when the judge questioned whether the consultant's report would be customarily relied upon by a valuation expert. As he responded affirmatively, you objected to the expert's response to your question, asked the court to strike the inadmissible hearsay recited from the consultant's report, and requested an instruction limiting the use of the hearsay statements by the jury.

You knew about the independent consultant's report and the problems it could cause your case if disclosed to the jury. But you thought opposing counsel would not be able to get the hearsay report into evidence. Unfortunately, with the help of an expert witness, your opposition has made the jury aware of the damaging hearsay statements in the independent consultant's report - enough, you fear, to sway the delicate balance of your case.

In the 2010 case *People v. Williams*,[1] the Illinois Supreme Court considered whether a police forensic expert could offer opinion testimony based upon a DNA report prepared by a separate, independent forensic laboratory. The forensic expert testified to the common practice of relying on DNA analyses of other analysts, and that she routinely relied upon the analyses of the particular independent laboratory.[2] In supporting her opinion that the DNA evidence linked the defendant to the crime, the forensic expert testified as to her comparison of the DNA profile in the police database with the profile in the independent laboratory report.[3]

The defense asserted that the independent laboratory findings were hearsay and, therefore, may not form a basis for the expert's opinion.[4] The prosecution contended that only the expert's opinion on the DNA evidence was offered for its truth as substantive evidence and that the testimony concerning the independent laboratory report was merely a basis for the substantive opinion.[5]

In holding that "prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of [an] opinion," the Illinois Supreme Court reaffirmed the wide latitude permitted to experts in proffering opinions in Illinois courts.[6]

Effective January 1, 2011, Illinois adopted Rule of Evidence 703. The rule permits an expert witness to base his or her opinion on facts or data not admissible in evidence if reasonably or customarily relied upon by experts in the particular field of expertise.[7] Under Rule 703, an expert may obtain the facts or data relied upon in forming an opinion prior to or during trial.[8]

Permitting an expert to base an opinion on such information creates parity between an expert's practice inside and outside the courtroom.[9] However, Illinois Rule of Evidence 703 may also allow an expert to base an opinion entirely on inadmissible facts or data, as long as they are reasonably relied upon in the field of expertise. While Rule 703 does not create an exception to the hearsay rule[10] and the trial judge retains discretion to bar an expert from disclosing the inadmissible basis for the opinion,[11] the rule does result in experts disclosing inadmissible information used in forming an opinion.

This article considers the implications of Rule 703 and the implications for your case of an expert using inadmissible evidence to formulate an opinion.[12]

Basis for expert opinion testimony: the law before Rule 703

At common law, expert witnesses were required to base their opinions upon admissible evidence. In the Depression-era case *People v. Black*,[13] the Illinois Supreme Court held that a medical doctor improperly relied upon psychiatric and medical testing performed by others in rendering an expert opinion concerning a defendant's sanity.[14]

The court was likely concerned about tainting the jury by permitting an expert to rely upon inadmissible or untrustworthy information in reaching an opinion that would be disclosed to the jury. Courts have always sought to ensure that facts and opinions presented to the jury are trustworthy.

Nearly 40 years later, the Illinois Supreme Court held in *People v. Ward*[15] that a medical doctor's expert opinion concerning a defendant's sanity could be based upon medical records not admissible in evidence and prepared by individuals who did not testify.[16] Recognizing the high degree of reliability of otherwise inadmissible medical records, the Illinois Supreme Court in *Ward* broadened the sources of data that an expert may rely upon, as long as the information is reasonably relied upon in the field.[17] As the scope and use of expert witness opinion testimony expanded, the legal community recognized that the data upon which opinion testimony may be based must broaden as well.

The relationship between Illinois and FRE 703

In 1981, the Illinois Supreme Court in *Wilson v. Clark*[18] adopted Federal Rule of Evidence 703, which governs the basis for expert testimony. In *Wilson v. Clark*, a medical malpractice action, the plaintiff objected to the trial court's admission of medical records without a proper evidentiary foundation and the defense expert's use of such records in opining on the proper standard of care.[19] The Illinois Supreme Court, in remanding the case for a new trial, held that the defendant failed to establish an adequate foundation to admit the medical records in evidence and, thus, the use of the medical records as a basis for the expert opinion testimony was improper.[20]

But the legacy of *Wilson v. Clark* is the Illinois Supreme Court's adoption of Federal Rule of Evidence 703 and the use of inadmissible records as a permissible basis for expert opinion.[21] In also adopting Federal Rule of Evidence 705, the Illinois Supreme Court stated that an expert may offer an opinion without disclosing the underlying facts, leaving it to the opposing party to reveal the basis for the opinion on cross examination.[22]

New Illinois Rule of Evidence 703 follows Federal Rule of Evidence 703, which has permitted expert opinion based upon inadmissible facts for decades. Illinois Rule 703, entitled "Bases of Opinion Testimony by Experts," states that

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[23]

In many instances, the facts or data upon which an expert typically relies in formulating an opinion are admissible in evidence as exceptions to the hearsay rule.[24] Rule 703 focuses on the disclosure to the jury of wholly inadmissible information relied upon and the impact of that disclosure on the admissible evidence in the case.

Under Federal Rule of Evidence 703, the otherwise inadmissible facts relied upon by the expert are not offered for their truth but instead to explain the basis for the expert's opinion. Similarly, under Illinois law, the expert's use of inadmissible facts in reaching an opinion does not make them admissible as substantive evidence. Instead, they may only be used to show the basis for the expert's opinion.[25]

However, Federal Rule of Evidence 703 expressly precludes the disclosure of facts not in evidence relied upon by the expert unless a judge determines that the probative value in evaluating the expert's opinion substantially outweighs the prejudicial effect.[26] Additional language in FRE 703 creating a presumption against disclosure of the inadmissible information was not included in the codified version of Illinois Rule of Evidence 703, leaving the possibility that an expert could be used to circumvent the hearsay rule.

While the drafters of the Illinois Rules of Evidence sought simply to codify existing Illinois evidence law, they curiously did not mirror the language of Federal Rule 703. Doing so would eliminate uncertainty surrounding disclosure of inadmissible facts or data relied upon by an expert.

Using an expert to get inadmissible information to the jury

The hearsay rule generally prohibits the introduction into evidence of an out-of-court statement offered to prove the truth of the matter asserted.[27] However, under *Wilson v. Clark* and new Illinois Rule of Evidence 703, an expert may consider hearsay, including inadmissible reports or data, in forming an opinion if that hearsay evidence is reasonably relied upon by experts in the field.[28] Further, the Illinois Supreme Court has permitted an expert to read an inadmissible report to the jury, though it would constitute hearsay if offered for its truth.[29] In *People v. Pasch*,[30] the Illinois Supreme Court stated as follows:

> While the contents of reports relied upon by experts would clearly be inadmissible as hearsay if offered for the truth of the matter asserted, an expert may disclose the underlying facts and conclusions for the limited

> purpose of explaining the basis for his opinion. By allowing an expert to reveal the information for this purpose alone, it will undoubtedly aid the jury in assessing the value of his opinion.[31]

While it is clear that a jury would be interested in hearing the basis for the expert's opinion, a significant concern is that the inadmissible facts will inappropriately influence the jury. The jury is unlikely to limit its use of the inadmissible evidence to explaining the expert's opinion. And the jury is likely to view the inadmissible evidence as important because, after all, the expert relied upon it in forming an opinion.

Thus, the question becomes what inadmissible information is truly "reasonably relied upon" by an expert in forming an opinion, as opposed to merely used by the opposition's expert to get otherwise inadmissible information before the jury.

Experts have broad latitude to rely on inadmissible facts

Generally, a witness may testify to facts obtained from first-hand knowledge or observation.[32] However, expert witnesses have broad latitude in the sources of facts upon which they may rely in rendering an opinion, including first-hand knowledge, information disclosed at trial, or any other source.[33] Where an expert relies upon inadmissible information in forming an opinion, the inquiry focuses on whether it is commonly used in the field of expertise. Often, it depends on the field of expertise and is left to the discretion of the trial judge.[34]

Experts may be permitted discretion to inform the trial court about the types of information reasonably relied upon in the field of expertise.[35] In practice, the expert is probably in the best position to know whether the information is customarily relied upon in the field.

However, courts have identified the need to monitor whether the underlying facts are truly reasonably relied upon by an expert in the particular field.[36] The expert certainly has an incentive to show the inadmissible information was reasonably relied upon and, thus, may be disclosed to the jury. The trial court must assure that the facts used by the expert to form an opinion, and the opinion itself, are reliable. Even so, in *Mele v. Howmedica, Inc.*,[37] the first district found the expert opinion reliable though he admitted he did not know how the injury occurred without the studies of other experts.

The guiding principle is whether the facts or data relied upon by the expert are reasonably relied upon by experts in the particular field of expertise,[38] but Illinois courts have imposed parameters. An expert may make estimates relying upon his or her own experience and first-hand observation.[39] An expert may also base his opinion on the opinion of others,[40] upon inadmissible statements of lay witnesses,[41] and reports created by others.[42] An expert has been permitted to employ assumptions supported by or reasonably inferred from the facts in rendering an opinion.[43]

However, an expert may not offer an opinion based upon speculation.[44] An expert cannot bolster his testimony with the opinion of a non-testifying expert. Such testimony is improper hearsay.[45] An expert may testify about the conclusions of a non-testifying expert used in forming an opinion.[46] Nonetheless, reasonable reliance depends upon the specific area of expertise.

There is one bright-line rule: Illinois courts have held that reports prepared for litigation are not reasonably relied upon by experts in any field of expertise.[47] However, the Illinois Supreme Court has also held that the depositions of a plaintiff and plaintiff's expert witnesses were properly relied upon in rendering expert opinion testimony.[48]

Practical considerations in an expert's reasonable reliance on inadmissible information

An expert who bases his or her testimony on otherwise inadmissible information may thereby make the jury aware of facts that it would not otherwise be privy to. The expert's "reasonable reliance" may allow a revelation of the

otherwise unknown facts. Further, the jury is likely to give increased weight to the inadmissible information relied upon by the expert.

An objection to the disclosure of the inadmissible information as hearsay is unlikely to be sustained because it is not being offered for its truth. Similarly, a motion to strike the testimony relating to the inadmissible information may be unsuccessful in light of Illinois Rule of Evidence 703. Even a limiting instruction to the jury, though prudent, will probably not rectify the harm done from the disclosure.

Instead, trying to prevent disclosure is the stronger line of attack. A motion *in limine* may successfully raise and conclude the issue. Whether by motion or at trial, the goal is to show the judge that the expert did not reasonably rely upon such information in forming an opinion or that the information is not customarily relied upon in the expert's field.

When an expert takes the stand, be aware of Illinois Rule of Evidence 703. The damaging inadmissible information you thought could not hurt your case may just find its way to the jury with the help of the expert.

Justin D. Scheid is a tax attorney and certified public accountant with the federal government in Chicago.

1. **238 Ill.2d 125**, **939 N.E.2d 268** (2010).

2. *Id.* at 138, 939 N.E.2d at 275.

3. *Id.* at 138-39, 939 N.E.2d at 276.

4. *Id.* at 143, 939 N.E.2d at 278.

5. *Id.*

6. *Id.* The U.S. Supreme Court granted cert in this case, recaptioned *Williams v. Illinois,* docket number 10-8505, to decide whether letting the police expert to testify about the non-testifying analyst's test results violated the Confrontation Clause. The case was argued December 6, 2011. No opinion had yet been issued as this article went to press.

7. Ill. R. Evid. 703 (adopted September 27, 2010, eff. January 1, 2011).

8. *Id.*

9. *City of Chicago v. Anthony,* **136 Ill.2d 169**, 184, **554 N.E.2d 1381**, 1388 (1990).

10. *Id.* at 185, 554 N.E.2d at 1389.

11. *People v. Anderson,* **113 Ill.2d 1**, 12, **495 N.E.2d 485**, 490 (1986).

12. While an expert's reliance on inadmissible information in rendering an opinion is undoubtedly intertwined with the broader concepts of the qualification of an expert as such and the admissibility of expert opinion testimony, the latter are beyond the scope of this article. Illinois Rule of Evidence 703 does not limit the information sources relied upon by an expert in forming an opinion. Nonetheless, the opinion rendered by an expert in an Illinois court must satisfy the admissibility requirements under *Frye v. U.S.*, **293 F 1013** (D.C. Cir. 1923). *Donaldson v. Central Illinois Public Service Co.*, **199 Ill.2d 63**, **767 N.E.2d 314** (2002); Ill. R. Evid. 702. The *Frye* standard requires a showing by the proponent that the methodology or scientific principle upon which the expert opinion is based has attained general acceptance in the particular field of expertise. *Donaldson,* 199 Ill.2d at 76-77, 767 N.E.2d at 324; compare with Fed R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, **509 U.S. 579** (1993) (holding "general acceptance" in

field not required for admissibility of expert testimony in federal courts, as admissibility determined through analysis of "reliability" in both method and application of method).

13. 367 Ill. 209, 10 N.E.2d 801 (1937).

14. *Id.* at 211-212, 10 N.E.2d at 802.

15. **61 Ill.2d 559**, **338 N.E.2d 171** (1975).

16. *Id.* at 566-67, 338 N.E.2d at 176.

17. *Id.* at 567-68, 338 N.E.2d at 176-177.

18. **84 Ill.2d 186**, 195-196, **417 N.E.2d 1322**, 1327 (1981).

19. *Id.* at 191-92, 417 N.E.2d at 1325.

20. *Id.* at 195-96, 417 N.E.2d at 1327.

21. *Id.* at 194, 417 N.E.2d at 1326; see also *People v. Lovejoy*, **235 Ill.2d 97**, 144-145, **919 N.E.2d 843**, 869 (2009) (permitting medical examiner's opinion based upon inadmissible toxicology testing performed by independent laboratory where reasonably relied upon in field of expertise).

22. *Id.* at 194-95, 417 N.E.2d at 1326-1327.

23. Ill. R. Evid. 703.

24. *See, for example*, Ill. R. Evid. 803(4), (6), (8), (9), and (17) (codifying existing Illinois law with respect to relevant exceptions to hearsay rule).

25. *City of Chicago*, 136 Ill.2d at 185, 554 N.E.2d at 1388.

26. Fed R. Evid. 703.

27. *Williams*, 238 Ill.2d at 143, 939 N.E.2d at 278 (2010).

28. *Wilson*, 84 Ill.2d at 194, 417 N.E.2d at 1326; *R.J. Mgmt. Co. v. SRLB Development Corp.*, **346 Ill.App.3d 957**, 969, **806 N.E.2d 1074**, 1085 (2d D. 2004).

29. *People v. Pasch*, **152 Ill.2d 133**, **604 N.E.2d 294** (1992).

30. *Id.*

31. *Id.* at 176, 604 N.E.2d at 311.

32. Ill. R. Evid. 602; Ill. R. Evid. 701.

33. Ill. R. Evid. 703; *Hatfield v. Sandoz-Wander, Inc.*, **124 Ill.App.3d 780**, **464 N.E.2d 1103** (1st D. 1984).

34. *People v. Robles*, **314 Ill.App.3d 931**, 939, **733 N.E.2d 438**, 445 (2d D. 2000).

35. *La Salle Nat. Bank v. Malik*, **302 Ill.App.3d 236**, 241, **705 N.E.2d 938**, 942 (2d D. 1999); People v. Lind, **307 Ill.App.3d 727**, 737, **718 N.E.2d 316**, 323 (4th D. 1999).

36. *See In re "Agent Orange" Product Liability Litigation,* **611 F. Supp. 1223**, 1243 (E.D.N.Y. 1985), aff'd., **818 F.2d 187** (2d Cir. 1987).

37. **348 Ill.App.3d 1**, 13, **808 N.E.2d 1026**, 1036 (1st D. 2004).

38. *City of Chicago*, 136 Ill.2d at 185, 554 N.E.2d at 1388 (1990); *Lebrecht v. Tuli*, **130 Ill.App.3d 457**, 479, **473 N.E.2d 1322**, 1388 (4th D. 1985); Ill. R. Evid. 703.

39. *Glassman v. St. Joseph Hosp.*, **259 Ill.App.3d 730**, 752-53, **631 N.E.2d 1186**, 1203 (1st D. 1994).

40. *In re Marriage of Hunter*, **223 Ill. App.3d 947**, 954-55, **585 N.E.2d 1264**, 1270 (2d D. 1992); *Wingo by Wingo v. Rockford Memorial Hosp.*, **292 Ill.App.3d 896**, 906, **686 N.E.2d 722**, 729 (2d D. 1997).

41. *Rios v. City of Chicago*, **331 Ill.App.3d 763**, **771 N.E.2d 1030** (1st D. 2002).

42. *Maercker Point Villas Condominium Ass'n v. Szymski*, **275 Ill.App.3d 481**, 487, **655 N.E.2d 1192**, 1195 (2d D. 1995).

43. *Hopkinson v. Chicago Transit Authority*, **211 Ill.App.3d 825**, 844, **570 N.E.2d 716**, 729 (1st D. 1991).

44. *Dyback v. Weber*, **114 Ill.2d 232**, 244-45, **500 N.E.2d 8**, 14 (1986).

45. *Denny v. Burpo*, **124 Ill.App.3d 73**, 78, **463 N.E.2d 1074**, 1078 (5th D. 1994).

46. *People v. Jones*, **374 Ill.App.3d 566**, 579-580, **871 N.E.2d 823**, 834 (1st D. 2007).

47. *Dugan v. Weber*, **175 Ill.App.3d 1088**, 1099, **530 N.E.2d 1007**, 1014 (1st D. 1988).

48. *Zavala v. Powermatic, Inc.*, **167 Ill.2d 542**, 545, **658 N.E.2d 371**, 373-374 (1995).

Member Comments

ILLINOIS STATE BAR ASSOCIATION™

Illinois Bar Journal

May 2015 • Volume 103 • Number 5 • Page 40

The Magazine of Illinois Lawyers

Expert Witness

No Surprises: Basics of Controlled Expert Witness Disclosure

By Tiffany Riggs and Tim Hammersmith

No matter how convincing your controlled experts, their testimony may be for naught if you fail to make the timely and appropriate disclosures required under Rule 213(f)(3).

In Illinois, discovery of the identity and opinions of a controlled expert witness - i.e., a "party, the party's current employee, or the party's retained expert" - is governed by Supreme Court Rule 213(f)(3).1 At first blush, the rule appears straightforward. However, courts interpreting Rule 213 (f)(3) have held that strict compliance and precision are required for disclosure of controlled expert witnesses and their opinions.

Furthermore, the duty to "seasonably supplement" past disclosures when new information later becomes known can be a trap for those not well versed in the rule.[2] Even if you find the most convincing expert witness in the world, it may be for naught if you fail to make timely and appropriate disclosure of their identity and their opinions.

Best practice dictates that you review your prior 213 (f)(3) disclosures and determine whether the experts and opinions necessary to prove your case have been properly disclosed well in advance of any discovery cut-off. If your adversary believes that any controlled expert witness or testimony were not properly disclosed under 213(f)(3), you will face objections and motions to bar that testimony.

This article looks at some of the cases that define the exacting disclosure standards imposed by Rule 213.

Rule 213 fundamentals

Rule 213(f)(3) says that a controlled expert witness

> is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.[3]

Two primary issues arise from 213(f)(3): first, the deadline for disclosing experts and second, the substance of the disclosures.

Timing. According to Rule 218(c), "[a]ll dates set for the disclosure of witnesses, including rebuttal witnesses, and the completion of discovery shall be chosen to ensure that discovery will be completed not later than 60 days before the date on which the trial court reasonably anticipates that trial will commence...," which provides a date certain for disclosure of experts in preparation for trial.[4]

Furthermore, although a party is required to answer interrogatories within 28 days after service,[5] few lawyers have identified their experts or the expert opinions early on in the case. The customary place-holder response, "investigation continues," obliges the attorney to timely supplement those answers consistent with Rule 213's requirements - be sure to do so.[6]

Subject matter. The Rule 213 drafting committee comments state that since Rule 220 on expert witness disclosure was eliminated, an opinion witness is now defined as "a person who will offer 'any' opinion testimony."[7] To avoid surprise, the subject matter of all opinions must be timely disclosed pursuant to Rule 213. No new opinions will be permitted "unless the interests of justice require otherwise."[8] "[T]he interest of justice" is a catch-all phrase you don't want to rely on while trying to survive a motion to bar.

Strict compliance required: *Sullivan* sets the standard

Thankfully, there is caselaw guidance on "controlled expert" disclosures, which is the source of most objections. The 2004 Illinois Supreme Court case *Sullivan v. Edward Hospital* sets the standard under which expert disclosures will be judged.[9] Although there have been various amendments to Rule 213 since the case was decided, the principles laid down in *Sullivan* and other cases discussed in this article are still valid. The adoption of Rule 213(f)'s tiered-approach to disclosing opinion testimony by rule amendment in 2002 heightened the importance of full disclosure.

In *Sullivan*, the defendant moved to strike a portion of the plaintiff's medical (physician) expert witness testimony. That portion included the expert's opinion that a nurse deviated from the standard of care when she failed to adequately communicate a patient's condition to the attending physician in a telephone conversation.

The witness' opinion as to the nurse's conduct was not explicitly included in the plaintiff's Rule 213(g) disclosure (the applicable rule provision at the time). However, the Rule 213(g) disclosure did mention that the expert would testify about the hospital's and attending physician's deviation from acceptable standards of care.

The plaintiff argued that its disclosure responses provided the "gist" or "logical corollary" of what the expert witness' opinion would be at trial, even though the nurse's alleged deviation from the standard of care was not previously disclosed under Rule 213.[10] The supreme court upheld the barring of opinion testimony related to the nurse,

reasoning that Rule 213 requires "you...to drop down to specifics" and only providing the "gist" of what the testimony might or will be is not enough. Instead, the rule demands "strict compliance."[11]

The supreme court in *Sullivan* established the following criteria for determining whether excluding a witness or part of his or her testimony is the appropriate sanction: (1) the surprise to the adverse party; (2) the prejudicial effect and (3) nature of the testimony; (4) the diligence of the adverse party; (5) the timeliness of the objection to the testimony; and (6) the good faith of the party calling the witness.[12] The decision to impose sanctions for non-compliance with discovery rules lies within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.

The *Sullivan* court found that both the expert witness' deposition testimony and the plaintiff's written disclosures under Rule 213 failed to state or even imply that an opinion would be offered that the attending nurse failed to communicate appropriately with the attending physician and that this failure caused the plaintiff's injuries. Expert testimony alleging a deviation from the standard of care in a professional negligence case should be barred as prejudicial if it is not disclosed. The purpose of Rule 213 is "to avoid surprise and to discourage tactical gamesmanship [and]...brings to a trial a degree of certainty and predictability that furthers the administration of justice."[13]

The importance of serving notice of depositions on all parties

McGovern vs. Kaneshiro, a 2003 first district ruling, stands for the proposition that even if an expert's identity and opinions are not disclosed in a party's answers to an opposing party's interrogatories, they may be allowed if they were disclosed in answers to a different party's interrogatories or in depositions.[14]

The *McGovern* court held certain disclosures proper because even though the plaintiff did not specifically supplement her prior answers to the complaining defendant's 213(g) interrogatories, she did give the defendant a copy of her nearly identical supplemental answers to a *co-defendant's* interrogatories.

The court also noted that the objecting defendant had notice of when the subject expert physicians were going to be deposed and could have attended those depositions. Further, the objecting defendant actually listed the two subject physicians as opinion witnesses in his answers to interrogatories.

Therefore, the complaining defendant should not have been surprised that these physicians may testify. A total bar of the witnesses and their opinions is a drastic sanction and should be exercised with the utmost caution.

Though *McGovern* was decided before *Sullivan*, it illustrates some of the principles ultimately laid out by the Illinois Supreme Court in that case. For example, the complaining defendant showed lack of diligence because its attorney failed to attend one of the testifying physician's discovery deposition. Also, *McGovern* stands for the proposition that an expert opinion expressed in a deposition does not have to be further disclosed under Rule 213. A lesson from *McGovern*: make sure all parties have notice of all depositions, even a party whose interest in the litigation might not be germane to the expert's opinion or theory.

Notably, the current version of Rule 213(g) provides that "[i]nformation disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or the discovery deposition."[15] Rule 213 also distinguishes in the current subparagraph (g) between an evidence deposition and discovery deposition. The rule states that "[e]xcept upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial."[16]

Late disclosures are costly

In *Smith v. Murphy*,[17] a first district case from 2013, the trial court issued a typical case management order after all fact discovery was complete imposing a specific deadline for the plaintiff to disclose experts pursuant to 213(f)(3). The plaintiff did disclose one expert physician before the deadline, stating that he would "provide an expert opinion that both residents [doctors] deviated from the standard of care in treating the plaintiff."[18]

When this expert was finally deposed (after the disclosure deadline had passed), he testified that he no longer held an adverse opinion of the resident physicians and found no wrongdoing on their part. Thus, the plaintiff's expert gave an opinion that was actually adverse to plaintiff's case. Discovering that her expert changed his opinion after the disclosure deadline had passed left the plaintiff in a compromised position.

Subsequently, the plaintiff filed an unsigned affidavit of a previously undisclosed expert with her response to a motion for summary judgment. Not surprisingly, the trial court ruled that since the affiant would not be able to testify because of the untimely disclosure, the court could not consider the opinion.

In analyzing the *Sullivan* factors, the court held that the defendants would have been surprised by the late disclosure. The court also found it to be prejudicial because the defendants would find it difficult to retain their own expert to refute these opinions or even depose the plaintiff's new expert so close to trial.

Note that the fourth *Sullivan* factor (diligence of the adverse party) and the fifth (timeliness of the objection) are also implicated. The *Smith* court stated that the plaintiff's attempt to use the affidavit of a previously undisclosed expert in a response to a motion for summary judgment "was nothing more than a thinly veiled attempt to circumvent the trial court's discovery orders."[19] Further, courts have noted, objections on discovery matters should be specific.[20]

Experts may not change the scope and nature of their testimony

In the 1998 first district case *Parker v. Illinois Masonic Warren Bar Pavilion*,[21] the plaintiff's expert physician was asked at trial whether it was "a deviation from the standard of rehabilitation care to allow someone to ambulate" if they were not independently able to do so.[22] The defendant objected, arguing in a sidebar exchange that the plaintiff was bringing an ordinary negligence case under the Nursing Home Care Act but the expert was attempting to make it a medical malpractice case.

No opinion about medical negligence had been disclosed prior to trial, nor had the expert been identified as someone giving an opinion related to medical malpractice. Although the defendant requested the substance of any opinion testimony before trial, the plaintiff never filed a formal response. Rather, he responded by letter stating that the rehabilitation doctor would testify about the continued course of treatment at the rehabilitation institute and that the opinions would be consistent with the doctor's records.

On appeal, the plaintiff argued that even if the doctor's testimony related to medical malpractice and technically violated Rule 213(g), it was not prejudicial because it was consistent with another witness' testimony. The appellate court disagreed. It distinguished between a question about a "deviation from the standard of rehabilitation care" and a response by an expert physician giving his "independent medical opinion."[23]

The court found it was an error for the court to allow the testimony of the physician about the legal standard for medical malpractice when the cause of action concerned a question of ordinary negligence. Answers that are general or ambiguous will be construed against the party making the disclosure.[24]

Consistency is key

Cases following *Sullivan* hold that expert witness testimony must be consistent with prior disclosures while recognizing the distinction between a controlled expert and an independent expert witness and noting the emphasis in the word "control" and the higher expectation for full disclosure.[25]

In the 2007 fourth district case *White v. Garloc Sealing Technologies, LLC*, one of the defendant's expert witnesses changed his opinion just before trial and testified differently on one subject than had been disclosed in his expert report.[26] The defendant's counsel failed to supplement the answers under subsection (i) of Rule 213 with this new opinion prior to trial.

Interestingly, the defendant's attorney purposely did not elicit this new opinion on direct examination of his expert. However, the new opinion was volunteered during the plaintiff's cross examination.

The appellate court noted that the expert volunteered this new opinion on cross in testimony that was not responsive to a question asked by plaintiff, and the witness was trying to subtly offer this changed opinion. The rule requires disclosure not only of opinions that will be elicited on direct examination but also those that could be elicited on cross. Further, if your expert changes his or her opinion during the course of discovery, it is not enough to refrain from asking about the new opinion at trial.

Conclusions

Rule 213(f)(3) requires litigants to disclose with specificity the subject matter of a controlled expert's opinion, as well as its basis and scope. If your expert deviates from the subject matter or goes beyond that which was disclosed, you should expect objections and motions to bar all or part of the testimony. You should review the scope and extent of disclosures throughout the case to make sure they are consistent with exactly what the expert is going to testify to at trial.

Tiffany Riggs is claims counsel for Westcor Land Title Insurance Company and administers title insurance claims on policies issued on property throughout the country. Tim Hammersmith is a principal of the real estate practice group at Masuda Funai in Chicago.

1. Ill. S. Ct. R. 213(f)(3). Rule 213 address three kinds of witnesses - lay, independent expert, and controlled expert. This article speaks only to controlled experts.
2. Ill. S. Ct. R. 213(i).
3. Ill. S. Ct. R. 213(f)(3).
4. Ill. S. Ct. R. 218(c).
5. Ill. S. Ct. R. 213(d).
6. See *Urban v. Drain Management & Investment Services*, 2013 IL App (1st) 113328-U.
7. Ill. S. Ct. R. 213, 1995 Committee Comments to Paragraph (g).
8. *Id.*
9. *Sullivan v. Edward Hospital*, **209 Ill. 2d. 100**, 109 (2004).
10. *Id.*
11. *Id.* at 109, 110.
12. *Id.* at 110.
13. *Id.* at 111.
14. *McGovern vs. Kaneshiro*, **337 Ill. App. 3d. 24**, 35 (1st Dist. 2003).
15. Ill. S. Ct. R. 213(g).

16. See generally *Bradshaw v. Union Pacific R.R. Co.*, 2012 IL App (5th) 100054-U.
17. *Smith v. Murphy*, 2013 IL App (1st) 121839.
18. *Id.* ¶ 5.
19. *Id.* ¶ 36.
20. See generally *Fritzshe v. Union Pacific R.R.*, **303 Ill. App. 3d. 276** (5th Dist. 1999).
21. See *Parker v. Illinois Masonic Warren Bar Pavilion*, **299 Ill. App. 3d. 495**, 502 (1st Dist. 1998).
22. *Id.*
23. *Id.* at 503.
24. See generally *Bradshaw v. Union Pacific R.R. Co.*, 2012 IL App (5th) 100054-U.
25. *White v. Garlock Sealing Technologies, LLC*, **373 Ill. App. 3d 309**, 325 (4th Dist. 2007).
26. *Id.*

Member Comments

ILLINOIS STATE BAR ASSOCIATION™

TRIAL BRIEFS

The newsletter of the ISBA's Section on Civil Practice & Procedure

Reprinted with permission.

October 2010, vol. 56, no. 3

Stapleton v. Moore: Cross-examination of a medical expert with a learned treatise

By Hon. Daniel T. Gillespie

Supreme Court Rule 213(g) requires a party to reasonably notify the other side of any experts it intends to call and documents it intends to use. The argument has been made that, generally speaking, if a party can reasonably foresee that he or she will be using or relying on a particular treatise to cross-examine an expert on the other side, that party should notify the other party in advance. At least that has been the understanding of the rule for many, especially before the 2002 amendment of the rule, which added language regarding cross-examination under 213(g).

In *Stapleton v. Moore,* 2010 Ill. App. Lexis 572 (1st Dist. 2010), the appellate court, in an opinion authored by Justice Toomin, declared that a party need not disclose in advance of trial under Rule 213(g) that it intends to cross-examine the other party's expert witness with a particular treatise or learned text. In *Stapleton,* the trial judge allowed defense counsel to cross-examine plaintiff's expert with a medical article that was not disclosed in discovery. The appellate court affirmed, with a spirited dissent from Justice Lavin.

The appellate court declared the issue to be whether the use of a medical journal article on cross-examination of an expert witness is permissible when only the reliability of the author is established and not the reliability of the particular article or the text itself. In this case, the infant Keenan Stapleton suffered a permanent left-side brachial plexus injury known as Erb's palsy. A note made on the medical chart shortly after birth described a normal spontaneous vaginal birth with shoulder dystocia, which means a difficult delivery of the baby's shoulders.

Plaintiff mother, as guardian of the child, contended this was the result of malpractice by the attending physician during birth. She contended that the defendant, Doctor Monica Moore, applied too much traction to the baby's head, causing him to sustain the brachial plexus injury. Dr. Moore contended she complied with the standard of care and applied an appropriate level of traction to the baby's head during delivery and that the injury resulted from the force of uterine contractions on the infant's body when his left shoulder became caught on a ridge in the sacral promontory area of the mother's spine. Dr. Moore denied that she pulled or twisted the baby's head during delivery.

Plaintiff's expert, Dr. Stuart Edelberg, board certified in obstetrics and gynecology, had been practicing in the field for more than 40 years. He testified that the shoulder dystocia that occurred during delivery was a medical emergency. Accordingly, he testified, such a delivery requires the McRoberts maneuver and the application of suprapubic pressure.

The McRoberts maneuver involves flexing the mother's legs toward her shoulders as she lies on her back, thus expanding the pelvic outlet. Suprapubic pressure involves applying pressure at the pubic bone, not at the top of the uterus. This should allow the shoulder enough room to move under the pubis symphysis. Dr. Moore asserted that suprapubic pressure was applied and that she performed the McRoberts maneuver properly.

Dr. Edelberg offered the expert opinion that the injury to the newborn occurred because Dr. Moore placed excess lateral traction on Keenan's head during delivery. Dr. Edelberg testified that traction places pressure on the baby's head, which stretches the brachial plexus. Dr. Edelberg testified that an application of greater-than-gentle lateral traction caused the baby's permanent injury and was a deviation from the standard of care. He testified further that transient brachial plexus injuries can result from pressure inside the womb and without any physician negligence, but permanent brachial injuries, as in this case, are different because they result from lateral force.

Over plaintiff's objections, Edelberg was also confronted with an article written by Doctors Harry Lerner and Eva Salamon, which reported a case of a baby born vaginally without physician traction that resulted in permanent brachial plexus injury. Edelberg later testified that the article related to a case in which Dr. Lerner was the defense expert for Dr. Salamon.

Although plaintiff objected on the basis of foundation and nondisclosure pursuant to Supreme Court Rule 213, the court allowed the testimony for impeachment purposes. Edelberg discounted the validity and application of the article to the case at trial.

He was also cross-examined about the 2005 PRECIS, a text by the American College of Obstetrics and Gynecology, which acknowledged that, although there is support for the view that brachial palsy is caused by the application of excess lateral traction, recent evidence suggests that most brachial palsies are not caused by traction and occur in uncomplicated deliveries. That text suggests that these injuries occur because of the way the infant presents in the mother's pelvis during delivery.

Dr. Edelberg was cross-examined about an additional article which suggested that it is most likely that maternal expulsive forces of delivery may be partly or totally responsible for an injury of the type that occurred here.

Defendant's expert, Dr. Mark Neerhof, a board certified physician in obstetrics/gynecology, opined that the available evidence did not suggest that Dr. Moore applied excessive traction. He testified that the gentle downward traction applied by Dr. Moore during delivery was within the standard of care. Although he agreed that the baby's injury occurred during delivery, he testified that nothing that Dr. Moore did or did not do caused that injury. The jury returned a verdict for Doctor Moore.

On appeal, plaintiff contended that the trial court erred in allowing the defense to use the Lerner and Salamon article to impeach plaintiff's expert, Dr. Edelberg. Plaintiff argued the article was misleading, fraudulent, and not disclosed in accord with Supreme Court Rule 213(g).

The appellate court noted that such issues are reviewable on an abuse of discretion standard and that, further, a party is not entitled to reversal unless the evidentiary ruling was substantially prejudicial and affected the outcome of the trial, citing *Simmons v. Garcia*, **198 Ill. 2d 541**, 566-67 (2002).

The court observed that defendant was able to secure testimony from her expert, Dr. Neerhof, that Dr. Lerner was a reliable authority in the field of shoulder dystocia and brachial plexus injuries. Accordingly, the appellate court found that defendant demonstrated the authoritativeness of the article used to impeach plaintiff's expert through the testimony of defendant's expert, Dr. Neerhof.

The appellate court declared that Rule 213(g) does not require that a party disclose journal articles that the party intends to use in cross-examining the opposing party's opinion witness, citing *Maffett v. Bliss*, 329 Ill. App. 3d 562, 577 (4th Dist. 2002). The appropriate section of Rule 213(g) reads:

> Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness.

A clear reading of Rule 213(g) would seem to support the majority's position. The majority opinion observed that the sentence cited above was reflected in the Illinois Supreme Court's amendment to Rule 213, effective July 1, 2002. The majority noted, however, that, unlike the situation under Federal Rule of Evidence 803(18), the learned treaty exception to the hearsay rule, where such learned treatises or medical articles may be read into the record as substantive evidence, under Illinois rules they are not admitted into evidence and are merely allowed for impeachment purposes.

In his dissent, Justice Lavin asserted that Rule 213 is designed not only to prevent surprise at trial but also to provide litigators with a ready guide to the evidentiary issues that will be dealt with by the expert witnesses who testify. The purpose of the discovery rule is to discourage surprise and strategic gamesmanship, he observed. Allowing a party to employ undisclosed medical articles is "contrary to the letter and spirit of the rule and it should be condemned by the court," he declared.

Justice Lavin argued that it was unfair that on direct examination an expert is not permitted to refer to the findings of any literature or treatise even if he would testify that his opinions are based, in part, on the literature in question, while he can be cross-examined utilizing reliable and authoritative literature. He observed this situation results in a conundrum where medical literature cannot be effectively utilized to support an expert's theory on direct examination but can be used as a sword to undermine an opposing expert's testimony.

Justice Lavin observed that the use of the medical article violated Rule 213(g). He questioned whether defendant had presented an adequate foundation for the authoritativeness of the article in question. He noted that the publisher had launched an inquiry into that article.

Justice Lavin also suggested defendant did not lay a sufficient foundation for the article used in cross examination of the expert. He asserts that a witness with sufficient knowledge should be able to testify that the article is authoritative.

However, the majority declared that a learned text is admissible for impeachment purposes if the cross-examiner proves the author's competence by a witness with expertise in the subject matter, citing *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 336 (1965). In addition, the majority notes, Dr. Edelberg was questioned extensively concerning several other articles supporting the view that brachial plexus injuries can occur spontaneously during delivery without excessive traction by the physician. ■

« **Back to the October 2010 Newsletter**

Member Comments

> This is an important matter to bring before the bench and bar. Whether this position will one day be affirmed by the S. Ct. remains to be seen.
>
> — Hon. Edward R. Burr on October 18, 2010
>
> Flag As Inappropriate

ILLINOIS STATE BAR ASSOCIATION™

TRIAL BRIEFS

The newsletter of the ISBA's Section on Civil Practice & Procedure

April 2006, vol. 51, no. 7

Offers of proof: What are they and when do you need them?

*By **Patrick M. Kinnally***

The trial court has entered an order which declares the dissolution of marriage complaint that was filed three months previous is: (1) set for trial in 60 days; and that if either party wanted to call more than two witnesses it had to request a pretrial conference seven (7) days before trial. A somewhat unusual order (*In re: Miller v. Miller*, 359 Ill. App. 3d 659, 834 N.E.2d 578 (4th Dist. 2005)) where in this case the issue is the determination of the custody of two children less than five years of age. Witness limitation orders are not favored in the law.

Notwithstanding, neither party requested a pre-trial conference. The wife's counsel withdrew two or three weeks before trial and her new counsel sought a continuance so "he could discuss the case with his client and perform discovery." At a hearing on that motion the wife's counsel informed the court:

***

Your Honor, this is a custody case. Obviously [,] it's a very serious matter. We would have liked to have called 10 witnesses for the hearing today, and probably the most important witness that we--which we could have called today as a witness, although we did not allow [sic] him because we believe the 2 other occurrence witnesses were probably more important, is [Bethany's] current psychologist, Dr. Brian Heatherton. Now, the reason that would be important is the court is going to hear some issues concerning [Bethany's] mental condition, which basically [is that] she's been diagnosed as bipolar 2, which is a less severe form of bipolar 1, but his testimony concerning her treatment and her ability to care for her children would be very important for the court to hear, I think.

***

We also would have other witnesses who would also be occurrence witness[es] because of, again, this court's reasonable pretrial order, but, again, it was not complied with, including a mentor and a priest of both individuals, who would give the court helpful information, Dr. Dennis Schafer, and other occurrence witnesses, such as [Bethany's] father; [Bethany's] sister, *** Sister Mary Ellen at QUANADA [(an organization that provides services for victims or domestic violence and sexual assault), who would testify concerning some emotional and physical abuses that may have occurred during the marriage, and 2 other witnesses, Danny Reid and Monica Esela, who could also testify concerning what their observations were of the parties concerning the 2 children in this matter.

***

The court denied the "motion to continue." Before the start of the trial, the judge denied a motion to reconsider his ruling. Bethany Miller was unsuccessful in obtaining custody of her children and the court enforced its two (2) witness limitation rule. There is nothing in the court's opinion which indicates the adjournment was sought pursuant to Supreme Court Rule 231 by way of affidavit, or consistent with the Illinois Code of Civil Procedure (735 ILCS 5/2-1007). No reason is indicated in the court's opinion as to why the motion to continue was denied.

Bethany Miller appealed, claiming the trial court erred by limiting the number of witnesses she could call thereby impairing her right to a fair trial. The appellate court affirmed the trial court's decision concluding Ms. Miller failed to make an adequate offer of proof as to the nature of her additional witnesses' testimony.

The appellate court concluded Ms. Miller failed to make an adequate offer of proof as to what the other witnesses would say for two reasons. First, the court concluded that she failed to make a formal offer of proof which is whenever the witness is called to testify, placed under oath and the witness testifies as to what his opinions are (citing, M. Graham, Handbook of Illinois Evidence 8th ed. 2004) at p.1037). Generally, this is done at trials in response to an in limine order (Lane and Lee, Illinois Motions in Limine 2004), entered prior to trial where the court has entered an order barring or admitting certain testimony. Such an offer of proof might be shown by interrogatory, a request to admit, an evidence deposition, or by reading a discovery deposition in part (Supreme Court Rule 212), or by stipulation of the parties.

Also, the court observed a party may ask the trial court for permission to make informal representations concerning proposed testimony of the witness(es). In doing so, the proponent must state with particularity: (1) of what the evidence will consist; (2) from whom the testimony will be offered and, (3) its purpose. (*Kim v. Mercedes Benz U.S.A., Inc.*, **353 Ill. App 3d 444**, **818 N.E.2d 713** (1st Dist. 2004).) Whether a trial judge lets a party proceed in such a fashion is left to the trial court's discretion. In this regard, the court concluded that Bethany's informal offer of proof was inadequate because it was conclusory and speculative. Moreover, the appellate court concluded because Bethany's trial counsel failed to announce he was seeking to make representations other than by a formal offer of proof, the trial court was never required to exercise its discretion as to whether the counsel for Ms. Miller could make an informal offer of proof. (Parenthetically, this seems curious since that is exactly what Bethany Miller's counsel was doing.) In any event, regardless of the distinction, the court found the offer (regardless of its type) insufficient as a matter of law because it was unspecific and not detailed as to purpose (see, *People v. Andrews*, **146 Ill. 2d 413**, **588 N.E.2d 1126** (1992)). The court "commended" the trial court for resolving the custody issue in a "timely fashion."

The issue of with whom a child will live when his married parents part ways permanently is a serious undertaking. Whether you call it custody, possession, or by some other name, does not change its importance. Whether you agree with the holding in Miller is not the issue. Understanding the nature of offers of proof is. This is because the failure to make an adequate offer of proof results in procedural default (*Chicago Park District v Richardson*, **220 Ill.App.3d 696**, **581 N.E.2d 97** (1st Dist. 1991)). It waives any review of whether the evidence was excluded improperly (*In re Estate of Romanowski*, **329 Ill.App.3d 769**, **771 N.E.2d 966** (1st Dist. 2002)).

The purpose of an offer of proof is twofold. First, it is to disclose to the trial court and your opponent the nature of the offered evidence thereby permitting them to respond. Secondly, an offer of proof provides a record for the appellate court so it can determine whether the exclusion of the evidence was not only erroneous but prejudicial (*Dillon v. Evanston Hospital*, **199 Ill. 2d 483**, **771 N.E.2d 357** (2002)). But, an offer of proof is not required where the trial court clearly understood the evidence sought to be introduced (*Dillon*, citing M. Graham Handbook of Illinois Evidence 103.7. (7th ed. 1999). See also, *People v. Thompkins*, **181 Ill. 2d 1**, **690 N.E.2d 984** (1998)). With this in mind the telling facets of offers of proof become apparent. Many trial judges have standing pretrial orders. In these pronouncements the trial judge indicates how he or she wants to address certain matters like the filing of motions, what is required at the final pretrial conference, whether back striking jurors is permitted etc. In many federal courts the pretrial order is not just an art form but a script from which deviation is severely limited. So, it was in *Miller*.

Therefore, you must determine from the court not only when motions in limine are to be filed, take the next step and find out how the court handles offers of proof. When in limine motions are denied how does (if at all) the trial judge distinguish between formal and informal offers of proof? Make the court announce that so not only you and your client, but most importantly your witness can understand the procedure. Then, call your opponent and find out how they intend to respond to the offer you will make and whether you can get some stipulation as to the type of proof as well as the procedure for making your record. This may avoid the waiver issue in the reviewing court.

Regardless of the type of evidence (deposition, interrogatory answer, live witness) your offer of proof will only be successful if the appellate court understands with particularity the nature of the evidence, by whom it is offered, and what purpose it bears on the trial proceeding. Hence, the focus is on what is said not as much as how it is uttered. A videotape or evidence deposition maybe a great deal more persuasive than some answers to Rule 213 interrogatories. Remember the point is not just to show an error in the exclusion of the evidence but that such a ruling resulted in prejudice (See, *In Re: Detention of Swope*, **213 Ill. 2d 210**, **821 N.E.2d 283** (2004)). Although the Miller court recites a distinction for trial courts between formal and informal offers of proof this holding seems illusory. If the reviewing court does not understand the nature and character of the excluded proof, what the trial court understood or which type of offer was made may be immaterial. Think about that. The real test will be the record you have made and what it actually says because a muddled transcript will never establish how a trial judge was thinking.

Where a trial court is praised for dispatching a complaint that addresses where, how, and with whom, two children will live for the next 15 years, the stakes are not slim. To limit the testimony on that issue to four witnesses on a complaint less than six months old may seem unusual. But, where it is based on an order the parties apparently did not heed, the result in Miller may not be unexpected. Knowing how to make, and making a proper offer of proof, might make a difference as to whether your client feels she had a fair opportunity to present her claim to the trial and appellate courts.

« **Back to the April 2006 Newsletter**

Member Comments

ILLINOIS STATE BAR ASSOCIATION™

TRIAL BRIEFS

The newsletter of the ISBA's Section on Civil Practice & Procedure

Reprinted with permission.

November 2013, vol. 59, no. 5

Prior consistent statements in trial practice: Can you use them?

*By **Patrick M. Kinnally***

Our common law jurisprudence in Illinois has long subscribed to the theory that proof of a witness' out-of-court statement is inadmissible when offered for the single purpose to corroborate that witness' in-court statement on the same subject. Although the genesis for this rule is somewhat murky, the rationale is that it is improper to permit corroboration by prior consistent statements since to do so permits jurors to place belief in what is repeated most often. See, *Moore v. Anchor Organization for Health Maintenance*, **284 Ill.App.3d 874**, 883-84 (1996) ("Moore"). Citing *Wigmore on Evidence*, the *Moore* court observed:

> ... A former consistent statement helps in no respect to remove such discredit as may arise from a contradiction by other witnesses. When B is produced to swear to the contrary of what A has asserted on the stand, it cannot help us, in deciding between them, to know A has asserted the same thing many times previously. If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible. *4 Wigmore, Evidence §* 1172 (Chadbourn rev. 1972).

For various reasons this seems to be an odd conclusion based simply on statistical deduction rather than on our human condition. For the most part human beings are creatures of habit. We are raised on routine. Whether that is worthwhile is debatable, but is a fact. Whether the truth of what one continues to repeat, of course, is not true, if erroneous.

Consequently, the fact one may repeat what s/he does continuously goes really to the weight of the repetitive fact not whether the fact that it reoccurs is actual. This is because the actor may be mistaken in the repetitive conduct or speech in which s/he engages. This is why prior consistent statements should not be discarded in trial practice just because they may be habitual or cumulative. Our judges and juries are smart enough to figure out that the mere repetition of what a witness thinks is true, even on a repetitive basis, does not make it so.

But even if you are not endorsing such a rejoinder to Wigmore's fiat, a recent opinion from the appellate court will permit the use of prior consistent statements in civil trial practice. See, *Jones v. Bojorge*, 2013 IL App (1st) 123209.

Robert Jones ("Jones") was a pizza dough delivery truck driver. He claimed the defendant Bibiana Bojorge ("Bibiana") struck him with her car while he was moving dough on a dolly into a Pizza Hut. He injured his knee.

At trial Bibiana claimed it was Jones who ran into her with his dolly. Jones then offered Bibiana's written statement in which she admitted "she hit the delivery guy" while leaving the parking lot. Jones' evidence at trial adduced his prior consistent statement when his wife, Stephanie, testified that Jones called her on the telephone and said "the delivery lady hit him".

After a jury returned a substantial verdict for Jones, Bibiana appealed on a lone issue, namely that the trial court erred in admitting the prior consistent statement that Stephanie said her husband had made. The Appellate rejected this challenge.

The theme of the defense case at trial wound around a single argument that Jones was an inveterate liar because he lied to his treating physicians about physical maladies unrelated to the accident and necessarily fibbed about the accident. This was so, the defendant urged, even though Bibiana claimed at trial she never hit the plaintiff even though he had her written statement taken at the time of the accident that she did. She had tried to explain this fact away by saying the plaintiff "tricked" her into writing the statement.

On appeal Bibiana argued that Stephanie's testimony that her husband told her "she had hit the delivery guy" denied her a fair trial.

The First District Appellate Court observed that prior consistent statements generally are not admissible because they have a tendency to bolster the credibility of a witness, citing *Moore*.

The court, however, found an exception to this rule. That is, a prior consistent statement is admissible only to rebut a charge or inference that the witness's testimony is of recent fabrication, as long as she made the prior statement before the alleged fabrication. The court found that Stephanie's statement met this test and was consistent with both Jones and Bibiana's original portrayal of what occurred in the parking lot at the Pizza Hut.

Or does it meet the test? Doesn't this analysis really beg the question of whether prior consistent statements should be admissible? The fact that either one of the parties lied or told the truth does not alter the fact that either one of them was being less than truthful.

This is a classic credibility struggle of whom to believe. One of them was prevaricating. And prior consistent statements should go to the weight of his/her testimony not its admissibility.

Maybe the court or jury credits or discounts its repetitive nature. But to say that merely because it is consistent does not seem to me to make it inadmissible. The exception noted by the appellate court swallows the rule. Perhaps, the rule should be discarded so the triers of fact, like in this case, are permitted to make the correct decision. ■

« **Back to the November 2013 Newsletter**

Member Comments

ILLINOIS STATE BAR ASSOCIATION™

TRIAL BRIEFS

The newsletter of the ISBA's Section on Civil Practice & Procedure

February 2009, vol. 54, no. 6

How judges influence advocacy

*By **Patrick M. Flaherty** and **Patrick M. Kinnally***

Judges determine the outcome of cases in many obvious ways—deciding motions to dismiss and motions for summary judgment and ruling on trial objections and on jury instructions—just to name a few. These decisions are usually based on specific legal concepts or defined legal principles.

What is less well appreciated are the subtle ways judges influence advocacy, especially during jury trials. Most of these arise from seemingly harmless practices or from rulings on what have become routine motions. These matters are important to anticipate because they often arise without notice. They have a substantial but unappreciated effect and the decision or practice almost always falls under the protective umbrella of "judicial discretion."

Judicial discretion, for the most part, is a good thing. It allows a trial court to ensure fairness within the context of the facts and the law. It comes with the unpredictability of human foibles, but it is an important tool and lawyers should respect it. Nevertheless, the exercise of discretion should always be tempered by the reality that trials are intended to be adversarial and that justice is best achieved by letting lawyers advocate and jurors decide.

Here are some of the subtle actions that can influence advocacy and some ideas for handling them.

Motion Calls During Trial

The decision to keep a motion or a case management call during a jury trial (especially a long one) can be seen as disrespectful and even hypocritical. It results in unpredictable start times, unnecessary waiting (by jurors, parties, witnesses and lawyers) and increases the overall length and cost of the trial.

It is disrespectful to the jury because we ask them to sacrifice jobs, families, and time to perform a vital public service and then we go out of our way to make it frustrating and difficult. It is hypocritical because we emphasis the importance of jury service to secure participation, yet we fail to give jurors the priority implied once they are seated.

The well-being and convenience of the jury should be our first consideration. It overshadows the consequences of delegating routine business, including any burden imposed on other judges or any loss of control over case dockets. We cannot ask citizens to sacrifice and fulfill a civic duty and then fail to extend to them the common courtesies we afford a guest in our home. That is not asking for too much.

The danger to advocacy of business as usual is clear. How we treat the jury can impact the jury's attention, patience, attitude and perception, making a fair and impartial assessment of the facts difficult or impossible. The irony is that

this danger comes not from undetected bias during jury selection but from conditions the court system creates after jury selection is complete.

In delivering justice, we are trying to solve problems for people who cannot solve them alone. People rely on our justice system for a quick but just resolution. Dispatch and continuity at trial are therefore paramount. Without it, the perception of fairness is lost, as is respect for the system we work so hard to protect.

Explaining the Absence of Parties

Defense attorneys often ask the judge to read a statement to the jury essentially "excusing" a defendant from being in attendance everyday at the trial. It happens in medical negligence cases where a defendant physician does not want to ("can't") take off every day from work. The proposed instruction often says, "Dr. Smith has professional obligations that may prevent him from being in attendance every day during the trial."

An instruction like this is patently unfair and should not be given. It diminishes the value of jury service. It implies that the physician is superior and deserves special treatment. It suggests that his/her occupation is more important than the job of the jurors who are expected to miss work and be in attendance every day. Giving such an instruction judicially validates this impression and effectively increases the burden of proof on plaintiff. The decision to attend or not to attend every day is a choice. No party should be immunized from the consequences of that choice, particularly when to do so gives one party an advantage over the other.

Excluding Witnesses

Parties routinely make a motion before trial (often orally) to exclude non-party witnesses from the courtroom until after they testify. The motion is always granted. There is no statute or rule that mandates exclusion; it arises from a common law practice designed to prevent collusion and fabrication. *In Re: H.S.H.*, **322 Ill. App.3d 892** (2nd Dist. 2001). The court has discretion to grant the motion and that decision will not be reversed absent clear abuse or clear prejudice. *People v. Jenkins*, **10 Ill. App.3d 588** (1st Dist. 1973).

It is easy to determine who non-party witnesses are in most cases but it can be controversial in wrongful death cases. In those instances, the technical plaintiff is the special administrator whereas the real parties in interest are the surviving next of kin. (735 ILCS 180/1). Defendants usually seek to exclude the next of kin (except the special administrator) on the ground that the administrator is the only plaintiff. This argument ignores the unique role of both the administrator and next of kin.

IPI 31.09 states that the special administrator brings suit only in a representative capacity and does so on behalf of the next of kin. The instruction also states: "They [next of kin] are the real parties in interest in this lawsuit, and in that sense are the real plaintiffs whose damages you are to determine. . . ." (IPI 31.09).

It is unfair to exclude the next of kin when they are treated as parties for all other purposes. They hire and pay the lawyer. They receive the money at the end of the case if a recovery is made, and they are subject to adverse examination as a party under 735 ILCS 5/2-1102.

A decision excluding next of kin has obvious consequences for advocacy. The jury can interpret absence at trial as disinterest in both the case and in the deceased and thereby reduce damages awarded for loss of society. The jury is there everyday but the people bringing suit and claiming loss are not. That image clearly undermines the loss asserted. If next of kin are excluded, the court should minimize the prejudice created by giving an instruction at the start of trial that the next of kin are not allowed by law to be present until after they have testified.

Order of Witness Examination

In a case with multiple defendants, an issue can arise about the order in which defendants will examine witnesses. Supreme Court Rule 233 provides that the order of examination is determined by the order in which "they appear in

the pleadings unless otherwise agreed to by all parties or ordered by the Court." See *J.L. Simmons v. Firestone Tire & Rubber Co.*, **126 Ill. App.3d 859** (3rd Dist.1984).

Straying from the order of the pleadings can impact advocacy and should rarely be allowed. In some cases, defendants propose that they determine order amongst themselves or that the defendant most impacted by a witness decide whether to go first or last and that the remaining defendants follow the pleadings. In cases where the witness impacts all defendants equally (i.e., an economist or vocational expert), it has been proposed that defendants determine the order.

Allowing defendants to orchestrate the sequence of examination allows them to coordinate a defense behind the scenes and yet maintain an appearance of individuality in front of the jury. It allows defendants to cooperatively plan examinations so as not to implicate or undermine one another during questioning. It gives defendants an advantage they would not otherwise have.

One instance where judicial re-ordering may be necessary is when the witness is an expert for one defendant in a multiple defendant case. Allowing a co-defendant to examine last instead of the plaintiff is the equivalent of allowing the presenting attorney two examinations. It permits the remaining defendants to coordinate the examination in a manner that bolsters the defendant presenting the witness.

Making Objections

Another issue that arises in cases with multiple defendants is whether one defendant can object for all defendants in order to avoid the negative impression of "piling on." Piling on is a contrived argument. Allowing defendants to avoid standing up and joining in the objection again immunizes them from the consequences of a choice every litigant must make. The disingenuous claim that this practice avoids the disruption and delay of multiple objections should be rejected. This is another example of defendants working cooperatively behind the scenes but wanting to appear independent in front of the jury. It is a false facade that should not be permitted. If defendants want the advantages of a unified defense, they should be treated as one for all purposes, including the disclosure of a single expert on common liability issues.

Controlling Adverse and Cross Examination

Wigmore famously said that cross examination is the "greatest legal engine ever invented for the discovery of truth." 5 Wigmore §1367 (3rd ed.). Yet the effective use of adverse or cross examination depends on both lawyer skill and judicial enforcement. The lawyer must ask narrow questions capable of "yes" or "no" answers. He or she must also move to strike non-responsive answers and ask that responses be limited to "yes" or "no" when that is appropriate. *Lebrecht v. Tuli*, **130 Ill.App.3d 457** (4th Dist 1985). The most carefully planned and executed examination, however, is useless if the court does not control the witness by striking answers and admonishing the witness. This is especially true where the witness is an expert or a defendant with specialized knowledge or training.

The court should be cautious about instructing the witness to "answer 'yes' or 'no' or 'say you can't.'" The option "or say you can't" effectively neutralizes altogether the instruction to answer "yes" or "no." Most experts will say they can't, not because the question is incapable of a "yes" or "no" answer, but because they want to explain or qualify the answer on their own terms. Any such explanation or qualification should be done on redirect examination and not on the adverse or cross exam itself.

The ability of a lawyer to present his/her theory of the case and ultimately to persuade often depends on being able to obtain responsive answers to properly framed questions from adverse witnesses. That process in turn is critical to the jury's ability to assess credibility and to weigh conflicting evidence. Few things impact advocacy more than whether and how a court responds to efforts at witness control. The court clearly has discretion to insist on responsive answers as long as it does so even-handedly for all parties. *Lebrecht v. Tuli*, **130 Ill.App.3d 457**(4th Dist 1985).

Deciding Motions in Limine

A cottage industry has existed for some time now of attempting to script and sanitize trials through motions in limine (MIL). A book as been written about them, *Illinois Motions in Limine*, Lane and Lee (2005). Lawyers make a lot of money preparing them. It is common to see 35-40 motions addressing every phase of the case, from jury selection through closing arguments. Many of these motions are an abuse of process and raise issues that cannot be, and were never intended to be, decided before trial. How the court handles these motions can influence the fabric of the trial.

The use of MILs is not authorized by statute or rule but has been sanctioned as part of the inherent power of the court to admit and exclude evidence. See, generally, Cleary and Graham, *Handbook of Illinois Evidence*, 9th Ed. (2009) pp. 41-47; *Department of Public Works v. Roehrig*, **45 Ill.App.3d 189** (5th Dist 1976). The limited purpose of a pretrial exclusionary order is to avoid prejudice from specific evidence when that prejudice cannot be avoided by objecting to the evidence at trial. That bears repeating: MILs are intended to prevent prejudice that can only be avoided by ruling before trial on an objection to specific evidence.

In ruling on a MIL, the court must decide preliminarily whether the rules of evidence require exclusion. If they do not, the motion should be denied. If the evidence is inadmissible, however, the court has discretion to grant the motion and bar the evidence before trial or to deny the motion and rule on the objection during trial. *Id.* Reserving the motion for trial is not appropriate. A pretrial exclusionary order is either issued or it is not issued. If it is not issued, the motion should be denied because that is the only relief sought by an MIL. Rulings on MILs are always interlocutory. The motion can be reasserted, and the moving party can still object at trial when the evidence is actually offered.

In exercising its discretion, the court should examine and balance the prejudice that waiting for trial would allegedly create against the difficulty of complying with a pretrial order. *Id.* If the difficulty of complying outweighs the prejudice of waiting, the motion should be denied. *Id.*

It is clear that MILs should not be used to enforce rules of evidence in a vacuum or without a specific factual target. For example, it is improper to use MILs to bar witnesses, documents, or opinions not disclosed under Rule 213 without identifying the witness, document, or opinion. Similarly improper are motions that seek to bar opinions not held to a reasonable degree of medical certainty without specifying the opinion, motions that seek to bar documents protected by privilege without specifying the documents, or motions that seek to prevent comment that a party has failed to call a witness equally available to other parties without identifying the witness. These are routine trial objections that need to be made during trial because a ruling requires context and a complete factual record. Such motions are a waste of time and the filing of them should be sanctioned. They are tantamount to asking for a pretrial order excluding all "irrelevant" evidence.

MILs are also not intended and should not be used to shield counsel from the act of objecting in front of the jury. That is part of trial practice. It is a strategy counsel elects and should not be immunized from the consequences of it. IPI 1.01 no longer prohibits the jury from considering the reasons for evidentiary rulings. In fact, Comment (3) specifically notes that "rulings on many objections should be considered." This can only be done if the objection occurs in open court. The jury likewise should be able to evaluate the conduct of counsel and that conduct should not occur behind closed doors.

Finally, MILs should not be used to script or program the trial. Trials are supposed to be spontaneous events. That is a good thing. Candor and honesty flow most reliably from unrestrained inquiry. Effective advocacy depends on passion and zeal which are diluted by a pretrial laundry list of do's and don'ts.

The following passage, endorsed in *Bradley v. Caterpillar Tractor*, **75 Ill. App.3d 890** (5th Dist. 1979), should be remembered by trial attorneys and trial courts alike:

> . . . The motion in limine is a useful tool, but care must be exercised to avoid indiscriminate application of it lest the parties be prevented from even trying to prove their contentions. That a plaintiff may have a

> thin case or a defendant a tenuous defense is ordinarily insufficient justification for prohibiting such party from trying to establish the contention. Nor should a party ordinarily be required to try a case or defense twice—once outside the jury's presence to satisfy the trial court of its sufficiency and then again before the jury. Moreover, the motion in limine is not ordinarily employed to choke off an entire claim or defense. . . Rather it is usually used to prohibit mention of some specific matter such as an inflammatory piece of evidence, until the admissibility of that matter has been shown out of the hearing of the jury. . .
>
> The motion is a drastic one, preventing a party as it does from presenting his evidence in the usual way. Its use should be exceptional rather than general. . . The motion should be used, if used at all, as a rifle and not as shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial. Since no one knows exactly how a trial will proceed, trial courts would ordinarily be well-advised to require an evidentiary hearing on the motion when its validity or invalidity is not manifest from the face of the motion.

Lewis v. Buena Vista Mutual Insurance Ass'n, **183 N.W. 2d 198** (Iowa 1971). *See generally*, Cleary and Graham,. *Handbook of Illinois Evidence*, 9th Ed. (2009) pp. 46-47).

Censoring Language

Particularly abusive motions in limine are ones that ask the judge to prohibit a witness from using certain words when answering questions. The challenged words are frequently culled from deposition testimony or reports prepared by the witness during discovery. Examples are efforts to bar "unconscionable," "outrageous," and "hard to believe" in a medical negligence case where the plaintiff's expert was describing the gravity of defendant's deviation from the standard of care, or to exclude "gold standard" or "best test" or "inexpensive" or "easy to perform" when describing the tests that were available to the defendant physician in diagnosing or treating the illness.

Defendants argue that the only relevant question is whether the doctor deviated from the standard of care and that any characterization of that deviation or the testing options available is "inflammatory" and "irrelevant." Fortunately, the law does not require that cases be tried in a sterile vacuum or that they be stripped of human emotion. Characterizing the gravity of the conduct or the superiority of alternative testing aids the jury in weighing the conflicting evidence and in determining whether negligence occurred. Witnesses should not be required to shed their vigor in the name of prudence. Cross examination has proven to be an effective crucible for excessive fervency.

The judge must guard against an invitation to bar language or to substitute his or her own judgment regarding word choice. The only legal question is whether the challenged words are so inflammatory as to deny an opposing party a fair trial. Short of profanity, it is difficult to imagine words that justify judicial editing. The fact that the language carries emotion or impact is clearly insufficient. Passion for a cause is a good thing. A motion in limine should not be an exercise on the limits of the First Amendment. What words a witness chooses to use in answering a question should rarely be subject to suppression, especially "prepublication" censorship.

Cumulative Evidence

Equally abusive motions are ones that seek to bar "cumulative" or "duplicative" evidence without identifying the evidence or witness that is alleged to be cumulative and without knowing what the evidentiary record is or will be. This is most often directed towards damage evidence (e.g., family photographs or loss of society witnesses) or towards liability evidence (e.g., expert witnesses on the standard of care or proximate cause). Premature and undue restrictions clearly impair advocacy.

Even when specific evidence is identified, defendants argue that anything more than one is improperly cumulative. That is not the law. The court has discretion in determining the volume of evidence and when evidence becomes inadmissibly duplicative. (*Dillon v. Evanston Hospital,* **199 Ill.2d. 483** (2002). The test, however, is not whether a fact

sought to be proved has already been established by earlier evidence (e.g., whether new witnesses will say the same thing or whether multiple photographs include the same people). In deciding whether evidence is cumulative, the court should consider the burden of proof borne by the party offering the evidence, the nature and extent of the dispute over the issue to which the evidence relates, the closeness of the evidence on the disputed issue, whether different perspectives are provided by the additional evidence, and whether the evidence relates to different periods of relevant time. (See *Hunt v. Harrison*, **303 Ill. App.3d 54** (1st Dist 1999); *Maffett v. Bliss*, **329 Ill.App.3d 562** (4th Dist 2002); *Moore v. Anchor*, **284 Ill.App.3d 874** (1st Dist. 1996); *Hubbard v. Sherman Hospital*, **292 Ill.App.3d 148** (2nd Dist. 1997).

Erring on the side of admission is prudent because the plaintiff carries a burden of proof the satisfaction of which is determined later by the jury at deliberations and not by the judge at the time of tender. It is more likely that insufficient evidence will be prejudicial than it is that duplicative evidence will be.

Emotional Outbursts

It is common in catastrophic injury and death cases for defendants to ask the judge to bar displays of emotion on grounds that they would unduly influence or inflame the jury. These motions are especially inappropriate because something as subjective as emotional displays cannot be evaluated before they occur and before context and circumstance are known. Attempting to do so stifles genuine emotions and deprives the jury of relevant facts. Trials involve human tragedy. Witnesses cry and break down. That is not error when it is real and spontaneous and when it is precipitated by and proportional to the evidence. These motions should be summarily denied because inappropriate conduct cannot be defined in advance. It is like pornography in that the court will only know it when it sees it.

The Judicial Imprimatur

The significance of what a judge says or does in front of the jury comes from the perception by the jury that the judge is infallible. The focal point of every courtroom is an elevated bench occupied by a person wearing a black robe. This is literally and symbolically a position of power. Juries recognize this and rely on judges for guidance. Every word and gesture from the bench has the potential to influence opinion. *People v. Terrell*, **185 Ill. 2d 467** (1998); *People v. Rush*, **250 Ill.App.3d 530** (1st Dist 1993).

This potential to influence is not limited to official rulings or instructions but extends to random comments the judge may make in front of the jury. Even seemingly innocuous banter can impact how the jury evaluates evidence. A good illustration is *1st National Bank of LaGrange v. Lowery*, **375 Ill.App.3d 181** (2007).

John Lowery, an attorney, was accused of professional negligence in his representation of a minor in an underlying medical malpractice claim relating to Lowery's failure to inform the minor's guardian of a one million dollar pretrial settlement offer. At trial, legal ethics professor, Steve Lubet, was permitted to offer his opinion that Lowery deviated from the standard of care by failing to abide by certain "Rules of Professional Responsibility." At the conclusion of Professor Lubet's testimony, the follow exchange occurred in front of the jury:

> Court: When did you start at Northwestern?
>
> Witness: 1975.
>
> Court: That's when my son was there.
>
> Witness: I taught your son.
>
> Court: I just wanted to make it clear.
>
> Witness: Thank you, your honor.

Court: My son is very ethical.

Witness: I did my job.

Of course, defense counsel did not object. To do so would only had thrown gasoline on the fire. The damage had been done. By conversing with the witness about irrelevant history, the trial court unwittingly but completely validated the witness's credibility in the presence of the jury. There is no way to unring that anthem's bell. The force of a central authority figure can never be ignored. Sometimes, we all forget this fact.

Conclusion

A jury trial is not the failure of our justice system, but rather its apex—its most complete expression. To a judge, it might involve an old case cluttering the docket. To parties and attorneys, it is the culmination of years of time, expectation, and financial investment. It is not something just "to get through." It is an opportunity for justice and it should be given room to breath.

Lawyers will always think of creative ways to shape the adversary process in a manner advantageous to their clients. The judicial challenge is to resist the invitation to act when not acting is more appropriate. Ensuring fundamental fairness does not require that a trial be scripted or that it be micro-managed. In fact, justice is best achieved and truth best defined through spontaneity and unrehearsed combat. When judicial action is appropriate, it should be tempered with recognition that action carries consequences and that even routine practices can impact an impressionable jury.

« **Back to the February 2009 Newsletter**

Member Comments