

Evidence and Practice Tips

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Cross-Examining an Expert Witness: Proper Preparation and Tips

The scope of cross-examination is not limited to the actual material discussed during direct examination of a witness, but is limited to the subject matter of the direct examination. *Neal v. Nimmagadda*, 279 Ill. App. 3d 834, 840 (1st Dist. 1996). On cross-examination, a party may properly develop circumstances within the witness' knowledge which "explain, discredit or destroy the witness' testimony on direct." *Neal*, 279 Ill. App. 3d at 840. This includes information that may not have been disclosed on direct examination. *Id.*

The areas to be explored when cross-examining an expert witness will depend largely on the facts of each case, and so will the order in which to explore them. Below are some useful tips to keep in mind to properly prepare to cross-examine an adverse expert effectively:

- Challenge the factual basis of their opinion. Determine whether there are any inconsistencies between the facts that the adverse expert relies on and the facts in the record. If so, explore how the expert's opinion would change if his or her factual basis is incorrect using hypotheticals.
- Identify the specific areas of disagreement between the adverse expert and any other experts in the case. Focus on these areas of disagreement as precisely as possible to make it easier for the jury to choose between experts.
- Elicit answers on the overarching principles on which the defense's expert will rely. The plaintiff's expert should be hard-pressed to disagree with those principles, which will lend credibility to the defense's position.
- Review the plaintiff's expert's prior publications. If any contain statements and/or opinions that support the defense's theory, they should be highlighted.
- Use literature that contradicts the plaintiff's theory. As explained in more detail below, literature that contradicts the plaintiff's expert can be used for impeachment if the court takes judicial notice or if it is established that the text or author is authoritative and reliable on the subject matter.
- Use testimony of treating physicians, if applicable, that contradict the plaintiff's expert. Treating physicians may be perceived as more neutral than an expert.

Impeaching an adverse expert witness through literature can be a particularly effective tool. As explained below, the materials do not necessarily have to be disclosed prior to trial, but it is important to ensure the defense's expert can lay the foundation that the text or author is authoritative as to the subject matter, provided the plaintiff's expert does not agree that the author or text is authoritative.

Pre-Trial Preparation

An effective cross-examination of an expert begins long before trial. Before deposing the plaintiff's expert, the defense must determine the potential weaknesses of the plaintiff's expert's opinions and examine the texts, studies, and other materials that the defense's expert has relied on to form his or her opinion. When preparing to depose the plaintiff's expert, the defense must decide whether to question the adverse expert on his or her familiarity with the literature that the defense plans on using for impeachment.

On the one hand, if the text, study, or guideline is well known by professionals in the area and the court is likely to take judicial notice of it at trial, asking those questions at deposition could alert the plaintiff of the defense's strategy. If the defense has already disclosed the literature upon which its expert relies, or if the defense has a reason to believe that the plaintiff will admit the validity of the points raised in that literature or by the author, the defense may not want to alert the plaintiff to its strategy. On the other hand, if the literature or materials have not been previously disclosed, or if the plaintiff's expert may not admit to the authoritative nature of the text or author, it may be helpful to question the plaintiff's expert on the text or author at deposition to ensure the defense can still lay the proper foundation through its own expert, as necessary.

The plaintiff may file a motion *in limine* to bar the use of literature based on lack of foundation. In that case, the plaintiff's expert deposition testimony on the validity of literature or author will prove useful to respond to the motion by establishing foundation. Of course, such a motion can also be challenged by citing Illinois law on the use of literature for impeachment and noting that foundation may be properly laid by the testimony of any expert, including the defense's own expert. If the defense has opted to question the plaintiff's expert on the authority of that literature, it may choose to ask questions such as:

- As a professional in [insert area of expertise], you are familiar with this author/journal/publication, correct?
- Do you agree that the author who published this [literature/study] is an authoritative/reliable in the [insert area of expertise]?
- Do you agree that the text/journal/publication is authoritative/reliable in the [insert area of expertise]?

When the defense's expert is deposed, the defense must make a similar decision as to whether to ask its own expert, in front of opposing counsel, similar questions on literature that it plans to use to impeach the plaintiff's expert.

Disclosure Requirements

Materials may not be required to be produced prior to trial pursuant to Illinois Supreme Court Rules 213, 214, or 237 if they are used for impeachment purposes only, and not as substantive evidence. *Yanello v. Park Family Dental*, 2017 IL App (3d) 140926, ¶ 47; *Stapleton v. Moore*, 403 Ill. App. 3d 147, 156 (1st Dist. 2010); *Maffett v. Bliss*, 329 Ill. App. 3d 562, 577 (4th Dist. 2002). Rule 213(g) specifies that "[w]ithout making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness." Ill. S. Ct. R. 213(g).

Courts have allowed litigants to use literature and articles, even if not disclosed pursuant to Rule 213. *See Iaccino v. Anderson*, 406 Ill. App. 3d 397, 408 (1st Dist. 2010) (holding that there was no discovery violation for the defendant's failure to disclose medical literature as part of his opinion on causation when plaintiffs' counsel asked at his deposition

if he was going to point to one particular article or set of articles as a specific basis of his opinions and responded “[n]o. I mean, there are too many that are, you know, quite explicit about the issues in this case” as the court held that the plaintiffs knew that the doctor believed his opinions were supported by the latest medical literature); *see also Stapleton*, 403 Ill. App. 3d at 160; *cf. Iser v. Copley Mem. Hosp.*, 288 Ill. App. 3d 408, 410-411 (3d Dist. 1997) (barring undisclosed opinion because the expert witness testified at his deposition that he was unaware of and did not review any articles for the case and thus could not give a new opinion contrary to his deposition testimony). However, if a defense’s expert witness at a deposition denies having reviewed materials or being aware of their existence, the expert may be barred from offering any new opinion to lay the proper foundation. *Iser*, 288 Ill. App. 3d at 410-411.

Cross-Examination at Trial

While the defense may not have the opportunity to bring its own expert before cross-examining the plaintiff’s expert, it can still use its own literature for impeachment purposes. The text or author’s competence is established if the judge takes judicial notice of it or if it is established by a witness expert in the subject. *Darling v. Charleston Cmty. Mem. Hosp.*, 33 Ill. 2d 326, 336 (1965). As the Illinois Supreme Court has noted:

An individual becomes an expert by studying and absorbing a body of knowledge. To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness. In our opinion, expert testimony will be more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.

Darling, 33 Ill. 2d at 336; *see also People v. Kallal*, 2019 IL App (4th) 180099, ¶ 25.

“An expert may be cross-examined with articles and treatises he does not recognize, provided some other expert has testified that the publications are authoritative.” *Iaccino*, 406 Ill. App. 3d at 408. Likewise, an expert may be cross-examined as to articles and treatises he has reviewed but did not rely upon. *Id.* at 408. To establish texts and literature as reliable, a litigant does not need to elicit the magic word that the text or author is “authoritative.” Rather, courts accept that the text is “‘standard,’ ‘well-respected,’ [or] ‘a good source.’” *Fragogiannis v. Sisters of St. Francis Health Servs.*, 2015 IL App (1st) 141788, ¶ 28.

Foundation is proper if an expert establishes the authoritativeness or reliability of an author and is not restricted to only proving the reliability of the text. *Stapleton*, 403 Ill. App. 3d at 158. Texts may also be established as reliable authorities even if not published by an individual author, but rather by an entity. *Stapleton*, 403 Ill. App. 3d at 159. While this issue has been mostly litigated in the context of medical malpractice, the rules governing the use of literature in cross-examining an expert are not restricted to professional liability cases or even to civil matters. *See, e.g., People v. Johnson*, 206 Ill. App. 3d 875, 879 (1st Dist. 1990) (recognizing that defense counsel in a criminal case should have been allowed to cross-examine the State’s expert using a textbook on the pathology of homicides, which she admittedly considered in reaching her opinion).



Conclusion

The cross-examination of a plaintiff's expert is often one of the most time-consuming aspects of the defense in a civil trial. The tools to use and areas to explore will vary greatly depending on the facts of the case, but defense counsel should not overlook the ability to use literature to impeach the plaintiff's expert. The defense must be mindful of disclosure requirements as a factor and trial strategy when deciding whether and how to properly prepare to use this particular cross-examination tool.

About the Authors

Jonathan L. Federman joined *Pretzel & Stouffer, Chartered* in July 2016, as an associate attorney with a focus on insurance coverage. Prior to joining *Pretzel & Stouffer*, Mr. Federman served as a judicial law clerk and administrative assistance to Justice Thomas L. Kilbride in the Supreme Court of Illinois, where he worked on petitions for leave to appeal, motions, opinions, and assisted Justice Kilbride in his administrative duties to the Court. Mr. Federman earned his J.D., *summa cum laude*, from The John Marshall Law School in 2013.

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