The Chicago Bar Association Presents:

Deposing the Party and the Party’s Expert in a Medical Malpractice Case

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SPEAKERS AND TOPICS:

DEPOSITING THE DEFENDANT'S EXPERT
Edward (Ted) McNabola, McNabola Law Group

DEPOSITING THE PLAINTIFF'S EXPERT
Scott C. Bentivenga, Lewis Brisbois Bisgaard & Smith LLP

DEPOSITING THE DEFENDANT PHYSICIAN
John J. MacInerney, Hofeld & Schaffner

DEPOSITING THE PLAINTIFF
Gregory V. Ginex, Bollinger Connolly Krause LLP

MODERATOR:
Eileen M. O'Connor, O'Connor Law Group, LLC; Chair, CBA Tort Litigation Committee
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Ted McNabola
Scott C. Bentivenga, Lewis Brisbois Bisgaard & Smith LLP

Scott C. Bentivenga is a trial lawyer with twenty-five years of trial experience representing doctors, hospitals, dentists, transportation/delivery companies, construction companies, product manufacturers and property owners in personal injury and property damage cases. He handles the following types of matters: • Medical malpractice• Dental malpractice• Transportation/trucking/auto • Construction accident• Premises liability• Products liability• Fire damage and injury and Security guard liability.

Gregory V. Ginex, Bollinger Connolly Krause LLC

Mr. Ginex is a 2004 graduate of Chicago-Kent College of Law. Since that time his practice has focused on general tort litigation with experience in areas such as Medical Malpractice, Product Liability, Premises Liability, Professional Liability, and Toxic Torts. In addition, Mr. Ginex has experience in handling complex appeals.

Mr. Ginex was recognized by the Cook County Jury Verdict Reporter and given an award for Trial Lawyer Excellence for his part in obtaining a defense verdict in a toxic mold exposure case. The award was presented at the JVR’s Fiftieth Anniversary Celebration and First Annual Awards Ceremony and was only one of two awards given for outstanding defense verdicts.

Mr. Ginex has been selected for inclusion in Illinois Super Lawyers – Rising Stars in 2012, 2013 and 2014.

John J. MacInerney, Hofeld & Schaffner

A graduate of Loyola University of Chicago School of Law, John MacInerney has been in practice for over 17 years. Mr. MacInerney has worked for Hofeld and Schaffner the entirety of his legal career representing plaintiffs in all matters of personal injury litigation. Mr. MacInerney has a special concentration in cases involving medical negligence. He is a member of the Chicago Bar Association, the Illinois State Bar Association, the Illinois Trial Lawyers Association and the American Bar Association. In 2013 Mr. MacInerney received an award for Trial Lawyer Excellence by the Chicago Law Bulletin’s Jury Verdict Reporter.

Edward (Ted) McNabola, McNabola Law Group

Mr. McNabola joined McNabola Law Group following his employment with a prominent Chicago defense firm where he was responsible for defending catastrophic injury cases involving interstate trucking, personal injury, wrongful death, aviation, general negligence, product liability and premises liability.

Mr. McNabola graduated with honors from Miami University in Oxford, Ohio. He obtained his Juris Doctorate Degree from Loyola University of Chicago School of Law and achieved a Master's Degree from Loyola University of Chicago, where he concentrated on jury selection and deliberation. He studied law in Innsbruck, Austria with the then-Chief Justice of the United States Supreme Court, William H. Rehnquist.
In 2008, Mr. McNabola received the honor of being admitted to the Bar of the United States Supreme Court and was sworn in by Chief Justice, John H. Roberts.

Mr. McNabola is an Adjunct Professor at the Northwestern University School of Law, where he teaches Trial Advocacy. He is an active member of the Illinois Trial Lawyers Association and the Chicago Bar Association. Mr. McNabola was elected by his peers to the General Assembly of the Illinois State Bar Association (ISBA).
PRELIMINARY ASPECTS OF TAKING A DEFENDANT EXPERT’S DEPOSITIONS©

By: Karen McNulty Enright
McNabola Law Group, P.C.
I. PURPOSE OF TAKING A DEPOSITION

PURPOSE

Any party may take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the actions. The notice, order, or stipulation to take a deposition shall specify whether the deposition is to be a discovery deposition or an evidence deposition. In the absence of specification a deposition is a discovery deposition only. If both discovery and evidence depositions are desired of the same witness they shall be taken separately, unless the parties stipulate otherwise or the court orders otherwise upon notice and motion. If the evidence deposition of the witness is to be taken within 21 days of trial a discovery deposition is not permitted unless the parties stipulate otherwise or the court orders otherwise upon notice and motion. * Amended Rule 202.

Make a Character Assessment of the Opposing Party.

Make a judgment as to your client’s veracity and the ability to influence the jury.

GOALS OF A DEPOSITION

1. To prepare your cross-examination for trial; and

2. To find out the facts as the deponent knows them.

II. WHEN TO DEPOSE AND WHEN NOT TO

The deposition of the Defendant and Defense Experts lays the foundation for your cross-examination at trial. However, they are not the same as the cross examination. A good cross-examiner’s questions should bear very little resemblance to his questions at deposition

* Amended in June 1, 1995 effective January 1, 1996.
III. HOW TO EFFECTIVELY AND THOROUGHLY TAKE A DEPOSITION IN THREE HOURS OR LESS

Amended Supreme Court Rule 206d has provided that all discovery depositions must be completed within three hours. If it is anticipated that a deposition will proceed beyond that time the party must seek leave of court or stipulate with the other side that the three-hour time limit will be extended.

1. Do not use the discovery deposition as a fishing expedition with the three-hour rule. It is paramount that you ask only questions that relate to the case and do not attempt to delve into extraneous or collateral matters.

2. Throw out all of the old deposition outlines. Most of the outlines contain questions that are not only irrelevant but will never lead to admissible information. Examples: Where have you lived for the past 20 years. Name all of your full and part time jobs for the past 20 years. Give your job description and reasons why you left that job. Name all of your brothers and sisters, aunts and uncles, addresses, phone numbers, date of birth, social security number.

3. Develop a theory.
   A. Objectively examine all of the facts without regard to which side you represent.
   B. Research the law based on the facts. Know all of the elements and the issues for the cause of action and its defenses. Thoroughly review the complaint, the answer and any and all affirmative defenses.
   C. Develop a theme based on your interpretation of the facts. Your clients version and the law and/or statutes that apply.
   D. Keep in mind the purpose of the deposition. This witness may be crucial to a motion for summary judgment or a motion to dismiss. This witness might be crucial in keeping your case alive in proving notice, lack of notice, damages, etc.


Prior to the deposition make sure you have all of the written discovery and have reviewed all of the records and orders with respect to the case. Make sure that the opposing party has fully complied with request to produce, has attached relevant photographs, bills, invoices, contract documents, medical records well in advance of the deposition. You do not want to be receiving these documents on the day of the deposition. When defending a personal injury action you want to make sure that you have all of the records of the plaintiff’s treating physicians prior to the deposition. This may lead to inconsistent statements by the plaintiff or evidence of other
injuries. In addition if you are producing a plaintiff for deposition you must know all of the records and discuss any inconsistencies if they exist. Do not be afraid to continue the deposition until you have all of the facts.

5. Prepare an outline.

Review your theory and pose questions to conform with your theory. You can accomplish this by asking one-sentence leading questions or one sentence open-ended questions. One of the purposes of a deposition is to impeach a witness at trial. You may often get admissions with open-ended questions but you will need to be careful so that the witness does not run away from you or with your question. You may want to start with an open-ended question and follow-up with a leading question. Such as “What was your speed on the block before the collision? How fast did you tell the officer you were traveling?” And then follow-up with a leading question. “Isn’t it true that the speed limit on such and such a street was 35 mph?”

6. Deposing the defendants medical expert

a. Remember the trial begins at deposition.

b. Defend a rider before the deposition which would include a full copy of the chart with the. Have the doctor bring a copy of the original chart and any and all writings, publications, etc. prior to the deposition.

c. Do not ask an expert an open-ended question. It will only give them an opportunity to ramble and try to explain their position. You are in control of the terms and the conditions of the testimony. Your knowledge of the records must be complete. Upon presentation of the symptoms the day after the accident, the symptoms during treatment. Lay a foundation by matching the patients symptoms with the medical literature. Know the typical symptoms of an injury. Ask the doctor whether or not the patient has the symptoms and then ask him to define the symptoms of the injury. Lay the foundation first by matching the patients symptoms with the medical literature.

7. Outline your topics and organize the topics, which you are going to be questioning the deponent about.

8. Have a series of questions prepared, but be sure to listen to the answers. Often, a rambling answer from the deponent will prove to be much more effective tool for you than a simple “Yes” or “No”.

9. Establish those facts that are helpful to your case through the witness, ensuring that he agrees with them.
10. Establish the general medical principles through the witness, ensuring that he agrees with them.

11. Ask every witness the purpose of the medical records and establish that accurate charting is the standard of care and the policy at virtually every hospital with which they have ever been affiliated.

12. Establish the charting serves as a means of communication between health care providers and therefore must be accurate. It can often serve as the basis for health care decisions going forward.

13. Be sure to establish all the potential causes for the plaintiff’s injury. If you can establish that multiple causes contributed in some way to the outcome, you are essentially ruling out a sole proximate cause.

14. Be familiar with the literature available on the medical issue in question. Ask the witness if he agrees with certain statements that you can read from the literature. These admissions can serve as the basis for cross-examination later.

15. When you cover an area in the case, make sure that the answer to your last question is “No.” (No more conversations, no more examinations, no more opinions, etc.) You want to be sure to define the boundaries of what they are likely to talk about.

IV. BOILER PLATE QUESTIONS AND AREAS TO COVER

1. Background on the witness and his/her CV

2. Any prior experience either testifying in or as a defendant in a medical negligence case.

3. What the witness reviewed.

4. Any conversations the witness has had with other medical personnel

5. Things the witness remembers independent of the medical record.

6. Be sure to have the witness acknowledge that if he/she gives an opinion in the case, he/she will state it to a reasonable degree of medical certainty unless he/she tells you otherwise

7. Go through each entry in the medical record. Establish history, examination, diagnosis, treatment and prognosis for each visit.

8. Ask if there were any events, conversations, etc., that took place that are not part of the medical record and then find out why.

9. Have the witness define “standard of care”.

CBA10
10. Have the witness define “proximate cause”.

11. Establish that various injuries suffered by the plaintiff were caused by certain acts or events, or that those acts or events contributed to cause the injury.

12. On important matters be sure to tie the witness down. Make sure you know everything they are going to say on the subject.

13. Establish the witness history as a retained expert or testifying in medical negligence cases. If appropriate ask for their charges for their professional time. Establish how much they testify and for whom.

14. Be polite and professional. It is a round world.
CHECKLIST FOR DEPOSING AN ADVERSE EXPERT

I. BACKGROUND AND QUALIFICATIONS

A. EDUCATION

1. Schools or training courses.

2. On-the-job training
   -- Did it involve patient care?

3. Degrees of certificates obtained.

4. Licensing, specialty certification, or other professional accreditation received.
   Detail about board certification - -
   -- What field?
   -- Pass on first occasion.

5. Any investigation, suspension or revocation of accreditation.

6. Any lawsuits.

7. Awards, honors, special recognition.

B. PUBLICATIONS

1. Title source topic.

2. Relevant to case.

3. Identify conflicting authors, titles, etc.

4. Publications on subject of lawsuit.

C. RESEARCH

1. Research relevant to subject at issue.

2. Results published.

3. Were results published?

D. EXPERIENCE

1. Schools.

2. Seminars.
3. Last time you performed work in area you are testifying about, i.e. surgery.

E. PROFESSIONAL ORGANIZATIONS

1. If physician, what hospital staffs.

2. All experts, get details as to organizations or positions.

3. Have privileges ever been questioned, investigated, suspended or removed?

F. EMPLOYMENT HISTORY

1. Employer

2. Title, position, responsibilities.

-- Why doctor left those positions

II. BIAS, INTEREST, PREJUDICE

1. Previous trial testimony.

-- Percentage for plaintiff v. defendant

2. Previous deposition testimony.

-- Percentage for plaintiff v. defendant

3. Previous reviewing/consulting experience.

-- Percentage for plaintiff v. defendant

4. How much of witnesses’ income is derived from testifying and preparing.

5. Names of cases and law firms doctor has reviewed or given testimony for.

6. Amount doctor charges for review, deposition, court time.

7. What have you charged so far in this case.

8. Does expert advertise?

9. How did expert get this case?
-- Does he know any of the attorneys?

10. Has expert served for this lawyer or law firm before?

11. Testimony regarding same subject matter.

12. Jurisdictions - - Cook County, and other states.

13. Do you know any of the treating physicians?

-- Do you have any evidence to question their competency?

14. Have you ever been named as a defendant in a lawsuit?

III. THE TASK OF THE EXPERT WITNESS

A. WHAT WAS EXPERT ASKED TO DO, AND BY WHOM?

1. Has expert ever done this task before?

2. Completed Answers to Rule 220 Interrogatories.


4. Did expert personally do all the work?

5. Other persons involved.

B. WHAT WAS DONE

1. Time spent reviewing.

2. Complete list of everything reviewed.

-- What were you given to first review the case

3. Complete list of all technical publications reviewed.

4. Complete list of authoritative sources.

5. Complete list of standards, statutes, guidelines, etc.


7. Oral information from attorney, party or investigator.

8. Consultations with colleagues or associates.

9. Performed any tests or experiments.
10. Anything expert has asked for but have not yet seen.

11. Anything else expert still needs.

IV. OPINIONS

A. LAY THEM OUT

1. Witness should list each professional opinion reached.

2. Read list of opinions back to be sure you have it right.

3. Get witness to agree you have them all and that your list is accurate.

B. BASIS OF OPINIONS

1. Get operative facts on which opinion is based.

   -- What do you rely on in forming these opinions.

2. Get an explanation of the reasoning process from facts to conclusions.

3. Make sure proper legal tests are met, such as “reasonable medical probability for scientific probability”, etc.

4. Standards.

5. Possible v. Probable

   -- Might or could

6. Proximate cause of injury

C. CONCLUSIONS

1. What additional responsibilities does expert expect to undertake.

2. Have all expert’s professional opinions or conclusion been explored.

   (a) If not, what else is there.
EXPERT DEPOSITION RIDER

You are hereby notified pursuant to the Illinois Code of Civil Procedure and Rules of the Supreme Court of Illinois that you, by this Notice, are required to produce or make available for inspection within the next fourteen (14) days and at the deposition of **, the following:

1. Deponent’s Curriculum Vitae and Bibliography.

2. All deposition transcripts, medical records, summaries, books and other documents or things actually reviewed by this deponent in conjunction with this case.

3. All notes, preliminary impressions, medical records, test results, opinions, reports, bills and other documents or things generated by this deponent in conjunction with this case.

4. Copies or citations of any articles, texts, or other literature or rules and regulations upon which this deponent relies to support his/her opinions in this case.

5. Any materials upon which the deponent relies in support of or which form a basis of his/her opinions in this case.

6. Any correspondence to or from this deponent and the attorney(s) by whom he/she was retained.

7. A list of all other cases in which this deponent has testified, at deposition or at trial, as an expert witness, and the attorney by whom he/she was retained.

8. Copies of any correspondence between this deponent and any service which finds medical consultants for litigation or any advertising services listing the deponent.

9. Any and all bills, statements, time sheets, billing records and payment receipts which said witness has generated or received at any time concerning the time spent in this matter.

10. The court reporter’s name and date of any deposition of this witness as an expert in any malpractice case and a transcript if you are in possession of same.

11. Any notes prepared by the witness in connection with the review of materials in this case or in the preparation of any oral or written reports.

12. Complete and updated answers to Supreme Court Rule 213 or 220 Interrogatories.

13. Any and all tax returns, 1099s, W-2s or other evidence of the income generated by the deponent for the past five years, pursuant to Sears and Trower.

In the event the requested materials are not produced or made available fourteen (14) days prior to the deposition and brought to or made available at the time of and at the site of the deposition, the deposition will (a) be continued to another date, (b) adjourned and completed at another time, (c) moved to another location, or (d) supervised by a Judge in a Court of Law. If the materials are not produced and the deposition must be rescheduled as set forth herein,
additional costs or fees may be incurred by the noticing counsel and the noticing party may seek to impose those costs and fees on the deponent and/or his/her counsel.
Deposing the Medical Expert – Defense Perspective
By: Scott C. Bentivenga
Lewis Brisbois Bisgaard & Smith LLP
550 West Adams Street, Suite 300
Chicago, IL 60661
312.345.1718

I. Before the Deposition

A. Illinois Supreme Court Rule 213(f)(3) Disclosures:
   1. Identify all opinion witnesses/experts, opinions, bases and evidence relied upon.
   2. Send them to your experts to review and evaluate.
   3. Hire additional experts if needed to evaluate opinion/expert areas you have not covered.
      (a) Problem if simultaneous disclosure.
      (b) Need schedule for rebuttal experts.

B. Gather information about each disclosed expert:
   1. Colleagues, Jury Verdict Reporter, DRI and other searches
   2. Prior depositions/trials
   3. Websites/ads
   4. Literature search

C. Decide/discuss with your clients whether this is a case to be defended at trial or settled:
   1. If trial is expected, do not give away everything at the deposition that you have for cross examination.
   2. If settlement is the goal, use everything you have to go after the expert in the deposition.

D. Decide whether to depose the expert at all or force your opponent to rely on only the Rule 213(f)(3) disclosed opinions and information at trial.

E. Send a Deposition Notice and a Rider requesting all correspondence, materials reviewed, bills, CV, list of prior testimony, notes, literature relied upon. [Subpoena?]

II. At the Deposition – Areas to Cover

A. Background of the Expert:
   1. Curriculum Vitae/Resume
      (a) Accurate, current, complete?
(b) Anything to add to it?
(c) Get details of areas of training and experience in the relevant subject of the case. 
(d) Identify relevant articles and presentations and ask for copies. Authoritative [caution]?
(e) Identify relevant associations, hospitals, journals

2. Teaching experience on the subject
3. Percentage of professional time spent in patient care, teaching, publishing, doing expert work.
4. Privileges at hospitals and licenses ever suspended or disciplined? If so, why?
5. History of expert work (do at beginning or end?):
   (a) Percentages: Defense vs. Plaintiff
   (b) Keep list of prior depositions and trial testimony? Federal Rules.
   (c) Keep transcripts? Get copies.
   (d) Work for plaintiff’s counsel/defense counsel before?
   (e) Rates/fees/charges for expert work
   (f) What states testified in
   (g) Advertising
   (h) Percentage of income from expert work
6. Know any of the parties or other witnesses – bias?
7. Licensed in Illinois? Experience, training, teaching in Illinois?

B. Involvement in this case:

1. When contacted initially?
2. Who contacted you?
3. What asked to do? Who and what asked to evaluate? If no opinions regarding your client, get that stated in the record and STOP and let your co-defendants’ counsel take over.
4. How did counsel obtain your name? From ad or prior work for counsel/colleague?
5. Time spent reviewing case so far?
6. Charges for work so far? Paid?
8. Take notes, tab, highlight materials reviewed? Take a look at file materials at deposition. Copy any materials, notes, highlights you do not have. [Copy whole file?]

C. Identify Everything Reviewed in the Case:

1. List everything reviewed. Any testing done? Research?
2. What did you rely upon as a basis for your opinions? What not relied upon from what you reviewed? Why? Why not?
3. Use any textbook, articles or other publications to formulate your opinion? If so, do you believe that they are “authoritative”? [Caution.]

D. Identify All Opinions:

1. Deviations from the standard of care.
(a) Go through each opinion listed in the Rule 213(f)(3) Disclosures.
(b) Get all bases for each opinion.
(c) Confirm that all opinions are listed in the Rule 213(f)(3) Disclosures.

2. Criticisms vs. Deviations.
3. Define the standard of care against which you are comparing the defendant for each opinion.
   (a) Where did expert obtain that standard of care?
   (b) Is the standard of care written down somewhere in a textbook, article, policy, procedure, bylaw, or association publication? Standard vs. Guideline.
   (c) Differences of opinion among reasonably well qualified and reasonably careful people in the field? Different schools of thought?

4. Look at the records relied upon to see if the expert read them correctly.
5. Causation – what damage or injury was caused by each alleged deviation from the standard of care?
   (a) Set up a motion in limine to bar any criticism not causally related to the injury.
   (b) List all injuries/damages.
   (c) What else can cause the injuries/damages? Did the patient have any of these alternative causes?

6. At End:
   (a) Do you have any other opinions [caution 213(f)(3)]? Or have we covered all of your opinions?
   (b) Have we covered the bases of all of your opinions?
   (c) Will you be coming to Chicago to testify live at trial? Evidence deposition?
   (d) Signature?

III. Helpful Hints – Be Prepared

A. Educate yourself ahead of time as to the expert, the opinions, and your client’s goals for the case.

B. Use your own expert to learn about the strengths and weaknesses of the expert, the opinions, and the bases.

C. Do not fight with the expert on the medicine or try to prove your knowledge of the medicine. Your job is to break down the expert’s background and opinions.

D. Do not go too far in the deposition to destroy the opponent’s expert because you may: (1) reduce the effectiveness of your cross examination at trial; and/or (2) force your opponent to go out and hire a new/better expert.

Note: Special thanks to Chip Barry, Bill Rogers, John Stalmack and Barry Bollinger who trained me regarding how to effectively depose a plaintiff’s medical expert.
DEPOSITING THE DEFENDANT PHYSICIAN

The most successful depositions are usually the result of careful and diligent preparation. Before taking the deposition of the defendant physician in a medical negligence case you must have a clear plan. You must identify those things that the defendant did wrong or what he or she failed to do, and have a theory on why the defendant did not act as you believe they should have. It is essential that you have an in-depth understanding of the medical issues involved in order to anticipate and block defenses to your theory.

PREPARATION FOR THE DEPOSITION

I. Obtain the complete medical record and verify that the record is complete by serving a Request to Admit on the appropriate defendants that an attached bates stamped record is complete. If your record is computerized it is rarely complete. There are often different methods of printing the computerized record which is determined by different queries and if a drop down sub-file is not selected the record produced will not be complete. Handwritten portions of the record such as anesthesia reports and intra-procedure records are often omitted by hospital record departments as this information is stored separate and apart from the computerized record. At some hospitals such as the University of Chicago Medical Center there is often the hospital chart, abbreviated mini charts, and shadow files that are maintained by the various physicians involved in the patient’s care. In many instances, the shadow files contain handwritten notes appearing on documents reviewed by the physician, and entries indicating when the records were reviewed by that physician, and handwritten notes on records indicating the physician’s impression and plan for the patient. The medical record needs to be analyzed in its entirety and indexed for easy reference and the complete timeline understood. Organized notes and charts should be generated that allow you to have a ready grasp of the facts. The better control you have of the record the better you are able to react to any testimony during the deposition that is unexpected.

II. Research the medical issues involved in your case. Point of care resources that clinicians use such as UpToDate and MDConsult offer an excellent starting point for medical research. I prefer UpToDate because it is comprehensive, regularly updated and, in my experience, it is well-recognized in the medical community. UpToDate also allows you to reference medications and their contraindications quickly and efficiently. Your expert can direct you to the leading textbooks concerning the medical issues involved. More current information is found in the medical journals and these articles can be found online or by accessing a medical/health science library. It is a good practice to carefully scrutinize the sources of the information that you obtain on the internet as misinformation is prevalent.

Many professional organizations will have published standards or guidelines. A helpful source for this information is the Official Directory of Healthcare Standards which is published annually by ECR Institute. This directory organizes standards by organization and indexes the standards by keyword. It also can direct you to state laws, legislation and regulation governing health care professionals and institutions.

The policies, procedures and guidelines of the hospital should be obtained. The table of contents or index to policies should be requested as well so that nothing that may have relevance is withheld. Your expert will usually have an understanding of what policies should exist. Where relevant, the hospital bylaws, information relating to credentialing, and a listing of the procedures that the defendant physician is permitted to perform at the hospital should also be obtained.
III. Sit down with your expert(s) well in advance of the defendant physician's deposition to discuss in detail the medical issues involved and to gain an understanding of your expert's view on the strengths and, perhaps, more importantly, the weaknesses that the expert sees in your case. Inquire from your expert what they would like to know from the defendant. Spend time with your expert discussing how he or she believes the case will be defended. If the expert cannot provide you with this information you may need to look further for expert support because it is extremely rare that a case cannot be defended. In most cases you want to have a clear understanding of the diagnostic criteria for the condition(s) involved and the appropriate differential diagnosis based upon the plaintiff's presentation, signs, symptoms and all diagnostic information available. Ask your expert to help you analyze the important diagnostic tests and procedures that were done as well as those that were not. In cases involving interpretation of radiological studies or pathology slides it is essential that your expert teaches you what is illustrated on the study and why it is important.

IV. Research must be conducted on the defendant physician. During written discovery you should request a complete and current copy of the defendant physician’s curriculum vitae. The CV should provide a list of everything that the doctor has published. Do not rest with those writings that have been disclosed, however, as the publications should be verified by referencing Medline or Pubmed to identify any of the witness's works not disclosed. Once all of the witness's writings are determined, complete copies of these publications should be gathered. Written interrogatories should identify all of the medical journals that the doctor read on a regular basis or subscribed to at the relevant times, and relevant articles in these journals should be researched. Written discovery should also identify all professional societies and organizations that the doctor has belonged to, and this will assist you in locating relevant guidelines and position statements of these organizations. If the doctor has authored chapters in textbooks, copies of the complete textbook should be obtained. All of these things can be used to moor the witness on issues or for impeachment.

You should obtain all previous testimony of the defendant physician which, again, should be identified by written interrogatory. To verify that all testimony was identified you can reference the deposition banks maintained by various bar associations in this state and in other states where the defendant physician has practiced, as well as other resources including Lexis (IDEX) and Westlaw. The defendant physician is required to identify all of the lawsuits in which he or she was named as a defendant, and this information can be verified through Lexis, Westlaw and the Circuit Court of Cook County Electronic Docket. Contact any lawyers who have taken the deposition of this doctor or who have cross-examined this doctor in the past.

The Illinois Department of Professional Regulation allows you to look up the defendant’s medical license and may provide information on any reprimands or other disciplinary action taken against the defendant physician.

V. Prepare an outline or checklist to refer to during the deposition so that if you get sidetracked, or if you run into time concerns due to unanticipated lines of questioning, you do not forget to cover all of those matters that you planned to cover.

VI. Prepare a Rider to the Notice of Deposition to ensure that all of the materials that the witness may reference during the deposition are provided to you in advance of the deposition.
TAking the Deposition

Once you have put in the time necessary to complete the above preparation, you should be ready to take the defendant physician's deposition. Adequate preparation allows you in most cases to have better command of the chart than the deponent, and to demonstrate that you have been educated on the issues involved, and likely have literature to support your side on the relevant issues. Each question that the defendant is unable to disagree with serves to empower you, as does a refusal to allow the witness to get away with unresponsive answers. Arguing with the witness should be avoided, but not at the expense of not getting responsive answers to your questions.

I. It is helpful early in the deposition to define the knowledge base of the witness. Inquire with specificity as to all of the documents that he or she reviewed during the time that the care at issue was delivered. Inquire with specificity as to all documents, literature and materials of any kind that the witness reviewed in preparation for the deposition. Establish all conversations that the witness had with the plaintiff and/or the plaintiff's family.

In short, inquire and establish all information that the witness had about the patient before the defendant saw the patient, and establish the source of the information.

II. It must be clear at the time of the deposition why the defendant doctor did what you believe he or she did wrong, or why he or she failed to do what you believe was required to be done by a reasonably careful physician in similar circumstances. Keep in mind that the judgment of the physician is always a defense in a medical negligence case, so it is imperative to establish all of those factors that influenced the defendant physician's exercise of judgment.

III. Inquire as to the physician's experience with the procedure, condition, contraindications of treatment, proper screening, etc. as relevant to your case. Also, establish the defendant physician's understanding at the time of the occurrence of the risks of leaving the condition untreated.

IV. Always question the defendant physician on the issue of causation. Why did the patient die or become catastrophically injured in this witness's opinion? Was this ever documented in the patient's chart? If not, why not? Was this opinion shared with any of the plaintiff's other caregivers around the time of the occurrence. When was the last point in time that the plaintiff's injury or death could have been prevented, and how could that have been achieved. Ask the doctor if he or she had done those things that you are critical of, would he agree that a better outcome was likely. Was a better outcome possible?

V. It is helpful if you get agreement from the witness that each sign, symptom and test result that is consistent with your theory of the case was indeed present to be acted upon. Establish that the standard of care of the disease required specific treatment. Establish that accepted standards of care required that said treatment be ordered or performed in a timely manner and define specifically what that time frame is. If the treatment or testing is not ordered and completed in a timely manner is this a deviation from accepted standards of care?

VI. You are served by having the defendant physician define all of the medical terminology that he or she uses during the deposition. You should not assume that he or she agrees with your definition of a term unless you ask them if they are familiar with the term, and either ask them for the term's definition or ask them to agree with your definition of the term.
VII. All timing variables must be secured. When must the treatment, testing, or diagnosis have been
effectuated to prevent the patient’s injuries or death. Establish that the standard of care required that the
treatment/testing/diagnosis be accomplished immediately, or required that it must be accomplished
while the defendant had the opportunity but failed to act appropriately. In many instances the whole
case may depend on time, and in such circumstances each day, hour or minute should be accounted for.
Again, when dealing with time, you will often encounter a “matter of judgment” defense that will
attempt to whittle away at the time available to properly treat the patient.

VIII. Effort should be made to eliminate or undermine any anticipated defenses during the
deposition of the defendant physician. Often, the defendant physician is less capable of articulating
these defenses than his or her retained expert will be, and it is more difficult to advance defenses before
the fact discovery is completed.

IX. In most instances you must go over each of the witness’s encounters with the patient. Have all
handwritten notes read into the record. Understand why the witness is seeing the patient, i.e. if it is
during rounds or whether he or she was asked to see the patient for some other reason. Establish that
each note is accurate and establish what the witness means to communicate by each note that was
generated. Establish that the defendant understood the importance of note taking in the medical
setting at the time of the occurrence.

X. Determine what the defendant physician was attempting to do and why for each of the relevant
orders that he or she entered. For the relevant orders entered by other providers, ask the defendant
physician why each drug was prescribed, x-ray or lab ordered, or consult requested. Often omissions
occur when doctors mistakenly believe that others are addressing the patient’s issues.

XI. Do not be afraid of bad news. Get a complete list of the bases for each opinion advanced by the
witness. For each relevant decision made by the defendant physician learn why they made the decision
that they made. At some point during the deposition you should cover what the defendant understood
his or her responsibility was at the time of the occurrence. You may also wish to address the plaintiff’s
damages, particularly where the medical chart, literature or other materials allow you some control over
the witness.
I. PREPARATION - WHO IS THE PLAINTIFF?

   a. Live Plaintiff vs. Representative / Administrator

   b. Social Media Searches – learn as much as you can about the plaintiff, via Google, Facebook, Twitter, etc., prior to taking the deposition. Ask questions that show the plaintiff you have delved into his or her social life.

   c. Family Members – run searches for all family members disclosed in plaintiff’s answers to Rule 213(f) interrogatories. In wrongful death cases, you must determine the type of relationship the decedent had with any beneficiaries. Determine if any family members have medical training.

   d. Medical Records – obtain all records from disclosed healthcare providers prior to deposing the plaintiff. If you agree to proceed with the deposition while medical records are outstanding, reserve your right to redepose the plaintiff once those records are produced.

      i. If consultant is on board prior to deposing the plaintiff, meet with consultant to discuss relevant medical treatment and develop defense theory.

      ii. Meet with client to review records from treatment / procedure at issue. Understand what your client communicated to the plaintiff on each visit.

   e. Employment and Educational background

II. WHAT IS PLAINTIFF’S CLAIM?

   -- The questions you ask at deposition will be largely dictated by the allegations in plaintiff’s complaint and plaintiff’s theory of liability.

   a. Personal Injury vs. Wrongful Death

   b. Survival Claim – Can you expect Representative / Administrator and/or other family members to testify that decedent was responsive for period of time; eye movements; voluntary movement in extremities? Are there references in the medical records that support a survival claim.
c. Apparent Agency – Allows for hospital to be vicariously liable for medical negligence if there is an apparent agency relationship between the hospital and the treating physician(s). Gilbert v. Sycamore, 156 Ill.2d 511 (1993).

i. To establish apparent agency, plaintiff must show (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence. Frezados v. Ingalls Memorial Hospital, 2013 IL App (1st) 121835.

ii. Consent Form – A plaintiff’s signature on a consent form that contains language disclaiming an agency relationship between the hospital and treating physician(s) is an “important factor” when determining whether the “holding out” element has been satisfied. Id. See also Lamb-Rosenfeldt v. Burke Medical Group, 2012 IL App (1st) 101558.

iii. To defeat apparent agency claim, establish that plaintiff signed consent form containing language that physicians were not employees or agents of hospital. Establish that no one informed plaintiff that any physicians were employees of hospital.

d. Informed Consent – This is an issue where the plaintiff alleges that the defendant failed to fully apprise the plaintiff of relevant factors affecting the plaintiff’s decision concerning the service to be rendered. See I.P.I. 105.07.01; 105.07.02; 105.07.03.

i. Look for entries in medical records where defendant documents informed consent conversation where plaintiff was advised of risks and/or alternatives to procedure at issue.

ii. Many times a plaintiff’s expert’s opinion on informed consent will be based solely on the plaintiff’s deposition testimony.

e. Medical Battery – Any procedure performed without the consent of the patient in a non-emergency situation constitutes a battery. See I.P.I 105.05; 105.06; 105.07.
III. ESTABLISH PLAINTIFF’S BASELINE MEDICAL CONDITION

a. Cover all relevant medical history with plaintiff.

b. Ask plaintiff directly whether they were diagnosed with various conditions referenced in medical records. Test the plaintiff’s memory to try to create credibility issues.

c. Obtain identity of all prior treating physicians. Many times there will be additional physicians who were not disclosed.

d. Cover medications plaintiff is currently taking and determine if plaintiff is aware of the purpose.

IV. TREATMENT / PROCEDURE AT ISSUE

a. Cover all relevant treatment with the plaintiff. What were the plaintiff’s complaints to your client? Is the plaintiff’s memory consistent with the medical records.

b. Are there statements by the plaintiff noted in the medical records that can be used as admissions?

c. Was the plaintiff given instructions by physician or hospital? Plaintiff has a duty to follow instructions and a failure to mitigate damages can be a bar to recovery. I.P.I. 105.08.

d. Has anyone with medical training criticized the care and treatment?

e. Does plaintiff recall conversations with or statements by medical personnel? Will plaintiff claim that doctor tried to apologize for poor outcome? Is this an admission?

V. DAMAGES

a. What are the elements of damages that are available to the plaintiff?
   i. Pain and Suffering I.P.I. 30.05
   ii. Disability / Loss of Normal Life
      1. The temporary or permanent diminished ability to enjoy life. This includes a person’s inability to pursue the pleasurable aspects of life. I.P.I. 30.04.01; 30.04.02
   iii. Disfigurement I.P.I. 30.04 – Generally need to see disfigurement to be able to adequately assess this claim.
   iv. Lost income (past and future) I.P.I. 30.07
v. Emotional Distress I.P.I. 30.05.01

b. Wrongful Death
   i. Conscious pain and suffering (survival claim)
   ii. Pecuniary Loss – loss of money, goods, services, society.
       1. Society includes the mutual benefits that each family member
          receives from the other’s continued existence, including love,
          affection, care, attention, companionship, comfort, guidance and
          protection. I.P.I. 31.11

c. Has a physician causally linked plaintiff’s claimed damages with treatment /
   procedure at issue.

d. Hobbies / activities that plaintiff can no longer participate in.
Practice Tips: A Primer on Cross-Examination of Experts, 2nd Edition

by Edward “Ted” McNabola

"More cross-examinations are suicidal than homicidal." - Emory R. Buckner

Despite the wisdom of this old saying, some lawyers fall to follow the rules of cross-examination. Most attorneys have the skills for a basic cross, but need an additional framework for cross-examination of expert witnesses at both deposition and trial. Every trial lawyer knows that a case may be won or lost on the cross of your opponent’s expert. Unlike fact witnesses, an expert’s testimony consists primarily of opinions that cannot be readily disproved. Consequently, counsel must use cross-examination to undermine the expert’s opinions and their bases. This article focuses on the groundwork, discipline and persistence necessary to prepare for an expert’s discovery deposition and suggests methods to effectively structure cross-examination at trial. Lastly, this article summarizes relevant Illinois law on expert testimony, including the most recent Illinois Rules of Evidence, the knowledge of which is crucial to adequate preparation.

I. Discovery as the Foundation for Cross-Examination

The preparation for cross-examining an opposing expert begins well in advance of trial. In fact, the groundwork is laid before the discovery deposition. Since the deposition can be a turning point, it can facilitate settlement. Thus, preparing for it is a worthwhile investment, possibly saving you the time and the risk inherent in trial. A well-researched, well-executed expert’s deposition may also be critical in winning your case. The following six steps are suggested:

A. Consult Your Experts

Once the defendant has answered discovery pursuant to Supreme Court Rules 213 and 214, counsel should study the issues including reviewing any relevant literature. One must also consult his own expert(s) to prepare a questioning algorithm to undermine the opinions of the defendant’s expert. This should include meeting with your experts and/or consultants to formulate questions that attack any weaknesses in the anticipated testimony. It should also include learning any terminology relevant to your expert’s industry and clearly defining those terms at the discovery deposition. There is nothing worse than having to digress into a debate about semantics at trial.

B. Review Previous Testimony and Publications

The more a witness attests to on the record, the more you can hang them with their own rope. To this end, you should obtain as many depositions, trial transcripts, and publications authored by the expert as possible. Make certain to question the expert about all of their previous testimony. Establish how many cases they have reviewed, how many depositions they have given and how many times they have testified at trial. More importantly, determine what percentage of their work is for the defendant versus the plaintiff. Determine the names of any case in which they have acted as an expert that involved similar issues and get any trial or deposition transcripts from that case. Also, determine exactly how much money they have been paid or billed in the case along with the percentage of their annual income that is earned through expert testimony. If they are not provided through written discovery, prior transcripts may be available through various state bar associations such as ISBA or trial lawyer’s associations such as ITLA and the American Association for Justice (formerly ATLA), through LEXIS or Westlaw databases. Also, you should contact other attorneys who may have cross-examined the expert in the past. Even if it does not relate directly to your case, this testimony may provide valuable nuggets of information regarding the qualifications of the expert for purposes of impeachment.

You should also thoroughly review the expert’s curriculum vitae and anything written and/or published by the expert that pertains to the case. Ask if the expert has ever given a presentation on any of the issues in your case. If so, determine if any written materials were prepared in conjunction with the presentation and obtain a copy. This inquiry should include unpublishable works that may be obtained on the internet or through a Medline search. Be mindful of experts who have done work for the government and generated unpublished reports. These reports may be obtained by a Freedom of Information Act request.
Information can be invaluable as experts will look particularly foolish if they contradict or minimize a position they took in a scholarly work.

In light of the prevalence of internet and social media, conduct an internet search, looking for information on the expert as well as professional postings, blogs, or other social media, (e.g. Facebook pages, RSS feeds, Twitter entries, LinkedIn posts) that may have been used by the expert for professional purposes.

C. Study Everything the Expert Has Reviewed or Generated

The notice of deposition should include a rider that requires the expert to produce their entire file, including all letters, reports, depositions, and materials they have reviewed and any notes they have generated prior to the deposition. These documents will provide insight into an expert’s thought processes. Hopefully you will have already obtained this information in advance through a 214 request, but such a request should also be included with the notice of deposition to obtain the most current information. You should fully examine all phone, mail, and e-mail correspondence between the expert and the opposing lawyer. Also, try to get the witness to fully endorse the 213 answers by having him admit that he assisted in preparing the answers and that he reviewed and corrected a draft. Obviously, if there is a first draft, obtain a copy. However, please note that in federal court an expert’s draft opinions may not be discoverable under FRCP 26(b)(3)(A) and (B) as specifically stated in FRCP 26(b)(4)(B).

D. Know Your Case

Experts often mistakenly assume their superior knowledge in their area of study can substitute for knowledge of the facts. Become intimately familiar with your case and in particular with the pertinent records. In a medical negligence case, a timeline is an effective tool. Once you have mastered the facts, you have gained a significant strategic advantage over most experts. This allows you an opportunity to undermine expert opinion by showing that despite being paid exorbitantly, they failed to study the specifics of the case.

E. Outline Areas of Inquiry for the Deposition

Once all of the information is compiled, prepare an outline or a checklist of the areas to cover without writing out specific questions that may inhibit your ability to listen carefully. You do not want to limit yourself with an outline that is too tightly drafted. Rather, be prepared to go where the expert’s answers lead you. Have an exchange that allows for spontaneity. An attorney who fixes on an outline is less likely to listen and will fail to ask the unanticipated, but logical, follow-up questions. The outline will give you the freedom to follow

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an unexpected tangent while still ensuring that you address all relevant areas.

**F. Be Persistent**

Once you have prepared, take a comprehensive deposition examining all questions you and your experts have formulated to aid in this task. You should attempt to achieve the following goals:

1. Lay the groundwork for your cross-examination at trial;
2. Expose the expert's bias or otherwise undermine the expert's credibility;
3. Elicit as much information as possible regarding the expert's opinions and the bases for them;
4. Gain concessions to help support arguments you wish to make later through the use of leading and hypothetical questions;
5. Attempt to get the expert to support even a small part of your case so you can argue to the jury that even the defendant's expert agrees with the plaintiff on certain issues;
6. Buttress weaknesses in your case; and
7. Judge the demeanor of the expert (accomplished only in person and not via telephone deposition).

As a general rule, you are more likely to regret the questions you did not ask, not the extra questions you asked and do not need at trial. However, on rare occasions, you may refrain from a line of questioning to avoid alerting the expert to certain trial questions. For example, you may not want to divulge evidence that the expert has misrepresented his or her qualifications. Also, please remember that the witness' trial testimony will be limited to his discovery deposition and the 213 answers. Therefore, be careful not to elicit new opinions that may assist the expert. It can be a mistake to delve into areas not delineated in the 213 answers because an expert will simply develop new opinions at the deposition. Make sure to go painstakingly through every written opinion with the expert and his bases as provided in the defendant's 213(f) answers. This method may reveal a disconnect between the expert's actual opinions and the defense attorney's disclosure. Finally, if an expert is skilled in evading and/or not completely answering questions, be steadfast in your pursuit of these answers. Repeat the question as many times as necessary to get an answer to your question; not the answer to the question that the expert wants to answer.

**II. Cross-Examination At Trial**

Everyone knows that controlling the witness is important. However, I suggest that when dealing with an experienced and dangerous expert, control is absolutely critical. The cross-examination of a defense expert should always relate back to the theory of your case. You should prepare a draft closing argument first and work backwards. This provides a roadmap for the theory of your case so you know how to travel the road picking up the provisions you need along the way to get you to a positive result. Since cross-examination can be one of the more rewarding theatrical trial experiences, some lawyers mistakenly focus on form rather than substance. If you are looking to impress the jury with grand gestures and lofty rhetoric, your credibility will erode quickly along with your case. This is particularly true when it comes to expert cross-examination. Focus on the substance, and the form will follow. The following six steps may help:

**A. Outline Your Cross-Examination**

Your preparation for cross-examination of a defense expert is an evolving process. In the weeks immediately before trial, you should review and summarize the expert's deposition. You should review the points that you highlighted from the expert's previous depositions and trial testimony from other cases. As you study these materials, consider an outline of your upcoming cross-examination as it relates to your theory of the case. This is crucial.

Unlike the outline for the expert's discovery deposition, your outline for trial cross-examination should include an exact wording of virtually all of the questions you expect to pose at trial. The questions should be precisely organized and handwritten or typed with large spaces between questions so additional questions with respect to unexpected direct examination can be noted and addressed later during cross-examination. You are not looking for spontaneity in your phrasing of questions. You want the answers you elicit to mirror the answers the expert gave at her deposition. This precision in wording best enables you to control the examination and impeach the expert with her previous testimony. It also helps to reference in your outline the relevant deposition or trial testimony by exact page and line number. Thus, if the expert deviates from prior testimony, you can quickly impeach and force him back into step with his prior testimony. On the most crucial questions, you should track your question as closely as possible to your inquiry at the deposition. The use of the deposition to impeach is never as effective when the wording of the trial question is different than the wording of the question at deposition. This difference will invariably provide the expert with room to clarify or explain his position. If you have an effective deposition question and answer, then use the exact same question at trial. The drama of the impeachment really hits home when you read the identical question to which the expert has now given a completely different answer.
8. Command the Courtroom

Extensive preparation allows you to control the dynamics of your cross-examination. You will also keep the rhythm of the examination on your terms and not provide gaps between an answer and the next question so the expert can fill the silence with a "spin" of his previous answer. At no time should you allow the opposing expert to gain control. In order to accomplish this, never ask the expert to explain what they mean even after they have given an unexpected answer. As we all know, most experts love to hear themselves talk and will gladly seize any opportunity to be a "benevolent teacher."

Never ask an open-ended question because it provides the expert with a chance to eloquently reassert their opinions. Questions should be worded, as often as possible, in the form of statements from prior testimony, followed by reflective rejoinders such as "Isn't that right?" or "Didn't you?" This form of questioning is the least likely to allow for an explanation because it is easily answered in the affirmative or negative. If you encounter an expert at deposition who persists in non-responsive answers to well-phrased questions, alert the court, in limine, of the expert's propensity to evade. If the witness continues these evasive tactics at trial, the Court will be sensitized to the issue and, therefore, more likely to respond appropriately.

C. Use Pointed Questions to Undermine the Expert's Qualifications

Do not conduct a prolonged inquiry into the qualifications of the expert unless you have powerful evidence. If you have any information that undermines his qualifications get to them quickly and directly.

D. Create an Impression

The big picture on cross-examination of defense experts is that you must leave the fact finder with an impression that the defendant's case is weak. It is not necessary to take the expert to task on every issue. Instead, pick the points you can win handily. Cover the high points with depth and precision, and leave the minutia on the cutting room floor. Also, the concept of "primacy and recency" is an effective tool in structuring your examination. Therefore, begin and end your cross-examination with your strongest areas to maximize the jury's attention to these points. In addition, control your emotions. Cross-examination does not mean you have to treat every witness with contempt. In fact, harassing or brow-beating often backfires. In most cases, such ferocity comes out during impeachment. Yet many lawyers forget that the goal of impeachment is not to intimidate the witness, but to expose the witness as either wrong or not credible. Particularly with defense experts, you want the jury to view the witness as a practice tips continued on page 80
hired salesman who cannot be relied upon for his objectivity. On the other hand, if the situation calls for vigorous impeachment, seize the opportunity but only if it involves a critical point. Unless you attach some sense of incredulity to your examination at this point, it might slide by the jury. Also, be discerning in terms of where, when and what ammunition is used in order to obtain maximum impact. The issue must go to the heart of the case. Impeachment on irrelevant matters is easily ignored and dilutes your other points. Finally, use visual aides as much as possible. The jury wants to see what you are talking about. If you do not put the impeachment material up on the board or use an overhead projector, they might miss the point.

E. Avoid Refreshing Recollection

When examining an opposing expert you should not use the expert’s prior testimony to “refresh” his recollection. This always invites unwanted explanation. The best way to handle an expert who has deviated from the line of questioning is to open to the appropriate page, identify the page and line number for the record, wait for opposing counsel to find the testimony, read the pertinent questions and answers into the record and simply ask, “I read that correctly, didn’t I?” or “Did you give those answers to those questions?” The expert can only answer one way—“Yes.” This way you maintain control and still undermine the expert’s credibility.

F. Save Some Ammunition for Re-Cross

It is often prudent to save at least some effective examination for re-cross-examination. This requires you to do a balancing act in selecting testimony that you are willing to lose if the redirect does not touch upon the subject matter that you have saved. Thus, to some extent, you have to predict the redirect. The reason for saving a small portion of your examination is to assure that you have some solid material in order to end the expert’s testimony on a high note.

III. Illinois Law on Cross-Examination of Experts

A. Foundation

For purposes of cross-examination as well as controlling the information a defense expert is allowed to introduce, it is important to have a command of the foundational requirements under the Rules of Evidence. The new Illinois Rules of Evidence became effective on January 1, 2011.

Illinois Rule of Evidence 703 governs the bases of expert testimony in Illinois state courts. It states that:

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

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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.

III. R. Evid. 703. The facts or data upon which expert opinions are based may be derived from three sources under Federal Rule of Evidence 703 and accompanying advisory committee notes (as adopted in Illinois):

1. Observation of the witness such as a treating physician;

2. Presentation at trial. The technique used may be a hypothetical question or having the expert attend the trial and hear the testimony establishing the facts;

3. Presentation of data to the expert outside of the court and other than by his own perception.1

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.2

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 disclose the underlying facts or data on cross-examination.3

Expert witnesses cannot read from or summarize medical literature as a basis for their opinions on direct examination.4 An expert is allowed to reveal the contents of materials upon which they reasonably rely in order to explain the basis of their opinion; but they may not publish those materials to the jury in the sense of physically distributing a copy of them to the jury.5 There is no Illinois authority holding that a trial court must allow copies of impeachment materials to be distributed to the jury, either in the courtroom or the deliberation room.6

B. General Areas of Cross-Examination

1. Facts and Data

An expert is under no affirmative duty to reveal facts or data that they considered before they rendered an opinion. Illinois courts have held that cross-examination is the appropriate method for eliciting facts underlying an expert's opinion. You may attack an expert witness by showing that their opinion would be different if certain facts were assumed or if certain assumed facts were changed. An expert-witness may also be attacked for the purpose of impeaching their credibility on matters not directly related to the accuracy of his opinion. It follows that you may explore the partiality or bias of an
2. Bias
Partiality or bias may be shown by probing the expert's financial interest and frequency of court experiences. The Illinois Supreme Court found that inquiry into the 700 cases reviewed by the retained witness was proper. Thus the court found that it was proper to inquire into the expert's annual income derived from expert testimony for the two years immediately prior to trial.

The Illinois Supreme Court has expressly allowed cross-examination on the following matters to establish bias or interest: fee arrangements in the case at bar; financial interest in the outcome of the case; the number, frequency, and financial benefits of patient referrals from the adverse party's attorney; annual income derived from services relating to serving as an expert witness; and a comparison of the frequency with which an expert testifies for plaintiffs and defendants. It constitutes reversible error when counsel is denied information relating to the bias and the financial interest of the expert.

C. Permissible Areas of Cross-Examination
1. Records and Reports
A medical expert may be cross-examined not only as to the records that they reviewed but upon which they did not rely.

2. Income
In addition to inquiry into an expert's income, you may question a medical expert regarding fee arrangements, financial interest in the case, frequency of referrals, number of referrals, and the financial benefits derived from them.

3. Discipline
There is no prohibition in Illinois that a physician expert can only be cross-examined regarding discipline if it resulted in a restriction on his or her practice. On the contrary, the fact that the physician expert is unable to practice medicine without supervision is highly relevant to their credibility where their testimony pertains to whether other physicians failed to exercise the appropriate standard of medical care. The fact that the Illinois Department of Professional Regulation found it necessary to reprimand a physician for the failure to recognize the presence of a medical condition reflects on their qualifications and has some tendency to lessen their credibility as an expert.

4. Asking Hypothetical Questions
You have the right to ask an expert witness a hypothetical question that assumes facts that you perceive are shown by the evidence. The assumptions contained in the hypothetical question must be based on direct or circumstantial evidence, or reasonable inferences therefrom. It should incorporate only the elements favoring the party's
theory of the case, and it should state facts that the interrogating party claims have been proved
and for which there is some support in the evidence. On cross, the opposing party may substitute
in the hypothetical those facts in evidence that conform to their theory of the case.

Typically, on cross-examination, counsel will supply omitted facts and ask an expert
whether the facts affect or alter the expert’s opinion. The omitted facts may include another expert’s
impression, such as another physician’s clinical opinion, as long as it is within the realm of
the evidence. Alternatively, counsel may present a different hypothetical on cross so long as
the hypothetical is supported by the evidence.

An expert witness’s answers to hypothetical questions are an acceptable basis for her expert
opinion. A physician may testify as to what might or could have caused an injury. However, the
trier of fact still must determine the facts and the inferences to be
drawn from this expert testimony.

5. Limitations Based on Direct Examination

The proper scope of cross-examination is not limited to the
actual material discussed during direct, but the subject matter of
direct examination. Nevertheless, on cross-examination a litigant may
properly develop circumstances within the witness’ knowledge,
which explain, discredit, or destroy the witness’ testimony on direct.
This is true even if the information may not have been given on
direct examination. Furthermore, one may go outside of the scope of
direct examination for the purpose of testing the credibility of
the witness.

6. Physician’s Personal Preference

During questioning, it may be
appropriate to inquire as to the
personal preference of the expert
witness. Even though their personal
preference does not relate directly
to the applicable standard of
care and cannot be used for that
purpose, the testimony is relevant
because it has persuasive value
as to the credibility of the expert’s
testimony. It is important to
expose the fact that the expert
is claiming the standard of care
allows treatment that they would
not render to their own patients in
the same situation.

D. Impermmissible Areas

1. Licensure

Evidence should be elicited, although it may not be admissible
at trial, that an expert is not board
certified in their specialty. Also,
you should explore at deposition
whether the witness passed the
board exam on the first attempt.

2. Negligence Cases Pending

Against Expert

Counsel cannot inquire as to
the number of medical negligence
cases against the defense expert.
Nor is it proper to ask an expert
whether they have ever been
sued for medical negligence and
whether sums have been paid
on his behalf in the settlement of
medical negligence claims.

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3. Other Impermissible Areas

The court may preclude a defendant from asking their own expert questions regarding prior instances where the defense expert had recommended to counsel for the defendant that he settle a case. A pending medical disciplinary charge against plaintiff’s expert was a collateral matter so that after the expert denied the existence of a pending charge on cross-examination, defense counsel was bound by that denial and could not impeach the expert by producing a document purporting to set forth the disciplinary charge. 29

Conclusion

Effective cross-examination of expert witnesses demands thorough preparation. A successful cross-examination often determines whether your client will win, lose, or settle. It is a rare expert who is impervious to cross-examination. Everyone has an Achilles’ heel whether it is exorbitant fees, lack of qualifications, ignorance of the facts, lack of preparedness, bias, or faulty methodology. It is up to you to expose it.

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What can the American Association for Justice (AAJ) do for you?

You are all members of ITLA for a number of reasons. I assume they include the following:

- Seminars/CLE
- Share information - listserv, deposition bank, etc.
- Support the civil justice system politically
- Network with fellow plaintiff’s lawyers
- Fun - legislative/judicial dinners, golf outings, etc.

With that in mind, I would like to ask you to join the American Association for Justice (AAJ) as well. If you don’t know what AAJ is all about, you will not be disappointed if you take the time to learn. I became heavily involved in AAJ after attending the winter convention meeting in February of 2012 in Scottsdale. I heard from some of the most dynamic speakers at their CLE’s, which included written materials with ideas that I’m incorporating in my practice to this day. Not only are the conventions (which are twice annually) great sources of information, but you meet some of the finest lawyers from across the country and have a lot of fun doing so. They choose fabulous locations and throw great parties. Busta Rhymes performed at the closing ceremony in Miami in February of this year. Not kidding.

Beyond the CLE and fun had at conventions is information from coast to coast regarding different causes of action, specific types of medical malpractice cases, expert depositions, pleadings, discovery requests for all types of cases... the list goes on. Check out their litigation groups and litigation packets.

Politically, AAJ is our last line of defense in Washington. In the last election campaign, AAJ gave over $5.5M to candidates in HOTLY contested elections. Over 80% of those elections were won. Linda Lipsen, the executive director, and her staff have lobbying down to a science. They are awesome. But AAJ is only as strong as its membership.

Finally, another reason we need additional members is because the Illinois membership has dwindled. We are in danger of losing a spot on the Board of Governors. We need a spot at the table so that issues that we work so hard to protect in Springfield are also taken care of in Washington. Visit the site below. If you aren’t a member or if your membership lapsed, join. Forward this to your colleagues and encourage them to join. There is very little reason not to be a member both of ITLA and AAJ. Thank you for your time.

http://www.justice.org/MembershipJoin.aspx

Pat Salvi II
AAJ Board of Governors

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Endnotes

2 III. R. Evid. 704.
3 III. R. Evid. 705.
4 Mielke v. Condelli Memorial Hospital, 124 Ill. App. 3d 42, 463 N.E.2d 216 (2nd Dist. 1984);
   Schuchman v. Stackable, 198 Ill. App. 3d 209, 555 N.E.2d 1012 (5th Dist. 1990); Praithe v. Snow Valley,
6 Id.
8 Id.
10 Id.
12 Trower, supra.
13 Id.
14 See Trower v. Jones, supra (an expert witness's fees and the frequency with which she testifies
   are proper inquiries on cross-examination).
16 Id.
17 Id.
19 Id.
23 Id.
24 Id.
26 Schmitz v. Binette, 368 Ill. App. 3d 447, 455-456 (1st Dist. 2006);
28 Id.

Edward (Ted) McNabola is a partner at McNabola Law Group and concentrates his practice on personal injury, wrongful death, and professional negligence. He is an Adjunct Professor at the Northwestern University School of Law, where he teaches trial advocacy. He is an active member of the Illinois Trial Lawyers Association, the American Association for Justice and the Chicago Bar Association. Mr. McNabola is also a member of the Illinois State Bar Association and was elected by his peers to the General Assembly of the association. He is a frequent speaker and a published author on various trial practice issues. 

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