Keys to Effective Expert Witness Examination in Illinois

I. INITIAL CONSIDERATIONS WHEN WORKING WITH EXPERT WITNESSES

A. WHY USE AN EXPERT WITNESS

[1] Generally

Now that you are faced with a big civil case, the question becomes do I need an expert witness? In certain cases, like medical malpractice cases, Plaintiffs will require an expert report even before they file suit. In other cases, while a Plaintiff may not need an expert to review a claim prior to filing suit, it will either be wise to consult with an expert before doing so, or it may be imperative to prove a strict liability case. In other cases, for either a Plaintiff or Defendant, far more discretion will be involved, to either establish or refute liability, or to maximize or minimize damages.

[2] Medical Malpractice Cases

Even before filing suit, the Illinois Code of Civil Procedure requires that Plaintiff's counsel append an affidavit to the Complaint certifying that "the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and the affiant has concluded on the basis of the reviewing health professional's

review and consultation that there is a reasonable and meritorious cause for filing of such action. 735 ILCS 5/2-622.

A frequent battleground between Plaintiffs and Defendants is whether Plaintiff timely obtained such a report and whether it is proper. Medical malpractice Defendants will often file Motions to Dismiss based upon 735 ILCS 5/2-622 and 5/2-619 arguing that the reviewing health professional's report either does not sufficiently state a basis of a claim against his client, or that there is no criticism at all. Where charges in a medical malpractice action are the same as to each defendant, and where they are sufficiently broad, a single report of health professional's determination that there is a meritorious cause of action is sufficient. Mueller v. North Suburban Clinic, Ltd., 299 Ill. App. 3d 568, 701 N.E.2d 246 (1st Dist. 1998). This is true in claims of *respondeat superior* as well. Steinberg v. Dunseth, 276 Ill. App. 3d 1038, 658 N.E.2d 1239 (4th Dist. 1995) (report finding meritorious cause of action against anesthesiologist sufficient to cover department head). In the event of a claim of vicarious liability based upon *respondeat superior*, it is sufficient if the medical professional identifies negligence against the agent. Comfort v. Wheaton Family Practice, 229 Ill. App. 3d 828, 594 N.E.2d 381 (1st Dist. 1992).

If the claim against the hospital raises independent claims of negligence, the reviewing health care professional will have to provide an independent basis for those claims separate and apart from any negligence of its agents. Jacobs v. Rush North Shore Medical Center, 284 Ill. App. 3d 995, 673 N.E.2d 364 (1st Dist. 1996).

Oftentimes, Plaintiffs may resort to using the treating physician in establishing their claims. If feasible, retaining the treating physician has distinct advantages over

another controlled expert witness – the doctor may appear less biased, may have more intimate knowledge of the patient's condition, and the Defendant will have to pay the treating physician for deposition time.

[3] Product Liability Actions

In products cases, while an expert opinion is not required for Plaintiff to file suit, it is highly recommended that Plaintiff consult with one prior to commencing an action. The expert may provide critical knowledge as to which parties may be liable, aid in drafting discovery, and assist in developing the theory of the case. Subsequently, it will be almost imperative for a Plaintiff to retain an expert to establish liability.

[4] Personal Injury Cases, Generally

For the remainder of garden variety of personal injury cases, a Plaintiff will generally not be required to retain an expert to establish liability, and may only need the testimony of a treating doctor to establish damages. Nonetheless, in certain actions it is extremely important to retain such experts. For instance, in a Premises Liability Action, Plaintiff may need to retain a safety expert or engineer to establish violations of a municipal code, OSHA regulations, deviations from BOCA standards, or other standards and regulations. By way of example, a safety expert can be used in an electrical injury case to explain how a manufacturing plant violated OSHA standards in allowing workmen to come too close to a power line, and may further opine as to how the landowner "controlled" the premises. In other unusual kinds of cases, for instance where a snowmobile accident may be involved, Plaintiff may need to retain an engineer to explain the mechanics of operating the snow machine or an expert to explain the relevant rules of the road.

In other situations, an expert can be used to not only establish liability against the Defendant, but also to minimize Plaintiff's comparative negligence. For example, in a Premises Liability Action where an invitee tripped over a downspout, Plaintiff's counsel may wish to retain a human factors expert. The expert can opine as to the negligent placement of the instrumentality, and also explain why the Plaintiff may not have seen that part of the building.

In terms of economic damages, Plaintiff may consider calling an economist, forensic accountant, or actuary to establish lost earnings or diminished earning capacity.

[5] Employment Discrimination Claims

Plaintiff may claim that he was unlawfully discharged from his position in violation of one or more of the federal employment statutes. In an effort to prove his damages, Plaintiff may disclose an economist to ascertain his backpay and future lost wages. The expert may premise his opinion on a series of assumptions based upon the discovery undertaken in the case. For example, the economist may project the Plaintiff's front pay without considering whether the Plaintiff would have been terminated for another non-discriminatory reason, or whether the Defendant employer would still be in business. Failure to consider the "separation rate" in this instance may result in the exclusion of this evidence.

Thus, the expert's potential ability to testify at trial – and the weight the jury will place on his testimony – depends largely upon the underlying assumptions relied on by the expert in forming his opinion. Use of an economist as an expert in such cases can range from a simple calculation based on Plaintiff's past earnings, to a complicated analysis taking into account comparative salaries of co-workers, opportunities for

promotion, valuation of benefits and projected timetable to obtain equivalent employment.

Plaintiff may consider retaining the following types of experts:

- Human resources/EEO
- Employment practices
- Social worker
- Business practices
- Statistical
- Medical professional (physicians, psychologists, psychiatrists)
- Economist
- Accountant
- Recruiter
- Vocational rehabilitation counselor

Defendant may consider retaining a mitigation expert or a rebuttal economist to counter Plaintiff's claim that he could not find work or challenge the nature and extent to his damages.

B. QUALIFICATIONS OF THE EXPERT

[1] State Court

[a] General Standards

In state court, the standard for the admissibility of an expert opinion is whether the proferred expert is qualified as an expert by knowledge, skill, experience, training, or education, and the testimony will aid the jury in understanding the facts of the case. Reed v. Jackson Park Hospital Foundation, 325 Ill. App. 3d 835, 758 N.E.2d 868 (1st Dist.

2001); Carlson v. City Construction Co., 239 Ill. App. 3d 211, 606 N.E.2d 400 (1st Dist. 1992). Expert witnesses are allowed to draw conclusions from the facts, but only if the expert's opinion is based on facts adduced at trial. Nelson v. Speed Fastener, Inc., 101 Ill. App. 3d 539, 428 N.E.2d 495 (1st Dist. 1981). An expert may render an opinion as to the ultimate issue in the case. Wade v. City of Chicago Heights, 295 Ill. App. 3d 873, 693 N.E.2d 426 (1st Dist. 1998). Expert opinions may not be admitted on matters of common knowledge unless the subject is difficult of comprehension and explanation. Hernandez v. Power Construction Co., 382 N.E.2d 1201, 73 Ill. 2d 90 (1978). The proponent of scientific evidence has the burden of establishing the qualifications of the expert testimony. In re Marriage of Jawad and Whalen, 326 Ill. App. 3d 141; 759 N.E.2d 1001 (1st Dist. 2001). The decision whether to allow expert testimony is left within the sound discretion of the trial court. Friedman v. Safe Security Services, 328 Ill. App. 3d 37, 756 N.E.2d 104 (1st Dist. 2002).

Formal academic training or specific degrees are not required to qualify person as an expert – practical experience in the field may serve just as well to qualify him. Boyle v. Manley, 263 Ill. App. 3d 200, 635 N.E.2d 1014 (1st Dist. 1994) (30 years boating experience sufficient to allow harbor master to testify as to negligent mooring of yacht); Yates v. Chicago National League Ball Club, 230 Ill. App. 3d 472, 595 N.E.2d 570 (1st Dist. 1992) (witness who designed over 300 softball and baseball fields permitted to testify as safety consultant on behalf of injured baseball spectator). The witness' knowledge at the time of the occurrence may prove critical, however. If an expert acquires the relevant expertise after the occurrence, it may not be sufficient to allow the expert's testimony. *See*, Thurmond v. Monroe, 159 Ill. 2d 240, 636 N.E.2d 544 (1994)

(officer who subsequently investigated 3,000 collisions by time of trial did not allow him to testify as to point of impact between vehicles which happened years before).

[b] Physicians

For a physician, however, the witness must be a licensed member of the area of medicine about which he is to testify and must show that he is familiar with the methods, procedures and treatments ordinarily observed by other physicians in either the defendant's community or in a similar community. Kottan v. Kirk, 321 Ill. App. 3d 733, 747 N.E.2d 1045 (1st Dist. 2001). If the foundational requirements are met, the trial court has discretion to determine whether a physician is qualified and competent to state his opinion as an expert regarding the standard of care. Id. The fact that a physician has been disqualified in other jurisdictions to offer expert testimony does not preclude him from testifying; rather; that issue is relevant to the witness' credibility. Washington v. Yen, 215 Ill. App. 3d 797, 576 N.E.2d 61 (1st Dist. 1991).

[2] Federal Court

Fed. R. Evid. 702 permits a witness who is properly qualified to testify as to a scientific, technical, or other matter of specialized knowledge if the testimony will assist the trier of fact. Expert testimony is admissible under Fed. R. Evid. 702 if it is based upon the witness' "knowledge, skill, experience, training or education…" Further, if the evidence is reasonably relied upon by the expert in the particular field, the underlying facts or data need not be admissible in evidence. Fed. R. Evid. 703.

C. BASIS OF OPINION BY THE CHOSEN EXPERT

[1] State Court

Under Illinois state law, recent changes have been made to the Illinois Supreme Court Rules concerning the classification of witnesses. Currently, witnesses are classified as being either "lay witnesses," "independent expert witnesses," or "controlled expert witnesses." Supreme Court Rule 213(f). Treating doctors are typically considered independent expert witnesses, whereas experts who are specifically retained are considered controlled expert witnesses. For the latter category, a party must not only disclose the expert's opinions but also, any bases therefore. Similar to the federal rules, a party must disclose the bases of a controlled expert's opinions, which would include documents submitted to the expert. The disclosing party is limited to the information set forth in the answer to a Supreme Court Rule 213 (f) interrogatory. Id. at § (g).

The controlled expert witness may rely upon any information typically relied upon expert, and the facts or data upon which an expert opinion may be based may be derived from three sources: 1) first-hand observation of the witness, 2) presentation of data at trial, 3) and presentation of data to the expert outside of court and other than by his perception. Hatfield v. Sandoz-Wander, Inc., 124 Ill. App. 3d 780, 464 N.E.2d 1105 (1st Dist. 1984). An expert may rely upon and testify upon facts or data that need not be admissible in evidence, if they are of a reasonably relied upon by experts in the field, pursuant to Wilson v Clark, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981). Those facts, however, are admissible only for the bases of an opinion, and not as substantive evidence. Id. Thus, it is permissible for the expert to rely upon hearsay evidence. *See*, *e.g.*, Groce v. South Chicago Community Hospital, 282 Ill. App. 3d 1004, 669 N.E.2d 596 (1st Dist.

1996) (physician relied upon letter in malpractice action that Plaintiff failed to return for follow-up treatment). The physician may even rely upon inadmissible literature in the field and not even identify it on direct examination. Becht v. Palac, 317 Ill. App. 3d 1026, 740 N.E.2d 1141 (1st Dist. 2000).

An expert may not offer testimony in terms of a guess, speculation or conjecture. Wojcik v. City of Chicago, 299 Ill. App. 3d 964, 702 N.E.2d 303 (1st Dist. 1998). Thus, it was proper for the trial court to exclude an expert's testimony in a Premises Liability Action that a security company breached the standard of care where a tenant was raped where the expert opined that the intruder entered the building after the security guard began duty, but there was no foundation for the assumption. Friedman v. Safe Security Services, 328 Ill. App. 3d 37, 756 N.E.2d 104 (1st Dist. 2002). An expert witness' opinion regarding the cause of an injury may be admitted if it is couched in terms of probabilities or possibilities based upon assumed facts. Becht v. Palac, 317 Ill. App. 3d 1026, 740 N.E.2d 1141 (1st Dist. 2000). The opinion, of course, must be expressed in terms of a reasonable degree of medical certainty. Mikus v. Norfolk and Western Railway Co., 312 Ill. App. 3d 11, 726 N.E.2d 95 (1st Dist. 2000). The expert may testify in terms of percentages, so long as it is not speculative. Wise v. St. Mary's Hospital, 64 Ill. App. 3d 587, 381 N.E.2d 809 (5th Dist. 1978). Typically, all that is required for the medical expert to establish causation is that the condition "might or could be" the result of a particular injury. Harris Trust & Savings Bank v. Abraham-Zwirn, 314 Ill. App. 3d 527, 731 N.E.2d 410 (1st Dist. 2000). Thus, an appropriate question on direct examination to establish causation is, "Dr., do you have an opinion based upon a reasonable degree of medical certainty whether Mr. Jones' condition might or could be

related to the accident in question?" The expert does not necessarily have to proffer an "opinion" at trial; rather, for damages experts, it is permissible for the expert to provide testimony through a formula. Varilek v. Mitchell Engineering Co., 200 Ill. App. 3d 649, 558 N.E.2d 365 (1st Dist. 1990).

Generally, a treating physician will rely upon the examination of the Plaintiff, the Plaintiff's history, and the Plaintiff's subjective and objective symptoms, and any additional records in his possession. A non-treating physician may only rely upon the Plaintiff's medical records, unless the physician has conducted an independent medical examination.

Illinois follows the Frye standard, or commonly referred to as the "general acceptance" test – scientific evidence is only admissible at trial if the scientific evidence upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs. Donaldson v. Central Illinois Public Service Co., 199 Ill. 2d 63, 767 N.E.2d 314 (2002). The Frye test does not concern the ultimate conclusion, but rather, the underlying methodology. Id. An expert witness may give an opinion without disclosing the facts underlying it. Aguilera v. Mount Sinai Hospital Medical Center, 293 Ill. App. 3d 967, 691 N.E.2d 1 (1st Dist. 1997).

[2] Federal Court

The district court's function is to act as a gatekeeper to insure that the proferred expert's testimony meets the requirements of Fed. R. Evid. 702, and thus decides the matter as a preliminary one of fact. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The

court may exclude evidence if its probative value is substantially outweighed by unfair prejudice or confusion. Fed. R. Evid. 403; Camp v. Lockheed Martin Corp., 1998 WL 966002 (S.D. Tex. December 29, 1998).

When acting as "gatekeeper," the court should utilize several factors, including:

- Whether the theory or technique on which expert evidence is based had been or was capable of being tested
- Whether it had been subjected to peer review and publication
- The known or potential rate of error of scientific methodology
- Whether there are standards for applying methodology
- The acceptance of relevant methodology in scientific community

Daubert, *supra.*

If the expert is permitted to testify in a given area, he may be allowed to testify as to an ultimate issue in the case. Fed. R. Evid. 704. An expert will generally be limited to testify within the scope of his expertise. Charles v. Cotter, 867 F. Supp. 648 (N.D. Ill. 1994) (expert witness certified in emergency medicine precluded from testifying where Plaintiff received injuries).

The decision to have an expert at trial is multi-faceted. Plaintiff's counsel should answer the following questions before retaining, disclosing, and having the expert testify at trial:

- Will the expert's methodology or opinion be excluded under Daubert?
- Can the expert economist's opinion by seriously challenged with more up to date financial information from the Defendant?

Generally, Defendant will only use an expert to rebut the proferred testimony of one of Plaintiff's experts. In addition to using one of its own experts, Defendant may want to consider moving to bar Plaintiff's expert from testifying entirely, or move to have certain opinions of the expert barred. Defendant should consult with its own experts once it is involved in the case. Further, having a retained consultant will greatly aid defense counsel in deposing Plaintiff's expert. Defendant may also be allowed to have its expert present in court to observe the Plaintiff's testimony or that of other witnesses for additional bases for his opinions. Fed. R. Evid. 703.

D. PRIVILEGE AND WORK PRODUCT ISSUES

Plaintiff's counsel should keep in mind that any communications between himself and the expert are not privileged. F.R.C.P. 26(a)(2)(B). Thus, expect defense counsel to thoroughly question the expert regarding every communication and letter sent by Plaintiff's counsel to him. Plaintiff's counsel should therefore be very circumspect about what to include in written documentation sent to experts. Thus, it is wise to generally conduct communications over the telephone and only commit final findings and opinions, when required, in a written report. As a matter of course, when I retain experts, I send my expert a letter confirming the terms of our engagement, and to only communicate over the telephone unless otherwise instructed.

II. PREPARING THE EXPERT TO GIVE TESTIMONY.

A. DEPOSITION PREPARATION

Thoroughly preparing the expert for deposition is crucial to determine if the expert will be allowed to testify at trial, and if so, which opinions he will be able to proffer. First, if the expert is a novice, go over the ground rules as you would with any

witness. The witness should be given the following standard instructions when testifying, similar to that of providing deposition testimony:

- Take your time when responding to questions;
- Advise opposing counsel if you do not understand the question;
- Use simple words and your own vocabulary unless explaining something technical;
- Do not speculate as to an answer;
- Do not fight with opposing counsel;
- Do not talk over opposing counsel when an objection is made;
- Testify only as what you personally observed or heard;
- Do not volunteer information;
- Always tell the truth, even when it appears to be a damaging admission.

Second, go over each of the opinions which was listed in the Supreme Court Rule 213 Answers or the expert's Rule 26 Report, if in federal court. The witness may not have actually seen the Supreme Court Rule 213 Answers, so show them to him. Then, I "source" the bases for each opinion from all the materials. Which deposition excerpts support each opinion? Make sure that the expert can testify as to all bases from the materials – *e.g.*, page 37, line 6 from the Smith deposition, § 1.1 from the ANSI standards, etc. Make sure that the expert has a complete command of all of the materials.

In the event that the matter involves a physical instrumentality or the action one for premises liability, make sure that the expert does a thorough inspection. If he does not, this is a potent ground for cross-examination.

Double check to make sure that the expert's report is accurate. Are the expert's facts and figures correct? Did any information develop since the expert prepared the report which requires any modification or supplementation? If so, it is wise to prepare a supplemental report, if necessary, and disclose it to opposing counsel prior to his deposition. Otherwise, opposing counsel may have a right to re-depose the expert or possibly bar his opinions.

Next, put the expert through a sample deposition. Test his knowledge of the case. Try to expose the weaknesses of your case, and plan how the expert will address these matters at the deposition. Plan for any possible re-direct examination.

B. PREPARING FOR LIVE TESTIMONY AT TRIAL

Preparing for live testimony is like deposition preparation except it takes it to another level. First, as soon as the expert's deposition is completed, send it to the expert for his review. Just as with any deposition, the expert can only make changes which are typographical in nature, as any substantive testimony will stand. Did the other side have an expert? If so, send your expert the other side's expert's report/deposition for his consideration. How will the other side cross-examine your expert based upon the opinions that the expert has disclosed? Does the other expert's opinions necessitate any additional work for your expert to do? Again, if so, be prepared to supplement your expert's opinions or report.

If any additional depositions have been taken which are relevant to your expert's area, send those to him as well.

If your expert is a treating doctor, and you represent the Plaintiff, be sure that the doctor conducts an examination of the client fairly close to the trial date. Otherwise, the

treating physician's testimony and opinions regarding prognosis and permanency may be barred.

Are there any substantive or demonstrative exhibits which would aid the expert in explaining his testimony? For treating doctors, it may be helpful to use X-rays or MRI films. When using these exhibits, bring a light box to court so the jury can plainly see what the doctor is talking about. Additionally, depending upon the case, you may wish to use an anatomically correct model or body part, or a medical illustration depicting a particular part of the body or the injuries involved.

C. PREPARING YOUR EXPERT FOR DIRECT EXAMINATION

Be sure to have all substantive exhibits marked. Run through the direct examination, and put the expert through a vigorous cross-examination. Are there any weak points which you expect to come out on direct? If so, "soft-sell" them on direct. Is there anything that the expert can be impeached on? If there is, point it out to the expert and determine how he will be rehabilitated. Anticipate what questions you will ask on re-direct, and how the expert will address them.

For liability experts in personal injury cases, it may be helpful to use scale models or a computer animation to illustrate the expert's testimony. For particularly dry testimony involving economists, actuaries, accountants or statisticians, consider using an overhead projector or blow-ups to explain their opinions. Keep the exhibits simple, and highlight or flag key findings.

D. PREPARING FOR CROSS-EXAMINATION

Determine if the expert is subject to cross-examination on bias, motive or credentials. If so, as stated in Section C, above, these areas should probably be fronted on direct examination.

Similar to deposition preparation, insure that your expert has reviewed all relevant materials and depositions. Make sure that the expert has completed all of his work and finished all of his inspections. Challenge your expert with contrary facts in depositions and documents and opposing opinions. Pose hypothetical questions to the expert, asking him if his opinion would change based upon a different set of facts. The hypothetical must be based upon admissible facts, but may be slanted to the side who proposes the question.

E. REGROUPING AFTER DESTRUCTIVE TESTIMONY

Your expert has just undergone a scathing cross-examination – what do you do now? First, as hard as it may be, take it in stride. Avoid making facial expressions which reflect how you feel. Confidently stride to the podium and start your re-direct examination. You may ask leading questions to re-direct the witness. Be sure to address all areas, if possible, where the witness was damaged.

While of course you cannot anticipate every question upon cross examination, most of your re-direct examination should be prepared even before you ask a single question on direct examination. If your expert was impeached, are there any areas in his deposition you can use for rehabilitation? Similarly, if the expert was cross-examined on unfavorable passages from other witness's depositions, use other supporting areas for re-direct. Flag these passages in advance. Ask the expert if the admissions he made on

cross-examination are substantive in nature – would his opinion have changed at all given the admission.

III. HANDLING PLAINTIFF EXPERT WITNESS TESTIMONY.

A. DIRECT EXAMINATION OF THE PLAINTIFF EXPERT

This is your opportunity to show the strength of your case. Start by asking the expert about his background, and what he considers himself an expert in. The direct examination should take the expert briefly discuss his educational background, professional background, teaching positions, achievements, and articles/texts written. Do not bore the jury by going through the expert's 50 page CV.

Ask the expert about his forensic experience. How many times has he acted as an expert? How many times has he testified in court, and what courts has he been qualified as an expert? At this point, depending upon the court, you may either tender the witness for voir dire as to his qualifications, or ask the court if he can be allowed to offer his expert opinions. Odds are both will be unnecessary as there will likely have been a pre-trial Motion to Bar or to limit the expert's testimony in some fashion.

Next, proceed to take the expert through his work. If the expert is a treating physician, ask the doctor when he first saw the Plaintiff professionally. How often did the physician continue to see the patient? Have the doctor talk about the key visits, but again, do not bore the jury with each one.

If it is a liability expert, have the expert describe the work he did to reach his opinions in the case. Ask him to describe the depositions and materials that he reviewed, what kind of inspections he conducted, and what independent research was made.

After you have covered the relevant materials, ask the expert if he reached any opinions in the case. For instance, ask the expert, "Mr. Expert, after reviewing all of the depositions in this case and the documentary evidence, and conducting a site inspection of the premises, do you have an opinion based upon a reasonable degree of scientific certainty as to whether the runoff from the downspout might or could have caused an unnatural accumulation of water at the site where the Plaintiff slipped and fell?" Initially, simply have the expert respond that he has an opinion. Then, ask him what his opinion is, and what the bases of his opinion are.

In the event that you are using any demonstrative exhibits, such as models, animation or blow-ups, have the expert use these during the direct.

The following is a direct examination of a treating psychiatrist in an age and disability discrimination case:

DIRECT EXAMINATION OF DR. SHOBA SINHA

BACKGROUND/QUALIFICATIONS

Q What is your professional address

Q Doctor, are you being compensated for appearing at trial today

Q What is your rate for appearing at trial

Q If you were not here, would you be seeing patients today

Q What is your educational background doctor

Q Dr. how long have you practiced medicine in the State of Illinois

Q What medical school did you attend

Q Did you complete an internship

Q Where did you intern

Q Did you complete a residency in any specialty

Q Where and when did you complete this residency

Q Do you have attending privileges at any hospitals

Q Dr. are you a member of a practice group

Q What is their name

Q Do you hold any academic affiliations

Q Have you authored any articles in your field

Q Do you serve on any professional committees

Q Have you ever been engaged in any professional presentations

Q Are you a member of any professional organizations

PRACTICE

Q What kind of patients do you see in your practice

Q How many patients have you treated for depression

PATIENT EXAM

Q Dr. what does the field of psychiatry study

Q How do you go about treating a patient – what is the first thing that you do (take history)

Q What is a history

Q Do you primarily rely upon a patient's history in providing care and treatment to the patient

Q What else do you rely upon to reach a diagnosis (objective findings, and subjective symptoms)

TREATMENT

Q Dr. did you have an opportunity to see Shirley Swiech professionally

Q When was the first time you saw Shirley Swiech for treatment

Q Before you saw Ms. Swiech on July 18, 1996, did you have an opportunity to review any of Ms. Swiech's prior medical records

Q What records were those

Q Who is Dr. Smith

Q When did Ms. Swiech begin seeing Dr. Smith

Q Did you rely upon those prior medical records concerning your care and treatment of Ms. Swiech

Q What was Ms. Swiech's chief complaint when she presented to the clinic on July 16, 1993

Q What did Ms. Swiech relate to her physician concerning the cause of her depressed mood

Q From July 16, 1993 up until the time that Ms. Swiech presented to you, three years later, did she continue to see various doctors and therapists

Q How frequently was she receiving treatment

Q During the three years before the time when you started to see her, did Ms. Swiech complain of various stressors in her life

Q What is a stressor

Q How does a stressor affect depression

Q What kind of stressors did Ms. Swiech have in her life

Q During that three year period, what, in your opinion, seemed to be the dominant stressor

Q During this three year period, July, 1993 – July, 1996, did Ms. Sweich continue to work at Gottlieb and perform her job duties

July, 1996 – October, 1996

Q How did Ms. Swiech come to you in July, 1996

Q What was Ms. Swiech's chief complaint on July 18, 1996

Q Did you take a history from the patient

Q What did that history disclose

Q When Ms. Swiech first came to you, she already had a history of depression

Q What stressors did the Plaintiff relate to you on that date

Q Did the Plaintiff indicate to you that there were stressors other than work on that first visit

Q Did you make any objective findings on that date

Q Did you reach a diagnosis of Ms. Swiech's condition on that date

Q Dr. can you explain the concept of cycling of depression

Q How does that apply in Ms. Swiech's case

Q Did the frequency of Plaintiff's office visits increase in the fall of 1996

Q What stressor was the Plaintiff's complaining of during this time

Q Directing your attention to the chart entry of October 3, 1996, what did Ms. Swiech relate to your associate

Q Did you examine the Plaintiff on October 18, 1996

Q What was the Plaintiff's history on that date

Q What objective findings did you make on that date

Q What was your assessment and plan after that office visit

Q Have an understanding that Ms. Sweich's last day of work was on October 23, 1996

Q Did she come into the clinic on the date after her separation from Gottlieb?

Q What did say to your associate on that date

Q Did Ms. Sweich report any stressors other than work in October, 1996

Q On October 23, 1996, did you give Ms. Swiech any recommendations

Q Did you send a letter to her employer to that effect on that date

November, 1996- present

Q Did you continue to see Ms. Swiech from November, 1996 to the present

Q How often did you see her

Q Did you have an opportunity to examine Ms. Swiech on December 16, 1996

Q Did you make any objective findings on that date

Q What were they

Q What was the significance of the Beck's finding of 37

Q During your subsequent office visits with Ms. Swiech, did she continue to complain about her job

Q What finding did you make regarding her job on January 30, 1997

Q On May 13, 1998, did you see Ms. Swiech again – what did you find at that time

Q Dr. directing your attn to your office visit of February 24, 1999, did you see the Plaintiff on that date

Q What stressor did you find was affecting Ms. Swiech nearly 2 ½ years following her discharge from Gottlieb

Q In your opinion dr., does Ms. Swiech's job loss still act as a stressor today?

Q Dr., when was the last time that you examined the Plaintiff

Q What was her condition on that date

OPINIONS

Q Dr. based upon your education, experience and training as a psychiatrist, and your five years of care and treatment of the Plaintiff, do you have an opinion based upon a reasonable degree of medical certainty as to whether Ms. Swiech had a disabling condition on October 23, 1996

Q Basis

Q Dr. based upon your education, experience and training as a psychiatrist, and your five years of care and treatment of the Plaintiff, do you have an opinion based upon a reasonable degree of medical and psychiatric certainty as to whether Ms. Swiech was unable to work from October 23, 1996 to the present

Q Basis

Q Dr. based upon your education, experience and training as a psychiatrist, and your five years of care and treatment of the Plaintiff, do you have an opinion based upon a reasonable degree of medical and psychiatric certainty as to whether Ms. Swiech's disability, and inability to work is permanent in nature

Q Why do you say that doctor

Q Dr. based upon your education, experience and training as a psychiatrist, and your care and treatment of the Plaintiff, do you have an opinion based upon a reasonable

degree of medical and psychiatric certainty whether the hostile work environment of Gottlieb Hospital caused in whole or in part Ms. Swiech's disabling condition, her inability to work

Q Basis

Q Dr., how can you say that given the fact that Ms. Swiech has not worked at Gottlieb since October, 1996

Q Dr. do you have an opinion based upon a reasonable degree of medical and psychiatric certainty as to whether Ms. Swiech's mental state in the future will be affected over her job related issues

Q Basis

Q Do you believe that this will affect her lupus

Q Basis

Q Dr., do you have an opinion based upon a reasonable degree of medical certainty as to whether Ms. Swiech could have continued to work at Gottlieb Hospital, if her work environment was not hostile, but given her condition of depression and lupus

Q Basis

Q Dr. do you have a pending appointment with Ms. Swiech

Q Dr. do you have an opinion based upon a reasonable degree of medical certainty as to whether Ms. Swiech will continue to need your professional services in the future

Q Basis

Q How often do you anticipate treating her

Q What is your charge per office visit

Q Do you believe, again, that your future medical treatment of her was necessitated in whole or in part by her hostile work environment or job loss

B. CROSS-EXAMINATION OF THE PLAINTIFF EXPERT

[1] Generally

Cross examining Plaintiff's expert at trial is crucial as it may not only weaken a liability or damages link, but it may weaken Plaintiff's case entirely. Defense counsel will be afforded great latitude on cross examination. Defendant should consult with its own experts once Plaintiff's expert has been disclosed. Having a retained consultant will greatly aid defense counsel in deposing Plaintiff's expert. Defendant may also be allowed to have its expert present in court to observe the Plaintiff's testimony or that of other witnesses for additional bases for his opinions. Fed. R. Evid. 703. Defendant may also be able to attack the Plaintiff's expert testimony at trial if he has offered contrary testimony in other cases.

If Defendant can have the expert concede that a certain text is authoritative in the field, Defendant may able to impeach the expert with a passage from the learned treatise. If the expert will not concede that a certain article or journal is authoritative in the field, Defendant will have to lay the foundation for it through another witness, such as its own expert. *See* § III.D., *infra*.

Defendant should utilize the documents which the expert has relied upon for effective cross examination. In re Michael D, 306 Ill. App. 3d 25, 713 N.E.2d 724 (1st Dist. 1999). Additionally, Defendant should attempt to get Plaintiff's expert to admit that he has not reviewed all materials in the case and that those depositions, documents, etc.

would have significance on certain issues. *See*, Tsoukas v. Lapid, 315 Ill. App. 3d 372, 733 N.E.2d 823 (1st Dist. 2000).

Another tactic which Defendant should use is to obtain an admission from the expert that his underlying assumptions are based on information provided by Plaintiff and his counsel. Therefore, if any of the assumptions are incorrect, the opinion necessarily fails. Even if the assumptions are correct, the opinion may appear "tainted" to the jury. Alternatively, Ask the Plaintiff's expert how a specific change in one of the underlying assumptions would affect the monetary damages calculation. This forces the expert to either provide testimony which may be more beneficial to the Defendant or, alternatively, impairs his credibility if he is unable or unwilling to recalculate the asserted damages.

Another tactic which Defendant may wish to consider is using the hypothetical question. Defendant will be allowed to pose a question to the expert using facts which he assumes will be admitted into evidence. Defendant may utilize this tactic to develop a potentially different opinion of the expert. Granberry by Granberry v. Carbondale Clinic, S.C., 285 Ill. App. 3d 54, 672 N.E.2d 1296 (5th Dist. 1996).

Consider whether it would be appropriate in your case to stipulate to certain mathematical calculations, thereby preventing jury from focusing unduly on Plaintiff's expert's presentation of damages figures, and shifting the jury's attention to your expert's testimony on Plaintiff's failure to mitigate. Often, Defendant will gain little when extensively cross-examining the economist where he is viewed only as a "number cruncher."

[2] Defendant's Cross-Examination Checklist

While your trial checklist should be accordingly modified depending on what kind of expert you are cross-examining, the following is a suggested general checklist for cross-examining Plaintiff's expert:

Preparation for Trial

- With whom did you speak with prior to appearing today?
- What documents did you review to reach your opinions in this case (discovery, depositions, deposition summaries, reports, records, photos, diagrams, articles, etc.)?
- You didn't review the deposition of _____ [*crucial deposition testimony*] did you?

Curriculum Vitae

For doctors:

- Are you board certified?
- What does board certified mean?
- Dr., you are not board certified are you?

Education/Training

- Generally
  - You do not have any special degrees or licenses?
  - Hasn't your license been suspended? [*only ask if the answer is yes*]
- Medical Expert
    - You don't have a specialty in _____ [*key field*]
    - Board Certification
        - You did not become board certified on your first attempt, isn't that correct?
        - You have not been re-certified have you doctor?

Teaching

- You have never taught or lectured in your field have you?
- You have never been the recipient of any academic appointments have you?

Publications

- You have never presented any papers or articles in your field?
- You have not published any papers have you?
- You have not been involved with any research projects?
- Who funded or sponsored those projects?

Certifications

- You currently possess a certification in _____ [*describe*]?
- Isn't the sponsoring organization made up of _____ [*demonstrate bias here*]?

Employment History

- You are currently employed by _____ [*show pure forensic background here*]

Litigation Experience

- You have testified as an expert many times before?
- Most of the time you testify on behalf of the Plaintiff isn't that true?
- You have testified ___ [*number*] times for the Plaintiff within the last five (5) years?
- Isn't it true that ___ [*number*] percentage of your time is devoted to serving as an expert in various litigation matters?
- You have worked with Plaintiff's counsel before?
- You have worked with Plaintiff's counsel's firm ___ [*number*] times before?

- What percentage of your total income for year ____ is comprised of forensic litigation work?

Retention/Hired Gun

- When you were first contacted by _____, did he ask you what opinions he was seeking in this case?

- Were you asked to express a particular opinion?

- When _____ [*name of attorney*] hired you, she provided you with certain documents?

- Isn't it true that counsel failed to provide you with _____ [*identify important deposition or document*]?

- You only spent ___ [*number*] hours reviewing documents, depositions, interrogatories, plans, and correspondences? [*only ask if it was minimal compared to the amount of materials in the case*]

- You didn't rely upon all of the documents which you were given?

- Didn't you rely upon [*identify key Plaintiff's document*] more that any other document?

- What is your hourly rate for:

    - Reviewing records?

    - Testifying today at trial?

- To date, what is the total amount of income that you have received from the firm of _____ [*name of firm*] for review, consultation and testimony in connection with this litigation?

- Are any of your bills unpaid?

- How much do you anticipate earning from this case?

C. COMPARATIVE CROSS-EXAMINATION

When seeking to cross-examine the Plaintiff's expert, try to attack him on a number of fronts. Is the expert properly qualified? Alternatively, does the witness have a

certain predisposition to testify in a certain manner? It is well settled that a party may explore bias, partisanship, or financial interest during cross-examination. Sears v. Rutishauser, 102 Ill. 2d 402, 466 N.E.2d 210 (1984). The widest latitude is afforded defense counsel to cross-examine the expert, or reversible error occurs. Washington v. Yen, 215 Ill. App. 3d 797, 576 N.E.2d 61 (1st Dist. 1991). Another successful technique is to demonstrate that the expert gave short shrift in studying the case and has failed to adequately prepare.

[1] Qualifications

A frequent battleground is to attempt to bar an expert due to lack of qualifications. While the trial court frequently may limit the testimony of an expert, a trial court most often will deny a Motion to Bar based upon lack of qualifications, reasoning that it is more appropriate to cross-examine the witness at trial on this issue.

How do you handle this issue at trial? If the expert is a physician, is he board certified? If he is board certified, is he the proper expert for the subject matter? If the Plaintiff has hired a safety expert for an electrocution case, in how many other power line cases has expert testified to. The following are suggestions to address this topic at trial:

- Does the expert lack a particular license or degree which is common in the field?
- Has the expert ever been qualified as a witness before?
- What formal education does the witness possess?
- How many similar cases has the expert handled?
- Has the expert ever been qualified as an expert in this particular kind of case?

- Has the expert's methodology/theory ever been rejected by a court? (e.g., Stan Smith and hedonic damages)
- What percent of the time does the expert devote to work in the field as opposed to giving forensic testimony?

[2] Bias

If Defendant can establish that the expert is biased in favor of the Plaintiff, the jury may completely disregard the expert's testimony. How long has the expert known the Plaintiff or his counsel? How was the expert retained? Is there a prior relationship between the parties? Where the expert was retained by the Plaintiff's brother, a former associate of Plaintiff's counsel's law firm, it is proper to elicit that testimony before the jury. Flores v. Cyborski, 257 Ill. App. 3d 119, 629 N.E.2d 74 (1st Dist. 1993).

[3] Partisanship

Is it possible for the Defendant to establish that this expert is predisposed to offer opinions in favor of Plaintiffs? For instance, it is proper for a Defendant to inquire how much the expert earned annually from services related to expert testimony, and it was also proper to inquire as to the past two years. Trower v. Jones, 121 Ill.2d 211, 520 N.E.2d 297 (1988). Another way of exploring this issue is to inquire how many cases the expert has testified in during the last year, and how many were on behalf of the Plaintiff. If the witness conveniently does not recall, Defendant can perform a search with the Jury Verdict Reporter using the expert's name. You will be able to access all case information. If the expert is a frequent visitor to the courthouse, you may wish to list John Kirkton from the Jury Verdict Reporter as a Supreme Court Rule 213(f) witness. Mr. Kirkton will be able to testify as to the frequency that the expert testified to during a

given time frame. If the expert has proferred similar opinions in other cases, it may be wise to obtain the expert's depositions from those cases.

[4] Financial Interest

It is proper and Defendant should inquire what kind of financial interest the expert has in the litigation? Does the expert expect to get future business from the Plaintiff or his counsel? Establish in the expert's deposition, if possible, that the expert and the Plaintiff or his counsel have done business for a number of years. A medical expert may be cross-examined concerning the number and frequency of referrals from an attorney; such cross-examination, however, should be strictly limited to the number of referrals, their frequency, and financial benefit derived from them. Sears v. Rutishauser, 102 Ill. 2d 402, 466 N.E.2d 210 (1984).

[5] Failure to Adequately Prepare

Another effective technique of undermining the expert's credibility is to establish that he did not do all of his homework. First, determine which materials Plaintiff's counsel sent to the expert. Were all depositions sent? Were only excerpts sent? Were certain passages flagged? That may suggest that the expert did not consider the entire deposition. Note that Defendant may use records to cross-examine the witness which he did not review, but Defendant may not use that method as a "Trojan Horse" to introduce inadmissible hearsay. Jager v. Libretti, 273 Ill. App. 3d 960, 652 N.E.2d 1120 (1st Dist. 1995).

Again, preparation for this method begins at the deposition. Ask the expert the following questions:

- Which documents were sent?

- How long has the expert spent reviewing them?
- Does the expert believe that he completed a thorough review of all the materials?
- Is there anything that you did not do that you wished you could have performed?

If the expert has not reviewed all depositions, and there have been numerous depositions in the case, I like to have the stack of depositions sitting at the bench in front of the jury and question the expert one by one if he reviewed the depositions. After he says no, I ask the expert whether he thinks that it would be important to do. I find that regardless of his answer, it is a winning response.

If the case is a Premises Liability Action, question the witness as to whether he toured the site, and how long he spent there.

D. STRATEGIES FOR IMPEACHMENT

A well prepared expert will allow little room, if any, for impeachment. Odds are that the Defendant will have greater success in cross-examining the Plaintiff's expert by other means – exploring motive, bias, lack of preparation, etc. as described in § III.B. – C., above. Nonetheless, should an opportunity for impeachment arise, Defense counsel should be ready, as a single powerful impeachment can possibly undo that the expert has testified to on direct examination.

When impeaching the expert or any witness for that matter, Defendant should concentrate on questioning the witness on a directly contradictory statement or testimony, or glaring omissions. Defense counsel should not rush in to impeach the expert simply because he made a contradictory statement on some issue at his deposition – it may be

deemed collateral, an objection may be sustained, and Defendant may lose points before the jury. Traditionally, Defendant will find the prior contradictory statement from a deposition; sometimes, however, there may be additional sources. Did the expert speak at this topic at a trade show or convention? Did the expert author any articles or texts which speak directly opposite of his trial testimony? Analyze the expert's CV prior to taking his deposition. Ask the expert which if any of his articles or texts speak to the issue at hand. Perform an Internet search of the expert to see what you can uncover.

When the opportunity arises, Defendant should be sure that the question posed by Plaintiff's counsel on direct and the expert's answer exactly track the language in the deposition. An example follows:

Q Mr. Expert, you testified on direct examination that it was necessary for the Plaintiff to have an independent observer at the accident site, correct?

A Yes.

Q Do you recall giving a deposition at my office on January 2, 2003?

A Yes.

Q Did you give the following answer to the following question at the time?

Q Mr. Expert was it necessary that the Plaintiff have an independent observer at the accident site?

A No.

Q Yes, I did.

Note: if the expert denies that this is his testimony at the deposition, you may need to call the court reporter to testify from her notes unless the parties can stipulate that that is what the expert testified to at his deposition.

Similarly, one may be able impeach by omission. If the expert testifies to a significant finding at trial that he did not state earlier, Defendant should be able to impeach the witness by failing to record it at an earlier time. Start by laying the foundation that the expert believes that he completed a thorough examination or analysis. Then ask the expert if it is his practice to record all significant findings, and that he would have recorded all such findings or data in his report at or near the time it was made. Conclude by showing him his report and asking him if the finding is included.

Another method of impeachment is by the learned treatise. If the expert testifies in contradiction to a recognized authority in the field, Defendant may use the text to impeach the expert at trial. Preparation for this method is done at the deposition. Ask the expert what texts are authoritative in the field. Alternatively, ask the expert which texts he maintains in his library, or which periodicals he subscribes to. If the expert acknowledges that there is an authoritative text, see if there is a contradictory opinion in the treatise. An example follows:

Q Dr., you have testified that the differential diagnosis for a bleeding ulcer is to palpate the patient's lower quadrant area in his stomache first, correct?

A Yes.

Q Dr., are there any authoritative texts in the field of internal medicine?

A Yes, there is Harrison's.

Q And you maintain a copy of Harrison's in your office, correct?

A Yes.

Q Dr., are you familiar that Harrison's on page 714 states that the differential diagnosis for a bleeding ulcer requires that the physician initially take a history of the patient?

A Yes.

Defendant will not be allowed to conduct this kind of impeachment unless he establishes that the subject text is authoritative. Brown v. Arco Petroleum Products Co., 195 Ill. App. 3d 563, 552 N.E.2d 1003 (1st Dist. 1989).

Note that once Defendant begins to impeach the witness, he must complete the impeachment. Failure to do so may result in prejudicial error and may result in a Motion For New Trial being granted if there is a defense verdict, or a reversal on appeal. *See*, Boersma v. Amoco Oil Co., 276 Ill. App. 3d 638, 658 N.E.2d 1173 (1st Dist. 1995) (56 questions resulting in incomplete impeachment of expert prejudicial).