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Notes

IMPARTIAL MEDICAL EXPERT TESTIMONY IN ILLINOIS: REMOVING THE BARRIERS TO ITS USE

*Who shall decide, when Doctors disagree,
And soundest Casuists doubt, like you and me?*¹

I. INTRODUCTION

The expert witness plays a critical role in all litigation, especially in medical malpractice litigation. During the last twenty-five years there has been a marked increase in the amount of medical malpractice litigation,² and with this a corresponding increase in expert medical testimony.³ This phenomenon has produced a competitive medical expert witness market, as evidenced by the vast number of advertisements in trial magazines.⁴

The marked increase in the use of medical expert testimony highlights

1. ALEXANDER POPE, *Epistle III: To Allen Lord Bathurst*, in 3-2 POEMS OF ALEXANDER POPE: EPISTLE TO SEVERAL PERSONS (MORAL ESSAYS) 81 (F.W. Bateson, ed., Yale University Press 1951) (originally published in 1733).

2. Peter D. Jacobsen, *Medical Malpractice and the Tort System*, 1989 JAMA 320, 324 (noting that from the 1970s until the mid-1980s, medical malpractice award severity and claim frequency increased sharply and without interruption). After World War II, malpractice suits against physicians slowly began to rise. The increase in lawsuits has been attributed to the growing complexity and technology of medical care. AM. MED. ASS'N SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE EIGHTIES REPORT (1984) [hereinafter AMA REPORT]. From 1960 until the late 1970s, there was a plateau in the frequency in claims brought against physicians. *Id.* at 6. From 1979 to the mid-1980s, malpractice claims increased 53%. *Id.* at 13. See also Ellen M. Keefe-Garner, Comment, *The Medical Malpractice Reform Act of 1985: Legislative Surgery Prescribed To Save Illinois Review Panels*, 19 J. MARSHALL L. REV. 637, 639 (1986). In response to the medical malpractice crisis, many states enacted remedial legislation directed at relieving the systemic effects of medical malpractice claims. While some evidence exists that this legislation has reduced claim frequency and damage awards, medical malpractice litigation continues to oppress the judicial system. Jean Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation To Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181 (1990).

3. Michael H. Graham, *Impeaching the Professional Witness by a Showing of Financial Interest*, 53 IND. L.J. 35, 37 (1977-78) [hereinafter Graham, *Professional Witness*]. See *infra* notes 128-32 and accompanying text.

4. Bill Winter, *For Hire, Expert Witness Boom Time*, 69 A.B.A. J. 429, 429 (1983). See *infra* notes 135-41 and accompanying text.

problems inherent in our current tort system. Two of these problems are the questionable competency and trustworthiness of medical expert testimony.⁵ The basis of the experts' employment depends upon their ability to provide convincing testimony favoring the party the experts represent.⁶ Many expert witnesses are not involved in the medical care of the plaintiff, but rather are hired to provide testimony at trial. The economic relationship between the expert witness and the party suggests that it is unlikely that the expert will provide a purely objective opinion.⁷

Some physicians spend a great deal of time acting as expert witnesses.⁸ Many physicians will testify only for plaintiffs or only for defendants.⁹ Some

5. Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43, 46 [hereinafter Graham, *Insuring Trustworthiness*]. See generally Edward H. Nielsen & Robert J. Franco, *Purchased Testimony: The Problem of Professional Expert Witnesses*, 57 DEF. COUNS. J. 525 (1990). Many expert witnesses have not been directly involved in the actual care of the plaintiff, but rather are hired by the plaintiff or defendant for the purpose of testifying at trial. Anthony Champagne et al., *An Empirical Examination of the Use of Expert Witnesses in American Courts*, 31 JURIMETRICS J. 375, 376 (1991).

6. Nielsen & Franco, *supra* note 5.

7. *Trower v. Jones*, 520 N.E.2d 297, 300 (Ill. 1988).

One commentator has noted:

It is often surprising to see with what facility and to what extent [the expert's] view can be made to correspond with the wishes or interests of the parties who call them. . . . [T]heir judgment becomes so warped by regarding the subject in one point of view that even when conscientiously disposed, they are incapable of expressing a candid opinion. . . . They are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is in many instances the result alone of employment and the bias growing out of it.

William L. Foster, *Expert Testimony—Prevalent Complaints and Proposed Remedies*, 11 HARV. L. REV. 169 (1897) (quoting Professor Himes, 135 FRANKLIN J. INST. 309).

The personalities of expert witnesses become more important than their credibility. DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, 3 FEDERAL EVIDENCE § 404, at 721. "There are 'no unbiased experts.'" *Id.* (citing Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIM. PSYCHODYNAMICS 221 (1959)). See also Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL'Y REV. 480, 483 (1988).

8. Given the market created by the litigation explosion, many expert witnesses earn their livelihood by testifying. The role of the expert witness has changed dramatically over the last decade, with the number of expert witnesses testifying at trial increasing significantly. Experts in many fields are testifying, but the majority of the expert witnesses continue to be physicians. Michael A. Pope, *It's Time to Take Our Courtrooms Back From the Expert Witnesses*, 2 CHI. BAR ASS'N REC. 15 (1988).

9. *Trower*, 520 N.E.2d at 299 (indicating that whether a particular expert witness testifies for a particular party is certainly of some value in determining whether the expert may have some disposition either to exculpate or find fault. Attorneys, judges, and many trial experts themselves are well aware that certain expert witnesses appear willing to testify that negligence has occurred, while others appear particularly inclined to testify that there was no deviation from the standard of care.). *Id.* at 301. See also Lee M. Freidman, *Expert Testimony, Its Abuse and Reformation*, 19

physicians perform more expert witness work than actual medical care; hence the term 'professional witness'.¹⁰ Professional expert witnesses, acting under the guise of non-partisan educators, may shade, alter, or enhance their testimony to strengthen the case of the party they represent.¹¹ Such altered testimony will not assist a jury in its attempt to determine whether medical negligence has occurred; rather, it may impede the jury in this endeavor.¹²

Both plaintiffs and defendants use expert testimony extensively in medical malpractice trials. The expert testimony is often the most critical evidence introduced in many medical malpractice trials, and, as a result, the trial often evolves into a battle of the experts instead of a presentation of relevant and trustworthy testimony.¹³ The battle between the experts can confuse and

YALE L.J. 247, 253 (1910) (noting that other court experts not only come to be known in court as "plaintiff's experts" or "defendant's experts," but they also begin to have a chronic one-sided medical point of view. Habitually, the plaintiff's expert sees or magnifies injuries, symptoms, and resultant ill effects, all of which the defendant's expert minimizes.).

10. Russell G. Donaldson, Annotation, *Propriety of Cross-Examining Expert Witness Regarding His Status As "Professional Witness,"* 39 A.L.R.4th 742, 746 (1985). Being a professional witness is a matter that is likely to bear on the credibility of that expert, since a significant portion of the expert's livelihood may depend on his or her desirability as a favorable and convincing witness. This could possibly lead to a temptation for the witness to color findings and testimony to suit the needs of the proponent party. *Id.* See also Nielsen & Franco, *supra* note 5, at 525 (claiming that a professional expert witness, whose testimony is untrustworthy, usurps the function of the jury, unduly affects the outcome of the trial, and corrupts the entire judicial process); Roger A. Pies & David J. Fischer, *Why Not Appointed Experts?*, 40 TAX NOTES 303 (1988).

11. "The opinions of experts may be had in any amount, and worse than merely failing to inform the court, partisan expert testimony may confuse the court and waste its time." John M. Sink, *The Unused Power of a Federal Judge To Call His Own Expert Witness*, 29 S. CAL. L. REV. 195, 198 (1956) (quoting *Winans v. New York & Erie R.R.*, 62 U.S. (21 How.) 88, 101 (1858)). See also Foster, *supra* note 7, at 169. In the battle between the expert witnesses, many experts will testify to almost anything the client desires. One unidentified trial lawyer was unsuccessful in cross-examining his opponent's expert witness and began his closing statement with the following, "Gentlemen, there are three kinds of liars, the common liar, the damned liar, and the scientific expert." *Id.* Federal courts are also very aware of the problems of biased expert testimony. The Seventh Circuit recently warned trial courts to be alert to the lack of objectivity possessed by many medical experts. See, e.g., *Stoleson v. United States*, 708 F.2d 1217, 1222 (7th Cir. 1983). See also Barry M. Epstein & Marc S. Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 SETON HALL L. REV. 656, 657 (1987); Graham, *Professional Witness*, *supra* note 3, at 36 (discussing the image of "venality" projected by some expert witnesses and the deep concern raised by their testimony).

12. A REPORT BY A SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *IMPARTIAL MEDICAL TESTIMONY* 6 (1956) [hereinafter N.Y. REPORT] (noting that the battle between medical experts can confuse and mislead the jury instead of helping it).

13. JOHN D. HAYES ET AL., *Expert Evidence*, in ILLINOIS CONTINUING LEGAL EDUCATION MANUAL ON MEDICAL EVIDENCE, § 10-7 (1989) (noting that expert testimony is the sine qua non of medical malpractice trials, with virtually every trial involving the so-called "battle of the experts," which is waged under the direction of each party's attorney); JOHN D. HAYES & THOMAS G. SIRACUSA, *Acquiring and Using Expert Testimony*, in ILLINOIS CONTINUING LEGAL EDUCATION

mislead the jury because the medical subject matters are often complex.¹⁴ Juries cannot be expected to have the expertise necessary to weigh the validity of one expert's argument against another.¹⁵ The end result is that jurors are often confused, rather than assisted, by the expert testimony, and they may base their decisions on the advocacy skills of the experts.¹⁶

Despite the many problems associated with its use, expert testimony continues to remain a vital part of civil litigation.¹⁷ This is especially true in medical malpractice trials where the complexity of the subject matter almost always requires expert testimony.¹⁸ Perhaps more than other forms of litigation, personal injury litigation involves considerable subjectivity in the

MANUAL ON MEDICAL EVIDENCE, § 6-5 (1991). With rare exception, expert medical testimony is required for a plaintiff to establish a medical malpractice cause of action. Expert testimony may also be necessary, if not legally required, to educate jurors regarding complex scientific principles. *Id.*

14. Expert testimony can be too technical and complex, tending to befuddle the jury rather than enlighten them. Winter, *supra* note 4. See also Rickee N. Arntz, Comment, *Competency of Medical Expert Witnesses: Standards and Qualifications*, 24 CREIGHTON L. REV. 1359, 1362 (1991).

15. Graham, *Professional Witness*, *supra* note 3, at 46. The jury is often helpless to determine which of two competing medical theories is correct, because the jurors depend upon the experts to explain the propositions with which they deal. The jury cannot independently measure the reliability of the expert testimony by applying experience, intuition, or common sense. *Id.* See also David W. Peck, *Impartial Medical Testimony, A Way to Better and Quicker Justice*, 22 F.R.D. 21, 23 (1959) [hereinafter Peck, *Impartial Medical Testimony*] (noting that the medical aspects of a malpractice case are beyond the understanding of jurors, and cannot be understood except by the receipt of trustworthy expert advice).

16. One commentator has stated:

Under present procedure, where the medical testimony comes from no objective or necessarily qualified source, and only through the hirelings of the parties, partisan experts, medical mouthpieces, the jury is more apt to be confused than enlightened by what it hears. It hears black from one expert, white from another, a maximizing or minimizing of injuries in accordance with the interest of the source of payment of the testimony.

Peck, *Impartial Medical Testimony*, *supra* note 15, at 22.

Even when totally honest experts testify, each party will produce the best witness, not necessarily the best qualified expert. The jury is often helpless to decide between which of two competing scientific theories, medical theories, or other technical theories is correct. Graham, *Insuring Trustworthiness*, *supra* note 5, at 47. See also 3 WEINSTEIN'S EVIDENCE § 706(01), at 706-07 (1985) (stating that when the evidence relates to highly technical matters, and each side has shopped for experts favorable to its position, it is naive to expect the jury to be capable of assessing the validity of diametrically opposed testimony); Nielsen & Franco, *supra* note 5 (noting that partisan expert witnesses change the focus of the trial from an impartial determination of liability and damages to a battle of the experts).

17. Kimberly S. Moore, *Exploring the Inconsistencies of Scrutinizing Expert Testimony Under the Federal Rules of Evidence*, 22 TEX. TECH. L. REV. 885, 889 (1991) (stating that expert testimony has become invaluable in explaining difficult subject matter to lay jurors); see also Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952).

18. N.Y. REPORT, *supra* note 12, at 7.

rendering of a decision.¹⁹ Because expert testimony is usually required to explain complex medical subject matter, and because of the inherent subjectivity involved in personal injury litigation, it is of the utmost importance for the jury to hear reliable and unbiased medical expert testimony.

The increases in both medical malpractice litigation and the use of expert testimony are widespread.²⁰ States with large urban areas have experienced more litigation than rural states.²¹ This disparity is generally attributed to the greater population density and the larger numbers of health care centers in the urban areas.²² The state of Illinois is such a jurisdiction, as is illustrated by the substantial increase in malpractice litigation since the 1970s.²³

The fundamental problems associated with expert testimony are exacerbated in Illinois because of the liberalization of the state's expert witness laws. Recent decisions have modified the rules that Illinois employs for qualifying and selecting expert witnesses.²⁴ Specifically, recent developments include the adoption of the Federal Rules of Evidence provisions pertaining to expert testimony,²⁵ and recent decisions by the Illinois appellate courts that have loosened the qualification requirements for expert witnesses.²⁶

19. Eric H. Marcus, *Dealing With the Plaintiff's Subjective Presentation*, FOR THE DEF., Mar. 1990, at 30.

20. It is undisputed that malpractice claims grew during the early and mid-1980s. By 1989, reports indicated that the number of claims had leveled. By 1991, evidence suggested that the number of claims rose for the first time in five years. INSURANCE INSTITUTE REPORTS (1993). See also *supra* note 2 and accompanying text; PATRICIA DANZON, *MEDICAL MALPRACTICE* 58 (1985) (noting that the dramatic increase in medical malpractice claims over the last two decades can be attributed to several causes, including increased willingness on the part of the patient to sue). For a detailed history of medical malpractice lawsuits, see Robert J. Flemma, *Medical Malpractice: A Dilemma in the Search for Justice*, 68 MARQ. L. REV. 237 (1985).

21. St. Paul Fire & Marine Insurance Company, one of the largest underwriters of malpractice insurance, excludes the states of Illinois, New York, Florida, California, and Washington D.C. because of their high litigation rates. See DANZON, *supra* note 20, at 60 (citing urbanization as one of the most powerful predictors of malpractice claim frequency and severity).

22. DANZON, *supra* note 20, at 60.

23. Many reports indicate that Illinois experienced a rapid increase in medical malpractice claims from the mid-1970s through the mid-1980s, with moderation in claims accruing in the mid-1980s. MEDICAL MALPRACTICE TASK FORCE OF ILLINOIS, REPORT OF THE TASK FORCE ON MEDICAL MALPRACTICE TO GOVERNOR JAMES THOMPSON 22 (1985) [hereinafter ILLINOIS TASK FORCE]; see also *Society Lobbies to Limit M.D. Malpractice Liability*, AM. MED. NEWS, April 26, 1985, at 22 (describing the increase in lawsuits against Illinois physicians and the lobbying efforts of the Illinois State Medical Society); MICHAEL PETERSEN, COMPENSATION OF INJURIES: CIVIL JURY VERDICTS IN COOK COUNTY 35 (1984) (noting that juries awarded medical malpractice plaintiffs anywhere from two to four times the amount of verdicts that they awarded to plaintiffs with similar injuries and losses in other tort cases).

24. See *infra* notes 49-116 and accompanying text.

25. See *infra* notes 95-116 and accompanying text.

26. See *infra* notes 49-75 and accompanying text.

The time has come for Illinois to reform its methods for the selection and use of expert witnesses in medical malpractice actions. Reform is necessary because juries are at risk of hearing expert testimony that is partisan and needlessly conflicting.²⁷ In addition to the adverse effects upon our legal system, the abuse of expert testimony adversely affects the medical profession.²⁸ Increased litigation costs result in higher insurance premiums for physicians²⁹ and more money being spent to practice defensive medicine.³⁰ The medical profession internalizes these costs, and this results in higher health care costs for the public.³¹

This Note examines the role of the expert witness in Illinois medical

27. See generally David W. Peck, *A Successful New Plan: Impartial Medical Testimony*, 42 A.B.A. J. 931 (1956) [hereinafter Peck, *Successful New Plan*].

28. The multitude of adverse effects on the medical profession that can be attributed to malpractice claim frequency is beyond the scope of this note. Some of the commonly cited effects on the medical profession include: prohibitively high malpractice insurance, leading to an insufficiency of physicians in high-risk specialties such as neurosurgery and obstetrics; and physicians ordering unnecessary diagnostic procedures to protect themselves from professional liability. Apart from the impact on the law, the direct and indirect costs of litigation result in increased litigation expenses. The same effect occurs in the field of medicine, contributing to the rise in health care costs and causing treatment to be prohibitively expensive. See generally W. John Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 TEMP. L. REV. 459 (1992).

29. In May 1992, a large national medical malpractice insurer announced rate increases ranging from three percent to fifteen percent in nine states. See INSURANCE INSTITUTE REPORTS, *supra* note 20, at 7; CENTER FOR HEALTH POLICY RESEARCH, AMERICAN MEDICAL ASSOCIATION, THE COST OF MEDICAL PROFESSIONAL LIABILITY IN THE 1980'S (1990) (noting that the average amount of premiums paid by physicians for professional liability insurance increased from \$5800 in 1982 to \$15,500 in 1989); AMA REPORT, *supra* note 2, at 16 (stating that one factor resulting from the increase in medical malpractice litigation is the increase in the practice of defensive medicine); PATRICIA DANZON, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS V (1982) (identifying the fact that the frequency and severity of malpractice claims outpaced inflation as contributing factors to the medical malpractice crisis); MICHAEL TODD, THE AVAILABILITY AND COST OF MALPRACTICE INSURANCE 2 (1975) (stating that physicians will have to suspend their practices due to their inability to afford malpractice premiums).

30. A 1992 American Medical Association survey found that more than eight out of ten doctors practice defensive medicine, including ordering of extra tests for patients to avoid being sued. Two-thirds of the doctors surveyed indicated that they believed this practice is a significant factor in increasing health care costs. INSURANCE INSTITUTE REPORTS, *supra* note 20, at 5. Physicians, sensitive to malpractice litigation, have changed their methods of practice in order to minimize lawsuits. Doctors' treatment modes often include defensive tactics that are intended to decrease their exposure to malpractice litigation. ILLINOIS STATE MED. SOC'Y, MALPRACTICE: NOBODY WINS . . . EVERYBODY PAYS 5 (1985). These defensive tactics include longer hospital stays, additional tests, and consultations with specialists to determine whether diagnosis and treatment are appropriate. *Id.*

31. Jacobsen, *supra* note 2, at 320. Rising damage awards and the resulting increase in malpractice insurance premiums raise important public policy concerns and have the potential to affect the practice of medicine and the delivery of health care services. *Id.*

malpractice actions and suggests a method for using court-appointed expert witnesses at trial to assist juries in reaching a fair and impartial result. Section II of this Note provides background information on the role of the expert witness in Illinois medical malpractice actions and examines Illinois law governing the qualification and use of medical expert witnesses. Section III identifies the problems associated with the current use of medical expert testimony in Illinois. Section IV examines court-appointed expert witness plans that have been used in other states and analyzes the problems and benefits associated with their use. Section V proposes that Illinois trial courts effectuate the use of impartial medical expert testimony by using comprehensive jury instructions.

II. HISTORY AND DEVELOPMENT OF EXPERT MEDICAL TESTIMONY IN ILLINOIS

A. *The Need for Expert Medical Testimony*

Historically, the common law has limited the admission of expert testimony to those situations where the judge or jury could not perform their roles without the expert's assistance.³² The expert witness was considered an objective assistant, not an advocate.³³ The expert's role was to assist the judge and jury in understanding the subject matter so that they could make accurate determinations of liability.³⁴

In a medical malpractice action, the plaintiff almost always establishes a prima facie case by the use of expert medical testimony.³⁵ By introducing the

32. 3 WEINSTEIN'S EVIDENCE §§ 702(02), 702(8) (1987); see also Lee W. Miller, *Cross-Examination of Expert Witnesses: Dispelling the Aura of Reliability*, 42 U. MIAMI L. REV. 1073, 1074 (1988).

33. "The physician should testify solely to the medical facts in the case and should frankly state his medical opinion. He should never be an advocate and should realize that his testimony is intended to enlighten rather than to impress or prejudice the court or the jury." NATIONAL INTERPROFESSIONAL CODE FOR PHYSICIANS AND ATTORNEYS (1958) (adopted by both the AMA and the ABA). See also Pope, *supra* note 8 (noting that traditionally the expert was considered an objective assistant to the trier of fact and not an advocate); 2 WIGMORE ON EVIDENCE, § 563, at 30 (Chadbourne Rev. 1978) (suggesting that the expert was impartial). "It is wrong for an expert to be an advocate." *Id.* (quoting Lord MacMillan).

34. Pope, *supra* note 8, at 15; see also WILLARD L. KING & DOUGLASS PILLINGER, A STUDY ON THE LAW OF OPINION EVIDENCE IN ILLINOIS 252 (1942).

35. *Walski v. Tiesenga*, 381 N.E.2d 279, 282 (Ill. 1978) (noting that unless the physician's conduct is so grossly apparent, or the treatment so common as to be within the everyday knowledge of a layperson, expert medical testimony is required to establish the standard of care and the defendant physician's deviation from that standard); see also *Borowski v. Von Solbrig*, 328 N.E.2d 301, 306 (Ill. 1975). For the plaintiff to prove his or her prima facie case of medical malpractice, obtaining a competent and credible expert witness becomes the most crucial element of the case. In the area of expert testimony, more discretion is allowed in the admission of expert testimony, including permitting the testimony when it would merely be helpful to the jury (as opposed to

evidence to establish a standard of prudent and reasonable medical care, the plaintiff attempts to demonstrate that the defendant physician's negligent conduct proximately caused the plaintiff's injury.³⁶ The plaintiff shows the causal relationship between the defendant physician's breach of this reasonable standard and the patient's injury or death.³⁷ The medical expert testimony regarding the proper standard of medical care permits the jury to determine whether the defendant physician's conduct constituted negligence.³⁸

Before an expert witness can even take the witness stand, the proponent of the expert testimony must demonstrate to the court that expert testimony is necessary.³⁹ To do this, the proponent must show the court that the subject matter of the trial is beyond the scope of a layperson's knowledge,⁴⁰ and that the expert testimony will assist the jury in making its determination.⁴¹ In medical malpractice trials, it is virtually assumed that the medical subject areas

necessary). Edward J. Kionka, *Evidence*, 12 S. ILL. U. L.J. 967, 967 (1988).

36. *Purtill v. Hess*, 489 N.E.2d 867 (Ill. 1986). An exception to the requirement of expert medical evidence involves medical conduct so grossly negligent that laypersons could readily appraise it. *Metz v. Fairbury Hosp.*, 455 N.E.2d 1096 (Ill. App. Ct. 1983). See also *Comte v. O'Neil*, 261 N.E.2d 1096 (Ill. App. Ct. 1983) (holding that examples of negligent acts within the jury's knowledge include a sponge left in the abdomen, an instrument left behind, or an X-ray burn); *Taylor v. City of Beardstown*, 491 N.E.2d 803 (Ill. App. Ct. 1986) (concluding that when the hospital is so grossly negligent or the treatment is so common that a layperson could readily understand and appraise it, then expert testimony is not necessary).

The Illinois Supreme Court decided the first medical malpractice case in 1860, *Ritchey v. West*, 23 Ill. 329 (1860). The *Ritchey* opinion indicates that the parties did present expert medical testimony:

The concurring evidence of all the physicians shows that the splints and the bandages were not properly applied. Had they extended below the wrist, the . . . evidence seems to show that they would have tended, notwithstanding the fracture, to have held the broken bone more nearly to its place until a union was formed, and thus have prevented to some extent if not altogether, the deformity and disability to use the hand.

Ritchey, 23 Ill. at 330. See generally ROBERT MICHAEL, ILLINOIS PRACTICE: CIVIL PROCEDURE BEFORE TRIAL § 39.9 (1989).

37. *Purtill v. Hess*, 489 N.E.2d 867 (Ill. 1986); *Walski v. Tiesenga*, 381 N.E.2d 279 (Ill. 1978).

38. *Borowski*, 328 N.E.2d at 301; *Ybarra v. Cross*, 317 N.E.2d 621 (Ill. App. Ct. 1974).

39. FED. R. EVID. 702. Rule 702 provides, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue, a witness qualified as an expert by knowledge, skill, training or education, may testify thereto in the form of an opinion or otherwise." Illinois adopted Federal Rule of Evidence 702 in *Wilson v. Clark*, 417 N.E.2d 1322 (Ill. 1981).

40. Kionka, *supra* note 35, at 967. The trend in Illinois' evidence law is to admit evidence that is merely helpful to the jury, as opposed to only that which is necessary. *Id.*

41. The proponent must demonstrate to the trial court that the jury will be helped by the expert testimony. *Id.*

will be beyond the knowledge of a layperson, thus necessitating expert testimony.⁴²

After the need for expert testimony has been established, the proponent of the expert testimony must demonstrate to the court that his or her expert is properly qualified to testify to the applicable standard of care.⁴³ The proponent generally does this before trial by affidavit or a voir dire examination so that the trial court can determine whether the practitioner is sufficiently qualified to be called as an expert witness.⁴⁴

At trial, the proponent shows the jury that the expert witness is qualified.⁴⁵

42. *Johnson v. Matviuw*, 531 N.E.2d 970, 975 (Ill. App. Ct. 1988) (establishing a standard of care, and reasoning that a deviation from that standard of care almost always requires expert medical testimony); *Walski v. Tiesenga*, 381 N.E.2d 279 (Ill. 1978). See generally MICHAEL H. GRAHAM, HANDBOOK ON ILLINOIS EVIDENCE § 705.1 (5th ed. 1990) [hereinafter GRAHAM, HANDBOOK ON EVIDENCE].

43. *Bloomgren v. Fire Ins. Exchange*, 517 N.E.2d 290 (Ill. App. Ct. 1987) (stating that the test for competence is whether the expert witness possesses and is prepared to disclose sufficient knowledge of the subject matter to entitle his or her opinion to go to the jury); *Gibson v. Healy Brothers & Co.*, 248 N.E.2d 771, 776 (Ill. App. Ct. 1969) (indicating that whether the expert witness is competent to give an opinion is a question for the trial judge).

44. A voir dire examination is conducted outside the presence of the jurors and is accompanied by a motion to oppose the testimony. See, e.g., *Geving v. Fitzpatrick*, 371 N.E.2d 1228 (Ill. App. Ct. 1978). See also Hayes, *supra* note 13, at 10-15.

45. Expert witnesses must be able to demonstrate that they have knowledge beyond that of an ordinary person before they can give an expert opinion. ILL. REV. STAT. ch. 110, para. 220(a)(1) (1989). This section provides in pertinent part:

An expert is a person, who, because of education, training, or experience, possesses knowledge of a specialized nature beyond that of an average person on a factual matter to a claim or defense in pending litigation and who may be expected to render an opinion within his expertise at trial.

Id.

The Illinois legislature established specific standards that a court must apply when determining the qualifications of an expert witness; however, the statute that specifies the requirements has not been analyzed by Illinois appellate courts and is relatively unknown. ILL. REV. STAT. ch. 110, para. 8-2501 (1989). This section provides:

In any case in which the standard of care given by a medical professional is at issue, the court shall apply the following standards to determine if a witness qualifies as an expert witness and can testify on the issue of the appropriate standard of care;

(a) Relationship of the medical specialties of the witness to the medical problem or problems and the type of treatment administered in the case;

(b) Whether the witness has devoted a substantial portion of his or her time to the practice of medicine, teaching or University based research in relation to the medical care and type of treatment at issue which gave rise to the medical problem of which the plaintiff complains;

(c) whether the witness is licensed in the same profession as the defendant; and

(d) whether, in the case against a non-specialist, the witness can demonstrate a familiarity with the standard of care practiced in this State.

Qualification is accomplished by laying a foundation that affirmatively establishes the expert witness' qualifications and competence. Generally trial counsel qualifies an expert during direct examination, when the expert witness is questioned about the nature and extent of the his or her training, experience, and educational background.⁴⁶ By setting forth the education and training of the expert witness, the proponent of the testimony establishes that the expert is properly qualified to testify regarding the defendant doctor's conduct.⁴⁷ In addition, a lengthy recitation of the expert witnesses' credentials creates an aura of credibility.⁴⁸

B. Qualifications for Illinois Medical Expert Witnesses

1. Licensure

Until 1979, the Illinois Supreme Court had held that an expert witness must possess the same licensure as the defendant physician to testify in a medical malpractice action.⁴⁹ This requirement was based on the principle that fairness to the defendant dictated that the defendant's conduct should only be evaluated by a person familiar with the standards in the defendant's particular field of medicine.⁵⁰ To ensure that the expert was well acquainted with the practices in the defendant's medical area, the Illinois Supreme Court required the expert physician to be licensed in that area of practice.⁵¹

One year later, however, the Illinois Supreme Court decided *Greenberg v. Michael Reese Hospital*⁵² and held the identical licensure requirement inappli-

46. LOUIS S. GOLDSTEIN, ILLINOIS CONTINUING LEGAL EDUCATION, ILLINOIS CIVIL LITIGATION SYSTEM, §§ F-33 to F-35 (1981).

47. *Id.*

48. Miller, *supra* note 32. See also Victor L. Drexel & Francis F. Shields, *Almost Anybody Can Be A Expert*, INS. COUNS. J. 335, 337 (July 1976) (claiming that a certain prestige and dignity will inevitably attach to the expert witness when he or she is sworn in); Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986).

49. Dolan v. Galluzzo, 396 N.E.2d 13 (Ill. 1979).

50. *Id.* at 16.

The rationale of the general rule restricting expert testimony regarding the standard of care owed by a practitioner of a certain school of medicine is that "there are different schools of medicine with varying tenets and practices, and that inequities would be occasioned by testing the care and skill of a practitioner of one school of medicine by the opinion of a practitioner of another school." . . . The practitioner of a particular school of medicine is entitled to have his conduct tested by the standards of his school. *Id.* at 16 (quoting 85 A.L.R.2d 1022, 1023).

51. The same licensure requirement sought to prevent an inequality, which would result if physicians were free to testify to the standard of care in a specialty area outside their own. *Id.* (holding that in order to testify to the standard of care of a podiatrist, the expert must be licensed in the same school of medicine as the defendant physician).

52. 415 N.E.2d 390 (Ill. 1980).

cable to plaintiff's expert witness. The court held that if expert witnesses were highly qualified and familiar with the applicable standard of care, their testimony would be sufficient regardless of the fact that they did not possess the same medical license as the defendant.⁵³

The *Greenberg* court noted that the identical licensure requirement worked to prevent physicians from testifying against nurses, and would prevent professors from testifying at all.⁵⁴ However, this requirement was especially problematic when the defendant was a hospital, as modern hospitals often are an "amalgam of many individuals, many of whom are not licensed medical practitioners."⁵⁵ Because of the diversity involved in hospital administration, the court held that it was appropriate to establish the standard of care via a broad range of evidence.⁵⁶

The effect of the *Greenberg* decision was to relax the identical licensure requirement.⁵⁷ The opinion suggests that a defendant in a medical malpractice action would not be prejudiced by expert testimony offered by a practitioner who did not possess the same licensure as the defendant. Relaxing the identical licensure requirement increased the available pool of expert witnesses, making it easier for a party to obtain an expert witness. Physicians who were previously barred from testifying as expert witnesses because of differing licenses are now free to testify.

53. In *Greenberg*, the plaintiff's expert was familiar with radiation treatments and possessed a Ph.D. in radiation sciences, but was not a licensed medical practitioner. *Id.* at 395.

54. *Id.*

55. *Greenberg*, 415 N.E.2d at 395 (citing *Darling v. Charleston Community Memorial Hosp.*, 211 N.E.2d 253 (Ill. 1965)). The *Greenberg* court also noted the wide diversity involved in the function of a hospital, and that because of this diversity, it was not necessary to establish a deviation from the standard of care by medical professionals only. *Id.*

56. *Greenberg* produced a very narrow holding: the plaintiff's affidavit was sufficient to raise a genuine issue of material fact, even though plaintiff's expert was not a medical practitioner. *Id.* The expert was familiar with radiation therapy in hospitals. Thus, the expert's affidavit was admissible on the issue of determining the standard of care applicable to the hospital in a suit alleging that therapeutic radiation treatments administered by the hospital resulted in tumorous growths on the plaintiff's thyroid gland. *Id.* The *Greenberg* court did not decide whether an expert witness who was not licensed in the same area as the defendant physician could sufficiently testify at trial as to whether the defendant breached the applicable standard of care. Instead, the court simply concluded that such testimony was sufficient to defeat a motion for summary judgment. *Id.* The *Greenberg* fact pattern is especially common in malpractice cases brought against hospitals, where the standard of care could be proved by many different sources.

57. Charles Chapman & Robert Robertson, *To Boldly Go Where No One Has Gone Before: The Final Frontier of Illinois Expert Witness Testimony on Medical Malpractice Cases*, 21 LOY. U. CHI. L.J. 757, 802 (1990) (noting that *Greenberg* only addressed whether the expert witness' testimony was sufficient to raise a genuine issue of material fact).

In 1987, the Illinois Supreme Court decided *Witherall v. Weimer*,⁵⁸ holding that an expert witness was sufficiently qualified to testify to the standard of care provided by the defendant, even though the expert did not possess a medical license at all.⁵⁹ The *Witherall* court held that the defendant physician was not prejudiced by the admission of testimony from the plaintiff's non-licensed expert because, despite the lack of medical license, the expert was adequately qualified.⁶⁰ The *Witherall* decision indicates that Illinois courts may no longer require an expert witness to possess a medical license in order to testify against a physician.⁶¹

By previously requiring the expert witness to possess a medical license in the same specialty as the defendant, the court ensured that the defendant's conduct would be reviewed by a practitioner familiar with the specific practices and tenets of defendant's medical specialty.⁶² Because the *Greenberg* and *Witherall* decisions relax the preliminary requirements for medical expert witnesses, a trial court must carefully examine the background and qualifications of a non-licensed expert witness to ensure that the expert testimony is reliable

58. 515 N.E.2d 68 (Ill. 1987).

59. *Id.* at 74-75. The expert witness in *Witherall* was a clinical pharmacologist and a physician, but held no medical license. The plaintiff offered the expert's testimony to demonstrate that the defendant, a physician licensed to practice internal medicine, deviated from the acceptable standard of care when he prescribed oral contraceptives to a patient diagnosed with a thrombosis. *Id.* The *Witherall* court held that because the expert witness had extensive experience as a pharmacologist, he was competent to testify about the standard of care in prescribing oral contraceptives. *Id.*

The *Witherall* court reasoned that if an expert witness had sufficient expert knowledge to render an opinion on the appropriate standard of care, then the expert testimony was admissible. *Id.* at 74-75. By eliminating the same licensure requirement, the Illinois Supreme Court left open the possibility that a defendant physician could be prejudiced by the expert testimony of a witness who did not possess as much education and experience as the expert witness in *Witherall*. The expert in the *Witherall* case had a medical doctor degree, a master's degree in pharmacology, work experience for a pharmaceutical manufacturer, and teaching experience in pharmacology. Thus, the expert witness in the *Witherall* case possessed sufficient education and experience to offer an opinion regarding the standard of care provided by the defendant physician. *Id.*

60. *Id.* at 74-75.

61. Chapman & Robertson, *supra* note 57, at 802; Novey v. Kishwaukee Community Health Ctr., 531 N.E.2d 427 (Ill. App. Ct. 1988) (precluding a licensed occupational therapist from testifying against a licensed physical therapist).

62. Requiring an expert witness to possess the same licensure as the defendant physician ensures that the conduct of the defendant will be reviewed by an expert who is directly familiar with the practices involved in the defendant's specialty, because the expert testifying will be familiar with the defendant's legislatively designated "school of medicine." Dolan v. Galluzzo, 396 N.E.2d 13, 16 (Ill. 1979). The schools of medicine are designated by the Illinois legislature to differentiate between the systems of diagnosis and treatment used by different groups of medical practitioners. *Id.* Distinctions have been made between medical doctors, nurses, dentists, chiropractors, and podiatrists. *Id.*; see also ILL. REV. STAT. ch. 91, para. 1 et. seq. (1973).

and does not prejudice the defendant physician.⁶³ The licensure of the expert witness, as well as the location of his or her medical practice, are the primary factors for courts to consider when they determine whether expert witnesses are qualified to testify.

2. Familiarity with the Local Standard of Care

Because of the difference in opportunities, experience, and practice between densely and sparsely populated communities, courts have long recognized that the character of the locality or neighborhood where a physician practices has an important relationship to the degree of care and skill that is required of the defendant.⁶⁴ This principle led Illinois to follow what is commonly known as the locality rule.⁶⁵ The locality rule requires that the defendant physician be judged by the standard of the locality of the practice, thus requiring the expert witness to be directly familiar with the skill and care ordinarily employed by physicians in good standing in the defendant's community.⁶⁶

Until 1986, Illinois strictly observed the locality rule.⁶⁷ Previously, only a physician from the same locality as the defendant physician could serve as an expert in a medical malpractice case.⁶⁸ The rationale was that it would be unfair to permit an expert witness to evaluate the plaintiff's treatment when the expert was not familiar with the environment surrounding the plaintiff's care.⁶⁹

63. It is possible that an expert witness could possess impressive qualifications, yet not be familiar with the specific practices of the defendant's specialty. For example, a well-educated expert witness could have extensive qualifications and yet not be familiar with the specific tenets and principles of defendant's practice. See generally *Bartimus v. Paxton Community Hosp.*, 458 N.E.2d 1072 (Ill. App. Ct. 1983).

64. The locality rule is a product of American courts, not English courts. The rule was developed to protect the rural practitioner who was presumed to have less education and less access to adequate facilities than a physician who practices in a large metropolitan area. See, e.g., *Hathorn v. Richmond*, 48 Vt. 557 (1876); *Smother v. Hanks*, 34 Iowa 286 (1872). See also Annotation, *Standard of Care Owed to Patient by Medical Specialist As Determined by Local, "Like Community," State, National, or Other Standards*, 18 A.L.R.4th 603 (1990); Edward Hume, *The Locality Rule: Enter the Hired Gun*, 12 LEGAL ASPECTS OF MED. PRACT., Apr. 1984, at 6 (claiming that physicians who practice in small or rural communities do not have the same opportunities to stay abreast of medical advances).

65. See, e.g., *Duvall v. Laidlaw*, 490 N.E.2d 1004 (Ill. App. Ct. 1986); *Thompson v. Webb*, 486 N.E.2d 326 (Ill. App. Ct. 1985); *Bartimus*, 458 N.E.2d 1072 (Ill. App. Ct. 1983).

66. *Thompson*, 486 N.E.2d at 327.

67. See generally *Duvall*, 490 N.E.2d at 1004; *Bartimus*, 458 N.E.2d at 1072.

68. See Jon R. Waltz, *The Rise and the Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DEPAUL L. REV. 408 (1969) (describing the problems associated with a strict application of the locality rule, such as the "conspiracy of silence" that can exist among physicians in a community, which can prevent physicians from testifying against one another).

69. *Bartimus*, 458 N.E.2d at 1075.

In 1986, the Illinois Supreme Court, in *Purtill v. Hess*,⁷⁰ recognized that there may be minimum uniform standards that could be applicable to a given situation, regardless of the location in which the defendant physician practices.⁷¹ In *Purtill*, the plaintiff's expert witness was not directly familiar with the standard of care in the defendant's small town, but testified that he was familiar with minimum standards of care that were uniform across the country, and that the defendant had deviated from those standards.⁷² The *Purtill* court held that even though the plaintiff's expert was not directly familiar with the defendant's medical facilities, this did not necessarily disqualify him from testifying.⁷³ The *Purtill* court noted that many physicians are board certified through a national process, which reduces the discrepancies in medical standards between the geographical areas.⁷⁴ While the court did not abolish the locality rule, *Purtill* suggests that the rule should be interpreted broadly.⁷⁵

70. 489 N.E.2d 867 (1986).

71. *Id.* at 874-75.

72. *Id.* at 870. The affidavit at issue in *Purtill* involved expert testimony concluding that the defendant's failure to properly diagnose and treat a plaintiff's medical condition did not amount to a breach of the applicable standard of care, because the plaintiff did not demonstrate any symptoms suggestive of the condition prior to when the problems occurred. *Id.*

73. *Id.* at 874-75.

74. *Id.*

75. The exact scope and application of the locality rule varies with each individual case. *See, e.g.,* *Wilson v. Sligar*, 516 N.E.2d 1099, 1102 (Ill. App. Ct. 1987) (holding that an expert witness must show familiarity with the standard of care in the same or a similar community); *Hansborough v. Kosyak*, 490 N.E.2d 181, 186 (Ill. App. Ct. 1986) (holding that the "same or similar locality" rule's definition is flexible, and not always governed by the same criteria); *see also* HAYES ET AL., *supra* note 13, at § 10-21. Illinois is not alone in its move to abandon the notion that a similar locality requirement is needed to ensure fairness of expert testimony. Other jurisdictions relaxing the requirement have recognized a trend toward a national standard of care because physicians are certified through a national board certification process. Jurisdictions that require the medical expert witness to be familiar with the standard of care in the same or similar locality include: Arkansas, Colorado, Georgia, Indiana, Minnesota, and Texas; *see DeWitt v. Brown*, 660 F.2d 516 (8th Cir. 1982) (applying Arkansas law); *Durkee v. Oliver*, 714 P.2d 1330 (Colo. App. Ct. 1986); *Wade v. John D. Memorial Hosp.*, 311 S.E.2d 836 (Ga. 1984); *Watson v. Emergency Services Corp.*, 532 N.E.2d 1191 (Ind. App. Ct. 1989); *Lundgren v. Eustermann*, 370 N.W.2d 877 (Minn. 1985); *Connor v. Waltrip*, 791 S.W.2d 537 (Tex. App. Ct. 1990).

Expanding the locality rule to permit expert testimony from a witness who is familiar only with the minimum standards of a similar locality will work to increase the number of expert witnesses who are eligible to testify. Expert witnesses who were previously ineligible to testify because they were not directly familiar with the defendant's location of practice can now testify if it can be shown that there are uniform minimum standards that suggest a national standard of care. HAYES ET AL., *supra* note 13, at § 10-22. To prevent prejudice to a rural defendant, the court must carefully determine from the facts of a case whether the particular conditions and facilities are relevant to the standard of care rendered. A plaintiff's expert who is well-qualified and well-prepared could avoid the application of the locality rule by testifying to the existence of a national standard of care. The expert's testimony could easily be supported by attendance at national seminars that discuss a specific medical subject. This admission of expert testimony could prejudice the defendant physician who may have rendered the best care possible under the circumstances, yet

The more liberal standards for qualification contribute to the court's need to ensure that expert testimony is qualified and trustworthy. Medical expert testimony must be trustworthy and reliable if expert medical witnesses are to fulfill their role successfully as objective educators in the malpractice litigation.

C. *The Role of the Expert Witness in a Medical Malpractice Case*

Prior to the 1970s, when Illinois and the rest of the nation experienced an increase in the number of malpractice claims filed, little was said about the risk of expert witnesses being biased or partisan. The large increase in the use of hired expert testimony at trial contributed to the concern that the expert witness is becoming less of an objective educator at trial and more of an advocate.⁷⁶

The concern about the increase in medical malpractice litigation led the Illinois legislature to attempt to reduce the filing of non-meritorious malpractice claims.⁷⁷ In 1985 the Illinois legislature enacted a malpractice act that contained several provisions regulating the prosecution of a malpractice case.⁷⁸ One year later, the Illinois Supreme Court struck down almost all of the legislation as unconstitutional.⁷⁹ One provision of the malpractice legislation that still remains is the requirement that the plaintiff obtain a certificate from a reviewing physician before filing a malpractice complaint.⁸⁰ The certificate

was unable to provide better care due to the resources available to him. *Id.*

76. In 1958, both the American Medical Association and the American Bar Association adopted the National Interprofessional Code for Physicians and Attorneys. The Code provides, in relevant part: "[T]he physician should testify solely as to the medical facts in the case and should frankly state his medical opinion. He should never be an advocate and should realize that his testimony is intended to enlighten, not to impress or prejudice the court or the jury." NATIONAL INTERPROFESSIONAL CODE FOR PHYSICIANS AND ATTORNEYS (1958).

77. For a discussion of the events leading up to the passage of the Illinois Medical Malpractice Act, see *Society Lobbies to Limit M.D. Malpractice Liability*, *supra* note 23, at 22. In 1984, Governor James Thompson appointed a Medical Task Force to examine the malpractice situation in Illinois and make recommendations to the Illinois legislature. See ILLINOIS TASK FORCE, *supra* note 23.

78. The Illinois Medical Malpractice Act contained several provisions, including a medical review panel to screen malpractice claims and a limitation on the recovery of non-economic damages. Illinois Medical Malpractice Reform Act of 1985, ILL. REV. STAT. Ch. 110, para. 2-114, 2-611, 2-622, & 2-1010 to 2-1020 (1985).

79. *Bernier v. Burriss*, 497 N.E.2d 763 (Ill. 1986).

80. 735 ILL. COMP. STAT. ANN. 5/2-622 (Smith-Hurd 1992). This section provides in pertinent part:

(a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff . . . shall file an affidavit . . . declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a health professional who . . . has determined in a written report . . . that there is a reasonable and meritorious cause for the filing of such action [T]he affidavit must identify

from the reviewing physician must state that the plaintiff's medical records have been reviewed by a physician who has determined that meritorious grounds exist for the filing of the malpractice claim.⁸¹ This requirement results in physician involvement prior to the filing of a medical malpractice complaint.

1. The Role of the Expert Witness Prior to Filing a Malpractice Complaint

The expert's first responsibility is to review a plaintiff's medical records to determine whether or not the complaining party has grounds to file a meritorious lawsuit.⁸² The Illinois statute setting forth the pleading requirements for healing art malpractice requires a plaintiff to obtain an affidavit from a reviewing physician who practices in the same specialty area as the defendant physician before the plaintiff can file a medical malpractice complaint.⁸³ Subject to a few exceptions, a plaintiff's failure to attach the pre-filing certificate to the complaint will result in the complaint's dismissal.⁸⁴

The purpose of the pre-filing affidavit is to eliminate frivolous malpractice

the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit

Id.

81. *DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139 (Ill. 1992). The *DeLuna* court addressed the constitutionality of the requirement of a pre-filing affidavit and held that the required affidavit did not constitute an unconstitutional exercise of judicial powers. *Id.* at 1144.

82. Section 2-622 requires that the affidavit be prepared by a specialist who practices in the same field as the defendant and is familiar with that area of health care or medicine that the defendant physician practices. It provides in pertinent part:

That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (1) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years in the same area of health care or medicine that is at issue in the particular action; (iii) is qualified by experience or demonstrated competence in the subject of the case

735 ILL. COMP. STAT. ANN. 5/2-622(a)(1) (Smith-Hurd 1992).

83. *Id.*

84. *DeLuna*, 588 N.E.2d at 1142. Unless the plaintiff can demonstrate that the medical records are unavailable, or that the statute of limitations is about to run, failure to obtain a section 2-622 affidavit will result in dismissal of the case. 735 ILL. COMP. STAT. ANN. 5/2-622(a)(2) (Smith-Hurd 1992). Section 2-622 provides in pertinent part: "That the affiant was unable to obtain a consultation required by paragraph 1 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations." 735 ILL. COMP. STAT. ANN. 5/2-622 (Smith-Hurd 1992). Section 2-622(g) provides that "[t]he failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619." 735 ILL. COMP. STAT. ANN. 5/2-622(g) (Smith-Hurd 1992). The affidavit must state that the reviewing physician has evaluated the facts of the plaintiff's medical care and has determined that reasonable and meritorious grounds exist for filing a malpractice complaint. 735 ILL. COMP. STAT. ANN. 5/2-622(a)(1) (Smith-Hurd 1992).

claims at the pleading stage by having a competent specialist determine whether meritorious grounds exist for filing the lawsuit.⁸⁵ Section 2-622 of the Illinois malpractice act does not require the reviewing physician to actually sign the affidavit that is filed with the court as part of the record.⁸⁶ It is satisfactory for the plaintiff's attorney to keep a copy of the signed affidavit to present to the court if questioned about the claim.⁸⁷

The problem of frivolous malpractice lawsuits is also linked to incompetent expert testimony at trial. Malpractice lawsuits based on questionable theories of liability will eventually have to be substantiated by expert testimony at trial. The weaker the theory of liability, the more the proponent of that theory will have to stretch to prove the causation element of the professional negligence case.

2. The Role of the Expert Witness at the Malpractice Trial

When a medical malpractice case comes to trial, the expert witness plays a critical role. Illinois has expanded its rules governing the subject matter about which an expert witness can testify, giving the expert witness much more freedom to offer opinions regarding the quality of care rendered by the defendant physician.⁸⁸ The combination of the more liberal rules governing the admission of expert opinions and the growing market for the use of expert witnesses has given rise to the concern that much of the expert testimony going to the jury is neither objective nor reliable.⁸⁹

Prior to 1981, the Illinois courts restricted the content of expert testimony to guard against untrustworthy testimony reaching the jury. An expert witness could only testify about hospital records if the records were present at trial and admitted into evidence.⁹⁰ When rendering an opinion about the defendant's standard of care, the expert witness was not asked directly what was thought of the medical care provided by defendant, but instead was asked a hypothetical question.⁹¹ The hypothetical question included the basic and uncontroverted

85. *Lyon v. Hasbro Indust.*, 509 N.E.2d 702 (Ill. App. Ct. 1987).

86. *Alford v. Phipps*, 523 N.E.2d 563 (Ill. App. Ct. 1988).

87. *Id.*

88. See *infra* notes 95-116 and accompanying text.

89. See generally Graham, *Professional Witness*, *supra* note 3.

90. See CHARLES T. MCCORMICK, *MCCORMICK ON EVIDENCE*, § 14, at 35 (3d ed. 1984).

91. The question could include facts, data, or opinions not yet received into evidence, at the discretion of the court, after counsel represents that counsel will subsequently introduce sufficient evidence of such facts. See, e.g., *Decateur v. Fisher*, 63 Ill. 241 (1872); see GRAHAM, *HANDBOOK ON EVIDENCE*, *supra* note 42, § 705.1.

facts, data, and opinions of the proponent's version of the case.⁹² Any disputed items in the case were stated in a manner most favorable to the party posing the question.⁹³ The purpose of the common law requirements was to ensure the reliability of the expert testimony by preventing any testimony from being heard by the jury unless the court had already approved its trustworthiness by admitting the underlying facts into evidence.⁹⁴

In 1981, the Illinois Supreme Court, in *Wilson v. Clark*,⁹⁵ adopted Federal Rules of Evidence 703⁹⁶ and 705.⁹⁷ In *Wilson*, the trial court permitted hospital records to be admitted into evidence even though the proper foundation had not been laid.⁹⁸ The defendant's expert witness then offered his opinion based upon these hospital records.⁹⁹ The Illinois Supreme Court held that because hospital records contain such a high degree of reliability, a medical expert witness could properly rely on hospital records in forming an opinion, even if the hospital records were not admitted into evidence.¹⁰⁰

The *Wilson* court noted that it was extremely time consuming to admit every relevant hospital record into evidence, and both time and money were wasted by continuing to authenticate materials that were already relied upon

92. For examples of how hypothetical questions are generally posed to a physician expert witness, see *Northern Trust Co., v. Skokie Valley Community Hosp.*, 401 N.E.2d 1246, 1255 (Ill. 1980); *Lange v. Coca-Cola Bottling Co.*, 245 N.E.2d 35, 38-39 (Ill. App. Ct. 1969), *rev'd on other grounds*.

93. *Kane v. Northwest Special Recreation Ass'n*, 508 N.E.2d 257 (Ill. 1987).

94. Prior to the adoption of Federal Rules of Evidence 703 and 705, Illinois courts permitted expert witnesses to testify about matters of which the expert had personal knowledge. *See, e.g., Louisville, New Albany & Chi. Ry. v. Shires*, 108 Ill. 617 (1884). Before offering an expert opinion, the expert witness was required to testify as to the exact facts upon which his or her opinion was based. This was required to ensure the reliability of the expert's opinion. *See, e.g., People v. Driver*, 379 N.E.2d 840 (Ill. App. Ct. 1978); *People v. O'Neal*, 254 N.E.2d 559 (Ill. App. Ct. 1969).

95. 417 N.E.2d 1322 (Ill. 1981).

96. FED. R. EVID. 703. Rule 703 provides:

The facts or data upon which expert opinions are based may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id.

97. FED. R. EVID. 705. Rule 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of 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.

Id.

98. *Wilson v. Clark*, 417 N.E.2d 1322, 1324 (Ill. 1981).

99. *Id.*

100. *Id.* at 1326.

outside of the legal process.¹⁰¹ The *Wilson* court held that if physicians normally relied upon hospital records when making diagnoses, the expert physician should similarly be able to render an opinion at trial.¹⁰² Under Federal Rule of Evidence 703, expert witnesses may now offer opinions without disclosing the underlying basis for their opinions, as long as the opinions are based on reliable data.¹⁰³ The only stipulation to Rule 703 is that the information relied upon by the expert witness must be of the type reasonably relied upon by other experts in the field.¹⁰⁴ When the Illinois Supreme Court adopted Federal Rules of Evidence 703 and 705, it abolished the common law evidentiary requirements that monitored the reliability of the expert testimony that was admitted into evidence.¹⁰⁵ The adoption of these federal rules resulted in profound change in the way that Illinois courts approached expert testimony.¹⁰⁶ By adopting Rule 703, the Illinois Supreme Court significantly enlarged the content of what a medical expert could testify to at trial. Now, not only can medical experts offer opinions about the standard of care rendered by the defendant physician, they can also actually become the source of that evidence.¹⁰⁷

In addition to expanding the categories of information from which an expert witness can offer an opinion, the Illinois Supreme Court adopted Federal Rule of Evidence 705 and abolished the common law hypothetical question requirement.¹⁰⁸ This change permits expert witnesses to be questioned directly about

101. *Id.*

102. *Id.*

103. Reliable data is considered to be any facts, data, or opinions that the physician would normally rely upon when making medical diagnoses.

104. The Advisory Committee's Note to Rule 703 states:

[T]he rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays.

FED. R. EVID. 703 advisory committee's note.

105. *Wilson v. Clark*, 417 N.E.2d 1322 (Ill. 1981).

106. With Illinois' adoption of Rule 703, the expert witness now has four categories of knowledge upon which to base his or her opinion: (1) his or her specialized medical knowledge which was derived from his or her education or experience, (2) firsthand, out of court, observations of facts, (3) facts or opinions which are already admitted into evidence, and (4) facts and opinions not admitted into evidence but presented to the expert outside of the courtroom and reasonably relied upon by other experts in the field. FED. R. EVID. 703 advisory committee's note.

107. Richard T. Shepard, *Expert Evidence*, 59 MEDICO-LEGAL J. 67 (1991). Justice Shepard describes an article written by Lee Rodwell stating that expert witnesses hold a unique place in our legal system, because they are able to express opinions on the facts of a case and as a result bear the responsibility for accuracy and honesty in giving their evidence. *Id.*

108. *Wilson*, 417 N.E.2d at 1322.

the conduct of the defendant physician.¹⁰⁹ The principle behind Rule 705 is that the jury is well-equipped to accept or reject the opinion of the witness; therefore, permitting the witness to give his or her opinion on an ultimate issue does not invade the province of the jury.¹¹⁰

Illinois adopted Federal Rules of Evidence 703 and 705 primarily to advance trial efficiency concerns.¹¹¹ Permitting medical expert witnesses to render opinions based upon information obtained outside the courtroom has clearly advanced the efficiency of medical malpractice trials, as much time is saved by not admitting voluminous hospital records into evidence.¹¹² However, the adoption of Rule 703 has raised questions regarding the trustworthiness of the expert testimony,¹¹³ because the requirement of facts that are "reasonably relied upon by other experts in the field" gives expert witnesses wide latitude to introduce testimony.¹¹⁴ An especially suspect basis for experts' opinions occurs when they support all of their conclusions with statements made out of court by the party they represent.¹¹⁵ Illinois courts have permitted this reliance, even though the only data relied upon by the expert witness consisted of the perceptions of a party to the lawsuit.¹¹⁶

The trial court has the responsibility of determining whether the expert

109. *Id.*

110. Peter J. Rescori, *Fed. R. Evid. 703: A Back Door Entrance For Hearsay and Other Admissible Evidence: A Time For Change?*, 63 TEMP. L. REV. 543, 548 (1990) (noting that the jury will use other evidence and cross-examination to evaluate the expert opinion).

111. *Wilson*, 417 N.E.2d at 1326.

112. *See, e.g., Borowski v. Von Solbrig*, 328 N.E.2d 301, 305 (Ill. App. Ct. 1975) (noting that trial counsel filled 72 pages of the record by asking a physician expert witness a hypothetical question).

113. Graham, *Insuring Trustworthiness*, *supra* note 5, at 73.

114. FED. R. EVID. 703 advisory committee's note.

115. *In re Scruggs*, 502 N.E.2d 1108 (Ill. App. Ct. 1986) (holding that hearsay statements made by the patient's building manager were properly relied upon by the expert physician). *See generally* Edward B. Arnolds, *Federal Rule of Evidence 703: The Back Door Is Wide Open*, 20 FORUM 1, 16 (1984) (claiming that a hearsay statement admitted into evidence may be relied upon by the jury, even if the opponent brings out the unreliability of the statement).

116. When an expert witness bases his testimony entirely upon the statements of one party to the lawsuit, the expert witness is essentially relying upon the truth of the statements. Should the issue in the malpractice case deal with a dispute over what transpired during medical treatment, it becomes the word of the plaintiff against the word of the defendant. *See, e.g., Melecovsky v. McCarthy Bros. Co.*, 503 N.E.2d 355 (Ill. 1986) (noting that statements about subjective symptoms made by plaintiff to an examining physician were sufficiently trustworthy to be relied upon by the expert witness; it is the responsibility of the opponent to challenge the sufficiency or reliability of the basis of the expert's opinion); *J.L. Simmons Co. ex rel. Hartford Ins. Group v. Firestone Tire & Rubber Co.*, 483 N.E.2d 273 (Ill. 1985) (permitting expert witness to base his opinion entirely upon statements made by a party to his vocational counselor).

testimony is trustworthy enough to be submitted to the jury.¹¹⁷ Determining the validity of expert testimony under the current approach is particularly difficult because it forces the court to evaluate unfamiliar data.¹¹⁸ Illinois courts generally have been lenient in approving the materials on which expert witnesses rely in forming the basis of their testimony.¹¹⁹ Once the trial court determines that an expert is properly qualified in a particular field, the witness' testimony will often flow naturally from this expertise. Frequently, a judge will admit a questionable opinion and assume that the jury will determine the proper weight to give to the opinion.¹²⁰ It is generally thought that adequate cross-examination will expose any deficiencies in the opinion of the expert witness.¹²¹

Federal Rule of Evidence 703 shifts the burden of exposing inconsistencies in the expert's opinion to the cross-examiner.¹²² The cross-examiner is free to question the expert witness about anything upon which the expert witness testified during direct examination, including the accuracy of the expert's opinions or any bias that the expert might have.¹²³ Cross-examining an experienced expert witnesses is often troublesome, however, because the cross-examiner must attempt to disclose the weakness in the expert's reasoning without letting the expert witness reinforce his or her direct testimony.¹²⁴ Medical expert cross-examination is especially problematic because the expert witness is often more familiar with the subject matter than the cross-examiner and may appear more convincing to the jury.¹²⁵ Further, the cross-examiner faces the risk that cross-examination can evolve into a confrontational exchange, which

117. *In re Village of Bridgeview v. Strickland*, 487 N.E.2d 1109 (Ill. App. Ct. 1985); see also Carlson, *supra* note 48, at 582-87.

118. See Miller, *supra* note 32, at 1083 (claiming that it is often difficult for a judge to determine whether the basis for the expert's opinion is reasonably reliable).

119. See, e.g., *Henry v. Brenner*, 486 N.E.2d 934 (Ill. App. Ct. 1985) (stating that admissible materials include medical reports prepared by other doctors within the testifying physician's group); *Thomas v. Brandt*, 493 N.E.2d 1142 (Ill. App. Ct. 1986) (holding that results of blood and alcohol tests cannot be admitted into evidence). *But see Hatfield v. Sandoz-Wander, Inc.*, 464 N.E.2d 1105 (Ill. App. Ct. 1984) (holding that a physician's out-of-court conversations with other physicians regarding the adequacy of defendant's product warnings were not admissible because they were not the type of information reasonably relied upon by other experts in the field).

120. See generally Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response To Professor Carlson*, 40 VAND. L. REV. 583 (1987); see also Miller, *supra* note 32, at 1083.

121. *Melecosky v. McCarthy Brothers Co.*, 503 N.E.2d 355 (Ill. 1986).

122. Miller, *supra* note 32, at 1084.

123. *Id.* (pointing out that the cross-examiner can scrutinize anything about which the expert witness has testified during direct examination, including the expert's qualifications and the soundness of the expert's opinion).

124. Graham, *Insuring Trustworthiness*, *supra* note 5, at 74.

125. *Id.*

could leave a negative impression on the jury.¹²⁶

Lack of reliability is a large problem associated with partisan medical expert testimony. The lack of reliability is exacerbated by the fact that the judge has difficulty identifying and correcting unreliable medical testimony. It would be a significant benefit to both the trial court judge and the legal process if the court had a method of ensuring that expert medical testimony remains as objective and reliable as possible.

III. PROBLEMS ASSOCIATED WITH MEDICAL EXPERT TESTIMONY

The number of medical expert witnesses in Illinois is proliferating at an significant rate.¹²⁷ From 1965 to 1974, the *Jury Verdict Reporter* listed 188 testifying experts in Cook County.¹²⁸ Today, the expert file contains close to 3000 experts, fifty-three percent of whom are malpractice experts.¹²⁹ In 1991, of the 511 medical malpractice experts who testified in Cook County, 231 had never previously testified as expert witnesses.¹³⁰ Because medical expert testimony is so commonly used, it is critical that the testimony actually serves its purpose of assisting the jury in understanding the medical issues. The substantial increase in the use of medical expert testimony raises concerns about the trustworthiness of the testimony that is being heard by the jury.¹³¹

The increased use of expert witnesses has become so common that many witnesses earn substantial portions of their total incomes from litigation.¹³² Not only do expert witnesses stand to gain by the remuneration they receive at trial, some become so proficient at expert witness advocacy that they depend upon witness work for their entire livelihood.¹³³ Physicians who spend a large portion of their time participating in litigation are so busy serving as professional

126. *Id.* (pointing out that counsel may attempt to use learned treatises to challenge the witness, but may end up "fencing with the witness," which the author claims may leave a negative impression on the jury).

127. *See infra* notes 128-41 and accompanying text.

128. Pope, *supra* note 8, citing from the COOK COUNTY JURY VERDICT REPORTER.

129. COOK COUNTY JURY VERDICT REPORTER, PHYSICIAN'S INDEX (1991-92).

130. *Id.* The 1991-92 *Cook County Jury Verdict Reporter Medical Index* states that 2870 different medical experts have testified since 1974. COOK COUNTY JURY VERDICT REPORTER, MEDICAL INDEX (1991-92).

131. *Trower v. Jones*, 520 N.E.2d 297, 299 (Ill. 1988) (noting the "true rhetorical masterpieces" that come from the lips of medical experts witnesses). If the medical expert witness is not objectively educating the jury, but is instead providing colored testimony to support the party the expert represents, then it is likely that a large amount of expert testimony is not serving its intended purpose. *Id.*

132. *See Pope, supra* note 8 (noting that expert witnesses charge up to \$6000 per day).

133. Lee, *supra* note 7, at 483 (citing sections from Theodore Postel, *Income From Testifying in Other Cases*, CHI. DAILY L. BULL., Apr. 23, 1987).

witnesses that they cannot spend much time practicing medicine, which is their designated profession,¹³⁴ and therefore do not practice the skills upon which the court system relies.

In Illinois, several reporting services¹³⁵ facilitate the use of expert witnesses. These services, such as the *Illinois Jury Verdict Reporter*, list the name, address, and specialty of each expert witness.¹³⁶ Additionally, these services list the party for which the expert has testified,¹³⁷ and the amount of the verdict the plaintiff received.¹³⁸ The existence of the expert locator services and the increase in the use of medical expert testimony are evidence that the expert witness industry has become a lucrative business.¹³⁹ The existence of expert witness organizations, such as the *Illinois Jury Verdict Reporter*, works to facilitate expert-shopping by both parties.¹⁴⁰ Trial strategies increasingly emphasize more numerous and more persuasive expert witnesses, facilitated by expert-shopping, raising concerns about the expenditure of party resources.¹⁴¹

Partisan medical expert witnesses can earn from \$100 to \$600 per hour for their testimony.¹⁴² As a result, obtaining effective expert witnesses results in high costs to the litigants. This expense is often rationalized by the hope that the litigant will prevail at trial, either with a large damage award or a

134. The professional witness raises a large number of evidentiary concerns, primarily competency and bias. See generally Graham, *Professional Witness*, *supra* note 3.

135. Expert witness reporting services, such as the *Illinois Jury Verdict Reporter*, offer subscribers a weekly newsletter that summarizes Illinois court activities for that week. The service lists which party the expert testified for and the amount, if any, of the award received. The service also compiles an index at the end of each year that lists the names, addresses, specialties, etc. of all the physicians who testified in Illinois courts as expert witnesses. See Pope, *supra* note 8, at 15.

136. *Id.*

137. *Id.* (describing expert witness locator services); see also Winter, *supra* note 4, at 429 (describing dozens of businesses that have begun offering the service of matching expert witnesses with attorneys).

138. See Pope, *supra* note 8, at 15.

139. These organizations advertise the availability of their witnesses with great enthusiasm. See 21 TRIAL, Dec. 1985, at 103. An advertisement appearing in *Trial* magazine featured a photograph of a physician dressed in a white coat and wearing boxing gloves. The caption in the advertisement read "Heavyweight malpractice experts. Any type physician, surgeon or medical expert available. . . . Two of our recent cases settled for \$41.45 million and \$990,000.00." *Id.* See also Carlson, *supra* note 48, at 578.

140. *Trower v. Jones*, 520 N.E.2d 297, 299 (Ill. 1988).

141. Winter, *supra* note 4, at 430 (contending that "expert witnessing" is one of the country's newest growth industries).

142. See Pope, *supra* note 8.

defendant's verdict.¹⁴³ Often, the losing party is left with staggering expert witness bills.¹⁴⁴ Additionally, if there is a disparity between the parties' resources, one side may be disadvantaged by being unable to call as many expert witnesses as the opponent.¹⁴⁵ Obtaining a persuasive medical expert is an expensive task, and the most expensive expert may not be the best expert in terms of assisting the jury in its fact-finding capacity.¹⁴⁶

The most frequent complaint associated with partisan expert testimony is bias.¹⁴⁷ Many expert witnesses are not consciously biased, but subconsciously develop bias during participation in the adversary proceeding.¹⁴⁸ After the expert physician is hired, the expert will attend several conferences with counsel during the preparation of the malpractice case.¹⁴⁹ The expert will often begin to identify his or her own reputation with the party's success and contribute a type of team spirit that may result in a loss of objectivity.¹⁵⁰

Some critics are more explicit, deeming partisan expert testimony "suspect,"¹⁵¹ "of the lowest order,"¹⁵² and "the most unsatisfactory part of judicial administration."¹⁵³ The strength of these criticisms seems to have grown as other changes in the trial process, such as Illinois' adoption of Rule 703, have caused the abuse of expert testimony to become a more serious

143. See Lee, *supra* note 7, at 482 (pointing out that if courts rely exclusively on the parties to produce experts, then any inequitable distribution of resources will create an unfair advantage for the side that has the most money to hire experts); see also Sink, *supra* note 11, at 199.

144. Lee, *supra* note 7, at 482.

145. Andrew Blum, *Experts—How Good Are They?*, 11 NAT'L. L.J. 1, 38-40 (1989). See also Drexel & Shields, *supra* note 48, at 335.

146. See generally Graham, *Professional Witness*, *supra* note 3.

147. For an excellent discussion on the problems encountered with partisan expert witnesses in the late 1880s, see Foster, *supra* note 7; see also Graham, *Professional Witness*, *supra* note 3 (discussing how to impeach a professional witness to reveal financial bias).

148. Many experts testify in cases that are very close, and experts who prepare their testimony with a very powerful financial inducement will often shade their opinions in favor of their clients' position. Professor Epstein points out that while expert witnesses are prohibited from sharing in the contingency fee, the end effect is the same, as experts who assist a party in reaching a successful outcome may be able to command a larger fee the next time they testify. Richard A. Epstein, *A New Regime for Expert Witnesses*, 26 VAL. U. L. REV. 757 (1992). For a comprehensive discussion of the various forms of bias found among expert witnesses, see Sink; *supra* note 11.

149. Foster, *supra* note 7. Judge Foster notes that "bias", or inclination in favor of the party by whom the witness is employed, is probably the most frequent complaint of all against the expert witness; and the inclination or partiality is often characterized by terms indicting dishonesty and corruption." *Id.* at 171.

150. It is human nature for expert witnesses to develop a close client identification with their parties, and thus shape their testimony to favor that client. Epstein, *supra* note 148, at 759. See also Sink, *supra* note 11, at 196-97.

151. *State Highway Comm'n v. Superbilt Mfg. Co.*, 281 P.2d 707, 713 (Or. 1955).

152. *Butman v. Christy*, 198 N.W. 314, 317 (Iowa 1924).

153. *Opp v. Pryor*, 128 N.E. 580, 583 (Ill. 1920).

problem.¹⁵⁴ The increased use of expert testimony and its attendant risks led the Illinois Supreme Court to expand the scope of cross-examination to expose medical expert witnesses who may be biased.

In *Sears v. Rutishauser*,¹⁵⁵ the Illinois Supreme Court held that it was proper to inquire whether a medical expert witness has frequently testified for one particular category of party.¹⁵⁶ In *Sears*, it was revealed that the plaintiff's attorney referred from twenty to thirty patients to the plaintiff's expert over a four-year period.¹⁵⁷ The court acknowledged the increasing difficulty for the jury when faced with conflicting medical testimony and held that it was proper to impeach a medical expert witness by asking questions about fee arrangements and prior testimony for the same party.¹⁵⁸

The *Sears* court noted that a jury could make a more informed decision about the expert testimony if the subject of bias was explored during cross-examination.¹⁵⁹ The *Sears* decision was important because it gave the cross-examiner the ability to expose partisan experts and to raise questions about the expert's credibility. A jury cannot be expected to seek the truth if it is not informed about the financial interest that an expert witness may possess; any financial interest of an expert will have a strong relationship to the expert's credibility.¹⁶⁰

Four years later, the Illinois Supreme Court, in *Trower v. Jones*,¹⁶¹ held that it was proper to ask what an expert witness' annual income was from providing expert testimony, and how many times the expert testified for a particular category of party.¹⁶² The court acknowledged that cross-examination of expert witnesses had become increasingly difficult, noting that "many experts today spend so much time testifying throughout the country that they might be deemed not only experts in their field, but also experts in the art of being a persuasive witness and in the art of handling cross-examination."¹⁶³

154. Graham, *Insuring Trustworthiness*, *supra* note 5, at 46.

155. 466 N.E.2d 210 (Ill. 1984).

156. *Id.* at 213. In *Sears*, the plaintiff's expert witness was an orthopedic physician who treated the plaintiff upon a recommendation by the plaintiff's attorney. *Id.*

157. *Id.* at 212.

158. *Id.* at 212-14.

159. *Id.* at 214.

160. See Russell G. Donaldson, Annotation, *Propriety of Cross-Examining Expert Witness Regarding His Status as "Professional Witness,"* 39 A.L.R.4th 742, 746 (1985); Graham, *Professional Witness*, *supra* note 3, at 50-51.

161. 520 N.E.2d 297 (Ill. 1988).

162. *Id.* at 301.

163. *Id.* at 298 (noting the increased latitude given to experts when they render their opinions and the proliferation of expert testimony services throughout the country).

This tactical disadvantage led the Illinois Supreme Court to permit inquiry into the frequency of an expert witnesses' testimony at malpractice trials and the earnings derived from this testimony.¹⁶⁴

The *Trower* court noted that cross-examination is the most effective tool a party has to safeguard against errant testimony, and it was therefore proper to permit the cross-examiner to probe into areas of bias and partisanship.¹⁶⁵ Complete and thorough cross-examination is critical to bring any facts that could reasonably discount an expert's credibility to the jury's attention.¹⁶⁶ Because our legal system is adversarial, cross-examination of an expert witness is the only tool the examining party has to safeguard against any errant expert testimony.¹⁶⁷ As a result, the prudent cross examiner will not only explore issues of financial bias, but will also question the expert witness regarding party bias or speculation of conclusions.¹⁶⁸ However, even the most skillful cross-examination often fails to discredit the professional expert witness because of the expert's extensive experience at fielding the type of questions commonly asked on cross-examination.¹⁶⁹ When the powerful tool of cross-examination will not discredit the professional witness in front of the jury, the opposing party is relatively defenseless against the risk of unreliable medical testimony. This situation mandates reform in the current law regulating the use of expert testimony.

A common solution offered to correct the problem of purchased partisan expert testimony is the use of impartial medical expert testimony.¹⁷⁰ A few jurisdictions have used impartial medical expert witnesses and have found this

164. *Id.* at 300.

165. *Id.* The court held that cross examination regarding frequency and earnings related to the expert witnesses testimony was proper as it served to illuminate whether the expert witness was biased, or whether his testimony was skewed; *see also* Chicago Ry. v. Handy, 69 N.E. 917 (Ill. 1904).

166. *Handy*, 69 N.E. at 917.

167. *Trower*, 520 N.E.2d 297; Chicago Ry. v. Handy, 69 N.E. 917 (Ill. 1904).

168. Many other states have expanded the scope of their cross-examination rules in order to expose the professional expert witness whose testimony may be biased as a result of the employment relationship. *See, e.g.*, Strain v. Heinsen, 434 N.W.2d 640 (Iowa 1989) (permitting counsel to cross-examine expert physician regarding the frequency of the expert's previous testimony for the same party); Henning v. Thomas, 366 S.E.2d 109 (Va. 1988) (permitting defense attorneys to explore the relationship between plaintiff's expert witnesses and the professional expert witness corporation for which they worked); Douglass v. Licciardi Constr. Co., 562 A.2d 913 (Pa. 1989) (permitting counsel to ask appellant's expert witness whether he had been employed by the appellant on other occasions); Wilson v. Stilwill, 309 N.W.2d 898 (Mich. 1981) (permitting counsel to cross-examine medical expert regarding the number and frequency of referrals from an attorney).

169. *Trower*, 520 N.E.2d 297.

170. FED. R. EVID. 706 advisory committee's note.

practice to be successful.¹⁷¹ The results achieved by jurisdictions implementing impartial expert witnesses suggest that impartial testimony could remedy many of the evils associated with partisan, purchased testimony.¹⁷² Several concerns about impartial medical expert testimony have been voiced, and these concerns must be addressed before the impartial medical expert witness can be used successfully.

IV. AN ALTERNATIVE: IMPARTIAL EXPERT TESTIMONY

A. *Use of Impartial Expert Testimony*

Since early in the common law, a trial court has possessed the power to call an expert witness.¹⁷³ Wigmore pointed out that the court has inherent power to call an expert witness because this power is necessary to conduct judicial business and to maintain the respect of the court.¹⁷⁴ Wigmore asserted that the power to call impartial witnesses is "one of the expedients employed for reforming the defects of the partisan system of providing such testimony."¹⁷⁵

The use of impartial expert witnesses is not foreign to the English court system.¹⁷⁶ Use of impartial expert testimony dates back to the 1300s, when the court called forth a surgeon to rule whether a wound was fresh.¹⁷⁷ More recently, the American Medical Association formally endorsed an Impartial Medical Testimony Plan in 1926.¹⁷⁸ Courts have used impartial expert witness programs in several states, including Pennsylvania, New York, New Jersey, and Maryland.¹⁷⁹ New York is often noted for its Impartial Medical Testimony

171. See *infra* notes 179-90 and accompanying text.

172. See *infra* notes 194-96 and accompanying materials.

173. 9 JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 2482 (3d ed. 1940).

174. The discretion of a trial judge to call forth an independent and impartial expert goes back to early common law. The judge's ability to call a witness was especially helpful in lawsuits where there were numerous witnesses to a single fact or occurrence. If the partisan witnesses provide only a conflicting version of what occurred, then the judge would be acting in the interests of justice to select additional impartial witnesses to the fact. See generally 9 JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 2484, at 276 (J. Chadbourn rev. ed. 1981).

175. *Id.*

176. The notion of a court-appointed expert witness originated in Roman law, which viewed the role of doctors at trial more as *amicus curiae* (friends of the court) than as witnesses. *Id.*

177. 7 JOHN H. WIGMORE, *WIGMORE ON EVIDENCE*, § 1917, at 3 (J. Chadbourne rev. ed. 1978) (citing JAMES BRADLEY THAYER, *CASES ON EVIDENCE* 673 (2d ed. 1900)).

178. Andre A. Moenssens, *The "Impartial" Medical Expert, A New Look At an Old Issue*, 25 *MED. TRIAL Q.* 63, 67 (1979).

179. Judge David W. Peck, former presiding Justice of the Supreme Court of New York, implemented an impartial medical expert witness plan in New York for the purpose of improving the quality of malpractice cases, as well as expediting the disposition of the cases. See Peck, *Impartial Medical Testimony*, *supra* note 15, at 21. Courts in Maryland, New Jersey, and Pennsylvania have also implemented impartial medical testimony plans. See Henry Menin & Gary

plan,¹⁸⁰ which has been in effect since 1952.¹⁸¹ In 1957, the New York Academy of Medicine and the New York County Medical Society jointly established a panel of independent expert physicians.¹⁸² This panel screened complaints in the Supreme Court of New York County⁹ to determine those cases in which there was a large degree of medical difference.¹⁸³ In a case where the medical expert testimony was in diametrical opposition, the court would refer the case to a member of the independent panel.¹⁸⁴ The expert would then review the record and supply all parties with a copy of the expert's findings,¹⁸⁵ a second pre-trial conference was held in light of the findings of the independent expert, and the case was often settled.¹⁸⁶

A similar plan in Pennsylvania permitted a trial judge to call an impartial medical expert witness to examine and testify about the injured person when the judge believes that this testimony will materially aid the trial court.¹⁸⁷ The

Charles Leedes, *The Present Status of the Impartial Medical Expert*, 32 TEMP. L.Q. 476 (1961). For information on Pennsylvania's impartial testimony plan, see *infra* note 187.

180. See Peck, *Impartial Medical Testimony*, *supra* note 15.

181. In 1952, the New York City Bar Association formed a committee consisting of doctors, lawyers, and judges for the purpose of implementing an Impartial Medical Testimony Plan. The project began as an experiment and has since continued in operation. A pool of impartial medical expert witnesses was formed, with the cooperation of the New York Academy of Medicine and the New York County Medical Society. All physicians in the pool were recognized as authorities in their fields. The financing for the impartial experts was arranged through a public service grant. The committee did not create a schedule of fees for the impartial experts, but let them submit bills on the basis of ordinary fees they received from patients. Medical malpractice cases were screened when the cases came to pre-trial conference and were assigned to an impartial expert when there were largely differing versions of the medical incidents. The impartial witness made medical findings and distributed them to the judge and both parties. A second pre-trial conference was held and the cases either settled or went to trial. At trial the impartial expert was called forward by the court and testified. The impartial experts were not associated with either party, and the judge explained their role to the jury. See Peck, *Impartial Medical Testimony*, *supra* note 15. The original Impartial Medical Testimony Plan has been modified over the years, but is still used. *Humbert v. Misericordia Hosp. Medical Ctr.*, 528 N.Y.S.2d 40 (N.Y. App. Div. 1988).

182. Peck, *Impartial Medical Testimony*, *supra* note 15, at 23. To become members of the New York independent expert panel, physicians had to be top authorities in their particular branch of medicine. Further, the physicians may not have previously testified for either the plaintiff's side or the defendant's side. *Id.*

183. *Id.* The initial pre-trial conference was usually the best opportunity for the court and the parties to ascertain those cases where the need for an independent expert witness existed.

184. *Id.*

185. *Id.*

186. *Id.*

187. In 1958, the U.S. District Court for the Eastern District of Pennsylvania adopted a local rule that described when an impartial medical expert could testify. Rule 22 provided in relevant part:

(a) In any personal injury action, death survival or malpractice case in which, prior to the trial thereof, a judge shall be of the opinion that an examination of the injured person and a report thereon, a report, and/or testimony by an impartial medical expert

impartial expert witness is usually called when the record indicates a substantial divergence of medical opinion.¹⁸⁸ The Medical Society of Pennsylvania furnished names of impartial expert witnesses to the court.¹⁸⁹ The majority of the cases using impartial expert testimony settle before trial, but if a case goes to court, the impartial physician testifies to his or her opinion and is subject to cross-examination by the parties.¹⁹⁰

The recent proliferation of medical expert testimony and its attendant problems of bias and reliability have revived interest in the concept of impartial medical testimony.¹⁹¹ The use of impartial experts would address the two significant problems that Illinois courts face regarding the use of expert medical testimony. First, the impartial expert testimony would provide the jury with more reliable guidance in the medical subject areas.¹⁹² If the jury heard medical expert testimony that was reliable and objective, the chances of making an accurate finding of medical negligence would increase.

Second, the use of impartial expert testimony would reduce the amount of pre-trial and trial time spent attempting to prove or defend a malpractice case.¹⁹³ Quicker resolution is possible because the findings of impartial

or experts on the facts involved would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties, and after giving counsel a hearing if such hearing shall be requested by either counsel, order such examination, report, and/or testimony. The examination will be made by a member or members of a panel of examining physicians designated for their particular qualifications by the Medical Society of the State of Pennsylvania after consultation with the Court. Copies of the report will be made available to all parties.

Francis L. Van Dusen, *A United States District Judge's View of the Impartial Medical Expert System*, 32 F.R.D. 498 (1963).

188. *Id.*

189. The Medical Society of the State of Pennsylvania furnishes a list of doctors to the court, and separates the doctors into groups of specialties. The court can then select a properly qualified impartial witness. If the parties object to the selection of any particular witness, that party can bring a motion to the court to assign a new impartial expert.

190. *Id.*

191. Richard Epstein has written and spoken extensively upon the subject of expert witness reform. For a discussion of his thoughts on impartial expert witnesses, see Epstein, *supra* note 148. See generally William A. Wick & Earl A. Kightlinger, *Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors*, 34 INS. COUNS. J. 115 (1967); Francis L. Van Dusen, *A United District Judge's View of the Impartial Medical Expert System*, 32 F.R.D. 498 (1963); Larry W. Myers, *The Battle of the Experts: A New Approach to an Old Problem in Medical Testimony*, 44 NEB. L. REV. 539 (1965).

192. See AMERICAN MEDICAL ASSOCIATION, *AMA DIGEST OF OFFICIAL ACTIONS 1846-1958*, at 255-56 (1959).

193. See Van Dusen, *supra* note 188, at 501-02 (citing the Report of the Committee on Impartial Medical Testimony of the American Bar Association). Impartial expert testimony serves to relieve court congestion by bringing about the settlement of many cases that would otherwise have to be tried, and which by their nature would entail lengthy trials. *Id.*

experts have been shown to facilitate settlement.¹⁹⁴ Jurisdictions that have implemented impartial expert witness plans have reduced the time needed to dispose of cases and have reduced the congestion in their courts.¹⁹⁵ Expediting case disposition would reduce the six-year backlog of personal injury cases in Cook County.¹⁹⁶

Illinois, like most jurisdictions, has long given its courts the discretion to call impartial witnesses. However, this discretion is rarely used.¹⁹⁷ History contains only a few cases where the trial court appointed an impartial witness.¹⁹⁸ When the discretion has been exercised, it has usually been used to call an impartial physician for the purpose of conducting a physical examination, not for the purpose of providing expert opinion testimony.¹⁹⁹ Despite their inherent power to appoint impartial witnesses, judges are reluctant to do so.²⁰⁰ Judicial reluctance to call impartial expert witnesses is one of several arguments that has been made in opposition to the use of impartial expert testimony.

B. *Opposition to the Use of Impartial Expert Testimony*

Judicial reluctance to call impartial medical experts has been attributed to the judges' desire to avoid the appearance of acting as advocates at trial,²⁰¹ and the judges' lack of knowledge of the procedure involved in appointing

194. See Peck, *Impartial Medical Testimony*, *supra* at 15.

195. Baltimore and New York City, two cities that have used impartial medical experts, have found that a larger number of cases settle at the pre-trial stage, thus eliminating the need for trial. See Van Dusen, *supra* note 188, at 498; see also Peck, *Impartial Medical Testimony*, *supra* note 15.

196. See Keith H. Beyler, *Illinois Appellate Courts: Meeting the Challenge of Heavier Caseloads*, 78 ILL. B. J. 440 (1990).

197. Illinois has no statute or court rule designed specifically for court appointment of medical experts. The Illinois Supreme Court has used ILL. REV. STAT. ch. 110a, para. 215(d) to appoint an impartial medical expert to perform a physical or mental examination. In *Stasiak v. Illinois Valley Community Hospital*, 590 N.E.2d 974 (Ill. App. Ct. 1992), the trial court ordered a physical and mental examination of the plaintiff, but there are no instances of an Illinois court appointing an impartial medical expert witness for the purpose of evaluating the record and offering opinion testimony in a medical malpractice action. *Id.*

198. See, e.g., *Yarn v. Yarn*, 392 N.E.2d 606 (Ill. App. Ct. 1979); *People ex. rel. DeVos v. Laurin*, 391 N.E.2d 164 (Ill. App. Ct. 1979); *In re Stevenson's Estate*, 256 N.E.2d 766 (Ill. 1970), *cert. denied*, 400 U.S. 850 (1970).

199. *Stasiak*, 590 N.E.2d at 974.

200. *Lee*, *supra* note 7 (citing ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES AND MATERIALS ON EVIDENCE 699 (1983)).

201. Marcia Chamber, *Experts Need To Put Their House In Order*, 10 NAT'L L.J., Apr. 18, 1988, at 13. See Sink, *supra* note 11, at 209, 214. For a critique of court-appointed expert witnesses, see Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978).

impartial expert witnesses.²⁰² Generally, judges fear risking mistrial by exceeding the proper scope of judicial power.²⁰³

If a trial court was assured that it was acting within its discretion, the fear of exceeding the proper scope of judicial power would be reduced or eliminated. Judicial reluctance to call an impartial witness would be reduced by implementing specific procedural rules to more clearly delineate the responsibility of the court.²⁰⁴ Illinois' procedural rules should be modified to clearly define when the use of an impartial witness is warranted.²⁰⁵ The impartial expert should be called only when it appears that the partisan expert witnesses hold opposing views and when the jury would likely be confused by the conflicting testimony.²⁰⁶ Additionally, trial court judges would need to view the use of impartial expert testimony as a redress for the congestion that exists in the civil divisions²⁰⁷ and as a deterrent to frivolous medical malpractice claims. The trial judges could be assured that they were acting within the proper scope of their power if they could instruct the jury regarding the proper role and weight of the impartial expert.

A second argument against impartial expert testimony has been made by the American Bar Association and several trial lawyer organizations. These groups have objected vociferously to the use of impartial expert witnesses, stating that the jury would give undue weight to the testimony of the court-appointed

202. See generally Nielsen & Franco, *supra* note 5, at 531-32.

203. Limited judicial action is often attributed to the desire to avoid judicial comment on the evidence or on the credibility of the partisan witnesses. Many judges are wary of being reversed and will not call an impartial witness. Note, *The Trial Judge's Use of His Power to Call Witnesses—An Aid to Adversary Presentation*, 51 NW. U. L. REV. 761, 765 (1957). See also Lee, *supra* note 7, at 495-96.

204. See Note, *supra* note 203. The reticence of courts to use their power to call impartial expert witnesses indicates that statutory recognition of the propriety of such action is needed.

205. One particularly difficult part of determining when an impartial expert witness should be called is ascertaining when the jury would be assisted by the findings of a disinterested party. Jurisdictions that have used impartial medical testimony have permitted the trial court to call an impartial expert when the impartial testimony would "materially aid the jury" in its fact-finding function, or when there is a "substantial divergence of medical opinion." See Peck, *Impartial Medical Testimony*, *supra* note 15, at 23.

206. *Id.*

207. The current system of selecting partisan expert witnesses contributes to the problem of court congestion. As each party shops for and prepares its many expert witnesses for trial, it becomes necessary for the parties to request continuances from the court to obtain depositions and schedule all expert witnesses for trial. See Peck, *Impartial Medical Testimony*, *supra* note 15. Lawyers and judges are natural traditionalists, but changes in litigation and court congestion warrant the implementation of new and improved techniques.

expert.²⁰⁸ Critics of court-appointed witnesses argue that the jury's function as fact-finder would be usurped by accepting, rather than weighing, the testimony of the expert.²⁰⁹

No conclusive empirical data indicates that juries are unduly influenced by court-appointed expert testimony.²¹⁰ Jurisdictions that have implemented impartial medical expert testimony plans have found that juries do not automatically accept the testimony of the impartial witness as dispositive of the issues.²¹¹ To counter the tendency of jurors to misunderstand the role of the impartial expert, the trial court should provide adequate assurance that the jury clearly understands the role of the impartial expert witness.²¹² If so, and if they also understand that the impartial testimony is simply additional evidence and is not endorsed by the court, the jury will be unlikely to view the impartial expert as representing the opinion of the court. To suggest that the jury, which has the responsibility of weighing all the evidence and discerning the facts,²¹³ could not do the same with the impartial expert testimony is illogical.²¹⁴ Any possibility of the jury being misled by the impartial expert testimony would be outweighed by the chance of error that exists when the jury bases its findings on opposing views of hired partisan experts.²¹⁵ The reluctance of the bar and the judiciary must be overcome before court-appointed expert witnesses can be used effectively.

A third argument against impartial expert testimony is that the adversary

208. See LOUISELL & MUELLER, *supra* note 7, § 404, at 721 (quoting *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 303 (1973) (statement of Joseph A. Moore) (arguing that the jury would view the impartial expert witness as "clothed in the sanctity of judicial authority")). See Wick & Kightlinger, *supra* note 191, at 123 (suggesting that the plaintiff's bar views the appointment of impartial experts as a "distinct threat to their pursuit of that holy grail").

209. The practical effect of impartial medical testimony would be to transfer the power of decision from the jury to the impartial doctor. Saltzburg, *supra* note 201, at 77-78. See also Wick & Kightlinger, *supra* note 191, at 124-25.

210. Lee, *supra* note 7, at 495-96.

211. SPECIAL COMMITTEE ON MEDICAL EXPERT TESTIMONY PROJECT, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, IMPARTIAL MEDICAL TESTIMONY, 34 (1956). See also Myers, *supra* note 191, at 588.

212. Instructing the jury on the role of the impartial expert would work to eliminate the fear that jurors would view the impartial expert testimony as the opinion of the court. Also, the impartial testimony is just one piece of evidence to be weighed along with the other evidence presented.

213. Peck, *Impartial Medical Testimony*, *supra* note 15, at 25.

214. *Id.*

215. Lee, *supra* note 7, at 493 (asserting that non-partisan experts are less likely to tailor their testimony to support a particular legal theory than are partisan experts whose fees are paid by interested parties).

system²¹⁶ is compromised when the court is permitted to call forth an impartial expert witness.²¹⁷ The notion that the adversary system permits parties to prepare their own cases and choose their own witnesses supports this argument.²¹⁸ If the court is permitted to call forth a witness, the jury is permitted to consider evidence that was not supplied by either of the two parties. Use of the court-appointed witness is inconsistent with the traditional notion that the party presenting the strongest case and the best evidence will win at trial.²¹⁹ This argument has been viewed as the primary objection to impartial medical testimony and is not to be minimized; however, careful and judicious use of impartial medical expert testimony would improve the current adversary system.

First, calling an impartial medical expert would help expose the medical facts to the judge and jury, enabling them to make an accurate evaluation of the issues in the case. The impartial expert witness would serve as a check on partisan experts and increase the likelihood that the partisan testimony would be accurate.²²⁰ Second, impartial medical expert testimony would work to decrease the litigation costs incurred by the parties. The exact nature of the adversary system itself contributes to the huge sums being spent to procure the medical expert for trial.²²¹ Current trial schemes place great emphasis on having numerous and persuasive expert witnesses.²²² The use of impartial medical testimony, which would work to encourage settlement of malpractice cases, would reduce costs by decreasing the amount spent for the litigants' experts.²²³

Third, the legal protections that exist to reveal errant partisan testimony would be available for impartial medical testimony. Each party would still be

216. Common law countries have used a contentious trial system where the parties, and not the court, have the responsibility to find and present proof. CHARLES T. MCCORMICK, *MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE*, § 17, 37-38 (1972).

217. Note, *supra* note 203, at 768.

218. See also LOUISELL & MUELLER, *supra* note 7, § 404, at 723 (allowing a court-appointed expert to participate as an assistant to the court "smacks of the inquisitorial process, as a major premise of the adversary system is that a disinterested person is not able to zealously argue and bring all the critical facts to light").

219. FED. R. EVID. 706 advisory committee's note.

220. It has been suggested that partisan expert witnesses who may be apt to exaggerate their testimony or opinions, might think twice about the veracity of their testimony if they knew that an esteemed colleague was to follow them on the stand.

221. Lee, *supra* note 7, at 482-83.

222. Sink, *supra* note 11, at 198 (noting that expert witnesses differ from ordinary witnesses in that they are not limited to the number of persons having knowledge of one specific event).

223. If the use of impartial medical testimony facilitated the settlement of malpractice cases, then there would be less of a need for expert witnesses at trial. See generally Peck, *Impartial Medical Testimony*, *supra* note 15.

free to prepare its own case, call its own expert witnesses, and cross-examine both the opposing witnesses and the impartial medical expert witness. The concern that the jury would place undue weight upon the impartial expert testimony is valid, but this concern should not dictate that impartial testimony be avoided. When the current adjudicatory system does not yield just or efficient results, implementing change in the trial proceedings via the use of impartial medical experts would serve to improve the current trial system.

V. PROPOSAL: COURT-APPOINTMENT OF IMPARTIAL EXPERT WITNESSES

The trial court must use safeguards to ensure that it is acting within its discretion when calling the impartial medical expert witness. This can be accomplished by defining when the impartial experts are to be used and how their testimony is to be considered. The court must charge the jury with explicit instructions regarding the role of the impartial expert, and how the impartial testimony is to be weighed.

The proper time for a court-appointed expert witness to enter the trial proceedings would be at the completion of discovery, preferably at a pre-trial conference.²²⁴ The judges should use their discretion to appoint an impartial expert when the two versions of expert testimony are diametrically opposed and

224. Because of the success observed with the New York Impartial Medical Testimony Plan, it is recommended that the court appoint impartial experts at the pre-trial conference, in hopes that their findings will either facilitate settlement or clarify the medical issues. See generally Peck, *Impartial Medical Testimony*, *supra* note 15.

The trial court should require submission of the expert testimony during pre-trial conferences in order to verify the trustworthiness of the facts underlying the expert testimony. The judge will be better equipped to assess the credibility of the expert witness than will the jury because the judge has far more trial experience. If the expert testimony indicates bias or incompetency, the court can request that the party offering the expert testimony present documented evidence of the facts and opinions upon which the expert witness bases the testimony. This type of screening device relies on the common law technique of requiring the basis of expert testimony to be admissible into evidence. However, in this instance, the trial concern of ensuring trustworthy testimony overrides the efficiency concerns which support the rule permitting expert witnesses to render opinions without disclosing the basis for their opinions.

Should the party offering expert testimony be unable to adequately document the basis for its expert testimony, the court should have the option of (a) striking the expert testimony, (b) appointing an impartial expert witness, or (c) limiting the scope of the subject matter to which the expert witness testifies. When the Illinois Supreme Court adopted Rule 703, it significantly curtailed the discretion of the trial court to screen the expert testimony and ensure its trustworthiness. By restoring preventive pre-trial screening measures, trial courts could eliminate a great deal of the "hired gun" and unreliable testimony that constitutes much of the existing expert testimony in medical malpractice trials.

the malpractice case will clearly not be resolved by settlement.²²⁵ The independent experts could review both the medical records and the court record to make their own findings.²²⁶ Any opinion rendered at the pre-trial conference would be the result of an expert's independent research and deliberation.²²⁷ The impartial expert witnesses would not confer with either party and would present their findings to the court at the next pre-trial conference. By introducing an impartial review of the evidence at this stage, many cases could be settled or disposed of by summary judgment.²²⁸

If the findings of the impartial witness do not facilitate settlement or summary judgment, then the impartial witness would be called by the court to testify at trial. The trial court would permit either party to show cause as to why the impartial expert witness should not be appointed by the court.²²⁹ The court would have the discretion to call its own witness, preferably from a pool of medical specialists who have no prior experience testifying for either the plaintiff or the defendant. In order to preserve the adversarial nature of the malpractice trial, the court-appointed expert witness should testify in addition to the expert witnesses selected by the parties. The plaintiff and the defendant would still call forth their own expert witnesses and present their cases. When the court calls the impartial experts forward, the judge would carefully explain their role to the jury.²³⁰ The judge would advise the jury that the testimony of the impartial expert witnesses does not represent the views of the court, nor

225. The judge is in an excellent position at the pre-trial conference to determine whether an evidentiary gap exists which needs to be filled. The judge is the only neutral party who can offer an impartial view, not provided by a partisan expert, that may fill this gap. See Lee, *supra* note 7, at 493.

226. Central to the concept of impartial expert testimony is the notion that the impartial medical expert must independently review the medical records so as not to be affected in any way by either party. Even if the expert had a predisposition toward either the plaintiff's or the defendant's perspective in the case, the impartial expert would be free from any partisanship or coaching by the parties.

227. Impartial experts should make their findings available to the parties and be available for explanation to the parties or the court. For a description of the Baltimore Plan, see Henry Menin & Gary Leedes, *The Present Status of the Impartial Medical Expert in Civil Litigation*, 34 TEMP. L.Q. 476, 479 (1961).

228. Additionally, the use of impartial expert testimony would deter the filing of unsubstantiated malpractice claims. If a plaintiff filed a case that involved a deviation in the appropriate standard of medical care, but could not prove the element of causation, then the impartial expert witness would likely identify and testify to the absence of causation. With access to such knowledge prior to filing the claim, it is unlikely that the plaintiff's attorney would incur the costs of filing the complaint and beginning discovery.

229. The judge could submit a copy of the curriculum vitae to the parties along with a copy of the impartial expert's findings. The court would then give each litigant an opportunity to be heard as to why the impartial expert should not testify at trial.

230. The court's introduction of the impartial expert witness is integral to the jury's understanding of the role of the impartial expert.

does it constitute a comment upon the evidence. The impartial experts would then present their findings to the jury and be examined and cross-examined by both parties.²³¹ At the close of the evidence, the judge would charge the jury regarding the role of the impartial expert witnesses and how to consider their testimony.²³² Currently, the *Illinois Pattern Jury Instructions* contain only one provision regarding the credibility of expert testimony,²³³ and no provisions are made regarding how testimony of an impartial expert should be weighed. This Note recommends that the *Illinois Pattern Jury Instructions* be amended to include instructions to inform the jury of the role of the impartial expert witnesses and how to consider their testimony. Proposed jury instructions include the following charges:

(1) You are the sole judge of the credibility of all the witnesses. The expert witness appointed by the court has been asked to testify to provide additional evidence. The expert witness called forward by the court does not represent the opinion or position of the court in any way.

(2) The findings and opinions of the expert witness who was called by the court are to be considered along with all the other evidence. You should not place undue weight upon the testimony of the expert witness who was called by the court, but you should consider the impartial opinions as you would any other evidence.

(3) In determining the ability of any expert witness, you must take into account the witness' ability to observe, the witness' memory, the witness' manner of testifying, and any of the witness' interests, biases, or prejudices. You should also consider the reasonableness of the expert testimony in light of all the evidence in the case.

(4) In deciding whether any fact has been proved, it is proper to consider the testimony of all the witnesses. It is important to remember that the number of witnesses testifying for one side is not conclusive. You should consider which testimony remains most convincing.

231. Vigorous cross-examination would permit the parties to explore the basis and reasoning for the impartial experts' opinions. Cross-examination would be a more effective safeguard in the case of the impartial expert than in the case of the professional witness, as the professional witness is more experienced in the courtroom and can handle the cross-examination more skillfully.

232. Explicit jury instructions are of critical importance to ensure that jurors understand that the impartial medical testimony is simply an additional piece of evidence to be considered.

233. COMMITTEE ON JURY INSTRUCTIONS, ILLINOIS SUPREME COURT, ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL, § 2.10 (2d ed. 1971).

(5) The testimony of the expert witnesses may conflict. The experts may not share the same opinions. It is your job as the jury to resolve the conflict between the experts. The way you determine which expert opinions to accept is the same way in which you resolve other factual questions and decide whether to believe ordinary witnesses. You should weigh one expert's opinion against the other, and you must consider the relative credibility and knowledge of the experts who have testified. You should decide in favor of the expert testimony which, in your opinion, is entitled to greater weight.

(6) The fact that several expert witnesses testified at trial does not mean that you must find yourselves bound by any of these opinions. You are free to discard any expert opinion even though you may not have heard evidence to contradict it.

VI. CONCLUSION

Because the medical expert witness plays such a vital role in malpractice litigation, the problems with expert-testimony bias—competency, inefficiency, and inequity in party resources—combine to create substantial threats to the goals of truth-finding and justice.²³⁴ The use of impartial, court-appointed medical expert testimony would help to alleviate all of these problems. Impartial medical expert testimony would disclose more objective medical information to the jury, reduce time and money spent prior to trial, increase the number of cases settled before trial, and serve as a deterrent to the prosecution of baseless malpractice claims. The concerns voiced in opposition to the use of impartial medical testimony would be addressed if the relationship between the jury and the impartial expert witness were more clearly defined. Any jury prejudice arising from the use of court-appointed medical experts would be diminished if the jury clearly understood the role of the impartial expert witness and understood that the impartial testimony constitutes merely one more piece of evidence to be considered. The judicial reluctance to call an impartial witness would be decreased if the court felt free to utilize jury instructions that clearly indicated that the impartial witness' testimony did not represent the opinion of the court.

Finally, the adversary system would be strengthened by juries considering the opinion of an objective and disinterested expert witness.²³⁵ The use of impartial expert witnesses would remedy the problems associated with the use

234. See Lee, *supra* note 7.

235. The practical considerations of impartial expert testimony can work to actually supplement and improve the current adversary system. Note, *supra* note 203, at 763 (noting that judicial intervention should be used only to improve the adversary system, not replace it).

of partisan testimony, therefore helping the jury make more accurate and objective findings. Without impartial testimony, the jury is forced to choose between the interpretations of two medical experts, both of whom may be looking to the fringes of their disciplines to justify their opposing conclusions.

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