# MONTHLY LUNCHTIME SEMINAR SERIES

47TH Session:

# IMPEACHMENT: DON'T MISS OUT ON ALL THE FUN

Judge Lynn M. Egan
Judge Lorna E. Propes

December 13, 2016

# JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 20 years. She has presided over high volume motion calls, an individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 250 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court-ordered medical exams, attorney-client/work product privileges, sanctions, special interrogatories, examination of experts and damages. She also serves as a mentor for new judges and currently serves on the Illinois Courts Commission, a seven-member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 10,000 hours of free CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

# JUDGE LORNA PROPES

Judge Propes is a Cook County Circuit Court judge, having been appointed by the Illinois Supreme Court in 2010 and subsequently elected in 2012. After initially serving in the First Municipal District, Judge Propes was assigned to the Law Division, where she currently presides over complex civil jury trials. She is a frequent speaker at judicial and bar association seminars.

Prior to joining the bench, Judge Propes gained a wealth of trial experience in both civil and criminal cases. After being admitted to practice law in 1975, she began her career as a Cook County Assistant State's Attorney, where she was one of the first women in Illinois to handle major felony cases. Following her service as an ASA, she moved to private practice, representing individuals and corporations in state and federal courts. In this capacity, she tried nearly 100 jury trials and countless bench trials and contested motions. She also served as a commissioner of the Illinois Racing Board for 18 years.

Beginning in the 1970's, she served as a faculty member of the National Institute of Trial Advocacy and earned its Faculty Award for outstanding service. She also received the St. Robert Bellarmine distinguished service award from Loyola Law School and was listed by Chicago Magazine as one of Chicago's "30 Toughest Lawyers" in 2002.

Judge Propes graduated from Indiana University in 1966 (B.S. in education), Columbia University Teachers' College (M.A. in secondary school counseling) in 1970 and Loyola University School of Law (J.D.) in 1975.

# Impeachment Scenarios

By
Hon. Stuart E. Palmer (Ret.)
Hon. Jeffrey L. Warnick
Updated By
Judge Lynn M. Egan
December 2016

On February 14, 2014, three pedestrians were standing on the sidewalk at the intersection of Main and Elm. Each was waiting to cross Main Street. Their names are AA, BB, and CC. The intersection is controlled by traffic light signals.

Each saw a white van traveling eastbound on Elm Street collide with a blue Chevrolet traveling northbound on Main Street. The driver of the Chevrolet, Sam Smith, suffered serious injury. The van was driven by Joe Jones. It had the words "Acme Quick Delivery" printed in large letters on both sides.

One of the pedestrians reported the collision to the police department. Officer Peter Patrick arrived at the scene about ten minutes after the collision. He talked to the van driver, Joe Jones, and each pedestrian: AA, BB, and CC. The other driver, Smith, was unconscious and could not talk.

AA, BB, and CC each told Officer Patrick that the white van was traveling "at a high rate of speed," about 45-50 miles an hour; each said the white van went through a red signal light before striking the blue Chevrolet. Officer Patrick also spoke to the van driver, Joe Jones, who said he entered the intersection on the green light and was not going more than the speed limit of 30 mph. He said he was employed by Acme to deliver packages and was behind schedule at the time of the collision. Officer Patrick filled out his report at the scene and included a summary of the witnesses' oral statements, as well as direct quotes from Joe Jones.

Sam Smith's injuries included a fractured tibia that required surgery. His orthopedic surgeon, Dr. Butcher, left the hospital after surgery, but directed the resident to place a hard plaster cast on Mr. Smith's leg. Several hours after the cast was applied, Mr. Smith began to complain of excruciating leg pain and tightness. The RN notes documented these complaints, but no effort was made to contact Dr. Butcher or have Mr. Smith examined by the resident. This continued for over 8 hours. By the next morning, Mr. Smith's pain was even worse and he also complained of leg paresthesia and weakness. After the RNs documented significantly increased swelling and discoloration, they called Dr. Butcher, but their calls went unanswered. Another 4 hours elapsed before the nursing staff contacted a resident, who ordered removal of the cast and a Doppler ultrasound. It took another 4 hours to complete this test, which documented absent pulses. Ultimately, Mr. Smith was diagnosed with compartment syndrome, requiring an emergency fasciotomy.

Smith subsequently filed a personal injury lawsuit against Joe Jones, Acme Quick Delivery, Dr. Butcher and the hospital. The complaint alleged negligent driving by Jones and

negligent hiring by Acme, citing Jones' criminal convictions for felony DUI in 2000 and misdemeanor domestic battery in 2009. It also alleged medical negligence against Dr. Butcher and the hospital/RNs/resident for failure to timely diagnose and treat Mr. Smith's compartment syndrome.

During discovery, the following information was revealed:

- During AA's deposition, he denied ever telling the police officer that the white van ran a red light, instead claiming he never saw the van before the collision;
- Several years before his deposition, AA was admitted to an inpatient drug rehab program for opiate addiction;
- During the RNs' discovery depositions, they all testified that they repeatedly called Dr. Butcher to alert him to Sam Smith's condition. Similarly, the on-call resident testified during discovery that he expected Dr. Butcher to return to the hospital, but had no opinion about whether he violated the standard of care by failing to do so.
- The hospital/RNs/resident settled with plaintiff & were dismissed from the lawsuit, but agreed in writing to be available at the time of trial.
- Medical records generated years before the accident reveal that Sam Smith saw numerous doctors & visited several ERs for complaints of chronic back pain. Two of those doctors refused to renew his prescriptions for pain medications, noting that Smith obtained multiple narcotic prescriptions from different doctors and routinely ran out of pain meds early;
- Records also reveal that Smith was treated for a medial meniscus tear in the same leg more than 16 years earlier and required extensive physical therapy due to complaints of chronic pain & weakness. However, during his hospitalization after the accident with Jones, Mr. Smith completed a written "Patient History" form, wherein he denied ever experiencing any prior leg pain, injuries or treatment.

## TRIAL ISSUES

### 1. Prior Inconsistent Statement -- Use of Depositions

During trial, the attorney for Jones/Acme calls AA during their case in chief and asks the following questions:

> **Q:** Isn't it true Mr. AA, that you never saw the van before the collision?
> **A:** No, that is completely wrong; I saw the white van for almost 30 seconds before the collision. It was going really fast. In fact, I heard its engine rev right before it ran the red light.
> **Q:** Have you ever given a different answer to that question, Mr. AA?
> **P:** Objection, Your Honor, this is counsel's own witness!!

Ruling? Would the analysis be different if AA answered by stating he couldn't remember anything about the day of the accident?

2. **Prior Inconsistent Statement -- Interrogatory Answers**

During the medical malpractice portion of plaintiff's case, plaintiff's attorney calls one of the hospital nurses as an adverse witness and asks these questions:

> **Q:** Nurse Ratched, isn't it true that your own hospital policy notes that hard casts are never to be applied to a patient such as Mr. Smith during the immediate post-operative period?
> **A:** I don't know about that – it's up to the doctor to decide whether a cast is appropriate.
> **Q:** Nurse Ratched, I'm now showing you Plaintiff's Ex. No 1, which is your employer's answers to interrogatories and direct your attention to the answer to question number 15, which includes a copy of a hospital policy that notes hard casts should never be applied in this type of setting.
> **D:** Objection, Your Honor, she is not a party and has never even seen those interrogatory answers!!

Ruling?

3. **Criminal Convictions**

During motions in limine, the attorney for Jones/Acme presents a motion to preclude reference to Jones' criminal convictions, arguing that plaintiff merely wants to "dirty up" Jones. Plaintiff's attorney disagrees, arguing that both convictions are relevant and admissible because they show Jones' disregard for the rules of society and that the count against ACME for negligent hiring makes the felony DUI conviction particularly appropriate, despite its age. As to the domestic battery conviction, plaintiff's counsel offers to simply mention a conviction, without identifying the actual charge.

Ruling? Is the analysis any different if defense counsel brings a motion in limine to preclude reference to BB's 2013 misdemeanor theft conviction?

4. **Drug Addiction**

During the examination of AA, defense counsel asks the following question:

> **Q:** Mr. AA, isn't it true that you are a long-time drug addict?
> **P:** Objection, Your Honor, this is outrageous & I request a sidebar!!

During the sidebar, the Court asks defense counsel for his good faith basis for the question. Counsel responds by saying he doesn't have access to any information beyond the fact that AA was an inpatient in a rehab program "several" years before his deposition.

Ruling? Would the analysis be different if AA was currently participating in a rehab program?

During the examination of plaintiff's expert, who opined that Sam Smith continues to suffer chronic pain due to Dr. Butcher's failure to timely treat the compartment syndrome, defense counsel asked the following questions:

> **Q:** Upon what basis, doctor, do you conclude that the failure to timely perform a fasciotomy is the reason Mr. Smith still complains of pain?
> **A:** My experience with patients like him, my understanding of the natural progression of this type of injury and my review of the notes from his doctors and physical therapists, which reveal that he continues to complain of pain and ask for pain medication.
> **Q:** Are you aware that Mr. Smith had a history of drug-seeking behavior that he masked with complaints of pain?

Ruling?

### 5. Settlement Agreements

After the close of discovery & shortly before trial, the hospital settled the negligence claim against it, but Dr. Butcher remains a defendant, along with Jones/ACME. During plaintiff's case in chief, the hospital resident is called as a witness & asked the following question:

> **Q:** Do you have an opinion, based on a reasonable degree of medical certainty, whether Dr. Butcher violated the standard of care by failing to personally examine Mr. Smith after being notified of symptoms consistent with compartment syndrome?
> **A:** Yes, he violated the standard of care by not returning to the hospital to perform a fasciotomy.

On cross-examination by defense counsel, the resident is asked the following questions:

> **Q:** Doctor, didn't you previously testify in your deposition that you had no opinion about whether Dr. Butcher violated the standard of care?
> **A:** Yes, but the hospital policies require the surgeon to return to the hospital within 45 minutes when notified of life or limb-threatening changes.
> **Q:** Well, you knew about those policies at the time you gave your deposition, right?
> **A:** Yes.
> **Q:** And at that time, when you testified under oath that you had no negative opinions about Dr. Butcher, you were also a defendant in this case, right?
> **A:** Yes.
> **Q:** And the only thing that's changed since you gave your deposition and testified under oath that you had no negative opinions about Dr. Butcher is that you've been dismissed as a defendant pursuant to a settlement agreement with plaintiff, right?
> **P:** Objection, relevance. I ask for a sidebar.

Ruling? Is the result any different if defense counsel merely asks whether the doctor "resolved" his dispute with plaintiff, rather than expressly mentioning a settlement agreement?

### 6. Prior injury – Same Part of the Body Rule

During trial, plaintiff testifies that his life is completely altered since the accident, specifically stating that he was previously very active and had no physical limitations. Although the Court previously ruled that evidence of Mr. Smith's earlier torn meniscus was irrelevant and inadmissible, defense counsel asks the following questions during cross-examination:

> **Q:** When you were initially admitted to the hospital following the accident, you completed a written form entitled, "Patient History," correct?
> **A:** I don't really remember, but probably.
> **Q:** And on that form, there were questions about your past medical history, right?
> **A:** Yes.
> **Q:** Specifically, you were asked whether you ever had any prior pain, injury or treatment to your legs and you answered, "None," true?!
> **A:** I don't remember.
> **Q:** That answer was false, wasn't it, Mr. Smith?
> **P:** Objection – relevance.

Ruling?

### 7. Medical Witness' Failure to Pass Board Certification Exam

During discovery, it was learned that Dr. Butcher initially failed his board certification exam. He subsequently passed the exam and was certified on the date of Mr. Smith's surgery. As a result, defense counsel brings a motion in limine to preclude any questions or references about his initial failure.

Ruling? Is the analysis different if Dr. Butcher does not offer standard of care testimony about his own conduct? Is the ruling different if Dr. Butcher never passed the certification exam? Does the venue of the trial matter?

### 8. Disciplinary Action Against Expert Witness

Shortly before trial, defense counsel learns that plaintiff's expert witness, whose CV lists membership in a national orthopedic society, had his membership revoked by the society as a sanction for providing false testimony in medical malpractice cases. During cross-examination of the expert, defense counsel asks the following questions:

> **Q:** Doctor, your CV has been marked as an exhibit and you've testified about the dozens of peer-reviewed articles you've authored, but can you tell me whether this version of your CV is accurate and up to date in terms of your hospital affiliations and professional memberships?
> **A:** Yes, I believe it is.
> **Q:** Isn't it true, doctor, that you were the subject of disciplinary proceedings by the National Society of Orthopedic Surgeons?
> **A:** No, that is not true.

**Q:** Doctor, I'd like to show you what I'll mark as Defense Ex. #50, a document from the National Society of Orthopedic Surgeons, and ask you whether it reveals that your membership was revoked as a result of your false testimony in medical negligence cases?
**P:** Objection – I request a sidebar, your Honor!

Ruling?

### 9. Medical Witness' Personal Practice

During the discovery deposition of Dr. Butcher's expert, he testified that he never places a hard cast immediately after surgery for a tibia fracture, but that Dr. Butcher's order to do so complied with the standard of care. Prior to trial, defense counsel brings a motion in limine to preclude questions about the expert's personal practice.

Ruling?

### 10. Medical Treatises & Post-Occurrence Literature

During trial, plaintiff's attorney posed the following questions to Dr. Butcher's expert witness:

**Q:** Doctor, are you familiar with the 2016 NIH study on the use of hard casts in post-operative patients?
**A:** Yes, I'm familiar with it, but I did not review it in formulating any opinions in this case because it post-dates the care by Dr. Butcher.
**D:** Objection, your Honor, relevance – the care in this case occurred in 2014.

Ruling?

# IMPEACHMENT

by
Judge Lynn M. Egan
December 2016

## I. What is impeachment?

Impeachment is any action taken during trial which is aimed at undermining a witness' credibility. Importantly, the impeachment of a witness may be developed in a variety of ways. For instance, a witness can be impeached by his interest, bias or hostility, contradictions, inconsistencies or omissions in his own testimony, other evidence in the trial, and reputation evidence in certain circumstances. *Robert S. Hunter, Trial Handbook for Illinois Lawyers – Civil, §36:1, pp. 718-719 (8th ed., 2015-2016).* Although the impeaching material is usually elicited during cross-examination, it may also be elicited during direct examination in certain circumstances. (*See, Supreme Court Rule 238(b), included at Section A.).*

## II. Who can impeach a witness?

Any party can attack the credibility of any witness, specifically including the party who calls the witness. Illinois Supreme Court Rule 238(a) changed the prior rule that precluded a party from impeaching his own witness.

**NOTE**: Despite the change generated by Rule 238(a), attorneys must remain mindful of the Illinois Rules of Evidence. Specifically in this context, Rule 607 incorporates the general language of Rule 238(a), but adds the following limitation: "the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement *only upon a showing of affirmative damage*. The foregoing exception does not apply to statements admitted pursuant to Rules 801(d)(1)(A), 801(d)(1)(B), 801(d)(2), or 803." *Ill. R. Evid. 607 (eff. Jan. 1, 2011)(emphasis added).*

## III. What matters are properly used as impeachment?

Discussions about impeachment almost invariably include reference to the distinction between collateral and non-collateral matters. Indeed, Hunter's *Trial Handbook* unequivocally notes that a witness "may not be impeached on collateral issues." *Robert S. Hunter, Trial Handbook for Illinois Lawyers -- Civil,* § 36:8, pg. 726 (8th ed. 2015-2016). Of course, practitioners must not be misled by such a definitive, and seemingly simple, declaration because the distinction between collateral and non-collateral matters "is necessarily vague." *Id. at 727.* Another concern with such a generic declaration is that it is frequently misinterpreted to mean that *inquiry* about collateral matters is prohibited. Yet, this is not the law in Illinois and such an approach has been criticized as incorrect.

*Graham's Handbook of Illinois Evidence, § 607.2 (2016 Edition).* "Thus, any ruling that a question on cross-examination is improper on the grounds that it relates to a collateral matter...is incorrect and should not be followed." Id.

### A. Can inquiry be made about collateral matters?

When considering the above question, lawyers and judges must remember that collateral and non-collateral distinctions are not the complete answer. A thorough review of the case law reveals that a witness may be questioned about collateral matters so long as the probative value is not substantially outweighed by considerations of prejudice and confusion. In fact, several First District Appellate cases unequivocally held that inquiry into collateral matters can be relevant and proper if it impeaches the witness' credibility. *Chapman v. Hubbard Woods Motors, Inc., 351 Ill.App.3d 99, 105 (1st Dist., 2004)("proper to allow inquiry into collateral matters revealing the past conduct of a witness which tends to impeach the witness' credibility"); accord, Preston v. Simmons, 321 Ill.App.3d 789, 802-803 (1st Dist., 2001); Poole v. University of Chicago, 186 Ill.App.3d 554, 561 (1st Dist., 1989).* Similarly, the court in *Gossard v. Kalra, 291 Ill.App.3d 180, 182 (4th Dist., 1997)* stated, "[i]n general, *any type of impeaching matter may be produced during cross-examination*, because a purpose of cross examination is to test the witness' credibility." (emphasis added)

Thus, attorneys must not expect trial judges to unduly restrict the examination of a witness merely because the opponent characterizes the matter as collateral. This distinction, alone, is not dispositive of whether a particular inquiry may be made. Instead, the distinction between collateral and non-collateral matters primarily governs the manner in which impeachment occurs and whether extrinsic evidence may be used to prove the subject of the impeaching question.

As noted by Justice Cook in a dissenting opinion in *People v. Lyons, 315 Ill.App.3d 959, 967 (4th Dist., 2000),* "the rule barring impeachment on collateral issues applies only to extrinsic evidence, i.e., evidence of testimony other than from the witness himself. A major reason for the rule is to prevent the waste of time, and extrinsic evidence consumes more time than simple cross-examination of the witness." *Accord, Poole v. University of Chicago, supra at 561. ("It is relevant and proper on cross-examination to inquire into collateral matters regarding the past conduct of the witness which tends to impeach his credibility. However, '[i]f the answer...is unsatisfactory to the cross-examiner because he believes or knows it to be untrue, he is nevertheless bound by it and cannot impeach the answer of the witness by other evidence.")*

This approach was embraced by the supreme court in *People v. Collins, 106 Ill.2d 237, 281 (1985)* and *Holton v. Memorial Hospital, 176 Ill.2d 95, 125 (1997),* as evidenced by its declaration that "if a question concerns a collateral matter the cross-examining attorney must accept the answer given and is not allowed to attempt impeachment on the issue." Thus, the rule against collateral attacks is

not a rule prohibiting particular inquiries; instead, it provides the procedural framework following a witness' denial or equivocal answer to an impeaching question.

### B. Distinguishing between collateral & non-collateral matters

A collateral matter is simply defined as something not relevant to a material issue in the case. *People v. Santos, 211 Ill.2d 395, 405 (2004).* Stated differently, a collateral matter is something that cannot be introduced for a purpose other than to contradict. *People v. Collins, supra at 269. Accord, People v. Beck, 2016 IL App (1st) 140901-U, ¶ 20.* Conversely, non-collateral matters are those relevant to establish something of consequence in the litigation. The test to be applied in making this determination is whether the matter could be introduced for any purpose other than to contradict the in-court testimony of the witness. *Id.*

Importantly, some matters are uniformly recognized as non-collateral, such as those bearing upon the credibility or competence of the witness. Thus, inquiries about the witness' interest, bias, corruption, coercion or prior conviction are proper. In fact, § 8-101 of the Code of Civil Procedure expressly provides that the interest or conviction of a witness "may be shown for the purpose of affecting the credibility of such witness..." *735 ILCS 5/8-101.* (Attached at Section B). Similarly, inquiries about prior inconsistent statements, drug addiction and certain psychiatric or emotional conditions are permitted.

Application of the collateral/non-collateral distinction is a matter left to the discretion of the trial court. *People v. Collins, supra.* As with most evidentiary rulings, the standard of review is abuse of discretion.

### C. Good faith requirement

Whenever examining counsel poses a leading question which suggests the truth of the matter contained in the question, there must be a good faith intent and ability to prove up the impeachment when necessary. Significantly, the requirement of a good faith basis is only required when leading questions are posed; it does not apply if the attorney merely asks whether or not something is true. *Khatib v. McDonald, 87 Ill.App.3d 1087 (1st Dist., 1980); Graham's Handbook of Illinois Evidence, § 607.3 (2016 Edition).*

**CAUTION**: It remains improper to insinuate or use innuendo about inadmissible or nonexistent matters. *Id.*

### D. When can extrinsic evidence be introduced?

As noted above, if a question concerns a collateral matter, the cross-examiner must accept the answer and the trial court must preclude the use of any extrinsic evidence on the matter. *Holton, supra.* Importantly, lawyers and judges must be

vigilant in this regard in order to prevent the jury from becoming distracted from the main issues. *Esser v. McIntyre, 169 Ill.2d 292, 305 (1996).*

However, if the inquiry concerns a non-collateral matter, extrinsic evidence may be introduced. *Krklus v. Stanley, 359 Ill.App.3d 471, 488-489 (1st Dist., 2005).* If the witness admits the matter, extrinsic evidence is not required, although the trial court has discretion to allow it.

If the witness denies the matter, extrinsic evidence *must* be introduced. Similarly, if the witness gives an equivocal answer or claims a lack of memory, the impeachment *must* be completed. *Edward Don Company v. The Industrial Commission, 344 Ill.App.3d 643, 652 (1st Dist., 2003).* In fact, it is error to allow leading questions about a non-collateral matter that is not subsequently proven with admissible evidence because "[t]he inherent danger posed by such ...questions is that the jury will ignore the witness' denial, make a presumption that the insinuation created by the questions is accurate, and substitute the presumption for proof." *People v. Williams, 204 Ill.2d 191, 211-212 (2003).*

Such an error may require reversal because innuendo through incomplete impeachment is considered highly prejudicial, "with the potential for prejudicial effect far beyond the questions asked." *First National Bank of LaGrange v. Glen Oaks Hospital & Medical Center, 357 Ill.App.3d 828, 836 (2d Dist., 2005); Green v. Cook County Hospital, 156 Ill.App.3d 826, 833 (1st Dist., 1987).*

## IV. Limiting instructions

Even when a party introduces extrinsic evidence to complete the impeachment of a witness, lawyers must remain mindful of the fact that the proof is not admitted as substantive evidence. *Edward Don Company v. The Industrial Commission, supra.* Such attentiveness is particularly important during closing argument since it is not uncommon for some lawyers to argue impeachment matters as substantive evidence. As a result, trial judges should be liberal with limiting instructions to the jury.

**NOTE:** IPI No. 2.02 should be given at the time the extrinsic evidence is admitted, while IPI No. 3.07 is appropriate after closing arguments. (Attached as Section C.)

## V. Impeachment in Civil Cases – Selected Issues with Scenarios

Although impeachment takes many forms, certain types are more common than others during trial. As a result, these types of impeachment warrant separate discussion.

## A. Prior Inconsistent Statement — Use of Depositions

"A statement can be used as a prior inconsistent statement for impeachment purposes when the statement is directly attributable to the witness." Nomat v. Mota, 2015 IL App (1st) 140102-U, ¶ 70.

*Kotvan v. Kirk, 321 Ill.App.3d 733 (1st Dist., 2001)*

During his discovery deposition, plaintiff's expert stated he had no opinion on whether the defendant breached the standard of care after he referred the plaintiff to another physician "unless [he became] aware of any other information that [he did not] have at the" time of his deposition. Id. at 748.

At trial, the expert testified the defendant breached the standard of care after he referred plaintiff to another physician by not ensuring the plaintiff received earlier treatment.

The trial court decision to allow the impeachment was affirmed on appeal.

Supreme Court Rule 212(a)(1) expressly authorizes the use of discovery depositions in order to impeach the deponent if he testifies at trial. (Attached at Section D). In order for the deposition testimony to be used as impeachment, it must contradict trial testimony by the same witness on a material matter. Kotvan, *supra*.

**NOTE**: The inconsistent trial testimony must be elicited before impeachment can occur. Additionally, a proper foundation must be laid, which includes directing the witness' attention to the time, place and circumstances of the statement, as well as its substance. *Robert S. Hunter, Trial Handbook For Illinois Lawyers – Civil, §36:5, pg. 724 (8th ed., 2015-2016).*

Importantly, for purposes of impeachment, deposition testimony does not need to be directly contradictory; instead, the inconsistency must simply have a tendency to discredit the witness' testimony. Moreover, inconsistency "'may be found in evasive answers, silence, or changes in position. *See,* Krklus v. Stanley, *359 Ill.App.3d 471 (1st Dist., 2005).*

*Krklus v. Stanley, 359 Ill.App.3d 471 (1st Dist., 2005)*

During his discovery deposition, decedent's son testified his father had "two years to go" before retirement and described his father's retirement plans to relocate to Florida.

At trial, the son testified he was unsure of his father's retirement plans, but that he could have worked as long as he wished because he was in good physical

health. The trial court decision to permit the impeachment was affirmed on appeal.

**CAUTION**: Do not forget the affirmative damage rule, which requires a showing of "affirmative damage" by a witness before the party calling that witness can impeach his testimony. *Ill. R. Evid 607 (eff. Jan. 1, 2011)("the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement ONLY UPON A SHOWING OF AFFIRMATIVE DAMAGE.")*.

### B. Interrogatory Answers

*York v. El-Ganzouri, 353 Ill.App.3d 1 (1st Dist., 2004), aff'd 222 Ill.2d 147 (2006)*

Plaintiff sued an anesthesiologist, claiming he inserted spinal needles too high during knee surgery. During trial, plaintiff was allowed to impeach defendant's expert with defendant's answers to Rule 213 interrogatories despite the fact that the answers were not prepared or signed by the expert, he never reviewed the answers before filing and he disavowed the answer during his discovery deposition so that his deposition and trial testimony were identical.

The appellate court affirmed, but the Supreme Court granted defendant's PLA.

In affirming this method of impeachment, the appellate court relied on Rule 213(h), which states, "answers to interrogatories may be used in evidence to the same extent as a discovery deposition," and Rule 212(a)(1), which permits impeachment use of discovery depositions.

The fact that the expert was impeached with a document he did not prepare or review was not dispositive since the appellate court concluded the preparation of Rule 213 answers is a "collaborative" effort between attorneys and experts such that "...retained experts implicitly authorize attorneys to reduce their opinions to writing and attest to the accuracy of the interrogatory answer."

Additionally, the court relied on *Estate of Whittington v. Emdeko National Housewares, Inc., 96 Ill.App.3d 1007 (1st Dist., 1981)*, where the court allowed impeachment of the plaintiff with interrogatory answers prepared and signed by her attorney. In affirming the impeachment, the appellate court held, "the fact that a document is not signed by the witness does not render it incompetent for impeachment purposes," primarily because there was evidence the plaintiff in that case swore to the contents of the answers and authorized her attorney to sign them

### C. Criminal Convictions

*People v. Montgomery, 47 Ill.2d 510 (1971)*

In *Montgomery*, the Illinois Supreme Court established the rules for impeachment use of a witness' prior criminal convictions. These rules were subsequently extended to civil cases in *Knowles v. Panopoulos, 66 Ill.2d 585 (1977)*. Whether the setting is civil or criminal, the following factors must be satisfied in order to attack a witness' credibility with prior criminal convictions:

1) The crime was punishable by death or imprisonment for more than one year **OR** the crime involved dishonesty or false statement, regardless of punishment; and
2) Less than 10 years has elapsed since the date of conviction or release from confinement, whichever is later; and
3) The probative value of the prior conviction outweighs the danger of unfair prejudice. *Montgomery, supra at 516.*

As to the first factor, there is no longer any distinction between "infamous" crimes and misdemeanors. *People v. Naylor, 229 Ill.2d 584, 597 (2008)*. Any timely felony conviction satisfies this factor, as do all misdemeanor convictions that involve "deceit, fraud, cheating, or stealing" because they are the type of crimes that "'press heavily on the probative side of the scale.'" *Stokes v. City of Chicago, 333 Ill.App.3d 272, 279 (1st Dist., 2002)*. Obviously, therefore, crimes such as perjury, suborning perjury, false statement, and false pretenses also qualify as crimes of dishonesty for purposes of impeachment. *Reichert v. Board of Fire & Police Commissioners of City of Collinsville, 388 Ill.App.3d 834, 848 (5th Dist., 2009)*. However, there is no equivalency with administrative sanctions, such as an ARDC suspension, even if the underlying conduct involved dishonesty. *See, Podolsky & Associates, 297 Ill.App.3d 1014, 1025 (1st Dist., 1998)*. Additionally, juvenile adjudications do not qualify as impeachable offenses. *People v. Villa, 2011 IL 110777.*

**CAUTION**: When assessing whether a misdemeanor conviction qualifies as a crime of dishonesty, the facts surrounding the conviction cannot be considered; instead, "only the crime 'as defined by statute' should be considered." *Id.*[1] Importantly, this is in contrast to the third factor, which requires a balancing test that includes consideration of the nature of the prior conviction. *Id.* at 847.[2]

Measurement of the second factor's 10-year time limit begins with the date of conviction or release from confinement and ends with the date of trial. *Naylor, supra at 598*. Notably, the proponent of the impeachment bears the burden of establishing that the conviction falls within the 10-year period. *Id. at 597*. If there is any ambiguity about the date of release from confinement, the court "must employ the date of conviction." *Id.*

[1] *The trial court in Reichert erred in concluding that a police officer's misdemeanor conviction for "Selling of Goods in Commerce at Unreasonably Low Prices Eliminating Competition" involved dishonesty for purposes of Montgomery* because the statutory definition did not include an element of lying, cheating, deceiving or stealing.

[2] *Appellate cases that indicate the nature of the conviction must bear on witness truthfulness have been criticized and are contrary to Supreme Court directive. Stokes, supra at 278-279.*

The third factor is referred to as the "balancing test" and is an essential part of the analysis because it addresses the risk that a jury will misuse the evidence. When conducting the balancing test, the trial court should consider the following things:

- Nature of the prior conviction
- Nearness or remoteness of the crime to the trial
- Length of the witness' criminal record
- The witness' age & circumstances surrounding the prior conviction
- Subsequent career of the person

*People v. McCoy, 2016 IL App (1st) 130988, ¶ 64; People v. Mullins, 242 Ill.2d 1, 14 (2011).*

Significantly, "a slight tipping of the scales toward the risk of unfair prejudice is not enough to exclude the prior conviction." *Stokes v. City of Chicago, supra at 279.* Instead, the risk of unfair prejudice must *substantially* outweigh the probative value. *Id.*

**NOTE:** There is less chance of unfair prejudice when the witness to be impeached is a nonparty. *Torres v. The Irving Press, Inc., 303 Ill.App.3d 151, 161 (1st Dist., 1999).*

**RULE & STATUTE:** *Ill.R.Evid 609(a) & (b)(eff. Jan. 1, 2011)(Impeachment By Evidence Of Conviction Of Crime); and 735 ILCS 5/8-101(West 2014)(Interested Witness – "conviction may be shown for the purpose of affecting the credibility of such witness.").*

**JURY INSTRUCTION**: IPI No. 3.05, attached at Section C.)

**TECHNIQUE:** The "mere fact" method of impeachment only informs the jury that the witness has a prior conviction without identifying the name of the offense. This is improper and is considered verboten in Illinois because it invites speculation that the witness was convicted of a more serious crime, undermines the *Montgomery* balancing test and prevents the jury from evaluating whether the nature of the crime is such that it should impact the witness' credibility. *People v. Atkinson, 186 Ill.2d 450 (1999). Accord, People v. Harvey, 211 Ill.2d 368, 388 (2004)(Supreme Court noted its "extreme disapproval" of trial court decision to allow "mere fact" impeachment.).*

### D. Drug Addiction

Using a witness' history for narcotics addiction can be a permissible form of impeachment because it affects "the ability to observe, accurately reflect and retain what was observed" and also affects a witness' "inclination toward truthfulness." *People v. Galloway, 59 Ill.158, 163 (1974).* In fact, in *People v. Givens, 135 Ill.App.3d 810, 825 (4th Dist., 1985),* the court noted that "habitual users become habitual liars."

*People v. Crisp, 242 Ill.App.3d 652 (1st Dist., 1992)*

During a side-bar in a murder/aggravated battery trial, defense counsel informed the court that he intended to cross-examine the shooting victim about his drug use. As a foundation, defense counsel offered a hospital record from the victim's hospitalization after the shooting, which noted that the witness had a history as a P.C.P. user. Counsel had no information about when the use occurred.

The State objected to the impeachment, arguing there was an insufficient foundation to show the witness had a narcotics addiction. The trial court sustained the objection and the appellate court agreed, finding that the hospital record was insufficient foundation and served no purpose except to "dirty up" the witness.

Before impeaching a witness with drug addiction, counsel must lay a proper foundation showing that the witness was an addict either at the time of testifying or at the time the relevant event occurred. *Id. See also, People v. Strother, 53 Ill.2d 95 (1972).*

**NOTE:** An addict can be asked to display his arms for needle marks during cross-examination. *People v. Adams, 109 Ill.2d 102, 122 (1985).* Additionally, a witness can be cross-examined about her addiction where she was participating in a methadone program on the date of the offense. *People v. Collins, 106 Ill.2d 237 (1985).*

### E. Settlement Agreements

*Batteast v. Wyeth Laboratories, Inc., 137 Ill.2d 175 (1990)*

Plaintiff suffered brain damage from a prescription drug overdose and filed suit against the health care providers and the drug manufacturer. Although plaintiff settled with one of the physicians prior to trial, the settlement agreement expressly provided that the doctor would be available to testify during the trial with the drug manufacturer, would not "'color, alter or otherwise deviate from' his deposition testimony" and would "'vigorously continue to defend himself.'"

The trial court instructed the parties they could inform the jury that plaintiff's dispute with Dr. Dela Cruz had been "resolved," but precluded inquiry about potential bias resulting from the settlement agreement. The Supreme Court found this error sufficient to warrant reversal.

Although evidence about settlement and negotiations is typically inadmissible, it is proper as impeachment "...if [the] extrajudicial agreement has the potential to bias a witness' testimony as to a relevant issue." *Batteast v. Wyeth Laboratories, Inc., 137 Ill.2d 175, 184 (1990).*

The Supreme Court found that the agreement "clearly had a potential to affect and bias Dr. Dela Cruz' testimony, and the jury should have had the opportunity to take that fact into account in assessing his credibility." Id. at 185. See also, Pister v. Matrix Service Industrial Contractors, Inc., 2013 IL App (4th) 120781(Appellate Court affirmed trial court decision to allow cross-examination challenging credibility of estate beneficiary, even though estate was voluntarily dismissed as a party prior to trial.)

**NOTE:** In Garcez v. Michel, 282 Ill.App.3d 346, 348-349 (1st Dist., 1996), the appellate court cautioned, "...we cannot agree that every settlement agreement involving nonparty, testifying witnesses has the potential to bias the witnesses' testimony." Id. at 350. Thus, prior to allowing evidence of a settlement agreement, the trial judge must make a threshold determination as to whether the agreement has the potential to bias the witness' testimony.

Revealing the existence of a settlement agreement without making the requisite threshold determination may prejudice the plaintiff because it allows defendants "to insinuate that the plaintiff was already compensated for her injuries and that the prior defendants settled because they were the truly culpable parties." Id.

### C. Prior Injury --- Same Part of the Body Rule

Voykin v. DeBoer, 192 Ill.2d 49 (2000)

"...**a prior injury may be relevant as impeachment.** For example, a plaintiff may be examined with respect to his failure to disclose to his physician that he has previously suffered an injury to the same part of the body. Similarly, an expert may be examined about whether his opinion would change if the expert was award of the plaintiff's prior injury. **This does not mean, however, that every undisclosed prior injury to the same part of the body is grounds for impeachment.** Just as with the substantive admission of evidence, trial courts should not permit inquiry into this area unless the prior injury is relevant to a fact in consequence, *i.e.*, whether the prior injury negates causation or negates or reduces the defendant's damages."

Prior to the Voykin decision, evidence of a plaintiff's prior injury was admissible without a showing that it was causally related to the present injury so long as both injuries affected the same part of the body. In Voykin v. DeBoer, 192 Ill.2d 49 (2000), the Supreme Court resolved the split of appellate authority over the doctrine known as the "same part of the body rule," expressly declaring "...we do not believe that, in normal circumstances, a lay juror can effectively or accurately assess the relationship between a prior injury and a current injury without expert assistance." Id. at 59. Thus, pursuant to Voykin, parties must generally have expert testimony to support references to prior or subsequent injuries.

Notably, however, a prior injury can be used to impeach a plaintiff's credibility in certain circumstances. Id. *See also,* Kayman v. Rasheed, *2015 IL App (1st) 132631, ¶ 61.*

**NOTE**: The rule of *Voykin* is inapplicable if plaintiff opens the door to such evidence. *Janky v. Perry, 343 Ill.App.3d 230, 235 (3rd Dist., 2003).* Additionally, there may be circumstances where the nature of plaintiff's injury obviates the need for expert testimony, such as when the claim focuses on an aggravation of a pre-existing condition. *Felber v. London, 346 Ill.App.3d 188 (4th Dist., 2004).*

### D. Medical Witness' Failure to Pass Board Certification Exam

*Gossard v. Kalra, 291 Ill.App.3d 180 (4th Dist., 1997)*

In a medical malpractice action, plaintiff sought to introduce evidence that the defendant doctor failed the board certification exam on his initial attempt. The doctor subsequently passed the certification exam and was board certified at all times during plaintiff's treatment.

The trial court barred the evidence and the appellate court affirmed.

In affirming the trial court decision, the appellate court emphasized the fact that the defendant ultimately attained board certification and was board certified at the time of trial and all throughout the years he treated plaintiff.

**Other cases:**

*Rockwood v. Singh, 258 Ill.App.3d 555 (1st Dist., 1993).* In this medical malpractice case, the trial court barred plaintiff from introducing evidence that the defendant doctor never obtained board certification and the appellate court affirmed. However, the defendant did not offer expert testimony during trial, a fact which was probably dispositive since the appellate court declared, "[g]enerally, when a physician sued for malpractice testifies as an expert, evidence as to his age, practice and like matters relating to his qualifications as an expert is admissible. In such cases, the failure to pass board certification examinations is relevant and admissible." Id. *at 557.* The appellate court also found it noteworthy that plaintiff's attorney referred to defendant's lack of board certification during opening statement and closing argument, despite the barring order.

*Kurrack v. American District Telegraph Company, 252 Ill.App.3d 885 (1st Dist., 1993).* The trial court allowed inquiry of plaintiff's expert about his repeated failure to pass the board certification exam, as well as the expert's "varying responses" in other trials about the number of times he failed the exam. At the time of trial, the expert had still not obtained board certification. In affirming the trial court's decision, the appellate court characterized the case as "a close call," but ultimately concluded the expert's failure to become board certified in the area

of medicine in which he offered expert opinions "did bear upon [his] credibility on the subjects to which he claimed expertise." The appellate court did not, however, approve of the impeachment related to the expert's testimony in other cases, expressly noting his "prior testimony on his past medical examination failures is a collateral issue that does not directly impinge the credibility of Dr. Carnow's expert medical opinions..." Id. at 901. Nevertheless, the court found the inquiry provided some limited "basis for assessing the witness' veracity." Id.

Flynn v. Edmonds, 236 Ill.App.3d 770 (4th Dist., 1992). The trial court allowed defendant to impeach plaintiff's expert with evidence of his failure to pass the board examination. Significantly, the expert was not board certified at the time of trial and lied during his discovery deposition and at trial about his prior failures. The appellate court affirmed the trial court's decision about the inquiry and the use of extrinsic evidence to complete the impeachment.

McCray v. Shams, 224 Ill.App.3d 999 (2d Dist., 1992), PLA denied. The trial court barred inquiry about defendant's failure to pass the board certification exam even though the defendant never attained board certification and offered expert testimony about the standard of care at trial. Despite the barring order, plaintiff's attorney revealed defendant's lack of board certification during trial. Although the appellate court concluded the trial court erred, it was not reversible "since the material issue is whether Dr. Shams was board-certified, the actual reason for why he was not so certified is of limited significance." Id. at 1004.

**FAILURE TO OBTAIN LICENSURE:**

O'Brien v. Meyer, 196 Ill.App.3d 457 (1st Dist., 1990). At the time of trial, plaintiff's expert was not licensed to practice medicine in Illinois, having failed the licensing exam. However, the expert was licensed to practice in Ohio. The trial court allowed inquiry about the expert's failure to pass the Illinois exam. The appellate court reversed, noting "...as long as an expert witness has obtained a license to practice medicine in one state, his or her failure to obtain a license in another has limited significance, at best." Id. at 463. The appellate court went on to caution, "[w]e do not pronounce an all-encompassing rule on if or when an expert's opinion may ever be impeached by the failure to pass a licensing examination. In general, we believe, the existence of a license goes only to the initial qualifying inquiry." Id. at 464.

Creighton v. Thompson, 266 Ill.App.3d 61 (1st Dist., 1994). The trial court allowed "limited" inquiry of plaintiff's expert about restrictions on his medical license. The appellate court affirmed, finding the testimony about the expert's practice restrictions "highly relevant to his credibility because his testimony concerned only whether other physicians failed to exercise the appropriate standard of medical care during the precise time frame in which his home licensing authority required that his professional practices be audited. Under these circumstances, any prejudice resultant to plaintiff's case was well warranted." Id. at 69.

## F. Impeaching Expert with Evidence of Disciplinary Action

*Poole v. University of Chicago, 186 Ill.App.3d 554 (1st Dist., 1989)*

Plaintiff sued defendant, alleging medical negligence during a surgical procedure. At trial, defense counsel was allowed to ask plaintiff's expert whether he had ever been the subject of any medical disciplinary proceedings. When the expert denied such proceedings, defense counsel gave the expert a document filed by the California medical licensing board against the expert and obtained affirmative responses from the doctor about the specific allegations in the document. At the time of trial, the California licensing board had not entered a final disposition of the matter.

The trial court admonished the jury to disregard the details of the allegations contained in the California document. Nevertheless, during closing argument, defense counsel referred to the document and called the expert a "liar" and "prostitute."

The jury returned a verdict for the defendant, but the appellate court reversed.

The appellate court decision provides support for the practice of allowing inquiry about collateral matters, even if extrinsic evidence is not appropriate.

"Dr. Bakst's denial of the pending medical disciplinary charge against him was a collateral matter in plaintiff's case against defendant, since the disciplinary charge was not a material issue in plaintiff's medical malpractice claim. As a result, once Dr. Bakst denied the existence of the pending disciplinary charge, defense counsel was bound by that denial and could not impeach [his] denial by producing a document purportedly setting forth the pending disciplinary claim." *Id. at 561.*

During the discovery phase of a medical malpractice case, plaintiff discloses an expert who tenders a curriculum vitae that lists membership in a national society of neurosurgeons. At his discovery deposition, the expert testifies the CV is accurate. At trial, defendant seeks to impeach the expert since his membership in the society was revoked prior to the date of his deposition. Specifically, defendant seeks to use extrinsic evidence showing the expert's membership was revoked as a sanction for his practice of offering false testimony in medical malpractice trials; the neurosurgery society conducted the review which reached this conclusion.
Is any of this admissible?

## G. Impeaching Medical Witness with Personal Practice

*Gallina v. Watson, 354 Ill.App.3d 515 (4th Dist., 2004), PLA denied 215 Ill.2d 596 (2005)*

Following treatment for injuries sustained in a motor vehicle accident, plaintiff filed a medical malpractice action against a physician, alleging negligence in connection with the doctor's treatment of a fracture. Defendant testified he did not operate on plaintiff because it was acceptable not to do so.

Evidence at trial revealed the section of the operative report prepared by defendant's resident characterized plaintiff's fracture as a type II fracture. The resident testified during his evidence deposition that he treats all type II fractures surgically, but that defendant complied with the standard of care in his non-surgical treatment of plaintiff.

The trial court granted defendant's motion to bar the resident's testimony about his personal practice. The jury returned a verdict in favor of the defendant, but the appellate court reversed.

In *Walski v. Tiesenga, 72 Ill.2d 249 (1978)*, the supreme court held that a plaintiff could not establish a prima facie case of medical negligence by merely presenting testimony from another physician that he would have acted differently.

Although the *Gallina* court agreed with *Walski*, it found the case distinguishable because Gallina was not attempting to establish his prima facie case against defendant through the personal practice testimony of the resident. Instead, plaintiff had his own expert witness to establish a prima facie case and simply wanted to use the resident's testimony to challenge the credibility of his opinion that defendant complied with the standard of care even though he treated plaintiff's fracture non-surgically.

"While we agree with defendants a plaintiff cannot establish a prima facie case of medical negligence based solely on the testimony of another physician that he or she would have done things differently, we disagree with defendants' argument that a expert medical witness's personal preferences are always irrelevant. In this case, the excluded portion of Dr. Whalen's testimony is relevant because it affects the persuasive value of Dr. Whalen's opinions..." *Id. at 521.*

The First District reached the same conclusion in *Bergman v. Kelsey, 375 Ill.App.3d 612 (1st Dist., 2007)*, specifically noting that "...a medical expert's personal practices may well be relevant to that expert's credibility, particularly when those practices do not entirely conform to the expert's opinion as to the standard of care."

### H. Impeachment with Medical Treatises & Post-Occurrence Literature

*Darling v. Charleston Comm. Memorial Hospital, 33 Ill.2d 326 (1965)*

During trial, plaintiff was allowed to cross-examine defendant's experts about medical treatises they did not review or rely upon in forming their opinions.

Trial court decision to allow this type of impeachment was affirmed by the Supreme Court.

In Darling, the Supreme Court abandoned the prior prohibition against cross-examination of experts about materials they did not review or base their opinions on, specifically finding such impeachment was necessary "in order to ensure that expert testimony will be more accurate..."

In Bergman v. Kelsey, *375 Ill.App.3d 612 (1st Dist., 2007)*, the Appellate Court affirmed the trial court's decision to allow use of post-occurrence literature in order to impeach defendant's expert and to establish causation. In so doing, the Appellate Court cited with approval the earlier decision in Granberry v. Carbondale Clinic, S.C., *285 Ill.App.3d 54 (4th Dist., 1996)*. However, the Third District Appellate Court subsequently expressed disapproval with the rationale of Bergman and Granberry, noting "we are uncomfortable with the reasoning in *Granberry* and *Bergman* allowing post-occurrence literature to be used to prove causation...we are troubled by their analysis." Cackley v. Paulsen, *2012 IL App (3d) 110033-UB, ¶ 36.*

**Other cases:**

Jager v. Libretti, *273 Ill.App.3d 960 (1st Dist., 1995)*. The trial court initially precluded counsel's improper attempt to impeach an expert by asking him to read the contents of materials he did not review in formulating his opinions, but subsequently allowed inquiry after counsel re-asked the questions in proper form.

The court noted that both efforts at impeachment represent "...textbook examples of what is permitted on cross-examination and what is not..." Id. *at 965.*

However, even though the court confirmed that an expert can be impeached with materials he did not review or rely upon, it cautioned that the materials must "...truly [be] used as tools of impeachment, rather than as a Trojan horse used to slip hearsay evidence into the trial." Id. *at 966.* This caution was evident in Rios v. City of Chicago, *331 Ill.App.3d 763, 773 (1st Dist., 2002)*, where the Appellate Court concluded that "facts, data or opinions that have not been reviewed by the expert, are not properly admitted in evidence, nor reasonably relied upon by another expert in testimony at trial, may not be employed to impeach the expert's opinion."

## I. Subsequent Remedial Measures

Herzog v. Lexington Township, *167 Ill.2d 288 (1995)*

Plaintiff sued the township after being injured in a single-car accident, alleging the township negligently failed to post signs indicating the presence of curves and the safe speed for traveling on them.

The trial court barred plaintiff from impeaching defendant's witnesses with evidence that they installed additional signs after the accident.

The appellate court reversed, finding that defendant invited such impeachment by eliciting opinions from its witnesses about the adequacy of the original sign. The Supreme Court reversed the appellate court.

Based on public policy considerations, it has long been the law in Illinois that evidence of post-accident remedial measures is inadmissible to prove prior negligence. *Schaffner v. Chicago & North Western Transportation Company, 129 Ill.2d 1 (1989).* Specifically, courts do not want to discourage defendants from making safety improvements, evidence of subsequent remedial measures is not probative and the jury may view this evidence as proof of negligence. *Id.*

However, the following situations represent exceptions to the general rule prohibiting evidence of subsequent remedial measures:

- Where defendant did not act voluntarily, but was required to do so by an outside governmental authority;
- In order to prove ownership or control of property when disputed by the defendant;
- To prove notice;
- To prove the feasibility of precautionary measures where disputed by the defendant; and
- For impeachment purposes.

Significantly, guidelines regarding the impeachment exception were not well defined until the supreme court decision in *Herzog v. Lexington Township, 167 Ill.2d 288, 300 (1995).*

In *Herzog*, the court held that evidence of subsequent remedial measures cannot be used for impeachment if "the sole value of the impeachment rests on th[e]...impermissible inference of prior negligence." *Id. at 302.*

However, when the impeachment value rests on inferences other than prior negligence, evidence of subsequent remedial measures may be admitted if its probative value outweighs prejudice to defendant. *Id.*

For instance, if defendant goes beyond stating the original condition was safe and makes exaggerated claims that the condition was the "'safest possible,' fairness may require that conduct inconsistent with these claims be admitted." *Id.* See also, *Grewe v. West Washington County Unit District #10, 303 Ill.App.3d 299, 308 (5th Dist., 1999).*

# SECTION A

- Supreme Court Rule 238

## Rule 238. Impeachment of Witnesses; Hostile Witnesses

(a) The credibility of a witness may be attacked by any party, including the party calling the witness.

(b) If the court determines that a witness is hostile or unwilling, the witness may be examined by the party calling the witness as if under cross-examination.

Amended Feb. 19, 1982, eff. April 1, 1982; amended eff. April 11, 2001.
**Formerly** Ill.Rev.Stat.1991, ch. 110A, ¶ 238.

**Committee Comments**

This rule is new. It extends the provision of section 60 of the Civil Practice Act authorizing cross examination to any witness who proves hostile or unwilling and the provision authorizing impeachment by prior inconsistent statements to any occurrence witness who surprises the party calling him by testimony on a material matter that is inconsistent with a prior statement made by him.

Under existing law, a witness not called under section 60 who proves hostile or unwilling can, in the discretion of the trial court, be asked leading questions. Bradshaw v. Combs, 102 Ill. 428, 434 (1882); People v. Gallery, 336 Ill. 580, 584-85, 168 N.E.2d 650, 651 (1929). A number of Illinois decisions hold that a witness who unexpectedly gives testimony against the party calling him inconsistent with prior statements may be examined by that party concerning the prior inconsistent statements for the purpose of refreshing the witness' recollection or awakening his conscience. People v. Michaels, 335 Ill. 590, 592, 167 N.E.2d 857, 858 (1929); People v. O'Gara, 271 Ill. 138, 143, 110 N.E.2d 828, 829 (1915); People v. Lukoszus, 242 Ill. 101, 107, 89 N.E.2d 749, 751 (1909); Chicago City Ry.Co. v. Gregory, 221 Ill. 591 598, 77 N.E.2d 1112, 1114 (1906).

The new rule establishes the more straightforward practice of permitting the party calling such a witness to impeach him by proof of prior inconsistent statements. This provision is consistent with the views of modern authorities in this field. 3 Wigmore, Evidence 383, 389 (3d ed. 1940); Morgan, Basic Problems in Evidence, vol. 1, pp. 64-65 (Committee on Continuing Legal Education, American Law Institute, 1954); Tracy, Handbook of the Law of Evidence 193 (1953); Maguire, Evidence—Common Sense and Common Law 43 (1947); Ladd, Impeachment of One's Own Witness—New Developments, 4 Univ. of Chi.L.Rev. 69 (1936); American Law Institute, Model Code of Evidence, Rule 106. The provision is limited to occurrence witnesses in order to forestall possible abuses in the area of expert witnesses.

# SECTION B

- *735 ILCS 5/8-101*
- *735 ILCS 5/8-1202*

## 735 ILCS 5/8-101. Interested witness

§ 8-101. Interested witness. No person shall be disqualified as a witness in any action or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime; **but such interest or conviction may be shown for the purpose of affecting the credibility of such witness;** and the fact of such conviction may be proven like any fact not of record, either by the witness himself or herself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence.

## 735 ILCS 5/8-1202. Court records

§ 8-1202. Court records. The papers, entries and records of courts may be proved by a copy thereof certified under the signature of the clerk having the custody thereof, and the seal of the court, or by the judge of the court if there is no clerk.

# SECTION C

- IPI No. 2.02
- IPI No. 3.07
- IPI No. 3.05

## 2.02 Evidence Admitted For a Limited Purpose

The [following] [preceding] evidence concerning [(describe evidence)] is to be considered by you [solely as it relates to [(limited subject matter)]] [only as to [(name the party or parties)]]. It should not be considered [for any other purpose] [as to any other party].

### Notes on Use

This instruction formerly appeared as IPI 1.01[7]. The only difference is that it is designed for use contemporaneously with admission of the evidence to which it is applicable. The Committee realizes that limiting instructions are routinely given at the time the evidence is elicited and that this practice is encouraged by the Supreme Court. *See People v. Anderson, 113 Ill.2d 1, 5; 495 N.E.2d 485, 486; 99 Ill.Dec. 104, 105 (1986).* One court has indicated that the preferred practice is to repeat the instruction after closing argument. *Atwood v. CTA, 253 Ill.App.3d 1, 14; 624 N.E.2d 1180, 1189; 191 Ill.Dec. 802, 811 (1st Dist., 1993).* If repeated, the instruction should be given in the form found in IPI 3.07.

## 3.07 General Limiting Instruction

Evidence that was [received for a limited purpose] [or] [limited to (one party) (some parties)] should not be considered for [any other purpose] [or] [as to any other (party)(parties)].

### Notes on Use

The instruction in this form was formerly found at IPI 1.01[7]. It is meant for use at the end of closing arguments. See Notes on Use and Comments to IPI 2.02.

## IPI 3.05 Impeachment by Proof of Conviction of Crime

The credibility of a witness may be attacked by introducing evidence that the witness has been convicted of a crime. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

### Comment

Proof of conviction for purposes of impeachment is no longer limited to proof of infamous crimes. In *People v. Montgomery,* 47 Ill.2d 510, 516, 268 N.E.2d 695, 698 (1971), the Illinois Supreme Court held that the provision of the 1971 draft of Federal Rule of Evidence 609 (51 F.R.D. 315, 393 (1971)) would henceforth be the test for determining the admissibility of prior convictions used for impeachment.

After *Montgomery*, such crimes include those punishable by imprisonment for a term in excess of one year (felonies) and crimes involving dishonesty or false statement. Thus, impeachment is now proper with misdemeanors, such as theft, that have as their basis lying, cheating, deceiving, or stealing. *(Citations omitted).*

Montgomery limits the time which a conviction can be used for impeachment to a period within 10 years of the date of the conviction or the release from confinement, whichever is later. However, in each case, the judge must exercise his discretion as to whether or not to allow the impeachment by weighing the probative value of the evidence of the crime against the danger of unfair prejudice. *(Citations omitted).*

Impeachment by use of prior criminal convictions is proper in civil as well as criminal cases. *(Citations omitted).*

# SECTION D

- Supreme Court Rule 212

## Rule 212. Use of Depositions

(a) **Purposes for Which Discovery Depositions May Be Used.** Discovery depositions taken under the provisions of this rule may be used only:

1) For the purpose of **impeaching the testimony of the deponent as a witness** in the same manner and to the same extent as any inconsistent statement made by a witness;

(c) **Partial Use.** If only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used.

# *IMPEACHMENT:*
# *DON'T MISS OUT ON ALL THE FUN!*

*Judge Lynn M. Egan*
*Judge Lorna E. Propes*

*December 13, 2016*

# *WHAT IS IMPEACHMENT?*

Any action aimed at undermining a witness' credibility.

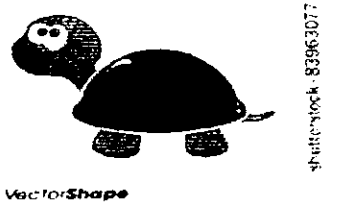
**Examples:**

- Interest, bias, prejudice
- Contradictions, inconsistencies, omissions
- Reputation (sometimes)
- Criminal convictions (per *Montgomery)*
- Drug addiction
- Other evidence

# *WHO CAN DO IT?*

*ANY* party can attack a witness' credibility – even the party calling the witness. (Sup.Ct.Rule 238(a)).

***BUT.....don't forget the turtle!!***




The party calling the witness can impeach with a prior inconsistent statement ONLY upon a showing of affirmative damage.

*Ill. R. Evid 607 (eff. Jan. 11, 2011)*

# *WHAT CAN BE USED?*

*(The Impeachment Trap: Collateral vs. Non-Collateral)*

A witness "may not be impeached on collateral issues."

*(Robert S. Hunter, Trial Handbook for Illinois Lawyers – Civil, ¶36:8 (8th ed. 2015-2016)*

## What Is Collateral?

Something not relevant to a material issue in the case.
Cannot be introduced for purpose other than to contradict.

## What is Non-Collateral?

Relevant to establish something of consequence in the case.
(Interest, bias, motive, truthfulness)

# *DOES THE DISTINCTION MATTER?*

## ABSOLUTELY!!

But not because you can't INQUIRE about collateral matters.

Instead, the distinction dictates the procedural & evidentiary framework if the witness denies or equivocates about the impeaching matter.

# *THE DISPOSITIVE DISTINCTION:*
## *Use of Extrinsic Evidence*

- **Collateral** matters: the witness' answer MUST be accepted and no extrinsic evidence is permitted.

- **Non-collateral** matters: extrinsic evidence MUST be introduced if witness denies or equivocates.

# *DON'T FORGET:*

# *LIMITING INSTRUCTIONS*

- IPI 2.02 should be given at the time the extrinsic evidence is admitted.

- IPI 3.07 is appropriate after closing arguments.

- Don't shy away from these based on fear they will emphasize the information. Jurors really do follow Court instructions!

# *LET THE GAMES BEGIN*

## *Selected Scenarios*

# *SCENARIO FACTS*

- During his deposition, AA denied ever telling the police that the white van ran a red light; instead, said he never saw the van before the collision.

- Several years before his dep, AA was admitted to an inpatient drug rehab program for opiate addiction.

# *PRIOR INCONSISTENT STATEMENT*

During trial, the attorney for Jones/ACME calls AA during their case in chief & asks the following:

> **Q**: Isn't it true that you never saw the van before the collision?
>
> **A**: No. I saw the white van for 30 seconds, going really fast. Even revved its engine right before running the red light.
>
> **Q**: Have you ever given a different answer to that question?
>
> **P**: Objection – this is counsel's own witness!

Ruling?

# *PRIOR INCONSISTENT STATEMENT*

- **Supreme Court Rule 212(a)(1)** authorizes the use of discovery depositions in order to impeach a deponent who testifies at trial.

- **Inconsistent:** The deposition testimony does not need to be directly contradictory – just inconsistent enough to have a tendency to discredit the witness' testimony. This includes evasive answers & silence.

- **Foundation:** The statement must be directly attributable to the witness. (*Nomat v. Mota, 2015 IL App (1st) 140102-U, ¶ 70.)* Witness must be directed to time, place, circumstances & substance of the prior statement.

# *PRIOR INCONSISTENT STATEMENT*

During the medical malpractice portion of the trial, plaintiff's attorney calls one of the hospital RNs as an adverse witness & asks the following questions:

> **Q:** Isn't it true that your own hospital policy says that hard casts should never be applied immediately after surgery?
>
> **A:** I don't know -- Its up to the doctor to make that decision.
>
> **Q:** Showing you Plaintiff's Ex. #1, which are your employer's answers to interrogatories, don't they include a copy of the hospital policy that says hard casts should never be applied in this setting?
>
> **D:** Objection – she is not a party & didn't sign the interrogatory answers!

Ruling?

# *PRIOR INCONSISTENT STATEMENT*

- **Supreme Court Rule 213(h)** – "answers to interrogatories may be used in evidence to the same extent as a discovery deposition." Combine with Rule 212(a)(1), which allows discovery depositions to be used to impeach.

- If preparation of discovery responses is found to be a "collaborative" effort, it may not matter that the witness did not prepare or review the document. *York v. El-Ganzouri, 353 Ill.App.3d 1 (1st Dist., 2004), aff'd 222 Ill.2d 147 (2006).*

- Accord, *Estate of Whittington v. Emdeko National Housewares, Inc., 96 Ill.App.3d 1007 (1st Dist., 1981)("the fact that a document is not signed by the witness does not render it incompetent for impeachment purposes.")*

# *SCENARIO FACTS*

- During discovery, the parties learn that Jones was previously convicted of felony DUI in 2000 & misdemeanor domestic battery in 2009. The parties believe he was sentenced to jail time for the DUI, but have no information about the length of his sentence or when he was released from confinement. Trial occurs in 2016.

- It is also discovered that eyewitness, BB, was convicted of misdemeanor theft in 2013.

•

•

# *CRIMINAL CONVICTION*

- During motions in limine, Jones' attorney moves to preclude any reference to Jones' criminal convictions, arguing only that plaintiff merely wants to "dirty up" Jones.

- Plaintiff's attorney argues that both convictions are admissible because they show a general disregard for the rules of society, just like running a red light, and the negligent hiring claim against ACME makes the DUI conviction especially relevant.

- As to the domestic battery conviction, plaintiff's attorney offers to simply tell the jury that Jones also had a misdemeanor conviction, without specifying the charge.

Ruling?

•

•

# *CRIMINAL CONVICTION*

***People v. Montgomery*** controls & applies to criminal & civil cases. These factors must be satisfied:

- Crime punishable by death or imprisonment for more than one year; OR
- Crime involved dishonesty or false statement, regardless of punishment; AND
- Less than 10 years has elapsed since date of conviction or release from confinement, whichever is later; AND
- Balancing test reveals that the probative value outweighs the danger of unfair prejudice.

# *CRIMINAL CONVICTION*

*Montgomery* balancing test includes consideration of the following:

- Nature of the prior conviction
- Nearness or remoteness of the crime to the trial
- Length of the witness' criminal record
- Witness' age & circumstances surrounding prior conviction
- Subsequent career of the witness

*People v. McCoy, 2016 IL App (1st) 130988; People v. Mullins, 242 Ill.2d 1 (2011).*

# *CRIMINAL CONVICTIONS*

## *(Misc. Points)*

- The risk of unfair prejudice must substantially outweigh the probative value. "Slight tipping of the scales" not enough to warrant exclusion. *(Stokes v. City of Chicago, 333 Ill.App.3d 272 (1st Dist., 2002))*
- Administrative sanctions (ARDC suspension) do not qualify.
- Consider the status of the witness. Less chance of unfair prejudice if witness is a nonparty.
- "Mere fact" method of impeachment is IMPROPER!!
- Don't forget jury instruction – IPI 3.05

# *SCENARIO FACTS*

During the examination of AA, defense counsel asks the following question:

> **Q:** Mr. AA, isn't it true that you are a long-time drug addict?
>
> **P:** Objection – this is outrageous & I request a sidebar!

During the sidebar, defense counsel reveals he doesn't have any information about AA's drug use beyond the fact that AA was an inpatient in a drug rehab program "several" years before his discovery deposition.

Ruling?

•

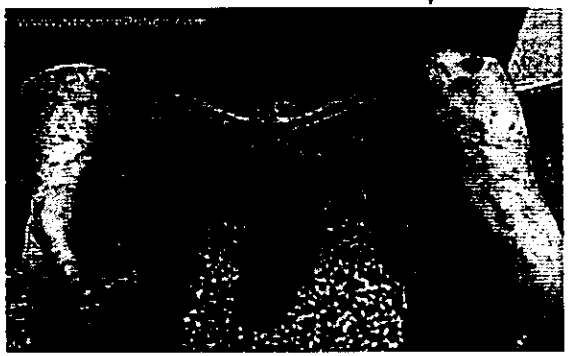
•

# *DRUG ADDICTION*

- **Can be proper** impeachment because it affects the ability to observe, accurately reflect & retain what was observed & may also affect witness credibility because "habitual users become habitual liars." *People v. Givens, 59 Ill. 158 (1974)*

- **Required Foundation:** MUST show that witness is an addict at the time of testifying OR was an addict at the time the relevant event occurred.

- **Visual Confrontation?** Yes. *People v. Adams, 109 Ill.2d 102 (1985)*



# *SCENARIO FACTS*

While the hospital & its resident were defendants, the resident testified in his deposition that he had no opinion about whether co-defendant, Dr. Butcher, violated the standard of care.

At trial, after the hospital has been dismissed pursuant to settlement, he testifies that Dr. Butcher DID violate the standard of care.

Dr. Butcher's attorney asks the following question:

> **Q:** The only thing that's changed since you gave your deposition & stated under oath that you had no negative opinions about Dr. Butcher is that you've been dismissed as a defendant pursuant to a settlement agreement with plaintiff, right?
>
> **P:** Objection, relevance. I request a sidebar.

Ruling?

# *SETTLEMENT AGREEMENTS*

- Can be proper impeachment "if [the] extrajudicial agreement has the potential to bias a witness' testimony as to a relevant issue." *Batteast v. Wyeth Laboratories, 137 Ill.2d 175 (1990).*

- Not every settlement agreement will qualify. Trial court MUST make a threshold determination about whether agreement has potential to bias the witness' testimony.

# *SCENARIO FACTS*

Prior to trial, the court barred reference to plaintiff's earlier torn meniscus. During trial, plaintiff & his physicians testify that his injuries and current physical limitations are solely related to the accident. Defense counsel asks the following questions during cross:

**Q:** Upon admission to the hospital, you completed a "Patient History" form, correct?

**A:** I don't really remember, but probably.

**Q:** There were questions about whether you ever had any prior pain, injury or treatment to your legs & you answered, "None," true?

**A:** I don't remember.

**Q:** That answer was false, wasn't it?

**P:** Objection – relevance.

Ruling?

# *SAME PART OF THE BODY RULE*

- ***Voykin v. DeBoer:*** "...a prior injury may be relevant as impeachment.***This does not mean, however, that every undisclosed prior injury to the same part of the body is grounds for impeachment."
- The trial court must preclude such impeachment unless the prior injury is relevant.
- Examples: negating causation, reducing damages & credibility (sometimes!)
- Plaintiff may open the door to otherwise irrelevant prior injuries.

# *IMPEACHMENT OF EXPERT WITNESSES*

Whet your appetite by watching Alex Baldwin's "I Am God" speech in the movie, Malice.

(www.youtube.com/watch?v=Lqec3BPYTmE)

# *SCENARIO FACTS*

Dr. Butcher initially failed his Board exams, but ultimately passed & was certified on the date of plaintiff's surgery.

As a result, defense counsel brings a motion *in limine* to preclude any inquiry about his initial failure.

Ruling?

# *FAILURE TO PASS BOARD EXAM*

Can depend on whether witness ever passed exam, offers standard of care testimony – and Appellate District!

**Examples:**

- *Rockwood v. Singh* (*1st Dist.*) – evidence barred (even though witness never passed exam), but Appellate Court stated "failure to pass board examinations is relevant and admissible" when witness testifies as an expert.
- *McCray v. Shams* (*2d Dist.*) – evidence barred (even though witness offered expert testimony & never attained board certification. Appellate Court found error, but not reversible.
- *Gossard v. Kalra* (*4th Dist.*) – evidence barred.
- *Flynn v. Edmonds* (*4th Dist.*) – evidence allowed.

# *SCENARIO FACTS*

Defense counsel learns that plaintiff's expert was expelled from a national orthopedic society as a sanction for providing false testimony in medical negligence cases. During cross-examination, he asks the following:

> **Q:** Your CV lists hospital affiliations & membership in a number of professional societies; is it current & up-to-date?
>
> **A:** Yes, I believe it is.
>
> **Q:** Isn't it true that your membership in the Nat'l Society of Orthopedic Surgeons was terminated because you provide false testimony at trials?
>
> **P:** Objection – I request a sidebar.

Ruling?

# *DISCIPLINARY ACTION*

- *Poole v. University of Chicago*: Appellate Court disapproved use of extrinsic evidence to prove existence of pending disciplinary charge against plaintiff's expert because it was not a material issue in plaintiff's medical malpractice claim (collateral), but did not find fault with INQUIRY about the charge.

- "Once Dr. Bakst denied the existence of the pending disciplinary charge, defense counsel was bound by that denial and could not impeach [his] denial by producing a document purportedly setting forth the pending disciplinary claim."

# *SCENARIO FACTS*

- During the discovery deposition of Dr. Butcher's expert, he testified that he never places a hard cast immediately after surgery for a tibia fracture, but that Dr. Butcher's order to do so complied with the standard of care.

- Prior to trial, defense counsel brings a motion *in limine* to preclude questions about the expert's personal practice, arguing it is irrelevant.

Ruling?

# *EXPERT'S PERSONAL PRACTICE*

- ***Bergman v. Kelsey***: "...a medical expert's personal practices may well be relevant to that expert's credibility, particularly when those practices do not entirely conform to the expert's opinion as to the standard of care."

- **NOTE:** Such evidence is NOT admissible to establish the standard of care or compliance/deviation.

# *SCENARIO FACTS*

During trial, plaintiff's attorney posed the following questions to Dr. Butcher's expert witness:

**Q:** Are you familiar with the 2016 NIH study on the use of hard casts in post-operative patients?

**A:** Vaguely, although I did not review it in formulating my opinions in this case.

**D:** Objection, relevance & foundation. The relevant time frame is 2014 , plus the doctor didn't even review it.

Ruling?

# *POST-EVENT LITERATURE*

- ***Bergman v. Kelsey*** *(1st Dist.)*: it can be appropriate to use post-event literature to impeach an expert (and to establish/negate causation, establish/challenge the efficacy of treatment or diagnostic capabilities of technology).
- *Accord, Granberry v. Carbondale Clinic, S.C. (4th Dist.).*

**CAUTION:** "We are uncomfortable with the reasoning in Granberry and Bergman allowing post-occurrence literature to be used to prove causation...we are troubled by their analysis." ***Cackley v. Paulsen****, 2012 IL App (3d) 110033-UB.*

# *NEXT SESSION*

# *EVIDENTIARY HOT TOPICS*

*January 25, 2017*