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Feature Article

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Wilson v. Clark—Its Use and its Ramifications

Expert witness testimony often involves the use of facts and other information not in evidence. In 1981, the Illinois Supreme Court, in the seminal case of *Wilson v. Clark*, 84 Ill. 2d 186 (1981), expressly adopted Rule 703 and Rule 705 of the Federal Rules of Evidence. MICHAEL H. GRAHAM, GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §§703.1, 705.1. (2016 ed.). By adopting these two Federal Rules of Evidence, the Illinois Supreme Court in *Wilson* liberalized trial procedures controlling the admissibility of expert testimony. Federal Rule of Evidence 703, now Illinois Rule of Evidence 703, governs the permissible bases of an expert's opinion. Federal Rule of Evidence 705, now Illinois Rule of Evidence 705, governs the disclosure of information underlying an expert's opinion. This article addresses the issues of what may be relied upon as well as what may not be relied upon, and how such materials relied upon by expert witnesses may be used at trial.

Admissibility of Expert Testimony Before *Wilson*

Prior to the adoption of the Illinois Rules of Evidence and long before the Illinois Supreme Court's decision in *Wilson*, the common law required the opinions of expert witnesses to rest on either first-hand observation or on the admitted facts of the case. FED. R. EVID. 703, Advisory Comm. Notes. Expert opinions based on evidence not admitted at trial were generally considered inadmissible under Illinois law. *Pritchett v. Steinker Trucking Co.* 108 Ill. App. 2d 371 (4th Dist. 1969). In other words, the common law admitted opinions based on facts or data personally observed by the expert as well as opinions based on facts or data presented at trial. In contrast, courts refused to admit expert opinions or the bases for such opinions if they did not fit into either of these two sources serving as the bases for the expert opinions.

The trial procedure to present facts relied upon by the expert, but not personally known to the expert was to have the expert answer hypothetical questions containing an assumed set of facts, data, or opinions. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE, *supra*, §705.1. If an expert had personal knowledge of the subject matter about which he would testify, the expert would first testify as to his personal observations and then offer his opinion. If the expert's opinion testimony involved interpreting data and drawing conclusions, the required procedure for eliciting the expert's opinions was the hypothetical question. *Sherman v. City of Springfield*, 77 Ill. App. 2d 195 (4th Dist. 1966).

The hypothetical question had been criticized as being time consuming, complex, and an impairment to the orderly presentation of evidence at trial. GRAHAM, HANDBOOK OF ILLINOIS EVIDENCE, *supra*, §705.1. The problem with hypothetical questions was that they were oftentimes confusing in that experts were asked to assume long and detailed series of facts at trial. If the hypothetical question included facts that differed from the facts of the case, judges would

sustain objections and strike the expert testimony. In addition, another practical problem which impeded the orderly presentation of evidence involved the need to call multiple foundational witnesses. The Illinois Supreme Court specifically referred to this issue in *Wilson* where it noted that it was extremely time-consuming to call multiple witnesses who made entries in hospital records to the witness stand to lay a proper foundation for a medical expert's opinion. *Wilson*, 84 Ill. 2d at 194.

Wilson Changes the Use of Expert Witness Trial Procedures

In *Wilson v. Clark*, the Illinois Supreme Court expressly adopted Federal Rule of Evidence 703 (basis of opinion testimony by experts) and Federal Rule of Evidence 705 (disclosure of facts or data underlying expert opinion), and drastically changed the use and approach of expert testimony at trial. *Id.*

Wilson involved a medical negligence action and presented two issues to the supreme court. First, whether the trial court erred in admitting the plaintiff's hospital records into evidence without requiring verification of the records by the testimony of the person who made the entries. Second, whether error was committed in permitting the defense expert witness to express his opinion in response to a hypothetical question based on those records. The *Wilson* court ruled that the hospital records were admitted into evidence without a proper foundation. *Id.* It further held that it was not necessary for the hospital records to be admitted in order for the defense expert to render a medical opinion. *Id.* at 192. The Illinois Supreme Court referred to its decision in *People v. Ward*, 61 Ill. 2d 559 (1975), which held that medical records may be used by an expert witness—who also happened to be a treating physician—in forming an opinion as to an accused defendant's sanity even though the reports themselves were not admitted into evidence. Relying on Federal Rule of Evidence 703, the *Wilson* court reasoned that expert opinions may be based on facts not yet entered into evidence. *Wilson*, 84 Ill. 2d at 193. The *Wilson* court stated that "the key element in applying Federal Rule 703 is whether the information upon which the expert bases his opinion is of a type that is reliable." *Id.*

Adoption of Federal Rule 703

The Illinois Supreme Court expressly adopted Federal Rule of Evidence 703 which permits an expert witness to give his opinion on the basis of facts which have not been admitted into evidence if they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. *Id.* The *Wilson* court emphasized that Federal Rule of Evidence 703 makes no distinction between treating and non-treating experts. *Id.* The information upon which the expert's opinions are based may be derived from three possible sources: (a) first hand observation; (b) presentations at trial such as hypothetical questions; and (c) presentation of data to the expert *outside* of the court and other than by his own perception. *Id.* The *Wilson* court held that due to the high reliability of hospital records, an expert may give his response to a hypothetical question based on these records, even if the records are not in evidence. *Id.* at 194.

Adoption of Federal Rule 705

In *Wilson*, the supreme court also adopted Federal Rule of Evidence 705, which allows an expert to give his opinion without initially disclosing the facts underlying it unless the court requires otherwise. *Id*. However, the expert may be required to disclose the underlying facts or data on cross-examination. *Id*. Under Federal Rule of Evidence 705, the burden is placed upon the adverse party during cross-examination to elicit the facts underlying the expert opinion. *Id*. Thus, the expert's opinion may be based on first hand or second hand information. *Id*. The supreme court's adoption of Federal Rules of Evidence 703 and 705 eliminated the time consuming process of asking expert witnesses long and complicated hypothetical questions that afford an opportunity to sum up the evidence in the middle of a case. *Id.* at 195.

Illinois Rules of Evidence

Illinois Rule of Evidence 703

Based on the Federal Rules of Evidence model, the Illinois Supreme Court adopted the Illinois Rules of Evidence on September 27, 2010. The Illinois Rules of Evidence became effective on January 1, 2011. Like its federal counterpart, Illinois Rule of Evidence 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or 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.

ILL. R. EVID. 703. The rule expands the legally acceptable bases of expert opinions by allowing expert witnesses to base their opinion testimony on their regular and customary activities outside of the litigation context. The key requirement is reasonable reliance by the expert in their particular field. In other words, reasonable reliance may be established by considering the following:

> Do experts in this particular field regularly utilize or employ this process or methodology?
>
> Is the process by which the expert reached his opinion generally accepted in the community in which the expert practices his profession?
>
> Is the substance of the bases of the opinions reliable?
>
> Do experts in this field customarily rely on the same or similar information in reaching conclusions formulated for non-litigation purposes?
>
> Is the reliance by the subject expert in the case at bar reasonable?

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Illinois Rule of Evidence 705

Based on Federal Rule of Evidence 705, the Illinois rule permits an expert witness to offer his opinion without prior disclosure of the underlying facts, unless the court requires otherwise, and states in relevant part:

> The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

ILL. R. EVID. 705. The burden is placed on the adverse party during cross-examination to elicit the facts underlying the expert opinion. *Wilson*, 84 Ill. 2d at 194. It should be noted that this aspect of the *Wilson* holding seldom becomes an issue at the trial or appellate levels because Illinois Supreme Court Rule 213(f)(3) requires that a controlled expert witness disclose the bases for the expert's opinions. If the materials underlying the opinions are not disclosed during the discovery process, the proponent of the evidence runs the risk having the opinion or the bases for the opinion barred by the trial court.

City of Chicago v. Anthony: Trial Court as Gatekeeper and the Concept of Trustworthiness

Permitting the expert witness alone to determine whether his reliance is reasonable would allow any expert to control the admissibility of evidence. The Illinois Supreme Court has therefore emphasized that an expert's statement of reasonable reliance is only part of the analysis, and clarified the gatekeeping function of the trial court in *City of Chicago v. Anthony*, 136 Ill. 2d 169 (1990). In *Anthony*, the supreme court promulgated a two-prong test as to what an expert may use as the bases for an opinion. Specifically, the trial court is required to determine:

> Whether the underlying facts or data upon which an expert bases an opinion are of a type reasonably relied upon by experts in the particular field; and
>
> If the facts or data are not excluded by another rule of law applicable to the case or a competing policy interest.

Anthony, 136 Ill. 2d at 184-85, 190.

In other words, if the material upon which the expert bases his opinion is of the type customarily relied upon by experts and the material must be sufficiently trustworthy to make the expert's reliance reasonable, then the information may be permitted to be presented to the jury. On the other hand, if another rule of law applicable to the case excludes the information sought to be relied on by the expert, the information may not be permitted to come before the jury under the guise of a basis for the opinion of the expert. *Id.* at 186. The opinion of an expert that the underlying facts or data upon which the expert seeks to base an opinion are of a type reasonably relied upon by experts in a particular field is one factor

to be considered by the trial court in the exercise of its independent assessment about whether the reliance is reasonable. The *Anthony* ruling clarified that the trial court serves as a gatekeeper to the trustworthiness of what experts may rely upon. Further, the trial court must determine whether there are any other restrictions as to what the expert may rely on. *Id*. If the expert relies on material that would not be independently admissible, the expert cannot present the material to the jury by simply saying that he reasonably relied on the material.

To be clear, in *Wilson,* the supreme court held that it would be unnecessary for hospital records to be admitted when those records are used for the purpose of eliciting a medical opinion. *Id*. at 192. The *Wilson* court stated that under Federal Rule of Evidence 703, an expert can give opinion testimony which relies upon facts and data not admitted into evidence as long as the underlying information is of the type reasonably relied upon by experts in the particular field. *Id.* at 192-94. However, Federal Rule of Evidence 703, upon which the *Wilson* opinion was based, was subsequently amended. Illinois Rule of Evidence 703 did not adopt the third sentence of Federal Rule of Evidence 703 which was not present when the supreme court adopted Rule 703 in *Wilson*. The third sentence provides:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantively outweighs their prejudicial effect.

FED. R. EVID. 703. A distinction must be made between to what extent evidence is deemed admissible compared to what manner the evidence has been admitted. *Wilson,* 84 Ill. 2d 192-94. Facts or data which have not been admitted can form the basis of the expert's opinion if of a type reasonably relied upon by experts in the field. *Id.* at 193. If evidence is independently inadmissible, then by definition it is not reasonably reliable. For instance, in the case of *Connelly v. General Motors Corp.*, the defendant manufacturer argued on appeal that its experts should have been allowed to testify that they relied on certain performance data to establish that the tire in question was not unreasonably dangerous. *Connelly v. General Motors Corp.*, 184 Ill. App. 3d 378 (1st Dist. 1989). Relying on *Wilson v. Clark*, the defendant asserted that an expert can testify concerning the data upon which he based his opinion even though that data itself might not be admissible in evidence. *Connelly*, 184 Ill. App. 3d at 390. The *Connelly* court held that testimony concerning other automobile manufacturers was inadmissible "state of the art" evidence and was irrelevant to plaintiff's case. *Id.* Hence, any reliance by defendant's experts upon this inadmissible state of the art evidence would be deemed unreasonable. *Id.* The court held that the expert could not present inadmissible state of the art evidence to the jury as a basis for his opinion. *Id.* at 390-91. For example, statements barred by the Illinois Dead Man's Act cannot serve as a basis for expert opinion testimony. *Hanks v. Justus*, 243 Ill. App. 3d 737, 740-41 (3d Dist. 1993).

However, the appellate decisions in *People v. Hooker*, 2012 IL App (2d) 101007 and *People v. Butler* 2013 IL App (1st) 113606 confuse the distinction between facts or data not admitted into evidence versus inadmissible facts or data. The key distinction to keep in mind is that if evidence is not independently admissible, then it is not reasonably reliable. The *Wilson* court interpreted Federal Rule of Evidence 703 to allow opinions based on facts not admitted into evidence. *Wilson*, 84 Ill. 2d at 193 (stating that both "Federal and State courts have interpreted Federal Rule 703 to allow opinions based on facts not in evidence."). Similarly, in *People v. Lovejoy*, 235 Ill. 2d 97, 142 (2009), the court noted that it adopted Federal Rule of Evidence 703, which provided that an expert may give opinion testimony which relies upon facts and data not in evidence, as long as the underlying information is of the type reasonably relied upon by expert in the particular field.

An expert cannot simply rely on inadmissible evidence as a basis for his opinion to satisfy the reasonable reliance requirement under Rule 703. The cases of *People v. Hooker*, 2012 IL App (2d) 101007 and *People v. Butler*, 2013 IL App (1st) 113606 relied on Illinois Rule of Evidence 703. These decisions add to the confusion between an expert's reliance on inadmissible facts or data, as compared to facts or data which have not been admitted into evidence but would be deemed admissible. In fact, the second sentence of Illinois Rule of Evidence 703 is contradicted by the Illinois Supreme Court's holding in *Wilson v. Clark*. Inadmissible evidence is inherently unreliable, and, therefore, cannot satisfy the reasonable reliance requirement under *Wilson v. Clark* and its progeny.

Parameters of *Wilson v. Clark*

When the facts or data upon which the expert relies meets the threshold requirements of Rule 703, and is not otherwise barred by Illinois Rule of Evidence 403 (exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time), the inquiry then becomes how much, or to what extent, the expert may disclose underlying facts or data to the jury at trial. The facts or data upon which an expert relies, unless independently admitted, have no substantive value, and do not rise to the level of substantive evidence because the materials relied upon are still hearsay. Therefore, one cannot argue or use the material in any manner for the truth of the matter contained therein. *Mayer v. Baisier*, 147 Ill. App. 3d 150, 156-57 (4th Dist. 1986). In other words, where an expert forms an opinion based on underlying facts or data which have not been admitted into evidence, Rule 703 permits the expert to disclose (and the trial court to admit) those facts or data reasonably relied upon by the expert, but only for the limited purpose of supporting the expert's opinion and allowing the expert to present the facts or data to assist the jury in understanding his testimony. ILL. R. EVID. 703. Allowing the expert to reveal the contents of the underlying facts or data upon which he has reasonably relied, affords the jury the opportunity to evaluate, and thus accept or reject the basis of the expert's testimony. This distinction is critical as to how the underlying facts or data may be used during cross-examination and final argument. It is important that counsel seek a limiting instruction to restrict the evidence to its proper purpose and scope and instruct the jury accordingly.

In *People v. Ward*, the court held that an expert may render opinions based on records compiled by others which had not been entered into evidence as long as they are of the type of records customarily relied upon by members of the medical profession. *People v. Ward*, 61 Ill. 2d 559, 567-68 (1975). Similarly, in *People v. Anderson*, the court followed the holding in *Ward*, and held that the expert was allowed to divulge the contents of the material the expert relied upon. *People v. Anderson*, 113 Ill. 2d 1, 9-12 (1986). Specifically, the *Anderson* court reasoned that without revealing what the expert relied upon, the jury would have no basis for evaluating the testimony and the opinion would sound like a "meaningless conclusion." *Anderson*, 113 Ill. 2d at 9-12. Therefore, the basis of the opinion had to be revealed so that the jury could evaluate it, and so that the opinion would not sound like a "naked opinion" with no factual basis.

The court in *People v. Pasch*, followed *Anderson* and reiterated that both the underlying facts and the conclusions reached by other physicians could be revealed to the jury. *People v. Pasch*, 152 Ill. 2d 133, 174-77 (1992). The obvious conclusion to be reached is that all of the material relied upon, including the opinions and conclusions reached by others, may be revealed to the jury. However, as previously stated, the trial court should give a limiting instruction. *Pasch*, 152 Ill. 2d at 177.

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Direct Examination: Materials on Which Experts Can Reasonably Rely

Not all materials containing facts or data satisfy the reasonable reliance requirement of Illinois Rule of Evidence 703. Illinois courts have allowed expert witnesses to rely on a multitude of sources of information. In *Wilson v. Clark*, the expert was allowed to rely on hospital records. *Wilson*, 84 Ill. 2d at 194 (1981). Likewise, in the case of *Kinsey v. Kolber*, over defendant's objection, plaintiff's expert read aloud the findings of another doctor to whom the expert had referred the plaintiff for psychological testing. *Kinsey v. Kolber*, 103 Ill. App. 3d 933, 951-52 (1st Dist. 1982). Relying on *People v. Ward*, the *Kinsey* court allowed the doctor to testify based on records or reports made by others who did not testify if such records or reports are of a type customarily utilized by the medical profession. *Kinsey,* 103 Ill. App. 3d at 952. Moreover, Illinois courts have allowed expert witnesses to rely on discovery depositions in support of their opinions. *Thome v. Palmer*, 141 Ill. App. 3d 92, 94-95 (3d Dist. 1986). Likewise, expert witnesses have been allowed to read to the jury portions of defendant's safety manual. *Colella v. JMS Trucking Co. of Ill.,* 403 Ill. App. 3d 82, 91 (1st Dist. 2010). In addition, hospital bylaws, policies, and procedures meet the reasonable reliance requirement in cases of institutional negligence. *Darling v. Charleston Cmty. Mem. Hosp.*, 33 Ill. 2d 326 (1965).

Materials Which do not Meet the Reasonable Reliance Requirement

Illinois Courts have also determined that certain facts or data cannot be reasonably relied upon by expert witnesses. A plaintiff's history as to the details of how an accident occurred cannot be read to a jury. *Reeves v. Brno, Inc.*, 138 Ill. App. 3d 861, 868-69 (2d Dist. 1985); see also *Bailey v. City of Chi.*, 116 Ill. App. 3d 862 (1st Dist. 1983). Likewise, reports prepared solely for litigation purposes do not satisfy the reasonable reliance requirement of Rule 703. *Dugan v. Weber*, 175 Ill. App. 3d 1088, 1098-99 (1st Dist. 1988); *see also Kim v. Nazarian*, 216 Ill. App. 3d 818, 826-27 (2d Dist. 1991). Further, an article published in a medical journal by plaintiff's treating physician used solely to bolster the opinion of the doctor, by showing that he and other doctors had previously reached the same conclusion in a case report that was accepted and published in a medical journal was not proper. *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶ 83. The content of published material to be read to the jury must be reasonably relied upon as a basis for the expert's opinion, not merely to corroborate that opinion. *Solis*, 2012 IL App (1st) 110875, ¶ 83.

Scope of Cross-Examination under *Wilson v. Clark*

The next issue to be addressed is whether an expert witness can avoid being cross-examined on *Wilson v. Clark* materials by claiming he has never reviewed the materials or has claimed that he never knew that they had existed. The unequivocal answer under Illinois case law is no. In *People v. Pasch*, the court found that a defense psychiatrist could be cross-examined regarding psychological reports of other psychiatrists who had not testified but who had concluded that defendant was sane even though the defense experts stated that he neither reviewed nor relied upon the reports. *Pasch*, 152 Ill. 2d at 178. The *Pasch* court held that it was proper for the trial court to allow cross-examination of the defense psychiatrist as to the material he did not review and was unaware of. *Id.* at 177-80. The defense psychiatrist could be cross-examined as to how the material would affect his opinions and to show the thoroughness or selectivity of his review of the materials. *Id.* The defense expert could be cross-examined as long as the material has been determined to be of the

type reasonably relied upon by similar experts and is trustworthy. The determination is to be made by the trial court. *Id.* at 180. Without this type of cross-examination, an expert can bootstrap himself out of cross-examination by doing a very selective review and ignoring items which would not support the expert's opinions. For a discussion of this issue. *Piano v. Davison*, 157 Ill. App. 3d 649, 671-72 (1st Dist. 1987).

There is no question that an expert may be cross-examined about records he has reviewed and relied upon. Likewise, the expert may be cross-examined on records he has reviewed, but on which he did not rely. In addition, an expert may be cross-examined about records he has neither reviewed nor relied upon if offered to affect the basis of the opinion. However, the attorney conducting the cross-examination may not use materials to introduce hearsay evidence into the record. *Tsoukas v. Lapid*, 351 Ill. App. 3d 372 (1st Dist. 2000).

In *Jager v. Libretti*, the plaintiff claimed a neck injury when his car was hit from behind by another vehicle. *Jager v. Libretti*, 273 Ill. App. 3d 960 (1st Dist. 1995). The emergency room records made no reference of any neck injury. *Id.* at 962. The trial court denied defense counsel's attempt to cross-examine the treating physician by reading passages from records the doctor neither reviewed nor relied upon. *Id.* On appeal the issue was whether the treating physician could be cross-examined regarding records he had neither reviewed nor relied upon. *Id*. The *Jager* court held that a treating physician could be cross-examined about records he has neither reviewed nor relied upon if the questions on cross-examination are designed to test the expert's opinion by asking if other facts, data or opinions would affect or alter the treating physician's opinion. *Id*. at 965-66. In other words, if those reports are truly used as tools of impeachment, rather than veiled attempt to slip hearsay evidence into the trial, then the cross-examination is proper.

Another case which addressed the same basic issue was *Rios v. City of Chicago*, 331 Ill. App. 3d 763 (1st Dist. 2002). The *Rios* case involved a slip-and-fall on ice. The trial court allowed plaintiff's expert to be cross-examined from a discovery deposition where the witness had testified that it was sleeting and there was ice on the streets and sidewalks. *Rios*, 331 Ill. App. 3d at 773. The plaintiff's expert testified that he was not aware of the witness's testimony, nor did he agree with the witness's testimony on the weather conditions at the time of the plaintiff's fall. *Id*. at 766. The *Rios* court held that it was error to allow the use of the deposition testimony to cross-examine the plaintiff's expert. *Id.* at 773-74. Specifically, it found that the hearsay statements of the occurrence witness were not properly used as impeachment, but rather as a Trojan horse used to slip hearsay evidence into the trial. *Id.* at 773. The *Rios* court reasoned that where the statements were otherwise inadmissible and no foundation was laid to support a reasonable reliance by another expert at trial, it was an abuse of discretion to allow the statements to be admitted for the purpose of impeachment on cross-examination. *Id.* at 774. It should be noted that in *Rios*, not only did the court err in admitting evidence without a proper foundation, but the trial court also failed to provide the jury with an appropriate limiting instruction on the evidence. *Id*. Furthermore, defense counsel improperly argued the evidence substantively both in opening and closing argument. These errors resulted in a reversal and remand for a new trial. *Id*.

An expert can be cross-examined on material he has reviewed, but did not agree with or rely upon. In *Halleck v. Costal Building Maintenance, Co.*, plaintiff's treating physician was cross-examined with another doctor's report that was in his file. *Halleck v. Costal Bldg. Maint., Co.*, 269 Ill. App. 3d 887 (2d Dist. 1995). Plaintiff's treating physician agreed with the other doctor's diagnosis, but disagreed with the conclusion about the plaintiff's ability to return to regular duty. *Id*. at 897. The *Halleck* court stated that the scope of cross-examination is not defined by material actually relied upon by an expert in forming his conclusions. *Id*. at 898. Instead, a trial court may permit cross-examination on materials reviewed by an expert, even though the expert did not rely on those same materials. *Id.* In *Halleck*, the defendant was

properly allowed to cross-examine the plaintiff's treating physician as to which aspects of the report he accepted and which aspects he had rejected. *Id*. at 897-98.

In summary, an expert can be cross-examined by using any material that the court has determined to be reasonably reliable, whether the expert relied on the material, did not rely on the material, read the material but did not rely on it, or was unaware of the existence of the material. Therefore, anything that is reasonably reliable for direct examination is likewise reasonably reliable for cross-examination.

Use of Authoritative Texts

Authoritative texts, articles and treatises can be used on direct examination to explain the basis of an expert's opinion, and they can be used on cross-examination to impeach an opponent's expert. Once again, it is important to emphasize that authoritative texts cannot be used substantively, i.e., for the truth of the matter asserted, because they are hearsay. *Walski v. Tiesenga*, 72 Ill. 2d 249, 258-59 (1978). Before authoritative texts, articles and treatises can be used, a proper foundation must be established that these materials are authoritative. *Bowman v. Univ. of Chi. Hosps.*, 366 Ill. App. 3d 577, 587-88 (1st Dist. 2006). Under *Bowman*, it is sufficient for an expert to testify that the text is "standard" or "well-respected" or "very good" and a "good source." *Id.* at 587-88.

The issue which then arises is whether the expert can read or show the jury the relevant portions of the authoritative text, article, or treatise. Prior to *People v. Anderson,* the answer was no because the material was determined to be hearsay. *People v. Anderson*, 113 Ill. 2d 1 (1986). However, subsequent to *Anderson,* the case law permits the jury to hear or see the material relied upon because the material is not being offered substantively (to prove the truth of the matter asserted). *People v. Lovejoy*, 235 Ill. 2d 97, 142 (2009). Although the material is hearsay, it is merely being offered as the basis of an opinion. Thus, today, the witness may read or show the relevant portions of the authoritative text, article, or treatise upon which the expert has relied. *Pasch*, 152 Ill. 2d at 133.

An expert must first opine that the text is authoritative in order to use the text for cross-examination purposes unless the expert witness being cross-examined relied on it. It should be emphasized that any opinion that the text or article is authoritative must be disclosed under Illinois Supreme Court Rule 213(f). *Iser v. Copley Mem. Hosp.*, 288 Ill. App. 3d 408 (3d Dist. 1997). Nearly every case that has dealt with the use of texts for cross-examination purposes has required an opinion that the text is authoritative. However, there is no legal basis for this requirement when the text or article is being relied upon as the basis for an opinion. The reason is that the text or article cannot be used substantively.

Conclusion

The adoption of Federal Rules of Evidence 703 and 705 by the Illinois Supreme Court in *Wilson v. Clark* laid the groundwork for a more practical and efficient use of expert testimony at trial. Expert testimony can be based on information not in evidence as long as the facts or data of those materials are reliable and customarily relied on by experts in the particular field. The gatekeeper function of the trial court is integral to understanding the parameters of *Wilson v. Clark*. Significantly, *Wilson v. Clark* facilitated greater consistency and conformity between the courtroom and the practices of experts outside of the courtroom. Adoption of Federal Rules of Evidence 703 and 705 sharply curtailed the

need for complicated and difficult hypothetical questions at trial and helped facilitate greater judicial efficiency by eliminating the need for multiple foundational witnesses.

Federal Rules of Evidence 703 and 705 can now be found in the Illinois Rules of Evidence. Prior to January 1, 2011, Illinois evidence law was found in various statutes, Illinois Supreme Court Rules, and case law. The Illinois Rules of Evidence further promote judicial efficiency and economy which began with the seminal case of *Wilson v. Clark.*

About the Authors

Judge Donald J. O'Brien, Jr., graduated from Northwestern University School of Law, 1963. Judge O'Brien was a principal in the firm of *O'Brien, Redding and Hyde* for 27 years. He has 27 years of experience as a trial lawyer, including arguing and trying cases in both the state and federal courts and the appellate level in both the state and federal courts. Appointed Cook County Circuit Court Judge, 1990; assigned in 1991 to Law Division hearing major personal injury cases and contract disputes. Elected to Cook County Circuit Court for full six-year term in November 1992. As an active trial lawyer, Judge O'Brien tried 107 cases to verdict. As a Presiding Judge, he presided over approximately 320 cases that went to verdict before a jury.

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About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.