

1989

## *Trower v. Jones*: Expanding the Scope of Permissible Cross-Examination of Expert Witnesses

Julie A. Correll

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [Civil Procedure Commons](#), and the [Evidence Commons](#)

---

### Recommended Citation

Julie A. Correll, *Trower v. Jones: Expanding the Scope of Permissible Cross-Examination of Expert Witnesses*, 20 Loy. U. Chi. L. J. 1071 (1989).

Available at: <http://lawcommons.luc.edu/lucj/vol20/iss4/11>

# *Trower v. Jones*: Expanding the Scope of Permissible Cross-Examination of Expert Witnesses

## I. INTRODUCTION

Expert witnesses are used in litigation to assist the trier of fact in ascertaining information not commonly understood.<sup>1</sup> The goal of expert testimony is to give the trier of fact the opportunity to make fully informed determinations of the issues to be resolved at trial. Ideally, such assistance is beneficial to the discovery of truth and attainment of justice.<sup>2</sup> Experts are permitted to testify, in the form of opinion, even when the subject matter of their testimony is an ultimate fact for the jury to determine.<sup>3</sup> In order for such opinion evidence to be admissible, however, it must be based upon facts and reasonable inferences adduced at trial.<sup>4</sup> Yet because expert

---

1. *Opp v. Pryor*, 294 Ill. 538, 545, 128 N.E. 580, 583 (1920). See *McCallister v. del Castillo*, 18 Ill. App. 3d 1041, 310 N.E.2d 474 (4th Dist. 1974) (medical expert's opinions regarding neurosurgical procedures are admissible because the techniques at issue are clearly outside common knowledge); *Kobrand Corp. v. Foremost Sales Promotions, Inc.*, 8 Ill. App. 3d 418, 291 N.E.2d 61 (1st Dist. 1972) (a liquor industry specialist's opinion regarding the effects of competition between particular brands of gin is admissible as expert testimony); *Filipello v. Filipello*, 130 Ill. App. 2d 1089, 268 N.E.2d 478 (1st Dist. 1971) (expert testimony regarding the psychological effects of placing children with their father rather than their mother should have been admitted into evidence). See also *Hernandez v. Power Constr. Co.*, 73 Ill. 2d 90, 382 N.E.2d 1201 (1978) (expert opinion is inadmissible when it goes to matters of common knowledge); *Dobkowski v. Lowe's, Inc.*, 20 Ill. App. 3d 275, 314 N.E.2d 623 (5th Dist. 1974) (a reconstruction expert's testimony is unnecessary when physical evidence is easily understood by the average juror).

2. *Opp*, 294 Ill. at 545, 128 N.E. at 583. See also *Payne v. Noles*, 5 Ill. App. 3d 433, 283 N.E.2d 329 (2d Dist. 1972) (expert testimony should not be admitted unless necessary to assist the jury in arriving at just and correct results). See *infra* note 4 and accompanying text.

3. Ultimate facts are those required to establish the plaintiff's cause of action or the defendant's theory of defense. See, e.g., *Crump v. Universal Safety Equip. Co.*, 79 Ill. App. 3d 202, 398 N.E.2d 188 (1st Dist. 1979) (testimony that goes to the ultimate issue in the case is not inadmissible when rendered by an expert and in the form of an opinion); *Cunningham v. Yazoo Mfg. Co.*, 39 Ill. App. 3d 498, 350 N.E.2d 514 (3d Dist. 1976) (because the matters testified to by an expert, even when regarding the ultimate issue, are beyond average and common knowledge, juries need not unequivocally accept the expert's opinion); *Matthews v. Stewart Warner Corp.*, 20 Ill. App. 3d 470, 314 N.E.2d 683 (1st Dist. 1974) (in a product liability action, the expert witness was allowed to testify as to his opinion of the product's defectiveness).

4. *Nelson v. Speed Fastener, Inc.*, 101 Ill. App. 3d 539, 428 N.E.2d 495 (1st Dist. 1981). See also *First Nat'l Bank v. Sousanes*, 96 Ill. App. 3d 1047, 422 N.E.2d 188 (1st Dist. 1981) (experts are allowed to testify to the ultimate issue of liability when asked to assume facts and reasonable inferences adduced from evidence at trial); *Schwartz v. Peo-*

testimony is rendered in the form of opinion, rather than a recounting of facts, it is arguably less trustworthy than other forms of admissible evidence.<sup>5</sup> The fact that virtually all expert witnesses who testify at trial are paid for their services adds to the problem of reliability.<sup>6</sup>

Information testified to by experts is, by definition, specialized and presumed to be outside of the jurors' general field of knowledge.<sup>7</sup> Therefore, an expert witness may be the only participant in the trial who fully understands some of the facts that are crucial to the resolution of the issues. Because the expert's testimony may be the sole source of information on the ultimate issue in a particular case, the impact of expert testimony on the jury can be profound.<sup>8</sup>

Parties seeking to lessen the impact of expert testimony use varied tactics. A party may call its own expert to counter the testimony.<sup>9</sup> Treatises advocating different conclusions than those

ples Gas Light & Coke Co., 35 Ill. App. 2d 25, 181 N.E.2d 826 (1st Dist. 1962) (expert witnesses may not state opinions based solely on conjecture, but they are qualified to draw inferences from facts in formulating their opinion testimony).

5. See generally Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 IND. L.J. 35, 37 (1977-78) (many judges and legal scholars consider expert testimony of opinion inherently suspect). See *infra* note 98.

6. *Opp*, 294 Ill. at 545, 128 N.E. at 583. See *infra* note 110.

7. Under Illinois law, an "expert witness" is defined as follows:

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

ILL. REV. STAT. ch. 110A, para. 220 (1987). See also *Montefelice v. Terminal R.R. Ass'n*, 100 Ill. App. 3d 858, 427 N.E.2d 370 (1st Dist. 1981) (experts testify to opinions on subjects which are not common knowledge and wide latitude should be given to cross-examining counsel).

8. See generally *Kemeny v. Skorch*, 22 Ill. App. 2d 160, 159 N.E.2d 489 (1st Dist. 1959). The court, in dictum, commented extensively on the expert medical witness's unique ability to influence juries:

[The expert] generally is a persuasive, fluent, impressive witness, able to make the jury understand that what he is telling them is the product of years of educational preparation . . . . That he is being paid by one side is always skillfully lost in casual answers to cross-examining cynical questions . . . . [L]ittle did the non-litigating public know the true rhetorical masterpieces that came from the lips of medical experts on the witness stand and how they, as much as the lawyers, shattered the aerial limits of verdicts in personal injury cases and made hundreds of thousands grow where only thousands grew before.

*Id.* at 170-71, 159 N.E.2d at 493-94. See *supra* notes 1-3 and accompanying text.

9. See generally *Sears v. Rutishauser*, 102 Ill. 2d 402, 406, 466 N.E.2d 210, 212 (1984) ("[t]he modern personal injury trial often becomes a battle between expert witnesses"); *Lebrecht v. Tuli*, 130 Ill. App. 3d 457, 473 N.E.2d 1322 (4th Dist. 1985) (both plaintiff and defendant in a malpractice action called several expert witnesses to testify on the issues of standard of care and causation).

expressed by the expert may be used for impeachment purposes.<sup>10</sup> An expert's qualifications may be scrutinized.<sup>11</sup> Additionally, experts, like all witnesses, may be impeached by prior inconsistent statements.<sup>12</sup>

Moreover, the weight a jury gives to expert testimony is directly linked to the perceived credibility of the witness.<sup>13</sup> Therefore, a most effective means of diminishing the importance of an expert's testimony is to demonstrate the witness's bias, partisanship, or financial interest through cross-examination.<sup>14</sup>

The scope of permissible cross-examination is within the discretion of the trial court.<sup>15</sup> Because expert testimony is based primarily on hypothetical facts and specialized knowledge, certain problems arise with respect to the impeachment of experts through cross-examination. Prior to 1988, minimal Illinois case law ad-

---

10. See, e.g., FED. R. EVID. 803(18), which states that treatises are admissible:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

*Id.* See also *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 356 N.E.2d 779 (1976) (medical witnesses may be cross-examined regarding relevant professional medical literature); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966) (expert witness can be impeached by demonstrating, through cross-examination, a contradiction between the actual text of authoritative treatises and the opinions of the expert allegedly formed based upon such treatises).

11. See, e.g., ILL. REV. STAT. ch. 110, para. 8-2501 (1987). In medical malpractice cases where the standard of care is at issue, the expert must conform to enumerated standards in order to qualify for expert status and testify at trial.

12. See ILL. REV. STAT. ch. 110., para. 2-1102 (1987) (allowing impeachment of a witness of an adverse party or agent by proof of prior inconsistent statements). See also FED. R. EVID. 613(b) (allowing the admission of extrinsic evidence of prior inconsistent statements as long as the witness is given the opportunity to explain the discrepancy and opposing counsel is allowed to question the witness).

13. See generally *Kerfoot v. City of Chicago*, 195 Ill. 229, 235, 63 N.E. 101, 103 (1902) (the weight to be given to an expert's opinions depends upon the witness's knowledge, biases, and connections with the litigants).

14. *Id.* See also *Sears v. Rutishauser*, 102 Ill. 2d 402, 407, 466 N.E.2d 210, 212 (1984) (attacking an expert's credibility is the best means of discrediting his testimony because experts testify to their opinions, making it "virtually impossible" to prosecute them for perjury).

15. *McMahon v. Chicago City Ry.*, 239 Ill. 334, 341, 88 N.E. 223, 225 (1909); *Lebrecht v. Tuli*, 130 Ill. App. 3d 457, 478, 473 N.E.2d 1322, 1337 (4th Dist. 1985). Accordingly, reversal of the trial court is appropriate only when an abuse of discretion has resulted in prejudicial error. See, e.g., *Davis v. Hinde*, 141 Ill. App. 3d 664, 665, 490 N.E.2d 1049, 1050 (2d Dist. 1986); *City of Chicago v. Merton Realty*, 99 Ill. App. 3d 101, 105, 424 N.E.2d 1326, 1329 (1st Dist. 1981); *City of Chicago v. Avenue State Bank*, 4 Ill. App. 3d 235, 281 N.E.2d 66, 71 (1st Dist. 1972).

dressed the permissible scope of cross-examination of an expert to show bias or interest. Few coherent rules on the subject have been articulated affirmatively.<sup>16</sup> Generally, cross-examination has been limited to questions about the witness's actions with respect to only the specific litigating party<sup>17</sup> or attorney.<sup>18</sup>

In *Trower v. Jones*,<sup>19</sup> however, the Illinois Supreme Court departed from previous authority and set forth expanded limits on the cross-examination of experts to show bias or interest.<sup>20</sup> The decision allows for cross-examination to probe the witness's professional behavior generally, rather than limiting the inquiry to the specific lawsuit in which the testimony is offered<sup>21</sup> or to the specific parties or attorneys to that suit.

This Note will first examine the trend in Illinois law prior to the *Trower* decision. Next, the Illinois Supreme Court's decision in *Trower* will be set forth and analyzed. Finally, the ramifications of the decision on litigants using experts, as well as those seeking to attack an expert's testimony, will be discussed.

## II. BACKGROUND

### A. Permissible Cross-Examination: Early Decisions

The Illinois Supreme Court established the permissible scope of cross-examination of an expert witness in a series of cases decided in the early 1900s. In *Kerfoot v. City of Chicago*,<sup>22</sup> the Illinois Supreme Court held that a trial court should permit cross-examination regarding the witnesses' fees for testifying.<sup>23</sup> In *Kerfoot*, a group of property owners challenged a special assessment levied by the city for street improvements.<sup>24</sup> At trial, the City called several real estate experts to substantiate the city engineer's determination of the benefit to the property owners.<sup>25</sup> The trial court sustained

---

16. See, e.g., *Sears*, 102 Ill. 2d at 408, 466 N.E.2d at 213. In *Sears*, the Illinois Supreme Court noted that "[p]rior Illinois decisions have not clearly delineated the permissible bounds of cross-examination of medical experts." *Id.* See also *McMahon*, 239 Ill. at 341, 88 N.E. at 225 ("[n]o definite limit can be prescribed as a rule of law").

17. See *infra* text accompanying notes 28-45.

18. See *infra* text accompanying notes 45-64.

19. 121 Ill. 2d 211, 520 N.E.2d 297 (1988).

20. *Id.* at 217, 520 N.E.2d at 300.

21. See *infra* text accompanying notes 90-108.

22. 195 Ill. 229, 63 N.E. 101 (1902).

23. *Id.* at 235, 63 N.E. at 103.

24. *Id.* at 230, 63 N.E. at 101. The special assessment in this case involved evaluating the beneficial increase in property values that accrued to private businesses by virtue of certain local street repair projects. *Id.* at 232, 63 N.E. at 103.

25. *Id.* at 234, 63 N.E. at 103.

the City's objections to questions with respect to specific property sales made by each expert and refused to allow cross-examination regarding the precise amounts of money each expert was receiving for testifying.<sup>26</sup>

The supreme court reasoned that in order for the jury to assess the weight to be given expert testimony, counsel should be allowed to inquire with specificity as to the amount of compensation the witnesses had received in the past and were receiving in the instant case.<sup>27</sup> The specific relationship between the witnesses and the parties was also deemed an appropriate subject of cross-examination.<sup>28</sup>

In *McMahon v. Chicago City Railway*,<sup>29</sup> the Illinois Supreme Court addressed the propriety of cross-examination regarding the number of times that an expert testified on behalf of similar parties. In *McMahon*, a streetcar conductor injured the plaintiff during an altercation between the conductor and the plaintiff's husband.<sup>30</sup> On appeal, the defendant contended that the trial court erred in allowing the plaintiff's counsel to cross-examine the defendant's expert medical witness regarding how many times the expert had testified for the various streetcar companies in Chicago.<sup>31</sup>

The supreme court concluded that this line of questioning was improper. The court cited *Kerfoot* for the general proposition that showing a pecuniary interest affects the weight to be given to the expert's opinions and, therefore, is permissible.<sup>32</sup> The court, however, limited the permissible scope of inquiry to "the number of

---

26. *Id.* at 234-35, 63 N.E. at 103.

27. *Id.* Counsel for the City had admitted that the witnesses were employed by the City to examine property in order to testify in special assessment litigation and that they had been paid for such services. *Id.* at 234, 63 N.E. at 103. Two years later, the court held, without citing authority, that an expert witness may be cross-examined to show that the fees he received for testifying exceeded the statutorily stipulated amount. *Chicago City Ry. v. Handy*, 208 Ill. 81, 83, 69 N.E. 917, 918 (1904).

28. *Kerfoot*, 195 Ill. at 234, 63 N.E. at 103. The court articulated no limitations on cross-examination; rather, the court stated generally that "it is always competent to show the interest of a witness and anything which would affect his credit or the value of his opinion." *Id.* One year later, the court held that a witness's relationship with the party paying his fee for testifying was relevant evidence even when it was revealed incidentally that the employing party was the defendant's insurance carrier. *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250, 258, 67 N.E. 818, 821 (1903) [hereinafter *Wrisley*]. In *Wrisley*, the court did not cite its holding in *Kerfoot* for support. The *Kerfoot* rule, apparently advocating cross-examination free of restriction, was modified to include restrictions in subsequent cases. See *supra* note 18 and accompanying text.

29. 239 Ill. 334, 88 N.E. 223 (1909).

30. *Id.* at 337-38, 88 N.E. at 224.

31. *Id.* at 341, 88 N.E. at 225. The plaintiff's counsel was attempting to show the expert's bias in favor of corporations. *Id.*

32. *Id.*

times the witness had testified for appellant.”<sup>33</sup> Nevertheless, the court reasoned that because the expert’s response did not serve to show the bias plaintiff’s counsel was seeking to elicit, admission of the cross-examination did not result in reversible error.<sup>34</sup>

### B. Extension of the McMahon Rule

The *McMahon* rule allowing only party-specific cross-examination was extended in subsequent cases to include other, related inquiries. The Illinois Supreme Court cited *McMahon* as authority in a subsequent case, *Plambeck v. Chicago Railway*.<sup>35</sup> In *Plambeck*, the plaintiff, a passenger in the defendant’s streetcar, had suffered a miscarriage three weeks after a collision between a freight train and the defendant’s streetcar.<sup>36</sup> Immediately following the accident, a policeman at the scene asked the injured passengers on the streetcar to identify themselves for a report to be submitted to city authorities.<sup>37</sup> The plaintiff did not tell either the conductor or the policeman that she had been hurt.<sup>38</sup>

The defendant called the policeman to testify at trial.<sup>39</sup> On cross-examination, the policeman was asked whether he had testified for the defendant streetcar company “five or six times previous[ly].”<sup>40</sup> The witness also was asked whether it was true that he

---

33. *Id.* The court relied upon two earlier cases, *Chicago & E. Ill. R.R. v. Schmitz*, 211 Ill. 446, 71 N.E. 1050 (1904) [hereinafter *Schmitz*] and *Chicago City Ry. v. Smith*, 226 Ill. 178, 80 N.E. 716 (1907) [hereinafter *Smith*]. In *Schmitz*, the court held that defendant’s counsel properly was prohibited from cross-examining an injured plaintiff’s medical expert regarding the expert’s professional opinion testimony in other cases. *Schmitz*, 211 Ill. at 456, 71 N.E. at 1054. In addition, counsel properly was prevented from showing the expert’s tendency to testify only against corporations by calling other witnesses to testify regarding such a reputation on direct examination. *Id.* In *Smith*, the court held that the trial court did not err in “refusing to allow the cross-examination to be extended to other cases having no connection with the case then being tried.” *Smith*, 226 Ill. at 187, 80 N.E. at 720.

34. *Id.* The witness testified that he had acted as an expert witness for both plaintiff and defendant companies. This response to plaintiff’s counsel’s improper cross-examination therefore “could not have been hurtful.” *Id.*

35. 294 Ill. 302, 128 N.E. 513 (1920).

36. *Id.* at 304, 128 N.E. at 514.

37. *Id.* At the time the names of the injured passengers were being collected, the plaintiff did not realize that she was hurt.

38. *Id.* The plaintiff and her family boarded a different street car shortly after the accident and visited friends as had been planned. The next day, however, the plaintiff felt ill, and a large bruise was discovered on her abdomen by her doctor. *Id.*

39. *Id.* at 304-05, 128 N.E.2d at 514. Although the court did not expressly characterize the policeman as an “expert” witness for the defense, the policeman was called as a witness to testify as to what happened while he acted in the official capacity of taking a report at the accident scene.

40. *Id.* at 305, 128 N.E. at 514.

had never testified for an injured plaintiff.<sup>41</sup> The witness answered both questions affirmatively.<sup>42</sup>

The Illinois Supreme Court held that the first inquiry was permissible, but that the second was improper, although not reversible error.<sup>43</sup> The court reasoned that the *McMahon* holding limited questions regarding the frequency of testimony to show bias to the number of times the witness had testified on behalf of the particular litigant involved in the case at bar.<sup>44</sup> Although the second question was indeed aimed at showing bias in favor of the particular defendant in the case, demonstrating such partisanship through an argument of exclusion was proper.<sup>45</sup>

The limit on cross-examination imposed by *McMahon* and the cases following *McMahon* prevented any inquiry from moving beyond the parties to the litigation.<sup>46</sup> Recently, however, Illinois courts have interpreted this rule to allow examination regarding the expert witness's relationship with the attorney retaining the expert. For example, a party properly can show, on cross-examination, that the attorney and the expert are related.<sup>47</sup> Moreover, a party can cross-examine an expert witness regarding the origin of the relationship to opposing counsel.<sup>48</sup>

---

41. *Id.*

42. *Id.*

43. *Id.* The court did "not regard the policeman's testimony of any particular significance" because the fact that others had been hurt in the accident had very little probative value. *Id.* at 306, 128 N.E. at 515. Therefore, the error was not prejudicial to the defendant, and the judgment for plaintiff was affirmed. *Id.*

44. *Id.* at 305, 128 N.E. at 514. See also *City of Chicago v. Van Schaack Bros. Chem. Works*, 330 Ill. 264, 161 N.E. 486 (1928) (per curiam) (in a case involving a special assessment levied for construction of a sidewalk, it was reversible error to disallow cross-examination regarding the expert's basis for fees and amount of payment for testimony in the instant trial and for testimony in previous assessment cases in which he was a witness for the City).

45. *Plambeck*, 294 Ill. at 305, 128 N.E. at 514. The court stated that "the mere fact that he had never testified for any injured person formed no proper basis for drawing an unfavorable conclusion from his testimony." *Id.* See *Schoolfield v. Witkowski*, 54 Ill. App. 2d 111, 203 N.E.2d 460 (1st Dist. 1964). In *Schoolfield*, the appellate court used *Plambeck* as authority for holding that asking an expert medical witness if he had always testified for "the person seeking to gain money" was improper cross-examination to show bias in favor of personal injury plaintiffs. *Id.* at 127, 203 N.E.2d at 467.

46. See *supra* note 33 and accompanying text.

47. *General Steel Indus. v. Industrial Comm'n*, 49 Ill. 2d 549, 555, 276 N.E.2d 290, 292 (1971). Because the relationship between plaintiff's counsel and plaintiff's medical expert witness goes to the credibility of the witness and, therefore, to the weight to be accorded his testimony, it was proper to show that the expert was the attorney's father. *Id.*

48. *Lebrecht v. Tuli*, 130 Ill. App. 3d 457, 478, 473 N.E.2d 1322, 1337 (4th Dist. 1985). The plaintiff's medical expert testified that she began reviewing medical malpractice files "when attorney friends of her attorney husband asked if she would be interested



In *Davis v. Gulf, Mobile & Ohio Railroad*,<sup>49</sup> an Illinois appellate court held that the plaintiff's expert medical witness could be cross-examined as to whether he had received referrals from the plaintiff's counsel.<sup>50</sup> The court, however, also held that the trial court erred in permitting the defense counsel, who was attempting to show the frequency of such referrals, to ask whether the expert remembered treating ten particular individuals.<sup>51</sup> The court cautioned that "there is no proper basis for going into specific cases and to do so would be reversible error."<sup>52</sup>

### C. *The Sears Decision*

The Illinois Supreme Court clarified the issue of a permissible demonstration of the relationship between attorney and expert witness in *Sears v. Rutishauser*.<sup>53</sup> In *Sears*, both the plaintiff and the defendant called expert witnesses to testify as to the cause and severity of the plaintiff's neck injuries.<sup>54</sup> The defendant called the plaintiff's "family doctor," who testified that the plaintiff's condition, neck pain, and stiffness on the right side of her body may have existed prior to the auto accident in question.<sup>55</sup> The plaintiff's expert, a specialist in neurosurgery with "impeccable" professional credentials, testified to the contrary.<sup>56</sup> The defendant had filed a motion *in limine* requesting the opportunity to impeach the plaintiff's expert by cross-examining him on the number and frequency of referrals he had received from the plaintiff's counsel.<sup>57</sup> The trial court denied the motion, ruling that the only permissible question

---

in doing so." *Id.* Testimony establishing this social relationship can properly demonstrate the expert's bias and, therefore, was admissible to impeach her credibility. *Id.*

49. 130 Ill. App. 2d 988 (Feb. 19, 1971), *revised on denial of reh'g*, 272 N.E.2d 240 (5th Dist. June 22, 1971).

50. *Id.* at 992, 272 N.E.2d at 245. The defendant's counsel posed the question: "You do have occasion frequently, don't you to see patients that are referred to you by [plaintiff's counsel] or his office, to testify on behalf of those patients who are either claimants or patients in lawsuits?" The doctor responded that he had received referrals, but refused to characterize them as "frequent." *Id.* at 991, 272 N.E.2d at 243.

51. *Id.* at 991, 272 N.E.2d at 244-45.

52. *Id.* at 991, 272 N.E.2d at 245. In this particular case, the error was not reversible because the doctor did not admit the frequency of referrals and remembered only one of the patients about which he was questioned. Therefore, the error had not been prejudicial to plaintiff. *Id.* at 991, 992, 272 N.E.2d at 243, 245.

53. 102 Ill. 2d 402, 466 N.E.2d 210 (1984).

54. *Id.* at 405-06, 466 N.E.2d at 211-12.

55. *Id.* at 405, 466 N.E.2d at 211. The plaintiff's family doctor attributed the plaintiff's symptoms to arthritis, which he testified may have existed prior to the collision. *Id.*

56. *Id.* at 410, 466 N.E.2d at 214. The plaintiff's specialist attributed the pain and loss of feeling to the accident. *Id.* at 405, 466 N.E.2d at 211.

57. *Id.* at 406, 466 N.E.2d at 212.

was whether the expert generally had received any referrals from the plaintiff's counsel.<sup>58</sup>

On appeal, the Illinois Supreme Court reversed, holding that the trial court abused its discretion in limiting cross-examination.<sup>59</sup> The court reasoned that a party, on cross-examination, may elicit the number and frequency of referrals that an expert receives from an attorney<sup>60</sup> to demonstrate the expert's bias or financial interest.<sup>61</sup> Furthermore, the court recognized that this form of questioning may be "the most promising avenue for . . . counsel to pursue" in impeaching expert witnesses.<sup>62</sup> After surveying the previous case law addressing this issue, the court defined the permissible scope of cross-examination as "strictly limited to the number of referrals, their frequency, and the financial benefit derived from them."<sup>63</sup> In addition, the court gave further guidance to trial courts in the exercise of their discretion by warning against allowing impeachment inquiries that waste judicial resources<sup>64</sup> or vi-

---

58. *Id.*

59. *Id.* at 411, 466 N.E.2d at 215.

60. Although the court did not state specifically that cross-examination regarding frequency of testifying from attorney referrals was limited to the attorney involved in the litigation, the Illinois appellate courts interpreting *Sears* have recognized such a limitation. See *Wilson v. Chicago Transit Auth.*, 159 Ill. App. 3d 1043, 1047, 513 N.E.2d 443, 446 (1st Dist. 1987) (affirmed trial court's attempt to follow *Sears* by disallowing a question regarding the frequency of testifying for injured plaintiffs generally); *Lebrecht v. Tuli*, 130 Ill. App. 3d 457, 478-79, 473 N.E.2d 1322, 1337-38 (4th Dist. 1985) (question regarding frequency of testimony given in malpractice cases generally was phrased in a "neutral fashion" and, therefore, was permissible).

61. *Sears*, 102 Ill. 2d at 411, 466 N.E.2d at 214. The court further emphasized that "both sides should have been allowed great latitude in impeaching the other side's expert." *Id.* at 410, 466 N.E.2d at 214.

62. *Id.* The court noted that the plaintiff's counsel had so thoroughly impugned the defense expert's credibility and humiliated him personally that the plaintiff's counsel "took the unusual step of apologizing to the jury during his closing statement." *Id.* The plaintiff's counsel had been permitted to demonstrate that defendant's expert "was 70 years old, was not board-certified as an orthopedic surgeon, and was not familiar with some specialized terminology used by plaintiff's attorney." *Id.* The court contrasted this with the fact that defense counsel had been permitted to ask the plaintiff's expert only one question for impeachment purposes. *Id.*

63. *Id.* at 411, 466 N.E.2d at 214. The *Sears* court noted that the appellate court's revision of *Davis* was incorrect. *Id.* at 409, 466 N.E.2d at 213. See *supra* note 50 and accompanying text. The *Sears* court stated that the appellate court properly had interpreted Illinois law in its original *Davis* opinion, 130 Ill. App. 2d at 992, 272 N.E.2d at 244, holding that cross-examination regarding the number and frequency of referrals was not error. *Sears* 102 Ill. 2d at 409, 466 N.E.2d at 213.

64. In interpreting the *Sears* decision, an Illinois appellate court held that cross-examination regarding referrals was proper as long as counsel "did not inquire into collateral matters such as other lawsuits." *Lebrecht*, 130 Ill. App. 3d at 478, 473 N.E.2d at 1337. In *Davis v. Hinde*, 141 Ill. App. 3d 664, 490 N.E.2d 1049 (2d Dist. 1986), the appellate court noted that allowing inquiry into other lawsuits in which the expert had

olate the physician-patient privilege.<sup>65</sup>

#### D. Other Jurisdictions

Evidentiary matters, including the scope of permissible cross-examination of expert witnesses, fall within the discretion of the trial courts. As a result, the few state and federal cases addressing this issue have taken diverse positions. Generally, most jurisdictions permit the inquiries allowed in Illinois pursuant to *Sears v. Rutishauser*.<sup>66</sup> Permissible examination includes questions regarding the amount and calculation of the witness's fees in the instant litigation and the relationship, employment or otherwise, between the witness and the party or attorney retaining him to testify in the case at bar.<sup>67</sup> State and federal jurisdictions, however, disagree over allowing questions of the type now permitted in Illinois after *Trower v. Jones*.<sup>68</sup> The disputed questions regard previous compensation for testimony as an expert witness in other trials and the frequency with which a witness testifies for a class of litigants.

State courts allowing questions regarding the frequency with which an expert testifies for a particular class of litigants and the fees that experts have received as witnesses in litigation reason that such inquiries are relevant to show bias.<sup>69</sup> For example, the Texas Court of Appeals held that questions probing bias or partisanship are "never collateral or immaterial."<sup>70</sup> Similarly, the Missouri Supreme Court has held that the trier of fact is entitled to hear all

---

testified would "necessarily result in . . . time consuming subtrials remote from the subject of the lawsuit." *Id.* at 668, 490 N.E.2d at 1052 (citing *Sears v. Rutishauser*, 102 Ill. 2d 402, 466 N.E.2d 210 (1984)).

65. *Sears*, 102 Ill. 2d at 411, 466 N.E.2d at 214. The defendant's attorney issued a subpoena requesting the patient records of the plaintiff's expert. The trial court correctly denied the request as violative of the privilege. *Id.*

66. See *supra* notes 53-65 and accompanying text.

67. See, e.g., *Weaver v. Georgia Power Co.*, 134 Ga. App. 696, 215 S.E.2d 503 (1975); *Commonwealth v. Simmons*, 361 Pa. 391, 65 A.2d 353 (1949). See *supra* notes 53-65 and accompanying text.

68. See *infra* notes 90-108 and accompanying text.

69. See, e.g., *St. Louis, I. M. & S. Ry. v. McMichael*, 115 Ark. 101, 171 S.W. 115 (1914). The Supreme Court of Arkansas held that asking experts whether they had testified frequently for the plaintiff railroad company or for other railroad companies in the past was not prejudicial error. See *infra* notes 67-68 and accompanying text.

70. *Barios v. Davis*, 415 S.W.2d 714, 716 (Tex. Ct. App. 1967). The court permitted questions regarding the number of times, for whom, and where the expert medical witness testified, how much he received in fees, and his yearly income from testifying and reviewing case files. *Id.* See generally *Traders & Gen. Ins. Co. v. Robinson*, 222 S.W.2d 266 (Tex. Ct. App. 1949) (the court permitted counsel to question a medical expert regarding other personal injury cases and their locations, but did not allow cross-examination on the merits of those cases).

evidence relevant to the expert witness's credibility.<sup>71</sup> Those jurisdictions disallowing such examination reason that it introduces collateral matters.<sup>72</sup>

The federal courts generally allow wide latitude in cross-examining experts regarding their prior employment as witnesses.<sup>73</sup> The Second Circuit has held that a district court does not abuse its discretion by allowing the plaintiff's counsel to ask the defendant's expert whether he testified as a defense witness in other, similar cases.<sup>74</sup> Such cross-examination, however, is not without limits. In a recent case, *United States Football League v. National Football League*,<sup>75</sup> the Second Circuit upheld the district court's exclusion of questions regarding prior testimony by an expert in other cases. The defendant's damages expert had testified previously in two similar antitrust actions,<sup>76</sup> each involving highly complex issues and a series of appeals. The court noted that under these circumstances, the district court acted well within its discretionary power to "avoid a confusing and complex digression into . . . totally unrelated cases."<sup>77</sup>

---

71. *Schuler v. St. Louis Can Co.*, 322 Mo. 765, 775, 18 S.W.2d. 42, 46 (1929). The plaintiff's counsel was permitted to ask the defendant's medical expert whether he made his living "at the behest of insurance companies." *Id.*

72. *See, e.g.*, *State v. Superbuilt Mfg. Co.*, 204 Ore. 393, 281 P.2d 707 (1955) (the court did not allow counsel to cross-examine an expert regarding the fees the expert had charged for testifying in other cases because it would require the court to allow the expert to justify the fees); *Zamsky v. Public Parking Auth.*, 378 Pa. 38, 105 A.2d 335 (1954) (questions regarding an expert's earnings from performing other services for the party retaining him to testify were collateral and inadmissible).

73. *See, e.g.*, *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). The court of appeals upheld the district court's admission of questions regarding the expert's fees in prior cases, the basis for his calculation of those fees, and details of a consulting "corporation" that he headed for the purposes of providing expert testimony. *Id.* at 783. The questions, which elicited responses including specific dollar amounts of yearly fees received by the expert, totalled more than 30 pages of the record. *Id.* at 784. The court noted the conspicuous lack of cases addressing whether this type of examination was permissible: "The parties have not cited and our research has not uncovered any federal cases on this point. Cases from the state courts are split." *Id.*

74. *United States v. Abrams*, 427 F.2d 86, 89 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970). The court noted that the cross-examination had "elicited no more than that the witness was friendly with appellant and that he had previously testified as a defense expert in two similar cases." *Id.* The court deemed such evidence relevant and admissible to show bias. *Id.* at 90.

75. 842 F.2d 1335 (2d Cir. 1988).

76. *Id.* at 1375. The expert had testified as an economist at both trials, one involving the break-up of the monopoly held by AT&T. *See Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors & Publishers*, 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Southern Pac. Communications Co. v. AT&T Co.*, 556 F. Supp. 825 (D.D.C.), *aff'd*, 740 F.2d 980 (D.C. Cir. 1982), *cert. denied*, 470 U.S. 1005 (1985).

77. *United States Football League*, 842 F.2d at 1375. The court distinguished the

### III. *TROWER V. JONES*

#### A. *The Facts*

Trower and her husband brought a medical malpractice action against their family physician, Dr. Jones.<sup>78</sup> Trower alleged that Jones's misdiagnosis of, and subsequent improper treatment for, pelvic inflammatory disease forced Trower to undergo several operations that otherwise would not have been necessary.<sup>79</sup> Trower consulted an attorney, who contacted the American Board of Medical Legal Consultants ("the Board"). Trower's expert witness at trial, Dr. Martins, had received her file through the Board.<sup>80</sup>

At trial, the court permitted the defense counsel to impeach Dr. Martins by cross-examining him about his annual income derived from his work as an expert witness<sup>81</sup> and the frequency with which he testified for a particular class of litigants.<sup>82</sup> After a jury verdict in favor of the defendant, Trower appealed claiming the trial court erred in allowing the impeachment of Martins by this inquiry.<sup>83</sup>

The appellate court reversed and remanded for a new trial.<sup>84</sup> The court distinguished *Trower* from *Sears v. Rutishauser*, stating

---

prohibited examination from that allowed in *Walker v. Firestone Tire & Rubber Co.*, 412 F.2d 60 (2d Cir. 1969). In *Walker*, the permissible cross-examination focused on the expert's contradictory testimony regarding his qualifications in an earlier case, but did not explore the expert's testimony on the merits. *Id.* at 63-64.

78. *Trower v. Jones*, 149 Ill. App. 3d 705, 708, 500 N.E.2d 1134, 1135 (4th Dist. 1986). Trower characterized Jones as "her family physician." In addition, Dr. Jones testified that he had treated the plaintiff "since she was a child." *Id.* at 711, 500 N.E.2d at 1138.

79. *Id.* at 709, 500 N.E.2d at 1136-37. Trower ultimately underwent a reversible colostomy and had her left fallopian tube and ovary removed due to pelvic inflammatory disease. At the time of the appeal, Trower was unable to become pregnant. *Id.* at 709, 500 N.E.2d at 1137. Jones initially had diagnosed her as suffering from a simple virus, and later diagnosed her as possibly having an ectopic pregnancy. *Id.* at 708, 500 N.E.2d at 1136.

80. *Trower v. Jones*, 121 Ill. 2d 211, 213, 520 N.E.2d 297, 298 (1988). The plaintiff's expert, Dr. Martins, testified at trial that the Board is a for-profit association of medical professionals established to review case files and provide expert testimony in malpractice trials. *Id.*

81. *Id.* Over objection, Martins testified that his income from his work with the Board in 1983 and 1984 totaled \$73,000. Martins also testified, without objection, that 80% of his "professional time" involved work for the Board. *Id.* at 214, 520 N.E.2d at 298.

82. *Id.* Martins stated at trial that he had been with the Board since 1983 and had reviewed more than 700 cases, including giving depositions in approximately 60 of those cases and trial testimony as an expert witness in 30 actions. *Id.* When asked, over objection, whether he had testified for plaintiffs in all 30 cases, Martins answered: "Of the majority, yes." *Id.*

83. *Trower*, 149 Ill. App. 3d at 720, 500 N.E.2d at 1143.

84. *Id.* at 724, 500 N.E.2d at 1146.

that the examination in *Sears* regarding referrals from the retaining attorney “directly linked the witness’s pecuniary interests to his testimony.”<sup>85</sup> Therefore, the court rejected Jones’s contention that the *Sears* holding should be extended to permit questions regarding the circumstances surrounding testimony given by virtue of any type of referral.<sup>86</sup> The court also held that the trial court erred in allowing Dr. Martins to be questioned about his income. The court reasoned that the inquiry was “in no way relevant to any legitimate purpose of cross-examination.”<sup>87</sup> The court concluded that these errors were clearly prejudicial<sup>88</sup> because the outcome of the case was dependent, to a great extent, on the credibility of both testifying doctors, Martins and Jones.<sup>89</sup>

### B. *The Holding and Reasoning*

The Illinois Supreme Court reversed the appellate court and reinstated the circuit court’s judgment for the defendant Jones.<sup>90</sup> The court expressly overruled the early precedents of *McMahon v. Chicago City Railway*,<sup>91</sup> *Chicago City Railway v. Smith*, and *Chicago & East Illinois Railroad v. Schmitz*.<sup>92</sup> The court conceded that those cases had limited cross-examination to inquiries relating only to the specific litigants and litigation.<sup>93</sup> The court, however, acknowledged that those cases merely held that the trial court did not abuse its discretion in disallowing certain types of cross-examination.<sup>94</sup> Those rulings, the court reasoned, did not mandate the conclusion that inquiries such as the defense counsel’s cross-examination of Dr. Martins are never permissible to demonstrate bias, motive, or financial interest.<sup>95</sup>

Furthermore, the court stated that the nature of modern litigation has increased the difficulty of effectively impeaching experts

---

85. *Id.* at 722, 500 N.E.2d at 1145.

86. *Id.*

87. *Id.* The court noted that the defense counsel’s questions regarding Dr. Martin’s income were posed to demonstrate that Martins was not a “full-time general practitioner.” Martins, however, had testified on cross-examination that he devoted 80% of his time to his work for the Board. The questions regarding income were therefore unnecessary. *Id.* at 724, 500 N.E.2d at 1146.

88. *Id.* at 722, 500 N.E.2d at 1145.

89. *Id.* The court emphasized the fact that Dr. Martins was the plaintiff’s only expert medical witness.

90. *Trower v. Jones*, 121 Ill. 2d 211, 222, 520 N.E.2d 297, 302 (1988).

91. *See supra* notes 29-34 and accompanying text.

92. *Trower*, 121 Ill. 2d at 222, 520 N.E.2d at 302.

93. *Id.* at 215, 520 N.E.2d at 299.

94. *Id.*

95. *Id.* *See supra* notes 29-34 and accompanying text.

through cross-examination.<sup>96</sup> In addition, the court reasoned that the adoption of Federal Rules of Evidence 703<sup>97</sup> and 705<sup>98</sup> augments the difficulty the cross-examining counsel faces in discrediting experts.<sup>99</sup> The court stated that these rules generally facilitate expert testimony by allowing experts to render opinions without revealing the underlying data supporting them.<sup>100</sup>

The court did not use its holding in *Sears* as authority in *Trower*. The defense counsel argued that *Sears* applied because no perceivable distinction differentiated cross-examination regarding the employment relationship between a party or attorney and a witness, permissible under *Sears*, from that between a witness and a referral service.<sup>101</sup> Rather than extending the *Sears* holding as the defense counsel urged, the *Trower* court held that questions regarding income derived from testifying generally are relevant and admissible of their own force.<sup>102</sup> The court stated that often the true financial benefit an expert derives from testifying is not indicated by re-

---

96. *Trower*, 121 Ill. 2d at 215, 520 N.E.2d at 299. The court acknowledged the proliferation of "expert 'locator' services" which enable litigants to procure expert witness to advocate their positions, but did not expressly characterize the Board as such a service. *Id.* at 216, 520 N.E.2d at 299. *See also* Graham, *supra* note 5, at 37 (the increase in products liability and medical malpractice actions has resulted in a corresponding increase in the use of expert witnesses).

97. Rule 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.

FED. R. EVID. 703.

98. Rule 705 states:

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

FED. R. EVID. 705.

99. Rules 703 and 705 were adopted in Illinois in *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322, *cert. denied*, 454 U.S. 836 (1981). In *Wilson*, the court reasoned that adopting these rules "eliminates the time-consuming process of posing long hypothetical questions that afford an opportunity to sum up or reiterate the evidence in the middle of a case." *Id.* at 195, 417 N.E.2d at 1327. In addition, the court noted that the burden placed upon opposing counsel to bring out the data relied upon by the testifying expert is not undue. Extensive pretrial discovery enables the cross-examining party to sufficiently cross-examine. *Id.* at 194, 417 N.E.2d at 1327.

100. *Trower*, 121 Ill. 2d at 215, 520 N.E.2d at 299. The data relied upon by the expert in formulating his opinion can be revealed by opposing counsel upon cross-examination. *Id.*

101. *Id.* at 217-18, 520 N.E.2d at 300.

102. *Id.* at 218, 520 N.E.2d at 300.

vealing his fee in the case at bar.<sup>103</sup> Therefore, a general inquiry into annual income derived from acting as an expert witness is permissible, as it more clearly reflects reality.<sup>104</sup>

The court rejected the plaintiff's argument that allowing the disputed cross-examination would result in the impermissible introduction of collateral matters.<sup>105</sup> The plaintiff argued that introducing evidence not directly connected with the principal controversy would prejudice the calling party, confuse the jury, and necessitate a detailed and time-consuming rehabilitation of the witness.<sup>106</sup> The court balanced this possibility against the need for effective cross-examination, and concluded that an explanation<sup>107</sup> by the witness of the reasonableness of his fees and his tendency to testify for only one type of litigant should be sufficient to avoid prejudice and confusion.<sup>108</sup>

#### IV. ANALYSIS

The trier of fact in modern litigation must understand and evaluate highly technical and specialized information. As a result, the

---

103. *Id.* A witness can establish a "track record" by testifying for successful litigants in a series of cases, thereby enhancing his employment opportunities as an expert witness in the future.

104. *Id.*

105. *Id.* at 219, 520 N.E.2d at 301. *See generally* Ryan v. Blakey, 71 Ill. App. 3d 339, 389 N.E.2d 604 (5th Dist. 1979) (introducing names, amounts sought, and legal theories of pending cases in which the defendant's expert was to testify was irrelevant and prejudicial to defendant); Forest Preserve Dist. v. Kelley, 69 Ill. App. 3d 309, 387 N.E.2d 368 (2d Dist. 1979) (introducing evidence of the value of land dissimilar to the land at issue in an eminent domain proceeding was prejudicial and misleading to the jury); Department of Pub. Works and Bldgs. v. Exchange Nat'l Bank, 40 Ill. App. 3d 623, 356 N.E.2d 376 (2d Dist. 1976) (the trial court properly excluded evidence that the defendant's real estate appraisal expert had been employed by the state previously for purposes of evaluating the property at issue).

106. Rehabilitation takes place when, through redirect examination, counsel improves or corrects the witness's standing with the trier of fact after the witness's credibility has been damaged by cross-examination. *See* BLACK'S LAW DICTIONARY 1157 (5th ed. 1979). In *Trower*, the plaintiff's counsel argued that such rehabilitation would, in many cases, only be accomplished by introducing extensive evidence to substantiate the reasonableness of the fees the expert charged for testifying. *Trower*, 121 Ill. 2d at 219, 520 N.E.2d at 301.

107. The court left the matter of deciding whether a witness has been afforded the sufficient opportunity to explain the reasonableness of his actions to the circuit courts' discretion. *Trower*, 121 Ill. 2d at 219, 520 N.E.2d at 310.

108. *Id.* The plaintiff argued that adequately preparing the allowable impeachment and rehabilitation evidence would render "the pretrial discovery process unnecessarily burdensome." *Id.* at 221, 520 N.E.2d at 302. In response, the court cautioned that its holding in no way affects the evidentiary privileges or the traditional discretion allowed the circuit courts with regard to discovery rulings. *Id.* at 221-22, 520 N.E.2d at 302.



need for expert testimony has increased considerably.<sup>109</sup> Thus, the policy considerations that motivated the court in *Trower* to expand the permitted range of cross-examination of experts are the proper subject of concern. The *Trower* court stated that an unfortunate side effect of modern litigation is an increased potential for unscrupulous and partisan experts to improperly influence a jury, rather than fully inform them, by virtue of the experts' superior knowledge.<sup>110</sup> The *Trower* court correctly recognized that the best method available to demonstrate an expert's bias or interest is to probe the expert's motives for becoming involved in the litigation.

This expanded range of cross-examination allowed by *Trower* has the potential to provide litigants with several benefits. One potential benefit is that inquiry into the expert's motives will provide the trier of fact with a more complete picture of the source of specialized knowledge upon whom the trier of fact must rely to resolve issues.<sup>111</sup> Another potential benefit after *Trower* is a higher quality of expert testimony. If expert witnesses are faced with the prospect of a disclosure which would severely discredit them and, therefore, damage or destroy the calling party's case, the experts' employability undoubtedly will be affected. In this respect, the experts' self-interest acts to restrain any tendencies to testify in a biased manner based on purely pecuniary motives. Therefore, in the long term, experts may change their behavior for the better.<sup>112</sup>

Despite the potential benefits inherent in *Trower*, in a practical

---

109. See *supra* note 96 and accompanying text. Other areas experiencing an increase of use of expert testimony include securities litigation, toxic torts, and patent infringement lawsuits.

110. *Trower*, 121 Ill. 2d at 217-18, 520 N.E.2d at 300-01. This misuse of expert testimony is aptly illustrated in *Sanchez v. Black Bros. Co.*, 98 Ill. App. 3d 264, 423 N.E.2d 1309 (1st Dist. 1981). The appellate court reversed and remanded this products liability case for a new trial, holding that the trial court had abused its discretion in denying the plaintiff's request to use a speech given by the defendant's expert to impeach the expert. Several years prior to trial, the expert had spoken to a group of fellow engineers regarding effective methods of testifying. The expert's advice included using "science as a foreign language" to "terminate cross-examination . . . in a hurry." *Id.* at 279, 423 N.E.2d at 1320. The expert explained that he "allowed" the jury to understand his testimony under direct examination, but not under cross-examination. *Id.* Counsel attempting to attack the credibility of an expert normally will not have such blatant evidence of bias with which to impeach the witness.

111. In *Kemeny v. Skorch*, 22 Ill. App. 2d 160, 159 N.E.2d 489 (1st Dist. 1959), the court described the expert witness as "part of the trial apparatus . . . . As such, every possible step should be taken to channel his contribution in a direction that will serve the ends of justice." *Id.* at 171, 159 N.E.2d at 494.

112. In advocating inquiries such as those sanctioned by *Trower*, one commentator sarcastically suggests that the result may be to prompt experts "to perform actual work in their alleged areas of expertise." Graham, *supra* note 96, at 52.

sense, the decision represents an inadequate means of achieving these goals. Although the trial court is vested with the discretionary power to prohibit cross-examination it deems impermissible, the direction trial courts should take in exercising this discretion remains unclear. Because *Trower* suggests that a cross-examiner may pose virtually any question affecting the credibility of the expert as a witness, trial courts attempting to follow *Trower* may allow, as the plaintiff in *Trower* posited, a series of subtrials on remote issues.<sup>113</sup> Moreover, because *Trower* permits heightened scrutiny of expert witnesses and allows parties calling experts the corresponding opportunity to justify the expert's actions during rehabilitation, litigants will expend additional time and resources in discovery<sup>114</sup> and trials involving expert testimony.

Allowing expert witnesses to explain the reasonableness of fees, the proportion of professional time spent in litigation-related activities, and the tendency to testify for certain classes of litigants may not provide as sufficient a rehabilitation as the *Trower* decision suggests. Determining "reasonableness" is an exercise in relative argument that could necessitate a tremendous amount of additional evidence.<sup>115</sup> In technically complex litigation, rehabilitation could include introducing additional experts to testify to the reasonableness of the original expert's actions.<sup>116</sup> Allowing such rehabilitation could confuse the jury. Yet, to disallow a sufficient attempt at rehabilitation is prejudicial. The *Trower* opinion offers little guidance for the circuit courts on this dilemma.<sup>117</sup>

Finally, the Illinois Supreme Court departed from a long established precedent<sup>118</sup> in *Trower*, but did not set forth the parameters of its departure with sufficient clarity. Although the court expressly overruled three earlier decisions,<sup>119</sup> it ignored its recent

---

113. *Trower*, 121 Ill. 2d at 217, 520 N.E.2d at 300.

114. Illinois already allows extensive discovery of testifying witnesses. ILL. REV. STAT. ch. 110A, para. 220 (1987). See *supra* note 108 and accompanying text.

115. For example, statistics and other empirical evidence may be required to determine what constitutes a "reasonable" fee for testimony by an expert with similar qualifications and experience as the witness at trial.

116. The plaintiff's counsel in *Trower* warned of this possibility. *Trower*, 121 Ill. 2d at 219, 520 N.E.2d at 301. The court responded that the party calling the expert will be permitted to respond only if a denial of such an opportunity would be "unfairly prejudicial." *Id.*

117. *Id.*

118. See *supra* note 108 and accompanying text.

119. *Id.* The court overruled *McMahon v. Chicago City Railway*, 239 Ill. 334, 88 N.E. 223 (1909), *Chicago City Railway v. Smith*, 226 Ill. 178, 80 N.E. 716 (1907), and *Chicago & East Illinois Railroad v. Schmitz*, 211 Ill. 446, 71 N.E. 1050 (1904). See generally text accompanying notes 27-34.

holding in *Sears v. Rutishauser*.<sup>120</sup> The early decisions<sup>121</sup> imposed a limitation on cross-examination to allow only questions regarding employment relationships and fee arrangements between the expert and the party retaining him, but unfortunately did so with little explanation.<sup>122</sup> The court in *Sears*, however, surveyed relevant case law and concluded that in Illinois, cross-examination should be "strictly limited" to questions regarding the number and frequency of, and remuneration for, referrals from the litigating attorney.<sup>123</sup>

The *Sears* decision was the most equivocal on the subject to date. The court's holding set forth the outer limits of permissible cross-examination; yet, the court in *Trower* declined to admit that it was extending the *Sears* decision in surpassing those limitations.<sup>124</sup> The *Trower* court also declined to expressly overrule *Sears*, instead basing its holding on policy considerations.<sup>125</sup> Unfortunately, implementation of these policies was not framed in specific and practical terms suitable for consistent application in the courtroom context.

## V. CONCLUSION

In *Trower v. Jones*, the Illinois Supreme Court attempted to devise a remedy for the problems associated with expert testimony. The court's efforts resulted in facilitating the revelation of factors affecting an expert witness's credibility to the trier of fact as a part of the entire impression expert testimony makes in the courtroom. In this limited respect, the court's opinion in *Trower* reflects an appropriate response to sensible adjudicative policy considerations. The court's opinion in *Trower*, however, gives insufficient direction to the circuit courts. The opinion intimates that prohibiting inquiries even remotely related to the case at bar could constitute an abuse of discretion warranting reversal. Because the Illinois Supreme Court failed to delineate the permissible boundaries of

---

120. 102 Ill. 2d 402, 466 N.E.2d 210 (1984). For a summary of the *Sears* decision, see text accompanying notes 53-65.

121. See *supra* notes 22-34 and accompanying text.

122. See Graham, *supra* note 5, at 47. In discussing Illinois law, Graham notes that "many of the reported decisions in this area simply state the court's conclusion as to whether or not the questioning is proper without any indication of the court's reasoning." *Id.* See also Schmitz, 211 Ill. at 456, 71 N.E. at 1054 (the court merely stated that "[c]ross examination upon the independent cases of the same character, and about the same time as the principal case, is not allowed").

123. *Sears*, 102 Ill. 2d at 411, 466 N.E.2d at 214.

124. See *Trower*, 121 Ill. 2d at 218, 520 N.E.2d at 300 ("we do not base our decision on the strict analogy to the facts in *Sears* suggested by defendant").

125. *Id.* See *supra* note 96 and accompanying text.

cross-examination and rehabilitation, *Trower* may frustrate the court's goal. Ultimately, the *Trower* decision in some instances may provide the jury with a more accurate picture of the expert witnesses upon whom they rely for information. Nevertheless, *Trower* is certain to escalate the "battle of experts" in future decisions in this area.

JULIE A. CORRELL

