

Cross-Examination With Learned Treatises

Strategic Use of MRE 707

By Steven E. Goren

As any trial lawyer will attest, cross-examination is often the key to victory. Undermining the credibility of an opponent's expert is particularly important and often quite difficult. Intelligent, prepared, and skilled expert witnesses hired by your opponent can destroy your case. Fighting back is crucial. Of all the tools provided in the Michigan Rules of Evidence, perhaps the most misunderstood and underused is the opportunity to confront the opposing expert upon cross-examination with "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...."¹

One reason Michigan litigators underuse MRE 707 may be that it's a weaker weapon than its federal counterpart. Under FRE 803(18), a learned treatise is admissible into evidence and can be carried back into the jury room to be reviewed and examined during deliberations. In Michigan courts, such statements are "admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits."² That doesn't mean, however, that use of a learned treatise can't leave an opponent's expert mortally wounded. It just requires more skill. This article addresses the art and science of using MRE 707.

To use a statement within the meaning of MRE 707, it must be contained within a "reliable authority." Don't be fooled. It's not the *statement itself* that must be deemed a reliable authority. Rather, Rule 707 and the cases interpreting it make clear that the *text-book, periodical, or other treatise* must be deemed reliable.³

To find a reliable authority, you must look in the right places. Book reviews have been held to not qualify as reliable authorities.⁴ Solid textbooks can almost always be found reliable with a proper foundation. Similarly, peer review journals that rely on professionals in the field to keep them updated are generally found to be reliable. Most websites probably don't qualify. Wikipedia, for example, probably doesn't have sufficient editorial oversight. Though no Michigan cases fully explain what is and isn't a reliable authority for these purposes, I propose the following guidelines:

- Is it written by a professional?
- Is it written for professionals?
- Is it subject to peer review?
- Do experts in the field read the publication to learn new information or remember basic information previously learned?

Publications written for the general public aren't always reliable. If peers review and then publish, the publications are given a stamp of reliability.

The next step is making sure you can use the putative authority you've located. There are three ways to have a source recognized as a reliable authority. First, the judge has the power to exercise "judicial notice." My experience is that judicial notice is difficult to obtain and can't be relied on. Second, you may have the hostile expert witness recognize the source as a reliable authority. There are many benefits to attempting this, even if you don't succeed. (I'm often more pleased with a cross-examination when I've engaged in a lengthy battle with the opposing expert about whether a source is a reliable authority than if the expert readily admits it.) Third, you can use your own expert to establish the reliability of your putative authority. If you can't use your own expert for this purpose, consider naming a librarian to your witness list to be ready to testify that each article or text is a reliable authority.

Many attorneys train their experts to avoid recognizing authoritative sources. I disagree. I want my experts to admit that sources they consult are "reliable authorities," even though they may disagree with some of the articles published or statements made in articles. Doing so allows them to lay the foundation for the literature I need to cross-examine an opposing expert. And if they're being intellectually honest, they shouldn't be afraid of statements the other side may find in the literature. Further, they will gain credibility with the jury. You want

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your side to be the one embracing the literature and the other side trying to hide from it.

During discovery, find out which textbooks the opposing expert (or defendant) has purchased and which periodicals he or she subscribes to or reads. Why would the expert pay for a book or periodical and spend time reading it if it wasn't reliable?

Note that statements from reliable authorities can't generally be used in direct examination to bolster your own expert's credibility.⁵ Your article file, therefore, can only be used in cross-examination.

Arguing technical information within an expert's field is like fighting a battle when your opponent has the high ground. You can win, but it's dangerous because you're fighting from a disadvantage. You're better off engaging in a battle with the opposing expert over what is a reliable authority. Consider bringing a big textbook to trial and carrying it to the podium as you begin your cross-examination. Start by explaining to the jury what you're doing:

Doctor, you said some things on direct examination that we don't agree with. Perhaps we can explore the issue further by opening up this textbook and reading from it.

The opposing counsel has to object at this point to lack of foundation as a reliable authority. If that happens, you're ready for a battle on which you occupy the high ground. Let the jury understand why you're arguing:

Doctor, before the jury gets to hear what is in this textbook, we have to agree this is a reliable authority. Can we agree on that?

If he says no—and most experts will—you are ready to discredit the witness without ever having to discuss difficult technical subjects. Spend a lot of time and ask a lot of questions. The longer and harder the expert fights, the more credibility the expert loses.

Look at this textbook, Doctor. Have you heard of it? Do you own it? Have you ever consulted it to learn? Look at the title page and tell me about the authors and their credentials. (You may want to compare the expert's credentials to the authors' credentials.) Just because a book is written does not mean it automatically gets published, does it? A book like this

goes through an editorial review. Look and tell me how many editors it had. What are their credentials? You did not have anyone review the statements you made to the jury before declaring them in court. And why did the book get published? Do you believe it was published as a paperweight? Is this meant for the general public? Is it used to educate doctors? Is it something that is probably in your hospital's medical library? What about the University of Michigan medical library? Wayne State medical library? All these libraries had to pay money for this book. Did they pay for it to fill their shelves? Do you think it is there because it is the type of resource that a doctor relies on to learn?

An admission that a source is reliable to professionals in the field should lead to the court's allowing you to cross-examine using statements made within the source. Turn to the judge and ask if, in light of the witness's testimony, you may use the source.

Don't be discouraged by the expert's failure to use the words "authority" or "authoritative." Michigan law requires only that the witness deem the source reliable. A trial judge was reversed for requiring a reliable source to be deemed authoritative by the witness.⁶ Also, because you are merely attempting to use the statement for impeachment, the barrier to reading the statement shouldn't be as high as it would be if you could hand the statement to a jury to use as substantive evidence.

The judge has discretion as to which sources you can use for cross-examination under MRE 707, and the judge's decision can only be reversed for an abuse of discretion.⁷

Even if you fail to win the judge's approval to read directly from the document in your cross-examination of the opposing expert, you can win the admissibility battle by citing to your own expert's testimony. Or you can have the medical librarian you've named on the witness list testify.

There is one additional option. Though there is no Michigan caselaw on the subject, an affidavit from a medical librarian should be sufficient to convince the judge to exercise discretion and allow the article or book to be used for impeachment.⁸ Determining what constitutes a reliable authority is a threshold matter and not an issue that

requires a judge to hear actual testimony. As previously stated, the judge has authority to take judicial notice of reliability, and an affidavit gives the judge a reason to take judicial notice. At the very least, it gives the judge a basis to know that a later witness will lay a foundation to establish the reliability of the text or publication.

In presenting the literature to the opposing expert, move swiftly. It's rare that you can fatally wound your opponent with a statement from a text or article. The longer you discuss a statement, the murkier it may become. Furthermore, in discussing literature within his or her field, the expert has the advantage. Keep your credibility. By showing the jury you're building your case on solid scientific principles and showing the opponent is hiding from them, you're on your way to victory.

MRE 707 is an important weapon in your arsenal. Used properly, it can mortally damage your opponent's credibility. ■



Steven E. Goren is a plaintiff's personal-injury lawyer, with many large verdicts and settlements. He graduated cum laude from the University of Michigan Law School and has taught as an adjunct professor. He has contributed chapters to several legal books, written numerous articles, and lectured for various organizations. He is a past president of the AAF litigation group on CRPS/RSD, and has a national reputation with litigation success in more than a dozen states.

ENDNOTES

1. MRE 707.
2. *Id.*
3. See, e.g., *Heins v Detroit Osteopathic Hosp Corp*, 150 Mich App 641; 389 NW2d 141 (1986) (finding foundation was properly laid to deem a textbook as a reliable authority).
4. *People v King*, 158 Mich App 672; 405 NW2d 116 (1987).
5. *Francisco v Manson, Jackson & Kane, Inc*, 145 Mich App 255; 377 NW2d 313 (1985) (discussing that learned treatises are only for impeachment, unless admissible for some other non-hearsay purpose).
6. *McCarty v Sisters of Mercy Health Corp*, 176 Mich App 593; 440 NW2d 417 (1989) (holding that even though an expert does not agree a journal is "authoritative," an admission that a journal is reliable is enough under MRE 707).
7. *Id.*
8. See, e.g., *Kirkpatrick v Wolford*, 704 So2d 708 (Fla App, 1998).