

6.26 Impeachment of an Expert Witness

(1) The qualifications of the expert to render an opinion on a specific subject, including whether a particular opinion rendered during an expert's testimony is within the expert's purported expertise, is subject to impeachment.

(2) Any scientifically developed procedures, tests, or experiments relied on by an expert may themselves be subject to impeachment.

(3) Provided an expert witness has accepted as authoritative a particular treatise, book, or scientific work or publication, upon the subject on which the expert has given an opinion, the expert may be impeached by a passage in the treatise or book (or section thereof) that is inconsistent with the expert's testimony.

(4) An expert is subject to the methods of impeachment that apply to any witness. For example:

(a) An expert may be impeached for testifying to inconsistent statements, including, for example, that the expert's testimony in another case on the same subject is not consistent with the expert's testimony in the present case.

(b) An expert may be impeached for having an interest in the case, for example, based upon the amount of compensation, financial interest in the outcome of the case, or other benefit the expert received or expects to receive for testifying.

(c) An expert may be impeached for potential bias, for example, based upon who retained the expert to testify, how often the expert has testified for the same party, and any benefit received or expected for doing so.

Note

Subdivision (1) recognizes the basic foundation requirement for a person to testify as an expert, namely, that the person is “qualified as an expert by knowledge, skill, experience, training, or education.” (Guide to NY Evid [GNYE] rule 7.01 [1], Opinion of Expert Witness.) A party has the right to examine and potentially impeach a witness before the trier of fact for not having the proper credentials to testify as an expert on the particular subject in issue. (*See* GNYE rule 1.09 [2], Court Determination of Preliminary Questions; *see Grasso v Nassau County*, 180 AD3d 1008, 1012 [2d Dept 2020] [on a motion for summary judgment, the claim that “plaintiffs’ expert was unqualified because he has not performed surgery in more than 25 years, and that the expert misstated facts from the record, are issues as to the expert’s credibility that should be resolved by a jury”].)

Subdivision (2) recognizes that an expert may provide testimony on scientific “procedures, tests, or experiments” (GNYE rule 7.01 [2], Opinion of Expert Witness) and that the science may itself be subject to impeachment. (*E.g.* GNYE rule 7.19 [2], Scientific Evidence.)

Subdivision (3) states the well-settled rule that on cross-examination of an expert, the examiner may question the expert about a passage in a treatise, book, or scientific work or publication that is inconsistent with the expert’s testimony, provided the expert accepts the treatise or book as authoritative. (*See People v Feldman*, 299 NY 153, 168 [1949] [“In this State when an expert witness has given opinion testimony and on cross-examination has testified that a book called to (the expert’s) attention is recognized by (the expert) as an authority upon the subject as to which (the expert) has given an opinion, (the expert) may be confronted with a passage from the book which conflicts with the opinion (the expert) has expressed. This is permitted for the purpose of discrediting or weakening (the expert’s) testimony”]; *Wolf v Persaud*, 130 AD3d 1523, 1525 [4th Dept 2015] [“it is well settled that the use of scientific works and publications may be used for impeachment purposes during cross-examination if it has been demonstrated that the work is the type of material commonly relied upon in the profession and has been deemed authoritative by such expert”]; *Lenzini v Kessler*, 48 AD3d 220, 220 [1st Dept 2008] [“Although a scientific text is inadmissible as hearsay when offered for its truth or to establish a standard of care, it may be introduced to cross-examine an expert witness where it has been demonstrated that the work is the type of material commonly relied upon in the profession and has been deemed authoritative by such expert”]; *Bryant v Bui*, 265 AD2d 848, 849 [4th Dept 1999] [“An expert may be cross-examined on a textbook only after the expert has accepted the textbook as authoritative”]; *Labate v Plotkin*, 195 AD2d 444, 445 [2d Dept 1993] [“an expert witness may be confronted with a passage from a treatise or book which contradicts the opinion the expert witness previously expressed on the stand, only after the expert witness has accepted the treatise or book as authoritative”]; *cf. Roveda v Weiss*, 11 AD2d 745, 746 [2d Dept 1960] [“The court’s rulings in permitting the use of textbooks, which had not been

accepted as authoritative by the witness in each instance, were erroneous. Such rulings permitted violation of the hearsay evidence rule”].)

While the use of the word “authoritative” is the “traditional verbal formulation,” the “modern trend” is to “eschew a narrow and rigid reliance upon semantic choices when other words, and the testimony viewed as a whole, convey an equivalent meaning.” *Wolf v Persaud*, 130 AD3d at 1525 [It was sufficient that the defendant, a physician, in his testimony “recognized the publication as a ‘standard of care’ to which he attempted to ‘adhere’ in his own practice”].

Nor is it required that the expert admit to having “read the book or article concerning which [the expert] is being questioned. However, in order to lay a proper foundation for the use of such material on cross-examination, the witness must concede its authoritativeness.” (*Mark v Colgate Univ.*, 53 AD2d 884, 886 [2d Dept 1976].) An expert may admit that only a section of a treatise or book is authoritative, which limits the cross-examination to that section. (*See Watkins v Labiak*, 6 AD3d 426, 426-427 [2d Dept 2004].)

An expert may “not foreclose full cross-examination by the semantic trick of announcing that he [or she] did not find the work authoritative’ where [the expert] has already relied upon the text and testified in substance that he [or she] finds it reliable and trustworthy.” (*Kearney v Papish*, 136 AD3d 690, 690 [2d Dept 2016]; *see Spiegel v Levy*, 201 AD2d 378, 379 [1st Dept 1994] [“Given the expert’s reliance on the treatise in his direct examination and his testimony that he agreed with much of it, the physician could not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative”]; *Lenzini v Kessler*, 48 AD3d 220, 220 [1st Dept 2008] [“Plaintiffs’ expert in radiology was, in that regard, questioned about a medical text he had brought to court, made notes thereon, and clearly deemed sufficiently authoritative notwithstanding that he may not have accepted everything contained in it”].)

The Federal Rules of Evidence rule 803 (18) allows the use of a “treatise, periodical, or pamphlet” on cross-examination of an expert if “the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination,” and “the publication is established as a reliable authority by the expert’s admission or testimony, by another expert’s testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.”

Subdivision (4) begins with the self-evident principle that an expert witness is subject to the same forms of impeachment as any other witness. (*E.g. Towne v Burns*, 125 AD3d 1471, 1471 [4th Dept 2015] [the expert was subject to impeachment for the expert’s prior conviction for “contempt” “based upon lies told by the expert to a judge during the course of the expert’s trial testimony”]; *People v Kelly*, 158 AD3d 520, 521 [1st Dept 2018] [“The court providently exercised its discretion in

allowing impeachment of the psychologist about acts of misconduct in other cases where he testified as an expert witness”].)

The more common forms of impeachment as stated for example in subdivision (4) are: Impeachment by Prior Inconsistent Statement (CPLR 4514; CPL 60.35 [2]) (GNYE rule 6.15); Impeachment—By Benefit to a Witness (GNYE rule 6.12); and Impeachment by Bias, Hostility, Interest (GNYE rule 6.13).

Paragraph (a) of subdivision (4) in reference to impeachment by inconsistent statements sets forth an example perhaps more common in the case of an expert witness and is illustrated by *Garces v Hip Hosp.* (201 AD2d 615, 616 [2d Dept 1994] [“Once the plaintiff’s expert denied that an electronystagmography test (hereinafter ENG) was warranted to determine whether the infant’s deafness was caused by gentamicin, the Supreme Court properly allowed defense counsel to cross-examine the plaintiff’s expert on his prior recommendation, in another case, that an ENG should be conducted to determine whether gentamicin caused that child’s deafness”]). (See *Matter of Hicksville Props. v Board of Assessors of County of Nassau*, 116 AD2d 717, 718 [2d Dept 1986] [“where an unfiled appraisal report was prepared by a party’s trial expert and is inconsistent with his trial testimony, the unfiled report may be introduced into evidence for impeachment purposes and used to cross-examine the witness”]; cf. *Guthrie v Overmyer*, 19 AD3d 1169, 1171 [4th Dept 2005] [“plaintiff’s expert previously had determined that plaintiff was permanently partially disabled as a result of the earlier injury, yet plaintiff testified herein that the earlier disability no longer existed. Thus, plaintiff’s expert was properly impeached with that evidence”].)

Paragraph (b) of subdivision (4) provides the “standard” examples of impeachment of an expert by an interest, financial or otherwise, the expert has in testifying. (See *People v Coakley*, 73 AD3d 565, 565 [1st Dept 2010] [“ ‘(s)howing that an expert witness is testifying for a fee is a standard impeachment technique’ ”]; *Zimmer v Third Ave. R.R. Co.*, 36 App Div 273, 274 [2d Dept 1899] [“Plainly the size of the fee a witness is to receive for his testimony may, in the case of a weak character, bias his judgment, and the parties and the jury are entitled to know just what compensation an expert witness has received or is to receive”]; *Andrew Carothers, M.D., P.C. v GEICO Indem. Co.*, 20 Misc 3d 1137[A], 2008 NY Slip Op 51775[U], *2 [Civ Ct, Kings County 2008] [“A medical expert can be questioned about fee arrangements . . . and financial interest in the outcome of the case”].)

Paragraph (c) of subdivision (4) allows for impeachment that explores an expert’s potential bias. (See *Salm v Moses*, 13 NY3d 816, 818 [2009] [“it was proper to allow cross-examination of a physician regarding the fact that the defendant’s insurance company retained him to examine the plaintiff in order to show bias or interest on the part of the witness”]; *Young v Knickerbocker Arena*, 281 AD2d 761, 763 [3d Dept 2001] [it was not error for “counsel for plaintiffs (to) twice question() defendant’s expert regarding how much income he derived from testifying on behalf of insurance companies and/or law firms that performed insurance defense work”]; *McClain v Lockport Mem. Hosp.*, 236 AD2d 864, 865 [4th Dept 1997] [“The

impeachment of plaintiff's expert witness with evidence that he had testified in over 100 cases was proper"]; *Andrew Carothers, M.D., P.C.*, 2008 NY Slip Op 51775[U], *2 ["A medical expert can be questioned about . . . prior testimony for the same party"]; *but see Feaster v New York City Tr. Auth.*, 172 AD2d 284, 285 [1st Dept 1991] ["it was severely prejudicial to permit plaintiff's counsel, on cross-examination, to impeach defendant's engineering expert by eliciting that he had previously testified as defendant's expert in a similar case in which the jury returned a six million dollar verdict against defendant. The only possible purpose of such testimony was to impeach the witness because he was on the losing side in another, factually distinguishable case where the verdict was in the millions of dollars. Clearly, the amount of damages awarded had nothing to do with the witness's credibility"].)