

***PROPOSED AMENDMENTS AS DRAFTED BY THE ILLINOIS JUDICIAL
CONFERENCE COMMITTEE ON DISCOVERY PROCEDURES***

Rule 213. Written Interrogatories to Parties

(a) - (b) (No changes)

(c) The reference to subparagraph (j) in the first sentence is amended to refer to subparagraph (k).

(d)-(e) (No changes.)

(f) **Identity and Testimony of Witnesses.** Upon written interrogatory, a party must furnish the identity and location of each witness not described in subsection (g) whom that party will call to testify at trial, together with the subject of each witness' testimony; and in the case of a non-retained expert witness, the party shall also state whether or not the witness will express any conclusions or opinions at trial.

(g) **Retained Expert Witnesses.** Upon written interrogatory, a party must disclose, with respect to any witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, the identity and location of the witness, together with the following information:

(i) the subject matter of the witness' testimony;

(ii) the conclusions and opinions of the witness and the bases therefor;

(iii) the qualifications of the witness; and

(iv) any report prepared by the witness.

Any conclusions, opinions, or bases therefor not disclosed in answer to this paragraph, or otherwise seasonably disclosed pursuant to paragraph (i), at least 60 days before the date on which the trial is anticipated to commence, shall be barred.

(h) (No changes.)

(i) **Duty to Supplement.** A party has a duty to seasonably supplement or amend, any prior answer whenever new or additional information required to be disclosed pursuant to paragraphs (f) or (g) above subsequently becomes known to that party; provided, however, that new or additional information already disclosed in the deposition of a witness

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or by other discovery procedure or in response to a case management order pursuant to Rule 218, need not be duplicated in a supplemental or amended Rule 213 answer.

If a non-retained expert witness is deposed and subsequently forms new conclusions, opinions or bases therefor, such new conclusions, opinions or bases therefor must be disclosed by the proponent of the testimony in a seasonable manner so as to prevent surprise at trial or to avoid hampering other parties' ability to prepare for trial. The witness' direct testimony at trial is limited to the conclusions, opinions and bases therefor stated in the witness' deposition, or otherwise seasonably disclosed. Upon objection at trial, the burden is on the proponent of the testimony to establish that any conclusion, opinion, or bases therefor, were seasonably disclosed.

- (j) Re-letter to (k).
- (j) Cross Examination. This Rule shall not be construed to limit otherwise proper cross examination of a witness. Proper cross examination includes impeaching an expert witness by eliciting a conclusion or opinion, or bases therefor, whether or not disclosed, that is adverse to the interests of the party who retained or called the witness. Proper cross examination does not include eliciting an undisclosed conclusion, opinion, or bases therefor, supporting the interests of the party who retained or called the witness unless that conclusion, opinion, or bases therefor, would have been allowed on direct examination of the witness.
- (k) (No changes.)

Committee Comments To 2001 Amendments

Paragraphs (f) and (g) reaffirm the basic proposition that litigants must disclose that information deemed necessary to prevent surprise at trial and to allow proper trial preparation. While it is not intended that the disclosures required by paragraphs (f) and (g) should create an undue burden on the parties before trial, basic fairness dictates the seasonable disclosure of the information required by these paragraphs in order to allow the trier of fact to reach a just result.

Paragraph (g) allows a party to obtain by interrogatory the conclusions, opinions and bases therefor of retained expert witnesses. However, paragraph (f) only requires a party to disclose the identity and location of witnesses whom that party will call at trial and the subject of their testimony; and in the case of a non-retained expert witness, to state whether or not that witness will express an expert opinion at trial. Detailed discovery of a witness' testimony not subject to disclosure under paragraph (g), including the

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conclusions, opinions and bases therefor, of non-retained expert witnesses must be obtained by deposition. The information obtained by deposition is subject to a duty to supplement in accordance with paragraph (i), and to the dictates of a case management order pursuant to Rule 218.

While the unpredictable nature of a trial is recognized, there are certain absolute disclosure requirements necessary to promote the interests of justice during the trial. Violation of such requirements will result in testimony being limited or barred. It is recognized that limiting or barring testimony is a severe sanction. However, that sanction is justified when a party fails to comply with a clearly-defined requirement and is forewarned of the consequences of that failure.

It is the responsibility of attorneys who elect to engage in litigation to inform themselves as to the requirements of this Rule, and to comply with those requirements. A party who is uncertain as to the sufficiency of a required disclosure, or other discovery issue, can raise such matters at a case management conference.

Because expert testimony can be determinative of a trial's outcome, this testimony takes on a special importance not only at trial, but in trial preparation. Accordingly, the requirements of this Rule regarding such testimony demand particular attention.

Paragraph (f)

The 1995 amendment to paragraph (f) required for the first time that a party identify the party's trial witnesses and the subject of their testimony. This rule requires a party to identify who that party will call as a trial witness, even if that witness has also been disclosed as a trial witness by another party. Paragraph (f) further requires a party to now state whether or not a non-retained expert witness will express any conclusions or opinions at trial. If a party does not disclose that a non-retained expert witness will express any expert conclusions or opinions at trial, that witness will be barred from testifying as to any such conclusions or opinions. This paragraph must be read with the requirements of Rule 218(c) regarding the timing for the disclosure of expert conclusions, opinions and bases therefor.

Retained expert witnesses must now be disclosed pursuant to paragraph (g) (1) rather than this paragraph. All other trial witnesses are subject to disclosure under this paragraph.

This paragraph requires the disclosure of the "subject" of a trial witness' testimony. The use of the term "subject", as opposed to "subject matter", is intentional and is intended to require a disclosure for notice purposes only. The response to a Rule 213(f) interrogatory is not intended to be a substitute for deposing a witness, or to create an undue burden on the answering party.

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It is the obligation of each party to determine the extent of discovery to pursue regarding any trial witness subject to disclosure under this paragraph. The purpose of this paragraph is solely to put opposing parties on notice as to whom each party will call to testify at trial and the subject of their testimony. Examples of adequate disclosures are as follows:

- (1) William Bystander, 123 Common Street, Chicago, IL 60601.
The witness will testify as to his observations of the collision alleged in the Complaint.
- (2) Dr. Susan Good, 123 Hope Street, Chicago, IL 60601.
The witness will testify as to the treatment of the Plaintiff following the collision alleged in the Complaint. This witness will express conclusions or opinions at trial.
- (3) Larry Secretary, 123 Lake Street, Chicago, IL 60603.
The witness will offer foundation testimony for the business records of ABC, Inc.
- (4) Paul Bartender, 123 Drink Street, Chicago, IL 60606.
The witness will testify to the actions of the Defendant and his observations of the Defendant prior to the collision alleged in the Complaint.
- (5) Officer Peter Goodcop, 123 Right Street, Chicago, IL 60611.
The witness will testify regarding his investigation of the collision alleged in the Complaint. This witness will not express any conclusions or opinions at trial.

Paragraph (g)

Paragraph (g) is redrafted so as to apply only to Retained Expert Witnesses.

Prior rules requiring the disclosure of opinion testimony have at times resulted in inconsistent trial court rulings regarding the sufficiency of the disclosure and the sanction for non-disclosure. This paragraph establishes the clear requirement that all conclusions, opinions, and the bases therefor, of a retained expert must be seasonably disclosed. The witness' testimony is limited to the conclusions, opinions, and bases therefor, so disclosed. By clearly stating the requirement for retained expert testimony, no party can claim lack of prior knowledge as to what is required, or how the information must be disclosed.

The requirement that all conclusions, opinions, and the bases therefor, be disclosed does not dictate that the witness must restate the disclosed opinion(s) and bases therefor word for word in the witness' testimony. Similarly, a witness may explain the witness' opinion(s), or bases therefor, to make them more understandable to the trier of fact, and may use examples to illustrate or emphasize the witness's testimony, so long as new, undisclosed conclusions, opinions, or bases therefore, are not introduced.

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If a retained expert had disclosed the opinion that the plaintiff is totally disabled, the witness can testify to the obvious effects of the plaintiff's condition, whether or not previously disclosed (i.e., the plaintiff is unable to drive a car. The plaintiff requires assistance in caring for his personal needs). All possible, obvious facts which would naturally follow from an opinion need not be disclosed to make the testimony admissible. The opinion that the plaintiff was totally disabled, and the bases for that opinion, require disclosure. The consequences that logically follow from that disability do not.

Continued objections to a witness' testimony that has been disclosed is improper conduct by counsel and subject to sanction by the Court.

This paragraph embodies the underlying principal that retained expert testimony can often determine the outcome of a case and that full and complete disclosure prior to trial is necessary to allow the trier of fact to reach a just result.

Paragraph (i)

This paragraph is intended to clarify that multiple disclosures of the same information are not required. Whether the information is obtained by interrogatory, deposition, request for production of documents or other discovery procedure or pursuant to a case management order is secondary to the information being timely disclosed to prevent surprise or allow a party an unfair advantage. This rule is intended to require the initial and all supplemental disclosures be made seasonably.

The second paragraph is intended only to insure that any new conclusions, opinions or bases therefor of a non-retained expert witness who is deposed will be timely disclosed prior to trial so as not to unfairly surprise the opposing party. This paragraph does not expand the disclosure required under paragraph (f), which requires only that the subject of the witness' testimony be disclosed and a statement as to whether or not the witness is expected to express an opinion on any issue at trial.

It is the decision of the opposing party as to whether the non-retained expert witness should be deposed in order to discover any conclusions, opinions or bases therefor that may be offered at trial. However, it is contrary to the interest of justice to allow new, undisclosed conclusions, opinions or bases therefor to be offered at trial that could well affect the outcome of the case. This sub-paragraph does not extend to non-expert, opinion testimony.

A failure to seasonably supplement or amend constitutes a discovery abuse subject to Rule 219 sanctions.

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Paragraph (j)

Paragraph (j) is new, and is intended to resolve any question that this Rule restricts in any way what would otherwise be proper cross-examination. However, cross-examination should not be used by a party, or a co-party aligned with that party, to introduce undisclosed conclusions, opinions or bases therefor that would not be allowed if elicited as direct testimony. An undisclosed conclusion, opinion or bases therefor that would buttress a witness' direct testimony, or the position of the party calling or retaining the witness, is not allowed on cross-examination. Conclusions, opinions or bases therefor, disclosed or not, elicited on cross-examination that impeach or otherwise undermine a witness' direct testimony are at the heart of proper cross-examination and are expressly allowed.