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## ILLINOIS LAW MANUAL

### CHAPTER XV

### AMENDED SUPREME COURT RULE 213

#### **B. COMMITTEE COMMENTS:**

##### **Paragraph (f)**

The purpose of this paragraph is to prevent unfair surprise at trial, without creating an undue burden on the parties before trial. The paragraph divides witnesses into three categories, with separate disclosure requirements for each category.

"Lay witnesses" include persons such as an eyewitness to a car accident. For witnesses in this category, the party must identify the "subjects" of testimony--meaning the topics, rather than a summary. An answer must describe the subjects sufficiently to give "reasonable notice" of the testimony, enabling the opposing attorney to decide whether to depose the witness, and on what topics. In the above example, a proper answer might state that the witness will testify about:

- (1) the path of travel and speed of the vehicles before impact,
- (2) a description of the impact, and
- (3) the lighting and weather conditions at the time of the accident.

The answer would not be proper if it said only that the witness will testify about: "the accident." Requiring disclosure of only the subjects of lay witness testimony represents a change in the former rule, which required detailed disclosures regarding the subject matter, conclusions, opinions, bases and qualifications of any witness

giving any opinion testimony, including lay opinion testimony. Experience has shown that applying this detailed-disclosure requirement to lay witnesses creates a serious burden without corresponding benefit to the opposing party.

"Independent expert witnesses" include persons such as a police officer who gives expert testimony based on the officer's investigation of a car accident, or a doctor who gives expert testimony based on the doctor's treatment of the plaintiff's injuries. For witnesses in this category, the party must identify the "subjects" (meaning topics) on which the witness will testify and the "opinions" the party expects to elicit. The limitations on the party's knowledge of the facts known by and opinions held by the witness often will be important in applying the "reasonable notice" standard. For example, a treating doctor might refuse to speak with the plaintiff's attorney, and the doctor cannot be contacted by the defendant's attorney, so the opinions set forth in the medical records about diagnosis, prognosis, and cause of injury might be all that the two attorneys know about the doctor's opinions. In these circumstances, the party intending to call the doctor need set forth only a brief statement of the opinions it expects to elicit. On the other hand, a party might know that a treating doctor will testify about another doctor's compliance with the standard of care, or that a police officer will testify to an opinion based on work done outside the scope of the officer's initial investigation. In these examples, the opinions go beyond those that would be reasonably expected based on the

witness's apparent involvement in the case. To prevent unfair surprise in circumstances like these, an answer must set forth a more detailed statement of the opinions the party expects to elicit. Requiring disclosure of only the "subjects" of testimony and the "opinions" the party expects to elicit represents a change in the former rule, which required detailed disclosures about the subject matter, conclusions, opinions, bases, and qualifications of all witnesses giving opinion testimony, including expert witnesses over whom the party has no control. Experience has shown that the detailed disclosure requirement is too demanding for independent expert witnesses.

"Controlled expert witnesses" include persons such as retained experts. The party can count on full cooperation from the witnesses in this category, so the amended rule requires the party to provide all of the details required by the former rule. In particular, the requirement that the party identify the "subject matter" of the testimony means that the party must set forth the gist of the testimony on each topic the witness will address, as opposed to setting forth the topics alone.

A party may meet its disclosure obligation in part by incorporating prior statements or reports of the witness. The answer to the Rule 213(f) interrogatories served on behalf of a party may be sworn to by the party or the party's attorney.

#### **Paragraph (g)**

Parties are to be allowed a full and complete cross-examination of any witness and may elicit

additional undisclosed opinions in the course of cross-examination. This freedom to cross examine is subject to a restriction that, for example, prevents a party from eliciting previously undisclosed contributory negligence opinions from a coparty's expert.

Note that the exception to disclosure described in this paragraph is limited to the cross-examining party. It does not excuse the party calling the witness from the duty to supplement described in paragraph (i).

#### **Paragraph (i)**

The material deleted from this paragraph now appears in modified form in paragraph (g).

#### **Paragraph (k)**

The application of this rule is intended to do substantial justice between the parties. This rule is intended to be a shield to prevent unfair surprise but not a sword to prevent the admission of relevant evidence on the basis of technicalities. The purpose of the rule is to allow for a trial to be decided on the merits. The trial court should take this purpose into account when a violation occurs and it is ordering appropriate relief under Rule 219(c).

The rule does not apply to demonstrative evidence that is intended to explain or convey to the trier of fact the theories expressed in accordance with this rule.