



If you have questions regarding Amended Rule 213, please contact:

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## ILLINOIS LAW MANUAL

### CHAPTER XV AMENDED SUPREME COURT RULE 213

(Effective July 1, 2002)

On March 28, 2002, the Illinois Supreme Court amended Rule 213 as it pertains to the disclosure of witnesses for trial. The order amending Rule 213 became effective July 1, 2002, and applies to all cases pending as of that date. When Rule 213(f) and (g) became effective as of January 1, 1996, the original intent was to avoid surprise and unfairness. Its application often resulted in an unnecessarily strict interpretation which created a new kind of unfairness. The application of Rule 213(f) and (g) became so strict that parties were forced to disclose opinions that would be elicited through cross-examination of an adverse party's witnesses. The evolution of Rule 213(f) and (g) into a "bright-line" rule prompted intense lobbying by lawyers and judges for less stringent disclosure requirements.

Former Rule 213(f) and (g) relating to the disclosure of witnesses and opinion witnesses has been consolidated into amended Rule 213(f). Rule 213(f) separates witnesses into three categories (lay witnesses, independent expert witnesses, and controlled expert witnesses) with each category of witness having distinct disclosure requirements. The disclosure requirements for lay witnesses and independent expert witnesses have been made more flexible. Lay witnesses include eyewitnesses to an occurrence or beneficiaries in a wrongful death case. Only the subject matter of a lay witness's testimony must be formally disclosed. An answer must describe the subject matter sufficiently to give the opposing party reasonable notice of the witness's testimony. Detailed

disclosure of a lay witness's potential trial testimony is not necessary under the amended Rule 213, making it unnecessary to provide the bases, opinions, conclusions, or qualifications for lay opinion testimony. But very general, non-specific disclosures do not comply with Rule 213. Kim v. Mercedes Benz, 353 Ill. App. 3d 444 (2004). Although detailed disclosure for lay witnesses is no longer required under Rule 213, notice of testifying as to matters set forth in the complaint is a generalized statement and is improper disclosure.

Independent expert witnesses include a party's treating physician who gives expert testimony based on the physician's treatment of the plaintiff's injuries. A party need only disclose the subject matter of an independent expert witness's testimony, as well as any anticipated opinions. The "reasonable notice" standard should protect a party from testimony being barred if it is impossible to speak with an independent expert witness. Disclosure of a controlled expert witness's opinions must be specific and detailed, or the risk of having that witness barred could be a potentially severe sanction for noncompliance.

The Committee Comments accompanying Rule 213 are meant to offer practitioners guidance on breadth and scope of the new disclosure requirements. As the Committee Comments note:

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 219(c).

Rule 213(g) specifically addresses disclosure requirements for opinions obtained through cross-examination. Except upon a showing of good cause, information in an evidence deposition that was not previously disclosed in a 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial. However, this section allows opinions and testimony obtained through cross-examination to be elicited for the first time at trial, without having previously disclosed such testimony or opinions. See also *Maffett v. Bliss*, 329 Ill. App. 3d. 562 (4<sup>th</sup> Dist. 2002). Nonetheless, the freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue in which its position is aligned with that of the party doing the direct examination. The trial court's discretion will need to be exercised in order to determine the alignment of parties for purposes of eliciting opinions on cross-examination.

#### **A. RULE 213**

The portions of Supreme Court Rule 213 relevant to this discussion are Sections (f), (g), (i), and (k). Those sections read as follows:

##### **(f) Identity and Testimony of Witnesses:**

Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial, and must provide the following information:

- (1) **Lay Witnesses.** A "lay witness" is a person giving only fact or lay opinion

testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

- (2) **Independent Expert Witnesses.** An "independent expert witness" is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

- (3) **Controlled Expert Witnesses.** A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify:
  - (i) the subject matter on which the witness will testify;
  - (ii) the conclusions and opinions of the witness and the bases therefor;
  - (iii) the qualifications of the witness; and
  - (iv) any reports prepared by the witness about the case.

##### **(g) Limitation on Testimony and Freedom to Cross-Examine:**

The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct

examination at trial. Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition. Except upon a showing of good cause, information in the evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial.

Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness. This freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In

such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination.

**(i) Duty to Supplement:**

A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party.

**(k) Liberal Construction:**

This rule is to be liberally construed to do substantial justice between or among the parties.



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