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Feature Article

Hon. Donald J. O'Brien, Jr. (Ret.)

Hon. William Gomolinski (Ret.)

Two Divergent Views of Supreme Court Rule 213

There are two divergent opinions and interpretations of Illinois Supreme Court Rule 213, its effect, its application, and what constitutes full and timely disclosure under Rule 213(f). Examining these divergent views is not simply an academic exercise. Indeed, learned judges, interpreting the same language, and aware of the same body of case law can hold differing opinions. Such is the case here. Judge William Gomolinski and I set forth our respective points of view regarding Illinois Supreme Court Rule 213.

Law Division Judges' Position On What Is Full and Timely Disclosure Under Rule 213(f)(3)

Illinois Supreme Court Rule 213(f)(3) requires that parties disclose the "subject matter, conclusions, opinions, bases for the opinions, qualifications, and all reports of a witness who will offer any opinion testimony and seasonably supplement any previous answers when additional information becomes known." *Copeland v. Stebco Products Corp.,* 316 Ill. App. 3d 932, 937 (1st Dist. 2000). The rule reads as follows:

> 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.

Ill. Sup. Ct. R. 213(f)(3) (2017).

The discovery process set forth in the rules is meant to avoid surprise. Consistent with this purpose, the Illinois Supreme Court Rule Committee stated in the comments to Rule 213 that no new or additional opinions are allowed "unless the interests of justice require otherwise." Ill. Sup. Ct. R. 213(g), Committee Comments.

In addition to written answers to discovery, an expert witness's testimony may be expanded to include information from that witness's discovery deposition. *Id.* Indeed, without making a disclosure under this rule a cross-examining party can elicit information, including opinions, from witnesses. *Id.* Furthermore, Rule 213(i) imposes a duty to supplement disclosures "whenever new or additional information subsequently becomes known to that party." Ill. Sup. Ct. R 213(i). Notably, the comment to this rule states that "[t]he Committee believes that the definition of 'seasonable' varies by the facts of each case and by the type of case, but in no event should it allow a party or an attorney to fail to comply with the spirit of this rule by either negligent or willful noncompliance." *Id.* at Committee Comments.

Of additional relevance here, Rule 218(c) states that all discovery must be completed no later than sixty days before the anticipated start of trial, unless the parties agree otherwise. Ill. Sup. Ct. R. 218(c). This requirement ensures an equitable discovery process that allows a party sufficient time to learn of its opponent's evidence. Promoting timely and complete supplemental discovery is vital to ensuring a fair trial in which the rules of discovery are properly used to expedite the litigation and not to any party's tactical advantage.

Moreover, case law dictates that the discovery rules are mandatory and demand strict compliance by the parties. *Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 109 (2004); *Clayton v. Cook Cnty*, 346 Ill. App. 3d 367, 377 (1st Dist. 2004). The Illinois Supreme Court has repeatedly emphasized that its rules are not mere suggestions, but carry the force of law, and must be obeyed and enforced as written. *See Applebaum v. Rush University Medical Center,* 231 Ill. 2d 429, 447 (2008) (citing *People v. Houston,* 226 Ill. 2d 135, 152 (2007). Discovery is not intended to be a tactical game, but a "mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial." *Copeland,* 316 Ill. App. 3d at 937 (quoting *Boland v. Kawasaki Motors Mfg. Corp.,* 309 Ill. App. 3d 645, 651 (4th Dist. 2000). Additionally, the disclosure of an expert witness's opinions and the bases thereof "is a bright line rule and must be followed." *Morrisroe v. Pantano,* 2016 IL App (1st) 143605, ¶ 44 (quoting *Seef v. Ingalls Mem. Hosp.,* 311 Ill. App. 3d 7, 24 (1st Dist. 1999). The court has the authority to shape an appropriate remedy for a Rule 213 violation, including limiting or excluding expert testimony. *Clayton,* 346 Ill. App. 3d at 378. The remedy should promote the aims of Rule 213 by "preventing unfair prejudice or the deprivation of a party's ability to prepare adequately his case through no fault of his own." *Id.*

It logically follows that the language of Rule 213, the Committee Comments, and applicable case law require diligent disclosure to avoid surprise and gamesmanship. They forbid parties from selectively offering only parts of a controlled expert witness's opinions to the opposing side, and then soliciting new opinions at a later date by deposing their own expert without ever having made a full and complete disclosure in its Rule 213(f)(3) answer. The text of Rule 213(f)(3) states that a party must identify "the conclusions and opinions of the witness and the bases thereof." Ill. Sup. Ct. R. 213(f)(3)(ii). It does not say a party must identify "some" or "partial" conclusions or opinions, and withhold known opinions for a later deposition. Additionally, the Committee Comments explain that, since parties can expect full cooperation from their controlled expert witnesses, parties must provide all of the details—the "gist of the testimony on each topic the witness will" address—rather than the topics alone. *Id.* at Committee Comments.

Although the rule specifically allows information provided in the Rule 213(f) answer or in the discovery deposition, by waiting to reveal an expert's new opinions for the first time at a party's own expert deposition, the party strategically delays complying with the rules of full disclosure in an answer and in timely supplementing discovery answers. This has the effect of unduly burdening the opposing party in a manner which the discovery rules were never intended to permit, and were in fact specifically designed to eliminate. Furthermore, such a maneuver suggests an intentional bad-faith reading of the rule that requires timely and complete disclosure.

An example of such a bad-faith interpretation, imagine a Rule 213(f)(3) disclosure that simply states, "The expert will provide the subject matter, conclusions and opinions of the witness and the bases therefor along with his curriculum vitae and resume at the deposition in this matter." This would not be an acceptable answer to Rule 213(f)(3) discovery. It is devoid of information, offers no assistance in preparing for a deposition of the expert, and would allow the expert to testify to anything without limit. Here, the risk of surprise or undue burden to the opposing party is inevitable, and the party is unable to fully develop its litigation strategy in response to the disclosures. Yet, a literal interpretation of Rule 213(g) would allow any information in a 213(f) answer or in the discovery deposition. That would be an absurd result.

The discovery rules are intended to expedite the litigation process and require good-faith openness in disclosing Rule 213(f)(3) witness opinions and bases in accordance with the rules, Committee Comments, and case law. The tactics in the example above violate the letter and spirit of the rules. Furthermore, this gamesmanship impairs the opposing party's ability to adequately prepare and cross-examine the expert and discover these opinions, conclusions and the bases thereof. It is not the opposing party's burden to guess the correct questions that would solicit the expert's hidden opinions. The party offering the 213(f)(3) witness has an affirmative obligation to comply with the rules in a timely manner, in the interests of promoting fair and expedient settlement or litigation. Moreover, upon a Rule 213 objection, the party offering an opinion bears the burden of proving that it was provided in a discovery deposition or Rule 213 interrogatory or answer. The court has discretion to determine whether the opinion was disclosed properly. *Clayton,* 346 Ill. App. 3d at 378. If a party could easily skirt this burden by providing extremely broad and open-ended written Rule 213(f)(3) disclosures, there could be no objection to any opinion the expert offers at trial, since the proponent could easily show that it was previously disclosed.

Rule 213(c), regarding interrogatories, has been interpreted to require a party to "answer fully and in good faith to the extent of his actual knowledge and the information available to him or to his attorney." *Singer v. Treat*, 145 Ill. App. 3d 585, 592 (1st Dist. 1986). The most reasonable reading of the rule as a whole would lead to the conclusion that other sections which require disclosure also demand full, good-faith answers utilizing the information available. Parties cannot deliberately withhold information in their answers to interrogatories only to release it at a later time, and they similarly cannot decide when to divulge the opinions, bases, or topics of their controlled expert witnesses. They also cannot give broad, all-encompassing disclosures that would then allow experts to testify to any number of possible opinions and reasons. *See Sullivan,* 209 Ill. 2d at 109. The discovery rules ensure that a party is able to freely rely on an opposing expert's disclosed opinions in order to construct its trial strategy. *Id.*

The court has discretion to determine on a case-by-case basis whether a party has violated its Rule 213 disclosure requirements. *See Id*. at 110 (setting out six-factor test for what the court must consider in deciding whether sanctions are appropriate); *see also Clayton*, 346 Ill. App. 3d at 381 (setting out factors the court must consider in determining whether a Rule 213 violation warrants a mistrial). Notably, the closer that the case is to the trial date, the greater the burden will be on an opposing party if another party attempts to supplement its discovery answers with new disclosures. The discovery rules require that parties disclose the subject matter, opinions, bases, conclusions, qualifications, and reports of their witnesses no later than sixty days before the anticipated trial date. Ill. Sup. Ct. R. 218(c); *see also Warrender v. Millsop,* 304 Ill. App. 3d 260, 266 (2d Dist. 1999) ("Rules 213(g), 213(i) and 218(c) work together to ensure that, upon written interrogatory and no later than sixty days prior to the anticipated date of trial, parties disclose the subject matter, conclusions, opinions, qualifications, and reports of their opinion witnesses.") The fundamental purpose of discovery is to bring to light the facts, opinions, and other bases that a party intends to rely on at trial to make its case, so that each side may develop a strategy to meet that evidence and attempt to counter it. The rules should not be used to frustrate any party's ability to do so. The closer that a case is to trial, the more likely it is that incomplete discovery disclosures will prejudice the opposing party due to surprise and time constraints; therefore, strict compliance with the discovery rules becomes even more important as the trial date draws closer.

Nothing in this discussion suggests that a party's efforts to timely supplement prior discovery answers as required by Rule 213(i) should receive a court's guarded suspicion as a matter of course. A controlled expert may certainly reveal new opinions in a deposition, beyond what she discloses in a written answer to discovery. The rule allows this on its face, and no court would hold otherwise. However, where a party is capable of eliciting some number of opinions and other

relevant disclosures from its Rule 213(f)(3) expert, it must seasonably disclose all of that information. Rule 213 specifically places a duty on parties to supplement discovery as additional information becomes known. This does not mean everything must be disclosed at once, in the initial written answers to discovery; however, this also does not mean that parties may pick and choose at their strategic convenience when to release expert opinions. While this rule is afforded liberal construction so that substantial justice is served, it cannot be so liberally construed as to prevent the very justice it is intended to achieve. *See* Ill. Sup. Ct. R. 213(k) ("This rule is to be liberally construed to do substantial justice between or among the parties").

To conclude, Rule 213 is meant to be a tool for parties to use in the complex discovery process. See *Sullivan*, 209 Ill. 2d at 109. Liberal construction notwithstanding, the court must be able to require strict compliance with the rule in order for it to be an effective means of preventing undue surprise or delay. *Id.* at 110; *see also Clayton,* 346 Ill. App. 3d at 381 *quoting Copeland*, 316 Ill. App. 3d at 945. Rule 213 is not meant to serve as a "sword to prevent the admission of relevant evidence on the basis of technicalities." Ill. Sup. Ct. R. 213(k), Committee Comments. Without a closer look at the facts and circumstances surrounding an alleged new disclosure—and as discussed here, specifically when made upon a party's deposition of its own expert after the party submits written answers to discovery—this rule can easily become a strategic tool for a party intending to obscure and delay disclosing an expert's opinion. This is in direct contention with a judge's need to manage discovery and prevent abuses from occurring in his or her courtroom. The rules were not intended to serve parties in gaining tactical advantages over their opinions. The Illinois Supreme Court specifically disallows such gamesmanship, and courts must not allow negligent or willful noncompliance with the spirit of Rule 213.

Judge O'Brien's Position

If the opposing position is boiled down to its bare bones, the following conclusions are revealed:

(a) If one deliberately fails to include all or every opinion a retained expert is going to give when answering 213(f) interrogatories, and then wait until the opposition take this deposition for the expert to reveal additional undisclosed opinions, then presenting party is acting in bad faith or engaging in gamesmanship.
(b) Alternatively, if one deliberately fails to reveal most or the majority of the retained expert's opinions in 213(f) answers, and waits the expert's deposition is taken to reveal additional undisclosed opinions, you are acting in bad faith and engaging in gamesmanship.
(c) If you refuse to answer a 213(f) interrogatory, and state the expert expert's opinions will be disclosed during his deposition, you are then acting in bad faith and engaging in gamesmanship. (See pages 3 and 4 of opposing argument.)

I heartily disagree with propositions (a) and (b) for reasons stated herein. I fully agree with proposition (c) and agree that if such an answer is given the party is arguably acting in bad faith and engaging in gamesmanship. I also contend that proposition (c) is a straw man set up by the opposing side to justify their arguments, and will be addressed herein.

If Rule 213 is interpreted under the rules of statutory construction, the following conclusions are reached.

First, there is no requirement that in answering 213(f) interrogatories one must disclose all opinions that one expects to elicit at trial. Second, the rule provides that you may offer new opinions if the witness if deposed. Ill. Sup. Ct. R.

213(g). Third, the rule provides that you may offer new opinions even if you answer 213(f) interrogatories and the witness is deposed because the rule provides for seasonable supplementation even if witness deposed. *See* Ill. Sup. Ct. R. 213(i).

Fourth, the logical corollary rule has no application to discovery under Rule 213. Rather, the logical corollary rule is applicable when a partially-disclosed opinion is offered at trial. Logical corollary only concerns itself with trial admissibility.

Fifth, that one offers new opinions in a deposition or upon seasonable supplementation does not mean that one is indulging in gamesmanship. It is assumed that authors of the rule felt that by allowing supplementation, gamesmanship was not being promoted. Further, the rule makes perfectly good sense. New opinions become viable based on new evidentiary facts. New opinions become viable when counsel, after contemplation of existing facts, identifies a new theory of liability or defense. Barring a new opinion as gamesmanship diminishes ingenuity, which should be encouraged.

Sixth, the opposing interpretation requires that one insert "all" or "every" in Rules 213(f)(2) and (f)(3), which is prohibited under the rules of statutory interpretation. This interpretation requires that 213(f)(2) read as follows: "All of the opinions or every opinion the party expects to elicit." This interpretation requires that 213(f)(3) read as follows: "All of the conclusions and opinions or every conclusion and opinion of the witness." Clearly, the verbiage of 213(f)(2) and (f)(3) does not contain the word "all" or "every." It was never the intent of Supreme Court Rule 213 to require that all or every opinion be contained in your 213(g) answers to interrogatories. It is plainly stated in the rule that you can supplement your 213(g) answers via a deposition or a seasonable supplementation per Supreme Court Rule 213(i).

Seventh, Rule 213 is not merely a recommendation, suggestion, or aspiration. The rule is mandated and subject to strict compliance. *Sullivan,* 209 Ill. 2d at 109; *Seef,* 311 Ill. App. 3d at 21. The supreme and appellate courts have stated that Rule 213 was promulgated to prevent surprise and tactical gamesmanship. *Sullivan,* 209 Ill. 2d at 110; *Warrender*, 304 Ill. App. 3d at 269. Therefore, if one is mandated to follow a rule that was promulgated to prevent surprise and tactical gamesmanship, the compliance with the rule should not suggest gamesmanship. *See Sullivan,* 209 Ill. 2d at 110.

Finally, the opposing interpretation is fundamentally unfair to defendants, and may violate due process. Defendants' experts are generally deposed last, and from a practical standpoint, are the only experts affected by this interpretation. If a plaintiff's expert in response to Rule 213(g) gives only one opinion and when deposed offers five new opinions, it is unlikely that a motion judge would bar the additional opinions because an expert may expand their opinions if deposed and the defense expert will have to rebut the opinions. Because defendants' experts are generally deposed last, a plaintiff could always argue that new opinions given during the expert's deposition are untimely because plaintiffs cannot respond. A motion judge may accept this argument and bar or limit the additional opinions.

Under this scenario, the plaintiffs' experts have an unfettered ability to offer new opinions at deposition, while defendants' experts may be barred or limited in offering new opinions on deposition. Rule 213 cannot be interpreted to allow disparate treatment of plaintiff and defense experts. The simple solution to this problem lies in crafting discovery schedules to permit a rebuttal period (if warranted), and not in rewriting Supreme Court Rule 213.

Discussion

A caveat: Rule 218(c) requires that whatever discovery is contemplated under Rule 213 must be completed sixty days prior to trial unless the time limit is waived by agreement or by conduct. Special consideration should be given for time for rebuttal only if the defendant, in his case, introduces new affirmative matter. *Hoem v. Zia*, 159 Ill. 2d 193 (1994); *Chapman v. Hubbard Woods Motors, Inc.*, 351 Ill. App. 3d 99 (1st 2004).

For example, assume a plaintiff's expert opines that a defendant doctor breached standard of care and, as a result, plaintiff's decedent died of a heart attack. Later, the defense expert opines there was no breach of the standard of care, and defendant's actions had nothing to do with the heart attack. Here, no rebuttal is allowed because there is a joinder of issues, and no new affirmative matter has been asserted. However, if the defendant's expert testifies as above and added a new opinion that the decedent did not die from a heart attack, but pneumonia, a new affirmative matter has been asserted, and rebuttal on the cause of death is appropriate.

Therefore, all discovery related to Rule 213 should be completed one hundred twenty days before trial to allow a sixty-day rebuttal period.

The interpretation of the Illinois Supreme Court Rules is governed by the same principles that govern statutory interpretation. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006); *People v. Santiago*, 236 Ill. 2d 417 (2010); Ill. Sup. Ct. R. 2. The primary rule of statutory construction is to give effect to the intention of the drafter. The best evidence of intent is the language used in the rule, and that language must be given its plain and ordinary meaning. The rule should be construed as a whole, and, if possible, in a manner that no term is rendered meaningless or superfluous. *Stroger v. Regional Transportation Authority*, 201 Ill. 2d 508, 524 (2002); *Paris v. Feder,* 179 Ill. 2d 173, 177 (1997). Where the language of the rule is unambiguous, the courts will not depart from the plain language reading in exceptions, limitations, or conditions that conflict with the expressed intent of the drafter. *Gaffney v. Board of Trustees*, 2012 IL 110012, 56 ¶; *MidAmerica Bank, FSB v. Charter One Bank, FSB,* 232 Ill. 2d 560, 565-66 (2009).

Rule 213 itself provides insight into how the rule should be interpreted. Rule 213(k) provides, "The rule is to be liberally construed to do substantial justice between the parties." The Comments indicate the purpose of the rule is to prevent unfair surprise, but should not be construed to prevent relevant evidence on the basis of technicalities. Rule 213(k) also notes it is a discretionary rule because it informs the court that it must use its discretion to ensure a trial is decided on its merits.

The Supreme Court itself has determined that Rule 213 is discretionary and there is not an automatic bar if a nondisclosed witness is called. The Supreme Court has adopted a six-prong test to determine if an unlisted witness should testify: (1) surprise to adverse party; (2) prejudicial effect of testimony; (3) nature of testimony; (4) diligence of adverse party; (5) timely objection to testimony; (6) good faith of party calling witness. *Sullivan*, 209 Ill. 2d at 109-11.

Rule 213 provides that the information disclosed in answer to a 213(f) interrogatory or in a discovery deposition or by seasonable supplementation constitutes the outer limits of the testimony of a witness on direct examination. The cases have interpreted 213(g) as applying not only to direct examination, but to redirect and rebuttal. *Copeland*, 316 Ill. App. 3d at 938; *Regala v. Rush North Shore Medical Center*, 323 Ill. App. 3d 579, 585 (1st Dist. 1999); *Seef*, 311 Ill. App. 3d at 24; *Prairie v. Snow Valley Health Resources, Inc.,* 324 Ill. App. 3d 568 (2001).

Rule 213(g) limits the testimony of direct, redirect, and rebuttal to not only the answers to 213(f) interrogatories. The rule specifically provides that the testimony is not limited to the 213(f) interrogatory answer because the rule states, "Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer." This statement would be unnecessary if one were confined to his 213(f) answers. The language itself contemplates that one can present direct testimony from a discovery deposition in addition to answers to Rule 213(f) interrogatories. Rule 213(g) does not limit the testimony given in a deposition to logical corollaries either. Indeed, importing that requirement violates a cardinal rule of statutory interpretation: that one should not read in nonexpressed, exceptions, limitations, or conditions. *See Gaffney, and MidAmerica*, cited above. Such language is not present in Rule 213(g).

Turning now to logical corollary, a logical corollary is an opinion that is an elaboration of a previous opinion, rather than a new reason for a previous opinion. The testimony must be encompassed by the original opinion. A new theory of negligence is not a logical corollary. *See Barton v. Chicago and North Western Transportation Co.*, 325 Ill. App. 3d 1005, 1039 (1st Dist. 2001); *Seef,* 311 Ill. App. 3d at 23; *Brax v. Kennedy*, 363 Ill. App. 3d 343, 356 (1st Dist. 2005).

Logical corollaries have no nexus to 213(g), but only apply to a partially disclosed opinion being offered at trial. Logical corollaries only come into play subsequent to the disclosures made under 213(g), i.e., is new opinion encompassed by original disclosed opinion either by 213(f) or deposition. *See Barton*; *Seef,* and *Brax*, cited above, plus *Prairie*, 324 Ill. App. 3d at 576.

Turning now to seasonable supplementation under Rule 213(i), said duty arises under two circumstances: supplementation to 213(f) interrogatories occurs if no deposition is taken or when a deposition is taken and new opinions are expected to be offered on direct at trial and that have been disclosed in the Rule 213(f) answers or in a deposition.

To equate an opinion described as a logical corollary with an opinion that is first disclosed during a discovery deposition is comparing apples to oranges. A logical corollary opinion is a partially disclosed opinion sought to be admitted at trial in contravention of Rule 213(g), which bars opinions that are not disclosed in response to Rule 213(f) interrogatories or discovery deposition.

An opinion given during a discovery deposition is a disclosed opinion that is permitted by Rule 213(g) because the rules allow an expert deponent to give opinions not previously disclosed in Rule 213(f) interrogatories without amending the Rule 213(f) interrogatory responses.

An interpretation that Rules 213(f)(2) and (f)(3) require all opinions to be disclosed is not consistent with Rule 213(g) because Rule 213(g) allows the opposite. Therefore, by the very verbiage of the rule you do not have to disclose all of your opinions under Rules 213(f)(2) and (f)(3) because the rule allows you to supplement via a deposition.

A few comments are necessary in rebuttal to Judge Gomolinksi's position. Judge Gomolinksi interprets Rule 213 to forbid parties from selectively offering only parts of a controlled expert's opinions, and then soliciting new opinions at a deposition. To validate this statement, one would have to read into the rule that one must disclose "all" or "every" opinion or read into the rule that one must disclose "most" or the "majority" of the opinions. The rules of statutory interpretation would not permit such an addition. The rule itself decries such an interpretation because it involves expansion by deposition or seasonable supplementation.

The proponents of the other view posit a hypothetical 213(f)(3) disclosure that states, "The expert will provide the subject matter, conclusions and opinions of the witness and bases along with his curriculum vitae and resume at the deposition in this matter." This hypothetical, according to the other side, offers no assistance in preparing for the deposition, sets one up for surprise, and prevents one from preparing a litigation strategy. This author could not agree more that the hypothetical answer sets one up for surprise and prevents one from developing a litigation strategy, and constitutes bad faith and gamesmanship. However, this argument creates a straw man because it neglects to refer to Supreme Court Rule 213(d), which provides that one can bring a motion to compel an answer when one refuses to answer an interrogatory. The alleged hypothetical answer amounts to a refusal to answer. It is difficult to imagine that a practitioner would would proceed to take a deposition without making a motion to compel an answer. As such, the hypothetical creates a straw man by setting up a scenario that is unlikely to occur simply for purposes of argument.

In sum, my position is:

(a) If no 213 interrogatories are served, there are no restrictions on what opinions may be offered at trial. *See Heriford v. Moore*, 377 Ill. App. 3d 849 (4th Dist. 2007).
(b) If 213 interrogatories are filed and no deposition is taken from expert, the expert is limited to the opinions given in answer to 213(g) interrogatories, unless seasonably supplemented under 213(i).
(c) If 213 interrogatories are filed and the expert is deposed, the opinions that would be allowed at trial are the opinions given in answer to 213 interrogatories and the opinions given at deposition per 213(g) and any opinions that are found to be seasonably supplemented under 213(i); said supplementation occurring after the expert's deposition.

Judge Gomolinski's Rebuttal

It is my position that Illinois Supreme Court Rule 213 mandates that parties fully and completely answer Rule 213(f)(3) interrogatories. I agree with Judge O'Brien that additional opinions may be elicited at a deposition of the expert, and the outside limit of the expert's disclosures is the deposition. However, full and complete disclosure is required, and a request to disclose opinions should be treated as a request to disclose all opinions and all of their underlying bases—not some or most. This is where our positions diverge—on the issue of deliberate nondisclosure of known or reasonably discoverable opinions, bases, and subject matter in the written answer to Rule 213(f) interrogatories. The opposing view of Rule 213(f) requires interpreting the statute in light of the case law in a way that is not supported by the language of the statute or the policy underpinning it.

Although we agree that the purpose of Rule 213 is to avoid unfair surprise and to do substantial justice among all parties, this is at odds with an interpretation of this rule that would empower a court to blindly approve of a party's withholding discovery. Ill. Sup. Ct. R. 213(k); *Id.* at Committee Comments. A party does not dictate to the court and to its opponents a discovery schedule that best suits the party's own litigation strategy. This impinges on the court's authority to manage the discovery process and certainly goes against the intent of the Supreme Court's discovery rules. That is the main premise of my position, nothing more—not to impose a stricter standard on initial Rule 213 disclosures or to do away with the liberal construction of Rule 213.

Judge O'Brien contends that this position would necessitate reading into the rule language that does not exist—that it inserts "all" and "every" before the opinions and conclusions a party expects to elicit from its witnesses, where the rule only reads, "the party must identify . . . the conclusions and opinions of the witness." *Id.* at (f)(3). This argument is disingenuous, as I could just as easily have said that Judge O'Brien's position reads the same language as "the party may identify any of conclusions and opinions of the witness." Similarly, in section (i), the rule states that a party has a duty to seasonably supplement its answers "whenever new or additional information subsequently becomes known to that party." *Id.* at (i). If there was no need for a party to make a genuine effort to disclose all of an expert's opinions—to the extent that the party knows or reasonably should know them at the time of completing its Rule 213(f) interrogatory responses—then this section would have no teeth to it, handing the rule over to the very gamesmanship it exists to prevent. A "seasonable" disclosure could simply be whenever a party felt so inclined to reveal more information, rather than when new information "subsequently becomes known," as the rule requires. As liberal a construction as Rule 213 provides for, it cannot be so loose as to remove important barriers to full and efficient discovery.

Next, any concerns that my view of Rule 213 would prejudice defendants, whose experts are deposed last and who, therefore, may give new opinions at deposition that are scheduled closer to the trial date, are unfounded. As Judge O'Brien notes, and I concur, discovery should be completed at least 60 days before the start of trial. If the court uses the tools at its

disposal to ensure that discovery proceeds according to schedule, there is no need to worry that plaintiffs would regularly succeed in barring a defense expert's new opinions due to untimeliness and prejudice. The plaintiff should have at least sixty days in which to rebut the expert's new opinions. Of course, it is in the court's discretion to bar new opinions, if the expert's testimony is being delayed in bad faith, in order to ensure that the plaintiff has minimal time to respond to it, but this should not be the court's initial presumption. Again, the crux of my argument is focused not on the intended good-faith use of Rule 213(f) to promote discovery and expedite the litigation process, but on those instances where a party acts contrary to the policy behind the rule and engages in deliberate conduct that may be considered gamesmanship when reviewed on a case-by-case and fact-by-fact basis.

Further on the subject of gamesmanship, Judge O'Brien posits that my hypothetical of a party who provides a deliberately broad and vague response as to what an expert will testify on in his or her discovery deposition is a straw man argument that would not occur in actual legal practice. However, if his interpretation of Rule 213(f) were followed, a party could easily be allowed to answer, "The expert will provide the subject matter, conclusions and opinions of the witnesses and the bases therefor along with his curriculum vitae and résumé at the deposition in this matter." There would be no expectation that a party will make a complete and truthful disclosure of its expert's opinions reasonably soon after learning of them if it has the option of holding off until the expert's discovery deposition. If the party provided an answer to the initial interrogatories that did provide the specific opinions and subject matter that the expert is expected to testify to, there would be no reason for the opposing side to assume that this is accurate and that no topics are being withheld, to be doled out when it would be more strategically advantageous.

To believe that this is merely a straw man argument is to give insufficient credit to the resourcefulness of zealous litigators and is a fanciful argument at best. The example I give of an improper Rule 213(f) disclosure may be a flagrant example of bad-faith noncompliance with discovery, but a disclosure that deliberately withholds important information from the opposing party would be just as prejudicial to that party in preparing its litigation strategy. My hypothetical would only alert the opposing side that it should expect surprise, whereas Judge O'Brien's position would lead them blindly into that trap. Again, I emphasize that deliberately withholding discovery disclosures is not the same as making what only retroactively could be termed an incomplete disclosure due to a genuine lack of knowledge at that time regarding an opinion or subject matter that an expert is expected to testify on, following a good-faith attempt to provide said disclosure.

About the Authors

Hon. Donald J. O'Brien, Jr., graduated from Northwestern University School of Law, 1963. Judge O'Brien was a principal in the firm of *O'Brien, Redding and Hyde* for 27 years. He has 27 years of experience as a trial lawyer, including arguing and trying cases in both the state and federal courts and the appellate level in both the state and federal courts. Appointed Cook County Circuit Court Judge, 1990; assigned in 1991 to Law Division hearing major personal injury cases and contract disputes. Elected to Cook County Circuit Court for full six-year term in November 1992. As an active trial lawyer, Judge O'Brien tried 107 cases to verdict. As a Presiding Judge, he presided over approximately 320 cases that went to verdict before a jury.

Hon. William Gomolinski served as a judge from 2007 - 2018, and was assigned to the Circuit Court of Cook County—Law Division (Motion Call) where he presided over 1,500 active files for case management and rules daily on contested motions ranging from summary judgment to discovery issues in the largest unified court system in the nation. Prior to his judicial service he was the litigation and managing partner in a four-attorney law firm representing client interests in civil litigation and consumer rights, culminating in numerous jury and bench trials or evidentiary hearings. He graduated from the John Marshall Law School in 1986 and from Loyola University in 1981 with a double major in finance and public accounting. He was a licensed stationary engineer and a licensed real estate broker for over 20 years. Judge Gomolinski is a senior mediator and arbitrator at ADR Systems.

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