First District Provides Useful Guidance Regarding Illinois Supreme Court Rule 218(c), 60-Day Rule

by Arlo B. Walsman

Illinois Supreme Court Rule 218(c) provides, in part, that:

> All dates set for the disclosure of witnesses, including rebuttal witnesses, and the completion of discovery shall be chosen to ensure that discovery will be completed not later than 60 days before the date on which the trial court reasonably anticipates that trial will commence, unless otherwise agreed by the parties.[1]

In practice, the 60-day rule is rarely followed. Litigants frequently conduct discovery within 60 days of trial by agreement, and the trial court has the inherent authority to disregard the 60-day rule and set its own dates for the closure of discovery.[2] Further, appellate courts in Illinois are reluctant to provide relief under Rule 218 when a party claims prejudice due to the late disclosure of an expert witness.[3]

Recently, in *Frulla v. Hyatt Corp.*, the first district declined to award the plaintiff a new trial where he claimed prejudice due to the defendant disclosing its expert witnesses 42 days before trial.[4] In so holding, the court provided useful guidance for plaintiffs to consider when defendants violate Rule 218 by failing to timely disclose their experts.[5]

I. *Frulla v. Hyatt Corp.*, 2018 IL App (1st) 172329

In *Frulla*, Frulla sued Hyatt Regency Chicago and Champion Exposition Services after injuring his back while working at a trade show, alleging that the floor around certain booths at the show was covered with carpet that had missing floor tiles underneath that caused him to fall.[6]

The initial trial date was May 2, 2016, and Frulla was ordered to disclose his expert witnesses by February 2, 2016.[7] However, the parties moved to continue the trial date, and the trial was rescheduled for October 2016.[8] Frulla was then ordered to disclose his experts by April 25, 2016, but he did not do so until May 2, 2016.[9] The parties then filed another motion to continue the trial, and a new trial date of March 3, 2017 was set.[10]

Frulla then sought leave to amend his Rule213(f)(3) disclosures to add an additional expert.[11] The circuit court granted this request and ordered him to serve his supplemental disclosures by November 21, 2016.[12] The court also ordered the defendants to disclose their experts by January 5, 2017 (within 60 days of the trial date).[13] This order did not reflect any objection by Frulla.[14]

On January 5, 2017, the trial court ordered the defendants to disclose their experts by January 20, 2017.[15] Frulla then objected on the basis that he had not waived the requirement that discovery be completed 60 days prior to trial.[16] The defendants then disclosed their experts on January 20, 2017, and supplemented the disclosures with a missing report on January 23, 2017.[17] None of the parties sought to extend the trial date.[18]

Before trial, Frulla filed a motion in limine to bar the defendants' experts from testifying because they had been disclosed only 42 days before the trial.[19] The court, however, denied the motion.[20]

After the jury returned a verdict for the defendants,[21] Frulla appealed, arguing that the trial court erred in failing to bar the defendants' experts from testifying due to their late disclosure.[22] The appellate court, however, disagreed and affirmed the verdict.[23]

First, the court noted that when the trial court, on November 26, 2016, set a deadline for the defendants to disclose their experts on January 5, 2017 (within 60 days of trial), Frulla did not object.[24] Second, the court held that failure of a party to disclose its expert witnesses 60 days before trial does not mean that the circuit court must automatically bar the witness.[25] Third, the court noted that the imposition of discovery sanctions for violations of discovery rules is within the discretion of the trial court.[26] Finally, the court held that the trial court did not abuse its discretion in failing to bar the defendants' experts because: (1) the trial court has the authority to set its own discovery schedule;[27] (2) the trial court had extended the trial date twice due to Frulla's late disclosures;[28] (3) Frulla was late himself in serving his supplemental expert witness disclosures;[29] (4) Frulla failed to inform the trial court, at the earliest possible time, of how its order allowing the defendants to disclose their experts within 60 days of trial would prejudice him so that the court could assess the situation;[30] (5) Frulla was attempting to enforce the letter of Rule 218(c) while ignoring his own attorney's lack of diligence in disclosing his experts;[31] and (6) Frulla did not show that the alleged error prejudiced him.[32]

II. Illinois Law Regarding the Modern 60-Day Rule

A. History and Purpose

Prior to January 1, 1996, the disclosure of expert witnesses was governed by Illinois Supreme Court Rule 220, which generally provided that a party must disclose the identity of an expert within 90 days after the substance of that expert's opinion first became known to the party.[33] The purpose of Rule 220 was to eliminate situations where "an expert's late or surprise testimony is permitted to the opponent's prejudice, the opinions are refused to the detriment of the offering party, the trials are continued, or the allowance or denial of the testimony produces reversible error and the cause must be retried."[34]

However, Rule 220 was interpreted by Illinois courts to create many exceptions to the disclosure requirements which made it ineffective.[35] So, effective January 1, 1996, Rule 220 was reserved, and the Illinois Supreme Court amended Rules 213 and 218.[36] The stated purpose of Rule 218's amendments were to avoid the need to continue trials due to the late disclosures of opinion witnesses.[37] Another purpose of Rule 218(c) is to "avoid surprise and discourage tactical gamesmanship."[38] Prior to Rule 218's amendment, Illinois courts had held that the main purpose of the rules governing the disclosure of expert witnesses was to promote discovery, and that the punitive nature of the rules was secondary to that goal.[39]

The resulting framework is one where Rule 213(g), Rule 213(i), and Rule 218 work together to ensure that parties disclose their experts no later than 60 days prior to trial.[40] Under this new framework, "trial courts should be more reluctant" than they were under former Rule 220 to permit parties to deviate from strict disclosure requirements and more willing to impose sanctions when deviations occur.[41] However, the disclosure of an expert within 60 days of trial does not mean that the trial court must automatically bar the witness.[42] The 60-day rule should also be liberally construed to do substantial justice between the parties.[43]

B. The Trial Court's Discretion

At the outset, it is important to note that the trial court may set its own discovery schedule that calls for the disclosure of expert witnesses within 60 days of trial.[44] However, if the court orders a schedule that honors the 60-day rule, and a party violates the order by disclosing an expert late, a trial court has essentially three options. First, the court can simply ignore the violation and reopen discovery.[45] Second, the court can continue the trial date.[46] A plaintiff, however, is not required to accept a continuance if one is offered in order to preserve for appeal the issue of the late disclosure of a witness.[47] Finally, the trial court may choose to issue appropriate sanctions.[48]

When fashioning an appropriate sanction, courts should consider the following six factors: "(1) the surprise

first district provides continued on page 42

first district provides continued from page 41
to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness."[49]

Examples of sanctions for violation of the 60-day rule include: barring the expert witness from testifying,[50] limiting the witness's testimony to only those matters discussed in reports that were properly disclosed,[51] and imposing the costs of additional discovery, such as conducting further depositions, on the offending party.[52]

C. Establishing Prejudice

Since Rule 218's amendment, several Illinois cases have shed light on when a plaintiff will be able to establish prejudiced due to the defendant's late disclosure of an expert witness, or that witness's opinions.

As an initial matter, if a party files a pretrial motion to bar an expert witness due to the late disclosure of that witness, and loses the motion, the party must also object to that witness's testimony at trial to preserve any error on appeal regarding the late disclosure.[53] A party must also allege some specific prejudice suffered by the late disclosure of a witness, and it is not enough to merely show that a witness was not timely disclosed. For example, in *Linn v. Damilano*, the court held that despite the plaintiff's claim that the prejudice he suffered due to the defendant's late supplemental disclosures of a doctor's opinions was "obvious," he was not entitled to a new trial where he could not "identify any specific portion of the doctor's testimony as prejudicial . . ."[54] According to the court, mere disappointment with the jury's verdict was insufficient.[55]

Prejudice may also be difficult to establish in cases with multiple defendants. For example, in *Scassifero v. Glaser*, a medical malpractice case, the court held that the plaintiff was not prejudiced when one defendant, only 30 days before trial, adopted the expert disclosures of a codefendant that had settled.[56] The court noted that when the first defendant settled, the other defendant promptly filed a supplemental disclosure pursuant to Rule 213(i), the trial court continued the trial date, and the plaintiff had an opportunity to retain an expert to rebut the defendant's expert.[57] Further, in *Gee v. Treece*, another medical malpractice case, the court held that the plaintiff was not prejudiced when the defendant disclosed an expert within 60 days of trial, where that expert's testimony was essentially the same as the plaintiff's own retained expert whom plaintiff had elected not to call after settling with another defendant.[58]

However, in *Seef v. Ingalls Memorial Hosp.*, the court held that the plaintiff had established prejudice entitling him to a new trial.[59] This was because the defendant's expert witness had given numerous opinions in an evidence deposition, which had never been previously disclosed, that excused the defendant doctor from preventing the death of a stillborn baby.[60]

III. Practical lessons for plaintiffs learned from *Frulla* and modern case law when a defendant violates the 60-day rule.

Frulla, and other cases decided after 1996 that interpret Rule 218(c)'s 60-day rule, provide valuable lessons for practitioners when faced with a defendant's late disclosure of an expert witness, or that witness's supplemental opinions.

First, if the trial court enters a discovery schedule that calls for disclosure of a defendant's expert witnesses within 60 days of trial, a plaintiff should object at the earliest possible time.[61] Second, if a plaintiff wishes to hold a defendant to the 60-day rule, he must disclose his own experts in a timely fashion to avoid "sandbagging" the defendant.[62] Third, in order to obtain any kind of relief, a plaintiff must identify some actual prejudice that the late disclosure caused, and be as specific as possible when doing so.[63] Fourth, rather than seeking to bar an expert from testifying, a plaintiff may have more success asking the court to impose more limited sanctions, such as limiting the expert's trial testimony to matters disclosed 60 days before trial, or granting the plaintiff leave to conduct an additional deposition of the expert at the defendant's expense.

Finally, if a pretrial motion to bar or limit an expert witness's testimony based on a violation of Rule 218(c) is denied, a plaintiff must also object to the introduction of the witness's testimony at trial to preserve any error for appeal.[64]

Endnotes

1 Illinois Supreme Court Rule 218.
2 *Ruane v. Amore*, 287 Ill. App. 3d 465, 471 (1st Dist. 1997).
3 *Frulla v. Hyatt Corp.*, 2018 IL App (1st) 172329 at ¶ 32; *Gee v. Treece*, 365 Ill. App. 3d 1029, 1037 (1st Dist. 2006); *Scassifero v. Glaser*, 333 Ill. App. 3d 846, 857 (2d Dist. 2002); *Linn v. Damilano*, 303 Ill. App. 3d 600, 606 (4th Dist. 1999).
4 2018 IL App (1st) 172329.
5 *Id.* at ¶¶ 25–29.
6 *Id.* at ¶ 4.
7 *Id.* at ¶ 6.
8 2018 IL App (1st) 172329 at ¶ 6.
9 *Id.*
10 *Id.*
11 *Id.* at ¶ 7.
12 2018 IL App (1st) 172329 at ¶ 7.
13 *Id.*
14 *Id.*
15 2018 IL App (1st) 172329 at ¶ 8.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at ¶ 9.
20 2018 IL App (1st) 172329 at ¶ 9.
21 *Id.* at ¶ 17.
22 *Id.* at ¶ 10
23 *Id.* at ¶ 32.
24 *Id.* at ¶ 25.
25 2018 IL App (1st) 172329 at ¶ 26.
26 *Id.* at ¶ 27.
27 *Id.*
28 *Id.*
29 *Id.*

first district provides continued on page 44

first district provides continued from page 43

[30] 2018 IL App (1st) 172329 at ¶ 28 (according to the court, it was inappropriate for the plaintiff to "sandbag" the defendant).

[31] *Id.* at ¶ 29.

[32] *Id.*

[33] The text of Illinois Supreme Court Rule 220 was as follows:

Rule 220. Expert Witnesses

(a) Definitions.

(1) Definition of expert witness. An expert is a person who, because of education, training or experience, possesses knowledge of a specialized nature beyond that of the average person on a factual matter material to a claim or defense in pending litigation and who may be expected to render an opinion within his expertise at trial. He may be an employee of a party, a party or an independent contractor.

(2) Consulting expert. A consulting expert is a person who possesses the same qualifications as an expert witness and who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial to render opinions within his area of expertise.

(b) Disclosure.

(1) Expert witness. Where the testimony of experts is reasonably contemplated, the parties will act in good faith to seasonably:

(i) ascertain the identity of such witnesses, and

(ii) obtain from them opinions upon which they may be requested to testify.

In order to ensure fair and equitable preparation for trial by all parties the identity of an expert who is retained to render an opinion at trial on behalf of a party must be disclosed by that party either within 90 days after the substance of the expert's opinion first becomes known to that party or his counsel or, if the substance of the expert's opinion is then known, at the first pretrial conference in the case, whichever is later. In any event, as to all expert witnesses not previously disclosed, the trial court, on its own motion, or on the motion of any party after the first pretrial conference, shall enter an order scheduling the dates upon which all expert witnesses, including rebuttal experts, shall be disclosed, the schedule established by the trial court will sequence the disclosure of expert witnesses in accordance with the complexities of the issues involved and the burdens of proof of the perspective parties as to those issues. All dates set by the trial court shall be chosen to ensure that discovery regarding such expert witnesses will be completed not later than 60 days before the date on which the trial court reasonably anticipates the trial will commence. Upon disclosure, the expert's opinion may be the subject of discovery as provided in paragraph (c) hereof. Failure to make the disclosure required by this rule or to comply with the discovery contemplated herein will result in disqualification of the expert as a witness.

(2) The party answering such interrogatories may respond by submitting the signed report of the expert containing the required information.

(3) A party shall be required to seasonably supplement his answers to interrogatories propounded under this rule as additional information becomes known to the party or his counsel.

(4) The provision of paragraphs (c) and (d) hereof also apply to a party or an employee of a party who will render an opinion within his expertise at the time of trial. However, the provisions of paragraphs (c) and (d) do not apply to parties or employees of entities whose professional acts or omissions are the subject of the litigation. The opinions of these latter persons may be the subject of disclosure by deposition only.

(5) The identity, opinions and work product of consulting experts are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions of the same subject matter by other means. However, documents, objects and tangible things as defined in Rule 214 which are in the possession of a consulting expert and which do not contain his opinions may be obtained by a request for that purpose served upon the party retaining him.

(6) Unless manifest injustice would result, each party shall bear the expense of all fees charged by his expert witness or witnesses.

(d) Scope of testimony.

To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings through interrogatories, depositions or request to produce, his direct testimony at trial may not be inconsistent with nor go beyond the fair scope of the facts known or opinions disclosed in such discovery proceedings. However, he shall be prevented from testifying as to facts or opinions on maters regarding which inquiry was not made in the discovery proceedings.

See Illinois Compiled Statutes 1994 vol. 7, Chapters 740 to End, Rights and Remedies, Business, Court Rules, 1409-1411 (West 1994).

[34] *Sohaey v. Van Cura*, 158 Ill. 2d 375, 381 (1994).

[35] Chapman, Jaws XVI: The Exceptions That Ate Rule 220, Volume 26, J. Marshall L. Rev., p. 189 (1993); *see also McMath v. Katholi*, 191 Ill. 2d 251, 254 (2000) ("[T]he whole point of replacing Rule 220 with the amendments to Rule 213 and Rule 218 was to rid Illinois law of the myriad of exceptions under the old rule.").

[36] Before their amendments in June 1995, Illinois Supreme Court Rules 213

first district provides continued on page 46

first district provides continued from page 44

and 218 provided as follows:

Rule 213. Written Interrogatories to Parties

(a) Directing Interrogatories. A party may direct written interrogatories to any other party. One copy of the interrogatories shall be filed with proof of service on all parties entitled to notice. Written interrogatories shall be reasonably spaced so as to permit the answering party to make his answer on the interrogatories served upon him. The answering party may attach an addendum to the copies if the space provided is insufficient.

(b) Duty of Attorney. It is the duty of an attorney directing interrogatories to restrict them to the subject matter of the particular case, to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.

(c) Answers and Objections. Within 28 days answer service of the interrogatories upon the party to whom they are directed, he shall file a sworn answer or an objection to each interrogatory, with proof of service upon all other parties entitled to notice. Any objection to an answer or to the refusal to answer an interrogatory shall be heard by the court upon prompt notice and motion of the party propounding the interrogatory. The answering party shall set forth in full each interrogatory being answered immediately preceding the answer. Sworn answers to interrogatories directed to a public or private corporation, or a partnership or association, shall be made by an officer, partner, or agent, who shall furnish such information as is available to the party.

(d) Option to Produce Documents. When the answer to an interrogatory may be obtained from documents in the possession or control of the party to whom the interrogatory was served, it shall be a sufficient answer to the interrogatory to specify those documents and to afford the party serving the interrogatory a reasonable opportunity to inspect the documents and to make copies thereof or compilations, abstracts, or summaries therefrom.

(e) Supplemental Interrogatories. If a party makes an answer that is complete when made, he has no duty to supplement the answer to include information thereafter received, unless requested to do so by a timely supplemental interrogatory. However, upon request made at any time before trial, a party must furnish the identity and location of persons, in additional to those previously disclosed, having knowledge of relevant facts.

(f) Use of Answers to Interrogatories. Answers to interrogatories may be used in evidence to the same extent as a discovery deposition.

See Illinois Compiled Statutes 1994 vol. 7, Chapters 740 to End, Rights and Remedies, Business, Court Rules, 1406 (West 1994).

Rule 218. Pretrial Procedure

(a) Conference. In any civil case, the court may hold a pretrial conference. At the conference, counsel familiar with the case and authorized to act shall appear, with or without the parties as the court directs, to consider:

(1) the simplification of the issues;

(2) amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) the limitation of the number of expert witnesses; and

(5) any other matters which may aid in the disposition of the action.

(b) Order. The court shall make an order which recites any action by the court and the agreements made by the parties as to any of the matters considered, and which specifies as the issues for trial those not disposed of at the conference. The order controls the subsequent course of the action unless modified.

(c) Calendar. The court shall establish a pretrial calendar on which actions shall be placed for consideration, as above provided, either by the court on its own motion or on motion of any party.

(d) Enforcement. The court shall make and enforce all rules and orders necessary to compel compliance with this rule, and may apply the remedies provided in paragraph (c) of Rule 219.

See Illinois Compiled Statutes 1994 vol. 7, Chapters 740 to End, Rights and Remedies, Business, Court Rules, 1408 (West 1994).

[37] Illinois Supreme Court Rule 218 (committee comments).

[38] *Scassifero*, 333 Ill. App. 3d at 854–55; *Renshaw v. Black*, 299 Ill. App. 3d 412 (5th Dist. 1998).

[39] *Wehde v. Regional Transp. Authority*, 237 Ill. App. 3d 664, 685 (2d Dist. 1992).

[40] *Gee*, 365 Ill. App. 3d at 1036; *Fosse v. Pensabene*, 362 Ill. App. 3d 172, 187 (2d Dist. 2005); *Scassifero*, 333 Ill. App. 3d at 854; *Boehm v. Ramey*, 329 Ill. App. 3d 357, 362 (4th Dist. 2002); *Warrender v. Millsop*, 304 Ill. App. 3d 260, 266 (2d Dist. 1999).

[41] *Adami v. Belmonte*, 302 Ill. App. 3d 17, 22 (1st Dist. 1998).

[42] *Frulla*, 2018 IL App (1st) 172329 at ¶ 26.

[43] *City of Chicago v. Eychaner*, 2015 IL App (1st) 131833 at ¶ 98.

[44] *Frulla*, 2018 IL App (1st) 172329 at ¶ 27.

[45] *Ruane*, 287 Ill. App. 3d at 471.

[46] *Eychaner*, 2015 IL App (1st) 131833 at ¶ 99 (decision to continue trial was "well within the court's power"); *Scassifero*, 333 Ill. App. 3d at 857.

[47] *Warrender*, 304 Ill. App. 3d at 267.

[48] *Fortae v. Holland*, 334 Ill. App. 3d 705, 711–12 (5th Dist. 2002).

[49] *Coleman v. Abella*, 322 Ill. App. 3d 792, 799 (1st Dist. 2001); *Warrender*, 304 Ill. App. 3d at 268.

[50] *Fortae*, 334 Ill. App. 3d at 711–12.

[51] *Linn*, 303 Ill. App. 3d at 606.

[52] *Uhrhan v. Union Pacific R. Co.*, 155 Ill. 2d 537, 541 (1993).

first district provides continued on page 48

first district provides continued from page 47

[53] *Gee*, 365 Ill. App. 3d at 1038–39; *Scassifero*, 333 Ill. App. 3d at 855–56.

[54] 303 Ill. App. 3d 600, 606 (4th Dist. 1999).

[55] *Id.*

[56] 333 Ill. App. 3d 846, 857 (2d Dist. 2002).

[57] *Id.*

[58] 365 Ill. App. 3d 1029, 1037 (1st Dist. 2006).

[59] 311 Ill. App. 3d 7, 24 (1st Dist. 1999).

[60] *Id.* at 23–24. It should be noted that the court granted the plaintiff a new trial because it held that the defendant violated Rule 213, rather than Rule 218. When seeking to bar an expert's testimony, a plaintiff should of course consider whether a defendant has violated Rule 213 and Rule 218.

[61] *Frulla*, 2018 IL App (1st) 172329 at ¶ 28.

[62] *Id.*

[63] *Frulla*, 2018 IL App (1st) 172329 at ¶ 29; *Linn*, 303 Ill. App. 3d at 606.

[64] *Gee*, 365 Ill. App. 3d at 1038–39; *Scassifero*, 333 Ill. App. 3d at 855–56.

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