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THE JOHN MARSHALL LAW REVIEW

Some Thoughts on the Pilot Program for
Simultaneous Disclosure of
Expert Witnesses in Cook County

Margaret Connery

SOME THOUGHTS ON THE PILOT PROGRAM FOR SIMULTANEOUS DISCLOSURE OF EXPERT WITNESSES IN COOK COUNTY

MARGARET CONNERY*

I. INTRODUCTION

The mission of the Illinois Association of Defense Trial Counsel (“IDC”) is to ensure civil justice with integrity, civility and personal competence. It is fair to say that in its history, no single issue has so put that mission at risk, and has so galvanized IDC’s members, as the Cook County Simultaneous Disclosure Pilot Project.¹

A. *The Pilot Program*

The Pilot Program was announced on August 25, 2011, and it mandates that in certain cases in the Law Division of the Circuit Court of Cook County, each side shall disclose experts simultaneously.² It was implemented as an experiment in an effort to streamline this aspect of discovery.³ This is a departure from

* J.D. Candidate, May 2014. The author would like to thank Professor Anthony Longo for bringing this topic to her attention and for his continued guidance and mentorship. The author would also like to thank Judge Kathy Flanagan, Judge Donald J. O’Brien, Jr., Jeanine L. Stevens, Craig M. Sandberg, and Steven B. Muslin for their generous interviews and insight on this topic. Except as noted, however, the author is solely responsible for any of the following views, content, or errors.

1. *Illinois Association of Defense Trial Counsel White Paper on Cook County’s “Pilot Project” for Simultaneous Expert Witness Disclosure*, IDC Q., Second Quarter 2012, at 4.

2. Circuit Court of Cook County, Illinois, Law Division, Administrative Order 11-2 for “Pilot Project” for Simultaneous Disclosure of Supreme Court Rule 213(f)(3) Witnesses (2011) [hereinafter Administrative Order 11-2]. Administrative Order 11-2 was soon thereafter amended by Administrative Order 11-3. Circuit Court of Cook County, Illinois, Law Division, Administrative Order 11-3 for “Pilot Project” for Simultaneous Disclosure of Supreme Court Rule 213(f)(3) Witnesses (2011), *available at* <http://www.cookcountycourt.org/Portals/0/Law%20Divison/General%20Administrative%20Orders/Law%20-%20General%20Administrative%20Order%2011-3.PDF> [hereinafter Administrative Order 11-3].

3. *Illinois Association of Defense Trial Counsel White Paper on Cook County’s “Pilot Project” for Simultaneous Expert Witness Disclosure*, *supra* note 1, at 4.

the recognized custom and practice, whereby the plaintiff historically discloses their witnesses first.⁴ According to Jerry Latherow, the former president of the Illinois Trial Lawyers Association, the defense bar is outraged by the Pilot Program and what it may signal for the future of civil litigation in Cook County's Law Division.⁵

B. The Road to the Pilot Program

Part II explains the common process historically utilized by litigants in the disclosure of expert witnesses in Cook County. It also details the process employed by the Pilot Program. Part II then explains the history of the Illinois Supreme Court Rules and, more specifically, it highlights the rules that govern expert disclosure and the sequencing of discovery. Lastly, it discusses the federal courts and the other states that require or allow for simultaneous expert disclosure.

Part III of this Comment outlines, in detail, the arguments made by both the opponents and the proponents of the Pilot Program. Part IV of this Comment discusses the problems caused by the current discovery process. It proposes an alternative to the Pilot Program by suggesting that Illinois Supreme Court Rule 213(f)(3) and Illinois Supreme Court Rule 201(e) be amended. The proposed amended rules will attempt to capture the goals of the Pilot Program while providing for an individualized approach to Rule 213(f)(3) expert witness disclosure.

II. BACKGROUND

A. Current Custom and Practice

When a civil lawsuit is filed in the Law Division of the Circuit Court of Cook County, the parties and the motion judge conduct an initial case management conference.⁶ During that conference,

4. Brook M. Carey, *Weighing Outcomes of the New Simultaneous Expert Disclosure in Illinois: A Multi-Jurisdictional Survey of Approaches Addressing the Expense and Duration of the Expert Witness Civil Discovery Process*, CASSIDAY.COM, October 19, 2011, at 6, available at <http://www.cassiday.com/files/Publication/ff3dab0a-8ceb-49e6-8b33-24de42b47835/Presentation/PublicationAttachment/614ca17c-b7ec-423e-a665-25c2f378dbbc/BMC%20%20Simultaneous%20213%20Disclosure%20Seminar%20Materials.pdf>.

5. Jerry A. Latherow, *The President's Thoughts*, VESTED INTEREST, (Ill. Trial Law. Ass'n, Springfield, Ill.), Sept. 2011.

6. Standing Order for Pretrial Procedure, Circuit Court of Cook Cnty. CIRCUIT COURT OF COOK COUNTY (Jan. 4, 2000), available at <http://www.cookcountycourt.org/Portals/0/Law%20Divison/Standing%20Order/s/Pierce%20-%20SO.pdf>. This conference occurs approximately ninety days after the filing of the complaint. *Id.* The parties are encouraged to make their best efforts to settle the case. *Id.* If that is not possible, a schedule for

various decisions are made, including the length of discovery.⁷ Depending on the complexity of the case, lawsuits are labeled as either a Category 1 case or a Category 2 case.⁸ Category 1 cases are given a twelve-month discovery schedule.⁹ Category 2 cases, which are more complex and require a more in-depth discovery process, are given a twenty-eight month discovery schedule.¹⁰ In Category 2 cases, the trial court commonly sets a schedule for expert witness disclosure at the end of all fact discovery.

Although the schedule differs from case to case, the plaintiff's lawyer generally has sixty to ninety days to disclose his expert witnesses following the close of fact discovery.¹¹ Then, the defendant usually has sixty to ninety days to take the plaintiff's experts' depositions.¹² The defense then has an additional sixty to ninety days to disclose its own expert witnesses.¹³ Finally, the plaintiff's counsel has sixty to ninety days to depose the defendant's expert witnesses.¹⁴ Thereafter, the parties can seasonably supplement expert opinions pursuant to Illinois Supreme Court Rule 213(i).¹⁵ After "supplementation" and "rebuttal" opinions are utilized, this process can take 330-510 days.¹⁶

When speaking of an "expert witness," this Comment is

discovery is agreed upon. *Id.* The schedule is dependent on the complexity of the case. *Id.*

7. *Id.*

8. Circuit Court of Cook County, Law Division, General Administrative Order 03-1 Black Line Trial Call, at 1 (2003). The Black Line trial call is the Court's way of pushing aging cases to trial. Upon completion of all discovery, the assigned motion judge will release the case into the pool of cases that are traveling up towards the Black Line for trial assignment. *Id.* at 2. Every day, the presiding judge calls the cases (around forty-five of them) and counsel must appear and explain whether or not they are ready for trial. If they are ready, a trial date is given. *Id.* If they are not ready, the judge will remove them from the pool of cases. *Id.* at 4. This gives the attorneys on the case an additional four to six months to conduct discovery until they are once again called before the presiding judge for trial screening. *Id.*

9. *Id.* at 1.

10. *Id.*

11. *Overview of Simultaneous Disclosure of SCR 213(f) Witnesses*, CASSIDAY, at 2, available at [http://www.cassiday.com/files/Event/366925d6-f99c-425d-b531-75a77f8c08a2/Presentation/EventAttachment/c2dc6c6a-3db5-45ef-ae5e-88e2df8d77fd/Overview%20of%20Simultaneous%20Disclosure%20of%20SCR%20213\(f\)\(3\)%20Witnesses.pdf](http://www.cassiday.com/files/Event/366925d6-f99c-425d-b531-75a77f8c08a2/Presentation/EventAttachment/c2dc6c6a-3db5-45ef-ae5e-88e2df8d77fd/Overview%20of%20Simultaneous%20Disclosure%20of%20SCR%20213(f)(3)%20Witnesses.pdf)

12. *Id.*

13. *Id.*

14. *Id.*

15. ILL. SUP. CT. R. 213. Rule 213(i) states "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." *Id.*

16. *Overview of Simultaneous Disclosure of SCR 213(f) Witnesses*, *supra* note 11, at 2.

referring only to those witnesses described in Illinois Supreme Court Rule 213(f)(3).¹⁷ Rule 213(f)(3) governs “controlled expert witnesses” and describes those witnesses as “a person giving expert testimony who is the party, the party’s current employee, or the party’s retained expert.”¹⁸ Rule 213(f)(3) disclosures must be very specific.¹⁹

B. The Pilot Program

Administrative Order 11-2 created the Pilot Program, which was announced by Judge William D. Maddux, the Presiding Judge of the Law Division.²⁰ Shortly thereafter, its terms were amended by Administrative Order 11-3.²¹ It was in effect for a period of nine months, from October of 2011 through June of 2012.²² Judge Kathy Flanagan, Judge Randy Kogan, and Judge James O’Hara of the Motions Section oversaw these cases.²³ Administrative Order 11-3 contained various guidelines for what types of cases

17. ILL SUP. CT. R. 213. Rule 213(f) states:

(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.

Id.

18. *Id.*

19. *Nedzvekas v. Fung*, 872 N.E.2d 431, 435 (Ill. App. Ct. 2007)

20. Administrative Order 11-2, *supra* note 2.

21. Administrative Order 11-3, *supra* note 2.

22. Adam C. Carter, *Simultaneous Disclosure of Experts in Cook County: To What End and At What Cost?* IDC DEF. UPDATE, March 2012, at 1, 1-2.

23. Interview with Hon. Kathy M. Flanagan, Supervising Judge of Motion Section, Law Division, Circuit Court of Cook County, in Chi., Ill. (Nov. 16, 2012).

were eligible for the Program.²⁴

According to Administrative Order 11-3, fifty to seventy-five cases would be included in the Pilot Program.²⁵ Initially, only medical malpractice, complex construction, and product liability cases were to be included, but it was later expanded to include other types of complex cases.²⁶ It stated that “all disclosures of Supreme Court Rule 213(f) witnesses shall be made simultaneously by all parties during the same sixty day period set forth in the applicable case management order.”²⁷ Then, the parties were to have thirty days to “supplement their own disclosures to address any new opinions and/or issues raised in the opposing party’s disclosures.”²⁸ Depositions of the expert witnesses were to be completed within sixty days thereafter.²⁹ This process envisions an expert discovery phase which takes less than one calendar year.

Pursuant to Administrative Order 11-3, a Pilot Project Study Committee was formed.³⁰ The Study Committee was in place throughout the course of the Pilot Program and was responsible

24. Administrative Order 11-3, *supra* note 2. Cases were entered into the Program either by request of one party’s counsel or by agreement of counsel for both parties. *Id.* The Pilot Program applied to Category 2 cases. *Id.* Only cases which had “all fact, Rule 213(f)(1) and (2) discovery completed and with no Rule 213(f)(3) discovery commenced” were eligible for the case inventory. *Id.*

25. *Id.* Actually a total of only forty-eight cases were entered into the Pilot Program. Interview with Hon. Kathy M. Flanagan, *supra* note 23. There are generally more medical malpractice actions filed in the Law Division than there are construction and product liability cases. *Id.* This led to a disproportionate number of medical malpractice cases being entered into the project. *Id.* Some of the attorneys on the Committee objected to the large number of medical malpractice cases being entered. *Id.* Ultimately, the Committee agreed to put a cap on the number of those types of actions which were included. *Id.* This led to a smaller number of cases being entered than had been anticipated. *Id.* All of the cases were placed in the Program between September 2011 and November 2011. *Id.* It was made up of twenty-five medical malpractice cases, nine complex construction cases, three police cases, two legal malpractice cases, two nursing home cases, two intentional tort cases (sexual assaults), one serious auto accident case, one fire property damage case with experts on causation, one combo medical malpractice/product liability case, one product liability case, and one premises liability case. *Id.*

26. *Illinois Association of Defense Trial Counsel White Paper on Cook County’s “Pilot Project” for Simultaneous Expert Witness Disclosure*, *supra* note 1, at 4. As stated above, the lack of availability of properly timed (“ripe”) complex construction and product liability cases led to the expansion of the Program to include all serious personal injury and/or complex cases. Interview with Hon. Kathy M. Flanagan, *supra* note 23.

27. Administrative Order 11-3, *supra* note 2.

28. *Id.*

29. *Id.*

30. *Id.*

for monitoring the Program.³¹ It consists of attorneys from the Plaintiffs Bar, the Defense Bar, and the Insurance Bar.³² The Committee also includes representatives from the Illinois Defense Counsel, the Illinois Trial Lawyers, the Society of Trial Lawyers, and the American Board of Trial Advocates.³³ When the Pilot Program ends, according to Administrative Order 11-3, “the Study Committee shall make a determination as to the option of a continuation, modification, or termination of the project guidelines, based upon all input reaction received.”³⁴

Judge Flanagan believes that the Pilot Program has been very successful and intends to submit a final report on the Program to the committee, which will then be submitted to Judge William D. Maddux.³⁵ When referring to the Pilot Program, Judge Maddux has stated that “[t]he initial results are pretty certain that simultaneous discovery of the experts goes almost all the way toward cutting in half the time consumed by naming and disclosing experts [consecutively]” and that simultaneous disclosure “definitely has the potential” to become a regular practice in the Law Division.³⁶ There are three remaining Pilot Program cases awaiting trial, however, so there have not been any published determinations as to the future of simultaneous disclosure of expert witnesses in Cook County.³⁷

31. *Id.*

32. *Id.*

33. Interview with Hon. Kathy M. Flanagan, *supra* note 23.

34. Administrative Order 11-3, *supra* note 2.

35. Interview with Hon. Kathy M. Flanagan, *supra* note 23; Mary Kate Malone, *Consensus Still Elusive on Pilot Project*, CHI. DAILY LAW BULL., Aug. 27, 2013, at 1. As of November 14, 2012, twelve cases were deducted the Program. Interview with Hon. Kathy M. Flanagan, *supra* note 23. Of these, three of the cases were removed from the Pilot Program for various reasons, one case was deleted from the Program, six cases were voluntarily dismissed, one case was trial-certified but waiting on multi-district litigation, and one case was dismissed with prejudice. *Id.* Of the remaining cases, seventeen were settled (sixteen without mediation; one with mediation), eight cases were set for trial, and eleven cases were pending. *Id.* In sum, after approximately one year, fifty percent of the cases had been resolved. *Id.*

As of August 8, 2013, the number of cases that had been deducted from the Program remained at twelve. *Id.* Twenty-seven of the cases were settled by that date (twenty-four without mediation; three with mediation) and one case was disposed of after the defendants’ motion for summary judgment was granted. *Id.* Three of the remaining cases are set for trial in October, November, and December of 2013. *Id.* Five of the cases were tried to verdict, three of which were returned in favor of the plaintiff, two in favor of the defendant. *Id.* In sum, after approximately twenty-three months, ninety-two percent of the cases were resolved. *Id.*

36. Malone, *supra* note 45, at 1.

37. *Id.*

C. The Reasons Behind the Change

The idea for simultaneous disclosure of expert witnesses in Cook County was formed when Judge Kathy Flanagan, the supervising Judge of the Motions Section in the Law Division, attended the American Board of Trial Advocates (ABOTA) National Jury Trial Summit in Chicago, Illinois from June 23-24, 2011.³⁸ The conference focused on the organization's desire to preserve jury trials as an important part of our justice system.³⁹ The thrust of this conference was that there needed to be a solution to over-litigation.⁴⁰ According to ABOTA, over-litigation was causing a decline in jury trials.⁴¹ It found that because of the costs incurred during the discovery process, jury trials were essentially being priced out of existence.⁴² It suggested that one of

38. Interview with Hon. Kathy M. Flanagan, *supra* note 23.

39. See Univ. of Denver Inst. for the Advancement of the Am. Legal Sys., *2011 National Jury Summit: A Call to Action*, AM. BD. OF TRIAL ADVOCATES June 23, 2011, at 1, http://www.ncsc.org/~media/Files/PDF/Jury/Nat_Jury_Summit_062311.ashx. (describing the conference, "The Jury Trial of the 21st Century," held June 23-24, 2011 in Chicago, Illinois)

40. *Id.* ABOTA based this goal on various studies conducted nationwide. *Id.* One such study was conducted by the American Bar Association ("ABA"). *Id.* The ABA surveyed its members in 2009 in an effort to examine how well our country's current civil litigation "is meeting its stated goal of being just, speedy, and inexpensive." *ABA Section of Litigation Member Survey on Civil Practice: Full Report* AM. BAR ASS'N (2009) at 1, <http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf>. Some of the notable findings included:

- 82% of survey respondents found that the longer a case goes on, the more it costs
- 81% were of the belief that litigation is too expensive
- 83% believe that the cost of litigation forces cases to settle that should not settle based on the merits.
- Discovery is the reason most often picked by respondents as the primary cause of delay. 48% picked that reason, while the next most popular reason (delayed rulings on motions) garnered only 25%.

Id. at 2.

41. *Id.* at 17; Marc Galanter *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459-60 (2004). At the federal level, since the mid 1980s, there has been a sixty percent decline in the total number of trials. *Id.* There were also comparable declines within the state courts. *Id.* at 460. Galanter noted that "although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy." *Id.*

42. Univ. of Denver Inst. for the Advancement of the Am. Legal Sys., *2011 National Jury Summit: A Call to Action*, *supra* note 39, at 1. The paper states, "the reality is that discovery is no longer the process by which parties prepare for trial; it has become the whole process." *Id.* at 3. The paper suggests that cost and delay, although they are not the exclusive factors, are major contributors to the decline in jury trials. *Id.* It recognizes that ADR and

the main causes of this problem was the fact that, oftentimes, the length of time devoted to discovery was disproportionate to the case.⁴³ One of the solutions offered to address this problem was to limit the number of experts and their depositions and to require them to be disclosed simultaneously.⁴⁴

After attending the conference, Judge Flanagan decided to implement the practice of simultaneously disclosing expert witnesses in her courtroom.⁴⁵ Shortly thereafter, Judge Maddux and Judge Flanagan decided to create a Pilot Program that would officially experiment with some of these discovery methods.⁴⁶ Thus, the “Pilot Project for Simultaneous Disclosure of Supreme Court Rule 213(f)(3) Witnesses” was created.⁴⁷

D. Illinois Supreme Court Rules

Relevant to the Pilot Program and the conflicting positions of plaintiff and defense attorneys are the Illinois Supreme Court Rules governing discovery. The Illinois Constitution states that the “general administrative and supervisory authority over all courts is vested in the Supreme Court.”⁴⁸ The Illinois Supreme Court appoints a Rule Committee that creates the Illinois Supreme Court Rules.⁴⁹ Illinois Supreme Court Rule 3 governs rulemaking procedures to be followed by the Rule Committee in creating such rules.⁵⁰

There are potentially many rules that apply to the action taken by the Circuit Court in promulgating Administrative Order 11-3. Illinois Supreme Court Rule 21 details the types of rules that

mediation techniques have also played a role in minimizing the number of jury trials but notes that these, too, were the result of rising litigation costs in the first place. *Id.* Furthermore, the paper states, ADR is beginning to “suffer from the same bloated processes and procedures” as litigation. *Id.* This conclusion, though, is not universally accepted. See Hon. Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved within the Existing Rules?*, 12 SEDONA CONF. J. 47 (2011) (arguing that the lack of enforcement of rules that are already in place are the cause of delayed discovery). This article argues that rather than creating new rules; courts should use discovery sanctions more often in an effort to streamline the discovery process and cut the high costs of litigation. *Id.* In other words, the authors argue that instead of replacing existing rules, the courts should use those rules more often. *Id.* This, the authors argue, would deter gamesmanship in the discovery process, which is the source of many delays. *Id.*

43. Univ. of Denver Inst. for the Advancement of the Am. Legal Sys., *2011 National Jury Summit: A Call to Action*, *supra* note 39, at 5.

44. *Id.*

45. Interview with Hon. Kathy M. Flanagan, *supra* note 23.

46. *Id.*

47. Administrative Order 11-3, *supra* note 2.

48. ILL. CONST. art. VI, § 16.

49. ILL. SUP. CT. R. 3.

50. *Id.*

circuit courts are allowed to create.⁵¹ Case law has interpreted Rule 21 to require uniformity of certain rules throughout the state.⁵² Rule 201 details the general discovery provisions, including the sequence of discovery.⁵³ Rule 213 governs written interrogatories between the parties to a lawsuit.⁵⁴ Rule 218 governs pretrial procedure.⁵⁵

51. *Id.*

52. *Vision Point of Sale, Inc. v. Haas*, 875 N.E.2d 1065 (Ill. 2007). In *Vision Point of Sale v. Haas*, the Illinois Supreme Court stated that Rule 21(a) vests the circuit courts “with the power to adopt local rules governing civil and criminal cases so long as: (1) they do not conflict with supreme court rules or statutes, and (2) so far as practical, they are uniform throughout the state.” ILL. SUP. CT. R. 21(a). *Id.* at 1080. Circuit courts, however, “are without power to change substantive law or impose additional substantive burdens upon litigants.” *Id.* In *Vision Point*, Illinois Supreme Court Rule 216, which governs requests to admit, was at issue. *Id.* The parties were in disagreement about whether a request to admit, which was served on the opposing party but not filed in the court, was valid. *Id.* There was a local Circuit Court rule, Rule 3.01(c), which stated:

(c) Requests for admission of fact shall be filed with the Clerk of the Circuit Court. Within twenty-eight (28) days after service of the requests, the answering party shall serve upon the party requesting the admission and file with the Clerk of the Circuit Court either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or a written objection to each request.

Id. at 1080; Cook Co. Cir. Ct. R. 3.1(c) (eff. May 1, 1996).

Rule 216 did not contain a requirement that the requests be filed with the court. *Id.*; ILL. SUP. CT. R. 216. The Court stated that,

Rule 216(c) only requires that responses to requests for admissions be served on the opposing party within the specified time period. When a response is filed with the court is irrelevant. Indeed, filing is not even necessary under the rule. The only purpose it serves is to help document when a responding party has acted within the rule’s time limits.

Vision Point, 875 N.E.2d at 1081.

The Illinois Supreme Court ultimately concluded that the local rule’s filing requirement could not form the basis for striking a party’s responses to requests for admission because the local rule had imposed additional substantive burdens on the litigants. *Id.*

53. ILL. SUP. CT. R. 201. Rule 201(e) states, “[u]nless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not operate to delay any other party’s discovery.” *Id.*

54. *Id.*

55. ILL. SUP. CT. R. 218. Rule 218(a) states, in pertinent part, that the parties to a lawsuit must hold a case management conference with the court within 35 days after the parties are at issue and in no event more than 182 days following the filing of the complaint. *Id.* Many things are considered at the conference. These include:

- (1) the nature, issues, and complexity of the case;
- (2) the simplification of the issues;
- (3) amendments to the pleadings;

E. The Federal System and Other State Courts

Discussion of the Pilot Program is enhanced when set against the backdrop of the discovery procedures of the federal and other state courts. Federal Rule of Civil Procedure 26 governs expert witness disclosure in the federal system.⁵⁶ When referring to disclosure of expert witnesses, it states that the parties must make the disclosures at the time and in the sequence that the judge orders.⁵⁷ It goes on to state that if there is no court order, then the disclosures must be made at least ninety days before the set trial date.⁵⁸ Federal Rule of Civil Procedure 26 is not entirely clear on whether the disclosure of expert witnesses is simultaneous or not.⁵⁹

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- (4) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
 - (5) limitations on discovery including:
 - (i) the number and duration of depositions which may be taken;
 - (ii) the area of expertise and the number of expert witnesses who may be called; and
 - (iii) deadlines for the disclosure of witnesses and the completion of written discovery and depositions;
 - (6) the possibility of settlement and scheduling of a settlement conference;
 - (7) the advisability of alternative dispute resolution;
 - (8) the date on which the case should be ready for trial;
 - (9) the advisability of holding subsequent case management conferences; and
 - (10) any other matters which may aid in the disposition of the action.

Id.

Supreme Court Rule 218(c) goes on to state that the court and the parties will make an order that outlines the subsequent course of action that are to be taken at discovery. *Id.* In other words, the order governs the discovery process. *Id.* It then states:

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

Id.

56. FED. R. CIV. P. 26. It is also worth noting that in the Northern District of Illinois, Local Patent Rule 5.1 requires simultaneous expert disclosure in patent cases. L.P.R. 5.1. Proponents of the Program argue that if simultaneous disclosure is required in cases such as these, which are generally very complex and require numerous experts, then it can certainly be utilized in other cases. Interview with Hon. Kathy M. Flanagan, *supra* note 23.

57. *Id.*

58. *Id.*

59. *Id.* There is disagreement among the literature on the topic of whether expert witness disclosure is done simultaneously or not in the federal courts. See Latherow, *supra* note 5 (implying that there is and has always been simultaneous disclosure of expert witnesses under FRCP 26). *But see Illinois Association of Defense Trial Counsel White Paper on Cook County's "Pilot*

F. Other State Courts

A handful of other state courts have rules that mandate simultaneous disclosure of expert witnesses.⁶⁰ California has one of the strongest state statutes requiring simultaneous disclosure.⁶¹ It allows for simultaneous disclosure of expert witnesses upon a request/application.⁶² Arizona requires simultaneous disclosure of expert witnesses in medical malpractice cases, unless good cause

Project” for Simultaneous Expert Witness Disclosure, supra note 1, at 8 (arguing that simultaneous disclosure of expert witnesses is not the norm in the federal courts).

According to the Illinois Defense Counsel,

There may be isolated judges in a federal district court who have adopted it for their own dockets, but those judges are few and far between. As for the judges in the Northern District of Illinois, the IDC is not aware of a single judge who mandates simultaneous disclosure of experts.

Id.

60. Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, at 13, *Brown v. Advocate Illinois Masonic Medical Center* (2011) (No. 09-L-9463).

61. *Carey, supra note 4, at 5.*

62. See CAL. CODE CIV. PROC. § 2034.210. (allowing parties to exchange information).

In California,

Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.

Carey, supra note 4, at 5.

According to the IDC, this rule has been chaotic, to say the least. *Illinois Association of Defense Trial Counsel White Paper on Cook County’s “Pilot Project” for Simultaneous Expert Witness Disclosure, supra note 1, at 8.* That paper states that once the demand is made, the disclosure of witnesses occurs only 50 days before trial in California. *Id.* There, lawyers are not required to disclose opinions and theories that they will be proceeding upon, they are simply required to give a general description of their expert witnesses. *Id.* Because of the vagueness of the disclosure, the lawyers are left to scramble and depose the other sides’ expert witnesses within 50 days of trial. *Id.*

The paper states that in California “[g]amesmanship and motion practice is the rule rather than the exception as the parties spar about when experts will be available for deposition, and which party’s depositions will proceed first - all in the context of an imminent trial date.” *Id.* This can be especially difficult when there are multiple parties who each designate multiple experts. *Id.* The IDC goes on to state how different the California civil justice system is from the system we have here in Illinois. *Id.* Among other things, there is a damage cap in medical malpractice cases of \$250,000, and all construction cases are run by a “special master” who oversees and supervises discovery within those cases. *Id.* Although there is apparently no plan to change the system in California, the IDC argues that the lawyers and judges there have grown accustomed to such a chaotic system, and that it is not one which should be emulated. *Id.*

is shown.⁶³ In October 2010, the Colorado Supreme Court enacted the Colorado Civil Access Pilot Project (“CAPP”), which is a broad-sweeping restriction on expert witnesses.⁶⁴ It mandates simultaneous disclosure in all cases (besides medical malpractice cases) and it strictly limits experts.⁶⁵ In most other states the rules are silent on the sequence and timing of expert disclosure.⁶⁶

G. Objection

Many Defendants in the Pilot Program took extraordinary steps to object. Each filed objections with the Illinois Supreme Court asking for a Writ of Prohibition or a Supervisory Order.⁶⁷

63. ARIZ. R. CIV. P. 16(c). This rule, titled “Scheduling and Subject Matter at Comprehensive Pretrial Conferences in Medical Malpractice Cases,” governs only expert disclosure in medical malpractice cases. *Id.* It states, with respect to the disclosure of standard of care and causation expert witnesses, “Except upon good cause shown, such disclosure shall be simultaneous and within 30 to 90 days after the conference, depending upon the number and complexity of the issues.” ARIZ. R. CIV. P. 16(c)(2).

64. Carey, *supra* note 4, at 6.

65. *Id.*

66. Plaintiff’s Objections to Defendants’-Petitioner’s Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, at 4-5, *Brown v. Advocate Illinois Masonic Medical Center* (2011) (No. 09-L-9463).

67. Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or in the Alternative, for Supervisory Order, *Strzykalski v. The University of Chicago* (2011) (No. 08-L-9820); Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or Alternatively for Supervisory Order, *Lopez v. VHS of Illinois, Inc.* (2011) (No. 09-L-12356); Motion for Leave to File an Original Complaint Seeking Writ of Prohibition or for Supervisory Order, *Baba v. Condell Medical Center* (2011) (No. 09-L-10793); Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, *Brown v. Advocate Illinois Masonic Medical Center* (2011) (No. 09-L-9463). *Johnson & Bell Ltd.*, a civil defense firm based in Chicago, was working on one of the cases that was enrolled in the Pilot Program. *Id.* Patricia Brown, as special administrator of the estate of Michael Brown, filed a lawsuit against Advocate North Side Health Network and its agents alleging seventeen separate counts of negligence. *Id.* at 5. The parties held a case management conference, and the lawsuit was to proceed normally with staggered disclosure of the expert witnesses. *Id.* at 6-7. After all fact discovery had commenced and Rule 213(f)(1) and (f)(2) witnesses had been disclosed and deposed, a case management order was entered which directed the parties to disclose their Rule 213(f)(3) witnesses simultaneously. *Id.* at 7-8. Shortly thereafter, the Defendant filed a motion in the Illinois Supreme Court requesting that the Court issue a Writ of Prohibition vacating the Pilot Program altogether, or, in the alternative, issue a Supervisory Order against the Pilot Program. *Id.* at 1-5. The motion was denied. It is not a ruling on the merits, but, rather, a refusal to exercise discretionary appellate jurisdiction. *See People ex rel. Birkett v. Bakalis*, 752 N.E.2d 1107, 1109 (Ill. 2001) (explaining that supervisory orders are generally disfavored and are only issued when it is shown that the “normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice”).

These writs were denied by the Court.⁶⁸ It seems as though there will be no reviewing court determination of Defendants' objections to the Pilot Program unless and until one of those Defendants suffers an adverse jury verdict and appeals.

III. ANALYSIS

This section details the complexity of what seems to be a very narrow issue. It describes the arguments made in opposition to the Pilot Program and then proceeds to describe the arguments made by those in favor of the Pilot Program. Opponents of the Program argue that it conflicts with various Illinois Supreme Court Rules, improperly alters the plaintiffs' burden of proof, and results in a waste of resources for Defendants. Alternatively, proponents of the Program argue that it cuts expert witness costs, expedites the discovery process, and generally makes more sense.

A. *Opponents of the Pilot Program*

The main arguments made by opponents of the Pilot Program are that it disregards Illinois Supreme Court Rule 21(a), Rule 213, and Rule 3. They also argue that the Pilot Program violates the work product doctrine, and that it improperly alters the plaintiffs' burden of proof.

1. *The Pilot Program Disregards Illinois Supreme Court Rule 21(a)*

Opponents of the Pilot Program argue that it conflicts with Illinois Supreme Court Rule 21(a).⁶⁹ Rule 21(a) allows circuit courts in Illinois to adopt rules as long as: "1) they do not conflict with Supreme Court rules or statutes, and 2) so far as practical, they are uniform throughout the state."⁷⁰ Opponents argue that simultaneous expert disclosure embodied in the Pilot Program conflicts with both of these requirements.⁷¹ As to the first requirement, they argue that the program conflicts with various Supreme Court Rules, which are detailed below.⁷² Also, opponents argue that the Pilot Program is not being used uniformly throughout the state but only by Cook County's Law Division; it is

68. Interview with Hon. Kathy M. Flanagan, *supra* note 23.

69. Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, *Brown v. Advocate Illinois Masonic Medical Center*, *supra* note 67, at 8-9.

70. ILL. SUP. CT. R. 21.

71. Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, *Brown v. Advocate Illinois Masonic Medical Center*, *supra* note 67, at 8-9.

72. ILL. SUP. CT. R. 201; Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, *Brown v. Advocate Illinois Masonic Medical Center*, *supra* note 67, at 8-9.

not being used in the Probate Division, Chancery Division, the County Division or any of the Suburban Districts.⁷³ For all of these reasons, opponents argue, the Pilot Program is in direct conflict with Illinois Supreme Court Rule 21.⁷⁴

2. *The Pilot Program Improperly Limits a Party's Ability to Supplement Witnesses Under Illinois Supreme Court Rule 213*

Parties in the Pilot Program are prohibited from allowing an expert to expand their opinions within the confines of deposition testimony.⁷⁵ Rule 213(g), however, allows for the possibility of disclosure of new opinions in a deposition.⁷⁶ Administrative Order 11-3 states, “[f]ollowing the simultaneous disclosures, the parties may have thirty (30) days to supplement their own disclosures to address any new opinions and/or issues raised in the opposing party’s disclosures.”⁷⁷ This means that the parties can supplement their answers to interrogatories and expert reports, but if they want to supplement their disclosures with new opinions raised in the other party’s disclosure, they must successfully argue that they are in fact “new.”⁷⁸ Otherwise, the supplementation is struck from the record.⁷⁹ Because of this, opponents argue that the Pilot Program and Illinois Supreme Court Rule 213(g) are in conflict.

Opponents also argue the Pilot Program conflicts with Illinois Supreme Court Rule 213(i),⁸⁰ which imposes a duty on the parties to seasonably supplement answers to Rule 213 interrogatories when new or additional information becomes known.⁸¹ It allows parties to supplement their Rule 213 answers up until the time limit imposed on discovery by Illinois Supreme Court Rule 218, which states that discovery must be completed sixty days before the trial.⁸² Administrative Order 11-3, however, only allows for supplementation within thirty days of the parties’ disclosures⁸³

73. *Id.*

74. *Id.*; see *infra* notes 84-83 and accompanying text.

75. Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, *Brown v. Advocate Illinois Masonic Medical Center*, *supra* note 67, at 11.

76. *Id.*

77. Administrative Order 11-3, *supra* note 2.

78. Interview with Hon. Kathy M. Flanagan, *supra* note 23. Under the Pilot Project, an expert is limited to opinions expressed in 213(f)(3) disclosures and may not testify at trial to opinions expressed for the first time at deposition. Interview with Jeanine Stevens, Attorney, Stevens Law Group, in Chi. Ill. (Nov. 2, 2012).

79. *Id.*

80. Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, *Brown v. Advocate Illinois Masonic Medical Center*, *supra* note 67, at 11.

81. ILL. SUP. CT. R. 213.

82. *Id.*

83. Administrative Order 11-3, *supra* note 2.

while Illinois Supreme Court Rule 213 allows for supplementation as long as “seasonable” and within Rule 218 time limits.⁸⁴

3. *The Pilot Program Conflicts with Illinois Supreme Court Rule 3*

Illinois Supreme Court Rule 3 details the rulemaking procedures of the Illinois Supreme Court.⁸⁵ Opponents argue that the Circuit Court is “rewriting Supreme Court Rules and is engaging in rulemaking outside of the rulemaking procedures provided in that rule.”⁸⁶ Because of this, they argue, the Pilot Program was created with “no opportunity for comments and suggestions by the public, bench or bar” prior to implementation.⁸⁷ Moreover, they argue there has been no public record of any competing proposals, or even a public record of the proposal that created Administrative Order 11-3.⁸⁸ Therefore, opponents argue that the Pilot Program violates Illinois Supreme Court Rule 3.⁸⁹

4. *Simultaneous Disclosure of Expert Witnesses Violates the Work Product Doctrine*

The defense bar further argues that simultaneous disclosure is an intrusion into defense counsels’ work product.⁹⁰ The work product doctrine refers to the rule that certain aspects of the lawyer’s work are not subject to discovery.⁹¹ The defense bar argues that prior to the Pilot Program, the defense counsel’s expert witnesses were protected by the work product doctrine until the plaintiff had disclosed their expert witnesses.⁹² Therefore, they

84. ILL. SUP. CT. R. 213.

85. ILL. SUP. CT. R. 3.

86. Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, *Brown v. Advocate Illinois Masonic Medical Center*, *supra* note 67, at 12.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Illinois Association of Defense Trial Counsel White Paper on Cook County’s “Pilot Project” for Simultaneous Expert Witness Disclosure*, *supra* note 1, at 7.

91. ILL. SUP. CT. R. 201(b)(2). The work product doctrine is codified in Illinois Supreme Court Rule 201(b)(2). *Id.* It states, “material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney.” *Id.* The main purpose of a work product doctrine is to protect information collected for use at trial by a diligent attorney to be used by a less diligent attorney who, instead of collecting the information him or herself, seeks to use the discovery rules to obtain it. *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 329 (Ill. 1991).

92. *Illinois Association of Defense Trial Counsel White Paper on Cook County’s “Pilot Project” for Simultaneous Expert Witness Disclosure*, *supra* note 1, at 6.

argue, the Pilot Program is violating the time-honored tradition of the doctrine by forcing defendants to disclose their work product before it is necessary.⁹³

5. *The Pilot Program Improperly Alters the Plaintiffs' Burden of Proof*

The defense bar also argues that the Pilot Program alters the burden of proof in civil litigation cases by shifting the burden from the plaintiff to the defendant.⁹⁴ Plaintiffs generally have the burden of proof because they are the ones who initiated the lawsuit.⁹⁵ The burden of proof has two different elements: (1) the burden of going forward, or producing evidence; and (2) the burden of persuasion.⁹⁶ The party with the burden of proof has the burden

93. *Id.*

94. *Id.*

95. *Ambrose v. Thornton Twp. Sch. Trustees*, 654 N.E.2d 545, 548 (Ill. App. Ct. 1995).

96. *Id.*; see also *Illinois Association of Defense Trial Counsel White Paper on Cook County's "Pilot Project" for Simultaneous Expert Witness Disclosure*, *supra* note 1, at 7 (arguing that the Pilot Program alters the burden of proof). The IDC's paper states that, except as to its affirmative defenses, the defendant is not required to affirmatively prove anything. *Id.* The plaintiff must prove all elements of their claim first. *Id.* The defendant can then either negate the proof of these elements or raise an affirmative defense. *Id.* But the defendant, up until that point, is not required to prove anything. *Id.* Therefore, the defense bar argues, forcing the defense to disclose expert witnesses completely alters the plaintiffs' burden of proof. *Id.*

Moreover, the defense bar argues, when a plaintiff either fails to attain an expert witness or does attain an expert witness but the plaintiff is unable to prove all of the elements of negligence, the defendant will be entitled to summary judgment. *Id.* Simultaneous disclosure will prevent this possibility. *Id.* Therefore, the paper states that the "simultaneous disclosure rule will not promote judicial efficiency or fairness in such cases, as it will prevent the defendants from moving for summary judgment until they have already spent the significant time and expense in hiring experts and preparing the initial defense expert disclosures." *Id.*

Sanders v. Frost is a good example of this argument. 251 N.E.2d 105 (Ill. App. Ct. 1969). In that case, the plaintiff brought a medical malpractice suit against two physicians. *Id.* He alleged that they were negligent in treating him for injuries to his pelvic area that arose out of an automobile accident. *Id.* The plaintiffs failed to provide expert testimony that supported their claim. *Id.* at 108. The defendants moved for summary judgment which was subsequently granted. *Id.* at 105. The Fifth District Appellate Court of Illinois stated,

In a malpractice action a physician will be held responsible for injuries resulting from his want of reasonable care, skill and diligence in his practice. The plaintiff must prove by affirmative evidence that the defendant was unskillful or negligent and that his want of skill or care caused injury to the plaintiff. It is not enough to prove that he made a mistake or that his treatment harmed the plaintiff; proof of a bad result or mishap is no evidence of lack of skill or negligence. Generally, it is necessary for the plaintiff to show by expert testimony not only that the

to meet both of these elements in order to establish a *prima facie* case.⁹⁷ Once it is shown that they can make out a *prima facie* case with their expert witnesses, it is then the defense's job to raise an affirmative defense.⁹⁸ With simultaneous expert disclosure, though, both sides disclose their expert witnesses at the same time.⁹⁹ Opponents argue that if the plaintiff cannot make out a *prima facie* case, then the defense counsel will have needlessly retained experts.¹⁰⁰

injury occurred, but that such event does not ordinarily occur in the normal course of events without negligence.

Id. at 107. The Court in *Sanders* concluded that because the plaintiff did not bring forth expert testimony, there was no triable issue of fact for a jury to consider. *Id.* at 108.

A similar situation arose in *Higgins v. House*. 680 N.E.2d 1089 (Ill. App. Ct. 1997). In *Higgins*, the plaintiffs brought a medical malpractice case against defendant, Dr. Stephen House. *Id.* at 1091. During the discovery process, the plaintiffs failed to comply with numerous requests from the defendant to disclose their expert witnesses. *Id.* The defendant then moved for summary judgment, which was granted by the Circuit Court. *Id.* The plaintiffs moved to set aside the judgment in the Circuit Court but the motion was denied. *Id.* The plaintiffs appealed to the Fourth District Appellate Court of Illinois which affirmed the granting of summary judgment. *Id.* In doing so, the Court stated,

In a medical malpractice case, Illinois law mandates a plaintiff prove (1) the proper standard of care by which to measure the defendant's conduct, (2) a negligent breach of the standard of care, and (3) resulting injury proximately caused by the defendant's lack of skill or care. Necessary to the establishment of a *prima facie* case of medical negligence is the presentation of expert testimony to establish the applicable standard of care, a deviation from the standard, and the resulting injury to the plaintiff.

Id. at 1092.

The Plaintiffs' attorney in that case argued to the court that his mistakes in failing to comply with the discovery requests and the subsequent court orders should not be used to punish the plaintiffs. *Id.* at 1093. The Court dismissed the argument by stating that, if they were to reverse the granting of summary judgment, they would be burdening the sins of the plaintiffs' counsel upon the defendant, which they did not wish to do. *Id.*

97. *Illinois Association of Defense Trial Counsel White Paper on Cook County's "Pilot Project" for Simultaneous Expert Witness Disclosure*, *supra* note 1, at 7.

98. *Id.*

99. Administrative Order 11-3, *supra* note 2.

100. *Illinois Association of Defense Trial Counsel White Paper on Cook County's "Pilot Project" for Simultaneous Expert Witness Disclosure*, *supra* note 1, at 7-8. Many opponents of the Pilot Program argue that it will result in a waste of resources. *Id.* In the common practice of staggering expert witnesses, the defense finds out who the plaintiffs' experts are and they depose them so that they essentially are shown most, if not all, of what the plaintiff will be presenting at trial. *Id.* They then obtain their own expert witnesses to specifically rebut what the plaintiff is trying to prove. *Id.* Especially in medical malpractice cases against a hospital, the IDC states,

it normally is not until the depositions of the plaintiffs' experts are taken that the defense will be made fully aware of all the various

B. Proponents of the Program

Proponents of the Pilot Program argue that it speeds up discovery and that it is wholly consistent with Illinois Supreme Court Rules. They also argue that, in reality, the witnesses of both parties are known at the time of simultaneous disclosure.

1. Speeds Up Discovery and Cuts Costs

The goal of the Pilot Program is to speed up the discovery process, thereby cutting expert witness costs.¹⁰¹ Proponents of the program argue that, generally speaking, the process of disclosing and deposing expert witnesses generally takes between 330 and 510 days.¹⁰² The present sequence of events is incredibly time consuming and, as a result, it becomes very expensive.¹⁰³ Proponents argue, therefore, that there is a clear need for reform of some kind, and the Pilot Program “represents a just and

medical hospital specialties that may be involved in the experts’ criticisms of the care of the plaintiff (e.g. emergency room personal, nurses, anesthesiologists, radiologists, etc.) for which appropriate defense experts in those specialties will need to be retained.
Id. at 5.

Defendants argue that, when forced to simultaneously disclose experts, they will be hiring experts in the dark, without any idea of exactly what the plaintiff will be trying to prove. *Id.* at 7. The IDC sums up this argument by stating,

the defendant must decide upon- and incur substantial expense for potentially multiple experts that may never have been otherwise retained- and disclose experts before it is ever given the chance to challenge the qualifications and bases of the opinions disclosed by the plaintiff.
Id. at 8; *But see* Interview with Jeanine Stevens, *supra* note 78 (arguing that, in reality, this is unlikely to happen). Jeanine Stevens is a plaintiffs’ attorney who has practiced in Chicago for quite some time. *Id.* She argues that, after all fact discovery has been completed and all Rule 213(f)(1) and (2) witnesses have been disclosed and deposed, it is very unlikely that the defense counsel will not know what expert witnesses they need. *Id.* At that point in the discovery process, it is clear what theories the plaintiff will be proceeding upon. She is a proponent of the Program. *Id.* The Pilot Program, she believes, evens the playing field between the plaintiff and defendant and takes away the defendants’ advantage. *Id.*

101. *Id.*

102. *Overview of Simultaneous Disclosure of SCR 213(f) Witnesses, supra* note 11, at 7(h). *But see Illinois Association of Defense Trial Counsel White Paper on Cook County’s “Pilot Project” for Simultaneous Expert Witness Disclosure, supra* note 1, at 8. (arguing that, in reality, the time required under simultaneous disclosure is not very different from the time required in the consecutive disclosure process). The time estimated for consecutive disclosure of expert witnesses includes “rebuttal experts” which, according to the IDC, are exceedingly rare. *Id.*

103. *See* Plaintiff’s Objection to Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or Alternatively for Supervisory Order, at 5, *Lopez v. VHS of Illinois, Inc.* (2011) (No. 09-L-12356) (arguing that the Pilot Program exemplifies a realistic method of cutting costs in discovery).

realistic process to study a method to remove some of the expense and delay from cases in which expert testimony is central.”¹⁰⁴

2. *The Pilot Program is Wholly Consistent with Illinois Supreme Court Rules*

Contrary to the argument that the Program conflicts with various Illinois Supreme Court Rules, proponents of the Program claim that it is wholly consistent with them.¹⁰⁵ Proponents argue that the circuit courts are empowered by the rules with broad discretion to control the discovery process.¹⁰⁶ Rule 218 mandates that all dates set for the disclosure of opinion 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 the trial will commence.¹⁰⁷

They note that the Illinois Supreme Court Rules say nothing about the sequence of disclosure.¹⁰⁸ Proponents argue that Rule 218, when read in conjunction with Rule 201(e), which authorizes that discovery be conducted in any sequence, specifically vests the trial court with discretion as to the sequence of discovery.¹⁰⁹

They also argue that both Rule 3 and Rule 21 have no application to this controversy.¹¹⁰ Administrative Order 11-3 is not a rule; instead, it is “an administrative order to guide the conducting of a study which involves the entry of orders which are already authorized under existing Supreme Court Rules- it is not itself a new rule.”¹¹¹ Therefore, proponents argue that because

104. *Id.* at 5

105. *Id.*; Plaintiff-Respondent’s Objections to Defendants-Petitioners Motion for Leave to File an Original Complaint Seeking Writ of Prohibition or for Supervisory Order, *Baba v. Condell Medical Center* (2011); Plaintiff’s Objections to Defendants-Petitioners’ Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, *Brown v. Advocate Illinois Masonic Medical Center supra* note 66.

106. *Id.*

107. ILL. SUP. CT. R. 218.

108. Plaintiff’s Objection to Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or Alternatively for Supervisory Order, at 2, *Lopez v. VHS of Illinois, Inc. supra* note 103.

109. *Id.* at 2-3. Case law has also interpreted these rules to vest the trial court with broad discretion when it comes to pretrial discovery. *Id.*; *see also* *Popeil v. Popeil*, 315 N.E.2d 629, 631 (Ill. App. Ct. 1974) (stating “[I]n the area of pretrial discovery, [the trial courts’] powers are extremely broad”); *Anastos v. O’Brien*, 279 N.E.2d 759, 764 (Ill. App. Ct. 1972) (stating “[I]t is well known among lawyers that wide discretion is given a trial judge to control the taking of discovery”); *Cohn v. Bd. of Ed. of Waukegan Twp. High Sch. Dist. No. 119, Lake County*, 254 N.E.2d 803, 804 (Ill. App. Ct. 1970) (explaining that a trial judge has wide discretion in controlling discovery).

110. Plaintiff’s Objection to Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or Alternatively for Supervisory Order, at 4, *Lopez v. VHS of Illinois, Inc. supra* note 103.

111. *Id.*

Rules 3 and 21 govern *rules*, and the Pilot Program is an experiment, said rules are irrelevant to the program.

3. *Administrative Order 11-3 is Wholly Consistent with the Goals of the Illinois Supreme Court Rules*

The Pilot Program advances the goals of the Illinois Supreme Court Rules by eliminating surprise and discouraging tactical gamesmanship. “Discovery is not a tactical game; rather, it is intended to be a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial.”¹¹² Proponents of the Program argue that it does just that.¹¹³ Moreover, in 1967, Illinois Supreme Court Rule 201(e) stated that discovery procedures were to be conducted in the order that the parties were noticed, which usually resulted in the plaintiff going first.¹¹⁴ Later, in 1978, the rule was amended to state that the methods of discovery may be conducted in any sequence.¹¹⁵ The Committee Comments explain that the amendment was introduced “to adopt the practice followed in the Federal courts since 1970, permitting all parties to proceed with discovery simultaneously unless the court orders otherwise.”¹¹⁶ Therefore, proponents of the Program argue, the simultaneous disclosure of expert witnesses is wholly consistent with the goals of the Illinois Supreme Court Rules Committee when enacting and amending the Illinois Supreme Court Rules.

4. *In Reality, the Witnesses of Both Parties Are Known at the Time of Simultaneous Disclosure*

Proponents of the Program disagree with the argument that simultaneous disclosure will force the defense to retain their experts in the dark.¹¹⁷ They argue that, realistically, in most complex litigation cases, both parties know which experts that will be called upon.¹¹⁸ Furthermore, simultaneous disclosure of witnesses occurs when all fact discovery has concluded.¹¹⁹

112. Boland v. Kawasaki Motors Mfg. Corp., USA, 722 N.E.2d 1234, 1239 (Ill. App. Ct. 2000).

113. Plaintiff's Objection to Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or Alternatively for Supervisory Order, at 2, Lopez v. VHS of Illinois, Inc. *supra* note 103.

114. ILL. SUP. CT. R. 201 comm. cmt. ¶ (e).

115. *Id.*

116. *Id.*

117. *Id.*

118. Plaintiff's Objections to Defendant-Petitioner's Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for Supervisory Order, at 3, Brown v. Advocate North Side Health Network, *supra* note 67.

119. *Id.* The theory of the case is already set forth in plaintiff's complaint, 2-622 report (in the case of a medical malpractice action), written and especially all party, fact, witness, and treating physician (in the case of a medical

Therefore, they argue that there is no need for the defense to identify and depose the plaintiffs' Rule 213(f) witnesses before they are able to hire appropriate expert witnesses.¹²⁰

IV. PROPOSAL

This Comment proposes a structural alternative to the institutionalization of the Pilot Program. The Proposal's aims are to capture the goals of the Circuit Court of Cook County's Pilot Program and to provide for a principled method of expert discovery consistent with the plaintiff's burden of proof. It first discusses the problems that the Pilot Program attempts to solve and then proposes an alternative to the Pilot Program by suggesting that two Illinois Supreme Court Rules be amended.

A. The Discovery Process Needs to be Expedited

As the 2011 National Jury Summit White Paper states, "discovery is no longer the process by which parties prepare for trial; it has become the whole process."¹²¹ Although that Paper addressed the issue on a national scale, the Circuit Court of Cook County, Law Division, is no exception. This led to the formation of the Pilot Program, as its creators recognized the need for a change in the way discovery is conducted locally. This sort of experimentation is precisely the type of ingenuity that is needed to fix the problem.

Both the historically accepted practice of staggering witness disclosure and a rule that mandates simultaneous disclosure, however, fail to recognize that a "one-size-fits-all" approach may not always be appropriate.¹²² Complex litigation is, as its name

malpractice action) depositions, which are complete prior to the 213(f)(3) witness disclosures. *Id.* Because of this, the defense should know from the very beginning how to defend the case and they should have consultants on board throughout the course of the case. Interview with Hon. Kathy M. Flanagan, *supra* note 23.

120. *Id.*

121. Univ. of Denver Inst. for the Advancement of the Am. Legal Sys., *2011 National Jury Summit: A Call to Action*, *supra* note 39, at 3. For example, in a complex construction case, the scope of discovery and the time devoted to discovery should be much greater than the scope of discovery in a case arising out of a slip and fall at a grocery store.

122. See Univ. of Denver Inst. for the Advancement of the Am. Legal Sys., *2011 National Jury Summit: A Call to Action*, *supra* note 39, at 5. (explaining that the "one size fits all" approach to the current federal and most state rules is useful in many cases but rulemakers should have flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently"); Interview with Anthony Longo, Professor, The John Marshall Law Sch., Chi. Ill.

A local rule or standing order that requires simultaneous expert disclosure in all cases, or even in a certain class of cases, however defined, is inconsistent with Illinois law. It is fundamental that the trial

implies, complex. Advocates of universal simultaneous expert witness disclosure and universal staggered disclosure represent extremes. This is so because the current Illinois Supreme Court Rules fail to provide a mechanism that clearly addresses this stage of discovery. This proposal encourages the Illinois Supreme Court Rules Committee to recognize these problems and make amendments to the current rules.

B. Amend Rule 213(f)(3)

This Comment first proposes that the Illinois Supreme Court Rules Committee amend Illinois Supreme Court Rule 213(f)(3) to recognize what appears to be an obvious but unspoken distinction between expert witnesses by breaking down those experts that are considered “controlled expert witnesses” into two categories: (1) burden-carrying experts and (2) non-burden-carrying experts. This proposed amendment would not eliminate the current language of Rule 213(f)(3) but would further clarify it as follows (new material is emphasized):

(3) 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.

(i) A “burden-carrying expert” is a “controlled expert witness” whose testimony is essential to meet the elements of a claim or a defense.

(ii) A “non-burden-carrying expert” is a “controlled expert witness” whose testimony is not essential to meet the elements of a claim or defense.

This distinction would then aid the court in determining whether expert disclosure is staggered or simultaneous, according to what this Comment also proposes, an amendment to Rule 201(e). Though this nomenclature has not been utilized, after listening to both sides of the debate, opponents of the Program seem to talk about burden-carrying experts while proponents focus

judge has wide discretion over discovery matters. In any given case, the trial judge of course has discretion to sequence the discovery, and so it follows then, that at least in some cases, that sequence could justifiably mean simultaneous expert disclosure. But to force simultaneous disclosure on any case, or class of cases, as a matter of course, robs the particular trial judge of the discretion to order discovery the best way he or she sees fit. Only the Illinois Supreme Court can make a rule that deprives a trial judge of discretion in discovery, and even then you always have Rule 183 which wisely permits alterations for good cause.

Id.

on non-burden-carrying experts and their tendency to delay litigation.

1. *Burden-Carrying Experts*

When essential elements of the plaintiff's case rest on its experts' opinions, they should be considered "burden-carrying experts." Without these experts, the plaintiff would be unable to carry its burden and summary judgment would be available to the defendant.¹²³

An explanation of burden-carrying experts is best illustrated by a medical malpractice case whereby the burden is on the plaintiff to prove the following through expert testimony: (1) the proper standard of care imposed on the defendant; (2) a failure to meet that standard of care, and; (3) causation, with few exceptions.¹²⁴ Expert witnesses are needed to prove each element in a medical malpractice case because jurors are not skilled in the practice of medicine and would find it difficult to come to a

123. *Studt v. Sherman Health Sys.*, 951 N.E.2d 1131, 1136 (Ill. 2011); *Colburn v. Mario Tricoci Hair Salons and Day Spas, Inc.*, 972 N.E.2d 266, 276 (Ill. App. Ct. 2012). In *Colburn*, the Court stated,

[I]n an ordinary negligence case, the standard of care required of a defendant is to act as would an ordinary, careful person or a reasonably prudent person. Generally, no expert testimony is necessary to prove the standard of care in an ordinary negligence case. In contrast, in a professional negligence case, the standard of care required of defendant is to act as would an ordinarily careful professional. Generally, expert testimony is necessary to prove the standard of care in a professional negligence case. This requirement is based on the simple fact that without expert testimony, jurors, not skilled in the profession, are not equipped to judge the professional's conduct.

Id. (citations omitted).

124. *See Alm v. Loyola Univ. Med. Ctr.*, 866 N.E.2d 1243, 1248 (Ill. App. Ct. 2007) (stating "to prove a claim of medical malpractice a plaintiff must show that (1) there was a standard of care by which to measure the defendant's conduct, (2) the defendant negligently breached that standard of care, and (3) the defendant's breach was the proximate cause of the plaintiff's injury. Each element must be presented by expert testimony"). The exception to the general rule exists where a doctor is so clearly negligent that the jury does not need the aid of an expert witness. *See Voykin v. Estate of DeBoer*, 733 N.E.2d 1275, 1280 (Ill. 2000) (explaining that expert testimony is NOT required in medical malpractice actions if the physician's conduct is so grossly negligent or the treatment so common that a layman could readily appraise it); *see also Montgomery v. Americana Nursing Centers, Inc.*, 349 N.E.2d 516, 518 (Ill. App. Ct. 1976) (explaining that unless the doctor is so "grossly negligent as to fall within the common knowledge of laymen," it is proper to direct a verdict in his favor where there was no expert testimony that the defendant doctor violated the proper standard of care); *see also* RESTATEMENT (SECOND) OF TORTS § 328D (1965) cmt. d (explaining "[T]here are other kinds of medical malpractice, as where a sponge is left in the plaintiff's abdomen after an operation, where no expert is needed to tell the jury that such events do not usually occur in the absence of negligence.").

decision without the help of medical evidence.¹²⁵ In essence, because every element of a medical malpractice case generally rests on the experts' opinions, those experts would be considered burden-carrying experts.

2. *Non-Burden-Carrying Experts*

Juxtaposed against what was explained above, there are also cases in which experts are utilized but are not required in order to meet the elements of a claim or a defense. These would be considered "non-burden-carrying experts." These might include personal injury cases that stem from a dog bite, a slip and fall, or battery.¹²⁶ Oftentimes, in cases such as these, experts are called but they are not necessarily required in order to meet an essential element of the cause of action or of a defense. These may include human factors experts,¹²⁷ premises security experts,¹²⁸ etc. Historically, parties can spend over a year on these non-burden-carrying experts which is directly at odds with the principle that discovery should be proportionate to whatever is being discovered.¹²⁹ It seems that these are the experts that frustrate

125. RESTATEMENT (SECOND) OF TORTS § 328D. In most medical malpractice cases, this court has recognized that expert testimony is normally necessary "because jurors are not skilled in the practice of medicine and would find it difficult without the help of medical evidence to determine any lack of necessary scientific skill on the part of the physician." *Id.*

126. *See also* Thornton v. Garcini, 888 N.E.2d 1217, 1222 (Ill. App. Ct. 2008) *aff'd*, 928 N.E.2d 804 (2010) (holding that "unlike a medical malpractice claim, a claim for emotional distress pursuant to a general-negligence approach, does not require expert testimony in order for the jurors to make their determination. Such a conclusion is consistent with our supreme court's application of a general-negligence approach to a direct victim's claims of negligent infliction of emotional distress"); Kinzinger v. Tull, 770 N.E.2d 246, 253 (2002) (explaining that an elbow injury arising out of an automobile accident did not require expert testimony due to the fact that "in ordinary negligence cases, no general rule requiring expert testimony exists").

127. *See generally* 40 AM. JUR. TRIALS 629 (originally published in 1990) (explaining that "'human factors' is a study which is devoted to the interaction between humans and their machines"). Human factor experts may be called on to testify in a wide variety of civil cases. *Id.* at B. § 9. These include product liability cases, premises liability cases, railroad accidents, traffic accidents, aircraft accidents, and cases involving slip and falls. *Id.*

128. 1 PREMISES LIABILITY 3d § 23:4 (explaining "experts commonly testify in premises liability cases involving escalators, walking surfaces, both inside and outside the premises, adequacy of markings or warnings on glass windows or doors, sufficiency of lighting, construction of stairways and ramps, and the cause, origin, and spread of fires").

129. Univ. of Denver Inst. for the Advancement of the Am. Legal Sys., 2011 *National Jury Summit: A Call to Action*, *supra* note 39, at 5. That Paper argues that discovery should be conducted in such a way so that it is in proportion to the case. *Id.* For example, in a complex construction case the scope of discovery and the time devoted to discovery should be much greater than the scope of discovery in a case arising out of a slip and fall at a grocery

judges and lawyers because they are not necessarily essential to proving an element of a claim or a defense yet an inordinate amount of time is spent on them if their disclosure is staggered.

C. Amend Rule 201(e)

In conjunction with the proposed amendment to Rule 213(f)(3), this Comment proposes that the Illinois Supreme Court Rules Committee consider amending the sequencing aspect of Illinois Supreme Court Rule 201(e). This Comment would not eliminate Rule 201's current language but proposes the following amendments (new material is emphasized):

Except in the case of Illinois Supreme Court Rule 213(f)(3) witnesses, unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(1) In the case of Illinois Supreme Court Rule 213(f)(3) witnesses, if the parties so stipulate, discovery may occur in the manner in which they request. If the parties are unable to do so, the court shall take the following factors into consideration:

- (i) whether or not burden-carrying experts are at issue;*
- (ii) the complexity of the case; (iii) the age of the case;*
- (iv) the age and/or health of the parties;*
- (v) any other factors.*

If the parties are unable to agree on the sequencing of Rule 213(f)(3) witness disclosure, they may submit a motion asking the judge to either stagger the disclosure of expert witnesses or to conduct it simultaneously. The judge will then decide based upon a number of factors whether expert disclosure should be staggered or simultaneous.

The first factor, whether or not burden-carrying experts are at issue, although not determinative, may quite possibly prove to be the most important. In order to be consistent with the plaintiff's burden of proof, in cases where burden-carrying experts are needed, the rule would allow the balance to tilt in favor of a staggered disclosure of expert witnesses. In the case of non-burden-carrying experts, the court could be more likely to find that simultaneous disclosure would be appropriate. This would speed up the discovery process by allowing non-essential experts to be disclosed and deposed quickly. Moreover, by clarifying the two types of experts and explicitly making those that are non-burden-carrying less significant, the courts will be equipped with added guidance when it comes to using their discretion. This is what is

store. Proportionality, as that paper argues, should be the "most important principle applied to all discovery." *Id.*

missing in the current Rule 201(e).

The other four factors would further provide the courts with guidance in determining the sequence of disclosure. One can easily imagine a case where burden-carrying experts are at issue but simultaneous disclosure is nonetheless appropriate. The last factor recognizes this issue, and provides for a “catch all” factor, which is consistent with Illinois law in that it vests the trial courts with wide discretion over pre-trial matters.¹³⁰

Although this proposed amendment may initially increase a judge’s workload, which is an extremely demanding job as is,¹³¹ it would hopefully streamline the duration of discovery in general, which would ultimately be beneficial. By breaking down controlled expert witnesses into two different categories, the courts will be better guided in determining the sequencing of expert witness disclosure under the proposed amendment to rule 201(e). Also, this proposed amendment seems to solve some of the most passionate disagreements on both sides.

130. See *TruServ Corp. v. Ernst & Young, LLP*, 876 N.E.2d 77, 86 (Ill. App. Ct. 2007) (stating “it is firmly established that a circuit court has wide latitude in ruling on discovery motions, and a court of review will not disturb such a ruling unless it constitutes a manifest abuse of discretion”); see also *Redelmann v. K.A. Steel Chemicals, Inc.*, 879 N.E.2d 505, 511 (Ill. App. Ct. 2007) (stating “it is well established that trial courts have wide discretionary powers in matters of pretrial discovery” and “it is equally well-established that trial courts possess the inherent authority to control their docket”).

131. Judge W.J. Lassers, *The Craft of Motion Judging*, 10-APR CBA Rec. 18 (Apr. 1996), at 18. In his article, Retired Judge Willard J. Lassers, details the complexities of sitting as a motion judge in the Cook County Circuit Court, Law Division. *Id.* He talks about the dual job motion judges have, which involves ruling on motions and moving cases to trial. *Id.*

In ruling on motions, the judge must rely on previous orders, motions from the attorneys, and oral arguments. *Id.* This is a big job. *Id.* They must take the facts and apply the law to each case. *Id.* In granting motions for dismissal, which may not be appealed, they have to be very careful to ensure justice. *Id.* In the meantime, they must rule on pre-trial motions of all kinds. *Id.* In the process of doing so, they also must encourage mediation and settlement. *Id.*

When describing the task of moving cases to trial, Judge Lassers states, the task is challenging, demanding and exasperating. It is difficult to close the pleadings because the law is generous about amending allegations and adding parties. It is difficult to close discovery and keep it closed. The most difficult job is to provide final determination to a legal issue of any importance. Like a vampire at midnight, it springs back to life. Defendant may raise a legal issue in a Section 2-615 motion, then plead the same issue under Section 2-619, then assert it as an affirmative defense, then present it in a motion for summary judgment. Plaintiffs are equally persistent. Because most cases in the Law Division are on an assembly line, losing counsel can raise the question again, in a new context if need be, once the case has moved to a new judge.

Id.

V. CONCLUSION

It is clear that the discovery process in the Law Division of Cook County's Circuit Court needs to be expedited somehow. Mandating the simultaneous disclosure of expert witnesses is one way of doing so. However, it is important to avoid a "one-size-fits-all" approach so that judges may still use their discretion when it comes to the sequencing of expert witness disclosure. It would be very beneficial for the Illinois Supreme Court Rules Committee to provide the courts with added guidance when it comes to this stage of discovery. This will ensure a more just process, while at the same time streamlining some cases by allowing for simultaneous disclosure. Unfortunately, the current Illinois Supreme Court Rule 201(e), and, to some extent Rule 213(f)(3), is unsatisfactory. A revision will provide much needed guidance for individual judges to exercise their discretion on a case-by-case basis.

