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ARTICLES

JAWS XVI: THE EXCEPTIONS THAT ATE RULE 220

CHARLES W. CHAPMAN*

INTRODUCTION

Do you remember the series of scenes from the first Godfather movie? Sonny Corleone receives the call from his sister, beaten, black-eyed and sobbing. He rushes to his car and into the trap at the toll booth. He dies, ripped apart by machine guns. Two scenes later Marlon Brando is at the funeral parlor. He looks at the mangled body, looks away, then speaks six words in his understated whisper, "Look how they massacred my boy." As a member of the Illinois Supreme Court's committee on discovery who worked on Supreme Court Rule 220, I feel a certain kinship to Brando in that scene. While Brando's fictional son was riddled by machine guns, Supreme Court Rule 220 has been riddled by exceptions.

Rule 220 was promulgated by the Illinois Supreme Court in 1984 to deal with the recurring problem of late disclosure of experts and their opinions. The supreme court committee which drafted Rule 220 found the expert provisions of the Illinois Code of Civil Procedure inadequate.¹ Rule 220 attempts to correct the problem by providing more specific time limits on the disclosure of both the expert's identity as well as the expert's opinions. Supreme Court Rule 220 has four subsections in which it defines experts and consultants, details disclosure requirements, develops discovery provisions, and describes the limits of an expert's testimony.² Rather

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1. "[D]isclosure of the identity of expert witnesses shall be made to all parties and the court in sufficient time in advance of trial so as to insure a fair and equitable preparation of the case by all parties." 735 ILL. COMP. STAT. 5/2-1003(c) (1993) (ILL. REV. STAT. ch. 110, para. 2-1003(c) (1991)).

2. Each subsection deals with a separate aspect of the treatment of experts, and each has been the subject of treatment by the courts. *See, e.g.*, Tzystuck v. Chicago Transit Auth., 124 Ill. 2d 226, 529 N.E.2d 525 (1988) (holding that treating physicians are not Rule 220 experts); Schnuck Markets, Inc. v. Soffer,

than examining the rule by section, however, this paper discusses the numerous exceptions to Rule 220 disclosure requirements that have cast doubt upon the rule's future effectiveness. Cases illustrating these exceptions will be grouped into the following categories:

- (1) the treating doctor exception;
- (2) the fact (not opinion) exception;
- (3) the merely an update exception;
- (4) the further elaboration exception;
- (5) the not in anticipation of litigation exception;
- (6) the party/owner exception;
- (7) the no inquiry exception;
- (8) the opinion elicited during cross exception;
- (9) the no surprise exception;
- (10) the unusual circumstances exception;
- (11) the harmless error exception;
- (12) the general discovery disclosure exception;
- (13) the opinion formulated as part of the job exception;
- (14) the official report exception;
- (15) the previously disclosed report exception; and
- (16) the intimately involved with the subject matter of the litigation exception.

EXCEPTION NO. 1:
THE TREATING DOCTOR EXCEPTION

A. Treating Doctor Exception

The treating doctor exception is the most important exception for two reasons. First, it is one of only two exceptions sanctioned by the Illinois Supreme Court;³ second, some of its language has been used by appellate courts to allow the unwarranted late disclosure of

213 Ill. App. 3d 957, 572 N.E.2d 1169 (5th Dist. 1991)(admission of testimony of defense expert was error where his identity not timely disclosed); *Huelsmann v. Berkowitz*, 210 Ill. App. 3d 806, 568 N.E.2d 1373 (5th Dist. 1991)(interrogatory answer did not comply with Rule 220 requiring disclosure of identity qualifications, conclusions, opinions, bases for opinions, and anticipated subject matter of testimony); *Fawcett v. Reinertson*, 131 Ill. 2d 380, 580 N.E.2d 558 (1989)(party/owner exception); *Hill v. Ben Franklin Savings & Loan Ass'n*, 177 Ill. App. 3d 51, 531 N.E.2d 1089 (2d Dist. 1988)(plaintiff landowner not an expert as defined in 220(a) because not retained for purpose of rendering opinion at trial); *Fogarty v. Parichy Roofing Co.*, 175 Ill. App. 3d 530, 529 N.E.2d 1055 (1st Dist. 1988). See *infra* notes 80-82 and accompanying text for a discussion of the limits of an expert's testimony under Rule 220(d).

3. *Tzystuck*, 124 Ill. 2d at 226, 529 N.E.2d at 525; *Wilson v. Chicago Transit Auth.*, 126 Ill. 2d 171, 533 N.E.2d 894 (1988).

either identity or opinions of experts.⁴ In *Tzystuck v. Chicago Transit Authority*,⁵ the supreme court recognized the treating doctor exception. That recognition was restated in *Wilson v. Chicago Transit Authority*.⁶ The *Tzystuck* court held that treating physicians should not be considered Rule 220 experts since they are consulted for treatment and not retained to render an opinion at trial.⁷ The court further held that treating doctors may give opinions at trial since those opinions were developed during the course of treatment and completely apart from any litigation.⁸ A physician's observations while treating a patient may have value as evidence at trial, but that value is merely secondary to the treatment. The court stated:

Although the defendants argue that "retained" in Rules 220(b)(1) and (c) refers broadly to witnesses who are "requested" to give an opinion within their field of expertise, we consider it obliges litigants to disclose the identity and opinions only of those witnesses who are engaged for the purpose of giving an expert opinion at trial. It may be said that the connection between a medical expert who is "retained to render an opinion at trial" and the party to the suit may be litigation-related. . . . Treating physicians, on the other hand, typically are not "retained to render an opinion at trial" but are consulted, whether or not litigation is pending or contemplated, to treat a patient's physical or mental problem. While treating physicians may give opinions at trial, those opinions are developed in the course of treating the patient and are completely apart from any litigation. Such an opinion is not formed in anticipation of a trial, but is simply the product of a physician's observations while treating the patient, which coincidentally may have value as evidence at a trial. In this respect, the opinions of treating physicians are similar to those of occurrence witnesses who testify, not because they were retained in the expectation they might develop and give a particular opinion on a disputed issue at trial, but because they witnessed or participated in the transactions or events that are part of the subject matter of the litigation.⁹

The court further indicated that the identity and opinions of treating doctors could be obtained through other discovery rules, citing Supreme Court Rule 201(b)(1).¹⁰ Finally, *Tzystuck* held that the defendant, not the plaintiff, must pay the deposition witness fees of

4. See *infra* text accompanying notes 100-109 for a discussion of the appellate court's use of *Tzystuck* to justify exceptions to Rule 220.

5. *Tzystuck*, 124 Ill. 2d at 234, 529 N.E.2d at 528.

6. *Wilson*, 126 Ill. 2d at 176, 533 N.E.2d at 897. Illinois appellate courts adopted the exception prior to *Tzystuck* and *Wilson*. See, e.g., *Ryan v. Mobil Oil Corp.*, 157 Ill. App. 3d 1069, 510 N.E.2d 1162 (1st Dist. 1987).

7. *Tzystuck*, 124 Ill. 2d at 234, 529 N.E.2d at 528.

8. *Id.*

9. *Id.* at 234-235, 529 N.E.2d at 528-529.

10. ILL. S.C.T. RULE 201(b)(1) (1989) (ILL. REV. STAT. ch. 110A, para. 201 (1991)). *Tzystuck* also noted the potential unfairness of imposing Rule 220's severe sanctions on a party who did not have control of a witness. *Tzystuck*, 124 Ill. 2d at 237, 529 N.E.2d at 530.

a treating doctor.¹¹

When again confronted with the issue, a sharply divided Illinois Supreme Court decided in *Wilson* to affirm the adoption of the treating doctor exception.¹² *Wilson* involved a physician who had last treated the plaintiff three years and seven months before the trial. His name was listed in answers to interrogatories. The defendant objected to any opinions concerning the permanency of plaintiff's injuries because of the length of time between the trial and the date of the last examination. In a hearing on that objection, the doctor volunteered that he had examined the plaintiff on the last day of trial and had an opinion on permanency based upon that examination. The defendant again objected, claiming surprise, and argued that the plaintiff had violated Rule 220's disclosure requirements. The majority opinion held that the length of time between treatment and the last examination did not change the witness from a treating doctor to an expert witness governed by Rule 220. The court also stated, "This type of surprise, however, must be avoided by adequate trial preparation and not through reliance on the 'protection' of Supreme Court Rule 220."¹³ Justice Miller disagreed:

Even if it is assumed that Dr. Treister remained a treating or attending physician and therefore not subject to Supreme Court Rule 220, which requires advance disclosure of the identities and opinions of expert witnesses I do not believe that the doctor should have been permitted to testify about the opinion he formed from his mid-trial examination of the plaintiff. Contrary to the majority's assertion, no amount of pre-trial preparation by defense counsel could have prevented the surprise that occurred here.¹⁴

The cases discussed above all dealt with the issue of permanency of the plaintiff's injuries. While this is obviously an important issue, it is certainly not the only one that is the subject of expert testimony.¹⁵ For example, in medical malpractice cases, is-

11. See ILL. S.C.T. RULE 204(c) (1989) (ILL. REV. STAT. ch. 110A, para. 204 (1991)). Prior to *Tzystuck*, the First District reached the same decision regarding treating doctors in *Ryan*, 157 Ill. App. 3d at 1079, 510 N.E.2d at 1168; *but cf. In re Marriage of Hartian*, 172 Ill. App. 3d 440, 526 N.E.2d 1104 (1st Dist. 1988) (holding that Rule 220 applies to a treating doctor who has been identified as an expert witness in answers to interrogatories).

12. *Wilson*, 126 Ill. 2d at 171, 533 N.E.2d at 894.

13. *Id.* at 176, 533 N.E.2d at 897.

14. *Id.* at 178-79, 533 N.E.2d at 898 (Miller, J., dissenting) (citation omitted).

15. Other types of experts include: Psychologists (*Jesse v. Amoco Oil Co.*, 230 Ill. App. 3d 337, 594 N.E.2d 1210 (1st Dist. 1992)); Chiropractors (*Lowney v. Arciom*, 232 Ill. App. 3d 715, 597 N.E.2d 817 (3d Dist. 1992)); Pharmacologists (*Dixson v. University of Chicago Hosp. & Clinics*, 190 Ill. App. 3d 369, 546 N.E.2d 774 (1st Dist. 1989)); Engineers (*Schaffner v. Chicago & Northwestern Transp. Co.*, 129 Ill. 2d 1, 541 N.E.2d 643 (1989)); Economists (*Grimming v. Alton & Southern Ry. Co.*, 204 Ill. App. 3d 961, 562 N.E.2d 1086 (5th Dist. 1990)); Appraisers (*Mobil Oil Corp. v. City of Rolling Meadows*, 214 Ill. App. 3d 718, 574 N.E.2d 41 (1st Dist. 1991)).

sues of causation and the standard of care will almost always arise, and the question of whether a treating doctor can give an opinion on those issues in the absence of timely disclosure has been addressed by the appellate courts.

In a medical malpractice case, *Dugan v. Weber*,¹⁶ the plaintiff's subsequent treating doctor examined the plaintiff on the eve of trial and was then interrogated about the extent of the plaintiff's disability as well as the defendant's deviation from the standard of care. The defendant argued that the substance of the doctor's opinion regarding whether the defendant deviated from the applicable standard of care transformed his status from a treating physician to a Rule 220 expert. The defendant's Rule 220 objection was overruled and the appellate court affirmed. The court stated that Rule 220 governs only those expert witnesses whose relationship with the plaintiff arose solely because the plaintiff retained the physician to render an opinion at trial. The physician's relationship to the case, not the substance of his testimony, qualifies him as a Rule 220 expert.¹⁷ In contrast, the appellate court in *Beaman v. Swedish American Hospital Ass'n of Rockford*,¹⁸ considered a similar issue and approved the trial court's bar of such opinions. The court reasoned that in order to notify the defendants of the allegations against them, the plaintiff should not be allowed to allege a theory of liability without identifying expert testimony in advance of trial.

Beaman appears to have reached the more appropriate result under Rule 220. However, its authority is questionable because *Tzystuck* did not limit the treating doctor exception to questions of permanency. In fact, the supreme court presented the *Tzystuck* issue as "whether a treating physician who will testify to a *medical opinion* at trial is an expert witness within the meaning of Rule 220(b)(1)."¹⁹ The supreme court held that treating doctors are not expert witnesses within the meaning of Rule 220. Since the *Tzystuck* court did not define or qualify "medical opinion," the holding encompasses more than the issue of a treating doctor's opinion testimony regarding permanency. Under *Tzystuck*, treating doctors may render opinions as to permanency, standard of care, causation, or theory of liability without being disclosed as experts under Rule 220.

The difficulty with the treating doctor exception to Rule 220 set forth in *Tzystuck* first became apparent in *Wilson*, and is further apparent in *Dugan* and *Beaman*. The *Tzystuck* rulings regarding

16. 175 Ill. App. 3d 1088, 530 N.E.2d 1007 (1st Dist. 1988).

17. *Id.* at 1092, 530 N.E.2d at 1010.

18. 179 Ill. App. 3d 532, 534 N.E.2d 522 (2d Dist. 1989).

19. *Tzystuck v. Chicago Transit Auth.*, 124 Ill. 2d 226, 234, 529 N.E.2d 525, 528 (1988) (emphasis added).

deposition costs and disclosure of the identity of treating doctors are unlikely to present any significant problems. The difficulty arises, however, in the late disclosure of *opinions* that would be barred but for the fact that the witness happened to be a treating doctor. As Justice Miller's dissent in *Wilson* points out, a party cannot adequately prepare so as to avoid the introduction of a new opinion if the treating doctor exception is taken to its logical conclusion. The party proffering the witness gains an unfair tactical advantage if he has no duty to supplement under Rule 220 and can furnish additional facts to the witness on the eve of trial.²⁰ Thus, while *Beaman*'s bar of the late opinion appears more in line with the equitable result contemplated by Rule 220, *Dugan*'s approval of the late opinion is more logically consistent with the Illinois Supreme Court's ruling in *Tzystuck*.

B. Expansion of the Treating Doctor Exception

The expansion of the treating doctor exception from treatment concerns, such as permanency,²¹ to non-treatment concerns, such as the standard of care,²² may be appropriate since both involve opinions from treating doctors.²³ It is clearly inappropriate, however, to grant "treating doctor" status to witnesses who do not qualify in order to absolve their opinions from Rule 220 disclosure requirements. An illustration of this problem is found in *Beierman v. Edwards*.²⁴

Beierman involved a state employee who was allegedly injured at a gas station when two cars collided. During the pendency of the plaintiff's third-party suit, the state had the plaintiff evaluated by Dr. Traycoff for plaintiff's worker's compensation claim. The plaintiff eventually abandoned his third-party suit, but the state intervened and pursued it. The defendant called Dr. Traycoff over the state's objection. The state appealed from a defense verdict and

20. This advantage would most often inure to the benefit of plaintiffs, but *cf.* *Corrales v. American Cab Co.*, 170 Ill. App. 3d 907, 524 N.E.2d 923 (1st Dist. 1988)(allowing testimony of plaintiff's treating physician on behalf of defendant notwithstanding disclosure of physician by plaintiff); *Green v. Rodgers*, 147 Ill. App. 3d 1009, 498 N.E.2d 867 (3d Dist. 1986)(allowing testimony of plaintiff's treating physician on behalf of defendants). *See also* *Fawcett v. Reinertsen*, 131 Ill. 2d 280, 546 N.E.2d 558 (1989)(holding that defendants in medical malpractice cases do not come under Rule 220). Thus, defendant doctors are free to give new opinions at any time.

21. *Wilson v. Chicago Transit Auth.*, 126 Ill. 2d 171, 174, 533 N.E.2d 894, 896 (1988).

22. *Beaman*, 179 Ill. App. 3d at 534, 534 N.E.2d at 524; *Dugan v. Weber*, 175 Ill. App. 3d 1008, 1093, 530 N.E.2d 1007, 1010 (1st Dist. 1988); *O'Brien v. Meyer*, 196 Ill. App. 3d 457, 554 N.E.2d 257 (1st Dist. 1989).

23. *See Tzystuck*, 124 Ill. 2d at 226, 529 N.E.2d at 525.

24. 193 Ill. App. 3d 968, 550 N.E.2d 587 (2d Dist. 1990).

the appellate court affirmed,²⁵ stating:

Rule 220 governs *only* those expert witnesses whose relationship with the party arose *solely* because a party retained the physician to render an opinion at trial; the physician's relationship to the case, not the substance of his testimony, qualifies him as a Rule 220 expert. Although Dr. Traycoff did not apparently "treat" Beierman's condition his relationship with Beierman was more in the nature of a treating physician than a physician hired to give an opinion at trial.²⁶

The appellate court concluded that, in the context of this case, Dr. Traycoff was either a treating physician or the state's expert. The second basis for the opinion is clearly preferable to the first. Dr. Traycoff was retained by the state in Beierman's worker's compensation case. The relationship between Dr. Traycoff and Beierman was adversarial and litigation related, and it should not have been classified as a treating doctor/patient relationship. While the court's second basis for affirming the decision is preferable, it also presents problems. Even though the state was aware of Dr. Traycoff's examination of Beierman, if the state did not know that the defendant would call Dr. Traycoff as an expert it would have no reason to seek expert testimony on its own behalf. Therefore, the late disclosure may have prejudiced the state. From a policy standpoint, the preferable position would be to require any party who intends to call any expert to disclose that intention.

In 1991, the Illinois Appellate Court expressed its frustration with the uncertainty surrounding the treating doctor exception to Supreme Court Rule 220. In *Phelps v. Chicago Transit Authority*,²⁷ the plaintiff received a beating on a CTA bus and recovered \$120,000.00 for his injuries. On the day of trial, the plaintiff was examined by his treating dentist, Dr. Bruce L. Douglas. The trial court allowed testimony from the doctor which was based upon the late examination. The appellate court affirmed, relying upon *Wilson*.²⁸ However, the court expressed its frustration as follows:

We do not condone the practice in question here. The *Wilson* decision demonstrates, however, that the supreme court is well aware of the problems caused by such undisclosed last-minute examinations. Despite this awareness, the court has not acted to amend its discovery rules to address the situation. Perhaps this is an area which should be

25. *Id.* at 982, 550 N.E.2d at 597. The court could have reached its decision on the basis that, since the state had originally contacted Dr. Traycoff through the injured party's worker's compensation claim, it was not unfair to allow the defendant to call Dr. Traycoff without disclosure. There may be problems even with this reasoning. However, the *Beierman* court did not utilize this reasoning.

26. *Id.* at 977-78, 550 N.E.2d at 594 (emphasis added) (citation omitted). The italicized words, *only* and *solely*, appear nowhere in the text of Rule 220, in its comments, or in the supreme court's *Tzystuck* opinion.

27. 224 Ill. App. 3d 229, 586 N.E.2d 352 (1st Dist. 1991).

28. *Wilson v. Chicago Transit Auth.*, 126 Ill. 2d 171, 171, 533 N.E.2d 894, 894 (1988).

covered by supreme court rules or appropriate legislation.²⁹

Despite such frustration, the treating doctor exception continues to plague Rule 220.

EXCEPTION NO. 2: THE FACT (NOT OPINION) EXCEPTION

Initially, there would not appear to be much controversy over the appropriateness of this exception. If the witness is not offering opinions, but is merely reciting facts, then it does not matter whether the witness happens to be an expert. For example, a person with a Ph.D in neuroanatomy who is also a board certified neurologist could be a witness to a car accident and testify regarding what the witness observed about the paths of the cars. Clearly, this expert need not be disclosed under Rule 220 because the witness is merely an occurrence witness. It may seem, under these circumstances, that the fact (not opinion) exception is really no exception at all. However, the analysis can be much more complicated.

Commentators have long recognized the difficulty in drawing a distinction between fact and opinion:

[T]he assumption that "fact" and "opinion" stand in contrast and hence are readily distinguishable, has proven the clumsiest of all tools furnished the judge for regulating the examination of witnesses. It is clumsy because its basic assumption is an illusion. . . . There is no conceivable statement, however specific, detailed and "factual," that is not in some measure the product of inference and reflection as well as observation and memory.³⁰

Thus, the line between fact and opinion is not easily drawn. *Bugno v. Mt. Sinai Hospital*³¹ illustrates the problems inherent in drawing that line. In *Bugno*, a medical malpractice case, the plaintiff claimed he suffered a stroke from a deep vein thrombosis which was caused by a tight cast. Plaintiff's expert, Dr. Miller, was cross-examined about a treatise he had co-authored with Dr. Abramson which supported the defendant's theory that the thrombosis was caused by physical inactivity. Dr. Miller responded that he and Dr. Abramson had mistakenly omitted a tight cast as one of the possible causes of deep vein thrombosis.³²

29. *Phelps*, 224 Ill. App. 3d at 233, 586 N.E.2d at 355.

30. Charles T. McCormick, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 11, at 23 (2d ed. 1954). See also 7 John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 1919, at 14-17 (1978) (logical opposition between opinion and fact). Another commentator states, "The difficulty with this exception (if it is an exception) comes in distinguishing between 'fact' and 'opinion' testimony. One envisions the court's manipulating the line between the two and avoiding the sanctions of Rule 220." Charles E. Redden, *The Decline of Rule 220: The Rise of Trial By Ambush*, 80 ILL. B.J. 440, 445 (1992).

31. 201 Ill. App. 3d 245, 559 N.E.2d 1 (1st Dist. 1990).

32. *Id.* at 253, 559 N.E.2d at 6.

The defendant called the co-author, Dr. Abramson, who had not been disclosed under Rule 220. Dr. Abramson was allowed to testify that no omission was made in the treatise, but he was not allowed to offer his opinion on the accuracy of the book. The appellate court affirmed the ruling.³³ While the ruling seems appropriate, it should be observed that Dr. Abramson could have known that there were no omissions (the fact involved) only because of his superior knowledge concerning the causes of thrombi.

The line on this map is indeed a fine one, and it is easy for experts to stray across such a line, either inadvertently or deliberately. More importantly, it does not require a question beginning, "Do you have an opinion . . .," to signal an imminent violation. For example, both a lay person and a medical doctor could testify to their observation of a bruise on a plaintiff's arm. Suppose that the doctor is a pathologist who takes a biopsy of the bruise, makes tissue samples, treats them appropriately with dyes, and places them under a microscope. The lay witness views the slide under the microscope and describes his observations as follows: "[t]here was a glob of red stuff in the center and some green and orange squiggly things around the edges." The pathologist views the same slide and states, "[t]here was an area of increased erythrocytes 120 microns in diameter in the center and an extremely decreased level of thrombocytic activity on the edges of the field." These statements both appear to be factual in nature, both deal with personal observations of objects that the respective witnesses saw and described, and both are equally useless.

What more is needed? Would the judge normally hear an opinion question next which would alert her to a possible Rule 220 violation? Not usually. In most cases, the next question would be, "What do you mean?" or "Would you explain that to the jury?" The layman would respond, "I've told you all I know." The pathologist, however, would be perfectly capable of explaining her answer, but that explanation is almost always going to be an opinion, whether it is explicitly stated as such or not. When the pathologist testifies that, "the increase of erythrocytes in the center of the field is a manifestation of the flow of red blood cells to the area because of a rupture of intracellular membranes," she is testifying as to her opinion, based upon her advanced learning.³⁴

These problems do not arise solely in the esoteric and expert-laden fields of medical malpractice and product liability; they are

33. *Id.* at 254, 559 N.E.2d at 7.

34. This hypothetical exercise in microscopic bruise viewing is included to alert judges to what may actually be occurring in their courtrooms under the guise of the fact (not opinion) exception. Some of these explanations may be harmless, but they are all likely to be opinions.

also present in the more routine world of a gas station's request to expand to include a car wash. In *Mobil Oil Corp. v. City of Rolling Meadows*,³⁵ the plaintiff called two witnesses, neither of whom had been disclosed under Rule 220. The trial court allowed the following testimony, purportedly based on the fact (not opinion) exception:

Q. Based on your personal observation and experience, can you tell us, if you know, what you would have expected from this station had it had a car wash?

* * *

[The City's Attorney]: Objection. Speculation. * * *

[The Court]: I'll overrule it. She may answer.

A. I would have expected at least a 20 percent increase at this location.

Q. Why is that?

[The City's Attorney]: Same objection, your Honor. There's no foundation. This witness is now testifying as an expert rendering an opinion.

[The Court]: I think that if, in fact, she had stated that all other stations that have car washes increase gas volume somewhere around 20 percent, that . . . meaning Mobil, that doesn't require her testimony to come under Rule 220. If she's expressing her opinion that based on other factors that are not the business experiences of Mobil, that gas stations increase volume by 20 percent when they put in car washes, I think that is a 220 expert . . . She may answer.³⁶

The trial court ruled that she could testify as a fact, if she knew it to be a fact, that all other stations with car washes increased their gas volume twenty percent. If, however, she was testifying that it was her opinion that including the car wash would increase volume by twenty percent, that testimony would be prohibited. There are two problems with that approach. First, the initial question in the colloquy called for an opinion. Second, and more important, the appellate court did not follow the trial court's lead, but focused instead on the source of the witness' basis as the determinant of expert status.

The opinion states:

The trial court properly determined that [the witness] would not be testifying as an expert because his testimony related to knowledge he personally learned as a consequence of supervising the mini-mart construction. Personal knowledge with respect to a matter is not sufficient to render an individual an "expert." Therefore, Mobil did not have to comply with Rule 220 of the supreme court rules.³⁷

35. 214 Ill. App. 3d 718, 574 N.E.2d 41 (1st Dist. 1991).

36. *Id.* at 722-23, 574 N.E.2d at 45.

37. *Id.* at 727, 574 N.E.2d at 48.

The opinion further states, "She merely testified as to matters she personally knew as a consequence of her employment with Mobil."³⁸ Thus, the *Mobil Oil* case establishes a new twist to the fact (not opinion) exception by making distinctions based on the source of the witness' knowledge. This is not a valid exception. An expert may be an expert either because of formal academic training or because of on-the-job experience.³⁹ The source of the expertise does not affect the witness' status as an expert.⁴⁰

A similar situation arose in *Pharr v. Chicago Transit Authority*.⁴¹ In *Pharr*, the plaintiff was allegedly caught in a bus door upon leaving a bus. The bus pulled out, dragging the plaintiff. The bus driver testified for the defendant, over objection, that the bus was equipped with an interlocking system. He also testified that the interlocking system prevented the bus from moving if the rear doors were open. The appellate court affirmed, and analogized the bus driver's testimony to a lay person testifying about his automobile's equipment.⁴² This analogy may apply to the bus driver's testimony as to the type of equipment on the bus; however, it is questionable whether testimony regarding the actual functioning of the safety device remains within the realm of factual testimony. Allowing the testimony as factual certainly stretches the line between 'fact' and 'opinion.'

A classic case of line stretching appears in *Atkins v. Thapedi*,⁴³ a medical malpractice case arising out of defendant's treatment of the plaintiff's lower back injury. While the basis for the appellate court's approval of the testimony of an undisclosed orthopedist is not completely clear, the bulk of the opinion deals with the fact

38. *Id.*

39. See *Nowakowski v. Hoppe Tire Co.*, 39 Ill. App. 3d 155, 163, 349 N.E.2d 578, 586 (1st Dist. 1976) (finding tire mechanic with 18 years of experience qualified to give an expert opinion); *Bollmeier v. Ford Motor Co.*, 130 Ill. App. 3d 844, 849, 265 N.E.2d 212, 215 (5th Dist. 1970) (stating that witness with extensive knowledge of automobiles qualifies as an expert, although lacking specific experience with the automobile at issue).

40. *Nowakowski*, 39 Ill. App. 3d at 163, 349 N.E.2d at 586. Assume that a locomotive engineer is called as a witness in a railroad crossing accident case and that his testimony will be to the effect that it would take a half-mile to stop a 60-car train comprised of hopper cars, half of which are loaded and half of which are unloaded, that is traveling on a level track at 30 miles per hour. Could the witness testify that he had been an engineer on such a train and brought it to a stop under these circumstances? Assuming there are no other evidentiary problems, the answer to that question should be "yes;" it is something he has done and therefore, "he personally knew as a consequence of his employment . . ." But, if he is asked, "In your opinion can such and such a train be stopped," the fact that his ability to give that opinion is based on the knowledge that he gained through his personal experience does not change its status as an opinion.

41. 220 Ill. App. 3d 509, 581 N.E.2d 162 (1st Dist. 1991).

42. *Id.* at 518, 581 N.E.2d at 168.

43. 166 Ill. App. 3d 471, 519 N.E.2d 1073 (1st Dist. 1988).

(not opinion) exception. Plaintiff's testifying expert, Dr. Sussman, testified by evidence deposition, and one of his criticisms of the defendant was that another treating doctor, Dr. Sheinkop, had recommended surgery. In order to contradict Dr. Sussman's testimony, the defendant called Dr. Sheinkop to establish his diagnosis of the plaintiff's condition and to establish the fact that he had not recommended surgery while the plaintiff was under his care. Even with the factual statement, "I did not recommend surgery," the difficulty with the fact (not opinion) exception is present, if not immediately obvious. What is implicit in that statement? "Because, *in my opinion*, surgery was not the proper course of treatment."⁴⁴ The appellate court stated that the main thrust of Dr. Sheinkop's brief testimony was a recitation of factual statements made by Dr. Sussman and that any error was harmless.⁴⁵

While there may have been reasons in *Atkins* that justify the ultimate result, the fact (not opinion) exception does not appear to be one of them. Although the result in *Atkins* is not necessarily wrong, the method chosen to reach that result suggests to lawyers that courts are manipulating the line between fact and opinion and avoiding the sanctions of Rule 220.⁴⁶

EXCEPTION NO. 3: THE MERELY AN UPDATE EXCEPTION

The problems inherent in the merely an update exception are

44. To make the problem even more glaring, consider some of the questions put to Dr. Sheinkop in his factual capacity:

Q. The organic part of his back pain, were you able to determine with a reasonable degree of medical, surgical certainty as to whether his back pain was caused in any part by the condition of his disk at L-4, 5 level?

* * *

Q. Were you able to arrive at a conclusion, based upon a reasonable degree of medical and surgical certainty as to whether any abnormality of the L-4 — excuse me, L-5 as one disk contributed to his problems?

* * *

Q. Based upon this information that the back brace did not relieve his symptoms, were you able to arrive at a conclusion based upon the reasonable degree of medical and surgical certainty as to whether Mr. Atkins had instability of the spine?

* * *

Q. Dr. Sheinkop, did you, based upon your—based upon the history, physical examination, CT scan, the myelogram, were you able to arrive at a decision as to whether this patient's condition based upon a reasonable degree of medical and surgical certainty as to whether this patient had a herniated disk at the L-4, 5 level that was compressing upon the nerve root?

Id. at 476, 519 N.E.2d at 1076.

45. *Id.* at 476, 519 N.E.2d at 1077.

46. Redden, *supra* note 30, at 445.

illustrated in *Singh v. Air Illinois*.⁴⁷ In *Singh*, a wrongful death case, the plaintiff's economist updated his report on the decedent's earning capacity just prior to trial. The court acknowledged that Rule 220(c)(3) requires automatic supplementation of experts' opinions.⁴⁸ The court quoted the committee comments on this point, stating, "In order to prevent an undisclosed shift in theory or belief, the rule requires that a party seasonably submit a modified report or supplemental answers taking into account shifts in the expert's views."⁴⁹ The court held, however, that there was no error because the new report was "merely an update of the original . . ." and did not involve a "shift in theory or belief."⁵⁰

The court may have been correct in its conclusion that there was no shift in theory, since the same methodology was apparently used. The validity of the second part of its conclusion that there was no shift "in belief," however, may be debatable. Since the court did not indicate the substantive difference between the opinion at trial and the opinion before trial, it is difficult to comment upon the result. If, however, the "updating" changed or shifted the expert's belief from an opinion that the present cash value of decedent's earning capacity was \$500,000 to a belief that the same present cash value was \$1,000,000, the potential prejudice to the defendant becomes readily apparent.

The committee comments do not refer merely to a shift in theory, they refer to a shift in theory *or belief*. The rule itself requires automatic supplementation. There was a lack of compliance in *Singh*, and the court created the merely an update exception to excuse it. The result may have been warranted, but the rationale for it is not supported by either the rule or its comments.⁵¹

EXCEPTION NO. 4:
THE FURTHER ELABORATION EXCEPTION

McGuckin v. Chicago Union Station,⁵² clearly illustrates how the further elaboration exception can riddle Rule 220. In *McGuckin*, an expert was allowed to change his opinion in a wrongful

47. 165 Ill. App. 3d 923, 520 N.E.2d 852 (1st Dist. 1988).

48. "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." ILL. S.C.T. RULE 220(c)(3) (1984) (ILL. REV. STAT. ch. 110A, para. 220(c)(3) (1991)).

49. *Committee Comments*, ILL. ANN. STAT. ch. 110A, para. 220 (Smith-Hurd 1984).

50. *Singh*, 165 Ill. App. 3d at 930, 520 N.E.2d at 856.

51. *See* *Stringham v. United Parcel Serv., Inc.*, 181 Ill. App. 3d 312, 321, 536 N.E.2d 1292, 1298 (2d Dist. 1989).

52. 191 Ill. App. 3d 982, 548 N.E.2d 461 (1st Dist. 1989).

death claim arising out of a fire.⁵³ During his deposition, the expert stated that "he could not render an opinion [as to the cause of the fire] with any degree of certainty."⁵⁴ At trial, however, the expert testified that the fire probably resulted from a cigarette or hot ashes in the trash carts.⁵⁵ The trial court allowed the testimony and the appellate court affirmed, stating:

We do not find the [deposition testimony and the trial testimony] inconsistent. The trial testimony . . . is a further elaboration on his deposition testimony. The same trial testimony could have been elicited at the deposition if the attorney had asked [the witness] to be more specific or to list the various possibilities and their corresponding probabilities. Even assuming that the testimonies differed, we are not persuaded that Union Station was prejudiced.⁵⁶

The ruling in *McGuckin* is not only wrong, but also would allow the elaboration exception to swallow the rule. If going from no opinion with any degree of certainty to a high probability of a specific cause is not inconsistent, then the scope of the testimony restriction of Rule 220(d) is meaningless.

EXCEPTION NO. 5:

THE NOT IN ANTICIPATION OF LITIGATION EXCEPTION

This exception was used in *Cleveland Wrecking Company v. Central National Bank*.⁵⁷ Cleveland Wrecking was a subcontractor on a demolition job. During a strike, and while Cleveland Wrecking was not on the job site, the owners had their workers sever a wall. When Cleveland Wrecking learned of this action, it hired a structural engineer named Larry Reiss to investigate. During the pendency of the lawsuit, Reiss was never disclosed as an expert. Nonetheless, he was allowed to testify to certain opinions about the wall during rebuttal. The appellate court likened Reiss to a treating doctor and found no error in his testimony.⁵⁸

Rule 220(b)(1) requires parties to disclose "the identity of an expert *who is retained to render an opinion at trial . . .*"⁵⁹ The

53. Two undisclosed experts were also allowed to testify, but the rulings on those witnesses are not the subject of this exception. *Id.* at 1000, 548 N.E.2d at 473.

54. *Id.* He stated that there were a number of possibilities, with varying degrees of probability. *Id.* at 1001, 548 N.E.2d at 474.

55. *Id.*

56. *McGuckin*, 191 Ill. App. 3d at 1001, 548 N.E.2d at 474.

57. 216 Ill. App. 3d 279, 576 N.E.2d 1055 (1st Dist. 1991).

58. "Even though litigation was unavoidable at the time Reiss rendered his opinion, he was not *specifically* called in anticipation of litigation. Therefore, he was not an expert witness whose identity was required to be revealed before trial pursuant to Supreme Court Rule 220." *Id.* at 295, 576 N.E.2d at 1067 (emphasis added).

59. ILL. S.C.T. RULE 220 (b)(1) (1984) (ILL. REV. STAT. ch. 110A, para. 220 (b)(1)(1991)).

supreme court relied upon this language in the rule to formulate the *Tzystuck* treating doctor exception,⁶⁰ but that language does not justify the decision in *Cleveland Wrecking*. The court acknowledged that "litigation was unavoidable at the time [the expert] rendered his opinion."⁶¹ The court ruled, however, that since "[the expert] was not *specifically* called in anticipation of litigation," he was not an expert witness subject to Rule 220.⁶² The *Cleveland Wrecking* court judicially inserted the word "specifically" before the word "retained" in 220 (b)(1). Under this construction, if *any* reason for the retention of an expert exists, in addition to his testimony at trial, then he has not been "specifically retained" and is not subject to disclosure under Rule 220. The rule does not allow this, the supreme court has not sanctioned it, and hopefully this exception will be limited to the *Cleveland Wrecking* facts.⁶³

EXCEPTION NO. 6:
THE PARTY/OWNER EXCEPTION

Unlike the preceding exception, which was created by the appellate court, the party/owner exception is, at least partially, the creation of the supreme court. In *Fawcett v. Reinertsen*,⁶⁴ a medical malpractice case, the defendants were held in contempt of court for refusing to answer deposition questions regarding the standard of care. The defendants based their refusal on the fact that the plaintiffs had not designated them as experts under Rule 220.⁶⁵ The supreme court held that they could be compelled to answer those questions.

Fawcett relied upon *Tzystuck* and its treatment-related rather than litigation-related distinction to determine that a defendant physician was not an expert within the disclosure provisions of Rule 220. The use of this distinction is not surprising since the defendants in *Fawcett* were clearly treating doctors and would, therefore, come under the *Tzystuck* umbrella.⁶⁶ The court held that the general discovery provisions, rather than Rule 220, would apply to de-

60. See *supra* notes 3-29 and accompanying text for a discussion of the treating doctor exception.

61. *Cleveland Wrecking*, 216 Ill. App. 3d at 295, 576 N.E.2d at 1067.

62. *Id.* (emphasis added).

63. See also *Forest Preserve Dist. v. Brookwood Land Venture*, 199 Ill. App. 3d 973, 981, 557 N.E.2d 980, 987 (2d Dist. 1990)(expert witness who had direct involvement in subject matter of litigation need not comply with Rule 220 because testimony was not prepared in anticipation of trial). See *infra* notes 100-126 and accompanying text for a discussion of the "intimately involved in the subject matter of the litigation" exception.

64. 131 Ill. 2d 380, 546 N.E.2d 558 (1989).

65. *Id.* at 383, 546 N.E.2d at 559.

66. *Id.* It may be noteworthy that the supreme court did not discuss control versus lack of control in deciding *Fawcett*. *Id.*

fendant physicians.⁶⁷

The party exception for defendant doctors has been extended to other parties. In *Hill v. Ben Franklin Savings & Loan Association*,⁶⁸ the plaintiff owner was not allowed to testify as to the value of his property. The appellate court reversed, relying upon *Tzys-tuck*.⁶⁹ The court stated:

[W]e conclude that a party to a suit cannot be said to be retained to render an opinion at trial. A party is not engaged for the purpose of giving expert opinion at trial, but rather is a participant in the transaction that is the subject matter of the litigation. A party is subject, however, to the expert witness discovery provision of Rule 220(c)(4) which gives an opposing party the opportunity to discover a party's expert opinion.⁷⁰

Hill has extended the defendant-doctor exception that was created by the supreme court in *Fawcett* to include all parties. However, *Hill*, unlike *Fawcett*, held that while the disclosure requirements of Rule 220(b) do not apply to party-experts, the discovery requirements of Rule 220(c) do apply.⁷¹

The move from the defendant-treating doctor exception to the party/owner exception was extended again in *Department of Transportation ex rel. People v. Central Stone Company*,⁷² an eminent domain proceeding. The *Central Stone* court approved the non-disclosure of the president and shareholder of a party, who had a degree in mining engineering and who testified as to the value of the property owned by his employer. The court first characterized the witness as a non-expert who was giving lay witness opinion testimony. On this point, it should be noted that the witness in *Central Stone* was not the owner, but the president. The court then ruled that even if the president was an expert, his non-disclosure was allowed under *Tzys-tuck* and *Hill*.⁷³

67. *Id.* at 385, 546 N.E.2d at 560.

68. 177 Ill. App. 3d 51, 531 N.E.2d 1089, (2d Dist. 1989).

69. *Id.* at 58, 531 N.E.2d at 1094 (citing *Tzys-tuck*, 124 Ill. 2d at 234-35, 529 N.E.2d at 528-29).

70. *Id.* Rule 220(c)(4) states:

The provisions 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.

ILL. S.CT. RULE 220(c)(4) (1984)(ILL. REV. STAT. ch. 110A, para. 204 (1991)).

71. *Hill*, 171 Ill. App. 3d at 58, 531 N.E.2d at 1093. *See also* *Karr v. Noel*, 212 Ill. App. 3d 575, 583, 571 N.E.2d 271, 276 (5th Dist. 1991)(noting that even treating doctors should not be allowed to extend their opinions beyond the scope of their deposition testimony).

72. 200 Ill. App. 3d 841, 558 N.E.2d 742, (4th Dist. 1990).

73. *Id.* at 852-53, 558 N.E.2d at 750.

With all due respect to the fourth district, the *Central Stone* case is far removed from either *Tzystuck* or *Hill*. The president of Central Stone was not a treating doctor and he was neither a party nor an owner. He was an engineer-employee of an owner. *Central Stone* comes perilously close to extending the party/owner exception to all experts who happen to own shares of the companies that employ them.⁷⁴

EXCEPTION NO. 7:
THE NO INQUIRY EXCEPTION.

This exception, unlike some of the others which have been discussed, has some basis in the language of Rule 220. Subsection (d) provides that experts shall not go beyond their pre-trial disclosure but it concludes, "[h]owever, [the expert] shall not be prevented from testifying as to facts or opinions on matters regarding which *inquiry was not made* in the discovery proceedings."⁷⁵ As the committee comments point out, however, "[t]his latter qualification will have only limited application in light of the requirement that a party continuously supplement discovery concerning the opinions of such witnesses."⁷⁶

Notwithstanding the emphasis on full disclosure that pervades Rule 220 and the quoted committee comments, the court in *Fogarty v. Parichy Roofing Company*.⁷⁷ affirmed a major change in opinion based on a no inquiry exception. In *Fogarty*, the defendant's expert witness, Dr. Smith, had given a deposition one and a half years before trial in which he limited his opinions to his orthopedic findings based upon his physical examination of the plaintiff. At trial, however, he began to testify about his neurological findings. The trial court recessed the proceedings and allowed plaintiff's counsel to depose Dr. Smith again. In this second deposition, the witness stated that he had not been asked to render the neurological opinions until the third day of trial. *After* the second deposition, defense counsel showed Dr. Smith the plaintiff's medical records, and when he took the stand again, he testified that the plaintiff's spinal cyst was pre-existing and had not been caused by the accident. On appeal, the plaintiff argued that the trial court should not have allowed the doctor to testify about this undisclosed opinion. The appellate court affirmed, based upon the last sentence of Rule

74. The control/lack of control basis of *Tzystuck* would not have supported the non-disclosure of the expert in *Central Stone*.

75. ILL. S.C.T. RULE 220(d) (1984) (ILL. REV. STAT. ch. 110A, para. 220(d)(1991)) (emphasis added).

76. *Committee Comments*, ILL. ANN. STAT. ch. 110A, para. 220(d) (Smith-Hurd 1984).

77. 175 Ill. App. 3d 530, 541, 529 N.E.2d 1055, 1063 (1st Dist. 1988).

220(d).⁷⁸ The court further justified its rulings by noting that the plaintiff's attorney had been given a second opportunity during trial to depose defendant's expert on the new neurological opinions, and the plaintiff's attorney had not inquired about any pre-existing causes at the second deposition.⁷⁹

Both of these reasons are subject to criticism. As to the first, requiring a party to take the deposition of an expert *during* trial is one of the evils which Rule 220 was promulgated to eliminate. As to the second, inquiry by plaintiff's counsel about the witness' knowledge of a pre-existing condition would have revealed nothing since defense counsel carefully chose not to show plaintiff's medical records to the expert until after the second deposition had been completed. Nevertheless, the court held that no violation of Rule 220 had occurred under these circumstances.

*Swaw v. Klompien*⁸⁰ is similar to *Fogarty* in its reliance on the last sentence of Rule 220(d), but different in its factual background. In *Swaw*, it was plaintiff's counsel who successfully introduced new opinions on the extent and permanency of the plaintiff's injuries. The appellate court held that these opinions were not developed during the course of the deposition of the expert. In *Swaw*, there is no indication of the type of gamesmanship employed by counsel in *Fogarty*. Even without the gamesmanship, however, the result is questionable because Rule 220 requires counsel to seasonably supplement prior discovery to make any new opinions known to opposing counsel. Therefore, even in the absence of inquiry by defense counsel, the plaintiff's lawyer should have supplemented the prior testimony with the new opinions. *Swaw* does not indicate when plaintiff's counsel learned of the new opinions, but Rule 220 contemplates the disclosure and *discovery* of all opinions sixty days before the reasonably anticipated trial date.

The expert's change of opinion in *Northern Trust Company v. St. Francis Hospital*⁸¹ revolved around the plaintiff's chances of survival. Defendant's witness, Dr. Rosenberg, testified at his depo-

78. *Id.* The court stated:

[T]he rule provides that the testimony of an expert at trial may not be inconsistent with nor go beyond the fair scope of facts known or opinions disclosed in the discovery proceedings. However, the rule further provides that an expert "shall not be prevented from testifying as to facts or opinions on matters regarding which inquiry was not made in the discovery proceedings."

Id.

79. *Id.*

80. 168 Ill. App. 3d 705, 715, 522 N.E.2d 1267, 1073 (1st Dist. 1988)(holding that the trial court did not abuse its discretion when it permitted an expert to testify as to an opinion which was well within the scope of discovery, even when no inquiry concerning that opinion was made during the deposition).

81. 168 Ill. App. 3d 270, 522 N.E.2d 699, (1st Dist. 1988).

sition that if plaintiff had been admitted to the hospital on his first visit at 1:30 a.m., he would have had a fifty-to-sixty percent chance of survival. At trial he testified that the decedent's chances of survival were only ten to fifteen percent when he was finally admitted at 6:30 a.m. The appellate court found no error and characterized these differences as "two separate opinions based on two separate scenarios."⁸²

Even if the *Northern Trust* holding is simply a recognition that a change in the facts presented to an expert may easily cause a change in his opinion, its result is still troublesome under Rule 220. The rule is intended to forcefully encourage early and complete disclosure of all opinions. The proponent of the evidence has the burden to disclose, since he is most knowledgeable about the opinions supporting his theory of the case and the facts necessary to establish a basis for those opinions.

EXCEPTION NO. 8:

THE OPINION ELICITED DURING CROSS EXCEPTION

In *Kokotkiewicz v. Leprino Foods Company*,⁸³ the plaintiff was examined at the defendant's request by Dr. Ross. The plaintiff called Dr. Ross in her case in chief. Dr. Ross testified that it was possible that the plaintiff had a herniated disk prior to the occurrence alleged in the complaint. During cross-examination, defense counsel presented Dr. Ross with some additional medical records, and based upon these records, he testified that the plaintiff did, in fact, have a herniated disk prior to the alleged occurrence. The plaintiff's objection to the new opinion was overruled and the appellate court affirmed, stating:

Dr. Ross was plaintiff's witness, and as such, the doctor's testimony had to be accepted by plaintiff. In effect, by calling Dr. Ross as her own witness, plaintiff exempted defendant from complying with Rule 220(d). Since defendant had no plans to call Dr. Ross, defendant had no need to supplement the doctor's opinion. Had it planned to call the doctor as its expert, it would have been required to give plaintiff notice of any changes or additional bases for the doctor's opinions. It was not error under these circumstances for defendant to use additional material to firm up the doctor's previous opinion.⁸⁴

While the *Kokotkiewicz* holding is fair standing alone, if combined with the appellate court's opinion in *Lebrecht v. Tuli*,⁸⁵ holding that co-defendants can cross-examine each other's experts even though no adverse relationship exists, the potential for abuse is apparent. In any case where there is more than one party on either

82. *Id.*

83. 162 Ill. App. 3d 493, 515 N.E.2d 395 (4th Dist. 1987).

84. *Id.* at 499, 515 N.E.2d at 399.

85. 130 Ill. App. 3d 457, 473 N.E.2d 1322 (4th Dist. 1985).

side, it can certainly be argued that any new opinion elicited on cross-examination does not come within the purview of Rule 220, thus thwarting the rule's purpose.

EXCEPTION NO. 9:
THE NO SURPRISE EXCEPTION

Compare *Mazzone v. Holmes*⁸⁶ and *Renfro v. Allied Industrial Equipment Corporation*⁸⁷ with *Coleman v. Central Illinois Public Service Company*.⁸⁸ In *Mazzone* and *Renfro*, the Illinois Appellate Court held that it was inappropriate to allow a party to call an adverse party's expert witness when no Rule 220 disclosure had been made.⁸⁹ However, the appellate court reached the opposite result in *Coleman*, stating in dicta that no disclosure was necessary where there was no surprise to the opponent.⁹⁰ The first matter of concern with the *Coleman* opinion is that it admittedly addresses a Rule 220 issue it need not have addressed. The second matter of concern is that, through dicta, the *Coleman* opinion specifically created an additional exception of no surprise in addressing the Rule 220 issue.⁹¹

The no surprise exception of *Coleman* is a little like a modification of the child's game of kick-the-can which is itself a modification of hide-and-seek. Under the regular rules of kick-the-can, the person who is "It" stands on a can and counts to 100 while the other

86. 197 Ill. App. 3d 886, 901, 557 N.E.2d 186, 195 (1st Dist. 1990)(stating that because plaintiff failed to meet the Rule 220 notice requirements, the trial court was correct in barring testimony of plaintiff's expert).

87. 155 Ill. App. 3d 140, 507 N.E.2d 1213 (5th Dist. 1987).

88. 207 Ill. App. 3d 96, 103, 565 N.E.2d 274, 278 (4th Dist. 1990)(noting that the only "surprise" to the plaintiff was that the witness was asked to give an expert opinion).

89. *Mazzone*, 197 Ill. App. 3d at 901, 557 N.E.2d at 195; *Renfro*, 155 Ill. App. 3d at 163, 507 N.E.2d at 1231.

90. *Coleman*, 207 Ill. App. 3d at 103, 565 N.E.2d at 278.

The *Coleman* court indicated that the circumstances of the case were unusual. *Id.* at 103, 565 N.E.2d at 279. The witness in *Coleman* was a chemist employed by the defendant. The defendant presented the witness to testify regarding the type of chemical present in barrels near where the plaintiff was injured. Plaintiff's claim was based on the slipperiness of the chemical. After some maneuvering, the plaintiff asked leave to call the chemist in rebuttal. The trial court denied the request and the plaintiff lost. On appeal, the appellate court held that the denial of the request was proper, noted that it did not need to address the Rule 220 question, and then proceeded to answer it. *Id.* at 101, 565 N.E.2d at 277.

In dicta, the court examined the possibility of approving non-disclosure under its interpretation of *Trystuck* as an occurrence witness exception case, but rejected that approach. Next, the court examined and rejected the possibility of approving non-disclosure under the intimately involved in the subject matter of the litigation exception. *Id.* (discussing *Smith v. Central Ill. Pub. Ser. Co.*, 176 Ill. App. 3d 482, 494, 531 N.E.2d 51, 59 (4th Dist. 1988)).

91. *Coleman*, 207 Ill. App. 3d at 103, 565 N.E.2d at 279.

players hide. The person who is "It" then looks for the hidden players and when he finds one, they race back to the can. If the person who is "It" wins the race, the other person is captured. The captured children are freed only if one of the other hidden children beats the person who is "It" back to the can and kicks it. The sound of a can rolling end-over-end down the street used to signal freedom for captured kids on hot summer nights.

Why this sojourn into childhood games? Well, there is no surprise about what the hidden children want to do. Generally, the slower ones remained hidden while the faster and more adventure-some ones made the run to kick the can and gain the glory of the night. Suppose, however, that the person who was "It" made a deal with the fastest runner of the group; say a payment of a Stan Musial card, a Mickey Mantle card, and one-half a king sized Royal Crown Cola was promised in exchange for the fastest runner not to free the captives. Note that the person who is "It" knows the identity of the fastest runner, and he also knows what he can do; he can beat him in the race to kick the can, but because of his arrangement the person who is "It" expects him not to do what he can do. Would anyone seriously contend that the person who is "It" is not surprised when the speedster shows up as the champion of the captives?

Similarly, a party to a lawsuit would be surprised by seeing its expert appearing on the other side and utilizing his skills on behalf of the opponent. The fact that the identity and the opinion are not surprises does not mean that the appearance on the other side is not. Baseball cards and R.C. Colas do not bind the fastest runner to the person who is "It" forever, but they ought to at least entitle him to a warning. The hundreds of thousands of dollars that experts receive should entitle a party to the assurance that the expert is not going to be testifying for the other side, at least not without a timely disclosure of that fact pursuant to Rule 220.⁹²

EXCEPTION NO. 10:
THE UNUSUAL CIRCUMSTANCES EXCEPTION

The title of this exception suggests that the number of cases utilizing it should be few. In *Engel v. Chicago & Northwestern Transportation Company*,⁹³ plaintiff called a forensic documents examiner during trial with no prior disclosure. Although this procedure did not comply with Rule 220, the trial court allowed the

92. See *Fischer v. G & S Builders*, 147 Ill. App. 3d 168, 172, 497 N.E.2d 1022, 1025 (3d Dist. 1986)(plaintiff's expert barred from testifying where identity not disclosed until three days before trial, even though defendants were aware that he had inspected the premises).

93. 186 Ill. App. 3d 522, 542 N.E.2d 729 (1st Dist. 1989).

witness' testimony, and the appellate court affirmed. The reader is wisely thinking, "there must have been unusual circumstances in this case." There were. The court allowed plaintiff's documents expert because the defendants had not produced the originals of the challenged documents until trial. *Engel* presents a truly unusual circumstance that warrants the late disclosure of an expert.⁹⁴

Another case which approved a late disclosure because of unusual circumstances is *Marshall v. Osborn*.⁹⁵ In *Marshall*, the trial court allowed the testimony of an undisclosed intoxication expert because, after the close of plaintiff's case in chief, the court reversed its *in limine* order barring intoxication evidence. However, the court warned, "[w]e caution counsel in future cases . . . that the better practice is to disclose all *potential* expert witnesses since the decision to bar an undisclosed witness rests with the trial judge."⁹⁶

EXCEPTION NO. 11: THE HARMLESS ERROR EXCEPTION

The term "harmless error" has been characterized as a device appellate courts use to affirm cases when no other reason can be found. The discussion of this exception does not discuss that characterization. However, it is true that the cases illustrating this exception have little precedential value.⁹⁷ After all, the disclosures involved have been characterized as error, albeit harmless. Therefore, it is unlikely that future litigants will use them to urge courts to approve conduct which courts have previously condemned. Because of the lack of precedential value of cases utilizing this exception, it is considered less harmful to the efficacy of Rule 220 than many of the others.

94. See also *Coleman*, 207 Ill. App. 3d at 103, 565 N.E.2d at 279 (noting that "[f]airness required that under the very unusual situation here, notice pursuant to Rule 220 should not be a condition precedent to calling a witness. . .").

95. 213 Ill. App. 3d 134, 571 N.E.2d 492 (3d Dist. 1991).

96. *Id.* at 142, 571 N.E.2d at 498 (emphasis added).

97. For a discussion of instances in which the application of Rule 220 results in harmless error see *Schnuck Markets, Inc. v. Soffer*, 213 Ill. App. 3d 957, 979, 572 N.E.2d 1169, 1185 (5th Dist. 1991); *Ryback v. Provenzale*, 181 Ill. App. 3d 884, 897, 537 N.E.2d 1321, 1329 (2d Dist. 1989); *McDonald's Corp. v. Butler Co.*, 158 Ill. App. 3d 902, 911, 511 N.E.2d 912, 919 (2d Dist. 1987).

Some of the harmless error cases also discuss waiver. While waiver is not included in this discussion, as it is not a true exception, some cases have been resolved at least partially on a waiver basis. See, e.g., *Kosinski v. Inland Steel Co.*, 192 Ill. App. 3d 1017, 1026, 549 N.E.2d 784, 790 (1st Dist. 1989); *Oakleaf of Illinois v. Oakleaf & Associates, Inc.*, 173 Ill. App. 3d 637, 651, 527 N.E.2d 926, 935 (1st Dist. 1988).

EXCEPTION NO. 12:
THE GENERAL DISCOVERY DISCLOSURE EXCEPTION

EXCEPTION NO. 13:
THE OPINION FORMULATED AS PART OF THE JOB
EXCEPTION

EXCEPTION NO. 14:
THE OFFICIAL REPORT EXCEPTION

EXCEPTION NO. 15:
THE PREVIOUSLY DISCLOSED REPORT EXCEPTION

These four exceptions are grouped together for discussion because any or all of them may be the basis for the decision in *DeYoung v. Alpha Construction Company*,⁹⁸ a wrongful death case arising out of a gas explosion. The expert in *DeYoung* was a fire marshal who was allowed to express an opinion on behalf of the plaintiff regarding the origin of the explosion even though he had not been disclosed under Rule 220. The defendant appealed. On appeal, the plaintiff argued:

- 1) both parties disclosed the witness' name in general discovery responses;
- 2) the fire marshal's opinion was formulated as part of his job duties;
- 3) the fire marshal's opinion was contained in his official report; and
- 4) the trial testimony was based on a previously disclosed report.

The portion of the opinion which discusses Rule 220 is short; it lists the plaintiff's arguments, cites *Tzystuck*, states that the defendant could not have been surprised since it had the expert's report well in advance of trial, and affirms. There are two problems with *DeYoung*. First, the fact that the identity of an expert and the existence of his report are known from outside sources does not mean that the proponent of the expert has complied with Rule 220.⁹⁹ The rule does not say, "disclose the identity of your expert unless your opponent may know about him from some other source." The rule says disclose the identity. The rule quite obviously does not include any of the other exceptions created and relied upon in *DeYoung*.

98. 186 Ill. App. 3d 758, 767, 542 N.E.2d 859, 865 (1st Dist. 1989)(holding that because the fire marshal was not "engaged for the purpose of giving an expert opinion at trial," plaintiffs were not required to disclose his opinion under Rule 220).

99. See *Fischer v. G & S Builders*, 147 Ill. App. 3d 168, 497 N.E.2d 1022 (3d Dist. 1986).

Second, trial lawyers are entitled to plan their preparation and presentation in reliance upon rules meaning what they say. Since analogies from the movies and childhood have already been used, one from sports might be in order.

The National Basketball Association allows five players per side to participate at any one time, and it requires the ball to be shot from in-bounds in order for the score to count. Now everyone, that is both sides in this context, knows the identity of the additional experts on these teams that sit along the side lines waiting to be called into the game. Everyone knows the degree of skill they possess.

What would happen if a sixth person rose from the bench and started popping three pointers from the sideline, but from out-of-bounds, just helping his five teammates on the floor? "The officials might ask the team doctor to take a look at him," you say? But wait, the officials say that these points count! "How can this be," you ask. "It's simple," the officials explain, "those rules about five players and being in-bounds do not apply in this case; see *DeYoung*."

What does *DeYoung* have to offer?

No. 12. Both sides knew the player's identity.

No. 13. He developed his opinion (skills) as a part of his job duties.

No. 14. There's an official report on his skills.

No. 15. His performance in the game mirrored the previously disclosed report.

If, in all seriousness, it is inconceivable that an official from the NBA would make such a ruling, one might ask, why do we view the rules that govern a game more seriously than we do those that govern the courts?

EXCEPTION NO. 16:

THE INTIMATELY INVOLVED IN THE SUBJECT MATTER OF THE LITIGATION EXCEPTION

If *Tzystuck* is the supreme court case which began the exceptions to Rule 220, *Smith v. Central Illinois Public Service Company*¹⁰⁰ occupies the point of origin for many of the appellate court exceptions. In *Smith*, the defendant's employee, an engineer, was allowed to testify regarding his opinion that a "galley system was designed in the safest manner and complied with all professional

100. 176 Ill. App. 3d 482, 531 N.E.2d 51 (4th Dist. 1988)(holding, *inter alia*, that an employee of a party to the litigation does not have to be disclosed as an expert witness if the employee is "intimately involved in the subject matter of [that] litigation").

standards.”¹⁰¹ Although the plaintiff had taken the engineer’s deposition, he argued that since the engineer had not been disclosed as an expert, he had not been questioned in the area of his expertise. The court likened the *Smith* situation to the treating doctor situation in *Tzystuck*, and held:

These rationales apply in the instant case. [The employee] was *clearly known as an engineer to plaintiff* long before trial because he was the project manager . . . [at the time the] plaintiff was injured. *Thus, the fact that he testified is not a surprise, rather that he gave an expert opinion surprised [the] plaintiff.* Also, [the employee] was not retained as an expert for litigation. Rather, he was testifying because he was intimately involved in the project as an occurrence witness, long before any litigation was even contemplated. *Therefore, we hold that a party, or an employee of a party, who is intimately involved in the subject matter of the litigation need not be disclosed as an expert witness pursuant to Rule 220(b)(1).*¹⁰²

The *Smith* court examined two rationales used by the *Tzystuck* court. The first *Tzystuck* rationale mentioned in *Smith* is that the doctor obtains the bases for his opinion by giving aid to the patient and not in preparation for litigation. The second is that a treating doctor’s activity is discoverable under the general discovery provisions, and consequently, possesses little threat of surprise.¹⁰³

While both of these statements appear in *Tzystuck*, it is submitted that neither of them was of prime importance in the supreme court’s decision. The source of the expert’s bases is important only in determining whether the witness was retained under Rule 220. The chance of surprise with regard to treating doctors is lessened because (a) their names will be routinely disclosed, and (b) they are obviously capable of rendering important opinions. This rationale, however, would apply to every expert whose disclosure was required by the predecessor of Rule 220. If the supreme court had meant to require parties to rely on the general discovery provisions to deal with experts, it need not have promulgated Rule 220. It is submitted that a rationale not mentioned by the *Smith* court is the primary basis for the *Tzystuck* opinion.

Our conclusion that treating physicians are not expert witnesses within the meaning of Rule 220 is logical in light of discovery obligations which Rule 220(c) imposes upon parties. Subsection (c) obligates the party “retaining or employing” an expert witness to respond to interrogatories regarding the subject matter of the expert’s testimony, the expert’s conclusions, opinions and the bases thereof, and the expert’s qualifications. The party retaining the expert must also continuously keep in touch with the witness in regard to his opinion and advise opposing parties of any changes in the opinion by seasonably supplementing answers to interrogatories propounded under the rule. An ex-

101. *Id.* at 493, 531 N.E.2d at 58.

102. *Id.* at 494-95, 531 N.E.2d at 59 (emphasis added).

103. *Id.* (citing *Tzystuck*, 124 Ill. 2d at 238, 529 N.E.2d at 530).

pert who refuses or fails to satisfy the discovery obligations of Rule 220(c) is disqualified as a witness.

Rule 220(c) not unreasonably presumes that a litigant who retains an expert witness has control of that witness and will have the expert's cooperation in answering and supplementing interrogatories of opposing parties. *A party generally does not have that ready access to or control over treating physicians, who, when involved in the litigation, are involved only because they did form an opinion while treating the patient which the litigant values as evidence at a trial. To construe Rule 220 to include treating physicians would unrealistically and unfairly oblige litigants to ensure that witnesses beyond their control comply with the extensive discovery obligations of subsection (c) at the risk of having a witness disqualified for failure to comply.*¹⁰⁴

Returning to *Smith* and its statement that "[t]hus the fact that he testified is not a surprise, rather that he gave an expert opinion surprised [the] plaintiff,"¹⁰⁵ it is important to point out that experts are not crucial witnesses who have a specific supreme court rule governing them simply because they are people with impressive qualifications. Experts are treated differently because they are the only witnesses who are allowed to testify in the form of opinions. It is the opinion that is the significant portion of the expert's testimony.

The significance of the *opinion* is explicitly recognized in Rule 220.

- (a) Definitions.
 - (1) . . . who may be expected to render an *opinion*
- (b) Disclosure.
 - (1) Expert witness
 - (ii) obtain from them the *opinions*
- (c) Discovery.
 - (1) * * *
 - (ii) his conclusions and *opinions*
- (d) Scope of testimony. To the extent that the facts known or *opinions* held.¹⁰⁶

The committee comments echo the rule's recognition of the importance of the opinion.

Rule 220 attempts to eliminate these evils by establishing a . . . framework for the timely revelation of . . . *the subject matter of their testimony*

104. *Trystuck*, 124 Ill. 2d at 237, 529 N.E.2d at 529-30 (emphasis added)(citations omitted). This position was developed in the recent case of *Wakeford v. Rodehouse Restaurants of Missouri, Inc.*, 223 Ill. App. 3d 31, 584 N.E.2d 963 (5th Dist. 1991), *aff'd*, No. 73352, 1992 WL 346133 (Ill. Dec. 4, 1992). *But see* *Taake v. WHGK, Inc.*, 228 Ill. App. 3d 692, 592 N.E.2d 1159 (5th Dist. 1992) (relying on *Smith*, 176 Ill. App. 3d 482, 531 N.E.2d 51 (4th Dist. 1988)).

105. *Smith*, 176 Ill. App. 3d at 494-95, 531 N.E.2d at 59.

106. ILL. S.C.T. RULE 220 (1984) (ILL. REV. STAT. ch. 110A, para. 220 (1991))(emphasis added).

The committee is of the opinion that this provides a litigant with ample time within which to decide whether an *opinion* is sufficiently favorable. . . . In instances where *opinions* are not sought until a party approaches an imminent trial, a mandatory and exclusionary cutoff is provided

Paragraph (c) regulates the discovery of an expert's *opinions*

The purpose of the rule is to permit litigants to ascertain and rely upon the *opinions* of experts retained by their adversaries.¹⁰⁷

The quotations from the rule and the comments are somewhat lengthy, but it is essential to establish the importance of opinions in view of *Smith's* lightheaded treatment of them. The conclusion reached in *Smith*, that "a party, or the employee of a party, who is intimately involved in the subject matter of the litigation need not be disclosed as an expert witness," can be criticized on several levels. First, the exclusion of a party, or a party's employees, from the ambit of the rule ignores both the language of the rule and the accompanying comments.¹⁰⁸ Second, the intimate involvement in the subject matter of the litigation exception is nowhere mentioned in Rule 220 or in its comments as a criterion upon which to determine disclosure. To the extent that *Smith* is relying upon *Tzystuck* for this exclusionary principle, it has already been pointed out that *Tzystuck's* reference to treatment as the source of the basis for the doctor's opinion was to establish that the doctor was not retained. In *Smith*, the witness was an *employee*.

If *Smith's* language is followed, no engineer employed by a party comes under Rule 220, no accountant employed by a party comes under Rule 220, and no nurse employed by a party comes under Rule 220 as long as any of them were intimately involved in the subject matter of the litigation. The engineer who designed the widget that is the subject of the suit would not come under Rule 220, and could therefore, change his opinion on the eve of, or during, the trial without fear of any Rule 220 sanctions.

107. *Committee Comments*, ILL. ANN. STAT. ch. 110A, para. 220(b)-(c) (Smith-Hurd 1985)(emphasis added).

108. Rule 220 states as follows:

(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.

ILL. S.C.T. RULE 220 (1984) (ILL. REV. STAT. ch. 110A, para. 220 (1991)).

The committee comments state, "It should be noted that the employees of a party and an individual party fall within the definition." *Committee Comments*, ILL. ANN. STAT. ch. 110A, para. 220(a) (Smith-Hurd 1984).

It is submitted by this writer that the *Smith* extension of *Tzystuck* is unwarranted. Nevertheless, other courts have followed *Smith* in extending *Tzystuck*.¹⁰⁹ The extent of *Smith*'s influence is exemplified by *Jessee v. Amoco Oil Company*,¹¹⁰ which actually involved a treating doctor exception, but in which the court stated:

An expert who acquires information because he [is] an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit rather than acquiring information because a lawsuit is contemplated or is pending *should* be treated as an ordinary witness; thus, Rule 220 disclosure and discovery provisions do not apply to treating physicians.¹¹¹

If *Jesse* had limited its holding to the reiteration of *Tzystuck* contained in the concluding clause, it would not require discussion. Note, however, that the emphasized "should" has moved the intimately involved exception of *Smith* from a position that "employee" experts "need not be disclosed" to the *Jesse* position that they "should" not be disclosed.

A fourth district case that follows *Smith* is *Moore v. Roberts*¹¹² which involved an injury at a horse race that occurred when a horse left the track, ran through a closed gate that led to the stables, and trampled the plaintiff. Three days into the trial, the jockey, Wells, and the owner, Roberts, settled with the plaintiff, and this left the Fair Association as the only defendant. To the Association's chagrin, its former co-defendants became expert witnesses for the plaintiff and testified that the placement of the gate was improper. The court observed that Roberts had been asked about the gate location in his deposition and had testified that it was not safe. The opinion did not indicate whether Wells had been asked similar questions. If he had, and if the court had decided the case on a harmless error basis, the case would be included under that section and would be of no further concern. Unfortunately, however, that was not the basis of the court's decision.

109. See *Voyles v. Sanford*, 183 Ill. App. 3d 833, 836-37, 539 N.E.2d 801, 803 (3d Dist. 1989)(trial court reversed based on exclusion of defendant's former employee who had not been disclosed as an expert). *Forest Preserve Dist. of DuPage County v. Brookwood Land Venture*, 199 Ill. App. 3d 973, 557 N.E.2d 980 (2d Dist. 1990), allowed three undisclosed experts to testify as "occurrence witnesses who had direct involvement in the subject matter of the litigation, and their opinion testimony was not merely prepared in anticipation of trial." *Id.* at 981, 557 N.E.2d at 987.

110. 230 Ill. App. 3d 337, 594 N.E.2d 1210 (1st Dist. 1992)(distinguishing between those experts who were privy to information because they were actors regarding the subject matter of the litigation and those experts who gathered information in anticipation of the litigation).

111. *Id.* at 344, 594 N.E.2d at 1215 (emphasis added).

112. 217 Ill. App. 3d 446, 577 N.E.2d 538 (4th Dist. 1991)(ruling that experts may testify as either occurrence witnesses or expert witnesses).

[A]lthough Roberts and Wells were not technically parties to this lawsuit, nor were they employees of parties, they were in fact occurrence witnesses to the subject matter of the litigation. The testimony they gave was not expert testimony as to the design of the racetrack, but rather was their *opinion* based on their experience in training and riding horses.¹¹³

While the opinion in *Moore* does not discuss the possibility of some arrangement being made between the plaintiff and the two settling defendants in exchange for their testimony against the sole remaining defendant, such a possibility has to cross the mind of any lawyer who has ever tried a case. One can envision, without any serious stretching of the imagination, similar scenarios in which doctors who had been co-defendants with a hospital in a medical malpractice case suddenly appear in the plaintiff's camp. The supreme court's treating doctor exception might allow this to happen, but it has been the goal of this paper to indicate that the exception should not be extended.

The only case that has been critical of the exception extension trend is *Wakeford v. Rodehouse Restaurants of Missouri, Inc.*,¹¹⁴ in which the fifth district took what has been called "a renegade view of Rule 220 disclosure requirements."¹¹⁵ The court determined that the identity of all experts must be disclosed pursuant to Rule 220. The court further classified experts into two groups: those retained for litigation and those not retained. Experts retained for litigation are subject to the normal strictures of the Rule. But Rule 220's treatment of nonretained experts, according to the court, requires a different procedure. Where nonretained experts were involved, the opposing party would be permitted to seek "whatever discovery it deem[ed] appropriate once disclosure [was] made."¹¹⁶

The practical effect of the *Wakeford* decision at the appellate level (*Wakeford I*) can be viewed in two ways. The first view holds that *Wakeford I* created an exception to the multiplicity of exceptions that began with *Tzystuck*. The second view holds that *Wakeford I* recognized an additional class of experts which are different from the retained or consulting experts that are the primary focus of Rule 220.

If the first view is accepted, then *Wakeford I* is subject to Mr. Redden's criticism that:

113. *Id.* at 454, 577 N.E.2d at 543.

114. 223 Ill. App. 3d 31, 584 N.E.2d 963 (5th Dist. 1991), *aff'd*, No. 73352, 1992 WL 356133 (Dec. 4, 1992).

115. James R. Williams, *Survey of Illinois Law: Civil Procedure*, 16 S. ILL. U. L.J. 807, 824 (1992). Williams notes that the suggestions contained in the appellate court's *Wakeford* decision may prove to be a precursor for needed change to correct the problems lawyers face in their attempts to comply correctly with Rule 220 disclosure requirements. *Id.* at 826.

116. *Wakeford*, 223 Ill. App. 3d at 40, 584 N.E.2d at 969.

The *Wakeford* court chose — remarkably — to find an exception to the exception. Rather than simply characterize the officer as an expert under Rule 220(a)(1), the *Wakeford* court noted that the witness' involvement in the case went beyond that of an occurrence witness and he became, therefore, an expert witness within the meaning of the rule.¹¹⁷

In response to Mr. Redden's criticism on this point, two matters should be noted. First, the quoted criticism is muted somewhat by his following paragraph:

Regardless, the *Wakeford* court must be credited for rejecting the notion that a label such as "treating physician" or "occurrence witness" unconditionally exempts an expert from the dictates of Rule 220. In its wisdom, the court in *Wakeford* found significant the nature and development of the opinion testimony and their relationship to the litigation.¹¹⁸

Further, the appellate court in *Wakeford I* was not writing upon a clean slate. *Tzystuck* is a supreme court decision. It began the exception trend. The appellate court is not the source of judicial policy in the state.¹¹⁹

The second possible view of *Wakeford I* is the preferable one: there are experts, as that term is defined in Rule 220, whose identity should be disclosed even though the rest of the Rule 220 requirements should not be imposed on their proponents. Mr. Redden's criticism and the author's personal views notwithstanding, on December 10, 1992, the supreme court resolved the issue in a somewhat different manner in *Wakeford v. Rodehouse Restaurants of Missouri, Inc. (Wakeford II)*.¹²⁰

Justice Clark, writing for the majority, stated:

We agree with our appellate court that the question of whether a witness must be disclosed as an expert under Rule 220 depends on the expert's relationship to the case. If the expert is intimately involved in the underlying facts giving rise to the litigation and he would reasonably be expected to form an opinion through that involvement, then disclosure is not required. In such a case, the opposing party is unlikely to be surprised by the testimony. On the other hand, where the expert's contact with the case is slight, or where the opinion rendered is unrelated to the expert's involvement in the case, then disclosure is required.¹²¹

117. Redden, *supra* note 30, at 445.

118. *Id.*

119. *People v. Layhew*, 139 Ill. 2d 476, 489, 564 N.E.2d 1232, 1238 (1990) (reminding the appellate court in the fifth district that "there is but one appellate court within the State of Illinois, and that a panel of the appellate court does not have constitutional authority to issue 'directives' to lower courts within its district").

120. No. 73352, 1992 WL 356133 (Ill. Dec. 4, 1992).

121. *Id.* at * 3.

As a judge who prefers being affirmed to being reversed as much as any other judge, and with all due respect to the supreme court, there are problems with the rationale of the majority opinion. In the first sentence of the quote, the supreme court did not adopt the appellate court's distinction that required the *identity* of all expert witnesses to be disclosed while relieving the proponent of the non-retained expert from the burden of the other provisions of Rule 220. Instead, the supreme court treats disclosure as a term that encompasses all the elements of Rule 220. With that treatment of the terms in mind, the supreme court then correctly states that the necessity of disclosure depends on the expert's relationship to the case. It is submitted, however, that interpretation of the next sentence of *Wakeford II* may present problems in the future.

Breaking the sentence down into its components, the clause, "[i]f the expert is intimately involved in the underlying facts giving rise to the litigation," is no more than the *Smith* "intimately involved with the subject matter of the litigation" test, and is subject to the same criticisms.¹²² The second portion of the sentence, "and he would reasonably be expected to form an opinion through that involvement, then disclosure is not required," presents a different sort of problem. The potential problem with the second portion of the *Wakeford II* test is its lack of certainty in several areas. First, how often and when will an expert reasonably be expected to form an opinion that is relevant to the issues at trial and that arises from the expert's intimate involvement with the underlying facts? Second, who is to make the determination of whether the expert would "reasonably be expected to form an opinion" at trial? Is it to be the proponent of the expert, or is the burden of making this determination to fall upon the opponent?

While Rule 220 properly recognizes that the proponent of the expert generally has superior knowledge of the witness' opinions and requires the proponent to disclose, *Wakeford II* may shift this burden. Immediately after the "reasonably expected" language, the court states that, "[i]n such a case, the opposing party is unlikely to be surprised by the testimony." This sentence might lead some readers to conclude that the opponent must make the determination. For example, Justice Heiple criticized the majority and focused upon the second portion in his vituperative dissent:

[N]ever mind that any attorney worth his salt would have anticipated that defendant would call the officer who investigated the shooting and would dispute the claim that security guards were necessary Therefore, a witness that an opposing party should reasonably expect to be called will probably not fall within the disclosure compelled by

122. See *supra* notes 100-113 and accompanying text for a discussion of the *Smith* exception.

Rule 220.¹²³

Thus, whether the majority in *Wakeford II* meant to shift the burden of determining whether an expert opinion would be offered, at least one member of the supreme court has implied that it did. More important than the opinion of the sole dissenting member is another statement in the majority opinion. "The opinion [on the need for a security guard] is not related to the investigation of the crime that a party could reasonably anticipate that Lahlien would testify on the matter."¹²⁴

Again, with all due respect to the majority and the minority opinions, the ability of a party to guess, infer, divine, or otherwise determine that the opponent will call a witness to offer an opinion should have little, if anything, to do with the duty of the proponent to disclose the expert's identity. Whether the opposing party could have, might have, or should have known of the identity or even the opinion of the witness is an element to consider in determining whether the opponent was improperly surprised or prejudiced by the use of the witness. The purpose of Rule 220, however, was to move the inquiry backward in time so that the question of surprise or prejudice does not arise. If the identities of all experts were disclosed under the *Wakeford I* analysis, and the identity, qualifications, and opinions of retained experts were disclosed under Rule 220, then the need to "anticipate" and the relative skills of lawyers would no longer consume inordinate amounts of judicial time in resolving these questions.

In a case decided between *Wakeford I* and *Wakeford II*, the fifth district appellate court again refused to expand the exceptions to Rule 220. In *Thompson v. Illinois Power Company*¹²⁵ the court reversed a \$1.6 million verdict. In *Thompson*, there was little discussion of the expert issue beyond a reference to *Wakeford I* and the following warning:

Counsel contemplating whether to provide their opponents with the names of experts would be well advised to heed Robert Frost's admonition to,

"The witch that came (the withered hag)
to wash the steps with pail and rag,
was once the beauty, Abishag."

Frost titled the poem and closed it with the same warning, "Provide, provide!"¹²⁶

123. *Wakeford*, 1992 WL 356133, at *4, 5.

124. *Id.* at *3.

125. 237 Ill. App. 3d 273, 603 N.E.2d 1303 (5th Dist. 1992).

126. *Id.* at 1307 (citing DAVID A. SOHN AND RICHARD W. TYRE, FROST: THE POET AND HIS POETRY 112 (1969)).

CONCLUSION

This paper has reviewed the exceptions to disclosure that have been created in the four years since *Tzystuck*, and it has been critical of most of them. No criticism has been leveled at the supreme court's decision in *Tzystuck* itself for two reasons. First, this paper was originally presented to Illinois judges who are bound to follow the decisions of the supreme court. Second, there is a legitimate distinction, in terms of control, between retained and non-retained experts. This distinction, however, does not require an extension of *Tzystuck's* exceptions into thirteen or fourteen additional categories to accommodate late disclosure of either the identities or the opinions of expert witnesses. The words of Justice Ryan are as applicable in the civil area as they are in the criminal area,

At the risk of stating the obvious, it should be pointed out that the rules adopted by this court concerning criminal defendants and guilty pleas are in fact *rules of procedure and not suggestions. It is incumbent upon counsel and courts alike to follow them.*¹²⁷

127. *People v. Wilk*, 124 Ill. 2d 93, 103, 529 N.E.2d 218, 221 (1988)(emphasis added).

