Feature Article

Illinois Association of Defense Trial Counsel
White Paper on Cook County’s “Pilot Project” for Simultaneous Expert Witness Disclosure

The mission of the Illinois Association of Defense Trial Counsel is to ensure civil justice with integrity, civility and professional 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 Expert Disclosure Pilot Project (hereinafter “Pilot Project”). The goal of the instant white paper is to raise issues with the Pilot Program beyond legal concerns, and to present a practical defense perspective on the issues raised by the program.

Introduction and Summary

In late August 2011, defense attorneys in Cook County were advised that the Circuit Court of Cook County had unilaterally implemented a Pilot Project which required, for cases within its ambit, that parties simultaneously disclose Illinois Supreme Court Rule 213(f)(3) expert witnesses. The Pilot Project was instituted without any advance notice to or dialogue with the defense bar. At the outset, it was to be limited to certain medical malpractice, construction and products liability cases. It since has been expanded to include other types of complex cases including all types of professional liability claims.

When first instituted, as reported to their membership by both ITLA and IDC, the Pilot Project was to be voluntary, requiring consent of both the plaintiff and the defendant. Shortly thereafter, defense counsel was advised that a case would be included in a Pilot Project if just one side requested it. Thereafter, many plaintiffs have requested that their cases be placed in the Pilot Program, and that request has been granted.

The stated goal of the Pilot Project is to increase efficiency and decrease the amount of time and expense of trial preparation. The IDC agrees that this is a laudable goal. The IDC also seeks ways to make litigation more efficient and less costly for their members and their member’s clients but, as will be demonstrated by this paper, the Pilot Project – in addition to being fundamentally unfair to defendants and inconsistent with plaintiff’s burden of proof – will actually serve to increase the expense and lengthen the time involved in preparing complex litigation cases for trial.

The primary goal of this paper is to demonstrate the fundamental fallacy of the Pilot Project’s underlying assumption i.e., that in complex litigation cases defendants sufficiently know plaintiff’s theories of the case and what defense experts they will need to engage before plaintiff’s experts and their opinions are revealed. IDC seeks to demonstrate that in most complex litigation cases just the opposite is true, and that due to the liberal rules of amendment and relation back, the practical litigation reality is that plaintiff’s theories of liability continuously evolve and change until the sworn deposition of plaintiff’s experts are completed.
Next, the white paper will demonstrate that the simultaneous disclosure procedure of the Pilot Project ignores plaintiff’s burden of proof and forces defense attorneys to choose and disclose their theories of defense before they know what theories of liability plaintiffs will ultimately argue at trial.

The white paper will also discuss the procedural infirmities in the Pilot Project that further skew the process in favor of plaintiffs and against defendants. The paper will also illustrate why the assumed time differential between the proposed simultaneous disclosure process and the historically accepted consecutive disclosure process does not exist in most cases.

The white paper will also briefly examine those few jurisdictions which have adopted some form of simultaneous disclosure and demonstrate that even those jurisdictions do not ordinarily have the kind of stringent simultaneous disclosure envisioned by the Pilot Project.

Finally, in recognition of the Pilot Project’s laudable goal of reducing the cost and time expenditure in preparing major litigation cases for trial, IDC suggests numerous alternative methods to achieve these goals and stands ready to participate in such efforts.

A. In Complex Cases Even Plaintiffs (Much Less Defendants) Typically Do Not Know What the Ultimate Theories of Recovery Will Be until the Expert Discovery of the Plaintiffs is Completed

The fundamental assumption of the Pilot Program—that defense counsel know from the pleadings and fact discovery what experts they will need and what expert opinions they must obtain to defend a case—simply does not comport with the realities of complex case litigation practice. To the contrary, in most cases, clarification of the issues and plaintiff’s liability and damages theories only begins with the filing of the answers of the plaintiffs to Rule 213(f)(3) interrogatories, wherein for the first time plaintiffs identify their experts and summarize their experts’ opinions as well as the bases for those opinions as Rule 213(f)(3) requires.

But even then, the exact nature and scope of the criticisms of the plaintiffs’ experts is often not fully known or understood until the discovery depositions of the experts are taken under oath and the experts’ Rule 213(f)(3) opinions are subject to the scrutiny that only a deposition can provide. It is not at all unusual for the expert at deposition to change, clarify, withdraw, limit or add to the criticisms contained in plaintiffs’ complaint and Rule 213(f)(3) answers to interrogatories. For example, in medical malpractice cases against a hospital, it normally is not until the depositions of their experts are taken that the defense will be made fully aware of all the various medical hospital specialties that may be involved in the experts’ criticisms of the care of the plaintiff (e.g., emergency room personnel, nurses, anesthesiologists, radiologists, etc.) for which appropriate defense experts in those specialties will then have to be retained. Accordingly, in complex cases, it is not unusual for the plaintiffs, aided by Illinois’ liberal rules of amendment and relation back, to file a number of amended complaints as the depositions of their experts expand, limit or sharpen the issues.

One medical malpractice case recently included in the Pilot Project at the request of the plaintiff is illustrative. In that case, a wrongful death action was filed in 2002 alleging that the pulmonary artery of the decedent was lacerated during a CT guided needle biopsy causing her death. The plaintiffs named six physicians (an interventional radiologist, a cardiologist, an emergency room physician, a thoracic vascular surgeon, an internist and a pulmonologist) and the hospital as defendants. There were no independent allegations against the hospital, but all six named physicians were alleged to be the actual or apparent agents of the hospital. In 2006, two of the physicians responding to the code that was called prior to plaintiff’s death filed summary judgment motions under the Good Samaritan Act. The circuit court granted summary judgment in favor of these two physicians, but the plaintiff appealed to the appellate court which eventually reversed the summary judgments and remanded the case to the trial court. In 2011, the plaintiff elected to voluntarily dismiss two of the defendant physicians – including one of the physicians whose summary judgment had been reversed on appeal. Relying on the customary consecutive discovery process, defendant hospital had not yet retained any experts to defend the conduct of the six-specialty defendants on the apparent agency claims, but now that the case has been placed in the Pilot Project it must immediately do so. Note that had the Project been
in effect when fact discovery was completed in this case, the hospital would have had to engage experts to defend the conduct of the two physicians who are no longer even in the case.

This issue is not limited to medical malpractice cases. Fundamentally, in any complex litigation case, a defendant is unable to know what experts it needs to engage and what issues those experts need to address until it is informed what experts the plaintiff has engaged and what the opinions of the plaintiff’s experts will be. For example, in a products liability case, the defendant cannot be certain until plaintiff’s expert disclosure of whether the theory of the plaintiff is focused on a warning defect, a manufacturing defect or a design defect. If a warning case, what do the experts of the plaintiff claim the warning should have said, and how would that have made a difference? What is the source of the expert’s opinion about the content of the warning? In a design case, does the expert of the plaintiff believe that there is an alternate design? What is the basis of that opinion? What about damages? Is the plaintiff going to use an economist and/or life care planner? Consider a legal malpractice case that involves a claim that a lawyer’s negligent advice caused the failure of a real estate developer. Will the plaintiff rely on a real estate expert, a forensic accountant, a financial analyst or a bankruptcy expert? Thus, to suggest that defendants and their counsel, no matter how experienced, already know what they have to respond to before they see the expert disclosure of the plaintiff is simply not consistent with real world practice. At one meeting of the Cook County Pilot Project Committee, to which six members each of the plaintiff’s bar and the defense bar have been appointed, six very experienced defense counsel, with a combined 234 years of defense experience, reported that it is almost never the case that defendants know the subjects of needed expert testimony at the commencement of a case, nor even at the close of fact discovery.

An additional area of concern involves the potential for disclosure of experts and/or opinions based upon perceived potential weaknesses of plaintiff’s case. Oftentimes, the defense consultants identify issues which may be disregarded or overlooked by the plaintiffs. If the defense discloses such opinions, it has the potential to raise a red flag to plaintiffs, thereby resulting in the expansion of opinions not originally contemplated by plaintiff. This could result in a perception that the defense opened doors to assist the plaintiff in proving her case.

Expert witnesses are expensive. Forcing defendants to guess what kind of expert witnesses and expert opinions will be necessary to defend a case, and then hire those experts and pay them to review the case and form opinions, all before they see what experts plaintiff has retained and what opinions the plaintiff’s experts will offer, will dramatically increase the cost of litigation for all defendants in complex litigation cases, contrary to the stated goals of the Pilot Project.

B. The Pilot Project is Also Contrary to the Burden of Proof

The plaintiff has the burden of proof in all complex litigation cases that have been placed into the Pilot Program. The burden of proof has two distinct elements: (1) the burden of going forward, or producing evidence; and (2) the burden of persuasion. The party with the burden of proof has, except in unusual circumstances, the obligation to meet both of these elements in order to make out a prima facie case sufficient to withstand summary judgment. Indeed, in one of the categories of cases within the Pilot Project, medical malpractice, the plaintiff has the burden of providing expert testimony on the standard of care and its breach, causation and damages to establish a prima facie case.

By contrast, except as to its affirmative defenses, if any, the defendant is not required to prove anything. It has no obligation as to any of the elements of the burden of proof. It is not required to retain an expert witness. It is not required to put forth any evidence. Rather, the defendant is entitled to make the plaintiff show that he or she can prove a prima facie case. Thus, defendants are entitled to defend a case simply by attacking the plaintiff’s experts without retaining their own (and incurring the expense as well.) But it is impossible to know whether such an attack is viable until after the disclosure of the plaintiff. Is the plaintiff’s expert qualified to give the disclosed opinions? Do the opinions and their bases meet the relevant standard established by the case law for expert opinions? It is impossible for a defendant to predict whether it even needs to retain experts, and what those experts need to be asked to evaluate, until the plaintiff’s expert disclosure is received. Nowhere is
this more evident than in a legal or medical malpractice case where there may be a wide variety of different experts needed as to all the elements of the underlying case, whatever its nature.

Simultaneous disclosure turns the burden of proof on its head. Under its auspices, 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.

The simultaneous disclosure advocated by the plaintiffs is not only inconsistent with the plaintiffs’ burden of proof, it also overlooks the fact that in a significant number of cases, the plaintiffs Rule 213(f)(3) answers to interrogatories and the deposition of plaintiffs’ experts will reveal that plaintiffs, particularly in medical malpractice cases cannot establish either that a violation of the accepted standard of care occurred and/or that such a violation was a proximate cause of the injury of the plaintiffs. Such cases are then resolved on summary judgment. Thus, 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 involved in hiring experts and preparing the necessary initial defense expert disclosures.

C. The Pilot Project Has Many Other Procedural Infirmities That Are Unfair to Defendants and Will Ultimately Increase the Cost of Complex Litigation

As initially instituted, and as stated in Administrative Order 11-3, the Project is only to apply to cases “which have all fact, Rule 213(f)(1) and (2) discovery completed and with no Rule 213(f)(3) discovery commenced” (emphasis added.) However, defense counsel report that some cases have been placed into the Pilot Program, even though (f)(2) discovery was not completed. In one particular instance, which is now the subject of a Motion for Leave to File an Original Complaint Seeking Writ of Prohibition, or for a Supervisory Order, a 213(f)(3) schedule had already been set for the plaintiff’s expert disclosure, requiring plaintiff’s disclosure by August 24, 2011. The plaintiff then filed a “Motion to Set Simultaneous Disclosure.” Over the objection of the defendant, the case was placed in the Pilot Project. As a result, far from creating greater efficiencies, putting this case into the Project delayed expert discovery by 90 days.

Defense counsel also report that, contrary to the Project’s rules, their first notice that a case has been placed into the Project is typically when they appear in court for a Case Management Conference. The Project contemplates that cases will be submitted to the Project not by a motion filed in the court record, but rather by a letter from counsel to the court. A copy of that letter is supposed to be sent to opposing counsel, but too often that is not happening, resulting in an ex parte communication to the court by submitting counsel. The concept of having cases submitted by letter, rather than motion filed in court, is itself flawed and requires additional expense, since it requires that defense counsel file motions in order to make a record and preserve the right to appeal.

In another reported instance, the parties appeared in court on a case that had been placed into the Project. The parties reported that neither side had submitted the case to the Project, and that (f)(1) and (f)(2) disclosures were not complete. The case nonetheless was included in the Project. In another case, a lawyer representing a hospital in a medical malpractice case reports that, under the pleadings, his client was sued only for vicarious liability. At the case management conference to set expert disclosure, the plaintiff advised for the first time that he would be disclosing a nursing expert and making a claim against the hospital for direct negligence. The court gave the plaintiff time to amend the complaint—obviously changing the issues as pleaded. Nevertheless, the court included the case in the Project and set a simultaneous expert disclosure schedule, even though not only was (f)(2) discovery incomplete, but the pleadings were not complete.

Also, while the Pilot Project was initially thought to still require that the depositions of plaintiff’s experts be taken prior to the depositions of the defense experts, that apparently is not so. Such an order of depositions must now be requested by motion, and allowed in a court order. This is yet another change from the originally
conceived Project, providing more opportunities for gamesmanship, and the need for additional motions and expense for everyone.

In summary, the stated parameters of the Pilot Project have continually changed with each change making the process more difficult and unfair to defendants.

D. The Time Required Under the Simultaneous Disclosure Process is not Significantly Different than that Required in the Consecutive Disclosure Process

One criticism voiced over the existing “consecutive” staggered expert disclosure process is that it takes between 330 and 510 days, while the proposed simultaneous disclosure in the Pilot Project would take between 210 and 215 days. These figures do not withstand analysis. The estimated 330 to 510 days for the consecutive discovery disclosure process includes 120 to 180 days for “supplemental” or “rebuttal” expert opinions. In the experience of the members of the IDC, it is exceedingly rare for either side to disclose rebuttal experts. Most defense attorneys can remember one or two instances in their entire careers, if that many, where the other side did so. Thus, if this 120-180 days for rarely used rebuttal experts is deducted from the consecutive discovery process, the typical expected expert discovery time in the consecutive process is only 210 to 330 days—almost exactly within the time frame that the proposed simultaneous disclosure procedure seeks to achieve.

E. Few Other Jurisdictions Require Simultaneous Disclosure—and in Those Places Where it Exists, it Engenders Gamesmanship and Extra Expense

Early in the implementation of the Pilot Project, it was suggested that it was consistent with Federal Rule of Civil Procedure (FRCP) 26, and that other jurisdictions adopting simultaneous disclosure have reported great success. IDC’s investigation of these assertions leads to a different conclusion.

First, nowhere does FRCP 26, which provides for planning conferences and a scheduling order for discovery and other aspects of a litigation, reference simultaneous disclosure of experts. There may be isolated judges in a federal district court who have adopted it for their own dockets, but those judges are far and few 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.

Second, most of the jurisdictions cited simply do not have any such procedure or rule. Among the few that do, such as California and Nevada, the result is widespread dissatisfaction, gamesmanship, and expense.

In California, for example, simultaneous expert disclosure does not occur until a demand is made only 70 days before trial, and the disclosure is made only 50 days before trial. Even then, the disclosures are sparse to say the least. The rules require only a general description of the general subject matter; opinions and bases are not disclosed. The parties then scramble within that 50-day period to take the depositions of the experts so that they can actually learn their opinions. Gamesmanship 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. This is especially difficult where there are multiple parties who each designate multiple experts. And there is additional context which far differentiates the California situation from Illinois, since in medical malpractice cases, general damages are capped at $250,000. All construction cases in California courts are run by a “special master” who supervises discovery and experts—another distinction not present in Illinois. Another important distinction is that there is no adverse inference risk if disclosed experts are withdrawn in California. While California attorneys may have become inured to these chaotic procedures through long practice, it is not a system to be emulated, and certainly not outside of the other contexts that are present in California, such as the damages cap.

In Nevada, similar issues with gamesmanship as to the disclosure and timing for expert depositions abound. There is sufficient dissatisfaction such that the Nevada Supreme Court has authorized a committee to study ways to change the system to make it shorter and more cost effective. One proposal under consideration is to revert back to a staggered disclosure system.
Many IDC members practice outside of Illinois, and outside of Cook County. Many also practice in Cook County. Because of this unique demographic, the IDC is in a position to view attorney civility and professional courtesy in many venues. The IDC has a viable concern that the kind of gamesmanship present in these other simultaneous disclosure states will also become the norm in Cook County resulting in an increased lack of civility and courtesy.

F. There are Many Things that Can Be Done to Meet the Pilot Project's Goals that Are Not Unfair to Either Side

The IDC believes there are many alternative options to expedite litigation. The following are examples:

A. Alter the Sequence of Rule 213 Disclosures

One alternative would be a staggered expert disclosure schedule that avoids virtually all of the problems that the simultaneous disclosure program creates, and yet meets the expert discovery time line (210 to 315 days) sought by the Pilot Project:

- Plaintiff’s disclosure of expert’s report .................. Day 1  
- Plaintiff’s expert’s deposition ..........................within 30 days  
- Defendant’s disclosure of expert report ............within 60 days  
- Defendant’s expert’s deposition ..................within 30 days  
- Plaintiff disclosure of rebuttal expert .................within 30 days  
- Deposition of Plaintiff’s rebuttal expert .............within 30 days  
- Disclosure of Defendant's rebuttal expert..........within 30 days  
- Deposition of Defendant’s rebuttal expert .........within 30 days

Total time 240 days

Even in cases where each side discloses multiple experts so that doing all of one side’s depositions within 30 days is impractical, adding another 60 to 90 days to the deposition process (30 to 45 days for extra for each side to take depositions) still brings the entire schedule within 300 to 330 days, well within the court’s sought time frame. Notably, this schedule includes 120 days for rebuttal experts which, as discussed earlier, is rare according to most experienced defense counsel. So, with this staggered schedule, the time for expert discovery is shortened, without the defects of a simultaneous disclosure program. Further, it still allows for professional courtesy to opposing counsel and avoids the gamesmanship built into a simultaneous disclosure program as reported by those who regularly practice under such a system. It plays to the strength of the Cook County bar, where the attorneys respect and accommodate each other within the bounds of vigorously representing their clients.

B. Allow Certain Fact Discovery Steps to Run Simultaneous to Rule 213 Staggered Disclosures

Another method would allow, after sequential completion of written discovery and party depositions, the staggered schedule of Plaintiff’s (f)(2) disclosures, followed by completion of those depositions. Defendant’s (f)(2) disclosures would follow with time allowed for completion of those depositions. Plaintiff’s (f)(3) disclosures could be required at the same time as Defendant’s (f)(2) disclosures and the case could proceed on a staggered schedule thereafter.

C. Require an Initial Scheduling Conference
Similar to FRCP 26

Another alternative to the Rule 213 Pilot Program is to adopt an initial scheduling conference, similar to the one required by the Federal Rules of Civil Procedure. According to Illinois Supreme Court Rule 218, the first time that attorneys representing parties in an Illinois lawsuit are required to meet is at initial case management conferences before the court. Thus, before the opposing attorneys have even had an opportunity to meet, the court considers a number of important issues, including but not limited to the complexity of the case, discovery deadlines, the advisability of alternative dispute resolution, and other matters that aid in the disposition of the action.

The initial case management conferences would be more efficient and productive if they were preceded by initial scheduling conferences between the parties, similar to those set forth by Rule 26(f) of the Federal Rules of Civil Procedure.

Rule 26(f) of the Federal Rules of Civil Procedure requires parties to meet and confer to negotiate a discovery plan as soon as practicable, and at least 21 days before a scheduling conference is held. During the meetings, parties:

- Discuss the nature and basis of their claims and defenses;
- Discuss the possibilities for a prompt settlement or resolution of the case;
- Make or arrange for the disclosures required by Rule 26(a)(1);
- Discuss any issues relating to the preservation of discoverable information; and
- Develop a proposed discovery plan.

Adoption of an initial scheduling conference in Cook County would require parties to meet early on in litigation and commit to a discovery plan, and afford parties an opportunity to set shorter discovery deadlines rather than conform to the rigid, form-based deadlines imposed during initial case management conferences. This would also set an early tone of cooperation between opposing counsel to foster and encourage agreements on discovery matters or even resolve matters outside of court. This alternative could result in significant efficiencies. More importantly, this alternative would not infringe on either party’s procedural or substantive due process rights.

D. Enforce Current Deadlines

Finally, the currently set deadlines for disclosures and depositions of experts would be efficient if enforced as ordered. Enforcement in this aspect of the case would increase efficiency and decrease time. It is not only this part of the case, however, where the deadlines are not enforced. Early in the case, deadlines for completion of respondent-in-discovery conversions are routinely extended over objection. Deadlines to extend time to file requisite 2-622 reports are routinely extended over objection. Deadlines to file discovery responses or complete depositions of parties are routinely extended over objection, when no good cause is shown. Trial dates are often continued without good cause shown and over objection. Tightening these deadlines and denying requests for continuances or extensions when no valid basis is set out, will move cases more quickly and allow for more consistency within the system itself. There may be additional ways to tighten up the scheduling. The items submitted above are just a sampling of ways to do so. IDC has been and remains committed to working with the court and the plaintiff’s bar to investigate, recommend, and implement ways to make the court system more efficient and cost effective for everyone involved. But for all the reasons stated above, IDC submits that Pilot Project’s upheaval of the most important aspect of the complex case—expert discovery—is not the way to achieve a more effective, less costly system.

About the IDC
The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion of their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation.

For more information on the IDC, visit us on the web at www.iadtc.org.

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