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Expert Discovery

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I. [11.1] INTRODUCTION

The prosecution and defense of medical negligence cases are expert-testimony intensive. Indeed, with the growth of medical knowledge and the proliferation of medical specialties, there has generally been a corresponding increase in the number of expert witnesses that may be required in the medical negligence case. For example, in a labor and delivery case, there may be experts in the areas of obstetrics and gynecology, pediatric neurology, pediatric neuroradiology, obstetrical nursing, psychiatry, infectious disease, and placental pathology, all in one case.

The successful use of expert witnesses requires that the attorney be aware of the requirements of Supreme Court Rule 213 because the failure to comply with this rule can result in one or more opinions being barred and, in the extreme case, the witness being barred altogether. In addition, the attorney must be aware of the limitations on expert testimony set down in *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), and related cases.

In an effort to clarify witness disclosure requirements, S.Ct. Rule 213 was amended July 1, 2002. The changes made in the amendment affected (a) lay witness disclosure, (b) retained expert witness disclosure, and (c) non-retained expert witness disclosure. The amendment classified witnesses into three categories for disclosure purposes: lay witnesses; independent expert witnesses; and controlled expert witnesses. This chapter addresses disclosure requirements for expert witnesses only. This chapter defines the disclosure requirements for independent and controlled expert witnesses and discusses the different methods of disclosure and the standards utilized by the court in determining the admissibility of expert testimony.

S.Ct. Rule 213 provides in part:

(f) *Identity and Testimony of Witnesses.* Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:

(1) *Lay Witnesses.* A “lay witness” is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party’s knowledge of the facts known by and opinions held by the witness.

(2) *Independent Expert Witnesses.* An “independent expert witness” is a person giving expert testimony who is not the party, the party’s current employee, or the party’s retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party’s knowledge of the facts known by and opinions held by the witness.

(3) *Controlled Expert Witnesses.* A “controlled expert witness” is a person giving expert testimony who is the party, the party’s current employee, or the party’s

retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.

(g) *Limitation on Testimony and Freedom to Cross-Examine.* The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial. Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition. Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial.

Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness. This freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination.

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

(i) *Duty to Supplement.* A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party.

(j) The Supreme Court, by administrative order, may approve standard forms of interrogatories for different classes of cases.

(k) *Liberal Construction.* This rule is to be liberally construed to do substantial justice between or among the parties.

II. INDEPENDENT AND CONTROLLED EXPERT WITNESSES

A. [11.2] Independent Expert Witnesses

An “independent expert witness” is defined as “a person giving expert testimony who is not the party, the party’s current employee, or the party’s retained expert.” S.Ct. Rule 213(f)(2). The party presenting the witness must “identify the subjects on which the witness will testify and the opinions the party expects to elicit.” *Id.* For an independent expert witness, an answer is sufficient “if it gives reasonable notice of the testimony, taking into account the limitations on the party’s knowledge of the facts known by and opinions held by the witness.” *Id.*