
Thomas G. Compall
COMMENTS

DISCLOSURE OF TESTIFYING EXPERT WITNESSES UNDER ILLINOIS SUPREME COURT RULE 220: THE CONTINUING STRUGGLE TO BALANCE ADEQUATE TRIAL PREPARATION AND FAIRNESS

Modern civil litigation has grown so complex1 that trial lawyers

1. Many areas of the law have become so complex that much of the testimony at trial may be outside the realm of knowledge of the average juror. Belli, The Expert Witness: Modifying Roles and Rules To Meet Today's Needs, 18 TRIAL 35, 35 (1982). In such cases, experts are needed, and sometimes required, to prepare and prove a case. Id. For instance, in medical malpractice cases, negligence on the part of the physician by reason of his or her departure from the standard of practice must be established, as a rule of law, by expert medical testimony. See, e.g., Stevens v. Sadiq, 176 Ill. App. 3d 333, 530 N.E.2d 1159 (1988) (stating the necessary elements in a medical malpractice action). But cf. Walski v. Tiesenga, 72 Ill. 2d 249, 381 N.E.2d 279 (1978) (stating the exception to the general rule that an expert is not needed when the negligence is so grossly apparent that a layman would have no difficulty recognizing it).

In products liability, patent, and other complex areas of the law, the use of expert witnesses will be allowed if the court determines that the expert possesses knowledge of a specialized nature that will help the jury in the determination of a factual matter. See Kionka, Evidence, 12 S. ILL. U. L. REV. 967 (1988) (discussing the use of expert witnesses in Illinois in relation to the rules of evidence). See also Ryan v. E.A.I. Constr. Corp., 158 Ill. App. 3d 449, 461, 511 N.E.2d 1244, 1252 (1987) (reaffirming the rule that Illinois favors the permissive use of expert testimony in all types of cases where the jury would be aided in its understanding of the facts). The trend in the law to allow expert testimony when it would be helpful to the jury evolved from the earlier practice in the 1930's and 40's which allowed expert testimony only in cases of extreme need. Annotation, Pretrial Discovery of Facts Known and Opinions Held by Opponent's Experts Under Rule 26(b)(4) of Federal Rules of Civil Procedure, 33 A.L.R. Fed. 403, 410 (1977) (emphasis added). See infra note 31 discussing various theories which early courts used to deny discovery of expert information.

Later, in the 1950's and 60's, the courts began to adopt a less restrictive attitude toward the discovery of expert witnesses. Annotation, supra, at 411. See infra note 33 and accompanying text discussing the liberalization of discovery of experts. This trend has manifested itself today in an avalanche in the US of expert witnesses. In this modern age, an “expert” can be found in almost any field. Belli, supra, at 35. There is a common attitude that, although the cost of employing an expert may be high, the cost of not employing one may be even greater, because practitioners who chose not to do so may be exposing themselves to malpractice actions. Id.

Indeed, in the back of nearly every legal magazine imaginable the same eye
have become dependent on the help of experts in both the preparation of the case before trial as well as proof of the case during trial. The dilemma caused by the surprise testimony of a concealed expert witness has plagued the court system for decades. The Illinois Supreme Court attempted to cure this evil by adopting Illinois Supreme Court Rule 220 (hereinafter “Rule 220”).

Rule 220, which took effect in 1984, contains a sanction provision which mandates that expert witnesses who are not disclosed in compliance with the strictures of the rule are to be disqualified as witnesses. However, in 1985, the Illinois Supreme Court amended supreme court rule 219 to allow the trial courts to apply various discretionary sanctions other than mandatory disqualification when faced with a Rule 220 violation. These contradictory sanction provisions appear. For instance, in one, under the heading “addictionologist”, a physician offered, for a fee, to provide expert testimony on alcohol and drug issues. N.Y. Times, July 5, 1987, at 1, col. 1. In others, specialists offered expert advice or testimony on bicycle mishaps, battery or bottle explosions, hot-air balloon accidents, and radiation incidents. Id.

The business of being an expert has become a cottage industry. Individuals with knowledge in scores of obscure fields have joined tens of thousands of doctors, university professors and engineers in the expert witness industry. Id. They can be hired to bring their learning into court by nearly anyone willing to pay their rates, which can range from $50 an hour for a law-enforcement expert, to more than $10,000 a day for a plastic surgeon. Id.

The Technical Advisory Service for Attorneys, established in 1961, is one of the oldest and largest of such enterprises. Id. at 13, col. 1. The service has developed a nationwide list of about 10,000 experts, grouped into 4000 categories. Id. 2.


5. Rule 219 is a discovery rule which allows the trial court to enforce the discovery rules and discovery orders through the use of broad sanctions. Ill. Ann. Stat. ch. 110A, ¶ 219, Historical and Practice Notes at 386 (Smith-Hurd 1985 & Supp. 1989). The 1985 amendment to rule 219 was intended to make its sanction provisions applicable to the recently added discovery Rules 220 and 222. Ill. Ann. Stat. ch. 110A, ¶ 219, Committee Comments at 89 (Smith-Hurd 1985 & Supp. 1989). It was also intended to apply to all future discovery rules which may be adopted, thereby eliminating the need for further amendments. Id.

Included in the list of possible sanctions which the court may use to enforce the discovery rules is the sanction of barring a witness from testifying. Ill. Rev. Stat. ch. 110A, ¶ 219(c)(iv) (1987). Unlike the sanction in Rule 220, however, the sanctions in rule 219 are not mandatory and are to be applied at the discretion of the trial judge. Ill. Ann. Stat. ch. 110A, ¶ 219, Committee Comments at 89 (Smith-Hurd 1985 & Supp. 1989). It is interesting to note that the amendment to rule 219 was not made until one year after the adoption of Rule 220. At the time Rule 220 was adopted in
sions provide conflicting guidelines for trial court judges who strive to balance adequate trial preparation with procedural fairness. This has resulted in a split in the appellate courts as to whether a mandatory or a discretionary sanction should apply against disclosure violations. This, in turn, has created uncertainty for litigators who are unable to predict with any degree of certainty how a judge will rule when faced with the issue of an undisclosed expert witness. This comment offers an analysis of Rule 220 in relation to the problem it was intended to cure. Specifically, it proposes that a mandatory sanction provision would provide a better standard for trial court judges who would be able to achieve more consistent results when faced with undisclosed expert witnesses. First, Part I will provide a historical overview of Rule 220. Part II will then present a detailed analysis of Rule 220 and survey various issues that have arisen under the rule. Next, Part III will examine the current split in the appellate courts over the proper sanction to be applied in Rule 220 and how these inconsistent rulings have been a poor guide for litigators to follow. Finally, Part IV will suggest that a mandatory sanction provision would result in more consistency and enhance the predictability of using Rule 220.

I. HISTORICAL DEVELOPMENT OF RULE 220

On June 29, 1984, the Illinois Supreme Court adopted Rule 220, which became effective October 1, 1984. The rule, which was without precedent in Illinois, gave express recognition to the numerous
problems regarding the scope and limits of discovery which the use of expert witnesses had posed for a civil trial.10

The express purpose of Rule 220 was to "facilitate trial preparation and the evaluation of claims by eliminating the last-minute disclosure of experts on the courthouse steps or during the course of trial."11 The drafters of Rule 220 recognized the need for a specific rule addressing expert witnesses due to the ineffectiveness of section 2-1003(C) of the Illinois Code of Civil Procedure, and the Illinois Supreme Court Rules regulating discovery.12 A discussion of these

problem. O'Brien, Rule 220 A Cure For Late Disclosure?, Chicago Daily L. Bull., Jan. 9, 1985, at 2, col. 2. Although Rule 220 was the first rule in Illinois to detail a framework for the timely revelation of an expert's identity and opinions, there were general provisions in the rules prior to Rule 220 which were used to address the issue. ILL. ANN. STAT. ch. 110A, ¶ 220, Historical and Practice Notes at 441 (Smith-Hurd 1985 & Supp. 1989).

Both section 2-1003(c) of the Illinois Code of Civil Procedure and Illinois Supreme Court Rule 201(b)(1) were used prior to Rule 220 to discover the identity and opinion of an expert. Id. However, these rules were very general compared to Rule 220, which addresses the issue in detail. See infra notes 13-19 for a discussion of how these rules were used.


12. The drafters of Rule 220 were an ad hoc Committee on Discovery that was appointed by the Illinois Supreme Court to investigate various alleged problems and abuses of discovery. Burleigh, Court Considers Changing Rule on Identity of Expert Witnesses, Chicago Daily L. Bull., May 21, 1984, at 1, col. 2. The committee, consisting of members of the Illinois State Bar associations and four judges, had determined that the process of disclosing the identity of a litigant's expert witness in a timely fashion was the most urgent problem plaguing the discovery process at that time. Id. The committee's recommendations were adopted by the Illinois Supreme Court on June 29, 1984. ILL. REV. STAT. ch. 110A, ¶ 220 (1987).


rules is necessary in order to understand the evolution of Rule 220.

Section 2-1003 was originally enacted by the Illinois Legislature as section 58 of the Civil Practice Act of 1933. The amendment to section 58(3) created an apparent conflict with supreme court rule 19-4, the predecessor to current Illinois Supreme Court Rule 201(b)(1).
which stated that, "[u]pon a discovery deposition, the deponent may be examined regarding any matter in litigation . . . including . . . the identity and location of persons having knowledge of relevant facts".\textsuperscript{17}

The Illinois Supreme Court determined that the two rules were not inconsistent by interpreting the term "witness" in rule 19-4 to mean persons having personal knowledge of the matter in issue, rather than in the technical sense of those who will testify at trial.\textsuperscript{18} Thus, these two rules did not require a party to disclose persons that the party intended to call as witnesses at trial. Rather, the rules only required that a party could not refuse to disclose the names of persons having knowledge of relevant facts merely because they may also be persons the party intended to call as witnesses.\textsuperscript{19}

However, neither section 58(3) nor rule 19-4 contained any sanction provisions which addressed the non-compliance of a request for the identification and address of a person with knowledge of discoverable information. Thus, litigants relied on rule 19-12,\textsuperscript{20} the predecessor to current Illinois Supreme Court Rule 219,\textsuperscript{21} which authorized the trial court to enforce the discovery rules and orders. Rule 19-12 provided an extensive list of sanctions which the trial courts could apply.\textsuperscript{22} However, the sanction of barring an un-
disclosed witness was not included. Therefore, a split developed in the Illinois Appellate Courts over the question of whether a trial judge had the authority to exclude an undisclosed witness. The Illinois Supreme Court finally resolved this issue in the 1963 decision, *Dempski v. Dempski*, where the court held that a trial judge had the authority, under rule 19-12, to exclude an undisclosed witness from testifying.

Since the *Dempski* decision, courts have considered several factors in determining whether to permit or exclude an undisclosed witness from testifying. These factors include the surprise to the adverse party, the harm that has been done to the adverse party's case, the nature of the witness's testimony, the timeliness of the objection, and whether the omission was intentional or inadvertent.
However, even accounting for the discretionary right accorded to the judges, the result was unpredictability, with some courts allowing the witness to testify and other courts barring the testimony of the witness. 29

Unlike the development of these discovery rules which addressed the problem of the undisclosed witness, there were no similar rules regarding the discovery of an expert witness. This was due to the fact that, historically, Illinois courts had been reluctant to allow discovery of expert opinions in litigation. 30 It was generally perceived as unfair that one litigant, who was free to obtain an expert’s assistance, should be able to benefit from an opponent’s expert by discovering the methods and conclusions of that expert. 31

829 (1965) (court barred testimony of undisclosed witness because content was not cumulative and would have created unfair surprise to adverse party).

28. See, e.g., Rubright v. Codman & Shurtleff, 86 Ill. App. 3d 94, 407 N.E.2d 681 (1980) (court permitted undisclosed witness to testify after allowing opposing party an opportunity to depose the witness); Thorsen v. City of Chicago, 74 Ill. App. 3d 98, 392 N.E.2d 716 (1979) (court allowed undisclosed witness to testify and merely scolded faulty party for violating the spirit of the rules); Mason v. Mundelein Lanes, 72 Ill. App. 3d 990, 391 N.E.2d 151 (1979) (court held it was an error to exclude undisclosed witness from testifying); Acosta v. Chicago Transit Auth., 39 Ill. App. 3d 80, 349 N.E.2d 613 (1976) (court allowed undisclosed witness to testify because element of surprise was not great enough); Smith v. Realcoa Constr. Co., 13 Ill. App. 3d 254, 300 N.E.2d 855 (1973) (trial court acted improperly in admitting undisclosed witness's testimony but did not constitute reversible error); Ocasio-Morales v. Fulton Mach. Co., 10 Ill. App. 3d 719, 295 N.E.2d 329 (1973) (court allowed undisclosed witness to testify because opposing party should not have been surprised by it); Brezinski v. Gajda, 5 Ill. App. 3d 977, 284 N.E.2d 383 (1972) (undisclosed witness allowed to testify because opposing party was not surprised and testimony was not cumulative).

29. See, e.g., Jensen v. Chicago & W. Ind. R.R., 94 Ill. App. 3d 915, 419 N.E.2d 578 (1981) (no error for trial court to exclude undisclosed expert from testifying); Garcia v. Chicago & N.W. Ry., 79 Ill. App. 3d 757, 398 N.E.2d 1029 (1979) (no error for trial court to bar undisclosed witness because testimony would only have been cumulative and not crucial to the case); Strope v. Chicago Transit Auth., 71 Ill. App. 3d 989, 389 N.E.2d 1374 (1979) (trial court excluded witness after considering all the factors); Ferenbach v. DeSyllas, 45 Ill. App. 3d 599, 359 N.E.2d 1214 (1977) (trial court barred undisclosed witness to protect opposing party from unfairness); Finrock v. Eaton Asphalt Co., 41 Ill. App. 3d 1020, 355 N.E.2d 214 (1976) (trial court considered all the factors and barred undisclosed witness from testifying); Mason v. Village of Bellwood, 37 Ill. App. 3d 543, 346 N.E.2d 175 (1976) (trial court's exclusion of undisclosed witness was proper even though exclusion should be imposed only when noncompliance is unreasonable); O'Brien v. Stefaniak, 130 Ill. App. 2d 398, 364 N.E.2d 781 (1970) (not error for trial court to exclude undisclosed witness after considering all the factors); Rosales v. Marquez, 55 Ill. App. 2d 203, 204 N.E.2d 829 (1965) (court barred undisclosed witness because testimony was not cumulative and would have created unfair surprise to opposing party).


31. Id. This early attitude in Illinois courts against the discovery of experts and their opinions paralleled that which was prevalent on a national scale. The federal expert rule, Federal Rule 26(b)(4), was not enacted until 1970, and most pre-1970 cases either denied discovery of experts entirely, or limited it to narrow areas. Smith v. Ford Motor Co., 626 F.2d 784, 792 (10th Cir. 1980).

Judicial restrictions on the discovery of experts took many forms. For instance,
Thus, it was not until 1966 and the Illinois Supreme Court's deci-


Another justification espoused by the courts to deny discovery of expert information was the doctrine of unfairness. The underlying premise of this theory was that unlimited discovery would encourage a party to wait until the opponent had hired experts and then build their own case through the discovery process using the more diligent litigant’s expert. Friedenthal, *supra*, at 479. Permitting a litigant to prepare his case in this manner was considered unfair and encouraged laziness. *Id.* see, e.g., Maginnis v. Westinghouse Elec. Corp., 207 F. Supp. 739 (E.D. La. 1962) (opinions and conclusions of expert were not discoverable because to allow so would be unfair); Schuyler v. United Airlines, Inc., 10 F.R.D. 111 (M.D. Pa. 1950) (court noted that rules of civil procedure were designed to permit liberal discovery, but not intended to be used as a vehicle through which one litigant could make use of the other’s preparation); Lewis v. United Airlines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940) (engineering expert witness not required to disclose reports or opinions because this information was obtained at great expense and it would be unfair to allow opposing party to obtain it). *See also* Friedenthal, *supra*, at 479-88 (discussing the doctrine of unfairness); Haynes and Ryder, *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. MIAMI L. REV. 1101, 1101-15 (1988) (discussing the unfairness doctrine); Annotation, *Pretrial Discovery of Facts Known and Opinions Held by Opponent’s Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure*, 33 A.L.R. Fed. 403, 410 (1977) (discussing the consideration of fairness in the use of experts).

The above uncertainties as to the appropriateness of allowing discovery of expert information were further complicated by the fact that an expert witness was not a
sion in Monier v. Chamberlain, that the reluctance to allow discovery of expert opinions started to recede.

The Monier decision opened the door to more liberal discovery than was previously available by narrowly construing the work product doctrine. The Monier court suggested that the work product

document. party to the action and that there seemed to be no appropriate way for the court to mandate when an expert had to be hired or when he had to have his testimony prepared. ILL. ANN. STAT. ch. 110A, § 220, Historical and Practice Notes at 441-42 (Smith-Hurd 1985 & Supp. 1989).

Eventually, a more liberal attitude toward the discovery of expert opinions developed, with the courts reasoning that the potential benefits of discovery were sufficiently desirable to offset any resulting unfairness. Annotation, supra, at 411. See infra note 33 discussing the liberalization of discovery in Illinois. The arguments in favor of broader discovery focused on the fact that justice required cases to be decided on their merits. See Hickman v. Taylor, 329 U.S. 495, 507 (1947) (ultimate purpose of discovery is to obtain a fair decision on the merits of the litigation). It was emphasized that broader discovery furthers this principal by narrowing the issues to be contested at trial, and by allowing each party to make adequate preparation to contest them. Comment, Discovery of Expert Information After Monier v. Chamberlain, 62 NW. U.L. REV. 624, 625 (1967). Furthermore, it was argued that cases involving complex issues necessitated the use of experts, therefore, discovery was needed to allow each side to prepare adequately. Id. See generally Friedenthal, supra, at 455 (discussing the pros and cons of the use of experts); Mclaughlin, Discoverability and Admissibility of Expert Testimony, 63 NOTRE DAME L. REV. 760 (1988) (discussing the conflict over the discoverability of expert witnesses).

32. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).
33. Monier v. Chamberlain, 35 Ill. 2d 351, 359-60, 221 N.E.2d 410, 417 (1966). The work product doctrine is provided for in both the federal and Illinois rules. See FED. R. CIV. P. 26(b)(3); ILL. REV. STAT. ch. 110A, § 201(b)(2) (1987). The work product exemption against the disclosure of otherwise discoverable material was addressed in Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the plaintiff sought discovery of oral and written statements of witnesses who had been personally obtained by the defendant’s attorney in preparation of litigation. Id. at 498-99. The United States Supreme Court rejected the contention that the material involved confidential communication between the attorney and client, and was thereby privileged. Id. at 508. The Court did hold, however, that the statements were exempt from discovery because they constituted the attorney’s work product. Id. at 511.

Thus, under Hickman, and Rule 26(b)(3), the application of the work product exemption operates in the following manner. Any work product that would reveal the opinions or mental impressions of the attorney are absolutely barred from discovery. Johnston, Discovery In Illinois and Federal Courts, 15 John Marshall L. REV. 1, 24 (1982). As for materials which are not absolutely barred, a number of requirements exist. First, the material must be relevant. Fed. R. Civ. P. 26(b). Furthermore, if discovery involves a mental or physical examination of persons, then an additional “good cause” requirement must be satisfied. Id. at 35. If the material meets these requirements, and is not otherwise privileged, then it is examined to determine its work product status. Johnston, supra, at 24. If the material has been collected by an adverse party’s counsel in the course of preparation for possible litigation, then it is work product and entitled to a qualified exemption. Hickman, 329 U.S. at 510-11. Discovery may still be obtained if necessity for securing the work product can be shown. Id. at 511.

Although not direct authority in state courts, the Hickman rule has influenced state discovery rules. The Illinois Supreme Court, in Monier, declared a narrower work product rule than the federal rule. Johnston, supra, at 25. Like the federal rule, the Illinois rule exempts work product that reveals the opinions or mental impressions of the attorney. Id. Unlike the federal rule, however, the Illinois rule does not require a showing of necessity to discover other work product materials. Id. at 26.
doctrine should be limited to materials actually prepared by an attorney and not an absolute work product bar to the discovery of expert information. Despite this trend toward more liberal discovery, litigants were still without a specific rule addressing the use of expert witnesses. Thus, the nondisclosure of expert witnesses continued to result in inconsistent court rulings.

The Illinois legislature attempted to cure these inconsistencies in 1976 by amending section 58(3) of the Civil Practice Act to add a provision concerning disclosure of the identity of expert witnesses. The legislature's goal was to facilitate trial preparation and the evaluation of claims by eliminating the surprise expert witness. Section 58(3) required, "that upon the motion of any party, disclosure 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." However, because the rule did not specifically provide any sanctions for noncompliance, the trial judges were in the same predicament as they were under the old section 58(3) and rule 19-12. Thus, as they did before, they used their discretion under rule 219 (formerly rule 19-12) in determining whether to allow or exclude the testimony of an undis-
closed expert witness. The result was a continuation of the inconsistencies which amended section 58(3) was intended to eliminate.

Recognizing the failure of section 58(3) (renumbered as section 2-1003(c) in 1982), the Illinois Supreme Court adopted Rule 220 in 1984. This rule was designed to provide more guidance to trial courts dealing with expert witnesses. Rule 220 contains its own sanction which specifically mandates the disqualification of experts who are not disclosed in compliance with the rule. However, in 1985 the
Illinois Supreme Court amended Illinois Supreme Court Rule 219, making all the sanctions it provides also applicable to Rule 220. Faced with conflicting sanction provisions, trial judges in Illinois have been deprived of a consistent guideline with which they can apply Rule 220. This has prevented Rule 220 from achieving its goal of eliminating the undisclosed expert witness problem.

II. ANALYSIS OF RULE 220

Because the use of expert witnesses has become so prevalent in today's litigious society, litigators practicing in Illinois must be familiar with Rule 220. The following section provides an explanation of the rule and addresses some of the issues that have arisen under it.

A. Definitions

Rule 220(a) embodies the common law by defining an expert witness as a person who possesses knowledge in a specialized area beyond the realm of the average person and whose opinion would aid the jury in deciding a factual matter. Once qualified as an expert

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43. ILL. ANN. STAT. ch. 110A, ¶ 219, Committee Comments at 89 (Smith-Hurd 1985 & Supp. 1989). The Illinois Supreme Court amended rule 219 on July 1, 1985, which took effect on August 1, 1985. Id.

44. See infra notes 77-103 and accompanying text discussing the inconsistent application of Rule 220.

45. See supra note 1 discussing the evolution of the experts' role in modern litigation.

46. Section (a) of Rule 220 provides:

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

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


47. Id. See also City of Chicago v. McNally, 227 Ill. 14, 18, 81 N.E. 23, 25 (1907) (stating the common law definition of an expert witness). Although Rule 220 was primarily intended to address discovery issues concerning expert witness testimony, the rule also operates as a rule of evidence. Kionka, Evidence, 12 S. Ill. U. L. Rev. 967, 983 (1988). Many of the issues formed by discovery under Rule 220 will eventually overlap with the rules of evidence, such as the scope of the expert's testimony. See generally Kionka, supra, at 967 (discussing the use of expert witnesses in Illinois in relation to the rules of evidence).

The requisite knowledge that is needed to qualify as an expert under Rule 220 need not be derived from academic or educational qualifications. Kionka, supra, at 968. It may be derived from education, practical experience, or both. Id. See, e.g.,
pert under this definition, the rule differentiates between testifying experts and consulting experts. A testifying expert is expected to render an opinion within his or her expertise at trial. A consulting expert is an expert whom an attorney has retained in anticipation of litigation or preparation for trial, but whom the attorney will not call upon at trial to render an opinion. The determination of whether a witness is a testifying expert as opposed to an ordinary witness rests within the discretion of the trial judge and will not be reversed absent a clear abuse of discretion.


It is also important to note that the Medical Malpractice Act provides additional expert witness standards, apart from those in Rule 220, in all cases in which the standard of care given by a medical professional is at issue. See ILL. REV. STAT. ch. 110, ¶ 8-2501 (West Supp. 1989).

48. ILL. REV. STAT. ch. 110A, ¶ 220(a)(1) (1987). This section of the rule encompasses testifying experts who may be expected to testify on a matter within their expertise at trial, regardless of their relationship to the case. Thus, this section applies equally to independent experts who are retained for the purposes of evaluation and testimony, employees of a party, and even the party. Id. See supra note 46 for the text of section (a)(1) of Rule 220. For a discussion of the disclosure requirements of testifying experts, see infra notes 51-62.

49. ILL. REV. STAT. ch. 110A, ¶ 220(a)(2) (1987). The nature of the consultation must be examined in order to determine the status of a nontestifying expert who has been consulted in anticipation of litigation. R. JOHNSTON AND K. KANDARAS, supra note 12, at 87. This determination is important because the disclosure requirements vary depending upon the type of consultant an expert is determined to be.

A consulting expert as defined in section (a)(2) is distinguished from an informally consulted expert. An informally consulted expert is an expert who has been initially contacted by a party to discuss the possible retention of the expert as a consultant, but who, for some reason, is not eventually retained by the contacting party as a consultant or expert. See Agers v. Jane C. Stormont Hosp., 622 F.2d 496, 501-04 (10th Cir. 1980) (discussing the determination of when an expert is considered informally consulted). See infra note 52 discussing the disclosure requirements of informally consulted and consulting experts.

On the other hand, a nontestifying expert retained or specially employed in anticipation of litigation, but whose information was not acquired in preparation of trial, is treated as an ordinary witness. R. JOHNSTON AND K. KANDARAS, supra note 12, at 87. Consequently, if an expert's information was acquired as an actor or viewer of events which gave rise to the lawsuit, then it is fully discoverable. Id. See also Grinnell Corp. v. Hackett, 70 F.R.D. 326, 332 (S.D.N.Y. 1976) (nontestifying expert retained in anticipation of litigation but whose information was not acquired in preparation of litigation, was discoverable).


The trial court judge also has the discretion to hold a pretrial conference to coordinate the conduct of an impending trial. Conover v. Smith, 20 Ill. App. 3d 258, 260, 314 N.E.2d 638, 640 (1974). Illinois Supreme Court Rule 218 allows the court to hold a pretrial conference to (1) simplify the issues; (2) amend the pleadings; (3) obtain admissions of fact and of documents; (4) limit the number of expert witnesses; and, (5) discuss remaining matters that may aid in the disposition of the case. ILL. REV. STAT. ch. 110A, ¶ 218(a) (1987) (emphasis added). Although it may be a better practice for a trial court to grant a motion for a pretrial conference specifically for the purpose of limiting the number of expert witnesses, it is within the court's discretion.
B. Disclosure of Expert's Identity

The disclosure obligations under Rule 220(b) depend on whether the expert has been classified as a testifying expert or a consulting expert. A party retaining a consulting expert does not have the burden of disclosing the expert's identity. There is, how-

to deny such a motion. Department of Transp. v. Prombo, 63 Ill. App. 3d 407, 411, 379 N.E.2d 953, 956 (1978). In cases in which the court does hold a pretrial conference, the order of the court will be controlling as to the subsequent cause of the action, unless it is modified otherwise. ILL. REV. STAT. ch. 110A, ¶ 218(b) (1987). See generally Fultz v. Peart, 144 Ill. App. 3d 364, 494 N.E.2d 212, (1986) (court has power to limit the number of expert witnesses); Curry v. Summer, 136 Ill. App. 3d 468, 483 N.E.2d 711 (1988) (court properly limited undisclosed expert witness testimony to that of an occurrence witness).

51. Section (b) of Rule 220 provides:

(b) DISCLOSURE

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

(i) ascertain the identity of such witnesses, and

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

(2) Consulting expert. Except as provided in paragraph (c)(5) hereof, a party need not disclose the identity of a consulting expert.


52. ILL. REV. STAT. ch. 110A, ¶ 220(b)(2) (1987). If the expert is a consultant whose opinions are used in formulating a claim or defense, but who will not testify at trial, then the expert's identity need not be disclosed, absent a showing of exceptional circumstances. Id. This provision protecting the contributions of consulting experts was added to Rule 220 out of the recognition that litigation remains an adversarial process, and to provide fairness. ILL. ANN. STAT. ch. 110A, ¶ 220, Historical and Practice Notes at 442 (Smith-Hurd 1985 & Supp. 1989).

On the other hand, the rule avoids any language that would permit a party to use a consulting expert as a shield for protecting documents or objects which would otherwise be discoverable. Id. Thus, under Illinois Supreme Court Rule 214, an opposing party may request documents, objects and tangible things which are in the possession of the consulting expert and which do not contain opinions. Id. For instance, parts of an allegedly defective product, photographs from an accident scene, or "smoking gun" documents in the possession of a consulting expert would be discoverable under rule 214. Foreman and Mueller, supra note 40, at 541.
ever, one exception. The consultant’s identity (as well as the work product and opinion) are discoverable upon a “showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.”

On the other hand, a party must disclose the identity of a testifying expert in every case. This obligation does not depend upon a request from the opposing party. A party intending to use a testifying expert must disclose the expert’s identity within ninety days after the substance of the expert’s opinion becomes known or at the first pretrial conference, whichever is later. In any event, the trial

If, instead, the expert is an informally consulted expert, then the discovery of the identity of the expert, and the facts and opinions acquired in anticipation of litigation, is precluded. R. Johnston and K. Kandaras, supra note 12, at 87. See generally T. Demetrio, Illinois Civil Discovery Practice § 1.13 (Illinois Institute For Continuing Legal Education 1987) (discussing nontestifying experts under Rule 220); R. Johnston and K. Kandaras, supra note 12, at 86-89 (discussing the requirements of nontestifying experts per Rule 220(a)).


56. Ill. Rev. Stat. ch. 110A, ¶ 220(b)(1) (1987). Under this section of the rule, experts who are to testify must be disclosed within ninety days from the date on which their opinions are first divulged. Id. The substance of the opinion then becomes discoverable pursuant to subsection (c). Id. The rule provides alternative guidelines in cases in which the parties delay the determination of whether an expert is going to testify. In this instance, when experts have not been previously identified, disclosure is to be made at the first pretrial conference. Id. See supra note 51 for the
court, on its own motion or on the motion of any party after the first pretrial conference, must enter an order scheduling the dates upon which all expert witnesses will be disclosed. The object is to complete discovery sixty days before the date of trial. The rule specifically mandates the disqualification of experts who are not disclosed in compliance with the above requirements.

57. ILL. REV. STAT. ch. 110A, ¶ 220(b)(1) (1987). There is currently a split in the appellate courts over the issue of whether or not an order must be entered by the trial court under section (b)(1) in order to preserve the application of Rule 220. The fourth district holds that where no pretrial order requiring disclosure has been made by the trial court, there can be no violation of Rule 220. Illini Aviation, 161 Ill. App. 3d at 347, 514 N.E.2d at 552. The remaining districts, however, hold that disclosure of expert witnesses under Rule 220 is mandatory, regardless of whether a demand for disclosure is made or whether an order requiring disclosure is entered. See Klingler Farms, 171 Ill. App. 3d at 517, N.E.2d at 1172; Jarmon v. Jinks, 165 Ill. App. 3d 855, 520 N.E.2d 783 (1st Dist. 1987); Fischer v. G & S Builders, 147 Ill. App. 3d 168, 497 N.E.2d 1022 (3d Dist. 1986).

58. ILL. REV. STAT. ch. 110A, ¶ 220(b)(1) (1987). All dates set by the trial court under this order are to insure that discovery of such expert witnesses will be completed no later than sixty days before the date on which the trial court reasonably anticipates the trial will begin. Id. The drafters of Rule 220 felt that the (b)(1) disclosure guidelines should, in the majority of cases, cause the identity of expert witnesses to be revealed within ninety days following the first pretrial conference. ILL. ANN. STAT. ch. 110A, ¶ 220, Committee Comments at 439 (Smith-Hurd 1985 & Supp. 1989). In the event this was not the case, the drafters provided in the rule that the trial court shall establish a schedule under which all experts must be disclosed to insure that all discovery relating to such experts be concluded not later than sixty days before trial. Id. The drafters felt that this provided litigants with ample time to decide whether they wanted to use the person expressing the opinions as a witness. Id. at 440.

59. ILL. REV. STAT. ch. 110A, ¶ 220(b)(1) (1987). The drafters of Rule 220 felt that because the disclosure guidelines provided ample time for litigants to decide whether they would use an expert's opinion, a mandatory and exclusionary cutoff was justified in instances where opinions were not disclosed by a party until after the disclosure period. ILL. ANN. STAT. ch. 110A, ¶ 220, Committee Comments at 339-40 (Smith-Hurd 1985 & Supp. 1989).

The imposition of sanctions under Rule 220 may be significantly impacted by a recent decision of the Illinois Supreme Court. In Gibellina v. Handley, the supreme court held that if a party refuses to comply with orders entered by the trial court pursuant to Rule 220 for the disclosure of experts, the trial court may entertain the opponent’s motion for summary judgment and preclude the violating party from escaping the motion for summary judgment by taking a voluntary dismissal under section 2-1009 of the Illinois Code of Civil Procedure. Gibellina, 127 Ill. 2d 122, 137-38, 535 N.E.2d 858, 866 (1989). This decision gives the trial court the discretion to entertain the dispositive motion before the motion for a voluntary dismissal if the trial court believes that there has been an abuse of the judicial process by the plaintiff. Id. Furthermore, the ruling is prospective only after February 22, 1989. Id.

Prior to Gibellina, when a defendant moved for summary judgment, or a dismissal for plaintiff's failure to comply with discovery pursuant to Rule 220 or 219, the plaintiff could escape a dismissal on the merits by taking a voluntary nonsuit under section 2-1009. See Johnston, The Voluntary Dismissal In Illinois - A Sword or a Shield, 21 J. MARSHALL L. REV. 537 (1988) (discussing the use of the voluntary dismissal in Illinois prior to Gibellina).

Finally, one other consideration of import is that the failure to specifically object at trial when an opponent puts an undisclosed expert witness on the stand, waives the issue for appeal. See, e.g., Puskar v. Hughes, 179 Ill. App. 3d 552, 533 N.E.2d 962
As previously noted, disclosure under Rule 220 is necessary only for experts expected to render an opinion at trial. Therefore, the determination of whether a person is a testifying or consulting expert is a crucial one. For instance, in a very controversial decision, the Illinois Supreme Court recently held that treating physicians are not experts under Rule 220. The court likened treating physicians to occurrence witnesses who may testify because they participated in or witnessed the events that are part of the subject matter of the litigation. Consequently, they are exempt from Rule 220 and may

(1989) (litigant waived Rule 220 issue by failing to object at trial); Tokar v. Crestwood Imports, Inc., 177 Ill. App. 3d 422, 532 N.E.2d 382 (1988) (litigant waived any error in undisclosed expert’s testimony by calling the expert as a witness in his case in chief rather than waiting for opponent to call the expert and then objecting); Oakleaf v. Oakleaf & Assoc., 173 Ill. App. 3d 637, 527 N.E.2d 926 (1988) (litigant waived claim that admission of testimony by undisclosed expert was error by failing to object at trial).


61. Id. at 238, 529 N.E.2d at 528-29. The Tzystuck court stated that treating physicians are not retained by litigants in the expectation that they might develop and give a particular opinion on a disputed issue at trial, therefore, they are exempt from Rule 220. Id. at 234-35, 529 N.E.2d at 529. The significance of this decision is of importance, not only for disclosure purposes, but also because it may determine which party will bear the expense of the discovery fees charged by the witness. For example, Rule 220 provides that each party shall bear the expense of all discovery fees charged by their experts. ILL. REV. STAT. ch. 110A, 220(c)(6) (1987). See also infra notes 67-69 and accompanying text for further discussion of expert’s fees under Rule 220. Rule 204, on the other hand, places the burden of bearing discovery fees on the party seeking the discovery, in instances where the physician is not an expert per Rule 220. ILL. REV. STAT. ch. 110A, ¶ 204(c) (1987). Thus, the Tzystuck decision has had a significant economic effect upon personal injury litigation because substantial discovery costs will not have to be borne by plaintiffs, should defendants wish to seek discovery of their treating physicians. Not surprisingly, defense attorneys throughout Illinois have expressed concern over the Tzystuck decision. See Lavin, Rule 220 Questions Remain After Recent Rulings, Chicago Daily L. Bull., June 20, 1989, at 2, col. 3 (discussing the impact of the Tzystuck decision on defense attorneys).

The Tzystuck decision was later broadened in Wilson v. Chicago Transit Authority. 126 Ill. 2d 171, 533 N.E.2d 894 (1988). In a four to three decision, the Illinois Supreme Court held that a plaintiff’s treating physician would not be barred from rendering an expert opinion, notwithstanding the fact that the treating doctor examined the plaintiff during the course of the trial, after not having treated the plaintiff in several years, and even though the doctor was not listed as a Rule 220 expert. Id. at 174-76, 533 N.E.2d at 896-97 (emphasis added). The Wilson court, noting the Tzystuck decision, held that the length of time between the treating physician’s treatment of the plaintiff and his examination of plaintiff on the last day of trial, did not make the treating physician an expert witness subject to Rule 220. Id. at 176-77, 533 N.E.2d at 897.

Additional recent decisions have resulted in the extension of the Tzystuck decision to occurrence witnesses who are not treating doctors. For instance, the fourth district permitted a project manager, who was an employee of the defendant, to render an opinion at trial despite the fact that he had not been disclosed as an expert per Rule 220. Smith v. Central Illinois Pub. Serv. Co., 176 Ill. App. 3d 482, 494-95, 531 N.E.2d 51, 59 (1988). The Smith court reasoned that, consistent with Tzystuck, the fact that an employee of a party, who is also an occurrence witness and intimately involved in the subject matter of the litigation, testifies poses no surprise to the opposing party. Id. See also Voyles v. Sanford, 183 Ill. App. 3d 833, 539 N.E.2d 801 (3d
testify without prior disclosure.\(^{62}\)

C. Discovery of Expert's Opinions

Although the disclosure of a testifying expert's identity is mandatory under Rule 220(b), their opinions and reports may be obtained only through the process of discovery. Rule 220(c)(1)\(^{63}\)

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Dist. 1989) (former employee of the defendant, a truck driver, was allowed to give an expert opinion about the trailer's brake system even though he was never disclosed per Rule 220); Puskar v. Hughes, 179 Ill. App. 3d 522, 533 N.E.2d 962 (2d Dist. 1989) (party to an action is not subject to the disclosure requirements of Rule 220); Hill v. Ben Franklin Sav. & Loan Assoc., 177 Ill. App. 3d 51, 531 N.E.2d 1089 (2d Dist. 1988) (court held that a party can give lay opinion testimony of the value of his land and, even if he were an expert per Rule 220, his identity need not be disclosed because he was not retained to render an opinion at trial, but merely participated in the suit). But see Nolan v. Elliot, 179 Ill. App. 3d 1077, 535 N.E.2d 1053 (2d Dist. 1989) (court refused to allow an eyewitness ambulance driver to testify to the standard of care of ambulance drivers because he was not disclosed as an expert per Rule 220); Meyer v. Caterpillar Tractor Co., 179 Ill. App. 3d 268, 533 N.E.2d 386 (1st Dist. 1988) (court refused to extend the Tzystuck doctrine and reversed the trial court's decision to allow five co-workers to give opinion testimony without prior disclosure under Rule 220), rev'd on other grounds, No. 68240 (Ill. Jan. 17, 1990) (WESTLAW, Illinois Cases Library).

Another important issue in this area is whether a defense attorney may engage in ex parte conferences with the plaintiff's treating physician. The first district held that defense attorneys are precluded from such conferences because they are against public policy and because defense attorneys can obtain all the appropriate information through proper discovery practices. Petrillo v. Syntex Laboratories, Inc., 148 Ill. App. 3d 581, 588, 499 N.E.2d 952, 961-62 (1986).

However, in a recent first district decision, an expert witness was allowed to testify for a defendant at trial, despite the fact that the expert had been originally hired as the plaintiff's expert in the same case. See Akers v. Atkinson, Topeka & Santa Fe Ry. Co., 187 Ill. App. 3d 950, 543 N.E.2d 939 (1st Dist. 1989).

62. Tzystuck, 124 Ill. 2d at 238, 529 N.E.2d at 529. Although a treating physician's identity and opinions are not discoverable under Rule 220, they are discoverable under Illinois Supreme Court Rules 201(b)(1), 204(c), 214, and 215, as are consulting experts and other persons with knowledge of the facts. Id. at 238, 529 N.E.2d at 530.

63. Section (c)(1) of Rule 220 provides:

(c) Discovery
(1) Upon interrogatory propounded for that purpose, the party retaining or employing an expert witness shall be required to state:
(i) the subject matter on which the expert is expected to testify;
(ii) his conclusions and opinions and the bases therefore; and
(iii) his qualifications.
(2) The party answering such interrogatories may respond by submitting the signed report of the expert containing the required information.
(3) A party shall be required to seasonably supplement his answers to interrogatories propounded under this rule as additional information becomes known to the party or his counsel.
(4) The 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.
(5) The identity, opinions and work product of consulting experts are discover-
places the burden of seeking such information on the opposing party. The opposing party may request, by way of interrogatory, the subject matter on which the expert will testify, the conclusions and opinions of the expert, and the expert's qualifications.  

The answering party may respond to an interrogatory request by submitting answers or by submitting the expert's signed report which contains the requested information. However, once the answering party responds to the interrogatory request, it is under an obligation to continuously keep abreast of the opinions of its experts and to advise the opposing party of any changes.

Rule 220 also addresses the long standing controversy of who is responsible for the payment of the expert’s fees. Subsection (c)(6) states that payment of the expert’s fees is the responsibility of the party who retains the expert. Thus, each party will bear the cost of its own experts. It is important to note that this provision does not apply to consulting experts or treating physicians who are not expert witnesses as defined under Rule 220(a).


66. Id. The answering party may keep the opposing party up to date of any changes in its expert's opinions by seasonably supplementing answers to the interrogatory or, where a report is provided in lieu of answers, by providing supplemental written changes. ILL. ANN. STAT. ch. 110A, ¶ 220, Committee Comments at 440 (Smith-Hurd 1985 & Supp. 1989).

67. See supra note 63 for the text of section (c)(6) of Rule 220. The rule resolves the intense controversy over the proper apportionment of discovery costs regarding expert witnesses by setting the fees impartially. Foreman and Mueller, supra note 40, at 543-44. Prior to Rule 220, economic factors often played a considerable role in pre-trial strategy. Id. at 543. Litigants frequently attempted to discourage their opponents from eliciting their expert's opinions by designating a large number of witnesses who lived out of state. Id. The magnitude of the expenses involved often served to deter the opponents from seeking such discovery. Id.

68. ILL. REV. STAT. ch. 110A, ¶ 220(c)(6) (1987). The rule does allow the court to use this section in the nature of a sanction in instances where manifest injustice would result if each party were to bear its own expense. ILL. ANN. STAT. ch. 110A, ¶ 220, Historical and Practice Notes at 442 (Smith-Hurd 1985 & Supp. 1989). Such discovery, however, will rarely be unfair. Id.

69. See supra note 61 for a discussion of discovery fees in relation to consulting
party seeking the discovery information bears the expense.\textsuperscript{70}

\textbf{D. Scope of Expert's Testimony}

Rule 220(d)\textsuperscript{71} regulates the scope of the expert witness's testimony. An expert is not allowed to testify at trial to opinions which were not previously disclosed in response to a discovery request.\textsuperscript{72} The purpose of this subsection is to permit the litigants to ascertain and rely on the opinions of their adversary's experts.\textsuperscript{73}

There are, however, a few exceptions to this general rule. For instance, if the discovering party fails to ask the expert about all of his or her opinions, the objection may be waived, since the burden is on the discovering party to uncover all the expert's purported opinions.\textsuperscript{74} Also, experts may be permitted to "update" their opinion as long as they do not shift their theory, belief, or methodology.\textsuperscript{75}

\begin{itemize}
  \item experts and treating physicians.
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} Section (d) of Rule 220 provides:
  \item \textsuperscript{(d) Scope of Testimony.}
  \item To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings through interrogatories, deposition or requests to produce, his direct testimony at trial may not be inconsistent with nor go beyond the fair scope of the facts known or opinions disclosed in such discovery proceedings. However, he shall not be prevented from testifying as to facts or opinions on matters regarding which inquiry was not made in the discovery proceedings.
  \item ILL. REV. STAT. ch. 110A, ¶ 220(d) (1987).
  \item \textsuperscript{72} \textit{Id. See, e.g.,} Ramos v. Pyati, 179 Ill. App. 3d 214, 534 N.E.2d 472 (1989) (court limited expert's opinion to his deposition testimony); Greene v. Rogers, 147 Ill. App. 3d 1009, 498 N.E.2d 867 (1986) (court limited pathologist's testimony to that given in his autopsy report and excluded testimony on the standard of care which was not contained in the report). \textit{But see infra} note 74 and accompanying text discussing the discovering party's duty to inquire into all of the expert's opinions.
  \item \textsuperscript{73} ILL. ANN. STAT. ch. 110A, ¶ 220, Committee Comments at 440 (Smith-Hurd 1985 & Supp. 1989). It is also a necessary supplement to the sanction of disqualification provided for in subsection (b)(1) in that the court can limit the scope of testimony which is not disclosed in compliance with the rule. ILL. ANN. STAT. ch. 110A, ¶ 220, Historical and Practice Notes at 442 (Smith-Hurd 1985 & Supp. 1989).
  \item \textsuperscript{74} ILL. ANN. STAT. ch. 110A, ¶ 220, Committee Comments at 440 (Smith-Hurd 1985 & Supp. 1989). A party who fails to ask an opposing expert about all the opinions and bases for them may be penalized when the trial court grants the expert witness freedom to testify broadly at trial. For instance, in Fogarty v. Parichy Roofing Co., the court allowed an expert to testify to an undisclosed medical opinion because the opposing party failed to inquire in a deposition about any additional opinions the expert might have with respect to the plaintiff's medical condition. 175 Ill. App. 3d 530, 541, 529 N.E.2d 1055, 1063 (1988).
  \item \textsuperscript{75} Sloan and Adams, \textit{Illinois Supreme Court Rule 220: The Winning Edge in the Battle of Experts}, 77 ILL. B. J. 642, 646 (Aug. 1989). \textit{See, e.g.,} Singh v. Air Illinois, Inc., 165 Ill. App. 3d 923, 520 N.E.2d 852 (1988) (court allowed expert to testify on material contained in revisions to his report which were made just prior to trial because they were merely an update of the original methodology and not a shift in theory or belief); Georgacopoulos v. University of Chicago, 152 Ill. App. 3d 596, 504 N.E.2d 830 (1987) (court allowed expert to testify beyond matters covered in his deposition because the additional testimony did not form the basis for his opinion);}
\end{itemize}
These exceptions should have only limited application, however, because of a party's continuing duty to seasonably supplement discovery concerning the expert witness's opinions. 78

III. APPLICATION IN ILLINOIS

As with any new statutory provision, Rule 220 contains many issues regarding the interpretation and application of the rule which the courts must resolve. However, few problems have troubled the civil trial court system with the magnitude and frequency as the issue concerning the appropriate sanctions to be imposed when an expert witness has not been disclosed in compliance with Rule 220. 77

As previously stated, the adoption of Rule 220 in 1984 was unique because it provided, for the first time, a specific sanction to be applied against undisclosed testifying experts. 76 The language in Rule 220 clearly mandates that noncompliance with the rule will result in disqualification of the expert as a witness. 79 However, in 1985, the Illinois Supreme Court amended Rule 219 which made its sanction provisions also applicable to Rule 220 violations. 80 The sanctions provided in Rule 219(c) are to be applied at the trial court's discretion; a discretion which was not provided for in Rule 220. Consequently, there are two contradictory sanction provisions being applied in Illinois, with the case law reflecting these inconsistent messages.

For instance, the third district provided the earliest appellate court interpretation of Rule 220 in Fischer v. G & S Builders. 81 In Fischer, the plaintiffs first disclosed their intent to use an expert


76. ILL. ANN. STAT. ch. 110A, § 220, Committee Comments at 440 (Smith-Hurd 1985 & Supp. 1989). The drafters of Rule 220 recognized that, because the rule imposes a duty on the party retaining an expert to keep an opposing party abreast of changes in the opinions of its experts, there should be only limited instances in which an opposing party would not be aware of any changes in the expert's opinions, thus nullifying the utility of the exceptions.

77. See, e.g., Foreman and Mueller, supra note 40, at 540 (discussing the disclosure problem under Rule 220); Sloan and Adams, supra note 75, at 642 (discussing the problems that the inconsistent application of the disclosure sanction has created); O'Brien, Rule 220 A Cure For Late Disclosure?, Chicago Daily L. Bull., Jan. 9, 1985, at 2, col. 2 (discussing practitioners' optimistic view of Rule 220 as a cure for the ever present undisclosed expert problem).

78. See supra note 9 and accompanying text describing Rule 220 as a rule without precedent in Illinois.


80. See supra note 5 and accompanying text discussing the 1985 amendment to rule 219.

witness three days before trial. The defendant motioned the court to exclude the expert’s opinion in accordance with Rule 220. The Fischer court decided that, because trial courts had the discretion to impose sanctions prior to Rule 220 under rules 219 and 2-1003(c), they should have a similar discretion over Rule 220. Consequently, the Fischer court held that the trial court had not abused its discretion in allowing the expert to testify in a limited capacity concerning matters of his personal knowledge.

The reasoning of the third district was subsequently followed by the first district in Jarmon v. Jinks, and Dietrich v. Jones. In Jarmon, the defendants did not disclose the identity of their expert witness until one and one-half days after the start of the trial. The Jarmon court held that although it was proper for the trial court to bar the tardily disclosed expert from testifying, the sanction under Rule 220 rests within the trial court’s discretion. The Dietrich case involved an expert whom the plaintiffs did not disclose until during the course of the trial. The Dietrich court rejected the defendant’s claim that Rule 220 mandated an inflexible sanction of disqualification for noncompliance. The court stated that the trial court did not abuse its discretion in allowing the plaintiff’s undisclosed expert to testify since the plaintiff had offered to allow the defendant to continue the trial and depose the expert. The court further stated that by not accepting such an offer, the defendant waived an opportunity to cure the alleged discovery defect, and the trial court was justified in not excluding the undisclosed expert.

Similarly, other districts followed this line of reasoning. The fourth district, in James v. Yasunaga, and the fifth district, in

82. Fischer, 147 Ill. App. 3d at 171, 497 N.E.2d at 1024.
83. Id.
84. Id. at 172, 497 N.E.2d at 1024-25. In support of its holding, the Fischer court cited to cases decided under rule 219 and section 58(c) of the old Civil Practice Act (now section 2-1003(c) of the Illinois Code of Civil Procedure), both rules which allow the trial judges to use discretion. Id. at 172, 497 N.E.2d at 1025.
85. Id.
86. 165 Ill. App. 3d 855, 520 N.E.2d 783 (1st Dist. 1987).
90. Dietrich, 172 Ill. App. 3d at 204, 526 N.E.2d at 452.
91. Id. at 205, 526 N.E.2d at 453. The Dietrich court cited the third district’s decision in Fischer v. G & S Builders in support of its holding. Id.
92. Id.
93. Id.
94. 157 Ill. App. 3d 450, 457, 510 N.E.2d 531, 536 (4th Dist. 1987). In Yasunaga, the trial court entered an order pursuant to Rule 220 which set a schedule for the disclosure of expert witnesses. Id. at 453, 510 N.E.2d at 534. Under the schedule, the
Klinger Farms, Inc. v. Effingham Equity, Inc., both cited the Fischer decision in holding that the sanctions applicable to Rule 220 violations were within the court's discretion. Unfortunately, due to the nature of the discretionary standard employed in these districts, the courts have been less than consistent in determining whether to bar or permit the testimony of an undisclosed expert witness.

Conversely, the second district chose not to follow Fischer in the case of Phelps v. O'Malley. In Phelps, the plaintiffs retained an expert witness fourteen months prior to trial, but did not disclose his identity until the trial. The trial court denied the defendant's attempt to bar the expert and permitted the expert to testify after allowing the defendants an opportunity to depose the expert. On appeal, the Phelps court held that the trial court had erred in allowing the undisclosed expert to testify. The Phelps court noted that, unlike rule 219, Rule 220 did not provide a list of sanctions and thus, the court's discretion was severely limited by the mandatory language in the rule. The court also pointed out that, plaintiffs were given 60 days to disclose their expert witnesses. Id. Subsequent to the 60 day deadline, the plaintiffs attempted to use the deposition of an undisclosed expert to challenge the defendant's motion for summary judgment. Id. In disqualifying the expert's report, the Yasunaga court relied on Fischer in support of a discretionary sanction. Id. at 457, 510 N.E.2d at 536.

95. 171 Ill. App. 3d 567, 570, 525 N.E.2d 1172, 1174 (5th Dist. 1988). In Klinger Farms, the trial court held a pretrial conference in which it set a date for trial and established a discovery cut-off date. Id. at 569, 525 N.E.2d at 1173. The Klinger Farms court, citing the Fischer decision, held that the trial court had not abused its discretion in refusing to permit the defendant to add a new expert witness after the discovery cut-off date. Id. at 571-72, 525 N.E.2d at 1174-75.


98. Id. at 223, 511 N.E.2d at 979.
99. Id.
100. Id. at 224, 511 N.E.2d at 980.
101. Id. at 224, 511 N.E.2d at 981. The Phelps court noted the failure of section
if every trial judge were to exercise discretion when dealing with undisclosed expert witnesses, the uncertainties that Rule 220 was intended to erase would remain.102

Consequently, the result of this split among the districts on the appropriate sanctions to be levied under Rule 220, as well as the degree of inconsistency within the districts in applying the discretionary privilege, has created unpredictability and confusion for litigators using Rule 220.103

IV. NEED FOR A CONSISTENT STANDARD

In civil litigation, "procedural certainty" is often times a lofty goal. Nevertheless, there are various reasons why the courts should strive for consistency in the application of procedural rules. Most importantly, consistency in application fosters predictability and promotes fairness for those using the rule. The inconsistency with which trial courts in Illinois have been applying the sanction provisions under Rules 220 and 219,104 therefore, necessitates immediate action to rectify the situation.

There are various approaches which may be considered to correct this dilemma. The easiest solution, albeit the least expedient, is to simply do nothing. That is, given the split that has developed between the second district and the remaining districts on the issue of what sanctions should apply under Rule 220, one could simply opt for a "wait and see" approach, hoping that the Illinois Supreme Court will eventually decide the issue.105 Should the Illinois Su-
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preme Court decide to hear this issue, there are two important rea-
sons why the court should adopt the mandatory sanction provision
urged by the second district in Phelps v. O'Malley.106

First, the use of a mandatory disqualification sanction would
more effectively accomplish the Illinois Supreme Court's express
goal and purpose for adopting Rule 220. As stated earlier, Rule 220
was intended to eliminate the problem of the undisclosed expert
witness.107 Rule 220 attempted to cure this evil by establishing a
flexible framework for the disclosure of expert witnesses and their
opinions.108 In adopting Rule 220, it appeared that the Illinois Su-
preme Court had established a mandatory disqualification standard
which the trial courts could use in dealing with expert witnesses.109
The rule mandated that noncompliance within this flexible frame-
work was to result in the disqualification of the expert.110

However, this standard was subordinated by the amendment to
Rule 219, which effectively created a second standard of discretion
which the courts could use.111 Due to these alternative sanctions,
Rule 220 never had an opportunity to operate under its own exclu-
sive sanction.112 Instead, Illinois courts were confused because they

106. See supra notes 97-102 and accompanying text discussing the Phelps
decision.

107. ILL. ANN. STAT. ch. 110A, ¶ 220, Committee Comments at 438 (Smith-Hurd

108. Id. at 439. Compare ILL. REV. STAT. ch. 110, ¶ 2-1003(c) (1987) (expert wit-
ess provision very brief with little detail) with ILL. REV. STAT. ch. 110A, ¶ 220 (1987)
(providing a more detailed expert witness provision than section 2-1003(c)).

109. The drafters of Rule 220 specifically noted the failure of section 2-1003(c)
and its discretionary sanctions in curbing the undisclosed expert problem. ILL. ANN.
See supra note 40 and accompanying text discussing the inadequacy of section 2-
1003(c) (formerly section 58(3)). Rule 220 was intended to eliminate this problem by
establishing uniform guidelines, which if not complied with, would result in disquali-
fication. ILL. ANN. STAT. ch. 110A, ¶ 220, Committee Comments at 439-40 (Smith-
Hurd 1985 & Supp. 1989). See supra notes 4 and 41 discussing the mandatory
sanction.


111. See supra note 5 and accompanying text discussing the 1985 amendment.

112. It is also possible that the early appellate districts which first decided that
sanctions for Rule 220 violations were discretionary, may have reached the same con-
clusion regardless of the 1985 amendment to rule 219. This is because, prior to Rule
220 and the amendment to rule 219, the courts were accustomed to using discretion in
applying sanctions under rule 219 and section 2-1003(c). See supra notes 36-40 and
accompanying text discussing the use of discretion under section 2-1003(c). This was
evident in the third district's decision, Fischer v. G & S Builders, which was the first
district faced with the issue. 147 Ill. App. 3d 168, 497 N.E.2d 1022. In Fischer, the
court held that disqualification for Rule 220 disclosure violations was not mandatory
and that the sanctions to be applied were within the discretion of the trial court. Id.
at 172, 497 N.E.2d at 1025. As authority, the Fischer court cited cases decided under
section 2-1003(c) in holding that the same discretionary standard should apply to
Rule 220. Id. Furthermore, the Fischer court never mentioned the 1985 amendment
to rule 219. The court seemed to place more emphasis on the authority of trial courts
to use discretion under the prior rules, and seemed to ignore the sanction provided
were faced with seemingly contradictory sanction provisions, and Rule 220 was prevented from achieving its intended goal.113

A second reason why a mandatory sanction is preferable to a discretionary sanction is because history has already shown that the discretionary standard is ineffective in dealing with undisclosed experts. The failure of section 2-1003(c) is testimony to the ineffectiveness of a discretionary sanction in dealing with this problem.114 The failure of section 2-1003(c) was the reason why the Illinois Supreme Court felt it necessary to adopt Rule 220 which contained its own sanction provision.115 It seems unlikely that the Illinois Supreme Court intended to allow trial judges discretion under Rule 220 when this very standard failed so miserably under section 2-1003(c).116

In any event, should the Illinois Supreme Court decide not to hear this issue, there is an alternative method by which the supreme court can adopt the mandatory sanction provision. The Illinois Supreme Court should amend rule 219 to make its discretionary sanction provisions inapplicable to Rule 220 violations, thereby allowing the mandatory sanction provision contained in Rule 220 to govern exclusively.117 This should be done regardless of whether the amendment to rule 219 was intentional or oversight.118 As noted above, this for in Rule 220. More importantly, the court failed to examine the intention and purpose behind Rule 220. Thus, it appears that the same result may have been reached by the Fischer court regardless of the 1985 amendment to rule 219. Nevertheless, the 1985 amendment did send out a message concerning sanctions which was clearly at odds with that provided for in Rule 220. Furthermore, because many of the later decisions in support of a discretionary standard either cited or referred to rule 219 cases, the 1985 amendment was expressly and implicitly used in support of the discretionary sanction. See, e.g., Kubian v. Labinsky, 178 Ill. App. 3d 191, 533 N.E.2d 22 (1st Dist. 1988) (sanctions should be discretionary because the sanctions provided for in rule 219(c) were made applicable to Rule 220 violations); James v. Yasunaga, 157 Ill. App. 450, 510 N.E.2d 531 (4th Dist. 1987) (citing rule 219 cases for the proposition that sanctions should be within the discretion of the trial court).

113. See supra notes 77-103 and accompanying text discussing the inconsistent application of Rule 220.
114. See supra notes 36-40 and accompanying text discussing the inadequacy of section 2-1003(c) (formerly 58(3)) to curb this problem.
116. See Phelps v. O'Malley, 159 Ill. App. 3d 214, 222-23, 511 N.E.2d 974, 979-80 (2d Dist. 1987) (implying that the mandatory sanction in Rule 220 was intended by the Illinois Supreme Court, because Rule 220 was adopted to correct the insufficiency of section 2-1003(c)).
117. The Illinois Supreme Court should amend rule 219, leaving its sanction provisions applicable to all current and future discovery rules, with an exception in the case of Rule 220 disclosure violations. The committee comments accompanying this amendment should make explicitly clear that Rule 220 disclosure violations require the mandatory exclusion of the undisclosed expert, as specifically provided for in the rule, and that the sanction for such a violation is not discretionary.
118. See supra note 5 discussing the possibility that the 1985 amendment to rule 219, incorporating Rule 220, may have been an oversight.
standard would serve as a better guide for the courts which would no longer have to struggle with conflicting sanction provisions. Mandatory disqualification would provide a more consistent standard than a discretionary standard under which judges are free to act as they choose when confronted with undisclosed expert witnesses.119

Under either of the above approaches, although the mandatory sanction provision may seem like a harsh standard which could result in the loss of a case by a non-complying party, the imposition of such a sanction will guarantee future compliance by that party's attorney.120 It seems more justifiable to shift any possible unfairness to parties not complying with the rule then to continually allow undisclosed experts to testify under a discretionary standard, which is unfair to those who comply with the rule. Such a standard does not foster compliance nor does it create any incentives for "fair play".

And finally, when both sides of a dispute lay all their cards on the table, there may be more incentive for the parties to reach a settlement. This, in turn, could contribute to a reduction in costly and lengthy trials which have notoriously clogged the courts' docket

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119. As was pointed out in Phelps v. O'Malley, a mandatory sanction for non-disclosure under Rule 220 is necessary because if every such violation is treated uniquely by allowing the trial court to exercise discretion in applying sanctions, the litigants and the trial courts will be faced with the same uncertainties and inconsistencies that existed under section 2-1003(c). Phelps, 159 Ill. App. 3d 214, 224, 511 N.E.2d 974, 981 (2d Dist. 1987). A mandatory sanction would remove the uncertainty. Id.

120. A mandatory standard would be reasonable in light of the severity of the undisclosed expert problem and would seem fitting in light of the statement by the Illinois Supreme Court that:

"Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation. Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances.... Disclosure is the object of all discovery procedures. It is the opinion of this court that trial courts should make disclosure a reality." Buehler v. Whalen, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1977).

Furthermore, a mandatory sanction is justified because the mechanics of disclosure under Rule 220 are hinged on the good faith of the litigants in retaining their experts well in advance of trial. See supra note 54 discussing the element of good faith which is inherent in Rule 220. In an adversarial system in which gaining an advantage over an opponent is desirable, litigants will be more apt to comply with the disclosure requirements when they know that failure to do so will result in the disqualification of the expert.

Finally, in extremely unusual circumstances, such as those in which a party's disclosed expert has died or refuses to testify after the discovery period is closed, the court may utilize other discovery rules to ensure that an injustice does not result. In the above example, the trial court could order a continuance of trial in order to allow the retaining party time to obtain a replacement expert. See Ill. Rev. Stat. ch. 110A, ¶ 201(f) (1987) (trial of a case may not be delayed to permit discovery unless due diligence is shown). Thus, neither party would be prejudiced by the unusual circumstances. The retaining party would not be denied expert assistance, and the opposing party would be able to depose the newly attained expert.
in this state. At a minimum, a mandatory sanction will foster predictability and fairness for those using expert witnesses under Rule 220.

CONCLUSION

The nondisclosure of expert witnesses in violation of Rule 220 should result in the mandatory sanction of disqualification of the expert. The Illinois Supreme Court can adopt this provision by either resolving the split in the appellate districts in favor of the mandatory sanction or by amending rule 219 so that trial courts are no longer able to justify the use of discretion in applying sanction provisions for Rule 220 violations.

The trial courts’ strict adherence to this rule and the swift imposition of sanctions will encourage compliance and eliminate the incentives for bypassing the disclosure requirements. The disclosure of expert witnesses will itself promote efficient trial presentation, allow adequate preparation, encourage settlements, and insure fairness to all litigants.

Tim Compall