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Simultaneous Disclosure of Experts in Cook County: To What End and At What Cost?

by Adam C. Carter
Cray Huber Horstman Heil & VanAusdal LLC

In complex civil litigation, particularly those cases involving product liability, medical malpractice, legal malpractice, and construction, the litigants must rely on the opinions of expert witnesses—those doctors, engineers and other professionals who are retained by the parties to give opinions on issues of liability and damages that are beyond the ken of the average juror. Such experts are retained to clarify issues for the jury and to give opinions advocating their litigants' positions. It has long been the history in Illinois that the plaintiff, who bears the burden of proof in the case, must first disclose their retained experts and, pursuant to Illinois Supreme Court Rule 213(f)(3), must also disclose the opinions that the expert has and will give at trial. After analyzing the plaintiff's expert's opinions and deposing the expert, the defendant then has the opportunity to retain and disclose its own experts, if necessary, to rebut or combat plaintiff's expert's opinions.

The Cook County "Pilot Project"

In early September 2011, the Cook County Circuit Court instituted a "Pilot Project" for the *simultaneous* disclosure of Supreme Court Rule 213(f)(3) witnesses. Per the administrative order establishing the project, 50 to 75 cases were to be selected via a screening process in order to study the viability of a system in which the plaintiffs and defendants disclose their experts and experts' opinions at the same time. The impetus for establishing the program was reported to be the thought that simultaneous disclosure of experts may save time in moving the cases from filing to trial. The project initiative noted that expert disclosures and depositions in complex cases often take too long and delay the cases from reaching trial or resolution. Therefore, complex cases that involved theories of liability in medical malpractice, products liability and construction negligence were to be screened and a number of cases in each of those areas were to be included in the project.

The parameters of the project were set forth when the project was first announced. Participation was reported to be voluntary and the cases were to be managed by three motion judges in the Law Division of Cook County. Further, due to the limited nine-month timeframe of the project and the limited number of cases that were to be included, cases to be screened and accepted had to be in a specific posture where all fact discovery was complete and the parties were ready for a Rule 213(f)

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On the inside

(3) expert disclosure schedule. If the case was accepted, the parties were to be given a date for the simultaneous disclosure of all experts. Thereafter, the parties were to be given 30 days to file supplemental expert reports, if necessary. After the supplements, depositions of all experts were to proceed, with plaintiff's experts to be deposed first. The depositions were to be completed within 60-90 days. Following the experts' depositions, the case would be trial-ready, as there would be no rebuttal witnesses. At the conclusion of the project on June 1, 2012, a Study Committee is to evaluate the project.

Implementation of the Project

After nearly two months of submissions, the list of submitted cases was nearly 90% medical malpractice cases. The original plan was to have approximately 25 medical malpractice cases, 25 products liability cases and 25 construction cases in the project. However, to date so many medical malpractice cases have been submitted that the Committee has made a determination to suspend the submission of medical malpractice cases. Also, due to the lack of cases other than medical malpractice in the project, the committee has also accepted other types of complex cases that have been categorized as 28-month discovery cases where all of the parties have retained experts. Such cases have included legal malpractice cases and complex automobile accident cases.

One important question that has been raised concerns the factors that will be considered in determining whether the project is "successful." To date, the answer remains unclear. If the success of the project is simply to be determined by whether those cases involved in the project complete expert discovery more quickly than cases that are not in the project during the same timeframe, such a barometer of success leaves out the considerable issues of whether the project improperly disrupts the natural progression throughout a case in which the plaintiff always moves first and the defendant responds, and further, whether additional and unneeded costs are imposed upon defendants.

The Big Picture—Who Needs an Expert to Prove a Case?

In the types of cases that are being submitted to the project, plaintiffs must rely on experts in order to prove liability and often damages as well. As a practical matter, in nearly all of these types of cases, defendants also will retain and rely upon experts in defense of their cases. However, a defendant is not required to put on any witnesses or evidence, let alone hire a controlled expert to defend the case. Defendants have the right to call an expert witness if they believe it will help their case by rebutting evidence and opinions offered by the plaintiff and plaintiff's experts. But the burden of proof remains on the plaintiff to prove her case.

Before a defendant can know if an expert is necessary or even a good idea, he needs to know if the opinions of plaintiff's expert need to be rebutted. Under the system currently in place, if a plaintiff's expert changes opinions or retreats from a position, then the defendant may not need an expert on a particular issue or theory, and may proceed to summary judgment or partial summary judgment without ever having to retain an expert as to that issue or theory. Simultaneous disclosure in the above-described situation could cause the defendant to expend time and money in retaining an expert in a case where it proves to be unnecessary.

In many medical malpractice cases, defendants may not know all of plaintiff's theories of liability until after plaintiff's expert disclosure. It is only after a plaintiff's expert witness disclosures that many defendants retain experts (or *additional* experts) in order to rebut the opinions set forth by plaintiff's experts. Simultaneous disclosure of experts would disallow defendants to retain additional experts in order to properly rebut plaintiff's experts' opinions.

The implementation of simultaneous disclosure of experts in conjunction with existing Illinois law will cause uncertainty on the part of defendants as to the types of experts they need to retain. For example, in a cardiology medical malpractice case, of course the defendant is aware that he will need to retain an expert cardiologist. However, under the simultaneous disclosure program, if the plaintiff discloses an economist and a vocational

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rehabilitation expert in addition to an expert cardiologist, and defendant only believes that plaintiff was going to disclose an economist, the defendant would be unable to rebut the testimony of the plaintiff's vocational rehabilitation expert, as the time for disclosure had passed.

The hypothetical situations one can think of in which defendants are guessing at plaintiff's theories and scrambling for multiple experts are too numerous to count. (In a large damages case, does the defendant need to disclose an economist, a vocational rehabilitation expert *and* a life care planner? In a products liability case, what is plaintiff's exact theory as to the defect in the product, and does the defendant need to disclose a engineering expert, a human factors expert, *and* a metallurgist as well as all appropriate medical and life care experts?) If such a scenario were to become permanent, defendants would be required to account for every possible theory that may be raised by plaintiff's pleadings and discovery up to the time of expert disclosure, even if plaintiff has no intention of proceeding on every possible theory. The defendants would then be required to retain experts in response to each of those theories and disclose all opinions that the defense counsel believes would rebut plaintiff's experts' anticipated opinions. This is particularly true where courts do not require plaintiffs to answer contention interrogatories or contention document requests so defendants have less than a clear understanding of the liability theories and evidence related to plaintiff's case before the defense must simultaneously disclose experts. To some extent, requiring defendants to simultaneously provide Rule 213(f)(3) witness disclosures before they know plaintiff's experts' opinions is nearly analogous to requiring defendants to file answers on the same date that plaintiffs file their complaints—the defendant is required to give his answer (or rebuttal) before he know the question (or statement).

The Natural Order of Things

There is a reason why Illinois has followed the progressive pattern of expert disclosure for decades. It simply follows the natural progression of a lawsuit. It is inherently aligned with the concept of the burden of proof that has been a part of civil litigation in this country for generations. The defendant answers the complaint that was initially filed by the plaintiff, thereby responding to the allegations. At trial, the defendant's case follows the plaintiff's case, thereby responding to the evidence and arguments made by plaintiff in her attempt to prove a prima facie case. The burden of proof throughout the case must rest on plaintiff's shoulders. The consistency of putting that burden on plaintiff at the pleading stage, at the discovery stage, and then at trial simply makes sense. Requiring plaintiff to disclose her experts and their opinions first keeps the burden of proof where it belongs. To suddenly change the natural procedure related to the burden of proof at the discovery stage disturbs the simple continuity of the litigation, and is particularly unsettling when expert discovery would be the only portion of the litigation in which plaintiff is not required to provide their evidence first.

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Who Pays Under a System of Simultaneous Disclosure?

The added requirements for a defendant to retain experts for all of the potential theories on which a plaintiff may possibly proceed could add tremendous costs to the defense of complex cases. It is no secret that retained experts cost money. They must be paid for their time to review and analyze materials, prepare their opinions and provide the bases therefor. For a defendant to be forced to retain experts to analyze the case and complete their work and then ultimately not be necessary because plaintiff chose not to proceed on that particular theory would result in an enormous waste of resources on the part of defendants. In response to the project, defense counsel have noted that the disruption of the natural order of litigation related to the burden of proof that must be shouldered by plaintiffs, as well as the costs the project would cause defendants to incur, render the project prejudicial to defendants.

The Defendants' Response to the Project

After weighing their options, some defendants have chosen to bring this issue to the Illinois Supreme Court, which is the final interpreter of its own rules. In some medical malpractice cases, defendants have filed motions with the Supreme Court requesting leave to file an original complaint seeking a writ of prohibition or a supervisory order directing the Circuit Court of Cook County to cease and desist enforcement of the project on the basis that it conflicts with other Supreme Court Rules, particularly Rule 213(g), which allows for expert opinions to be disclosed in a discovery deposition, and Rule 213(i), which allows a party to seasonably supplement or amend its discovery responses, which would include written discovery answers. Further, there is an argument that the project is an exercise in rulemaking that is outside the scope of the rulemaking procedures in Supreme Court Rule 3.

The Illinois Association of Defense Trial Counsel convened a task force in order to review the project and provide counsel and information to its members with regard to the project. It is also drafting a white paper to look critically at the issues that the project was alleged to have been created to address. In addition, the task force and its white paper will address the issues that the project has raised, including the disruption of the natural and historical progression of a lawsuit, the costs associated with such a shift, and a review of other jurisdictions and how they handle expert disclosures. Finally, the IDC is making a point of identifying other remedies for shortening the time between the filing and the trial of a case that would not prejudice defendants or plaintiffs.

The Cook County Simultaneous Disclosure Pilot Project has, in a short amount of time, raised a number of issues as to how complex cases are litigated in Cook County. While the alleged objective of the project—at-tempting to move cases more quickly from filing to resolution—is reasonable, serious questions have been raised by the path taken to reach that objective. Whether it is at the close of the project in June 2012, or earlier if the Supreme Court of Illinois provides guidance pursuant to the motions made to it, attorneys who practice complex civil litigation in Cook County will have an answer as to whether simultaneous disclosure of experts is a new reality or simply a short-term experiment. ■

What You Do Not Know Can Still Hurt You: The Statute of Limitations and the Discovery Rule are Extended to Encompass Unknown Causes of Injury

by Donald Patrick Eckler
Pretzel & Stouffer, Chartered

In a matter of first impression, the Appellate Court of Illinois, First District, in *Mitsias v. I-Flow Corporation*, recently ruled that where the causal relationship between the allegedly defective product and the claimed injury is unknown to science, the statute of limitations does not run until such time as that causal relationship could have been known because to hold otherwise would defeat the purpose of the discovery rule. This is a significant ruling in products liability cases, medical malpractice cases, and any case in which the cause of an injury or damage could not be known to the plaintiff during the statutory limitations period. As a secondary matter the case also provides further elucidation on the right of an expert to subsequently seek to clarify a statement made at a deposition in order to avoid an adverse result to the party by which he or she was retained.

Procedural and Factual History

The plaintiff had left shoulder surgery in October 2001. As part of the surgery, the surgeon installed a pain pump that delivered the local anesthetic, Marcaine, to assist in controlling the plaintiff's pain post-surgery. After the surgery, the plaintiff experienced glenohumeral chondrolysis as a result of cartilage necrosis in her shoulder. Due to this post-surgical condition, in October 2003 the plaintiff filed a medical malpractice action against her treating orthopedic surgeon alleging that his errors had caused her injury. The case proceeded through discovery and the plaintiff's expert's deposition was taken in two sessions, one in August 2006 and one in October 2007. During the first deposition, the plaintiff's expert testified that there were three possibilities for the cause of the plaintiff's injury including:

> A third possibility which has become more apparent recently is the use of an interarticular anesthetic agent, particularly a medicine called Marcaine, and so the use of a postoperative interarticular pain pump, which I'm not aware of whether that was done or not, has been shown over the last year-and-a-half to two years to be highly associated with a condition where articular cartilage is aggressively lost in the shoulder after arthroscopic stabilization.

At that same session of the deposition, the plaintiff's expert testified that "in the last year and a half there's been a growing body of evidence that this can cause cartilage death or necrosis and lead to the loss of cartilage in a shoulder." At the second session of the deposition of plaintiff's expert in October 2007, the expert testified that as of that date it was recognized in the medical literature that Marcaine pain pumps "can be a cause for loss or destruction of articular cartilage at the glenohumeral joint space." He further testified that this information was not known at the time that the orthopedic surgeon installed the pump and was not known until a "few years later."

Based on this information, the plaintiff voluntarily dismissed the action against the surgeon in November 2008. However, in February 2009 the plaintiff refiled her action, and in addition to reasserting her claims against the defendant doctor, she included product liability claims against the manufacturer of the pain pump on theories of both negligence and strict liability. The product manufacturer successfully moved for dismissal arguing that the statute of limitations had expired by the time of the filing of the complaint against it and the trial court granted Supreme Court Rule 304(a) certification allowing immediate appeal.

The product manufacturer moved to dismiss the refiled complaint based on the two year statute of limi-

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tations found in 735 ILCS 5/2-213(d). The product manufacturer argued that the plaintiff was on notice that her injury was wrongfully caused as of the time of her filing her complaint in 2003. In opposition, the plaintiff argued that she was not on notice until her expert testified at his deposition in 2007 that the pain pump may have caused the injury. In addition, the plaintiff offered the affidavit of her expert, which in relevant part stated:

> It is my understanding, and opinion to a reasonable degree of medical certainty, that any information concerning potential chondrolysis caused by the wrongful use of pain pumps did not occur by publication for which a patient or other lay person might realize that chondrolysis might be wrongfully caused by pain pumps or their design or lack of warnings or instructions until the summer of 2007.

The expert also explained his testimony in his first deposition in which he expressed the opinion that the pain pump could have played a role in causing the plaintiff's injury, by saying that he was only speaking to the length of time that the anesthetic had been delivered and that he had no information that the pain pump was a defective product until the summer of 2007.

Considering the arguments on the motion to dismiss, the trial court held that the statute of limitations began at the same time for both the medical malpractice and product liability claims and that because the claims against the product manufacturer were not filed until over 8 years after the surgery, the claims against the product manufacturer were barred.

Ruling of the Appellate Court

In reversing the judgment of the trial court, the Appellate Court held that the central question was "**how the discovery rule is applied when a plaintiff is aware that her injury might have been wrongfully caused by one source but is unaware that her injury might have been caused by another source and, in fact, could not be aware of that source because the causal link was as yet unknown to science.**" The Court answered the question in favor of the plaintiff and held that allowing the statute of limitations to begin to run when the plaintiff is aware of one source of injury, (the alleged negligence of the treating physician), but unaware of another, (the allegedly defective product), would defeat the policy and purpose of the discovery rule.

The Court first addressed when the plaintiff is deemed to have knowledge that the injury suffered was wrongfully caused. Initially, the Court rejected the argument of the defendant that knowledge of *any* cause is notice of *all* causes and in doing so looked to the analysis under *Nolan v. Johns Mansville Asbestos*, 85 Ill. 2d 161, 421 N.E.2d 864 (1981), *Knox College v. Celotex Corporation*, 88 Ill. 2d 407, 430 N.E.2d 976 (1982), and their progeny of what it means for the plaintiff to have knowledge that an injury is wrongfully caused. Recognizing that the Illinois Supreme Court has not addressed this specific question, the Court sought guidance from the United States Supreme Court opinion of *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352 (1979) which had been relied upon by the *Nolan* and *Knox* Courts. The *Kubrick* Court held that a plaintiff had a duty to inquire of individuals in order to ascertain if his injury had been wrongfully caused and that because he did not do that, the plaintiff's complaint was properly dismissed because it was possible for the plaintiff to determine that his injury had been wrongfully caused. Applying these principles to the instant case, the Court stated:

> Permitting knowledge of the one to trigger the discovery rule as to the other would seem to defeat the policy and purpose behind the discovery rule, which is to accommodate the need of the victim, upon reasonable inquiry, to discover her cause of action against a defendant who has wronged her. Therefore, where plaintiff has discovered one cause of her injury, but has not and, in fact, could not have discovered a second cause, tolling the statute of limitations

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> with regard to that second claim until such time as "[t]here are others who can tell him if he has been wronged, and he need only ask" would seem to be a logical extension of the *Kubrick* decision, as well as one that flows from our supreme court's concern that plaintiffs conduct diligent inquiry into potential causes of action without slumbering on their rights. (citations omitted).

Accordingly, the Court held that because the plaintiff in the instant case could not have known through inquiry that her injury had been caused by any action of the product manufacturer the statute did not begin to run until the summer of 2007.

The Court next turned to the plaintiff's expert's testimony in 2006 that suggested that the pain pump may have been a cause of the plaintiff's injury and the attempt to clarify that statement. The Court held that the 2006 deposition testimony was ambiguous, or at least insufficiently clear and unequivocal, to bar the expert from clarifying his statement that the pain pump could have caused the plaintiff's injury and that he was aware of such a cause as early as of that date. In refusing to resolve the ambiguity, the Court seemed to allow the issue to be raised by the defense at trial as to when and whether the plaintiff was aware of a wrongfully caused injury by the pain pump as early as 2006 when the plaintiff's expert testified at his first deposition. This issue is important because if the plaintiff's expert was aware as early as 2006 that the injury could have been caused by the pain pump, and not as of 2007 as claimed in the expert's affidavit, then the 2009 complaint filed against the product manufacturers would not have been timely and the plaintiff's complaint would have likely been properly dismissed.

Conclusion

Particularly in the areas of products liability and medical malpractice, but perhaps in many others areas of litigation, as scientific knowledge increases new potential causes of injury will likely be discovered. The *Mitsias* opinion lays the groundwork for an expansion of the time frame within which claims can be brought against defendants when a new cause of the injury is discovered long after the injury itself is discovered. A potential extension of this opinion is that the claim first could have been brought in 2009 against the product manufacturer even if the complaint was not filed against the defendant doctor in 2003, thus portending that the discovery rule exception could swallow the statute of limitations. Irrespective of how the rule evolves this is a significant development in the law. ■

What To Do When Your Expert Witness Blows the Deposition

by Bradley C. Nahrstadt
Williams Montgomery & John Ltd.

An expert is a person who has made all the mistakes in a very narrow field.

—Niels Bohr

Mistakes are the portals of discovery.

—James Joyce

If you practice law long enough, and you produce enough expert witnesses for depositions, eventually you will experience what no one wants to face: an expert witness who messes up during the deposition. There are a number of different ways that an expert can "blow" the deposition. Some mistakes are much worse than others. Some can be fixed and others cannot. What follows is hopefully some helpful advice about what to do when your retained expert blows the deposition.

With all due deference to David Letterman, I have prepared my *Top Ten Ways an Expert Witness Can Blow the Deposition*:

1. Offering opinions outside his area of expertise.
2. Failing to master the facts of the particular case in which he is employed.
3. Relying on data or documents not pertinent to the date on which the event occurred which has given rise to the lawsuit.
4. Ignoring the opposing lawyers' and experts' view of the case.
5. Becoming an advocate instead of an unbiased expert whose opinion happens to favor his client.
6. Allowing his "ego" to intrude in his deposition or trial testimony.
7. Damaging his credibility by quibbling over peripheral issues.
8. Answering hypothetical questions without forcing the cross-examiner to supply all the variables or assumptions.
9. Answering questions in deposition when he does not understand the question.
10. Retreating from his opinions/conceding the opposing side is right.

The first nine (9) errors can be corrected, either during the course of the deposition or shortly after the deposition is concluded. The last error may be fatal—in which case you will have to abandon the expert and start over again.

Offering opinions outside his area of expertise.

If your expert offers opinions outside of his area of expertise, state on the record that the witness is not being offered to provide those opinions. Make it clear that you will not be eliciting those opinions from the expert in support of your case. Follow up with a letter to counsel reiterating your refusal to call the witness to offer those opinions.

Failing to master the facts of the particular case in which he is employed.

If your expert fails to master the facts of the case, it may be helpful to take a break during the course of the deposition and have a chat with the expert about the salient facts. If she doesn't have a chance to correct

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herself during the direct examination, make sure you explain the relevant facts during your questioning and ask the witness if those facts support her opinions or change her opinions in any way.

Relying on data or documents not pertinent to the date on which the event occurred which has given rise to the lawsuit.

If your expert relies on data or documents not relevant to the date on which the event occurred, state on the record that the expert will not be relying on those materials to support his opinions. Again, follow up with a letter to opposing counsel confirming the fact that your expert will not be relying on outdated materials to support his opinions.

Ignoring the opposing lawyers' and experts' view of the case.

If your expert ignores the opposing party's view of the case or the opinions of the opposing expert, again, take a break and speak to your expert about this. Ask him to explain why the opposing party's views or opinions are not applicable to the case at bar. When you have a chance at the end of the deposition to question your expert about this issue, have him explain on the record why the opposing party's views or opinions do not hold water.

Explain to the expert that he needs to keep his ego in check—juries like smart witnesses, they do not like smart asses.

Becoming an advocate, allowing ego to intrude, and quibbling over peripheral issues.

Becoming an advocate, allowing ego to intrude on the deposition and quibbling over peripheral issues are generally not the kind of trouble that will necessitate the replacement of an expert. If the deposition is being videotaped, and the jury will be allowed to see the tape, it would probably be a good idea to ask for a break in the questioning and have a conference with the expert in order to ask for an attitude adjustment. Let the expert know that it is your job to be the advocate, not his. Encourage him to explain his position and his opinions in a neutral way, backed up by his education, training and experience. Explain to the expert that he needs to keep his ego in check—juries like smart witnesses, they do not like smart asses. Remind the expert to keep his eye on the big picture—focus on the important issues and stop quibbling over the little details. The last thing you want is for the expert to lose sight of the forest for the trees.

Answering hypothetical questions without forcing the cross-examiner to supply all the variables or assumptions.

If your expert witness insists on answering hypothetical questions without having all of the facts necessary to do so (a nice objection by you at this point may prevent this mistake from happening), make sure you go back over the hypothetical questions before the deposition comes to a close and discuss the expert's opinions in light of all the relevant facts. In other words, give your expert all of the facts and then ask her to provide her opinion based on those facts. Have her commit to the error of her prior opinions given counsel's failure to provide her with all of the facts.

Answering questions in deposition when he does not understand the question.

If it is clear during the course of the deposition that your expert is answering questions she does not understand, ask for some clarification. If your expert still does not understand what is being asked, or worse yet, still answers a question she does not understand, ask to take a break and try to clear up the misunderstanding. If

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you are unable to take a break and get the expert back on track, when you have an opportunity to ask questions, make sure you take advantage of it. Clear up the confusion and have your expert testify about the true facts of the case or the correct assumptions.

Retreating from his opinions/conceding the opposing side is right.

If, at the end of the day, your expert has turned tail and run—he has retreated from his opinions or, worse yet, agreed with opposing counsel's theory of the case—then you may have only one option: jettison the expert. It is difficult to throw away all the time and money you invested in the expert, but you simply cannot afford to put a witness who will agree with the opposing side on the stand.

It is difficult to throw away all the time and money you invested in the expert, but you simply cannot afford to put a witness who will agree with the opposing side on the stand.

If you have made the painful decision to withdraw your expert, you must make sure that the withdrawal or abandonment is proper in order to avoid a missing witness instruction at the time of trial. Illinois, like many states, has a jury instruction which allows the court to bring to the attention of the jury the fact that a particular witness or piece of evidence was not produced by one of the parties to the litigation. Illinois Pattern Jury Instruction 5.01, also known as the "missing witness" instruction, allows the jury to infer that the testimony of the missing witness would have been adverse to the party that failed to produce the witness to testify—an inference that can be very hard to overcome and, in some cases, can sound the death knell for a party's claim or defense. Illinois Pattern Jury Instruction 5.01 is generally available when the following conditions have been met: (1) the missing witness was under the control of the party to be charged and could have been produced by reasonable diligence; (2) the witness was not equally available to the opposing party; (3) a reasonably prudent person would have produced the witness if he believed that the testimony would be favorable; and (4) there is no reasonable excuse shown for the failure to produce the witness. *Schaffner v. Chicago & Northwestern Transportation Co.*, 129 Ill. 2d 1, 541 N.E.2d 643 (1989). Whether to use the instruction or to permit the argument is within the sound discretion of the trial court. *Schaffner,* supra.

In a case where a party to asks its retained expert not to testify at trial, the question becomes whether the party that abandons that previously disclosed expert is subject to a 5.01 instruction. The answer depends on the timing of the abandonment and the particularity with which it was done.

The Illinois Supreme Court, in the case of *Taylor v. Kohli*, 162 Ill. 2d 91, 642 N.E.2d 467 (1994), held that a party may abandon an expert witness prior to trial, and avoid the missing witness instruction, by giving notice to the other side in a reasonable time prior to trial. Unfortunately, the court did not define "reasonable time". In holding that a party can avoid the missing witness instruction by abandoning an expert, the *Taylor* court stated the following:

> That an expert witness may be abandoned is not disputed. The steps which must be taken to effect an abandonment, however, have not previously been addressed by this court. The only appellate court case which has addressed this issue is brief in its discussion of abandonment. (*Bargman v. Economics Laboratory, Inc.*, (1989), 181 Ill. App. 3d 1023, 1027-28, 130 Ill.Dec.

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> 609, 537 N.E.2d 938.) *Bargman* recognized a right to abandon an expert witness, but articulated the concern that the opposing party should be made fully aware, through clear notice, of such abandonment. Further, this notice should be given at a time where the opposing party is still capable of acting on that awareness to his benefit. We agree.
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> * * *
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> The goal is that a party will be able to rely on his adversary's expressed intention to call the experts he discloses. Thus, a missing-witness instruction is appropriate if such an expert is not abandoned and is not called. Thus, we rule that a party may give notice of abandonment and avoid the missing-witness instruction. The notice must be given in reasonable time prior to trial.

Taylor, 642 N.E.2d at 469-470. The *Taylor* court did not specifically find that the 19 month notice plaintiff's counsel allegedly gave defense counsel of his intention to withdraw his expert was given a "reasonable time" before trial. The Supreme Court remanded the case to the trial court with instructions to determine whether plaintiff's counsel had in fact notified defense counsel of his intention to abandon plaintiff's expert 19 months before trial.

Another case to discuss the issue of abandonment and the propriety of the 5.01 instruction is *Natalino v. JMB Realty Corp*., 277 Ill. App. 3d 270, 660 N.E.2d 138 (1st Dist. 1995). In that case, the plaintiff abandoned his expert one week before trial. The appellate court held that the trial court properly gave the 5.01 instruction in that case since the abandonment of the expert occurred a relatively short time prior to trial. Since there was no way for the adverse party to adopt the expert, or, pursuant to the applicable rules, list him as their own expert, and he had potentially damaging testimony about the plaintiff's case, the appellate court held that giving the jury the missing witness instruction was proper.

Other cases which have examined the propriety of giving the 5.01 instruction when a party has abandoned an expert witness include *Bishop v. Baz*, 215 Ill. App. 3d 976, 575 N.E.2d 947 (3rd Dist. 1991) and *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 588 N.E.2d 1193 (4th Dist. 1992). In *Bishop*, the defendants abandoned one of their experts before trial (the exact timeframe is never mentioned). The court held that the trial court properly refused to give a 5.01 instruction since the "plaintiff was given ample opportunity to depose [Dr. O'Neal] or call him to testify as an expert on his own behalf after defendant gave notice that he was withdrawing the doctor as an expert witness for the defense." *Bishop*, 575 N.E.2d at 985. In *Betts*, the issue of abandonment was peripherally mentioned (it is not altogether clear when and how the defendants abandoned some of their experts). The important language from *Betts* is the court's statement that it would "decline to require every party to produce every expert it lists as a possible witness in order to avoid the unfavorable inference instruction." *Betts*, 588 N.E.2d at 1206.

In order to avoid a 5.01 missing witness instruction, if counsel decides that the expert witness cannot be called to testify at trial, counsel should immediately make the opposing side aware of the decision to abandon the expert. Opposing counsel should be informed of the abandonment of the expert in writing. The letter abandoning the expert should specifically reference the case law cited herein and unequivocally declare that the expert is being abandoned and will not be called to testify at the trial of the case (indeed, in the *Bargman* case, the court found that the defendant had not effectively abandoned its expert witness even though it had failed to list him as an expert witness in the disclosures that were filed prior to the second trial). Every effort should be made to provide notice of the abandonment of the expert well before the trial is set to commence and certainly before the expiration of any discovery closure date set by the court. ■

■ **Adam Carter** is an associate with *Cray Huber Horstman Heil & Van Ausdal LLC* in Chicago, Illinois. He focuses his practice in the areas of product liability, aviation litigation, professional liability, and commercial litigation. Mr. Carter is a member of the Illinois Association of Defense Trial Counsel and the Illinois State Bar Association. He earned his B.A. *cum laude* from Augustana College in 1998 and earned his juris doctorate *cum laude* from the University of Illinois College of Law in 2001. He was admitted to the Illinois Bar and United States District Court, Northern District of Illinois in 2001, and has been admitted pro hac vice to defend clients in numerous state and federal courts across the country. Mr. Carter is a former Monograph contributor to the IDC Quarterly and currently serves as the Vice-Chair for the IDC's Civil Practice Committee.

■ **Donald Patrick Eckler** is an associate at *Pretzel & Stouffer, Chartered*. He practices in both Illinois and Indiana in the areas of commercial litigation, professional malpractice defense, tort defense, and insurance coverage. He earned his undergraduate degree from the University of Chicago and his law degree from the University of Florida. He is a member of the Illinois Association Defense Trial Counsel, the Risk Management Association, and the Chicago Bar Association. He is the co-chair of the CBA YLS Tort Litigation Committee. The views expressed in his article are his, and do not reflect those of his firm or its clients.

■ **Bradley C. Nahrstadt**, a Partner at *Williams, Montgomery & John, Ltd.* in Chicago, focuses his practice on the defense of high stakes products liability, premises liability, insurance bad faith and commercial claims. Mr. Nahrstadt has litigated cases involving a wide variety of products, including fine grinding machines, silicone breast implants, dietary supplements, automobile axles, hydraulic automotive lifts, hydraulic jacks, brakes, clutches, child safety seats, chemical floor wax strippers, signal components, genetically engineered corn, rewinders, pharmaceuticals, thermal oxidizers, gravimetric feeders, welding rods and contact lens solution. Mr. Nahrstadt has served as regional counsel for a national testing laboratory and currently serves as regional counsel for a large consumer of welding rods, a leading optical manufacturer and a major brake and clutch manufacturer. He is a graduate of Monmouth College (Summa Cum Laude) and the University of Illinois College of Law (Cum Laude) and currently serves as a member of the Illinois Association of Defense Trial Counsel Board of Directors.

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion 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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Illinois Association of Defense Trial Counsel, PO Box 3144, Springfield, IL 62708-3144, 217-585-0991, **idc@iadtc.org**