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Case Study: Best Practices for Taking and Defending Discovery and Evidence Depositions of a Doctor

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I. DEP PREPARATION

A. Initial Considerations.

1. Purposes for the Deposition.

- Evaluate the witness.
- Obtain facts and information and explore opinions.
- Commit witness to a specific version of events.

Defense perspective – why is plaintiff taking the deposition of this doctor?

Is doctor qualified to give opinions on the relevant medical issues in the case?

Can doctor testify that certain medical complaints are not related to the claim and state that bills for treatment for that condition are also unrelated?

Can doctor testify to facts and opinions that would assist my expert in formulating beneficial opinions as to other medical issues beyond this doctor's expertise?

Can this doctor help me to prove facts that are detrimental to other side's expert opinions?

2. Three Kinds of Questions.

- Past.
- Present.
- Future.

B. Steps to Initial Preparation.

1. Review Facts – Know The Medicine and Record.

2. Identify Issues (Duty, Breach, Proximate Cause, Damages, Pre-Existing Conditions).

3. Prepare a Road Map.

C. Focus on Goal Rather than Specific Questions.

Review disclosures from other side to determine expected testimony.

Treating physician may be used to establish standard of care in malpractice claim if properly disclosed. See *Nedzvekas v. Fung*, 374 Ill. App. 3d 618 (1st Dist. 2007).

Determine whether all records have been produced prior to deposition.

Review the law regarding elements of plaintiff's claim and any affirmative defenses such as failure to mitigate damages.

Identify all potential legal objections to doctor's testimony to establish basis for exclusion or limiting instruction:

Last date of treatment too long ago to support an opinion on prognosis, permanency of injuries;

A treating physician may give opinion testimony regarding the permanency of a patient's injuries providing a recent examination has been performed. A physician may not give an opinion on the permanency without a recent examination. *Knight v. Lord*, 271 Ill. App. 3d 581 (4th Dist. 1995) – barring such evidence where exam was 28 months before trial.

Opinion is outside area of expertise and would rely on specialist in area – lacks foundation.

Objection required to preserve issue of qualification. See *Russo v Corey Steel Co.*, 2018 IL App (1st) 180467, citing *Gill v. Foster*, 157 Ill. 2d 304 (1993) and *Purtill v. Hess*, 111 Ill. 2d 229 (1986) for establishing expert's qualifications and competency to testify.

Is this doctor giving opinions as a retained expert?

Does the doctor have any biases?

A party may properly cross-examine a medical expert regarding fee arrangements, prior testimony for same counsel or party, and financial interests in the outcome of the case. *Kim v. Evanston Hosp.*, 240 Ill. App. 3d 881 (1st Dist. 1992), citing *Sears v. Rutishauser*, 102 Ill. 2d 402, 408 (1984).

II. ISSUE IDENTIFICATION

A. Exacerbation or Aggravation.

B. Weight and Credibility.

C. Conflicting Opinions or Testimony.

D. Plaintiff's Improvement and Effort.

E. Effectiveness of Treatment Provided.

F. Are There Other and Better Witnesses to Address the Issues Discussed.

G. Are the Injuries Discussed By This Witness In Dispute in This Case.

H. Stay Focused On True Defense of Claim.

- Statute of Limitations
- No Negligence
- No duty of care

III. RULES FOR DEPOSITION

A. For the Deponent.

Yes or no.

No gestures, head shakes, or nod.

Make sure you understand the question.

Stop the questioner if you don't understand the question.

If a question is answered, it will be assumed that it is understood.

Listen carefully to the questions.

Do not answer until the question is complete.

B. For the Attorneys.

Be aware of appropriate objections.

- Form
- Foundation

Evidence Deposition.

- Form
- Foundation
- Not timely disclosed
- Hearsay
- Irrelevant

- Prior consistent statement
- Learn the exceptions to the objections

Is the other side bullying you? The witness? Making inappropriate comments during the deposition? Asking inappropriate questions?

It is not appropriate to instruct the witness to not answer the question under most circumstances – usually only to preserve a privilege or enforce a Court Order.

It is appropriate to stop the deposition and move for a protective order to stop the inappropriate behavior/questioning when necessary.

IV. FOUNDATION AND COMPETENCY

A. Rule of Evidence 702 – Issues Regarding Competency.

A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

B. Rule of Evidence 803 – Foundation for Self-Authentication and Hearsay Exception.

(6) Records or regularly conducted activity. A memorandum, report, record, or data compilation in any form, of acts, events, conditions, opinions, or diagnosis made at or near the time by, or from information transmitted by, a person with knowledge is kept in the course of a regularly-conducted business activity, and if it was the regular practice of that business activity to make the memorandum . . ."

C. Rule of Evidence 902 – Self Authentication.

(11) Certified records of regularly conducted activity. The original or a duplicate of a record of regularly-conducted activity that would be admissible under Rule 803(6) . . . made at or near the time . . . kept in the regular course . . . kept as a regular practice.

V. TESTIMONY

A. Identify Witness.

Identify the witness. Name, address, occupation, location.

Qualifications.

Education.

College, medical school.

Residency.

Fellowships.

Other Post-Graduate or Doctoral work.

Board Certification. Hospital Affiliations.

Teaching Responsibilities.

Publications and research.

Organizations.

The current practice or specialty.

Clinic.

Hospitals

Limited area of practice.

B. Treatment of the Petitioner (Pre-Accident).

Primary Care Physician.

Pre-occurrence medical knowledge of Plaintiff.

Post-accident referral.

Availability of prior health records and health history.

C. Treatment of Petitioner (Accident).

First contact.

History of incident.

History of complaints.

Pre-existing conditions related to complaints.

Emergency or medical care from other sources.

D. History of Occurrence.

Purpose and value of history.

Description of accident.

Description of injury.

Accident Facts Included or Considered by deponent.

Description of injury.

Subjective v. Objective.

Body mechanics.

Seatbelts, safety equipment, or guards.

Importance and necessity of history – most important element of care.

Reliability of patient.

E. Physical Examination.

Purpose for examination.

Describe examination in full.

Each test – Purpose and Result.

Objective and Subjective information from each test.

Correlate results of examination with history.

F. Differential Diagnosis.

Possible diagnoses that would explain complaints and objective findings.

G. Objective Tests.

Labs.

MRI.

X-Rays.

Sonograms.

NCV.

EKG.

H. Diagnosis.

Definition and explanation. Describe nature of injury and mechanics for the trier of fact.

Supporting history.

Supporting clinical examination.

Supporting test results.

Supporting medical records or past medical history.

Supporting literature or authority.

I. Care and treatment. Subsequent Visits.

Ongoing treatment with doctor.

Pain medication.

Physical therapy.

Exercises.

Chiropractic.

Anti-inflammatory medications.

Braces, supports, crutches.

Surgical procedures available.

Surgical procedures recommended.

J. Surgery.

Description.

Goal.

Risks.

Complications.

Invasive trauma associated with surgery.

Anesthesia.

Results, residuals, sequela, scars.

Compliance or non-compliance of patient.

Reliable.

Credible.

Consistency.

Reasonableness of claimant's decision to avoid or undergo Surgery. See notes to IPI 33.01.

K. Prognosis.

Permanent disability.

Partial disability.

Loss of a normal life.

Pain.

Suffering.

Disability.

Relevant jury instructions.

L. Future Treatment.

Future degeneration.

Post-traumatic arthritis.

Adjacent segment disease.

Therapy.

Medication.

Likelihood of improvement.

Likelihood of deterioration.

M. Bills.

Familiarity.

Reasonable.

Necessary.

Personal knowledge.

Hospital.

Physician.

PT and ancillary treatment.

Future costs, duration, and reasonable necessity.

N. Causation.

To a reasonable degree of medical certainty.

More probably true than not.

Opinion based on history, exam, tests, responses, to treatment = Treatment success can lead to conclusion.

Other potential causes.

O. Pain Proximate Cause: Injury.

Disability. Loss of a normal life. Work restrictions.

Lifestyle changes.

Daily activities.

Future medical.

VI. APPLICABLE LAW

A. Statutes.

1. 735 ILCS 5/8-2301 Perpetuation of Testimony.

Perpetuation of testimony. Any person may take the deposition of a witness to perpetuate the remembrance of any fact, matter or thing, . . . necessary to the security of any estate, or to any private right by filing a petition supported by affidavit in the circuit court of the proper county. The petition shall set forth, briefly and substantially, the petitioner's interest, claim or title in or to the subject concerning which the petitioner desires to perpetuate evidence, the fact intended to be established, the names of all other persons interested or supposed to be interested therein, whether there are any persons interested therein whose names are unknown to the petitioner (who shall be designated as unknown owners), and the name of the witness proposed to be examined. . . .

735 ILCS 5/8-2301; *Suffolk v. Chapman*, 31 Ill. 2d 551 (1964).

2. 735 ILCS 5/2-1003 Discovery and Depositions.

(a) Discovery, such as admissions of fact and of genuineness of documents, physical and mental examinations of parties and other persons, the taking of any depositions, and interrogatories, shall be in accordance with rules.

735 ILCS 5/2-1003(a).

B. Illinois Supreme Court Rules.

1. Supreme Court Rule 201 – General Discovery Provisions.

(a) Discovery Methods. Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral examination or written questions, written interrogatories to parties, discovery of documents, objects or tangible things, inspection of real estate, requests to admit and physical and mental examination of persons. Duplication of discovery methods to obtain the same information and discovery requests that are disproportionate in terms of burden or expense should be avoided.

(b) Scope of Discovery.

(1) Full Disclosure Required. Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter. . . .

(c) Prevention of Abuse.

(1) *Protective Orders*. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.

(2) *Supervision of Discovery*. Upon the motion of any party or witness, on notice to all parties, or on its own initiative without notice, the court may supervise all or any part of any discovery procedure.

(3) *Proportionality*. When making an order under this Section, the court may determine whether the likely burden or expense of the proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(d) Time Discovery May Be Initiated. Prior to the time all defendants have appeared or are required to appear, no discovery procedure shall be noticed or otherwise initiated without leave of court granted upon good cause shown.

(e) Sequence of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence,

. . .

(i) Stipulations. If the parties so stipulate, discovery may take place before any person, for any purpose, at any time or place, and in any manner.

(j) Effect of Discovery Disclosure. Disclosure of any matter obtained by discovery is not conclusive, but may be contradicted by other evidence.

Ill. S. Ct. R. Rule 201.

2. Supreme Court Rule 202 – Purposes for Which Depositions May Be Taken in a Pending Action.

Summary:

- For the purpose of discovery or for use in evidence. Notice shall specify which.
- In the absence of specification, discovery deposition only.
- Discovery depositions and evidence depositions shall be taken separately unless stipulated.
- If evidence deposition of a witness is to be taken within 21 days of trial, a discovery deposition is not permitted unless the parties stipulate otherwise or the Court orders otherwise upon Notice and Motion.

Any party may take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the action. The notice, order, or stipulation to take a deposition shall specify whether the deposition is to be a discovery deposition or an evidence deposition. In the absence of specification a deposition is a discovery deposition only. If both discovery and evidence depositions are desired of the same witness they shall be taken separately, unless the parties stipulate otherwise or the court orders otherwise upon notice and motion. If the evidence deposition of a witness is to be taken within 21 days of trial, a discovery deposition is not permitted unless the parties stipulate otherwise or the court orders otherwise upon notice and motion.

Ill. S. Ct. R. Rule 202.

3. Supreme Court Rule 203 – Where Depositions May Be Taken.

Unless otherwise agreed, depositions shall be taken in the county in which the deponent resides or is employed or transacts business in person, or, in the case of a plaintiff-deponent, in the county in which the action is pending.

Ill. S. Ct. R. Rule 203.

4. Supreme Court Rule 204 – Compelling Appearance of Deponent.

Summary:

- In Illinois.

Subpoenas to non-parties. Can command productionOf documents or things.

Notice to parties can require production of Documents or things.

- In another state,

  Actions pending in another State can petition the Court for a Subpoena to compel an appearance. The Court may hear and act upon that Petition with or without notice.

- Depositions of physicians.

  Discovery depositions only with the agreement of the parties and the consent of the deponent or under Subpoena issued by Court Order.

  Parties shall pay a reasonable fee to a physician testifying at such a deposition. Fees shall be paid by the party at whose instance the deposition is taken.

- Non-compliance by parties:

  Body Attachment

(a) Action Pending in This State.

(1) *Subpoenas*. Except as provided in paragraph (c) hereof: (i) the clerk of the court shall issue subpoenas on request; or (ii) subpoenas may be issued by an attorney admitted to practice in the State of Illinois who is currently counsel of record in the pending action. The subpoena may command the person to whom it is directed to produce documents or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted under these rules subject to any limitations imposed under Rule 201(c).

(2) *Service of Subpoenas*. A deponent shall respond to any lawful subpoena of which the deponent has actual knowledge, if payment of the fee and mileage has been tendered. Service of a subpoena by mail may be proved prima facie by a return receipt showing delivery to the deponent or his authorized agent by certified or registered mail at least seven days before the date on which appearance is required and an affidavit showing that the mailing was prepaid and was addressed to the deponent, restricted delivery,

return receipt requested, showing to whom, date and address of delivery, with a check or money order for the fee and mileage enclosed.

(3) *Notice to Parties, et al*. Service of notice of the taking of the deposition of a party or person who is currently an officer, director, or employee of a party is sufficient to require the appearance of the deponent and the production of any documents or tangible things listed in the notice.

(4) *Production of Documents in Lieu of Appearance of Deponent*. The notice, order or stipulation to take a deposition may specify that the appearance of the deponent is excused, and that no deposition will be taken, if copies of specified documents or tangible things are served on the party or attorney requesting the same by a date certain. That party or attorney shall serve all requesting parties of record at least three days prior to the scheduled deposition, with true and complete copies of all documents, and shall make available for inspection tangible things, or other materials furnished, and shall file a certificate of compliance with the court. Unless otherwise ordered or agreed, reasonable charges by the deponent for production in accordance with this procedure shall be paid by the party requesting the same, and all other parties shall pay reasonable copying and delivery charges for materials they receive. A copy of any subpoena issued in connection with such a deposition shall be attached to the notice and immediately filed with the court, not less than 14 days prior to the scheduled deposition. The use of this procedure shall not bar the taking of any person's deposition or limit the scope of same.

(b) Action Pending in Another State, Territory, or Country. Any officer or person authorized by the laws of another State, territory, or country to take any deposition in this State, with or without a commission, in any action pending in a court of that State, territory, or country may petition the circuit court in the county in which the deponent resides or is employed or transacts business in person or is found for a subpoena to compel the appearance of the deponent or for an order to compel the giving of testimony by the deponent. The court may hear and act upon the petition with or without notice as the court directs.

(c) Depositions of Physicians. The discovery depositions of nonparty physicians being deposed in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a subpoena issued upon order of court. A party shall pay a reasonable fee to a physician for the time he or she will spend testifying at any such deposition. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the court, the fee shall be paid by the party at whose instance the deposition is taken.

(d) Noncompliance by Nonparties: Body Attachment.

(1) An order of body attachment upon a nonparty for noncompliance with a discovery order or subpoena shall not issue without proof of personal service of the rule to show cause or order of contempt upon the nonparty.

Ill. S. Ct. R. 204.

5. Supreme Court Rule 206 – Method of Taking Depositions On Oral Examination.

Summary:

- Notice of Examination: Time and Place

  Representative deponent

  Audiovisual recording can be used.

- Any party entitled to take deposition pursuant to notice

  Any party may take a deposition under a notice in which case that party shall pay the fees.

- Scope and manner of examination and cross-examination.

  Deponent may be examined regarding any matters.

  Subject to discovery as if under cross-examination.

  Any evidence deposition shall be examined as if the deponent were testifying at trial.

  Objection shall be concise stating the exact legal nature of the objection.

- Duration – 3 hours.

- Motion to terminate or limit examination.

  Upon a showing that the examination is being Conducted in bad faith.

- Record of examination: Oath: Objection

Objections made at the time of the examination to The qualifications of the officer shall be included in the deposition. Evidence objected to shall be taken subject to the objection.

- Video Depositions

- Remote electronic means deposition

Any party may take a deposition by telephone, Video conference, or other remote electronic means by so stating in the notice.

(a) Notice of Examination; Time and Place. A party desiring to take the deposition of any person upon oral examination shall serve notice in writing a reasonable time in advance on the other parties. The notice shall state the time and place for taking the deposition; the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify the deponent; and whether the deposition is for purposes of discovery or for use in evidence.

. . .

(c) Scope and Manner of Examination and Cross–Examination.

(1) The deponent in a discovery deposition may be examined regarding any matter subject to discovery under these rules. The deponent may be questioned by any party as if under cross-examination.

(2) In an evidence deposition the examination and cross-examination shall be the same as though the deponent were testifying at the trial.

(3) Objections at depositions shall be concise, stating the exact legal nature of the objection.

(d) Duration of Discovery Deposition. No discovery deposition of any party or witness shall exceed three hours regardless of the number of parties involved in the case, except by stipulation of all parties or by order upon showing that good cause warrants a lengthier examination.

Ill. S. Ct. R. 206.

6. Supreme Court Rule 207 – Signing and Filing Depositions.

(a) Submission to Deponent; Changes; Signing. Unless signature is waived by the deponent, the officer shall instruct the deponent that if the testimony is transcribed the deponent will be afforded an opportunity to examine the deposition at the office of the officer or reporter, or elsewhere, by reasonable arrangement at the deponent's expense, and that

corrections based on errors in reporting or transcription which the deponent desires to make will be entered upon the deposition with a statement by the deponent that the reporter erred in reporting or transcribing the answer or answers involved. The deponent may not otherwise change either the form or substance of his or her answers.

Ill. S. Ct. R. 207.

7. Supreme Court Rule 208 – Fees and Charges; Copies.

Summary:

- Who shall pay.
- Amount. Every witness is entitled to fees and Mileage allowance.
- Upon payment of a reasonable charge, the officer Shall furnish a copy of the deposition transcript.
- Fees and charges may in the discretion of the Trial Court be taxed as costs.
- Controlled expert witness fees; Each party bears their own.

(a) Who Shall Pay. Except as provided in paragraph (e), the party at whose instance the deposition is taken shall pay the fees of the witness and of the officer and the charges of the recorder or stenographer for attending. The party at whose request a deposition is transcribed shall pay the charges for transcription. If, however, the scope of the examination by any other party exceeds the scope of examination by the party at whose instance the deposition is taken, the fees and charges due to the excess shall be summarily taxed by the court and paid by the other party.

(b) Amount. The officer taking and certifying a deposition is entitled to any fees provided by statute, together with the reasonable and necessary charges for a recorder or stenographer for attending and transcribing the deposition. Every witness attending before the officer is entitled to the fees and mileage allowance provided by statute for witnesses attending courts in this State.

(c) Copies. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or to the deponent.

(d) Taxing as Costs. The fees and charges provided for in paragraphs (a) through (c) may, in the discretion of the trial court, be taxed as costs.

(e) Controlled Expert Witness Fees. Each party shall, unless manifest injustice would result, bear the expense of all fees charged by his or her Rule 213(f)(3) controlled expert witness or witnesses.

Ill. S. Ct. R. 208.

8. Supreme Court Rule 209 – Failure to Attend or Serve Subpoena; Expenses.

Summary:

- Failure to attend or proceed; Expenses.
- Failure to serve Subpoena or notice; Expenses.

(a) Failure to Attend or to Proceed; Expenses. If the party serving notice of the taking of a deposition fails to attend or to proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party serving the notice to pay to the other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(b) Failure to Serve Subpoena or Notice; Expenses. If the party serving notice of the taking of a deposition fails to serve a subpoena or notice, as may be appropriate, requiring the attendance of the deponent and because of that failure the deponent does not attend, and if another party attends in person or by attorney because he expects the deposition of that deponent to be taken, the court may order the party serving the notice to pay to the other party the amount of the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

Ill. S. Ct. R. 209.

9. Supreme Court Rule 210 – Depositions on Written Questions.

Summary:

- Serving questions.
- Officer to take responses.
- Notice of Filing.

(a) Serving Questions; Notice. A party desiring to take the deposition of any person upon written questions shall serve them upon the other parties with a notice stating the name and address of the person who is to answer them if known, or, if the name is not known, a general

description sufficient to identify the deponent, and the name or descriptive title and address of the officer before whom the deposition is to be taken….

Ill. S. Ct. R. 210.

10. Supreme Court Rule 211 – Effect of Errors and Irregularities in Depositions; Objections.

Summary:

- As to notice.
- As to disqualification of officer.
- As to competency of the deponent, admissibility Of testimony: Questions and answers: Misconduct: Irregularities:

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer or Person. Objection to taking a deposition because of disqualification of the officer or person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could have been discovered with reasonable diligence.

(c) As to Competency of Deponent; Admissibility of Testimony; Questions and Answers; Misconduct; Irregularities.

(1) Grounds of objection to the competency of the deponent or admissibility of testimony which might have been corrected if presented during the taking of the deposition are waived by failure to make them at that time; otherwise objections to the competency of the deponent or admissibility of testimony may be made when the testimony is offered in evidence.

(2) Objections to the form of a question or answer, errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the oath or affirmation, or in the conduct of any person, and errors and irregularities of any kind which might be corrected if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written questions are waived unless served in writing upon the party propounding them within the time allowed for serving succeeding questions and, in the case of the last questions authorized, within 7 days after service thereof.

(4) A motion to suppress is unnecessary to preserve an objection seasonably made. Any party may, but need not, on notice and motion obtain a ruling by the court on the objections in advance of the trial.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after the defect is, or with due diligence might have been, ascertained.

Ill. S. Ct. R. 211.

11. Supreme Court Rule 212 – Purposes for Which Discovery Depositions May Be Used.

(b) Use of Evidence Depositions. The evidence deposition of a physician or surgeon may be introduced in evidence at trial on the motion of either party regardless of the availability of the deponent, without prejudice to the right of either party to subpoena or otherwise call the physician or surgeon for attendance at trial.

Ill. S. Ct. R. 212.

12. Supreme Court Rule 213 – Written Interrogatories to Parties.

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

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

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

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

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

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

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

Ill. S. Ct. R. 213.

C. Rules of Evidence.

1. Rule of Evidence No. 702 – Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.

Ill. R. Evid. 702.

2. Rule of Evidence No. 703 – Basis of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Ill. R. Evid. 703.

3. Rule of Evidence No. 704 – Opinion on Ultimate Issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Ill. R. Evid. 704.

4. Rule of Evidence No. 705 – Disclosure of Facts or Data Underlying Expert Opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Ill. R. Evid. 705.

5. Rule of Evidence No, 803 – Hearsay Exceptions; Availability of Declarant Immaterial.

(6) Records of Regularly Conducted Activity. Except for medical records in criminal cases, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the opposing party shows that the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the

opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness.

Ill. R. Evid. 803.

6. Rule of Evidence No. 902 – Self Authentication.

(11) Certified Records of Regularly Conducted Activity. The original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice. The word "certification" as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country which, if falsely made, would subject the maker to criminal penalty under the laws of the country. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Ill. R. Evid. 902.