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Staggered expert witness disclosures is necessary safeguard for defendants

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"What was old is new again" could describe the recent imposition of simultaneous disclosures in a broad swath of Law Division cases. First introduced in Cook County as part of a pilot program nearly 10 years ago and maintained by some judges since, the case management orders released in July broadened this requirement.

The requirement, which presumably has been imposed to move cases more expeditiously toward trial after the shutdown that began in March, is being inconsistently applied by the motion judges. Anecdotally, some judges have even rejected staggered expert disclosure when agreed to by the parties. As with other requirements of the recently issued case management orders in the Law Division written about in this space previously that (1) defendants in Category 2 cases produce audit trails and (2) that dispositive motions be filed before expert discovery is conducted, the requirement for simultaneous expert witness disclosures will likely have the opposite of the intended effect in many cases and is a deprivation of defendants' substantive rights in any event. It should be abandoned.

My first experience with a disaster that can result from simultaneous disclosures occurred in a case we came into in Indiana state court in which prior counsel had agreed to such an expert schedule. Shortly after coming into the case the plaintiff's expert witness disclosures were received, and they included the diagnosis of an entirely new and extremely rare condition allegedly suffered by the plaintiff that was claimed to have resulted from our client's negligence.

We successfully scrambled to identify and disclose rebuttal experts, but we were only able to do that after months of expensive litigation about the propriety of disclosing those experts at all. The plaintiffs ambushed us with these claims and supporting experts in the hope of using the schedule as a sword to prevent us from being able to rebut their claims. Fortunately, the trial judge gave us relief, and we were able to resolve the case, but had he not, we would have been exposed to a trial in which we had no opportunity to challenge the plaintiff's theory of damages and the cause of those damages.

The ordinary sequenced schedule would have avoided all of that litigation, and the matter could have proceeded in an orderly fashion, that is not only logical, but in conformity with the procedural consequence of the plaintiff bearing the burden of proof. The problem was not the disclosure, but the timing, and any time that was saved was lost and then some with the subsequent litigation.

The plaintiff has the burden of proof of making out a prima facie case of the elements of negligence. *McMillen v. Carlinville Area Hospital*, 114 Ill.App.3d 732, 737 (4th Dist. 1983) citing *Edgar County Bank & Trust v. Paris Hospital*, 57 Ill.2d 298, 306 (1974). Especially in professional liability cases, and particularly in medical malpractice cases, that burden can only be met with expert testimony on at least the standard of care and in many cases on causation and damages too. In contravention of the burden placed on the plaintiff, a

simultaneous disclosure requirement impermissibly places the burden on the defendants by requiring them preemptively to produce expert testimony in opposition to what the plaintiff might put forth. *Vision Point of Sale, Inc. v. Haas*, 226 Ill.2d 334, 347 (2007) (circuit courts "are without power to change substantive law or impose additional substantive burdens upon litigants").

When coupled with the requirement that dispositive motions be filed before expert discovery is even required, the substantive effect of this procedural requirement is clear. If the plaintiff's expert disclosures are inadequate, e.g., the experts are not qualified, not in the proper field, or that the plaintiff does not have an expert on an element of the claim, the plaintiff has failed to meet their burden, but the defendant is unable to deal with that effectively. Instead, and in derogation of what should be the purpose of case management orders under the current circumstances, the matter will proceed that should not.

Allowing the prospect of rebuttal experts is a weak salve and adds a layer of litigation that defeats the very purpose of the simultaneous expert requirement in the first instance. In addition, Supreme Court Rule 213(g) allows disclosure of additional opinions at deposition that need not be previously disclosed such that the full scope of an expert's opinion is not known until the discovery deposition is completed. Further handicapping the defense, a defendant may not even know that an expert in a particular area is even needed until the deposition of the plaintiff's expert.

Expert testimony is the heart of the most complex cases in the civil justice system. It should not be the subject of surprise, haste, or tactical advantage, especially when imposed by the trial court. As has been written here several times previously, cases should move forward to trial and trial dates should be set to encourage the parties to do that. Requiring simultaneous disclosures does not tend toward the efficient resolution of matters and it should not continue.
