Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 44 May 10, 2001

S. 4375 By: Senator Saland
A. 1860 By: M. of A. Kaufman
Senate Committee: Codes
Assembly Committee: Codes
Effective Date: On the first day of the calendar month next succeeding the sixtieth day after it shall have become a law and shall apply to all cases in which a note of issue is filed after the effective date of this act and shall supersede all rules or orders

AN ACT to amend the civil practice law and rules, in relation to expert witness disclosure and the definition of the term "expert witness"

LAW AND SECTION REFERRED TO: CPLR 3101(d)(1)

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES (#14)

THIS BILL IS DISAPPROVED

This bill would create a new subparagraph (iv) to CPLR 3101(d), fixing specific time periods prior to trial when expert disclosure must be made. The proposed law requires a party who has the burden of proof on a claim to make expert disclosure "on or before sixty days preceding the date that the trial is scheduled to commence" and also requires the opposing party to serve its "answering response" thirty (30) days after receipt of such expert disclosure. A party's failure to comply with the rule will result in preclusion "unless the court orders otherwise." In addition the bill adds a new subparagraph (v), excluding from the definition of "expert witness" a treating physician or other health care provider "whose record or records or report or reports have been timely provided."

While the proposed rule intends to establish a minimum standard for the timely disclosure of expert information, it will have the opposite effect. The language of the

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proposal will remove judicial discretion to order expert disclosure prior to the statutory periods and will effectively supersede all local rules and orders that require expert disclosure much earlier in some cases. (See Expert Disclosure Rule, New York State Supreme Court, Third Judicial District, requiring all expert disclosure prior to the filing of the note of issue, except in matrimonial cases). Under current practice, a number of reported cases already establish the right of the court to allow (or forgive) late disclosure in certain circumstances (e.g., usually where the expert is retained "an insufficient period of time before the commencement of trial to give appropriate notice thereof" or where late such disclosure was found "not willful or intentional") and the proposed rule continues that discretion. Therefore, the only substantive change offered by the proposed rule is that, even where a party retains an expert well in advance of trial, indeed, even if before the filing of a note of issue, that party will only have to make expert disclosure 60 days before the date the trial is scheduled to commence.

By purging the right to expert disclosure "upon request," the likely effect of the proposal will be to encourage late disclosure of expert information, regardless of the importance or need for earlier expert disclosure in more complex cases. Additionally, more proactive courts, that now require expert disclosure earlier in certain types of cases, may be hamstrung by a new minimum standard of 60/30 days prior to trial. In the absence of any language giving them express power to order earlier disclosure pursuant to the court's discretion, courts may see no alternative but to allow disclosure in accordance with the minimum standard or later.

Another of the difficulties with the proposal is that it appears to disregard the current practice in courts in the Metropolitan New York area (Greater New York City and Long Island), where a trial date is not fixed by the IAS court, but is determined by the vicissitudes of a court's trial calendar. Members of the committee who have practiced law in metropolitan New York can affirm that it is virtually impossible to determine when that 60/30 day period would begin to run.

A majority of the committee believes that expert disclosure required by the new proposal, for most cases, is too late and that the current state of affairs demands more comprehensive changes including a requirement that judges address the issue of expert disclosure via a mandatory scheduling order. Furthermore, the proposal opens the possibility that expert disclosure might not be exchanged until after the deadline for making a summary judgment motion has passed, where expert information might be the basis of summary judgment. See CPLR 3212(a). The committee is also aware that practitioners currently engage in summary judgment practice as a tool to flush out opinions and information on expert witnesses on both sides.

CPLR 3101(d)(1), was amended into its current form in 1985 (see L1985, Ch. 294) as an effort to expand New York's antiquated system which prevented the discovery of expert witness information, as privileged trial preparation material. The legislative memorandum accompanying the amendment indicated that the purpose of the amended CPLR 3101(d) was to encourage full disclosure of expert opinion testimony:

> "Disclosure Of Expert Witnesses and their Opinions: Although virtually all other information is now shared by litigants in civil practice, information concerning expert witnesses and their opinions remains shielded from disclosure. Since the testimony of expert witnesses is often the single most important element of proof in medical malpractice and other personal injury actions, sharing information concerning these opinions encourages prompt settlement by providing both parties an accurate measure of the strength of their adversaries' case. In addition, both parties will be discouraged from asserting unsupportable claims or defenses, knowing that they will be required to disclose what, if any, expert evidence will support their allegations."

Salander v. Central General Hospital, 130 Misc. 2d 311, 315 (Sup. Ct. Nassau Cty. 1985) (quoting 1985 McKinney's session Law News of NY, at A725). A majority of the committee agrees that the above quoted language rings true today, over fifteen years after the legislature's attempt to expand the scope of expert disclosure. Meaningful discovery of expert witnesses, their opinions and the basis for their opinions is virtually nonexistent, despite the frequently stated scope of New York's discovery rules as being "very broad, consistent with New York's policy of permitting 'open and far-reaching pretrial discovery.'" See Kavanaugh v. Ogden Allied Maintenance Corp., 92 N.Y.2d 952 (1998).

CPLR 3101(d) requires timely disclosure of expert witnesses to enable the parties to adequately prepare for trial, and in the absence of good cause shown for late disclosure, the trial court has the authority to preclude a party from offering expert testimony. Meyer v. Zeichner, 263 A.D.2d 597 (3rd Dep't 1999). Where expert testimony is required to establish a prima facie case, preclusion is tantamount to a dismissal. Commentators have noted that untimely disclosure of expert disclosure is at the peril of the late disclosing party.

It is clear that the Appellate Divisions are split regarding the meaning of "timely disclosure" and the remedy for untimely disclosure. It has been observed that as a rule the Second Department will preclude the testimony of a late disclosed expert where the Fourth Department approaches the question with a more liberal attitude, attaching great weight to the absence of any time limit in the statute. See Rassaei v. Kessler, N.Y. Law Journal, Nov. 4, 1997, p. 36, col. 3 (Sup. Ct. Rockland Cty. Miller. J). In the absence of a specific rule the Third Judicial District, consisting of seven counties with Albany County at its center, instituted an Expert Disclosure Rule, in effect since April 1, 2000. The Rule requires expert disclosure no later than the filing of the note of issue and statement of readiness, which signify that a case is ready for trial. The committee is currently unaware of an existing challenge to the Rule.

The Third Judicial District's rule has some support in case law. New York prohibits post note of issue discovery, absent "special, unusual or extraordinary circumstances" and a party is not required to comply with a request for expert disclosure served after the note of issue has been filed. Amherst Magnetic Imaging Associates, P.C. v. Community Blue, 262 A.D.2d 1082 (4th Dep't 1999). In Miceli v. Van Curler Motor

Company, Inc, the plaintiff in a personal injury action filed a note of issue at a time when no expert's report had been prepared (as required by a court order) and defendant successfully moved to preclude the offer of expert testimony. Miceli v. Van Curler Motor Company, Inc., 105 A.D.2d 580 (3rd Dep't 1984). On appeal the Third Department held that "[b]y filing the note of issue (and presumably the certificate of readiness) at a time when no expert's report had been prepared, plaintiff indicated that he was ready for trial without such information." Id.

While there may be a need for a bright line rule explicitly setting a deadline for the disclosure of expert witness information, a majority of the committee believes this particular proposal does not achieve the stated policy of New York of open and far-reaching pretrial discovery. The committee is concerned that courts may interpret this minor change as the legislature's only word on the subject of expert witness disclosure. This is troubling in the face of a trend toward more liberal discovery of expert witnesses on a case by case basis and an acknowledged need for more definitive expert disclosure rules, being called for by members of the bench and bar. Were this proposal to pass the committee fears that other necessary changes would be held in abeyance until some indefinite incubation period has elapsed.

Therefore, at the very least, the committee advocates that any proposal on the issue of expert disclosure should include a provision requiring judges to actively manage their cases, similar to the rules for the handling of matrimonial cases. See "Milonas Rules," 22 NYCRR § 202.19. We also advocate that the following be incorporated into proposed legislation in the future:

1) Either party or the court may request a scheduling conference to address the issue of expert disclosure;

2) At the scheduling conference, the court is to consider other factors to determine the timing and scope of expert disclosure (e.g. type of case, nature of injury and damages, judicial economy, the economic demands of expert disclosure and whether post-note of issue disclosure is feasible in a manner that would not impose an unreasonable expense and burden upon the adverse party in preparing for trial);

3) The court may require the exchange of expert information, reports and permit depositions for the purpose of discovering the expert's opinion and underlying basis for that opinion;

4) If depositions are permitted, the party requesting the deposition pays for the expert's preparation and the deposition;

5) If no scheduling order is entered and expert disclosure has been demanded, parties must exchange expert information by the filing of the note of issue. If no demand has been made expert disclosure must be made no later than sixty (60) days prior to trial by the party prosecuting and thirty (30) days for the

defense. Disclosure must contain CPLR 3101(d)(1) expert information, viz., substance of the opinions or testimony, the expert's qualifications and a summary of the grounds for the opinions;

6) A party is precluded from offering testimony of any expert not disclosed in compliance with this section or the scheduling order entered by the court pursuant to this section; and

7) For good cause shown a party may apply to the court for relief from the dictates of the expert witness disclosure section.

For the above reasons, this bill is **DISAPPROVED**

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