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CITY BAR

COMMITTEE ON STATE COURTS  
OF SUPERIOR JURISDICTION

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July 8, 2010

The Hon. Ann Pfau  
Chief Administrative Judge of the  
State of New York  
25 Beaver Street  
New York, New York 10004

Re: Proposed Revisions to CPLR 3101(d)(1)

Dear Judge Pfau:

I chair the Committee on State Courts of Superior Jurisdiction of the New York City Bar Association. In January 2009, the Advisory Committee on Civil Practice to the Chief Judge of the Courts of the State of New York (the "Advisory Committee") issued a report in which it called, among other things, for certain amendments to be made to the rules governing expert disclosure under the Rule 3101(d)(1) of the Civil Practice Law and Rules. Two of these proposals are of particular interest to our Committee: (i) that for expanding expert disclosure in commercial cases; and (ii) that for setting a time frame for expert disclosure. These are contained in Section III.4 and III.5 of the Advisory Committee's Report, which is attached for your convenience. The Advisory Committee's entire Report is available on the New York court system's website.


In Section III.4 of its Report, the Advisory Committee proposes to amend CPLR 3101(d)(iii) to allow that, in commercial actions in which the amount in controversy appears to the court to exceed \$250,000 the court may order additional discovery (beyond the expert statement already called for by existing law), including a deposition, subject to such restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. The court could authorize such discovery upon a showing by any party that the need outweighs the resulting expense and delay to any party, and would eliminate the current requirement of a showing of "special circumstances". For purposes of this proposed amendment, "commercial action" is defined as an action alleging breach of contract, breach of fiduciary duty or misrepresentation or other tort, arising out of, or relating to, business transactions or the affairs of business organizations; or involving other business claims determined by the court to be commercial, but shall not

include personal injury, wrongful death, matrimonial or foreclosure actions or landlord-tenant matters not involving business leases.

In Section III.5 of its Report, the Advisory Committee proposes to amend CPLR 3101(d)(1)(iv) to provide for a minimal deadline for expert disclosure (i.e., sixty days before trial), a time frame which could be modified by the court to give earlier or later expert disclosure depending on the needs of the case. Specifically, that subsection would be amended to state that “[u]nless otherwise provided by a rule or the chief administrative judge or by order of the court,” the expert disclosure shall be made no later than 60 days before trial by the party who bears the burden of proof. Within 30 days of service of the expert response, any party opposing shall serve its expert response. Within 15 days after service of such response, any party may serve an amended or supplemental response limited to issues raised in the answering response. The term “expert” does not include a treating physician or health care provider whose records or reports have been timely provided.

After careful study and discussion of these proposals of the Advisory Committee to amend Rule 3101(d), the Committee on State Courts of Superior Jurisdiction has concluded that their adoption would improve civil practice in New York State and, therefore, on behalf of the New York City Bar Association, we hereby formally endorse these proposed amendments. We note that the Advisory Committee’s Report, as such reports generally do, contains a fuller analysis of the policy considerations that led it to formulate these proposals, and the limitations to them, in the manner it has done. Our Committee takes no position on the relative merit of any of these policy considerations or observations. Our endorsement is based solely on our determination that the administration of civil justice in this State would be better served if the substantive amendments the Advisory Committee has proposed, as far as they go, were to be enacted than if they were not.

Respectfully,

  
Cynthia B. Rubin,

Enclosure

cc: Alan Rothstein, Esq., General Counsel, New York City Bar Association  
George Carpinello, Esq., Chair, Advisory Committee on Civil Practice

4. Expanding Expert Disclosure in Commercial Cases  
(CPLR 3101(d)(1))

One of the main objectives of the commercial division is to provide “[a] world class forum for the resolution of commercial disputes.” Chief Judge Kaye, Commercial Litigation in New York State Courts § 1.7, at p.16 (Haig 4B West’s NY Prac Series). In furtherance of that objective, a priority of several groups charged with studying the commercial division is to relax certain restrictions on expert disclosure imposed by the CPLR (see id. at pp. 3-4) to address the special needs of substantial commercial cases. The Committee believes that limited amendments to the expert disclosure statute, CPLR 3101, would promote more efficient and thorough preparation by attorneys in commercial actions and speedier resolution of those actions, thereby encouraging commercial litigants to use our court system. Thus, the Committee supports an amendment to CPLR 3101(d)(1)(i) that would allow for greater expert disclosure in commercial actions.

CPLR 3101(d)(1)(i) provides for the furnishing, upon request of a party, of a statement regarding an expert whom the adversary intends to call at trial. That provision authorizes further disclosure concerning the expected testimony of an expert only by court order “upon a showing of special circumstances.” The courts have interpreted “special circumstances” narrowly, generally confining it to instances in which the critical physical evidence in a case has been destroyed after its inspection by an expert for one side but before its inspection by the expert for the other, and certain other, similarly limited situations. E.g., Adams Lighting Corp. v First Central Ins. Co., 230 AD2d 757 (2d Dept. 1996); The Hartford v Black & Decker, 221 AD2d 986 (4th Dept. 1995); Rosario v General Motors Corp., 148 AD2d 108 (1st Dept. 1989); Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, C:3101:29A.

The Committee believes that, on balance, the current rules governing expert disclosure work reasonably well in cases other than commercial cases. The issue of expert disclosure, generally, raises diverse opinions in the bar. Therefore, the Committee recommends that CPLR 3101(d)(1)(i) should be modified to permit additional expert disclosure in substantial commercial cases only. The issues addressed by experts in commercial cases are often complex, touching on nuanced economic, financial and corporate principles, such as how stock or other securities should be valued; how a business should be valued; or whether the financial analysis of a board of directors was sound under the circumstances. In addition to presenting difficult legal and factual issues, commercial cases often involve substantial sums of money or impact corporate governance. Generous expert disclosure is available in virtually all other forums, including all other state courts and the federal courts, *see* Federal Rules Civil Procedure 26. A modern forum for the resolution of commercial disputes is essential for New York to maintain its prominence as an international financial center; unless meaningful expert disclosure is routinely available in commercial actions. New York’s efforts to maintain its financial dominance may be seriously compromised. Accordingly, we believe that additional expert disclosure in commercial cases should be permitted to provide the world class forum for the resolution of commercial disputes the State needs.

Under the Committee's proposal, subdivision (d)(1)(iii) would be divided into two subparts. The first subpart (A), would retain the existing provisions of (d)(1)(iii), which would apply to most cases, including smaller commercial cases. These commercial cases are usually less complex than those involving larger sums, and more extensive disclosure of experts would be disproportionately costly. However, in commercial cases in which \$250,000 or more is found by the court to be in controversy, the amendment, in the form of a new subpart (B), would expressly authorize the court to allow further disclosure of experts expected to testify at trial. Under this proposal, the applicant would be obliged to show that the need for that disclosure outweighs the concomitant expense and delay to any party. The applicant would be required to demonstrate that traditional expert discovery as provided for by subdivision (d)(1)(i) would not suffice. However, the applicant would not have to demonstrate "special circumstances" as currently construed by the case law, which would remain the standard for all cases other than this group of substantial commercial cases. Because the proposal would require the court to weigh the risk that the proposed disclosure might be unduly expensive or cause unreasonable delay, the court should normally inquire, if further disclosure is found necessary, whether a particular form of disclosure would be more appropriate, including less expensive and time-consuming, than another.

"Commercial action" is defined so as to include the most common forms of such disputes, and a measure of flexibility is provided for. The definition expressly excludes personal injury, wrongful death, matrimonial and certain other matters. The Committee wishes to emphasize that the proposed amendment would not alter expert disclosure practice outside commercial cases. To be sure, the proposed amendment expressly states that it is inapplicable to "personal injury, wrongful death, matrimonial, or foreclosure actions."

Under the proposal, if the court determined that a deposition was in order, it could set reasonable boundaries on the breadth of the matters to be inquired into and the length of the deposition. The proposal provides that unless it is unreasonable, the court shall require that the inquiring party pay a reasonable fee to the expert in the case of deposition disclosure, since this seems the fairest approach in most instances.

The proposal provides that the further disclosure of experts authorized by the court shall take place at such time as the court deems appropriate. In contrast with the practice in most personal injury matters, experts in commercial cases are often retained at an early point. In large commercial cases, many of which are litigated in the Commercial Division around the state, the court is expected to, and does, engage in extensive supervision of disclosure proceedings and establishes a comprehensive disclosure schedule, which would include an appropriate deadline for further expert disclosure, if ordered.

The Committee's proposal for the establishment of a time frame for expert disclosure, set forth below, would have a broader application than those that would be governed by this new subdivision (d)(1)(iii)(B).

Proposal

AN ACT to amend the civil practice law and rules, in relation to broadening expert disclosure in commercial cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subparagraph (iii) of paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules is amended to read as follows:

(iii) (A) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to such restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

(B) Notwithstanding any other provision of this section, in any commercial action in which the amount in controversy appears to the court to be \$250,000 or more, the court, without requiring a showing of special circumstances but upon a showing by any party that the need outweighs the resulting expense and delay to any party, may authorize such further disclosure of an expert, including a deposition, subject to such restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. For purposes of this subparagraph, a "commercial action" is an action alleging breach of contract, breach of fiduciary duty, or misrepresentation or other tort, arising out of, or relating to, business transactions or the

affairs of business organizations; or involving other business claims determined by the court to be commercial, but shall not include personal injury, wrongful death, matrimonial, or foreclosure actions, or landlord-tenant matters not involving business leases.

§2. This act shall take effect immediately.

5. Setting a Time frame for Expert Witness Disclosure  
(CPLR 3101(d)(1))

The measure recommends that CPLR 3101(d)(1) be amended to provide a minimal deadline for expert disclosure (*i.e.*, sixty days before trial), a time frame which could be modified by the court to give earlier or later expert disclosure depending on the needs of the case.

Currently, section 3101(d)(1) of the CPLR requires that only the following information be exchanged upon request: identification of trial expert witnesses; the subject matter on which they expect to testify; the substance of the facts and opinions on which they are expected to testify; their qualifications; and a summary of the grounds for their opinion. Further disclosure of an expert can be obtained by court order upon a showing of special circumstances, which permits a court to require additional discovery, such as a written report or deposition of experts, if necessary. However, no time frame within which to provide expert discovery is mandated.

This is in contrast to the federal system, where the Federal Rules of Civil Procedure require that *all disclosure* be made "at the times and in the sequence directed by the court," which is actively involved in requiring that timely expert disclosure take place. In the absence of directives from the court, Rule 26(a)(2)(c) generally requires that *all disclosures* be made at least 90 days before the trial date or the date the case is set to be ready for trial. Rebuttal or contradictory disclosure must be made within 30 days after disclosure by the other party. Many states have adopted some part of the Federal Rules' liberal expert disclosure requirements, including a specific deadline for expert disclosure prior to trial.

The need for this amendment is further highlighted by the recent decision in Construction by Singletree, Inc. v. Lowe, 55 A.D.3d 861, 866 N.Y.S.2d 702, 2008 N.Y. Slip Op. 08287. The Second Department ruled that it was proper for the trial court to decline to consider the affidavits of experts provided in opposition to a motion for summary judgment, where those experts were not identified in pretrial disclosure and the affidavits were served after the note of issue and certificate of readiness were filed. The dissent argued that the application of CPLR 3101(d)(1) to use of experts in opposition to a summary judgment motion is against the express language of the statute and not within its clear legislative intent.

The Committee feels that specific time frames for expert disclosure would 1) avoid "trial by ambush"; 2) permit more efficient preparation for trial and management of cases; 3) provide consistency between the law and practice in this area (court discovery orders often mandate disclosure of expert testimony either 30 or 60 days before trial, not pre-note of issue); and 4) discourage application of section 3101(d)(1) to motions for summary judgment.

Subparagraph (iv) of CPLR 3101(d)(1) has therefore been amended to state that "Unless otherwise provided by a rule of the chief administrative judge or by order of the court," the expert disclosure shall be made no later than 60 days before trial by the party who bears the burden of proof. Within 30 days of service of the expert response, any opposing party shall serve its expert response. Within 15 days after service of such response, any party may serve an amended or supplemental response limited to issues raised in the answering response. The term "expert" does

not include a treating physician or health care provider whose records or reports have been timely provided.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the time of disclosure of expert witness information

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules is amended by adding two new subparagraphs (iv) and (v) to read as follows:

(iv) Unless otherwise provided by a rule of the chief administrator of the courts or by order of the court, disclosure of expert information shall be made as follows: the party who has the burden of proof on a claim, cause of action, damage or defense shall serve its response to an expert demand served pursuant to this subdivision on or before sixty days before the date on which the trial is scheduled to commence; within thirty days after service of such response, any opposing party shall serve its answering response pursuant to this subdivision; within fifteen days after service of such response, any party may serve an amended or supplemental response limited to issues raised in the answering response. Unless the court orders otherwise, a party who fails to comply with this subparagraph shall be precluded from offering the testimony and opinions of the expert for whom a timely response has not been given.

(v) The term "expert" shall include any person who will testify with respect to his or her qualifications and give opinions relating to the issues in the case that could not be given by a layperson. However, the term "expert" shall not include a treating physician or other treating health care provider whose records and reports have been timely provided.



### **VIII. Subcommittees**

The following subcommittees of the Advisory Committee on Civil Practice are now operational:

- Subcommittee on Alternative Dispute Resolution  
Chair, Richard B. Long, Esq.
- Subcommittee on Appellate Jurisdiction  
Chair, James J. Harrington, Esq.  
Acting Chair, Thomas F. Gleason
- Subcommittee on Civil Jury Trial Procedures  
Chair, Richard B. Long, Esq.
- Subcommittee on the Collateral Source Rule  
Chair, Richard Rifkin, Esq.
- Subcommittee on the Commercial Division  
Chair, Mark C. Zauderer, Esq.
- Subcommittee on Contribution and Apportionment of Damages  
Chair, (to be designated)
- Subcommittee on Costs and Disbursements  
Chair, Thomas F. Gleason, Esq.
- Subcommittee on the Court of Claims  
Chair, Richard Rifkin, Esq.
- Subcommittee on Courts of Limited Jurisdiction  
Chair, Leon Brickman, Esq.
- Subcommittee on Court Operational Services Manuals  
Chair, John F. Werner, Esq.
- Subcommittee on Criminal Contempt Law  
Chair, George F. Carpinello, Esq.
- Subcommittee on Disclosure  
Chair, Burton N. Lipshic, Esq.
- Subcommittee on the Enforcement of Judgments and Orders  
Chair, Mark C. Zauderer, Esq.

Subcommittee on Evidence

Chair, James J. Harrington, Esq.

Subcommittee on Expansion of Offers to Compromise Provisions

Chair, Jeffrey E. Glen, Esq.

Subcommittee on General Obligations Law Section 15-108

Chair, Brian Shoot, Esq.

Subcommittee on Impleader Procedures

Chair, Robert C. Meade, Esq.

Subcommittee on Interest Rates on Judgments

Chair, Brian Shoot, Esq.

Subcommittee on Legislation

Chair, George F. Carpinello, Esq.

Subcommittee on Liability Insurance and Tort Law

Chair, George F. Carpinello, Esq.

Subcommittee on Matrimonial Procedures

Chair, Myrna Felder, Esq.

Subcommittee on Medical Malpractice

Chair, Richard Rifkin, Esq.

Subcommittee on Monitoring the Implementation of Chapter 216,  
Laws of 1992

Chair, Richard B. Long, Esq.

Subcommittee on Mortgage Foreclosure Procedure

Chair, James N. Blair, Esq.

Subcommittee on Motion Practice

Chair, Richard Rifkin, Esq.

Subcommittee on Motion for Summary Judgment in  
Lieu of Complaint

(Chair to be designated)

Subcommittee on Periodic Payment of Judgments and Itemized Verdicts

Chair, Brian Shoot, Esq.

- Subcommittee on Preliminary Conference Orders  
Chair, Bert Bauman, Esq.
- Subcommittee on Pretrial Procedure  
Chair, Robert M. Blum, Esq.
- Subcommittee on Procedures for Specialized Types of Proceedings  
Chair, Leon Brickman, Esq.
- Subcommittee on Providing Index Numbers in Actions and Proceedings  
(Chair to be designated)
- Subcommittee on Provisional Remedies  
Chair, James N. Blair, Esq.
- Subcommittee on Records Retention & CPLR 3404  
Chair, John F. Werner, Esq.
- Subcommittee on Review of the American Bar Association  
Litigation Section's Civil Trial Practice Standards  
(Chair to be designated)
- Subcommittee on Sanctions  
Chair, Thomas F. Gleason, Esq.
- Subcommittee on Service of Interlocutory Papers  
Chair, Thomas F. Gleason, Esq.
- Subcommittee on Service of Process, Generally  
Chair, Leon Brickman, Esq.
- Subcommittee on Service of Process by Mail  
Chair, Bert Bauman, Esq.
- Subcommittee on Statutes of Limitations  
Chair, James J. Harrington, Esq.  
Acting Chair, Richard Rifkin
- Subcommittee on Technology  
Chair, Thomas F. Gleason, Esq.
- Subcommittee on Tribal Court Judgments  
Chair, Lucille A. Fontana, Esq.

Subcommittee on the Uniform Rules  
Chair, Harold A. Kurland, Esq.

Subcommittee on the Use of the Regulatory Process to Achieve  
Procedural Reform  
Chair, Richard Rifkin, Esq.

Subcommittee on Venue  
Chair, Thomas Newman, Esq.

Ad Hoc Subcommittee on the New York State Bar Association Simplified Case  
Resolution Proposal  
Chair, Robert C. Meade, Esq.

Ad Hoc Subcommittee on the New York State Bar Association Civil Practice  
Law and Rules Committee Proposal for Notice in Lieu of Subpoena  
Co-Chairs, George F. Carpinello, Esq. & Burton Lipshie, Esq.

Joint Subcommittee with the Advisory Committee on Surrogates Court Practice  
on Structured Settlement Guidelines  
Chair, Lucille A. Fontana, Esq.

Respectfully submitted,

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James N. Blair, Esq.  
Helene E. Blank, Esq.  
Robert M. Blum, Esq.  
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