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**REPORT ON LEGISLATION BY THE COMMITTEE ON
STATE COURTS OF SUPERIOR JURISDICTION**

A.9076-A (2014)

S.5079-A (2014)

M. of A. Weinstein

Sen. Bonacic

AN ACT to amend the Civil Practice Law and Rules, in relation to the time of disclosure of expert witness information

THIS BILL IS APPROVED WITH SUGGESTED MODIFICATIONS

The Committee on State Courts of Superior Jurisdiction of the New York City Bar Association (the “Committee”) supports the purpose of A.9076-A/S.5079-A,¹ the proposed amendment to CPLR § 3101(d)(1) (the “Bill”) to reduce the confusion and inconsistent results caused by CPLR § 3101(d)(1)’s omission of a specific time period for disclosure of expert information. The Committee agrees that imposing specific deadlines for expert disclosure will help address these issues. However, the Committee offers the following suggestions and commentary, as follows²:

- (1) We suggest eliminating “at least sixty days before the date on which the trial is scheduled to commence” in subparagraph 5 of the Bill and replacing this language with “not more than 180 days after the Note of Issue is filed or at least 60 days before the date on which trial is scheduled to commence, whichever occurs first.”

Although the Bill acknowledges the fluidity of trial dates, its solution of postponing the deadline for expert disclosure at each adjournment of the trial is impractical and will likely lead to speculation and confusion. Our suggested change eliminates this uncertainty by setting the deadline after the occurrence of an event (filing Note of Issue), rather than focusing exclusively on the date of a future event (commencement of trial) that will likely change multiple times. Our proposal also provides that the expert disclosure process will begin no later than 60 days before trial, allowing for efficient trial preparation and case management. In sum, our suggested language maintains the spirit of the proposed amendment but eliminates unnecessary confusion.

- (2) We suggest adding “, including either objections to the expert disclosure, responsive expert disclosure, or both” after “answering response” in subparagraph 5 of the Bill. The existing language – “answering response” – leaves unclear exactly what kind of response

¹ This bill is currently awaiting reintroduction for the 2015-16 Session.

² See also attached Appendix.

is required and could create confusion over what the statute requires to be done and when. Our proposed change provides more clarity. We believe that this clarification is appropriate given that the Bill seeks to eliminate confusion caused by the language of the existing rule.

- (3) The Committee notes that Rule 13(c) of the Rules of the Commercial Division regarding expert disclosure is different from the proposed Bill. In short, Rule 13(c) requires the parties, *inter alia*, to confer on a schedule for expert disclosure with such discovery to be completed no later than four months after the completion of fact discovery. Most significantly, pursuant to Rule 13(c), “[t]he note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial.”

Of course, the Bill is designed to *avoid* early deadlines for expert disclosure for the reasons addressed in the New York State Assembly Memorandum in Support of Legislation. As discussed in that Memorandum, early deadlines for expert disclosure give rise to disputes regarding whether a belated expert report should be allowed. The Bill is meant to avoid those disputes, because it does not mandate the disclosure of experts prior to filing the note of issue.

- (4) Although Rule 13(c) imposes requirements beyond both the current C.P.L.R. 3101(d)(1) and the proposed Bill to amend it, compliance with Rule 13(c) will assure compliance with both versions of C.P.L.R. 3101(d)(1). Very good reasons may dictate disclosure of experts before the note of issue in the types of actions litigated in the Commercial Division. When expert disclosure occurs before the note of issue, however, the timetable required by the proposed C.P.L.R. 3101(d)(1) will be met.
- (5) Similarly, we note that Uniform Trial Court Rule 202.16(g) addresses disclosure of expert information in matrimonial cases. It is not clear from its text that the proposed amendment aims to modify or alter that rule. To avoid any confusion or ambiguity, we suggest making that intention known in the text of the amendment.
- (6) Finally, we believe that the concluding language of the Bill is problematic, *to wit*: “This act shall take effect immediately, and shall apply to all rules or orders requiring the service of expert responses issued prior to, on or after such effective date.” This language mandates that the amended rule would apply to all outstanding discovery orders. We do not believe that such retroactive effect is necessary or desirable and suggest deleting “prior to” from that sentence.

We hope our suggestions prove to be helpful. Thank you for your consideration.

February 2015

APPENDIX

RECOMMENDED CHANGES OF THE
COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION TO
A.9076-A / S.5079-A (2014)

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:

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

3 (v) Disclosure of expert information shall be made as follows: the party who has
4 the burden of proof on a claim, cause of action, damage or defense shall serve its
5 response to an expert demand served pursuant to this subdivision at least sixty days
6 before the date on which the trial is scheduled to commence **not more than 180 days**
7 **after the Note of Issue is filed or at least 60 days before the date on which trial is**
8 **scheduled to commence, whichever occurs first;** within thirty days after service of
9 such response, any opposing party shall serve its answering response pursuant to this
10 subdivision; within fifteen days after service of such response, any party may serve an
11 amended or supplemental response limited to issues raised in the answering response
12 **including either objections to the expert disclosure, responsive expert disclosure, or**
13 **both.** If the trial is adjourned, the deadlines in this subparagraph shall shift accordingly.
14 Unless the court orders otherwise, for good cause shown or in the interests of justice,
15 a party who fails to comply with this subparagraph shall be precluded from offering the
16 testimony and opinions of the expert for whom a timely response has not been given.

17 (vi) Subparagraph (v) of this paragraph shall not apply to a treating physician or
18 other treating health care provider for whose records a patient authorization is given to
19 the opposing party.

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- 1 § 2. This act shall take effect immediately, and shall apply to all rules or orders
- 2 requiring the service of expert responses issued prior to, on or after such effective date.