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The Right Time?

CPLR offers no bright line as to when information on experts must be disclosed.

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WHEN IS a party required to identify, and provide information about, its expert witnesses?

The Federal Rules of Civil Procedure provide explicit guidance on the subject, whereas the CPLR does not. As a consequence, the law is more settled in federal than in New York state courts. The cases discussed below may provide attorneys with some insight into considerations regarding the timing of expert witness disclosure in New York courts.[1]

New York State Law

CPLR §3101(d)(1)(i) provides that "upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." This is plain enough. The controversy arises over the timing of expert witness disclosure. Requests for information concerning expert witnesses are likely to be met with an objection that the query is premature during the discovery phase of the action. So when is a party required to provide this information?

The CPLR sets no specific time frame. CPLR 3101(d)(1)(i) states only that "where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at trial solely on the grounds of noncompliance with this paragraph." It further provides that "the Court may make whatever order may be just."[2] As Professor David D. Siegel aptly observes, "Not exactly a beacon."[3]

Since there is no bright line concerning the timing of expert disclosure in the CPLR, some counties have enacted rules on the subject. A New York County rule, which became effective April 17, 2006, provides: "Unless otherwise directed by the court in a preliminary conference order or otherwise, a party having the burden of proof shall serve a response to an expert demand pursuant to CPLR 3101(d) no later than 30 days prior to the date set by the court for trial. Within 15 days after receipt of this response any adverse party shall serve its response."[4] In Bronx County, a party who intends to call an expert witness "must provide written notice to all parties of such witness, along with a copy of that expert's narrative report(s) not less than 20 days before trial. Failure to comply with this provision shall result in the preclusion of such expert witness at the time of trial."[5]

Other New York state courts have taken a case-by-case approach in determining whether a party has timely disclosed expert information pursuant to CPLR3101(d)(1)(i). Courts have broad discretion in determining whether disclosure is timely and whether the expert should be precluded from testifying at trial.[6] As a result, there is some variance across the state, as illustrated by a sampling of the cases.

For example, in *Lillis v. D'Souza*, the Appellate Division, Fourth Department, held that the defendants would not be precluded from offering expert testimony even though they retained the expert a week before the trial and did not serve the expert witness response upon plaintiffs until the second day of the trial.[7] The jury ruled for the defendants.

On appeal, the plaintiffs argued that the lower court should have precluded the expert from testifying because the defendants did not comply with CPLR 3101(d)(1)(i). The appeal was denied and the plaintiffs' argument rejected. The Fourth Department took note of the fact that the expert was retained shortly before trial and that there was no evidence of willful non-disclosure by the defendants. Additionally, the court found that the expert testimony offered no surprises and, therefore, the plaintiffs were not prejudiced. Thus, in the absence of a showing of intentional withholding of expert information and resultant prejudice to the other side, the expert

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testimony was admitted.

The Fourth Department's interpretation of the CPLR 3101(d)(1)(i) was rejected outright by the Appellate Division, Second Department, in *Corning v. Carlin*.[8] In that case, the plaintiff commenced an action to recover damages for legal malpractice, alleging that the defendant had negligently represented her in a matrimonial action. The defendant served a demand for expert information pursuant to CPLR 3101(d)(1)(i), which was denominated as a "continuing demand, requiring the disclosure of information whenever it is received."[9] The plaintiff did not respond and nonetheless proceeded to call an expert witness at trial, nearly three years later. The defendant moved to preclude his testimony on the ground that the plaintiff failed to disclose her expert, and the trial court granted the motion.

The Second Department upheld the trial court's order of preclusion. It held that the plaintiff failed to show good cause for retaining an expert until the eve of trial and then waiting to disclose his existence until after opening statements had been made. Furthermore, the Second Department expressly pointed out that "to the extent that the decision of the Appellate Division, Fourth Department, in *Lillis v. D'Souza*, may be read to the contrary, we decline to follow it."[10]

The Second Department reiterated its position on expert witness preclusion in *Vigilant Ins. Co. v. Barnes*.[11] It rejected expert disclosure made three weeks before trial, holding that such disclosure should have been made beforehand. The plaintiff in that case was a property owner who brought a subrogation action seeking to recover for damage to his property. The insurance company served an expert witness demand pursuant to CPLR 3101(d) (1)(i) for the identity of expert witnesses expected to be called at trial as well as for other pertinent information regarding such experts. A year later, sthe property owner finally responded, but did not include the names of the expert witnesses. Instead, he waited until three weeks before trial to disclose the identity of his expert witnesses.

The trial court granted the insurer's motion to preclude the testimony because the property owner failed to timely disclose the names. The court held that the property owner was aware from the commencement of the litigation that it would be calling these experts and failed to provide an adequate explanation for his failure to identify them until the eve of trial. The Second Department affirmed the trial court's order and made clear that there was no abuse of discretion in precluding expert testimony under these circumstances.

Other courts have taken a middle ground between precluding belated expert testimony and permitting it without consequence. In *McDermott v. Alvey*, the plaintiff waited three years, until the eve of trial, to disclose the identity of his economics expert in response to the defendant's demand pursuant to CPLR 3101(d)(1)(i).[12] The plaintiff asserted that he retained the services of the expert approximately one month before the scheduled trial date, but did not disclose the expert's identity at that time because he was not certain whether the expert would be available to testify at trial. The First Department allowed the economics expert to testify and noted that "[w]hile other similar delays in disclosure have resulted in preclusion of expert testimony (citing *Corning v. Carlin*), we find there is no proof of intentional or willful failure to disclose, on plaintiff's part, and an absence of prejudice to the parties opposing the testimony."[13] However, plaintiff's counsel was ordered to pay the sum of $1,500 for its lack of diligence, which the First Department found more appropriate than an order of preclusion.

Given the lack of clear standards as to what constitutes timely expert disclosure under CPLR 3101(d)(1)(i), it has been suggested that 20 days before trial is a reasonable deadline, as similar sections of the CPLR have this requirement.[14] However, in the absence of a local court rule, timing alone is not dispositive of the issue. Since preclusion is a drastic remedy, courts will examine the factual circumstances to ascertain whether the failure to disclose was purposeful.[15] As evident by a glance at the case law, a court is likely to preclude an expert's testimony where the party intentionally or willfully failed to disclose.[16] Likewise, it is relevant if the party was diligent in retaining the expert or if the party delayed. An inference that a party intentionally failed to disclose may be drawn if there is an extensive time lapse between expert retention and disclosure.[17] As the CPLR makes clear, the proponent of the undisclosed expert bears the burden of establishing "good cause" for retaining the expert too close to the commencement of trial.[18] Late retention of an expert, which is "the result of [the party's] failure to prepare for trial," has been found to be grounds for an order of preclusion.[19] Finally, courts will consider whether the party challenging the expert testimony has been prejudiced.[20]

One solution to the uncertainty of expert witness disclosure in New York state is for the matter to be dealt with in a preliminary conference order, which may impose a time frame for responding to a 3101(d)(1)(i) request.[21] Preliminary conference orders can alleviate attorney confusion, or even deliberate manipulation, regarding expert witness information and ensure "full disclosure of all evidence material and necessary in the prosecution or defense of an action."[22]

Federal Law

In contrast to the CPLR, the Federal Rules of Civil Procedure provide explicit direction as to the timing of expert witness discovery. Rule 26(a)(2)(C) states that expert disclosures "shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party...within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required."[23] As a practical matter, the time frame for expert witness discovery is frequently set forth in a pretrial scheduling order pursuant to Rule 16(b), and there is no room for confusion.

Rule 26(a)(2)(C) is straightforward, and failure to comply with it may result in sanctions, including the exclusion of the proffered expert testimony. Rule 37(c)(1) states: "A party that without substantial justification fails to disclose information required by Rule 26(a)...is not unless such failure is harmless...permitted to use as evidence...any witness or information not so disclosed."

New York federal courts have not hesitated to enforce these rules. In *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, the

Southern District of New York precluded the testimony of an expert because the plaintiff failed to disclose the identity of the expert by the court-imposed discovery deadline.[24] During the discovery period, the defendants had propounded interrogatories seeking the identification of expert witnesses and reports. The plaintiffs did not identify any expert because no one had yet been retained, but they promised to provide supplemental interrogatory answers at the appropriate time. The plaintiffs failed to do so, and the discovery period expired. The court refused to permit the expert discovery in light of its directive that no discovery of any kind would be permitted after the deadline. It also held that the 90-day period set forth in Rule 26(a)(2)(C) is applicable only if there were no such direction. Accordingly, the court denied the plaintiffs' motion to designate expert witnesses after the expiration of discovery.

Similarly, in *Kassim v. City of Schenectady*, the Northern District of New York refused to permit the plaintiff to proceed with an economic loss expert who was not disclosed before the deadline set in the pretrial scheduling order, even though the plaintiff had left the country to attend his father's funeral, and the data necessary for the expert to determine the damages were located in a foreign country.[25] The plaintiff had several months to return and select an expert, but failed to do so. He also delayed in requesting an extension or alerting the court to his situation until two weeks after summary judgment was granted in his favor on liability. The court emphasized its intention to adhere strictly to the deadlines in the pretrial scheduling order. It noted, "Plaintiff was the party that initiated this litigation. His unavailability to timely participate in the selection and briefing of an expert witness bears more on a finding of apathy than on one of good cause."[26]

Other courts have been more lenient—but not by much. In *Semi-Tech Litigation LLC v. Bankers Trust Co.*, the plaintiff did not disclose its expert witnesses until the eve of the expiration of the discovery period, and hence the defendant was unable to depose the experts or produce rebuttal experts within the time frame provided for in the pretrial scheduling order.[27] The Southern District of New York scolded the plaintiff for being "inattentive" but found there was no evidence "that this failure to prepare in a timely and diligent manner was the product of bad faith."[28] Nor was there any prejudice to the defendant. In light of these circumstances, the court granted a brief extension of the discovery period to permit the experts to be deposed. However, it issued the following warning, "In future cases, the Court will take into account the publication of this decision in determining whether to preclude testimony by experts in similar circumstances. It is unlikely to be as charitable again."[29]

Of course, there are cases in which the situation warrants belated expert discovery. For example, in *Sealed Plaintiff #1 v. Sealed Defendant #1*, the Northern District of New York granted an extension of time to serve disclosures regarding a proposed law enforcement expert in an action against law enforcement officers and agencies.[30] The plaintiffs had not made prior extension requests, and the request was made barely one year after the action was filed. Moreover, the need for the expert was apparent only after the deposition of a witness, and the expert's testimony was of significance to the plaintiffs' case. Even though the defendants relied on the plaintiffs' initial disclosure of only one expert witness, the court held that it was not unduly prejudicial to permit the testimony because the need for an additional expert arose on a different subject.

It is worth noting, however, that in denying an order of preclusion, some federal courts have imposed other penalties on the recalcitrant party, including an award of costs and attorney's fees.[31]

Conclusion

Both New York state and federal courts promote a policy of fair and open expert disclosure, and seek to avoid trial by ambush. The deadline to make such disclosures is more uncertain in state than in federal court. However, attorneys are well-advised to retain and disclose their expert witnesses as soon as practicable under the circumstances, and certainly within the time set forth in any court rule and pretrial scheduling order, thereby avoiding the risk that the expert will be precluded from testifying.

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1. Expert disclosure in cases involving medical, dental or podiatric malpractice may be governed by other rules as well, and are not the focus of this article. See, e.g., CPLR 3101(d)(1)(ii).

2. CPLR 3101(d)(1)(i).

3. David D. Siegel, New York Practice, ¶348A at 564 (4th ed. 2005).

4. Rule 11, New York County Supreme Court, Civil Branch Rules of the Justices.

5. Rule 4(c), Bronx County Supreme Court, General Rules.

6. See *Marra v. Hensonville Frozen Food Lockers, Inc.*, 189 A.D.2d 1004, 592 N.Y.S.2d 525 (3d Dept. 1993).

7. *Lillis v. D'Souza*, 174 A.D.2d 976, 572 N.Y.S.2d 136 (4th Dept. 1991).

8. *Corning v. Carlin*, 178 A.D.2d 576, 577 N.Y.S.2d 474 (2d Dept. 1991)

9. *Corning*, 178 A.D.2d at 576, 577 N.Y.S.2d at 475.

10. *Corning*, 178 A.D.2d at 577, 577 N.Y.S.2d at 475.

11. *Vigilant Ins. Co. v. Barnes*, 199 A.D.2d 257 (2d Dept 1993)

12. *McDermott v. Alvey*, 198 A.D.2d 95, 603 N.Y.S.2d 162 (1st Dept. 1993).

13. *McDermott*, 198 A.D.2d at 95, 603 N.Y.S.2d at 163.

14. See Patrick Connors, Commentary, C3101:29A(B) citing CPLR §3107 (requiring 20 days notice for oral deposition); CPLR §3122(a) (requiring response to subpoena duces tecum within 20 days), CPLR §3123(a) (requiring response to notice to admit within 20 days); CPLR §3133(a) (requiring answers to interrogatories within 20 days of service).

15. See *Silverberg v. Cmty. Gen. Hosp.*, 290 A.D.2d 788, 736 N.Y.S.2d 758 (3d Dept. 2002).

16. See *Blade v. Town of North Hempstead*, 277 A.D.2d 268, 715 N.Y.S.2d 735 (2d Dept. 2000) (accepting expert affidavit on summary judgment where action was not on the trial calendar and there was no showing of intentional or willful failure to disclose).

17. See *Kassis v. Teachers Ins. and Annuity Ass'n*, 258 A.D.2d 271, 685 N.Y.2d 44 (1st Dept. 1999) (holding that a six-year delay between retention and disclosure was inexcusable even though the demand for expert information was served three weeks before trial).

18. CPLR 3101(d)(1)(i); see also *Quinn v. Artcraft Constr. Inc.*, 203 A.D.2d 444, 610 N.Y.S.2d 598 (2d Dept. 1994) (precluding expert's testimony because plaintiff failed to show that there was "good cause" for the expert's retention only a few days before trial).

19. See *Hudson v. Manhattan and Bronx Surface Transit Operating Authority*, 188 A.D.2d 355, 355, 591 N.Y.S.2d 31, 32 (1st Dept. 1992).

20. See *Karoon v. New York City Transit Auth.*, 286 A.D.2d 648, 730 N.Y.S.2d 331 (1st Dept. 2001) (permitting expert to testify at trial where objecting party was not prejudiced).

21. See 22 NYCRR §202.12(b)

22. CPLR 3101(a)

23. Fed. R. Civ. P. 26(a)(2)(C)

24. *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, No. 93 Civ. 8571 (JGK), 1996 WL 30457 (S.D.N.Y. Jan. 25, 1996)

25. *Kassim v. City of Schenectady*, 221 F.R.D. 363 (N.D.N.Y. 2003)

26. Id. at 366.

27. *Semi-Tech Litigation LLC v. Bankers Trust Co.*, 219 F.R.D. 324 (S.D.N.Y. 2004)

28. Id. at 325

29. Id.

30. *Sealed Plaintiff #1 v. Sealed Defendant #1*, 221 F.R.D. 367 (N.D.N.Y. 2004).

31. See *McNerney v. Archer Daniels Midland Co.*, 164 F.R.D. 584 (W.D.N.Y. 1995)

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