July, 2005

Identifying Expert Witnesses

By Bari Brandes Corbin

Anyone who has handled a custody or equitable distribution case knows that expert witness testimony may be necessary at trial with regard to the disputed custody or valuation issues. The Civil Practice Law and Rules require counsel to lay a preliminary foundation for the introduction of expert testimony at trial, if a proper demand is made. However, many attorneys never make such a demand, so their adversary is free to offer such testimony. Attorneys who serve a demand are often successful in precluding such testimony when their demand goes unanswered.

The Uniform Rules also require counsel to lay a preliminary foundation for the introduction of expert testimony well in advance of trial. However, as a general rule, many judges do not insist upon compliance with these rules, and many attorneys ignore them. It is important to know these rules in order to assure that you will be permitted to present expert testimony at trial, and to prevent its introduction into evidence by your adversary. Trial counsel should be familiar with the importance of serving a Notice to Identify Experts (herein, "Notice") -- used to obtain identifying information on the experts the opposing party intends to call at trial - on an adversary well in advance of the trial.

The Mechanics

CPLR 3101(d)(1), which applies to all civil actions and proceedings, provides that, upon request, each party must identify each person whom they expect to call as an expert witness at trial, and must disclose in reasonable detail: 1) the subject matter and the substance of the facts and opinions upon which each expert is expected to testify; 2) the qualifications of each expert witness; and 3) a summary of the grounds for each expert's opinion. In the event that a party retains an expert and there is not sufficient time before the commencement of trial to give appropriate notice of the requested information, that party is not precluded from introducing the expert's testimony at the trial solely on the grounds of his noncompliance with the statute. However, that party must show good cause for failure to comply.

Even though a party may have good cause for failure to comply, the party who requested the information may move before or at trial for "whatever order may be just." If a party fails to respond to a timely request for information as to that party's experts, the other party may seek an order of the court precluding that expert from testifying. CPLR 3101(d)(1)(I) leaves the penalty for disregarding the expert disclosure requirement up to the court. While the ultimate penalty for disregarding the notice is to preclude that party from calling the expert to testify at the trial, lesser penalties, such as costs, counsel fees, or sanctions, may be imposed and an adjournment may be granted.

22 NYCRR 202.16 (g), which applies only to matrimonial actions and does not require the service of a notice, sets a time limit for responses to demands for expert information in matrimonial proceedings, despite the silence of CPLR 3101 (d) in this regard. It provides that each expert witness whom a party expects to call at trial must file a written report with the court no later than 60 days before the date set for trial. Reply reports, if any, must be filed no later than 30 days before the date set for trial. The rule states, "Failure to file a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties are the only reports admissible at trial." Late retention of experts and the consequent late submission of reports is permitted "only upon a showing of good cause as authorized by CPLR 3101(d)(1)(I)." This language is confusing, since CPLR 3101 (d)(1)(I) applies only where a timely request for expert information is made, and it does not define "good cause." It appears that the intention of the matrimonial rule is to apply to a determination of whether there has been "good cause shown" for the late retention of experts, which is the same standard as that applied in determining whether there has been compliance with a timely demand for expert information served pursuant to CPLR 3101(d). This is an area where there

is little case law, and there are no reported cases construing this matrimonial rule.)

Do the Courts Stick to the Rules?

The treatment of undisclosed or late-disclosed expert testimony varies from one case to another, according to each court's interpretation of what constitutes lateness, good cause and prejudice to the other party.

In *Simpson v Bellew*, 161 A.D.2d 693 (4th Dept., 1991), a wrongful death action, the defendants submitted this response to the plaintiff's demand for discovery of expert witnesses: "Defendants herein at the present time do not plan to call any expert witness to testify at trial on our behalf. If and when, however, it is in the future deemed necessary, all parties will be duly notified." An expert accident reconstruction witness was, in fact, retained by the defense during the trial, and allowed to testify, but at the conclusion of the case the expert's testimony was stricken. On appeal, the Fourth Department held that the expert should have been allowed to testify, based on "good cause," *ie*, certain "surprise" testimony adduced during another witness' cross-examination.

In *Lillis v D'Souza*, 174 A.D.2d 976 (4th Dept. 1991), the Fourth Department rejected the plaintiff's contention that the trial court should have precluded defendants' expert from testifying at trial because defendants did not respond until the second day of trial to the demand for disclosure of the expert's report. It held that CPLR 3101(d)(1)(I) does not require a party to retain an expert at any specific time, nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute. The expert was retained only a week prior to trial, and there was no evidence of intentional or willful nondisclosure by defendants. The expert testimony offered no surprises, and plaintiffs had not demonstrated any prejudice. Thus, the trial court did not abuse its discretion in allowing the expert to testify for defendants.

The Second Department appeared to specifically reject the holding of *Lillis* in *Corning v. Carlin*, 178 A.D.2d 576 (2d Dept.1991), where the plaintiff commenced an action based on legal malpractice in 1986 in a matrimonial action. In September 1986 the defendant served a demand for expert information pursuant to CPLR 3101(d)(1). The demand was a "continuing demand, requiring the disclosure of information whenever it is received." The plaintiff never responded to the demand. The trial began in August 1989, nearly 3 years later. When the plaintiff called her first witness, an expert, the defendant moved to preclude his testimony on the ground that the plaintiff had failed to disclose the existence of her expert. The trial court granted the defendant's motion. The Second Department held that the plaintiff failed to show good cause why she did not retain an expert until the eve of trial, and then failed to disclose his existence until after opening statements had been made. Under such circumstances, the trial court's preclusion order was proper. Notably, the court stated that, to the extent that the decision of the Fourth Department, in *Lillis* may be read to the contrary, it declined to follow it.

Nevertheless, in *Aversa v. Taybes*, 194 A.D.2d 580 (2d Dept.1993), a medical malpractice action, the Second Department adopted the rule of the Fourth Department. *See also Cutsogeorge v Hertz Corp.*, 264 A.D.2d 752 (2d Dept.1999); *Blade v. Town of North Hempstead*, 277 A.D.2d 268 (2d Dept. 2000). In *Aversa*, plaintiffs waited almost 4 years to respond, on the eve of trial, to the defendant's demand for expert witness information. The Second Department held that CPLR 3101(d)(1)(I) does not require a party to respond to a demand for expert witness information "at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute," unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party. Nevertheless, it held that the plaintiffs' attorney's "dilatory tactics in this regard will not be countenanced," and concluded that the imposition of a monetary penalty on the plaintiffs' attorney was the proper remedy for its tardy conduct.

In *Kaprelian v. Kaprelian*, 236 A.D.2d 369 (2d Dept. 1997), an action for a divorce, the Second Department agreed with the plaintiff's contention that the Supreme Court improvidently exercised its discretion in denying his trial motion to preclude defendant's actuarial expert's testimony. Although the plaintiff demanded a statement pursuant to CPLR 3101(d)(1), the defendant never filed a statement, nor did she inform the plaintiff until after the trial began that she would present an actuary who would challenge plaintiff's valuation of his annuity. The defendant also failed to proffer a reasonable explanation for the delay. Most significantly, the deliberate nature of the defendant's nondisclosure was inferred from the

fact that the defendant's counsel represented on numerous occasions, to both the plaintiff and the court, that the valuation of the annuity would not be contested.

In *Vicinanzo v. Vicinanzo*, 193 A.D.2d 962 (3d Dept.1993), the Third Department held that preclusion is justified where there is a blatant disregard of the requirements of CPLR 3101(d). There, plaintiff presented expert testimony as to the value of defendant's law practice. When defendant sought to call his own expert to testify on the subject, however, plaintiff objected on the grounds that the expert's qualifications and the substance of his opinions had not been disclosed pursuant to plaintiff's ongoing request under CPLR 3101 (d). The Third Department held that Supreme Court's decision to strike the testimony of defendant's expert was not an abuse of discretion. Plaintiff disclosed that she intended to call an expert witness, and the substance of his testimony, prior to trial. Defendant's excuse for failing to engage the services of an expert until late in the trial was somewhat disingenuous. Defendant proffered no explanation for his failure to disclose the credentials and expected testimony of his witness during the brief period after the expert was hired, but before he was called to the stand.

In *Bauernfeind v. Albany Medical Center*, 195 A.D.2d 819 (3d Dept. 1993), a medical malpractice action, defendants served a demand for experts' names in 1985. Plaintiff replied in 1992 -- 7 years after the demand was made and 4 days before trial -- indicating that an expert witness would be called at trial on the issue of informed consent. Plaintiff had in fact retained the expert in early 1988. Defendants rejected the response as untimely and brought a motion *in limine* to exclude use of expert testimony on the ground that the untimely notification critically undermined defendants' preparation for trial; relying on plaintiffs' failure to respond to the demand, defendants had not retained an expert of their own. The Supreme Court granted the motion, finding that no justifiable excuse for the delay was made in conformity with CPLR 3101. The Third Department affirmed, finding that CPLR 3101(d) was intended to ensure parties could adequately and thoroughly prepare for trial. It was incumbent upon plaintiff to disclose the expert information as close to the date of retention as reasonable.

In *Hansel v. Lamb*, 257 A.D.2d 795 (3d Dept.1999), a vehicular negligence case, the plaintiff contended the trial court committed error by permitting defendant to present the expert testimony of a State Trooper who investigated the accident, notwithstanding defendant's failure to disclose his intention, pursuant to CPLR 3101(d)(1)(I), to have the witness testify. The Third Department held that the Supreme Court did not abuse its broad discretion in allowing the testimony. It pointed out that plaintiff could not have been surprised by the introduction of reconstruction evidence because defendant had previously informed plaintiff of his intention to obtain such testimony from a different individual (who was not called to testify). Moreover, there was no indication that defendant intentionally or willfully withheld notice that this proof would be offered.

Conclusion

The Second, Third and Fourth Departments tend to agree as to what is required to comply with the statute and what constitutes good cause for failure to comply. In a negligence case the most significant factors appear to be whether there is a reasonable explanation for the delay, whether it is intentional or willful, whether there has been a blatant disregard for the rules and whether there is prejudice to the other party. CPLR 3101(d) (1) does not require a party to retain an expert at any specific time. It does not mandate preclusion merely because of noncompliance. Penalties will not be imposed for noncompliance unless there is evidence of intentional or willful failure to disclose the information and a showing of prejudice to the opposing party. Even if this is shown, the court may impose lesser penalties, such as costs, counsel fees, sanctions or an adjournment may be granted.

Nevertheless, the penalty of witness testimony preclusion is always available to the court. The two matrimonial cases cited herein strictly construed the statute in accordance with the policy of the courts to provide the parties with full and fair disclosure prior to trial and to prevent unfair surprise. In these cases, the penalty of preclusion was imposed for noncompliance because of a failure to disclose the information and a showing of prejudice to the opposing party. Because of this, counsel should never fail to serve a Notice to Identify Experts well in advance of the trial and must be sure to timely respond when such notice is served on his or her client.

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