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A Changing of the Guard

By Hillary Frommer

One of the biggest differences between pretrial discovery in state court and pretrial discovery in federal court is expert disclosure. The limited disclosure under CPLR 3101(d) is often seen as both a blessing and a curse. Unlike under Rule 26(a)(2) of the Federal Rules of Civil Procedure, a party does not have to produce an expert report, or her expert for a deposition. And, where good cause is shown, courts have allowed experts to testify even where the party discloses the expert on the eve of trial.[1] On the other hand, without a deposition, and with nothing more than a CPLR 3101(d) statement stating broadly that the expert will testify as to damages (something almost all state court practitioners have seen at least one in their careers), it becomes challenging to adequately preparing to cross-examine that expert at trial. This problem has increased in complex commercial matters where the dollars at stake are in the tens of millions, and the experts become the most important witnesses.

The Commercial Division of the New York Supreme Court has recognized that expert disclosure under CPLR 3101(d) is insufficient in these cases, which often involve complicated business valuations or real estate appraisals. To remedy this problem, it has implemented Rule 13 of the Commercial Division Rules. This new rule bears a striking resemblance to Federal Rule 26(a)(2). To those who rarely practice in the Commercial Division or those who are entering the Commercial Division for the first time, beware.


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Under Rule 13(c), if a party intends to introduce expert testimony at trial, she must, within 30 days after fact discovery is completed, confer on a schedule for expert disclosure. That schedule includes identifying the experts, exchanging expert reports, and completing depositions of testifying experts. Yes, now expert depositions are automatically permitted in cases pending in the Commercial Division. All of this expert discovery must be completed within four months, unless otherwise scheduled by the court, and prior to the filing of the note of issue and certificate of readiness. Moreover, expert disclosure provided after the note of issue is filed will be precluded at trial unless good cause is shown for that untimely production.

Rule 13 also sets forth what must be contained in an expert report. A party must produce a written report signed by the expert witness, which includes the following:

- A complete statement of all opinions the witness will express and the basis and the reasons for them;
- The data or other information considered by the witness in forming the opinion(s);
- Any exhibits that will be used to summarize or support the opinion(s);
- The witness's qualifications, including a list of all publications authored in the previous 10 years;
- A list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and
- A statement of the compensation to be paid to the witness for the study and testimony in the case.

This is identical to Rule 26(a)(2)(ii). Thus, litigants in the Commercial Division can no longer provide the more limited statement under CPLR 3101(d)(1), and disclose only who will testify, the subject matter "in reasonable detail" on which the expert is expected to testify, the substance of facts and opinions, and the expert's qualifications.

This rule is in its infancy. It will be interesting to see the decisions by the Commercial Division judges concerning expert discovery, especially decisions resolving motions to preclude expert testimony based on a party's failure to timely produce expert disclosure or the purported insufficiency of an expert report. Will these courts be stricter in determining what constitutes "good cause" for an untimely filing? Stay tuned.

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1 *See, e.g., Allen v Calleja*, 56 AD3d 497 [2d Dept 2008]; *Simpson v Bellew*, 161 AD2d 693 [2d Dept 1990].