

ADVISORY GROUP TO THE NEW YORK FEDERAL-STATE JUDICIAL COUNCIL

Report on Discrepancies Between Federal and New York State Expert Witness Rules in Commercial Litigations

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This report (i) sets forth the key differences between federal and New York state expert witness rules, (ii) discusses the reasons why the New York expert witness rule (the “New York Rule”) should more closely track the federal expert witness rule (the “Federal Rule”) in commercial litigations, (iii) summarizes the Commercial & Federal Litigation Section’s *Proposal for Enhanced Expert Disclosure in the Commercial Division*, and (iv) endorses the Commercial & Federal Litigation Section’s proposed Commercial Division Uniform Rule for discovery with respect to experts in commercial litigations. This report concludes that because many of the commercial litigations filed in federal and state court bear similar characteristics, and because of the ability of the Commercial Division of the New York State Supreme Court (the “Commercial Division”) to adopt uniform rules of practice for cases filed only in the Commercial Division, adoption by the Commercial Division of a rule for expert discovery that more closely tracks the Federal Rule will encourage greater uniformity between federal and state courts in this historically divergent area of the law.

I. Differences Between the Federal Rule and the New York Rule

The Federal Rule governing expert disclosures is set forth in Rule 26 of the Federal Rules of Civil Procedure, while the New York Rule governing expert disclosures is addressed in Rule 3101(d) of the New York Civil Practice Law and Rules (“CPLR”). There are a few key differences between the Federal Rule and the New York Rule with respect to expert depositions and expert reports. Unlike the Federal Rule, the New York Rule does not provide explicitly for

expert depositions, nor does it require disclosure of expert reports. The Federal Rule allows parties to depose “any person who has been identified as an expert whose opinions may be presented at trial.”¹ On the other hand, there is no automatic right to depose an expert under the CPLR and the party seeking to take such a deposition must obtain a court order upon a showing of “special circumstances.”²

In addition, CPLR 3101(d)(1)(i) outlines the limited disclosures testifying experts must provide and it requires, upon request, that parties identify the experts whom they expect to testify at trial and disclose in “reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions 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.”³ The Federal Rule, in contrast, requires testifying experts to provide a written report, which must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.⁴

¹ Fed. R. Civ. P. 26(b)(4)(A).

² N.Y. C.P.L.R. 3101(d)(iii). Special circumstances have been recognized in two limited instances: (1) where evidence has either been lost, destroyed, or is unavailable, and (2) where some other unique factual situation exists. *See A Proposal for Enhanced Expert Disclosure in The N.Y. State Com. Division (Commercial & Fed. Litig. Section, New York, Feb. 7, 2011, at 10)*, available at http://www.nysba.org/AM/Template.cfm?Section=Commercial_and_Federal_Litigation_Section_Reports&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=24&ContentID=7108 (follow “2011 Commercial & Federal Litigation Reports” hyperlink, password protected for New York State Bar Association Members only) (last visited June 17, 2011).

³ N.Y. C.P.L.R. 3101(d)(1)(i).

⁴ Fed. R. Civ. P. 26(a)(2)(B).

Presently, parties involved in New York state court proceedings must obtain a court order upon a showing of “special circumstances” in order to obtain an expert’s written report, just as they must do with respect to taking an expert’s deposition.⁵

Finally, Rule 26 of the Federal Rules of Civil Procedure was recently amended in 2010⁶ to extend work-product protection to: (i) draft expert reports and disclosures; and (ii) attorney/testifying expert communications, subject to three limited exceptions.⁷ Currently, the New York Rule does not address the protections extended to draft expert reports and attorney/testifying expert communications.

II. Summary of the Commercial & Federal Litigation Section’s Proposal for Enhanced Expert Disclosure in the Commercial Division

A central conclusion of the Commercial & Federal Litigation Section’s Proposal for Enhanced Expert Disclosure in New York State,⁸ attached hereto as “Annex A,” is that expert disclosure in New York is insufficient and causes parties to take their disputes elsewhere, namely to Delaware and the federal courts. The report reveals that the Commercial Division has already made strides in the direction of enhanced expert disclosure because several Commercial Division justices have implemented more expansive expert disclosure rules in their individual practices akin to what is provided in the Federal Rules. In addition, where Commercial Division justices have not implemented broader expert witness rules in their

⁵ N.Y. C.P.L.R. 3101(d)(1)(iii).

⁶ See Fed. R. Civ. P. 26 advisory committee’s note.

⁷ See Fed. R. Civ. P. 26(b)(4)(C). The referenced caveats permit disclosure of attorney-testifying expert communications, which: (i) relate to the expert’s compensation; (ii) identify facts or data provided by the party’s attorney that the expert considered in forming his opinions; or (iii) identify assumptions provided by the party’s attorney that the expert relied on in forming his opinions. *Id.*

⁸ A Proposal for Enhanced Expert Disclosure in The N.Y. State Com. Division (Commercial & Fed. Litig. Section, New York), Feb. 7, 2011 (*see Supra* at FN 2).

individual practices, it has been reported that parties often enter into stipulations providing for enhanced expert disclosure.

III. Reasons for Bridging the Expert Witness Rules Gap

The Advisory Committee believes that the New York Rule, as it is applied in cases pending in the Commercial Division, should be made more consistent with the Federal Rule because the Commercial Division's mission is bolstered by enhanced expert disclosure. Furthermore, adoption of a rule similar to the Federal Rule will help re-direct litigants back to New York, and the Commercial Division has already taken steps towards enhanced expert disclosure.

By way of brief background, in 1995, after a two year trial period, the Commercial Division was established as a way to improve the efficiency with which complicated commercial disputes were handled and as a way of enhancing the "quality of judicial treatment" of such cases.⁹ "[B]ecause disclosure in commercial cases can be complicated, protracted and expensive, particularly in light of electronic discovery, the [Commercial] Division makes use of vigorous and efficient case management."¹⁰ Enhanced and timely expert disclosure would contribute to the Commercial Division's goal of efficient case management by narrowing the issues set for trial. The sooner in a commercial litigation that parties can identify and explore the issues that will ultimately go to trial, the sooner settlement discussions and assessment of trial costs can take place.

As it stands, many litigants in commercial litigations prefer the more expansive expert disclosure available to them in the federal courts and in Delaware. By implementing a rule which broadens the expert disclosures available in New York state in commercial litigations,

⁹ See N.Y. State Supreme Court Commercial Div., *History of the Commercial Division*, available at <http://www.nycourts.gov/courts/comdiv/history.shtml> (last visited June 13, 2011).

¹⁰ *Id.*

and by narrowing the gap between the Federal Rule and the New York Rule, the Commercial Division would help reduce forum shopping.

Finally, the Commercial Division has already taken steps towards enhanced expert disclosure, which suggests that the Commercial Division would be amenable to a rule that addresses the gaps in the New York Rule. The Nassau County Commercial Division has moved forward with an expert witness disclosure pilot program, which offers litigants a “So Ordered” stipulation¹¹ that closely tracks the Federal Rule. The form stipulation, attached hereto as “Annex B,” provides for a seven hour deposition of each disclosed expert witness, requires experts to provide either a report or a written disclosure, and extends work-product protection to attorney/testifying expert communications and to draft expert reports and disclosures.

IV. Advisory Group’s Recommendations

The Commercial & Federal Litigation Section’s proposed Commercial Division Uniform Rule for discovery with respect to experts provides as follows:

A party must disclose to the other parties the identity of any witness it may use at trial to present expert testimony.

If any party intends to introduce expert testimony at trial, no later than thirty (30) days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure, including the identification of experts, exchange of reports and disclosures, and depositions of testifying experts – all of which shall be completed no later than four months after the completion of fact discovery. In the event that a party does not consent to this procedure, the parties shall raise the objection as to enhanced expert disclosure and shall request a conference to discuss the objection with the court.

Unless otherwise stipulated or ordered by the court, if the witness is one who was retained or specially employed to provide expert

¹¹ New York Commercial Division Case Compendium, *Enhanced Expert Witness Disclosure Pilot Program Launched in the Nassau County Commercial Division*, available at <http://www.nycommdivcompendium.com/2011/06/case-database/keyword/expert-witness/enhanced-expert-witness-disclosure-pilot-program-launched-in-the-nassau-county-commercial-division/> (last visited June 17, 2011).

testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, then the witness must provide a written report – prepared and signed by the witness – that contains:

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

The note of issue and certificate of readiness may not be filed until the completion of expert disclosure and expert disclosure provided after these dates without good cause will be precluded from use at trial.¹²

The Advisory Group endorses the Commercial & Federal Litigation Section's¹³ proposed expert discovery rule for commercial litigations, as modified, and thus recommends that the New York Federal-State Judicial Council urge the Chief Administrative Judge to adopt it.

In light of the Advisory Group's above-referenced proposal, which mandates the exchange of expert reports, and the recent amendment to Rule 26 of the Federal Rules of Civil Procedure, the Advisory Group respectfully suggests that the following provisions,

¹² A Proposal for Enhanced Expert Disclosure in The N.Y. State Com. Division (Commercial & Fed. Litig. Section, New York), Feb. 7, 2011, at 29 (*see Supra* FN 2).

¹³ The drafters of this report note that the Commercial & Federal Litigation Section's proposed expert discovery rule has been slightly modified because that draft did not address Rule 26(a)(2)(C) regarding "Witnesses Who Do Not Provide a Written Report" and this proposal attempts to incorporate that rule. Appended as Annex C is a blackline of the Commercial & Federal Litigation Section's proposed expert discovery rule and the proposed expert rule as modified by the drafters of this report, which highlights the differences between them.

in addition to the Commercial & Federal Litigation Sections' proposed rule, be considered for adoption in commercial litigations as well:

Protection of Draft Reports

Drafts of any written report required under this rule are not discoverable, regardless of the form in which the draft is recorded.

Protection of Attorney-Testifying Expert Communications

Communications between a party's attorney and any expert witness required to provide a written report pursuant to this rule are not discoverable, regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Witnesses Who Do Not Provide a Written Report¹⁴

Unless otherwise stipulated or ordered by the court, if a party intends to use a witness to present expert testimony at trial, but such witness is not required to provide a written report pursuant to this rule, the party who intends to present such expert's testimony at trial must provide a disclosure that states:

- (i) the subject matter on which the witness is expected to present evidence; and

¹⁴ The drafts of these three proposed rules for the Commercial Part are based on Rules 26(a)(2)(C), 26(b)(4)(B), and 26(b)(4)(C) of the Federal Rules of Civil Procedure, but have been amended to address wording differences in the CPLR.

(ii) a summary of the facts and opinions to which the witness is expected to testify.

To be clear, this proposal is applicable *only* to cases filed in the Commercial Division and does not seek an amendment to the CPLR or the application of this rule to other courts within the New York State Court system. Further, the considerations analyzed in this report pertain only to the Commercial Division and the analysis does not contemplate considerations that may be relevant in other courts within the New York State Court system.

V. Conclusion

The Commercial Division has become known and respected for the way in which it vigorously and efficiently manages complex commercial disputes. A Commercial Division Uniform Rule directed at enhancing expert disclosure will complement the Division's mission of uniformity and efficiency by providing a rule applicable to all Commercial Division cases and by increasing the amount of pre-trial disclosure available to parties, which will, ideally, reduce the number of triable issues. Ultimately, enhancing the expert disclosure available to parties in the Commercial Division will reduce forum shopping by leveling the playing field between New York, Delaware, and the federal courts as the three jurisdictions at the forefront of complex commercial litigation.