COMMERCIAL & FEDERAL LITIGATION SECTION

A Proposal for Enhanced Expert Disclosure in The New York State Commercial Division

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

EXECUTIVE SUMMARY

The Commercial Division of the New York State Supreme Court was established to improve the efficiency with which commercial cases are resolved. Since then, in recognition that the resolution of commercial cases can be complicated, protracted, and expensive, courts and practitioners have continued to review the issue of efficiency (among other things) in the Commercial Division, and, over time, rules and practices have been amended and adjusted to ensure that commercial cases in the Commercial Division are resolved efficiently. In keeping with this continued review, various proposals have been made to enhance the existing expert disclosure rule (CPLR Section 3101(d)) for Commercial Division cases to address concerns that the rule does not promote efficiency, predictability, or reliability. For a variety of reasons, none of those proposals was adopted. This report proposes a procedural rule that would not amend the CPLR and that would be *for use only in Commercial Division cases*, which the Committee believes is sensitive to the concerns raised in connection with prior proposed amendments and, at the same time, addresses concerns about the inefficiencies under the existing current rule.

The developing hodge-podge of ad hoc fixes by practitioners and judges designed to address the current rule's limitations in commercial cases, as set forth herein, evidences the need to amend the current expert disclosure rule. At least two Commercial Division's justices (Justice Ramos of New York County and Justice Karalunas of Onondaga County) have implemented more expansive expert disclosure rules than those afforded by Section 3101(d). In addition, litigants have addressed the rule's limitations by entering into agreements or stipulations governing expert disclosure on a case by case basis. And, relevant studies, including the 2006 Commercial Division Focus Group Report, suggest that some litigants simply choose to go somewhere else to resolve their commercial disputes. This state of play is inconsistent with the underlying purpose of the Commercial Division as well as with the articulated goal of

ensuring that the Commercial Division is a venue of choice for complex commercial litigation. Chief Judge Lippman observed that the Commercial Division's "emphasis on specialization ha[s] led to more efficient dispositions, greater predictability and a reliable body of decisional law on which important business and corporate governance decisions can be made."[1] The Committee believes that the proposed rule will further the goals of efficiency, predictability and reliability.

This report recommends a rule that provides for more expanded expert disclosure, including depositions of testifying experts and timely disclosure of expert reports, subject to consultation with the court if a party does not consent. It is modeled after the approaches and practices already implemented by certain Justices of the Commercial Division in their Individual Practices. The report also proposes that the Chief Administrative Judge amend Title 22 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (the "NYCRR") Section 202.70 Rules of the Commercial Division of the Supreme Court to expand and focus expert disclosure by adopting the proposed rule and, in the alternative, that the individual Commercial Division justices adopt the proposed rule.

Commercial Division cases frequently involve controversies where the legal fees for just the pre-trial phase approach or exceed $1 million. In light of these costs, parties seek full and timely disclosure to allow them to assess the risks of trial and the benefits of potential settlement. Unfortunately, the Commercial Division currently does not provide the type of expert disclosure necessary for parties to undertake this analysis – particularly where efforts to quantify valuation or damages will be based on the strength of the expert's testimony.

[1] Chief Judge Lippman, Commercial Litigation in New York State Courts § 1.8 (Haig 4B West's NY Prac. Series).

Moreover, under the current rules this expert testimony frequently is not revealed until the eve of or at trial. Consequently, parties are often forced to continue to litigate even when the amount in controversy that may ultimately be proved is far less than the legal fees incurred simply because they are unable to adequately assess the true value of a case early enough in the process. This, in turn, forces parties to prepare to ensure that they can advocate for or against the highest conceivable amount at risk. For parties who can control forum selection – either by contract or through removal – it is often wiser to litigate in Delaware or the federal courts since both alternatives provide substantially more robust and timely expert disclosure.

We believe that the proposed rule for enhanced expert disclosure in Commercial Division cases can rectify this current impediment to the Commercial Division's evolution and efficiency. Moreover, we believe that, for the reasons set forth at the end of this report, the new proposed rule can be implemented in the limited arena of Commercial Division cases in a manner that is consistent with the dictates of the CPLR.

I. INTRODUCTION

The current expert disclosure rule (CPLR Section 3101(d) ("Section 3101(d)")), promulgated in 1985, "reflected the Legislature's view that expanded disclosure with respect to expert witnesses would, among other things, discourage parties 'from asserting unsupportable claims or defenses' and promote 'settlement by providing both parties an accurate measure of the strength of their adversaries' case.'"[2] Given the developments in modern complex commercial litigation and the increased role and importance of expert witnesses in a significant portion of that litigation, there is a clear need to supplement the rule in Commercial Division cases to ensure that the rule promotes the purpose for which it (and, the Commercial Division itself) was designed, namely to promote the efficient resolution of commercial cases.

The need for a predictable set of expert discovery rules that provide for full and thorough disclosure and testing of expert opinion and testimony is particularly acute in complicated commercial cases because the financial stakes are so high. Without full and thorough expert disclosure, parties cannot adequately assess the possibility of settlement or prepare for motion practice and trial. As a result, the court has a much more difficult task in determining which issues should go to the fact finder. Furthermore, participants in the 2006 Commercial Division Focus Groups indicated that unpredictable and inadequate expert disclosure is a substantial reason for not taking advantage of the Commercial Division, especially when alternative fora provide the level of expert disclosure necessary to fully prepare, assess and litigate a case.[3]

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[2] *Jasopersaud v. Rho*, 169 A.D.2d 184, 186 572 N.Y.S.2d 700 (2nd Dep't 1991) (quoting mem. of State Executive Dept. in support of L. 1985, ch. 294, 1985 McKinney's Session Laws of N.Y., at 3019, 3025).

[3] Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups (July 2006).

In this report, this Committee (1) highlights the current state of play of expert disclosure in the Commercial Division; (2) identifies inefficiencies created by the absence of a supplemental rule providing for enhanced expert disclosure in the Commercial Division; (3) discusses various ways in which litigants and courts have tried to address those inefficiencies; and (4) proposes a procedural rule for Commercial Division cases to remedy the inefficiencies.

II. CURRENT STATE OF PLAY OF EXPERT DISCLOSURE IN COMMERCIAL DIVISION CASES

Section 3101(d) governs expert disclosure in New York State Court. Set forth below is a summary of the case law relevant to Section 3101(d) relating to (a) the required scope of disclosure, (2) the "special circumstances" under which additional disclosure is permitted, and (3) the timing of disclosure.[4] Notably, there are relatively few Commercial Division cases addressing these issues; most of the jurisprudence regarding expert disclosure that has been developed in appellate courts across the state does *not* involve commercial litigation.[5]

A. Section 3101(d)(1)(i): Scope of Disclosure

Section 3101(d)(1)(i) provides that a party is entitled to know the identity of any testifying expert and is entitled to a "reasonabl[y] detail[ed]"[6] disclosure of: (1) "the subject matter on which each expert is expected to testify", (2) "the substance of the facts and opinions

[4] This is by no means an exhaustive review of cases addressing Section 3101(d). For those interested in a more expansive review of Section 3101(d), Robert L. Haig's Commercial Litigation in New York State Courts (West N.Y.Prac. Series 2010) is an excellent resource.

[5] Our research found four Commercial Division cases discussing these areas. *Maniscalco v. Hay*, Index No: 115646/09 (Sup. Ct. New York Cnty. 2010) (Bransten, J.); *Sieger v Zak*, No. 19978/05, 2010 WL 4383416 (Sup. Ct. Nassau County 2010) (Bucaria, J.); *Mendelovitz v. Cohen*, 20 Misc. 3d 1146(A); 873 N.Y.S.2d 235 (Sup. Ct. Kings County 2008) (Demarest, J.); *A&B Furniture, Inc. v. Pitrock Realty Corp*., 16 Misc. 3d 1131A; 847 N.Y.S.2d 900 (Sup. Ct. Kings Cnty. 2007).

[6] Although not expressly stated in CPLR 3101(d), the "reasonable detail" standard has also been applied to the substance prong. *See Parsons v. City of N.Y.*, 175 A.D.2d 783, 573 N.Y.S.2d 677 (1st Dep't 1993).

on which each expert is expected to testify", (3) "the qualifications of each expert witness", and (4) "a summary of the grounds for each expert's opinion".[7]

For obvious reasons, the manner in which "reasonable detail" has been defined is of particular concern to this report, given the considered view that limited expert disclosure does not promote the goal of efficient resolution in Commercial Division cases. "Reasonable detail" is defined as information sufficient to give the opposing party a sense of the content of the expert's anticipated testimony without actually laying out the expert's opinions.[8] The rule does not require that the summary of the expert's testimony "provide the fundamental factual information upon which the expert's opinions were made".[9] Although a disclosure "so general and nonspecific that the [other party] has not been enlightened to any appreciable degree about the content of this expert's anticipated testimony"[10] does not satisfy the requirement, disclosure with particularity is not required.[11] Disclosure "not so inadequate or inconsistent with the expert's testimony as to have been misleading," and "not so lacking in specifics or details as to result in prejudice or surprise to the Defendant" does satisfy the requirement.[12]

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[7] N.Y. C.P.L.R. § 3101(d)(1)(i). Once a request has been made under Section 3101(d)(1)(i), it is treated as a continuing request that requires supplemental updates.

[8] *See Richards v. Herrick*, 292 A.D.2d 874, 874, 738 N.Y.S.2d 470, 471 (4th Dep't 2002) (disclosing that a meteorologist would testify that weather conditions at "the time and location of the accident" is statutorily deficient).

[9] *See id.*

[10] *See Chapman v. State*, 189 A.D.2d 1075, 1075, 593 N.Y.S.2d 104, 105 (3d Dep't 2002).

[11] *Foley v. Am. Indep. Paper Mills Supply Co*., 222 A.D.2d 401, 402, 635 N.Y.S.2d 515, 515 (2d Dep't 1995).

[12] *S*ee *Gagliardotto v. Huntington Hosp.*, 25 A.D.3d 758, 759, 808 N.Y.S.2d 430, 431 (2d Dep't 2006); *Hageman v. Jacobson*, 202 A.D.2d 160, 161, 608 N.Y.S.2d 180, 181 (1st Dep't 1994).

An expert's testimony will rarely be precluded because of inadequate disclosure.[13] Generally, preclusion for failure to comply with Section 3101(d) is improper unless there is "evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party".[14] Furthermore, upon finding the summary of an expert's expected disclosure insufficient, courts permit the proponent of the testimony to supplement the disclosure rather than deciding to preclude the expert's testimony at trial, provided the other party is not prejudiced by the late disclosure.[15] For example, in an unpublished Commercial Division case, plaintiffs moved to preclude defendants from offering expert testimony due to the vague and conclusory nature of the disclosure. The court held that even though the defendant's expert disclosure did not explain in reasonable detail the method by which its expert proposed to value the company (it only referred to "standard valuation methods and procedures"), the remedy was an amended disclosure, not preclusion.[16] In *Beard v. Brunswick Hospital Center Inc.*, the Second Department found the following generic and conclusory disclosure sufficiently reasonable:

> "Defendants' expert will testify that defendants acted in accordance with good and accepted medical practice with respect to the issues of malpractice and informed consent. The expert will further testify that the defendants were not negligent; and that plaintiff's condition was not related to, or proximately caused

[13] But see *Desert Storm Construction Corp. v. SSSS Limited Corp.*, 18 A.D.3d 421, 422 (2d Dep't 2005) (holding that "trial court providently exercised its discretion in precluding the defendants' expert witness from testifying regarding a subject that was not included in the defendants' pretrial expert disclosure").

[14] *See Shopsin v. Siben & Siben*, 289 A.D.2d 220, 221, 773 N.Y.S.2d 697, 698 (2d Dept. 1991); *see also Ryan v. City of N.Y.*, 269 A.D.2d 170, 170, 703 N.Y.S.2d 90, 91 (1st Dep't 2000); *Hansel v. Lamb*, 257 A.D.2d 795, 796, 684 N.Y.S.2d 20, 21 (3d Dep't 1999); *Peck v. Tired Iron Transp., Inc*., 209 A.D.2d 979, 979, 620 N.Y.S.2d 199, 200 (4th Dep't 1994).

[15] *Se*e, *e.g*., *Gallo v. Linkow,* 255 A.D.2d 113, 679 N.Y.S.2d 377 (1st Dep't 1998); *Chapman*, 227 A.D.2d at 869, 642 N.Y.S.2d at 976.

[16] *Sieger v Zak*, No. 19978/05, 2010 WL 4383416 (Sup. Ct. Nassau County 2010) (Bucaria, J.) (slip opinion).

> by, any act of negligence or malpractice of the defendants. The expert will dispute the theories put forward by the plaintiff in the pleadings."[17]

In *Oliver Chevrolet, Inc. v. Mobil Oil Corp.*, the Third Department found the defendant's disclosure sufficient even though the statements disclosed only that the expert would negate the plaintiff's causation theory and failed to disclose that the expert had discovered a separate cause for the incident.[18] In *Maldonado v. Cotter*, the Fourth Department found plaintiff's expert disclosure notice reasonably sufficient although it gave no more detail than positing a general theory of medical malpractice.[19]

As the above shows, courts in all four departments have interpreted "reasonable detail" narrowly and have been reluctant to preclude expert testimony where a party fails to satisfy the narrow requirement. In *Gallo v. Linkow*, the First Department declined to preclude expert testimony concerning plaintiffs' contributory negligence even though defendant's disclosure notice "referred to culpable conduct somewhat vaguely as 'factors outside of the control' of the defendant".[20] The court based its decision on the fact that the bill of particulars "gave plaintiffs full warning of the details to which this phrase referred."[21] In *Flores v. New York Hospital-Cornell Medical Center*, the Second Department noted that defendant's disclosure, "although not detailed," was adequate to satisfy Section 3101(d) as the defendant

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[17] 220 A.D.2d 550, 632 N.Y.S.2d 805 (2d Dep't 1995) (a medical malpractice case).

[18] 274 A.D.2d 782, 783, 711 N.Y.S.2d 225, 226–27 (3d Dep't 2000) (a negligence case involving a gas leak of an underground gas tank where at trial the expert disclosed a second leak and when challenged the court said this new information "merely constituted an explanation in support of the ultimate opinion that the contamination source was not defendant's fuel tank.").

[19] 256 A.D.2d 1073, 1074, 685 N.Y.S.2d 339, 341 (4th Dep't 1998).

[20] 255 A.D.2d 113, 117, 679 N.Y.S.2d 377, 381 (1st Dep't 1998) (also inadvertent); *see also Law v. Moskowitz*, 279 A.D.2d 844, 846, 719 N.Y.S.2d 357, 359 (3d Dep't 2001).

[21] *Gallo,* 255 A.D.2d at 117, 679 N.Y.S.2d at 381.

"apprised plaintiff that defendant's experts would dispute and rebut plaintiff's theory that his injury was caused by the failure of defendant, through its on-call anesthesiologist, to properly monitor and regulate plaintiff's body fluid levels."[22] Accordingly, the court held that plaintiff was sufficiently notified that defendant's expert would, "in his trial testimony, attribute plaintiff's injury to causes other than those urged by plaintiff," and therefore that it was improper to preclude the expert's testimony, which posited "a theory of causation not specifically disclosed in defendant's response."[23]

B. Section 3101(d)(1)(iii): Additional Disclosure under "Special Circumstances"

Section 3101(d)(1)(i) does not require disclosure of an expert's report, the data used by the expert to reach his or her opinion or the opinion itself; nor does it provide for expert depositions all of which are essential in many complex commercial cases to efficiently resolve a commercial dispute. Absent an agreement by the parties or a court rule requiring disclosure of this information, a party can obtain this disclosure by court order upon a showing of "special circumstances."[24] Whether "special circumstances" exist is within the discretion of the court,[25] and most courts have construed the exception narrowly.[26]

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[22] 294 A.D.2d 263, 264, 743 N.Y.S.2d 267, 268 (2d Dep't 2002).

[23] *Id*; *see also Maldonado*, 256 A.D.2d at 1074, 685 N.Y.S.2d at 341 (expert disclosure was reasonably sufficient when it stated that the expert would testify that staff deviated from acceptable standards of care by failing "to monitor the [plaintiff] after removing him from the operating room," failing to "appreciate changes in [his] respiratory rate", and failing to properly access, monitor, and respond to changes").

[24] Further discovery from a trial expert pursuant to CPLR 3101(d)(1)(iii) may be obtained only upon a court order, after a party files a formal motion accompanied by affidavits showing "special circumstances," which affords the adversary an opportunity to oppose the relief or request restriction or protection concerning fees and expenses. *See* N.Y. C.P.L.R. § 3101(d)(1)(i), (iii).

[25] *Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d 333, 334, 533 N.Y.S.2d 915, 916 (2nd Dep't 1988).

[26] *See Brooklyn Floor Maint. Co. v. Providence Wash. Ins. Co.*, 296 A.D.2d 520, 521, 745 N.Y.S.2d 208, 210 (2d Dep't 2002) (the requirement of "special circumstances" is "more than a nominal barrier to discovery"); *232*

Courts have recognized two circumstances under which there are "special circumstances" justifying additional expert disclosure and discovery. The first is where the evidence reviewed and relied upon by an expert and is lost, destroyed, or otherwise becomes unavailable.[27] (In other words, a situation where the material cannot be duplicated because of a change of conditions.) The second circumstance under which "special circumstances" exist is "where some other unique factual situation exists."[28] Instances where courts have found "unique factual" circumstances include where a plaintiff's principal was "unable to answer basic inquiries into the plaintiff's bookkeeping practices, or regarding specific entries in the corporation's financial records" and the accountant was the "sole person who could respond to those inquiries"[29] and where a plaintiff's claim was "based not on any facts personally known to defendant," but rather, on reports conducted by plaintiff's expert accountant and construction industry executive".[30] Even when the court finds "special circumstances" exist, courts have generally limited the additional disclosure to the materials and data on which the expert based his opinion and will not compel the expert to disclose his or her actual opinion.[31] Consequently,

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Broadway Corp. v. N.Y. Prop. Ins. Underwriting Ass'n, 171 A.D.2d 861, 861, 567 N.Y.S.2d 790, 790 (2d Dep't 1991) ("A conclusory allegation that such discovery is necessary to fully prepare for litigation is insufficient.").

[27] *Hallahan v. Ashland Chem.*, 237 A.D.2d 697, 698, 654 N.Y.S.2d 443, 445 (3d Dep't 1997); *232 Broadway Corp. v. N.Y. Prop. Ins. Underwiring Assn.*, 171 A.D.2d 861, 861, 567 N.Y.S.2d 790, 790 (2d Dep't 1991).

[28] *See e.g.*, *Hallahan*, 237 A.D.2d at 698, 654 N.Y.S.2d at 445.

[29] *Brooklyn Floor Maintenance*, 296 A.D.2d at 522, 745 N.Y.S.2d at 210.

[30] *Taft Partners Development Group v. Drizin*, 277 A.D.2d 163, 163, 717 N.Y.S.2d 53, 54 (1st Dep't 2000),

[31] *Tedesco v. Dry-Vac Sales Inc.*, 203 A.D.2d 873, 874, 611 N.Y.S.2d 321, 322 (3d Dep't 1994); *see also Hartford v. Black & Decker (U.S.) Inc.*, 221 A.D.2d 986, 986, 634 N.Y.S.2d 294, 295 (4th Dep't 1995) (scope of expert depositions "limited strictly to the factual circumstances of the observations of the experts and the procedures performed by them. Inquiry into the experts' opinion is prohibited.")

even where "special circumstances" exist, disclosure is generally limited to portions of the expert's report or narrowly tailored interrogatories.

C. Timing of Expert Disclosure

Section 3101(d) does not set forth a deadline by which expert disclosure must be provided,[32] nor does it set forth the consequences for failing to provide adequate expert disclosure, although Section 3101(d) explicitly states that a party will not be excluded from providing expert testimony if the failure to comply with Section 3101(d) is for a "good cause."[33] The case law and commentary vary greatly with respect to when disclosure is due and the appropriate penalty for failing to provide adequate disclosure.[34]

Appellate courts from all four departments have all, at some point, held that a party is not required to respond to a demand for expert witness information within a specified time. All have also held that a party may be precluded from proffering expert testimony where there is evidence of an intentional or willful failure to disclose and a showing of prejudice by the opposing party[35] (the burden of showing an intentional or willful failure is, of course, on the

[32] N.Y. C.P.L.R. 3101(d)(1)(i).

[33] N.Y. C.P.L.R. 3101(d)(1)(i).

[34] Patrick M. Connors, *Case Law on CPLR 3101(d)(1)(I), Expert Disclosure Is in Shambles*, N.Y. L.J., Jan. 20, 2009, at 3.; *compare What About the CPLR, David Horowitz*, NYSBA Journal, p. 20-23 (Jan. 2009), *with* Letter to the Editor in response from David Hamm (citing *CPLR 3101(d): Myth of the 'Missing' Time Limit, N.Y. L.J.*, p.5 (Nov. 29, 2007)).

[35] *St. Hilaire v. White*, 305 A.D.2d 209, 210, 759 N.Y.S.2d 74, 75 (1st Dep't 2003); *Rowan v. Cross Cnty. Ski & Skate Inc*., 42 A.D.3d 563, 564, 840 N.Y.S.2d 414, 415 (2d Dep't 2007); *Silverberg v. Cmty. General Hosp.*, 290 A.D.2d 788, 788, 736 N.Y.S.2d 758, 760 (3d Dep't 2002); *C.P. Ward, Inc. v. Deloitte & Touche LLP*, 74 A.D.3d 1828, 1828, 904 N.Y.S.2d 842, 844, (4th Dep't 2010); *Sieger v Zak*, No: 33045U, 2010 WL 4383416 (Sup. Ct. Nassau Cnty. Oct. 19, 2010) (Bucaria, J.) (slip opinion); *A&B Furniture, Inc. v. Pitrock Realty Corp*., 16 Misc. 3d 1131A; 847 N.Y.S.2d 900 (Sup. Ct. Kings Cnty. 2007) (Demarest, J.) (court denied plaintiff's motion to preclude because plaintiff suffered no prejudice from late disclosure); *Mendelovitz v. Cohen*, 20 Misc. 3d 1146(A); 873 N.Y.S.2d 235 (Sup. Ct. Kings County 2008) (Demarest, J.) (court denied motion to strike note of issue and motion for summary judgment and granted leave to defendants to serve expert opinion to rebut plaintiff's claims).

party seeking disclosure)[36]. In fact, most courts are willing to avoid precluding expert disclosure by finding alternative means to avoid prejudice. For example, the Second Department has affirmed a trial court's decision to adjourn a trial date to allow a party to submit expert disclosure two weeks before trial.[37]

Nonetheless, recent decisions in the Second Department suggest that courts in the Second Department are in fact willing to preclude expert discovery for noncompliance with Section 3101(d)(1). In a recent decision by the Second Department Appellate Division, the court held that a trial court had not abused its discretion in declining to consider the affidavits of experts offered to rebut summary judgment where the plaintiff had previously requested the affidavits and the note of issue and certificate of readiness had been filed.[38] Similarly, the Court found that a trial court erred in declining to preclude the plaintiff's expert's report, which was submitted in opposition to the defendant's motion for summary judgment, when there was no good cause for the expert not being disclosed prior to the filing of the note of issue and certificate of readiness.[39] The cases appear to support the proposition that, at least in the Second Department, if requested, expert disclosure must be provided prior to filing of the note of issue and certificate of readiness. The Second Department, however, has since upheld a trial court's

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[36] *See* Patrick M. Connors, *Case Law on CPLR 3101(d)(1)(i), Expert Disclosure Is in Shambles*, N.Y. L.J., Jan. 20, 2009, at 3.

[37] *See, e.g.*, *Rowan*, 42 A.D.3d at 564, 840 N.Y.S.2d at 415 (preclusion denied because "any potential prejudice to the plaintiffs could have been eliminated by an adjournment of the trial").

[38] *Construction by Singletree Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702, 704 (2d Dep't 2008).

[39] *King v. Gregruss Management Corp.*, 57 A.D.3d 851, 851, 870 N.Y.S.2d 103, 104 (2d Dep't 2008); *Gerardi v. Verizon N.Y.*, 66 A.D.3d 960, 961, 888 N.Y.S.2d 136, 137 (2d Dep't 2009); *see also Wartski v. C.W. Post Campus of L.I. Univ.*, 63 A.D.3d 916, 917, 882 N.Y.S.2d 192, 192 (2d Dep't 2009).

refusal to preclude expert testimony offered in opposition to a motion for summary judgment, stating:

> "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 offering 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."[40] [41]

III. PROBLEMS WITH THE CURRENT EXPERT DISCLOSURE RULE IN COMMERCIAL CASES

As the January 2010 Report of the Advisory Committee on Civil Practice recognizes, "[t]he issues addressed by experts in commercial cases are often complex, touching on nuanced economic, financial and corporate principles, such as how stock or other securities should be valued, how a business should be valued, or whether the financial analysis of a board of directors was sound under the circumstances."[42] Expert disclosure requirements that do not provide for the date by which disclosure must be provided, or for disclosure sufficient for parties to assess and analyze the strength of their cases is simply out of step with the nature of most of the complex commercial cases in today's world. And litigants hoping to get an efficient

[40] *Browne v. Smith*, 65 A.D.3d 996, 997, 886 N.Y.S.2d 696, 697 (2d Dep't 2009); *Howard v. Kennedy*, 60 A.D.3d 905, 905, 875 N.Y.S.2d 271, 272 (2d Dep't 2009); *see also* Connors, Patrick M., 7B McKinneys Civil Practice Law and Rules § 3101, C:3101:29A (2010 Supplemental Practice Commentaries).

[41] Some trial courts within the Second Department, in an apparent attempt to reconcile the expert disclosure case law in the department, have set forth two different rules for expert when an expert will be precluded—one governing an expert opinion offered for the first time in response to a summary judgment motion and another where an expert opinion is identified for the first time at trial. *See Lukasik v. Lukasik*, N.Y. L.J., Feb. 9, 2009, at 21 (Sup. Ct. Queens Cnty.).

[42] Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, p.61 (Jan. 2010).

resolution of their commercial disputes in New York, cannot take much comfort from decisions relating to the application of Section 3101(d).[43]

A. Lack of Predictability

Lack of predictability with respect to expert disclosure, including what must be disclosed when, can result in over or early disclosure. The truth is that a litigant in the Commercial Division cannot predict when it will get the expert discovery it requests; nor can a litigant predict what discovery it will get. And it is anybody's guess as to what consequences, if any, there are for failing to comply with Section 3101(d)(1)(i). Not only can the current rule lead to prejudice, but it is ripe for inefficient gamesmanship.

Commercial Division litigants in the Fourth and Second Departments are currently operating with different disclosure dates, and even within the Second Department, it is difficult to ascertain when disclosure is due and what will happen if a disclosure is late.[44] Commentators are at odds on whether Section 3101(d)(1)(i) imposes a time limit.[45] One commentator has suggested that "the unwritten, but widely accepted deadline" for expert disclosure under Section 3101(d) is thirty days before trial commences,[46] while another suggests

[43] *See* Patrick M. Connors, *Case Law on CPLR 3101(d)(1)(i), Expert Disclosure Is in Shambles*, N.Y. L.J., Jan. 20, 2009, at 3.

[44] *see* Jonathan A. Judd & Andrew L. Weitz, *The Timing and the Traps of CPLR 3101(d) Expert Disclosure*, N.Y. L.J., Nov. 1, 2010, *see also* Connors, Patrick M., 7B McKinneys Civil Practice Law and Rules §3101, C:3101:29A (2010 Supplemental Practice Commentaries).

[45] *Compare What About the CPLR, David Horowitz*, NYSBA Journal, p. 20-23 (Jan. 2009), *with* Letter to the Editor in response from David Hamm (citing *CPLR 3101(d): Myth of the 'Missing' Time Limit,* N.Y. L.J., p.5 (Nov. 29, 2007)).

[46] *See* Jonathan A. Judd & Andrew L. Weitz, *The Timing and the Traps of CPLR 3101(d) Expert Disclosure*, N.Y. L.J., Nov. 1, 2010.

that a response within twenty days of the request is reasonable based on other approaches in the CPLR.[47]

B. Inadequate Disclosure

As commentators and practitioners have indicated, New York's expert disclosure rules "are very limited [] and do little to inform the adversary about the expert testimony that will be offered."[48] Indeed, as discussed above, courts are apparently more concerned with whether a party is sufficiently on notice of the fact that it should expect expert testimony than whether the party has been sufficiently apprised of what the expert will actually say. However, knowing the details of and the bases for what an expert will say is essential for the efficient resolution of a business dispute. Section 3101(d)(1)(i) does not, for example, require the expert to disclose his/her methodology, a written report, the data underlying his/her opinions or the exhibits upon which the expert will rely at trial. Section 3101(d)(1)(i) also does not provide for depositions of experts (though the special circumstances exception, as it has been interpreted, does provide commercial litigants with a way to get some additional discovery). This lack of meaningful expert disclosure has led to (1) ill-prepared *Frye* motions, (2) uninformed summary judgment motions, (3) misguided settlement analysis, and (4) inefficient trial preparation.

1. *Ill-prepared Frye Motions*

A motion to exclude expert witnesses on evidentiary grounds can result in a meaningful narrowing of issues for the trial court in business litigation. While such motions are

[47] Connors, Patrick M., 7B McKinneys Civil Practice Law and Rules §3101, C:3101:29A (2009 Supplemental Practice Commentaries).

[48] Commercial Litigation in New York State Courts § 28.5 (Haig 4B West's NY Prac Series) (henceforth "Haig"); *see also* Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups (July 2006).

common practice in federal courts, they are not often seen in New York state court practice.[49] One reason for this, as has been noted in commentary, is the fact that "the attack on the opponent's expert is made much more difficult by the thinness of expert disclosure under the CPLR".[50] Without adequate disclosure, it is difficult to mount an appropriate challenge to an expert's opinion.

As one treatise stated, "[i]deally, one would like to know all the details about the expert's methodology so one can determine whether that methodology is reliable," however, a litigant "is unlikely to learn those details through the pretrial expert disclosure provided by CPLR 3101(d)(1)(i)".[51] The treatise suggests using other sources to mount the challenge, including researching other publications, papers and speeches to get a better understanding of the expert's methodology and opinion.[52] While it is certainly advisable to look to secondary sources when analyzing an opposing expert, not having a clear statement as to what methodology was actually used by the expert hampers the preparation of an effective *Frye* motion. Efficiency is not served by allowing decisions to be made in business disputes on the basis of unreliable expert testimony. Further, the risk that unreliable expert testimony will be admitted against them is undoubtedly among the factors causing litigants to go elsewhere to resolve their complex commercial disputes.

[49] Haig §§ 28.8-10.

[50] Haig § 28.11.

[51] Haig § 28.10.

[52] Haig § 28.10.

2. *Uninformed Summary Judgment Motions*

Pretrial motion practice, and in particular a dispositive motion for summary judgment, is an indispensable part of commercial litigations. Summary judgment motions provide litigants with an opportunity to seek full dismissal of a case or, at least, to focus the issues to be tried. Those summary judgment motions in commercial cases that are premised heavily on expert testimony are often, under the current rules, not useful because the summary judgment movant lacks sufficient information to launch a proper challenge. This, in turn, reduces the efficacy of the summary judgment procedure to eliminate and/or narrow issues for trial.

A movant who makes a summary judgment motion without the benefit of expert discovery runs the risk of making arguments that would not otherwise have been made if the litigant had the benefit of full expert disclosure. In addition to wasting time and resources on arguments that otherwise would not have been made, an attorney may forego other arguments or prepare his expert's affidavit in a different manner. These inefficiencies explain in part why the Second Department has held on certain occasions that post-note of issue expert disclosure made in response to a summary judgment motion should be precluded.[53]

Judicial resources should be conserved for taking a hard look at the very best arguments for and against summary judgment. Timely and adequate expert disclosure in commercial cases would further that cause.

[53]*See Construction by Singletree Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702, 704 (2d Dep't 2008); *King v. Gregruss Management Corp.*, 57 A.D.3d 851, 851, 870 N.Y.S.2d 103, 104 (2d Dep't 2008); *Gerardi v. Verizon N.Y.*, 66 A.D.3d 960, 961, 888 N.Y.S.2d 136, 137 (2d Dep't 2009); *Wartski v. C.W. Post Campus of L.I. Univ.*, 63 A.D.3d 916, 917, 882 N.Y.S.2d 192, 192 (2d Dep't 2009).

3. *Settlement Inefficiencies*

Prior to going to trial, parties generally entertain the idea of settlement. Among the reasons for expert disclosure is the fostering of early settlement. The decision to settle—whether from the vantage point of plaintiff or defendant—is best done with full and complete information. In business litigation, lawyers typically attempt to handicap the chances of success based on, among other things, the persuasiveness of competing narratives, the admissibility of documentary evidence, the credibility of fact witnesses, the burden of proof, and the strength of the expert testimony. In fact, many cases can come down to a "battle of the experts". The administration of justice is simply not served when parties settle based on inadequate information, particularly where, as is the case with expert disclosure, it would be easy to remedy the current situation.

4. *Trial Inefficiencies*

Trial preparation for complex commercial cases is a rigorous time-consuming affair. In New York, all of this pretrial work can be derailed because litigants are permitted to disclose experts and expert testimony on the eve of trial, or during trial (e.g., when a party only learns during an expert's testimony that certain theories in interrogatory responses or in a bill of particulars are the subject of expert opinion).

There are no rules for when and under what circumstances parties can disclose new experts in Commercial Division cases. In fact, as things now stand, a "new expert" may be one who was retained late in the day or, alternatively, one retained and prepared long ago but only recently disclosed. Thus, a lawyer could be faced with finding a rebuttal expert and preparing to move against or cross examine the testimony to be offered by the surprise expert on

short notice.[54] Furthermore, since an expert is not required to prepare a report and parties are not entitled to depose experts, it is difficult to meaningfully and efficiently cross examine experts at trial.

Trial by ambush—which Section 3101(d)(1) implicitly permits—does nothing to further the pursuit of fair and efficient resolution. Indeed, our rules of disclosure are designed, at least in part, to eliminate this inefficiency. Moreover, in Commercial Division cases, where parties will frequently spend hundreds of thousands (if not millions) of dollars on legal fees in the *pre-trial* phase of the case, this trial by ambush imposes risks and uncertainties so late in the process as to make resolution of commercial cases in the Commercial Division a gamble that many sophisticated business litigants cannot justify when adequate and timely disclosure is available in other fora (*e.g.*, federal court or Delaware state court).

IV. THE LIMITATIONS OF, AND LESSONS LEARNED FROM, SELF-HELP

While judges and parties will likely attempt to address the above-referenced inefficiencies of Section 3101(d)(1) as best they can, self-help is not a long-term solution.

A. Litigant Self-Help

1. *Alternative Forums*

We know from the July 2006 Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups that inadequate expert disclosure rules have pushed litigants to different forums. This trend away from New York is not a new phenomenon. Prior to the establishment of the Commercial Division, commercial litigants were choosing alternative forums to litigate their disputes. Chief Judge Lippman, among others,

[54] While the *Singletree* decision indicates that an expert may be precluded if it is disclosed for the first time in response to a post-note of issue summary judgment motion, the current practice requires a showing of willfulness and prejudice for an eve of trial disclosure.

observed this flight from New York state courts firsthand and noted that he witnessed "the steady decline in commercial filings as lawyers and litigants increasingly migrated to the federal courts, Delaware, or private dispute resolution fora".[55]

As Chief Judge Lippman has stated, the Commercial Division was established to reverse the trend of commercial litigants turning to federal courts or alternative forums.[56] While this Committee has not conducted a survey of why litigants have chosen not to litigate in the Commercial Division, the focus groups suggest that commercial litigants are again citing inadequacies in New York procedure as reason not to choose the Commercial Division.[57]

2. *Stipulations*

Sophisticated parties in complex commercial litigation generally want extensive expert disclosure, and consequently usually enter into some sort of agreement or stipulation governing expert discovery. For the most part, parties doing so agree to disclosure requirements similar to those under the federal rules.[58] Indeed, the fact that this is common practice is one of the reasons there is so little Commercial Division case law relating to expert disclosure.[59] It is worth noting that a leading treatise on Commercial Division practice even provides a form stipulation for additional expert disclosures that is consistent with the federal rules.[60]

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[55] Haig § 1.5.

[56] Haig § 1.1.

[57] Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups, (July 2006).

[58] Haig § 28.6 ("It is not uncommon, particularly in the Commercial Division of the New York County Supreme Court, for the parties to agree to conducting expert discovery in a fashion more akin to the federal model than to CPLR 3101(d)(1)(i)").

[59] *Maniscalco v. Hay*, Index No: 115646/09 (Sup. Ct. New York Cnty. 2010) (Bransten, J.) (Commercial Division case in which the expert disclosure stipulation for expert depositions was enforced by the court).

[60] Haig § 28.20.

Agreements and stipulations between parties, however, do not address the systemic inadequacies under the current system. While a stipulation may be the best solution in a given case, litigants cannot count on reaching agreement on the issue of expert disclosure. Without the comfort of adequate expert disclosure rules that exist independently from intra-party agreements, the timing and scope of expert discovery may well depend on the judge before who you find yourself. This does not further predictability or efficiency in Commercial Division cases.

3. *Summary Judgment Motions*

Some parties have attempted to get expert disclosure in Commercial Division cases by filing a summary judgment motion that leaves the party against whom the motion is filed no choice but to respond with expert testimony.[61] Obtaining disclosure this way may be better than nothing, but it is hardly adequate because it does not necessarily provide adequate disclosure of the expert's opinion(s). Furthermore, if the party filing the motion does not carry the burden of proof, it may be prejudiced by having to disclose its expert opinion first.

4. *Trial Subpoenas*

A trial subpoena pursuant to CPLR Section 2305 is another method by which a commercial litigant can seek expert disclosure,[62] but a litigant is likely to get a response and/or material on the eve of trial, by which time it may be too late. Moreover, as a general rule courts

[61] This practice may or may not be applicable in the Second Department as the Second Department has recently held that previously requested disclosure that is first revealed in a post-note of issue response to summary judgment may be precluded and that a trial court did not abuse its discretion by not precluding an expert affidavit not disclosed until the response to summary judgment. *Compare Singletree Inc.*, 55 A.D.3d at 863, 866 N.Y.S.2d at 704, *with Browne*, 65 A.D.3d at 997, 886 N.Y.S.2d at 697.

[62] Haig § 28.6 ("By using a well-crafted trial subpoena [pursuant to CPLR 2305], one may be able to obtain on the eve of trial the production of material and information that exceed the limitations of CPLR 3101(d)(1), such as expert reports, on the grounds that the material is necessary for cross examination.").

do not allow parties to use trial subpoenas as broad discovery devices.[63] Thus, trial subpoenas usually must be narrowly tailored, which may result in some, but not necessarily adequate disclosure.

B. Judicial Self-Help

There have been a number of instances of judges both in and out of the Commercial Division who have attempted to address the limitations of the current system in cases where greater disclosure is necessary to the just and efficient administration of justice. Additionally, the Chief Administrative Judge has promulgated a set of expert disclosure rules specific to matrimonial actions.

1. *Commercial Division Self-Help*

Justice Ramos of the New York County Commercial Division has issued a Part 53 Practice Rule that provides that "no later than thirty 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 depositions."[64] Unless otherwise stipulated or ordered, the experts must prepare and sign a report that must comport to the same requirements as found in Federal Rule of Procedure 26(a)(2)(B), namely:

> "(A) a complete statement of all opinions the witness will express and the basis and the reasons for them;
> (B) the data or other information 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

[63] Haig § 28.6, n.12 (*citing Genevit Creations, Inc. v. Gueits Adams & Co.*, 306 A.D.2d 142 (1st Dep't 2003) (subpoena properly quashed which was overly broad in its demands and which was served to obtain further discovery after certification of the completion of discovery)).

[64] Commercial Division Justice Ramos Part 53 Practice Rule 21.

(F) a statement of the compensation to be paid for the study and testimony in the case."[65]

A number of other Commercial Division justices have addressed expert disclosure in their preliminary conference forms. The forms in Nassau County Commercial Division and in one Commercial Part in Kings County ask the parties to identify the date by which they will provide expert disclosure.[66] The form used by Justice Karalunas of Onondaga County asks the parties to identify when expert disclosure will be made but provides that, in any event, the plaintiff and the defendant shall serve disclosure no later than 30 and 60 days, respectively, after the filing of the trial note of issue.[67] Justice Karalunas's Preliminary Conference Stipulation and Order states that "[e]xpert disclosure provided after these dates without good cause will be precluded from use at trial."[68] Justice Pines of the Suffolk County Commercial Division asks parties to identify the date by which they will provide expert disclosure,[69] and Justice Scheinkman of Westchester County provides five blank lines for the parties to fill in whatever they choose regarding expert disclosure.[70]

2. *Examples of Other New York State Court Self-Help*

The Commercial Division is not alone in recognizing the need to provide procedural rules to govern predictable and efficient expert disclosure. The Committee has not undertaken a complete survey of practice in New York, but we have identified a few examples.

[65] Commercial Division Justice Ramos' Part 53 Practice Rule 21.

[66] Cnty. of Nassau Commercial Division Preliminary Conference Form; Part 202 Preliminary Conference Form.

[67] Cnty. of Onondaga Commercial Division Preliminary Conference Stipulation and Order.

[68] Cnty. of Onondaga Commercial Division Preliminary Conference Stipulation and Order.

[69] Cnty. of Suffolk Commercial Division: IAS Part 46 Preliminary Conference Form.

[70] Cnty. of Westchester Preliminary Conference Order - Commercial Case.

Justice Wood in the Supreme Court, Dutchess County requires the parties to exchange "any report by an expert whom counsel expects to call at trial."[71] In the New York County Supreme Court, Civil Branch[72] the party having the burden of proof shall respond to a Section 3101(d) request no later than 30 days prior to the trial date with a response due 15 days later.[73] The Third Judicial District mandates that plaintiff's expert disclosure is made on or before the filing of the note of issue.[74]

3. *Expert Disclosure Rules in Matrimonial Actions*

The Chief Administrative Judge has promulgated procedural rules in matrimonial actions that provide for efficient, predictable, and timely expert disclosure. A matrimonial action in the Supreme Court of New York[75] is governed by particular provisions in the NYCRR.[76] Expert disclosure responses are due twenty days following the request and the expert report for an expert to be called at trial and any responsive report are required to be exchanged no later than 60 and 30 days before the trial date, respectively.[77] The rule requires that any expert witness whom a party expects to call at trial submit an expert report that, barring a showing of good

[71] Individual Rules of the Honorable Charles D. Wood.

[72] The rules are not applicable to the Commercial Division.

[73] New York Cnty. Supreme Court, Civil Branch, Rules of the Justices, page 21.

[74] Third Jud. Dist. Rules. The Third District's rules do not apply to the Commercial Division and trial courts are not obligated to abide by the timeline. *Silverberg v. Cmty. General Hosp.*, 290 A.D.2d 788, 788 (3d Dep't 2002).

[75] The Supreme Court has exclusive original jurisdiction over matrimonial actions that affect the status of a marriage. See N.Y. Fam. Ct. Act § 115(b).

[76] 22 N.Y.C.R.R. § 202.16.

[77] 22 N.Y.C.R.R. §§ 202.16(g)(1)-(2).

cause, will be the only report admissible at trial.[78] Failure to comply with the rule results in preclusion unless good cause, as authorized by Section 3101(d)(1)(i), is shown.[79] In certain instances, the court can bind the expert's testimony to the contents of the report.[80]

V. EXPERT DISCLOSURE RULES IN FEDERAL AND DELAWARE COURTS

We know from various surveys that litigants often chose to litigate complex commercial cases in federal court or in Delaware state court.

The Federal Rules of Civil Procedure provide for expansive expert discovery.[81] Parties are required to identify trial experts, provide either a report prepared and signed by experts retained or employed specifically to provide expert testimony or a summary disclosure for all trial experts not required to provide a report.[82] The expert report must contain certain elements, including, among others, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them".[83] For expert witnesses "whose careers are devoted to causes other than giving expert

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[78] 22 N.Y.C.R.R. §§ 202.16(g)(2).

[79] 22 N.Y.C.R.R. § 202.16(g)(2); *see also* Westchester Supreme Court Matrimonial Part Operational Rules ("In the event that the expert does not complete the assignment within the time set by the assigned Matrimonial Part Justice, the assigned Matrimonial Part Justice may disqualify the expert, may order a refund or return of any monies paid to the expert, may take the expert's failure to complete the assignment timely in deciding whether to appoint such expert to another matter.").

[80] 22 N.Y.C.R.R. § 202.16(g)(2).

[81] It is worth noting that Rule 26(b)(4)(B), which is new, provides work-product protection for all draft expert reports (and summary disclosures), including supplemental reports, "regardless of the form in which the draft is recorded," *i.e.*, "whether written, electronic or otherwise." 2010 Advisory Note. Rule 26(b)(4)(C), which is also new, provides work-product protection for communications between retaining counsel and the testifying experts required to provide Rule 26(a)(2)(B) reports, regardless of the form of the communications, "whether oral, written, electronic, or otherwise. 2010 Advisory Note.

[82] Fed. R. Civ. P. 26(a)(2).

[83] Fed. R. Civ. P. 26(a)(2).

testimony"[84] a party is required to disclosure the subject matter on which the witness is expected to present evidence and summary disclosure of (i) the opinions to be presented by those experts and (ii) the facts supporting those opinions. The default timing for expert disclosure is 90 days before the case is set for trial or to be ready for trial with rebuttal evidence due 30 days after.[85] The federal rules also allow for a party to depose an expert whose opinions may be presented at trial.[86]

In the Delaware Court of Chancery, another popular forum for the resolution of commercial disputes, the rules governing expert disclosure rule provide that, if requested by interrogatory, a party shall identify the expert witnesses it expects to call and "state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."[87] Further discovery can be requested upon motion.[88] There are two principal differences with the New York rule. First, there is no need to show "special circumstances" in order to get additional discovery[89] (a showing of "exceptional circumstances" is required for discovery of the facts and opinions of non-testifying experts).[90] Second, the Delaware rules explicitly state that an interrogatory requesting expert disclosure must be responded to within 30 days of service.[91]

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[84] Report of the Civil Rules Advisory Committee (June 15, 2009 revision) at 2.

[85] Fed. R. Civ. P. 26(a)(2).

[86] Fed. R. Civ. P. 26(b)(4)(A).

[87] Court of Chancery Rule 26(b)(4)(A).

[88] Court of Chancery Rule 26(b)(4)(A).

[89] Court of Chancery Rule 26(b)(4)(A).

[90] Court of Chancery Rule 26(b)(4)(B).

[91] Court of Chancery Rule 33(b)(3).

Effective May 1, 2010, a new division in New Castle County, Delaware known as the Complex Commercial Litigation Division was established with jurisdiction over commercial controversies exceeding $1 million.[92] The Complex Commercial Litigation Division of Delaware has issued a standard protocol for expert discovery that provides for depositions of expert witnesses as well as disclosure beyond that which is required by Chancery Court Rule 26(b).[93] Under this protocol, prior to the expert's deposition, a party must identify the documents reviewed by the expert and produce certain documents relied upon by the expert, including third-party documents not produced, documents with no common Bates numbering, documents prepared by a non-testifying expert relied upon by testifying expert, all publications relied upon by testifying expert, the expert's C.V., and a list of cases, administrative matters or other proceedings in which the expert has given trial or other testimony in public within last four years.[94]

VI. RECOMMENDATION

The measures taken by litigants and courts to address current limitations of expert disclosure in commercial cases will not result in the predictability and efficiency that the Commercial Division was established to create. There are numerous examples where inadequacies in our procedural rules have been addressed in order to maintain predictability and efficiency in the Commercial Division. The recent progressive steps to improve electronic

[92] Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3, Complex Commercial Litigation Division.

[93] Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3, Complex Commercial Litigation Division, Sample Case Management Order, Exhibit A.2 Protocol for Expert Discovery.

[94] Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3, Complex Commercial Litigation Division, Sample Case Management Order, Exhibit A.2 Protocol for Expert Discovery.

discovery ("e-discovery") in New York is but one example. In response to the July 2006 Report on the Commercial Division Focus Groups there was a concerted effort to improve e-discovery in commercial litigation.[95] After an extensive review of the issue, various recommendations were implemented to improve the management and resolution of e-discovery issues in all state courts.[96]

Treatises, articles, and practitioners have acknowledged there is a problem with applying the current expert disclosure rule to commercial cases. In the same Focus Group Report where e-discovery was addressed, practitioners "cited the lack of expert discovery as a reason to use other forums", and "that it was of interest to their clients to be able to conduct meaningful and appropriate expert discovery".[97] Furthermore, the Advisory Committee on Civil Practice has consistently advocated for a change to Section 3101(d)(1)(i) for commercial actions in which the amount in controversy is $250,000 or more.[98]

A. Proposed Rule

To address the concerns set forth above,[99] we recommend that new language be added to the Commercial Division Uniform Rules or that Individual Commercial Division judges

[95] Haig § 1.7; *see* A Report to Chief Judge and Chief Administrative Judge, Electronic Discovery in the New York State Courts (Feb. 2010).

[96] Haig § 1.7; *see* A Report to Chief Judge and Chief Administrative Judge, Electronic Discovery in the New York State Courts (Feb. 2010).

[97] Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups, at 18 (July 2006).

[98] Proposal in Reports of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York, 2010 - 2004.

[99] The most significant arguments against this proposal will likely concern the time and expense added to the litigation process by expanding expert disclosure. There are unlikely to be many new costs since, for example, commercial litigants typically retain an expert early in the litigation and prepare expert reports regardless of whether they are to be disclosed. Any additional time spent preparing the disclosure will be outweighed by the increase in efficiency.

adopt the rule as part of their local rules. We believe that this new rule should reflect some of the steps already implemented in Individual Practices and Preliminary Conference forms in the Commercial Division.[100] Specifically, we recommend modifying Uniform Rule 8 to require parties to discuss the scope and timing of expert disclosure in preparation for and at the Preliminary Conference. We also recommend adoption of a new rule *for Commercial Division cases only* that states:

> If any party intends to introduce expert testimony at trial, no later than thirty 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 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, expert disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
>
> > (A) a complete statement of all opinions the witness will express and the basis and the reasons for them;
> > (B) the data or other information 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.

[100] *See* Section IV.B., *supra*.

While we advise that the rule be adopted across the Commercial Division, we recognize that certain caveats may be desirable. Like the monetary thresholds of the Commercial Division,[101] this rule could be limited to actions in which the amount in controversy exceeds a certain threshold – such as $250,000.

B. Two Proposed Implementations

1. *Commercial Division Uniform Rule*

We recommend that the Chief Administrative Judge promulgate the proposed rule and believe that a Commercial Division Uniform Rule would provide the consistency and predictability that would be beneficial to commercial practice. The Chief Administrative Judge has the authority to promulgate rules for the Commercial Division.[102] The rules may impose additional or specific procedural requirements when the CPLR is silent on a certain issue,[103] but any such rule must be construed consistently with the CPLR.[104] Similar to the rules promulgated regarding expert disclosure in matrimonial actions,[105] the Chief Administrative Judge should promulgate the proposed rule for the Commercial Division. Commercial actions, similar to matrimonial actions, encompass a limited category of actions requiring specialized procedures to address their unique nature.

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[101] 22 N.Y.C.R.R. § 202.70(a).

[102] The authority of the Chief Administrative Judge to promulgate rules regulating practice is derived from Article VI, §§ 28, 30 of the New York Constitution and Judiciary Law §§ 211, 212(2)(d). *See also* 22 N.Y.C.R.R.§ 202.70.

[103] *See* 1 Weinstein, Korn & Miller, N.Y. CIVIL PRACTICE: C.P.L.R. ¶ Intro.01(6)(a) ("The Uniform Rules for the New York State Trial Courts and the other court-specific rules provide a level of detail about practice in the courts that would be inappropriate in the CPLR and impracticable to frequent legislative action.").

[104] *See* N.Y. C.P.L.R. § 101; 22 N.Y.C.R.R. § 202.1(d).

[105] 22 N.Y.C.R.R. § 202.16(g).

2. *Individual Practices or Local Court Rule*

In the alternative, we propose that the individual Commercial Division justices exercise their authority and promulgate the proposed rule. As described above, individual courts have already begun to provide rules for expert disclosure.[106] The New York Constitution expressly states that it does not prohibit individual courts from adopting rules that are "consistent with the general practice and procedure as provided by statute or general rules."[107] The NYCRR also authorizes the practice, stating that "local court rules, not inconsistent with law [including the CPLR[108]] or with the rules contained in Part 202," can be adopted so long as they comply with part 9 of the Rules of the Chief Judge.[109] In addition to the judiciary's delegated power to enact formal procedural rules, it is well accepted that courts also possess inherent authority "to do that which is necessary to ensure the integrity of the proceedings over which they preside."[110] Courts are authorized to promulgate rules on a certain issues pursuant to inherent authority when applicable constitutions, existing statutes, and binding precedent are silent on the issue.[111]

VII. THE PROPOSAL IS CONSISTENT WITH THE CPLR

The CPLR governs the procedure "in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."[112]

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[106] Connors, Patrick M., 7B McKinneys Civil Practice Law and Rules § 3101, C:3101:29A (2010 Supplemental Practice Commentaries).

[107] See N.Y. CONST. art. VI, § 30.

[108] Local rules must be construed consistently with the CPLR. *See* N.Y. C.P.L.R. 101.

[109] 22 N.Y.C.R.R. § 202.1(c). Part 9 of the Rules of the Chief Judge simply address the ministerial filing and publication of local rules and regulations. 22 NY ADC 9.1.

[110] *See Alvarez v. Snyder*, 264 A.D.2d 27, 35, 702 N.Y.S.2d 5, 12–13 (1st Dep't 2000).

[111] *See Alvarez*, 264 A.D.2d at 35, 702 N.Y.S.2d at 12–13

[112] N.Y. C.P.L.R. § 101.

Courts of general jurisdiction cannot supersede the CPLR.[113] However, rules that supplement the CPLR are permissible.

Courts have not yet squarely dealt with how expert disclosure in commercial cases is limited by Section 3101(d)(1). Given the important policy considerations set forth in this report, we believe that a supplemental rule tailored specifically to the needs of the Commercial Division can be reconciled with Section 3101(d)(1). As noted in Section IV.B., both court rules and practitioners have fashioned extensive expert disclosure rules in line with the needs of commercial cases and the appellate division has provided the trial courts with a great deal of discretion when it comes to crafting appropriate expert disclosure rules and remedies.[114] Section 3101(d)(1)(i) and the appellate case law are silent as to what the appropriate "reasonabl[y] detail[ed]" expert disclosure would be in commercial cases, and the Chief Administrator or a local court may propose the standard reasonable detail for commercial cases. "CPLR § 3101(d)(1)(iii) provides the court general discretion to order further disclosure regarding expert testimony in any case"[115] and the appellate case law on "special circumstances" does not foreclose recognizing the unique set of cases arising in the Commercial Division as a "special circumstance".[116] Just as matrimonial actions are governed by expert disclosure rules particular to matrimonial practice, Commercial Division cases may tailor expert disclosure rules to their

[113] *See Ling Ling Yung v. Cnty. of Nassau*, 77 N.Y.2d 568, 571, 569 N.Y.S.2d 361, 362, 571 N.E.2d 669, 671 (1991); *see also Sharratt v. Hickey*, 298 A.D.2d 956, 957, 748 N.Y.S.2d 112, 113 (4th Dep't 2002).

[114] *Compare Construction by Singletree Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702, 704 (2d Dep't 2008); *Browne v. Smith*, 65 A.D.3d 996, 997, 886 N.Y.S.2d 696, 697 (2d Dep't 2009)

[115] *New York Civil Practice: CPLR*, Weinstein, Korn & Miller, at 31-158 (2d Ed 2010); *see also Kavanagh v. Odgen Allied Maintence Corp.*, 92 N.Y.2d 952 (1998).

[116] We have not found a case that has held that the complexity or nature of the case is insufficient to constitute a "special circumstance" that warrants further disclosure.

unique and specific needs. To that end, the proposed rule expressly provides that any party may object to enhanced expert disclosure and request a conference with the court if it believes that enhanced disclosure may not be warranted under the circumstances of an individual case.

CONCLUSION

The New York Commercial Division is a leader in reform and innovation. Unfortunately, the general expert disclosure rule set forth in Section 3101(d) was not designed with the Commercial Division in mind; in fact, it was drafted before New York even had created a Commercial Division. Moreover, Section 3101(d) was crafted at a time when experts were not such meaningful participants in commercial litigation. We respectfully submit that the enhanced expert disclosure rules are critical to ensure that the Commercial Division continues to promote efficiency, predictability, and reliability, and ameliorate the current situation in which practitioners in the Commercial Division face expert disclosure limitations that make litigating in New York substantially less desirable than bringing the same case to federal court or Delaware. Accordingly, we believe that the proposed rule should be adopted as soon as practicable.