
LITIGATION NEWS

THE NEW YORK LAW JOURNAL

VOLUME 228
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TUESDAY, OCTOBER 15, 2002

NEED FOR EXPERTS IN DIVORCE INTENSIFIES
Defending Against Improper Forays Into Discovery
of the Witness' Testimony Is Critical

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*To secure ourselves against defeat lies in our own hands,
but the opportunity of defeating the enemy is provided by the
enemy himself.*

-Sun Tzu (The Art of War).

From O'Brien to Hartog to McSparron to Hougie to Grunfeld,^[1] the landmark matrimonial decisions of the past 20 years are synonymous not only with groundbreaking redefinitions and refinements to the law on equitable distribution, but are in and of themselves responsible for cementing the formidable, and now nearly indispensable role of the valuation expert.

Over the past two decades the role of expert testimony has gained immense significance in sorting out the contentious intricacies of divorce. As matrimonial cases have become progressively more complicated, the use of, and practical need for experts has intensified.^[2] Ill-preparedness on the expert front has brought unfortunate results to many a claimant bearing the burden of determining the value of the marital estate.^[3] Whether the issue is the appraisal of real estate, business valuation, forensic accounting or taxation, achieving success demands the careful utilization of discovery tools as they affect the expert and thorough presentation at trial.

Potent Value of CPLR ' 3101

Often underutilized, CPLR ' 3101(d)(i) is as effective a shield as it is a sword in expert and trial preparation.

CPLR ' 3101(d)(i) requires a party, within 20 days of receiving such notice, to identify each person it 'expects to call as an expert witness at trial,' and then enumerates the disclosure that is

permitted.[4] Each party must disclose, with as reasonable an amount of detail as is available at the time the demand is made (and would be wise to update all responses as additional information becomes available[5]) the subject matter on which each and every 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 (traditionally a c.v. will do), along with a summary of the grounds for each expert's opinion. CPLR ' 3101(d)(i). That is the extent of knowledge to which the adversary is entitled; and that is exactly what he/she should get. No more, no less.

Neither the deposition of the expert(s) nor documentary discovery is on the list of entitlements.[6] Indeed, although an individual has been identified, as an expert there is no certainty and certainly no requirement that the particular individual will ultimately be utilized as a trial expert. The adversary will just have to wait until there is compliance with 22 NYCRR 202.16(g).[7]

Often a zealous adversary will wittingly or unwittingly run afoul of the boundaries purposely afforded expert discovery. In so doing, they will attempt to breach the sanctity of relationships with trial consultants/experts and in all likelihood tread upon the exclusions and immunities provided in CPLR ' 3101(c) and (d)(2) - attorney work product, and material prepared for litigation, as well as the 'mental impressions' exclusion of CPLR ' 3101(d)(2).

CPLR ' ' 3101(c) and 3101(d)(2) accord immunity from discovery to the work product of an attorney and his agents and their materials prepared for litigation. Indeed, CPLR ' 3101(d)(2) expressly mandates that the court 'shall protect against the disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.' Work product - the interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, strategies, analyses, research, notes, documents including the work product of those upon which the practitioner relies in preparing a case for trial and those who act at counsel's direction and who are adjuncts to the attorney's strategic thought processes - are beyond the scope of disclosure.[8]

To be sure, there are at times special circumstances that warrant discovery of a party's experts; however, those occasions are few and far between.

The 'special circumstances' requirement of CPLR ' 3101(d)(1)(iii) is a purposeful step - put in place to prevent mischief, harassment and unnecessary imposition upon the expert that could potentially occur. As noted earlier, CPLR ' 3101(d)(1)(i) explicitly provides the scope of expert disclosure permissible upon mere notice. Further disclosure may be obtained under subdivision (d)(1)(iii) only by court order based upon a showing of special circumstances.[9] Bald allegations typically proffered on the face of third-party subpoenas, that the information sought is 'relevant and material,' are insufficient. It must be shown that information sought cannot be discovered from other sources or is otherwise unavailable and is necessary to prepare for trial.[10]

The onus is upon the party seeking the disclosure. If he wants to take an expert's deposition, obtain copies of preliminary or final reports written by the expert, review materials compiled by the expert, he must move for such relief under subdivision (d)(1)(iii).[11] Where there is no showing of

special circumstances - where the adversary has not and cannot meet his burden of demonstrating, with specific support, his claim that the deposition and document production sought from the previously identified expert is necessary because of the uniqueness of the information sought - then the discovery desired must be denied.[12]

Clearly, on the one hand the stratagem is to limit the exposure of the expert pre-trial. On the other hand there are sanctions, indeed harsh consequences, for failure to disclose sufficient expert information. In *Corning v. Carlin*, [13] a legal malpractice case, where plaintiff failed to show good cause as to why she did not retain her expert until the eve of trial, and then did not disclose the existence of the expert until after opening statements, the court properly issued an order of preclusion, preventing the expert from testifying. [14]

As discussed in *Corning*, the 'for good cause shown' clause of CPLR ' 3101(d)(1) does provide a modicum of help. This clause expressly states that where a party, 'for good cause shown,' fails to retain an expert until just before the commencement of trial, thereby interfering with the ability to give appropriate notice concerning the expert, the party shall not thereupon be precluded from introducing the expert's testimony at trial solely on grounds of noncompliance with the statute.

To be sure, expert witness testimony has been stricken, due to the failure to properly comply with a properly noticed demand for exchange of expert information. In *Vincinanzo v. Vincinanzo*,[15] for example, the wife had, prior to trial, fully disclosed in accordance with CPLR ' 3101(d); the husband however, blatantly failed to do so. The trial court refused to consider the opinion of the husband's expert on the value of the husband's law practice because of his failure to comply with the statute. The appellate court affirmed the use of the trial court's discretion to do so.

In *Kaprelian v. Kaprelian*, 236 A.D.2d 369, 653 N.Y.S.2d 634 (2d Dept. 1997), it was held that the trial court properly precluded testimony from the wife's actuarial expert, because of her failure to file a CPLR ' 3101(d)(1) statement (despite due demand for such), and because of her failure to advise plaintiff that she intended to present an actuary until the commencement of the trial. To make things worse for Mrs. Kaprelian her attorney had purportedly represented to the court on numerous occasions that the value of the annuity in issue had been resolved.[16] In *Myers v. Myers*, 255 A.D.2d 711, 680 N.Y.S.2d 690 (3d Dept. 1998), the trial court was found to have properly precluded the testimony of three out of the defendant's four proposed experts due to her 11th hour service of her notice of expert witnesses.

Consequences of Failure of Proof

Expert disclosure having been made, the trial begins. But what if the proofs fail? Clearly, the trial court in a matrimonial action cannot distribute property without arriving at some determination of its value.[17] Is the judge to substitute his/her discretion?

There are numerous possibilities where there is a failure or omission of proof or confusion of proof on valuation. Famously, Golub v. Golub, 139 Misc. 2d 440, 527 N.Y.S.2d 946 (Sup. Ct. N.Y. Co. 1988) actress/model /businesswoman Marisa Berenson's husband focused on securing a piece of her celebrity in equitable distribution, but (it is said) failed to offer testimony as to the monetary value of her profession or business dealings. In Elkus v. Elkus, 169 A.D.2d 134, 572 N.Y.S.2d 901 (1st Dept. 1991) a lager-head of expert testimony preceded the quiet settlement prior to final judgment. In Semans v. Semans, 199 A.D.2d 790, 605 N.Y.S.2d 510 (3d Dept. 1993), the trial court awarded the wife a distributive share of the value of the husband's masters degree in science; however, the appellate court reversed, questioned the expert's testimony/opinion, and pointed out that the expert had admitted that it was the husband's supervisory position, and not the masters degree, that had resulted in the enhancement of his earnings. The appellate court, having determined the expert's opinion to have been severely flawed then eliminated the award upon a finding that there was no other evidence upon which to base the value of the degree.

In Reingold v. Reingold, 143 A.D.2d 126, 531 N.Y.S.2d 585 (2d Dept. 1988), the husband offered no proof disputing his wife's proof on the value of the parties' silverware - so all that he received was a \$250 credit. In Morales v. Morales, 230 A.D.2d 895, 646 N.Y.S.2d 884 (2d Dept. 1996), the court rejected the testimony of the wife's expert where it was determined to be 'fatally flawed' in that 'the logic manifest in the analysis of the wife's expert resulted in a speculative valuation which was not founded in economic reality.'

In many instances, ignoring the valuation of property especially when representing the spouse who was not in physical possession can result in the judge ignoring the distribution or credit issue since there has been no legitimate testimony as to value.[18]

In some situations the court will substitute its own discretion or approximate the value;[19] or determine that a waiver of the claim has taken place.[20] The court may order a physical division,[21] or order a remitter.[22] The court may even choose to rely on the testimony of a party or other lay witness,[23] or utilize party admissions as contained in net worth statements, prior sworn testimony, loan applications, even counsel's representations to the court. Fassett v. Fassett, 101 AD.2d 604 (3d Dept. 1984) is a prime example where the court utilized estimates of value contained in financial disclosure affidavits as the basis for the value of the business in issue.

Properly preparing for, and defending against improper forays into disclosure of expert witness testimony is critical to the success of the matrimonial practitioner at trial.

FN[1] O'Brien v. O'Brien, 66 N.Y.2d 576, 488 N.Y.S.2d 743 (1985); Hartog v. Hartog, 85 N.Y.2d 36, 623 N.Y.S.2d 537 (1995); McSparron v. McSparron, 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995); Hougie v. Hougie, 261 A.D.2d 161, 689 N.Y.S.2d 490 (1st Dept. 1998); Grunfeld v. Grunfeld, 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000).

FN[2] Valuation is an exercise properly within the fact-finding power of the trial courts, guided by expert testimony. Burns v. Burns, 84 N.Y.2d 369, 618 N.Y.S.2d 761 (1994).

FN[3] See, e.g., Capasso v. Capasso, 119 A.D.2d 268, 506 N.Y.S.2d (1st Dept. 1986).

FN[4] In pertinent part, the statute provides: (d) Trial Preparation 1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just ... (iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate...

FN[5] The demand is ongoing, requiring disclosure the identity of the expert promptly upon the expert's retention. Dunn v. Medina Metropolitan Hospital, 131 Misc. 2d 971, 502 N.Y.S.2d 633 (Sup. Ct., Erie Co., 1986), Corning v. Carlin, 178 A.D.2d 576, 577 N.Y.S.2d 474 (2d Dept. 1991).

FN[6] CPLR ' 3101 (d) (iii) specifically states that '... disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances.' The bare assertion of special circumstances is insufficient. There must be uniqueness to the information sought, and singular necessity of the evidence for which there is no alternative or replacement. Hallahan v. Ashland Chemical, 237 A.D.2d 697, 654 N.Y.S.2d 443 (3d Dept. 1997); Mead v. Benjamin, 201 A.D.2d 796, 607 N.Y.S.2d 472 (3d Dept. 1994).

FN[7] 22 N.Y.C.R.R. ' 202.16[g] requires the exchange of expert reports sixty days prior to trial.

FN[8] Holmes v. Weissman, 251A.D.2d 1078, 674 N.Y.S.2d 215 (4th Dept. 1998); Matter of Rosalie S., 172 Misc.2d 176, 657 N.Y.S.2d 131 (Sup. Ct. Kings Co., 1997) psychologist's report prepared to assist respondent's attorney in a proceeding to extend foster care placement where respondent's mental health was in controversy, was not subject to disclosure as a part of the attorney's work product and as material prepared for litigation.

FN[9] Russo v. Quincy Mutual Fire Insurance Co., 256 A.D.2d 1164, 683 N.Y.S.2d 445 (4th Dept. 1998).

FN[10] Michalak v. Venticinque, 222 A.D.2d 1060, 635 N.Y.S.2d 875 (4th Dept. 1995).

FN[11] Hallahan v. Ashland Chemical, 237 A.D.2d 697, 654 N.Y.S.2d 443 (3d Dept. 1997).

FN[12] North Shore Towers v. Zurich Insurance Company, 262 A.D.2d 468 691 N.Y.S.2d 327 (2d Dept. 1999); King Electronics v. American National Fire Ins. Co., 232 A.D.2d 273, 648 N.Y.S.2d 302 (1st Dept. 1996).

FN[13] Corning v. Carlin, 178 A.D.2d 576, 577 N.Y.S.2d 474 (2d Dept. 1991) .

FN[14] Similarly, in Hodge v. Pilch, N.Y.L.J., Dec. 3, 1990 , p. 31 col. 4 (Sup. Ct., Dutchess Co.) an order of preclusion was issued, preventing the use of the expert or his report at the trial.

FN[15] 193 A.D.2d 962, 598 N.Y.S.2d 362 (3d Dept. 1993).

FN[16] See also, Katzman v. Katzman, 284 A.D.2d 160, 725 N.Y.S.2d 849 (1st Dept. 2001), and in Gadomski v. Gadomski, 245 A.D.2d 579, 664 N.Y.S.2d 886 (3d Dept. 1997) where the claimed deficiencies in proof were of the Husband's own making.

FN[17] Niles v. Niles, 126 AD2d 874 (3d Dept. 1987); Michalek v. Michalek, 114 AD2d 655 (3d Dept. 1985), app. den. 69 NY2d 602; Rogers v. Rogers, 98 AD2d 386 (2d Dept. 1983).

FN[18] Moller v. Moller, 188 AD2d 807 (3d Dept. 1992); Cassano v. Cassano, 111 AD2d 208 (2d Dept. 1985).

FN[19] Ward v. Ward, 94 AD2d 908 (3d Dept. 1983); Nahorayoff v. Nahorayoff, 108 Misc. 2d 311.

FN[20] Davis v. Davis, 128 AD2d 470, 513 N.Y.S.2d 405 (1st Dept. 1987).

FN[21] VanHousen v. VanHousen, 114 A.D.2d 411, 494 N.Y.S.2d 135(2d Dept. 1985).

FN[22] Largiader v. Largiader, 151 AD2d 724 , 542 N.Y.S.2d 789 (3d Dept. 1989).

FN[23] Del Vecchio v. Del Vecchio, 131 A.D.2d 536, 516 N.Y.S.2d 700 (2d Dept. 1987).

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