

## New York State Civil

### 1. Timing of Expert Disclosure

- a. **3101(d)(1)(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.
  - i. 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.
  - ii. Upon motion made by either party, before or during trial, or on its own initiative, the court may make whatever order may be just.
- b. **Issues that can arise:**
  - i. When a party does not respond to numerous discovery demands regarding the expert witness.
  - ii. Intentionally withholding disclosure of witness.
  - iii. Evidence (or lack thereof) that party is injured due to the delay.

### 2. Discovery Issues

- a. **Expert Report/What must be disclosed –**
  - i. **Barrowman v. Niagara Mohawk Power Corp.**, 675 N.Y.S.2d 734, N.Y.App.Div.4.Dept.,1998: Party is not obligated under statute governing disclosure of expert witnesses to disclose his expert's report; rather, such statute provides for disclosure in reasonable detail of subject matter on which expert is expected to testify and a summary of grounds for expert's opinion. Report of expert witness constitutes material prepared for litigation and is not subject to disclosure unless party seeking disclosure has substantial need for the report and is unable without undue hardship to obtain its substantial equivalent by other means.
- b. **Consulting v. Testifying –**
  - i. **Delta Financial Corp. v. Morrison**, 14 Misc.3d 428, 827 N.Y.S.2d 601, N.Y.Sup.,2006: Even if litigation consultant were designated as an expert to testify at trial, statute requiring the limited production of information regarding qualifications of the expert, the subject matter of the expert's testimony, the substance of the fact, and opinion on which the expert is expected to testify, and summary of the grounds for the expert's opinion, would not require disclosure of privileged documents that had been either created as a result of counsel's retention of litigation consultant or communications made in furtherance of that retention.
- c. **Deposing of Expert Witnesses –** Under 3101(a)(4) – Expert depositions are not permitted in New York State court except where one obtains a court order upon a showing of "special circumstances.

- i. The special circumstances that render the taking of such a deposition proper are not specified in the statute, and it is therefore left to the sound judicial discretion of the court, depending upon the facts of the particular case, to determine whether such special circumstances exist.
- ii. The courts have adopted a liberal construction of the words “special circumstances.”
- iii. Usually, there must be a demonstration supported by evidence or some factual background statement showing materiality or necessity of the examination, and not a naked or unsupported assertion.
- iv. Special circumstances are not established merely upon a showing that the information sought is relevant. Rather, special circumstances are shown by establishing that the information sought cannot be obtained through other sources.

3. Privilege Issues

a. **Preserving/Destroying Inadvertently Disclosed Information –**

- i. **Rosario v. General Motors Corp**, 148 A.D.2d 108, 543 N.Y.S.2d 974, N.Y.A.D. 1 Dept.,1989: When material physical evidence is inspected by expert for one side and then lost or destroyed before other side has had opportunity to conduct its own expert inspection, special circumstance exists that per se warrants disclosure directly from expert concerning facts surrounding his inspection.

b. **Work Product –**

- i. **Delta Financial Corp. v. Morrison**: same cite and information above.

4. What is Expert Testimony?

a. **Gatekeeper –**

- b. **Frye v. U.S. 54 App.D.C. 46, 293 F. 1013.**: Provides that expert opinion based on a scientific technique is admissible only where the technique is generally accepted as reliable in the relevant scientific community.
- c. **Daubert** and **Kumho Tire** have emphasized the role of the trial judge as gatekeeper in determining the admissibility of expert testimony. New York state courts have continued to rely on the Frye standard but may also invoke Daubert. Nevertheless, the debate will continue on the importance, necessity and impact of utilizing Daubert, Kumho and Frye in determining the admissibility of proposed expert testimony.