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Advocate's VIEW

Additional quirks of practicing in New York

In the last Advocate's View article, my colleague Stacey Trien offered her perspective as an experienced Florida litigator who recently began practicing in New York. This article continues Ms. Trien's theme of highlighting some of the more unusual aspects of New York law that are not always apparent to new practitioners.

The Article 31 demand

CPLR 3101 states that a party can "obtain" copies of his own statement, insurance policies that may cover a judgment, accident reports and relevant films, photographs, videotapes and audiotapes. But CPLR 3101 does not provide a mechanism for requesting these materials. Parties commonly serve an "Article 31 Demand" that requests the materials listed in CPLR 3101, but is not issued pursuant to any particular CPLR provision.

The Article 31 Demand is not a statewide phenomenon. I never saw an Article 31 Demand when I practiced downstate. Instead, parties requested CPLR 3101 materials through notices to produce served under CPLR 3120. Since moving to Rochester, I have seen Article 31 Demands served in nearly every case without objection, even where some of the requested materials clearly did not exist (such as accident reports in cases that did not involve accidents).

By JEREMY M. SHER
Daily Record Columnist

The never-ending deposition

The CPLR imposes no limit on the length or number of depositions, and witnesses typically must answer all of the examiner's questions. The Uniform Rules for the Conduct of Depositions only permit a deposition witness to refuse to answer a question in order to preserve a privilege or right of confidentiality, enforce a court order limiting the deposition, or resist a question that is "plainly improper" and would "cause significant prejudice," 22 NYCRR § 221.2. As long as an examining attorney asks questions that have some bearing on the case, he can question the witness indefinitely.

A witness subjected to an excessively long deposition can move for a protective order. The CPLR appears to anticipate that parties and witnesses will determine the length of depositions informally, and go to the court when they disagree. The problem with this theory is that an attorney who plans to depose a witness for a long time – or simply ends up questioning the witness for longer than expected because the witness has a lot to say, offers unexpected testimony, is evasive, or brings several documents to the deposition – usually does not open the deposition by stating that it will take three days. Instead, the defending attorney might only discover that a deposition will continue for multiple days when the first day of questioning ends.

Stopping a deposition to seek a protective order is a risky decision that can upset discovery deadlines, irritate the judge, and inconvenience other parties. These downsides to unlimited depositions under the CPLR might explain why the Commercial Division instituted its own set of deposition rules, discussed below.

The walled-off expert

CPLR 3101(a) promises "full disclosure of all matter material and necessary in the prosecution or defense of an action," but parties receive much less than full disclosure when it comes to experts. While parties must identify their experts "[u]pon request" and summarize their opinions and qualifications, any other discovery concerning experts "may be obtained only by court order upon a showing of special circumstances," CPLR 3101(d)(1)(i), (d)(1)(iii).

This means that the standard tools for taking pretrial discovery from a non-party witness – subpoenas for documents and testimony – are unavailable when it comes to experts. In fact, the CPLR does not clearly state that experts must produce reports prior to trial.

Since experts are essentially excluded from pretrial discovery, a party who wants to obtain an expert's file usually has to rely on

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a trial subpoena. Trial subpoenas are a problematic solution, as trials make a poor setting for resolving discovery disputes. Restricting expert discovery to trials also defeats the purpose of the pre-trial Note of Issue, which supposedly confirms that all discovery is complete.

It is difficult to reconcile the CPLR's narrow view of expert discovery with "New York's policy of permitting open and far-reaching pretrial discovery," *Kavanagh v. Ogden Allied Maint. Corp.*, 92 NY2d 952, 954 (1998) (internal quotation marks omitted). Given the pivotal role that experts play, parties should have an opportunity to question experts and obtain their non-privileged documents – including their reports – prior to trial.

The commercial division's separate set of discovery rules

In the last two years, the chief administrative judge has dramatically reformed discovery in the Commercial Division. New Commercial Division rules restrict the number of depositions per side to 10, cap the length of depositions at seven hours, limit the number and scope of interrogatories, and provide instruction on exchanging privilege logs as well as obtaining electronic discovery from non-parties, see Comm. Div. R. 11-a, 11-b, 11-c, 11-d, 11-e.

Practice in the Commercial Division is now more like practice in federal court, specifically the Southern District of New York, which shares the same limitation on the scope of interrogatories, see Fed. R. Civ. P. 30(a)(2)(A)(i) and (d)(1) (imposing the same restrictions on the number and length of depositions), 33(a)(1) (limiting number of interrogatories); Local SDNY Civ. R. 33.3 (limiting the scope of interrogatories to the names of witnesses, the computation of damages, and a general description of relevant documents).

The Commercial Division Rules require parties who will introduce expert testimony to produce expert reports. The rules also suggest that the parties agree to expert depositions, and go to the court if they cannot agree, see Comm. Div. R. 13(c).

The new Commercial Division Rules resolve many persistent problems in New York discovery, such as uncertainty regarding the length of depositions, opaque expert disclosure, and poorly-phrased interrogatories that produce nothing but lawyerly objections. The new rules' existence is likely due to the fact that the chief administrative judge could implement them without action by the state legislature – unlike changing the CPLR.

The downside to these new rules is that they broaden the difference between practice inside and outside of the Commercial Division. Cases that do not qualify as "commercial," do not meet the amount-in-controversy threshold (which ranges as high as $500,000 in New York County), or are venued in a county that does not have a Commercial Division, do not benefit from the new Commercial Division rules. This distinction may be the biggest New York practice quirk of all.

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