Expert disclosure in New York State-Court Practice.

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I. Summary

New York state-court practice regarding expert disclosure is limited in comparison to federal court practice. New York state-court practice requires only that, upon request, a party (a) identify experts who may be called to testify at trial, (b) provide the expert's qualifications, and (c) provide a reasonably detailed summary of the subject matter, facts, and opinions as to which the expert will testify. Disclosure is thus required only of litigation experts to be called at trial; no disclosure is required of consulting experts. And no further disclosure of testifying experts is permitted absent a court order upon a showing of extraordinary circumstances; more specifically, no reports are disclosed and no depositions are conducted; that is, absent court order, the experts' reports are not exchanged and no depositions are held.

Different rules apply to treating and examining health care professionals, however, and the rules differ depending on whether they are plaintiff's professionals or defendant's:

- Plaintiff does not have to provide expert disclosure as to plaintiff's treating health care professionals because they are deemed to be fact witnesses. But plaintiff is required to provide authorizations for and copies of all relevant treating records. And plaintiff must provide copies of reports of any examinations plaintiff has undergone, e.g., for workers' compensation or no-fault benefits.

- Defendant who has plaintiff examined by a health care professional must provide not only the CPLR 3101(d)(1) disclosure as to the examining professional but also a copy of the report. Plaintiff may subpoena defendant's examining professional to testify as part of plaintiff's case in chief. If defendant does not call his/her/its examining healthcare professional to testify at trial, defendant is subject to a missing witness charge. Defendant who obtains copies of plaintiff's hospital records must provide plaintiff with a copy free of charge, but in the Fourth Department may require plaintiff to share in the cost of obtaining and to pay the copying costs for records from other providers and professionals.

Scope of this outline: This outline discusses (1) the general rules on expert disclosure, omitting any reference to special rules that apply to experts in medical malpractice; (2) specific rules that apply to treating and examining health care professionals; and (3) the mechanics of moving to challenge an opponent's expert disclosure and to prevent or limit the opponent's expert testimony. Other presenters' outlines will discuss the expert disclosure rules in federal court

practice and the substantive law on *Frye* hearings in state court practice and *Daubert* hearings in federal court practice.

II. General rule for expert disclosure

Expert disclosure in New York state-court practice is governed by CPLR 3101(d)(1) and supplemented by CPLR 3101(d)(2). Without the provisions that pertain solely to medical malpractice, CPLR 3101(d) reads as follows:

> CPLR 3101
>
> (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 witness** 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.** . . .
>
> 2. Materials. Subject to the provisions of paragraph one of this subdivision, **materials** otherwise discoverable under subdivision (a) of this section and **prepared in anticipation of litigation or for trial** by or for another party, or **by or for that other party's representative (including** an attorney, **consultant**, surety, indemnitor, insurer or agent), may be **obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means**. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

CPLR 3101(d)(1)(i) and (iii) and 3101(d)(2) (bolding supplied).

A. Elements of sufficient expert disclosure

The elements for adequate expert disclosure are:

1. Upon request
2. The party shall identify
3. Each expert whom the party expects to call as an expert witness at trial.

4. The party shall disclose in reasonable detail
    a. the subject matter on which each expert is expected to testify,
    b. the substance of the facts and opinions on which each expert is expected to testify,
    c. a summary of the grounds for each expert's opinion, and
    d. the qualifications of each expert witness.

Missing from the rule are any definitive deadlines for expert disclosure. Supreme Court justices, however, have imposed their own rules, and the Third Judicial Districts (Albany County and environs) has a district-wide rule, but there is no rule across any of the Appellate Divisions.

The elements for adequate expert disclosure are discussed element by element below:

1. Upon request

Expert disclosure is conditioned upon there being a request for it. The request may stand alone as its own separate discovery demand, or it may be included in a discovery demand that is typically called "CPLR Omnibus Discovery Demand". CPLR omnibus discovery demands typically request information such as witnesses, the demanding party's statements, photographs, non-privileged accident reports, surveillance materials, insurance policies and proof of insurance coverage, medical and employment records as well as signed authorizations for obtaining those records, medical bills, and collateral source material.

The following is a typical demand for expert discovery:

> PLEASE TAKE NOTICE that pursuant to CPLR 3101(d)(1), [*name and procedural title of party from whom expert disclosure is sought*] is required to provide to the undersigned, within twenty days after service of this demand, the following information:
>
> [#]. A statement setting forth:
>
> a. the name and address of each and every person whom you expect to call as an expert witness at the trial of this action;
> b. in reasonable detail, the subject matter on which each expert is expected to testify;
> c. in reasonable detail the substance of the facts and opinions on which each such expert is expected to testify;
> d. the qualifications of each such expert; and
> e. a summary of the grounds for each such expert's opinion(s).
>
> . . .
>
> PLEASE TAKE FURTHER NOTICE that this is a continuing demand. Pursuant to CPLR 3101(h) you are required to amend or supplement any response previously given to this demand promptly upon obtaining information that the previous response was incorrect or incomplete when made, or that the previous response, though current and complete when made, no longer is correct and complete.

It is improper to use a demand for a bill of particulars as the vehicle for requesting expert disclosure: a demand for a bill of particulars seeks amplification of the opponent's pleading; it cannot be used to seek evidentiary material. *See, e.g., Coleman v Richards*, 138 A.D.2d 556 (2d

Dep't 1988). Although there is case law to the contrary permitting a bill of particulars to demand expert disclosure, it is better practice to separate the two.

The request for expert disclosure must be made before the note of issue is filed because the filing of the note of issue cuts off discovery. 22 NYCRR §202.21(b), par. 8 of the note of issue form. The timing for the response, however, is less certain as discussed below.

2. Shall identify

The expert's name is essential in all expert disclosure except in actions for medical malpractice, which as mentioned earlier is outside the scope of this outline. If the expert's address is requested, as it usually is, the address should be furnished. *Avila v. State*, 132 Misc. 2d 1068 (Ct. Cl. 1986) (personal injury plaintiffs were entitled to disclosure of: (1) address of any expert to be called by defendant, since such information was part of the identification mandated by statute, (2) each expert's occupation, field of specialization, years of experience, and (within witness's area of expertise) professional society or organizational membership, since such information was part of expert's "qualifications" under statute, and (3) identity of documents seen by each expert prior to formulation of his or her opinion (but only to degree that documents related to formation of expert's opinion), since such information was directly related to "facts" on which expert would testify and "summary of the grounds" on which opinion would be based under statute).

Expert disclosure is effected by either a formal response matching the format of the demand, or by letter. Regardless of the format, the disclosure is signed by the attorney, not the expert.

3. Each expert whom the party expects to call as an expert witness at trial

Only those experts who are to be used at trial (i.e., litigation experts) are subject to this disclosure. Consulting experts are protected from disclosure, a point that is reinforced by CPLR3101(d)(2) (which covers attorney work product and material prepared in anticipation with litigation). *See, e.g.*, *Santariga v. McCann*, 161 A.D.2d 320 (1st Dep't 1990) (defendant could not be required to disclose reports of consultant radiologist who reviewed plaintiff's diagnostic images, where radiologist would not be testifying at trial; the report was protected as attorney work product).

Expert witnesses are distinguishable from fact witnesses. CPLR 3101(d)(1) applies only to experts retained to give opinion testimony at trial, and not to treating physicians, other medical providers, or other fact witnesses. *Rook v. 60 Key Centre*, 239 A.D.2d 926 (4th Dep't 1997); *Wylie v Consolidated Rail Corp.*, 229 AD2d 966 (4th Dep't 1996); *Nesselbush v. Lockport Energy Assocs.*, 169 Misc. 2d 742 (Sup. Ct., Erie Co. 1996); See, also, *Sheppard v. Blitman/Atlas Bldg. Corp*., 288 A.D.2d 33 (1st Dep't 2001) (court properly permitted testimony of a union witness about the terms of plaintiff's pension plan, notwithstanding plaintiff's failure to disclose the identity of the witness prior to trial; the witness was a fact witness, not an expert.)

4. **Disclose in reasonable detail**
   a. **The subject matter on which each expert is expected to testify,**
   b. **the substance of the facts and opinions on which each expert is expected to testify, and**
   c. **a summary of the grounds for the expert's opinion.**

The key is the amount of detail that has to be provided to be deemed reasonable. There is no requirement to provide the expert's report. See, e.g., *Renucci v. Mercy Hosp.,* 124 A.D.2d 796 (2d Dep't 1986); *Pizzi v Muccia*, 127 A.D.2d 338 (3d Dep't 1987). But the devil is in the amount of detail that the disclosing party must provide in order to have provided enough.

The disclosure should identify the documents seen by each expert prior to formulation of his or her opinion (but only to the degree that the documents relate to the formation of the expert's opinion), since such information is directly related to "facts" on which expert will testify and the "summary of the grounds" on which opinion is based under statute. *Avila v. State,* 132 Misc. 2d 1068 (Ct. Cl. 1986) (personal injury plaintiffs were entitled to disclosure of (in pertinent part) the identity of documents seen by each expert prior to formulation of his or her opinion, but only to degree that documents related to formation of expert's opinion, since such information was directly related to "facts" on which expert would testify and "summary of the grounds" on which opinion would be based under statute).

The cases on this subject, and there are many, give few facts to support their holdings, but the following cases give some sense of the disclosure that was at issue:

The disclosure must cover all of the theories of liability that will be relied on. The expert cannot testify to new theories of liability that were not disclosed in the expert disclosure. *Durant v. Shuren,* 33 A.D.3d 843 (2d Dep't 2006) (new trial ordered in the interests of justice; plaintiff failed to show good cause for serving expert disclosure the day before trial that advanced a new theory of liability; the belated addition of a new and significantly different theory of recovery substantially prejudiced defendant because the substance of the expert's testimony was not readily discernible from the numerous and extremely generalized allegations set forth in the bill of particulars or from the statements in the plaintiffs' original expert disclosure).

The disclosure should set forth the nature and relevance of the expert's testimony. *Inwood Sec. Alarm, Inc. v. 606 Rest., Inc.,* 35 A.D.3d 194 (1st Dep't 2006) (plaintiff's expert disclosure failed to set forth the nature and relevance of the proposed expert testimony and plaintiff's offer of proof during trial disclosed a new theory of liability that went well beyond what defendants might reasonably have anticipated from the notice); *Dalrymple v. Koka*, 2 A.D.3d 769 (2d Dep't 2003) (plaintiffs were prejudiced when testimony of trial expert "was so far removed" from expert disclosure provided by defendant); *cf. Farrell v. Gelwan,* 30 A.D.3d 563 (2d Dep't 2006) (testimony of defendant's expert in medical malpractice action did not transcend the scope of information set forth in the applicable expert disclosure form or previously exchanged medical reports).

All the requester is entitled to is a statement of the "substance" of the facts and opinions the expert would testify to. A request that apparently sought a complete statement of the facts and

opinions was rejected as "excessively detailed". *Renucci v. Mercy Hosp.*, 124 A.D.2d 796 (2d Dep't 1986).

The date of the report does not need to be disclosed. *Pizzi v. Muccia*, 127 A.D.2d 338 (3d Dep't 1987) (in medical malpractice action, defendant was not entitled to disclosure of dates of reports prepared by plaintiffs' expert witnesses. CPLR 3101(d) permits disclosure only of the substance of experts' facts and opinions and a summary of grounds for their opinions, with the reports themselves being immune from disclosure as was case before the 1985 enactment of this provision).

d. The expert's qualifications

Disclosure of the expert's qualifications is satisfied by and effected by providing the expert's curriculum vitae and should include the expert's occupation, field of specialization, years of experience, and (within the witness's area of expertise) any professional society or organizational membership, since such information is part of the expert's "qualifications" under statute. *Avila v. State*, 132 Misc. 2d 1068 (Ct. Cl. 1986) (personal injury plaintiffs were entitled to disclosure of (in pertinent part) each expert's occupation, field of specialization, years of experience, and (within witness's area of expertise) professional society or organizational membership, since such information was part of expert's "qualifications" under this provision).

B. When expert disclosure is due

The only guidance CPLR 3101(d)(1)(i) offers as to the timing of expert exchange concerns exchanges that do not give "appropriate" notice. The rule is as follows:

> [W]here 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.

1. Elements of "appropriate notice"

a. Good cause for retaining expert too close to trial to give adequate notice

Although the rule speaks in terms of justifying the late retention of the expert as the reason for the late notice, many cases apply this rule to late notice without regard to when the expert was retained. The cases discussing "good cause" for giving late notice usually give only their conclusions with little or no facts of the underlying disclosure. But the cases discussed below disclose the following themes. The courts place the burden on the proffering party to justify the late disclosure. The courts frequently phrase their holdings in terms of whether the party's delay was intentional or a willful failure to provide disclosure. Not only must the late disclosure be explained but also the late retention of the expert where a party waited until two days before trial to retain a radiologist to review plaintiff's films. The courts look at the length of time between hiring the expert and disclosure of the expert's information: for example, waiting until three

weeks before trial to disclose an expert who had been retained six years earlier creates an inference of intentional withholding of the information. Courts dislike disclosure that is made a day or two before trial and *a fortiori* during trial that materially changes the theory of liability or supplies new information that prejudices the opponent or is materially different from the party's bill of particulars and other disclosure and therefore could not be expected. Courts will also look at the length of time between the demand for expert disclosure and the disclosure.

Late retention of the expert. Defendant showed good cause for the retention of an expert during trial, where the expert was retained in response to surprise testimony of a police officer adduced during defendant's cross-examination of the officer. *Simpson v. Bellew*, 161 A.D.2d 693 (2d Dep't 1990).

Defendant was rebuffed in his attempt to change his experts mid-trial after having disclosed other experts before trial, on the ground that the attempted change was made mid-trial and would have prejudiced plaintiff. *Gallagher v Gallagher* 93 A.D.3d 1311 (4th Dep't 2012).

Disclosure one day before trial of a radiologist whom defendants had retained two days before trial was held to be unreasonably late. Defendants offered no excuse for the late retention of the radiologist and plaintiffs were prejudiced by the late notice. The radiologist was going to testify that plaintiff's MRI showed degenerative changes rather than trauma, which was a new theory not previously disclosed and which the plaintiffs had no opportunity to prepare to rebut. *Caccioppoli v. City of New York*, 50 A.D.3d 1079 (2d Dep't 2008).

Defendant was precluded from calling different experts who would testify to newly raised defense theories whom defendant disclosed after 5 pm on the Friday before jury selection on the following Monday. Defendant was the sole defendant remaining in a medical malpractice action after the remaining defendants had settled. The trial had been adjourned several times during the settlement discussions. Defendant claimed that the late disclosure was justified by defendant's having to change trial attorneys at the last minute because his previous attorney had jointly represented one of the settling co-defendants and therefore had been conflicted out of representing the remaining defendant at trial. The First Department held that defendant's explanation was insufficient. *Lissak v. Cerabona*, 10 A.D.3d 308 (1st Dep't 2004).

Other timing issues: Waiting until three weeks before trial to disclose an expert who had been retained six years before trial raises an inference of intentionally withholding the information. *Kassis v. Teacher's Ins. & Annuity Ass'n*, 258 A.D.2d 271 (1st Dep't 1999).

Defendant's disclosing an expert on the eve of trial in response to a demand that plaintiff made seven years earlier required an adequate explanation which the defendant was unable to make. *Lyall v. City of New York*, 228 A.D.2d 566 (2d Dep't 1996).

Testimony that differed from the expert disclosure: The trial judge properly allowed defendant's expert to testify in a medical malpractice action as to the theory of anemia/hypotension although that theory was not disclosed in defendant's expert disclosure. The court held that the failure was not willful and prejudicial because plaintiff demonstrated no prejudice from the inadequate notice. Defense counsel addressed the anemia/hypotension theory through testimony of both of

plaintiff's experts and through the testimony of another defense expert without any objection by plaintiff. Plaintiff's counsel never requested an adjournment to prepare and re-call his expert to give further testimony rebutting the anemia/hypotension theory. Lack of prejudice was also established by plaintiff's experts' admitted awareness of the anemia/hypotension theory and the medical literature supporting it. *Gilbert v. Luvin*, 286 A.D.2d 600 (1st Dep't 2001).

In a medical malpractice action, plaintiff's expert was properly permitted to testify in support of plaintiff's negligence even though the testimony deviated from the expert witness statement, because defendant was not "deliberately misled" by plaintiff's expert's report and defendant was given enough time to obtain additional experts. So there was no prejudice. *Citron v. Northern Dutchess Hosp.,* 198 A.D.2d 618 (3d Dep't 1993).

b. Court-imposed rules.

In the Second Department, there is a line of cases that bars consideration of an expert's affidavit submitted in opposition to a post-note-of-issue motion for summary judgment where the expert was not disclosed before the note of issue was filed. S*ee, e.g., Construction by Singletree, Inc. v. Lowe*, 55 AD3d 861, 863 (2d Dep't 2008); *Liang v Yi Jing Tan*, 98 AD3d 653 (2d Dep't 2012); *Crawford v Village of Millbrook*, 94 AD3d 1036, 1037 (2d Dep't 2012); *Mohamed v New York City Tr. Auth*., 80 AD3d 677, 678-679 (2d Dep't 2011); *Parlante v Cavallero*, 73 AD3d 1001, 1003 (2d Dep't 2010); and *Safrin v DST Russian & Turkish Bath, Inc*., 16 AD3d 656, 656 (2d Dep't 2005).

But the Second Department has recently also held that special term should have considered an expert's affidavit in support of and in opposition to post-note-of-issue motions for summary judgment where expert disclosure was requested but not provided before the note of issue was filed. *Rivers v. Birnbaum*, 102 A.D.3d 26 (2d Dep't 2012) (special term had properly considered an expert affidavit filed in support of a post-note-of-issue motion for summary judgment even though the moving defendant had not previously disclosed the expert in response to plaintiff's pre-note-of-issue demand; neither nor the statute imposed an expert discovery deadline); *LeMaire v. Kuncham*, 102 A.D.3d 659 (2d Dep't 2013) (special term should have considered plaintiff's expert's affidavit submitted in opposition to defendant's post-note-of-issue motion for summary judgment; defendant had not disclose his expert before the note of issue was filed, so the parties should be treated equally). Both the *Rivers* and the *LeMaire* have been cited extensively by the Second Department and by the Supreme Court justices under the Second Department's dominion.

The Fourth Departments has no requirement that expert disclosure be provided before an expert's affidavit is used on a motion for summary judgment. *See, e.g., Kozlowski v. Alcan Aluminum Corp.*, 209 A.D.2d 930 (4th Dep't 1994) (in challenging denial of summary judgment motion, movants could not argue that the affidavit of the opposing party's expert should be disregarded for failure to disclose the expert's identity before submitting the affidavit; movant should have moved for an order of preclusion under CPLR 3101(d)(1)(i)); *Roundpoint v. V.N.A., Inc.,* 207 A.D.2d 123 (3d Dep't 1995) (the mere fact that plaintiffs did not responded to defendant's demand for expert witness information did not, in the absence of an order, preclude plaintiff's expert's affidavit in response to defendant's motion for summary judgment).

The Third Department likewise has no timing requirement but the Third Judicial District, which is comprised of Albany County and several adjacent counties south of the Mohawk River and west of the Hudson River, does. The Third Judicial District's rules require disclosure of plaintiffs' experts by the filing of the note of issue, with rebuttal experts to be exchanged thirty days thereafter. *See* 2002 Third Jud. Dist. Rules § I. But the Appellate Division Third Department (which governs the Third Judicial District) consistently holds that the trial court has the power to excuse non-compliance with the rule. *See, e.g., Gushlaw v. Roll*, 290 A.D.2d 667, (3d Dep't 2002). No Appellate Division currently has a division-wide rule.

C. Challenging the sufficiency of the disclosure

The opponent should object to inadequate disclosure before moving to challenge the disclosure. Doing so builds a record in preparation for a motion to preclude and obviates the need for the good-faith-effort required by 22 NYCRR 202.7(a) to resolve the dispute before bringing the motion. *Qian v. Dugan,* 256 A.D.2d 782 (3d Dep't 1998). It also behooves the disclosing party to take those objections seriously, especially if the court has ruled on those objections and the disclosing party ignores the court's directives:

- In products liability action that involved several successful pre-trial challenges to the sufficiency of plaintiff's expert disclosure, plaintiff's expert was properly precluded from testifying as to alleged defects in motorcycle where plaintiff failed to provide information about expert's proposed testimony. *McCarthy v. Handel*, 297 A.D.2d 444 (3d Dep't 2002).

- Supreme Court properly precluded plaintiff's expert's testimony about the value of art works. Despite **knowing** defendant's objections to the adequacy of plaintiff's expert disclosure, plaintiff made no attempt to fix the defects before trial. Plaintiff's failure to make any effort to augment his responses, even after having been apprised of defendant's challenge to the level of detail provided, warranted the court's finding that plaintiff's lack of compliance was "intentional or willful". *Qian v. Dugan,* 256 A.D.2d 782 (3d Dep't 1998).

- Supreme Court properly limited the testimony of plaintiffs' expert. Although plaintiffs had ample opportunity to demonstrate good cause for their delay in disclosing the expert, plaintiffs failed to do so: the court noted that plaintiffs "belatedly" furnished the information only in their supplemental omnibus disclosure. Plaintiffs' failure to disclose the expert until three weeks before trial where one of the experts had been retained six years before disclosure gave rise to an inference of intentional withholding. *Kassis v. Teacher's Ins. & Annuity Ass'n*, 258 A.D.2d 271 (1st Dep't 1999).

1. Motions before trial

Motions before trial: Where the disclosure is inadequate, opponents should move reasonably soon after receipt to challenge the sufficiency of the disclosure. Decisions on the adequacy of the disclosure, and *a fortiori motions* for that relief should not be deferred to the time of trial. *See, e.g., Chapman v. State*, 227 A.D.2d 867 (3d Dep't 1996).

The Fourth Department holds that motions challenging the sufficiency of the disclosure should be based on the substantantive elements set forth in CPLR 3101(d)(1)(i) rather than the question of whether the party has previously disclosed the elements. *Koslowski v. Alcan Aluminum Corp.*, 209 A.D.2d 930 (4th Dept. 1994).

2. Motions at trial (motions *in limine*)

Motions *in limine* may be made either orally at trial or on papers in the course of regular pre-trial motion practice. If made on papers, the motion *in limine* should adhere to the timing requirements of CPLR 2214 for service of the motion papers. Written submissions to the court at the time of trial should be marked as court exhibits to make them part of the record.

If the motion *in limine* is made on the eve of or during trial, it may be made orally without the need for a writing or for adhering to the timing requirements of CPLR 2214. It is therefore essential that a court reporter be present and take down all of the arguments and the court's decision, which may contain specific limitations or instructions about the proposed evidence, so that there is a record. It is all too easy to have the arguments and the court's decision occur in chambers or at side bar conferences off the record. Losing counsel must be vigilant about placing the arguments and the decision on the record at the earliest opportunity.

Whether the motion is made on papers or orally, it may be renewed or reargued at trial when the admissibility of the evidence in question arises. See, e.g., *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416 (1st Dep't 2008); *People v. Santiago*, 75 A.D.3d 163 (1st Dep't 2010), *rev'd on other grounds* 17 N.Y.3d 661 (2012).

Making the record: Therefore, when a motion *in limine* is decided, and the evidence or testimony is to be excluded or admitted at trial, the party who lost on the ruling must be certain to offer or object to the proof at time of trial and obtain a formal ruling on the record in order for the evidentiary ruling to be appealable. *See, e.g., People v. Williams*, 6 N.Y.2d 18, *cert. denied*, 361 U.S.920 (1959), *reargument denied*, 10 N.Y.2d 1011 (1961); *People v. Ventimiglia*, 52 N.Y.2d 350 (1981) ("There is, moreover, a greater probability of error, and consequent waste of scarce judicial resources, when evidentiary rulings are made during trial than in the more relaxed atmosphere of an inquiry out of the presence of the jury").

Where the case is being heard by a jury, the objection may be made in the presence of the jury, but the offer of proof by the party seeking admission of the evidence should be made outside of the presence of the jury, if the trial court permits. Once the trial court rules at the trial on the admissibility of the evidence, the objection has been preserved, subject to the making of any post-trial motions.

Motions *in limine* must be made on the record and all grounds placed on the record at the time the motion is made. The grounds cannot be asserted later in a motion to renew or reargue. *Grassel v Albany Medical Ctr. Hosp.*, 223 A.D.2d 803 (3d Dep't 1996).

Appealability of motions *in limine*: A ruling on an evidentiary issue regardless of whether made before trial or a motion *in limine* at trial is advisory and is not appealable separately from the verdict or judgment. *See, e.g., Kelly v. Metro-North Commuter R.R.,* 74 A.D.3d 483 (1st Dep't

2010) (an evidentiary ruling made before trial is generally reviewable only in connection with an appeal from the judgment rendered after trial); accord: *Weatherbee Constr. Corp. v. Miele*, 270 A.D.2d 182 (1st Dep't 2000); *Fontana v. Larosa*, 74 A.D.3d 1016 (2d Dep't 2010) ("The order appealed from, which denied the appellant's motion *in limine* to preclude certain testimony of the plaintiffs' expert witness or to direct that witness to submit to a hearing pursuant to *Frye v United States* was an evidentiary ruling. Such a ruling, even when made in advance of trial on motion papers, is an advisory opinion which is neither appealable as of right nor by permission.); *Balcom v. Reither*, 77 A.D.3d 863 (2d Dep't 2010) (Supreme Court's determinations were evidentiary rulings made in advance of trial on motion papers and thus were not appealable"); *Hough by Hough v. Hicks*, 160 A.D.2d 1114 (3d Dep't 1990).

However, an appeal will lie if the ruling is case-determinative or limits the legal theories on which the case will be tried. *See, e.g., Strait v. Arnot Ogden Medical Center*, 246 A.D.2d 12 (3d Dep't 1998) (a pretrial order that limits the legal theories of liability to be tried is an appealable order, but an order that merely limits the admissibility of evidence, even when made in advance of trial on motion papers, is an advisory opinion that is neither appealable as of right nor by permission; and appropriate review may only be attained after trial and when the propriety of the challenged ruling can be assessed, not speculatively, but in the context of its application to a concrete factual controversy).

3. By any party or by the court sua sponte

This element is self-evident. Motions by the court sua sponte are rarely if ever made, and none has been found among the reported cases.

4. The court may render whatever order may be just

In addition to preclusion, which is always available, courts have ordered a conditional order of preclusion conditioned on disclosure by a certain date, monetary sanctions against the offending attorney, and continuances or short adjournments of trial.

The Fourth Department issued a conditional order of preclusion and monetary sanction of $500 against the offending attorney for delaying the trial. *Herd v. Town of Pawling*, 244 A.D.2d 317 (2d Dep't 1997).

On a discovery motion to challenge the insufficiency of plaintiff's expert disclosure, the First Department held that the trial court should have ordered preclusion conditioned on plaintiff's supplying adequate disclosure within 45 days and pay sanctions of $500 to the moving party. *Busse v. Clark Equip. Co.*, 182 A.D.2d 525 (1st Dep't 1992).

Outright dismissal of plaintiff's complaint is too draconian, however, absent a clear showing that plaintiff's failure to disclose was willful and contumacious. *See, e.g., Bernardis v Town of Islip*, 95 A.D.3d 1050 (2d Dep't 2012).

But preclusion will have the same effect if plaintiff cannot establish his or her case without the expert testimony. *See, e.g., Hageman v. Jacobson*, 202 A.D.2d 160 (1st Dep't 1994) (in a medical-malpractice action, the trial court properly precluded plaintiff's expert testimony and not

submitting to the jury the issue of the defendant-hospital's failure to diagnose plaintiff's condition; plaintiffs' response to the hospital's request for expert testimony was so misleading as to be wholly inadequate and to warrant the trial court's preclusion of the expert's testimony and directed verdict in favor of the hospital).

D. Amending and supplementing expert disclosure

CPLR 3101(h) requires that a party amend or supplement his/her/its previous disclosure promptly upon obtaining information that the response was incorrect or incomplete then or is no longer correct or complete now and that the circumstances are such that a failure to amend or supplement the disclosure would be materially misleading.

III. Treating and examining health care professionals and plaintiff's medical records

A. Plaintiff's treating health care professionals

No CPLR 3101(d)(1) expert disclosure is required of a plaintiff's treating physician. CPLR 3101(d)(1)(i) applies only to experts retained to give opinion testimony at trial, and not to treating physicians, other medical providers, or other fact witnesses", even though the treating physician will likely have an opinion on the case. *Rook v 60 Key Centre*, 239 AD2d 9 (4th Dep't 1997).

The Second Department's holding in *Overeem v. Neuhoff*, 254 A.D.2d 398 (2d Dep't 1998), is similar: the physician's report had been furnished in an exchange pursuant to Uniform Rule 202.17, but the physician expressed no expert opinion about causation in the report. Treating physicians are percipient fact witnesses; the mere fact that they may possess opinions regarding the case and treatment does not ipso facto make them expert witnesses.

Erie County Supreme Court in *Nesselbush v. Lockport Energy Assocs., L.P.*, 169 Misc. 2d 742 (Sup. Ct. Erie Co. 1996) cites federal court cases for the same proposition.

B. Plaintiff's examining professionals and plaintiff's medical records and reports from examining professionals.

The court rule governing the exchange of medical information and physical examinations in personal injury, disability, or wrongful death actions (22 NYCRR §202.17) provides that plaintiff must provide defendant (and to all parties in the action):

- copies of all reports of all treating and examining medical providers which must include a recital of the injuries and conditions as to which testimony will be offered at the trial; the records must refer to and identify any X-rays and technicians' reports that will be offered at trial and include a description of the injuries, a diagnosis and a prognosis; the medical reports may consist of completed medical provider, workers' compensation, or insurance forms that provide this; and
- duly executed and acknowledged written authorizations permitting all parties to obtain and make copies of all hospital records and such other records, including X-ray and

technicians' reports, as may be referred to and identified in the reports of those medical providers who have treated or examined the party seeking recovery.

Although the rule makes this record-delivery obligation conditioned on defendant's notice of examination, in practice, defendant's CPLR omnibus discovery demands, which defendant serves with defendant's answer, will include a request for medical records and authorizations, and defendant will move to compel production of the records and authorizations if plaintiff does not serve them in due course.

C. Defendant's independent examination of plaintiff (and plaintiff's obligation to provide records and authorizations

Section 202.17(a) of title 22 of the New York Code of Rules and Regulations authorizes defendant's right to an independent medical examination of plaintiff. The deadlines and timing requirements imposed by section 202.17(a), however, are impracticable, so only when the delays have been egregious are motions made to enforce them.

1. Notice of examination

At any time after plaintiff serves his or her bill of particulars, any party may serve a notice fixing the time and place of plaintiff's physical examination. 22 NYCRR §202.17(a).

The rule states that unless otherwise stipulated, the examination must be held not less than 30 nor more than 60 days after service of the notice. If the notice is served by any party other than plaintiff, the notice must give the name of the examining medical provider or providers. Id. [Note that the rule does not limit the number of examinations to one.]

The rule further states that if plaintiff serves the notice, the opponent has five days to advise plaintiff with the name of the medical provider who will examine plaintiff. Any party who objects to the time or place or to the examining provider, or objects to the examination and exchange of information as being against the interests of justice, has 10 days within which to move to modify or vacate the notice fixing the time and place of examination or the notice naming the examining medical.

The rule requires plaintiff to serve upon and deliver to all other parties at least 20 days before the examination the following, which may be used by the examining medical provider:

(1) copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery. These shall include a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those X-ray and technicians' reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis. Medical reports may consist of completed medical provider, workers' compensation, or insurance forms that provide the information required by this paragraph;

(2) duly executed and acknowledged written authorizations permitting all parties to obtain and make copies of all hospital records and such other records, including X-ray and technicians' reports, as may be referred to and identified in the reports of those medical

providers who have treated or examined the party seeking recovery.

2. Disclosing the examiner's report

The rule requires that the examiner's report be served on all parties within 45 days after completion of the examination. This provision, however, is difficult if not impossible to enforce because it usually takes more than 45 days (and often much more than 45 days) to get the report from the examining doctor.

3. Vocational rehabilitation

Defendant is entitled to have plaintiff evaluated by a vocational rehabilitation expert under 22 NYCRR 202.17 even though the vocational expert is not a "medical provider" and regardless of whether plaintiff has hired a vocational rehabilitation expert. *Kavanagh v Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 955 (1998); *Allen v Aetna Life Ins. Co*. (256 A.D.2d 103, 104 (1st Dep't 1998); *Smith v Manning*, 277 A.D.2d 1004 (4th Dep't 2000) (because plaintiff intends to establish her present lack of capacity to perform in the work force, plaintiff thereby overtly made vocational rehabilitation assessment procedures material and necessary in the defense for the purposes of rebuttal. The holding in *Kavanagh*. is not limited to cases in which the plaintiff has retained a vocational rehabilitation specialist); *accord: Freni v. Eastbridge Landing Assocs. LP*, 309 A.D.2d 700 (1st Dep't 2003).

IV. Calling the opponent's expert to testify.

A party may call the opponent's expert if there is no conflict of interest. *Roundpoint v. V.N.A., Inc*., 207 A.D.2d 123 (3d Dep't 1995). In *Roundpoint*, the defendant golf course moved for summary judgment on liability. Plaintiff submitted an affidavit from of defendant's architect who designed a change in the premises post-accident. The architect opined that the premises were hazardous at the time of plaintiff's accident. Defendant claimed the architect was disqualified by conflict of interest. The court held that there is a two-step analysis to resolve the issue of whether a claimed conflict of interest disqualifies an expert: (1) was it objectively reasonable for the party who initially retained the expert to conclude that a confidential relationship existed between them and (2) was any confidential or privileged information disclosed by said party to the expert. An affirmative answer to both questions disqualifies the expert; a negative answer to either will likely result in a finding that disqualification is not appropriate. *Roundpoint v. V.N.A., Inc*., 207 A.D.2d 123 (3d Dep't 1995).

Plaintiff may call defendant's examining doctor as plaintiff' witness after the doctor's report has been furnished. *Gilly v. City of New York*, 69 N.Y.2d 509 (1987). In *Gilly*, defendant's expert cardiologist examined plaintiff and concluded in a written report that it was impossible for him to refute some of the plaintiff's damages claims. The report was exchanged pursuant to 22 NYCRR § 202.17 (the rule on the exchange of independent medical reports). Thereafter, the expert indicated he did not want to get involved in the trial but would respond if he were subpoenaed. Plaintiff subpoenaed the doctor. During the offer of proof, the doctor testified that he was not opposed to relating his findings. The defendant moved to preclude the expert from testifying and the trial court denied the motion. The Court of Appeals concluded that a physician in the position of the examiner who has examined the plaintiff, formulated his findings, and had

them conveyed to both parties in litigation, should not be barred from relating the substance of his report when plaintiff calls him as a witness.

Crucial to the Court of Appeals' decision in *Gilly* were the facts that (a) the expert had voluntarily involved himself in the case when he undertook to examine the plaintiff, (b) he was not being compelled to express an opinion against his will, but only to relate conclusions already formulated and fully disclosed, and (c) the expert was not subject to any ethical dilemma or subject to competing loyalties. "Once a physician's report has been reduced to writing and served on the adversary, it ceases to be for the exclusive use of defendant. At that point both sides have access to this probative evidence and there is no basis for withholding it from the trier of fact." *Gilly, supra,* 69 N.Y.2d at 512.