STATE OF NEW YORK

6802

2017-2018 Regular Sessions

IN SENATE

June 18, 2017

Introduced by COMMITTEE ON RULES -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the civil practice law and rules, in relation to identification of expert witnesses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (a) of section 3101 of the civil practice law and rules is amended by adding a new paragraph 5 to read as follows:

(5) Notwithstanding anything to the contrary in subparagraph (i) of paragraph one of subdivision (d) of this section, in an action for medical, dental or podiatric malpractice, each party shall serve the disclosure described therein at least sixty days prior to the filing required by rule thirty-four hundred two of this chapter. Further at any time after joinder of issue, any party may, by written notice made to and served upon all other parties and filed with the court, conduct an examination upon oral deposition, of any person who has been disclosed as an expert witness by any other party. Each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule thirty-one hundred seven of this chapter, and unless otherwise ordered by the court, all expert witness depositions shall be taken before the filing required by rule thirty-four hundred two of this chapter. If any party, having received such notice, fails to make that party's expert witness available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action. For purposes of rule thirty-one hundred ten and rule thirty-one hundred seventeen of this article, an expert witness, as provided in this section, shall be considered a party. Each party seeking the deposition of an expert witness shall pay the expert a reasonable fee for the time spent at the deposition.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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§ 2. Subdivision (d) of section 3101 of the civil practice law and rules, as amended by chapter 485 of the laws of 1986, paragraph 1 as amended by chapter 184 of the laws of 1988, and subparagraph (ii) of paragraph 1 as amended by chapter 165 of the laws of 1991, is amended to read as follows:

(d) [~~Trial preparation~~] **Expert witness disclosure**.

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. [~~In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.~~

~~(ii) In an action for medical, dental or podiatric malpractice, any party may, by written offer made to and served upon all other parties and filed with the court, offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial. Within twenty days of service of the offer, a party shall accept or reject the offer by serving a written reply upon all parties and filing a copy thereof with the court. Failure to serve a reply within twenty days of service of the offer shall be deemed a rejection of the offer. If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition in accordance with rule three hundred seven of this chapter. If any party, having made or accepted the offer, fails to make that party's expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.~~

~~(iii)~~] **(ii)** Further disclosure**, except as expressly provided in paragraph five of subdivision (a) of this section,** 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. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

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.

§ 3. This act shall take effect immediately.