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# THE EXPERT WITNESS: SOME PROPOSALS FOR CHANGE†

BERNARD S. MEYER\*

The purpose of this article is to propose amendments to the Civil Practice Law and Rules dealing with disclosure and the expert witness and the use at the trial of the opposing party's expert or the opposing party himself as an expert. Since 1967,<sup>1</sup> several significant developments have occurred in connection with these problems. First, in November of 1967, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published the *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure Relating to Deposition and Discovery*, which included provisions governing discovery of expert opinion.<sup>2</sup> Second, in 1969 the American Bar Association adopted the report of its Special Committee on Automobile Accident Reparations, which included a recommendation on when the deposition of an expert may be taken.<sup>3</sup> The proposals that follow are the product of a review of the foregoing in the light of present New York law.

## PRESENT NEW YORK LAW

A brief look at the present state of the law in New York is a prerequisite to an understanding of the changes proposed. Disclosure of

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† A revision of an address before the Defense Association of New York, Oct. 18, 1969.

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<sup>1</sup> At which time, this author prepared an article based upon a speech made to the National Conference of State Trial Judges dealing with these same questions. However, specific consideration was not given to New York law. See Meyer, *Some Problems Concerning Expert Witnesses*, 42 ST. JOHN'S L. REV. 317 (1968).

<sup>2</sup> *Proposed Rule 26(b)(4)*, 43 F.R.D. 211, 225, 233 (1967). Comments upon the 1967 draft can be found in *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479 (1968); Thomsen, *Proposed Changes in the Federal Rules of Civil Procedure*, 35 INS. COUNSEL J. 290, 293-94 (1968); Vetter, *Proposed Changes in Federal Civil Discovery—What Effect on State Practice?*, 11 FOR THE DEFENSE 5 (1968); Comment, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 280-82 (1968); Note, *Discovery of Experts: A Historical Problem and A Proposed FRCP Solution*, 53 MINN. L. REV. 785 (1968); Note, *Clarifying the Scope of Civil Discovery Under the Federal Rules: The Proposed Amendments*, 44 NOTRE DAME LAW. 81, 88-92 (1968). It is understood that the proposed rule is under significant reconsideration as a result of these and other comments upon the 1967 draft.

<sup>3</sup> REPORT OF THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS iv, 42-43 (1969) (recommendation 13), reprinted in 55 A.B.A.J. 374 (1969). See also Madden, *Illinois Pioneers Videotaping of Trials*, 55 A.B.A.J. 457 (1969).

expert opinion is governed by CPLR 3101(d), CPLR 3121 and by the Appellate Division rules governing exchange of medical information.<sup>4</sup> Under CPLR 3101(d), any opinion of an expert prepared for litigation is conditionally privileged from disclosure<sup>5</sup> and not obtainable unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship.<sup>6</sup> Under CPLR 3121, any party can obtain a physical, mental or blood examination of another party to any action in which the mental, or physical condition or blood relationship of the other party is in controversy, and authorizations for hospital records relating to such condition or relationship. Upon request, he must deliver a copy of the examining physician's report to any party requesting to exchange a copy of each report in his control of an examination made with respect to the condition in controversy, but the examining physician's report so delivered need only set out his "findings and conclusions." Beyond that limited area, the conditional privilege of CPLR 3101(d) applies. Thus, a defendant in a malpractice action is not required to disclose his expert's report concerning the claimed malpractice,<sup>7</sup> though he is required on request to exchange his examining physician's report concerning the malpractice plaintiff's condition.

The Appellate Division Rules, on the other hand, apply only to personal injury or death actions other than actions for medical or dental malpractice. They require that a plaintiff, in order to put his case on the calendar, furnish to the defendant copies of the reports of those examining or treating physicians who will testify at the trial<sup>8</sup> and an authorization to obtain hospital records and any other records referred to in the physician's report, and that a defendant who elects to have a physical examination of the plaintiff furnish him with a

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<sup>4</sup> 22 N.Y.C.R.R. 660.11 (1st Dep't 1963); 22 N.Y.C.R.R. 672 (2d Dep't 1963).

<sup>5</sup> See, e.g., *Penn Plaza Venture v. Glens Falls Ins. Co.*, 32 App. Div. 2d 768, 301 N.Y.S.2d 686 (1st Dep't 1969) (fire loss report, to the extent that opinion was included); *Clarke v. First Presbyterian Church*, 30 App. Div. 2d 763, 291 N.Y.S.2d 843 (4th Dep't 1968) (condition of floor); *Silberberg v. Hotpoint Div. of Gen. Elec. Co.*, 23 App. Div. 2d 754, 259 N.Y.S.2d 60 (1st Dep't 1965) (operation of washing machine); *Finegold v. Lewis*, 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965) (property damage to automobile).

<sup>6</sup> Thus, a plaintiff is entitled to a copy of the expert's report when, for example, the test to be conducted would destroy the object being tested. See *Edwardes v. Southampton Hosp.*, 53 Misc. 2d 187, 278 N.Y.S.2d 283 (Sup. Ct. Suffolk County 1967); *Hayward v. Willard Mountain, Inc.*, 48 Misc. 2d 1032, 266 N.Y.S.2d 453 (Sup. Ct. Rensselaer County 1966). Another example would arise where a defendant has tested property of his co-defendant and withholds its return. See *Baczmagala v. Reynolds*, 44 Misc. 2d 997, 255 N.Y.S.2d 582 (Sup. Ct. Niagara County 1965).

<sup>7</sup> See *Sommers v. Federation of Jewish Philanthropies*, 56 Misc. 2d 529, 289 N.Y.S.2d 96 (Sup. Ct. N.Y. County 1968).

<sup>8</sup> A party who relies solely upon hospital records may so certify, under the rule, in lieu of serving physician's reports.

copy of the examining physician's report within 20 days after the examination. A hospital report not made available is inadmissible under the rule, as is the testimony of any physician whose report has not been so exchanged; but the rule says nothing about what use may be made of the records or reports furnished under the rule or whether the physician making the report can be called as a witness by the adverse party.

*McDermott v. Manhattan Eye Hospital*<sup>9</sup> establishes not only that a malpractice plaintiff is entitled to call the defendant as a witness at the trial and examine him as to both fact and opinion, but also that a plaintiff is entitled to call as a witness at the trial the doctor who examined the plaintiff prior to trial on behalf of the defendant and question him about the plaintiff's condition, and other facts ascertained by him on examination. That portion of the *McDermott* rule concerning calling the adverse party as an expert witness has been applied to permit examination before trial of the adverse party as an expert,<sup>10</sup> but has been limited by the holding in *Forman v. Azzara*;<sup>11</sup> that when the plaintiff's trial proof includes the opinion of experts other than the defendant, it is not reversible error to exclude the defendant's opinion given on examination before trial that he should have performed a procedure he omitted. Moreover, some confusion has been generated concerning the second part of the *McDermott* holding (that plaintiff may call as a witness the doctor who examined plaintiff on behalf of defendant) by three later cases,<sup>12</sup> all of which appear to have overlooked the second portion of the *McDermott* decision,<sup>13</sup> and all of which rule that, absent a finding of difficulty in

<sup>9</sup> 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964). *McDermott* was a malpractice suit involving defendants who unsuccessfully performed a corneal transplant, resulting in the plaintiff's partial blindness. For discussion of this case, see 31 BROOKLYN L. REV. 411 (1965); 33 FORDHAM L. REV. 732 (1965); 16 SYRACUSE L. REV. 892 (1965).

<sup>10</sup> See *Kennelly v. St. Mary's Hosp.*, 52 Misc. 2d 352, 275 N.Y.S.2d 597 (Sup. Ct. Rensselaer County 1966).

<sup>11</sup> 23 App. Div. 2d 793, 259 N.Y.S.2d 120 (2d Dep't), *aff'd*, 16 N.Y.2d 955, 212 N.E.2d 537, 265 N.Y.S.2d 103 (1965).

<sup>12</sup> *Maglione v. Cunard S.S. Co.*, 30 App. Div. 2d 784, 291 N.Y.S.2d 604 (1st Dep't 1968); *Gnoj v. City of New York*, 29 App. Div. 2d 404, 288 N.Y.S.2d 368 (1st Dep't 1968); *Gugliano v. Levy*, 24 App. Div. 2d 591, 262 N.Y.S.2d 372 (2d Dep't 1965). In *Maglione*, the language is dicta, the primary holding being that it is error to permit a defendant's doctor to testify as a rebuttal witness, when the defendant has offered no medical evidence that can be rebutted.

<sup>13</sup> *McDermott* is referred to in the *Gnoj* decision. 29 App. Div. 2d at 406, 288 N.Y.S.2d at 371, but the court does not refer to the second holding of the case.

The *McDermott* decision may be further distinguished from these subsequent appellate determinations since it approved interrogation of the opponent's doctor concerning the patient's condition and other facts discovered by examination; on the other hand, *Maglione*, *Gnoj* and *Gugliano* dealt with opinion. But, *query*: does not a patient's condition require an expression of the doctor's opinion?

obtaining other expert testimony, a party may not call an expert retained by his adversary and thus put him in the intolerable position of working for both sides.

To complete our review, two other rules must be mentioned. The first, that of *People ex rel. Kraushaar Bros. v. Thorpe*,<sup>14</sup> is that a witness cannot be compelled to give his opinion as an expert against his will. The expert in that case was unrelated to either party, but had knowledge of the property in question because he had appraised it for a prior owner.<sup>15</sup> Discussion in the *McDermott* opinion<sup>16</sup> (which in fact required an expert to give opinion evidence against his will) concerning the reason underlying the *Kraushaar* rule suggests that it will be limited to the unrelated expert situation.

The second rule deals with when a party may depose his own expert. It has been held that he may not examine before trial his own nonresident expert, at least not without showing that a resident expert is not available,<sup>17</sup> and that while he may examine his own treating doctor who by refusing to attend the trial has evidenced hostility, he may not inquire into the doctor's expert opinion.<sup>18</sup> The continued validity of the latter limitation is doubtful in view of the *McDermott* decision.

Statement of these rules is enough to demonstrate the necessity for modification, for they are in many respects overlapping and inconsistent. To what extent should doctors' reports be treated differently than any other expert opinion? Why does CPLR 3121(b) require plaintiff to turn over reports of all treating doctors when the Appellate Division Rules limit the requirement to the reports of doctors who will testify at the trial? Why does CPLR 3121 include but the Appellate Division Rules exclude malpractice cases?<sup>19</sup> Are the reasons behind the present rules still valid? Are the rules themselves really in the interest of justice, or are they, in part at least, simply a vestige of the old sporting theory of justice?

<sup>14</sup> 296 N.Y. 223, 72 N.E.2d 165 (1947).

<sup>15</sup> Note, however, that CPLR 3140 now authorizes the Appellate Division to adopt rules governing exchange of appraisal reports in condemnation or tax certiorari proceedings.

<sup>16</sup> 15 N.Y.2d at 29, 203 N.E.2d at 475, 255 N.Y.S.2d at 73.

<sup>17</sup> See *Robinson v. Wildenstein & Co.*, 19 App. Div. 2d 807, 243 N.Y.S.2d 341 (1st Dep't 1963); *Paparone v. Ader*, 139 Misc. 281, 248 N.Y.S. 321 (Sup. Ct. Schuylcr County 1931).

<sup>18</sup> See *Reif v. Gebel*, 246 App. Div. 776, 284 N.Y.S. 98 (2d Dep't 1935).

<sup>19</sup> The CPLR provision takes precedence. See CPLR 101; 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3121.21 (1969).

## DEPOSING ONE'S OWN EXPERT

The reason behind the rule which prevents a party from taking the deposition of his own expert is the importance in the evaluation of the expert's testimony of his examination and cross-examination in the presence of the trier of fact and in light of all the facts developed at the trial.<sup>20</sup> As the American Bar Association's special committee<sup>21</sup> has recognized, the advent of videotape makes it possible for the trier of fact to see as well as hear what transpires at an examination before trial. All of us are aware of the difficulties involved in getting expert witnesses into court and of the large fees charged by such witnesses. This is due in good part to the time required of the expert in traveling to and from the trial, awaiting the call to the stand, and responding to examination and cross-examination. Both the fees and the reluctance of the expert should be substantially reduced if the testimony can be taken before a videotape machine in the expert's or the lawyer's office.

Such a procedure should be initiated on motion rather than simply by notice, so that it can be made subject to such reasonable conditions as in the discretion of the court justice requires. Moreover, since the motion judge cannot foresee what may transpire at the trial by way of unexpected proof or failure of proof of some fact assumed during the deposition, the trial judge should not be foreclosed from requiring the appearance of the expert as a witness at the trial, notwithstanding his deposition, if there is good cause for doing so. Finally, since the purpose of such an examination is to facilitate presentation to the jury of the testimony of movant's expert and since fees of expert witnesses generally are not taxable as costs,<sup>22</sup> movant's expenses in taking his expert's deposition should not be taxable as costs.

That such a technique can and does work and has real advantages is suggested by experience in Virginia<sup>23</sup> and in the Ninth Federal Circuit, both of which allow a party to take the deposition of his own expert for use at the trial. Set forth in the *Appendix* is a proposed new subdivision (c) of CPLR 3140, authorizing the procedure in New York. Once it is authorized, it may be expected that a demonstration

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<sup>20</sup> See *Robinson v. Wildenstein & Co.*, 19 App. Div. 2d 807, 243 N.Y.S.2d 341 (1st Dep't 1963).

<sup>21</sup> See note 3 *supra*.

<sup>22</sup> See *Kiev v. Seligman & Latz*, 47 Misc. 2d 364, 262 N.Y.S.2d 766 (Broome County Ct. 1965); cf. 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 8301.07 (1969).

<sup>23</sup> RULES OF THE SUPREME COURT OF APPEALS OF VIRGINIA, rule 4:1(a). This rule, entitled "When Depositions May Be Taken," provides in its last sentence: "The depositions of a witness whose first connection with the case was his employment to give his opinion as an expert may be taken only at the instance of the party who employed him."

project, sponsored jointly by the bar association and the medical society in one or more of our more populous counties, can be set up<sup>24</sup> and should quickly establish the practical value of the procedure.

#### DISCOVERY OF ADVERSARY'S EXPERT'S OPINION

The ostensible reason for limiting disclosure of expert opinion is that only fact and not opinion is discoverable.<sup>25</sup> CPLR 3101(a) calls for "full disclosure of all evidence material and necessary," a phrase clearly broad enough to encompass opinion as well as fact were it not for the provision of subdivision (d) limiting disclosure of expert opinion. Since it is a basic concept of our system of pleading and practice that a party is entitled to know in advance what he must be prepared to meet, and since the components of any claim or defense are law, fact and opinion, the unfairness of a system which requires disclosure of legal theory in the pleadings and facts in the bill of particulars but denies disclosure of the expert opinion upon which a party will rely to prove his claim or defense is self-evident.

The system is, it is submitted, wholly unreasonable with respect to an expert who will testify at the trial. Withholding disclosure of his opinion and the data supporting it until the trial precludes effective cross-examination, for even though the cross-examiner becomes entitled after completion of the expert's direct testimony to a copy of the report for use in cross-examination,<sup>26</sup> and even though the cross-examiner has his own expert present in the courtroom to advise him, preparation of cross-examination under courtroom tension and in the few minutes available can never be adequate. The expert should be at no personal disadvantage at the trial if his opinion is disclosed in advance of trial because he will have been paid for gathering the foundation facts and formulating his opinions in the course of preparing his report, and the cross-examination can only go beyond his direct testimony with the permission of the court, which can condition permission upon payment by the cross-examining party of a reasonable fee to be fixed by the court. Nor is there any real unfairness to the party employing the expert, though it is argued that to require disclosure permits the opposing party to "manufacture" evidence in

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<sup>24</sup> In Pittsburgh, Pennsylvania, the Allegheny County Bar Association has under study a proposal to videotape doctor's testimony before trial. The Bar Association of Nassau County, New York is arranging an experiment along the same lines. See Hart, *The Seventies and the Committee on Courts*, 17 NASSAU LAW. 157, 159 (1969).

<sup>25</sup> See Reif v. Gebel, 246 App. Div. 776, 284 N.Y.S. 98 (2d Dep't 1935); Vaughn v. City of New York, 132 N.Y.S.2d 919 (Sup. Ct. Kings County 1954).

<sup>26</sup> This is on the principle of *People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961).

rebuttal and penalizes the diligent in favor of the lazy. The first contention ignores the fact that without disclosure the opponent of the party employing an expert to testify will be hard put to meet the threat of "manufactured" or excessively partisan testimony by the expert. When disclosure is required, the party employing the expert is not at the same disadvantage if his opponent attempts to "manufacture" expert rebuttal, for the opponent will be required in advance of trial to disclose his rebuttal expert's qualifications and opinions. In most cases, therefore, the present policy favors plaintiffs; the proposed policy will favor neither side. The second argument is no more persuasive. It is conceivable that plaintiff may seek to examine a defendant's expert before trial in order to be able to prove his case without the expense of hiring his own expert, but as a practical matter the probability of such a maneuver is not great. It is also conceivable that a defendant may, after disclosure of plaintiff's expert's report and opinion, decide that he does not need to bring in an expert because plaintiff's expert's testimony can be met by cross-examination. A defendant willing to gamble on the effectiveness of cross-examination may, it is true, save some expense as a result of disclosure, but this is true of all disclosure and can hardly be classified as unfair. On balance, therefore, it appears that the CPLR should be amended to allow discovery of the report of, and examination before trial of an expert who will testify at the trial. Set forth in the *Appendix* as CPLR 3140(b)(1) is a proposed statute so providing.

Should we permit discovery as to experts who will not be called to testify? Though expert shopping is a very real abuse, disclosure, generally, as to experts consulted but who will not be called to testify, does not appear warranted. Experts often differ in good faith, yet a trial will be unduly prolonged if the good faith issue is left to the jury, and unless good faith can be put in issue, the jury may easily misinterpret the situation. As to experts who are retained but not called to testify, denial of discovery is in most cases justified, because the function of such an expert is usually limited to finding the holes in the opponent's case and his opinions are never put before the trier of fact. There are, however, at least three situations in which disclosure should be permitted even though the expert will not testify.

The three situations referred to are now covered in part by CPLR 3101(d), CPLR 3121 and the Appellate Division Rules, but in each case the present provision should be expanded and modified. The first and most obvious is the case in which the work of the expert cannot be duplicated because the subject matter of his report has been



changed or destroyed or because other special circumstances exist. CPLR 3140(b)(2), set forth in the *Appendix*, is the draft proposal intended to meet this need. The second involves cases of discovery of documents or things for inspection and testing. Provided the party producing the document or thing for inspection and testing offers to exchange reports, the expert's report resulting from the discovery should be disclosed. This situation assumes that the expert is not to be called as a witness; if he is, his report will have to be made available prior to trial under the procedure previously outlined. The theory is that disclosure should not be a one-way proposition, with the discoverer using the expert's report if favorable to him but suppressing it if not, but rather that the party producing the document or thing is entitled to know the results of the tests, provided that he is willing to divulge the results of any similar tests made on his behalf. To this end, a new paragraph (3) should be added to CPLR 3120(a), as proposed in the *Appendix*.

The third situation concerns reports of prior medical history, where by a claim or defense a party has affirmatively put in issue his mental or physical condition and thus waived the physician-patient privilege.<sup>27</sup> In such a case, the opposing party should be entitled to obtain not only hospital record authorizations and the reports of doctors who will testify at the trial, but also the names of all doctors who have treated the same mental or physical condition, and if a report from such a doctor is not available or is not adequate, the opposing party should be permitted to examine the doctor before trial, the doctor's fee for such examination to be fixed by the court. Of course, if the opposing party also has his own medical expert examine the party whose mental or physical condition is in issue, the latter should be entitled to a copy of the examining doctor's report. Set forth in

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<sup>27</sup> See *Koump v. Smith*, 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969); *Steinberg v. New York Life Ins. Co.*, 263 N.Y. 45, 188 N.E. 152 (1933); *Hethier v. Johns*, 233 N.Y. 370, 135 N.E. 603 (1922); *Capron v. Douglass*, 193 N.Y. 11, 85 N.E. 827 (1908); *Kruger v. Holland Furnace Co.*, 12 App. Div. 2d 44, 208 N.Y.S.2d 285 (2d Dep't 1960); *Luciano v. Moore*, 45 Misc. 2d 335, 256 N.Y.S.2d 825 (Sup. Ct. Monroe County 1965). See also *Proposed Federal Rule 35*, 43 F.R.D. 257 (1967); *Annots.*, 25 A.L.R.3d 1401; 21 A.L.R.3d 912 (1968).

The *Koump* case holds that the burden is on the party seeking disclosure to demonstrate that the opposing party's mental or physical condition is in controversy. 25 N.Y.2d at 300, 250 N.E.2d at 865, 303 N.Y.S.2d at 869. Furthermore, the case holds that defense of the action is not enough to put the defendant's condition in issue. The defendant must have affirmatively asserted his condition, by way of counterclaim or as an excuse for the conduct complained of, in a pleading or examination before trial, or there must exist a prior physical examination which gives credence to allegations in the plaintiff's complaint concerning the defendant's condition. 25 N.Y.2d at 294 & 299, 250 N.E.2d at 861 & 864, 303 N.Y.S.2d at 864 & 868.

the *Appendix* is a proposed revision of CPLR 3121 which integrates the provisions of the present CPLR section with the present Appellate Division Rules and which, together with proposed CPLR 3140(b)(2), provides for the broadened medical history disclosure above suggested.

CALLING THE ADVERSARY OR HIS EXPERT  
AS AN EXPERT WITNESS

The reason behind the rule which proscribes calling an unrelated expert to testify at the trial was stated in the *Kraushaar* decision to be that

[i]n the realms of medicine, law, science, and many other callings where highly specialized knowledge is essential, only the most eminent are competent to answer *ex tempore* and defend impromptu opinions upon cross-examination, but none, without reflection upon his professional ability, may confess ignorance.<sup>28</sup>

One cannot quarrel with the rule as it concerns unrelated experts, for any other rule would certainly place an unfair burden upon those who have achieved the greatest prominence in any profession. But, if, as *McDermott* instructs, that reasoning is inapplicable when the expert involved is a party to the action, it is difficult to understand the holding of the *Forman* case that its applicability is affected by the availability of other expert opinion. As the Court recognized in the *McDermott* case, if the adversary cannot testify that his conduct conformed to the required standard, his opponent's chances of success "are unquestionably increased."<sup>29</sup> To hold that the error is not prejudicial because the opinion is cumulative overlooks completely the fact that an opinion of an adversary expert adverse to himself is also an admission. The proposed new section 4509 set forth in the *Appendix* takes the availability element out of the *McDermott* rule and, thus, out of the *Forman* situation as well.

The rule which forbids the calling of one's adversary's expert as a witness should also be changed. The stated reason for the rule is that the expert is put in the unethical and intolerable position of serving two masters. That reason is, it is submitted, more apparent than real. In the first place, when no other expert is available the rule will, it appears, be relaxed.<sup>30</sup> Furthermore, when plaintiff puts in issue his physical or mental condition, defendant may call plaintiff's doctor

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<sup>28</sup> 296 N.Y. at 225, 72 N.E.2d at 166.

<sup>29</sup> 15 N.Y.2d at 28, 203 N.E.2d at 474, 255 N.Y.S.2d at 72.

<sup>30</sup> *Gugliano v. Levy*, 24 App. Div. 2d 591, 262 N.Y.S.2d 372 (2d Dep't 1965).

as a witness.<sup>31</sup> Do the ethical considerations really differ when the plaintiff calls the defendant's doctor from those involved when the defendant calls the plaintiff's doctor? Is not the truth of the matter that an expert subpoenaed by the opposing party testifies not under retainer but under compulsion, and that the opposing party is not in any real sense a master that he serves? Has anything unethical really been done unless the expert testifies to an opinion different than that he reported to the party who originally employed him?<sup>32</sup> Yet there is little likelihood of that ever occurring, for seldom will an expert be called by an opposing party who has not seen his report. The expert cannot be embarrassed by being called for he has had full opportunity to prepare. Moreover, his property interest in his opinions can be protected by requiring the party who calls him to pay him such reasonable fee as is fixed by the court. Proposed new section 4509, set forth in the *Appendix*, would authorize, with appropriate protection of the expert's property rights, the calling of one's adversary's expert as a witness.

#### CONCLUSION

The confusion generated by conflict between statute, rule and decisional law and the suppression, without sufficient reason, of relevant information has too long continued. While some aspects of the changes proposed in the *Appendix* may, at first blush, seem too broad, all are subject to CPLR 3103 which authorizes "a protective order denying, limiting, conditioning or regulating the use of any disclosure device." Abuse of the proposed changes, therefore, need not be feared. To the contrary, their adoption will prevent surprise, result in better prepared cases, more pretrial settlements, shorter trials and trial verdicts more consonant with justice, than does the present law.

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<sup>31</sup> Steinberg v. New York Life Ins. Co., 263 N.Y. 45, 188 N.E. 152 (1933); Hethier v. Johns, 233 N.Y. 370, 135 N.E. 603 (1922); Capron v. Douglass, 193 N.Y. 11, 85 N.E. 827 (1908).

<sup>32</sup> Cf. Farrington v. State, 33 App. Div. 731, 733, 305 N.Y.S.2d 175, 177 (3d Dep't 1969).

## APPENDIX

PROPOSED AMENDMENTS CONCERNING EXPERT WITNESSES TO THE CIVIL PRACTICE LAW AND RULES (New Matter in Italics; Deletions in Brackets).

CPLR 3101 — Revise subdivision (d) to read:

(d) Material prepared for litigation. *Except as provided in sections 3120, 3121 and 3140, no writing or thing created by or for a party or his agent in preparation for litigation shall* [The following shall not] be obtainable unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship. [ : 1. any opinion of an expert prepared for litigation; and 2. any writing or anything created by or for a party or his agent in preparation for litigation.]

CPLR 3120 — Add to Rule 3120(a) a new subparagraph reading:

3. A copy of a detailed written report of the person making any such inspection, survey, sampling, test or photograph setting out his findings and conclusions of fact or opinion shall be delivered by the party seeking discovery under this section to any party offering to exchange therefor a copy of each report in his control made or which may thereafter be made with respect to the same document, thing or property.

(Based in part on present CPLR 3121(b)).

CPLR 3121 — Revise Section 3121 to read as follows:

§ 3121 — *Disclosure of physical or mental [examination] condition.*

(a) Notice of examination. [After commencement of an] *In any action in which the mental or physical condition or the blood relationship of a party, or of an agent, employee or other living person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent[,] or employee or the person in his custody or under his legal control. The notice [may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of the hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party.] shall specify the time of examination, which except by leave of court for good cause shown shall be not less than thirty nor more than forty days after service of the notice, the place, the conditions and the scope of examination.* A copy of the notice shall be served on the party to be examined [It shall specify the time, conditions and scope of the examination].

(b) Copy of report. A copy of the detailed written report of the examining physician setting out his findings and conclusions *of fact or opinion* shall be delivered by the party seeking the examination to [any party requesting to exchange therefor a copy of each report in his control of an examination made with respect to the mental or physical condition in controversy] *every other party to the action and to the person examined, within twenty days after completion of the examination.*

(c) *Disclosure of Medical History. In any such action or in any action for wrongful death in which the mental or physical condition or blood relationship of the decedent is in controversy, any party may require (i) disclosure, with respect to the decedent or to the living person whose mental or physical condition or blood relationship is in controversy, of the name and address of every physician who treated or examined such decedent or living person with respect to such condition or relationship and of every hospital in which he has been treated or examined with respect thereto, (ii) delivery of a copy of every report, in the possession or control of the party whose condition or relationship, or whose decedent's condition or relationship, is in controversy, relating to such condition or relationship made by each physician named in response to (i) above, (iii) delivery of duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records relating to such condition or relationship of each hospital named in response to (i) above, of such other records, including X-ray and technician's reports, as may be referred to and identified in any physician's report, and with respect to a decedent of all autopsy or post-mortem reports. The response to such demand shall, unless the court otherwise directs, be served not later than the twentieth day after service of the demand.*

(d) *Preclusion.* Unless an order to the contrary is made prior to the trial or unless the judge presiding at the trial, in the interests of justice and upon a showing of good cause, shall hold otherwise, no party shall be permitted to offer any evidence of injuries or conditions not set forth or put in issue in the respective medical reports previously exchanged, nor will the court hear the testimony of any physician whose medical reports have not been served as in this section required, nor may any party offer in evidence any part of a hospital, autopsy, post-mortem, X-ray or other technician's record or report not available pursuant to subdivision (c) of this section.

(Based on CPLR 3121 and Appellate Division Rules, 22 N.Y.C.R.R. 672 (2d Dep't 1963). *Nota Bene:* If the proposed 3121 is enacted, the Appellate Division rules referred to, *supra* note 4, will have to be modified accordingly.)

CPLR 3140 — Revise the title of the Section to read: "Disclosure of expert opinion; deposition of expert," reletter the present section and section title as subdivision (a) and insert new subdivisions as follows:

(a) Disclosure of appraisals in proceedings for condemnation, appropriation or review of tax assessments. Notwithstanding the provisions of subdivisions (c) and (d) of section 3101, the appellate division in each judicial department shall adopt rules governing the exchange of appraisal reports intended for use at the trial in proceedings for condemnation, appropriation or review of tax assessments.

(b) *Disclosure and depositions of adversary's expert in other trials.* Notwithstanding the provisions of subdivisions (c) and (d) of section 3101, in all cases other than those provided for in subdivision (a) of this section, discovery of facts known and opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial may be obtained only as follows:

(1) *Expert who will testify at trial.* A party may through interrogatories require any other party to identify and state the qualifications of each person whom the other party expects to call as an expert witness at the trial, to state the subject matter on which the expert is expected to testify, to furnish a copy of any written report made by the expert, and to state the substance of any facts and opinions not stated in such written report to which the expert is expected to testify and a summary of the grounds for each such opinion. Except for good cause shown, no party shall be permitted to present the expert testimony of any witness concerning whom he has not furnished the information required by this paragraph nor as to any witness for whom such information has been furnished to present the expert testimony of that witness outside the scope of the party's answers to such interrogatories.

(2) *Expert not expected to testify at trial.* A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in paragraph 3 of this subdivision, in paragraph 3 of subdivision (a) of Rule 3120 or in subdivision (b) or (c) of section 3121, or upon a showing of exceptional circumstances as a result of which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) *Deposition of adversary's expert.* Upon motion and subject to such restrictions as to scope as the court deems appropriate, the deposition of (i) a physician or technician or hospital named in response to a notice served, or referred to in a report furnished, pursuant to subdivision (c) of section 3121, or (ii) an expert whose report or opinion is available pursuant to this subdivision (b) or to subdivision (a) of Rule 3120 or to subdivision (b) or (c) of section 3121 to a party other than the party retaining or employing him, may be taken by any such other party.

(4) *Fees and expenses.* The court may require that a party who seeks disclosure under paragraph (2) of this subdivision pay to the party who retained or employed the expert a fair portion of the fees and expenses incurred by the latter party in obtaining the report or opinion from the expert, and that a party who seeks to take a deposition pursuant to paragraph (3) of this subdivision pay the expert, in addition to the fee provided for in section 8001, a reasonable fee for time spent, including travel time, in appearing for examination.

(c) *Deposition of party's expert.* The deposition of an expert witness may be taken by the party who retained or employed him, subject to such reasonable conditions as the court in its discretion determines, upon motion, justice requires, but movant's expenses in taking such a deposition shall not be taxable as costs. Unless the trial justice

for good cause shown determines otherwise, such a deposition may be used at the trial, notwithstanding the ability and willingness of the expert to attend the trial, by any party against any other party who was present or represented at the taking of the deposition or who had notice of the motion made under this subdivision.

CPLR 4509—Add a new section reading:

§ 4509—*Expert Witness.*

A witness shall not be excused or prevented from answering relevant questions concerning his expert opinion on the ground that (i) a party to the action other than the proponent of the questions employed him as an expert, but a witness who testifies, on either direct or cross-examination, as the witness of a party other than the party who employed him, shall be entitled to receive such amount, in addition to any fee payable to him pursuant to section 8001, as the court determines to be a reasonable fee for the time spent, including travel time, in attending for the purpose of giving such testimony, or (ii) he is a party to the action and the opinion sought to be elicited from him is available through testimony of another expert.

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