

EXPERT WITNESS TRANSPARENCY



Ending “trial by ambush”

New York lacks a statewide timeframe for disclosure

Currently in a lawsuit in New York all parties must disclose who they expect to call as an expert witness at trial, 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. Amazingly, however, *current law provides no statewide time frame for the disclosure of expert witnesses*. In practical effect, this allows both plaintiffs and defendants to withhold disclosing their witnesses until as late as the day of trial.

The current system enables abuse

Expert witnesses are often critical to the strength of a case, and can have a substantial impact on the case's outcome. New York's law requires disclosure specifically so that parties can understand the strength of the case against them and engage in meaningful settlement negotiations *before* a case goes to trial. The practice of withholding the identity of experts until the moment before trial—“trial by ambush” - unfairly disadvantages defendants because they are not afforded adequate time prepare a defense and cross examination. As the New York State Bar Association Committee on the Commercial Division recently noted, “*Trial by ambush – which 3101(d) [the current NYS law] implicitly permits – does nothing to further the pursuit of fair and efficient resolution.*”¹

A statewide timeframe is necessary

The solution to ending “trial by ambush” is to require all parties to disclose their expert witnesses no later than the “note of issue,” which is the point at which a lawsuit is certified as ready for trial. This would reduce frivolous lawsuits and promote meaningful settlement negotiations before court resources are expended. Ultimately, this would reduce the financial and administrative burdens on the courts, allowing more expedient justice for those with legitimate claims. As distinguished legal scholar David Siegel noted,

*“As enacted...the statute [CPLR 3101(d)] is ineffective at eliciting adequate disclosure and in alleviating heavily burdened court dockets. The statute cries out for some type of amendment to impose some kind of time period on the disclosure...”*²



¹ NYSBA Committee on the Commercial Division. “A Proposal for Enhanced Expert Disclosure in the New York State Commercial Division.” 2/7/2011

² David D. Siegel, *New York Practice* 566 (4th ed. 2005); Thomas F. Gleason & Patrick M. Connors, *Search Engine Technology “Overrules” Expert-Witness Laws*, *NYLJ*, Nov. 21, 2005