

THE SCOPE OF EXPERT DISCLOSURE IN MEDICAL MALPRACTICE ACTIONS: THE IMPACT OF ELECTRONIC SEARCH PROGRAMS AND THE INTERNET

Andrew P. Nitkewicz*

INTRODUCTION

The scope of expert disclosure in Medical Malpractice actions continues to be an unsettled and controversial area of New York Law. The Courts have always been faced with the dilemma of balancing the need for pre-trial disclosure of expert witness information with the necessity of shielding the identity until the time of trial. The massive influx of computer technology over the past decade has only served to further complicate this bewildering dilemma for the New York Courts.

HISTORY OF EXPERT DISCLOSURE IN NEW YORK

In 1985, in response to criticism from the plaintiff's bar and the medical and insurance industries, the New York State Legislature passed the Medical Malpractice Insurance – Comprehensive Reform Act¹ (hereinafter referred to as "The Act"). The Act substantially altered the discovery procedures related to the litigation of Medical Malpractice action in New York Courts. Specifically, the Act promulgated New York Civil Procedure Laws and Rules (CPLR) Section 3101(d)(1)(i).

Prior to the 1985 introduction of CPLR Section 3101(d)(1)(i), CPLR Section 3101(d) specifically provided that the opinion of an expert, prepared for the purpose of litigation, was not subject to pre-trial disclosure. The passing of the Act in 1985 directly reflected the Legislature's view that a more complete expert disclosure would result in discouraging the parties "from asserting unsupported

* Andrew P. Nitkewicz is managing partner of the Medical Malpractice Division at Avelino & Nitkewicz, LLC in Manhattan. Mr. Nitkewicz concentrates primarily in the area of medical malpractice litigation and trial. He has obtained millions of dollars in awards and settlements on behalf of his clients. Mr. Nitkewicz has obtained numerous favorable jury verdicts in New York Courts. Mr. Nitkewicz has served as an adjunct faculty member in Trial Practice at Hofstra University – Nation Institute of Trial Advocacy and has served as an advisor to the Touro Law School Trial Advocacy and Competition Board.

¹ L. 1985, ch. 294, Section 4.

claims or defenses” and promote “settlement by providing both parties an accurate measure of their adversaries’ case”².

CPLR Section 3101(d)(1)(i) reads as follows:

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.

In addition to mandating pre-trial disclosure of expert witness qualifications and opinions, CPLR Section 3101(d)(1)(i) provides that, in an action for medical, dental or podiatric malpractice, a party may omit the identity of their expert witness. This “exception”, applicable only to medical, dental and podiatric malpractice actions, has been the source of much debate and even more motion practice.

Since the 1985 enactment of the Act, the New York State Courts, on both the trial and appellate levels, have repeatedly set forth that the legislative intent behind the provision, calling for the omission of the names of expert witnesses in medical malpractice actions, was to address the concern that medical experts might be discouraged from testifying by the direct or indirect pressure of their colleagues³. However, according to the 1985 Report of the Advisory Committee on Civil Practice, reprinted in 1985 N.Y. Laws 3347, 3380-3381, at the time of the enactment of the 1985 reform act, the legislature did not base its decision in

² Memorandum of State Executive Department in Support of L. 1985 ch. 294, McKinney’s Session Laws of New York, ch. 294, at 3019, 3025.

³ See, Jasopersaud v. Rho, 572 N.Y.S.2d 700 (2nd Dept. 1991); Yablon v. Coburn, 631 A.D.2d 351 (1st Dept. 1995); Thomas v. Alleyne, 752 N.Y.S.2d 362; Wagner v. Kingston Hospital, 582 N.Y.S.2d 214, 215 (2nd Dept. 1992); Duran v. NYCHHC, 696 N.Y.S.2d 795 (Sup. Ct. Bronx Cty. 1999); Esquilin v. Brooklyn Hospital, 739 N.Y.S.2d 230 (Sup. Ct. Kings Cty. 2002).

favor of CPLR 3101(d)(1) on a systematic study of the problem of physician pressure on colleagues not to testify for plaintiffs⁴.

CPLR SECTION 3101(d)(1)(i) – GROWING PAINS

Since its promulgation in 1985 CPLR Section 3101(d)(1)(i) has, with resultant motion practice and appeals, significantly developed and transformed. This growth, however, was not without its issues and problems. Significantly, two primary problems emerged.

The first problem to ensue following the promulgation of CPLR Section 3101(d)(1)(i) was that the statute failed to define exactly what “qualifications” were required to be disclosed. Now, with each party vigorously protecting the identity of their expert witnesses, the practice of disclosing only basic expert qualifications so as to shield the name of ones expert quickly began to develop. Consequently, the motion practice ensued. The law regarding definition of “qualifications” and the scope of disclosure in medical malpractice actions remained in disarray⁵.

The muddy waters, however, began to clear in 1991 with the seminal Second Appellate Division cases of Jasopersaud v. Rho⁶.

In Jasopersaud v. Rho⁷ the Appellate Division, Second Department addressed the issue of what, exactly, was discoverable under CPLR Section 3101(d)(1)(i). That is, what constitutes a “qualification” under the statute? The underlying matter was a medical malpractice action pending in the Supreme Court, Queens County. During discovery the defendant physicians served plaintiff’s counsel with identical demands for expert witness information pursuant to CPLR Section 3101(d)(1)(i). Defendants’ expert witness demands were lengthy and sought extremely detailed information regarding the plaintiff’s medical expert including, inter alia, the expert’s name, medical school (including year of

⁴ See, Basuk, Expert Witness Discovery for Medical Malpractice Cases in the Courts of New York: Is it Time to Take off the Blindfolds?, NYU Law Review, November, 2001, p. 1535.

⁵ See, Catino v. Kirschbaum, 514 N.Y.S.2d 751 (2nd Dept. 1987) (CPLR 3101(d)(1) does not preclude the possibility of uncovering or discovering an expert’s name); Jones v. Putnam Hospital, 519 N.Y.S.2d 665 (2nd Dept. 1987) (additional “qualifications” information would be improper in that it would lead to the discovery of the name of the expert witness); McGoldrick v. Young, 514 N.Y.S.2d 872 (Sup. Ct. Albany Cty. 1987) (Legislature, by permitting the omission of the expert’s name in a medical malpractice action, meant to “sharply curtail” what has to be disclosed as to those qualifications); Hamilton v. Wein, 506 N.Y.S.2d 387 (place and extent of education, board certification, number of years practicing and specialty should be disclosed under the statute).

⁶ 572 N.Y.S.2d 700 (2nd Dept. 1991).

⁷ Id.

graduation), time and place of residency, internship and fellowship, board certifications and hospital affiliations. Plaintiff's counsel moved for a protective order arguing that compliance with defendants' discovery demands would be tantamount to revealing the identity of plaintiff's expert witness. Defendants cross-moved for an order compelling compliance with defendants' expert witness demands. The Supreme Court, Queens County⁸ agreed with plaintiff's counsel, granted plaintiff's motion and denied defendant's cross-motion permitting defendants to serve properly framed expert witness demands.

The Appellate Division, Second Department, held that certain information sought by defendants' expert witness demands was discoverable while other information sought by the defendants was not discoverable. Specifically, the Court found that

. . . the items which request the medical school attended by the plaintiff's expert, the expert's board certifications, areas of special expertise, jurisdiction of licensure and the locations on internships, residencies and/or fellowships, are proper inquires bearing upon the "qualifications" of the expert (citations omitted). The dates associated with the attainment of the foregoing qualifications need not be provided, however, since we are of the view that under the circumstances, the disclosure of such information would tend to reveal the identity of the plaintiff's expert (citations omitted).⁹

In reaching its conclusion the Jasopersaud Court held that

. . . a liberal construction of the term "qualifications" comports with the framers' intent to remediate the perceived crisis in medical malpractice litigation by broadening the scope of discovery concerning expert witnesses. On the other hand, the Legislature could not have intended to undermine a party's statutory right to omit an expert's identity by authorizing excessively detailed demands for an expert's qualifications.¹⁰

Thus, the Court concluded,

. . . a trial judge assessing the propriety of a request for expert witness information must weigh the relevant policy interests involved, i.e., the Legislature's intent to materially expand discovery relating to experts and the competing concern reflected by the statutory provision authorizing a party to refrain from disclosing an expert's identity.¹¹

⁸ Lonschein, J.

⁹ Id. at 703.

¹⁰ Id.

¹¹ Id.

Although leaving delicate job of balancing the interest of full disclosure with the statutory intent of safeguarding the identity of the expert witness with the trial judge, the Jasopersaud Court set forth a seemingly clear outline of exactly what expert information was discoverable in medical malpractice action and what information was not discoverable.

The First, Third and Fourth Appellate Departments have each individually addressed the issue of "qualifications" as set forth in CPLR Section 3101(d)(1)(i).

In Yablon v. Coburn¹², the Appellate Division, First Department specifically adopted those notions set forth in Jasopersaud and held that defendant's demand for expert witness information seeking information regarding plaintiff's medical expert's medical school, fellowship, residency, and the states in which such witness was licensed to practice were ". . . proper inquiries bearing upon the qualifications of the expert, the need for which outweighs the likelihood that the information would allow identification of the expert's name."¹³

In Pizzi v. Muccia¹⁴, the Appellate Division, Third Department failed to specifically list what information constituted "qualifications" but rather placed the burden on the party opposing disclosure to set forth exactly how the disclosure would reveal the subject expert's identity.¹⁵

The Appellate Division, Fourth Department in McClain v. Lockport¹⁶ adopted a variation of Jasopersaud by requiring disclosure of board certifications, specialty and teaching positions.

Unfortunately, in the years since Jasopersaud and its progeny the scope of expert disclosure has, once again, become complicated. That is, over the past decade technological advances such as the internet, CD-ROMS, Lexis-Nexus and other search engines have caused the concepts set forth in Jasopersaud and others to become outdated. Such is the second problem to ensue following the promulgation of CPLR Section 3101(d)(1)(i).

THE DEVELOPMENT OF TECHNOLOGY – THE INTERNET AND COMPUTER SEARCH PROGRAMS

When Jasopersaud was decided in 1991 the internet was, essentially, nonexistent. Worldwide use of personal computers was in its infancy. While

¹² 631 N.Y.S.2d 351 (1st Dept. 1991).

¹³ Id. at 561.

¹⁴ 515 N.Y.S.2d 341 (3rd Dept. 1987).

¹⁵ Id. at 343.

¹⁶ 653 N.Y.S.2d 774 (4th Dept. 1997).

most New York law offices utilized personal computers at the time, such computers were almost exclusively used for word processing, database and accounting functions. Although, many firms in the early to mid-nineties were using programs such as Lexis and Westlaw, the programs were primarily used for legal research as an alternative to manual book research.

As the nineties progressed computer technology became cheaper, more common and more user-friendly. Law firms began to develop more complex computer information departments. The internet began spreading like wildfire. CD-ROM programs became more useful to the legal field and Lexis-Nexis and Westlaw started to take the place of the New York Supplement and Appellate Reporters.

As with most inventions, with a necessity came an innovation. With the promulgation of CPLR Section 3101(d)(1)(i) came the need for medical malpractice attorneys to determine the identity of adverse medical experts simply by entering the basic qualifications of the physician. Thus came the innovation of medical search programs¹⁷. With these programs an attorney has the ability to simply enter in a medical school, a specialty and a state and a physician's name, address and all other qualifications can be found. Since the mid-nineties the programs became quicker, more accurate and more comprehensive. Moreover, the internet has made physician information readily available to anyone with a personal computer. To date, a medical malpractice attorney simply requires the bare essentials of qualifications to determine the adverse experts identity, full qualifications, publications, teaching positions as well as malpractice history.

SIGNIFICANT DECISIONS SINCE THE ADVENT OF THE INTERNET AND COMPUTER SEARCH PROGRAMS

The technological advancements in the area of medical expert search programs have not gone unnoticed by the Courts of New York.

Some Courts have ruled that, in light of Lexis-Nexis and other computer search programs, the balancing test set forth in Jasopersaud requires a more basic, non-detailed, expert disclosure so as to avoid the possibility of identifying adverse medical expert witnesses¹⁸. The most unambiguous of these decisions is the decision by Justice Stanley Green of the Supreme Court, Bronx County in Duran v. New York Health and Hospitals Corporation¹⁹. In Duran, Justice Green

¹⁷ Such computer search programs include Lexis-Nexis – GENMED – ABMS Board Certified Physician Searches.

¹⁸ See, e.g., Deitch v. May, 185 Misc.2d 484 (Supreme Ct. Rockland Cty 2000); Brosnan v. Shaffron, N.Y.L.J., May 3, 2001, p. 23, col. 6, (Supreme Ct. Richmond Cty).

¹⁹ 696 N.Y.S.2d 795 (1999).

squarely confronts the issue of computer expert witness search programs and, even further, demonstrates how each specific program could easily determine the identity of plaintiff's expert witnesses²⁰. Even further, Justice Green takes the reader, step by step, through the Lexis-Nexis search procedure²¹. Therein the Court pointed out how

. . . one could easily identify an expert by using the information provided in an expert response pursuant to Jasopersaud. The search is conducted as follows: First one would select the GENMED library from the list provided by LEXIS-NEXIS. Next, one would choose the file entitled ABMS Board Certified Physicians. From the ABMS file one would pick instruction to conduct a full text search. Finally, by searching with particular words and phrases, such as state of licensure, board certification, medical school and internship, one can find the identity of a doctor. Using this method, plaintiff demonstrated how that particular expert was easily identified. However, plaintiff found that the only search that did not enable her to narrow down the possibilities in order to identify the physician was a search using only the location of licensure and board certification. Thus, the granting of a protective order would be consistent with the intent of the statute as enunciated in Jasopersaud and with the holdings of Jasopersaud, Yablon and Pizzi²².

Thus, pursuant to the reasoning of Duran, if the party seeking the protective order can demonstrate how the information sought in the subject expert information demand would lead to discovery of their expert's identity through computer assisted searches, then the protective order should be granted and only that information which would not lead to the identity of the expert need be exchanged.

Other Courts, however, continue to embrace the specific "qualification" guidelines set forth in Jasopersaud. Most notably, the Supreme Court, Kings County in Esquilin v. Brooklyn Hospital Center²³. In Esquilin the Court emphasized that Jasopersaud and CPLR Section 3101(d)(1)(i) attempts to balance the need to protect a medical expert in a medical malpractice case from peer pressure, against a defendant's need for adequate discovery. Acknowledging the recent technological advances, the Court went on to hold that

. . . while computer technology and accessible information has expanded greatly in the 10 ½ years since Jasopersaud, so has the willingness and

²⁰ Id. at 796.

²¹ Id.

²² Id.

²³ 739 N.Y.S.2d 230 (2002).

availability of medical 'experts' to come forward and testify against the interests of their colleagues²⁴.

The Esquilin Court concluded that

. . . these are matters best addressed by the Legislature since it seems clear to this Court that providing the information which one party seeks as essential to its ability to properly prepare for trial or move for summary judgment could lead to disclosure of the opposing expert's name if one is prepared to engage in the necessary 'detective' work. This Court, in any event, still regards Jasopersaud as prevailing and controlling authority which, even now, properly 'harmonizes and effectuates the objectives sought to be achieved by the competing provisions'²⁵.

Once again the medical malpractice litigator is left with conflicting views as to what expert witness information, exactly, is discoverable prior to a medical malpractice trial.

WHERE ARE WE NOW? – THOMAS V. ALLEYNE

The Appellate Division, Second Department recently revisited Jasopersaud in the case of Thomas v. Alleyne²⁶. In Thomas, the Appellate Division, Second Department, once again, addressed the balancing of pre-trial disclosure of expert information and potential discovery of an expert witness' identity. The Thomas Court found the balancing standard set forth in Jasopersaud to have proven "elusive to the point of unworkability". Consequently, the Court determined to abandon the balancing test set forth in Jasopersaud in favor of new approach. Specifically, the Court ruled that defendants in medical malpractice actions are entitled to a statement of plaintiff's expert qualifications "in reasonable detail" and may only avoid compliance with this requirement upon sufficient proof to sustain a finding

. . . (a) that there is a reasonable probability that such compliance would lead to the disclosure of the actual identity of their expert or experts, and (b) that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to 'unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice'²⁷.

Thus, the Thomas Court concluded, unless plaintiff is able to make a factual showing that the expert or experts would be subject to intimidation or

²⁴ Id. at 233.

²⁵ Id.

²⁶ 302 A.D.2d 36 (2002).

²⁷ Id.

threats before trial, full disclosure of all qualifications must be made even if such qualifications would lead to the discovery of the expert's identity²⁸.

WHERE ARE WE GOING? – POST THOMAS QUESTIONS

While the Thomas Court sought to clear up the utter disarray of expert witness disclosure in medical malpractice cases, many practical questions still remain for the medical malpractice practitioner.

Does the Thomas standard conform to the spirit and intent of CPLR Section 3101(d)(1)(i)? - By specifically permitting the omission of an expert witness' name, the Legislature clearly set forth a desire to shield a medical malpractice expert's identity until the day of trial. With the advent of computer search programs the standard set forth by Thomas does not, in any way, address this concern. To the contrary, the Thomas Court specifically implies that the discovery of the name of the expert witness is, essentially, irrelevant. The Court finds that specific proof that the "expert would face certain consequences if his identity is discovered" is the important factor. Nevertheless, this completely ignores the clear intent of the legislature that the expert's identity be shielded.

Will the Thomas standard work? - It is highly unlikely that any litigant will be able to prove the second requirement of the Thomas standard (that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice"). To do so would require a litigant (usually the plaintiff) to demonstrate that the proposed expert would subject to intimidation or threats before trial – a virtually impossible task.

Has the balancing test set forth in Jasopersaud become inoperable? - With the advent of computer search programs the balancing test set forth in Jasopersaud has become difficult, but not inoperable. That is, it is complicated to weigh the need for pre-trial disclosure of expert information against the, very real, concern that medical experts might be discouraged from testifying by the direct or indirect pressure of their colleagues. However, the standard is not unworkable.

What standard should be set forth? – In the opinion of this writer the standard set forth by Justice Stanley Green in Duran v. New York Health and Hospitals Corporation²⁹ is the most practical standard. If the party seeking the protective order (the party seeking to shield the identity of an expert) demonstrates how the information sought in the subject expert information

²⁸ Id.

²⁹ 696 N.Y.S.2d 795 (1999).

demand would lead to discovery of their expert's identity through computer assisted searches, then the protective order should be granted and only that information which would not lead to the identity of the expert need be exchanged. This standard would rest on all fours with the balancing test set forth in Jasopersaud while remaining consistent with the Legislative intent of CPLR Section 3101(d)(1)(i) to shield a medical malpractice expert's identity until the day of trial. The "Duran Standard" would be a practical standard to enforce until the Legislature addresses the issue of computer search programs revealing the identity of medical malpractice expert witnesses.

CONCLUSION

As a plaintiff's medical malpractice attorney I am confronted daily with the unwillingness of medical expert witnesses to testify at time of trial. While the experts are willing to provide me with their opinion regarding the defendant's malpractice, the experts are confronted with very real pressure from their colleagues. Often such colleagues pressure willing physicians not to testify due to their own personal experience with malpractice suits, malpractice insurance rates or lawyers in general. The problem is real and not, as some Courts have written, perceived. As such there is certainly a need to balance "the Legislature's intent to materially expand discovery relating to experts and the competing concern reflected by the statutory provision authorizing a party to refrain from disclosing an expert's identity".³⁰ Until this problem is addressed by the Legislature, a uniform standard must be set forth to give adequate pre-trial notice to counsel while protecting the expert's identity. The "Duran Standard" is such a standard.

³⁰ Id.