NOTES

EXPERT WITNESS DISCOVERY FOR MEDICAL MALPRACTICE CASES IN THE COURTS OF NEW YORK: IS IT TIME TO TAKE OFF THE BLINDFOLDS?

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In this Note, Richard Basuk explores the current application of the Federal Rules of Civil Procedure (FRCP) and the New York Civil Practice Law and Rules (CPLR) regarding expert witness discovery in medical malpractice cases. Basuk finds that, while both the FRCP and the CPLR claim to value principles of broad discovery, the federal rules surpass the CPLR in actually advancing those principles. The expert discovery provisions of the FRCP, as they apply to medical malpractice cases, successfully balance and incorporate the advantages of liberal expert disclosure. Their mandatory pretrial exchange of information allows parties to evaluate the strength of their cases, to achieve early and just settlements, and to prepare effectively for cross-examination so that trials proceed on cases' merits. In contrast, the New York rules severely limit the exchange of expert witness information during discovery and thereby frequently prevent parties and the courts from reaching any of these goals. Basuk concludes that New York should more fully embrace the principles of the FRCP and adopt the federal language for expert witness discovery in medical malpractice cases.

INTRODUCTION

A generation ago, families congregated once a week to watch episodes of "What's My Line?," a popular television game show. The rules of the show required blindfolded panelists, without the benefit of advance preparation, to ask questions of a well-known "mystery guest" in an attempt to guess his or her identity. Unfocused questions produced answers that often encouraged the panelists to follow false leads or pursue dead ends. The television audience, along with the

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panelists, enjoyed the lighthearted, circuitous journey toward eventual revelation of the celebrity's identity.

A similarly circuitous but less lighthearted journey faces medical malpractice attorneys in the courtrooms of New York State. New York's medical expert witness disclosure provisions blindfold these attorneys during pretrial expert discovery and handicap them during expert cross-examination. Unlike the federal system, where the Federal Rules of Civil Procedure (FRCP) require full disclosure of expert witness identity and proposed testimony,[1] New York persists in maintaining a system that cloaks the medical expert in secrecy.[2] Attorneys in New York receive only limited pretrial information concerning the opposition's medical expert.[3] Specifically, New York does not allow a party to depose its opponent's medical expert witness[4] and further limits the open exchange of information by restricting disclosure of even the name of this expert.[5] New York, in fact, stands alone among the states in declining to follow the broad discovery principles of the FRCP that encourage complete investigation and development of expert witness information in medical malpractice suits.[6] While

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[1] See Fed. R. Civ. P. 26(a)(2) (requiring disclosure of identity of expert witness); Fed. R. Civ. P. 26(b)(4) (allowing discovery of expert's proposed testimony); see also infra Part I.A (discussing federal expert discovery rule).

[2] See N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991) (limiting expert witness discovery to attorney-prepared summaries of expected expert testimony). Both Federal Rules of Civil Procedure (FRCP) Rule 26 and New York Civil Practice Law and Rules (CPLR) 3101(d)(1) apply to expert discovery in general; CPLR 3101(d)(1), however, provides additional limitations on expert discovery in medical malpractice cases. This Note therefore focuses on expert discovery in medical malpractice cases, where the contrast between the FRCP and the CPLR is most evident and the rationale for reform of the CPLR is, arguably, most compelling.

[3] See id. (allowing parties to omit names of experts in medical malpractice cases); infra Part I.B.

[4] See N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991) (lacking provision permitting deposition of expert witnesses). But see N.Y. C.P.L.R. 3101(d)(1)(ii)-(iii) (McKinney 1991) (describing limited circumstances in which party may depose opponent's expert witnesses). Parties rarely make use of CPLR 3101(d)(1)(ii), which allows a party to offer its expert for deposition in exchange for the opportunity to depose the adversary's expert, see infra note 53 and accompanying text, and have great difficulty justifying the special circumstances required to prompt disclosure under CPLR 3101(d)(1)(iii), see infra note 51 and accompanying text.

[5] N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991).

[6] All states except New York freely permit discovery of expert witnesses, including the expert's identity, through depositions or interrogatories. Twenty-five states allow the parties to depose the opposition's expert witness. Alaska R. Civ. P. 26(b)(4)(A)(i); Ariz. R. Civ. P. 26(b)(4)(A); Cal. Civ. Proc. Code § 2034(h)(i) (West 1998); Colo. R. Civ. P. 26(b)(4)(A); Conn. R. Super. Ct. Civ. § 13-4(1)(B); Fla. R. Civ. P. 1.280(b)(4)(A)(ii); Ga. Code Ann. § 9-11-26(b)(4)(A)(ii) (1993); Iowa R. Civ. P. 125(a)(2)(A); Kan. Civ. Proc. Code Ann. § 60-226(b)(5)(A) (West Supp. 2000); Md. R. Civ. P. 2-402(e)(1)(B); Mich. R. Civ. P. 2.302(B)(4)(a)(ii); Mo. R. Civ. P. 56.01(b)(4)(b); N.J. R. Civ. P. 4:10-2(d)(2); N.D. R. Civ. P. 26(b)(4)(A)(2)(ii); Okla. Stat. Ann. tit. 12, § 3226(B)(3)(a)(2) (West Supp.

blindfolds and unprepared cross-examinations may amuse television audiences, such handicaps do not belong in front of medical malpractice juries.

Medical malpractice cases critically rely upon, and turn on, expert testimony.[7] Effective litigation, therefore, depends upon skilled cross-examination, rebuttal, and impeachment of the experts and requires thorough preparation by means of pretrial access to the opposing party's expert witness.[8] These principles, in theory, guide those who formulate and enact procedural rules for New York and federal

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2001); Or. R. Civ. P. 39(A) (providing no restriction on depositions specific to expert witnesses); S.C. R. Civ. P. 26(b)(4)(C); Tenn. R. Civ. P. 26.02(4)(A)(ii); Tex. R. Civ. P. 195.3(a); Utah R. Civ. P. 26(b)(4)(A); Vt. R. Civ. P. 26(b)(4)(A)(i); Wash. R. Civ. P. 26(b)(5)(A)(i); W. Va. R. Civ. P. 26(b)(4)(A)(ii); Wis. Stat. Ann. § 804.01(2)(d)(1) (West Supp. 2000); Wyo. R. Civ. P. 26(b)(4)(A)(ii).

Twenty-four states and the District of Columbia do not explicitly allow depositions of expert witnesses, but allow parties to obtain expert witness information through interrogatories. Ala. R. Civ. P. 26(b)(4)(A)(i); Ark. R. Civ. P. 26(b)(4)(A)(i); Del. Ct. C.P.R. 26(b)(4)(A)(i); D.C. R. Civ. P. 26(b)(4)(A)(i); Haw. R. Civ. P. 26(b)(4)(A)(i); Idaho R. Civ. P. 26(b)(4)(A)(i); Ill. R. Civ. P. 213(g); Ind. R. Civ. P. 26(b)(4)(a)(i); Ky. R. Civ. P. 26.02(4)(a)(i); La. Code Civ. Proc. Ann. art. 1425(1)(a) (West 1984) (allowing party to request expert information "through interrogatories or by deposition," but not to depose expert); Me. R. Civ. P. 26(b)(4)(A)(i); Mass. R. Civ. P. 26(b)(4)(A)(i); Minn. R. Civ. P. 26.02(d)(1)(A); Miss. R. Civ. P. 26(b)(4)(A)(i); Mont. R. Civ. P. 26(b)(4)(A)(i); Neb. R. Civ. P. 26(b)(4)(A)(i); Nev. R. Civ. P. 26(b)(4)(A)(i); N.H. R. Civ. P. 35(b)(3)(a)(i); N.M. R. Civ. P. 1-026(B)(5)(a); N.C. R. Civ. P. 26(b)(4)(a)(1); Ohio R. Civ. P. 26(B)(4)(b); Pa. R. Civ. P. 4003.5(a)(1); R.I. R. Civ. P. 26(b)(4)(A)(i); S.D. Codified Laws § 15-6-26(b)(4)(A)(i) (Michie Supp. 2000); Va. R. Civ. P. 4:1(b)(4)(A)(i).

All states except New York, by permitting broad discovery of experts, pattern their expert witness disclosure on either the current FRCP provisions that allow for depositions, see infra note 31, or the previous version of the FRCP, in force until 1993, that allowed for discovery through interrogatories, see infra note 28. States that currently use interrogatories perhaps decided to delay further liberalization that would allow for depositions pending further study by the FRCP Advisory Committee of the 1993 expert witness deposition provision. A federal study has since noted the perceived success of the liberalized federal provisions for expert witness discovery. Thomas E. Willging et al., Fed. Judicial Ctr., Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases 29 (1997) ("[O]ver two-thirds of the attorneys [surveyed] reported that at least one of the intended benefits [of expert disclosure] was realized in their case."); see infra notes 136-41 and accompanying text.

[7] See, e.g., Toth v. Cmty. Hosp., 239 N.E.2d 368, 372 (N.Y. 1968) (noting that courts base medical malpractice negligence standard on professional norms established at trial through expert testimony).

[8] The Advisory Committee to the FRCP recognized this, stating that "[e]ffective cross-examination of an expert witness requires advance preparation. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side." Fed. R. Civ. P. 26(b)(4) advisory committee's note (1970).

courts,[9] as well as those who litigate and judge medical malpractice cases.[10]

Both the FRCP and the New York Civil Practice Law and Rules (CPLR) commit in broad terms to full pretrial disclosure.[11] By moving away from a strict adversarial system in 1938, the Advisory Committee on the FRCP embraced the principle that full and timely expert witness disclosure, for those expected to testify at trial, promotes litigation on the merits and discourages litigation based upon strategic

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[9] New York Governor Mario Cuomo cited the importance of expert testimony when he recommended amendments to the CPLR to the legislature. See Governor's Program Memorandum: Medical Malpractice Insurance, reprinted in New York State Legislative Annual 1985, at 131, 133 [hereinafter Governor's Program Memorandum] ("[T]he testimony of expert witnesses is often the single most important element of proof in medical malpractice."). Indeed, in the memoranda accompanying the legislation containing the discovery provisions, the New York Legislature echoed the Governor's comments, suggesting that this principle actually guided its enactment. See Legislative Memoranda: Medical Malpractice Insurance—Comprehensive Reform, Memorandum of State Executive Department, reprinted in 1985 N.Y. Laws 3019, 3025 [hereinafter Legislative Memoranda].

Similarly, the Advisory Committee to the FRCP noted the importance of expert testimony in science-based cases. Fed. R. Civ. P. 26(b)(4) advisory committee's note (1970) ("Many [science-based] cases present intricate and difficult issues as to which expert testimony is likely to be determinative.").

[10] Malpractice attorneys themselves have recognized and propounded these principles. Thomas A. Moore and Daniel Kramer, both medical malpractice attorneys, write: "[I]n light of the recognized technical complexities involved in proving a medical malpractice case, expert medical testimony is ordinarily required to establish the relevant standard of care, departure therefrom, and resultant proximate cause." Thomas A. Moore & Daniel Kramer, Medical Malpractice: Discovery and Trial 203 (6th ed. 1990) (footnote omitted).

The New York Court of Appeals also has noted the importance of medical expert testimony. See Sawyer v. Dreis & Krump Mfg. Co., 493 N.E.2d 920, 924 (N.Y. 1986) ("Amnesia, like most medical conditions, is beyond the understanding of laymen and expert evidence on the matter is not only helpful, it is required if plaintiff is to prove the condition . . . ."); Koehler v. Schwartz, 399 N.E.2d 1140, 1141 (N.Y. 1979) (noting that in medical malpractice case, evidence of negligence "is not a matter of common knowledge which a lay jury could decide in the absence of expert testimony"); *Toth*, 239 N.E.2d at 373 (basing judgment of reasonableness of jury verdict on expert's testimony); McDermott v. Manhattan Eye, Ear & Throat Hosp., 203 N.E.2d 469, 473 (N.Y. 1964) (noting that whether defendant physician's "actions deviated from the accepted standard of medical practice . . . [is] a matter deemed to call for expert opinion" (internal quotation marks omitted)).

Similarly, federal courts have cited the importance of expert testimony in medical malpractice cases. See, e.g., Bockweg v. Anderson, 117 F.R.D. 563, 566 (M.D.N.C. 1987) (noting that liberal discovery of expert witnesses outweighs any potential abuses "particularly . . . in cases such as [medical malpractice] where the expert witnesses may likely be the crucial witnesses in the trial").

[11] See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."); N.Y. C.P.L.R. 3101(a) (McKinney 1991 & Supp. 2001) ("There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . .").

maneuvering.[12] This principle guided the Advisory Committee as it amended and refined Rule 26, from a rule that in 1938 was permissive but vague in its disclosure provisions, to the current rule mandating both the exchange of reports prepared by the expert witnesses and the availability of these experts for pretrial deposition.[13] In cases, such as medical malpractice litigation, where expert witness testimony is essential to successful litigation, the Advisory Committee maintains that access to disclosure from an adversary's experts encourages just settlements, discourages "trial by ambush," and functions with a minimum of wasteful motion practice.[14]

New York has taken a different approach to expert witnesses in medical malpractice cases. Although the legislative history of the CPLR and the case law applying the rules recognize underlying principles similar to the FRCP,[15] New York, in practice, maintains a strict adversarial system when dealing with expert witness disclosure.[16] This is most evident in cases of medical malpractice, where CPLR 3101(d)(1) allows parties to shield their medical experts from both deposition and interrogatory disclosure, permits parties to conceal the identity of the expert, and places few, if any, requirements on the substance and timeliness of the limited disclosure that the CPLR section does require.[17] The imprecision inherent in the language of CPLR 3101(d)(1), exacerbated by inconsistent judicial interpretation, encourages medical malpractice attorneys in New York to engage in a robust motion practice that diverts energies and resources from just settlements and trials on the merits.[18]

Part I of this Note will explore the current application of both sets of rules, emphasizing the principles underlying the FRCP and the CPLR regarding expert witness discovery in medical malpractice cases. Part I.A will examine the provisions of the federal rules, Part I.B will similarly explore the language of the rules of New York, and

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12 See infra Part I.A.

13 See Fed. R. Civ. P. 26(a)(2)(B) advisory committee's note (1993) ("The information disclosed under the former rule . . . was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition . . . ."); see also Fed. R. Civ. P. 26(a)(2)(B) (requiring expert witness to provide written report); Fed. R. Civ. P. 26(b)(4)(A) (allowing depositions of identified experts expected to testify at trial).

14 See infra Parts I.A, I.C.1 (discussing FRCP's expert disclosure rules, policy behind them, and their application in practice).

15 See supra note 9 and accompanying text.

16 See infra Part I.C.2 (discussing how adversarial role of New York attorneys manifests itself through vigorous motion practice); cf. Part II.B.3 (discussing how, in theory, New York rules strictly promote adversarial role of attorneys).

17 See infra Part I.B.

18 See infra Part I.C.2.

Part I.C will discuss the operation of the two sets of rules in practice. Part II will analyze the effectiveness of the two sets of rules in achieving the basic goals of discovery, exploring, in Part II.A, the impact of the rules on the important practice of cross-examination of the medical expert witness. Finally, Part II.B will examine the policy decisions that underlie discovery and the choices that the two sets of rules make, concluding that New York should adopt the principles and language of the FRCP for medical expert witness discovery.

I
RULES OF CIVIL PROCEDURE GOVERNING EXPERT WITNESS DISCLOSURE

A. The Federal Rules of Civil Procedure

Discovery has been an essential ingredient and a distinguishing feature of the FRCP since their adoption in 1938.[19] The current rules governing discovery have evolved from a principled understanding of the value of a pretrial exchange of information.[20] For expert witness

[19] See infra Parts I.C.1 and II for discussions of the federal discovery rules.

[20] The history of federal civil litigation is a progression from less discovery to more. Prior to the adoption of the FRCP, the litigation process involved little, if any, discovery. See Stephen N. Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. Rev. 691, 691, 694-95, 698 (1998) (describing how, until adoption of FRCP, sole discovery provided for in federal statutes permitted depositions in extremely limited situations). The discovery provisions of the FRCP dramatically altered the pretrial landscape in federal court, allowing for the increased use of discovery. Id. at 691.

The influential studies and writings of George Ragland Jr. and Edson Sunderland, the drafter of the FRCP, laid the foundations for the changes that Congress would incorporate into the new Federal Rules. Id. at 702-10, 714-17 (discussing works of Ragland and Sunderland). Ragland's studies, conducted in the courts of various states, confirmed that the liberal use of pretrial depositions eliminated many cases before trial, and, if the case actually proceeded to trial, reduced the element of surprise at the trial itself. George Ragland Jr., Discovery Before Trial 266 (1932). Ragland's work heavily influenced Sunderland as he drafted the FRCP. Subrin, supra, at 702. Sunderland envisioned that "if [the] use [of discovery] can be sufficiently extended and its methods simplified, litigation will largely cease to be a game of chance." Edson R. Sunderland, Improving the Administration of Civil Justice, 167 Annals Am. Acad. Pol. & Soc. Sci. 60, 76 (1933). He noted that "information . . . is an almost universal necessity if the merits of the case are to be fully presented, if preparation is to be facilitated, and if the trial is not to be confused and encumbered with useless matters." Edson R. Sunderland, Scope and Method of Discovery Before Trial, 42 Yale L.J. 863, 869 (1933) (arguing for adoption of broad discovery methods including oral depositions). The FRCP, adopted in 1938, incorporated "every major discovery device previously known anywhere in the United States." Subrin, supra, at 729. The initial Rule 26 permitted the taking of depositions from parties, agents of parties, and ordinary witnesses. See Rules of Civil Procedure for the Dist. Courts of the United States, 308 U.S. 645, 694 (1939) ("By leave of court . . . the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination . . . .").

discovery, in particular, FRCP Rule 26 implements the mandates of Rule 1, which states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action,"[21] by requiring full disclosure of expert information to opposing parties.[22] The Supreme Court reaffirmed the importance of these pretrial factual inquiries in *Hickman v. Taylor*:[23]

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. . . . The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[24]

With such expert information in hand, parties are better able to prepare for trial, engage in effective cross-examination of experts, make informed decisions about settlement, and save time and expense.[25]

The Advisory Committee on the FRCP, noting the increasingly important role of expert testimony, ushered in the modern era of expert witness discovery under the FRCP in 1970 when it recommended a new provision, Rule 26(b)(4)—Trial Preparation: Experts.[26] The Advisory Committee, in proposing Rule 26(b)(4)(A), observed that effective preparation and cross-examination necessitates that parties have pretrial access to an adversary's expert who is expected to testify

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21 Fed. R. Civ. P. 1.

22 Fed. R. Civ. P. 26(a), (b).

23 329 U.S. 495 (1947).

24 Id. at 507 (footnote omitted).

25 See infra Part II (discussing benefits of expert disclosure under FRCP).

26 Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 492-95 (1970). The 1970 amendment also added Rule 26(b)(4)(B), restricting discovery from nontestifying experts to those circumstances where "it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Id. at 495.

at trial.[27] The new rule permitted pretrial discovery of the expert's identity, qualifications, and opinions.[28]

The current rule, enacted by the 1993 amendments to the FRCP, increases the availability of expert information by mandating identification of expert witnesses[29] and the exchange of detailed reports prepared by the experts themselves,[30] as well as by authorizing the deposition of experts.[31] The report must contain the expert's opinions, the facts on which the expert based these opinions, the substance of the testimony that the expert intends to give at trial, the expert's qualifications, a list of publications authored by the expert, and a list of other cases in which the expert has testified.[32] The purpose of the pretrial exchange of a complete expert report is to avoid unfair surprise and conserve the resources of the parties and the court.[33] Parties must give the expert reports to opponents, without waiting for a request,[34] sufficiently in advance of trial to afford the parties a reasonable opportunity to seek further discovery and prepare for effective

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27 Fed. R. Civ. P. 26(b)(4) advisory committee's note (1970). The Advisory Committee noted that a California study had found that the only substitute for discovery of expert information was "lengthy—and often fruitless—cross examination during trial." Id. (citing Cal. Law Revision Comm'n, Recommendation and Study relating to Condemnation Law and Procedure, Number 4—Discovery in Eminent Domain Proceedings 707, 707-10 (1963)). Significantly, the Advisory Committee embraced the application of the new Rule 26(b)(4)(A) to cases such as medical malpractice in which expert testimony is critical. Id. ("[T]he trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts . . . .").

28 Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. at 494 (allowing party to obtain through interrogatories information from those experts expected to testify at trial).

29 Fed. R. Civ. P. 26(a)(2)(A).

30 Fed. R. Civ. P. 26(a)(2)(B) ("[D]isclosure shall . . . be accompanied by a written report prepared and signed by the [expert] witness.").

31 Fed. R. Civ. P. 26(b)(4)(A); see also supra note 13 (quoting FRCP Advisory Committee on need for authorizing use of depositions). The Advisory Committee noted that requiring parties to make their experts available for depositions conformed to the standard practice followed in most courts. Fed. R. Civ. P. 26(b) advisory committee's note (1993).

32 Fed. R. Civ. P. 26(a)(2)(B).

33 See, e.g., Reed v. Binder, 165 F.R.D. 424, 429 (D.N.J. 1996) ("The test of a report is whether it was sufficiently complete, detailed, and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and the costs are reduced.").

The Advisory Committee notes that "the experience of the few state and federal courts that have required [the exchange of expert reports] indicates that savings in time and expense can be achieved" and that "[a] major purpose of the [rule] is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." Fed. R. Civ. P. 26(a) advisory committee's note (1993).

34 See Fed. R. Civ. P. 26(a)(2)(B).

cross-examination.[35] FRCP Rule 26 authorizes a deposition of an expert after the mandatory exchange of expert reports.[36]

B. *The New York Civil Practice Law and Rules*

While based on principles similar to FRCP Rule 26,[37] the New York expert discovery provision, CPLR 3101, takes a markedly different approach to expert discovery in form and practice. While CPLR 3101(a) requires "full disclosure of all evidence material and necessary in the prosecution or defense of an action,"[38] CPLR 3101(d)(1) significantly limits discovery from expert witnesses in medical malpractice cases.

Although the Advisory Committee on Civil Practice of New York State sought guidance from FRCP Rule 26 in crafting the form and substance of the comparable CPLR provision, CPLR 3101(d)(1) has not followed the lead of the FRCP in incorporating broad provisions for expert disclosure.[39] First, CPLR 3101(d)(1) incorporates an exception to the obligation to disclose the name of each expert witness a party expects to call at trial by allowing the parties to omit the names

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35 See Fed. R. Civ. P. 26(a)(2)(C) ("[T]he disclosure shall be made at least 90 days before the trial date . . . .").

36 Fed. R. Civ. P. 26(b)(4)(A). The Advisory Committee anticipated that, having obtained a report, a party might very well no longer need to depose the expert or at least might only need a shorter deposition. Fed. R. Civ. P. 26(b) advisory committee's note (1993). In addition, the Advisory Committee blunted criticism about the costs of such depositions by noting that the party taking the deposition bears the expert's fees for the deposition. Fed. R. Civ. P. 26(b) advisory committee's note (1993). Therefore, when deciding whether to depose an expert, that party is forced to weigh its costs and benefits.

37 1985 Report of the Advisory Committee on Civil Practice, reprinted in 1985 N.Y. Laws 3347, 3380-81 [hereinafter Advisory Committee on Civil Practice]. The Advisory Committee intended the amendments to CPLR 3101 to "enact the substance of the present federal rule." Id. at 3380. Furthermore, "[t]he decisions of the federal courts in applying Federal Rule of Civil [Procedure] 26(b)(4) would provide guidance in the interpretation of the amended subdivision (d)(1) insofar as the provisions are similar." Id. at 3381. Similarly, a major commentator on New York procedural practice writes, "Much of the New York disclosure article, Article 31 of the CPLR, is modeled on the federal rules, which continue to exert their influence." David D. Siegel, New York Practice 1094 (3d ed. 1999).

38 N.Y. C.P.L.R. 3101(a) (McKinney 1991).

39 CPLR 3101(d)(1) was part of a sweeping legislative medical malpractice package enacted in 1985 to address a perceived malpractice "crisis" in New York. See Betsy A. Rosen, Note, The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis With a Prescription for Comprehensive Reform, 52 Brook. L. Rev. 135, 135 (1986) (noting that legislation's objectives included "(1) contain[ing] the cost of medical malpractice insurance while assuring adequate and fair compensation to injured persons; (2) expedit[ing] the resolution of malpractice claims; and (3) reduc[ing] the incidence of medical malpractice"). The legislation enacted a broad package of reforms intended to solve problems of insurance costs, physician competence, the incidence of malpractice, and malpractice damage awards. See id. at 135.

of expert witnesses in medical malpractice cases.[40] This provision, unique to New York,[41] finds its origins in plaintiffs' inability to obtain medical expert testimony for their cases, which was attributable to, or at a minimum exacerbated by, New York's use of the so-called "locality rule," which required parties to establish negligence based on professional custom in a specific locality.[42]

In 1985, because of varying standards of care throughout the country, New York and many other jurisdictions used the locality rule in medical malpractice cases.[43] The rule mandated that parties obtain for their malpractice cases the expert testimony of only local doctors. These local doctors, however, were likely to be colleagues of a defendant doctor. Plaintiffs' attorneys sought a solution to the difficulty that New York's "locality rule" posed to securing competent medical expert witnesses for their malpractice litigation.[44] These attorneys proposed the substance of CPLR 3101(d)(1) in exchange for concessions they made in other areas of the legislative package.[45] The Advisory Committee on the CPLR in turn pointed to "unique problems" that mandatory pretrial identification of expert witnesses in malpractice cases would pose, reasoning that disclosure of the names of expert witnesses would allow doctors impermissibly to dissuade colleagues from testifying for plaintiffs.[46] New York responded in 1985 to these

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40 N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991).

41 See supra note 6 and accompanying text.

42 See, e.g., Toth v. Cmty. Hosp., 239 N.E.2d 368, 372 (N.Y. 1968) ("[E]vidence that a physician conformed to accepted community standards of practice usually insulates him from tort liability." (citations omitted)); Pike v. Honsinger, 49 N.E. 760, 762 (N.Y. 1898) ("A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices . . . ."); Prooth v. Wallsh, 432 N.Y.S.2d 668, 669 (Sup. Ct. 1980) ("The locality rule continues to be alive and does appear in statements as the applicable standard in the great majority of appellate and trial court decisions.").

43 See supra note 42.

44 Telephone interview with Bert Bauman, Member, N.Y. Office of Court Admin. Advisory Comm. on Civil Practice, former Chair, Legislative Comm., N.Y. State Trial Lawyers Ass'n, Senior Partner, Bauman & Kunkis, P.C. (Mar. 10, 2001) (audio cassette on file with the *New York University Law Review*).

45 Id.

46 See Advisory Committee on Civil Practice, supra note 37, at 3380. The Legislative Chair of the New York State Trial Lawyers Association, Bert Bauman, elaborated on this point at the time of the legislature's consideration of the provision allowing the omission of the expert's name. Bauman cited the specific problems of medical colleagues and insurance carriers placing undue pressure on plaintiffs' doctors not to testify. Robert A. Barker, More on Medical Experts, N.Y. L.J., Nov. 15, 1999, at 3 (quoting Bert Bauman). At the time of the enactment of the 1985 reform package, the legislature did not base its decision in favor of CPLR 3101(d)(1) on a systematic study of the perceived problem of physician pressure on colleagues not to testify for plaintiffs. Bauman, supra note 44. Bauman concedes that once a physician testifies for plaintiffs, medical colleagues theoretically can exert

perceived problems by enacting CPLR 3101(d)(1). Since then, New York courts have recognized that avoiding such problems is the purpose of the provision.[47]

Today, however, the judicial trend away from a rigid locality standard in New York[48] likely has obviated the need to protect the testifying expert from pretrial identification. Expert testimony now can come from physicians nationwide, and these nonlocal experts are less subject to pressure not to testify from local physicians with whom they have no working relationship.

A second difference between the FRCP and the CPLR expert disclosure provisions is that, while the current FRCP Rule 26 freely allows the parties to depose experts who are expected to testify at trial,[49] the net effect of the current CPLR is to bar such discovery. CPLR 3101(d)(1) does not allow for discovery through interrogatories or depositions except upon the limited condition of "special circumstances."[50] By narrowly construing that exception, the courts of New York have virtually eliminated the use of expert witness depositions.[51]

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pressure on that physician not to testify in the future and, therefore, CPLR 3101(d)(1) has value only for first time, or "virgin," expert witnesses. Id. Application of current negligence standards in medical malpractice litigation has eroded even this potential value. See infra note 48 and accompanying text.

47 See Wagner v. Kingston Hosp., 582 N.Y.S.2d 214, 215 (App. Div. 1992) ("This provision was enacted because of the concern that medical experts might be discouraged from testifying by their colleagues." (citation omitted)); Jasopersaud v. Rho, 572 N.Y.S.2d 700, 702-03 (App. Div. 1991) ("This exception was addressed to the perceived problem of the exertion of direct or indirect pressure by some physicians to discourage their colleagues from giving expert testimony against them." (internal quotation marks and citations omitted)).

48 See Payant v. Imobersteg, 681 N.Y.S.2d 135, 137 (App. Div. 1998) ("Although the 'locality rule' was promulgated 100 years ago, it is still extant; however, the development of vastly superior medical schools and postgraduate training, modern communications, the proliferation of medical journals, along with frequent seminars and conferences, have eroded the justification for the rule." (citations omitted)); Riley v. Wieman, 528 N.Y.S.2d 925, 928-29 (App. Div. 1988) (allowing expert testimony from California radiologist by rejecting strict application of locality rule).

49 Fed. R. Civ. P. 26(b)(4)(A).

50 See N.Y. C.P.L.R. 3101(d)(1)(iii) (McKinney 1991) ("Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances . . . .").

51 See, e.g., Anderson v. Kamalian, 647 N.Y.S.2d 545, 546 (App. Div. 1996) (finding no "special circumstances" that would allow deposition of nonparty physician "merely upon a showing that the information sought might be relevant," in part because information was available from other sources); Hawksby v. New York Hosp., 556 N.Y.S.2d 312, 314 (App. Div. 1990) (denying defendant doctor right to depose typewriting expert who analyzed doctor's typewritten records for fabrication, noting absence of any "special circumstances" because defendant already had received expert's report); Dioguardi v. St. John's Riverside Hosp., 533 N.Y.S.2d 915, 916 (App. Div. 1988) (denying defendant right to depose any and all physicians who treated plaintiff by noting that information was available from hospital records and therefore proposed depositions did not fall under "special circumstances" ex-

CPLR 3101(d)(1), however, does attempt to facilitate at least some disclosure in medical malpractice cases by allowing parties to offer their own expert for deposition in exchange for a deposition of the opposing expert.[52] Unfortunately, attorneys rarely freely exchange their experts' identities or voluntarily make available their experts for oral deposition under CPLR 3101(d)(1)(ii).[53]

A third difference is that CPLR 3101(d)(1) requires that the parties themselves, not the experts, prepare an expert "response" that is more limited in scope than the federal report, and further permits the parties to forego providing such a response altogether unless the opposing party requests it.[54]

Finally, CPLR 3101(d)(1), unlike FRCP Rule 26,[55] does not mandate that the parties make expert disclosures in a prescribed time relative to the trial, but instead allows the court complete discretion to enforce the timeliness of the expert response exchange.[56]

New York does not base its treatment of experts in medical malpractice cases on a principled disagreement with broad discovery. The current justification may rest solely and precariously on the strategic advantage each party obtains by exploiting the rule.

An explanation for plaintiffs' support may be found in studies that have shown a low incidence of actual negligence in medical malpractice claims.[57] If plaintiffs can delay disclosure of the merits of

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ception). But see Rosario v. Gen. Motors Corp., 543 N.Y.S.2d 974, 974 (App. Div. 1989) (finding "special circumstances" where car parts were lost before adversary's expert had opportunity for examination).

[52] See N.Y. C.P.L.R. 3101(d)(1)(ii) (McKinney 1991) (allowing party to offer witnesses for deposition by adversary).

[53] Marian E. Silber & Maria Elyse Rabar, Medical Malpractice Litigation: The Vicissitudes of Expert Disclosure, N.Y. L.J., June 18, 1996, at 3 (discussing failures of CPLR 3101(d)(1) discovery reforms in New York).

[54] N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991); Silber & Rabar, supra note 53, at 3.

[55] See Fed. R. Civ. P. 26(a)(2)(C) (mandating disclosure at least ninety days before trial).

[56] N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991). The rule states, in part:

> [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.

Id.

[57] Studies of medical malpractice suits have indicated that negligence occurs in only about one-third of all malpractice claims. See Stephen D. Sugarman, Doctor No, 58 U. Chi. L. Rev. 1499, 1501 (1991) (reviewing Paul C. Weiler, Medical Malpractice on Trial (1991)). Sugarman based his calculations on Weiler's book and a well-known study from the Harvard Medical Practice Study Group. Id. at 1501 (citing Harvard Med. Practice Study Group, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York (1990)).

their case until trial, they can very possibly negotiate an early monetary settlement on a nonmeritorious claim. Indeed, thirty percent of all settled claims represent cases where no malpractice has occurred.[58] Many plaintiffs in New York, therefore, have an incentive to settle early before expert testimony at trial exposes the weaknesses of their claims. By shielding the expert's testimony and identity during discovery, CPLR 3101(d)(1) allows plaintiffs to control the litigation to their advantage.

Similarly, defendants, when faced with clear negligence, can use the limited expert disclosure of the CPLR to force a delay in the litigation. If defendants can conceal the weakness of their defense by not revealing expert information, then plaintiffs may choose to withdraw a meritorious claim or settle for less than the full value of their claim.

Policymakers, courts, and commentators in New York, however, have not subscribed to the self-serving justification espoused by attorneys in support of limited discovery. Instead, they have demonstrated a deep-rooted understanding of the value of a broad and liberal discovery regime. Governor Nelson Rockefeller, at the time of passage of the original CPLR in 1963, noted the promise that the new rules held in utilizing "the advantages of modern pre-trial disclosure."[59] Governor Mario Cuomo voiced similar expectations in his memorandum accompanying the 1985 legislation that incorporated the core of the current CPLR 3101(d)(1) provisions.[60] In addition, the New York Legislature strongly and clearly spoke in support of broad expert witness disclosure when it enacted the current CPLR 3101(d)(1) amendments.[61] Furthermore, as noted above, the New York Advisory

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[58] Id. at 1501.

[59] 1962 N.Y. Laws 3621, 3622 (reprinting letter from Governor approving enactment of CPLR). The Governor went on to write, "A just decision on the merits, expeditiously reached, is best achieved when the 'sporting theory of justice' is laid to one side and well-prepared counsel, each aware of the other's case, present their respective cases to the Court." Id.

[60] He wrote:

> A major contributor to the cost of medical malpractice insurance is delay. . . . Although virtually all other information is now shared by litigants in civil practice, information concerning expert witnesses and their opinions remains shielded from disclosure. . . . [S]haring information concerning these opinions encourages prompt settlement by providing both parties an accurate measure of the strength of their adversaries' case. In addition, both parties will be discouraged from asserting unsupportable claims or defenses, knowing that they will be required to disclose what, if any, expert evidence will support their allegations.

Governor's Program Memorandum, supra note 9, at 133.

[61] See Legislative Memoranda, supra note 9, at 3021, 3022, 3025 (noting that one purpose of amendments is to deter "use of dilatory defense strategies" by allowing disclosure of evidence pertaining to expert witnesses).

Committee on Civil Practice sought guidance when crafting the substance of the 1985 amendments by looking to the form of liberal disclosure incorporated into FRCP Rule 26.[62] Finally, New York courts have stressed the similarities between the CPLR and the FRCP, noting the strong parallel between the federal and state disclosure provisions.[63] New York courts thus appear committed to advancing the concept of liberal disclosure embodied in the federal rules[64] and, in the New York courts' view, the New York State rules.[65] Given these professed preferences for broad discovery, the restrictions of the CPLR on expert witness discovery in malpractice cases seem at odds with, and, in fact, thwart New York's goal of achieving liberal disclosure.

C. *The FRCP and CPLR in Practice*

Judicial interpretation and legal commentary in New York have supported the notion that the federal and New York expert discovery rules share a similar purpose and function.[66] A comparison of the motion practice that accompanies medical malpractice litigation in federal and New York courts, however, belies this perception. As this Part shows, the language of CPLR 3101(d)(1) forces the New York courts to remain mired in satellite litigation, with the courts frequently finding the need to rule on discovery disputes between the parties in malpractice actions. Furthermore, the restrictive CPLR provisions

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62 Advisory Committee on Civil Practice, supra note 37, at 3380-81.

63 See, e.g., Chapman v. State, 642 N.Y.S.2d 975, 976 (App. Div. 1996) (stating that CPLR 3101 is modeled upon FRCP 26). The Court of Appeals advanced principles similar to those underlying the FRCP when it stated:

> The purpose of disclosure procedures . . . is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits and . . . if there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross examination, it should be considered evidence material . . . in the prosecution or defense.

Allen v. Crowell-Collier Publ'g Co., 235 N.E.2d 430, 432 (N.Y. 1968) (internal quotation marks and citations omitted).

64 See supra Part I.A.

65 See *Allen*, 235 N.E.2d at 432 (interpreting CPLR 3101 liberally, in favor of disclosure "of any facts bearing on the controversy").

66 See, e.g., Carroll v. Nunez, 550 N.Y.S.2d 1008, 1013 (Sup. Ct. 1990) (finding that trial judge's power to demand timely disclosure of expert information was "supported by those cases interpreting Rule 26 of the Federal Rules of Civil Procedure, which rule is similar to CPLR 3101(d)"); Salander v. Cent. Gen. Hosp., 496 N.Y.S.2d 638, 642 (Sup. Ct. 1985) ("[T]he amended CPLR 3101(d) is very similar to the provisions of Rule 26 of the Federal Rules of Civil Procedure."); 6 Jack B. Weinstein et al., New York Civil Practice: CPLR, ¶ 3101.49a (2000) ("CPLR 3101(d) was completely rewritten so as to become more closely aligned with the philosophy and language of Federal Rule of Civil Procedure 26(b)(3) and 26(b)(4) regarding disclosure of trial preparation materials . . . .").

hinder adequate trial preparation, and thus "trial by ambush," absent in the federal courts, is alive and well in New York.

1. *Interpretation and Application by the Federal Courts of FRCP 26: Expert Witness Disclosure*

The mandatory, liberal discovery provisions of the current FRCP, coupled with their precise disclosure requirements, blunt adversarial procedural motion practice regarding discovery. Courts consistently sanction parties with preclusion of expert testimony for failure to disclose an expert's identity in a timely manner[67] or for delay in filing an expert's report,[68] and closely scrutinize the contents of an expert's report.[69] While the federal courts offer some criticism of the current rules, these judicial comments only suggest proposals for further im-

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[67] See, e.g., Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 283-84 (8th Cir. 1995) (precluding expert who did not timely disclose academic or practical experience in areas of proposed testimony); Derby v. Godfather's Pizza, Inc., 45 F.3d 1212, 1214-15 (8th Cir. 1995) (precluding architectural expert in slip-and-fall case because plaintiff failed to disclose expert's identity before discovery deadline); In re Air Crash, 982 F. Supp. 1086, 1088 (D.S.C. 1997) (precluding improperly identified witnesses); R.C.M. Executive Gallery Corp. v. Rols Capital Co., No. 93 CIV. 8571 (JGK), 1996 WL 30457, at *1-*2 (S.D.N.Y. Jan. 25, 1996) (precluding plaintiff's expert for failure to disclose identity by court-imposed discovery deadline).

[68] See, e.g., Vance ex rel. Hammons v. United States, No. 98-5488, 1999 WL 455435, at *5-*6 (6th Cir. June 25, 1999) (precluding expert testimony in medical malpractice case where plaintiff delayed filing expert report). The Sixth Circuit has stated explicitly that "the new rule clearly contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule, and the required sanction in the ordinary case is mandatory preclusion." Id. at *4; see also Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 203 (1st Cir. 1996) (precluding expert testimony because names were not disclosed prior to court-imposed deadline); Finley v. Marathon Oil Co., 75 F.3d 1225, 1230-31 (7th Cir. 1996) (precluding rebuttal evidence because plaintiffs missed deadline by months); Cong. Air Ltd. v. Beech Aircraft Corp., 176 F.R.D. 513, 515-16 (D. Md. 1997) (precluding plaintiff's expert report because delay of nearly six months in filing constituted "trial by ambush"); In re TMI Litig. Cases Consol. II, 911 F. Supp. 775, 828-29 (M.D. Pa. 1996) (adhering to strict case management schedule by precluding expert testimony that plaintiffs prepared eight months late).

[69] See, e.g., Cummins v. Lyle Indus., 93 F.3d 362, 371 (7th Cir. 1996) (finding report inadequate because plaintiff's expert did not disclose basis for opinion); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 571 (5th Cir. 1996) (holding one-and-one-half page "points of testimony" insufficient); Palmer v. Rhodes Mach., 187 F.R.D. 653, 655-56 (N.D. Okla. 1999) (demanding that defendant's expert provide list of over two hundred previous cases, although bulk of list was available on Internet site); Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 53-54 (S.D. W. Va. 1995) (finding "preliminary" reports that referred to documents in vague terms both "brief" and inadequate to satisfy Rule 26).

In contrast to their current practice, immediately after the enactment of the 1993 amendment to the FRCP, some courts were less firm in their resolve to enforce the FRCP provisions. See, e.g., Bonin v. Chadron Cmty. Hosp., 163 F.R.D. 565, 566 (D. Neb. 1995) (finding that preclusion was "understandable" but "too harsh" remedy for inadequate expert disclosure in view of fact that trial could proceed on merits).

provement and reflect an overall satisfaction with the purpose and goals of the discovery provisions.[70]

2. *Interpretation and Application by the New York Courts of CPLR 3101(d)(1): Expert Witness Disclosure*

In contrast to the federal procedural rules, the New York rules spawn a flourishing procedural motion practice in medical malpractice litigation that encourages unfair surprise, squanders the resources of the parties and the court, and ultimately diverts cases from an orderly adjudication on their merits. This practice is the result of the CPLR's more limited disclosure requirements, their lack of precise, clearly articulated directives, and the nonmandatory, discretionary character of their disclosure rules.

The expert witness discovery provisions of the CPLR create several problems. First, CPLR 3101(d)(1) allows parties to shield the identity of their experts, but at the same time it requires parties to disclose the qualifications of their experts.[71] CPLR 3101(d)(1), therefore, encourages parties to engage in extensive motion practice, with each party attempting to minimize disclosure of the qualifications of his or her expert, while simultaneously trying to maximize disclosure of the qualifications of the adversary's expert.[72] In reported cases,

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[70] See, e.g., 1st Source Bank v. First Res. Fed. Credit Union, 167 F.R.D. 61, 67 (N.D. Ind. 1996) (suggesting provision whereby parties may test adequacy of disclosures but otherwise finding Rule 26 "salutary").

[71] N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991).

[72] Furthermore, parties to malpractice litigation have forced the courts to rule on the disclosure of the identity of an expert witness as late as the summary judgment stage. See, e.g., Rubenstein v. Columbia Presbyterian Med. Ctr., 527 N.Y.S.2d 680, 682-83 (Sup. Ct. 1988) (holding that party opposing summary judgment motion may redact expert's name in papers submitted by adversary, reserving original for in camera inspection). The *Rubenstein* court stated:

> The in camera inspection procedure is an extremely practical method to balance a plaintiff's right to protect the identity of his expert from disclosure prior to trial and a defendant's right to put a plaintiff to the test on the validity of the underlying claim by way of a summary judgment motion.

Id. at 683; see also Carrasquillo v. Rosencrans, 617 N.Y.S.2d 51, 51 (App. Div. 1994) ("The name of the plaintiffs' expert was redacted from his affidavit, and an unredacted version was submitted to the Supreme Court in camera. . . . [T]he Supreme Court did not err in following this procedure, as it is wholly consistent with the logic underlying CPLR 3101(d)(1)(i)." (citations omitted)); McCarty v. Cmty. Hosp., 610 N.Y.S.2d 588, 589 (App. Div. 1994) ("The court should not have required the plaintiff to reveal the name of her expert to all parties before it would fully consider the merits of her opposition to defendant's [summary judgment] motion.").

Courts, however, have rejected attempts by a party to submit a redacted version of an expert's affidavit to other parties when *seeking* summary judgment. E.g., Marano v. Mercy Hosp., 670 N.Y.S.2d 570, 571 (App. Div. 1998). The *Marano* court stated that, if it permitted the submission of an affidavit from an unidentified expert, "[a] moving party could . . . prevail, without a trial, through the use of an unknown expert effectively permitted to

typically, parties make motions claiming that the opposition's disclosure of its expert's qualifications is inadequate, whereupon the opposition replies that further disclosure would reveal its expert's identity. This conduct forces New York courts, in contrast to their federal counterparts, to find the elusive balance between adequate disclosure of expert qualifications and appropriate protection of the expert's identity.

After the enactment of CPLR 3101(d)(1), the courts initially had difficulty in even defining "qualifications."[73] Thereafter, the courts shifted their focus and attempted to balance the right of parties to conceal their expert's identity against the obligation of parties to disclose their expert's qualifications upon request. These efforts have led to myriad holdings throughout the various geographical departments of the Appellate Division, New York's intermediate appeals court. For example, the Appellate Division, Second Department, at first held, in *Catino v. Kirschbaum*,[74] that CPLR 3101(d)(1) did not preclude any possibility of identifying an expert's name.[75] The court, however, soon retreated from this position in *Jones v. Putnam Hospital Center*,[76] observing that "further information as to the expert's qualifications was palpably improper since it would effectively lead to disclosure of the expert's identity . . . ."[77] The Second Department finally overruled the holding of *Catino* in *Jasopersaud v. Rho*,[78] where the court noted that "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."[79] The *Jasopersaud* court required disclosure of the expert's medical school, board certifications, areas of special expertise, and jurisdictions of licensure, as well as the locations of internships, residencies, and/or fellowships.[80] Furthermore, the *Jasopersaud* court

testify from behind a screen, whose credibility is immune from any attack no matter how justified." Id.

73 See, e.g., McGoldrick v. Young, 514 N.Y.S.2d 872, 873-74 (Sup. Ct. 1987). The *McGoldrick* court noted that a request for twelve detailed and itemized categories of qualifications included items "beyond the scope allowable under the amendment," then vacated the entire demand, and observed that "[i]t is obvious that there is going to be no easy answer for every case." Id. The court in Hamilton v. Wein, 506 N.Y.S.2d 387 (Sup. Ct. 1986), formulated its own definition in striking a demand for an expert's curriculum vitae and list of expert's published articles, noting that CPLR 3101(d)(1) fails to define "qualifications." Id. at 389.

74 514 N.Y.S.2d 751 (App. Div. 2d Dep't 1987).

75 Id. at 752.

76 519 N.Y.S.2d 665 (App. Div. 2d Dep't 1987).

77 Id. at 665.

78 572 N.Y.S.2d 700 (App. Div. 2d Dep't 1991).

79 Id. at 703 (citation omitted).

80 Id.

indicated that parties need not disclose current hospital affiliations or dates associated with the qualifications, because such information could effectively lead to disclosure of the expert's identity.[81] The *Jasopersaud* court noted the balance of competing policy interests inherent in CPLR 3101(d)(1), i.e., the benefit of expanding expert discovery and the need to protect an expert's identity from disclosure.[82] Since *Jasopersaud*, the balance has become even more elusive, because in the current world of computer technology and databases, parties have the ever-increasing ability to use qualifications to identify an adversary's expert.[83]

A second problem created by the CPLR's expert discovery provisions arises because CPLR 3101(d)(1) fails to dictate the time within which the parties must disclose information about their expert witnesses. FRCP Rule 26 mandates that the parties make timely disclosures of expert witness information, generally at least ninety days prior to trial.[84] In contrast, CPLR 3101(d)(1) sets no definite timetable,[85] and thus allows the parties to delay disclosures to work strategic

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[81] Id. at 704. The First Department has taken a similar approach to the Second Department, requiring the broad disclosure of an expert's qualifications without revealing the expert's identity. See Yablon v. Coburn, 631 N.Y.S.2d 351, 351 (App. Div. 1st Dep't 1995) (requiring disclosure of "medical school, residency, and fellowships . . . and the states in which such witness is licensed to practice medicine").

In contrast, the Third Department does not require a specific list of disclosures but instead places on the party resisting disclosure the burden of demonstrating that the disclosure effectively would reveal the expert's name. Pizzi v. Muccia, 515 N.Y.S.2d 341, 343 (App. Div. 3d Dep't 1987).

The Fourth Department uses its own variation of a limited disclosure requirement. See McClain v. Lockport Mem'l Hosp., 653 N.Y.S.2d 774, 775-76 (App. Div. 4th Dep't 1997) (finding that adequate disclosure included qualifications of board certification in pediatrics, specialty certification in pediatric infectious disease, and teaching position as professor of pediatrics).

[82] *Jasopersaud*, 572 N.Y.S.2d at 703.

[83] See Duran v. New York City Health & Hosps. Corp., 696 N.Y.S.2d 795, 796 (Sup. Ct. 1999) (discussing ease with which attorneys can use electronic database like LEXIS to identify expert); cf. Nathan L. Dembin & Edward J. Yun, Medical Expert Witness Disclosure Under CPLR: An Anachronism, N.Y. L.J., Dec. 1, 1997, at 1, 8 (noting that holding of Jasopersaud is incompatible with technological advances).

The author of this Note, a former practicing plastic surgeon, conducted a search on January 10, 2001 of the GENMED-ABMS database on LEXIS using his own qualifications: location—New York; education—M.D. from N.Y.U. School of Medicine; plastic surgery residency—N.Y.U. Medical Center; hand surgery fellowship—N.Y.U. Medical Center; and board certifications—plastic surgery and general surgery. The search revealed only one name—the author's. See The Official ABMS Directory of Board Certified Medical Specialists, 2000, LEXIS GENMED Library, ABMS file, available at http://www.lexis.com/research (result of database search on file with the *New York University Law Review*).

[84] Fed. R. Civ. P. 26(a)(2)(C).

[85] N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991) states that even where a party retains an expert "an insufficient period of time before the commencement of trial to give appro-

advantages, in addition to spawning further motion practice. Unfortunately, the New York courts, in applying CPLR 3101(d)(1), have sent mixed messages to litigants. At times, the courts allow the last-minute designation of an expert upon a showing of good cause,[86] while at other times they admonish parties for delay.[87] Even after case law and "accepted practice"[88] apparently established that the courts would consider timely expert disclosure served at least thirty days before trial,[89] a recent ruling refused to recognize the so-called "thirty-day rule," holding instead that parties should make disclosure as close to the date of retention of the expert as possible.[90] The New York courts' case-by-case approach to the timeliness component of CPLR 3101(d)(1) emboldens parties to test the waters repeatedly and push a given court to its limit.

The third cause of New York's flourishing pretrial motion practice stems from the failure of the CPLR to define precisely the substance of an adequate expert witness response. FRCP Rule 26 mandates that the expert witness prepare and sign a detailed written

priate notice thereof," the witness nevertheless is not necessarily precluded. Furthermore, the rule does not define "insufficient."

[86] Saar v. Brown & Odabashian, P.C., 527 N.Y.S.2d 685, 689 (Sup. Ct. 1988). The *Saar* court allowed an "eleventh hour" designation of an expert, noting that "the court cannot compel a response where the statute provides no specific timetable for compliance." Id. The court made an empty threat of preclusion, stating that "[i]t is *conceivable* that a showing of *intentional non-compliance* . . . *could* result in the court's exclusion of such testimony." Id. (emphasis added). Similarly, the court in Simpson v. Bellew, 555 N.Y.S.2d 829 (App. Div. 1990), permitted the selection of an expert in midst of trial. Id. at 832.

[87] See Rassaei v. Kessler, N.Y. L.J., Nov. 4, 1997, at 36 (N.Y. Sup. Ct. Nov. 3, 1997) (reprimanding plaintiff for failing to serve expert disclosure, noting plaintiff's "shopping for medical experts on the eve of trial"), aff'd 676 N.Y.S.2d 217 (App. Div. 1998); Carroll v. Nunez, 550 N.Y.S.2d 1008, 1012 (Sup. Ct. 1990) (lamenting "altogether too familiar reply of a party . . . that they have not yet retained an expert"). Similarly, the court in Salander v. Cent. Gen. Hosp., 496 N.Y.S.2d 638 (Sup. Ct. 1985), would not countenance "dilatory tactics" and thus compelled expert disclosure sufficiently in advance of trial to allow effective preparation of the case. Id. at 641-42.

[88] Marks v. Solomon, 667 N.Y.S.2d 194, 196 (Sup. Ct. 1997) (acknowledging lawyers' belief that CPLR requirements were met by serving expert witness disclosure at least thirty days before trial, but rejecting validity of practice).

[89] E.g., Krajewski v. Rosinski, 622 N.Y.S.2d 367, 368 (App. Div. 1995) (stating that trial court's thirty-days-before-trial order "complied with our interpretation of the statute"); see also Marian E. Silber & Maria Elyse Rabar, Expert Disclosure, Revisited, N.Y. L.J., Apr. 23, 1998, at 3, 7 ("In the past . . . it was generally accepted that expert disclosure served at least 30 days before trial was considered timely." (emphasis omitted)). Silber and Rabar outline the current motion practice in New York whereby the disclosing party attempts to disclose its expert as close to trial as possible while the opposition attempts to force the disclosure as far in advance of trial as possible. Id. at 7.

[90] See *Marks*, 667 N.Y.S.2d at 195, 197 (holding that service of expert response thirty-three days before trial was untimely). Defendant argued that her trial schedule and other responsibilities had prevented her from serving the response earlier, but the court failed to recognize the thirty-day rule. Id. at 195-98.

report.[91] The federal courts scrutinize the reports to ensure adequate disclosure.[92] New York courts, on the other hand, are less strict than their federal counterparts in demanding full disclosure. This is perhaps because CPLR 3101(d)(1) allows attorneys to prepare the "responses,"[93] rather than requiring experts to do so, or perhaps because the New York rule permits parties to disclose only the "substance" of the facts and opinions on which the expert is expected to testify.[94] Following the 1985 amendment, the New York courts have, at times, enforced the discovery provision strictly, by requiring full and accurate disclosure of an expert's anticipated testimony,[95] and at times have permitted cases to proceed despite reduced or nominal expert disclosure.[96] The trend has been toward more lax judicial enforce-

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[91] See supra notes 30, 32 and accompanying text.

[92] See supra note 69 and accompanying text.

[93] See supra note 54 and accompanying text (noting requirements of expert response under CPLR). A respected plaintiff's attorney "strongly" advises practitioners not to divulge the expert's more informative report but instead recommends submitting only the attorney-prepared responses. See Thomas A. Moore, Disclosure of Expert Witnesses—Part III, N.Y. L.J., Sept. 8, 1993, at 3, 7.

[94] See, e.g., Krygier v. Airweld, Inc., 574 N.Y.S.2d 790, 791 (App. Div. 1991) ("[A] party's request for the facts and opinions upon which another party's expert is expected to testify is improper. The requesting party is entitled only to the substance of those facts and opinions." (citation omitted)); Renucci v. Mercy Hosp., 508 N.Y.S.2d 518, 519 (App. Div. 1986) ("[T]he Hospital's request for the 'facts and opinions' upon which the plaintiff's expert was expected to testify was improper, as the Hospital was entitled to only the 'substance' thereof." (citation omitted)).

[95] See White v. Timberjack, 630 N.Y.S.2d 1005, 1006 (App. Div. 1994) (granting new trial because plaintiff's response did not disclose subject of opinion that expert gave at trial); Hageman v. Jacobson, 608 N.Y.S.2d 180, 181 (App. Div. 1994) (precluding expert testimony because plaintiff's expert response "was so misleading . . . as to be wholly inadequate"); Parsons v. City of New York, 573 N.Y.S.2d 677, 678-79 (App. Div. 1991) (granting new trial because defendant's response was both misleading and unrevealing).

[96] See Curatola v. Staten Island Med. Group, 664 N.Y.S.2d 570, 571 (App. Div. 1997) (finding that "conclusory statement in the plaintiff's . . . response . . . failed to satisfy the statutory requirement," but permitting plaintiff to provide further response); Misel v. N.F.C. Cab Corp., 658 N.Y.S.2d 625, 626 (App. Div. 1997) (holding that "mere[ ]" fact that expert's opinion was "inadvertently omitted from the expert notice" did not warrant preclusion); Citron v. N. Dutchess Hosp., 603 N.Y.S.2d 639, 641 (App. Div. 1993) (noting that "defendant was not deliberately deceived or misled by plaintiff's expert witness report," and thus holding that trial court did not abuse discretion in permitting expert to testify though testimony deviated from expert response); Putchlawski v. Diaz, 597 N.Y.S.2d 10, 11 (App. Div. 1993) (holding that allowing defense expert to testify was not abuse of discretion because failure to provide response "was not calculated to put plaintiff at an unfair disadvantage"); Santos v. Toodle Lou Rest. & Bar, 596 N.Y.S.2d 395, 396 (App. Div. 1993) (holding that trial court's allowing testimony despite noncompliance with CPLR 3101(d)(1) was harmless because party submitted substance of testimony in "bill of particulars" detailing party's claims); Carroll v. Nunez, 550 N.Y.S.2d 1008, 1012 (Sup. Ct. 1990) (calling response "so vague, ambiguous and conclusory as to constitute no response at all" but allowing plaintiff to provide new response); Saar v. Brown & Obadashian, P.C., 527 N.Y.S.2d 685, 689-90 (Sup. Ct. 1988) (noting that "information provided [in the expert response] is so general and non-specific that the plaintiff has not been enlightened to any

ment of expert disclosure.[97] One pair of New York attorneys claims that "plaintiffs' attorneys now seemingly set forth every claim in their expert responses except the one that they expect to pursue most seriously at trial."[98]

A fourth problem arises from the ambiguity in the CPLR concerning the proper form of the request for an expert response. While FRCP Rule 26 mandates the exchange of written reports,[99] CPLR 3101(d)(1) states that the parties must exchange expert information only upon request but does not specify the form the request must take.[100] The unwillingness of the courts to settle the question leads to persistent litigation. For example, in New York, after responding to a summons and complaint with an answer, defendants generally demand a bill of particulars, which is a request for the details of a party's claim. Parties repeatedly have litigated the question of whether defendants' demand for a bill of particulars or plaintiffs' returned bill of particulars may include a request for expert information.[101]

A final problem results from the imprecise language of the CPLR remedy provisions, which drives New York courts to apply variable standards of judicial review and inconsistent sanctions for noncompliance. FRCP Rule 26 calls for strict enforcement by precluding expert testimony in cases of noncompliance.[102] The federal courts have applied a consistent standard for review that minimizes unfair surprise, discourages unnecessary motion practice, conserves resources of the parties and the court, and thus allows cases to proceed on their merits.[103] By contrast, CPLR 3101(d)(1), and the robust motion practice

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appreciable degree about the content of this expert's anticipated testimony" but allowing defendant to serve amended response).

97 See Marian E. Silber & Maria Elyse Rabar, Trial Surprises, and More—Part I, N.Y. L.J., Sept. 29, 1999, at 3, 7 (describing current case law in which courts have allowed expert testimony despite minimal disclosure).

98 Id. at 7.

99 See supra note 30.

100 See supra note 54 and accompanying text.

101 Compare Bellen v. Baghei-Rad, 538 N.Y.S.2d 663, 663-64 (App. Div. 1989) (holding that request for expert witness information included in demand for bill of particulars was proper), and Salander v. Cent. Gen. Hosp., 496 N.Y.S.2d 638, 641-42 (Sup. Ct. 1985) (allowing request in demand for bill of particulars by noting that CPLR 3101(d)(1) does not offer guidelines for proper form of expert disclosure request), with Coleman v. Richards, 526 N.Y.S.2d 138, 139 (App. Div. 1988) ("[E]videntiary material may not be obtained by a demand for a bill of particulars."), and Galtman v. Edelman, 511 N.Y.S.2d 1011, 1012 (Sup. Ct. 1987) (holding same); see also Siegel, supra note 37, at 538 ("Some judges have held that the request can be embodied as an additional paragraph in a demand for a bill of particulars. Others say no, because that would confuse bill of particulars remedies with disclosure remedies." (footnotes omitted)).

102 See supra notes 67-69 and accompanying text.

103 Id.

it creates, forces each court in its individual discretion to fashion both standards of review and remedies for noncompliance. The New York courts fail to articulate predictable and consistent guidelines to govern these inquiries.[104] The courts' difficulty results from the remedy provision of CPLR 3101(d)(1)(i). It excuses from preclusion parties who fail to provide timely expert information because they have not retained an expert sufficiently in advance of trial for "good cause." It does not, however, define "good cause" or guide the trial court in crafting standards or remedies.[105] The courts have given an inconsistent meaning to, or left undefined, "good cause," by occasionally accepting excuses for "good cause," while, at times, rejecting excuses.[106] In addition to "good cause," some courts have examined two additional factors in setting a particularly high threshold for determining whether to preclude expert testimony: intentional and willful noncompliance with CPLR 3101(d)(1),[107] and prejudice to the opposing party.[108] In essence, the provision grants a court complete discretion to determine compliance[109] and an appropriate remedy.[110] While the

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[104] See David D. Siegel, Practice Commentaries, in 7B McKinney's Consolidated Laws of New York Annotated 4, 16 (Supp. 2001) ("The courts have been unable to agree on a set of guideposts to determine how to handle conduct that appears to violate the provisions of CPLR 3101(d)(1)(i) on expert disclosure.").

[105] See N.Y. C.P.L.R. 3101(d)(1)(i) (

> [W]here a party for good cause shown retains an expert an insufficient period of time before 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.).

[106] Compare, e.g., Saar v. Brown & Obadashian, P.C., 527 N.Y.S.2d 685, 689 (Sup. Ct. 1988) (allowing defendant to use expert in absence of intentional or willful nondisclosure even though defendant gave expert response to plaintiff on eve of trial), with Klatzky v. Lewis, 702 N.Y.S.2d 319, 320 (App. Div. 2000) (concluding, without defining "good cause," that trial court erred in permitting plaintiffs to retain expert on eve of trial because their "proffered excuse [did] not rise to the level of 'good cause'").

[107] For example, Citron v. Northern Dutchess Hospital, 603 N.Y.S.2d 639, 641 (App. Div. 1993), holds that the trial court did not abuse its discretion in permitting an expert to testify even though his testimony deviated from the expert response. The court relied on the fact that the "defendant was not deliberately deceived or misled by plaintiff's expert witness report." Id.

[108] For example, Stafford v. Molinoff, 645 N.Y.S.2d 313, 314 (App. Div. 1996), found that because the litigation record clearly reflected the defendant's defense, calling a previously undisclosed expert could not come as a surprise and therefore did not result in prejudice to the plaintiff. One commentator notes that New York courts equate prejudice with unfair surprise or with a limitation on the opposition's ability to prepare adequately for trial. Moore, supra note 93, at 7.

[109] See, e.g., 6 Weinstein et al., supra note 66, ¶ 3101.52a ("Whether there was good cause for the delayed notice or the failure to provide the notice is generally determined on an ad hoc basis."); Thomas A. Moore, Disclosure of Expert Witnesses—Part II, N.Y. L.J.,

typical remedy for noncompliance is preclusion of expert testimony,[111] some New York courts choose instead merely to fine the noncompliant party.[112]

Overall, the imprecision and ambiguity in the language of the CPLR's provisions have prevented the courts of New York from announcing either uniform definitions of noncompliance or a system of predictable sanctions. CPLR 3101(d)(1) thus emboldens parties in a medical malpractice case to restrict disclosure and press individual judges to the limit of their particular tolerance.

II
THE EFFECTIVENESS OF EXPERT WITNESS DISCLOSURE PROVISIONS IN ADVANCING TRIAL OBJECTIVES AND DISCOVERY PRINCIPLES UNDER THE FRCP AND THE CPLR

The expert discovery rules of the FRCP and CPLR, while sharing a common stated purpose to promote the broad disclosure of expert information, diverge significantly from each other in their form and function. The federal rules, in practice, provide parties with liberal disclosure of expert information, while CPLR 3101(d)(1) severely restricts the exchange of such information.[113] While the FRCP provisions allow federal courts to focus on the merits of cases, CPLR 3101(d)(1) diverts the attention of New York courts to a thriving motion practice. This Part argues that the FRCP expert witness discovery provisions surpass those of the CPLR in providing practical benefits and balancing conflicting discovery policies. Part II.A explores the practical effects of the two sets of rules by comparing the manner in which the rules allow attorneys to prepare for cross-examination of the medical expert and will argue that CPLR 3101(d)(1) sig-

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Aug. 3, 1993, at 3 (observing that CPLR 3101(d)(1)(i) gives court discretion to define "good cause").

110 See, e.g., Dunn v. Medina Mem'l Hosp., 502 N.Y.S.2d 633, 635 (Sup. Ct. 1986) (noting that remedy for CPLR 3101(d)(1) noncompliance is "entirely in the Court's hands"); see also Silber & Rabar, supra note 89, at 7 ("[T]he determination of whether disclosure was . . . timely . . . rest[s] within the discretion of the trial court.").

111 E.g., *Klatzky*, 702 N.Y.S.2d at 320; Martin ex rel. Martin v. NYRAC, Inc., 684 N.Y.S.2d 605, 606 (App. Div. 1999); McClain v. Lockport Mem'l Hosp., 653 N.Y.S.2d 774, 776 (App. Div. 1997); Lasek v. Nachtigall, 592 N.Y.S.2d 420, 420 (App. Div. 1993); Hudson v. Manhattan & Bronx Surface Transit Operating Auth., 591 N.Y.S.2d 31, 32 (App. Div. 1992); Corning v. Carlin, 577 N.Y.S.2d 474, 475 (App. Div. 1991); Zarrelli v. Nathan Littauer Hosp., 575 N.Y.S.2d 973, 975 (App. Div. 1991).

112 See Marks v. Solomon, 667 N.Y.S.2d 194, 195-97 (Sup. Ct. 1997) (affirming trial court's finding of noncompliance without good cause and assessing financial penalty against defendant without precluding expert's testimony); Schmidt v. Persico, N.Y. L.J., June 25, 1992, at 29 (N.Y. Sup. Ct. June 25, 1992) (assessing penalty and adjourning case for thirty days because defendant added expert after jury selection had begun).

113 See supra Part I.C.

nificantly impedes effective cross-examination. Part II.B concludes that the federal rules also make better policy choices than the CPLR and thus more effectively advance worthwhile discovery principles.

A. The Use of the FRCP and the CPLR for Effective Cross-Examination of the Medical Expert Witness

The disclosure provisions of the FRCP allow parties in medical malpractice cases to prepare effectively for a successful cross-examination of a medical expert. Conversely, by delaying the discovery of expert information until trial, CPLR 3101(d)(1) undermines essential expert cross-examination and rebuttal.

A trial is a search for the truth,[114] and cross-examination is "the principal and most efficacious test for the discovery of truth."[115] Successful cross-examination requires advance preparation,[116] which should include an investigation of the experts' credentials, together with their testifying experience, actual transcripts from prior trials, and the frequency with which the experts have reviewed cases and given opinions in lawsuits.[117] Successful cross-examination uses this information not only to refute the medical evidence and opinions presented by experts, but also to establish doubt as to their credibility.[118]

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114 See, e.g., Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966) ("The basic purpose of a trial is the determination of truth . . . ."); Allen v. Crowell-Collier Publ'g Co., 235 N.E.2d 430, 432 (N.Y. 1968) (noting same); see also Thomas A. Moore, Cross-Examination of the Expert Witness: Part I, N.Y. L.J., Sept. 4, 1990, at 3 ("We have all heard that a lawsuit is a search for the truth.").

115 Richard T. Farrell, Prince, Richardson on Evidence § 6-301 (11th ed. 1995); see also Thomas A. Moore & Matthew Gaier, Cross-Examining a Medical Expert, N.Y. L.J., Oct. 7, 1997, at 3 ("One of the most critical aspects of every medical malpractice trial is the cross-examination of the medical experts.").

116 See Fed. R. Civ. P. 26(a)(2) advisory committee's note (1993) (justifying disclosure duties because they allow opposing parties to have "a reasonable opportunity to prepare for effective cross-examination and perhaps arrange for additional expert testimony"); see also Fed. R. Civ. P. 26(b)(4) advisory committee's note (1970) ("Effective cross-examination of an expert witness requires advance preparation. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side."); Moore, supra note 114, at 3 (noting that effective preparation requires "long-term" efforts).

117 See Moore & Gaier, supra note 115, at 30; Moore, supra note 114, at 3, 4 (detailing possible research into expert's qualifications and identity). Moore and Gaier encourage attorneys in medical malpractice cases to engage in "scrupulous research" to uncover the expert's prior testimony, articles and publications authored by the expert, and other statements made by the expert. Moore & Gaier, supra note 115, at 30. They also note that "[t]he expert's qualifications can be fertile ground for discrediting or reducing the impact of her opinions, and there are many aspects of her qualifications that can be explored without restraint." Id.

118 Moore & Gaier, supra note 115, at 3, 30. Courts and commentators recognize that robust cross-examination by a highly prepared adversary, such as one prepared through the FRCP's discovery provisions, potentially carries a risk. Such questioning, in theory,

The disclosure provisions of the FRCP provide in advance all the essential information concerning the opposition's expert witness that a seasoned medical malpractice attorney needs for an effective cross-examination. FRCP Rule 26 mandates disclosure of the expert's report, which details the expert's identity, qualifications, anticipated testimony, and previous testifying experience.[119] Furthermore, FRCP Rule 26 requires that parties exchange this report at least ninety days before trial[120] and that parties permit the opposition the opportunity to depose their experts.[121]

In contrast, the disclosure provisions of CPLR 3101(d)(1)(i) do not provide the tools necessary for effective cross-examination.[122] CPLR 3101(d)(1) allows the parties to conceal the identity of the opposition's expert; it permits, by request only, the exchange of an expert witness "response" prepared by the attorney; it effectively prohibits discovery from the expert by either interrogatories or deposition.[123] Yet, despite all of these limitations, CPLR 3101(d)(1) sets no time frame for the minimal disclosure it does require or permit.[124] The New York provisions make advance preparation for cross-examination of the medical expert difficult and inefficient. With limited expert witness discovery, attorneys must prepare for cross-examination by pursuing perhaps needless avenues of research and by making educated, but perhaps incorrect, conjectures about the expert's identity, qualifications, and approach to the case.[125] Some attorneys confound pretrial cross-examination preparation by providing multiple expert responses during discovery, so that the opposition cannot be certain

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can lead to harassment of the expert witness, an emphasis on marginally relevant points of contention, or frank confusion of the issues. Farrell, supra note 115, § 6-301 (emphasizing ability of trial judge to impose reasonable limits on cross-examination to avoid, among other things, harassment of witness and confusion of issues); see Feldsberg v. Nitschke, 404 N.E.2d 1293, 1297 (N.Y. 1980) (recognizing trial court's discretion to "restrict inquiry into collateral matters or prohibit unnecessarily repetitive examination" (internal citation omitted)); cf. Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (noting that party in criminal cases, analogous to civil cases, has "*opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the [party] might wish"). Trial judges, however, are able to keep this risk to a minimum because they have wide latitude to impose limits on improper questioning. *Feldsberg*, 404 N.E.2d at 1297.

119 Fed. R. Civ. P. 26(a)(2)(B).

120 Fed. R. Civ. P. 26(a)(2)(C).

121 Fed. R. Civ. P. 26(b)(4)(A).

122 See, e.g., Moore, supra note 114 (outlining information attorneys should hurriedly acquire upon learning expert's identity).

123 See N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 1991).

124 See id.

125 Interview with Rocco Conte, malpractice defense attorney and Senior Partner, O'Connor, McGuinness, in White Plains, N.Y. (Mar. 10, 2001).

which expert will testify at trial.[126] Such practices force attorneys to have mechanisms in place for rapidly researching an expert's credentials and background on the day of trial when the opposition finally reveals the expert's identity.[127] By necessitating such last-minute measures, the expert witness disclosure provisions of the CPLR, unlike those of the FRCP, severely restrict the parties in medical malpractice cases from effectively preparing in advance for the critical cross-examination of the opposition's expert.

B. The Use of the FRCP and the CPLR to Balance Conflicting Policies Inherent in the Rules of Discovery

Discovery rules are designed to achieve two broad and related purposes—to foster "the ascertainment of truth and the encouragement of just settlements."[128] Both federal courts[129] and the New York Court of Appeals[130] support practices that foster such principles. Within the broad discovery principles, however, there are more focused, and often competing, concerns that discovery rules respond to in varying ways. In this respect, discovery rules necessarily reflect a series of distinct choices made by the rulemakers that favor certain policies over others. Traditionally, the discovery debate has centered on several areas of apparent conflict between equally important policies, namely: (1) full disclosure versus cost savings, (2) discovery overuse versus discovery evasion, (3) the attorney as advocate for the client versus the attorney as officer of the court, and (4) judicial inter-

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126 Conte, supra note 125.

127 See Moore, supra note 114. Moore offers the following advice:

> On the day of the expert's testimony, you may be fortunate enough to recognize him. If so, have your assistant do a check on the professional background of the witnesses' involvement in litigation. . . . If the witness is a stranger to you, the above quest should be set in motion by an assistant when the witness identifies himself, his address and his affiliations at the beginning of his testimony.

Id.; see also Moore & Gaier, supra note 115, at 30 (noting that effective cross-examination requires "expeditious research" to learn about previously unidentified expert).

128 Wayne D. Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978); see also William W. Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 713 (1989) (arguing that without exchange of information parties cannot adequately evaluate and present their cases).

129 See, e.g., Stacey v. Bangor Punta Corp., 107 F.R.D. 786, 789 (D. Me. 1985) (recognizing that discovery encourages accurate "determination of the truth").

130 See, e.g., Allen v. Crowell-Collier Publ'g Co., 235 N.E.2d 430, 432 (N.Y. 1968) ("The purpose of disclosure procedures . . . is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits . . . ." (quoting Rios v. Donovan, 250 N.Y.S.2d 818, 820 (App. Div. 1964))).

vention versus judicial laissez-faire.[131] Accordingly, any set of discovery rules likely will reflect a balance or compromise between these competing policy concerns. The question then becomes whether the balance struck is a sensible one. As this Part will demonstrate, the discovery rules of the FRCP balance these policy choices better than the CPLR.

1. Full Disclosure vs. Cost Savings

Discovery rules must balance the benefits of disclosure against the costs of such disclosure.[132] The discovery provisions of the FRCP acknowledge the benefits of disclosure by embodying the principle that "greater openness and broader disclosure facilitate the search for truth."[133] The Supreme Court emphatically endorsed such an approach when it noted that the discovery provisions "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[134]

In theory, one could defend the CPLR on the ground that the costs of disclosing expert witness information before trial outweigh its benefits. If requiring experts to prepare a report or to sit for a deposition greatly increased the costs of litigation, it might follow that the balance struck by New York is preferable to that embodied in the FRCP. Indeed, the common perception among attorneys is that ex-

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131 Francis H. Hare, Jr. et al., Full Disclosure: Combating Stonewalling and Other Discovery Abuses 48-55 (1994). Two other areas of competing policies are less controversial when related to expert witness disclosure. The first, "prefiling proof of liability vs. proof obtained by discovery," attempts to balance the competing policy interests of deterring frivolous lawsuits and of permitting access to the judicial system to plaintiffs who need information from defendants to prove their case. Id. at 54. In a medical malpractice case, however, this policy conflict is unlikely to arise because it is improbable that plaintiffs will rely on information obtained from defendants' experts to make their case. See Moore, supra note 114, at 3 ("Obviously, the raison d'etre of the expert's presence and testimony has been to hurt your client's case.").

Hare's second, less controversial, area of competing policies, "who pays: discovering party vs. disclosing party," Hare et al., supra, at 55, concerns which party should bear the burden and costs of developing information. For expert witness disclosure, the FRCP and CPLR place equal and symmetric burdens on the parties since each party can obtain from the other either FRCP expert witness reports or CPLR expert responses. In addition, under the FRCP, parties who request to depose an expert bear the cost, but make such a request only at their option. These parties are positioned best to weigh the costs and benefits of the deposition. See Fed. R. Civ. P. 26(b) advisory committee's note (1993) ("Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition.").

132 Hare et al., supra note 131, at 48.

133 Id.

134 United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). The Supreme Court thus reasserted principles inherent in the FRCP, see supra Part I.A, and first announced in Hickman v. Taylor, 329 U.S. 495 (1947), see supra text accompanying note 24.

pert witness discovery does increase litigation costs.[135] Empirical evidence, however, refutes this widespread belief.

A report from the Federal Judicial Center analyzed five potential costs and benefits of expert disclosure to the litigation process, including overall litigation expenses, the costs that expert discovery imposes because of delays, the benefit of overall procedural fairness, the benefit of fairness of case outcome, and the benefit of early settlement.[136] The study found that the added costs of an expert report and deposition did not result in increased litigation expenses in the majority of cases.[137] In addition, expert disclosure did not impose delay costs,[138] but did have a positive impact on the fairness of litigation procedure[139] and the fairness of the outcome,[140] and did promote cost-saving early settlements.[141]

The results of the Federal Judicial Center study of FRCP expert disclosure show that broad disclosure does not increase litigation costs. While no empirical studies exist to evaluate the CPLR, the results of the federal study would imply that the more limited CPLR disclosure, in comparison to the FRCP disclosure, should not achieve

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135 See Bauman, supra note 44 (citing personal, not empirical, evidence). This observation cites the direct expense of expert witness depositions, see id., but gives less consideration to the fact that an exchange of information through depositions could reduce costs indirectly by eliminating delay, motion practice, and satellite litigation, see supra Part I.C (discussing practical effects of liberal expert discovery).

136 See Thomas E. Willging et al., supra note 6, at 29 tbl.20. The study surveyed responses from almost 1200 attorneys nationwide to analyze benefits and costs of using expert disclosure provisions of 1993 FRCP amendments in cases involving expert witnesses. Id. at 57 n.26. The Federal Judicial Center made no separate analysis for medical experts, but nearly one-half of the respondents to the expert disclosure questions were attorneys involved in tort cases. Id. at 28.

137 See id. at 29 tbl.20. Seventy-four percent of respondents found that expert disclosure either had no effect on or decreased litigation costs. See id. Thirty-one percent of respondents, in fact, said that overall litigation expenses actually decreased. Id. This 31% was equally divided between plaintiffs' and defendants' attorneys, with 29% of plaintiffs' attorneys and 32% of defendants' attorneys responding that overall litigation expenses decreased with expert disclosure. Id. While 27% of respondents found that disclosure increased expenses, only 9% thought that the disclosure was too expensive. Id. at 29.

138 See id. at 29 tbl.20. Only 10% of attorneys surveyed reported that expert disclosure increased the time from the filing of a claim to final disposition. Id.

139 See id. The study noted that 49% of plaintiffs' and 45% of defendants' attorneys reported that procedural fairness increased with disclosure, while only 8% of all attorneys surveyed believed that the expert disclosure requirements decreased this fairness. Id.

140 See id. Ninety-three percent of the surveyed attorneys found that disclosure either increased or had no effect on the fairness of the outcome of a case. See id.

141 Thirty-seven percent of respondents said that disclosure increased incentive to settle. Id.

Interestingly, the most frequent problem that attorneys encountered with expert disclosure concerned disclosures that were too brief or incomplete. Id. at 30. This lends additional support for the mandatory and liberal expert disclosure requirements of the FRCP and argues against the limited discovery available under the CPLR.

significant cost savings. Cost-saving arguments cannot justify the New York limitations.

2. *Discovery Overuse vs. Discovery Evasion*

A related area of conflict that surfaces in the face of discovery reform involves overuse[142] and evasion, two types of discovery abuse.[143] Discovery rules that promote full disclosure can lead to overuse, in which one party makes excessive and wasteful discovery requests to the other. Rules that restrict discovery can lead to evasion, in which one party is able to resist discovery requests from the other.[144] The federal rules use their expert disclosure provisions to curb both forms of discovery abuse. CPLR 3101(d)(1) curbs only overuse.

Expert witness discovery obligations as found in the FRCP rarely lead to excessive expert discovery requests because a party can limit expert disclosure to only those experts proposed for use at trial.[145] In other words, a party, by selecting which experts it will use at trial, sets the limits for expert discovery by the opposition. FRCP Rule 26 further limits wasteful overuse by requiring that the party seeking to depose an expert bear the costs.[146] Finally, FRCP Rule 30 controls potential overuse by directly limiting the number of depositions and interrogatories.[147] Similarly, CPLR 3101(d)(1) controls overuse with its restrictive expert disclosure provisions that limit access to information from the opposition's expert.[148]

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142 Overuse of discovery methods should not be confused with overuse of the court system. The first entails excessive and burdensome discovery requests to the opposing party while the second entails excessive applications and motions to the court.

143 Hare et al., supra note 131, at 49.

144 Id. An additional concern is that, in theory, both forms of discovery abuse can lead to increased litigation costs. See id. at 49-50. Overuse of disclosure provisions can increase litigation expenses to the parties, whereas delay and evasion can force parties to seek court intervention and thus increase litigation costs to both the parties and the court. Id. As shown above, however, the Federal Judicial Center study indicates that the expert discovery provisions of the FRCP do not increase litigation costs. Supra note 137 and accompanying text.

145 See Fed. R. Civ. P. 26(b)(4)(A) (allowing deposition of expert whose opinion may be presented at trial); Fed. R. Civ. P. 26(b)(4)(B) (limiting discovery from experts not expected to testify).

146 See Fed. R. Civ. P. 26(b)(4)(C) (requiring party requesting deposition to pay expert reasonable fee).

147 See Fed. R. Civ. P. 30(a)(2) ("A party must obtain leave of court . . . if . . . a proposed deposition would result in more than ten depositions being taken under this rule . . . ."); Fed. R. Civ. P. 33(a) ("[A]ny party may serve upon any other party written interrogatories, not exceeding 25 in number including discrete subparts . . . .").

148 N.Y. C.P.L.R. 3101 (d)(1)(i) (McKinney 1991); see also supra text accompanying notes 39-56 (comparing CPLR and FRCP expert disclosure provisions).

The importance of expert witness information in a medical malpractice case[149] may create an incentive to delay and evade disclosure. The federal rules effectively control evasion by enforceable provisions[150] that mandate disclosure[151] and provide for the preclusion of a witness in cases of evasion.[152] CPLR 3101(d)(1), on the other hand, fails to strike the proper balance. While it controls overuse with its restrictive disclosure provisions, it encourages parties to engage in evasions, delay, and noncompliance as a result of its imprecise language and nonmandatory terms.[153]

3. *Attorney as Advocate for the Client vs. Attorney as Officer of the Court*

Litigators derive information relevant to their cases either by working in the interests of their clients (i.e., as advocates for their clients), or by working in the interest of the trier of fact (i.e., as advocates for the court),[154] or both. Attorneys work as advocates for clients when they independently gather information and do not rely on the efforts of other parties. In contrast, attorneys act as advocates for the court when they freely exchange information so that all relevant facts are available to all parties. Although commentators disagree as to which of these roles best achieves the goals of discovery—the search for the truth and the encouragement of just outcomes[155]—

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149 See supra note 7 and accompanying text.

150 See supra Part I.C.1.

151 Fed. R. Civ. P. 26(a)(2); see also supra Part I.A (outlining FRCP's requirements for expert witness disclosure).

152 See Fed. R. Civ. P. 37(c)(1) ("A party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not . . . be permitted to use as evidence at trial . . . any witness or information not so disclosed.").

153 See supra Part I.C.2.

154 See Hare et al., supra note 131, at 50.

155 Hare and his co-authors argue that rules that promote attorneys as client advocates motivate parties to uncover more facts than they otherwise would, because such rules do not mandate that they share these additional facts. Hare et al., supra note 131, at 52. These facts allow parties to create more complete and more creative views of their cases. Id. In contrast, Brazil argues that the benefit of discovery comes from attorneys' role as court advocates, providing all relevant information to the parties so that each party can evaluate the complete set of facts, and thereby present or rebut this information in the most complete and persuasive way at trial. Brazil, supra note 128, at 1349, 1360-61. Brazil believes that allowing all parties access to the same pool of information promotes a fundamental fairness that necessarily contributes to just outcomes. Id. Similarly, Schwarzer, who supports the role of attorneys as court advocates, maintains that the adversarial approach does not encourage fact-finding but "opens the door to all kinds of misconduct intended to obstruct, frustrate, and wear down opponents." Schwarzer, supra note 128, at 710.

The Model Rules of Professional Conduct, without entering the policy debate, refers to both attorney roles by stating: "A lawyer is a representative of clients, an officer of the

FRCP Rule 26 allows attorneys to function in both roles, combining the benefits of each. CPLR 3101(d)(1), on the other hand, requires that attorneys function only as client advocates, failing to utilize the advantages of the dual roles.

In order to maximize the information exchange, FRCP Rule 26 encourages attorneys to act as both client and court advocates. The rule allows attorneys to function as client advocates by permitting broad avenues of investigation to the extent that the investigations do not burden other parties.[156] FRCP Rule 26 allows parties aggressively to evaluate factual information through the use of trial preparation materials and experts.[157] At the same time, the federal discovery rule requires attorneys to function as court advocates by mandating initial disclosures, disclosure of expert witness information, and other pretrial disclosures.[158]

While the provisions of the CPLR encourage attorneys to function as advocates for the client by allowing them aggressively to seek relevant facts using a broad range of discovery devices,[159] the limited expert discovery provisions of the CPLR restrict attorneys' ability to function as thorough fact providers for the court. CPLR 3101(d)(1) does not mandate a complete exchange of expert information, and thus limits the parties' ability to obtain information relating to the expert's identity, proposed testimony, previous testifying history, and qualifications.[160] While at least one group of commentators argues that mandatory disclosure of information might cause attorneys to become complacent by relying on the adversary's information,[161] the argument is not persuasive in the context of disclosure of expert witness information. Even with mandatory disclosures, attorneys retain an incentive to find their own expert witnesses.[162] Parties would be foolish to rely solely on expert information supplied by an adversary because

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legal system and a public citizen having special responsibility for the quality of justice." Model Rules of Prof'l Conduct Preamble (1999).

156 See Fed. R. Civ. P. 26(a)(5), 26(b)(1), (2).

157 Fed. R. Civ. P. 26(b)(3), (4).

158 See Fed. R. Civ. P. 26(a)(1)-(3).

159 See N.Y. C.P.L.R. 3102(a) (McKinney 1991) (listing devices of deposition, interrogatories, inspection, mental examination, and physical examination available to parties for purpose of searching for relevant information).

160 See N.Y. C.P.L.R. 3101(d)(1) (McKinney 1991); supra Part I.B.

161 See Jeff A. Anderson et al., Special Project: The Work Product Doctrine, 68 Cornell L. Rev. 760, 785 (1983) ("[T]he adversary system fosters a competitive relationship that motivates each party to marshall all the law and facts beneficial to its case. The system of open discovery dulls the competitive relationship that encourages attorneys to develop legal theories and facts.").

162 See Moore, supra note 114, at 4 (warning parties that adversary's expert will not be helpful to their own case).

medical malpractice cases turn on the testimony of each party's expert.[163] As a result, the limited disclosure of the CPLR provides no appreciable incentives or benefits, while reducing access to a complete set of relevant facts.

When attorneys act strictly as client advocates under the CPLR, the goals of discovery suffer. In contrast, because FRCP Rule 26 mandates a full exchange of expert information while still recognizing the need for adversaries to independently develop their cases, the federal rule combines the benefits of the attorney as both fact provider and fact finder.

4. Judicial Intervention vs. Judicial Laissez-Faire

The classic analysis of the adversarial process by Professor Lon Fuller noted that the presence of a neutral tribunal is a principal component of American litigation.[164] Fuller's concept of neutrality envisioned a system with limited rules and limited need for judicial intervention.[165] Fuller presupposed that judges would depend upon the attorneys, as advocates for their clients, to seek and provide the information that the fact finders would need for a just determination.[166] Fuller's straightforward model, however, fails to recognize the value of judicial intervention in promoting the exchange of expert witness information.[167] By providing for a defined but limited role for judicial oversight, the federal rules acknowledge the benefit of intervention and use it to improve outcomes; CPLR 3101(d)(1) does not.

Under the FRCP, the strict adversarial system cedes to a system of judicial intervention premised on the principle that the parties should obtain, at reasonable cost and in reasonable time, "truthful and complete information from the opponent helpful to the evaluation of

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163 See supra note 10. Furthermore, the Advisory Committee to the FRCP, recognizing that one party should not benefit unduly from another party's preparation, see Fed. R. Civ. P. 26(b)(4)(B) advisory committee's note (1970), limited discovery of experts to trial witnesses, see Fed. R. Civ. P. 26(b)(4)(B).

164 See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 384 (1978) (discussing roles of advocates and "deciding tribunal").

165 See id. at 382-85.

166 Id.

167 See Schwarzer, supra note 128, at 707. Schwarzer critiques Fuller's model and extols the benefits of mandatory discovery and of judicial enforcement of these provisions. Id. He also notes that Fuller's concept of limited judicial intervention "is at war with the reality of present-day litigation" because "[f]ew cases go to trial without some pretrial judicial intervention." Id. Another commentator plainly states the case for curbing zealous adversarial behavior by noting that if courts do not regularly enforce formally stated rules, "the rational competitor has strong incentive to test the outer limits of the rules and little disincentive to avoid exceeding these limits." Judith L. Maute, Sporting Theory of Justice: Taming Adversary Zeal With a Logical Sanctions Doctrine, 20 Conn. L. Rev. 7, 16 (1987) (arguing for predictable and consistent enforcement of procedural rules).

their position."[168] Since the 1970s, the federal courts, led by the Supreme Court, have promoted this principle by intervening in discovery disputes and sanctioning parties for noncompliance.[169]

The federal courts find that the mandatory features of the expert witness disclosure provisions of the FRCP, coupled with the availability of enforceable sanctions, allow the courts to promote the exchange of expert witness information by using judicial intervention in a predictable and consistent manner to punish and deter noncompliance.[170] The deterrent effect of sanctions for noncompliance in the federal system reduces satellite litigation and motion practice and deters gamesmanship and strategic maneuvering.[171] The expert witness disclosure and sanction provisions of the FRCP effectively allow a limited form of judicial intervention to ensure the resolution of cases on their merits.

In contrast, the CPLR expert witness discovery rules, with their imprecise directives to the parties and their discretionary enforcement, do not define clearly the role of the courts in the discovery process. This leaves the judiciary free to meander along a continuum from complete judicial laissez-faire to strict judicial intervention.[172] The language of the CPLR forces the New York courts to function as inconsistent and unpredictable arbiters attempting to control a robust motion practice in medical malpractice litigation. Cases thus proceed on theories of tactics rather than on their merits.[173] Unlike the FRCP expert discovery rules, CPLR 3101(d)(1), by failing to give the judici-

168 Schwarzer, supra note 128, at 708.

169 See, e.g., Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642-43 (1976) (holding that district court did not abuse discretion in dismissing antitrust action for failure to respond timely to written interrogatories); see also Hare et al., supra note 131, at 53 (explaining how amendments to Rule 26 in 1970, 1980, 1983, and 1993 led to more court involvement in discovery process). The federal courts' use of the sanction provisions initially led to a "virtual explosion" of reported cases addressing attorney misconduct. Maute, supra note 167, at 27. Observers correctly anticipated, however, that the sanctions, when fully enforced by the federal courts and "incorporated into the litigation process and adversary ethic," would become "largely self-executing." See id. at 27-28 ("[M]ost risk-averse [attorneys] will comply voluntarily.").

170 See supra Part I.C.1 (discussing federal courts' treatment of FRCP expert disclosure provisions).

171 See id. Furthermore, the majority of attorneys working under the federal disclosure rules, who perhaps would be the harshest critics of increased judicial intervention, express satisfaction with the current degree of judicial involvement in discovery. See Willging et al., supra note 6, at 40 (finding that eighty-three percent of surveyed attorneys with cases involving discovery or disclosure reported no complaints about court's management).

172 See supra Part I.C.2 (analyzing inconsistency of New York courts' holdings on discovery compliance).

173 See Silber & Rabar, supra note 53, at 6 (lamenting that CPLR 3101(d)(1) has not significantly advanced malpractice litigation in New York beyond "old days" of adversarial trial by ambush).

ary a defined role of intervention, falls short of achieving the professed purposes of its expert discovery provisions: to promote a full pretrial exchange of information, and ultimately to reach just outcomes.[174]

CONCLUSION

While both the FRCP and the CPLR claim to adhere to principles of broad discovery, the federal rules surpass the CPLR in actually advancing those principles. The expert discovery provisions of the FRCP successfully balance and incorporate the advantages of extensive expert disclosure. Their mandatory pretrial exchange of information allows parties to evaluate fully their positions, to achieve early and just settlements, and to prepare effectively for cross-examination so that trials proceed on cases' merits. CPLR 3101(d)(1), on the other hand, frequently prevents parties and the courts from reaching any of these goals.

The federal and state courtrooms of New York City illustrate the contrast between the FRCP and the CPLR. At 60 Centre Street, the home of the New York County Supreme Court, medical malpractice attorneys must wrestle with the burdens of CPLR 3101(d)(1). Attorneys may struggle to cross-examine the opposition's experts as they look for guidance in attorney-prepared expert "responses," but find that the information there is of little value. Associates may run from courtrooms the moment that they know the experts' names to access background information, but they understand the futility of their efforts, knowing that they will not return in time for subsequent questions. Attorneys may want to pause and refer to the experts' reports and the experts' deposition transcripts, but they know that such information is not available to them. Judges and juries listen intently to the experts' words and, at times, realize that something important is missing.

Next door, at 40 Centre Street, the site of the Federal District Court for the Southern District of New York, the same attorneys representing the same clients in the same medical malpractice actions have mastered the facts of the cases. They have known the experts' identities for some time, have a working knowledge of the experts' backgrounds, and refer both to reports prepared by the experts and to transcripts of the experts' depositions for aid in their cross-examinations. No associates are seen darting from courtrooms. No surprises lurk beyond the questions. Judges and juries sense that the attorneys

[174] See supra notes 59-61, 63 and accompanying text (citing statements from New York governors, legislature, and Court of Appeals on purposes of discovery).

are effectively, persuasively, and completely exploring the facts of the cases. All participants in these litigations, from the parties to the attorneys to the judges and juries, know that the cases will proceed on their merits to determine the truth and reach just outcomes.

The courtrooms of 40 Centre Street and 60 Centre Street, in direct physical proximity, function across a great procedural divide. CPLR 3101(d)(1) handicaps the trial attorneys in the New York Supreme Court. It is time to take off the blindfolds.