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Cover Page Footnote
J.D. 2003, Fordham University School of Law; B.A. Geography, State University of New York at Buffalo. I would like to thank Anna for her love, my friends for their never-ending encouragement, and the Editorial board and staff of the Fordham Urban Law Journal-this piece would not have been possible without the support and advice of my friends and colleagues on Urban. A special thank-you to Kim Smith, and to Jonathan Deblinger, Michael Raniere, and Matthew Stein for their creativity. Finally, I would like to thank Professor George W. Conk, Barry R. Temkin, and Stacie L. Young for reviewing and commenting upon various drafts of this piece.
IDENTITY CRISIS: THE OBSOLESCENCE OF JASOPERSAUD V. RHO AND THE MEDICAL MALPRACTICE EXPERT EXCEPTION

Mark D. Shifton*

INTRODUCTION

During a recent thriller directed by the late Stanley Kubrick, Tom Cruise, playing Doctor William Harford, embarks on a voyage of both geographic and psychological distance. Under the spell of extreme jealousy, he walks the streets of New York City seeking to understand the societal forces affecting his emotions. In one of the film’s most gripping scenes, Harford is drawn into a conspicuous display of wealth, power, and intrigue. While mesmerized by the events unfolding around him, he remains masked; his identity hidden from the anonymous participants, both physically, and to a possibly greater extent, psychologically. In a shocking turn, Harford is confronted, unmasked, and humiliated. The anonymous horde discovers his identity and before long Harford nearly loses his spouse, his medical practice, and his life.

Although Harford’s desperate desire to shield his identity—and the group’s efforts to identify him—may seem like sheer fiction, similar efforts occur every day among New York State medical malpractice attorneys. Desperate parties go to extreme lengths to identify their adversaries’ experts, while their opponents struggle to block their efforts. Experts that are ultimately unmasked fear the loss of their practices, income, and professional lives.

This Comment discusses the provision of the New York Civil Practice Law and Rules (“CPLR”) governing the disclosure of medical malpractice expert witnesses, and how medical malpractice

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1. EYES WIDE SHUT (Warner Bros. 1999).
litigants strive to protect the identities of their experts. Part I of this Comment discusses the applicable CPLR provision, beginning with the 1985 amendments to CPLR 3101, which, as part of medical malpractice reform legislation, sought to broaden discovery within civil litigation. Part I will also highlight the medical malpractice expert exception provided by CPLR 3101(d)(1)(i), which applies solely to experts testifying in medical, dental, or podiatric malpractice actions.

Part II of this Comment discusses the initial judicial decisions dealing with the amended CPLR 3101, and how courts initially struggled to apply the medical malpractice expert exception. Part III discusses the Appellate Division, Second Department case Jasopersaud v. Rho, which attempted to create a workable standard to further the competing goals of CPLR 3101(d)(1)(i). Part III also examines cases from the various Departments that have interpreted and analyzed Jasopersaud. Part IV of this Comment discusses the Appellate Division, Second Department's 2002 decision Thomas v. Alleyne.

Part V discusses whether the policy goals behind the medical malpractice exception remain viable, and asks whether, in light of evolving technology, any test that seeks to further the dual goals of CPLR 3101(d)(1)(i) can work. Finally, Part V concludes that to create judicial consistency among the Departments, either the Court of Appeals must take up the issue and create a uniform standard for lower courts to follow, or the New York State Legislature must either amend CPLR 3101(d)(1)(i) or repeal the medical malpractice expert exception entirely.

2. The case and statutory law discussed in this Comment applies also to dental and podiatric malpractice actions. For the sake of simplicity, this Comment will refer solely to actions in medical malpractice.


4. See infra notes 13-27 and accompanying text.

5. See infra notes 30-34 and accompanying text.

6. See infra notes 35-51 and accompanying text.

7. 572 N.Y.S.2d 700 (2d Dep't 1991).

8. See infra notes 19-32 and accompanying text (discussing the dual, often competing goals of CPLR 3101).

9. 572 N.Y.S.2d 700 (2d Dep't 1991); see infra notes 52-71 and accompanying text.

10. 752 N.Y.S.2d 362 (2d Dep't 2002); see infra notes 71-81 and accompanying text.

11. See infra notes 106-119 and accompanying text.

12. See infra notes 121-126 and accompanying text.
I. BACKGROUND ON CPLR DISCLOSURE PROVISIONS

CPLR 3101 is the central rule governing disclosure within civil actions. The text of CPLR 3101 suggests that the New York State Legislature intended to provide for broad information exchange among civil litigants. Indeed, the Legislature intended CPLR 3101 to closely parallel its federal counterpart, Rule 26 of the Federal Rules of Civil Procedure.

CPLR 3101 also provides for the disclosure of expert information. Upon request, litigants must disclose specific background information pertaining to their experts. To comply with Rule 3101, the litigant must

[Identify each person whom the party expects to call as an expert witness at trial . . . disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and the opinions on which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds of each expert's opinion.]

A litigant who fails to abide by CPLR 3101’s disclosure mandates may be precluded from offering the expert at trial.

13. CPLR 3101, entitled “Scope of disclosure,” states “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” N.Y. C.P.L.R. 3101(a) (McKinney 2003).

14. Federal Rule of Civil Procedure (“FRCP”) Rule 26 states, in pertinent part: Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense 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. FED. R. CIV. P. 26(b)(1); see also 1985 Report of the Advisory Committee on Civil Practice, reprinted in 1985 N.Y. Laws 3347, 3380 [hereinafter Advisory Committee] (“With some variation, proposed CPLR 3101(d) would enact the substance of the present federal rule.”).


16. CPLR 3101(d)(1)(i) states, in pertinent part:

Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion.

17. Id. Within medical malpractice actions, expert “qualifications” have often been held to include the expert’s education, board certifications, special expertise, board certifications, jurisdictions of licensure, internships, residencies, and fellowships. See, e.g., Jasopersaud v. Rho, 572 N.Y.S.2d 700, 701 (2d Dep’t 1991).

18. See, e.g., Silverberg v. Cmty. Gen. Hosp., 736 N.Y.S.2d 758, 759 (3d Dep’t 2002) (“[A] trial court has discretion to preclude expert testimony for failure to reasonably comply with [CPLR 3101]”); Gholson v. Nassau, 711 N.Y.S.2d 899, 899 (2d Dep’t 2000). The litigant seeking preclusion, however, must show that she has been
CPLR 3101’s disclosure requirements were enacted in 1985 as part of an effort to reform medical malpractice litigation in New York.19 Seeking to stem the perceived tide of rising medical insurance premiums and judicial delays created by meritless claims, the New York State Legislature broadened CPLR 3101’s disclosure provisions.20 The Medical Malpractice Reform Act of 1985 (the

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20. See Medical Malpractice Reform Act, supra note 3, at § 1. In its legislative findings, the Legislature noted:

The legislature finds and declares that a comprehensive reform of the medical and dental malpractice adjudication system is necessary in order to ensure the continued availability and affordability of quality health services of New York State. Escalating malpractice insurance premiums discourage physicians and dentists from initiating or continuing their practice in New York and contribute to the rising cost of health care as premium costs are passed along to the health care consumer. The legislature finds, therefore, that steps must be taken to reduce the cost of malpractice insurance and to restrain associated health care costs ...

Id.

The Memorandum of the State Executive Department supporting the legislation echoed similar concerns:

Over the past decade, New York State has taken important steps to assure the availability and to contain the cost of medical malpractice insurance. The establishment of new medical malpractice carriers, improved professional misconduct procedures, and a number of evidentiary and litigation reforms are among the major legislative initiatives that demonstrated the commitment of the Legislative and Executive branches to this issue.

...Despite these efforts, the cost of medical malpractice insurance has continued to increase at alarming rates. When combined with increased costs associated with the practice of "defensive medicine"—the ordering of additional and often unnecessary tests and consultations to protect the physician from potential malpractice allegations—these costs significantly contribute to ever-escalating health care costs and are ultimately borne by the consumer.

At the same time, the tort system itself has been generally called into question. The ‘medical malpractice crisis’ has increasingly been viewed as resulting from the inability of the existing litigation structure to provide compensation for injured persons adequately, efficiently and fairly.
"1985 Act") amended various provisions in the Public Health Law,\textsuperscript{21} CPLR,\textsuperscript{22} Education Law,\textsuperscript{23} Insurance Law,\textsuperscript{24} and Judiciary Law.\textsuperscript{25}

The New York State Legislature intended the amended CPLR 3101 to streamline medical malpractice litigation, provide for prompt settlements, and discourage groundless claims.\textsuperscript{26} Indeed, a report from the New York State Executive Department recognized the Legislature's intention that the amended expert disclosure provisions would foster broad information exchange among medical malpractice litigants:

Although virtually all other information is now shared by litigants in civil practice, information concerning expert witnesses and their opinions remains shielded from disclosure. Since the testimony of expert witnesses is often the single most important element of proof in medical malpractice and other personal injury actions, sharing 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 unsupported claims or defenses, knowing that they will be required to disclose what, if any, expert evidence will support their allegations.\textsuperscript{27}

While the amendments to CPLR 3101 sought to bring a much needed modernization to the expert witness disclosure process in civil actions generally, they had a narrower impact on medical malpractice litigants. Attempting to avoid "unique problems"\textsuperscript{28} related to medical malpractice actions, the New York State Legislature exempted medical malpractice litigants from one spe-
specific requirement provided by the amended provision—the requirement that a litigant identify her expert.29

A. The Medical Malpractice Expert Exception

Under CPLR 3101, as amended by the 1985 Act, a medical malpractice litigant may refrain from disclosing the name of the expert she intends to rely upon.30 The medical malpractice expert exception was enacted in response to concerns of possible harassment, annoyance, or embarrassment directed at medical malpractice expert witnesses by their colleagues, who might attempt to discourage their testimony.31 Many decisions dealing with the medical malpractice expert exception have reiterated this concern as an im-

30. Id. CPLR 3101(d)(1)(i) states, in pertinent part:
   In an action for medical, dental, or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental, or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

It is important to note that medical malpractice litigants are not required to omit their experts’ identities. CPLR 3101(d)(1)(ii) clearly provides for such disclosure, stating:

   In an action for medical, dental, or podiatric malpractice, any party may . . . offer to disclose the name of, and to make available for examination upon oral deposition, any person the party making the offer expects to call as an expert witness at trial . . . . If all parties accept the offer, each party shall be required to produce his or her expert witness for examination upon oral deposition . . . .

Despite providing the “carrot” of full disclosure, some argue that this provision is rarely taken advantage of. See Marian E. Silber & Maria Elyse Raber, The Vicissitudes of Expert Disclosure, N.Y. L.J., June 18, 1996, at 3. CPLR 3101(d)(1)(i)’s protections end, however, by jury selection. See Draves v. Chua, 642 N.Y.S.2d 1022, 1024 (Sup. Ct. Erie County 1996).

31. See Advisory Committee, supra note 14, at 3359 (“The Committee has been advised that in medical malpractice actions, the mandatory pretrial identification of medical experts poses unique problems which warrant the proposed statutory exception.”); Scott C. Paton, Disclosing an Expert’s Identity In a Medical Malpractice Action, N.Y. L.J., Mar. 16, 1999, at 1. New York City medical malpractice attorneys Matthew Gaier & Thomas A. Moore provide an enlightening account of the possibility of expert harassment:

   [W]e did have one recent experience where an expert was intimidated into withdrawing from the case on the eve of trial. The expert, a renowned neurosurgeon, practicing in another state had agreed to testify for the plaintiff more than a year in advance of trial, and the expert disclosure [effectively identified the expert]. Several months before trial he accepted a position with a hospital in Manhattan; however, he reaffirmed his commitment to testify on behalf of the plaintiff. Only days before the trial was to commence, when he was notified that the trial was going ahead, he refused to testify. His office informed us that this neurosurgeon “was told he could not testify.” The defendant hospital in the case was not affiliated with the hospital at which he had accepted employment. Nor were any of the defendant doctors affiliated with his new institution. It is obvious that someone either
important policy goal, one which acts as a counterweight to the CPLR’s goal of broad disclosure.32

The New York State Legislature’s concern for medical malpractice expert harassment resulted from New York’s historical reliance on the “locality rule” in medical malpractice actions. According to the locality rule, the standard of care necessary to prove medical malpractice was based on geographic proximity—plaintiffs were required to show a violation of the standard of care particular to a specific locality.33 This limitation required plaintiffs to retain experts familiar with the locality where the action was brought—experts who presumably might have worked alongside the doctors they were retained to testify against.34

II. POST-1985 ACT DECISIONS

Soon after the passage of the 1985 Act, the Second Department was confronted with the issue of possible inadvertent expert disclosure in Catino v. Kirschbaum.35 The defendant served a demand for the plaintiff’s expert’s qualifications under CPLR 3101,36 and the plaintiff moved for a protective order.37 Affirming the trial court’s denial of the protective order, the Second Department noted that “[w]hile CPLR 3101(d)(1)(i) grants a party the right to not disclose the name of a prospective medical expert, its underlying purpose is not to preclude any possibility of identifying an adversary’s medical expert . . . .”38 Narrowly reading the medical malpractice expert exception, the court essentially held that CPLR

from his new hospital or from an insurance company had exerted pressure on him to withdraw from testifying in support of the plaintiff.


34. See Basuk, supra note 33, at 1536.


36. The court did not name the specific qualifications demanded. See id.

37. See N.Y. C.P.L.R. 3103 (McKinney 2003); see also infra note 81 (describing the “protective order” standard).

38. Id.
3101(d)(1)(i) provides the medical malpractice litigant with the “procedural” right to omit the name of her expert, not the “substantive” right to actually protect an expert’s identity.\(^39\)

Five months later, however, the Second Department turned around and broadened its reading of the exception. In Jones v. Putnam Hospital Center, the court held that a “request for further information as to [a medical] expert’s qualifications was palpably improper since it would effectively lead to disclosure of the expert’s identity.”\(^40\) The Second Department did not have occasion to rectify this patent inconsistency until four years later.\(^41\)

The Third Department, in Pizzi v. Muccia, analyzed the competing policy goals behind the medical malpractice expert exception a bit more thoroughly than had the Second Department.\(^42\) In Pizzi, the court held that while a detailed demand for expert disclosure “would have the net effect of disclosing the experts’ identities,” the plaintiff seeking to protect an expert’s identity should bear the burden of showing that disclosure would likely identify the expert.\(^43\) Only upon such a showing would the court grant a motion for a protective order.\(^44\)

Other courts across New York State were similarly struggling to apply the exception. In Avila v. New York, the Court of Claims seemingly vitiated the exception by denying the defendant’s motion for a protective order, and holding all demanded information disclosable under the “qualifications” clause of CPLR 3101(d).\(^45\) The defendant first objected to the demand for their expert’s address, which the court denied, noting that “both the name and ad-

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39. See id.
40. 519 N.Y.S.2d 665, 665 (2d Dep’t 1987); see also Rogowski v. Royce W. Day Co., 497 N.Y.S.2d 864, 865 (Sup. Ct. Albany County 1986) (granting protective order upon plaintiff’s assertion that disclosure of demanded information would identify expert); cf. Catino, 514 N.Y.S.2d at 752 (2d Dep’t 1987).
41. See Jasopersaud, 572 N.Y.S.2d at 700; see also infra notes 51-58 and accompanying text (describing the impact of Jasopersaud).
42. 515 N.Y.S.2d 341, 342-43 (3d Dep’t 1987).
44. Pizzi, 515 N.Y.S.2d at 343.
45. 506 N.Y.S.2d 412, 413-14 (Cl. Ct. 1986); see also Hamilton v. Wein, 506 N.Y.S.2d 387, 389 (Sup. Ct. Kings County 1986) (“clearly, disclosure of the place of education, extent of education, special areas of practice, the number of years of practice and whether or not the expert is board certified should be disclosed as bearing upon qualifications of the witness.”).
dress of a witness to an occurrence giving rise to a cause of action are proper subjects to disclosure.” 46 The court again allowed disclosure of the expert’s specialization as a qualification, as well as the expert’s professional memberships. 47 Under this narrow reading of the exception allowing the demanded disclosure, the court did not discuss the possibility that the ordered disclosure could result in the expert’s identification.48

While the various Departments struggled to apply the medical malpractice expert exception, there was little discussion of the implications of increasing technological advancements on the efficacy of the exception. Motions for protective orders were either granted or denied, in inconsistent fashion.49 The Second Department was the first court to directly confront these implications, in Jasopersaud v. Rho.50 Attempting to create a workable solution to the departmental inconsistencies, the court addressed the possibility that medical malpractice litigants, armed with a few key pieces of information regarding their adversaries’ experts, could identify those experts and defeat the exception.51

III. JASOPERSAUD AND ITS PROGENY

In Jasopersaud v. Rho, the Appellate Division, Second Department issued the first decision closely scrutinizing the medical malpractice expert exception within the terms of technological

46. Id. at 413 (“We see no reason why this principle should not be extended to expert witnesses.”).

47. Id. ("Mere membership in [professional organizations] does not, in and of itself, establish an individual’s qualifications. However, since it is common practice to inquire as to professional organizations, and since such membership may be tangentially related to an expert’s competency [sic], we find the information sought to be disclosable.").

48. In contrast to the Court of Claims in Avila, other courts of the time discussed the possibility that disclosure could result in an expert’s identification. See Carroll v. Nunez, 550 N.Y.S.2d 1008, 1011 (Sup. Ct. Ulster County 1990) (“Of course, the more detailed the information given in the effort to maximize the salubrious purposes of CPLR 3101(d), the easier it is for even the most inept of sleuths to identify the opposing party’s expert.”); cf. Pizzi, 515 N.Y.S.2d at 343 (“[T]he request is so detailed that disclosure would have the net effect of disclosing the experts’ identities, even though their names are never mentioned.”).


50. 572 N.Y.S.2d 700 (2d Dep’t 1991).

51. Id.; see infra notes 51-58 and accompanying text.
advancements since the 1985 Act. The defendant demanded disclosure of the plaintiff’s expert witness, seeking details regarding, among other items, the expert’s education, specializations, Board Certifications, and hospital affiliations. The plaintiff moved for a protective order, and argued that even with omitting the expert’s name, disclosing the demanded information would effectively permit the defendant to quickly identify the expert and vitiate the exception. The trial court granted the plaintiff’s motion, and the defendant appealed.

The Second Department, analyzing the policy goals and legislative history of the 1985 Act, 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.” The court also noted, however, that the expert’s education, training, and skills fell directly within the CPLR’s use of the term “qualifications.” To balance the competing concerns of privacy and disclosure, the court applied a “balancing test,” whereby the “desirability of broad disclosure” would be measured against the risk that disclosing the demanded information would “effectively lead to the disclosure of the expert’s identity.”

The Jasopersaud balancing test overruled Second Department precedent and touched off a firestorm of subtle decisional inconsistencies in all four departments. Throughout the next decade, Jasopersaud was both heavily criticized and followed by trial and appellate courts alike, and its reasoning misstated, misapplied, and even ignored.

52. Id. While the Jasopersaud court was the first to closely analyze the technological implications bearing upon the medical malpractice expert exception, it was by no means the first court to recognize them. See, e.g., McGoldrick v. Young, 514 N.Y.S.2d 872, 874 (Sup. Ct. N.Y. County 1987) (“With answers to all those questions, it would not take an experienced detective to easily discover the name of the medical expert.”).
54. Id.
55. Id.
56. Id. at 700 (citing Jones v. Putnam Hosp. Ctr., 519 N.Y.S.2d 665 (2d Dep’t 1987)).
57. Id. at 702.
58. Id. at 701.
Many courts seemed to cite *Jasopersaud* as the final link in a result-oriented chain of reasoning, regardless of whether a protective order was granted or denied. Over the next decade, *Jasopersaud* was cited several times in decisions granting protective orders to plaintiffs, and several times in decisions reaching the opposite conclusions. In most cases, no mention was given to the competing factors of disclosure versus privacy.

In *Thompson v. Swiantek*, the Fourth Department cited *Jasopersaud*, yet without mention of its balancing test. The court noted "It is undisputed that disclosure of the additional information sought ... would enable defendants to ascertain the identity of the expert." Given that information, however, the court failed to balance the interests of privacy against the CPLR's policy of broad disclosure, and simply stated: "Because disclosure of that additional information would effectively lead to disclosure of the expert's identity, the request for such disclosure is palpably improper."

Eventually, the lower courts' frustrations with the vague *Jasopersaud* standard began to show. In *Engel v. DeFeo*, a trial court, while recognizing the propriety of the *Jasopersaud* balancing test, criticized it in light of a decade of technological advances. The court noted that modern technology would enable a medical malpractice litigant, with a modicum of effort, to effectively negate the statutory protection provided by CPLR 3101(d)(1)(i) with only a few simple keystrokes. The court further noted:

> While *Jasopersaud* has set up a viable balancing test to be used in determining the issue of expert disclosure, technology has rendered the fulcrum of that balance inoperable. Clearly, given


63. 736 N.Y.S.2d at 820.
64. *Id.*
65. *Id.* (citing *Jones v. Putnam Hosp. Ctr.*, 519 N.Y.S.2d 665 (2d Dep't 1987)).
While quoting from a pre-*Jasopersaud* case, however, the Fourth Department did see fit to cite *Jasopersaud* itself, apparently without regard to its reasoning. See *supra* note 36 and accompanying text; cf. *Jones*, 519 N.Y.S.2d at 665.
67. *Id.* ("There is no dispute herein of the effectiveness of the modern computerized search engines which, when provided a minimal amount of information on a particular expert, can efficiently negate the statutory omission provided.").
the information that the relevant statutory and case law permits, current computer programs renders [sic] the protection of the expert's identity impossible. It is not this Court's province, nor is it the intent of this determination, to attack or declare CPLR 3101(d)(1)(i) invalid. It must be left to the New York State Legislature to revisit said statute, inasmuch as technology has made the present applicability of Jasopersaud impossible, or at least improbable.68

A Kings County trial court echoed the same concerns of the Engel court, noting that “[C]omputer technology has expanded greatly in the 10 1/2 years since Jasopersaud . . . .”69 Indeed the court, criticizing the policy goals furthered by the medical malpractice expert exception, also noted that “so has the willingness and availability of medical ‘experts’ to come forward and testify against the interests of their colleagues.”70 Since Jasopersaud, no other court has strongly questioned the rationale behind the medical malpractice expert exception, and the decision that abrogated Jasopersaud, Thomas v. Alleyne, was no exception.71

IV. Thomas v. Alleyne:72 Burden Shifting

In Thomas v. Alleyne, decided in December 2002, the Second Department recognized the inherent inconsistencies and weak reasoning behind a “balancing test,” and abrogated Jasopersaud.73 In

68. Id. at 777-78 (citation omitted).
70. Esquilin, 739 N.Y.S.2d at 233. In questioning the rationale behind the statutory protection, the court asserted that:

The proliferation of medical, dental, and podiatric malpractice cases since 1985 with the concomitant availability of ‘experts’ ready, willing, and able to testify, calls into question the validity of those concerns today. The technology and attitudes of the present era make the policy considerations that prompted the statute irreconcilable or irrelevant in today's world.

Id. But see Gaier & Moore, supra note 31, at 1. After tearing apart the fabric upon which Jasopersaud rests, the court noted that it “still regards Jasopersaud as prevailing and controlling authority which, even now, properly ‘harmonize[s] and effectuate[s] the objectives sought to be achieved by the competing provisions of [CPLR 3101(d)(1)(i)].’” Esquilin, 739 N.Y.S.2d at 234 (citing Jasopersaud, 572 N.Y.S.2d 700, 703 (2d Dep't 1991)).
71. 752 N.Y.S.2d 362 (2d Dep't 2002).
72. Id.
73. Id. at 368 (abrogating the Jasopersaud balancing test).
Thomas, a defendant served the plaintiff with an exhaustive list of
discovery demands regarding the plaintiff's expert witness. The
plaintiff moved for a protective order, on the grounds that providing
the information would effectively identify the expert. The
court discussed the rapid technological advances since the Jasopersaud
court's time, noting that a medical malpractice litigant's identity could be easily ascertained with only the barest information regarding the expert's qualifications. While the plaintiff argued that the technological evolution militated toward a policy of requiring narrower disclosure due to the ease in identifying experts, the court saw the argument the other way—any attempt to conceal a medical malpractice expert's identity would be futile.

In response to this perceived futility, the Second Department
threw out the Jasopersaud test, describing it as "no longer workable." The court held that instead of "harmoniz[ing] and effectuat[ing] the objectives sought to be achieved by the competing provisions of [CPLR 3101(d)(1)(i)]," defendants would be presumptively entitled to full disclosure of the expert witness's qualifications, even if such disclosure would effectively identify the expert. Plaintiffs could seek a protective order under CPLR 3103(a), however, if they could show that upon disclosing the expert's qualifications, there would be a reasonable probability that the disclosure would identify the expert, and that there would be a reasonable probability that the expert would suffer embarrassment, harassment, or expense.

74. Id. at 364.
75. Id.
76. Id. at 368 ("We agree with the plaintiff, that, in light of the expansion of computer technology, it has become markedly easier for attorneys, or their employees, to perform various research functions that, at the time of the enactment of CPLR 3101(d)(1)(i) in 1985 would have required significantly more time and effort.") (citation omitted).
77. Id.
78. Id.
80. Thomas, 752 N.Y.S.2d at 369; see also supra notes 42-44 and accompanying text; cf. Pizzi v. Muccia, 515 N.Y.S.2d 341 (3d Dep't 1987).
81. Thomas, 752 N.Y.S.2d at 371. CPLR 3103, entitled "Protective Orders," states, in pertinent part:

(a) Prevention of abuse. The court at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.
A New York County trial court, lacking recent guidance from the First Department, quickly adopted the Thomas court's reasoning and predicted its eventual adoption by the First Department, in Scher v. St. Luke's-Roosevelt Hospital. In Scher, the plaintiff suffered a stroke while in the care of St. Luke's-Roosevelt Hospital, leaving him with severe brain damage, and he sued the hospital for medical malpractice.

The defendant served the plaintiff with a demand for expert witness disclosure under CPLR 3101(d)(1), seeking the qualifications of the expert witness, including medical school information, board certifications, areas of expertise, years of practice, jurisdictions of licensure, a list of authored publications, and locations and years of internships, residencies, and fellowships. The plaintiff answered only in general terms, relying on the statutory protection of CPLR 3101(d)(1)(i).

The defendant moved to compel disclosure of the expert's medical school, location of residencies, and any sub-specialty training; the court granted the defendant's motion.

The court predicted that the First Department would eventually "adopt the trend favoring more liberal disclosure and conclude that CPLR 3101(d), by its plain terms, authorizes omission of a medical expert's name while mandating disclosure of all other information concerning such experts." The court acknowledged that disclosing the expert's qualifications could lead to the expert's identifica-

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N.Y. C.P.L.R. 3101(a) (McKinney 2003). The precursors to the Thomas court's reasoning can clearly be seen in Pizzi v. Muccia, 515 N.Y.S.2d 341, 343 (3d Dep't 1987) ("[W]hile plaintiffs assert that the qualifications items sought by defendant are immune from disclosure because they effectively reveal the experts' identities, they have made no demonstration of how the identities would be revealed. The mere assertion that identities would be revealed is insufficient.").

82. The First Department had not been faced with the issue since 1995. See Yablon v. Coburn, 631 N.Y.S.2d 351, 351 (1st Dep't 1995). The Yablon court, citing Jasopersaud, held that "the need for [the demanded information] outweigh[ed] the unlikelihood[sic] that the information would allow identification of the expert's name." Id.

84. Id.
85. Id.
86. Id. Responding to the Hospital's demand, the plaintiff answered:
Plaintiff will introduce the testimony of an expert in the area of Internal Medicine. The expert is board-certified in internal medicine. The expert graduated from a major northeast medical school, is licensed to practice medicine in New York. The expert completed a residency program in Internal Medicine.

Id.
87. Id.
88. Id. (citing N.Y. C.P.L.R. 3101(d)(1)(i) (McKinney 2003)).
tion, but noted that the plaintiff had made "absolutely no showing . . . that the disclosure would probably cause the expert to be subjected to 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.'" 89 A coordinate court in the First Department concurred, holding the Thomas approach "more consistent with the intent and plain language of CPLR 3101(d)(1)(1)." 90

Another trial court in the First Department came to the opposite conclusion, in Hara v. Levin. 91 The court noted the many criticisms of the Jasopersaud test, and held a medical malpractice litigant's bare disclosure proper. 92 While the Hara court rejected the Jasopersaud test, it came to a completely different conclusion than Scher:

As shown supra, the sentiment has been expressed time and time again by the Courts that the directives set forth in Jasopersaud as to the information that must be revealed about a party's expert are outdated and out of touch with the modern world of computer technology . . . . The bottom line is that the expert witness' identity is to be concealed, and if providing the information discussed supra will lead to the discovery of the witness' identity, then this Court is of the opinion that the information is not discoverable. 93

Whereas the Scher court placed the burden upon the party opposing disclosure to show that their expert would be identified, narrowing the exception, the Hara court applied the exception broadly. The court assumed that disclosing the expert's qualifications would identify the expert, and thus held the disclosure improper.

89. Id. (quoting Thomas v. Alleyne, 752 N.Y.S.2d 362, 371 (2d Dep't 2002)).
90. Muniz v. Our Lady of Mercy Med. Ctr., No. 20301/1999, 2003 N.Y. Misc. LEXIS 617, at *9 (Sup. Ct. N.Y. County, May 7, 2003) (granting motion to compel, noting that opponent had made "[a]bsolutely no showing . . . that there is a reasonable probability that the requested disclosure would lead to discovery of Plaintiff's expert's identification.").
92. In response to the defendants' demands, the plaintiff in Hara noted that its expert "attended medical school . . . internship, residency, and/or fellowship programs in the United States," and that its expert was licensed to practice medicine in New York State. Id. at *1-2.
93. Id.
V. The Future of the Medical Malpractice Expert Exception

Decisional inconsistencies still exist within all New York Appellate Division Departments and trial courts. While the Second Department has embraced the presumption that expert information is disclosable unless the opponent can show a reasonable probability that the disclosure will result both in its expert’s identification and probable harassment, trial courts in the First Department still must follow Yablon v. Coburn, which provided little guidance. Recent criticisms of Yablon by lower courts, however, as well as the recent New York County case of Scher v. St. Luke’s-Roosevelt Hospital, indicate that the First Department may soon embrace the presumption of disclosure standard issued by the Second Department in Thomas.

The Third and Fourth Departments, however, have not fully clarified just where they stand on the issue. The Fourth Department seems to be leaning toward a standard of protection, following the early Second Department case of Jones v. Putnam Hospital Center. The Third Department, however, has arguably been in line with the new Thomas standard since CPLR 3101’s amendment. Pizzi v. Muccia, decided in 1987, which was effectively reaffirmed in the 1996 case of Morris v. Clements, closely parallels the Thomas standard.

95. Thomas, 752 N.Y.S.2d at 369-70.
96. 631 N.Y.S.2d 351 (1st Dep’t 1995); see supra note 62.
98. N.Y. L.J., Jan. 28, 2003, at 18 (Sup. Ct. N.Y. County, Jan. 27, 2003); see supra notes 83-89 and accompanying text.
99. See Thompson, 736 N.Y.S.2d at 820; see also supra note 63-65.
100. 519 N.Y.S.2d 665 (2d Dep’t 1987); see supra note 40 and accompanying text.
101. 515 N.Y.S.2d 341, 343 (3d Dep’t 1987); see supra note 43 and accompanying text.
102. 644 N.Y.S.2d 850, 851 (3d Dep’t 1996); see supra note 43 and accompanying text.
103. See Clements, 644 N.Y.S.2d at 851.

With the exception of [an expert’s name], virtually all information regarding expert witnesses... is discoverable under CPLR 3101(d)(1)(i)... To avoid an order directing such disclosure, a party must move for a protective order.
A. Is the Medical Malpractice Expert Exception Necessary?

No decision on the fate of the medical malpractice expert exception can be reached until there is a consensus on the need for the exception. The first few sections of this Comment have illustrated the judicial difficulties in crafting a workable test to apply to exception, and it is not difficult to see why. Decisions are inconsistent, with different courts relying upon alternatively broad or narrow readings of the exception. Even decisions within Departments are inconsistent, and often contradictory. These conflicts may result from disagreements as to the policy goals behind the exception.

Several courts have criticized the rationale for the medical malpractice exception. Some argue that the exception is outdated and unneeded, and should be repealed. Repealing the exception would at least eliminate the difficulties inherent in inconsistent application.

As noted earlier, the medical malpractice expert exception was crafted by the New York State Legislature to combat concerns of harassment, annoyance, or embarrassment directed at experts by their peers. These concerns have been attacked on several fronts. Some courts have simply taken issue with the assertion that experts would face such problems. Under this view, experts simply are not subject to the harassment and embarrassment feared by the Legislature almost two decades ago, and the Legislature’s concerns are simply outdated and irrelevant.

Another argument against the exception hinges on the decline of the locality rule. The locality rule, with its concomitant expert

and to succeed thereon, the movant must shoulder the burden of demonstrating that the information sought is immune from disclosure.

Id.


105. See id. Compare, e.g., Catino v. Kirschbaum, 514 N.Y.S.2d 751, 752 (2d Dep't 1987), with Jones v. Putnam Hosp. Ctr., 519 N.Y.S.2d 665 (2d Dep't 1987); see also supra notes 35-39 and accompanying text.


107. See Basuk, supra note 33, at 1551-52.

108. See Advisory Committee, supra note 14, at 3359; see also notes 31-32 and accompanying text.


110. See supra notes 33-34 and accompanying text.
harassment, flourished in New York for decades before the Legislature created the medical malpractice exception in 1985. The medical malpractice expert exception might have been desirable, even necessary, under a regime that forced a medical malpractice litigant to produce an expert intimately familiar with the local standard of care. Presumably, this expert would be likely to be testifying against close colleagues, or even friends. These concerns to protect experts were thus inherent to the time. As New York courts move away from the locality rule, however, the rationale behind the medical malpractice expert exception weakens.

As familiarity with the local standard of care becomes less important, experts are less likely to be testifying against close colleagues. Indeed, experts in medical malpractice cases may increasingly come from far away jurisdictions, and have little or no prior contact with litigants prior to trial.

Some critics of the medical malpractice expert exception note that even accepting the concerns of expert harassment as true, an expert can only be harassed once—after initial litigation ends, the expert has effectively been “outed” for all time. Should the expert’s colleagues be so inclined, they may exert pressure upon the expert not to testify in the future—vitiating the protections of the medical malpractice expert exception as to that expert.

Finally, many commentators argue that the medical malpractice expert exception serves only the purposes of judicial delay and obfuscation, and diverts energies from adjudicating the important

111. See Basuk, supra note 33, at 1536.
112. See Kenny v. Lesser, 722 N.Y.S.2d 302, 304 (3d Dep’t 2001); Payant v. Imobersteg, 682 N.Y.S.2d 135, 137 (3d Dep’t 1998); Darwak v. Benedictine Hosp., 669 N.Y.S.2d 417, 418 (3d Dep’t 1998); Hoagland v. Kamp, 552 N.Y.S.2d 978, 979 (3d Dep’t 1990) (“Whatever may actually be the standard of care practiced by general dentists in any particular locality in this State, if it is less demanding than the minimum level of skill . . . it is unacceptable. If that were not true, spectacular ineptitude could be condoned under the guise of the locality rule.”); see also Basuk, supra note 33, at 1536-37 (discussing New York’s decreasing reliance on the locality rule in medical malpractice actions).
113. See Riley v. Wieman, 528 N.Y.S.2d 925, 928-29 (3d Dep’t 1988) (allowing testimony of California expert, rejecting strict compliance with locality rule). But see Prooth v. Walsh, 432 N.Y.S.2d 668, 669-70 (Sup. Ct. N.Y. County 1980) (“[T]here is still some basis for requiring that the level of proper medical practice be that of the same or similar communities.”). One court has noted the potential scarcity of qualified experts in a given community qualified to testify in medical malpractice actions as an argument against applying the locality rule. See Hirschberg v. State, 398 N.Y.S.2d 470, 474 (Ct. Cl. 1977). But see Riley, 528 N.Y.S.2d at 928-29.
114. See Basuk, supra note 33, at 1536 n. 46.
115. See id.
The exception is an anomaly, having no analogous provision in either the Federal Rules or other states' civil practice. While the medical malpractice expert exception cannot be wholly condemned, it does seem inconsistent with the CPLR's policy of broad disclosure. While the amendments to CPLR 3101(d), taken together, broaden disclosure in civil litigation, the medical malpractice expert exception only frustrates this effort.

B. The Search for a Workable Standard

The inconsistent application of Jasopersaud, along with the recent Second Department adoption of the Thomas standard, leads the medical malpractice litigant (or judge, for that matter), to one inescapable question—Is any standard created by judicial fiat workable?

It appears increasingly clear that advances in technology have made it easier for a medical malpractice litigant to identify their opponent's expert with only a few pieces of key information.

116. See, e.g., Basuk, supra note 33, at 1531 (arguing that the medical malpractice expert exception remains a national anomaly, frustrates the intent of the CPLR to encourage broad disclosure in civil actions, and "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").

117. Federal Rule of Civil Procedure ("FRCP") Rule 26 is the central rule governing discovery in federal civil actions, and does not shield expert identities from discovery. FRCP 26(a)(2), entitled "Disclosure of Expert Testimony," states, in pertinent part:

[D]isclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years.

FED. R. CIV. P. 26(a)(2)(B)

118. See, e.g., Basuk, supra note 33, at 1528 n.6 (2001). Basuk notes that twenty-five states allow parties to depose an opponent's expert witness, while twenty-four states and the District of Columbia, while not explicitly allowing depositions, provide for interrogatories. Id.

119. See, e.g., id. at 1551-52.

120. Id.

121. See, e.g., Thomas v. Alleyne, 752 N.Y.S.2d 362, 368 (2d Dep't 2002) ("[T]echnological [advances] point to the futility of attempting to conceal the identity of expert witnesses in medical malpractice cases . . . ."); Duran v. New York City Health and Hosps. Corp., 696 N.Y.S.2d 795, 796 (Sup. Ct. Bronx County 1999), appeal withdrawn, 723 N.Y.S.2d 422 (1st Dep't 2001) (criticizing Jasopersaud, in light of "the current state of the Internet and the resources available to counsel."). Clearly illustrating his point, Basuk notes that he, a former practicing surgeon, was able to quickly
Even with technology two decades advanced from the 1985 Act, the medical malpractice identity exception provided by CPLR 3101(d) may be effectively inoperative. While the policy goals behind the medical malpractice expert exception may be noble, it is completely incompatible with current technology.

The Jasopersaud court was the first to attempt to develop a workable test to determine whether a medical malpractice expert's information should be disclosed. The Jasopersaud balancing test sought to balance the two competing forces: broad disclosure under CPLR 3101, and the risk of expert identification sought to be protected by the medical malpractice expert exception. Advances in technology, however, make it almost certain that the barest disclosure by a litigant of its expert's qualifications will identify the expert. Put simply, the goal of expert privacy cannot be realized without completely frustrating the goal of broad disclosure. The risk of expert identification will always trump the policy of disclosure.

The CPLR's policies of broad disclosure, planned to speed the resolution of claims, will continue to be frustrated by judicial scrutiny of the risk of identification. If a court is required to scrutinize every motion for a protective order every time a medical malpractice litigant receives a demand for expert disclosure, the disclosure envisioned by CPLR 3101(d)(1) will rarely occur. When faced with near certain expert identification, the scales will tip in favor of protecting the expert's identity, as long as the exception remains.

Of the several applications and tests put forth by the various Appellate Division Departments to further the competing goals of CPLR 3101(d)(1)(i), the Second Department's Thomas test arguably works best. Although it is far from perfect, the Thomas court recognized the contradictions inherent in balancing the goals of

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123. See supra notes 51-58 and accompanying text.


125. See Memorandum of State Executive Department, supra note 20, at 3021; see also supra notes 26-27 and accompanying text.
disclosure and expert privacy. Under the Thomas test, the presumption will be to disclose the expert’s qualifications.\textsuperscript{126} Only if the opponent of disclosure can show that a reasonable possibility exists that disclosure will result in the identification of its expert, and that a reasonable possibility exists that such identification would result in harassment or annoyance of the expert, will a litigant be able to overcome the presumption of disclosure. This test recognizes that a blanket application of the exception would completely frustrate disclosure, and seeks to create a workable solution to the conflict.

C. A Prescription for the Future

Regardless of whether the goals behind the medical malpractice exception remain necessary, courts will continue to face inconsistent results unless the issue is clarified from above. The Court of Appeals must put forth a consistent standard that both furthers the policy goals behind CPLR 3101’s broad disclosure provision yet respects the medical malpractice expert exception.\textsuperscript{127} Alternatively, the New York State Legislature must amend CPLR 3101(d)(1)(i) to reflect the current state of technology, or repeal it entirely. Until a workable solution is prescribed, either the policies of disclosure or privacy will be completely vitiated.

CONCLUSION

While the medical doctors serving as expert witnesses in New York State medical malpractice actions face pressures of a different sort than our fictional William Harford, the efforts to retain anonymity is no less real. Perhaps Eyes Wide Shut represents yet another case of art imitating life. Doctors, through their attorneys, desperately seek to remain nameless, their identities hidden by the masks of protective orders, while their opponents strive to unmask them.

While the policy goals behind the medical malpractice expert exception is debatable, it is clear that intervention is needed for reasons of finality and consistency. Either the Court of Appeals must take up the issue and finalize a working test to ensure statewide uniformity, or the New York State Legislature must clarify or re-

\textsuperscript{126} See Thomas v. Alleyne, 752 N.Y.S.2d 362, 369-70 (2d Dep’t 2002); see also supra notes 72-81 and accompanying text.

peal the medical malpractice expert exception. For as long as CPLR 3101(d)(1)(i) remains in its present form, the battle to unmask medical experts will continue unabated.