

10152

I N A S S E M B L Y

March 8, 2010

Introduced by M. of A. WEINSTEIN -- read once and referred to the
Committee on Codes

AN ACT to amend the civil practice law and rules, in relation to elec-
tronic discovery

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEM-
BLY, DO ENACT AS FOLLOWS:

1 Section 1. Rule 3120 of the civil practice law and rules, as amended
2 by chapter 575 of the laws of 2002, is amended to read as follows:

3 Rule 3120. Discovery and production of documents and things for
4 inspection, testing, copying or photographing.

5 1. After commencement of an action, any party may serve on any other
6 party a notice or on any other person a subpoena duces tecum:

7 (i) to produce and permit the party seeking discovery, or someone
8 acting on his or her behalf, to inspect, copy, test or photograph any
9 designated documents, ELECTRONICALLY STORED INFORMATION or any things
10 which are in the possession, custody or control of the party or person
11 served; or

12 (ii) to permit entry upon designated land or other property in the
13 possession, custody or control of the party or person served for the
14 purpose of inspecting, measuring, surveying, sampling, testing, photo-
15 graphing or recording by motion pictures or otherwise the property or
16 any specifically designated object or operation thereon.

17 2. The notice or subpoena duces tecum shall specify the time, which
18 shall be not less than twenty days after service of the notice or
19 subpoena, and the place and manner of making the inspection, copy, test
20 or photograph, or of the entry upon the land or other property and, in
21 the case of an inspection, copying, testing or photographing, shall set
22 forth the items to be inspected, copied, tested or photographed by indi-
23 vidual item or by category, and shall describe each item and category
24 with reasonable particularity. THE NOTICE OR SUBPOENA MAY SPECIFY THE
25 FORM OR FORMS IN WHICH ELECTRONICALLY STORED INFORMATION IS TO BE
26 PRODUCED.

27 3. The party issuing a subpoena duces tecum as provided hereinabove
28 shall at the same time serve a copy of the subpoena upon all other

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 parties and, within five days of compliance therewith, in whole or in
2 part, give to each party notice that the items produced in response
3 thereto are available for inspection and copying, specifying the time
4 and place thereof.

5 4. Nothing contained in this section shall be construed to change the
6 requirement of section 2307 that a subpoena duces tecum to be served
7 upon a library or a department or bureau of a municipal corporation, or
8 of the state, or an officer thereof, requires a motion made on notice to
9 the library, department, bureau or officer, and the adverse party, to a
10 justice of the supreme court or a judge of the court in which the action
11 is triable.

12 S 2. Rule 3122 of the civil practice law and rules, as amended by
13 chapter 575 of the laws of 2002, is amended to read as follows:

14 Rule 3122. Objection to disclosure, inspection or examination; compli-
15 ance. (a) Within twenty days of service of a notice or subpoena duces
16 tecum under rule 3120 or section 3121, the party or person to whom the
17 notice or subpoena duces tecum is directed, if that party or person
18 objects to the disclosure, inspection or examination, shall serve a
19 response which shall state with reasonable particularity the reasons for
20 each objection, INCLUDING AN OBJECTION TO THE REQUESTED FORM OR FORMS
21 FOR PRODUCING ELECTRONICALLY STORED INFORMATION. If objection is made
22 to part of an item or category, the part shall be specified. IF
23 OBJECTION IS MADE TO THE REQUESTED FORM OR FORMS FOR PRODUCING ELECTRON-
24 ICALLY STORED INFORMATION, OR IF NO FORM WAS SPECIFIED IN THE REQUEST,
25 THE RESPONDING PARTY MUST STATE THE FORM OR FORMS IT INTENDS TO USE. A
26 medical provider served with a subpoena duces tecum requesting the
27 production of a patient's medical records pursuant to this rule need not
28 respond or object to the subpoena if the subpoena is not accompanied by
29 a written authorization by the patient. Any subpoena served upon a
30 medical provider requesting the medical records of a patient shall state
31 in conspicuous bold-faced type that the records shall not be provided
32 unless the subpoena is accompanied by a written authorization by the
33 patient. [The] A PARTY OR PERSON NEED NOT PROVIDE DISCOVERY OF ELECTRON-
34 ICALLY STORED INFORMATION FROM SOURCES THAT THE PARTY IDENTIFIES AS NOT
35 REASONABLY ACCESSIBLE BECAUSE OF UNDUE BURDEN OR COST. A party seeking
36 disclosure under rule 3120 or section 3121 may move for an order under
37 rule 3124 or section 2308 with respect to any objection to, or other
38 failure to respond to or permit inspection as requested by, the notice
39 or subpoena duces tecum, respectively, or any part thereof. ON A MOTION
40 TO COMPEL DISCLOSURE UNDER RULE 3124 OR SECTION 2308 OR FOR A PROTECTIVE
41 ORDER UNDER SECTION 3103 OR SECTION 2304 INVOLVING ELECTRONICALLY STORED
42 INFORMATION IDENTIFIED AS NOT REASONABLY ACCESSIBLE, THE PARTY OR PERSON
43 FROM WHOM DISCOVERY IS SOUGHT MUST SHOW THAT THE INFORMATION IS NOT
44 REASONABLY ACCESSIBLE BECAUSE OF UNDUE BURDEN OR COST. IF THAT SHOWING
45 IS MADE, THE COURT MAY NONETHELESS ORDER DISCLOSURE FROM SUCH SOURCES IF
46 THE REQUESTING PARTY SHOWS GOOD CAUSE THEREFOR. IN ORDERING SUCH DISCLO-
47 SURE THE COURT MAY MAKE ANY ORDER PERMITTED UNDER SECTION 3103, INCLUD-
48 ING AN ORDER SPECIFYING CONDITIONS FOR THE DISCLOSURE.

49 (b) Whenever a person is required pursuant to such a notice, subpoena
50 duces tecum or order to produce documents OR ELECTRONICALLY STORED
51 INFORMATION for inspection, and where such person withholds one or more
52 [documents] ITEMS that appear to be within the category of the [docu-
53 ments] MATERIALS required by the notice, subpoena duces tecum or order
54 to be produced, such person shall give notice to the party seeking the
55 production and inspection [of the documents] that one or more such docu-
56 ments OR ELECTRONICALLY STORED INFORMATION are being withheld. This

1 notice shall indicate the legal ground for withholding each such [docu-
2 ment] ITEM, and shall provide the following information as to each such
3 [document] ITEM, unless the party withholding the [document] ITEM states
4 that divulgence of such information would cause disclosure of the
5 allegedly privileged information: (1) the type of document OR ELECTRON-
6 ICALLY STORED INFORMATION; (2) the general subject matter of the [docu-
7 ment] ITEM; (3) the date of the [document] ITEM; and (4) such other
8 information as is sufficient to identify the [document] ITEM for a
9 subpoena duces tecum.

10 (c) Whenever a person is required pursuant to such notice or order to
11 produce documents for inspection, that person shall produce them as they
12 are kept in the regular course of business or shall organize and label
13 them to correspond to the categories in the request.

14 (d) Unless the subpoena duces tecum directs the production of original
15 documents for inspection and copying at the place where such items are
16 usually maintained, it shall be sufficient for the custodian or other
17 qualified person to deliver complete and accurate copies of the items to
18 be produced. The reasonable production expenses of a non-party witness
19 shall be defrayed by the party seeking discovery.

20 (E) UNLESS THE PARTIES OTHERWISE AGREE OR THE COURT ORDERS OTHERWISE:

21 (I) WHENEVER A PERSON IS REQUIRED PURSUANT TO SUCH NOTICE, SUBPOENA
22 DUCES TECUM, OR ORDER TO PRODUCE ELECTRONICALLY STORED INFORMATION FOR
23 INSPECTION AND COPYING, IF SUCH NOTICE, SUBPOENA OR ORDER DOES NOT SPEC-
24 IFY THE FORM OR FORMS FOR PRODUCING ELECTRONICALLY STORED INFORMATION,
25 THE PERSON SHALL PRODUCE THE INFORMATION IN A FORM OR FORMS IN WHICH IT
26 IS ORDINARILY MAINTAINED OR IN A FORM OR FORMS THAT ARE REASONABLY
27 USEABLE; AND

28 (II) A PERSON NEED NOT PRODUCE THE SAME ELECTRONICALLY STORED INFORMA-
29 TION IN MORE THAN ONE FORM.

30 S 3. Section 3126 of the civil practice law and rules, as amended by
31 chapter 98 of the laws of 1993, is amended to read as follows:

32 S 3126. Penalties for refusal to comply with order or to disclose. If
33 any party, or a person who at the time a deposition is taken or an exam-
34 ination or inspection is made is an officer, director, member, employee
35 or agent of a party or otherwise under a party's control, refuses to
36 obey an order for disclosure or wilfully fails to disclose information
37 which the court finds ought to have been disclosed pursuant to this
38 article, the court may make such orders with regard to the failure or
39 refusal as are just, among them:

40 1. an order that the issues to which the information is relevant shall
41 be deemed resolved for purposes of the action in accordance with the
42 claims of the party obtaining the order; or

43 2. an order prohibiting the disobedient party from supporting or
44 opposing designated claims or defenses, from producing in evidence
45 designated things or items of testimony, or from introducing any
46 evidence of the physical, mental or blood condition sought to be deter-
47 mined, or from using certain witnesses; or

48 3. an order striking out pleadings or parts thereof, or staying
49 further proceedings until the order is obeyed, or dismissing the action
50 or any part thereof, or rendering a judgment by default against the
51 disobedient party.

52 ABSENT EXCEPTIONAL CIRCUMSTANCES, A COURT MAY NOT IMPOSE SANCTIONS ON
53 A PERSON FOR FAILING TO PROVIDE ELECTRONICALLY STORED INFORMATION LOST
54 AS A RESULT OF THE ROUTINE, GOOD-FAITH OPERATION OF AN ELECTRONIC INFOR-
55 MATION SYSTEM.

1 S 4. Section 3131 of the civil practice law and rules, as amended by
2 chapter 859 of the laws of 1975, is amended to read as follows:
3 S 3131. Scope of interrogatories. Interrogatories may relate to any
4 matters embraced in the disclosure requirement of section 3101 and the
5 answers may be used to the same extent as the depositions of a party.
6 Interrogatories may require copies of such papers, documents [or],
7 photographs OR ELECTRONICALLY STORED INFORMATION, SUBJECT TO THE
8 PROVISIONS OF RULE 3122 OF THIS ARTICLE, as are relevant to the answers
9 required, unless opportunity for this examination and copying be
10 afforded.
11 S 5. This act shall take effect on the thirtieth day after it shall
12 have become a law.