S T A T E O F N E W Y O R K

6000

2009-2010 Regular Sessions

I N A S S E M B L Y

February 23, 2009

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

AN ACT to amend the civil practice law and rules, in relation to electronic discovery

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

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

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

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

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

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

2. The notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection, copy, test or photograph, or of the entry upon the land or other property and, in the case of an inspection, copying, testing or photographing, shall set forth the items to be inspected, copied, tested or photographed by individual item or by category, and shall describe each item and category with reasonable particularity. THE NOTICE OR SUBPOENA MAY SPECIFY THE

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

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FORM OR FORMS IN WHICH ELECTRONICALLY STORED INFORMATION IS TO BE PRODUCED.

3. The party issuing a subpoena duces tecum as provided hereinabove shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof.

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

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

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

(b) Whenever a person is required pursuant to such a notice, subpoena duces tecum or order to produce documents OR ELECTRONICALLY STORED INFORMATION for inspection, and where such person withholds one or more [documents] ITEMS that appear to be within the category of the [docu-

ments] MATERIALS required by the notice, subpoena duces tecum or order to be produced, such person shall give notice to the party seeking the production and inspection [of the documents] that one or more such documents OR ELECTRONICALLY STORED INFORMATION are being withheld. This notice shall indicate the legal ground for withholding each such [document] ITEM, and shall provide the following information as to each such [document] ITEM, unless the party withholding the [document] ITEM states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document OR ELECTRONICALLY STORED INFORMATION; (2) the general subject matter of the [document] ITEM; (3) the date of the [document] ITEM; and (4) such other information as is sufficient to identify the [document] ITEM for a subpoena duces tecum.

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

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

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

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

(II) A PERSON NEED NOT PRODUCE THE SAME ELECTRONICALLY STORED INFORMATION IN MORE THAN ONE FORM.

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

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

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

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

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

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

S 4. Section 3131 of the civil practice law and rules, as amended by chapter 859 of the laws of 1975, is amended to read as follows:

S 3131. Scope of interrogatories. Interrogatories may relate to any matters embraced in the disclosure requirement of section 3101 and the answers may be used to the same extent as the depositions of a party. Interrogatories may require copies of such papers, documents [or], photographs OR ELECTRONICALLY STORED INFORMATION, SUBJECT TO THE PROVISIONS OF RULE 3122 OF THIS ARTICLE, as are relevant to the answers required, unless opportunity for this examination and copying be afforded.

S 5. This act shall take effect on the thirtieth day after it shall have become a law.