

LAWS OF 19 93

MEMORANDUM NO. _____

SENATE BILL _____

ASSEMBLY BILL 6439

6439

1993-1994 Regular Sessions

IN ASSEMBLY

March 29, 1993

Introduced by M. of A. KOPPELL, LENTOL -- Multi-Sponsored by -- M. of A. BRENNAN, GOTTFRIED, JOHN, SHABROOK -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Codes

AN ACT to amend the civil practice law and rules, in relation to disclosure and to repeal certain provisions of such law and rules relating thereto

IN THE SENATE BY S.3200 Volker

DATE RECEIVED BY GOVERNOR

2/27

ACTION MUST BE TAKEN BY:

6/8

DATE GOVERNOR'S ACTION TAKEN:

JUN 7 1993

000001

SENATE VOTE 52 Y 0 N

HOME RULE MESSAGE Y ✓ N

DATE 5/26/93

BILL IS DISAPPROVED

ASSEMBLY VOTE 136 Y 0 N

DATE _____

DATE 4.26.93

COUNSEL TO THE GOVERNOR

000002

1993

SENATE JOURNAL

MAY 26 1993

PAGE

36

ASSEMBLY

The Assembly Bill

by Assem. KOPPELLCalendar No. 664Assembly No. 6439

Sen. Rept. No. _____

Entitled: "

AN ACT to amend the civil practice law and rules, in relation to disclosure and to repeal certain provisions of such law and rules relating thereto

"was read the third time

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	19	Mr. Babbush	EXCUSED		23	Mr. Mega	EXCUSED
	43	Mr. Bruno			28	Mrs. Mendez	EXCUSED
	25	Mr. Connor			18	Ms. Montgomery	
	40	Mr. Cook			42	Mr. Nolan	
	61	Mr. Daly			53	Mr. Nozzolio	
	49	Mr. DeFrancisco			27	Mr. Ohrenstein	
	54	Mr. Dollinger			14	Mr. Onorato	
	32	Mr. Espada	EXCUSED		36	Mrs. Oppenheimer	
	44	Mr. Farley			11	Mr. Padavan	
	33	Mr. Galiber			37	Mr. Pataki	
	13	Mr. Gold			29	Mr. Paterson	EXCUSED
	31	Mr. González	EXCUSED		56	Mr. Present	
	26	Mr. Goodman			41	Mr. Saland	
	21	Mr. Halperin			17	Ms. Santiago	EXCUSED
	6	Mr. Hannon			47	Mr. Sears	
	48	Ms. Hoffmann			50	Mr. Seward	
	38	Mr. Holland			60	Mr. Sheffer	
	4	Mr. Johnson			9	Mr. Skelos	
	55	Ms. Jones			12	Miss Smith	
	52	Mr. Kuhl			22	Mr. Solomon	
	2	Mr. Lack			35	Mr. Spano	EXCUSED
	39	Mr. Larkin			58	Mr. Stachowski	
	1	Mr. LaValle			45	Mr. Stafford	
	30	Mr. Leichter			16	Mr. Stavisky	
	8	Mr. Levy			3	Mr. Trunzo	
	51	Mr. Libous			7	Mr. Tully	
	15	Mr. Maltese			34	Mr. Velella	
	24	Mr. Marchi			59	Mr. Volker	
	5	Mr. Marino	EXCUSED		10	Mr. Waldon	
	20	Mr. Markowitz			46	Mr. Wright	
	57	Mr. Masiello					

AYES

52

NAYS

0

Ordered, that the Secretary return said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

000003

A. 10437

NEW YORK STATE ASSEMBLY
TWO HUNDRED SIXTEENTH SESSION

REPRINT
DATE: 04/26/93

DATE: 04/26/1993
TIME: 02:59:26 PM

BILL: A6439

CAL. NO: 351 SPONSOR: KOPPELL (MS)

Provides liberalization of disclosure and reduction of motion practice by more informal procedures; repealer

Y	Abbate PJ	EOR	Genovesi AJ	Y	Oaks RC
Y	Alesi JS	Y	Glick DJ	Y	O'Neil CA
Y	Anderson RR	Y	Gottfried RN	Y	Ortloff C
Y	Aubry JL	Y	Graber VJ	Y	O'Shea CJ
EOR	Balboni MA	Y	Grannis A	Y	Parmet WL
Y	Barbaro FJ	Y	Green RL	Y	Parola FE
Y	Barraga TF	Y	Greene A	Y	Perry NN
Y	Becker GR	Y	Griffith E	Y	Pheffer AI
Y	Behan JL	Y	Gromack AJ	Y	Pillittere JT
EOR	Bennett LE	Y	Gunther JE	Y	Pordum FJ
Y	Bianchi IW	Y	Harenberg PE	Y	Prescott DW
Y	Bonacic JJ	Y	Healey PB	Y	Pretlow JG
EOR	Boyland WF	Y	Hevesi AG	Y	Proskin AW
Y	Bragman MJ	Y	Hickey EM	Y	Ramirez R
Y	Brennan JF	EOR	Hikind D	Y	Rappleyea CD
Y	Brodsky RL	Y	Hill EH	Y	Ravitz J
Y	Brown HC	Y	Hochberg AG	Y	Reynolds TM
Y	Butler DJ	Y	Hoffman EC	Y	Rivera PM
Y	Cahill KA	Y	Hoyt WB	Y	Robach JE
Y	Calhoun N	Y	Jacobs RS	Y	Rosado D
Y	Canestrari RJ	Y	Jenkins C	Y	Sanders S
Y	Casale AJ	Y	John SV	Y	Sawicki J
Y	Casale PM	Y	Johnson J	Y	Schimminger RL
Y	Christensen JK	Y	Kaufman SB	EOR	Seabrook L
Y	Clark BM	Y	Keane RJ	Y	Seminario AS
ELB	Cochrane JC	Y	King JP	Y	Sidikman DS
EOR	Colman S	Y	Koppell GO	Y	Silver S
Y	Connelly EA	Y	Lafayette IC	Y	Singer CD
Y	Conte JD	Y	Lasher HL	ELB	Straniere RA
Y	Cook VE	Y	Leibell VL	Y	Stringer SM
Y	Crowley J	Y	Lentol JR	Y	Sullivan EC
Y	D'Andrea RA	Y	Lopez VJ	Y	Sullivan FT
Y	Davidson DR	Y	Luster MA	Y	Sweeney RK
Y	Davis G	Y	Magee B	Y	Tallon JR
Y	Del Toro A	Y	Matusow NC	Y	Talomie FG
Y	Destito RM	Y	Mayersohn N	Y	Tedisco J
Y	Diaz HL	Y	McEneny JJ	Y	Tocci RC
Y	DiNapoli TP	Y	McGee PK	Y	Tokasz P
EOR	Dugan EC	Y	McLaughlin BM	Y	Tonko PD
Y	Englebright S	Y	Meeks GW	Y	Towns DC
Y	Eve AO	Y	Miller RH	Y	Townsend DR
EOR	Farrell HD	Y	Morelle JD	Y	Vann A
Y	Faso JJ	Y	Murtaugh JB	Y	Vitaliano EN
Y	Feldman D	Y	Muscarella VT	Y	Warren GE
Y	Ferraro D	Y	Nesbitt CH	Y	Weinstein HE
Y	Fessenden DJ	Y	Nicoletti JA	Y	Weisenberg H
Y	Flanagan JJ	ABS	Nieves JA	Y	Wertz RC
Y	Friedman G	Y	Nolan CT	Y	Winner GH
Y	Galef SR	Y	Norman C	Y	Wright KL
EOR	Gantt DF	Y	Nortz HR		Mr. Speaker

YEAS: 136

NAYS: 0

CONTROL: 23859264

CERTIFICATION: /S/ FRANCINE M. MISASI
CLERK OF THE ASSEMBLY

LEGEND: Y=YES, NAY=NO, NV=ABSTAIN, ABS=ABSENT,
ELB=EXCUSED FOR LEGISLATIVE BUSINESS, EOR=EXCUSED FOR OTHER REASONS.

000004

65
11-64-29

TO COUNSEL TO THE GOVERNOR

RE: SENATE

ASSEMBLY 6439

Inasmuch as this bill does not appear to relate to the functions of the Department of Law, I am not commenting thereon, at this time. However, if there is a particular aspect of the bill upon which you wish comment, please advise me.

**ROBERT ABRAMS
ATTORNEY GENERAL**

Dated: 6-1-93

000005

C-98

A. 10/24

B-203 (12/75)

BUDGET REPORT ON BILLS

Session Year 1993

SENATE

NO RECOMMENDATION

ASSEMBLY

No.

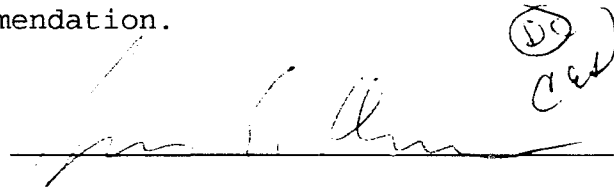
No. 6439

Law: Civil Practice Law and Rules

Title: AN ACT to amend the above law, in relation to disclosure and to repeal certain provisions of such law and rules relating thereto

The above bill has been referred to the Division of the Budget for comment. After careful review, we find that the bill has no appreciable effect on State finances or programs, and this office does not have the technical responsibility to make a recommendation on the bill.

We therefore make no recommendation.

 (D.C.)
C.C.

Sandra Shepard

000006

C-98



A. 6439

STATE OF NEW YORK
DEPARTMENT OF STATE
ALBANY, N.Y. 12231-0001

GAIL S. SHAFFER
SECRETARY OF STATE

M E M O R A N D U M

DATE: June 7, 1993

TO: Hon. Elizabeth D. Moore
Counsel to the Governor

FROM: James N. Baldwin
Executive Deputy Secretary of State

SUBJECT: A.6439 [M. of A. Koppell, Lentol] at request
of the Office of Court Administration

The Department of State offers no comments on the subject bills.

JNB:ub

000007

printed on recycled paper

COMMERCIAL & FEDERAL LITIGATION SECTION

Legislation Report

Opinions expressed are those of the Committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee

REPORT NO. 110

May 6, 1993

S. 3200
A. 6439

By: Senator Volker
By: M of A Koppell

Senate Committee: Codes
Assembly Committee: Codes
Effective Date: 1st day of January next
succeeding the date on which
it shall become a law

AN ACT to amend the civil practice law and rules, in relation to disclosure and to repeal certain provisions of such law and rules relating thereto

LAW AND SECTIONS REFERRED TO: CPLR, §§3101, 3102, 3103, 3113, 3116, 3120,
3122, 3124, 3126, 3132, 3133, 3134 & 3140

REPORT PREPARED BY THE COMMERCIAL AND FEDERAL LITIGATION SECTION (#1)

THIS BILL IS APPROVED

This bill submitted by the Advisory Committee on Civil Practice of the Office of Court Administration makes a number of changes to Article 31 of the CPLR to simplify and rationalize discovery practice. While this report does not attempt to discuss every suggested change, the Section believes that all changes in these bills are desirable and strongly endorses their enactment.

Scope of Discovery

The bill will amend CPLR §3101(a), defining scope of discovery, by directing "full disclosure of all matter material and necessary in the prosecution or defense of an action." The substitution of "matter" for "evidence" will make the standard conform to that specified in Allen v. Crowell-Collier Publishing Co., 21 N.Y. 2d 403 (1968), which has long been the law of the state. This change will not have any substantive effect other



ONE ELK STREET

ALBANY, NEW YORK 12207

518-463-3200

000008

than to eliminate any confusion caused by divergence between the CPLR and the Court of Appeals by conforming the former to the latter's statement of the law.

Amendment or Supplementation of Response

A new sub-division (h) has been added to CPLR 3101 to set forth an express requirement for amendment of supplementation of responses:

A party who has responded to a request for disclosure shall amend or supplement the response promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading. Where a party obtains such information an insufficient period of time before the commencement of trial appropriately to amend or supplement the response, the party shall not thereupon be precluded from introducing evidence at the trial solely on grounds of noncompliance with this subdivision. 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. Further amendment or supplementation may be obtained by court order.

Although there has long been a similar requirement provided by Fed. R. Civ. Pro. 26(e) and a number of other states have such express requirements, there is now no such express provision in the CPLR. The courts have generally addressed the matter specifically only upon objection raised to an answer that the information will not be available until a later date. See, generally, Weinstein, Korn & Miller, New York Civil Practice-CPLR, ¶3134.07. The experience of the bar has been that when the record establishes that a discovery response was misleading, the party serving the misleading response is apt to avoid any

sanction or other discipline from the trial court on the excuse that the other party should have served further interrogatories, or other supplemental discovery requests to create any duty to amend or supplement.

The proposed duty to amend or supplement "would apply to all disclosure devices" and, according to the Advisory Committee, "establishes a reasonable balance between the need to maintain the integrity of responses to disclosure requests and for the need to avoid imposing on a party a burdensome obligation to review and update on a continuing basis responses to disclosure requests." Consistent with this objective the bill amends CPLR 3134(c) by eliminating the current restriction on serving amended answers to interrogatories without leave of court, thus removing an obvious inhibition to amending or supplementing previously served answers.

The additional provisions regarding introduction of evidence at trial track the language in CPLR 3101(d)(1)(i) as enacted in 1985, respecting the introduction of expert testimony where the expert was retained an insufficient period of time prior to trial to give appropriate notice of disclosure relating to the expert's prospective testimony. 1992 Report of the Advisory Committee on Civil Practice, December, 1992, p. 19.

The bill provides that where the information requiring amendment or supplementation is received an insufficient amount of time in advance of trial to permit amendment, preclusion is not available solely on the ground of failure to amend. Preclusion of evidence is never appropriate unless there is prejudice

which cannot be otherwise cured. Where there is such prejudice, preclusion should be an available remedy if a party cannot satisfactorily explain a failure to amend or supplement before trial, and this would be the case under the amendment.

The adoption of an express duty to amend or supplement will do much to increase the efficacy of the discovery process and prevent surprise at trial.

Signing of Deposition Transcripts

CPLR 3116(a) currently contains a burdensome procedure for signing of deposition transcripts excusing the requirement for a signature from a party who has been provided 30 days notice to return the transcript signed and permitting the officer before whom the deposition was taken to sign the transcript of a witness who has refused to sign. These procedures add little to the reliability of a transcript. They do provide opportunities for argument at trial as to the use of an unsigned deposition which more than likely will be permitted regardless of compliance with the rule. As amended, the bill will eliminate any requirement for signing, and require merely that the deposition shall be submitted to the witness for examination. This conformance of statute to practice is desirable.

Discovery and Inspection of Specifically Designated Documents

CPLR 3120 presently permits discovery and inspection only of "specifically designated" documents, things or objects. There is no consistency in the decision determining whether documents (or other subjects of disclosure) have been designated with sufficient specificity, particularly where a request includes the

characterizations "any," "all," or "any and all." See, e.g., Miller v. Columbia Records, Inc., 70 A.D.2d 517 (1st Dep't 1979), app. dism. 48 N.Y.2d 629 (use of "any and all" in a notice for discovery and inspection palpably improper); Craig v. New York Telephone Company, 123 A.D.2d 580 (1st Dep't 1986) (in certain limited circumstances the use of "all" may relate to a specific subject matter that is proper in a notice for discovery and inspection); Mendelowitz v. Xerox Corp., 169 A.D.2d 300 (105 1st Dep't 1991) (use of such phrases as "all," "all other," or "any and all" is not necessarily improper but is still "frowned upon"); Hudson Valley Tree, Inc. v. Barcana, In., 114 A.D.2d 400 (2d Dep't 1985) (use of "any," "all," or "any and all" renders the notice for discovery and inspection improper); Stevens v. Metropolitan Suburban Bus Authority, 117 A.D.2d 733 (2d Dep't 1986) (use of "all" does not in itself render improper a specific request for identifiable documents); Brady v. Wyeth Laboratories, Inc., 106 A.D.2d 795 (3d Dep't 1984) (demand for "all" recall notices stricken); Brown v. Daisy Manufacturing Co., 109 A.D.2d 995 (4th Dep't 1987) (use of adjective "all" does not render request impermissible per se). The leading case of Rios v. Donovan, 21 A.D. 2d 409 (1st Dep't 1964), and its progeny, Torpey v. Alpine Brook Triangle Corp., 84 A.D. 2d 739 (1st Dep't 1981); Zimmerman v. New York City Transit Authority, 115 A.D.2d 738 (2d Dep't 1986); Albero v. State, 25 A.D.2d 470 (3d Dep't 1966); DiVicenzo v. State Farm Mutual Insurance Company, 107 A.D.2d 1044 (4th Dep't 1985), have extended this uncertain requirement of specificity even further to an expressed preference that

documents be identified during a deposition prior to a party's making a specific request under CPLR 3120 for their production.

S. 3200 changes this law. It eliminates the requirement of "specificity." The bill adopts instead the language of Fed. R. Civ. Pro. 34 that the notice "set forth the items . . . by individual item or by category, and . . . describe each item and category with reasonable particularity." It overturns the procedure recommended by Rios v. Donovan, 21 A.D.2d 409 (1st Dep't 1964), in favor of the more efficacious federal procedure of production of documents prior to a deposition followed by questioning about the documents during a deposition. See, Baer and Meade, "Some Reflections on Pre-Trial Delay in State Court," 65 New York State Bar Journal 30, 33 (January 1993); National Union Fire Insurance Company of Pittsburgh, Pa. v. Continental Illinois Corporation, 116 F.R.D. 78 (N.D. Ill. 1987).

The Section believes that the adoption of the federal practice for discovery and inspection of documents and things by item and category, usually prior to depositions, will streamline the discovery process, eliminate sometimes duplicative depositions, and eliminate unnecessary motion practice with regard to the "specificity" of such requests. The proposed change should not be interpreted to expand the scope of discovery or to permit fishing expeditions. While no longer requiring that items to be produced be designated specifically, the proposal does require description of "each item and category with reasonable particularity."

At its April 1992 meeting the House of Delegates of the

000013

Association adopted a report of this Section recommending adoption of the procedures for designating requested documents contained in S3200, as well as the procedures set forth in the bill for objecting to disclosure requests discussed below. The Association as a whole has not considered any of the other provisions now contained in S3200.

Procedure for Objections to Discovery

Under the present CPLR 3122 and 3133, objections to notices for discovery and inspection and interrogatories must be made by motion within ten days of service of these discovery requests. However, the courts have carved out discretionary exceptions to these time constraints by granting motions for protective relief under CPLR 3103, which may be made "at any time" by any party or by the court, sua sponte. Relief is granted under CPLR 3103 against notices for discovery and inspection and interrogatories despite the failure to move within the ten-day period, where the information sought is "privileged" or "attorney work product," or where the discovery requests themselves are otherwise "palpably improper" in the scope or genre of information sought. See, generally, Siegel, "Practice Commentaries" and "Supplementary Practice Commentaries," McKinney's Consolidated Laws of New York (Annotated), C3122:1, C3122:2 and C3133:1. Not only does this create two conflicting rules for when a motion must be made, but differing views on how to apply the standard of "palpably improper" can create considerable uncertainty as to which rule shall govern. The consequence of failure to move on time may be a complete waiver of a meritorious objection or a grant of all

000014

relief requested which appears to reward dilatory conduct. Compare Corriel v. Volkswagen of America, Inc., 127 A.D.2d 729, 572 N.Y.S.2d 126 (2d Dep't 1987), with Zembelis v. Nicholar, 92 A.D.2d 936, 460 N.Y.S.2d 360 (2d Dep't 1983).

The other objectionable feature of the present practice is that the only way a party can preserve an objection to discovery with certainty is to make a motion or to stipulate with the adversary to extend the time to make a motion. The latter option requires the cooperation of the adversary, frequently not available. Thus, the party with objections of any kind to discovery has a strong incentive to make a motion.

S3200 adopts the basic model of Rules 33 and 34 of the Federal Rules of Civil Procedure by requiring that objections, rather than a motion, be served within 20 days, the same period within which the answering party's responses to discovery as to which no objection is taken must be made. The requirement that objections be made within 20 days, with specific reference to claims of privilege, makes it plain that all objections must be made within the 20-day period, thus eliminating all present uncertainty as to when objections must be made.

This change will also substantially reduce motion practice. Under the current federal practice, substantial negotiation is likely to take place after service of objections, and a motion to compel production is the exception rather than the norm. It can be expected that the same practice will prevail under CPLR 3122 and 3133 as amended by S3200, thereby avoiding both motions and interlocutory appeals from such motions.

000015

As noted above, the House of Delegates of the Association approved the method for objecting to disclosure requests contained in S3200 at its April 1992 meeting.

As amended by the bill, CPLR 3122 and 3134 will require that a party asserting privilege or similar legal basis for withholding a document produce certain specific information concerning each document withheld. The identical information as to claims of privilege has been required since 1984 in the United States District Court for the Southern District of New York pursuant to its Civil Rule 46. This has been widely accepted as a reasonable and expeditious method of addressing and identifying claims of privilege so that they may be considered without revealing confidential information while discouraging the use of generalized claims of privilege to hinder discovery.

When an objection is made to a category of documents on grounds of relevance and/or the burden of assembling them, the objecting party will likely not examine each document, as it is that burden the party is seeking to avoid. Consequently, if the objecting party loses a subsequent motion to compel production, and in response to the order granting the motion assembles the documents for production, only then will it know which, if any, documents are privileged. To avoid a waiver of such a privilege which a party understandably did not know existed, the bill provides that the procedure for describing privileged documents not produced may be used in response to a "notice or order." This may suggest the possibility of abuse by a party asserting privilege in response to an order granting a motion to compel

000016

production in circumstances where the privilege could have easily been asserted prior to the motion. However, the reasonable exercise of the court's discretion and the availability of Part 130 of the Uniform Rules for Trial Courts to deter frivolous conduct should avoid dilatory claims of privilege which have plainly been waived.

Motion to Compel Disclosure

CPLR 3124 has been substantially rewritten and simplified. Substantively, the predicate to the making of a motion under CPLR 3124 that the party failing to submit to discovery did not make a timely motion for a protective order has been deleted, consistent with the amendments to CPLR 3122 and 3133 providing for service of objections rather than a motion for a protective order. That is, under this revised procedure, it can be expected that motions to compel discovery under CPLR 3124 will very often follow a timely objection.

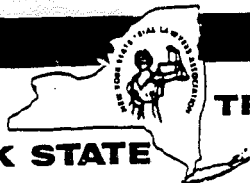
Timing of Interrogatories

CPLR 3132 is modified by providing that interrogatories may not be served upon the defendant before the defendant's time for serving a responsive pleading has expired rather than merely not less than 30 days after service of the summons and complaint, and by providing that exceptions to this restriction can be obtained only on motion with notice rather than a motion without notice as is presently the case. The requirements that early service of interrogatories by plaintiff should be only on order after notice to all parties is a desirable change.

000017

Report prepared by:
Gregory K. Arenson
James N. Blair
Steven M. Critelli

NEW YORK STATE



Memorandum in SUPPORT

TRIAL LAWYERS ASSOCIATION, INC.

132 NASSAU STREET, NEW YORK, NEW YORK 10038 • 212-349-5890 FAX 212-608-2310

May 3, 1993

COMMITTEE ON STATE LEGISLATION

S.3200 (Volker) / A.6439 (Koppell)

AN ACT to amend the civil practice law and rules, in relation to disclosure and to repeal certain provisions of such law and rules relating thereto

This bill is largely the product of the Office of Court Administration Committee on Civil Practice with substantial input by legislative counsel. The OCA CPLR Committee is composed of experienced civil practitioners in both the commercial and personal injury areas, and law school professors. This writer was privileged to have worked on most aspects of this bill as a member of that committee. The bill would revise certain aspects of disclosure to accord with the needs of litigants to more fairly achieve expeditious discovery, and reduce motion practice by adding more informal procedures. The bill both liberalizes and streamlines discovery procedure and removes some archaic practices.

Section 1 would amend CPLR 3101 to remove the word "evidence" describing that which is discoverable, replacing it with the word "matter." The change is not cosmetic, but real. It would accord with state case law as enunciated in the Court of Appeals decision of Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403 (1968) which held, in part, that the scope of discovery is greater than evidentiary admissibility, including matter that could lead to evidence.

3101(a)(3) would be amended to add to the list of persons from whom disclosure may be sought dentists and podiatrists in order to conform to 3101(d)(1)(i)(ii).

Section 2. Rule 3101(h) is new and is comparable to supplemental responses to discovery tracking Federal Rules of Civil Practice 26(e). Parties have a need to supplement responses to discovery without the requirement of obtaining court permission. The party should have that freedom and this rule accomplishes that end.

Section 3, subdivision c, of Rule 3102 would be amended to delete the requirement for recording of depositions and documents obtained for an action involving title to real property. The CPLR committee believes that the inconvenience of such recording and the possibility that it might create an unjustified cloud on title to property outweighs what little benefit such recording might have in alerting title searchers to any claim involving title to the property in question.

(over)

MAY 04 1993

000019

5-5200

(664)

Section 4. Rule 3102(f) is amended to strike the prohibition against using interrogatories or requests for admission against the state as a party in light of the case law.

Section 5. Rule 3101 is amended to make it clear that any person who is the subject of a discovery request, whether or not a party or a witness, is entitled to move for a protective order.

Section 6. This merely changes the word "dominion" to "jurisdiction" to eliminate a formal discrepancy between federal and state practice.

Section 7. This would amend rule 3116(a) to eliminate the requirement that a deposition be signed by the officer before whom it is taken if the witness fails or refuses to sign it. This requirement is inconvenient and serves no practical purpose and should be abolished.

Section 8. This change in rule 3120 will be of widespread importance and is extremely helpful to all civil practitioners. The present requirement that requested items for discovery to "specifically" designated has led to a narrow interpretation which has largely precluded any serious discovery prior to deposition. If a party can reasonably identify an item, it should not require a deposition to describe it. The interpretation has frustrated discovery, has increased the amount of depositions required, and lengthened the discovery process unnecessarily while also increasing expenses of litigation. If the party to whom a request is made object on the grounds that the item is not discoverable or is improper, the party should state the objection pursuant to Rule 3122 rather than seeking a shelter behind a claimed insufficient designation.

Section 9. This section would amend Rule 3122 and would reduce motion practice by eliminating the requirement that objections to production be made by motion. This amendment provides a notice procedure encouraging the parties to solve the dispute without a motion. If not done, the party serving the notice may move for an order compelling disclosure under rule 3124.

These are just some of the more important salutary changes in discovery which will benefit both the bench and the bar.

NYSTLA supports this bill.



STATE OF NEW YORK
UNIFIED COURT SYSTEM
OFFICE OF COURT ADMINISTRATION
AGENCY BLDG. 4 - 20TH FLOOR
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223
(518) 474-7469

MATTHEW T. CROSSON
Chief Administrator of the Courts

MICHAEL COLODNER
Counsel

June 1, 1993

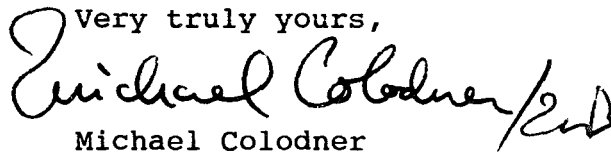
Hon. Elizabeth D. Moore
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Assembly 6439

Dear Ms. Moore:

Thank you for requesting the comments of this Office on the above-referenced measure, which would amend Article 31 of the CPLR to effectuate a general revision of the disclosure statutes.

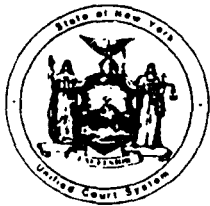
This measure was introduced at the request of this Office upon the recommendation of the Chief Administrator's Advisory Committee on Civil Practice. A copy of our explanatory memorandum is attached. For the reasons given therein, we strongly urge approval.

Very truly yours,

Michael Colodner

MC:kc

Attachment

000021



MATTHEW T. CROSSON
Chief Administrator of the Courts

①
STATE OF NEW YORK
UNIFIED COURT SYSTEM
(OFFICE OF COURT ADMINISTRATION)
AGENCY BLDG. 4 - 20TH FLOOR
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223
(518) 474-7469

A6439
OCA 93-39

MICHAEL COLODNER
Counsel

IN SUPPORT OF

S.

A.

AN ACT to amend the civil practice law and rules, in relation to disclosure and to repeal certain provisions of such law and rules relating thereto

This measure is being introduced at the request of the Judiciary. It was recommended to the Chief Administrator of the Courts by his Advisory Committee on Civil Practice.

This measure proposes a general revision of CPLR Article 31 (Disclosure) in order to ensure fairness to litigants and to effect the expeditious disposition of civil actions.

This measure would amend Article 31 of the Civil Practice Law and Rules (Disclosure) to ensure (1) liberalization of disclosure and (2) reduction of motion practice by more informal procedures.

An explanatory commentary upon this measure follows:

Section 3101

Subdivision (a)

The preamble of subdivision (a) of section 3101 would be clarified to permit disclosure of "matter" that is material and necessary, conforming to the standard set forth in Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403 (1968).

With respect to matrimonial actions and custody and visitation proceedings, however, the Committee does not intend to affect existing or evolving statutes and decisional law as to the availability of disclosure.

While the Advisory Committee is recommending liberalization of disclosure and the streamlining of disclosure procedures, it notes that protection against abuse of disclosure procedures is afforded by the power of the court under section

000022

(2)

A6439

3103(a) to make a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts," as well as by the requirement for special circumstances under section 3101(a)(3) or for a statement of circumstances or reasons for disclosure under section 3101(a)(4).

Section 3101(a)(3) would be amended to list persons authorized to practice dentistry or podiatry so that it technically conforms to section 3101(d)(1)(i)(ii) which relates to disclosure by medical, dental and podiatric experts.

Subdivision (b)

Subdivision (b) would be clarified to provide that the privilege in question may be invoked not only by a party to the action but also by any other person entitled to assert the privilege.

Subdivision (h)

The CPLR does not contain a provision comparable to Fed. R. Civ. P. 26(e) explicitly requiring a party under certain circumstances promptly to supplement or amend responses to disclosure requests. New subdivision (h) would incorporate the substance of the federal rule, which, the Committee believes, establishes a reasonable balance between the need to maintain the integrity of responses to disclosure requests and the need to avoid imposing on a party a burdensome obligation to review and update on a continuing basis responses to disclosure requests. New subdivision (h) would apply to all disclosure devices. Provision is made, tracking CPLR 3101(d)(1)(i) as enacted by chapter 294 of the Laws of 1985, for introduction of evidence at trial in the court's discretion where the information was received too close to trial to provide sufficient time for amendment of the response.

Section 3102(c)

The requirement for the recording of depositions and documents obtained for an action involving title to real property would be deleted. The Committee believes that the inconvenience of such recording and the possibility that it might create an unjustified cloud on title to property outweighs what little benefit such recording might have in alerting title searchers to any claim involving title to the property in question.

Section 3102(f)

Subdivision (f) would be amended to strike the prohibition against using interrogatories or requests for admissions against the State as party in light of Vista Business Equipment, Inc. v.

③

A6439

State of New York, N.Y.L.J., p.12, col. 3, 1/23/86 (Court of Claims).

Section 3103(a)

Subdivision (a) would be amended to make it clear that any person who is the subject of a discovery request, whether or not a party or a witness, is entitled to move for a protective order.

Rule 3113(a)(2)

The amendment would eliminate a formal discrepancy between federal and state practice created by the 1980 amendment to Fed. R. Civ. P. 28(a).

Rule 3116(a)

The amendment would eliminate the requirement that a deposition be signed by the officer before whom it was taken if the witness fails or refuses to sign it. The requirement, which is inconvenient to comply with if the officer is not readily located, serves no significant purpose, since the officer must in any event rely upon representations or statements of a party or the witness as to the fact that the latter failed or refused to sign the deposition and the reasons therefor.

Rule 3120(a)

The purpose of the requirement in rule 3120(a) that a party designate the items he or she seeks to inspect is to enable the party served with the notice to determine what items are requested and to enable the court to determine whether the requested items have been produced. Cf. 8 Wright & Miller, Federal Practice and Procedure §2211 at 631. The present requirement that the requested items be "specifically" designated lends itself to a restrictive interpretation under which technical defects may frustrate reasonable discovery requests. In addition, a party frequently must conduct a deposition in order to obtain the information enabling that party to designate the requested items with the required specificity. See King v. Morris, 57 A.D.2d 530 (1st Dept. 1977). This result has been justified on the theory that the deposition may be necessary for proper resolution of objections to the discovery request. Rios v. Donovan, 21 A.D.2d 409, 413-14 (1st Dept. 1964). The Committee believes that a party who can reasonably identify a requested item or category of items should not need to conduct a deposition in order to establish the existence and specific identities of the requested items. In most instances, the Committee believes, pretrial discovery will be conducted more efficiently and effectively if a party can obtain materials for use in preparing for a deposition. If the party to whom the request is made objects on the ground that it is unduly burdensome, includes materials which

④

A6439

are not discoverable, or is improper in some similar respect, the party should state the objections pursuant to rule 3122 "rather than seeking shelter behind a claim of insufficient designation." 8 Wright & Miller, supra, at 634. The Committee, however, would retain the requirement in CPLR 3120(a)(ii) for specific designation of the object or operation to be inspected, measured, surveyed, sampled, tested, photographed or recorded, where entry upon land or property is to be permitted.

Rule 3122

The amendment of rule 3122 is intended to reduce the volume of motion practice arising out of disclosure procedures by eliminating the requirement that objections to requests for production of documents or other things or for physical or mental examinations be made by motion. The Committee believes that the notice procedure required by the amendment would encourage parties to resolve disputes concerning such requests without court intervention. In the event that a dispute is not so resolved, the party seeking disclosure may move for an order compelling disclosure pursuant to the proposed new section 3124.

The proposed amendment to rule 3122 also would enlarge the time for objecting to a disclosure request, and also would require a party served with a notice to produce documents to indicate to the party serving the notice if some documents are being withheld because of privilege or other legal reason and reasonably to describe such documents.

Rule 3124

Rule 3124 would be revised to achieve greater clarity and simplicity and to delete the requirement that a person move for a protective order in order to preserve objections to a disclosure request. This should encourage parties to resolve disputes over disclosure matters on their own without resort to the Court and also should serve to narrow the scope of motions regarding disclosure matters, since ordinarily the motion would be made as a motion to compel disclosure after the person from whom disclosure was sought had complied with so much of the disclosure request as to which no objection was raised. Such narrowing of issues, particularly under IAS, would help to speed up the disposition of cases.

The reference to the right of a party to obtain local remedies for failure to comply with a disclosure request would be deleted as unnecessary; the Committee does not intend to suggest that section 3124 preempts other applicable law.

⑤

AG439

Section 3126

The substitution of the clause "this article" for "notice duly served" would make it clear that a willful failure to disclose information within the meaning of section 3126 includes a willful failure to amend or supplement a response to a disclosure request as required under new subdivision (h) of section 3101.

Rule 3132

The prescriptive period during which a plaintiff may not serve interrogatories upon a defendant would be revised to parallel the amendment of rule 3106.

Rule 3133

The amendment of rule 3133 would consolidate present rules 3133 and 3134. Paralleling the proposed amendment of rule 3122, subdivision (a) of rule 3133 would be amended to eliminate the requirement that an objection to an interrogatory be made by motion. Subdivision (b) of rule 3133 would be deleted as unnecessary in light of the amendment of subdivision (a).

Rule 3134

Rule 3134 would be repealed, and its provisions would be incorporated into the amended rule 3133.

Section 3140

Section 3140 would be amended to correct a misspelling in the caption and to clarify that the responsibility for making procedural rules governing the exchange of appraisal reports is vested in the Chief Administrator of the Courts in conformity with section 212(2)(d) of the Judiciary Law. (See also 22 NYCRR 202.59, 202.60, 202.61). This amendment also is in furtherance of one of the purposes of this measure, the assurance of greater statewide uniformity with respect to disclosure procedures.

This measure, which would have no fiscal impact upon the State, would take effect on the first day of January next succeeding the date on which it shall have become a law.

1989-90 Legislative History: Senate 6461 (Rules) [Codes Com.]
Assembly 8382 (Rules, at request
of Koppell) [Codes Com.]

1991-92 Legislative History: Senate 7512 (Volker) [Rules Com.]
Assembly 7397 (Koppell) [passed
Assembly]

A.6439

New York State Bar Association

DEPARTMENT OF GOVERNMENTAL RELATIONS

MARY ELIZABETH BABCOCK, *Associate Director*

June 1, 1993

Honorable Elizabeth D. Moore
Counsel to the Governor
Executive Chamber
Capitol - Room 225
Albany, New York 12224

RE: A.6439

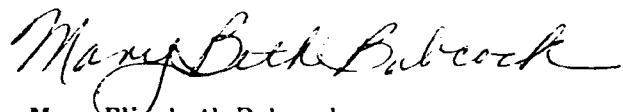
Dear Ms. Moore:

You requested the views of this Association with respect to the above bill which is pending before the Governor.

Enclosed please find Legislation Report No. 110, prepared by the Commercial and Federal Litigation Section, approving the above measure.

Thank you for the opportunity to comment.

Sincerely,



Mary Elizabeth Babcock
Associate Director

MEB/I
enclosure



One Elk Street, Albany, New York 12207

518-463-3200/FAX 518-487-5517

000027

Communications

George F. Lusk
Assembly Representative
New York State
Legislative Staff

Members

Chief Justice, Appellate
Court, Appellate Division
Chief Justice, Appellate
Court, Appellate Division
Chief Justice, Appellate
Court, Appellate Division
Chief Justice, Appellate
Court, Appellate Division
Chief Justice, Appellate
Court, Appellate Division



NEW YORK STATE

LAW REVISION COMMISSION
488 BROADWAY
ALBANY, NEW YORK 12207

TELEPHONE: 432-4500
TELEFAX: 432-2655

Kenneth F. Joyce
Executive Director

June 1, 1993

Elizabeth D. Moore
Counsel to the Governor
Executive Chamber
The Capitol
Albany, NY 12224

RE: A 6439 AN ACT to amend the civil practice law and rules, in relation
to disclosure and to repeal certain provisions of such law and
rules relating thereto (Koppell, Lentol)

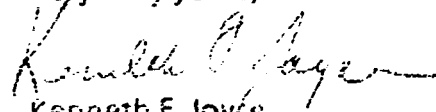
Pursuant to your request for comment on the above-captioned bill, the
Executive Director of the Law Revision Commission submits the following.

The bill amends several provisions of the CPLR relating to the rules of
disclosure. Included are the repeal of Rule 3124, to be replaced by a new Rule 3124,
and repeal of Rule 3134, having its language inserted in Rule 3133.

After review of the proposal, it appears that the amendment is adequately
drafted to achieve the purpose of clarification of discovery rules in New York
practice. The Law Revision Commission has NO OBJECTION to the proposal.

Thank you for seeking our comments on this bill.

Very truly yours,


Kenneth F. Joyce
Executive Director

000028

C-98



Nassau County Surrogate's Court

NASSAU COUNTY COURT HOUSE

ALBERT W. PETRAGLIA
Chief Clerk
535-2082

MINEOLA, N.Y. 11501
TELECOPIER (516) 535-5864

VINCENT P. MALLARO
Deputy Chief Clerk
535-2080

C. RAYMOND RADIGAN
Surrogate

LAW DEPARTMENT
535-2042

PATRICK J. CASTELL, III
Chief Court Attorney

CARL R. F. EDWARDS
Principal Law Clerk

THOMAS A. CRANCK
Principal Court Attorney

GAIL B. SINGER
Court Attorney-Referee

WILLIAM J. CONNOLLY
Court Attorney-Referee

ANDREW L. MARTIN
Court Attorney

FAX TRANSMITTAL

Please deliver the following to:

NAME: Elizabeth D. Moore, Counsel to Governor

FROM: Hon. C. Raymond Radigan

DATE: June 3, 1993 TIME SENT: 12:55 pm

TOTAL NUMBER OF PAGES (including cover sheet): -1-

WE ARE TRANSMITTING FROM A MURATA F-50 (516) 535-5804

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE - (516) 535-2042. THANK YOU.

OPERATOR: Tina

MESSAGE (if any): Please be advised that the Surrogates Association
is in favor of Assembly Bill 6439. If you have any questions or
comments, please do not hesitate to contact me at (516) 571-2040.

000029