

BILL TEXT:

STATE OF NEW YORK

2995

2005-2006 Regular Sessions

IN ASSEMBLY

January 31, 2005

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

AN ACT to amend the civil practice law and rules, in relation to the timing of disclosure of films, photographs, video or audio recordings created after the commencement of the action

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision (i) of section 3101 of the civil practice law
2 and rules, as added by chapter 574 of the laws of 1993, is amended to
3 read as follows:

4 (i) In addition to any other matter which may be subject to disclo-
5 sure, there shall be full disclosure of any films, photographs, video
6 [~~tapes~~] or audio [~~tapes~~] recordings in whatever medium, including tran-
7 scripts or memoranda thereof, involving a person referred to in para-
8 graph one of subdivision (a) of this section. There shall be disclosure
9 of all portions of such material, including out-takes, rather than only
10 those portions a party intends to use. A party shall not be compelled to
11 disclose any such material created after commencement of the action
12 until such party has had a full and fair opportunity to depose the
13 person depicted therein unless the court orders otherwise for good cause
14 shown. The provisions of this subdivision shall not apply to materials
15 compiled for law enforcement purposes which are exempt from disclosure
16 under section eighty-seven of the public officers law.

17 § 2. This act shall take effect immediately and shall apply to all
18 actions pending or commenced on and after such date.

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

LBD07109-01-5

SPONSORS MEMO:

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(e)

BILL NUMBER: A2995

SPONSOR: Weprin

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TITLE OF BILL: An act to amend the civil practice law and rules, in relation to the timing of disclosure of films, photographs, video or audio recordings created after the commencement of the action

JUSTIFICATION:

In

DINARDO VS. KORONOWSKI, A.D.2d, N.Y.2d (Case # 1409, 4th Dep't 12/30/98), the Fourth Department was asked to determine the right of a defendant, who had obtained videotape surveillance of a plaintiff in a personal injury action, to postpone disclosure of the videotape until the deposition of the plaintiff had been completed. The Fourth Department Appellate Court first reviewed the well-reasoned and balanced approach to disclosure of surveillance material adopted by the Court of Appeals in the case of

DIMICHEL VS. SOUTH BUFFALO RAILWAY COMPANY, 80 N.Y.2d 184, 590 N.Y.2d 1 (1992) prior to the enactment of CPLR 3101 (1). The

DIMICHEL rule required disclosure of surveillance materials; but the Court of Appeals held that such disclosure was to be made after the conduct of a deposition testimony which was tailor-made to explain away the events portrayed in the surveillance materials.

The DiNardo Court then reviewed CPLR 3101 (1), which requires the disclosure of "films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof". Observing that CPLR 3101(1) was enacted after the decision of the Court of Appeals in DiMichel, the Court noted that CPLR 3101(1) was silent concerning the timing of the disclosure. In reviewing the legislative history of CPLR 3101(1) the Fourth Department also noted that the advisory committee in Civil Practice Law and Rules, as well as the Division of the State Police, disapproved of the bill when it was pending before the legislature, in part because there was nothing in the bill that would limit the timing of the disclosure until after plaintiff had been deposed. The holding in DiMichel and therefore concluded that, had the legislature wanted to limit the disclosure of surveillance tapes until after depositions, it would have included language to that effect. It consequently held that the party under surveillance was entitled to absolute disclosure of the surveillance materials even before his or her deposition.

Nevertheless, since the enactment of CPLR 3101 (1), other courts have reached contrary.

APREA V. SONN, Misc.2d(Sup. Ct., Bronx Co. NYLJ 9/23/99 QDS:32701572) ("adhering to the principle announced by the Court of Appeals in

DIMICHEL that such deposition");

RANKIN VS. WALDBAUM

INC., 176 Misc.2d 184, 670 N.Y.2d 1023 (Sup. Ct. Nassau Co., 1998;

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VS. PUTNAM, 240 A.D.2d 784, 657 N.Y.S. 2d 849 (3rd Dep't 1997) (allowed an audiotaped statement of a party that was demanded pursuant to CPLR 3101 (e) to be withheld pending a deposition of the party);

BOULWARE V.

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, ET AL., 161 Misc.2d 435 (Sup. Ct., N.Y. County 1994).

The current proposal attempts to forge a method for the disclosure of photographic, video and audio recordings made after the commencement of the action. In almost every case, these will fit within the genre of surveillance materials or materials created for the purposes of litigation. Rather than rely upon a case by case adjudication of the respective rights of the parties to seek, to disclose or withhold these materials, the Committee believed that it would be productive to create a rule that would allow a party possessing such materials to withhold them until that party had an opportunity to test the credibility and/or

RETRIEVE BILL

impeach the persons depicted therein in a deposition. Only after the holding of a deposition would these materials be disclosed.

Since the rule suspends disclosure until after a party has had a "full and fair opportunity" to depose the person depicted therein, such deposition should proceed without delay; otherwise, a dilatory party could be found to have relinquished its right to continue to withhold such materials even if the deposition has not been held. Furthermore, notwithstanding the procedure immediate disclosure of these materials "for good cause shown." In this way, the Committee believes that the rule enunciated in DIMICHEL is codified and that the resultant effect will reduce the need to repeatedly address the issue in court.

PRIOR LEGISLATIVE HISTORY:

A.9735 of 2000 A.4063/S.125 of 2002 A1363 of 2004.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:

This act shall take effect immediately and shall be effective as to all actions then pending and all actions commenced on that date or thereafter.
