

## BILL TEXT:

## STATE OF NEW YORK

11064

## IN ASSEMBLY

May 2, 2006

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 creating a notice in lieu of trial subpoena

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

1 Section 1. The civil practice law and rules is amended by adding a new  
2 section 2305-a to read as follows:  
3 § 2305-a. Notice in lieu of trial subpoena. (a) Upon the trial of an  
4 action, the trial testimony of a party, other than a party whose attend-  
5 ance can be compelled only by an order or subpoena issued by a judge,  
6 may be compelled by a notice in lieu of subpoena served upon the party's  
7 attorney of record demanding that the attorney produce the client at  
8 trial, provided that the party maintains an actual place of business,  
9 dwelling place or usual place of abode within the geographical limits of  
10 the court's subpoena power, or has designated an agent for service  
11 pursuant to rule three hundred eighteen of this chapter within such  
12 geographical limits. The notice may require production at trial of  
13 books, papers, documents or other things specifically designated there-  
14 in, except those books, papers, documents and things the production of  
15 which would otherwise require an order or subpoena issued by a judge.  
16 The notice shall be served in accordance with subdivision (b) of rule  
17 twenty-one hundred three of this chapter, at least twenty days before  
18 the date of trial. If the party whose attendance is the subject of such  
19 notice is not a natural person, the testimony of a particular officer,  
20 director, member or employee of such party may be compelled by like  
21 notice stating the identity, description or title of such individual;  
22 provided, however, that the producing party may, by notice served on all  
23 parties no later than ten days before the date of trial, designate a  
24 substitute witness, stating the identity, description or title of such  
25 individual. A party whose attendance and production of things at trial  
26 is compelled by notice pursuant to this section shall not be entitled to  
27 the traveling expenses and witness fees set forth in subdivision (a) of  
28 section twenty-three hundred three of this article.

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

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1 (b) An application to quash, fix conditions or modify a notice in lieu  
 2 of subpoena or an application to quash a notice designating a substitute  
 3 witness shall be made promptly.

4 (c) Upon the failure of a party to comply with a notice in lieu of  
 5 subpoena, the court may, as it deems appropriate, issue an order provid-  
 6 ing the relief set forth in section thirty-one hundred twenty-six of  
 7 this chapter, or adjourn the trial and impose costs attendant thereto  
 8 upon the disobedient party.

9 § 2. This act shall take effect on the first of September next  
 10 succeeding the date on which it shall have become a law.

**SPONSORS MEMO:**

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

**BILL NUMBER:** A11064**SPONSOR:** Weprin**TITLE OF BILL:**

An act to amend the civil practice law and rules, in relation to creat-  
 ing a notice in lieu of trial subpoena

**PURPOSE:**

This bill creates a new procedure to compel a litigant represented by  
 counsel and who is otherwise subject to the court's subpoena power to  
 attend trial; and bring designated documents, books, papers or other  
 things as may be identified by a notice in lieu of subpoena served upon  
 the party's attorney of record and without the need for the adverse  
 party to serve a trial subpoena.

**SUMMARY OF PROVISIONS:**

This bill provides that upon the trial of an action, the trial testimony  
 of a party, other than a party whose attendance can be compelled only by  
 an order or subpoena issued by a judge, may be compelled by a notice in  
 lieu of subpoena served upon the party's attorney of record. The notice  
 may demand that the attorney produce the client at the time of trial and  
 it may require the production of books, records, papers, documents or  
 things. It must be served at least twenty days prior to trial. A motion  
 to quash may be promptly brought. Upon the failure of a party to comply  
 with a notice in lieu of subpoena the Court may issue appropriate relief  
 or adjourn the trial and impose costs as may be appropriate.

**EXISTING LAW:**

Civil Practice Law and Rules Section 2305(a) provides that a Subpoena  
 may provide that the person subpoenaed shall appear on the date stated  
 and give testimony. CPLR Section 2305 (b) provides that a subpoena duces  
 tecum may be joined with a trial subpoena and a person may comply by  
 having the requisite books, documents or things produced by a person  
 able to identify them and testify respecting their origin, purpose and

custody.

**JUSTIFICATION:**

This proposal would create a new mechanism by which a litigant who is represented by counsel and who is otherwise subject to the court's subpoena power can be compelled by mere notice to the litigant's attorney to attend the trial and to bring designated books, papers or things without the need for the adverse party to serve a trial subpoena. There is one exception, however, in that a notice in lieu of subpoena cannot be used to compel the attendance of a party or the production of those things that would otherwise require a court order or subpoena issued by a judge ( e.g. attendance of a prisoner, original patient records kept by a hospital or a municipal or state agency, or other books, papers and things of a municipal or state agency etc.).

The notice in lieu of subpoena would save the time, expense and uncertainty of serving a trial subpoena upon an adverse party while sparing the surprise, embarrassment and discomfort often suffered by recipients of subpoenas who receive the unexpected and often unwelcome visit of a process server at their home or workplace on the eve of trial. Under this proposal, a mere notice to the attorney for the party/witness would suffice to compel trial attendance and production of documents.

This new proposal would have other advantages as well. As with examinations before trial under CPLR 3106(d), if the party is not a natural person, the trial testimony of a particular officer, director, member or employee of such party may be compelled by notice, subject to the right of the party receiving the notice to designate a substitute trial witness. If the seeking party is not satisfied with the designated substitute witness, two options are available: the seeking party can resort to the use of a conventional trial subpoena, or an application can be made to quash the notice of substitute witness.

Under the proposed rule a party, who at the time of trial is not subject to service of a subpoena, would not be subject to a notice in lieu of subpoena. An attorney in receipt of a notice in lieu of subpoena who has reasonable grounds to believe that his or her client is not subject to such notice because the client, for example, no longer maintains an actual place of business in the jurisdiction must promptly make an application to quash. Parties burdened by a notice in lieu of subpoena may also move to fix conditions or modify the notice. In keeping with the intent to employ the notice in lieu of subpoena as a cost saving device, and recognizing that in the vast majority of cases parties do attend their own trials, the new rule makes it clear that parties who are compelled to attend their own trials are not entitled to travel expenses or daily attendance fees.

Disobedience of a notice in lieu of subpoena would subject the disobedient parties to certain penalties or a postponement of the trial.

**LEGISLATIVE HISTORY:**

2006: New bill.

**FISCAL IMPLICATIONS:**

None.

**LOCAL FISCAL IMPLICATIONS:**

None.

**EFFECTIVE DATE:**  
Immediately

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