

Legislation Report

REPORT NO. 95

February 7, 2002

S. 6143
A. 9695

By: Senator Volker
By: M. of A. Weprin
Senate Committee: Codes
Assembly Committee: Codes
Effective Date: 1st day of January next
succeeding the date on
which it shall have become
a law.

AN ACT to amend the civil practice law and rules, in relation to the service of a subpoena duces tecum

LAW AND SECTIONS REFERRED TO: Subdivision (a) of section 2303 of the civil practice law and rules, as amended by chapter 398 of the laws of 1997

THIS BILL IS APPROVED

This proposal is designed to ensure fundamental fairness and due process in connection with the issuance of a subpoena in a pending action by requiring service of a copy of the subpoena duces tecum on the other parties to the action. As currently written, a trial subpoena duces tecum may be issued and served without any notice to the other parties whatsoever. In many counties, subpoenas duces tecum are made returnable at a "records" room well in advance of a trial. Once delivered to the Court House, the issuing attorney may view the subpoenaed items ex parte. This quasi-discovery practice allows the issuing attorney to obtain documents that were not sought during the discovery state, either because there was no effort made to seek them at that point or because the documents are such that a court may not permit disclosure of them. Often, these subpoenas are directed to a party's medical records, an employment file or other financial records. A subpoena of such materials (medical, hospital or personnel records) compels production even in the absence of a signed authorization. So records relating to a party could be perused without giving the party an opportunity to object to their production via subpoena. Because such subpoenas duces tecum can be served with no notice to the opposing party what so ever, that party has no opportunity to seek judicial relief under CPLR 2304 (motion to quash). Hence, there is an opportunity for serious abuse.

The ability to make ex parte service of subpoena is also inconsistent with the policy of liberal pretrial disclosure to all matters that will "assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Allen v. Crowell-Collier Pbg. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968). Advance notice of the issuance of a subpoenas duces tecum will allow disputes regarding the subpoenaed material to be resolved in advance of the actual trial and allow the trial to proceed more efficiently.

The service provision is designed to permit service of the copy by any subpoena duces tecum by any means permitted under CPLR 2103, such as a mail. Although service is not required on the parties in advance of service on the witness, it is required promptly thereafter and in any event, in such a manner as to be received before the witness is required to produce the "books, documents or things" required by the subpoena.

The proposal extends to subpoenas duces tecum served in connection with nonparty depositions during the discovery phase of the case pursuant to CPLR 3106(b). Although CPLR 3107 requires service on the parties of the deposition notice itself, there is no similar requirement that copies of the subpoena duces tecum required under CPLR 3106(b) also be served on the parties. Since information contained within the subpoena duces tecum itself might not be contained within the deposition notice, the other parties to the action should receive service of both the deposition notice and the subpoena.

The provision would apply only to subpoenas served in a "pending action" (or special proceeding **§103(b)**); it, therefore, would not apply to subpoenas issued in a non-litigation context. The amendment also would not govern subpoenas issued pursuant to CPLR 5224 (post-judgment subpoenas issued in aid of the enforcement of a judgment), as "service of a CPLR 5224 subpoena does not commence a special proceeding." D,Siegal, *New York Practice*, § 509 at 927 [3d ed.].

This affirmative legislative proposal of the New York State Bar Association is **APPROVED**.