***Introduction***

Courts and commentators have repeatedly noted the sea change in litigation practice brought about as a result of electronic discovery. The proliferation of email and other kinds of electronically stored information in business and personal affairs, coupled with ever-increasing ease of dissemination and retention of such information, has vastly multiplied the volume of electronic material that can potentially meet the threshold requirements for discoverability in cases of even modest complexity. In some instances, the time and attention that is required to identify, preserve, collect, analyze, and produce electronic information is staggering; yet, in many such cases, the *most* relevant information can only be found through e-discovery.

The reaction to electronic discovery in the Federal courts has been sweeping and profound. The federal courts have recognized that relevant, non-privileged electronic information is presumptively discoverable so long as it is reasonably accessible. Based on this principle, the Federal courts have adopted procedural rules to ensure that e-discovery issues are addressed at the outset by attorneys, the parties they represent, and the courts. Under federal practice, failure to comply with e-discovery obligations has at times led to significant sanctions, both for clients and for the firms who represent them. And attorneys have been confronted with a new kind of responsibility – the obligation to police the client's compliance with e-discovery obligations – that combines legal, ethical, and technical issues in new and challenging ways.

Thus far, these changes in federal practice and procedure have not been matched by any corresponding amendments to the CPLR. Some New York state courts have tried to provide guidance on the procedures for and permissible scope of e-discovery through individual decisions. *See, e.g., Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 908, 2006 N.Y. Misc. LEXIS 2232 (Sup. Ct. Nassau Co. 2006) (Warshawsky, J.); *Weiller v. N.Y. Life Ins. Co.*, 800 N.Y.S.2d 359, 2005 N.Y. Misc. LEXIS 473, (Sup. Ct. N.Y. Co. 2005) (Cahn, J.); *Lipco Electrical Corp. v. ASG Consulting Corp.*, 798 N.Y.S.2d 345, 2004 N.Y. Misc. LEXIS 1337 (Sup. Ct. Nassau Co. 2004) (Austin, J.); *Etzion v. Etzion*, 796 N.Y.S.2d 844, 2005 N.Y. Misc. LEXIS 519 (Sup. Ct. Nassau Co. 2005) (Stack, J.). In addition, the Commercial Division of the New York State Supreme Court has promulgated rules providing for the management of electronic discovery through early conferencing and inclusion of e-discovery issues in case management orders. *See* Rule 8(b) of the Rules of the Commercial Division of the Supreme Court, NYCRR 202.70. By their nature, these efforts could not (and did not) attempt to establish a comprehensive or uniform statewide practice for managing and conducting e-discovery; and while models for state-level rules of electronic discovery have been developed, *see, e.g.*, Nat'l Conference of Commissions on Uniform State Laws, *Uniform Rules Relating to the Discovery of Electronically Stored Information* (2007),[1] we are unaware of any proposals either to adopt these Uniform Rules in New York or to incorporate any of their provisions into the CPLR.

***Overview of Proposed Amendments***

The Section believes that the core purposes of the CPLR[2] would be furthered by incorporating certain – but not all – of the recent changes to the Federal Rules of Civil Procedure in Article 31 of the CPLR. As electronic systems have come to replace other means of communication and of assembling and manipulating information, such electronic content increasingly forms the substance of the information that is "material and necessary in the prosecution or defense of an action." CPLR 3101(a). However, the CPLR's rules for the disclosure of recorded or reproducible information are, in several instances, phrased in terms of requirements for producing or withholding "documents" – terminology which, at best, only approximates the nature of electronically stored information, and at worst bears little resemblance to such information.

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[1] The final version is available at www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm).

[2] *See* CPLR 104 ("The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding.").

The proposed amendments modify the CPLR to recognize and reflect this reality by explicitly acknowledging that electronically stored information falls within the realm of potentially discoverable information, and clarifying that the *sui generis* nature of electronically stored information requires rules that differ in several particulars from the rules for production of traditional hard copy "documents." Of particular importance, the proposed amendments seek to achieve three principal goals:

(i) to encourage litigants to discuss the format and scope of electronic discovery early in the discovery process. The prevalence of electronically stored information raises issues regarding the format of production that are without precedent in the realm of "hard copy" discovery. These may include concerns such as (i) the presence of "metadata" which, if produced, may disclose privileged information, giving rise to questions regarding the viability of production in the format in which electronic data is originally stored and, relatedly, (ii) the potential for disputes over incompatibility or loss of functionality in cases where parties convert electronically stored information to different formats in order to avoid disclosure of privileged information. While many cases will not involve voluminous or complex discovery, in cases where substantial and/or diverse electronic production is anticipated, a failure to achieve agreement on the scope and format of production before parties make their production may result in costly and wasteful production efforts, as well as needless discovery disputes. The proposed amendments seek to avoid such problems by encouraging parties to identify scope-of-production disputes and format preferences early enough in the process so that these issues can be resolved before the parties collect and produce electronically stored materials;

(ii) to provide reasonable procedures for addressing the special problems associated with electronically stored information which, while still in a litigant's possession, custody, or control, is not reasonably accessible. Enterprises that create and store electronic information often retain data which, for a variety of reasons, is not maintained in "live" format on the enterprise's computer systems and cannot be made accessible without considerable effort or expense. Examples may be as varied as stored data that was designed for use with out-of-date hardware or software, back-up data that is kept only for emergency recovery purposes, or data that can only be accessed through costly recovery or programming efforts. While the proposed amendments are not intended to modify in any way the court's authority pursuant to CPLR 3103(a) to issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device," the likelihood of disputes regarding the discoverability of relatively inaccessible data makes it desirable to establish a framework for the early identification of such data coupled with procedures for determining whether and under what circumstances discovery of such data may be required and a deferral of any obligation to search, produce, or formulate objections related to relatively inaccessible material absent a determination of a reasonable means of access to such materials.

(iii) to recognize, as did the drafters of the Federal Rules, that "a distinctive feature of computer operations" is "the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part." *See* Advisory Committee Notes to 2006 Amendment adding Fed. R. Civ. P. 37(f). In light of this ubiquitous feature of computer systems, the proposed amendments clarify that the loss of data through the "routine, good-faith operation of an electronic information system" should not be an occasion for sanctions, "absent exceptional circumstances." Of course, the rule is not intended to prevent a party or a court from addressing any individual situation where good faith is in doubt.

Specifically, the proposed amendments would modify Article 31 in the following ways:

* CPLR 3120(1)(i) would be modified to explicitly recognize "electronically stored information" as a category of potentially discoverable information, along with "documents" or "things";

* CPLR 3120(2) would be modified to permit a party seeking discovery of electronically stored information to request production of such information in one or more specifically designated forms;

* CPLR 3122(a) would be modified (i) to permit a party, when objecting to a request for electronically stored information, to include any specific objection the party has to a requested form of production; (ii) to require the objecting/responding party to designate the form or forms in which the party proposes to produce electronically stored information, in cases where such party has objected to the requested form or forms of production, or where no particular forms of production were specified in the request; and (iii) to clarify that, absent a court order, a party need not provide disclosure of electronically stored information that is not reasonably accessible due to undue burden or cost, and to provide a balanced procedure for handling disputes as to whether such information is reasonably accessible;

* CPLR 3122 would be further amended to add a new CPLR 3122(e) specifying that, as a general practice, (i) production of electronically stored information shall be made either in the form in which such information is ordinarily maintained, or in a form that is reasonably useable by the party requesting such discovery, and (ii) a party need not produce electronically stored information in more than one form;

* CPLR 3122(b) would be amended to extend its provisions for identification of withheld materials to the production of electronically stored information;

* CPLR 3126 would be amended to include a limitation on sanctions in cases where information is lost through the routine, good-faith operation of an electronic information system; and

* CPLR 3131 would be amended to include electronically stored information among the types of materials that a party may request as a supplement to interrogatories.

The proposed amendments are intended primarily to clarify the treatment of electronically stored information in civil disclosure proceedings conducted prior to the filing of a note of issue. These amendments are not intended to expand or restrict the scope of information that might otherwise be accessible in other contexts, such as by issuance of a trial subpoena pursuant to Article 23 or through subpoenas in aid of enforcement issued pursuant to CPLR 5223 or 5224. In light of the volume and complexity of materials that are now retained in electronic format, it is anticipated that counsel would normally attempt to access such information through requests for disclosure under Article 31, and that attempts to do so through service of a trial subpoena may be more vulnerable to objection on various grounds. However, in particular cases, a party might legitimately require production of electronically stored information for purposes of trial, and the present amendments do not preclude such a result.

***Federal Rules Changes Not Included in the Proposed Amendments to the CPLR***

While the above modifications are both desirable and feasible, the proposed amendments do not incorporate the Federal Rules' e-discovery amendments in their entirety into the CPLR. In particular, this proposal does not include provisions comparable to the following federal e-discovery amendments:

* *Case Management Procedures*: Rules 16 and 26(f) of the Federal Rules of Civil Procedure establish an early case management conferencing procedure under which issues concerning electronic discovery must be discussed among the parties and with the court at the outset of the discovery period. There is no CPLR

analogue to Federal Rule 16's procedure for early case conferencing. Instead, case management procedures are treated in the uniform rules applicable to various branches or divisions of the state court system, or at times in practice rules promulgated by particular courts or justices. While the proposed amendments seek to encourage litigants to address electronic discovery issues early in the litigation, given the absence of an existing CPLR framework for case management conferences, the proposed amendments contain no analogue to the recent amendments to Rules 16 and 26(f) of the Federal Rules.

* *Modifications to Initial Disclosure Requirements*: Similarly, there is no CPLR analogue to Federal Rule 26(a)'s procedures for initial disclosures, and thus there is no readily adaptable framework within the CPLR through which to require early identification of electronically stored information that may be relevant to the prosecution or defense of the action.

* *Procedures for Disputes Regarding Inadvertent Production of Privileged Documents*: Federal Rule 26(b)(5)(B) requires that, in cases where a producing party notifies a receiving party of an inadvertent production of privileged material, the receiving party must "return, sequester, or destroy" pending resolution of the claim of privilege. These mandates are substantially similar to a New York attorney's ethical obligations upon receipt of inadvertently produced privileged materials. *See* N.Y. City Bar Ass'n, Comm. on Professional and Judicial Ethics, Formal Op. 2003-04. In addition, the New York cases presently establish reasonably clear standards and procedures for determining claims of inadvertent production of privileged material. *See, e.g., New York Times v. Lehrer McGovern Bovis, Inc.*, 752 N.Y.S.2d 642 (1st Dep't 2002); *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 425, 2006 N.Y. Misc. LEXIS 1083 (Sup. Ct. Nassau Co. 2006). Accordingly, there is not a present need to adopt a CPLR analogue to Federal Rule 26(b)(5)(B).

***Specific Amendments to the CPLR***

The full text of the proposed amendments is set out in the Appendix. Following is a discussion of the amendments individually and in relation to one another.

**1. Identification Of Electronically Stored Information As A Separate Category Of Potentially Discoverable Information.**

The proposed amendment modifies CPLR 3120(1)(i) to state that a request may seek discovery of "electronically stored information" as well as "documents" or "things."

While in some instances electronically stored information shares the characteristics of "documents," very often there is no such correspondence; and even in cases where the two categories are most similar, there are real differences between them that cannot be ignored. The proposed amendment creates a starting point for addressing these differences by identifying electronically stored information as a category unto itself, distinct from "documents" or "things."

**2. Establishment Of Procedures For Specifying The Preferred Form(s) Of Production, And For Objecting To Requests For Production In Particular Forms.**

The proposal amends CPLR 3120(2) to permit a requesting party to specify the form or forms of production in which the party wishes to receive electronically stored information, by adding the following language to that section: "***The notice or subpoena may specify the form or forms in which electronically stored information is to be produced.***"

Correspondingly, the proposal amends CPLR 3122(a) to permit the responding party to object to the requested form or forms of production by specifying that the responding party's objections may include "***an objection to the requested form or forms for producing electronically stored information.***" As an inducement to the early identification of the form(s) in which the parties wish production to be made, the proposal further amends CPLR 3122(a) to provide that "***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.***"

The proposed amendments generally incorporate corresponding language from Federal Rule 34(b) into appropriate subsections of the CPLR. The Federal amendments were intended to encourage early identification and resolution of any disputes as to the form of production of electronically stored information. Because the form of electronic storage can have a material effect on the receiving party's ability to search, read, review, or access electronic information, or to associate such information with related materials, courts and litigants have a mutual interest in establishing rules that will (i) permit parties who wish to receive electronic information in particular formats to request such formats at the outset, (ii) permit responding parties to object to such request, if there is a reasonable basis to do so, and (iii) clarify the form(s) of production that are to be used *before* the responding party actually undertakes to produce the electronically stored information.

Following the Federal Rules changes, the proposed amendments do not *require* the requesting party to designate a particular form for production of electronically stored information. In addition, the proposed amendments recognize that a requesting party may wish to receive different categories of information in different formats. The reference to "form or forms of production" is not, however, intended to permit a requesting party to require production of the *same* information in multiple forms; as discussed below, absent unusual circumstances, a party should not be required to produce the same electronically stored information in more than one format.

**3. Setting Limits On The Forms Of Production That A Party May Be Required To Provide.**

The proposal amends CPLR 3122 to incorporate a new subsection (CPLR 3122(e)) specifying that (a) the "fallback" requirement for production of electronically stored information is to produce such materials *either* in the form in which they are ordinarily maintained *or* in some other reasonably useable form; and (b) absent an agreement or court order to the contrary, a party would only be required to produce the same electronically stored information in a single format:

> ***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.***

Multiple considerations give rise to the need for this amendment. First, in the ordinary case, a party should not be expected or required to produce the same electronically stored information in more than one format; for example, if a requesting party seeks production of data in electronic form, the producing party should not *also* be required to provide the material in "hard copy." These procedures are intended to create strong incentives

for parties to reach agreement on format before production occurs, and to provide a framework for resolving objections if the parties cannot agree on a mutually acceptable format.

Second, although the cases have recognized that a party ordinarily may not be required to *create* material that did not previously exist for purposes of production, special considerations often lead a producing party to choose to convert electronically stored information into a new format for purposes of responding to discovery. One essential difference between "documents" and "electronically stored information" is that the latter category often incorporates "metadata" which, while not readily apparent to the reader, may nonetheless reveal many particulars about the creation and modification of the information. Such hidden information may substantially increase the costs and risks of dealing with electronic discovery, because (i) on the one hand, if a document is produced in a format with its metadata intact, it may reveal client confidences or the substance of privileged communications; but (ii) on the other hand, a comprehensive review of the metadata associated with potentially relevant electronic materials may substantially increase the costs of discovery for a producing party. As a result, many practitioners decline to produce electronically stored information "in the form in which it is ordinarily maintained,"[3] preferring instead to convert documents into some other reasonably useable format that will not contain all of the metadata associated with the data in its original form. The proposed amendment is intended to facilitate this approach, in order to avoid the evidentiary and ethical problems associated with production of metadata. As with the Federal Rule, the specification that such materials be produced in "reasonably useable" format is intended to mean that (i) the chosen format should not be more difficult or burdensome for the requesting party to use efficiently in the litigation, and (ii) if the information is searchable in its native format, the information should not be produced in a format that removes or significantly downgrades this feature.

It should be noted that the foregoing procedures governing the format of production may be modified in any case where the parties so agree or the court so orders. Thus, for example, in cases involving only modest amounts of discovery with no need for electronic searching capability, the parties might reasonably agree (or the court might require) that electronic documents or emails might be produced in hard copy rather than in electronic form. Conversely, in more complex cases, parties might reasonably choose to convert all electronically stored materials into one or more agreed formats, so as to facilitate their accessibility through a shared data facility.

**4. Procedures For Addressing Relatively Inaccessible Electronically Stored Information.**

The proposal amends CPLR 3122(a) to provide (i) a presumptive limitation on disclosure of electronically stored information that is not reasonably accessible and (ii) a procedure for determining disputes as to whether electronically stored information is, in fact, reasonably accessible, and for ascertaining whether and under what circumstances such information may nonetheless be subject to disclosure.

Specifically, the proposal amends CPLR 3122(a) to provide that

> ***[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,***

and to further provide that

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[3] *See also* NYSBA Ethics Op. 782 (Dec. 8, 2004) (counseling that the transmission of electronically created documents may violate ethical prohibitions on the disclosure of a client's confidences or secrets).

> ***[o]n 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.***

The proposed amendment is similar to the 2006 amendments to Federal Rule 26(b)(2)(B). As noted in the Advisory Committee comments accompanying those amendments, "some sources of electronically stored information can be accessed only with substantial burden and cost," and in particular cases this may make the information not reasonably accessible. Such instances may arise, for example, in cases where parties seek disclosure of information stored on backup tapes maintained only for disaster recovery purposes, in circumstances where the restoration of such tapes would require extensive effort and/or expense.

The proposed amendments are intended to (i) help ensure that such questions are identified and addressed before a producing party is required to incur potentially unwarranted expense, and (ii) to clarify the procedure for courts and litigants to determine whether the disclosure should be required, and the respective burdens that each party bears in that process. In cases where a court concludes that the disclosure would impose undue burdens or costs on the producing party or person and that no countervailing showing of good cause has been made, consistent with New York law, the court may, consistent with CPLR 3103, decline to require disclosure.

The proposal is also intended to make clear that, where a court finds that particular electronically stored information is not reasonably accessible but that, nonetheless, good cause exists to require its disclosure, the court has full authority, pursuant to CPLR 3103, to protect the producing party or person from excessive burdens or costs by imposing conditions on disclosure. Such conditions might include imposing limits on the materials to be produced, requiring testing of limited portions of the information in advance of more extended disclosure, defraying costs that must be incurred in order to access the information (such as costs of engaging forensic experts with the skills necessary to handle such information, or of obtaining access to equipment or software necessary to access the information), and/or other protective measures. *See, e.g.*, *Lipco*, 2004 N.Y. Misc. LEXIS 1337 at *24-25 (declining to order production of electronic data until requesting party clarifies whether it is willing to bear the cost thereof); *Delta Fin. Corp.*, 819 N.Y.S.2d at 918 (requiring requesting party to pay costs of certain electronic discovery); *Etzion*, 796 N.Y.S.2d. at 846-48 (specifying procedure for copying defendant's hard drives, producing relevant and non-privileged materials contained thereon, and requiring each party to bear the costs of their own experts).

Under the proposed amendment, where a party or person identifies a particular source of electronically stored information as not reasonably accessible, that party or person would not be required to undertake a comprehensive search or review of the source unless so directed by the court, and would not be required to propound specific objections regarding relatively inaccessible material or provide a privilege log identifying each document that was withheld from production. The party seeking disclosure may be entitled to discovery in order to test the claim that the source is not reasonably accessible. In considering whether to require production of information that the court concludes is not reasonably accessible, the court may find helpful the factors identified by the federal Advisory Committee in its comments to the 2006 Amendment to Federal Rule 26(b)(2).[4]

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[4] The Advisory Committee's comment provides as follows:

> The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the

## 5. Identification Of Withheld Electronically Stored Information

The proposal amends CPLR 3122(b) – which requires parties withholding documents on grounds of privilege or other recognized exemptions from disclosure – to specify that the requirement to identify withheld materials applies to electronically stored information.

CPLR 3122(b)'s requirement that a producing party identify any materials withheld from production on grounds of privilege or work product immunity is a fundamental check on the integrity of any document production, and if "electronically stored information" is to be treated as a separate category of potentially discoverable information, there is no reason to exempt this category from CPLR 3122(b)'s scope. Needless to say, the proposed changes are not intended, and should not be interpreted as, a requirement that a party who objects to production of particular electronically stored information on grounds of inaccessibility be required to specifically identify each item for which the objection is asserted.

## 6. Requests For Electronically Stored Information In Conjunction With Interrogatories

The proposal amends CPLR 3131 to specify that, as with documents, production of electronically stored information may be requested in conjunction with interrogatories. As electronic communication and record-keeping has in many instances replaced the use of "hard copy" materials, CPLR 3131's authorization to request production of "papers" or "documents" would lose much of its effect if electronically stored information were excluded from its scope. The amendment is intended to clarify that, while electronically stored information is within the scope of materials that may be requested as an adjunct to interrogatories, this method of discovery should not be used as a means to evade the limitations on e-discovery proposed for inclusion as part of CPLR 3122.

## 7. Limitation On Sanctions For Loss Of Information Through The Routine, Good-Faith Operation Of An Electronic Information System.

The proposal amends CPLR 3126 to include a limit on sanctions in certain instances where information is lost through the routine, good-faith operation of an electronic information system:

> ***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.***

The proposed change follows a similar amendment to Federal Rule 37. As the drafters of the Federal amendments recognized, electronic information systems routinely make alterations to stored data in ways that are essential to the operation of such systems and are largely irrelevant to the litigation process. The fact of such modifications, so long as they are made as part of the routine operation of the system and are done in good faith, should not be an occasion for sanctions or the threat thereof.

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circumstances of the case. Appropriate considerations may include (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

*See* Advisory Committee Comment, 2006 Amendment to Federal Rule 26(b)(2).

As with the amendment to Federal Rule 37, the proposed amendment is intended only to apply to "good faith" operations. Good faith may require parties, when apprised of a claim, to modify or suspend some features of their electronic information system so as to ensure that, to the extent a preservation obligation applies, relevant materials are not lost. The proposed amendment is not intended to apply to the knowing disposition of relevant information after receipt of notice of a claim, nor should it be interpreted to prevent a litigant or a court, in an appropriate case, from inquiring into particular losses of data other than through the routine, good-faith operation of the information system where such data was kept.

It should be noted that the corresponding Federal provision only limits a court's ability to impose sanctions "under these rules," *i.e.*, under the Federal Rules of Civil Procedure. The Advisory Committee comments note that the protection afforded under Federal Rule 37(f) "does not affect other sources of authority to impose sanctions or rules of professional responsibility." It is submitted that, whether under the CPLR or any other source of judicial authority, a person who acts in good faith should not be sanctioned for such conduct except in truly extraordinary circumstances. Accordingly, the proposed amendment is not limited in its application to sanctions under the CPLR.

## APPENDIX: A COMPILATION OF THE PROPOSED AMENDMENTS TO THE CIVIL PRACTICE LAW & RULES RELATED TO ELECTRONIC DISCOVERY

(In the following compilation, new material is indicated by ***bold italicized text***; deleted material is [~~bracketed and stricken through~~].)

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

1. After a 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 seeing 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 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.

**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. ***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.*** [~~The~~] ***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 [~~documents~~] ***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.***

**§ 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.***

## § 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 (subject to the provisions of rule 3122) electronically stored information*** as are relevant to the answers required, unless opportunity for this examination and copying be afforded.