



**NEW YORK
CITY BAR**

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**REPORT ON LEGISLATION BY THE
COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION**

**A.6554
S.4850**

**M. of A. Braunstein
Sen. Bonacic**

AN ACT to amend the civil practice law and rules, in relation to expanding the delineated persons who may seek the remedy of a protective order in regard to the use of discovery devices such as a subpoena for records.

THIS BILL IS APPROVED

The New York City Bar Association, founded in 1870, is a private, non-profit organization of more than 24,000 attorneys, judges and law professors, and is one of the oldest bar associations in the United States. The Committee on State Courts of Superior Jurisdiction (the “Committee”) addresses issues relating to the New York Supreme Court, the Appellate Division, the Court of Claims and the Court of Appeals, and is comprised of both public and private sector attorneys who routinely practice and represent clients in these courts. As part of its agenda, the Committee considers and comments on proposed amendments to the Civil Practice Law and Rules or court rules.

After review and deliberation, the Committee has voted to support the enactment of A.6554/S.4850. The proposed bill would amend CPLR 3103(a) of the civil practice law and rules to permit non-parties who are not actually served with a subpoena, but whose records are nevertheless sought by the subpoena, to seek a protective order.

The Committee supports the proposed amendment to CPLR 3103(a) because it extends important protections against discovery abuse to non-parties whose records and/or personal or confidential information is the subject of a subpoena. As it currently reads, CPLR 3103(a) only permits a party or “any person from whom discovery is sought” (i.e., the party actually served with the subpoena) to seek a protective order. An amendment of CPLR 3103(a), effective January 1, 1994, changed the word “witness” to the phrase “person from whom discovery is sought” to clarify that the custodian of a relevant paper or thing is also included within the statute. *See* Siegel, New York Practice, Fifth Edition, § 353 n.3 (West 2011).

However, in many instances the true party in interest is a non-party whose records or information is sought by the subpoena, not the custodian of the records actually served with the subpoena. As an example, if an accountant is subpoenaed to produce records of clients who are not parties to the litigation, it is unclear under the present statute whether the non-party clients would have standing to object to the production of their records, despite their having the most

direct and compelling interest to intervene and challenge the subpoena if it is perceived to be improper or overreaching. In some cases, the custodian of the records may not wish to challenge the subpoena or may not adequately defend the interests of the non-party whose information is targeted by the subpoena.

In the absence of express statutory protection for such non-parties, New York courts have struggled with the issue of whether such parties have standing to seek a protective order. *See, e.g., Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d 104, 110-11 (1st Dep't 2006) (“there apparently is nothing to prevent a nonparty served with an excessively overbroad CPLR 3120 subpoena or a party affected by such subpoena from moving for a protective order pursuant to CPLR 3103”); *Norkin v. Hoey*, 181 A.D.2d 248, 255 (1st Dep't 1992) (held that a bank customer did not have standing to challenge a subpoena served upon a bank in connection with an investigation conducted by the Department of Investigation of the City of New York regarding a facility owned by the bank customer); *Daniels v. JP Morgan Chase Bank, N.A.*, 2011 WL 4443599, at *5 (Sup. Ct. Nassau Co. 2011) (noting that “a few New York courts have implied that a depositor . . . *may* have standing to object to a subpoena of his or her bank account information in the context of a wholly civil proceeding between private parties”) (italics in original).

The proposed amendment would clarify the right of such non-parties to seek a protective order against abusive discovery practices that directly affect their personal interests. For these reasons, the Committee supports A.6554/S.4850 and urges its enactment.

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