

STATUS:**S4855-B** DEFRANCISCO

Civil Practice Law and Rules

TITLE....Relates to the service of a subpoena duces tecum upon a hospital or a health care professional

This bill is not active in the current session.

04/18/05 REFERRED TO CODES
 05/04/05 AMEND AND RECOMMIT TO CODES
 05/04/05 PRINT NUMBER 4855A
 06/01/05 REPORTED AND COMMITTED TO RULES
 06/07/05 ORDERED TO THIRD READING CAL.1397
 06/16/05 AMENDED ON THIRD READING 4855B
 06/20/05 PASSED SENATE
 06/20/05 DELIVERED TO ASSEMBLY
 06/20/05 referred to judiciary
 06/24/05 substituted for a8560a
 06/24/05 ordered to third reading rules cal.1011
 06/24/05 passed assembly
 06/24/05 returned to senate
 07/28/05 DELIVERED TO GOVERNOR
 08/09/05 VETOED MEMO.58

BILL TEXT:**STATE OF NEW YORK**

4855--B

Cal. No. 1397

2005-2006 Regular Sessions

IN SENATE

April 18, 2005

Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Rules -- ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the civil practice law and rules, in relation to service of a subpoena duces tecum upon a hospital or a health care professional

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

1 Section 1. Section 2306 of the civil practice law and rules, subdivi-
 2 sion (a) as amended by chapter 4 of the laws of 1986, is amended to read
 3 as follows:

4 § 2306. Hospital records; medical records of a health care practition-
 5 er; medical records of department or bureau of a municipal corporation
 6 or of the state. (a) Transcript or reproduction. Where a subpoena duces
 7 tecum is served together with a legally sufficient authorization as
 8 otherwise provided by law, upon a hospital, as defined under article

9 twenty-eight of the public health law, upon a health care practitioner
10 licensed under the education law, or upon a department or bureau of a
11 municipal corporation or of the state, or an officer thereof, requiring
12 the production of records relating to the condition or treatment of a
13 patient, a transcript or a full-sized legible reproduction, [~~certified~~
14 ~~as correct by the superintendent or head of the hospital, department or~~
15 ~~bureau or his assistant, or the officer, may~~] shall be produced unless
16 otherwise ordered by a court. Such records shall be certified as
17 correct, in the form required by rule thirty-one hundred twenty-two-a of
18 this chapter, by the superintendent or head of the hospital, department
19 or bureau, by the state or municipal officer or other state or municipal

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

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1 officer delegated for the purpose, by the health care practitioner or by
 2 an employee charged with the responsibility of maintaining the records.
 3 Except as otherwise provided in paragraph one of this subdivision, the
 4 records so certified shall be deemed to have satisfied the requirements
 5 of subdivision (a) of rule forty-five hundred eighteen of this chapter.
 6 Such a subpoena shall be served at least three days before the time
 7 fixed for the production of the records [~~unless otherwise ordered by a~~
 8 ~~court.~~], except in the case of medical records of a health care practi-
 9 titioner such a subpoena shall be served no later than three days before
 10 the commencement of jury selection or the commencement of the trial, if
 11 no jury is selected, unless otherwise ordered by a court.

12 (1) The medical records of a health care practitioner, otherwise
 13 certified as provided by this section, shall not be admissible at trial
 14 without the appearance of a witness to testify as to their admissibility
 15 under subdivision (a) of rule forty-five hundred eighteen of this chap-
 16 ter unless such subpoena duces tecum has been served together with
 17 legally sufficient authorization as otherwise provided by law including
 18 that required by the federal health insurance portability and account-
 19 ability act of nineteen hundred ninety-six, Pub. L. 104-191, also known
 20 as HIPAA, and unless a copy of such subpoena, the HIPAA-compliant
 21 authorization and any other documents served on the health care practi-
 22 tioner with the subpoena have been served on all parties pursuant to the
 23 requirements of section twenty-three hundred three of this article.

24 (2) Notwithstanding the provisions of subdivision (b) of section twen-
 25 ty-three hundred two of this article, nothing in this section shall be
 26 deemed to require the issuance of a subpoena by a court for the
 27 production of an original record of a health care practitioner.

28 (b) Delivery to clerk. Where a court has designated a clerk to receive
 29 records described in subdivision (a) of this section, delivery may be
 30 made to him or her at or before the time fixed for their production. The
 31 clerk shall give a receipt for the records and notify the person subpoe-
 32 naed when they are no longer required. The records shall be delivered in
 33 a sealed envelope indicating the title of the action, the date fixed for
 34 production and the name and address of the attorney appearing on the
 35 subpoena. They shall be available for inspection pursuant to the rules
 36 or order of the court.

37 § 2. This act shall take effect immediately.

SPONSORS MEMO:

**NEW YORK STATE SENATE
 INTRODUCER'S MEMORANDUM IN SUPPORT
 submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S4855B

SPONSOR: DEFRANCISCO

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to service of a subpoena duces tecum upon a hospital or a health care professional

PURPOSE OF BILL:The purpose of this legislation is to permit health care practitioners, (e.g. physicians, dentists, physical therapists, optometrists etc.) to submit proper certified copies or transcripts of their records in response to a Judicial Subpoena Duces Tecum served at least three days before the commencement of trial.

SUMMARY OF PROVISIONS: Section 1 of the bill provides that where a subpoena duces tecum is served together with a legally sufficient authorization upon a hospital as defined under Article 28 of the Public Health Law or upon a health care practitioner licensed under the Education Law requiring the production of records relating to the condition or treatment of a patient, a transcript or a full-sized legible reproduction shall be produced unless otherwise ordered by the court. These records shall be certified as correct pursuant to CPLR rule 3122-a by the head of the hospital, by the health care practitioner or by an employee charged with the responsibility of maintaining the records. Records so certified are deemed to comply with CPLR rule 4518.

However, the medical records of a health care practitioner shall not be admissible at trial without compliance with the Federal Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, commonly known as HIPPA, unless the subpoena, the HIPPA authorization and any other documents are served on all parties. This legislation does not require a court to issue a subpoena for the production of an original record of a health care practitioner.

Section 2 of the bill provides that this act shall take effect immediately.

JUSTIFICATION: This legislation permits health care providers to submit properly certified copies or transcripts of their records in response to a Judicial Subpoena Duces Tecum served prior to trial. This provision would be equivalent to those already in law pertaining to the subpoena of hospital records. Hospital records when properly certified are already admissible at trial as a business record without having to call any witnesses to authenticate the records. Currently it is necessary for a witness to appear at trial and give testimony to authenticate the records of licensed health care professionals or residential facilities in order to obtain their admission as a business record. The certification requirements of CPLR rule 3122-a which is incorporated into this legislation makes this testimony unnecessary. However, compliance with HIPPA is required by this legislation and service of the subpoena duces tecum must be accompanied by a legally sufficient authorization.

This legislation will save physicians and other health care practitioners time and money and avoid the inconvenience of providing live testimony for the sole purpose of authenticating office records which are kept in the ordinary course of business of the practice. This procedure should reduce court delays and cost to litigants for procuring the admissibility of these records. This legislative proposal would not

change or waive any other evidentiary objection to the admissibility of the hospital or health care provider records.

LEGISLATIVE HISTORY: New Bill, 2005.

FISCAL IMPLICATIONS: None.

EFFECTIVE DATE: Immediately.

VETO MESSAGE:

VETO MESSAGE - No. 58

TO THE SENATE:

I am returning herewith, without my approval, the following bill:

Senate Bill Number 4855-B, entitled:

"AN ACT to amend the civil practice law and rules, in relation to service of a subpoena duces tecum upon a hospital or a health care professional"

NOT APPROVED

This bill would amend the Civil Practice Law and Rules to provide that where a subpoena duces tecum demanding production of medical records at

trial is served on a "health care practitioner licensed under the Education Law," such practitioner would be entitled to submit certified copies of such records in lieu of having to appear in person to verify the records. The bill would thus conform the law governing the production of medical records in the custody of individual health care practitioners to the law currently applicable to the production of medical records in the custody of hospitals or State or municipal agencies, with two exceptions. First, under current law, such a subpoena must be served at least three days before the time fixed for production of records. This bill would provide that a subpoena for the records of a health care practitioner must be served at least three days before the commencement of jury selection or, if no jury is to be selected, the commencement of trial, unless otherwise ordered by a court. Second, in the event the subpoena is not accompanied by written authorization from the subject of the records that is consistent with applicable federal privacy laws, current law provides that the subpoena may be ignored by the hospital or governmental agency. This bill would provide that the failure to include such an authorization or the failure to serve the subpoena and authorization upon all parties would require the health care practitioner to appear in person with the requested records. The bill would also provide that a subpoena issued by a court would not be required in order to obtain original records from a health care practitioner. The bill would take effect immediately.

While I agree with the sponsors and supporters of this bill that the law governing the production of medical records would benefit from improvement and greater uniformity, I am constrained to disapprove this bill based on the objections and concerns raised by affected parties. First, the Medical Society of the State of New York, whose members are among the intended beneficiaries of the bill, is concerned that the bill fails to place health care practitioners on equal footing with hospitals and agencies in cases where the subpoena fails to include proper medical authorization. As noted previously, current law permits a hospital or governmental entity to ignore such a subpoena, while this bill requires health care practitioners to respond in person in such cases. The Medical Society also questions the rationale for the provision in the bill stating that a court-issued subpoena is not required in order to obtain original records from a health care practitioner - a provision that the Medical Society believes will diminish substantially the benefits of this legislation to health care practitioners.

In addition, the Committee on Civil Practice Law and Rules of the New York State Bar Association, which supports the legislation, identifies two concerns in connection with the use of the term "health care practitioner licensed under the education law" in the bill. The use of this term could be read to exclude occupations identified in the Education Law as "registered" rather than "licensed," such as physical assistants, specialist assistants, and physical therapist assistants. It could also be read to exclude practitioners licensed in other jurisdictions. The

State Education Department also suggests that these provisions be clarified to avoid litigation.

Finally, the Healthcare Association of New York State ("HANYs") notes that, in general, the laws governing production of medical records are confusing and inconsistent. For this reason, HANYs, the Medical Society and the Association of Health Information Outsourcing Services all believe that the issues raised by this bill would be more appropriately addressed as part of a comprehensive package of reforms relating to the production of medical records.

Based upon the foregoing, I am compelled to disapprove this bill. However, I am directing my staff to work with the sponsors and other interested parties to develop more comprehensive legislation that meets the objections of the interested parties and establishes a comprehensive, fair and efficient system for accessing medical records in litigation.

The bill is disapproved.

(signed) GEORGE E. PATAKI
