

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 13

March 8, 2001

A. 1858

By: M. of A. Kaufman
Assembly Committee: Codes
Effective Date: Immediately

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

LAW AND SECTIONS REFERRED TO: Subdivision (a) of section 2306 of the civil practice law and rules, as amended by chapter 4 of the laws of 1986

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES (#7)

THIS BILL IS APPROVED WITH SUGGESTED MODIFICATIONS

This bill would amend CPLR 2306 (a) by adding “physician practice” to the list of institutions or persons (viz., hospital, department or bureau of a municipal corporation or of the state, or an officer thereof) who are permitted to respond to a judicial subpoena duces tecum by producing reproductions of its records which have been “certified as correct” by a person authorized to do so.

Under current law, a hospital or other governmental unit served with a judicial subpoena duces tecum for records “relating to the condition or treatment of a patient” may comply with such request by providing full-sized legible reproductions provided that they are certified by a person with requisite authority within the hospital or governmental unit. A physician, however, is required to produce the original medical records and may not comply with the subpoena by merely providing photocopies. The bill, thus, is intended to correct this unjustified distinction, since there is no reason to suspect that the copies of a physician’s office records are any less reliable than those of the hospital or government. The memorandum in support of the proposed bill reflects the salutary purpose of the bill which would permit a physician to retain the original records of the patient rather than surrendering them to a judicial subpoena duces tecum under circumstances where the physician is still treating the patient, or where there is a concurrent investigation by the Office of Professional Medical Conduct or by the federal government.

The impact of this bill extends beyond the confines of CPLR 2306(a) as it will have the effect of expediting the submission of proof in virtually every court action where bodily injury is claimed. Hospital or government records are obtained on a subpoena “so ordered” by the court and reproductions are readily admitted into evidence pursuant to CPLR 4518(c), provided that the documents bear the appropriate certification or authentication. It is now well settled law that a physician’s office records are admissible in evidence under the “business records” exception to the hearsay rule of CPLR 4518 and may be received as evidence despite the fact that a physician is unavailable to testify as to the substance content of the records. See Wilson v Bodian, 130 A.D.2d 221 (2d Dept. 1987); Napolitano v Branks, 141 A.D.2d 705 (2d Dept. 1988). The proposed bill would effectively codify Bodian and Napolitano by specifically including the records of a physician practice within the confines of CPLR 2306(a) and eliminating any questions as to the admissibility of “certified” copies of physician’s office records.

While the bill in its present form represents a positive step forward in the development of the law, the text of the bill should be expanded and clarified to avoid the inevitable questions that will arise as to the interpretation of the word “physician practice.” The bill contains no definition of this term.¹ Accordingly, it could be read so as to exclude healthcare providers that are not “physicians.” Thus, while a radiologist is a “physician” and may submit statements subscribed and affirmed to be true under penalties of perjury in lieu of and with the same effect as an affidavit pursuant to CPLR 2106 [see Harth v Nicholas Liakis & Son, Inc., 103 Misc.2d 217 (Sup. Ct. Nassau Co. 1980)], the question may arise as to whether a psychologist is a “physician” within the meaning of the term. See, Delan v CBS, Inc., 111 Misc.2d 928, 938 (Sup. Ct., Queens Co. 1981) rev’d on other grounds 91 A.D.2d 255 (2d Dept. 1983) (“A doctorate in the field of psychology does not legally place such person in the position of a duly licensed physician”); Moreover, as CPLR 2106 as presently drafted specifically distinguishes a “physician” from an osteopath or a dentist, it would appear that practitioners in those disciplines would be excluded from the benefits of the revision of CPLR 2306(a); as would be chiropractic practitioners, physical therapists and occupational therapists.

It is therefore the recommendation of this committee that the bill be amended so as to remove the words “physician practice” and insert in place thereof the words “licensed healthcare practitioner” so as to properly expand the statutory benefit of the amendment to CPLR 2306(a) to other healthcare providers whose medical records may be sought in connection with litigation. In addition, the Committee recommends an amendment of CPLR 4518(c), which identifies persons authorized to certify these records, so as to harmonize it with the new CPLR 2306 which identifies the person authorized to certify these medical records as “a person authorized to receive service under article three” of the CPLR.

Lastly, the Committee also notes that the New York State Bar Association has approved a proposal to allow for the admission of copies of any non-party’s business

¹Public Health Law §3700(3) defines a physician to be a practitioner of medicine licensed to practice medicine pursuant to Article 131 of the Education Law.

records upon a certification made by the custodian of those records, subject to an adverse party's right to insist that the custodian appear for the purposes of laying a traditional evidentiary foundation under CPLR 4518.

This proposal was introduced in the 1999-2000 legislative session as Senate Bill No.3412 and Assembly Bill No. 8544. Thus, it is the position of the NYSBA that admission of certified business records should not be limited to just medical records, but be made available to any non-party for the same salutary reasons mentioned above.

For the foregoing reasons, **THIS BILL IS APPROVED WITH SUGGESTED MODIFICATIONS.**

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