New York Law Journal

WWW.NYLJ.COM

An ALM Publication

MAY 27, 2002

Outside Counsel

Evidentiary Update: An Outline of How Some Rules Have Changed News

By Sherri Sonin

And Robert J. Genis

Statutory changes with respect to certain evidentiary rules, some of which are already in effect and some of which will be in effect shortly, have recently been made. Some of these amendments may significantly affect the way in which lawyers prosecute and defend lawsuits.

The following provides in pertinent part some of these significant amendments.

Trial Subpoenas: CPLR 2301 was amended last year and requires that a trial subpoena duces tecum shall state on its face that all papers or other items delivered to the court pursuant to such subpoena shall be accompanied by a copy of such subpoena. This amendment has been in effect since Jan. 1, 2002. This practical amendment makes life easier for the county subpoenaed records room clerk and helps counsel actually get the records they need for trial. The records come to court with a copy of the subpoena so that they may be properly and promptly filed.

Diagnostic Tests: Pursuant to CPLR 4532-a, certain medical records, such as MRIs, may be entered into evidence via an appropriate affirmation, without a live authenticating witness.[1] CPLR 4532-a was amended last year and was expanded to include any graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test taken of a patient by a medical practitioner or medical facility. This section and amendment does not prohibit counsel from placing such items into evidence through other means where otherwise admissible, it merely allows counsel to do so without a live witness.[2] This amendment also has been in effect since Jan. 1, 2002.

Computer Generated Records: As of July 23, 2002, assuming sufficient foundation has been established and other hearsay problems do not exist, computer generated records may be entered into evidence. CPLR 4518(a) has been amended to include an electronic record as defined in Section 102 of the New York State Technology Law. This amendment is essentially a codification of the voluminous writings exception to hearsay[3] combined with CPLR 4539.

Pedestrians: As of Jan. 19, 2003, the rights of pedestrians have been better protected by amendments to VTL 1151, giving pedestrians' the right of way in all crosswalks.

Non-Party Records: The most sweeping changes have been with respect to obtaining records belonging to non-parties. These changes are amendments to CPLR 2305 (subpoenas), 3120 (production of records) and 3122 (objection to disclosure), and new section CPLR 3122-a, all of which act in conjunction with one another. All become effective on Sept. 1, 2003.

Until then, a party seeking discovery from a non-party must make a motion pursuant to CPLR 3120(b). Such a motion requires that the motion be served on notice to all adverse parties, and that the non-party shall be served with notice on motion in the same manner as a summons. If the movant fails to serve the non-party parent(s) and/or sibling(s) in an appropriate manner, the court will lack jurisdiction over the matter and will not be able to entertain the motion for the relief requested.[4]

However, CPLR 3120 was recently amended. The amendment deletes the provision for a motion to be made against a non-party, and instead provides for a subpoena duces tecum to be utilized. The amended version of CPLR 3120(3) provides in pertinent part: 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.

The amendment prevents a defendant from secretly subpoenaing a non-party's records concerning the plaintiff; the defendant must give notice to the plaintiff and the plaintiff has an opportunity to object or move to quash the subpoena.

The objecting party (or non-party) must state with reasonable particularity the reasons for each objection.[5] Similarly, the non-party whose records are being sought may give notice to the party seeking the records that one or more documents are being withheld and the grounds for doing so.[6]

Moreover, to prevent abuse, 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 boldfaced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient.[7]

Business and Medical Records: A significant change in the CPLR is the addition of section 3122-a, which permits properly certified business records to be entered into evidence. CPLR 3122-a(a) and (b) detail the foundational requirements that the affidavit must contain for the records to be entered into evidence.

CPLR 3122-a(c) details how a party intending to offer the records into evidence at trial must give at least 30 days notice before trial of such intent, and how a party seeking to object to the admission of the records into evidence must state the grounds for their objection at least 10 days before the trial.

Unless such a timely objection is made, or the objecting party demonstrates at trial that the evidentiary basis for the objection could not have been discovered by the exercise of due diligence in a timely fashion, the records will be deemed to have satisfied the requirements of CPLR 4518(a), and be admitted into evidence as a properly certified business record. Notwithstanding the issuance of such a notice or objection to same, a party may subpoena the custodian of the record to appear and testify concerning the records.

Similar to CPLR 4532-a, this new section of the CPLR may be used by counsel to admit into evidence the business records of a physician or health care provider, i.e., the plaintiff's medical records, without having to produce (and compensate) a witness in court to establish foundation. This amendment may result in trials proceeding in a more expeditious fashion by allowing medical records into evidence without having to juggle a trial around the schedule of foundation witnesses.

Conclusion

While time will tell whether all these statutory changes are for the better and work as intended, they are a step in the right direction.

We expect that courts construing these amendments will do so to secure the just, speedy and inexpensive determination of every civil judicial proceeding.[8]

SHERRI SONIN *and* ROBERT J. GENIS *partners at Sonin & Genis in the Bronx, specialize in the prosecution and trial of plaintiff's personal injury and negligence cases.*

1. *Galuska v. Arbaiza*, 106 A.D.2d 543 (2nd Dept.1984); *Harth v. Nicholas Liakis & Son*, 103 Misc. 2d 217 (Sup. Nassau 1980).
2. *Hoffman v. City of New York*, 141 Misc. 2d 893 (Sup. Kings 1988).
3. See, *Ed Guth Realty, Inc., v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 367 (1974) (computer-based business records that summarize voluminous records may be admissible). See also, *People v. McFarlan*, 191 Misc. 2d 531, 744 N.Y.S.2d 287 (Sup. NY 2002).
4. See e.g., *Carrasquillo v. Netsloh Realty Corp.*, 279 A.D.2d 334, 335 (1st Dept. 2001); *Nieves v. 1845 7th Avenue Realty Associates*, 184 Misc. 2d 639, 642 (Sup. NY 2000); *Van Epps v. County of Albany*, 184 Misc. 2d 159, 163 (Sup. Albany 2000); See, *Blake v. LP 591 Ocean Realty*, 237 A.D.2d 554 (2nd Dept. 1997).
5. CPLR 3122(a).
6. CPLR 3122(b).
7. CPLR 3122(a).
8. CPLR 104. See also, CPLR 2001 and CPLR 2004.

Reprinted with permission from the May 27, 2003 edition of the NEW YORK LAW JOURNAL © 2012 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-12-12-30