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CPLR 3122-a Makes Testimony Unnecessary For Proper Admissibility Of Business Records

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The New York Legislature enacted several important new laws concerning civil procedure, effective Sept. 1, 2003, with the intent to remove foundation testimony from trial. One of the new provisions is CPLR 3122-a, which allows properly certified business records to be entered into evidence without witness testimony concerning foundation. When a subpoena *duces tecum* requires the production of business records, a custodian of the records may now provide, in the form of an affidavit, a certification to substitute for the evidentiary foundation otherwise required for the admission of the records.

The certification that must accompany the records, under CPLR 3122-a(a), must provide that (1) the affiant is a duly authorized custodian or qualified witness and has authority to make the certification; (2) the records are accurate versions of the documents described in the subpoena *duces tecum* that are in the possession, custody or control of the person whom received the subpoena; (3) the records represent all the documents described in the subpoena *duces tecum*, or, if not a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence; and finally (4) the records were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, and it was the regular course of business to make such records.

However, CPLR 3122-a(a) does not explain whether the certification must recite specific facts actually demonstrating these elements, or whether it is simply enough to recite the statutory language. Moreover, there is no mention of whether the individual providing the affidavit is entitled to compensation. As a practical matter, the party subpoenaing business records should provide a proposed affidavit for the custodian to execute. Whether or not these custodian affidavits prove to be accurate enough for admission at trial, like any other evidentiary issue, will depend on the discretion of each particular judge.

Additionally, CPLR 3122-a(b) states that the certification of the custodian is presumed to be true, therefore laying the groundwork for the admission of the records without any further evidentiary showings. Aparty intending to introduce these certified business records needs to, pursuant to CPLR 3122-a(c), afford the other parties thirty (30) days notice before trial and specify the location where the documents may be inspected. The other parties then have ten (10) days before trial to object to the admission of the documents. Unless an objection is interposed 10 days before the trial, or if the objection is based on evidence that could not have been discovered by the exercise of due diligence 10 days before trial, the records will be deemed business records under CPLR 4518(a).

Interestingly, the statute removes any penalty or sanction for making an objection. Does such an objection destroy the presumption and require that the proponent, through witness testimony, establish foundation? Based upon the presumption of authenticity in the statute, one would reason that the objecting party would have the burden of demonstrating that the records were not proper business records.

At the very least, the legislature guaranteed that any party would have the right to subpoena the records custodian to actually appear at trial and testify concerning the records, notwithstanding the issuance of an objection. Similar to CPLR 3122-a, CPLR 4532-a, effective last year, permits pictorial records, such as MRIs, to be entered into evidence via an appropriate affirmation without an authenticating witness.

Therefore, using both provisions, counsel may be able to admit into evidence business records of physicians, health care providers, or other types of witnesses, without having to produce (and compensate) a witness in court to establish foundation. As a result, this amendment may result in trials proceeding in a more expeditious and cost-effective fashion by receiving medical records or other business records into evidence without the need for foundation witnesses. Of course, only time will tell whether this statutory change achieves its objective.

In a related certification issue, the Appellate Division, Fourth Department, recently ruled, in *Dumont v. D.L. Peterson*, 307 AD2d 709 (4th Dept. 2003), that defendants were not entitled to rely upon unsworn medical records in attempting to establish lack of "serious injury" under no-fault law in support of their summary judgment motion. In *Dumont*, plaintiffs' counsel provided defendants with authorizations for the medical records and the Fourth Department, in its ruling, highlighted the fact that plaintiffs' counsel did not provide medical records directly to defendant. Of course, this raises the question of whether defendant would have been able to rely on the records if the medical records were directly provided by plaintiff.

In any event, based upon CPLR 3122-a and the *Dumont* decision, it would be sound practice, when subpoenaing business records, or even medical records, to include an affidavit of certification for the custodian to execute. Following this simple procedure will only help prevent future headaches for counsel when it comes time to rely on the subpoenaed records in a motion or at trial.

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