

Memorandum Urging Approval

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed # 2 - GOV

July 9, 2014

S. 7143
A. 9314

By: Senator Bonacic
By: M of A Weinstein
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to business records of non-parties

LAW AND SECTION REFERRED TO: CPLR 3122-a

THE COMMERCIAL AND FEDERAL LITIGATION SECTION URGES APPROVAL OF THIS LEGISLATION

The New York State Bar Association's Commercial and Federal Litigation Section urges approval of this bill, concerning the admissibility at trial of a non-party's certified business records.

The certification procedure set forth in CPLR 3122-a, which facilitates the introduction of non-party business records, became a feature of New York civil practice on September 1, 2003 (C. 575, L. 2002), as part of a package of amendments to CPLR 2305(b), 3120, and 3122. We are proud to say that these amendments were originally proposed by our Section and its CPLR Committee approximately twenty years ago. During the developmental stages of that legislation, we were materially assisted by the Chief Administrative Judge's Advisory Committee on Civil Practice, the proponent of the proposed amendment. The objective then, as it is now, was to streamline civil practice in an effort to make it easier and less expensive for parties and non-parties.

Current law permits parties to serve a subpoena *duces tecum* for non-party business records without court order, and to obtain their admission at trial, as long as the records have been certified by the non-party's custodian of records in accordance with the prescriptions of CPLR 3122-a and further provided that no objection has been interposed by an adverse party. A party intending to offer such certified business records at trial must give a 30-day notice, and any party upon whom the notice is served may object to their admission. If there is an objection, the custodian of records will be required to appear and testify in court in order to lay an evidentiary foundation for the business records and address any questions concerning their authenticity or reliability.

Irrespective of whether an objection is made pursuant to CPLR 3122-a(c) to an offer of business records of a non-party by certification, current CPLR 3122-a does not preclude a party from serving a testimonial subpoena upon such a non-party's custodian of records (or otherwise seek to take such custodian's testimony if they are beyond the reach of a New York subpoena). Yet, by virtue of the inherent advantages of its more streamlined procedure for non-controversial documents, the proponents of the original legislation hoped that litigants would embrace the certification process in the interest of increased ease and reduced expense, and it is now used regularly by parties to civil litigation.

The proposed amendment arises from a notable limitation in the current statute, which permits the introduction of certified business records only when they are obtained pursuant to subpoena. If a non-party's business records are acquired voluntarily or otherwise, CPLR 3122-a cannot be employed; this limitation may be of particular concern when the custodian of the documents is beyond the subpoena jurisdiction of our courts. This legislation addresses this gap by extending the statutory certification procedure to documents obtained without a subpoena. In all other respects, the operation of the statute remains unchanged.

For the reasons stated above, the Section urges gubernatorial **APPROVAL** this Legislation.

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