

Memorandum in Support

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #4

June 16, 2011

S. 4586-A
A. 7465-A

By: Senator Bonacic
By: M. of A. Zebrowski
Senate Committee: Judiciary
Assembly Committee: Codes
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to subpoenas duces tecum for medical records

LAW AND SECTIONS REFERRED TO: CPLR §§ 2302(b) and 3122

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES

THE COMMITTEE SUPPORTS THIS LEGISLATION

In 2002, the Legislature amended the CPLR in order to make it easier to obtain non-party records and admit them into evidence. This legislation (amendments to CPLR 2302(b), 3120 and 3122 and a new CPLR 3122-a, effective January 1, 2003) grew out of the work of the NYSBA's Commercial and Federal Litigation Section and was refined further by this Committee and the OCA Advisory Committee on Civil Practice. Notably, the legislation eliminated the need for court intervention in connection with discovery requests for non-party documents, while at the same time giving non-parties an easy way to provide discovery responses and object to burdensome and inappropriate requests.

During the legislative comment period, the Medical Society of the State of New York persuaded the bill's proponents to add a provision to CPLR 3122(a) (concerning objections to disclosure) which excepted a medical provider from the duty to respond or object to a subpoena duces tecum for medical records unless it was accompanied by a patient's authorization. The medical provider exception was reinforced by mandating a statutory warning to the same effect on the subpoena itself. Thus, confidential patient information would be secure from inadvertent violations of the physician-patient privilege where court process was employed. The Medical Society's concerns were doubtlessly spurred by the passage of the 1996 Health Insurance Portability and Accountability Act ("HIPAA"), whose privacy rule became effective on April 14, 2003. Yet, it bears noting that, even as they safeguarded confidential patient information, the 2002 CPLR amendments were intended to primarily streamline pre-trial discovery, not to limit the power of the court to order the production of medical records for trial.

Nevertheless, Civil Court, Richmond County, in *Campos v. Payne*, 2 Misc.3d 921 (2003), construed the medical records provision in CPLR 3122(a) as barring even a trial court from ordering the production of medical records without a patient's authorization. According to the sponsor's supporting memorandum for this bill, *Campos* has been widely followed, effectively impairing the ability of counsel to obtain the timely production of medical records for trial purposes and consequently impeding a fair adjudication of claims and defenses by the courts. We, committee members who conceived the 2002 CPLR amendments, therefore support the Advisory Committee's effort to correct the misinterpretation of those amendments.

The newly-proposed amendments to CPLR 2302(b) (relating to subpoenas duces tecum issued by the court) and CPLR 3122 clarify the court's authority to order the production of medical records without a patient's authorization and address the concerns of medical providers over the confidentiality obligations imposed by HIPAA. The proposal adds a sentence to the end of CPLR 2302(b) stating that, in the absence of a patient's authorization, a trial subpoena for medical records "may only be issued by the court." The proposed amendment to CPLR 3122(a) is recast in new subdivisions (1) and (2), the latter setting forth the exception for medical providers. But the medical providers exception contains its own exception for "a trial subpoena issued by the court," thereby empowering the court to order medical records without a patient's authorization. This amendment resolves the perceived ambiguity in CPLR 3122 highlighted by *Campos* and also, as the sponsor's memorandum observes, complies with the HIPAA [45 C.P.R. 164.512 (introductory paragraph) and 164.512(e)(1)(i)] which permits the release of "protected health information" without an authorization in response to a court order.

For the reasons stated above, the Committee **SUPPORTS** this legislation.

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Chair of the Committee: Robert P. Knapp III