3.20 Public Record or Document [CPLR 4520 & Common Law]

Part I
CPLR 4520: Certificate or affidavit of public officer

Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated.

Part II
Common Law

When a public officer is required or authorized statutorily or by the nature of his or her official duties to keep records of transactions occurring in the course of such duties, the records made either by the public official with personal knowledge of the matter recorded or by a subordinate with the requisite personal knowledge who acts under the supervision of the public officer are admissible in evidence.

Note

Introduction

This rule states a statutory and common-law exception to the hearsay rule for certain types of public records and documents. There are other statutory exceptions to the hearsay rule for public records and documents that provide exceptions for specific types of public records and documents. (Guide to NY Evid [GNYE] rules 3.21–3.33-a, 3.34, 3.41, 3.60.) These statutory exceptions to the hearsay rule also provide that the particular public record or document constitutes prima facie evidence or presumptive evidence of the facts stated.

A public record or document may also be admitted in evidence pursuant to the Business Record exception to the hearsay rule. (*See* GNYE rule 8.08, Business Record.) A business record or document referred to in CPLR 2306 (*Hospital*

records; medical records of department or bureau of a municipal corporation or of the state) or CPLR 2307 (*Books, papers and other things of a library, department or bureau of a municipal corporation or of the state*) will on admission in evidence also be "prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician." (GNYE rule 8.08 [c].) Other business records are admitted as evidence of the facts contained in the record.

There is a special exception to the hearsay rule for health records in Public Health Law § 10 (2). That statute provides that "written reports of state and local health officers, inspectors, investigators, nurses and other representatives of state and local health officers on questions of fact pertaining to, concerning or arising under and in connection with complaints, alleged violations, investigations, proceedings, actions, authority and orders, related to the enforcement of this chapter, the sanitary code or any local health regulation shall be presumptive evidence of the facts so stated therein, and shall be received as such in all courts and places." (*See Cramer v Benedictine Hosp.*, 190 Misc 2d 191 [Sup Ct, Ulster County 2002].)

In a criminal proceeding, the admission in evidence of a document may be subject to the constitutional right of confrontation (*see* GNYE rule 8.02, Admissibility Limited by Confrontation Clause [*Crawford*]).

CPLR 4520

Part (I) restates verbatim CPLR 4520. It creates a hearsay exception for certain records or documents in the form of a "certificate or affidavit," prepared by public officers, and filed in New York within a public office of the state. A record or document admissible under this rule constitutes "prima facie evidence of the facts stated." (*See People v Brown*, 221 AD2d 270 [1st Dept 1995].)

To be admissible under this rule, the statute prescribes the following requirements:

1. the record must be made by a public officer;
2. it must be in the form of a "certificate" or "affidavit";
3. the record must be required or authorized "by special provision of law";
4. it must be made in the course of the officer's official duty;
5. it must be a record of a fact ascertained or an act performed by the officer; and

6. it must be on file or deposit in a public office of the state as opposed to the office of a county, city, town, village or municipality.

While the Court of Appeals has not construed the statute, courts have construed these requirements strictly. (*See People v Garneau*, 120 AD2d 112 [4th Dept 1986] [breathalyzer test results were not admissible as they were not authorized or required by a special provision of law]; *Kozlowski v City of Amsterdam*, 111 AD2d 476, 478 [3d Dept 1985] [investigative report prepared by the Medical Review Commission of the State Commission of Corrections concerning the death of an inmate pursuant to statutory mandate was not admissible as it was neither a certificate or affidavit]; *Bogdan v Peekskill Community Hosp*., 168 Misc 2d 856, 858 [Sup Ct, Westchester County 1996] [documents prepared by Department of Health Office of Professional Misconduct in connection with an ongoing investigation of a physician's alleged incompetence not admissible as they were neither certificates nor affidavits].) As commentators have noted, only a few types of public records or documents have been determined by the courts to meet all of the CPLR 4520 requirements. (*See* Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, Book 7B, C4520:1; Michael Martin & Daniel Capra, New York Evidence Handbook § 8.3.3 [3d ed].)

Admissibility of a document or record under the rule does not satisfy authentication requirements. Where the original of the certificate or affidavit is proffered, the authentication requirement will be deemed satisfied pursuant to CPLR 4540 (a). (*See* GNYE 9.08; *People v Sykes*, 225 AD2d 1093 [4th Dept 1996].) A proffered copy of the certificate or affidavit must comply with the attestation and certification provisions of CPLR 4540 (a)-(b). Certified copies that meet the requirements of CPLR 4540 will also satisfy the best evidence rule. (*See* GNYE 9.08, Self-Authenticating Evidence; *Chanler v Manocherian*, 151 AD2d 432, 435 [1st Dept 1989].)

Common Law

Part (II) sets forth the common-law rule for the admission of a public record or document as recognized by the courts. The common-law rule is broader in scope than CPLR 4520 or the specific statutory exceptions. The common-law rule is not superseded by CPLR 4520 (*Consolidated Midland Corp. v Columbia Pharmaceutical Corp.*, 42 AD2d 601, 601 [2d Dept 1973] ["The common-law rule, which is much broader in scope (than CPLR 4520), has not been superseded by CPLR 4520"]). In fact, CPLR 4543 dictates that conclusion by its express language:

"Nothing in [article 45] prevents the proof of a fact or a writing by any method authorized . . . by the rules of evidence at common law."

Federal law has long recognized this common-law rule. (*United States v Percheman*, 32 US 51, 85 [1833] ["on general principles of law, a copy (of a grant of territory) given by a public officer whose duty it is to keep the original, ought to be received in evidence"]; *Hedrick v Hughes*, 82 US 123, 127 [1872] [the book of a school commissioner was admissible to show "his acts as school commissioner in selling the land in question as school lands." The entry in the book was "made in the course of his official duty" and was a "public record"]; *Evanston v Gunn*, 99 US 660, 665-667 [1878] [records kept by an employee of the United States Signal Service were admissible even though there was no law authorizing the admission of such records. "They (the records) come . . . within the rule which admits in evidence 'official registers or records kept by persons in public office in which they required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation.' To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him" (citations omitted)]; *Chesapeake & Delaware Canal Co. v United States*, 240 F 903, 907 [3d Cir 1917] ["when a public officer is required, either by statute or by the nature of his duty, to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordinarily admissible"], *affd* 250 US 123 [1919]; *Olender v United States*, 210 F2d 795, 801 [9th Cir 1954] [the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates].)

Derivation of the common-law rule in New York appears to begin with *People v Minck* (21 NY 539, 541 [1860]), which approved the introduction in evidence of "election returns," noting that they "are documents of a public nature, made out and filed in the proper office, under the responsibilities of an official oath, and they remain in the custody of a sworn public officer." The court in *People v Baker* (183 Misc 2d 650 [Oneida County Ct 2000]) synthesized the rule, holding, like *Chesapeake*, that "when a public officer is required or authorized statutorily or by the nature of his or her official duties to keep records of transactions occurring in the course of such duties, the records made by or under the supervision of the public officer are admissible. When the document is offered under this exception to the hearsay rule, proper authentication is nonetheless required" (*id*. at 653 [citations omitted]).

The significant difference between CPLR 4520 and the common-law rule is that the common-law rule, unlike CPLR 4520, is not limited to certificates or affidavits or records filed in a state public office. It covers any public record. Furthermore, the common-law rule, unlike CPLR 4520, does not require that the public officer be required or authorized "by special provision of law" to make the record. (*See People v Sykes*, 167 Misc 2d 588, 591 [Sup Ct, Monroe County 1995] ["The line of demarcation between CPLR 4520 and 4518 would seem to be this 'special provision of law' clause as it affects the governmental agency involved in publishing the document"], *affd* 225 AD2d 1093 [4th Dept 1996].) Rather, the common-law rule is satisfied when the public officer is required to make the record by the nature of the public officer's official duties.

A record, when admissible under the common-law rule, is not "prima facie" evidence of the facts contained (CPLR 4520), but it is some evidence of the facts (*Martin v Ford Motor Co.*, 36 AD3d 867, 867 [2d Dept 2007]). The trier of fact is free to disbelieve these facts, even though no contrary proof is offered by the adverse party. (*Id*.)

Admissibility of the record under the common-law rule does not satisfy the authentication requirement. If the original record is introduced, the authentication requirement will be deemed satisfied pursuant to CPLR 4540 (a). (*See* GNYE 9.08; *People v Smith*, 258 AD2d 245, 249-250 [4th Dept 1999].) A proffered copy of the certificate or affidavit must comply with the attestation and certification provisions of CPLR 4540 (a)-(b). (*See* GNYE 9.08, Self-Authenticating Evidence.)

Investigative Reports Per CPLR 4520 & Common Law

Government bodies charged with investigating a particular product or occurrence may produce a public document detailing its investigatory procedures and fact findings and stating a conclusion as to the safety of a product or cause of an occurrence and perhaps the party responsible for an occurrence. These documents inevitably contain multiple hearsay statements.

The Court of Appeals has yet to address whether an investigatory report may be admissible in a civil proceeding pursuant to CPLR 4520 or the common law, and if admissible under either rule, to what extent.

A few other courts have in principle allowed for the admissibility of "trustworthy" investigative reports. Those courts have drawn support for their

decision from Federal Rules of Evidence rule 803 (8) and may have thereby extended the reach of CPLR 4520 or at least the common-law rule. The combination, however, of no Court of Appeals determination and few court decisions discussing the question leaves some doubt about their admissibility and their parameters if they are admissible.

In a personal injury action that charged the manufacturer of a Harley Davidson motorcycle with defective design and manufacture, the trial court, over objection, permitted the plaintiff to introduce a favorable National Highway Traffic Safety Administration study of the motorcycle. On appeal, *Cramer v Kuhns* (213 AD2d 131 [3d Dept 1995]) discussed whether the study was admissible pursuant to CPLR 4520. The Court, however, did not state whether the study met the traditional requirements of the statute. Instead, the Court turned for "guidance" to the CPLR 4520 federal "counterpart," namely Federal Rules of Evidence rule 803 (8), which at the time of the decision required as a condition of admissibility that "neither the source of information nor other circumstances indicate a lack of trustworthiness." *Cramer* accordingly held an investigatory report would be admissible provided the trial court was satisfied that the hearsay information " 'has sufficient independent indicia of reliability to justify its admission' " (*Cramer v Kuhns*, 213 AD2d 131, 135-136 [3d Dept 1995] [citation omitted]). "To that end," the Court opined, "it has been suggested that factors to be weighed in determining the document's trustworthiness and reliability, among other things, might include (1) the timeliness of the investigation, (2) the skill and/or experience of the investigator, (3) whether the report was based upon testimony adduced at a hearing, and (4) the possibility of bias (*see*, Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4520:3, at 246)." On the facts of the case, *Cramer* found that the study lacked sufficient indicia of reliability. (*See D.H. v Kindercare Learning Ctr., Inc.*, 6 AD3d 220, 221 [1st Dept 2004] [the agency's investigation "lacked sufficient indicia of trustworthiness and reliability"]; *Kaiser v Metropolitan Tr. Auth.*, 170 Misc 2d 321, 325 [Sup Ct, Suffolk County 1996] [the "reports are not sufficiently trustworthy to be admissible"]; *Fruit & Vegetable Supreme, Inc. v Hartford Steam Boiler Inspection & Ins. Co.*, 28 Misc 3d 1128, 1134 [Sup Ct, Kings County 2010] [the reports "are sufficiently reliable"].)

It is not clear whether *Cramer* was simply engrafting an additional CPLR 4520 requirement of trustworthiness for an investigatory report, or, in the absence of an investigatory report that met the statutory requirements of CPLR 4520, implying by its reliance on the federal rule of evidence for "guidance" that an investigatory report, if trustworthy, was admissible under the common law. The difference is significant because CPLR 4520 documents constitute prima facie

evidence of their contents while common-law documents are only some evidence of the facts.

Some courts have indeed opined that an investigatory report prepared pursuant to a statutory mandate may "at the very least" be admissible under the common law (*Kozlowski v City of Amsterdam*, 111 AD2d 476, 478 [3d Dept 1985] ["Since the report was prepared pursuant to statutory mandate, it was at the very least admissible under the public documents common-law exception to the hearsay rule"]; *Donovan v West Indian Am. Day Carnival Assn., Inc.*, 6 Misc 3d 1016[A], 2005 NY Slip Op 50052[U], *11 [Sup Ct, Kings County 2005] [the "report was made under statutory mandate and the court finds said document sufficiently trustworthy to be admissible under, at the very least, the common law public documents exception to the rule against hearsay"]).

In its decision, *Donovan* noted that it was applying the "*Cramer/Bogdan* analysis." *Bogdan* (168 Misc 2d 856) addressed the admissibility and parameters thereof of documents of the Office of Professional Medical Conduct (OPMC). While the records may have been admissible pursuant to Public Health Law § 10 (*Maraziti v Weber*, 185 Misc 2d 624, 626 [Sup Ct, Dutchess County 2000]), the *Bogdan* court discussed their admissibility under CPLR 4520 and the common law. *Bogdan* was a breach of contract action arising out of the plaintiff physician's suspension by defendant hospital; the hospital offered an OPMC report to prove plaintiff's incompetence, which would justify the suspension. The report detailed the result of hearings held by OPMC, and included findings of fact, determinations of departures by plaintiff from generally accepted standards of practice, and conclusions as to instances of gross negligence or incompetence. Plaintiff in turn offered a report of the Public Health Council (PHC), stating the hospital had acted improperly in summarily suspending the plaintiff. Supreme Court initially held CPLR 4520 was not applicable to the reports as those documents were neither certificates or affidavits. However, the court, influenced by Federal Rules of Evidence rule 803 (8) (C), held admissibility of the reports may be appropriate under the common law that would authorize the admissibility of the reports, subject to a trustworthiness analysis. (*Id.* at 859-860.) Upon applying the trustworthiness factors, Supreme Court admitted the OPMC findings of fact as they resulted from detailed hearings, but not the conclusions of negligence and incompetence, holding they were matters for the jury. (*Id.* at 861.) The PHC report was rejected because of its brief and conclusory nature and because "[n]o hearings were held and no investigation [was] conducted beyond consideration of written submissions from each party." (*Id.* at 861-862.)