

9.09 Admissibility of graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests (CPLR 4532-a)

A graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test is admissible in evidence provided:

(1) the name of the injured party, the date when the information constituting the graphic, numerical, symbolic or pictorial representation was taken, and such additional identifying information as is customarily inscribed by the medical practitioner or medical facility is inserted on such graphic, numerical, symbolic or pictorial representation; and

(2) (a) the representation has been previously received or examined by the party or parties against whom it is being offered; or

(b) (i) at least ten days before the date of trial of the action, the party intending to offer such graphic, numerical, symbolic or pictorial representation as a proposed exhibit serves upon the party or parties against whom said proposed exhibit is to be offered, a notice of intention to offer such proposed exhibit in evidence during the trial and that the same is available for inspection; and

(ii) the notice aforesaid is accompanied by an affidavit or affirmation of such physician identifying such graphic, numerical, symbolic or pictorial representation and attesting to the identifying information inscribed thereon, attesting that the identifying information inscribed thereon is the same as is customarily inscribed by the medical practitioner or facility, and further attesting that, if called as a witness in the action, he or she would so testify.

Nothing contained in this rule, however, shall prohibit

the admissibility of a graphic, numerical, symbolic or pictorial representation in evidence where otherwise admissible.

Note

This rule restates verbatim CPLR 4532-a. That rule was substantially amended by the Laws of 2004, chapter 375, effective January 1, 2005, so judicial decisions under the rule before then may no longer be applicable.

Under the best evidence rule, a party seeking to prove the contents of an X ray, a magnetic resonance imaging (MRI), or an analogous pictorial, graphic, symbolic, or numerical representation must introduce the authenticated original image or offer a satisfactory excuse for the absence of the original that would allow for proof by secondary evidence. (Guide to NY Evid rule 10.03.) A physician witness may not prove the contents of an X ray or MRI, for example, that is not in evidence based on a reading of a report interpreting an X ray or MRI.

CPLR 4532-a facilitates admission of the image itself without calling the technician who conducted the imaging or testing, by providing a means to authenticate any “graphic, numerical, symbolic or pictorial representation of the results of a medical or diagnostic procedure or test” without foundation testimony.

The rule encompasses not only X rays and MRIs, but also computed axial tomographs (CAT scans), positron emission tomographs (PET scans), electromyograms (EMGs), sonograms, fetal heart monitor strips, and other diagnostic tests that are currently in use or may be developed. (*See e.g. Clevenger v Mitnick*, 38 AD3d 586, 587 [2d Dept 2007] [MRI scans and EMG test data].)

The rule does not encompass *reports* of tests. (*Ewanciw v Atlas*, 65 AD3d 1077, 1078 [2d Dept 2009] [the rule did not encompass a report of quantitative results of a nerve conduction study].)

The rule creates a self-authentication procedure and a hearsay exception for the identifying information on the image or other test results.

Subdivision (1) of the rule sets forth the required identifying information. The only specified requirements are the patient’s name and the test’s date. Subdivision (1) otherwise is flexible to conform to medical practitioners’ and facilities’ varying practices of imprinting identifying information on patients’ test results: “and such additional identifying information as is customarily inscribed by the medical practitioner or medical facility.”

The rule sets forth two alternative additional prerequisites to admissibility.

Subdivision (2) (a) requires the proponent of the exhibit to show that the

parties against whom the exhibit is introduced have received or examined the exhibit. Parties who received the exhibit thus are provided the opportunity to examine the exhibit and therefore are presumed to have examined it. Otherwise the proponent may provide the opportunity for examination, for example, at an attorney's or medical practitioner's office or at a deposition. Receipt or examination of the exhibit enables an opponent to challenge the exhibit's admissibility or develop rebuttal evidence.

Subdivision (2) (b) sets forth an alternative means for admissibility. At least 10 days before the trial, the proponent must serve the parties against whom the exhibit is to be introduced with notice of the proponent's intent to introduce the exhibit and its availability for inspection. (*See e.g. Trombin v City of New York*, 33 AD3d 564, 564 [1st Dept 2006].) This notice must be accompanied by a physician's affidavit identifying the exhibit and attesting (1) to the information inscribed on the exhibit, (2) that that information is what the practitioner or facility customarily inscribes, and (3) that the physician would so testify if called as a witness. Noncompliance with the notice requirements will result in the exhibit's exclusion (*Dwight v New York City Tr. Auth.*, 30 AD3d 270, 271 [1st Dept 2006]), or its erroneous admission. (*Wang v 161 Hudson, LLC*, 60 AD3d 668, 668-669 [2d Dept 2009]; *Lucian v Schwartz*, 55 AD3d 687, 689 [2d Dept 2008].)

In any event, a physician's testimony inevitably will be necessary to interpret the exhibit since this rule simply provides a shortcut to authenticating the exhibit. The witness, however, need not be the physician who conducted or supervised the imaging or diagnostic test as would be necessary to authenticate it.

CPLR 4532-a does not preclude the use of a witness to authenticate an image or other diagnostic test encompassed by the rule. The proponent of course may call the physician or technician who conducted the imaging or testing to authenticate it or may introduce at the trial a physician's authentication of the imaging or testing at a deposition. (CPLR 3101 [a] [3]; 3117 [a] [4].)

Finally, admission over objection of images or tests without strict adherence to the required authentication procedures may amount to harmless error where physicians testify regarding their review of the images or other test results or reports of them are admitted without objection. (*Lucian v Schwartz*, 55 AD3d at 689.)