Medical Records in Depositions and at Trial

Prepared by:
David Randolph Smith
David Randolph Smith & Associates

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A. Foundations for Use and Admissibility

When we discuss using medical records and getting them into evidence the two key concepts are authenticity and admissibility. Medical bills and records are needed at trial to prove both liability and damages for personal injuries. To be admissible as business records, a live witness would be necessary to provide the foundation testimony as a business record. This could have the effect of disrupting medical care across many medical offices and hospitals and could increase expenses significantly.

In both state and federal courts, there is another way. In federal court, for example, medical records and bills are admissible as business records in federal court. Fed. R. Evid. 803(6). Such records are admissible without witness testimony if the custodian of records or another qualified person certifies that the copies are true and accurate copies of the original and that they are business records that were made in the regular course of business by a person with firsthand knowledge of the information recorded. Fed. R. Evid. 902. Under the rules, the party seeking to admit such records must give his opponent reasonable written notice of the intent to offer the record and must make the record and certification available for inspection to the opponent. Fed. R. Evid. 902. In practice, this should be done no later than the final pretrial conference to mark exhibits as full

or for identification only. Counsel may also wish to send a letter during the discovery process with the certification to notify opposing counsel that the record may be used as evidence at trial. As in state court, the record is admitted as a business record. Thus, any statements not relating to medical treatment must be brought within an exception to the hearsay rule or they will be excluded. Thus, in federal court, you can introduce medical records accompanied by a certification by the custodian of records that the records are a true and accurate copy of the original and were made in the regular course of business. To introduce such records, you must give notice to your opponent that you intend to introduce the records and provide the opponent with the opportunity to examine both the certification and the records to be introduced.

In state court state procedures and statutes generally permit the introduction of medical records and bills. In Tennessee, for example, T.C.A. § 24-7-122 provides:

> Chapter 7 - Admissibility of Evidence
>
> 24-7-122 - Medical records.
>
> (a) As used in this section, medical records mean all written clinical information that relates to the treatment of individuals, when the information is kept in an institution.
>
> (b) Medical records or reproductions of medical records, when duly certified by their custodian, physician, physical therapist, or chiropractor, need not be identified at the trial and may be used in any manner in which records identified at the trial by these persons could be used. The records

shall be accompanied by a statement signed by the person containing the following information:

(1) The person has the authority to certify the records;

(2) The copy is a true copy of all the records described in the subpoena; and

(3) The records were prepared by the personnel of the company acting under the control of the company, in the ordinary course of business.

(c) When records or reproductions of records are used at trial pursuant to this section, the party desiring to use the records or reproductions in evidence shall serve the opposing party with a copy of the records or reproductions no later than sixty (60) days before the trial, with notice that the records or reproductions may be offered in evidence, notwithstanding any other rules or statutes to the contrary.

[Acts 2006, ch. 842, § 1.]

B. Stipulations, Authenticity, Reasonableness &Necessity of Treatment

Often opposing counsel can agree and stipulate to the authenticity and admissibility of medical records without the need to call a custodian of the records at trial and sometimes without all the formality of a certification. Sometimes hospitals

or providers will only provide a certification with a hefty bill for the produced records.

C. Basis for Expert Opinion; Proving Damages; Exhibits; Juror Notebooks

Experts. Physicians routinely rely upon medical records, reports, exhibits, and deposition transcripts. Evidence is not excluded by the hearsay rule if it is a record of regularly conducted business activity. FRE 803(6). An expert may also rely upon hearsay if of a type reasonably relied upon by experts in the field. FRE 703. In addition, there is the hearsay exception for statements made for, or reasonably pertinent to, medical diagnosis or treatment or that describe the medical history or present symptoms or sensations; their inception; or their general cause. es of medical treatment. FRE 803(4).

Damages. Medical records can help prove lost wages, a life-care plan, the reasonableness and necessity of medical treatment, the basis for a damages expert's opinion, and proof of medical expenses such as physician costs, surgical costs, rehab and therapy expenses, and prescription medications. These records can also help prove the plaintiff is entitled to recover monetary compensation for mental anguish and pain and suffering that was caused by your accident.

Exhibits. The complete chart for the relevant treatment should be admitted into evidence. PowerPoint slides or blow-up

charts for the key pages should also be presented for illustrative purposes. Electronic records can easily be displayed by projection to the court's AV/monitor system or displayed on a document viewer. A PowerPoint containing medical records can also be a very effective way of presenting expert testimony. See e.g.:

> Here, the PowerPoint is relevant, but not unfairly prejudicial and does not risk confusing the jury. Mr. Wiseman may therefore display the PowerPoint during Dr. Gash's testimony at trial. The terms, illustrations, X-rays, and other medical images all describe spinal anatomy and spinal health in the abstract. (See generally ECF No. 76-2.) The jury will need to know what these body parts are and what the words mean before they can understand Dr. Gash's testimony about Ms. Jones's condition. The change in her condition as the result of this accident—in other words, her damages—is one of the chief facts of consequence in this matter.
>
> Therefore, because the PowerPoint will help the jury understand Dr. Gash's testimony, which itself makes Ms. Jones's damages more or less likely, the PowerPoint is probative of damages. See Fed. R. Evid. 401, 402. Ms. Jones insists that the PowerPoint provides no source for the accuracy of the terms or the images in it. However, this contention is the

> proper subject of cross-examination, rather than a basis for exclusion.
>
> The Court also finds no risk of confusing the issues or unfair prejudice that substantially outweighs the PowerPoint's probative value. Fed. R. Evid. 403.
>
> The artist's illustrations in the PowerPoint are clearly not images of Ms. Jones, but, to the extent that she worries that the excerpted X-rays and other medical images will come across to the jury as images of her spine, the Court will issue a limiting instruction to clarify that the PowerPoint is for educational purposes only and that it is not evidence. Rideout, 2008 U.S. Dist. LEXIS 62595, at *5–6; Johnson, 362 F. Supp. 2d at 1059. Therefore, Dr. Gash may use the PowerPoint as a demonstrative aid during his testimony, and the Motion is DENIED.

Jones v. Wiseman, No. 18-CV-02197-SHL-DKV, 2019 WL 12758126, at *3 (W.D. Tenn. June 3, 2019).

Juror Notebooks. The "hot" or "key" portions of the medical records or any records that provide a summary can be produced in a juror notebook. If the "chart" is not too large the complete chart can also be put into a juror notebook. *See e.g.*:

> Plaintiffs note that each juror was provided a large notebook containing medical records. Among the records in the notebook was the defendants' expert's

three-page report, which referenced plaintiff Amy Touchstone's history of depression and use of antidepressant medication.

Touchstone v. MacKinnon, No. 228068, 2003 WL 193522, at *2 (Mich. Ct. App. Jan. 28, 2003.

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2510 Alpine Road Eau Claire, WI 54703
www.lorman.com 866-352-9539 customerservice@lorman.com