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Opposing Admission of Medical Records Unsupported by Testimony

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Introduction

Often at trial, your opponent will, *without supporting testimony from a witness*, attempt to move into evidence someone's medical records (usually the plaintiff's) to prove a relevant medical fact at issue in the trial. However, introducing medical records containing medical opinions, conclusions, or diagnoses in this fashion deprives you of the opportunity to test by cross-examination the statements of the declarant, *i.e.* person who provided the information in the records.

Parties to civil lawsuits often agree to the *authenticity* of medical records under Rule 901, West Virginia Rules of Evidence, reserving all other objections to their use at trial. The reason for this practice is to avoid the time and expense of taking in-person or deposition testimony of a record custodian merely to establish that the records are kept in the usual course of business and that they are what they purport to be.

It is not unknown for a trial court judge to take the authenticity stipulation as *carte blanche* for your opposition to use the records for *any purpose* they wish at trial. This may lead to the gross misrepresentation to the jury of the content of the records since once those records are received *in toto* without limitation they are open to virtually any interpretation or gloss the parties might put on them.

For example, in one asbestos trial held in West Virginia, a lawyer for the plaintiff read the "history statement" recorded in a medical record, which related merely what the plaintiff had said to his treating doctor ("history of asbestosis"), as a statement of the diagnosis of the doctor himself. The doctor himself was an osteopathic family doctor who no doubt would have been shocked to see his note presented as a diagnosis of occupational lung disease. No doubt also, he would have denied any competence to render such an opinion. In that same trial, a medical record that noted that a plaintiff had once had an "intestinal blockage" was read to the jury during plaintiff's closing argument as discussing

an "interstitial[1] blockage" of the plaintiff's lung. After objection by his opponent, the lawyer shrugged and said, "Interstitial, intestinal, what's the difference?" and went on to another record while the judge looked on in bemused silence.

Even if a doctor makes a statement in a record about a person's condition or about the his diagnosis of a disease in the person, permitting the record to be introduced without a calling the declarant as a witness who is subject to cross-examination violates the right of the opponent to challenge such "evidence."

Opposing the Introduction of Unsupported Medical Records

Receiving medical records in evidence to permit a party to rely on the substantive statements in the records to prove the truth of the matter asserted would seem to violate rules against hearsay. Rule 802, West Virginia Rules of Evidence, states, "Hearsay is not admissible except as provided by these rules."

However, records of regularly conducted activity generally are admissible under subsection 6 of the first "hearsay exception" rule, West Virginia Rules of Evidence 803, if the records also meet the requirements of the other exclusionary rules. Hospital and medical records are admissible under Rule 803(6) as a record of a regularly conducted activity if they are verified by their custodian. Tedesco v. Weirton General Hospital, 160 W.Va. 466, 235 S.E.2d 463 (1977); State v. Bias, 171 W.Va. 678, 301 S.E.2d 776 (1983).

Rule 803(6) does constitute a substantive change in the common law with regard to the admissibility of medical records containing diagnoses or opinions.

> Under the common law, diagnostic entries in medical or hospital records were often excluded. The new rule permits opinions and conclusions to be introduced as part of the business entry record. **It appears, however, that the new rule does not repeal the old rule** (see Cline v. Evans, 127 W.Va. 113, 31 S.E.2d 681 (1944)), that the record cannot contain conclusions or opinions which would not be admissible through the testimony of a witness.

[1] "Interstitial" pertains to the small spaces between working structures in the lung, "interstitial disease" being a hallmark of occupational lung disease.

Franklin D. Cleckley, Handbook on West Virginia Evidence 223 (1994)(emphasis added).

In Cline v. Evans, 127 W.Va. 113, 31 S.E.2d 681 (1944) the Court held that medical records that state opinions are not admissible as evidence if they could not have been testified to by the declarant as a witness in court. In Cline, the plaintiff introduced medical records that contained comments from a doctor stating that the plaintiff's leg was infected and it was "probably tuberculosis." Id. at 684. The Court held that it was error to admit these records because "a record which merely assumes to state the opinion of a surgeon or pathologist is not admissible as tending to show any fact." Id. The Court went on to say that if the plaintiff wanted to show that there was a tuberculosis infection the plaintiff should have had a test to determine if this condition actually existed and then should have called the person who performed the test to testify. Id. The Court focused on the idea that the defendants were denied the opportunity to test this evidence by cross-examination. Id.

In Holbrook v. Lykes Bros. S.S. Co. Inc, 80 F.3d 777 (3rd Cir. 1996) the plaintiff sued asbestos manufacturers and suppliers alleging that he had developed mesothelioma, a form of cancer, from exposure to asbestos. The court affirmed the trial court's decision to redact all references to mesothelioma in various medical records. The doctors who made the records did not testify at trial and the court in making its ruling stated that "The diagnosis of mesothelioma is a diagnosis that must be subjected to cross-examination due to the fact that this type of disease is very difficult to diagnose." Id. at 787. For these reasons, the court found that it was improper to admit records with references to mesothelioma without giving the defendants the opportunity to cross-examine the training of the doctors who made the diagnosis and to inquire into the methods and techniques they used to arrive at the diagnosis.

Similarly, the First Circuit has held that portions of hospital records were properly excluded where nothing in the records themselves indicated that the doctor who made the notation in question had made it based on his own examination and diagnosis of the plaintiff. Petrocelli v. Gallison, 679 F.2d 286 (1st Cir. 1982). In Petrocelli, a medical malpractice

action, the plaintiff attempted to introduce medical records from his current doctor which contained a notation that said that the plaintiff's nerve had been severed during an earlier operation at another hospital. The plaintiff did not call his current doctor as a witness, so the defendant did not have an opportunity to ascertain from the doctor why this type of declaration was made in the record; therefore, the court excluded that portion of the hospital record. The court said that hospital records should not be admitted when the record is "so cryptic that pure guesswork and speculation is required to divine the source of the cited information." Id. at 291.

Conclusion

A court should not receive medical records in evidence and then permit a party to rely on declarations of fact and opinion contained in those records, without requiring the declarant to be produced to testify about those declarations so that the declarations can be tested.