New York Law Journal

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An ALM Publication

FEBRUARY 24, 2000

Outside Counsel

Admissibility Of Medical Records And Reports

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It is well established that pursuant to CPLR 4518(a), the office records of a physician are admissible. *Napolitano v. Branks*, 141 A.D.2d 705 (2nd Dept. 1988); *Wilson v. Bodian*, 130 A.D.2d 221 (2nd Dept. 1987); Prince, Richardson On Evidence, 11th Ed., Sec. 8-309. Similar to hospital records, it is the business and duty of a physician to diagnose and treat a patient's illness. Therefore, entries in the office records germane to diagnosis and treatment are admissible, including medical opinions and conclusions. *Wilson v. Bodian*, 130 A.D.2d at 231 (emphasis added). The failure to allow into evidence the medical records and report of a treating doctor may constitute reversible error. C, 243 A.D.2d 447, 449 (2nd Dept. 1998).

In discussing the admissibility of medical records and reports it is important to note that it is not just the business and duty of a physician to make records concerning their diagnosis and treatment of a patient, it is a requirement.

All physicians are required to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient. 8 N.Y.C.R.R. 29.2[a][3]. See, *Osowicki v. Young*, 140 A.D.2d 898, 900 (3rd Dept. 1988). This means that a doctor is required to record the patient's complete history, the physician's physical examination, including all positive and negative findings from the inventory of systems, abnormalities, diagnosis, procedures performed, and sufficient information to warrant the tests ordered and medications prescribed, if any, to the patient. See, *Adrien v. Kaladjian*, 199 A.D.2d 57 (1st Dept. 1993); *Villaflor v. Board of Regents of the State University of New York*, 109 A.D.2d 925, 926 (3rd Dept. 1985); *Schwarz v. Board of Regents of the State University of New York*, 89 A.D.2d 711, 712 (3rd Dept. 1982); *Keppler v. New York State Department of Social Servi*, 218 A.D.2d 877, 879 (3rd Dept. 1995).

A physician who fails to keep and maintain adequate medical records may be disciplined or sanctioned, particularly where the doctor participates in a medical assistance program (i.e., Medicaid/ Medicare). See, *Camperlengo v. Barell*, 78 N.Y.2d 674 (1991); Education Law Sec. 6509; 18 N.Y.C.R.R. 515.2[b][6]; 8 N.Y.C.R.R. 29.2[a][3].

Other Doctor's Records

Pursuant to 8 N.Y.C.R.R. 29.2[a][3], a medical record is required to convey objectively meaningful medical information concerning the patient treated to other physicians. *Mucciolo v. Fernandez*, 195 A.D.2d 623, 625, lv. to app. den., 82 N.Y.2d 661 (1993)(emphasis added).

The purpose behind this requirement is in part to ensure that meaningful information is recorded in case the patient should transfer to another professional or the treating practitioner should become unavailable. *Mucciolo v. Fernandez*, 195 A.D.2d 623, 625, lv. to app. den., 82 N.Y.2d 661 (1993) (emphasis added).

The reality of modern day medicine is that to properly diagnose and treat a patient, a doctor is required to consult with other physicians and health care professionals. Indeed, it may constitute medical malpractice per se for a physician to fail to consult with other medical care providers and obtain copies of their reports. Similarly, to assist the doctor in caring for the patient, the specialist is obligated to write their findings and send their medical conclusions to the referring physician. These medical reports become part and parcel of the treating doctor's office records, and may play an integral role in determining the course and modalities of treatment.

In recognition of the foregoing, the courts have allowed a physician's entire office record concerning their patient into evidence, including the records and reports of other medical care providers.

In *Stein v. Lebowitz-Pine View Hotel*, Inc., 111 A.D.2d 572, mot. for lv. den., 65 N.Y.2d 611 (1985), the court allowed the records and reports prepared by other persons but made a part of the physicians' records for the patient to be entered into evidence. The court held that:

Certain laboratory reports, X-rays and electrocardiograms included in the file of decedent's physician and entered by either the physician or his staff were admissible pursuant to CPLR 4518(a). That these records were prepared by other persons merely affects the weight of this evidence, not its admissibility. (Emphasis added) 111 A.D.2d at 574.

Similarly, in *Freeman v. Kirkland*, 184 A.D.2d 331 (1st Dept. 1992), the court properly allowed into evidence,

the complete medical file of plaintiff's treating osteopathic physician, including records, reports and correspondence generated by other medical specialists and laboratories, where the treating physician's testimony at trial established that the medical records related to the diagnosis and treatment of plaintiff's injuries (citations omitted). (Emphasis added) 184 A.D.2d at 332.

The reports of other physicians contained in each doctor's records are generally admissible. *Cohn v. Haddad*, 244 A.D.2d 519, 520 (2nd Dept. 1997). Thus, a letter written by Dr. Fanelli (the plaintiff's father), to a psychiatrist who was treating plaintiff for the emotional problems associated with this incident (the subject of the lawsuit) was properly admitted into evidence as a business record of Dr. Fanelli.] *Fanelli v. Lorenzo*, 187 A.D.2d 1004, 1005 (4th Dept. 1992).

In *Marulli v. Pro Sec. Service, Inc.*, 151 Misc. 2d 1077, 1078 (App. Term, 1992), the Appellate Term held that the trial court properly permitted limited reference by plaintiff's succeeding treating physicians to the contents of the report of plaintiff's non-testifying original treating physician.

In *Munoz v. 608-610 Realty Corp.*, 194 A.D.2d 496, mot. for lv. to app. den., 82 N.Y.2d 661 (1993), the court held that the

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report of plaintiff's consulting surgeon was evidence of a kind accepted in the medical profession as reliable in forming a professional opinion.

In *Colezetti v. Pircio*, 214 A.D.2d 926, 927 (3rd Dept. on transfer from 2nd Dept. 1995), the plaintiff's primary treating physician was permitted to testify with regard to the reports he received from the consulting specialists.

The Court of Appeals has held that a psychiatrist can give expert opinion testimony based in part on hearsay, including psychological and medical tests and examinations never introduced into evidence, *People v. DiPiazza*, 24 N.Y.2d 342 (1969), and interviews with people who do not testify at trial, *People v. Stone*, 35 N.Y.2d 69, 74-75 (1974); *People v. Sugden*, 35 N.Y.2d 453 (1974). In *People v. Sugden*, a psychiatrist was allowed to testify based in part on his review of a psychologist's report and other psychiatric and medical reports, a written confession and written statements. 35 N.Y.2d at 458.

Radiology Reports

In *Holshek v. Stokes*, 122 A.D.2d 777 (2nd Dept. 1986), the court held that plaintiff's treating doctor could give testimony based upon his examination of the plaintiff, his reading of an X-ray, and the report of another doctor. The court held that:

Additionally, the doctor's testimony that the plaintiff has suffered a torn miniscus (sic) was properly admitted, although based in part on an X-ray and report not in evidence. An expert may rely upon material not in evidence, if it is of a kind accepted in the profession as reliable in forming a professional opinion (citations omitted). Here, the material relied upon met this test. Additionally, while not in evidence, the defendant had a copy of both the X-ray and the report; accordingly, he was not foreclosed from effective cross-examination. (Emphasis added) 122 A.D.2d at 779.

In *Pegg v. Shahin*, 237 A.D.2d 271 (2nd Dept. 1997), the court held that plaintiff's treating doctor could properly give testimony concerning the results of certain X-rays and MRI tests. The court noted that:

To confirm his diagnosis, the physician sent the plaintiff Paul Morabito for an MRI test and X-rays. Under these circumstances, and in light of the fact that MRI and X-ray reports are data which are of the kind ordinarily accepted by experts in the field, it was not error for the trial court to permit the physician to testify with respect to the MRI and X-ray report (citations omitted). (Emphasis added) 237 A.D.2d at 272.

In *Serra v. City of New York*, 215 A.D.2d 643 (2nd Dept. 1995), the defendant contended that the trial court erred by allowing into an MRI report into evidence, and permitting the plaintiff's treating physician, Dr. Lehman, to testify concerning the results of the MRI test. The Appellate Division affirmed the trial court and the jury's verdict, and held that:

Under these circumstances, and in light of the fact that an MRI report is data which is of the kind ordinarily accepted by experts in the field, it was not error for the trial court to permit Dr. Lehman to testify with respect to the MRI report (citations omitted). (Emphasis added) 215 A.D.2d at 644.

In *Serra v. City of New York*, supra, even though the plaintiff failed to lay proper foundation for the admission of the MRI report into evidence, the admission of the report constituted harmless error. Similarly, in *Flamio v. State*, 132 A.D.2d 594 (2nd Dept. 1987), the Appellate Court held allowing a medical expert to testify with respect to the oral finding of a radiologist who conducted CAT scans and did not testify at trial, if error, was harmless.

Where the medical findings of plaintiff's expert are based upon his clinical observations of the plaintiff, a physical examination as well as review of certain X-rays, the failure to produce the X-rays does not prove fatal where the references to the X-ray served to confirm the conclusions of the expert following his examination of her. *Karayianakis v. L & E Grommery, Inc.*, 141 A.D.2d 610, 611 (2nd Dept. 1988).

Moreover, secondary evidence, such as an X-ray report, is admissible into evidence. See, *Schozer v. William Penn Life Ins. Co. of New York*, 84 N.Y.2d 639 (1994). The X-ray report is admissible even though the original X-ray is not produced, and the defendant may not rely on an alleged violation of the best evidence rule where it objects to the introduction of the record solely on hearsay grounds. *Lanpont v. Savvas Cab Corp., Inc.*, 244 A.D.2d 208, 211 (1st Dept. 1997).

Foundation

In *People v. Kennedy*, 68 N.Y.2d 569, 579-580 (1986), the three foundation requirements of CPLR 4518(a) are outlined by the Court of Appeals:

1. the record must be made in the regular course of business;

2. it must be the regular course of business to make the record; and

3. the record must have been made at the time of the event, or within a reasonable time thereafter.

The Court of Appeals has also held that an expert may base their opinion on material that is not in evidence, if it is of a kind accepted in the profession as reliable in forming a professional opinion. *People v. Sugden*, 35 N.Y.2d 453, 459-450 (1974). See, e.g., *Comizio v. Hale*, 165 A.D.2d 823, 824 (2nd Dept. 1990); *Toth v. Community Hospital at Glen Cove*, 22 N.Y.2d 255, 259, 261-264 (1968).

Once the prerequisites have been, the record is admissible. See, *Kelly v. Wasserman*, 5 N.Y.2d 425, 430 (1959). CPLR 4518(a) is explicit:

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility.

Who Can Lay Foundation

The treating doctor who testifies at trial can lay the foundation for the admission of their office chart and the records contained therein. See, *Napolitano v. Branks*, 141 A.D.2d 705 (2nd Dept. 1988). The courts have also allowed other classes of people to lay foundation for the admission of medical records and reports.

In *People v. Kennedy*, 68 N.Y.2d 569 (1986), the Court of Appeals held that the foundation requirements of CPLR 4518(a) are applicable to criminal proceedings. In *People v. Cratsley*, 86 N.Y.2d 81 (1995), the Court of Appeals affirmed a decision that allowed into evidence an IQ test report prepared by a psychologist who was not an employee of the Association of Retarded Citizens (ARC) facility, through a counselor at the facility.

In *People v. Cratsley*, supra, a mentally retarded adult resident of the ARC facility was allegedly raped by an employee of the facility. The prosecution offered the psychologist's report into evidence through the counselor, that testified that in order to carry out her evaluation and counseling of the resident, she had to know the resident's medical and psychological background, and therefore maintained all relevant records, including medical, psychological and social histories. She testified that she recognized the psychologist's report as an initial evaluation prepared in accordance with ARC's requirements, and she worked with these reports as part of her regular course of business at ARC, and they were relied upon for various purposes. 86 N.Y.2d 89-90.

Because the report was prepared for ARC, and in conformity with its procedures, the fact that the psychologist was not himself an ARC employee did not defeat

its admission. The report had the indicia of reliability characteristic of a business record, and supported the trial court's conclusion that the report was a business record under CPLR 4518(a), and the evidence was properly received. 86 N.Y.2d 90-91.

The Court of Appeals decision in People v. Cratsley, supra, reaffirms the validity of other lower court cases that have made similar holdings. In *McClure v. Baier's Automotive Service Center, Inc.*, 126 A.D.2d 610 (2nd Dept. 1987), the court held that an adequate foundation was laid for the introduction into evidence of the records of the plaintiff's former treating physician through the testimony of his medical secretary, who explained that the entries in the record were made in the regular course of business by members of the physician's staff during the plaintiff's office visits.

In *Hessek v. Roman Catholic Church of Our Lady of Lourdes in Queens Village*, 80 Misc. 2d 410, 412 (Civ. Ct. Queens 1975), the managing agent of a medical corporation where plaintiff received treatment testified that the plaintiff was a patient, that the file in question was kept in the regular course of the business of the doctor, that the agent had personally seen the file and was familiar with the entries in the file and the doctor's signature in the file. The records were properly entered into evidence.

The widow of the former treating doctor may also lay the foundation for the admission of the records, including his medical opinions. *Duffy v. Thomas A. Edison, Inc.*, 240 App. Div. 1002 (2nd Dept. 1933); *Jezowski v. Beach*, 59 Misc. 2d 224 (Sup. Oneida 1968)(reviewing the trial transcript of *Duffy v. Thomas A. Edison, Inc.*, supra).

Counsel seeking the admission of such medical records may do so by serving a subpoena duces tecum for the records on the physician or secretary/managing agent. Pursuant to CPLR 2305[b], a subpoena duces tecum requires compliance by producing the requested material and by providing a witness that can identify it and testify about its origin, purpose and custody. *Castro v. Alden Leeds, Inc.*, 144 A.D.2d 613, 615 (2nd Dept. 1988).

If the subpoenaed witness fails to appear, the court is required to issue a warrant, pursuant to CPLR 2308(a), to ensure compliance with the subpoena duces tecum. The failure to issue such a warrant may constitute reversible error. *Hefte v. Bellin*, 137 A.D.2d 406 (1st Dept. 1988).

While pursuant to CPLR 2306, a subpoena duces tecum may be used to place medical records in evidence, it is not the exclusive means of doing so. If counsel offers a properly certified and authenticated copy of the records, a subpoena does not have to be served, and pursuant to CPLR 4518[c], the records are admissible in evidence. *Joyce v. Kowalcewski*, 80 A.D.2d 27, 29 (4th Dept. 1981).

Future Trends

It is no secret that the courts are overburdened, overworked and understaffed. Our Chief Judge has made clear that in the 21st Century we must streamline the way we do things. Yesterday's formalities must yield to today's practicalities. If a trial can take place without the delays inherent in having to schedule, produce and question foundation witnesses merely to enter records into evidence, the courts will function in a more efficient, economical and expeditious fashion. This can be accomplished by the following means.

The trial judge should encourage the parties to stipulate to the admission into evidence of medical records and reports. Many judges already encourage counsel to stipulate to as much evidence as possible. This saves time and money, and narrows appealable issues.

Counsel should enclose an appropriate certification/attestation to properly authenticate records to the medical care provider. Pursuant to CPLR 4518(c), records are admissible in evidence if they bear a certification or authentication by an employee delegated for that purpose or by a qualified physician. The doctor or appropriate member of the staff can duly execute such a certification and annex it to the medical records that they send to the requesting attorney or to the Courthouse Subpoenaed Records Room (along with a copy of the subpoena).

Alternatively, counsel can obtain an affidavit from the appropriate person. Some judges permit certain testimony to be admitted in the form of an affidavit. See, *Campaign for Fiscal Equity v. State of New York*, 182 Misc. 2d 676, 699 N.Y.S.2d 663 (Sup. NY 1999) (citing CPLR 4011). While obviously this cannot be done for all witnesses, it seems an appropriate mechanism for foundation witnesses for medical records.

Foundation witnesses can testify over the telephone. The courts have allowed testimony to be taken over the telephone in a variety of circumstances. In the context of Family Court proceedings, pursuant to the Federal Uniform Interstate Family Support Act (UIFSA) and the New York State Family Court Act Section 580-316(f), a party or a witness residing in another state may testify via telephone. See, *In Re Ronald D. v. Doe*, 178 Misc. 2d 457, 461 (Fam. Ct. Jefferson 1998). Similarly, testimony may be taken over the telephone at Administrative Hearings, such as an unemployment proceeding. 12 N.Y.C.R.R. 461.7[c][2]; In Re Murphy, d A.D.2d , 694 N.Y.S.2d 531, 532 (3rd Dept. 1999).

The courts have found that taking testimony over the telephone does not deprive a party of their right to due process. *In Re Hoffman*, 138 A.D.2d 785, app. dis., 77 N.Y.2d 987 (1991); *In Re Rowlett v. Coombe*, 242 A.D.2d 798, 799 (3rd Dept. 1997).

In *Ferrante* by *Ferrante v. Ferrante*, 127 Misc. 2d 352 (Sup Queens 1985), the court held that where the plaintiff was 92 years old, in poor physical condition and permanently confined to a nursing home, she could not travel to Queens to testify on her own behalf. The court determined that justice would be best served by having the plaintiff testify from Florida via a telephone conference call. 127 Misc. 2d at 353.

In *Superior Sales & Salvage, Inc. v. Time Release Sciences, Inc.*, 227 A.D.2d 987 (4th Dept. 1996), the appellate court held that in this jury trial, the judge did not err in permitting a witness to go on vacation and use a courtroom speakerphone to conclude the cross-examination.

Conclusion

WHERE COUNSEL LAYS THE PROPER FOUNDATION, THE Medical records and reports of VARIOUS MEDICAL CARE PROVIDERS MAY BE ADMITTED INTO EVIDENCE. THE BENEFITS IN TERMS OF MONETARY SAVINGS AND JUSTICE TO THE PARTIES MAY BE SIGNIFICANT. SEE, *IN RE PALMA S. V. CARMINE S.*, 134 MISC. 2D 34 (FAM. CT. KINGS 1986); *HESSEK V. ROMAN CATHOLIC CHURCH OF OUR LADY OF LOURDES IN*, 80 MISC. 2D 410, 412 (CIV. CT. QUEENS 1975). THE BENEFITS IN TERMS OF THE OVERALL JUDICIAL EFFICIENCY AND ECONOMY MAY BE EVEN GREATER. SEE, CPLR 104.