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To What Extent Are The Contents Of Your Client's Medical Records Admissible?

by David G. Wirtes, Jr., and Lucy E. Tufts

Introduction

As you begin trial preparation and give thought to proving medical causation, the extent of your client's injuries and damages, and the severity of her pain and suffering, you discover seemingly helpful entries by treating physicians and nurses in her medical records. Are these comments admissible as substantive evidence on causation and damages? Or should you expect motions in limine seeking to preclude these statements as hearsay or opinions expressed without adequate foundation?

The general rule is that when medical records are certified in conformance with the requirements of §§ 12-21-5 through 7, Ala. Code 1975, such records constitute self- authenticating business records falling within the hearsay exception provided by Rule 803(6), Ala. R. Evid. Accordingly, as provided by the statutes, records speaking to a patient's history, "written interpretations thereof," "written orders," "directions," "findings and reports of physicians, doctors, surgeons, pathologists, radiologists, specialists ... and nurses" are all *expressly* deemed admissible by the language of § 12-21-5. Any challenges to "... the circumstances of the making of such hospital records, including lack of personal knowledge of the entrant or maker of such hospital records," ... "may ... be shown to affect the *weight* of such hospital records" ... but ... "this shall not affect their *admissibility*." § 12-21-6(a) (emphasis added).

As with all general rules, there are exceptions. This article explains the operative statutory and regulatory law and holdings of Alabama's appellate courts that govern the admissibility of medical records.

Sections 12-21-5 through 7, Ala. Code 1975

Medical records certified in conformance with the procedures set forth at §§ 12-21-5, 6, and 7, Ala. Code 1975, are considered self-authenticating business records falling within the hearsay exception provided by Rule 803(6), Ala. R. Evid. These rules work in concert with Rule 901(b)(10), Ala. R. Evid., which allows for authentication by means provided by statute or other rules proscribed by the Alabama Supreme Court. Once records are produced under cover of a § 12-1-7 certification by its custodian of records, the complete medical record so certified is deemed self-authenticating and admissible – subject to relevancy, hearsay, or other objections – without need of testimony from an authenticating witness. See Charles W. Gamble, Robert J. Goodwin, *McElroy's Alabama Evidence* § 254.01(9) (6th ed. 2016) ("Copies of [ ] hospital records, when properly certified, may be introduced into evidence without the production of the original and without the custodian of these records being present to lay a predicate.").

Sections 12-21-5 And 6 Define The Extent Of Admissibility Of Such Records

Sections 12-21-5 and 6 expressly define what is admissible and explain that if questions arise concerning how any entries were made in such records, the questions may affect *weight* but not *admissibility* of such records. Section 12-21-5 states:

> **§12-21-5. Copy Of Hospital Records – Admissibility.**
>
> When the original would be admissible in any case or proceeding in a court in the state, a certified copy of the hospital records of any hospital organized or operated under or pursuant to the laws of Alabama, **including records of admission, medical, hospital, occupational, disease, injury and disability histories, temperature and other charts, X rays and written interpretations thereof, pictures, photographs, files, written orders, directions, findings and reports and interpretations of physicians, doctors, surgeons, pathologists, radiologists, specialists, dentists, technicians and nurses, as well as of all employees of such hospital, forming a part of such hospital records as to the health, condition, state, injuries, sick-**

ness, disease, mental, physical and nervous disorders, duration and character of disabilities, diagnosis, prognosis, progress, wounds, cuts, contusions, lacerations, breaks, loss of blood, incisions, operations, injuries, examinations, tests, transfusions, hospitalization and duration thereof, medication, medicines, supplies, treatment and care and the cost, expenses, fees and charges therefor and thereof, a part of, or shown on or in, said hospital records of any patient in said hospital, when certified and affirmed by the custodian of said hospital records as provided in Section 12- 21-7, **shall be admissible in evidence without further proof in any court in the state where admissible**, if and when said hospital records were made and kept in the usual and regular course of business of said hospital and it was in the regular course of business of said hospital to make and keep said records and that said records were made at the time of such acts, transactions, occurrences or events therein referred to occurred or arose or were made, or within a reasonable time thereafter.

Id. (emphasis added).

Section 12-21-6 states:

> **§ 12-21-6. Copy of hospital records – Subpoena duces tecum; inspection; form; weight.**
>
> (a) A certified copy of said hospital records may be procured by any litigant in any court of competent jurisdiction in the state by subpoena duces tecum, and when any such subpoena duces tecum is issued for said hospital records, the custodian of said hospital records shall prepare a copy of said hospital records as provided in this subsection and securely seal the same in an envelope or other container and date and fill out and sign a certificate in substantially the form provided in Section 12-21-7 and place on, or securely fasten said certificate to the outside of, said envelope or container in which said copy of said hospital records are placed and deliver the same to the clerk or register of the court hearing, or to hear or to try, the case or proceeding in which the records are sought, and he shall not otherwise be required to appear in court unless thereafter ordered to do so by the court. The copy of the hospital records shall not be open to inspection or copy by other persons than the parties to the case or proceeding and their attorneys until ordered published by the court trying the case at the time of the trial. When so prepared and certified, the copy of said hospital records shall be admissible in evidence in any court in the state, if and when admissible, in prima facie proof of the facts therein shown just as if otherwise verified and just as if the copy were the original. The copy of the hospital records may be photostated, photographed or made by microphotographic plate or film, or otherwise made, so long as clear and easily legible. **All the circumstances of the making of such hospital records, including lack of personal knowledge of the entrant or maker of such hospital records, may otherwise be shown to affect the weight of such hospital records, but this shall not affect their admissibility**.

Id. (emphasis added).

The principles set forth in §§ 12-21-5 and 6 make sense because Alabama law impose mandatory duties upon hospitals, physicians, and nurses to make only accurate entries into patients' medical records. See, e.g., Ala. Admin. Code, Ch. 420-5-7-.13(1)-(5) (establishing Alabama's Board of Health regulations concerning hospitals' duties to create and maintain accurate medical records); Ala. Admin. Code, Ch. 545-X-4-.08(1) (adopting the Alabama Board of Medical Examiners' "minimum standards" establishing physicians' duties relative to accurate medical records) and § 34-24-504, Ala. Code 1975, requiring all Alabama licensed physicians to "comply with all laws, rules, and regulations governing the maintenance of patient medical records...."); Ala. Admin. Code, Ch. 610-X-6 and -8 (imposing duties upon Alabama-licensed registered and practical nurses to create and maintain accurate medical records upon threat of punishment for among other things *falsifying* or *altering* such records).

Alabama's reported appellate opinions and corresponding rules of evidence are consistent with the express language of the statutes as well.

In *Kirksey v. State*, 191 So. 3d 810 (Ala. Crim. App. 2014), reh'g denied Apr. 10, 2015, cert. denied Sept. 18, 2015 (Ala. S.Ct. 1140749), the Court of Criminal Appeals explained that so long as the statutory certification requirements of §§ 12-21-5 through 7 were met, the medical records so certified were deemed admissible as an exclusion to the hearsay rule pursuant to Rule 803(6), Ala. R. Evid. *Id.*, 191 So. 3d at 845-46. Citing *McElroy's Alabama Evidence*, § 254.01(9), the court stated "[C]opies of [certified] hospital records, when properly certified, may be introduced into evidence without the production of the original and without the custodian of these records being present to lay a predicate." *Id.* at 846. The court noted, however, that § 12-21-5 "does not allow the carte blanche admission of all hospital records...." *Id.* Citing *Liberty National Life Ins. Co. v. Reid*, 276 Ala. 25, 158 So. 2d 667 (1963), the court held:

> "that since statements in hospital records pertaining to the manner of the injury are hearsay, and have no reference to the diagnosis or treatment of the patient, they should not be considered as records pertaining to the business of the hospital, **unless pathologically germane to a diagnosis and treatment of the patient**."

Id., 191 So. 3d at 846 (quoting *Liberty National*, 276 Ala. at 36, 158 So. 2d at 677) (emphasis added).

In *Wyatt v. State*, 405 So. 2d 154 (Ala. Crim. App. 1981), the court acknowledged that diagnoses and opinions expressed in a properly certified medical record are admissible through § 12-21-5 as though the physician were a witness expressing an expert opinion. *See id.* at 158 (quoting *Seay v. State*, 390 So. 2d 11 (Ala. 1980)). *Accord, Carroll v. State*, 370 So. 2d 749, 758 (Ala. Crim. App. 1979) ("... the diagnosis of the defendant by a doctor who does not testify at trial which is contained in the records, is competent and admissible evidence.").

In *Fleming v. State*, 625 So. 2d 1195 (Ala. Crim. App. 1993), the Court of Criminal Appeals held that medical re-

cords containing diagnoses and treatment were admissible even when partly made by attending nurses. *Id.* at 1198.

In *Anderson v. State*, 35 Ala. App. 111, 44 So. 2d 266 (1950), discussing the predecessor certification statute, the Alabama Court of Appeals held:

> The notes of other physicians attending to the deceased, and of nurses, would clearly be admissible, even though additional to Dr. Thigpen's [the physician who testified live at trial] notations in the record, that is **insofar as they related to acts, transactions, occurrences, or events incident to the hospital treatment of the deceased**.

Id., 44 So. 2d at 272 (emphasis added).

McElroy's Alabama Evidence summarizes these rules concerning the admissibility *vel non* of discreet entries contained within a patient's medical records this way:

> ...The courts have been rather strict... in adhering to the rule that the admissibility of these hospital records should be limited to entries recording the details of the diagnosis and the medical and surgical treatment of the patient. ...It has been held that notes on the hospital record, made by the attending nurses and physicians **incident to a patient's treatment in the hospital, are admissible**.

Id., § 254.01(9) (emphasis added), citing *Anderson v. State*, 35 Ala. App. 111, 44 So. 2d 266 (1950).

McElroy's recitation of the general common law rule from other appellate opinions was followed by promulgation of the hearsay exceptions contained within Rules 803(4) and (6), Ala. R. Evid., which state:

> **Statements for Purposes of Medical Diagnosis or Treatment**
> Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause or external source therefore insofar as reasonably pertinent to diagnosis or treatment.

Id. This rule must be read in concert with the corresponding hearsay exception for business records of regularly conducted activity found at Rule 803(6):

> **Records of Regularly Conducted Activity**
> A memorandum report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or date compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the medical or circumstances of preparation indicate a lack of trustworthiness.

Id. Given these rules, Alabama's general rule is that the *entirety* of a patient's certified medical record is admissible, including notes from physicians, nurses, and consultants, so long as incident to or related to the patient's care, as they are deemed expressly excepted from the hearsay rule. Any questions about those entries go to their weight, not their admissibility.