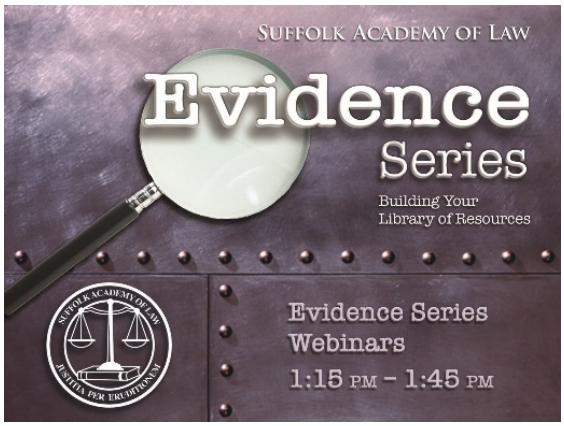
SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588



ZOOM WEBINAR

EVIDENCE SERIES
Business Records & Medical Records
Hearsay within Documents

FACULTY:
Douglas K. Stern, Esq.

MODERATOR: Hon. James A. McDonaugh

Coordinators: Hon. John J. Leo and Harry Tilis, Esq.

June 23, 2021
Suffolk County Bar Association, New York

Like us on:

"The opinions, beliefs and viewpoints expressed herein are those of the authors and do not necessarily reflect the official policy, position or opinion of the Suffolk County Bar Association, Suffolk Academy of Law, their i Board of Directors or any of their members"

Douglas K. Stern

Partner

Douglas K. Stern is a partner at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP.

Mr. Stern has over twenty five years of experience in the field of mental health, criminal and elder law. He was previously a partner with Reinach Wolf, Stern and Associates, LLP, and employed as a Principal Attorney with the Mental Hygiene Legal Service.

Mr. Stern has a breadth and depth of knowledge relating to mental health and elder law issues and has lectured extensively on various topics including psychiatry and the law, trial advocacy, select disability and elder law issues. Since 1998, he has been an adjunct professor of law at the St. John's University School of Law. In addition, Mr. Stern is widely published in his fields of concentration. He has presented at several hospital based “Grand Rounds” lectures and performed numerous in-service training programs. He has argued and briefed cases before the Appellate Division and the Court of Appeals. He has been appointed as Counsel, Court Evaluator and Guardian by the Supreme Court in the metropolitan area on well over 50 occasions. Throughout the course of his legal career, Mr. Stern has conducted and/or supervised well over 10,000 hearings and trials held pursuant to the Mental Hygiene Law.

Mr. Stern holds a J.D. from New York Law School and a B.A. from Hofstra University. He is admitted to practice law in New York State.

Medical Records
The Business Records Exception

Douglas K. Stern, Esq.

CPLR 4518

- 4518 - Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.
    - Must be recorded by an individual based upon their personal knowledge or given by an individual with personal knowledge with a business duty to transmit the information accurately.
    - Admissions within a medical record may be admissible if they meet other exceptions to the hearsay rule.
    - All Business records must be properly Authenticated (certified) to be admissible CPLR 3120

Admissibility Generally

- "[A] hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule if the entry is germane to the diagnosis and treatment of the patient." Berkowits v. Chaaya (138 ad2d 1050; App. Div. 2d Dept. - 2016).
- While the recorded observation of physicians and others would be admissible where they were germane to care and treatment and could be utilized by in court experts as the basis of their opinions, many of the entries included statements and remarks made by other parties who were not under an independent obligation to report. Consequently such portions should have been excluded for failure to meet the requisites of matter of Leon RR (48 NY2d 177). Cited In: In Re Harry M., 98 A.D.2d 201 (App. Div. 2d – 1983)

Admissibility Generally

- "Each participant in the chain producing the record, from the declarant to the final entrant, must be acting within the course of regular business or the declaration must meet the test of some other hearsay exception." Memenza v. Cole (131 AD3d 1020; App. Div. 2d - 2015).
- The record must be properly authenticated/certified. Matter of Jodel KK 189 AD2d 63 (App. Div. 3rd – 1993)
- The record must be made "at or near the time" of the occurrence of the clinically significant event. People v Kennedy, 68 NY2d 569; But, it should not be too rigid. Toll v. State of New York 32 AD2d 47 (App. Div. 2d – 1969).

CPLR 4532-A

- Set out the procedure for admitting graphic, numerical, symbolic or pictorial representations of medical or diagnostic tests of a party without the need to produce to the technician.
  - Still must be germane to treatment
  - A physician cannot testify to a diagnosis based upon a test result where the underlying "film" has not been received into evidence.
  - A physician cannot testify to an opinion based upon an x-ray without first producing the x-ray. Hambsch v. New York City Tr. Auth., supra, at 726, 480 N.Y.S.2d 195.
  - Written diagnostic reports are not admissible if the underlying "film" is not admitted or proven to be unavailable. Wagman v. Bradshaw 292 AD2d 84 (App. Div. 2d – 2002)

It's The Collateral!!!

- Clinical guidance on collateral sources: In general – communicating with "outside" individuals connected with the patient. There should be something specific the clinician is seeking from the collateral that would aid in diagnosing, treating, developing a safety plan, etc. The provider should get "collateral" if the actual patient was too impaired to provide any meaningful history, the patient isn't providing a useful history, the history being given is suspect for various reasons, or the patient is a minor.
- The majority of controversies over hearsay within medical records involves issues relative to the recording of information gathered from collateral sources.

Mea Culpe

- Admissions within clinical records: Is it an admission or an observation?
  - "If the entry is inconsistent with a position taken by a party at trial, it is admissible as an admission by the party, even if it is not germane to diagnosis or treatment, as long as there is evidence connecting the party to the entry." Robles v. Polytemp, Inc. 127 AD3d 1052 (App. Div. 2d - 2015).

  NOTE: A hearsay statement regarding the cause of an injury, even if it does not qualify as an admission, MAY, still be admissible if it is germane to diagnosis, care or treatment. Coker v. Bakkal Food, Inc., 52 AD3d 765 (App. Div. 2d – 2008).

Clinical Opinions – "The Office Chart"

- The Appellate Division Second Department in Wilson v. Bodian (1987) observed that courts were split as to whether physician's opinions contained within an office medial record are admissible. The Court held that such opinions were analogous to opinions contained in hospital medical records and found them to be admissible.
- The Second Department held that an Expert's reliance on a medical office chart was appropriate as long as the reliance was on clinical facts/observation and not on the treating physician's opinions. Murray v. Weisenfeld 37 AD3d 434,(2007)

The IME – Deny Thy Entry

- Typically the Independent Medical Exam (IME) report – think worker's comp, no fault cases, etc., are inadmissible as they are not considered business records and the physician-author typically is not available to testify. Seawright v. Crooks, 87 AD3d 1345, (App. Div. 4th - 2011)
- Similarly. Treating or expert physicians external narratives in support of litigation preparation, or letters offering an opinion as to causation are inadmissible. Matter of Brownstein-Becker v. Becker, 25 Ad3d 796, (App. Div. 2d – 2006).

In My Expert Opinion… Professional Reliability Exception

- "[T]he professional reliability exception to the hearsay rule…enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession." (see, Hambsch v. New York City Tr. Auth., supra, at 726, 480 N.Y.S.2d 195, 469 N.E.2d 516; see also, Romano v. Stanley, 90 N.Y.2d 444, 452, 661 N.Y.S.2d 589, 684 N.E.2d 19; Serra v. City of New York, 215 A.D.2d 643, 627 N.Y.S.2d 699; Flamio v. State of New York, 132 A.D.2d 594, 517 N.Y.S.2d 756). A/K/A The Hambsch professional reliability exception.
  - Some considerations include: The expert testimony must establish that the out of court material was professionally reliable in the clinical process at issue.
  - This scenario occurs quite often in child protective proceedings, and civil commitment and sexual confinement proceedings under the Mental Hygiene Law.
- What about conduit hearsay? In its essence, the Second department held that "Hambsch" material is admissible if it constitutes a mere link in the process expert's opinion and cannot serve as the singular basis for said opinion. Wagman v. Bradshaw 292 AD2d 89 (App. Div. 2d 2002)

People v. Goldstein
Into the Collateral Weeds…

- *People v. Goldstein*, 14 A.D.3d 32 – Court of Appeals - 2005
- Dr. Angela Hegarty – "a Forensic Psychiatrist" (non-treating physician) - who testified that interviews with non-parties was necessary to seek out "the truth" in order to make a determination if Goldstein was not criminally responsible at the time he committed the murder.
- Dr. Hegarty personally interviewed several witnesses which, in part, served as a foundation for her opinion that the defendant was criminally responsible.

People v. Goldstein

- The trial court (New York County), allowed Dr. Hegarty to tell the jury the substance of what the six witnesses reported to her.
- The jury convicted on second degree murder and rejected the "insanity" defense.
- Court of Appeals observed: The distinction between the admissibility of an expert's opinion and the admissibility of the information underlying it, when offered by the proponent, has received surprisingly little attention in this state (which perhaps accounts for the parties' failure to discuss it here). We have found no New York case addressing the question of when a party offering a psychiatrist's opinion pursuant to Stone and Sugden may present, through the expert, otherwise inadmissible information on which the expert relied. The issue of when a proponent may present inadmissible facts underlying an admissible opinion.

People v. Goldstein

- Since the prosecution's goal was to buttress Hegarty's opinion, the prosecution obviously wanted and expected the jury to take the statements as true. Hegarty herself said her purpose in obtaining the statements was "to get to the truth." The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context. (See Kaye et al., The New Wigmore: Expert Evidence § 3.7, at 19 [Supp 2005] ["(T)he factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a Constitutional prohibition"].) We conclude that the statements of the interviewees at issue here were offered for their truth, and are hearsay.

Clinical Opinions – "The Office Chart"

- The Appellate Division Second Department in Wilson v. Bodian (1987) observed that courts were split as to whether physician's opinions contained within an office medial record are admissible. The Court held that such opinions were analogous to opinions contained in hospital medical records and found them to be admissible.
- The Second Department held that an Expert's reliance on a medical office chart was appropriate as long as the reliance was on clinical facts/observation and not on the treating physician's opinions. Murray v. Weisenfeld 37 AD3d 434,(2007)

Questions?

SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend resources. All calls are private and confidentiality is protected under Judiciary Law Section 499. (Lawyer Assistance Committee)