

A patient sued a hospital for medical negligence, claiming that a nurse employed by the hospital failed to administer critical medication prescribed by the patient's treating physician during the patient's hospitalization.

At trial, to prove the nurse's failure to administer the prescribed medication, the patient has called the medical records librarian, who has authenticated the hospital's record of the patient's treatment, which contains no entry showing that the medication in question was administered.

Is the hospital record admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the nurse's testimony would be the best evidence of her actions in treating the patient.
- C. Yes, because, although hearsay, it is a statement against interest by agents of the hospital.
- D. Yes, because it is within the hearsay exception covering the absence of entries in business records.

Explanation:

Business records hearsay exception

Existing record Admissible as substantive evidence if:

(FRE 803(6)) made at or near time of recorded event (or act, opinion, condition, diagnosis)
made by or based on information from someone with personal knowledge *and*
made & kept as regular practice in course of regularly conducted business activities

Absence of record Admissible as substantive evidence if:

(FRE 803(7)) evidence is offered to prove matter did not occur or exist
record was regularly kept for that kind of matter *and*
opponent does not establish a lack of trustworthiness

FRE = Federal Rule of Evidence.

An out-of-court statement (eg, hospital record) offered to prove the truth of the matter asserted therein is generally inadmissible under the rule against hearsay. However, evidence that a **matter is *not* included in a business record is excepted from the hearsay rule** and may be offered as substantive evidence if:

the evidence is offered to **prove that a matter did not occur** or exist

a **record was regularly kept** for a matter of that kind *and*

the opponent does **not** establish a **lack of trustworthiness** for the source of that information.

Here, the authenticated hospital record is hearsay, but it falls within the hearsay exception covering the absence of entries in business records. That is because the missing entry in that record is being used to prove that the administration of medication—a matter that would regularly be recorded by the hospital—did not occur. And since there is no indication that the record is untrustworthy, it is admissible **(Choice A)**.

(Choice B) The [best evidence rule](#) requires that an original (or reliable duplicate) of a writing, recording, or photograph be produced to prove its contents. But this rule does not mandate the use of live testimony over a document.

(Choice C) The [statement against interest](#) hearsay exception applies to a statement that goes against the declarant's pecuniary, proprietary, or penal interest AND is made by a declarant who is *unavailable* as a witness. Since there is no indication that the nurse is unavailable, this exception does not apply here.

Educational objective:

The hearsay exception for the absence of entries in business records applies when (1) evidence is offered to prove that a matter did not occur or exist, (2) a record was regularly kept for a matter of that kind, and (3) the opponent does not establish a lack of trustworthiness.

References

Fed. R. Evid. 803(6) (business records hearsay exception).

Fed. R. Evid. 803(7) (absence of business records hearsay exception).

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