

In a medical malpractice suit by a plaintiff against his doctor, the plaintiff seeks to introduce a properly authenticated photocopy of his hospital chart. The chart contained a notation made by a medical resident that an aortic clamp had broken during the plaintiff's surgery. The resident made the notation in the regular course of practice, but he had no personal knowledge of the operation and cannot remember which of the operating physicians gave him the information.

Is the photocopy of the plaintiff's hospital chart admissible?

- A. No, as a violation of the best evidence rule.
- B. No, because it is hearsay within hearsay.
- C. Yes, as a record of regularly conducted activity.
- D. Yes, as recorded recollection.

Explanation:

Business records hearsay exception

(FRE 803(6))

Business record admissible if it was:

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 a regular practice in the course of regularly conducted business activities

FRE = Federal Rule of Evidence.

Under the hearsay rule, out-of-court statements (eg, notations in a hospital chart) are generally inadmissible when offered to prove the truth of the matter asserted therein (eg, clamp broke during surgery). However, one **hearsay exception** applies to **business records** that were:

made **at or near the time** of the recorded event (or act, condition, opinion, diagnosis)

made by or based on information from someone with **personal knowledge** of that event
and

made and kept as a **regular practice** in the course of **regularly conducted business activities**.

Hospital charts are maintained as a regular practice in the regular course of hospital activities and are created near the time of the recorded event. And though the resident here did not have personal knowledge of the operation, the chart was based on information from someone who did—an operating physician. The chart is therefore admissible under the business records exception. And since duplicates are generally admissible to the same extent as original writings under the **best evidence rule**, a photocopy of the hospital chart is admissible (**Choice A**).

(Choice B) **Hearsay within hearsay** occurs when one hearsay statement is contained within another hearsay statement—eg, a patient claims her husband caused her injury and her physician notes that on her chart. When this occurs, both statements are inadmissible unless *both* are excepted or excluded from hearsay.

(Choice D) A **recorded recollection** is a hearsay exception for records that (1) contain information that a witness once knew but cannot recall well enough to testify, (2) were made or adopted by the witness when a matter was fresh in his/her mind, and (3) accurately reflect the witness's knowledge at the time the record was made. But this exception is inapplicable here because the chart is not being used to supplement a witness's testimony.

Educational objective:

Business records are excepted from hearsay if they were (1) made near the time of the recorded event, (2) made by or based on information from one with personal knowledge, and (3) made and kept as a regular practice in the course of regular business activities.

References

Fed. R. Evid. 803(6) (records of a regularly conducted activity).

Fed. R. Evid. 1003 (admissibility of duplicates).

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