

In a civil action for personal injury, a man alleges that he was beaten up by a bouncer during an altercation in a crowded bar. The bouncer's defense is that he was not the person who hit the man. To corroborate his testimony about the cause of his injuries, the man seeks to introduce, through the hospital records custodian, a notation in a regular medical record made by an emergency room doctor at the hospital where the man was treated for his injuries. The notation is: "Patient says he was attacked by the bouncer at the bar."

Is the notation admissible?

- A. No, as hearsay not within any exception.
- B. No, unless the doctor who made the record is present at trial and available for cross-examination.
- C. Yes, as a statement made for the purpose of medical diagnosis or treatment.
- D. Yes, as hearsay within the exception for records of regularly conducted activity.

Explanation:

Common hearsay exceptions

Declarant unavailable	Former testimony
	Dying declaration
	Statement against interest
	Statement of personal or family history
	Statement offered against party that wrongfully caused declarant's unavailability
Declarant's availability irrelevant	Present sense impression
	Excited utterance
	Mental state or physical condition
	Medical diagnosis or treatment
	Recorded recollection
	Business or public records
	Learned treatises, periodicals, or pamphlets
	Judgment of previous conviction
	Residual (catch-all) exception

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein. This type of statement is considered inherently unreliable and therefore is only admissible if it falls within an **exclusion** or exception to the rule against hearsay. One **exception** raised here applies to **records of regularly conducted activity**—ie, records that are:

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.

As a result, this exception would apply to statements in medical records that contain information within the personal knowledge of health care professionals, such as the patient's vital signs or the physician's diagnosis. But statements that merely report how a patient was injured (as seen here) would not fall within this exception (**Choice D**).

Another hearsay **exception** raised here applies to statements made for **medical diagnosis or treatment**—ie, statements that describe the declarant's medical history, past or present symptoms, or the **inception or general cause of those symptoms**. This exception would apply to statements about *how* a patient was injured—not *who* is responsible for that injury

(as seen in the notation) **(Choice C)**. And since no other hearsay exclusion or exception applies, the notation is inadmissible.

(Choice B) A record of regularly conducted activity is admissible regardless of whether the person who made the record is present at trial and available for cross-examination. So had the notation met this exception, the doctor's presence at trial would be irrelevant.

Educational objective:

Medical records containing information within the personal knowledge of health care professionals fall within the hearsay exception for records of regularly conducted activity. And statements in those records that describe the declarant's medical history, symptoms, or their general cause fall within the hearsay exception for statements made for medical diagnosis or treatment.

References

Fed. R. Evid. 803(4) (hearsay exception for statements made for medical diagnosis or treatment).

Fed. R. Evid. 803(6) (hearsay exception for records of regularly conducted activity).

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