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7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF

8 THE PEOPLE OF THE STATE OF) Case No.
CALIFORNIA,)
9)
Plaintiff,) POINTS AND AUTHORITIES IN
10) SUPPORT OF THE ADMISSIBILITY
vs.) OF CERTAIN PORTIONS OF
11 HOSPITAL) RECORDS PERTAINING TO THE
,) PHYSICAL EXAMINATION OF THE
12) ALLEGED VICTIM
Defendant.)
13)

14 I.

15 **FACTUAL BACKGROUND**

16 The prosecution seeks the admission of hospital records
17 pertaining to the physical examination of (insert victim's name).

18 Contained in these records are three basic categories of
19 information:

20 (1) hearsay statements from the child, his/her parents
21 and/or police;

22 (2) opinions and conclusions of the examining physician;
23 and

24 (3) personal factual observations of the examining
25 physician.

26 II.

27 **THE EXAMINING PHYSICIAN'S REPORT IS ADMISSIBLE**
28 **SUBJECT TO CERTAIN LIMITATIONS.**

1
2 **A. THE BUSINESS RECORD EXCEPTION.**

3 Certain exceptions to the hearsay rule may permit parts of a
4 physician's examination report to be admitted at trial. Evidence
5 of a writing made in the regular course of business as a record
6 of an act, condition, or event is admissible if:

7 (1) the writing was made at or near the time of the act,
8 condition, or event;

9 (2) the custodian of the record or another qualified
10 witness testifies to its identity and the mode of its
11 preparation; and

12 (3) the sources of information and the method and time of
13 preparation of the writing indicate trustworthiness. (Evidence
14 Code §1271.)

15 **B. LIMITATIONS ON THE BUSINESS RECORDS EXCEPTION.**

16 Hospital records can be admitted if properly authenticated.
17 (People v. Diaz (1992) 3 Cal.4th 495, 535; People v. Moore (1970)
18 5 Cal.App.3d 486, 492-493.) The correct procedure was discussed
19 many years ago in People v. Gorgol (1953) 122 Cal.App.2d 181,
20 300:

21 "If a proper foundation is laid, the fact that the
22 records are hearsay and that the particular ... person
23 making the record has not been called, does not
24 preclude their admission. Nor does the fact that they
25 contain inadmissible matter prevent their admission.
26 Such parts should be omitted or proper instruction of
the court given concerning them. Admissible matter
seems to be such matter as is customarily contained in
a hospital record, for example the data required the
above mentioned Hospital Manual, and such matter as
would be admissible were the person making the record
present in court."

27 Determining whether a proper foundation has been laid for
28 the admission of a hospital record as a business record is within

1 the trial court's discretion. (In re Troy D. (1989) 215
2 Cal.App.3d 889, 902.) Admissibility of such records is limited.
3 The courts have recognized that the medical records contain
4 hearsay statements, opinions, conclusions and personal factual
5 observations. The courts have consistently limited the admission
6 of hospital records in the following areas:

7 (1) Hearsay Statements:

8 The business records exception was not devised to allow
9 unreliable hearsay to be introduced merely because it was reduced
10 to writing in a book of records. (Witkin, Cal. Evidence 3rd
11 (1986) § 772.) Thus, the out of court statements made by (Insert
12 victim's name) alleging sexual abuse cannot be offered to prove
13 the truth of the matter asserted, either orally or in written
14 form. The "who, what, or when" of the specific allegations are
15 not admissible. (In re Cheryl H. (1984) 153 Cal.App.3d 1098,
16 1120-1121.)

17 Hospital records often contain matters learned from the
18 patient which are not within the personal knowledge of the person
19 creating the written record. Such matters are not admissible.
20 (People v. Williams (1960) 187 CA2d 355, 363 [hospital records of
21 victim's psychotic behavior consisting of hearsay statements by
22 victim and police rejected by court].)

23 (2) Opinions and Conclusions of the Examining Physician:

24 Opinions and conclusions are not admissible under Evidence
25 Code § 1271. (People v. Terrell (1955) 138 Cal.App.2d 35, 57
26 [physician's opinion that patient had a criminal abortion
27 inadmissible]; People v. Reyes (1974) 12 Cal3d 486, 502-503
28 [psychiatrist's opinion that homicide victim suffered from sexual

1 psychopathology was not "act, condition, or event" within the
2 meaning of Evidence Code § 1271]; In the Matter of Cheryl H.,
3 supra, 153 CA3d at p. 1120-1121 [treating psychiatrist's opinion
4 that a certain person has molested Cheryl H. was inadmissible
5 opinion testimony].)

6 (3) Personal Factual Observations of the Examining Physician:

7 An examining doctor can obviously testify as a percipient
8 witness to his or her first-hand observations regarding the
9 physical condition of a patient. These facts are "customarily
10 contained" in hospital reports (per Gorgol), are normally entered
11 in the regular course of medical business, near in time to the
12 observation and in order to preserve such record, and the source
13 of the information and the method of preparing the record are
14 such as to indicate trustworthiness (per Evidence Code § 1271).
15 (Also see People v. Beeler (1995) 9 Cal.4th 953, 981 [doctor's
16 conclusion concerning cause of death (a bullet wound to the
17 heart), was based on direct observation and hence admissible].)

18 **III**

19 **ADMISSIBILITY OF EXPERT WITNESS TESTIMONY REGARDING**
20 **THE ORIGINAL MEDICAL REPORT.**

21 Both the defense and prosecution should be able to use
22 expert testimony to evaluate the facts contained in the medical
23 reports in question. Such testimony is admissible because the
24 subject matter of physical symptoms in a sexual abuse case is
25 sufficiently beyond common experience that the opinion of an
26 expert would assist the trier of fact. (Evidence Code § 801(a).)

27 An expert opinion must be based on matter perceived, or
28 personally known by the witness, or on hypotheses reasonably

1 supported by the evidence. (Evidence Code § 801(b).) Conjecture
2 and speculation are improper matters to support an expert's
3 opinion because they are not sufficiently reliable. (Evidence
4 Code § 801(b).) An otherwise admissible expert opinion is not
5 made inadmissible by the unavailability (due to death or
6 otherwise) of that person. (Evidence Code § 804(d); People v.
7 Clark (1992) 3 Cal.4th 41, 159.)

8 If a statement relied upon by a testifying expert is the
9 opinion of another non-testifying expert, the qualifications of
10 the non-testifying expert should be shown to establish that the
11 testifying expert's reliance on such opinion was reasonable.
12 (Evidence Code § 801(b); People v. Aylwin (1973) 31 CA3d 826, 841
13 [a drug expert reasonably relied on a participant's description
14 of crime scene events for manner of how a drug was
15 manufactured].)

16 **CONCLUSION**

17 The examining physician's report is admissible subject to
18 limitation. It must be properly authenticated and excised of
19 inadmissible hearsay and opinions/conclusions.

20 Dated:

21 Respectfully submitted,
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24 Attorney for Defendant
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