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Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

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

I.

FACTUAL BACKGROUND

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

Contained in these records are three basic categories of information:

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

(2) opinions and conclusions of the examining physician;

and

(3) personal factual observations of the examining physician.

II.

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

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

3 Certain exceptions to the hearsay rule may permit parts of
4 a physician's examination report to be admitted at trial.
5 Evidence of a writing made in the regular course of business as
6 a record 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

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

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

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

22 "If a proper foundation is laid, the fact that the
23 records are hearsay and that the particular ... person
24 making the record has not been called, does not
25 preclude their admission. Nor does the fact that they

1 contain inadmissible matter prevent their admission.
2 Such parts should be omitted or proper instruction of
3 the court given concerning them. Admissible matter
4 seems to be such matter as is customarily contained in
5 a hospital record, for example the data required the
6 above mentioned Hospital Manual, and such matter as
7 would be admissible were the person making the record
8 present in court."

9
10 Determining whether a proper foundation has been laid for
11 the admission of a hospital record as a business record is
12 within the trial court's discretion. (In re Troy D. (1989) 215
13 Cal.App.3d 889, 902.) Admissibility of such records is limited.
14 The courts have recognized that the medical records contain
15 hearsay statements, opinions, conclusions and personal factual
16 observations. The courts have consistently limited the
17 admission of hospital records in the following areas:

18 (1) Hearsay Statements:

19
20 The business records exception was not devised to allow
21 unreliable hearsay to be introduced merely because it was
22 reduced to writing in a book of records. (Witkin, Cal. Evidence
23 3rd (1986) § 772.) Thus, the out of court statements made by
24 (Insert victim's name) alleging sexual abuse cannot be offered
25 to prove the truth of the matter asserted, either orally or in

1 written form. The "who, what, or when" of the specific
2 allegations are not admissible. (In re Cheryl H. (1984) 153
3 Cal.App.3d 1098, 1120-1121.)

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

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

11 Opinions and conclusions are not admissible under Evidence
12 Code § 1271. (People v. Terrell (1955) 138 Cal.App.2d 35, 57
13 [physician's opinion that patient had a criminal abortion
14 inadmissible]; People v. Reyes (1974) 12 Cal3d 486, 502-503
15 [psychiatrist's opinion that homicide victim suffered from
16 sexual psychopathology was not "act, condition, or event" within
17 the meaning of Evidence Code § 1271]; In the Matter of Cheryl
18 H., supra, 153 CA3d at p. 1120-1121 [treating psychiatrist's
19 opinion that a certain person has molested Cheryl H. was
20 inadmissible opinion testimony].)

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

22 An examining doctor can obviously testify as a percipient
23 witness to his or her first-hand observations regarding the
24 physical condition of a patient. These facts are "customarily
25

1 contained" in hospital reports (per Gorgol), are normally
2 entered in the regular course of medical business, near in time
3 to the observation and in order to preserve such record, and the
4 source of the information and the method of preparing the record
5 are such as to indicate trustworthiness (per Evidence Code §
6 1271). (Also see People v. Beeler (1995) 9 Cal.4th 953, 981
7 [doctor's conclusion concerning cause of death (a bullet wound
8 to the heart), was based on direct observation and hence
9 admissible].)

11 III

12 AMMISSIBILITY OF EXPERT WITNESS TESTIMONY REGARDING 13 THE ORIGINAL MEDICAL REPORT.

14
15 Both the defense and prosecution should be able to use
16 expert testimony to evaluate the facts contained in the medical
17 reports in question. Such testimony is admissible because the
18 subject matter of physical symptoms in a sexual abuse case is
19 sufficiently beyond common experience that the opinion of an
20 expert would assist the trier of fact. (Evidence Code §
21 801(a).)

22 An expert opinion must be based on matter perceived, or
23 personally known by the witness, or on hypotheses reasonably
24 supported by the evidence. (Evidence Code § 801(b).)
25 Conjecture and speculation are improper matters to support an

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

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

14
15 **CONCLUSION**

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

19 Dated:

20 Respectfully submitted,
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24 Attorney for Defendant
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