

Recent decision on expert testimony about medical records

In People v. Dean (May 26, 2009) 09 C.D.O.S. 6352, the defendant appealed a judgment and order committing him to the State Department of Mental Health as a sexually violent predator (SVP). The SVP commitment and appeal are civil proceedings. Part of the Dean's appeal was based on his contention that the State's medical experts testified—over Dean's objections—about matters that were otherwise inadmissible hearsay. Dean contended that by allowing that testimony to come in, the court abused its discretion and deprived him of a fair trial. This decision is of interest because it cites to Garibay v. Hemmat (2008) 161 Cal.App.4th 735.

On appeal, Dean argued that the State's experts were allowed to testify to inadmissible hearsay in three different subject areas, one of which was “information gleaned from the records of ASH [Atascadero State Hospital] and other institutions.” Interestingly, according to Footnote 5, “[t]he respective medical records were not marked as exhibits, nor were they admitted into evidence pursuant to Evidence Code sections 1271 [Business Records exception] or 1272 [Absence of Record as Evidence]. Hospital and prison records, if properly authenticated, fall within the umbrella of the business record exception.” The issues raised by Dean would not have existed had the State moved the ASH and other records into evidence under the Ev. C. 1271.

Despite the fact the records were not authenticated or admitted, of the experts' specific references to and reliance on them the court said:

As a general rule, out-of-court statements offered to support an expert's opinion are not hearsay because they are not offered for the truth of the matter asserted. Instead, they are offered for the purpose of assessing the value of the expert's opinion.

The court observed, however, that the State's experts' “extensive” testimony as to the details of the ASH and other institutional records was “problematic.”

As earlier indicated, “An expert may generally base his opinion on any ‘matter’ known to him, including hearsay not otherwise admissible, which may ‘reasonably...be relied upon’ for that purpose. (Cite omitted). Here, Drs. Goldberg and Starr could reasonably rely on and base their opinions on the ASH and other institutional records in forming their opinions. (See Garibay v. Hemmat (2008) 161 Cal.App.4th 735, 743 [hospital records can be used as a basis for expert opinion].)”

The court did find that the State's experts' testimony about the details of the ASH and other institutional records was inadmissible hearsay. Also in Footnote 5, the court cited to Garibay for the proposition that a proper foundation laid by authentication of the records in conformance with the Evidence Code “ensures that the entries are made by personal knowledge, not on secondhand information days following the act, condition or event.” (Garibay v. Hemmat, supra 161 Cal.App.4th at p. 742.)

While noting this is the preferred route of introducing medical record evidence relied on and referred to in detail by medical experts, the court did say that “Experts can properly and credibly place before the jury the matters they relied upon and the nature of those matters, without testifying to the specific details of the documentary entries not otherwise admitted into evidence.” However, an expert’s inability to point to specific entries or items referred to and relied upon in reaching his or her opinions may affect his or her credibility.

The court in Dean found that while the trial court erred in letting the otherwise inadmissible evidence in, the error was harmless because the “court more than once gave limiting instructions to the jury.”¹ One such instruction was “[A]n expert witness may testify that in reaching their conclusions as expert witnesses they considered statements made by other persons and sources. Now you may consider those statements only to evaluate the expert’s opinion. Do not consider those statements as proof that the information contained in the statements is true or false.” In addition, much of the evidence that came in through the experts about what the ASH records showed had happened at Atascadero, also came in through Dean; he admitted he did not finish the treatment program, was abusive to the female staff and possessed drugs during his confinement.

Though the court in this case found the error was harmless, it did refer to and rely on the principles set out in Garibay regarding the importance of authentication and admission of medical and other institutional records used by experts in support of their opinions. This appears to be particularly true if specifics of the records will be testified to and opined upon, rather than generically used to form an overarching opinion. In a medical negligence setting, where the expert’s opinions are always dissected to determine the basis for the opinion and what the expert relied upon in forming an opinion, under Garibay, each part of a medical record used by and relied upon by the expert should be admitted (whether in the MSJ—as in Garibay—or other setting).

¹ Though in Footnote 6, the court cautioned that a limiting instruction may not remedy the problem or prejudice caused by admission of the hearsay evidence.