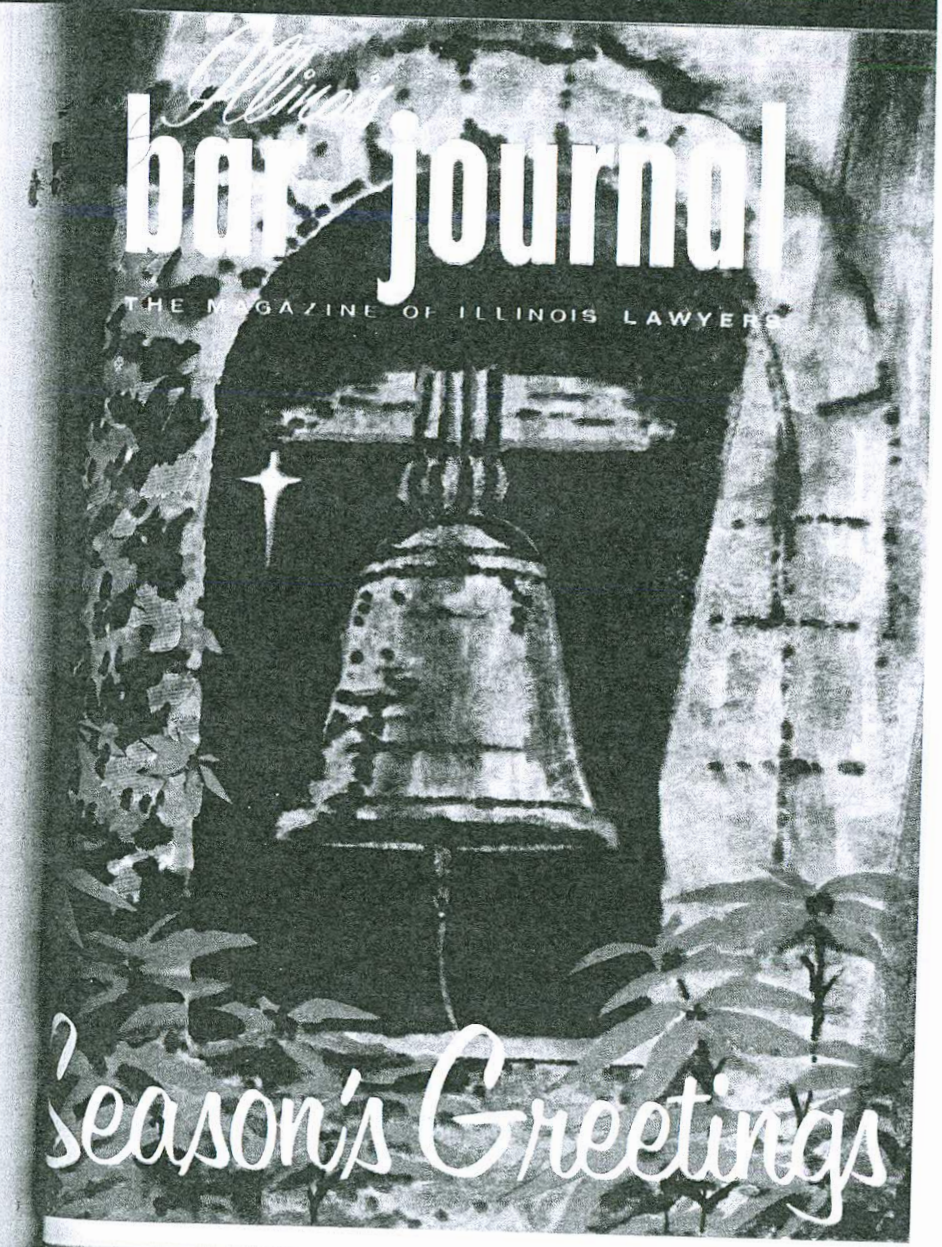

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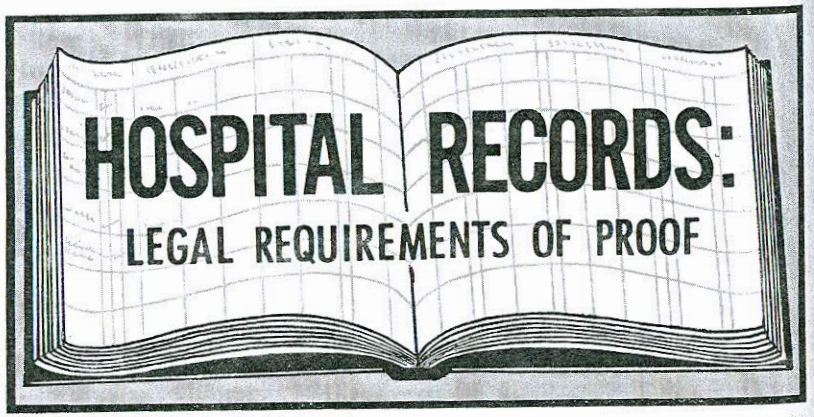
The author discusses some of the major problems of use of hospital records in Illinois courts. The hearsay rule, relevant exceptions thereto, refreshing recollection and impeachment are among the topics covered in this article which is based upon a lecture given at the recent annual Trial Evidence Seminar of the Illinois Institute for Continuing Legal Education.



BY NORMAN M. GARLAND*

There are primarily three ways that hospital records may be used as proof in litigation:

1. As an aid in the preparation for trial. If hospital records may be obtained in advance of court appearance,[1] such records will serve as the vehicle for discovery, investigation and preparation of trial strategy.

2. As independent evidence of the facts contained therein. If the hospital record contains evidence of a fact in issue and such record may be introduced in evidence at trial, other sources of proof, such as testimony of nurses, doctors or technicians, might be unnecessary.

3. As an aid in the presentation of testimonial proof. Notes, memoranda or other entries in the hospital record may be used to refresh the recollection of a stumbling witness or to impeach, by showing the making of a prior inconsistent statement, an opposing witness.

This discussion will not deal with hospital records as an aid in the preparation for trial. Moreover, in discussing the use of hospital records as independent proof and as an aid in the presentation of testimonial proof, only the rules of evidence governing such problems will be treated. There will be no demonstration of how to apply the principles discussed. Finally, the law of the State of Illinois will be of principal concern.

* The author is grateful to Mr. Stewart Zelmar for assistance in the preparation of this analysis.

1. Whether and how hospital records may be obtained in pre-trial discovery are topics beyond the scope of this discussion. The same is true for other threshold questions suggested by an inquiry as to their producibility, such as, whether in a given case the physician-client privilege precludes such production.

Classification of Hospital Records

Hospital records may be classified as those recording the fact of routine business occurrences, or those recording non-routine details of occurrences. For example, the record may show a charge for medication or that medication was given at a particular time on a particular day. On the other hand the same record, or a portion of it, may contain the notation that medication was given the patient because of the doctor's belief that a particular malady required treatment.

Hospital records may also be classified as those containing objective observations of occurrences, or those containing a statement of the author's opinion as to the occurrence. The medication example above is applicable here as well: An objective observation of the occurrence would be that medication was administered; that it was administered because of the doctor's belief that a particular malady required treatment would be a statement of opinion.

Hospital records may be classified as those containing the author's objective observations of occurrences, or those which contain statements of others accompanying the event noted. Using the medication example again, a nurse's notation that the doctor said he was ordering certain medication for a certain ailment would distinguish the latter category from the former.

It is arguable that there is a common distinction between each of the classification groups defined above. On the one hand, the recordation of events, and on the other hand, the recordation of some subjective observation or assertion accompanying the event. However, there are problems with attempting to draw such a simple distinction. For example, one may be inclined to term a nurse's notation that the patient had a temperature of 104° at 3:00 p.m. as an objective observation. But such observation is an assertion of the nurse's conclusion that an accurate gauge of the patient's temperature is 104°. Another, and perhaps a better, example of this problem is a nurse's notation: "patient resting comfortably."

Aside from the considerations which may, in any given case, change one's view, such as how important the observation is to the outcome of the case, the admissibility of such evidence may turn upon such classification. This practical result argues for imposing upon all hospital records a different classification, one which probably spans those mentioned so far. That is, perhaps the law should distinguish between those records which have a guarantee of reliability from those which have no such guarantee. Such guarantee may stem from two sources: "(1) an efficient clerical system, and (2) the fact that they [the contents of the records] are the kind of observations on which competent men would not differ."[2] It is submitted that such classification of hospital records may be of some usefulness in Illinois due to the statutory restriction upon the admissibility of medical and hospital records within the business records exception to the hearsay rule.

Introduction of Hospital Records into Evidence as Independent Proof of Matters Therein Contained

In order for hospital records to be admitted into evidence as independent proof of the matters therein contained, either the record or a portion of it must come within an exception to the hearsay rule. One must bear in mind that as independent proof, such record is offered either in the absence of the

2. New York Life Insurance Co. v. Taylor, 147 F. 2d 297 (D.C. Cir. 1945).

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person who could give testimonial proof of such facts as the records contain, or notwithstanding the presence of such a person.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in such a statement. This is the generally accepted definition of hearsay.[3] Thus, a written statement, which depends upon the credibility of the author or some other out-of-court declarant for its value, when offered to prove the assertions therein, is hearsay. So hospital records containing everything from billings to notations of bowel movements are technically hearsay.

A very important exception to the hearsay rule is that which allows written statements to be admitted into evidence if they are:[4]

> made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. [Rule 236, Illinois Supreme Court Practice, Rules; Ill. Rev. Stat. Ch. 110A §236(a) (1967)].

This provision is the same as that governing the business records exception under federal law[5] and the law of a number of other states. The source of the business records statutes in many jurisdictions, including Illinois, is the Model Business Records as Evidence Act.[6]

Hospital records, as well as other records with a potential to contain crucial hearsay assertions of both litigants and bystanders, have created confusion in the determination of the applicability of such statutes. Notwithstanding a provision of the New York Civil Practice Act, following language similar to that of the Illinois statute quoted above, that "all other circumstances of the making of such writing . . . may be shown to affect its weight, but . . . not . . . its admissibility,"[7] the Court of Appeals of New York held a policeman's report of an accident containing statements of bystanders was not admissible under the statute.[8] In *New York Life Insurance Co. v. Taylor*,[9] the Court of Appeals for the District of Columbia Circuit found that hospital records containing "proof" that a patient had attempted to commit suicide were inadmissible to prove suicide in defense to a claim on an insurance policy. The court found that the Federal Shop Book Rule, containing the same provisions as the New York and Illinois statutes, did not permit such records to be admitted since the records were "not offered to prove routine facts such as the date of admission to the hospital, the names of the attending physicians, etc."[10]

Illinois courts have treated hospital records the same as "book records," provable in accordance with a statute dating back to 1867[11] requiring, *inter alia*, that (1) there must be proof that the business entries came from books of original entry; (2) the person who made the entry must be present in court as a witness if not deceased or a non-resident of the state; and (3) the entries must have been made as part of the duty or employment of the party so testifying.[12] Thus, in *Boss v. Illinois Central R. R. Co.*,[13] the appellate court reversed a trial court decision excluding a hospital record where the doctor who produced the "clinical record" at trial testified he obtained it a few hours before from the bookkeeper at the hospital, that it was in the handwriting of a nurse at the hospital, that he had seen her handwriting many times and recognized it, that she had attended many cases he had at the hospital and that she had died before trial. Another doctor testified that he knew the records were true and correct and made by the deceased nurse. On this basis the court concluded that the records were "sufficiently identified" as to be admissible.

In *Wright v. Upson*,[14] the Illinois Supreme Court held that the admission of an entire hospital record was erroneous because it was the product of two or more nurses and only one nurse was called to testify "as to the correctness" of the entries she had made and when she had entered them. The Court stated:

3. See, 5 WIGMORE, EVIDENCE §1361 (3d ed. 1940); MCCORMICK, EVIDENCE §225 (1954); CLEARY HANDBOOK OF EVIDENCE §17.1 (1963); Proposed Rules of Evidence for United States Courts and Magistrates, Rule 8-01(c). Cross examination is an essential element of the rule excluding hearsay evidence. Novicki v. Department of Finance, 373 Ill. 342, 26 N.E. 2d 130 (1940). For an analysis of the theory underlying the hearsay rule see 5 WIGMORE, EVIDENCE §1362 (3d ed. 1940); MCCORMICK, EVIDENCE §224 (1954).

4. See also Ill. Rev. Stat., Ch. 38, §115-5(a) for an identical provision relating to evidence in criminal cases.

5. The Federal Business Records Act, 28 U.S.C. §1732 (1968) contains the same language as the Illinois provisions.

6. See, MCCORMICK, EVIDENCE §289 (1954). The Model Act (circa 1927) was used in formulating the Uniform Business Records as Evidence Act, promulgated by the Commissioners on Uniform State Laws in 1936. See MCCORMICK, EVIDENCE §289 at p. 607 nn. 6-8.

7. Section 374-a, N.Y. Civil Practice Act (1928), cited in Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).

8. Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).

9. 147 F. 2d 297 (D.C. Cir. 1945).

10. *Id.* at 300.

11. Ill. Rev. Stat., Ch. 51, §3 (1967).

12. See Note, 41 Ill. L. Rev. 282, 283 and n. 10 (1946).

13. 221 Ill. App. 504 (1921).

14. 303 Ill. 120, 135 N.E. 209 (1922).

> If the hospital record is admissible at all, it is for the same reason that books of account are admissible, and the same character of proof is required, and all persons who make entries therein are required to testify to their correctness before they are admitted in evidence.[15]

This requirement for admissibility of hospital records in evidence has been the rule in Illinois for over forty years, with at least one possible exception. In 1940 the Chicago Municipal Court adopted a copy of the Federal Shop Book Rule. This rule, Rule 70, was apparently approved by the Illinois Appellate Court in 1945 in *Bell v. Bankers Life and Casualty Co.*,[16] in which the court affirmed the trial court's admission of county hospital records for the purpose of proving age.[17] The cases after *Bell* follow the *Wright v. Upson* rule and require identification by all authors.[18]

In 1967, the Illinois Supreme Court adopted the Federal Shop Book Model Act rule in its new Rule 236. As noted at the time, the new rule sought to bring "uniformity to the state and federal practice with respect to the admission of business records in evidence."[19] Moreover, the rule was not viewed as a "major change in Illinois law."[20]

Medical records as well as police accident reports were excepted from the coverage of the statute and were to be governed by the case law "because the federal decisions are in conflict as to the admissibility of such documents" and it was not deemed wise either to adopt the confusion of the federal cases or "compose a detailed code" on the subject.[21] The same commentator asserted that the new rule does not render such evidence inadmissible; "it simply leaves their admissibility to the case law."[22] However, the case law is based on the "book records" statute and other exceptions to the hearsay rule.

On the other hand, the statute is limited in its exclusion from the exception to "medical records." From this it is arguably apparent that the statute was intended to allow such hospital records as are of the traditional business records variety to fall within the statutory exception to the hearsay rule. Under this view, bookkeeping entries would be admissible to prove dates of entry into and departure from the hospital, and operating room logs would be admissible to prove that a particular doctor was present during an operation or the duration of an operation. This interpretation of the statute is supported by the fact that the Criminal Code provision which defines the business records exception in criminal cases specifically extends beyond mere medical records:[23]

> No writing or record made in the regular course of any business shall become admissible as evidence by the application of this Section if:
>
> (1) Such writing or record has been made by anyone in the regular course of any form of hospital or medical business. . . .

This language, when contrasted with the "medical records" language of Rule 236, seems to carve out, under Rule 236, hospital business records which may be distinguished from medical records. Unfortunately, there have been no cases decided which would assist in the clarification of this point.

The effect of excluding hospital records from the statute or rule stating the business records exception to the hearsay rule in Illinois is to require testimony of those who prepare hospital records to prove the facts contained therein, unless the records come within some other exception to the hearsay rule or the parties stipulate as to their admissibility.[24] It is possible for some assertions in medical or hospital records to be within some exception other than the exception for past recollection recorded, discussed below. However, in order for such other exceptions to apply, it usually is necessary to prove the fact that the statement contained in the record was made. Without the business records exception, it is improbable that some other exception will save the day, although it is possible, as for example where a party adopts a physician's statement as an admission.[25]

15. *Id.* at 144, 135 N.E. at 218.

16. 327 Ill. App. 321, 64 N.E. 2d 204 (1945).

17. For a discussion of the history of the admissibility of hospital records in Illinois as well as the history of Chicago Municipal Court Rule 70, see Note, 41 Ill. L. Rev. 282 (1946).

18. See, e.g., People v. Wallace, 35 Ill. 2d 620, 221 N.E. 2d 655 (1966); People v. De Simone, 67 Ill. App. 2d 249, 214 N.E. 2d 305 (1966); Stewart v. Du Plessis, 42 Ill. App. 2d 192, 191 N.E. 2d 622 (1963); Flesberg v. Prince Warehouse Co., Inc., 37 Ill. App. 2d 22, 184 N.E. 2d 813 (1962).

19. Tone, *Comments on the New Illinois Supreme Court Rules*, 48 Chicago Bar Record 47, 51 (1967).

20. *Ibid.*

21. *Ibid.*

22. *Ibid.*

23. Ill. Rev. Stat., Ch. 38, §115-5(c) (1967).

24. A case dealing with the application of Rule 236, People v. Tucker, 106 Ill. App. 2d 62, 245 N.E. 2d 638 (1969), was disposed of on the basis of the fact the medical records, "containing the conclusions of doctors and nurses" were the subject of a stipulation. The stipulation, according to the Court, admitted the truthfulness of the later disputed doctor's report, "and there was no need for further evidence as to the correctness of the entries made."

25. See, e.g., Braswell v. N.Y., Chicago & St. Louis R.R. Co., 60 Ill. App. 2d 120, 208 N.E. 2d 358 (1965).

Stanton Dotson (left), Mattoon, State's Attorney of Coles County, converses with John P. Ewart, also of Mattoon, at the dinner honoring ISBA President H. Ogden Brainard, Charleston, on October 13 at the Charleston Country Club.

admission of the document itself but rather to the nurse's reading of the contents.

Use of Hospital Records as an Aid in the Presentation of Testimonial Proof

There are two primary uses of hospital records as an aid to the presentation of testimonial proof: to refresh the recollection of a witness and to test the credibility of a witness.

As the discussion of the past recollection recorded exception to the hearsay rule above may have implied, that rule is susceptible to confusion with the rule governing use of writings to refresh the recollection of a witness. Even if a writing is not admissible, it may be used by a witness once it is shown that the witness has no independent recollection of the events but that a writing or other document[33] exists which would aid the witness in recalling the events.

Thus, it is not necessary for the document to have been prepared by the witness himself. Moreover, the witness may refer to the document to refresh his recollection prior to appearing in court.[34] Once the document is used to refresh recollection and the witness can state he has an independent recollection of the matters described in the writing, the document itself is not admissible in evidence, nor is the witness permitted to read from it.[35]

Use of written documents, including hospital records, for purposes of testing credibility involves impeachment by prior inconsistent statements. A written statement contrary to testimony given by a witness may be proven during cross examination. However, there must be a proper foundation lain before proof of the prior statement is permitted. That foundation may be lain by directing the attention of the witness to the time, place and circumstances of the statement and its substance or, if the statement is in writing, "by permitting the witness to read the statement and proving by him or others that he wrote it himself, or that what he said was reduced to writing and was signed by him."[36]

33. Illinois courts have approved the use of various matters to refresh recollection: e.g., photographs, Paden v. Rockford Palace Furniture Co., 220 Ill. App. 534 (1921); a pleading, Dunlap v. Berry, 4 Scam. 327 (1843); and a newspaper article, Clifford v. Drake, 110 Ill. 135 (1884).

34. See, People v. Griswold, 405 Ill. 533, 92 N.E. 2d 91 (1950).

35. See, Wolf v. City of Chicago, 78 Ill. App. 2d 337, 223 N.E. 2d 231 (1966).

36. Esderts v. Chicago, Rock Island & Pacific R.R. Co., 76 Ill. App. 2d 210, 222 N.E. 2d 117 (1966).

Attorneys James F. Lemna (left), Tuscola, and William E. Larrabee, Mattoon, attended the dinner honoring ISBA President H. Ogden Brainard, Charleston, on October 13 at the Charleston Country Club. The Coles-Cumberland County Bar Association sponsored the event.

In many jurisdictions, if the witness admits making a prior inconsistent statement, further proof of the statement is not permitted; in those jurisdictions extrinsic proof of such statements is allowed only if the witness denies making such statement. In Illinois, however, the statement may be "introduced into evidence during the cross-examiner's case and the portions contradictory to the witness' testimony read to the jury."[37] As the Supreme Court of Illinois stated in 1961:[38]

> a party is not foreclosed from making further proof of the former inconsistent statements even when the witness admits having made such statements, for the party may prefer to have these statements clearly brought out and emphasized.

While it is not clear that the document itself is not admissible, it is probable that only the contradictory statements may be admitted and then only read into evidence. ■

37. *Ibid.*

38. People v. Williams, 22 Ill. 2d 498, 177 N.E. 2d 100 (1961). Compare, Illinois Central R.R. Co. v. Wade, 206 Ill. 523, 69 N.E. 565 (1904). See also People v. Hahn, 90 Ill. App. 2d 367, 234 N.E. 2d 142 (1967).

Raymond I. Massey (left), Paris, and Harrison J. McCown, Tuscola, were among the many lawyers who attended a dinner honoring H. Ogden Brainard, Charleston, ISBA President, on October 13 at the Charleston Country Club.

Two Mattoon lawyers who attended the dinner honoring ISBA President H. Ogden Brainard, Charleston, were Mark B. Hunt (left) and Stephen L. Corn.