Practice Pointer

"Practice Pointer," a regular feature in *The Journal*, offers brief tips from your colleagues to improve your practice. The areas of expertise will vary as will the approaches.

Admissibility of a hospital blood alcohol test in a personal injury case

An issue to confront in a drunk driving personal injury case involving a hospital alcohol blood test is the admissibility of such test as an exhibit. Unlike a case involving a breath or blood test performed by the police, there are no statutory exceptions to the hearsay rule permitting the admission of such lab results.[1] Fortunately, several circuit courts have ruled that hospital lab results are admissible under the business records or modern shopbook rule exception to the hearsay rule provided a proper foundation has been laid. That foundation requires a showing that the document comes from the proper custodian, that it is a record kept in the ordinary course of business made contemporaneous with the event by persons having a duty to keep a true record, and the records are relied upon hospital personnel in the treatment and care of patients. This foundation should be able to be proved by the testimony of the records custodian only.

Common Hearsay Challenges

Common hearsay challenges to the admissibility of hospital lab reports are that the blood alcohol content is an opinion, not a fact. Since a testifying expert cannot repeat, in direct, the opinions of a non-testifying expert, *McMunn v. Tatum*,[2] the argument goes that the person performing the test must be present at trial to testify. This argument logically leads to the next challenge-that the proponent of the evidence must prove the "chain of custody" of the sample. This requirement creates practical problems for the proponent of the evidence as it may be difficult to locate and obtain the testimony of the lab technician who performed the test and the person who drew the blood, as well as proving the accuracy of the equipment used to analyze the sample.

Discussion

Virginia has adopted the modern "Shopbook Rule" as an exception to the hearsay rule in both civil[3] and criminal cases.[4] However, opinions and conclusions contained within hospital records are not admissible under the business records or shopbook rule exception to the hearsay rule.[5]

The argument that blood test results are opinion and not fact was recently rejected in *Allen v. Doe* (Case No. 4781-L). In that case, Judge Paul Peatross of the Albemarle Circuit Court held that the result of an alcohol blood test was a fact and not an opinion. Similarly, in the recent case of *Deal v. Woodward, et. al.,* [6] Judge John R. Cullen addressed the hearsay challenges to the admissibility of a hospital alcohol blood test. In doing so, Judge Cullen ruled that the lab results contained within the hospital records were facts and not opinions.

The argument that the "chain of custody" must be established before the blood alcohol test results are admissible ignores the very basis for the modern Shopbook Rule exception to the hearsay rule. That is, it is the very nature of the records that insures its reliability and hence makes it admissible.

> Under the modern Shopbook Rule… verified regular entries may be admitted in evidence without requiring proof from the original observer or record keepers. Pursuant to this rule, practical necessity requires the admission of written factual evidence based on considerations other than the personal knowledge of the recorder, provided there is a circumstantial guarantee of trustworthiness… The trustworthiness or reliability of the records is guaranteed by the regularity of their preparation and the fact that the records are relied upon in the transaction of business by the persons…for [whom] they are kept.[7]

In addressing the foundational requirements, the *Guy* Court stated:

> "…an entry made by one person in the regular course of business, recording an oral or written report made to that person by others in the regular course of business, of a transaction within the personal knowledge of such latter persons is admissible" if verified by the testimony of (1) the person making the entry, (2) a superior, or (3) some other person with official "access to [the] records" and "knowledge of how the …records were maintained in the ordinary course of …business." *(emphasis added)*[8]

In *Guy*, the Court held that verified hospital records indicating the appellant's blood alcohol content were admissible as they were testified to by the proper custodian. Similarly, in *Smith v. Commonwealth*,[9] the trial court, over objection, admitted two exhibits containing records from the Medical College of Virginia Hospitals which included references to blood alcohol concentrations. The Commonwealth had two witnesses testify, one as to each record, that the records were made in the ordinary course of business and close in time to the actual transaction. Rejecting the defendant's challenge on appeal that the Commonwealth failed to establish the "chain of custody" necessary to authenticate the test results, the Court affirmed their admissibility under the mod-

ern Shopbook Rule. The "chain of custody" argument was also recently rejected by Judge Cullen in *Deal*.[10] In that case, Judge Cullen ruled that the hospital lab records were admissible under the modern Shopbook Rule exception to the hearsay rule provided a proper foundation was laid. That foundation consisted of proof that the document comes from the proper custodian, that it is a record kept in the ordinary course of business made contemporaneous with the event by persons having the duty to keep a true record, and the records are relied upon by hospital personnel in the treatment and care of patients. Most importantly, from the practical standpoint, the records custodian of the hospital should be the only witness needed to satisfy the foundational requirements.

Conclusion

Counsel must be familiar with the basis and purpose of the business records exception and be prepared to educate trial judges that hospital alcohol blood results contain all the circumstantial guarantees of trustworthiness to make them reliable and admissible.

Endnotes

1. *See* Va. Code §§18.2-268.7 and 18.2 268.9 (1950, as amended).
2. *McMunn v. Tatum*,2 237 Va. 558, 566, 379 S.E.2d 908 (1989).
3. *See Neely v. Johnson*, 215 Va. 565, 571, 211 S.E.2d 100 (1975).
4. *See Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267.
5. *See Neely v. Johnson, supra.*
6. *Deal v. Woodward, et. al,* (Circuit Court, Culpeper County, Law #CL2003-L-234, 10/27/04).
7. *Guy v. Commonwealth*, 2002 Va. App. LEXIS 10, (Note-unpublished opinion), *citing Sprinkler Corp. of America v. Coley, Peterson, Inc.*, 219 Va. 781, 792-793, 250 S.E.2d 765, 773 (1979).
8. *Guy*, *supra*, at 3.
9. *Smith v. Commonwealth*, 2000 Va. App. LEXIS 151, (Note-unpublished opinion).
10. *Deal, supra*.

— submitted by Thomas J. Curcio

VIRGINIA:
IN THE CIRCUIT COURT OF CULPEPER COUNTY

ERIN L. NEFF
Plaintiff
v. LAW NO. 2003-L-234
BELINDA L. DEAL, et al.
Defendants.

ORDER

THIS MATTER came before the Court on October 27, 2004 upon the defendant Christopher Woodward's Motion in Limine to exclude evidence of his alcohol consumption on the day of the collision and blood alcohol laboratory test results contained within his University of Virginia Medical Center medical records dated January 3, 2003. Upon considering the defendant's motion and the oppositions filed by the plaintiff Erin Neff and the co-defendant Belinda Deal, and hearing argument of counsel, the Court DENIES the Motion in Limine and ORDERS as follows:

1. Christopher Woodward's deposition testimony, interrogatory answers, and statement that he consumed two mixed drinks prior to the collision is, given the other evidence relating to his intoxication, relevant to the issue of his negligence and his credibility is admissible;
2. The blood alcohol lab report and results contained within Christopher Woodward's University of Virginia Health System medical records are facts that are admissible under the modern Shopbook Rule exception to the hearsay rule provided a proper foundation is laid consisting of proof that the document comes from the proper custodian, that it is a record kept in ordinary course of business made contemporaneous with the vent by persons having the duty to keep a true record, and the records are relied upon by hospital personnel in the treatment and care of patients.
3. The expert toxicologists identified by the plaintiff Erin Neff and defendant Belinda Deal can testify to Christopher Woodward's blood alcohol tests results contained within his University of Virginia Health System medical records upon direct examination provided the medical records containing Woodward's blood sample have been admitted into evidence.
4. The expert toxicologists identified by the plaintiff Erin Neff and the co-defendant Belinda Deal can testify, as part of their opinions, that the defendant Christopher Woodward's impairment was due to his consumption of alcohol regardless of whether the medical records containing the results of the testing of Defendant Woodward's blood sample have been admitted into evidence.
5. There shall be no reference to the medical records containing the results of the testing of Defendant Woodward's blood sample in opening statement or by any witness until the lab reports have been admitted pursuant to a proper foundation being laid.