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ROCKINGHAM
SUPERIOR COURT

ROCKINGHAM, SS.

2009 SEP 28 P 12:00 SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JESSE T. BROOKS

09-S-319, 08-S-579, 07-S-2885

**DEFENDANT'S MOTION IN LIMINE TO ADMIT CERTAIN CERTIFIED
MEDICAL RECORDS PURSUANT TO RULES OF EVIDENCE 803(6) AND 902(11)**

Defendant Jesse T. Brooks, by and through counsel, moves to admit at trial certain of his medical records by written certification of the relevant keepers of records pursuant to N.H. Rules of Evidence 803(6) and 902(11). The Rules of Evidence and applicable caselaw plainly allow for the admission of medical records by these means. Moreover, Mr. Brooks intends to offer the records at trial solely as evidence of his location at certain relevant dates and times during which the records indicate he was receiving medical attention. Requiring keepers of records from the relevant medical facilities—located in California and Nevada—to travel to New Hampshire to appear at trial merely to authenticate Mr. Brooks' records is unnecessary and highly inefficient.

The State, however, has indicated that it intends to object to admission of Mr. Brooks' medical records by written certification. If in-person record keeper testimony is deemed necessary, Mr. Brooks requires sufficient time to obtain subpoenas and ensure that the appropriate witnesses will appear at trial. He therefore seeks a ruling in limine on this issue.

In further support of this motion, Mr. Brooks states as follows:

1. New Hampshire Rule of Evidence 803(6) provides an exception to the hearsay rule, regardless of the availability of the declarant, for "records of regularly conducted activity." See N.H. R. Evid. 803(6). Rule 803(6) applies to any

memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation

Rule 803(6).¹

2. Rule 803(6), by its terms, thus applies to medical records. See N.H. R. Evid. 803(6); State v. Wall, 154 N.H. 237, 242 (2006). Indeed, the New Hampshire Supreme Court affirmed this proposition in Wall. See 154 N.H. at 242. The Court held that, in a prosecution for aggravated driving while intoxicated, a hospital laboratory test report was admissible under Rule 803(6). Id.; accord Aubert v. Aubert, 129 N.H. 422, 429 (1987) (admitting medical records under former RSA 521:2 “business record exception to the hearsay rule” (repealed 1986)).

3. The party offering a record pursuant to Rule 803(6) may establish that it meets the requirements of the rule, and establish its authenticity, “by the testimony of the custodian or other qualified witness, *or by certification that complies with Rule 902(11)*, ... unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness.” Rule 803(6) (emphasis added). Rule 902(11) provides that a record that “would be admissible under Rule 803(6)” is self-authenticating if “the custodian thereof or another qualified person certifies under oath” that the record:

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

N.H. R. Evid. 902(11); see, e.g., State v. Huffman, 154 N.H. 678, 684 (2007) (bank records admissible under Rule 803(6) with sufficient written certification under Rule 902(11)).² This

¹ “The term ‘business’ as used in this paragraph, includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.” Id.

provision of the New Hampshire rules (adopted in 2001), like its counterpart in the federal rules (adopted in 2000), thus “provides that the foundation requirements of Rule 803(6) can be satisfied ... without the expense and inconvenience of producing time-consuming foundation witnesses.” See Fed. R. Evid. 803(6), Advisory Committee’s Note; see also Fed. R. Evid. 902(11).³

4. Medical records, therefore, are admissible under Rule 803(6) with a proper written certification pursuant to Rule 902(11). As the New Hampshire Supreme Court has indicated, such records by their nature meet the “trustworthiness” concerns of Rule 803(6):

[T]he safeguards of trustworthiness of the records of the modern hospital are at least as substantial as the guarantees of reliability of the records of business establishments. Progress in medical skills has been accompanied by improvements and standardization of the practice of recording facts concerning the patient, and these recorded facts are routinely used to make decisions upon which the health and life of the patient depend.

Aubert, 129 N.H. at 430 (quoting E. Cleary, McCormick on Evidence § 313, at 882 (3d ed. 1984)). Indeed, other courts have admitted medical records in evidence where those records were certified by written affidavit under terms substantially similar to those of N.H. Rule 902(11). See United States v. Ellis, 460 F.3d 920, 927 (7th Cir. 2006) (discussing Crawford v. Washington, 541 U.S. 36 (2004), and holding that defendant’s hospital test result records were admissible under Fed. R. Evid. 803(6) with certificate of authenticity under Fed. R. Evid.

² “Rules 803(6) and 902(11) ... go hand in hand.” See United States v. Kahre, 610 F. Supp. 2d 1261, 1263 (D. Nev. 2009) (discussing Fed. R. Evid. 803(6) and 902(11)).

³ As Mr. Brooks has previously asserted, the Confrontation Clause of the Sixth Amendment precludes the State from introducing records into evidence with similar certifications over a defendant’s objection. See United States v. Melendez-Diaz, 129 S. Ct. 2527 (2009); see also Def.’s Objection to State’s Motion in Limine Seeking the Court’s Permission to Admit Certain Domestic Records Under Rule 902(11) (Aug. 14, 2009). Nevertheless, defense counsel have tentatively agreed to stipulate to the admission of many of the certified records that the State has indicated its intent to offer pursuant to Rule 902(11), and are working with the State to reach agreement on others.

902(11)); Shannon v. Advance Stores Co., Inc., No. 3:08-0940, 2009 WL 2767039, at *5 (M.D. Tenn. Aug. 29, 2009) (allowing plaintiff leave to “submit an affidavit authenticating [her] medical records as required by Rules 803(6) and 902(11)”); Reyes v. State, 48 S.W.3d 917, 921-22 (Tex. Ct. App. 2001) (hospital records admissible under Tex. R. Evid. as “records kept in the course of regularly conducted activities” with affidavit from hospital custodian that records were “kept ... in the course of the hospital’s business,” “were made by an employee of [the hospital] with knowledge of the events,” and “that the employee made the records at or near the time of the event”).

5. Mr. Brooks has produced to the State in discovery the medical records at issue. These records are from three sources: (1) Cedars/Sinai Medical Center in Los Angeles, California (Bates D5-0854-858), (2) Spring Valley Hospital Medical Center in Las Vegas, Nevada (Bates D5-0859-0862), and (3) the University of Nevada School of Medicine in Las Vegas, Nevada (Bates 0896-870). Mr. Brooks also identified these records in his notice to the State of records he intends to introduce at trial pursuant to N.H. R. Evid. 902(11). See Def.’s Notice Pursuant to N.H. R. Evid. 902(11) (Sep. 22, 2009).

6. As noted above, Mr. Brooks intends to offer these records at trial solely as evidence of his location during certain relevant dates and times. Based on the applicable rules and caselaw, Mr. Brooks believed that the admission of these records with written certifications from the relevant keepers-of-records would be unobjectionable, and therefore did not file a motion in limine earlier. The State, however, in a discussion with defense counsel on September 17, 2009, indicated its intent to object to admission of the records by those means. In particular, the State expressed concern regarding “hearsay” that, according to the State, pervades the records in question.

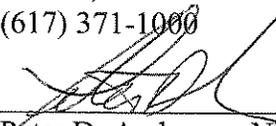
7. As set forth above, Mr. Brooks disagrees with the State's conclusion. See Rule 803(6); Wall, 154 N.H. at 242. However, much of the information that the State contends constitutes "hearsay" may well be irrelevant to the purpose for which Mr. Brooks intends to offer these records. Accordingly, Mr. Brooks may agree to redaction of information in the records to the extent that the parties can agree that such information is not relevant or the extent that the Court deems appropriate.

WHEREFORE, Defendant Jesse T. Brooks respectfully requests that this Honorable Court:

- A. Allow Defendant's Motion in Limine to Admit Certain Medical Records Pursuant to Rules of Evidence 803(6) and 902(11);
- B. Admit Mr. Brooks' medical records, identified above, into evidence at trial with written certifications from the relevant keepers of records pursuant to Rules of Evidence 803(6) and 902(11); and
- C. Grant such other relief as is just and appropriate.

Respectfully submitted,
JESSE T. BROOKS,
By his attorneys,

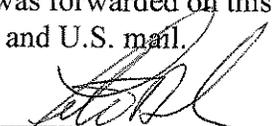
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Dated: September 28, 2009

Certificate of Service

I hereby certify that a copy of the foregoing was forwarded on this date, September __, 2009, to all counsel of record by electronic mail and U.S. mail.


Peter D. Anderson, NH Bar #7860