

I. Introducing Physical Evidence at Trial

Physical Evidence is another term for Real Evidence.

Real evidence is frequently defined as tangible objects as contrasted with testimony. To be admissible, real evidence must be material and relevant to the case. Virginia Rules of Evidence 2:901 (Authentication) discusses the necessary foundation to be laid before the evidence can be admitted. The foundational testimony comes from someone with knowledge that a matter is what it is claimed to be. In most circumstances, this will not be a particularly high hurdle, but where the evidence has passed through several hands, several witnesses may be needed.

In a personal injury case this would include medical bills and medical records.

Self-authentication of evidence is discussed in Rule 2:902 and requires certification of a custodian and proper notice to the opponent. Admissibility of bills and records is discussed in Rule of Evidence 2:902(4) but the controlling statute for General District Court is 16.1-88.2 which requires an affidavit from the treating healthcare provider vouching for the accuracy of the records. Payroll and other business records may also be self-authenticating if the records are accompanied by an affidavit from a custodian of the records. Rule of Evidence 2:902(6). Other than the logistics of size and weight, there is no reason an attorney could not bring a damaged or defective part of a vehicle (such as defective brakes), or machinery (such as a broken or missing safety guard) into the courthouse and have it authenticated and introduced as evidence. The same would apply to something like a damaged tooth or bloodstained clothing. More commonly, such items are photographed and the photograph is then introduced, but so long as there is testimony the item "is in substantially the same condition it was in when the negligence occurred", the item itself can be admitted.

Film studies like x-rays, MRI and CT scans are admissible once a foundation is laid by the medical expert identifying the accuracy of the film. Typically the witness will confirm that the film depicts the plaintiff, the date of the film and the relevant findings.

MEDICAL BILLS

Circuit Court:

The most common practice for admitting medical bills, particularly substantial bills, in Circuit Court is to have your expert state the bills at issue were reasonable (in cost) and necessary to treat the injury.

If you do not have an expert to testify about particular bills, the key to admissibility is your client and Virginia Code § 8.01-413.01(A)&(B).

§ 8.01-413.01(A)

Rebuttable Presumption the bills are authentic and reasonable if the Plaintiff's testimony:

- (i) identifies the health care provider,
- (ii) explains the circumstances surrounding his receipt of the bill,
- (iii) describes the services rendered and
- (iv) states that the services were rendered in connection with treatment for the injuries received in the event giving rise to the action. The presumption herein shall not apply unless the opposing party or his attorney has been
- (v) furnishes such medical records at least twenty-one days prior to the trial.

What if the provider is Kaiser or other HMO which does not generate a traditional bill?

§ 8.01-413.01(B)

If the provider does not generate a medical bill, you can retain a billing coder to sign an affidavit which states the usual and customary fee charged for the services. The affidavit

must be submitted to the opposing party at least twenty-one days prior to trial.

What is the risk to the plaintiff who relies on § 8.01-413.01?

:The testimony of your client and the affidavit described in subsection B can be rebutted by a defense expert. If the client has incurred medical bills with a high dollar value, and he does not have an expert to relate the bills to the injury, the testimony of a defense expert could result in the bills being excluded.

General District Court:

The controlling statute for General District Court is 16.1-88.2 which requires an affidavit from the treating healthcare provider or billing custodian vouching for the accuracy of the bills.

Below is an example of such an affidavit:

SWORN STATEMENT OF HEALTH CARE PROVIDER

I, print name of provider, pursuant to Virginia Code § 16.1-88.2, 8.01-581.1, and 8.01-4.3, do hereby certify that § 16.1-88.2, 8.01-581.1, and 8.01-4.3, do hereby certify that:

1. I am a billing custodian for [name and address of the provider].
2. The attached statement of cost for services rendered to [name of client] by [name of provider] on [date of service] totaling {amount of bill} is true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Signature

Date

MEDICAL RECORDS:

I. Circuit Court:

Rule of Evidence 2:803(4) (Statement for Purpose of Medical Treatment) and Rule of Evidence 2:803(6) (Records of a Regularly Conducted Activity) allow admission of medical records which contain statements made for purposed of treatment. (Va. Code 8.01-413.01 authorizes use of copies instead of the original documents)

Va. Code 8.01-413 provides for the admission of medical records which contain statements made by the Plaintiff to healthcare providers for purposes of treatment. The rule is limited to statements made for medical care, and arguably does not include some aspects of a history, such as the speed or other facts not relevant to the medical care provided. Opinions of providers are not generally admissible and would need to be redacted from the medical record. The **business records exception** to the hearsay rule allows the admission into evidence of verified regular entries without requiring proof from the original observers or record-keepers. The exception is limited to facts or events within the personal knowledge and observation of the recorder, to which he could be called to testify. This exception **does not extend to the opinions and conclusions** of physicians or others recorded in hospital records. *Neeley v. Johnson*, 215 Va. 565 (1975). Confirmed by *McMunn v. Tatum*, 237 Va. 558 (1989). Hearsay matters of opinion relied upon by the expert are not admissible upon direct examination of the expert.

II. General District Court:

In the General District Court, bills and records are admissible by affidavit and filing a Notice of Intent to Admit bills and records. See, Va. Code 16.1-88.2. Below is an example of such an affidavit:

SWORN STATEMENT OF HEALTH CARE PROVIDER

I, Print name of provider, pursuant to Virginia Code § 16.1-88.2, 8.01-581.1, and 8.01-4.3, do hereby certify that:

1. I am a records and billing custodian for [name and address of provider].
2. [name of patient/client] was treated by [name of provider] from [first date of treatment] through [last date of treatment].
3. The attached is a true and accurate copy of the medical records pertaining to [name the patient/client] treatment at [name the provider] from [first date of treatment] through [last date of treatment].
4. The attached statement of cost for services rendered for [name of patient/client] from [first date of treatment] through [last date of treatment], totaling [insert amount of the bill] is true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Signature

Date

BUSINESS RECORDS AS EVIDENCE

Va. Code 8.01-390.3(A)&(B) and Rule of Evidence 2:902(6)(a)&(b)

Notice to Admit Business Record - Rule of Evidence 2:902(6)(b) & Va. Code 8.01-390.3(B)

The proponent of a business record SHALL:

- (i) give written notice to all other parties if a certification under this section will be relied upon in whole or in part in authenticating and laying the foundation for admission of such record, and
- (ii) provide a copy of the record and the certification to all other parties...no later than 15 days in advance of the trial or hearing.

Authentication is established by:

- (i) witness testimony, or a certification of the authenticity of and foundation for the record made by the custodian of such record or other qualified witness either by affidavit or
- (ii) by declaration pursuant to § 8.01-4.3: "I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct."), or
- (iii) a combination of witness testimony and a certification.

Surgical and Prosthetic Appliances:

Such items of real evidence can easily be authenticated by the Plaintiff or relevant medical provider. The foundation would require asking the witness to describe the appliance, show and/or explain its purpose, and confirm that the injury at issue left the injured party with a need for such an appliance. However, because in most instances the injured party needs the appliance, either a replica is admitted or a photograph would be admitted instead of the actual appliance. As set forth below under Demonstrative Evidence, the photograph would be admitted upon the testimony of someone with firsthand knowledge that the photograph "fairly and accurately depicts" the appliance.

Records Proving Driving While Intoxicated:

Va. Code 8.01-413.02 and 18.2-268.7 and Rule of Evidence 2:902 (5) allow for self-authentication and admissibility of certificates of analysis and refusal to submit to blood or breath test. Once certified, the document is admissible as evidence of the blood alcohol content (BAC) or refusal. In either instance, once admitted into evidence the Plaintiff has made a prima facie case for claiming punitive damages.

Va. Code 18.2-267.8(A). The Director shall execute a certificate of analysis indicating the name of the accused; the date, time and by whom the blood sample was received and examined; a statement that the seal on the vial had not been broken or otherwise tampered with; a statement that the container and vial were provided or approved by the Department and that the vial was one to which the completed withdrawal certificate was attached; and a statement of the sample's alcohol or drug or both alcohol and drug content.

The certificate of analysis (with the withdrawal certificate attached) shall be admissible in any court (including any civil proceeding) as evidence of the facts therein stated, and of the results of such analysis. However the certificate must be attested to by the Director.

Va. Code 8.01-413.02 - Records of blood alcohol tests conducted upon persons receiving medical treatment in a hospital or emergency room are admissible in evidence as a business records exception to the hearsay rule in any civil proceeding.

Sound Recordings:

Sound recordings are admissible if the recording device is described, the recording is authenticated as authentic and correct and without alterations, if it was properly preserved and if the speakers are identified. Also, a transcript of the sound recording is admissible if testimony confirms it is accurate and will assist the jury in understanding the recording.

Unless a transcript of a proceeding is under oath, the evidence is the recording, not the transcript.

911 Emergency Calls:

Va. Code 8.01-390(B) allows for a presumption that 911 calls are authentic if accompanied by a certificate containing the information in subsection A (authenticated as a true copy by a custodian) and includes the date and time of the incoming call and if available, the phone number of the incoming call.

Drawings, Diagrams and Maps:

If shown by testimony to be relevant, material and accurate, drawings, diagrams and maps are admissible. The witness authenticating such evidence must have sufficient personal knowledge to testify that the document is a correct and true representation of what it intends to show without any material distortions or inaccuracies.

Computer Generated Models and Accident Reconstruction:

Computer generated evidence and accident reconstruction must be established as reliable and accurate. For computer generated evidence, and particularly accident reconstruction, the reconstruction or experiment must be conducted under conditions sufficiently similar to those existing at the time of the original occurrence. In other words, all relevant variables must be accounted for and data must be available for each variable. This includes speed, trajectory, brake type and brake force, surface of roadway, weather, reaction time, weight of the vehicles including anyone or anything inside the vehicle, steering mechanisms, sightlines, lighting, etc. If any material variable is missing, the evidence is inadmissible.

Demonstrative or Illustrative Evidence:

Demonstrative evidence, also called illustrative evidence, is a subset of real evidence and consists of objects used as a visual aid in demonstrating the meaning of a witness' testimony. In most cases, demonstrative evidence, such as medical drawings, or models are not introduced as evidence, but certainly can be once properly authenticated as if it were real evidence. More commonly photographs which are authenticated as "fairly and accurately depicting" the item or scene photographed are admitted into evidence. It is not necessary to find the photographer to authenticate a photograph. It is sufficient that someone with firsthand knowledge of what is depicted by the photograph establish the foundation for admissibility by declaring the photo is fair and accurate.

It is a common practice to ask the Plaintiff to display the injury to the jury. If a burn or scar or other visible injury is permanent, it can be shown to the jury, and then a corresponding photograph of the injury can be admitted. The same goes for a disability, such as a limp or inability to reach or extend an arm. While "real evidence" in one sense, the purpose of the display is demonstrative, an example of what the injury has done to the Plaintiff. As a photo can be admitted to show a scar or burn, a video can be admitted to document and depict the limp or other deficient which can only be shown with motion. Gruesome and bloody photographs may be excluded if the court determines they are likely to "inflame the passions of the jury."

Public Records & Reports

Rule 2:803(8) Virginia Rules of Evidence - Hearsay Exceptions for Public Records & Reports.

Case Example - Medical Examiner's Report is a Public Record

Admissibility not as straightforward as it would appear.

Wrongful Death Case - Code § 8.01-390.2 provides:

Reports of investigations made by the Medical Examiner...and the records and certified reports of autopsies made under the authority of Title 32.1, shall be received as evidence in any court or other proceeding, and copies of photographs, laboratory findings and reports in the office of the Chief Medical Examiner or any medical examiner, when duly attested by the Chief Medical Examiner or an Assistant Chief Medical Examiner, shall be received as evidence in any court or other proceeding....

The recent case of Lucas v. Riverhill Poultry, Inc., 2021 Va. LEXIS 74; 2021 WL 2692440, (July 1, 2021) explains parts of a medical examiner's report are inadmissible.

The State medical examiner in Roanoke performed an autopsy on an occupant of a single-vehicle truck accident. One issue in the case was which of the two occupants was the driver. The Estate alleged its decedent, Lucas, was the passenger and Hilliard was the driver. The defense claimed Lucas was the driver, and moved to exclude the medical examiner's report.

The medical examiner concluded the cause of Hilliard's death was "Blunt Force Trauma of Head" and the manner of death was "Accident." Her autopsy report included a "summary of circumstances" which was advantageous to Lucas' Estate, as set forth below:

1. This 68-year-old decedent (Hilliard), was driving a 2004 Kenworth tractor trailer on I-81 in Virginia with a passenger.
2. The vehicle reportedly ran off the road, struck a guardrail, struck an embankment, and then overturned.

3. The driver and passenger were pronounced dead.

In her pre-trial deposition, the medical examiner testified:

1. Some of the medications found in Hilliard's blood were drowsiness-inducing medications typically taken as sleep aids
2. In addition to her physical examination of Hilliard's body, the medical examiner relied on the final report from the state police to conclude that Hilliard was driving the tractor-trailer at the time of the crash.
3. The photographs of the accident scene showing Hilliard situated between the driver and passenger seats in the cab of the tractor-trailer with his left hand on the steering wheel also informed her conclusion that Hilliard was the driver.

So why would there be a problem with the admissibility of the report which is admissible under *Code § 8.01-390.2*? The problem lies with hearsay and speculation in areas which arguably go beyond a strict interpretation of her official duties to determine the cause and manner of death.

On cross-examination, the medical examiner admitted:

1. She had relied on the police report to tell her who was driving in this case.
2. She was neither trained nor expected to recreate automobile accidents or make final conclusions about what object or mechanism may have caused the blunt force trauma to Hilliard's head.
3. She agreed she could only speculate about what occurred.
She could only speculate about whether Hilliard suffered any adverse reactions to any of the medications found in his blood or whether he was awake or asleep at the time the vehicle left the roadway.
4. She confirmed that once she determined the cause and manner of death, her duties were complete.

The Estate of Lucas noted there was no language in the statute limiting what part of the report “shall be received as evidence”, and therefore the General Assembly understood that parts of the report would be based on hearsay, including reports from first responders and third-party forensic laboratories. Rejecting this and other arguments made by the Estate, the Virginia Supreme Court held that the medical examiner’s statement that Hilliard was driving and ingested sleep aids were inadmissible due to (1) lack of an adequate foundation, such as testimony from the persons with firsthand knowledge of the facts, and (2) the expression of opinions with no personal knowledge of the facts, and (3) Code § 8.01-390.2 was enacted with nearly identical language as the corresponding criminal code section (Code § 19.2-188), and the legislature did so with the knowledge that existing caselaw excluded opinions which lacked a proper foundation, and (4) the fact that the circumstances suggest a jury was just as well-equipped as the medical examiner to consider and draw its own conclusions.

Nor did Rule 2:803(8) of the Virginia Rules of Evidence (Hearsay Exceptions for Public Records/Reports) save the day because the information at issue was not observed as part of the official duties of the medical examiner.

The Virginia Supreme Court did hold that if the jurors were incapable of forming an intelligent opinion about the evidence and drawing their own conclusions, the opinion testimony of an expert based upon such facts and circumstances would be admissible, assuming it met all other evidentiary requirements.

Where the real evidence has passed through several hands, it may be necessary to offer testimony using chain of custody witnesses to establish there were no material alterations to the evidence. Chain of custody testimony is required before admitting trace residue of a drug or chemical, while it is not required to admit a photograph of a car showing damage at the accident scene.

Damage to or Total Loss of Motor Vehicle

Virginia Code 8.01-416 allows for admission of itemized estimates of repair or statements of diminution of value, if sworn to by an estimator who includes the time he has engaged in such work and the trade name and address of the employer, and if the affidavit is provided to the adverse party at least 7 days prior to trial.

Virginia Code 419.1 allows for admission of the NADA yellow or black books or any other vehicle valuation service regularly used and recognized in the automobile industry to establish the market value of the relevant date.

Query: Is the data compiled for insurance companies by CCC (Certified Collateral Corporation) admissible? Is it a service recognized by the automobile industry, or just the insurance industry?

Summaries

Rule 2:10 006, which restates the holding in Norfolk and Western Railway v Puryear, 250 Va. 229 (1995) This rule allows for summaries (in the form of a chart, summary or calculation) of otherwise admissible but voluminous writing so long as the originals are made available for inspection prior to offering the summary.

REFEREE

The Court will referee a dispute if you file a Motion in Limine. If counsel anticipates the introduction of objectionable evidence, it is advisable to file a motion in limine to allow the court to hear argument prior to trial.