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Key Steps In Making A Pretrial Record – And Why They Matter

by Brenda M. Johnson

Trial lawyers are, by nature, focused on getting their cases ready for trial. Sometimes, however, the path to presenting a case to a jury also involves a little dispositive motion practice. Ohio's Civil Rule 56, which governs summary judgment motion proceedings, is specific as to the materials a party is allowed to submit either in support of or in opposition to a summary judgment motion.

As we all know, only facts that would be admissible at trial can be considered by a trial court in ruling on a summary judgment motion.[1] Rule 56, however, sets forth specific requirements as to the manner in which such facts can be presented at the dispositive motion stage. Under the rule, only "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations, if any" will do.[2] Documents, unless they are attached to a pleading, must be "sworn, certified or authenticated by affidavit" to be considered by the trial court.[3]

There are certain cases where a trial attorney can anticipate that summary judgment motions will be filed. We have no control, however, over whether a defendant will decide to move for summary judgment. The best practice, therefore, in all cases is to take certain basic steps in the course of discovery to make sure that you can respond properly in the event that occurs. What that means in a particular case depends, of course, on the facts and issues presented. However, there are certain basic principles that should apply in almost every case – and this article is an attempt to summarize them.

Rule One: When You Can, Get It Certified!!

For documents to be admissible at the summary judgment stage, they have to be sworn, certified, or authenticated by affidavit. So, whenever possible, if you're requesting medical records, public records, official investigation reports, or records kept by a business entity, get *certified* copies. This is a basic authentication method that you should incorporate into your practice if you haven't already.[4] Many health care providers and medical record retrieval services allow you to specify certified copies when you're asking for records pursuant to authorizations, and you should take advantage of this option, even if your case is not yet in suit.

Rule Two: Certification Is Not Always Enough

So you've gotten certified copies of all of the medical and business records – but you're not done yet. Depending on the issues presented in your case, you may need to take further steps to obtain admissible evidence of facts reflected in the *contents* of those records.

Evidence Rule 803(6) creates a hearsay exception for properly-authenticated business records, but the exception doesn't automatically extend to everything *contained* in those records. This is particularly important to be aware of where medical records are concerned. Statements made by your client for purposes of treatment, for instance, will likely fall within Evidence Rule 803(4), the hearsay exception for statements made for those purposes. Diagnoses made by her care providers, on the other hand, might not. Depending on what court you're in, these statements may be inadmissible hearsay. Courts in the Second, Sixth, Eighth, Ninth, and Tenth Districts allow such evidence, under varying standards.[5] The First and Fourth Districts, apparently, do not.[6]

If you anticipate dispositive motion practice in your case regarding causation or damages – and you *should* if there is any question as to whether an exception to noneconomic damage caps may apply – you need to be aware of the standards applied by your court in order to get that diagnostic evidence in. In courts where statements in the medical records are not enough, prepare to obtain testimony or affidavits from suitable experts or the treating physicians themselves.

Let's not forget police reports and other reports of official investigations. Police reports and reports

of official investigations are public records under Evidence Rule 803(8), but as with medical records, the contents of these reports can pose hearsay issues. Evidence Rule 803(8) extends to "[r] ecords, reports, statements, or data compilations . . . of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . ." Statements of investigating officers or other officials as to their own personal observations fall within this exception. Witness statements, however, do not, nor do matters that are not firsthand observations on the part of the investigating officials.

In other words, getting certified copies of qualifying records is a necessary first step in obtaining admissible evidence, but it is *only* the first step. It is imperative to examine the records carefully to determine whether there are facts or opinions reflected in those records that you will have to establish through direct testimony or other discovery.

Rule Three: Documents that Can't Be Certified Have To Be Authenticated By A Competent Witness – So Work This Into Your Discovery Depositions

If there are key documents in your case that don't qualify for certification, then you have to authenticate them the good old fashioned way – namely, through the sworn testimony of a witness with personal knowledge. Even when it seems a little tedious to do so, it's a very good practice to spend the time getting this kind of foundational testimony in the course of your discovery depositions. You (and your briefwriting colleagues) will be grateful you did in the event that the document is needed in order to oppose a dispositive motion.

Rule Four: Ask Foundational Questions In Your Discovery Depositions

Take the time in your discovery depositions to elicit testimony about foundational issues in your case that are within the personal knowledge of that deponent. This may seem tedious as well, since these issues may be things already known to you. But these matters are as important at the dispositive motion stage as they are at trial, and without a testimonial record, there is no way to present them to the court. Besides, there is always the risk that the deposition will be all you have to rely on at trial, since witnesses can become unavailable in many ways.

And A Suggestion: Consider Asking Questions In The Depositions Of Your Clients And Experts When The Defense Has Tried To Paint The Wrong Picture

When defense counsel takes the deposition of your client or your expert, he or she is not going to be focusing on creating a record that establishes the critical elements of your case. If critical issues aren't brought up during these cross-examinations, or are explored in a lopsided fashion, consider taking some time at the end of the deposition to get your client's or expert's full testimony on these issues on the record.

If your client's testimony needs clarification after a round of one-sided or possibly misleading questioning, it can make sense to allow her to revisit and clarify her testimony before the deposition is over, as opposed to getting an affidavit from her later. Likewise, if there is favorable evidence and testimony that you would like to get on the record, such as testimony about the extent of her injuries or how they have affected her, it can make good sense to bring this out in the deposition as well. Whether or not to do so depends on a multitude of issues, of course, but if your client is properly prepared this can be much more effective than supplementing or curing her testimony with an affidavit later.

Similar issues arise with experts. Defense counsel, for instance, may well try to trip your expert up, or spend all her time focusing on the weaker aspects of your expert's opinions. Defense counsel may not elicit the full basis for your expert's opinions, or she may ask misleading questions about your expert's credentials or background. It can be worthwhile, if your expert is properly prepared, to spend some time bringing out the substance of your expert's opinion and the basis for that opinion before the deposition ends, rather than expending additional resources on a curative affidavit once the deposition is over. ■

End Notes

1. *See, e.g., Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 631, n.4, 605 N.E.2d 936 (1992).
2. Civ. R. 56(C) ("No evidence or stipulation may be considered except as stated in this rule.").
3. Civ. R. 56(E); see also *Castle CFD Group, LLC v. Kenney*, 6th Dist. Lucas No. L-22-1245, 2023-Ohio-2980, ¶ 16; *Smith v. Gold-Kaplan*, 8th Dist. Cuyahoga No. 100015, 2014-Ohio-1424, ¶ 16 and cases cited therein.
4. *See* Evid. Rule 902(4) (public records); Evid. R. 903(11) (business records); Evid. R. 901(B)(10), R.C. 2317.422(A) (medical records).
5. A discussion of Ohio case law dealing with the admissibility of diagnoses in medical records could be a separate article in itself. The seminal opinion dealing with the issue, *Hytha v. Schwenderman,* 40 Ohio App.2d 478, 320 N.E.2d 312 (10th Dist. 1974), antedates Ohio's adoption of the evidence rules. In that opinion, the Tenth District held that certain opinions and diagnoses in medical records were admissible under R.C. § 2317.40. The Second, Sixth, Eighth, and Ninth Districts have adopted or applied *Hytha* in the context of interpreting Evid. R. 803(6), and will allow such evidence, subject to restrictions that vary by district. *See, e.g., Somerick v. YRC Worldwide, Inc.*, 9th Dist. Summit No. 29239, 2020-Ohio-2916; *Flowers v. Siefer,* 6th Dist. Lucas No. L-16-1002, 2017-Ohio-1310; *Ruth v. Moncrief,* 2d Dist. Montgomery No. 18479, 2001-Ohio-1709, *Gallagher v. Firelands Regional Med. Ctr.*, 6th Dist. Erie No. E-15-055, 2017-Ohio-483; *Smith v. Dillard's Dep't Stores*, 8th Dist. Cuyahoga No. 75787, 2000 Ohio App. LEXIS 5820, 2000-Ohio-2689.
6. *See Guarino-Wong v. Hosler,* 1st Dist Hamilton No. C-120453, 2013-Ohio-1625; *see also Gallagher v. Firelands Regional Med. Ctr.,* 6th Dist. Erie No. E-15-055, 2017-Ohio-483 (discussing district split).