COMMONWEALTH OF MASSSACHUSETTS
THE TRIAL COURT

HAMPDEN, ss

SPRINGFIELD DISTRICT COURT
DOCKET:

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IN THE MATTER OF

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RESPONDENT'S MEMORANDUM OF LAW REGARDING THE ADMISSIBILITY OF CERTAIN STATEMENTS CONTAINED IN THE INDEPENDENT FORENSIC RISK ASSESSMENT (IFRA) THAT WAS MARKED FOR IDENTIFICATION

The Petitioner stated two grounds for the admissibility of hearsay statements contained in the IFRA. One, the hearsay statements are admissible because Petitioner's expert relied on the statements when forming his opinion and two, the hearsay statements are admissible because the IFRA is part of the Respondent's medical record and therefore the statements are admissible pursuant to G.L. c.233, s.79, the medical records exception to the hearsay rule. The Respondent will address both of these grounds.

EXPERT'S RELIANCE

An expert may base an opinion on facts and data that are not in evidence if the facts or data would be independently admissible and are the kind of facts and data relied upon by experts in that field when forming an opinion. Department of Youth Services v. A Juvenile, 398 Mass. 516, 531-532 (1986). However, the fact that the expert has relied on hearsay when forming her opinion does not make the hearsay admissible during the expert's direct examination. Commonwealth v. Jaime, 433 Mass. 575, 577-578 (2001);

Commonwealth v. McNickles, 434 Mass. 839, 856 (2001). Thus in Jaime, the Supreme Judicial Court (SJC) held:

> Taking the rule and its rationale into consideration, permitting the expert to offer the contested hearsay testimony on direct examination constituted error. The judge should have sustained the defendant's objection and precluded the admission of hearsay statements irrespective of whether they formed the basis of the expert's opinion. Jaime at 577-578.

Similarly, in McNickles the SJC held:

> Under Commonwealth v. Jaime, supra, and Grant v. Lewis/Boyle, Inc. supra, the witness should have been allowed to testify to her opinion, but not to testify to the facts or data relied on in reaching that opinion when those facts or data were not yet themselves in evidence. McNickles at 856.

The SJC went on to hold, "We adhere to our position that an expert witness may not, on direct examination, present the specifics of hearsay information on which she has relied in reaching her opinion." McNickles at 857. Therefore, in the present case, the fact that Petitioner's expert relied on hearsay contained in the IFRA when forming his opinion regarding Mr. xxxxxx did not make that hearsay admissible without the Respondent specifically questioning him during cross examination about the basis of his opinion.

THE MEDICAL RECORDS EXCEPTION

Given that the hearsay contained in the IFRA is not made admissible by virtue of being relied upon by the Petitioner's expert when forming an opinion of Mr. xxxxxx, the question remains whether the hearsay is admissible pursuant to the medical records exception to the hearsay rule (the medical record) given the testimony that the IFRA was made a part of Mr. xxxxxx's medical record. In Bouchie v. Murray, 376 Mass. 524

(1978), the SJC established requirements for admissibility through the medical record.

Those requirements are:

> First, the document must be the type of record contemplated by G.L. c. 233, s. 79. Second, the information must be germane to the patient's treatment or medical history. Third, the information must be recorded from the personal knowledge of the entrant or from a compilation of the personal knowledge of those who are under a medical obligation to transmit such information. Fourth, voluntary statements of third persons appearing in the record are not admissible unless they are offered for reasons other than to prove the truth of the matter contained therein or, if offered for their truth, come within another exception to the hearsay rule or the general principles discussed supra (internal citations omitted). Murray at 531.

Thus the general rule is that statements from third persons, that is persons who are neither the patient himself nor medical staff, are not admissible through the medical record.

Indeed, the SJC held:

> Hence entries made in the regular course of the institution's operation from the personal knowledge of the recorder or from a compilation of the personal knowledge of those who have an obligation in the course of their employment to transmit that medical information to the recorder are admissible under the exception. Any other statements in the record which relate to treatment and medical history and which are offered for the truth of the matter contained therein must fall within some other exception to the hearsay rule in order to be admissible. Murray at 528-529.

However, the SJC permitted an exception to the general rule that statements contained in the medical record from third persons are not admissible. That exception is as follows:

> We think that the statute may be read to permit the admission of a medical history taken from a person with reason to know of the patient's medical history by virtue of his or her relationship to the patient. Such a history may contain personal knowledge gained from observation or knowledge gained from an intimate relationship. We think that our statute should be read to include such statements if made for purposes of medical diagnosis or treatment and if the declarant's relationship to the patient and the circumstances in which the statements are made guarantees their trustworthiness. Murray at 531.

Applying the above principles to the present case, the Respondent acknowledges that the statements in the IFRA that he made directly to Dr. Mumley would be admissible because arguably such statements were made for the purpose of diagnosing whether he needs further inpatient treatment. However, there are numerous statements in the IFRA that are not admissible. For example, there are statements in the IFRA that were taken from witness statements regarding the 2003 incident at the television station. Such statements were made as part of a criminal investigation and not for the purpose of diagnosis and treatment. Therefore, these statements do not fall within the exception to the general rule that statements from third persons are not admissible and thus must be redacted. There is a reported incident regarding Mr. xxxxxx's interactions with a peer in 2003 at Worcester State Hospital. It is not clear whether the report is based on what was said by the peer. If the report is based on what was said by the peer, then there is no reason to believe that the peer made statements for the purpose of diagnosing and treating Mr. xxxxxx. Therefore, reference to this incident would have to be redacted. There are statements allegedly made by Mr. xxxxxx's ex-girlfriend. Without knowing the nature of the relationship between Mr. xxxxxx and his ex-girlfriend, these statements do not fall within the exception to the general rule that statements from third persons are not admissible and thus must be redacted. There are references made regarding Mr. xxxxxx's family that have no attribution and therefore there is no way to know how many layers of hearsay may be involved. Therefore, these references do not fall within the

exception to the general rule that statements from third persons are not admissible and thus must be redacted.

CONCLUSION

If the IFRA is going to be admitted into evidence at all, the inadmissible hearsay will have to be redacted first.

Respectfully Submitted,

xxxxxxx,

by his attorney,

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Dated: December 24, 2013

CERTIFICATE OF SERVICE

I, Nadell Hill, certify that on December 24, 2013, I served one copy of the above memorandum of law via facsimile to:

Attorney
Facsimile number:

Nadell Hill

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