

2021

## The Reliability of Statements Made for Medical Diagnosis or Treatment: A Medical – Legal Analysis of a Hearsay Exception, 54 UIC L. Rev. 679 (2021)

Marc Ginsberg

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### Recommended Citation

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THE RELIABILITY OF STATEMENTS  
MADE FOR  
MEDICAL DIAGNOSIS OR TREATMENT: A  
MEDICAL – LEGAL ANALYSIS OF A  
HEARSAY EXCEPTION

MARC D. GINSBERG\*

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“Hearsay is inherently unreliable.”<sup>1</sup>

“The study of the reliability of hearsay is long overdue. Indeed, the behavioral assumptions on which the legal doctrine of the hearsay rule and its exceptions rest have never been rigorously, scientifically tested during the three centuries of their evolution.”<sup>2</sup>

I. INTRODUCTION

The law of evidence and the field of medicine intersect as a product of multiple hearsay exceptions. Federal Rule of Evidence (“FRE”) 803(6), records of a regularly conducted activity, by its terms, applies to a record of a condition, opinion, or diagnosis.<sup>3</sup> FRE 803(18), statements in learned treatises, periodicals, or pamphlets, applies to medical expert witnesses.<sup>4</sup> FRE 803(3) applies to a

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\* B.A., M.A., J.D., LL.M (Health Law), Professor of Law, University of Illinois Chicago School of Law. The author thanks his wife, Janice, for her never ending inspiration and support, his son, Brian, a brilliant appellate lawyer, and his grandson, Dave, for their inspiration. The author thanks Ms. Paige Krueger, his research assistant, for her research, citation checking and proofreading efforts. The author also thanks University of Illinois Chicago School of Law which provided a stipend for this project.

1. Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145, 145 (1991).

2. Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCH. PUB. POL’Y & L. 485, 487 (1999).

3. FED. R. EVID. 803(6).

4. FED. R. EVID. 803(18).

declarant's statement of a then-existing medical condition.<sup>5</sup> This paper, however, focuses on FRE 803(4), a textually brief hearsay exception, covering a statement made for medical diagnosis or treatment,<sup>6</sup> which provides as follows:

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.<sup>7</sup>

For analytical purposes, this paper assumes that the declarant is the patient<sup>8</sup> and the witness is the health care provider, typically a physician, even though FRE 803(4) does not so limit the declarant.<sup>9</sup> This is an important assumption because this paper will primarily address the patient-declarant as a reliable “historian” or “reporter.” This implicates issues pertaining to the physician-patient relationship and whether FRE 803(4) is properly a hearsay exception.

This paper will also address whether FRE 803(4) should refer to a declarant's statement made for medical diagnosis *and* treatment as opposed to statements made for medical diagnosis *or* treatment. This topic questions whether non-treating physicians should be capable of arriving at diagnoses and whether FRE 803(4) should apply to declarant's statements to independent medical examiners.

## II. HEARSAY EXCEPTIONS-UNDERLYING POLICY

It has been urged that “the [hearsay] exceptions in Rules 803 and 804 make admissibility dependent on only the circumstances surrounding the hearsay statement in question.”<sup>10</sup> These exceptions “require a guarantee of trustworthiness.”<sup>11</sup> “Wigmore consider[ed] two factors to be controlling: (1) a circumstantial probability of trustworthiness (reliability), and (2) necessity.”<sup>12</sup> One important

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5. FED. R. EVID. 803(3).

6. FED. R. EVID. 803(4).

7. *Id.*

8. See *Francois v. Gen. Health Sys.*, 459 F. Supp. 3d 710, 723 (M.D. La. 2020).

9. For example, could a declarant-physician's statement to another physician qualify under the terms of FRE 803(4)?

10. Victor Gold, *The Three Commandments of Amending the Federal Rules of Evidence*, 85 *FORDHAM L. REV.* 1615 (2017).

11. Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 *FORDHAM L. REV.* 1485, 1486 (2016).

12. Wilbur E. Simmons, Jr., *Is Necessity Alone Sufficient Basis for Hearsay Exception? – Moore v. Atlanta Transit System, Inc.*, 23 *MD. L. REV.* 157, 159 (1963).

author has added the “adequate foundation,” the “substantial foundation,” or the “sufficient foundation” rationales for hearsay exceptions, which operate to assist the jury (or the judge in a bench trial) in assessing reliability.<sup>13</sup>

As three examples of historically (supposedly) reliable hearsay exceptions, one may consider records of a regularly conducted activity,<sup>14</sup> statements against interest,<sup>15</sup> and statements made under the belief of impending death.<sup>16</sup> FRE 803(6) is based, in part, on the reliability of contemporaneous record entries meaning record entries made at or very near the time of the transaction or event involved. FRE 804(b)(3) is based on the reliability of the declarant’s statement, which is inculpatory in a criminal or civil sense. FRE 804(b)(2) is based on the reliability of the “death bed” statement, i.e., that the victim of an event believed to be life-ending by the victim will only speak the truth. Of course, these underlying assumptions supporting the hearsay exceptions are subject to challenge.<sup>17</sup>

### III. FRE 803(4): RELIABILITY OF THE PATIENT-DECLARANT & MEDICINE

“[R]eliability simply means the extent to which information can be trusted.”<sup>18</sup>

The reliability of the FRE 803(4) patient-declarant’s statement to a physician relating to “medical history; past or present symptoms or sensations; their inception; or their general cause”<sup>19</sup> was described more than forty years ago. The reliability is dependent on “[t]he patient’s desire for effective treatment, and not the immediacy of the statement, became the guarantor of trustworthiness.”<sup>20</sup>

The reliability of a patient’s statements to physicians has been questioned more recently in legal scholarship.<sup>21</sup> Without reference to authority, “[t]he undeniable fact is that people see doctors for many reasons and have varying motives for describing their present

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13. Saltzburg, *supra* note 11, at 1488-90.

14. FED. R. EVID. 803(6).

15. FED. R. EVID. 804(b)(3).

16. FED. R. EVID. 804(b)(2).

17. See Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1425 (2010); Michael M. Martin, *The Supreme Court Rules on Statements Against Interest*, 11 TOURO L. REV. 179, 181 (1994); Saltzburg, *supra* note 11, at 1490.

18. Pamela A. Moss, *The Meaning and Consequences of “Reliability,”* 29 J. EDUC. & BEHAV. STAT. 245, 246 (2004) (internal citation omitted).

19. FED. R. EVID. 803(4).

20. William H. Theis, *The Doctor as Witness: Statements for Purposes of Medical Diagnosis or Treatment*, 10 LOY. U. CHI. L. J. 363, 364 (1979).

21. Saltzburg, *supra* note 11, at 1489.

and past medical symptoms. There is no way to assess which statements are likely to be reliable.”<sup>22</sup> The purpose of this paper is not to dispute the possible unreliability of the patient-declarant’s statement to a physician. Instead, the plan at this point is to examine medical scholarship in an effort to evaluate the likely reliability of FRE 803(4) statements.

Medical literature is replete with opinions and studies which conclude that statements made by patients to their physicians are unreliable due to the hesitancy to disclose accurate information or the telling of lies.<sup>23</sup> In either case, patients are often, intentionally, poor historians when providing health information to their physicians.

A publication of the American Medical Association has noted that “there is a long-standing conventional belief in the field of medicine that patients lie to clinicians.”<sup>24</sup> The same publication identified patients’ reasons for non-disclosure of information to clinicians as:

- not wanting to be judged or lectured;
- not wanting to hear how harmful the behavior is;
- embarrassment;
- not wanting the clinician to think that they are a difficult patient;
- not wanting to take up more of the clinician’s time.<sup>25</sup>

A Canadian medical journal has reported “seven scenarios in which patients tend to avoid telling the truth,”<sup>26</sup> as follows:

- patients disagree with a doctor’s advice;
- patients did not understand treatment instructions;
- unhealthy diet, lack of exercise;
- did not want the doctor to lecture the patient;
- patient embarrassment;
- did not want to be difficult or waste a physician’s time;
- embarrassment regarding diet, exercise habits, sex lives or adherence to treatments.<sup>27</sup>

The Primary Care Companion Journal of Clinical Psychiatry has reported that “[p]atients . . . lie about symptoms to obtain disability or access to controlled medication or to avoid

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22. *Id.*

23. Lauren Vogel, *Why do Patients Often Lie To Their Doctors?*, 191 CAN. MED. ASS’N J. E115 (2019).

24. Andrea Gurmankin Levy et al., *Prevalence of and Factors Associated with Patient Nondisclosure of Medically Relevant Information to Clinicians*, 1 J. AM. MED. ASS’N NETWORK OPEN 1, 2 (2018).

25. *Id.* at 5, 6.

26. Vogel, *supra* note 23.

27. *Id.*

incarceration or other undesired legal consequences of their actions.”<sup>28</sup> Also, “[p]atients lie to avoid negative consequences, to achieve secondary gain (e.g., to obtain medication or disability payments), out of embarrassment or shame, or to present themselves in a better light (e.g., as dutiful and compliant).”<sup>29</sup> Physicians understand “that making an accurate diagnosis relies on the provision of reliable information by patients . . . .”<sup>30</sup>

If it is well understood in medicine that patients are not reliable reporters – that they refuse to disclose information and routinely lie to their physicians – what are the consequences, if any, for FRE 803(4)? Should there be some controversy regarding the viability of FRE 803(4) as a hearsay exception? Should litigants and courts have the ability to challenge FRE 803(4) reliability?

#### IV. FRE 803(4): RELIABILITY OF THE PATIENT-DECLARANT & LAW

I have previously written that courts do not understand medicine.<sup>31</sup> Courts in the United States, including the United States Supreme Court,<sup>32</sup> simply believe that “statements made in the course of receiving medical care . . . are made in contexts that provide substantial guarantees of their trustworthiness.”<sup>33</sup> In *White v. Illinois*,<sup>34</sup> the Supreme Court stated:

[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.<sup>35</sup>

Of course, the evidence contained in medical literature, previously referred to in this paper, contradicts this thinking, is readily available to, and is seemingly ignored by courts. The Supreme Court’s statement in *White* is wishful thinking. The notion that courts ignore medicine was well noted by Judge Posner, albeit in a different context, in *Jackson v. Pollion*.<sup>36</sup> Judge Posner

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28. John J. Palmieri & Theodore A. Stern, *Lies in the Doctor-Patient Relationship*, 11 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 163, 165 (2009).

29. *Id.*

30. *Id.* at 163.

31. See Marc D. Ginsberg, *Non-Physician vs. Physician: Cross-Disciplinary Expert Testimony in Medical Negligence Litigation – Who Knows the Standard of Care?*, 35 GA. ST. U. L. REV. 679, 725 (2019) (citing my prior law review article which cites to Judge Posner’s opinion in *Jackson v. Pollion*, 733 F.3d 786, 790 (7th Cir. 2013)).

32. *White v. Illinois*, 502 U.S. 346, 355-56 (1992).

33. *Id.* at 355.

34. *Id.* at 346.

35. *Id.* at 356.

36. *Jackson*, 733 F.3d at 786.

stated:

Like the lawyers, the two judges made no reference to any medical literature ... But if they were going to venture an opinion on the “objective seriousness” of the plaintiff’s “medical condition,” they had to get the condition right — ....

To determine the effect on the plaintiff’s health of a temporary interruption in his medication, the lawyers in the first instance, and if they did their job the judges in the second instance, would have had to make some investment in learning about the condition. That could have taken the form . . . [of] just consulting a reputable medical treatise. The legal profession must get over its fear and loathing of science.<sup>37</sup>

This having been said, what is a trial court to do when considering a FRE 803(4) statement? This is no small undertaking as the issue raised here is not simply that of a court ignoring medical evidence relating to the plaintiff’s *prima facie* case or defendant’s defense. Here, the problem concerns the application of FRE 803(4), which is, indisputably, a revered component of the law of evidence.

First, there is no doubt that hearsay evidence must be relevant to be admissible,<sup>38</sup> even if the hearsay statement fits within a recognized hearsay exception.<sup>39</sup> Then, the analysis becomes more complicated. Can a trial court refuse to admit a hearsay statement which otherwise fits within the FRE 803(4) exception if the court were to recognize the medical literature indicating that patients often do not provide accurate information to their physicians? It has been held that “[u]nder the hearsay rule, the trial court retains the power to exclude evidence that is unreliable . . . .”<sup>40</sup>

United States Courts of Appeals have developed FRE 803(4) admissibility tests.<sup>41</sup> In *United States v. Joe*,<sup>42</sup> the Tenth Circuit Court of Appeals explained the test adopted by the Fourth and Eighth Circuits, as follows:

The Fourth and Eighth Circuits . . . have employed the following two-part test to determine a statement’s admissibility under Rule 803(4): “first, the declarant’s motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a

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37. *Id.* at 790.

38. FED. R. EVID. 402.

39. See Norman M. Garland, *An Overview of Relevance and Hearsay: A Nine Step Analytical Guide*, 22 SW. U. L. REV. 1039, 1039 (1993).

40. *Coulter v. Indus. Comm’n of Ariz.*, 198 Ariz. 384, 388 (Ct. App. 1st Div. 2000) (citing 2 MCCORMICK ON EVIDENCE § 277, 248 (John W. Strong ed., 4th ed. 1992); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 803.11(7)(a), 803-76 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997)).

41. See *United States v. Harry*, 20 F. Supp. 3d 1196, 1230, 1232 (D.N.M. 2014) (referring to tests developed by the Tenth, Fourth and Eighth Circuits).

42. 8 F.3d 1488, 1494 (10th Cir. 1993).

physician in treatment or diagnosis.”<sup>43</sup>

The Tenth Circuit, in *Joe*,<sup>44</sup> rejected this test as “not contemplated by the rule and . . . not necessary to ensure that the rule’s purpose is carried out.”<sup>45</sup> Instead, the court simply held that “the plain language of Rule 803(4) should guide us in determining the admissibility of statements made for purposes of medical diagnosis or treatment.”<sup>46</sup>

The Seventh Circuit has pronounced that the FRE 803(4) admissibility test “is whether such statements are of the type reasonably pertinent to a physician in providing treatment.”<sup>47</sup> In *Gong v. Hirsch*,<sup>48</sup> the Seventh Circuit also referred with approval to the admissibility test suggested by Judge Weinstein’s evidence treatise as “the same as under Rule 703 – whether an expert in the field would be justified in relying upon this statement in rendering his opinion.”<sup>49</sup>

These “tests” for FRE 803(4) admissibility are not necessarily helpful. Statements fitting within hearsay exceptions are not necessarily admissible in the absence of relevance, yet the aforementioned “tests” suggest that the opposite is true, particularly if there is an argument for unreliability. Therefore, is there a vehicle by which to bring a FRE 803(4) admissibility issue to the attention of a trial court in advance of an objection to trial testimony? Is it possible to raise the issue of unreliability before trial?

The motion *in limine* appears to be an available vehicle through which, at least, some FRE 803(4) issues may be raised before trial.<sup>50</sup> The relevance<sup>51</sup> of FRE 803(4) statements is a fair subject of a motion *in limine*.<sup>52</sup> The application of FRE 403<sup>53</sup> as a method to exclude otherwise relevant evidence is also a proper subject of a motion *in limine*.<sup>54</sup>

Worthy of mention is that the FRE does not address motions *in limine*.<sup>55</sup> Instead, it is thought that the authority for motions *in*

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43. *Id.* at 1494 n.5 (citation omitted).

44. *Id.* at 1488.

45. *Id.* at 1494 n.5.

46. *Id.*

47. *Cook v. Hoppin*, 783 F.2d 684, 690 (7th Cir. 1986).

48. 913 F.2d 1269 (7th Cir. 1990).

49. *Id.* at 1273–74 (citing 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE ¶ 803(4)[01], 803-146 to 803-147 (1988)).

50. *See United States v. Woody*, 336 F.R.D. 293, 301, 309-10 (D.N.M. 2020); *In re Fosamax Prods. Liab. Litig.*, No. 08 Civ. 4119, 2013 WL 174416 (S.D.N.Y. Jan. 15, 2013); *Samaan v. Saint Joseph Hosp.*, 764 F. Supp. 2d 238, 239-40 (D. Me. 2011).

51. FED. R. EVID. 401 (defining relevance).

52. *See In re Fosamax*, 2013 WL 174416.

53. FED. R. EVID. 403 (explaining the exclusion of otherwise relevant evidence).

54. *See Samaan*, 764 F. Supp. 2d at 239-40.

55. Jennifer M. Miller, *To Argue Is Human, to Exclude, Divine: The Role of*



*limine* derives from “the trial court’s inherent powers, the court’s power to determine threshold questions of admissibility under [FRE] 104, and the court’s power to determine evidentiary questions at the pretrial conference.”<sup>56</sup> Notwithstanding the availability of the motion *in limine* as a vehicle to address certain FRE 803(4) issues, whether reliability may be addressed is another matter. The Ninth Circuit’s opinion in *United States v. George*<sup>57</sup> may be instructive.

In *George*,<sup>58</sup> the Ninth Circuit considered an appeal of a conviction for sexual abuse. Among the appellate issues was a physician’s testimony “to a hearsay statement identifying George as the assailant, which the victim made during the course of [the physician’s] examination of her.”<sup>59</sup> The defendant urged that the admission of the physician’s testimony constituted a Confrontation Clause violation.<sup>60</sup>

In addressing this issue, the Ninth Circuit’s comments suggest that the declarant’s reliability for purposes of FRE 803(4) may not be subject to a direct attack. Consider these statements of the Ninth Circuit:

Hearsay testimony is barred by the Confrontation Clause in criminal cases unless, *inter alia*, it has “adequate indicia of reliability.” The reliability requirement is satisfied if the statement falls within a “firmly rooted hearsay exception” or if it is supported by “particularized guarantees of trustworthiness.” The trial court admitted [the physician’s] hearsay testimony pursuant to the hearsay rule’s medical examination exception . . . [FRE] 803(4). The medical examination exception is a firmly rooted hearsay exception. When hearsay testimony is properly admitted pursuant to this exception, no further guarantees of trustworthiness are required.<sup>61</sup>

These comments clearly suggest that a declarant’s statement which satisfies the text of FRE 803(4), a firmly rooted hearsay exception, is reliable. Unless reliability can be addressed as a legal matter, referring to medical scholarship indicating that patients routinely do not tell their physicians the truth (for various reasons), arguably it can be indirectly addressed by cross-examining the physician-witness. Pursuant to FRE 611(b),<sup>62</sup> the physician-witness can be cross-examined on the subject matter of direct examination,

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*Motions in Limine and the Importance of Preserving the Record on Appeal*, 32 AM. J. TRIAL ADVOC. 541, 543 (2009) (“No state or federal rule clearly recognizes the motion in limine.”).

56. Christopher B. Mead, *Motions in Limine: The Little Motion that Could*, 24 LITIG. 52, 52 (1998). See also Edna Selan Epstein, *Motions in Limine – a Primer*, 8 LITIG. 34, 35 (1982).

57. 960 F.2d 97 (9th Cir. 1992).

58. *Id.*

59. *Id.* at 98–99.

60. *Id.* at 99.

61. *Id.* (citations omitted).

62. FED. R. EVID. 611(b); See also Theis, *supra* note 20, at 365.

which would include the physician's FRE 803(4) testimony. Of course, by that point at trial, the jury will have already heard the declarant's statement. If FRE 803(4) presumes reliability, the trial court would need to determine if reliability was a proper subject for cross-examination.

An examination of a few state court opinions, from Maine, Colorado, Mississippi, and Texas, provides insight as to how some courts evaluate declarant reliability. In *Walton v. Ireland*,<sup>63</sup> the Supreme Judicial Court of Maine considered the application of Maine's Rule of Evidence 803(4),<sup>64</sup> which provides a hearsay exception for statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."<sup>65</sup> Interestingly, the Supreme Judicial Court, in characterizing the reliability of a declarant's statement, pronounced:

The reliability of a hearsay statement . . . goes to its weight, not its admissibility; it is a matter for the fact-finder to consider in its evaluation of all the evidence, and not for the court to consider in determining the admissibility of the statement.

Absent a change to the rules of evidence, we decline to require an additional showing of reliability for hearsay statements that fall within the Rule 803(4) exception.<sup>66</sup>

Of course, under this approach, the only available attack on reliability is through cross-examination.

In *Kelly v. Haralampopoulos*,<sup>67</sup> the Supreme Court of Colorado considered the application of Colorado Rule of Evidence 803(4),<sup>68</sup> which is similar to FRE 803(4). Here, the Supreme Court emphatically stated that there is no "test of reliability that is separate from the 'made for the purpose of medical diagnosis or treatment' language of the Rule."<sup>69</sup>

A decidedly different approach was taken by the Court of Appeals of Mississippi in *Carpenter v. State*.<sup>70</sup> The Court of Appeals recognized that the trial court conducted "an on-the-record reliability determination"<sup>71</sup> "[p]rior to trial"<sup>72</sup> and "outside the presence of the jury."<sup>73</sup> The trial court's determination, following the

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63. 104 A.3d 883 (Me. 2014).

64. ME. R. EVID. 803(4).

65. *Walton*, 104 A.3d at 886.

66. *Id.* at 887–88.

67. 327 P.3d 255 (Colo. 2014).

68. COLO. R. EVID. 803(4).

69. *Kelly*, 327 P.3d at 265.

70. 132 So. 3d 1053 (Miss. Ct. App. 2013).

71. *Id.* at 1057.

72. *Id.*

73. *Id.*

hearing, although lengthy, is worthy of repetition here:

Considering any apparent motive on the declarant's part to lie, the general character of the declarant, the number of persons that were present and heard the statements that were made, the spontaneity of the statements made, the timing of the declaration, the relationship between the declarant and the witnesses, the possibility of faulty recollection, the certainty of the statements made, the credibility of the persons testifying about the statements, the age and maturity level of the declarant, whether any suggestive techniques were used in eliciting the statements, and whether the declarant's age, knowledge, and experience make it unlikely or rather the likelihood of the declarant's statement[s] being fabricated, and in . . . including or considering the time, content, and circumstances of the statements made, *the court finds it provides a substantial indicia of reliability . . .*<sup>74</sup>

This approach to a reliability determination is consistent with the use of a motion *in limine* to obtain a pre-trial ruling. Certainly, this extensive, detailed approach by the trial court is case specific and perhaps not required in every case. Nevertheless, this method provides a pre-trial opportunity to urge the lack of reliability of a statement which appears to satisfy the hearsay exception.

A rather interesting, yet perplexing, case is *Sneed v. State*,<sup>75</sup> an opinion of the Court of Appeals of Texas involving a "felony conviction for driving while intoxicated."<sup>76</sup> Here, the defendant sought admission into evidence of his medical records to establish that "he previously suffered a head injury and was taking medication at the time he was arrested for driving while intoxicated."<sup>77</sup> These were "potentially exculpatory post-arrest medi[c]al records."<sup>78</sup> The defendant urged admissibility pursuant to Texas Rule of Criminal Evidence 803(4), the hearsay exception for "statements made for the purpose of medical diagnosis or treatment."<sup>79</sup> As with FRE 803(4), the "exception is based on the rationale a patient will provide accurate information to a doctor in order to receive effective treatment."<sup>80</sup> The trial court excluded the evidence but "did not articulate the basis for its exclusionary ruling . . . ."<sup>81</sup>

The Court of Appeals affirmed the trial court's exclusion of the evidence as it was self-serving, which according to the Court of Appeals, reduced the reliability of the statements contained in the medical records.<sup>82</sup> Of course, the difficulty with the Court of

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74. *Id.*

75. 955 S.W.2d 451 (Tex. Ct. App. 1997).

76. *Id.* at 452.

77. *Id.* at 452-53.

78. *Id.* at 453.

79. *Id.* (citing TEX. R. CRIM. EVID. 803(4)).

80. *Sneed*, 955 S.W.2d at 453 (citation omitted).

81. *Id.*

82. *Sneed*, 955 S.W.2d at 454-55.

Appeals' rationale for inadmissibility is that all evidence should be self-serving. That is, for evidence to be compelling, it should be helpful to the party seeking to introduce it. If self-serving evidence suffers from reduced reliability, then, theoretically, all evidence should be subject to exclusion, a result which is preposterous.

## V. FRE 803(4): OTHER SIGNIFICANT PRINCIPLES

Despite the fact that the text of FRE 803(4) neither identifies the declarant as the patient nor demands that the declarant is the patient, it is clear that federal courts require the declarant to be the patient, i.e., the person seeking treatment.<sup>83</sup> Referring to the previous discussion of patient unreliability, one might question why FRE 803(4) would not encompass statements by a declarant-physician to a testifying witness physician. It seems reasonable that a physician's statement to a physician colleague pertaining to medical diagnosis or treatment would be more reliable and trustworthy than a statement by a patient-declarant. Nevertheless, that position is not likely to prevail.<sup>84</sup>

FRE 803(4) statements must be made to medical professionals, but not necessarily limited to physicians. This point was recently made by the Eighth Circuit in *United States v. Earth*,<sup>85</sup> where the Court held that FRE 803(4) applied to a declarant's statement to an EMT.<sup>86</sup> Therefore, statements to non-physician health care professionals, including nurses and allied health professionals, should qualify as FRE 803(4) statements.<sup>87</sup>

The declarant's FRE 803(4) statement need not be spontaneous or volunteered. The statement may be in response to a physician's question. This application of FRE 803(4) was well explained by the Sixth Circuit in *Kentucky Central Life Insurance Co. v. Jones*,<sup>88</sup> a case involving a "judgment . . . rescinding a life insurance policy . . . because of a material misrepresentation made by [the insured]

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83. See *Francois v. Gen. Health Sys.*, 459 F. Supp. 3d 710, 723 (M.D. La. 2020); *Tucker v. Nelson*, 390 F. Supp. 3d 858, 862 (S.D. Ohio 2019); *Bombard v. Fort Wayne Newspapers*, 92 F.3d 560, 564 (7th Cir. 1996); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315 (9th Cir. 1985).

84. See *Tucker*, 390 F. Supp. 3d at 862 (FED. R. EVID. 803(4) does not apply to statement of declarant-physician who was consulted during the course of treatment).

85. 984 F.3d 1289 (8th Cir. 2021).

86. *Id.* at 1294-96.

87. For example, Allied Health Professionals may include physiotherapists, occupational therapists, speech pathologists (Robyn L. Saxon et al., *Extended Roles for Allied Health Professionals: An Updated Systematic Review of the Evidence*, 7 J. MULTIDISCIPLINARY HEALTHCARE 479 (2014)) and dental hygienists (Thomas W. Elwood, *Patchwork of Scope-of-Practice Regulations Prevent Allied Health Professionals from Fully Participating in Patient Care*, 32 HEALTH AFFS. 1985 (2013)).

88. No. 92-6263, 1993 U.S. App. LEXIS 21976, at \*1 (6th Cir. Aug. 27, 1993).

concerning his history of smoking.”<sup>89</sup> The Sixth Circuit stated:

... he was asked by [physicians] to relate to them his medical history as well as any personal habits which might influence the course of treatment. There can be little doubt that information regarding [his] smoking history was relevant to the physicians’ efforts to alleviate his illness. It was precisely the kind of patient-generated information contemplated by Rule 803(4) as being reliable and credible.

Their inquiries were plainly relevant to their efforts to cure his illness. The thought behind Rule 803(4) is that when a patient answers questions of this type there is a high probability that the response provided will be trustworthy because of the patient’s natural interest in aiding his or her recovery.<sup>90</sup>

The non-spontaneous statement of the declarant is not limited to the FRE 803(4) hearsay exception. It is also a feature of the “dying declaration.”<sup>91</sup> McCormick has noted that “occasionally, dying declarations have been limited with regard to statements elicited by leading questions. However, no blanket limitation against statements in response to questions is generally recognized or appropriate.”<sup>92</sup>

The Fourth Circuit, in *Morgan v. Foretich*,<sup>93</sup> held that FRE 803(4) may be satisfied by a young child-declarant’s statement even if the child is incompetent to testify at trial.<sup>94</sup> The rationale is two-fold. “First, a young child will have the same motive to make true statements for the purposes of diagnosis or treatment as an adult.”<sup>95</sup> Next, “statements of a child are ‘reasonably relied on by a physician in treatment or diagnosis.’”<sup>96</sup>

Finally, insofar as basic principles are concerned, the FRE 803(4) declarant’s statement need not be made to a physician actually involved in the declarant’s treatment. FRE 803(4) statements may be made to health care providers consulted for the purpose of testifying at trial.<sup>97</sup> An example would be statements made to a child psychologist “who had spent over one hundred hours

89. *Id.*

90. *Id.* at \*11-12, 15.

91. FED. R. EVID. 804(b)(2).

92. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 705 (Robert P. Mosteller ed., 8th ed. 2020).

93. 846 F.2d 941 (4th Cir. 1988).

94. *Id.* at 949. See FED. R. EVID. 601.

95. *Id.*

96. *Id.* (citation omitted). It should be noted that this paper does not focus on statements of child-declarants in child abuse/sexual assault litigation. The child-declarant is well discussed in legal scholarship. Myrna S. Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009 (2007); Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989).

97. *Morgan*, 846 F.2d at 941.

examining and working with [a child abuse victim].”<sup>98</sup> The Fourth Circuit has explained that “Rule 803(4) ‘abolished the [common law] distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only: the latter usually refers to a doctor who is consulted only in order to testify as a witness.’”<sup>99</sup>

The rationale underlying the FRE 803(4) application to statements made to physicians consulted for litigation purposes has been soundly criticized many years ago in a law review article primarily focused on Illinois law.<sup>100</sup> Here, it is explained that:

If the patient is presumed to tell the truth when he wants effective treatment, the law should assume no similar reliability when the patient is describing his illness to a doctor from whom he does not seek treatment. When the patient seeks an expert for purposes of testifying, he seeks only to better his legal position; he not only lacks the motivation to be truthful, but he actually has a motivation to be untruthful.<sup>101</sup>

The Illinois Rules of Evidence (“IRE”) have specifically addressed this issue. IRE 803(4)(A) provides:

(4) Statements for Purposes of Medical Diagnosis or Treatment.

(A) Statements made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment but, subject to [IRE] 703, not including statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial . . . .<sup>102</sup>

Statements to health care providers for litigation purposes are not encompassed by the hearsay exception contained in the IRE.

Pennsylvania’s Rule of Evidence 803(4) is not identical to the Illinois rule. Pennsylvania’s rule provides as follows:

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

is made for--and is reasonably pertinent to--medical treatment or diagnosis in contemplation of treatment; and

describes medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment,

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98. *Id.* at 948.

99. *Id.* at 950 (citation omitted).

100. Theis, *supra* note 20, at 371.

101. *Id.*

102. ILL. R. EVID. 803(4)(A).

or diagnosis in contemplation of treatment.<sup>103</sup>

The Pennsylvania Supreme Court has similarly held that the medical treatment hearsay exception applies to “statements which were made for the purposes of receiving medical treatment . . . .”<sup>104</sup>

The application of FRE 803(4) to statements to health care providers solely for litigation purposes deserves some attention in the context of the independent medical examination. The next section of this paper addresses this topic.

## VI. THE INDEPENDENT MEDICAL EXAMINATION

The independent medical examination has been well described in medical literature, as follows:

An independent medical evaluation (IME) is an assessment performed by a physician who does not treat the patient. Disability insurers, employers or lawyers often request an IME when faced with uncertainty about the cause or nature of a claimed disability, or the functional status and/or rehabilitation potential of the claimant.<sup>105</sup>

Independent medical examinations are provided for by the Federal Rules of Civil Procedure:

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.<sup>106</sup>

Insofar as FRE 803(4) is concerned, this paper has previously referred to the unreliability of patients’ statements to physicians. This point merits repeating with respect to the independent medical examination.<sup>107</sup>

Medical literature has warned of the inherent problems with

103. PA. R. EVID. 803(4)(A)-(B).

104. *Commonwealth v. Smith*, 681 A.2d 1288, 1291 (Pa. 1996).

105. Shanil Ebrahim et al., *Ethics and Legalities Associated with Independent Medical Evaluations*, 186 CAN. MED. ASS’N J. 248, 248 (2014).

106. FED. R. CIV. P. 35(a)(1).

107. Not addressed in this paper is the fascinating issue of whether an independent medical examiner owes a duty of care to the examinee. The reader is encouraged to refer to the following: *Smith v. Radecki*, 238 P.3d 111 (Alaska 2010); *Ritchie v. Krasner*, 211 P.3d 1272 (Ariz. Ct. App. 2009); *Hafner v. Beck*, 916 P.2d 1105 (Ariz. Ct. App. 1995); Liza H. Gold & John E. Davidson, *Do You Understand Your Risk? Liability and Third-Party Evaluations in Civil Litigation*, 35 J. AM. ACAD. PSYCHIATRY L. 200 (2007); Donna Vanderpool, *Professional Liability for Forensic Activities: Liability Without a Treatment Relationship*, 13 INNOVATIONS CLINICAL NEUROSCI. 41 (2016).

independent medical examinations.<sup>108</sup> Consider the following:

“Examiners must also carefully consider patient motivations and perceived gains associated with IMEs. For example, poor job satisfaction may lead some patients to view the IME as a means of securing financial stability without returning to work.”<sup>109</sup>

“Some patients may feign their own illness in order to gain worker’s compensation benefits for the purpose of caring for a loved one. Furthermore, because of serious illness in close family members, other patients may create or exaggerate their own illness so they can care for someone close to them.”<sup>110</sup>

“There are currently a number of organizations and websites that provide information to patients on methods of maximizing the appearance of injury and even feigning a workplace injury. . . . Unfortunately, these resources may invite claimants to exaggerate or fake injuries in a manner that is difficult for the physician to detect.”<sup>111</sup>

These comments reinforce the notion that statements by patient-declarants to health care providers tend to be unreliable. This problem is exacerbated in the context of the independent medical examination, in which the role of the examining physician is not treatment related.

## VII. CONCLUSION-A MODEST PROPOSAL

This paper has demonstrated the tension between law and medicine in the context of FRE 803(4). Courts have routinely taken the position that statements appearing to satisfy the FRE 803(4) requirements are reliable. Arguably, courts find these statements reliable based on the notion that patients understand that effective medical treatment is predicated, in part, on the health care provider’s receipt of accurate, truthful information from patients and that patients, therefore, will provide this information. Unfortunately, medical literature suggests that this is not true, and that patients are not necessarily inclined to provide health care providers with accurate information.

Even if the argument for FRE 803(4) applies to statements made to health care providers who are involved in the treatment process, the argument is decidedly weaker when considering health care providers not involved in the treatment process – those consulted for litigation purposes. A “clinician . . . makes diagnoses on the basis of history, physical examination, accumulated laboratory data and X-ray findings, and is fundamentally concerned

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108. See Paul Ky et al., *Independent Medical Examinations: Facts and Fallacies*, 12 PAIN PHYSICIAN 811, 812-14 (2009).

109. *Id.* at 813.

110. *Id.*

111. *Id.* at 815.



with treatment.”<sup>112</sup> Furthermore, “before [the physician] can fit the disease into a known category, [the physician] must similarly have a period of observation, fortified by special tests and diagnostic procedures.”<sup>113</sup> In fact, in 1917, the term diagnosis was defined as follows:

Diagnosis means more than merely naming a disease. It demands such accurate sub-classification and intelligent, painstaking individualization, as necessitates a knowledge of etiologic factors, the nature and sequence of pathologic changes, the effect of age, occupation, residence, habits, heredity, past ailments, and even of the constitutional peculiarities and personal characteristics of the individual.<sup>114</sup>

A physician not involved in the treatment process is unlikely to have all of the aforementioned information available to a clinician and therefore is less likely to know if the patient-declarant has provided reliable information.

Therefore, my recommendation is quite simple. The FRE 803(4) hearsay exception should not be eliminated. Certainly, there are patient-declarants who are excellent historians and reporters of their health conditions and provide reliable information to their health care providers in the quest for effective medical treatment. Regrettably, other patient-declarants do not reliably communicate with their health care providers. Courts should be able to address declarant reliability on a pre-trial basis through the motion *in limine*. Otherwise, cross-examination provides the only check on reliability, elevating credibility over admissibility.

An amendment to FRE 803(4) would be helpful, yielding a rule similar to those adopted in Illinois or Pennsylvania. Eliminating the application of FRE 803(4) to statements made to expert witnesses and independent medical examiners would produce a rule focusing on diagnosis essential to the treatment process.

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112. Lester S. King, *The Meaning of Medical Diagnosis*, 8 ETC: REV. GEN. SEMANTICS 202, 202 (1951).

113. *Id.* at 203.

114. CHARLES LYMAN GREENE, MEDICAL DIAGNOSIS FOR THE STUDENT AND PRACTITIONER 1, 1 (1917).