Hearsay

Generally

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*
- *Objection. The question calls for conduct hearsay because* (explaining why conduct was intended by declarant as a substitute for verbal expression).

Response

- *The statement is not hearsay because it is not being offered for the truth of the matter asserted, but rather to show that the statement was made. The making of the statement is relevant*
  - » *because it is an operative fact or verbal act;* or
  - » *because it has independent legal significance to prove the existence of a contract* (or *a misrepresentation* or *that a defamatory statement was made* or some other issue)*;* or
  - » *to show the knowledge* (or *state of mind*) *of* (person who heard the statement and whose knowledge or state of mind is somehow relevant in the case)*;* or
  - » *to show notice to* (person or party whose conduct is in issue) *of* (existence of an event or condition)*;* or
  - » *to show the information acted on by* (person whose conduct, knowing the information contained in statement, is somehow relevant in the case)*;* or
  - » *to show a prior inconsistent statement made by this witness.*

Cross-Reference to Texas Rule 801

Explanation

Hearsay is an out-of-court statement, written or oral, that is offered to prove the truth of the matter asserted by the declarant of the statement (*see Mosley v. State*, 141 S.W.3d 816 (Tex. App.—Texarkana 2004)). An out-of-court statement offered for any relevant purpose other than the truth of the matter asserted is not hearsay. Thus, when the mere fact that an out-of-court statement was made is relevant, independent of whether the statement is true, the statement is not hearsay. Hearsay can include conduct such as hand gestures, if intended as a statement. A finger pointing in accusation of a crime can be conduct hearsay if intended to prove the truth of the matter asserted.

Practice Tip

Understand the differences between hearsay, nonhearsay, and hearsay statements that fall within an exception to the hearsay rule. When preparing for trial, consider any out-of-court statement that you may need as evidence and analyze how to gain admissibility. For documents, look for hearsay within hearsay.

Hearsay

Admissions of a Party Opponent

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *The statement is not hearsay, because*
  - *the statement was made by a party opponent;* or
  - *though the statement was made by* (declarant)*, it was adopted by the party opponent as his* (or *her*) *own and so is a vicarious admission of the party opponent;* or
  - *the statement was made by an agent authorized to speak on behalf of a party opponent and so is a vicarious admission of the party opponent;* or
  - *the statement was made by an agent* (or servant) *of the party opponent, concerning a matter within the scope of the declarant's agency or employment, and was made during the existence of the declarant's agency or employment, and so is a vicarious admission of the party;* or
  - *the statement was made by a coconspirator of the party opponent, during the course of the conspiracy, and in furtherance of the conspiracy, and so is a vicarious admission of the party opponent.*

Cross-Reference to Texas Rule 801(e)(2)

Explanation

Statements falling under the hearsay exclusion provided by Rule 801(e)(2) are no longer referred to as "admissions" in the title to the

subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion when compared with the Rule 803(24) exception for declarations against interest. No change in application of the exclusion is intended.

Party admissions are statements made by a party that are offered by the opponent. The simplest form of admission is a statement made by the opposing party in either her individual or representative capacity. Rule 801(e)(2) further provides for a number of vicarious nonhearsay statements, previously known as admissions. These are statements of a declarant other than the party opponent that are attributed to the party opponent because of the party's adoption of the statement or some relationship between the party opponent and the declarant. Employees, attorneys, experts—all can make finding statements for a party opponent (*Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231 (Tex. 2007) (statements made in superseded pleadings are admissible as party-opponent statements and are not hearsay)). The term admissions may be a slight misnomer in that any statement that fits with the confines of the rule will be admissible—the party opponent need not "admit" anything in the traditional sense of the word. *Any* statement by a party-opponent is admissible against that party (*Quick v. Plastic Solutions*, 270 S.W.3d 173 (Tex. App.—El Paso 2008)).

It is important to note that in a criminal case, the victim is not a party opponent and the victim's admission is not binding on the State (*see, e.g.*, *Willover v. State*, 70 S.W.3d 841 (Tex. Crim. App. 2002)).

Practice Tip

To avoid a hearsay objection being sustained, when the admission is by an agent, servant, or employee, lay a predicate showing the nature and existence of the relationship between the declarant and the party-opponent, the fact that the admission was made during the existence of the relationship, and the fact that it was within the scope

of the relationship (*Trencor, Inc. v. Cornech Machine Co.*, 115 S.W.3d 145 Tex. App.—Fort Worth 2003)).

Hearsay

Attacking and Supporting the Credibility of a Declarant

Objection

- *Objection. The question seeks to attack the credibility of a person who has not appeared as a witness.*

Response

- *This impeachment of an out-of-court declarant is permissible, under Rule 806, to the same extent available for a testifying witness.*

Cross-Reference to Texas Rule 806

Explanation

In most instances in which a hearsay statement is admitted, the credibility of the declarant may be attacked. This is because once the statement is admitted, the declarant is considered a witness to the matters asserted out of court. The opponent may impeach the credibility of the absent declarant to the same extent that one could impeach a live witness. The rule contains no requirement that the declarant have been given an opportunity to deny or explain, and all of the usual impeachment methods are available, including affidavits and prior statements (*see Leal v. State*, 614 S.W.2d 835 (Tex. Crim. App. 1981); *Anthony Pools, Inc. v. Charles & David, Inc.*, 797 S.W.2d 666 (Tex. App.—Houston [14th Dist.] 1990)).

Hearsay

Depositions

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *The statement is not hearsay because*
  - *it was made in a deposition taken in this cause;* or
  - *it was made in a deposition taken in the same proceeding within the meaning of Rule 801(e)(3) of the Rules of Evidence and Rule 203.6(b) of the Rules of Civil Procedure. The deposition was taken in a cause involving the same subject matter and was between the same parties or their representatives or successors.*

Cross-Reference to Texas Rule 801; Texas Rules of Procedure 203.6

Explanation

Unlike in federal court, depositions are not treated as hearsay in Texas.

Same Proceeding

Any deposition taken in the same proceeding may be used at trial or hearing by any party, for any relevant purpose, against any party who was either present or represented at the deposition, or who had notice of it, or who substituted for such a party. The "same proceeding" as defined in Tex. R. Civ. P. Rule 203.6(b) includes a proceeding in a different court, but involving the same parties (including their representatives and successors in interest) and the same subject matter. Therefore, not only are depositions considered

nonhearsay if taken in the cause on trial, but also depositions are not hearsay if taken in any other cause involving the same subject matter and the same parties, their representatives, or successors. While a deposition taken in federal court would constitute inadmissible hearsay in that court, it is nonhearsay and admissible in a Texas state court involving the "same proceeding."

Other Proceeding

If the deposition does not qualify under Rule 203.6(b) as being taken in the same proceeding, then it is considered hearsay. The proponent must then seek admission under any other theory available under the hearsay rules.

Hearsay Within Hearsay

Objections

- *Objection. The question calls for hearsay within hearsay as to what* (second declarant) *stated that* (first declarant) *said.*
- *Objection. The answer is hearsay within hearsay as to what* (second declarant) *stated that* (first declarant) *said.*

Response

- *Both statements are admissible because each either comes within a hearsay exception or is nonhearsay. Specifically,* (explaining theory of admissibility as to each statement).

Cross-Reference to Texas Rule 805

Explanation

This is the multiple hearsay rule. The rule often applies to writings that contain attributed statements (*see Garcia v. State*, 126 S.W.3d 921 (Tex. Crim. App. 2004)). To secure admission of the statement within the statement, the proponent must account for both out-of-court statements with either a hearsay exception or an argument that the out-of-court statement is not hearsay at all.

Hearsay

Nonhearsay Prior Statements of Witnesses

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Responses

- *The statement is not hearsay, pursuant to Rule 801(e)(1)(A), because it is inconsistent with the witness's trial testimony and was given under oath at an earlier proceeding* (or *in a deposition*).
- *The statement is not hearsay, pursuant to Rule 801(e)(1)(B), because it is consistent with the witness's trial testimony and is offered to rebut an express* (or *implied*) *charge of recent fabrication* (or *improper influence* or *motive*).
- *The statement is not hearsay, pursuant to Rule 801(e)(1)(C), because it is a statement by the testifying witness of identification of a person made after perceiving such person.*
- *The statement is not hearsay, pursuant to Rule 801(e)(1)(D), because it is taken and offered in accordance with article 38.071 of the Code of Criminal Procedure.*

Cross-Reference to Texas Rule 801(e)(1)

Explanation

The Texas rules define as nonhearsay prior statements by a witness in the four categories contained in Rules 801(e)(1)(A)–(D). Such statements are admitted for the truth of the matter asserted. Each category of 801(e)(1) statements requires the declarant to be present, testifying in court, and available for cross-examination. The declarant need not actually be on the stand at the time the prior

statement is offered; if the declarant has already testified, but has not yet been excused, he would be subject to cross-examination concerning the statement if recalled to the stand. The prior statement could therefore be proved by another witness (*see, e.g., Tome v. United States*, 513 U.S. 150 (1995); *Coronado v. State*, 351 S.W.3d 315 (Tex. Crim. App. 2011)).

Hearsay Exception

Absence of Entry in Business Records

Predicate Questions

If Records Are Offered

Authentication Questions

- *I hand you what has been marked for identification as Exhibit ____. Can you identify it?*
- *What is it?*

Business Records Questions

- *Were the records contained in Exhibit ____ made by or from information transmitted by a person with knowledge of the events* (or *conditions recorded*)*?*
- *Were these records made at or near the time of the events* (or *conditions recorded*)*?*
- *Were these records made in the regular course of your business?*
- *Were these records kept in the regular course of your business?*

Absence of Records Questions

- *If* (event, act, or condition in question) *had occurred, would it have been recorded in the documents contained in Exhibit ____?*
- *Did you make a diligent search for records of _____?*
- *Did you find any record of _____?*

If No Records Are Offered

Business Records Questions

- *Is it in the regular course of your business to make records of* (event, act, or condition in question)*?*

- *Is it in the regular course of your business to keep such records?*
- *Are such records made by or from information transmitted by a person with knowledge of the events* (or *conditions recorded*)*?*
- *Are such records made at or near the time of the events* (or *conditions recorded*)*?*

Absence of Records Questions

- *Did you make a diligent search for records of _____?*
- *Did you find any record of _____?*

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *The absence of an entry in this record is admissible to show the nonoccurrence of an event pursuant to Rule 803(7).*

Cross-Reference to Texas Rules 803 and 902

Explanation

The absence of any entry concerning an event that would ordinarily be recorded in a business record may be offered to show that such event never occurred. The reliability of the absence of such entry lies in the notion that prudent, conscientious businesses regularly keep records of events that actually occur.

Such evidence is normally coupled with direct testimony from a witness with knowledge of the nonoccurrence of the event, but it may be independently sufficient evidence to support a verdict on the issue of the nonoccurrence of the event.

Practice Tip

When obtaining a business records affidavit from the custodian of records, include a blank for a page count. The custodian must then certify to the number of pages that comprise the entirety of the business's records. Having certified that there are only *x* pages of

records and that these are all the records, it will be easier to establish the absence of a record at trial.

Hearsay Exception

Absence of Public Record or Entry

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *Evidence of a diligent, but unavailing search of the records of the public agency* (or *office*) *is admissible pursuant to the hearsay exception contained in Rule 803(10).*

Cross-Reference to Texas Rule 803(10)

Explanation

As with Rule 803(7), this rule provides a hearsay exception for evidence of the absence of a record or record entry. The proof that the rule contemplates is evidence of a diligent, but unavailing search of the records or record-keeping system of a public office or agency that regularly maintains such records.

Practice Tip

As with business records, when obtaining an affidavit from the custodian of public records, include a blank for a page count. The custodian must then certify the number of pages that comprise the entirety of the records. Having certified that there are only *x* pages of records and that these are all the records, it will be easier to establish the absence of a record at trial.

Hearsay Exception

Excited Utterance

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the excited utterance exception, Rule 803(2).*

Cross-Reference to Texas Rule 803(2)

Explanation

Excited utterances gain their reliability from the connection between the making of the statement and the startling event. Thus, to qualify as an excited utterance, the event that gives rise to the statement relating to it must be sufficiently startling so as to remove the likelihood of self-serving reflection before the statement was made (*see Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004)).

Timing of the Statement

Unlike present sense impressions, an excited utterance need not be contemporaneous with the pertinent event. Texas cases have held a statement to be admissible under this exception even though there was a passage of many minutes or even hours between the event and the statement (*see, e.g., City of Dallas v. Donovan*, 768 S.W.2d 905 (Tex. App.—Dallas 1989)). The critical element is not time, but whether the declarant was still acting under the stress of the exciting or startling event when the statement was made.

Practice Tip

Establish the nature of the startling event and the declarant's emotion reaction to it as a foundational question or questions. Demonstrate that the effect of the event still pervaded the witness's mind if significant time elapsed between the event and the statement. When a statement fails to meet the criteria for an excited utterance (perhaps because the event was not sufficiently startling), it may in some cases be admissible under the present sense impression exception.

Hearsay Exception

Family Records

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the family record exception pursuant to Rule 803(13).*

Cross-Reference to Texas Rule 803(13)

Explanation

This rule creates a hearsay exception for facts relating to family or personal history that are found in a variety of writings, ranging from Bibles to tombstones.

The reliability of these writings stems from the fact that an entry in such a document or item would not be made erroneously without family or personal protest. There is no requirement of contemporaneity of entry for family records. However, like any other writing, family records must be authenticated. Because the writing or entry is only reliable if generally accepted by the family or person to whom it refers, the proponent's offer of evidence of family acceptance or lack of protest regarding the writing or inscription would be persuasively important. However, such testimony is not a required predicate for admissibility. The rule does away with the common-law requirements that the declarant be unavailable, be a family member, have no motive to fabricate, and have made the statement *ante litem motam* (before the lawsuit began).

Practice Tip

Making the Bible, a photograph of the tombstone, or the family tree document available to the jurors adds texture, depth, and credibility to the evidence under the exception.

Hearsay Exception

Former Testimony

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the former testimony exception pursuant to Rule 804(b)(1).*

Cross-Reference to Texas Rule 804(b)(1); Tex. Rule of Civil Procedure 203.6

Explanation

This exception draws its reliability from the general lack of hearsay dangers at the time the statement was made. The former testimony, now an out-of-court statement, was made under oath, and the person against whom it is now offered—or someone in a similar position in a civil case—had the opportunity to examine and confront the witness with a similar motive (*see Jones v. State*, 843 S.W.2d 487 (Tex. Crim. App. 1992)). When offering the prior testimony for an unavailable witness, the proponent must establish that the witness is unavailable (dead, insane, or physically unable to testify). An uncooperative witness is not per se unavailable (*Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914 (Tex. App.—Beaumont 1998, pet. granted, judgm't vacated w.r.m.); *see also* Unavailable Witnesses)).

Practice Tip

To enhance your ability to use prior testimony, have robust evidence of how and why the witness is unavailable. If the witness is

sane and alive, but merely uncooperative, show evidence of your diligent efforts to obtain the witness's testimony.

Hearsay Exception

Judgment as to Personal, Family, or General History, or Boundaries

Objection

- *Objection. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible as a judgment as to personal, family, or general history, or boundaries pursuant to Rule 803(23).*

Cross-Reference to Texas Rule 803(23)

Explanation

This exception provides a means to prove a fact that was essential to an earlier judgment as to personal, family, or general history, or as to boundaries. This rule must be read in conjunction with Rules 803(19) and 803(20), because Rule 803(23) only allows a judgment that proves facts that would be provable by reputation evidence.

Hearsay Exception

Judgment of Previous Conviction

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a judgment of previous conviction pursuant to Rule 803(22).*

Cross-Reference to Texas Rule 803(22)

Explanation

Civil Cases

The exception allows prior felony convictions to be admitted for the truth of facts essential to the judgment of conviction. Such conviction is admissible for its truth in a second case only against the person convicted in a first case. A no-contest plea may not be admitted under this exception.

If the conviction is still on appeal, then it is not admissible under this exception.

Criminal Cases

In criminal cases, evidence of any prior conviction that proves an element in the present case is admissible regardless of the plea, if it is a prior conviction of the accused in the present case. The purpose of the rule is to allow collateral estoppel of some fact proven in the prior case and necessary to prove the present case. If the conviction is of someone other than the accused, the exception does not apply. If the third party's conviction is an element of the new case, then this rule would still be applicable, as in the case of committing an offense

by dealing with a felon. Proof of the conviction of that felon would fall under this rule.

Practice Tip

This exception may be of particular value in civil cases in which there has been an ancillary criminal case. For example, a prior conviction in a DUI/manslaughter case may be of value in a Dram Shop Act, although the conviction may not be used against the bar owner.

Hearsay Exception

Learned Treatises

Objection

- *Objection. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible under the learned treatise exception pursuant to Rule 803(18).*

Cross-Reference to Texas Rule 803(18)

Explanation

Under the learned treatise exception to the hearsay rule, a court may admit passages, excerpts, or—on occasion—the entire contents of a book, article, or other writing on a subject ordinarily the subject of expert testimony. While this exception has traditionally applied to pamphlets or periodicals, some Texas courts have expanded its application as treatises and many journals or technical bulletins are produced in digital in addition to or rather than paper form (*see, e.g.*, *Loven v. State*, 831 S.W.2d 387, 397 (Tex. App.—Amarillo 1992) (video-recordings can qualify as learned treatises for purposes of the learned treatise exception to the hearsay rule)).

The learned treatise, or parts thereof, are only to be admitted when used to cross-examine an expert witness or when an expert witness has relied on a learned treatise in the direct examination. Significantly, the treatise may be admitted for its substantive truth, whether offered during direct or cross.

Practice Tip

The treatise itself may not go to the jury room, a fact that can create memory problems or disputes among the jurors about the

contents. Most judges, however, allow the admitted portions of a learned treatise to be displayed to the jurors rather than merely read to them. Thus, displaying the “learned” portion of the treatise to the jurors via ELMO, projector, or other enlargement device may allow note-taking jurors to capture the pertinent information and thus have the treatise in the jury room.

Hearsay Exception

Market Reports and Commercial Publications

Objection

- *Objection. The document is an out-of-court statement and is therefore hearsay.*

Response

- *This statement is admissible as a market report* (or *commercial publication*) *pursuant to Rule 803(17).*

Cross-Reference to Texas Rule 803(17)

Explanation

Market reports or quotations and commercial publications—including commercial newspapers, actuarial papers, and the like—are admissible against a hearsay objection. They gain their reliability from the general reliance placed on them by the entities that use them. As a result, the person or entity that creates such documents for use in a business or profession has an incentive to make the documents reliable and accurate. In addition, any inaccuracies are likely to be corrected. The predicate of use and reliance may be proved by a person with knowledge of the particular occupation, including an expert.

Hearsay Exception

Marriage, Baptismal, and Similar Certificates

Objection

- *Objection. The document is an out-of-court statement offered for its truth and is hearsay.*

Response

- *This statement is admissible as a marriage* (or *baptismal* or similar certificate) *pursuant to Rule 803(12).*

Cross-Reference to Texas Rule 803(12)

Explanation

This hearsay exception admits the facts relating to religious ceremonies, like marriages or baptisms, as long as the entrant is authorized by law or religious practice to perform such ceremony and the record is made contemporaneously with or reasonably soon after the occurrence of the ceremony.

These records are considered to be reliable because of the solemnity of the occasion, the entrant's legal authorization, and the contemporaneity of the entry with the fact or ceremony recorded.

Practice Tip

As with family bibles and other nostalgic materials, having the actual certificate present in the courtroom adds interests and authenticity to the testimony.

Hearsay Exception

Present Sense Impression

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Responses

- *This statement is admissible under the present sense impression exception, Rule 803(1).*

Cross-Reference to Texas Rule 803(1)

Explanation

A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter (Rule 803(1)). The rationale for the exception stems from the statement's contemporaneity (*Rabbani v. State,* 847 S.W.2d 555, 560 (Tex. Crim. App. 1992)). Present sense impressions gain their reliability from the fact that the out-of-court statement was made virtually contemporaneously with the occurrence of the event described or explained (*see Fischer v. State*, 252 S.W.3d 375 (Tex. Crim. App. 2008)). The substantial contemporaneity of the event and the statement negate the likelihood of deliberation or conscious misrepresentation. Another potential credibility defect, lapse of memory, is likewise minimized by the short time period between the perception and statement. Without probative evidence that establishes the amount of time between the event and the statement, the statement will not fall within this exception (*1.70 Acres v. State,* 935 S.W.2d 480, 489 (Tex. App.—Beaumont 1996); *Daniels v. Yancey*, 175 S.W.3d 889 (Tex. App.—Texarkana 2005)).

Hearsay Exception

Public Records and Reports

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

[In a criminal case]

- *Objection. The report is not admissible against a criminal defendant.*

Response

- *The statement is admissible under the hearsay exception for public records and reports.*

Cross-Reference to Texas Rule 803(8)

Explanation

Nature of Records

Public records or reports gain their reliability from the public duty or the duty imposed by law on the maker to observe and record the kinds of events contained in such public records or reports (*see Beech Aircraft v. Rainey*, 488 U.S. 153 (1988)). In addition, the maker of the record or report will have no interest in reporting or recording information favoring one side over another. There are three types of matters that are admissible under the public records exception:

1) records or reports that disclose the activities of the public agency;
2) observations made pursuant to legal duty and that the public official has a legal requirement to record; or

3) factual findings (including conclusions and opinions derived therefrom) that result from an investigation made pursuant to law.

There is no requirement that the public record be sworn, and such records are commonly created, filed, and admitted in an unsworn format in civil cases (*Texas DPS v. Caruana*, 363 S.W.3d 558, 564 (Tex. 2012) ("a report is no less admissible in a civil case merely because it is unsworn ...")). Within public records, however, you may frequently find statements by witnesses or others that do not constitute the "factual finding" excused from hearsay as a public record. For example, statements by witnesses frequently appear in police reports, and they do not necessarily qualify as public records and may be hearsay within a document that meets a hearsay exception (*Corrales v. TDFPS*, 155 S.W.3d 478 (Tex. App.—El Paso 2004)).

Practice Tip

Be alert for hearsay within hearsay in public documents or records—if you find one, establish a hearsay exception or be prepared to argue that the matter is not offered for the truth of the matter asserted. If the maker of the public record is also tendered as an expert, the otherwise inadmissible witness statement within a public record may become a basis for the expert's opinion (*see* Experts generally).

Hearsay Exception

Recorded Recollection

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the past recollection recorded exception.*

Cross-Reference to Texas Rule 803(5)

Explanation

A past recollection recorded statement is an out-of-court memorandum or writing that records a matter about which the declarant once had knowledge, but now, as a witness, lacks sufficient recollection to testify completely about the matter (*see Phea v. State*, 767 S.W.2d 263 (Tex. App.—Amarillo 1989)).

Predicate Elements

The predicate for past recollection recorded is the following:

1) the witness must have a failure of recollection while on the witness stand;

2) the witness must authenticate a memorandum;

3) the memorandum must contain facts of which the witness testifies he once had personal knowledge;

4) the memorandum must have been created or adopted by the witness at a time when the matter was fresh in the witness's memory; and

5) the memorandum must accurately reflect the witness's knowledge.

Practice Tip

Sometimes referred to as a document to refresh recollection, this hearsay exception to help a witness you have called, but who seems to have an unfortunate lapse in memory or who, due to nerves or other understandable human conditions, simply cannot remember an important fact or series of facts. Similarly, refreshing recollection may be a strategically advantageous way to help an adverse witness who, because they are a sympathetic witness, you would prefer not to impeach for fear that the jurors will perceive impeachment as picking on the witness.

Hearsay Exception

Records of Documents Affecting an Interest in Property

Objections

- *Objection. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible as a record of a document affecting an interest in property pursuant to Rule 803(14).*

Cross-Reference to Texas Rule 803(14)

Explanation

The record of a document affecting an interest in property is admissible for its truth in regard to the contents of the original recorded document, as well as for the fact of its execution and delivery by the parties to the document. These documents are considered to be reliable because they are records of a type kept by a public office, such as a registry of deeds, pursuant to recording statutes. Affidavits of heirship traditionally do not fall within this hearsay exception, but more properly fall under the Rule 804(b)(3) exception (*see Compton v. WWV Enters.*, 679 S.W.2d 668 (Tex. App.—Eastland 1984)).

Hearsay Exception

Records of Regularly Conducted Activity

Business Records

Predicate Questions

Authentication Questions

- *I hand you what has been marked for identification as Exhibit ____.*
- *Can you identify it?*
- *What is it?*

Business Records Questions

- *Were the records contained in Exhibit ____ made by* (or *from information transmitted by*) *a person with knowledge of the events* (or *conditions*) *recorded?*
- *Were these records made at* (or *near*) *the time of the events* (or *conditions*) *recorded?*
- *Were these records made in the regular course of your business?*
- *Were these records kept in the regular course of your business?*

Objections

- *Objection. The exhibit is hearsay.*
- *Objection. The exhibit contains hearsay within hearsay, specifically for example* (specifying at least one example of a double hearsay statement).

Response

- *This exhibit is admissible under the business record exception.*

Reply

- *This exhibit does not qualify as a business record, because*
  - *it was made solely for litigation purposes and therefore was not made in the regular course of business and is not trustworthy;* or
  - *the sources of information* (or *method* or *circumstances of preparation*) *indicate a lack of trustworthiness;* or
  - *the record is hearsay within hearsay since it contains statements by* (declarant)*, who was not under a business duty to report to* (entity that made record).

Cross-Reference to Texas Rules 803(6) and 902(10)

Explanation

The business records exception codified in Rule 803(6) is one of the most important and most utilized exceptions to the hearsay rule (*see Palmer v. Hoffman*, 318 U.S. 109 (1943); *Garcia v. State*, 126 S.W.3d 921 (Tex. Crim. App. 2004); *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497 (Tex. 1995)).

A business record gains its reliability from the regularity of the record-keeping operation that is necessary to transact regularly conducted activity. The exception is premised on the notion that if the record is good enough to rely on for business purposes, then it ought to be reliable enough to be admitted into evidence when issues regarding the business are litigated. Proof of significant record-keeping irregularities may preclude application of this exception, although in most instances, this type of proof will go more to the weight to be given the records than to their admissibility.

The rule applies to the records of any business, institution, association, profession, or occupation. Whether the entity in question has a profit motive for its existence is irrelevant.

Records of other organizations included in the business's records may constitute hearsay within hearsay, and the business records exception will not, as a general rule, remove the hearsay impediment from the second business's records. There are instances, however, where the first business and its custodian's affidavit or testimony can

be sufficient to apply the hearsay exception. “Business records that have been created by one entity, but which have become another entity’s primary record of the underlying transaction may be admissible pursuant to Rule 803(6). In addition, a document can comprise the records of another business if the second business determines the accuracy of the information generated by the first business.” (*Riddle v. Unifund CCR Partners*, 298 S.W.3d 780, 782–83 (Tex. App.—El Paso 2009); *Ortega v. CACH, LLC*, 396 S.W.3d 622, 629–30 (Tex. App.—Houston [14th Dist.] 2013, no pet.)). If the “source of information or the method or circumstances of preparation indicate lack of trustworthiness, even a properly authenticated record may be inadmissible. Lack of trustworthiness is most frequently found when the record was prepared in anticipation of litigation” (*id.* at 630; *see also Freeman v. American Motorists Ins.*, 53 S.W.3d 710, 715 (Tex. App.—Houston [1st Dist.] 2001)).

Rule 803(6) does not require the predicate witness to be record’s creator or have personal knowledge of the content of the record. The rule does require, however, that the witness have personal knowledge of the manner and methods in which the records were prepared and kept (*Riddle*, 298 S.W.3d at 783).

Emails as Business Records

While these rules regarding the business records hearsay exception are all applicable to emails qualifying as business records, emails do have special conditions.

A party seeking to introduce an email made by an employee about a business matter under the hearsay exception under Rule 803(6) must show that the employer imposed a business duty to make and maintain such a record. Emails qualify under this exception only if it is the business duty of an employee to make and maintain emails as part of his job duties and if the employee routinely sent or received and maintained the emails (*see DirecTV, Inc. v. Murray*, 307 F. Supp. 2d 764, 772–73 (D. S.C. 2004) (finding that sales records contained in emails were admissible under the business records hearsay exception when the sales orders were regularly received by email and the emails were retained as records of each order); *New York v.*

Microsoft Corp., No. CIV A. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 7683, 2002 WL 649951, at *2 (D. D.C. Apr. 12, 2002) (declining to admit emails under the business records hearsay exception because there was a "complete lack of information regarding the practice of composition and maintenance of" the emails); *United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997) (holding that "in order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type," and finding that emails submitted by the government did not fall under the business records exception because "while it may have been [an employee's] routine business practice to make such records, there was no sufficient evidence that [the employer] required such records to be maintained."); *but see Pierre v. RBC Liberty Life Ins.*, Civil Action No. 05-1042-C, 2007 U.S. Dist. LEXIS 50949, 2007 WL 2071829, at *2 (M.D. La. June 12, 2007)).

Practice Tip

Because the foundation for business records may be established by affidavit or testimony, obtaining a business records affidavit may be a time- and money-saving approach, especially if the custodian will not otherwise be needed to testify. Business record affidavits must generally be filed at least fourteen days before trial (or twenty-days before the hearing if they are to be used as summary judgment evidence). If, however, no affidavit is available, keep the predicate to prove the exception for business records handy—or better yet, memorize it.

Hearsay Exception

Records of Religious Organizations

Objection

- *Objection. The record is an out-of-court statement offered for its truth and is hearsay.*

Response

- *This statement is admissible as a record of a religious organization pursuant to Rule 803(11).*

Cross-Reference to Texas Rule 803(11)

Explanation

This exception for regularly kept records of personal or family history gains its reliability from the fact that such events are ordinarily contemporaneously recorded by a religious functionary or clergyman with no motive to falsify a record on which persons ordinarily rely.

Though bearing some superficial similarity to business records under Rule 803(6), there is no requirement that the entry be contemporaneous to the event recorded or that the person entering the record have personal knowledge or a source with personal knowledge.

Practice Tip

Records that would fit within the 803(12) exception may also fit the 803(11) exception. Because 803(11) has broader application, it is a useful backup should the court sustain a hearsay objection and find the evidence does not fit within the 803(12) exception.

Hearsay Exception

Records of Vital Statistics

Objection

- *Objection. The record is an out-of-court statement offered for its truth and is hearsay.*

Response

- *The statement is admissible pursuant to Rule 803(9) as a record of vital statistics.*

Cross-Reference to Texas Rule 803(9)

Explanation

Records of vital statistics gain their reliability from the circumstances of their making. Ordinarily, the information contained in such records is provided by doctors or other persons who have no interest in the outcome of any future litigation. Furthermore, they are recorded by public officials who have an official duty to receive, record, and maintain such records.

Hearsay Exception

Reputation as to Character

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as reputation as to character pursuant to Rule 803(21).*

Cross-Reference to Texas Rule 803(21)

Explanation

Reputation is a collection of hearsay. It must be reported by a witness on the stand who has had occasion to overhear discussion of the person's character, either among such person's associates or among people in the community. Reputation is distinguished from opinion on the question of character because opinion raises no hearsay problems, but merely refers to a notion formed by the witness from personal experience.

Hearsay Exception

Reputation Concerning Boundaries or General History

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of reputation concerning boundaries* (or *general history*) *pursuant to Rule 803(20).*

Cross-Reference to Texas Rule 803(20)

Explanation

Reputation concerning boundaries or general history, although a collection of hearsay statements, is admissible under this exception as long as 1) the reputation arose before the controversy involved in the trial and 2) the witness is familiar with the reputation, having heard it discussed in the relevant community. The reliability is presumed because a fact has been the subject of "prolonged observation and discussion of certain matters of general interest by a whole community [which] will sift possible errors and bring the result down ... in a fairly trustworthy form ..." (*Roberts v. Allison*, 836 S.W.2d 185, 191 (Tex. App.—Tyler 1992)).

Hearsay Exception

Reputation Concerning Personal or Family History

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of reputation concerning personal* (or *family history*) *pursuant to Rule 803(19).*

Cross-Reference to Texas Rule 803(19)

Explanation

Reputation concerning personal or family history is admissible against a hearsay objection as long as it is generally accepted among the family, associates, or community where the reputation is known. The witness who testifies about the reputation must be familiar with that reputation, which is shown by 1) the witness being a member of the relevant family, community, or group of associates, and 2) the witness's familiarity with the reputation, having either heard it discussed or taken part in such discussions.

Hearsay Exception

Requirement of Unavailability

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *The declarant is unavailable because he* (or *she*)
  - » *was exempted from testifying concerning the subject of the statement by ruling of the court on the ground of privilege;* or
  - » *persists in refusing to testify concerning the subject of the statement, despite a court order to do so;* or
  - » *testified to a lack of memory on the subject of the statement;* or
  - » *is unable to testify at the hearing because of death* (or *illness*)*;* or
  - » *is absent from the hearing, and we have been unable to procure his* (or *her*) *attendance through process or other means.*

Cross-Reference to Texas Rule 804

Explanation

Rule 804(b) exceptions require the declarant's unavailability. The types of unavailability listed in Rule 804(a) are not the exclusive circumstances of unavailability. While Rule 804(a) lists circumstances that per se amount to unavailability, the rule does not preclude any other legitimate showing of unavailability that the trial judge determines acceptable pursuant to Rule 804.

Unavailability pursuant to Rule 804(a) is a necessary predicate for Rule 804(b) exceptions to the hearsay rule to apply. Unavailability of

the declarant alone does not constitute a hearsay exception—the requirements of the exception must be met.

If the proponent relies on the fifth type of unavailability—absence from the hearing—the predicate must include proof that the proponent could not compel the declarant to attend the hearing, nor could the declarant be deposed ("attendance or testimony"). An uncooperative or difficult witness who still could have been deposed—even if not within the court's subpoena range for trial—may not be an unavailable witness. (*In Re Marriage of Moon*, No. 07-03-0144-CV, 2004 Tex. App. LEXIS 3805, n.1 (Tex. App.—Amarillo April 29, 2004) (no abuse of discretion in sustaining hearsay objection where proponent failed to affirmatively proof witness was unavailable: "There was no evidence at the hearing that Melinda was unable to attend because of a snowstorm as Donald asserts on appeal."); *Owens-Corning Fiberglass Corp. v. Wasiak*, 917 S.W.2d 883 (Tex. App.—Austin 1996, consolidated with and affirmed by *Owens-Corning Fiberglass Corp v. Malone*, 972 S.W.2d 35 (Tex. 1988) (Owens-Corning failed to demonstrate affirmatively its own executive was unavailable by arguing he lived in California and vacationed extensively in Europe)).

Moreover, the proponent of the hearsay must demonstrate the efforts taken to obtain the testimony. Mere requests to take the deposition, without actually noticing the deposition or filing a motion to compel the deposition may not constitute the witness's being unavailable (*id.* at 888 ("although [the witness] may have been beyond the subpoena power of the court, [the proponent] did not establish that it was unable to take his deposition or otherwise procure his testimony" before his vacation.); *Otero-Miranda v. State*, 746 S.W.2d 352 (Tex. App.—Amarillo 1988) (hearsay objection properly sustained when only evidence of efforts to procure the testimony was an unserved subpoena); *Reyes v. State*, 845 S.W.2d 328 (Tex. App.—El Paso 1992)).

Hearsay Exception

State of Mind

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay*

Responses

- *This statement is admissible under the state of mind exception.*
- *Even though the statement looks backward in time, it is permissible because it relates to the execution* (or *revocation* or *identification* or *terms of the declarant's will*).

Objecting Party's Reply

- *The state of mind exception is not applicable because*
  - *the statement looks backward in time and so is not a then-existing state of mind;* or
  - *the declarant's state of mind is not relevant;* or
  - *the statement does not go to the declarant's state of mind.*
- *Even if admissible under the state of mind exception, the statement is admissible only to prove that* (declarant) *believed* (fact stated by declarant) *and not to prove that* (fact stated by declarant) *is true.*

  [If statement admitted over this objection]
- *We request that the jurors be instructed that they may consider this statement only as proof that* (declarant) *believed* (fact stated by declarant)*, but not that* (fact stated by declarant) *is true.*

Cross-Reference to Texas Rule 803

Explanation

Statements of then-existing mental or emotional condition gain their reliability from the fact that the statement was made contemporaneously with the state of mind, sensation, or condition that the declarant described. It is critical to note that only statements regarding a present (at the time of the making of the statement) mental or emotional condition fit within the exception (*see Shepard v. United States*, 290 U.S. 96 (1933)). A statement regarding a past condition will not be admissible, because there is no substantial guarantee of reliability—that is, the time between the existence of the condition of mind and the statement allows the declarant time to reflect and fabricate. This hearsay exception is based on the premise that there can be no better evidence of the state of mind of a declarant than the declarant's own statement while experiencing the condition.

Hearsay Exception

Statement Against Interest

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement against interest pursuant to Rule 803(24).*

Cross-Reference to Texas Rule 803(24)

Explanation

Civil Cases

A statement against interest is an out-of-court declaration that was so contrary to the interest of the declarant when made that he would not have made the statement unless it was true (*see Robinson v. Harkins & Co.*, 711 S.W.2d 619 (Tex. 1986)). For example, statements that would subject the declarant to criminal or civil liability may be statements against interest (*Green v. Reyes*, 836 S.W.2d 203 (Tex. App.—Houston [14th Dist.] 1992)). The potential consequence provides reliability and justifies this hearsay exception. Unlike the corresponding federal rule, unavailability of the declarant is not required.

The key to this exception is whether a reasonable person would make such a statement if it was untrue. The circumstances surrounding the making of the statement usually determine its admissibility.

Some statements, however, can be self-serving in one respect, but contrary to the speaker's interest in another. The court will have to

evaluate the primary purpose of the statement and whether it is ultimately trustworthy (*State v. Arnold*, 778 S.W.2d 68 (Tex. 1989)).

Criminal Cases

This exception is often confused with a simple admission by a defendant. An admission by a criminal defendant is not hearsay, does not fall under this exception, and thus requires no corroboration. This rule covers a statement by someone other than the accused that admits to some crime and implicates the defendant in doing so. Before that statement is admissible against the accused, 1) the declarant must implicate himself as well as the accused; 2) there must be a high degree of independent corroboration; and 3) the statement must not be offered in a joint trial of the declarant and accused (*see Cofield v. State*, 891 S.W.2d 952 (Tex. Crim. App. 1994)).

Hearsay Exception

Statement of Personal or Family History

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of personal* (or *family*) *history pursuant to Rule 804(b)(3).*

Cross-Reference to Texas Rule 804(b)(3)

Explanation

This exception pertains to statements regarding the declarant's own family line: birth, adoption, marriage, divorce, legitimacy, etc., and gains its reliability from the declarant's likely reliance on such information throughout the course of the declarant's life. For many such statements, it would be impossible for the declarant to have personal knowledge. As such, the requirement that a declarant have personal knowledge, which ordinarily must be apparent from the circumstances of the making of a declarant's admissible hearsay statement, is explicitly dispensed with pursuant to Rule 804(b)(3).

Hearsay Exception

Statement Under Belief of Impending Death

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible under the dying declaration exception pursuant to Rule 804(b)(2).*

Cross-Reference to Texas Rule 804(b)(2)

Explanation

A statement made under belief of impending death gains its reliability from the notion that a declarant, who in good faith believes that he is about to die, would not fabricate either the cause of death or the circumstances that caused the declarant's condition. The rule does not require a declarant to die for the statement to be admitted under belief of impending death (*see Burks v. State*, 876 S.W.2d 877 (Tex. Crim. App. 1994)). The guarantee of reliability is found in the declarant's reasonable belief that he is about to die. Unavailability must, of course, be proved, but the proof may consist of any of the five categories in Rule 804(a) and not just subdivision (4) relating to death.

Practice Tip

For a statement to be admissible, the proponent of the evidence may need to lay a predicate about the declarant's belief about his impending death, either through acts or statements of the declarant or statements made to the declarant that affected his mindset (i.e., a physician's statement that she believes the end is close). Laying this

predicate, however, may compound the hearsay problem if you need to use other out of court statements to establish foundation.

Hearsay Exception

Statements for Purposes of Medical Diagnosis or Treatment

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement for purposes of medical diagnosis* (or *treatment*) *pursuant to Rule 803(4).*

Objecting Party's Reply

- *This exception is not applicable because the statement is not pathologically germane, that is, reasonably pertinent to diagnosis* (or *treatment*).
- *This exception is not applicable because the statement was made by the doctor* (or *nurse* or *paramedic* or other) *rather than to him* (or *her*).

Cross-Reference to Texas Rule 803(4)

Explanation

Statements made for purposes of medical diagnosis or treatment gain their reliability from the notion that one who is seeking medical treatment has a strong interest in being truthful to a person in the position to render or obtain medical assistance. This would include, of course, statements to any medical professional, as long as the patient sought the diagnosis or treatment (*see In the Interest of L.S., P.P., G.S., and M.S.*, 748 S.W.2d 571 (Tex. App.—Amarillo 1988)). The test usually applied to statements under this exception looks at whether the statement 1) was made for purposes of diagnosis and

treatment and the declarant knows that it is; and 2) the statement is actually pertinent to the diagnosis or treatment. This second factor is sometimes referred to as being pathologically germane.

Pathologically Germane Statements

Statements about causation or the external source of the physical condition mentioned in the out-of-court statement will only be admissible if pathologically germane—that is, pertinent to the medical diagnosis or treatment. If the statement is not related to what a doctor needs to know for proper diagnosis or treatment, then the declarant lacks the incentive to be truthful (*see Taylor v. State*, 268 S.W.3d 571 (Tex. Crim. App. 2008) (trial court erred in admitting counselor's testimony because the state, as proponent of the evidence, did not demonstrate the statement identifying defendant as the perpetrator of her sexual assault satisfied the requirement of being pathologically germane)).

Practice Tip

Statements made to physicians performing independent medical examinations or hired by an injured party's counsel for litigation purposes (rather than a treating physician) do not have the same indicia of reliability. Such physicians frequently concede they are not the patient's physician and did not intend to establish a physician-patient relationship. As such, attempts by the injured party to bootstrap otherwise inadmissible hearsay from such an examination should not be allowed. If such statements are helpful to the other party, they may be used as admissions against interest or admissions by a party opponent.

Hearsay Exception

Statements in Ancient Documents

Objection

- *Objection. This statement is contained in an out-of-court writing offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible under the ancient document exception pursuant to Rule 803(16).*

Cross-Reference to Texas Rules 803(16) and 901(b)(8)

Explanation

Statements contained in ancient documents gain their reliability from the notion that a document created twenty or more years prior to its being offered during litigation is unlikely to be created at a time when there was any motive to falsify the document, at least for purposes of the current litigation. The predicate for authenticating an ancient document requires that

1) the condition of the document creates no suspicion regarding its authenticity;
2) the document has been kept in a place where it likely would be kept if it were authentic; and
3) it has indeed been in existence for at least twenty years at the time of its offer.

Hearsay Exception

Statements in Documents Affecting an Interest in Property

Objection

- *Objection. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *This statement is admissible pursuant to Rule 803(15) as a statement in a document affecting an interest in property.*

Cross-Reference to Texas Rule 803(15)

Explanation

Statements contained in a document—whether or not recorded—that create, relate to, or affect an interest in property are admissible, provided two requirements are met: 1) the factual statement contained in the document must relate or be relevant to the purpose of the document; and 2) the document would only be admissible as long as dealings with the property after the time that the document was created have not been inconsistent with the truth of the statement or the purport of the document offered (*Tri-Steel Structures, Inc. v. Baptist Found.*, 166 S.W.3d 443 (Tex. App.—Fort Worth 2005)).

Hearsay Exception

Then-Existing Physical Condition

Objections

- *Objection. The question calls for hearsay.*
- *Objection. We move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of a then-existing physical condition pursuant to Rule 803(3).*

Objecting Party's Reply

- *The state of physical condition exception is not applicable because*
  - *the statement looks backward in time and so is not a then-existing physical condition;* or
  - *the declarant's physical condition is not relevant.*

Cross-Reference to Texas Rule 803(3)

Explanation

Statements admitted under this exception relating to then-existing physical conditions are usually spontaneous remarks about pain or some other sensation that are made by the declarant while the sensation, not readily observable by a third party, is being experienced (*James v. Texas Dept. of Human Services*, 836 S.W.2d 236, 243 (Tex. App.—Texarkana 1992); *see also Ochs v. Martinez*, 789 S.W.2d 949, 959 (Tex. App.—San Antonio 1990, writ denied)). "The exception does not extend to statements of past external facts or conditions." (*James*, 836 S.W.2d at 243; *see also Ochs, 789 S.W.2d at 959*; *see also Power v. Kelley*, 70 S.W.3d 137, 141 (Tex. App.—San Antonio 2001)).

A statement of a then-existing physical condition gains its reliability from the fact that the statement was made contemporaneously with the physical condition described by the declarant. It is critical to note that only statements regarding present (at the time of the making of the statement) physical conditions come within the exception. A statement regarding a past condition will not be admissible, because there is no substantial guarantee of reliability—that is, the time between when the bodily condition happened and when the declarant made the statement allows the declarant time to reflect and fabricate.

Statements that qualify for admissibility pursuant to Rule 803(3) need not be made to a physician and need not be made for purposes of obtaining medical diagnosis or treatment (*see Shepard v. United States*, 290 U.S. 96 (1933)).

Practice Tip

There may be overlap between a present sense impression and statements made for purposes of medical care. Rule 803(4) excepts statements made for the purposes of medical diagnosis or treatment from the hearsay rule (*see* Rule 803(4)). If the present sense impression is made in connection with seeking health care, 803(4) may provide an alternative route to admissibility. Similarly, if the court finds the statement was not made in connection with diagnosis or treatment, it may be prudent to offer the statement as a present sense impression.