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Rule 803(4): Statements for Purposes of Medical Diagnosis or Treatment

RULE 803(4): STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT

Federal Rule of Evidence 803(4) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> (4) Statements for purposes of medical diagnosis or treatment. 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.[1]

The 803(4) hearsay exception rests on the general reliability of statements made to a physician or others for purposes of medical diagnosis or treatment.[2] The presumption of the hearsay exception is that the declarant will be truthful in describing symptoms to his doctor in order to assure proper diagnosis and method of treatment.[3] The belief is a patient is motivated to be wholly honest with his or her doctor or other for purposes of

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1. FED. R. EVID. 803(4). *See also* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN ON EVIDENCE ¶ 803, at 150-72 (Joseph M. McLaughlin ed., 1995); MCCORMICK ON EVIDENCE § 277, at 488-90 (John William Strong ed., 4th ed. 1992).

2. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). The rationale of the rule "focuses upon the patient and relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says." *Id.* at 83-84. *See also* Roberts v. Hollocher, 664 F.2d 200, 204-05 (8th Cir. 1981) (holding that statements made by the plaintiff to his physician concerning "excessive force" were inadmissible under Rule 803(4) because these statements concerned a conclusion going to fault rather than to "past or present conditions" or "the cause of the condition").

3. *Iron Shell*, 633 F.2d at 83-84. "It is thought that the declarant's motive guarantees trustworthiness sufficiently to allow an exception to the hearsay rule." It is on this presumption that the doctor's testimony is admissible under Rule 803(4). *Id.* at 84. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 442, at 456 (2d. ed. 1994). "The patient knows that his description helps determine treatment, so he has reason to speak candidly and carefully, and risks of insincerity and ambiguity are minimal." *Id.*

medical diagnosis. This honesty is sufficient to allow the doctor's or other person's testimony to be an exception to the hearsay rule.[4]

In interpreting Rule 803(4), the United States Court of Appeals for the Eighth Circuit in *United States v. Iron Shell*[5] emphasized that for hearsay evidence to be admissible, the statements made by the declarant to his physician must be pertinent to diagnosis or treatment.[6] The *Iron Shell* court devised a two-prong test to determine whether the statements were made for the purpose of medical diagnosis or treatment.[7] The first prong requires that the patient's motive in making his statement must be consistent with the purpose of promoting treatment.[8] The second prong questions whether the physician has a reasonable basis to believe that the patient's statements of symptoms can be used in diagnosis or treatment.[9]

The *Iron Shell* court applied this two-prong test, and allowed testimony into evidence of a physician relating statements made to him by a nine-year-old victim of sexual assault.[10] The victim stated that she was pulled into the bushes, that all of her clothes were removed and that the attacker "tried to force something into her vagina which hurt."[11] The court noted that all of the victim's statements were admissible because "they were related to her physical condition and were consistent with a motive to promote treatment."[12]

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4. *Iron Shell*, 633 F.2d at 84.

5. 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

6. *Id.* at 83-84. *See* MUELLER & KIRKPATRICK, *supra* note 3, § 442, at 457-65.

7. *Iron Shell*, 633 F.2d at 84.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 82.

12. *Id.* at 84 (finding that the victim's statements were made for the purpose of obtaining treatment and the doctor's questions focused on what happened rather than who did the act). *See* United States v. Longie, 984 F.2d 955 (8th Cir. 1993). When applying the *Iron Shell* test, the *Longie* court found that the statement of a child patient to a doctor identifying his abuser was

The Advisory Committee's note for 803(4) states that a physician or other person may recount a patient's description of the cause of the injury if it is for the purpose of diagnosis *and* treatment, but generally the exception does not extend to statements of fault.[13] Further, the Committee illustrated this point by stating that a patient's statement, that he was struck by a car, would be admitted under 803(4),[14] but the patient's statement that the car was driven through a red light would not fall under 803(4).[15] In addition, it is not necessary for the statement to be made to a doctor for the exception to apply.[16] The statement can be made to any person who would use the information to treat the person or who would pass on the information to a doctor or other medical personnel, such as an ambulance driver, hospital staff or family member, in order for the 803(4) hearsay exception to take effect.[17]

In *Cook v. Hoppin*,[18] the court explained that "Rule 803(4) does not exclude from the hearsay rule statements relating to fault which are not relevant to diagnosis or treatment."[19] In *Cook*, the owner of an apartment house was sued for negligence regarding the construction and maintenance of an exterior stairway after the plaintiff fell off of the steps and sustained serious injury.[20] One of the main issues on appeal was whether the trial court erred in allowing into evidence a hospital record which referred to a shoving or wrestling match as the cause of the injury.[21] The court of appeals held that, in order to determine if the statements are admissible hearsay, they must be "of the type reasonably

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admissible because such information impacted the physician's course of treatment and recommendation for counseling. *Id.* at 959.

13. FED. R. EVID. 803(4) advisory committee's note.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id. See* MCCORMICK, *supra* note 1, § 277, at 489.

18. 783 F.2d 684 (7th Cir. 1986).

19. *Id.* at 690 (citing Roberts v. Hollocher, 664 F.2d 200, 204 (8th Cir. 1981)).

20. *Id.* at 687.

21. *Id.*

pertinent to a physician in providing treatment."[22] Based on this reasoning, the *Cook* court deemed the records inadmissible.[23]

The Advisory Committee's note states that a physician's testimony of statements made for purposes of medical diagnosis or treatment is permitted, even if the information was gleaned from the declarant for the sole purpose of the doctor's expert testimony at trial.[24] Prior to the adoption of Rule 803(4), it was believed that if treatment was not the ultimate goal, then there were no guarantees as to the truthfulness of the statement.[25] Rule 803(4), however, rejects the differentiation between testimony of treating and nontreating physicians on the basis that jurors simply do not distinguish between factual evidence admitted for truth versus such evidence offered as the ground for an expert's opinion.[26] Today, the correct test for determining whether expert testimony made in reliance on a statement made for the purpose of diagnosis is admissible under 803(4) is whether "an expert in this particular field would be justified in relying upon [this statement] in rendering an opinion."[27]

This rule was applied in *Gong v. Hirsch*,[28] where the administrator of the decedent's estate alleged that decedent's doctor had negligently prescribed the drug prednisone, and such prescription caused the decedent's death.[29] The plaintiff tried to admit into evidence a letter from the family doctor sent to the decedent's employer which stated that the prednisone had caused a perforated ulcer.[30] The Seventh Circuit affirmed the district court's ruling that the letter was inadmissible under 803(4).[31]

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22. *Id.* at 690 (quoting United States v. Iron Shell, 633 F.2d 77, 83 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981)).

23. *Id.*

24. FED. R. EVID. 803(4) advisory committee's note.

25. WEINSTEIN & BERGER, *supra* note 1, ¶ 803, at 153-54. *See, e.g.*, Padgett v. Southern Ry., 396 F.2d 303 (6th Cir. 1968); Chicago N.W. Ry. v. Garwood, 167 F.2d 848 (8th Cir. 1948).

26. *See* WEINSTEIN & BERGER, *supra* note 1, ¶ 803, at 153-54.

27. *See id.* at 154.

28. 913 F.2d 1269 (7th Cir. 1990).

29. *Id.* at 1271.

30. *Id.* at 1271-72.

31. *Id.* at 1274.

The court noted that the letter did not "reveal symptoms, objective data, surrounding circumstances or any similar *factual* data that a reasonable physician would consider relevant in the treatment or even diagnosis of a medical condition."[32] Instead, the letter, though written by the doctor, was deemed to be merely the patient's own conclusion as to his physical problem and its cause.[33]

In comparison, the Second Circuit permitted a doctor to testify, even though the doctor's testimony was comprised of the plaintiff's version of opinions given to her by other doctors that treated her, as well as recollections of the plaintiff herself.[34] The doctor clearly stated that he based his testimony, in part, on the other doctors' reports that were in his possession and the hospital report regarding the plaintiff's surgery, as well as the plaintiff's statements.[35] The court held that witness's should be allowed to explain the basis for their opinions and allowed the admission of the evidence.[36] The holding was based on the fact that 803(4) rejected the distinction between evidence admitted for its truth and evidence admitted to establish the ground for a witness's opinion "as being too esoteric for a jury to recognize."[37] It is vital to note, however, that the court's decision hinged on the fact that the doctor did actually have copies of the doctors' reports in his possession, which he consulted, when the plaintiff made her

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32. *Id.*

33. *Id.* The court explained that the source of the statement in the doctor's letter was never identified. However, for 803(4) purposes, the court assumed that the decedent or "someone acting on his behalf . . . made the statement." *Id.* at 1274 n.5.

34. O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1088 (1978). A stewardess sued an airline caterer alleging that the incorrect placement of a 500-800 pound buffet caused her to injure her back when she tried to push the buffet back into its proper position. *Id.* at 1085. District Judge Weinstein permitted the doctor to testify not only as to what the plaintiff told him about "her condition and its genesis, but also to what O'Gee had told him that the other doctors had told her about the injuries." *Id.* at 1088-89.

35. *Id.* at 1089.

36. *Id.*

37. *Id.*

statements of what those doctors said for purposes of medical diagnosis or treatment.[38] Indeed, the court left open the question of whether the doctor's testimony of the plaintiff's version of the medical reports would have been admissible if the actual reports had been unavailable.[39]

New York common law takes an approach similar to Rule 803(4) concerning statements made by patients to medical practitioners. New York will allow testimony by a witness as to statements made by a person for diagnostic or treatment purposes.[40] New York, however, does not allow out-of-court statements made solely to obtain a medical expert's testimony.[41] "It is a well-settled principle . . . that a non-treating physician, hired only to testify as an expert witness, may not state the history of an accident as related to him by the plaintiff or testify as to plaintiff's medical complaints."[42]

In *Daliendo v. Johnson*,[43] an example of the limits of the New York rule concerning testimony by nontreating physicians, the plaintiff was involved in a car accident with defendant's taxi.[44] Plaintiff alleged that injuries sustained from this accident caused him to black out while driving and caused a second car accident three days later.[45] In addition, plaintiff submitted an affidavit of a nontreating physician who had examined the plaintiff and suggested a nexus between the injuries from the first accident and the second accident.[46] The court found that the defendants overstated the New York rule concerning the admissibility of

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38. *Id.*

39. *Id.*

40. Daliendo v. Johnson, 147 A.D.2d 312, 320, 543 N.Y.S.2d 987, 992 (2d Dep't 1989).

41. Nissen v. Rubin, 121 A.D.2d 320, 321, 504 N.Y.S.2d 106, 107 (1st Dep't 1986) (citing Davidson v. Cornell, 132 N.Y. 228, 30 N.E. 573 (1892); Lessin v. Direct Delivery Serv., 10 A.D.2d 624, 196 N.Y.S.2d 751 (1st Dep't 1960)).

42. *Id.*

43. 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dep't 1989).

44. *Daliendo*, 147 A.D.2d at 314-15, 543 N.Y.S.2d at 988-89.

45. *Id.* at 315, 543 N.Y.S.2d at 989.

46. *Id.* at 316, 543 N.Y.S.2d at 989.

testimony of nontreating physicians.[47] While the court acknowledged that a nontreating physician's testimony should not include statements made by a party about the history of the accident or the party's medical complaints in order to prevent "unfair bolstering of a party's credibility," the court held that the rule does not prevent a medical expert from examining a plaintiff, looking at the facts and deducing an opinion.[48] On this basis, the court held the nontreating physician's testimony admissible.

In *Nissen v. Rubin*,[49] the court held that it was "highly prejudicial" to admit expert testimony of two non-treating physicians who testified to the plaintiff's rendition of his accident, including their view of plaintiff's physical ailments.[50] This was based on the view that to admit such evidence "permits the plaintiff to unfairly buttress his claim."[51] Thus, the court held that the testimony of the nontreating physicians was inadmissible because it recounted the history of the plaintiff's accident.[52] Furthermore, the court noted that the most significant aspect of the error by the trial court in admitting the testimony of the nontreating physicians was its damage to the defendants' case.[53] Finally, the *Nissen* court explained New York's aversion to

47. *Id.* at 320, 543 N.Y.S.2d at 992.

48. *Id.* The *Daliendo* court held that the defendant's motion for summary judgment should have been denied because it was for the trier of fact to decide whether a sufficient nexus existed between the plaintiff's injuries in the first accident in order to infer that they were the cause of the second accident. *Id.* The court stated that "a medical expert would be permitted to render an opinion that the injured party sustained a concussion in one accident and, as a result of that brain injury, suffered a blackout three days later" in order to establish the relationship. *Id.*

49. 121 A.D.2d 320, 504 N.Y.S.2d 106 (1st Dep't 1986).

50. *Id.* at 321, 504 N.Y.S.2d at 107. Plaintiff alleged that he slipped and fell from the fourth floor of his apartment building to the third floor due to the landlord's negligence. *Id.* In response, defendant introduced into evidence plaintiff's alleged statement made to a nurse in the hospital wherein plaintiff stated that he hit his head on a filing cabinet. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 322, 504 N.Y.S.2d at 107.

admitting testimony by a nontreating medical expert under the hearsay exception for statements made for purposes of medical diagnosis or treatment.[54] The court stated that "while a 'strong inducement' may exist for a patient to speak truthfully of his pains and sufferings for the purpose of treatment, 'it may be otherwise when medically examined for the purposes of creating evidence in his own behalf.'" [55]

Federal Rule 803(4) permits testimony by physicians concerning statements made for purposes of medical diagnosis or treatment even if the statements were made solely for the purpose of gaining the doctor's expert testimony for trial.[56] In contrast, New York will admit hearsay statements by a physician, or other

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54. *Id.* at 322, 504 N.Y.S.2d at 107-08.

55. *Id.* (citing *Davidson v. Cornell,* 132 N.Y. 228, 229, 30 N.E. 573, 574 (1892). When preparing for trial, it is in the plaintiff's best interest to describe his injuries to the doctor who will be testifying on his behalf, and how the injuries are the result of the accident. *Davidson,* 132 N.Y. at 237, 30 N.E. at 576. However, this testimony would be considered hearsay and, therefore, inadmissible because the statements were made for the purpose of preparing evidence for litigation rather than for treatment. *Id.* at 238, 30 N.E. at 576. A plaintiff's credibility is questionable when he is testifying on his own behalf, especially when it is corroborated by experts testifying about information supplied by the plaintiff. *Id.*

56. FED. R. EVID. 803(4) advisory committee's note.

person, only if they relate directly to present pain.[57] The *Davidson* court held that the doctor's testimony regarding present pain and suffering brought on by the accident was admissible because of its inherent reliability.[58] However, statements made relating to discomfort experienced over the last year as a result of the incident would be inadmissible hearsay.[59] Testimony based on statements made for the sole purpose of litigation is also deemed inadmissible in New York.[60]

57. *Id.* at 237, 30 N.E. at 576.
58. *Id.* at 238, 30 N.E. at 576.
59. *Id.*
60. *Id.* at 237, 30 N.E. at 576.