

# STATUTORY COMPILATION AND DIGEST

MEDICAL HEARSAY  
*CURRENT AS OF NOVEMBER 2010*

*Contains:*

*Federal Rule*

*States that have adopted the rule verbatim*

*States that have adopted the rule with some distinction*

*Common law jurisdictions*

*Foundational cases*

*Current law on SANE/SAFE testimony admissibility*

*Common objections on the basis of medical hearsay*

*Procedure*

*COMPILED BY*



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## **Federal Rule/Law**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

### **(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.

### **Summary of States that have adopted the Federal Rule/Law Verbatim**

- Alabama
- Alaska
- Arizona
- Arkansas
- Colorado
- Connecticut
- Delaware
- Georgia
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kentucky
- Maine
- Minnesota
- Mississippi
- Montana
- Nebraska
- Nevada
- New Mexico
- North Carolina
- North Dakota
- Ohio
- Oregon
- South Dakota
- Tennessee
- Texas
- Utah
- Washington
- West Virginia
- Wisconsin
- Wyoming
- Virgin Islands

### **Summary of States that have not adopted the Federal Rule/Law Verbatim --- Statutory Distinctions**

- California
- Florida
- Illinois
- Kansas
- Louisiana
- Maryland
- Michigan
- Mississippi
- New Hampshire
- New Jersey
- Oklahoma
- Pennsylvania
- Rhode Island
- South Carolina
- Vermont

### **Summary of States that have not adopted the Federal Rule/Law --- Common Law Jurisdictions**

- District of Columbia
- Massachusetts
- Missouri
- New York
- Virginia

### **Foundational Cases:**

- Davis v. Washington, 547 U.S. 813 (2006)
- Crawford v. Washington, 541 U.S. 36 (2004)
- White v. Illinois, 502 U.S. 346 (1992)
- State v. Roberts 97 Or. App. 217 (Or. App. 1989) **\*\*Citation\*\***
- Idaho v. Wright 497 U.S. 805 (1990)
- United States v. Ironshell, 633 F.2d 77 (8th Cir. 1980)
- United States v. Renville, 779 F.2d 430 (\*\*1985)
- United States v. Sumner, 204 F.2d 1182 (Minn\*\*\* 2000)

### **Procedure**

- Generally, the admissibility of medical hearsay will be determined by whether:
  - The statement is declared to be testimonial or non-testimonial. *See Crawford and Davis.*
  - If the witness is unavailable, the defendant must have had a prior opportunity to cross examine, regardless of reliability. *See Crawford*
  - The statement is made for *purposes of* medical diagnoses or treatment and *reasonably pertinent* to diagnosis or treatment. *United States v. Iron Shell, 633 D.2d 77 (C.A.S.D. 1980)*

### **Prosecutorial Issues Arising with Medical Hearsay Law**

#### *Crawford Objections*

##### A. What is a Crawford Objection?

*Crawford v. Washington*, 541 U.S. 36 (2004) held that statements by witnesses that are testimonial are barred under the confrontation clause, unless witnesses are available and defendant had prior opportunity to cross examine, regardless of reliability.

In determining whether testimony is admissible under *Crawford/Davis*, first ask yourself two questions; (1) Is the statement testimonial? And (2) What was the primary purpose for obtaining a statement?

##### B. Arguing Crawford: Argue in two steps

- (1) The Constitutional issue of confrontation
- (2) Traditional evidentiary analysis under state law.

C. Combating a Crawford Objection

You must combat a Crawford objection by first establishing a valid exception to hearsay, for example a statement made for purposes of medical treatment or diagnosis. Once you have established that there is an exception to the hearsay rule. Once the exception is established you must argue that the statement in question is testimonial or not testimonial.

Many of the reversals or determined errors in trial court decisions result from the prosecution’s failure to show that an expert witness was (1) unavailable and (2) that the defense had an opportunity to cross examine that witness. Additionally, when dealing with out of court statements of a victim to a SANE/SAFE, do not take for granted the need to establish the exception to hearsay for purposes of medical diagnosis or treatment, under 803(4).

Sufficient guarantees of trustworthiness are no longer admissible under *Crawford* to admit hearsay on its own but they should not be discounted completely. You should still argue the policy behind the exception to the medical hearsay as being the motivation of a patient to speak truthfully to their medical provider. This will be especially helpful prove up that there is an exception for medical hearsay.

*Davis --- Testimonial vs. Non Testimonial*

A. Under *Davis v. Washington*, 547 U.S. 813 (2006)

<b>Testimonial</b>	<b>Non-Testimonial</b>
When circumstances objectively indicate that there is no such ongoing emergency and the primary purpose of the interrogation <b><i>is to establish or prove past events</i></b> potentially relevant to criminal prosecution.	When made in course of investigation and the primary purpose of interrogation <b><i>is to assist police in an ongoing emergency.</i></b>

Where a statement is non-testimonial, the Confrontation Clause does not prevent the admission of the evidence under an exception to hearsay rule, for example the medical hearsay exception, and there is no need to complete the analysis of whether the defendant was given the opportunity to cross-examine the witness.

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Where a statement is testimonial hearsay, the confrontation clause is implicated and you must prove two things to get the evidence admitted:

- The unavailability of the witness
- That the defense had a prior opportunity to cross-examine the witness.

You will not be able to admit evidence under the notion of reliability, previously the law under *Ohio v. Roberts*, where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is the one prescribed by the Constitution, confrontation.

### *SANE/SAFE Medical Professionals*

- The definition of the SANE/SAFE is crucial to the determination of the primary purpose of the sexual assault exam. Not all/many courts take the dual role approach of a SANE/SAFE as in *Mendez*. The definition of the SANE/SAFE role will vary by jurisdiction and it must be clear that the SANE/SAFE is **not a branch of law enforcement** but an independent medical professional who has a two pronged responsibility to the community: (1) to provide access to comprehensive immediate care; and (2) also to facilitate investigations. The national protocol emphasizes a “coordinated community response,” focusing on “victim centered care.”<sup>1</sup>
- Non-Testimonial – *The following cases reflect instances where a SANE/SAFE was permitted to testify to out of court statements made by the victim. One consistent factor in cases where the testimony of the nurse examiner was allowed is that the examination was conducted in accordance with hospital procedure and that any statements were made during the ordinary course of conducting a medical examination. Another consistent factor is the definition of the role of the nurse examiner, the way he/she conducts their examination (i.e. are the police present or are they working under law enforcement protocol), and the way in which he/she described what they are doing (i.e. collecting evidence or forwarding the investigation).*
  - State v. Stahl, 855 N.E.2d 834 (Ohio 2006)
  - State v. Slater, 939 A.2d 1105 (Conn. 2008)
  - People v. Garland, 777 N.W.2d 732 (Mich. App. 2007)
    - People v. Spangler, 285 Mich.App. 136, 774 N.W.2d 702 (2009):
  - Danzy v. State, 553 So.2d 380 (Fl. App. 1989)
  - People v. Vigil, 127 P.3d 916 (Colo. 2006)

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<sup>1</sup> *National Protocol for Sexual Assault Medical Forensic Examinations*, U.S. DEPARTMENT OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, 1, 3, 27 (2004), available at, <http://samfe.dna.gov/>.  
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- Testimonial – *The following cases reflect instances, in which courts found that a victim's statements to a SANE/SAFE were testimonial. Much of the time the reasoning behind the court's ruling are that the victim has already been treated once or twice by another physician or nurse. Another critical factor is, as mentioned above, the way in which the examination is conducted and explained to the victim.*
  - Medina v. State, 143 P.3d 471 (Nev. 2006)
  - State v. Cannon, 254 S.W.3d 287 (Tenn. 2008)
  - Hartsfield v. Kentucky, 277 S.W.3d 239 (Ky. 2009).
  - State v. Miller, 208 P.3d 774 (Kan. App. 2009)
  - State v. Mendez, 2010 WL 4345067 (N.M. 2010) (overruling State v. Ortega, 175 P.3d 929 (N.M. Ct. App. 2007)
  
- Statements made to SANE/SAFE regarding the identification of the perpetrator. There is some discrepancy as to whether the identification of the perpetrator will be allowed. Some courts do allow the identification of the perpetrator as made to a medical professional when such identifications are relevant to medical diagnosis or treatment. The reasoning behind this admission is the need to protect patients from future harm where they may know their perpetrator or be living in the same household. Incidents of domestic violence present a similar problem to physicians in treating patients as does child sexual abuse. The treatment of domestic violence involves psychological as well as physical treatment and where the perpetrator is living in the household, this information is reasonably pertinent to the diagnosis and treatment of the patient.
  - United States v. Joe, 8 F.3d 1488 (10th Cir. 1993)
  - United States v. Renville, 779 F.2d 430 (8th Cir. 1985)
  - Colvard v. Com, 309 S.W.3d 239 (Ky. 2010)
  - Com v. DeOliveria, 849 N.E.2d 218 (Mass. 2006)
  
- Statements made to a SANE/SAFE that are an explanation/narrative of events. Part of the job of nurses and doctors is to assess, not only the physical but psychological trauma of their patients.
  - State v. Janda, 397 N.W.2d 59 (N.D. 1986)
  - People v. Matuszak, 687 N.W.2d 342 (Mich. App. 2004)
  - State v. Lopez, 175 P.3d 682 (Ariz. App. Div. 2008)
  - State v. Romero, 156 P.3d 694, 141 N.M. 403 (2007)

## Alabama

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### STATE STATUTE

#### ALA. R. EVID. 803(4) HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Courts have generally relied on a “two-pronged test” for allowing admission of evidence under the exclusion: (1) “the statement must be one upon which medical personnel reasonably rely in diagnosis and treatment” and (2) “the declarant must be motivated by a desire to seek medical diagnosis and treatment.” The Supreme Court has stated that although statements of fault generally do not qualify for the exclusion, in sexual assault cases medical hearsay evidence regarding the identity of the perpetrator is admissible if it “is related to the treatment of the emotional and psychological injuries suffered by the victim.” [Ex parte C.L.Y., 928 So. 2d 1069 \(Ala. 2005\)](#).

The court has not addressed whether statements made to individuals other than medical professionals as part of the process of medical diagnosis and treatment fall under the exclusion, but the court did quote a West Virginia opinion allowing for admission of hearsay evidence from “social workers, counselors, or psychologists” in child abuse cases if the two-pronged test is satisfied. [S.J.R. v. F.M.R., 933 So. 2d 352 \(Ala. Civ. App. 2004\)](#), cert. denied, (Jan. 13, 2006), quoting from [State v. Pettrey, 209 W. Va. 449, 460, 549 S.E.2d 323, 334 \(2001\)](#).

## Alaska

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### STATE STATUTE

*Alaska Rule of Evidence 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Courts have adopted the Iron Shell test for whether a statement is “reasonably pertinent” to diagnosis or treatment, requiring that (1) the declarant’s motivation in making the statement is consistent with the rule and (2) the content of the statement is of the type a reasonable medical professional would rely on in making diagnosis and treatment decisions. Sluka v. State, 717 P.2d 394 (Alaska App. 1986). In general statements of fault or identifying individuals inflicting harm do not fall under the exception. Sluka v. State, 717 P.2d 394 (Alaska App. 1986). Under the previous rule, the Supreme Court supported this position in the case of assault of an adult by her domestic partner, and courts continue to favorably cite the decision. State v. Johnson, 579 P.2d 20 (Alaska 1978). However, statements by child sexual abuse victims identifying perpetrators have been held admissible under the exception for the purpose of grand jury proceedings (but not for trial). State v. Nollner, 749 P.2d 905 (Alaska App. 1988). Courts have indicated that statements made to physicians, nurses, psychologists and psychiatrists are admissible so long as they conform with the purposes of the rule.

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## Arizona

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### STATE STATUTE

*Ariz. R. Evid. 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

*See State v. Lopez*, 175 P.3d 682 (Ariz. App. Div. 2008). Following the sexual assault, the victim was transported to the hospital where was examined by a SANE. The nurse testified that “looking for injury is the main purpose” of the sexual assault examination and collecting evidence for police is another purpose. She also testified that, during the examination, she asks the person what happened during the assault to determine “where to look for injury.” The Court held that the statements were admissible and relevant to diagnosis and treatment. Additionally, the Court applies a two part test for applying the exception for medical hearsay: (1) whether “the declarant’s apparent ‘motive ... [was] consistent with receiving medical care’ ”; and (2) whether it was “ ‘reasonable for the physician to rely on the information in diagnosis or treatment.’ ”

‘Unlike the exception in [Rule 803\(3\)](#) for statements as to state of mind, mental or physical condition, this exception applies to statements as to past symptoms and medical history as well as statements as to the declarant’s present condition. It also includes statements made to expert witnesses for purposes of diagnosis. ... [Rule 803\(4\)](#) thus changed the Arizona rule and broadened the rule that had existed in other jurisdictions. Clearly statements about past or present symptoms are admissible. In addition, statements concerning the cause of the symptoms, such as an automobile accident, are also admissible. While the exception does not encompass statements attributing fault for an event, our supreme court has held this general rule inapplicable to child abuse cases where the evidence shows that the identity of the abuser is “critical to effective diagnosis and treatment.” [State v. Robinson](#), 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987). *See also State v. Jones*, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. Div. 1 1996). This holding was

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broadened from sexual to physical abuse in [State v. Sullivan, 187 Ariz. 599, 931 P.2d 1109 \(Ct. App. Div. 2 1996\)](#). The state must, however, make the requisite showing that the statements were pertinent to diagnosis or treatment. [State v. Thompson, 169 Ariz. 471, 820 P.2d 335 \(Ct. App. Div. 1 1991\)](#). Under the broad language of the rule, the statement “need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.” See [State v. Rushton, 172 Ariz. 454, 837 P.2d 1189 \(Ct. App. Div. 1 1992\)](#), redesignated as opinion and publication ordered, (June 9, 1992) (statements made to mental health counselor who was not “certified” to treat medical conditions admissible).’

## Arkansas

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### STATE STATUTE

*Ark. R. Evid 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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 sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

### STATE CASE LAW

The “crucial question” for exclusion from the hearsay rule under the medical exception is “whether the out-of-court statement of the declarant was ‘reasonably pertinent’ to diagnosis or treatment”; under this standard there is a two part test: “(1) the declarant’s motive in making the statement must be consistent with the purposes of promoting treatment; and (2) the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.” [Huls v. State, 27 Ark. App. 242, 770 S.W.2d 160 \(1989\)](#). Quoting [U.S. v. Renville, 779 F.2d 430 \(8<sup>th</sup> Cir. 1985\)](#), the [Huls](#) court said statements of fault (identification of perpetrator) generally do not promote treatment or diagnosis and thus do not fall within the exception. However, the Supreme Court subsequently ruled in a case of sexual abuse by a stepfather that admission of statements made to treating physician was acceptable because the information was necessary for physician to treat victim’s psychological and emotional injuries. [Hawkins v. State, 348 Ark. 384, 72 S.W.3d 493 \(2002\)](#). Statements made to medical professionals after litigation has begun are not admissible under the exception. [Collins v. Hinton, 327 Ark. 159, 937 S.W.2d 164 \(1997\)](#). Statements made to social workers have not been treated as falling under the exception. [Meins v. Meins, 93 Ark. App. 292, 218 S.W.3d 366 \(2005\)](#).

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## California

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### STATE STATUTE

*Cal. Evid. §1253. Statements for purposes of medical diagnosis or treatment; contents of statement; child abuse or neglect; age limitations*

Subject to [Section 1252](#), evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes 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. This section applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect. “Child abuse” and “child neglect,” for purposes of this section, have the meanings provided in [subdivision \(c\) of Section 1360](#). In addition, “child abuse” means any act proscribed by Chapter 5 (commencing with [Section 281](#)) of Title 9 of Part 1 of the Penal Code committed against a minor.

### STATE CASE LAW

California has not fully adopted the medical treatment hearsay exception language of Federal Rule of Evidence 803(4); however, Cal. Evid. § 1253 employs parallel language, but restricts its applicability to statements made by minor child abuse (including sexual abuse) and neglect victims to medical professionals, when the victim was under the age of 12. To fall under the exception, the statements must be “reasonably pertinent” to diagnosis or treatment, and may be inadmissible if the “circumstances indicate ... lack of trustworthiness.” [People v. Brodit, 72 Cal.Rptr.2d 154, 61 Cal.App.4th 1312](#) (1998). The exception appears to apply to statements made to a relatively broad variety of health care providers, including nurse practitioners and therapists. [Brodit, 61 Cal.App.4th 1312, 72 Cal.Rptr.2d 154](#) (1998). The [Brodit](#) court also favorably cited federal courts’ interpretation of Fed. R. Evid. 803(4) as allowing admission of hearsay evidence regarding the identity of the perpetrator, when the statements are made to a psychologist for obtaining psychological diagnosis. [61 Cal.App.4th 1312, 1332 72 Cal.Rptr.2d 154, 165](#). While not directly dealing with statements made to medical professionals, admissibility of hearsay evidence may also be sought under Cal. Evid. § 1250 and Cal. Evid. § 1251, which respectively allow for admission of statements to party that pertain to the declarant’s “then” or “previously” existing “mental or physical state,” subject to certain conditions. Such evidence is not admissible if “the statement was made

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#### MEDICAL HEARSAY



under circumstances such as to indicate its lack of trustworthiness.” Cal. Evid. § 1252.

## Colorado

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### STATE STATUTE

*Col. R. Evid. 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

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.

### STATE CASE LAW

See *People v. Vigil*, 127 P.3d 916 (Colo. 2006). Father's friend assaulted his 7 year old son one night when the two men and another were drinking. The father found Vigil in his son's bedroom and his son told him that Vigil had "stuck his winkle in his butt" and that he was hurt. The child was taken to the hospital and the doctor performed a victim sexual assault kit. The Court held that the treatment by the doctor was for the sexual abuse and that the child's statements were non-testimonial. Even though the doctor was a member of the child protection team an objectively reasonable person would not have believed that his statements would be available for later use at trial.

For admission under the rule, evidence must be "reasonably pertinent" to diagnosis or treatment, which requires satisfaction of a two-part test: (1) the motive of the declarant in providing the statements must align with the purpose of the rule and (2) the medical professional must be able to reasonably rely on the information for the purposes of diagnosis and treatment. Statements of fault do not generally qualify for the exclusion. *People v. Jaramillo*, 183 P.3d 665 (Colo. App. 2008). However, in cases where a physician seeks to identify a perpetrator in an effort to diagnose and treat psychological trauma, to report abuse or remove a victim from a dangerous situation such information may be admissible, but only if the physician takes additional steps relying on the information. *People v. Vigil*, 127 P.3d 916 (Colo. 2006). The rule has been applied to statements given to a variety of medical professionals including nurses, nontreating physicians, psychiatrists (even when given as part of pretrial psychiatric evaluations), and paramedics. See *People v. Martinez*, 18 P.3d 831 (Colo. App. 2000); *King v. People*, 785 P.2d 596 (Colo. 1990).

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### MEDICAL HEARSAY

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## Connecticut

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### STATE STATUTE

*Conn. Code of Evid. §8-3(5). hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(5) Statement for purposes of obtaining medical diagnosis or treatment . A statement made for purposes of obtaining a 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 the medical diagnosis or treatment.

### STATE CASE LAW

*See State v. Slater*, 939 A.2d 1105 (Conn. 2008). Victim made statements to nurse and physician in the emergency room regarding her assault, that she had been forced into a car, forced to have oral and vaginal sex with a man she did not know, and who punctured her hand with a large knife. The physician administered a rape kit and the DNA taken during that exam was matched with the defendants. The victim did not identify or accuse the defendant during her examination. The victim died before trial and the defendant objected to admission of the statements under the Confrontation Clause. The fact that a rape kit was administered does not eviscerate the medical treatment purpose of the exam. Every statement made by the victim to the nurse and physician was related to treatment.

For medical hearsay evidence to be admissible it must have been “reasonably pertinent” to the diagnosis or treatment of the patient. In general statements as to causation or identity of perpetrator are inadmissible since they are generally not treated as being obtained in the “furtherance” of medical treatment, but the Supreme Court has allowed admission of such evidence in the case of domestic child abuse. [State v. DePastino](#), 228 Conn. 552, 565, 638 A.2d 578 (1994). The exception has been expanded by courts in recent years to include statements made to caregivers other than physicians. [State v. Maldonado](#), 13 Conn.App. 369, 374, 536 A.2d 600 (Allowing admission of statement made by child abuse victim to Spanish speaking hospital security guard). Statements made to non-treating physicians have also been held to be admissible. [George v. Ericson](#), 250 Conn. 312, 736 A.2d 889 (1999).

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### MEDICAL HEARSAY

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## Delaware

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### STATE STATUTE

*D. R. E. 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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 course thereof insofar as reasonably pertinent to diagnosis or treatment.

### STATE CASE LAW

To be admissible, the Supreme Court stated the statement must satisfy a two-part “reliability” test: (1) “the declarant’s motive in making the statement must be consistent with purpose of promoting treatment” and (2) “doctors must reasonably rely on this sort of information in diagnosis or treatment”; further, the judge must “determine that the probative value is not substantially outweighed by the danger of unfair prejudice.” Capano v. State 781 A.2d 556, 624 (Del. 2001). Courts have allowed admission of statements made to caregivers other than physicians, in particular psychotherapists and psychologists and “medical paraprofessionals,” so long as “circumstances demonstrate reliable guarantees of trustworthiness.” Capano v. State 781 A.2d 556, 624 (Del. 2001).

## District of Columbia

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### STATE STATUTE

Common law jurisdiction.

### STATE CASE LAW

The exception applies if the statement is “reasonably pertinent” to diagnosis and the declarant is “the patient, or someone in a special relationship with the patient such as a parent.” [Barrera v. Wilson, 668 A.2d 871, 873 \(D.C.1995\)](#). Courts have allowed admission of statements identifying perpetrators in cases of nonsexual and sexual abuse of a minor by a member of their. [Galindo v. United States, 630 A.2d 202 \(D.C.1993\)](#). Courts have suggested that admission of statements identifying perpetrators may be acceptable outside of the child abuse context so long as they are made for the purposes of diagnosing and treating the “psychological and emotional consequences” of the injury. [Jones v. U.S. 813 A.2d 220, 226 \(D.C. 2002\)](#). The rule has been relied on to allow admission of statements to physicians, nurses and psychologists. The exception does not apply to when the examination was made for the purposes of eliciting evidence for trial, not medical treatment. [Sullivan v. United States, 404 A.2d 153, 158 \(D.C.1979\)](#).

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### MEDICAL HEARSAY

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## Florida

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### STATE STATUTE

*F. S. A. §90.803(4). Hearsay Exceptions Availability of Declarant Immaterial.*

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(4) Statements for purposes of medical diagnosis or treatment.--Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

### STATE CASE LAW

*See Danzy v. State*, 553 So.2d 380 (Fl. App. 1989). The defendant was staying with his girlfriend at the time of the incident and the girlfriend's sister was also at the apartment recovering from a back injury caused by a car accident. The defendant was helping the victim into a recliner when he sexually assaulted her. The victim then ran out the door and fell down the stairs, reinjuring her back. The victim went to the emergency room for her renewed injuries. The Court stated that, "the doctor specifically testified that he believed it was important to find out why his patient was in obvious distress." The Court applied the same analysis to the statements made to the nurse examiner. Even though the victim initially came in to the hospital for a back injury, she was visibly upset and was urged to recount the incident by the doctor.

(1) purpose of diagnosis or treatment, (2) the person making the statement knew it was being made for the purpose of diagnosis or treatment and (3) the statement was "reasonably pertinent" to diagnosis or treatment. The court must also evaluate whether the statements were reliable. The exception applies both to statements about the patient's current medical conditional as well as the patient's medical history. Unlike the Federal Rule which does not place limitations on who can make the statements, § 90.803(4) restricts applicability of the rule to the patient or to persons who have "knowledge of the facts and [are] legally responsible for the person who is unable to communicate the facts." The latter category includes parents or young children or family members aiding in the treatment of the elderly. The exception is not restricted to statements made to physicians, but also applies to

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#### MEDICAL HEARSAY

statements made to nurses, ambulance technicians and others so long as they satisfy the purpose of the exception. Courts have differed on whether statements regarding child abuse to physicians that are part of teams investigating crimes qualify for the exception. Compare [Pagan v. State, 599 So. 2d 744, 745 \(Fla. 3d DCA 1992\)](#) (Allowing admission of statements made to rape treatment center physicians.); with [Jones v. State, 600 So. 2d 1138, 1139 \(Fla. 5th DCA 1992\)](#) (Denying admission of statements made to physicians providing services for Child Protection Team.). While the statute allows for admission of statements regarding “the inceptions or general character of the cause or external source thereof,” the Supreme Court has not interpreted this language as allowing for admission of statements of fault or regarding the identity of the person committing a crime. [State v. Jones, 625 So. 2d 821 \(Fla. 1993\)](#).

## Georgia

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### STATE STATUTE

*GA. Code §24-3-4. 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 shall be admissible in evidence.

### STATE CASE LAW

To qualify for admission under the exception the statements must be “reasonably pertinent for diagnosis or treatment.” So long as the statement conforms to the purpose of the rule, the exception applies to statements made to a broad variety of individuals (physicians, mental health professionals, nurses, emergency medical technicians or any other person the person making the statement believes will take medical action or convey the information to a third party who will take medical action). [Banks v. State, 144 Ga.App. 471, 241 S.E.2d 587 \(1978\)](#). The Supreme Court has said that statements identifying an attacker are inadmissible, [State v. Butler, 256 Ga. 448, 349 S.E.2d 684 \(1986\)](#) (Noting statements from child sexual abuse victim as to “what happened” are admissible, but rejecting admission of statements of victim as to “who did it.”).



## Hawaii

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### STATE STATUTE

*HRS §626-1, Rule 803(b)(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(b) Other exceptions.

(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.

### STATE CASE LAW

The medical treatment hearsay exception is governed by Haw. Rev. Stat. § 626-1(b)(4), which uses the same language as Fed. R. Evid. 803(4). To qualify for admission under the exception, the statement must be “reasonably pertinent to diagnosis or treatment.” In State v. Yamada, 99 Haw. 542, 556 (2002), the Supreme Court appears to embrace the Federal precedent interpreting Fed. R. Evid. 803(4), particularly with regard to the abolishment of the distinction between treating and consulting physicians. Evidence can be admitted under the exception regardless of whether the declarant is available. The rule applies to statements regarding both physical and mental illness. State v. Wakisaka, 102 Haw. 504 (2003).

## Idaho

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### STATE STATUTE

*I.R.E. 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

*(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 source thereof insofar as reasonably pertinent to diagnosis or treatment.

### STATE CASE LAW

The Supreme Court has provided a three part test for determining whether evidence should be allowed under the exception: (1) the statements must be “made for the purposes of medical diagnosis or treatment”; (2) the statements described “medical history, or past or present symptoms, pain, or sensations, or the source thereof”; and (3) that the statements were “reasonably pertinent to diagnosis or treatment.” [State v. Kay, 129 Idaho 507, 927 P.2d 897 \(Ct. App. 1996\)](#). In the case of statements by minors, the court must assess whether the statement is reliable considering a variety of factors. [State v. Kay, 129 Idaho 507, 518, 927 P.2d 897, 908 \(Ct. App. 1996\)](#). Statements made to psychologists have not been treated as falling under the exception. [State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 \(1992\)](#). In dicta, an intermediate appellate court indicated that statements regarding the identity of a person who caused an injury do not qualify for admission under the exception since such statements are generally not “necessary for the ... diagnosis of the injuries.” [State v. Crawford, 110 Idaho 577, 580, 716 P.2d 1349, 1352 \(Ct. App. 1986\)](#).

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### MEDICAL HEARSAY

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## Illinois

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### STATE STATUTE

#### 725 ICLS §5/115-15. HEARSAY EXCEPTION; STATEMENTS BY VICTIMS OF SEX OFFENSES TO MEDICAL PERSONNEL.

In a prosecution for violation of Section 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the “Criminal Code of 1961”, statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

### STATE CASE LAW

In the case of sexual offenses, the medical treatment hearsay exception in Illinois is governed by 725 Ill. Comp. Stat. § 5/115-13, which states that in a prosecution for violation of Section 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961, statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.” Courts have allowed admission of evidence under the exception for statements made to nurses (including sexual assault nurse examiners) as well as both treating and consulting physicians. [People v. Monroe, 304 Ill. Dec. 432, 852 N.E.2d 888 \(App. Ct. 2d Dist. 2006\)](#), appeal pending, (Sept. 1, 2006). Courts have not interpreted statements regarding the identity of the perpetrator as falling under the exception, on grounds that they are not “pertinent” to diagnosis or treatment. [People v. Hall, 1992, 601 N.E.2d 883, 176 Ill.Dec. 185, 235 Ill.App.3d 418](#). (identification of defendant as perpetrator of sexual assault inadmissible even though one of the options of treatment might have included removal of victim from defendant’s home). Illinois also has a firmly-rooted common law rule allowing for admission of hearsay evidence based on statements made for the purpose of medical diagnosis or treatment. [People v. Oehrke, 860 N.E.2d 416 \(Ill. App. Ct. 1st Dist. 2006\)](#).

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### MEDICAL HEARSAY

## Indiana

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### STATE STATUTE

*Rules of Evid., 803 (4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(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.

### STATE CASE LAW

To fall under the exception, the statement must satisfy a two part test for being “reasonably pertinent” to treatment or diagnosis: (1) the declarant must have been “motivated” to provide truthful information such that (2) a medical profession could reasonably rely on such information in diagnosis or treatment. [McClain v. State, 675 N.E.2d 329, 331 \(Ind.1996\)](#). The rule encompasses statements made to treating and consulting physicians as well as non-physicians such as nurses, emergency medical technicians, psychologists and social workers “so long as the declarant makes the statements to advance a medical diagnosis or treatment.” [In re Paternity of H.R.M., App.2007, 864 N.E.2d 442](#), citing [McClain v. State, 675 N.E.2d 329, 331 \(Ind.1996\)](#). Statements regarding the identity of the perpetrator are admissible if the information was necessary for appropriate provision of treatment. [In re Paternity of H.R.M. 864 N.E.2d 442 \(Ind. Ct. App. 2007\)](#) (Allowing admission of statements made to social worker by abused child regarding identity of abuser.); [Dowell v. State, 865 N.E.2d 1059, 1066 \(Ind. Ct. App. 2007\)](#) (Allowing admission of evidence regarding identity of person who bit adult victim.).

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### MEDICAL HEARSAY

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## Iowa

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### STATE STATUTE

#### *I.C.A. Rule 5.803(4)*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Similar to the Federal Rule, there is a two part test for determining whether a statement is “reasonably pertinent” to diagnosis or treatment: (1) the declarant’s motive in making the statement must be in line with seeking treatment and diagnosis and (2) the content of the statement must be such that a reasonable medical professional would rely on it in treatment and diagnosis. [State v. Long, 628 N.W.2d 440 \(Iowa 2001\)](#); [State v. Tracy, 482 N.W.2d 675 \(Iowa 1992\)](#). Court have admitted evidence under the exception from statements made to a broad variety of health care providers including physicians, nurses, psychologists and social workers. [State v. Hildreth, 582 N.W.2d 167, 169 \(Iowa 1998\)](#). Statements about the identity of the person inflicting the injury are admissible to the extent that they were reasonably pertinent to diagnosis or treatment; the Supreme Court ruled that statements that an abuser of a child is a household member is reasonably pertinent to diagnosis and treatment, [State v. Tracy, 482 N.W.2d 675 \(Iowa 1992\)](#), but the exception has not been extended to adult victims, [Donald v. State, 690 N.W.2d 696 \(Iowa Ct. App. 2004\)](#).

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### MEDICAL HEARSAY

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## Kansas

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### STATE STATUTE

#### **K.S.A. §60-460(1)(2). HEARSAY EVIDENCE EXCLUDED; EXCEPTIONS**

Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:

(1) *Statements of physical or mental condition of declarant.* Unless the judge finds it was made in bad faith, a statement of the declarant's (1) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant or (2) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition.

### STATE CASE LAW

See *State v. Miller*, 208 P.3d 774 (Kan. App. 2009). Defendant Miller was a neighbor of the 4 year old victim and her family. Miller stayed at the house one night and sexually assaulted the victim who complained the next day to her mother and grandmother of pain and that she did not want Mr. Miller to come back. Her mother took her to the hospital to be examined and the Court held that the statements were testimonial because an objective witness would know that the statements made to a SANE could be used during a later prosecution.

The rule states: "Unless the judge finds it was made in bad faith, a statement of the declarant's ... previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition." A plain language reading of the statute indicates that the exception only applies to statements made to physicians. With regard to identifying the person inflicting the injury, court have said the legislature meant for the statute to be interpreted more narrowly than the Federal Rule, but also suggested that such statements may be admissible in child abuse cases because the information may be necessary for mental health treatment. [State v. Todd, 24 Kan.App.2d 796, 954 P.2d 1 \(1998\).](#)

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### MEDICAL HEARSAY

## Kentucky

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### STATE STATUTE

#### *KRE 803. Hearsay exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

(4) Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis 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 treatment or diagnosis.

### STATE CASE LAW

See *Hartsfield v. Kentucky*, 277 S.W.3d 239 (Ky. 2009). Hartsfield reached a plea agreement with the State on multiple counts of sexual assault. The State appealed and the defendant sought discretionary review. The issue in the case regards a motion in limine, made by the State to determine the admissibility of the SANE nurse's statements. A SANE nurse, in this case, has two roles: (1) to provide medical treatment and (2) to gather evidence. They are brought in on sexual assault cases, specifically, at the request of the police or prosecuting attorney. The Court held that the role of the SANE was to collect evidence and to discover what happened in the past and not to treat the patient for an ongoing emergency.

See also *Colvard v. Com*, 309 S.W.3d 239 (Ky. 2010). Two young girls were assaulted in their bedrooms by their neighbor. Immediately after the two girls reported the assault to their mother, the incident was immediately reported and the girls were given medical examinations for a sexual assault. The Court held in this case that they were no longer recognizing the identification of a perpetrator as pertinent to medical treatment to fall under the purposes of medical diagnosis or treatment for hearsay. The analysis of the court determines that it is not reasonably conclusive that statements identifying a perpetrator, by young children, was for the purposes of medical treatment or diagnosis.

To qualify for admission under the exception if (1) the statement was made for the purpose of medical diagnosis or treatment and (2) a medical professional could reasonably rely on the statement in making diagnosis and treatment decisions. [J.M.R. v. Com., Cabinet for Health and Family Services \(Ky.App. 2007\) 239 S.W.3d 116](#). The Supreme Court has relied on the exception to admit statements

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#### MEDICAL HEARSAY

identifying the person inflicting the victim's injury in cases of sexual abuse of children (regardless of whether the abuser is a household member). [Stringer v. Com. 956 S.W.2d 883 \(Ky. 1997\)](#); [Edwards v. Com. 833 S.W.2d 842 \(Ky. 1992\)](#). However, statements regarding the identity of the perpetrator have not been treated as being reasonably pertinent to diagnosis or treatment in an adult assault case. [Gilliam v. Com. \(Ky. 2008\) 2008 WL 4291544](#). The exception has been applied to statements made to treating and consulting physicians, psychologists, marriage therapists and nurses, but not social workers, [Prater v. Cabinet for Human Resources, Com. of Ky. 954 S.W.2d 954 \(Ky. 1997\)](#).



## Louisiana

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### STATE STATUTE

*LSA – C.E. 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for purposes of medical treatment and medical diagnosis in connection with treatment. Statements made for purposes of medical treatment and medical diagnosis in connection with 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 treatment or diagnosis in connection with treatment.

### STATE CASE LAW

The Louisiana Rule only applies to “statements for the purposes of medical treatment and medical diagnosis,” whereas the Federal Rule covers statements made solely for the purpose of diagnosis as well. To qualify for the exception the statement must be (1) made for the purpose of medical diagnosis and treatment, (2) describe a medical condition or history and (3) relied upon by a medical professional in making treatment and diagnosis decisions. The exception applies to statements made to a broad variety of health care professionals including treating physicians, nurses (including sexual assault nurse examiners), psychologists and physical therapists so long as the purpose of the statements fell within the rule. See [Op. Atty. Gen., No. 01-92, June 21, 2001](#). Statements made to medical professionals in preparation in trial may be admissible, but not if the principle purpose of the examination was forensic. [State v. Harris, 781 So.2d 73, 1999-2845 \(La.App. 4 Cir. 2001\)](#). Statements regarding the identity of the person inflicting the injury have been held in admissible in childhood sexual abuse cases. [State v. Brown, 746 So. 2d 643 \(La. Ct. App. 4th Cir. 1999\)](#).

## Maine

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### STATE STATUTE

*Maine Rules of Evidence, 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

To be admissible, declarant must evince a strong motivation to be truthful and the content of the statement must be such that a medical professional could reasonably rely on it in rendering diagnosis or treatment. See [State v. Cookson, 837 A.2d 101, 109 \(Me.2003\)](#). Statements identifying cause of injury are admissible to the extent that they are reasonably pertinent to diagnosis or treatment. [State v. Cookson, 837 A.2d 101 \(Me.2003\)](#) (Allowing admission of statement made to nurse practitioner that stressful relationship with defendant in murder trial was cause of patient's depression since statement was pertinent to nurse's decision to treat patient with antidepressant drugs.).

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### MEDICAL HEARSAY

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## Maryland

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### STATE STATUTE

*MD. R. Evid. 5-803(b)(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(b) Other Exceptions.

(4) *Statements for Purposes of Medical Diagnosis or Treatment.* 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 sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

### STATE CASE LAW

To qualify for admission under the exception, the declarant must be motivated to provide reliable information and the statement must be given in “contemplation” of medical treatment or diagnosis. [Griner v. State, 2006, 899 A.2d 189, 168 Md.App. 714](#). Statements regarding the cause of an injury or identifying the person inflicting the injury are only admissible to the extent that they are relevant to treatment and diagnosis; statements to “medical practitioners” identifying perpetrators are unlikely to satisfy this requirement. [State v. Coates, 2008, 950 A.2d 114, 405 Md. 131](#). However, in the case of child sexual assault statements regarding the identity of the perpetrator made to psychologists or social workers have been held to satisfy the requirement on the theory that such information is necessary for diagnosis and treatment. [In re Rachel T., 77 Md.App. 20, 549 A.2d 27 \(1988\)](#). Statements that are made during forensic examinations are generally inadmissible, but statements made during examinations that have “dual” medical and forensic functions are admissible so long as the court determines the declarant has the requisite motive. [Webster v. State, 151 Md.App. 527, 536, 827 A.2d 910 \(2003\)](#). Statements to a broad variety of health professionals have qualified for the exception, including statements to treating physicians, nurses, sexual assault examiners, psychologists, social workers, and paramedics. The rule does not apply to non-treating physicians. [Low v. State, 1998, 705 A.2d 67, 119 Md.App. 413](#).

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### MEDICAL HEARSAY

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## Massachusetts

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### STATE STATUTE

#### *Common Law*

Massachusetts's medical treatment hearsay exception is primary grounded in common law, and is narrower than Fed. R. Evid. 803(4) in that it only applies to statements made to physicians or physicians' agents in the context of treatment or diagnosis. Under proposed Mass. R. Evid. § 78:27 (updated Sept. 2009), the language of the Federal Rule would be adopted.

### STATE CASE LAW

*See Com v. DeOliveria*, 849 N.E.2d 218 (Mass. 2006). Victim was anally raped by her mother's boyfriend. Abuse was reported by a day care worker, leading to an investigation by social services and the ultimate medical assessment for sexual abuse. The Court held that the medical exception to hearsay does not extend to testimony that goes to the guilt of the defendant, for example identification, only symptoms and conditions made to them for purposes of medical diagnosis or treatment.

Massachusetts's medical treatment hearsay exception is primary grounded in common law, and is narrower than Fed. R. Evid. 803(4) in that it only applies to statements made to physicians or physicians' agents in the context of treatment or diagnosis. Under proposed Mass. R. Evid. § 78:27 (updated Sept. 2009), the language of the Federal Rule would be adopted. The Mass. common law rule is buttressed by [M.G.L.A. c. 233, § 79](#), which allows for admission of statements provided to physicians for diagnosis and treatment that is included in hospital records. [Bouchie v. Murray](#), 376 Mass. 524, 381 N.E.2d 1295 (1978). Generally, statements regarding who is at fault for an injury are inadmissible. [Morrissey v. Ingham](#), 111 Mass. 63 (1872). However, while not necessarily treated as an exception to the hearsay rule, statements by sexual assault victims to physicians regarding the identity of their attacker as well as the circumstances of the attack are generally admissible at common law. [Glover v. Callahan](#), 299 Mass. 55, 12 N.E.2d 194 (1938).

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### MEDICAL HEARSAY

## Michigan

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### STATE STATUTE

*MI Rules MRE 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment. Statements made for purposes of medical treatment or medical diagnosis in connection with 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 necessary to such diagnosis and treatment.

### STATE CASE LAW

*See People v. Garland*, 777 N.W.2d 732 (Mich. App. 2007). The victim in this case had been out at a bar with the defendant, her sister, and another friend the night of the rape. The victim and her sister went home and fell asleep and the victim woke up to find the defendant having sex with her. The morning after the assault the victim went to the hospital and was directed to a not for profit organization that provides free and confidential services for sexual assault victims. The Court held that the victim's statements to the SANE were non-testimonial because, under a totality of the circumstances, her statements were made separate from any police interrogation, the nurse's taking of the history was critical to treatment given that there were no outward injuries, and even though the nurse examiner does turn over information, her examination is separate from any police interrogation.

*See also, People v. Spangler*, 285 Mich.App. 136, 774 N.W.2d 702 (2009). establishing the test for determining whether a victim's statements to SANE were testimonial or not. The test is whether, under a totality of the circumstances, the situation *objectively* indicates that the statements would be available for use in later prosecution or that medical treatment was not the primary purpose.

*See also People v. Matuszak*, 687 N.W.2d 342 (Mich. App. 2004). Defendant was convicted of first and third degree criminal sexual conduct. The Court held that the description of the rape and the injuries were well within the parameters of 803(4) for purposes of medical treatment. They did not identify the assailant and described the injuries received.

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### MEDICAL HEARSAY

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To qualify for admission under the rule, (1) the motivation for making the statement must be consistent with the purpose of the rule and (2) the content of the statement must be such that a reasonable medical professional could rely on in making diagnosis and treatment decisions. [People v. Hackney, 183 Mich. App. 516, 455 N.W.2d 358 \(1990\)](#). The court must determine that the statements are trustworthy given the context (including age of declarant) in which they were made. [People v. Meeboer, 439 Mich. 310, 484 N.W.2d 621 \(1992\)](#). Statements regarding the identity of the person inflicting the injury are generally not admissible under the exception, particularly in the context of medical treatment of adults. [People v. Hackney, 183 Mich. App. 516, 455 N.W.2d 358 \(1990\)](#). However, child's statements, particularly in the context of sexual assault, have been admissible under the rule when given in the context of psychological diagnosis and treatment. [People v. Meeboer, 439 Mich. 310, 484 N.W.2d 621 \(1992\)](#). The rule has been applied to statements made to a broad variety of medical professionals, including physicians, nurses (including Sexual Assault Nurse Examiners), psychologists, and physician's aides.

## Minnesota

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### STATE STATUTE

*50 M.S.A., Rules of Evid., Rule 803. Hearsay Exception; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

To qualify for admission under the exception, the declarant must be aware that the statement will be used for medical treatment or diagnosis and the content of the statement must be such that a medical professional would rely on it in making decisions regarding diagnosis and treatment. The rule applies to statements made to a broad variety of individuals including treating and consulting physicians, nurses, social workers, psychologists as well as other individuals that would be expected to relay the information to a medical professional for treatment or diagnosis. [See \*Gordon v. Engineering Const. Co.\*, 271 Minn. 186, 135 N.W.2d 202.](#) (Allowing admission of statement of parent about child's condition to physician, under previous common law rule.); [State v. Salazar](#), 504 N.W.2d 774, 777-78 (Minn. 1993) (Admitting statement of child victim to social worker.). While generally statements of fault do not fall under the exception, [State v. Robinson](#), 718 N.W.2d 400 (Minn. 2006), in the case of child sexual abuse statements made to medical doctors and psychologists regarding the identity of the perpetrator have been held admissible, particularly when the alleged perpetrator is a member of the victim's family, [State v. Larson](#), 453 N.W.2d 42 (Minn. 1990).

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### MEDICAL HEARSAY

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## Mississippi

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### STATE STATUTE

*M.R.E. Rule 803(4). Hearsay Exception; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness. For purposes of this rule, the term “medical” refers to emotional and mental health as well as physical health.

### STATE CASE LAW

The Mississippi Rule expands upon the Federal Rule by stating that the rule applies “regardless of to whom the statements are made or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness.” The Mississippi Rule also clarifies that the exception applies to “emotional and mental health as well as physical health.” The rule covers statements made to a broad variety of individuals including physicians, nurses, forensic interviewers, clinical workers and psychologists. To qualify for the exception, (1) the declarant’s motive in making the statement must be consistent with promoting treatment and (2) the content of the statement must be of the type that a medical professional could reasonably rely on in making diagnosis and treatment decisions. [Branch v. State, 998 So. 2d 411 \(Miss. 2008\)](#). Courts have generally not treated statements of fault as falling under the exception; however, the Supreme Court has said that statements identifying perpetrators of child sexual assaults are admissible. [Jones v. State, 606 So. 2d 1051 \(Miss. 1992\)](#); [Rowlett v. State, 791 So. 2d 319 \(Miss. Ct. App. 2001\)](#).

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### MEDICAL HEARSAY

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## Missouri

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### STATE STATUTE

Common law jurisdiction.

### STATE CASE LAW

“Statements made to a physician, or contained in hospital records, even if characterized as medical history, are admissible insofar as such statements are reasonably pertinent to diagnosis and treatment.” Lauck v. Price, 289 S.3d 694 (Mo. App. E.D. 2009)(citing Morrow v. Fisher 51 S.W. 3d 468, 472 (Mo.App. S.D. 2001)).

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### MEDICAL HEARSAY

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## Montana

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### STATE STATUTE

*MCA 26-10 Rule 803(4). hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Montana leans towards admitting only testimony from physicians in comparison to other states, however has allowed testimony from a nurse ([State v. Newman, 790 P.2d 971](#) Mont.,1990) and EMT's in their roles as first responders ([State v. Arlington, 875 P.2d 307](#) Mont.,1994). Montana however has disallowed testimony from a counselor ([State v. Harris, 808 P.2d 453](#) Mont.,1991) as "counselor was not licensed to render medical diagnoses, and she thus could not testify about diagnoses under the exception."

## Nebraska

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### STATE STATUTE

*Neb. Rev. St. §27-803(3). Hearsay Exceptions; Enumerated; Availability of Declarant Immaterial.*

Subject to the provisions of [section 27-403](#), the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) 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;

### STATE CASE LAW

Nebraska requires additional evidence for a child's statements ([State v. Vaught, 682 N.W.2d 284](#) Neb.,2004), however has had a mixed record in allowing physician statements. The court also ruled in [State v. Dyer \(513 N.W.2d 316](#) Neb.,1994) that an EMT's testimony was not admissible as the "victim's statement was made while she was being encouraged to "seek" medical treatment."

## Nevada

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### STATE STATUTE

*N.R.S. 51.115. Statement 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 are not inadmissible under the hearsay rule insofar as they were reasonably pertinent to diagnosis or treatment.

### STATE CASE LAW

See *Medina v. State*, 143 P.3d 471 (Nev. 2006). Medina was visiting a friend who lived in Ryer's (victim) apartment complex. Medina talked himself into Ryer's apartment and then he raped her. Ryer was found by a neighbor the next day and taken to the emergency room and Adams, a certified SANE nurse, conducted a sexual assault examination. The Court held that the statements made to Adams were testimonial because Adams was a "police operative." Adams testified that her job was to gather evidence for possible use in later prosecutions and that is a violation of the Confrontation Clause, where the victim passed away prior to trial and there was no opportunity to cross-examine.

Nevada is less likely to allow testimony from a psychologist or psychiatrist (as opposed to a physician) due to the "probability that [the] patient is telling [the] truth is less convincing, as declarant is not requesting immediate relief from [a] physical ailment. ([Felix v. State](#), 849 P.2d 220 Nev.,1993). The court did allow testimony from a nurse, even after the initial exam was completed in [Koerschner v. State](#), 13 P.3d 451 Nev., 2000).

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### MEDICAL HEARSAY

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## New Hampshire

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### STATE STATUTE

*New Hampshire Rule of Evidence, Rule 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The statements, records and documents specified in 803(1) through 803(24) are not excluded by the hearsay rule, even though the declarant is available as a witness.

(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, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness.

### STATE CASE LAW

New Hampshire's courts have stated "there are three areas of inquiry for determining whether statement is admissible under hearsay exception as having been made for purposes of medical diagnosis or treatment: declarant's intent, subject matter of statements, and whether there are circumstances indicating trustworthiness of statements." Beyond this, New Hampshire has not discriminated between a physician or a counselor. [State v. Roberts, 622 A.2d 1225](#) N.H.,1993. The court did state that "declarant must have intended to make the statement in order to obtain a medical diagnosis or treatment." ([State v. Wade, 622 A.2d 832](#) N.H.,1993. This case also required that the child have made the statement under the requisite state of mind.

## New Jersey

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### STATE STATUTE

*NJ R. Evid. N.J.R.E. 803(c)(4). Hearsay Exceptions not Dependent on Declarant's Availability.*

The following statements are not excluded by the hearsay rule:

(c) Statements not dependent on declarant's availability. Whether or not the declarant is available as a witness:

(4) *Statements for purposes of medical diagnosis or treatment.* Statements made in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment.

### STATE CASE LAW

New Jersey has disallowed testimony from a minor defendant ([State v. Schumann, 545 A.2d 168](#), N.J., 1988), an autistic and mentally retarded sexual assault victim ([State v. Jefferson, 2005 WL 3947950](#) N.J.Super.App.,2006) and physicians in both [State v. Bowens, 530 A.2d 338](#) N.J.Super.App.,1987 and [State v. Pillar, 820 A.2d 1](#) N.J.Super.App.,2003.

## New Mexico

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### STATE STATUTE

*NMRA, Rule 11-803(d). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

D. 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.

### STATE CASE LAW

*See State v. Ortega*, 175 P.3d 929 (N.M. Ct. App. 2007), the previously held authority on admissibility of SANE/SAFE testimony, has been overruled on at least one area of law by *State v. Mendez*, 2010 WL 4345067 (N.M. 2010). *Mendez* overrules *Ortega* in regards to the determination that a statement was testimonial. *Ortega* focuses on the primary purpose test while ignoring any guarantees of trustworthiness. *Mendez* holds that the correct assessment of whether statements made to a SANE are testimonial require an analysis, not of the circumstances surrounding the interview, but rather should focus on the substance of the individual statements. *Ortega* was wrong in ignoring trustworthiness and went too far in categorically excluding statements made to a SANE. Additionally, *Mendez* contributes to the case law that a SANE has a *dual role* as a medical examiner and evidence collector.

*See also State v. Ortega*, 175 P.3d 929 (N.M. Ct. App. 2007). Mother overheard her then boyfriend and a friend making comments about being the “first to do” the 8 year old. She asked her daughter who eventually told her she had been sexually molested by the boyfriend and his friend. Mother brought the child to the emergency room where she was examined by a SANE for any immediate injuries and to collect evidence. The Court held that statements made to the SANE were testimonial because the need for medical treatment had ended. They held that the primary purpose of the examination was to prove some past fact for use at trial rather than to assist the victim with a medical emergency. Much of this opinion focuses on the fact that the victim did not require any treatment but the examination was conducted to develop and preserve evidence.

### MEDICAL HEARSAY

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*See also* United States v. Joe, 8 F.3d 1488 (10th Cir. 1993). Husband runs over wife and neighbor while they were trying to escape one of his drunken rages. The wife had been treated previously for an alleged rape and the issue is whether the statements she made to the physician then are admissible. The Court focuses on whether the statement was reasonably pertinent to medical diagnosis or treatment. Specifically, the Court stated, “The identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case.” Applying the analysis of the physician’s responsibility to prevent future abuse where the abuser is a member of the family or household and identification would help to protect a victim, the Court held the evidence was non-testimonial and admissible.

*See also* State v. Romero, 156 P.3d 694, 141 N.M. 403 (2007). Defendant’s wife was found dead in their bed and he was convicted of domestic violence and murder. The victim made a statement to a SANE weeks after an incident, in which she relayed a narrative of the assault. The Court held that, although the narrative was made during the course of treatment, the statements of specific acts were not admissible. The Court would have required a different kind or level of redaction to admit the statement into evidence.

New Mexico has allowed statements from a psychologist ([State v. Altgilbers, 786 P.2d 680 N.M.App.,1989](#)), a neighbor ([State v. Buck, 266 P. 917 N.M.,1927](#)) and a nurse ([State v. Massengill, 62 P.3d 354 N.M.App.,2002](#)). New Mexico has also disallowed statements from a nurse examiner specializing in sexual assault ( [State v. Massengill, 62 P.3d 354 N.M.App.,2002](#)), however this appears to be an aberration.



## New York

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### STATE STATUTE

Common law jurisdiction.

### STATE CASE LAW

New York's courts have admitted testimony from a gynecologist ([People v. Torres, 572 N.Y.S.2d 269](#) N.Y.App.Div.4.Dept.,1991), hearsay statements contained within hospital records ([People v. Archie, 561 N.Y.S.2d 1000](#) N.Y.App.Div.4.Dept.,1990) and by a deceased victim ([People v. James, 797 N.Y.S.2d 129](#) N.Y.App.Div.2.Dept.,2005) and by a domestic violence victim as a "prompt outcry." ([People v. Archbold, 835 N.Y.S.2d 577](#) N.Y.App.Div.1.Dept.,2007)

New York has disallowed statements from a victim made outside of an examination setting (at a child advocacy center) ([People v. Ballerstein, 860 N.Y.S.2d 718](#) N.Y. App. Div.4.Dept.,2008) and a victim's notes from a counseling session. ([People v. Benedetto, 744 N.Y.S.2d 92](#) N.Y.App.Div.4.Dept.,2002)

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### MEDICAL HEARSAY

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## North Carolina

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### STATE STATUTE

#### **RULES OF EVID., G.S. § 8C-1, RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Statements from psychologists “are admissible hearsay under rule as statements made for purposes of medical diagnosis or treatment.” ([State v. Bullock, 360 S.E.2d 689](#) N.C.,1987).

North Carolina courts disallowed the testimony of two rape task force volunteers ([State v. Smith, 337 S.E.2d 833](#) N.C., 1985), a child’s out of court statements ([State v. Hinnant, 523 S.E.2d 663](#) N.C.,2000). The latter case established a two part inquiry regarding “(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment, and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment.”

## North Dakota

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### STATE STATUTE

*Rule 803, N.D.R.Ev. Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

North Dakota has allowed testimony from a nurse ([State v. Janda, 397 N.W.2d 59](#), N.D., 1986), however has a broad rule that “there is no requirement that the physician must have been the person's doctor at any time prior to the examination.” ([State v. Muhle, 737 N.W.2d 647](#) N.D.,2007).

*See also* State v. Janda, 397 N.W.2d 59 (N.D. 1986). Defendant Janda was convicted of gross sexual imposition. The Court held that medical examinations can be for the purpose diagnosing and treating physical injuries just as much as diagnosing whether the victim of a sexual assault has suffered psychological trauma. There is occasion where such a narrative is reasonably pertinent to the diagnosis and treatment.

## Ohio

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### STATE STATUTE

*Evid. R. Rule 803(4). Hearsay Exceptions; Availability Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Ohio has denied a victim's testimony when not directly related to a medical treatment or diagnosis, albeit is used to only further an investigation ([State v. Chappell, 646 N.E.2d 1191](#) Ohio.App.8.Dist.Cuyahoga.Co.,1994)).

Ohio did allow statements made by children in [State v. Dever, 596 N.E.2d 436](#) Ohio,1992 and [State v. Dever, 596 N.E.2d 436](#) Ohio,1992. The standard was described as "a nonexhaustive list of considerations includes (1) whether the child was questioned in a leading or suggestive manner, (2) whether there is a motive to fabricate, such as a pending legal proceeding such as a bitter custody battle, and (3) whether the child understood the need to tell the physician the truth" in [State v. Muttart, 875 N.E.2d 944](#) Ohio,2007.

*See State v. Stahl, 855 N.E.2d 834 (Ohio 2006).* The State is seeking to introduce a statement of the victim made to a nurse practitioner during an emergency-room examination, where the victim identified her perpetrator in the presence of a police officer. The Court reversed and held that the statements made to the nurse practitioner were non-testimonial. The statements made to the nurse, in this case, were made in the ordinary course of conducting a medical examination. "In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations."

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### MEDICAL HEARSAY

## Oklahoma

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### STATE STATUTE

*12 Okl.St. Ann. §2803(4). Hearsay Exceptions; Availability of Declarant immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

4. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, if reasonably pertinent to diagnosis or treatment;

### STATE CASE LAW

Oklahoma allowed statements made to a physician in [Kennedy v. State, 839 P.2d 667 Okla.Crim.App.,1992](#)) under a similar two part test as used within North Carolina.

The court also stated that admissibility is discretionary and not a cause for reversal in [Drake v. State, 761 P.2d 879 Okla.Crim.App.,1988](#).

Oklahoma did disallow a summery case presented by the defense in [Kiser v. State, 782 P.2d 405 Okla.Crim.App.,1989](#).

## Oregon

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### STATE STATUTE

*O.R.S. §40.460. Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by [ORS 40.455](#), even though the declarant is available as a witness:

(4) 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.

### STATE CASE LAW

Oregon allowed testimony from a physician in [State v. Vosika, 731 P.2d 449 Or.App.,1987](#), and stated in [State v. Moen, 786 P.2d 111 Or.,1990](#) that “the statement must be made for such purposes, the statement must describe or relate medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause thereof, and the statement must be reasonably pertinent to diagnosis or treatment.”

Oregon has also allowed testimony via a videotaped interview ([State v. Logan, 806 P.2d 137 Or.App.,1991](#)) and the use of anatomically correct dolls via video ([State v. Barkley, 846 P.2d 390 Or.,1993](#)).

A mother’s testimony to her child’s physician that she saw her child throw up was considered admissible as proof in [State ex rel. Juvenile Dept. of Multnomah County v. Pfaff, 994 P.2d 147 Or.App.,1999](#).

## Pennsylvania

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### STATE STATUTE

*Pa.R.E., Rule 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for purposes of medical diagnosis or treatment. A statement 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 treatment, or diagnosis in contemplation of treatment.

*Comment:* Pa.R.E. 803(4) is similar to [F.R.E. 803\(4\)](#) in that both admit statements made for purposes of medical treatment. Pa.R.E. 803(4) differs from [F.R.E. 803\(4\)](#) because it permits admission of statements made for purposes of medical diagnosis only if they are made in contemplation of treatment. Statements made to persons retained solely for the purpose of litigation are not admissible under this rule. The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully. This rationale is not applicable to statements made for purposes of litigation. Pa.R.E. 803(4) is consistent with Pennsylvania law. *See* [Commonwealth v. Smith, 545 Pa. 487, 681 A.2d 1288 \(1996\)](#).

An expert medical witness may base an opinion on the declarant's statements of the kind discussed in this Rule, even though the statements were not made for purposes of treatment, if the statements comply with [Pa.R.E. 703](#). Such statements may be disclosed as provided in [Pa.R.E. 705](#), but are not substantive evidence.

This exception is not limited to statements made to physicians. Statements to a nurse have been held to be admissible. *See Smith, supra*. Statements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible. *See Smith, supra*.

### STATE CASE LAW

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#### MEDICAL HEARSAY

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Pennsylvania courts disallowed testimony from a nurse in [Com. v. Smith, 681 A.2d 1288](#) Pa.,1996. Interestingly, protection from future abuse apparently did not “constitute medical treatment or diagnosis for purposes of medical treatment exception from hearsay rule” within this same case.



## **Rhode Island**

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### **STATE STATUTE**

*Rhode Island of Evidence, Rule 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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, but not including statements made to a physician consulted solely for the purposes of preparing for litigation or obtaining testimony for trial.

### **STATE CASE LAW**

Rhode Island allows statements made to any family member to be admissible (as opposed to only a medical professional). [In re Andrey G., 796 A.2d 452](#) R.I.,2002 A child's statement to a school psychologist was not considered admissible ([State v. Lynch, 854 A.2d 1022](#) R.I.,2004), although portions of a hospital record were in [State v. Kelly, 554 A.2d 632](#) R.I.,1989.

## South Carolina

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### STATE STATUTE

*Rule 803(4), SCRE. Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

### STATE CASE LAW

South Carolina disallowed testimony from a victim's nurse in [State v. Burroughs, 492 S.E.2d 408](#) S.C.App.,1997 and a treating physician in [State v. Camele, 360 S.E.2d 307](#). S.C.,1987. The court did permit testimony from an emergency room physician in [State v. McFadden, 458 S.E.2d 61](#) S.C.App.,1995.

## South Dakota

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### STATE STATUTE

#### *19-16-8. (Rule 803(4)) Statements given to aid diagnosis or treatment*

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof are not excluded by [§ 19-16-4](#) in so far as reasonably pertinent to diagnosis or treatment, even though the declarant is available as a witness.

### STATE CASE LAW

South Dakota allowed testimony given to a physician eight months after an incident of sexual abuse ([State v. Olesen, 443 N.W.2d 8](#), S.D., 1986) although disallowed testimony from an emergency room physician in a rape case ([State v. Fool Bull, 745 N.W.2d 380](#) S.D.,2008.)

*See also* United States v. Renville, 779 F.2d 430 (8th Cir. 1985). Renville was convicted of two counts of sexual assault of his 11 year old step daughter. The victim was examined several weeks after allegations were made and she was in the care of a foster family. The Court holds the statements to be admissible for purposes of identification where the child's motives were nothing more than a patient responding to a physician's questions during treatment.

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### MEDICAL HEARSAY

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## Tennessee

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### STATE STATUTE

*Rules of Evid., Rule 803(4). Hearsay Exceptions.*

The following are not excluded by the hearsay rule:

(4) Statements for Purposes of Medical Diagnosis and Treatment. Statements made for purposes of medical diagnosis and treatment describing 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 diagnosis and treatment.

### ADVISORY COMMISSION COMMENT

The proposal continues the Tennessee position of limiting declarations of past physical condition to those made to treating doctors. See [Gulf Refining Co. v. Frazier, 15 Tenn.App. 662, 688-95 \(1932\)](#). The declaration must be for both diagnosis and treatment. Declarations of present bodily condition fall within Rule 803(3).

It is important to distinguish declarations of bodily condition, admissible as substantive evidence, from similar declarations used by a physician to support an expert opinion. The latter are not evidence, but rather give weight to the opinion--which is the evidence. [T.C.A. § 24-7-114](#); [State v. Holt, 222 Tenn. 721, 440 S.W.2d 591 \(1969\)](#); see Rule 703.

### STATE CASE LAW

See *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008). An 82 year old woman was raped at her home by a man she had seen walking past her house and who she then gave water too. The victim told the police that the perpetrator forced his way into her home, covered her face with a pillow and raped her. She was taken to the hospital, examined and stabilized. The nurse's testimony was excluded and held to be testimonial for a couple of reasons: the victim had been examined and stabilized prior to seeing the Nurse, the training of the SANE by law enforcement and the District Attorney on how to question victims and collect and preserve evidence, and finally the Court ruled as it did because of the way the Nurse explained her role to the victim and the examination as an investigation with the police officer present. The Tennessee Court did not create a blanket rule. They laid caution for precedent that made such an assumption in the dicta.

### MEDICAL HEARSAY

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Tennessee disallowed statements from a psychologist in [State v. Barone, 852 S.W.2d 216](#) Tenn.,1993, comments made by a mother to a social worker in [State v. Rucker, 847 S.W.2d 512](#) Tenn.Crim.App.,1992 and testimony to a physician [State v. Livingston, 907 S.W.2d 392](#) Tenn.,1995. [State v. Hunter, 926 S.W.2d 744](#) Tenn.Crim.App.,1995 is an intriguing case given the involvement (and admissibility of testimony) against an abuser within the same household.

Tennessee clarified its view towards medical hearsay exceptions in [State v. McLeod, 937 S.W.2d 867](#) Tenn.,1996 in that the “statement must have been made for purpose of medical diagnosis and treatment, describing medical history, which includes past or present symptoms, pain, or sensations; or, second, if statement addresses inception or general character of cause or external source of problem, then information in statement must be reasonably pertinent to diagnosis and treatment.”

## Texas

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### STATE STATUTE

*TX Rules of Evidence, Rule 803. Hearsay Exceptions; Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Statements were allowed from a psychologist ([Macias v. State, 776 S.W.2d 255](#) Tex.App.San.Antonio,1989), an emergency room nurse ([Torres v. State, 807 S.W.2d 884](#) Tex.App.Corporus.Christi,1991), a social worker ([Puderbaugh v. State, 31 S.W.3d 683](#) Tex.App.Beaumont,2000) and a drama therapist ([Gohring v. State, 967 S.W.2d 459](#) Tex.App.Beaumont,1998).

Testimony was deemed inadmissible from a psychotherapist who was not deemed to have had the necessary medical background ([Moore v. State, 82 S.W.3d 399](#) Tex.App.Austin,2002).

## Utah

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### STATE STATUTE

*Utah Rules of Evidence, Rule 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Testimony from a social worker ([State v. Sloan, 72 P.3d 138](#) Utah.App.,2003) and a neighbor ([State v. Vance, 110 P. 434](#) Utah,1910) were both deemed admissible.

## Vermont

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### STATE STATUTE

*Vermont Rules of Evidence, Rule 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Vermont disallowed out of court statements detailing abuse made to a psychologist ([State v. Gokey, 574 A.2d 766](#) Vt.,1990) and a physician in ([State v. Gallagher, 554 A.2d 221](#) Vt.,1988).Vermont concluded “statements relating to inception or cause of condition or symptom are not admissible under exception to hearsay rule even if pertinent to diagnosis or treatment” under both [State v. Recor, 549 A.2d 1382](#) Vt.,1988 and [State v. Babson, 908 A.2d 500](#) Vt.,2006.



## Virginia

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### STATE STATUTE

Common law jurisdiction.

### STATE CASE LAW

Virginia allowed a deceased victim's statements to a "spouse, cardiac technician, and police officer within ten minutes after being shot in head." ([Harris v. Com., 382 S.E.2d 292](#) Va.App.,1989). A child's statements were not permitted in [Jenkins v. Com., 471 S.E.2d 785](#) Va.App.,1996.

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### MEDICAL HEARSAY

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## Washington

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### STATE STATUTE

#### **WASHINGTON RULES OF EVIDENCE, ER 803(A)(4). HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL**

**(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Washington did not allow statements made by a nine year old victim purely for the purposes of an investigation in [State v. Lopez, 980 P.2d 224](#) Wash.App.Div.3,1999, however did permit testimony from nurses, psychologists and others in much more numerous cases.

## West Virginia

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### STATE STATUTE

*West Virginia Rules of Evidence (WVRE), Rule 803(2). Hearsay Exceptions; Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Testimony was deemed admissible by a counselor in [State v. Pettrey, 549 S.E.2d 323](#) W.Va.,2001, a psychologist in [State v. Shrewsbury, 582 S.E.2d 774](#) W.Va.,2003.

## Wisconsin

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### STATE STATUTE

*W.S.A., 908.30 (3). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Third party statements were deemed admissible in [State v. Huntington, 575 N.W.2d 268](#) Wis.,1998 as was testimony of a physician.

## Wyoming

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### STATE STATUTE

*Wyoming Rules of Evidence, Rule 803 (4). Hearsay Exceptions; Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

Wyoming's courts ruled in [Oldman v. State, 998 P.2d 957](#) Wyo.,2000 that "statements that have the effect of attributing fault or causation generally are not admissible in evidence under the hearsay exception for statements made for purposes of medical diagnosis or treatment because they are not relevant to such diagnosis or treatment."

Testimony was ruled admissible from a psychologist in [Large v. State, 177 P.3d 807](#) Wyo.,2008, as were child's out of court statements in [Bush v. State, 193 P.3d 203](#) Wyo.,2008 and statements made by a social worker in [Simmers v. State, 943 P.2d 1189](#) Wyo.,1997.

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### MEDICAL HEARSAY

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## American Samoa

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STATE STATUTE

STATE CASE LAW

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## Guam

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STATE STATUTE

STATE CASE LAW

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## **Northern Mariana Islands**

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**STATE STATUTE**

**STATE CASE LAW**

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## Virgin Islands

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### STATE STATUTE

*VI ST R FRE Rule 803(4). Hearsay Exceptions; Availability of Declarant Immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(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.

### STATE CASE LAW

## Puerto Rico

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STATE STATUTE

STATE CASE LAW

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