TOWARD A PRESUMPTIVE ADMISSION OF MEDICAL RECORDS UNDER FEDERAL RULE OF EVIDENCE 803(4)

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Abstract: Despite the centrality of medical records to many of the civil cases that reach trial, the rules governing their admission into evidence are a confusing morass of hearsay exceptions and exceptions to exceptions. Some rules follow ill-conceived, common-law justifications for admitting hearsay to their increasingly illogical conclusions. Others limit the application of common-law hearsay exceptions without an apparent logical basis for doing so.

There must be a better way. The recent revisions to Federal Rules of Evidence 803(6) and 807 provide a model for such a pathway. This Article examines the current state of hearsay law as applied to medical records, critiques the peculiarities of Rules 803(4) and 803(6) with respect to those records, and assesses the concern that medical records are too inaccurate to be presumptively true. Additionally, this Article proposes that courts presumptively admit into evidence medical records prepared for an actual medical purpose, subject to specific objections to identified records. It further proposes that records made in preparation of liti-

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gation be presumptively *in*admissible when offered by the declarant. Finally, this Article concludes that no amendment to the Rules of Evidence is necessary to accomplish this goal. All courts need to do is discard the yoke of common-law doctrine that has developed and return to Rule 803(4)'s plain text. This reading would invert the current interpretation of the Rule in critical ways, but would better serve courts, litigants, and the administration of justice.

INTRODUCTION

The Federal Rules of Evidence search for black and white truth in a land of gray. They seek reliability in a world of fallible memory, flawed perception, and bias. The rules of hearsay are no exception, but they do not make it easy on courts or litigants: "[T]he hearsay rule is the most chaotic of the Federal Rules of Evidence, with its byzantine structure, conflicting rationales for its existence, and Swiss-cheese style approach to its nearly thirty exceptions."[1]

But it does not have to be so. Sometimes, the simplest answer is best. And sometimes, as with Rule 803(4) and the admission of medical records, that answer was in the text all along.

For litigators, medical records are a big deal: in cases likely to reach trial, issues of liability or damages often turn on them.[2] They "contain some of the most intimate details about an individual that can be found in a single place."[3] Although their importance in personal injury and medical malpractice cases is self-evident, they are also essential in employment litigation[4] and family law.[5]

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[1] Justin Sevier, *On Hearsay Dragon-Slaying*, 67 FLA. L. REV. F. 269, 269 (2016) (citing Eliotte M. Harold, Jr., *The Hearsay Rule: The Law of Evidence's Swiss Cheese*, 21 LOY. L. REV. 279, 279 (1975)), http://www.floridalawreview.com/wp-content/uploads/Sevier_Published.pdf [https://perma.cc/6RP2-XF8Z]; *see also* JOHN H. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE 238 (1935) (stating that hearsay is like a "spoiled child").

[2] Jury trials are becoming rarer. *See generally* Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119 (2020); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, JUDICATURE, Winter 2017, at 26 (addressing the decreasing occurrence of trials); United States v. Morrison, 833 F.3d 491, 504 (5th Cir. 2016) (suggesting that we are in "an age of vanishing jury trials"). Medical records, however, are disproportionately at issue in the civil cases that most often go to trial, such as tort matters, which account for approximately 65% of state civil jury trials. PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 26 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [https://perma.cc/AGK5-YLLR]; *see* Lloyd W. Gathings, *Getting It Done on a Low-Tech Budget*, 80 ALA. LAW. 252, 253 (2019) (stating that most civil litigation involves medical records).

[3] Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 327, 327 (2002).

[4] For example, the Federal Civil Rights Act allows awards for emotional damages of up to $300,000 in intentional discrimination cases involving large employers. 42 U.S.C. § 1981a(b)(3)(D). Parties typically substantiate claims for significant emotional damage claims using mental health treatment records. *See, e.g.*, Hawkins v. Anheuser-Busch, Inc., No. 2:05-CV-688, 2006 WL 2422596, at *2 (S.D. Ohio Aug. 22, 2006) ("Certainly, contemporaneous medical records documenting the

Medical records affect criminal trials, too, especially in sexual-assault prosecutions or when degree of injury is an element of the crime.[6]

Considering the importance of medical records, one might expect the rules governing their admission to be straightforward. Not so. The admissibility of even the most common medical records often turns on four or more hearsay exceptions or exclusions, several of which have sub-exceptions. This undermines the Rules' goal of simplicity and predictability in truth-seeking.[7] Worse, the motivations undergirding these exceptions and carve-outs are internally contradictory and counterintuitive to the point that self-serving statements made by parties to their own experts are more readily admitted than statements by emergency room physicians to nurses while trying to save a patient's life.[8]

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existence of emotional distress are relevant, and most plaintiffs would wish to disclose such documents during discovery so that they can be used as affirmative proof of the existence and severity of the claimed condition."). *See generally* Megan I. Brennan, *Scalpel Please: Cutting to the Heart of Medical Records Disputes in Employment Law Cases*, 41 WM. MITCHELL L. REV. 992, 1008–14 (2015) (discussing the scope of discoverability of such records).

[5] *See generally* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., DISCLOSURE OF CONFIDENTIAL CHILD ABUSE AND NEGLECT RECORDS (2022), https://www.childwelfare.gov/pubpdfs/confide.pdf [https://perma.cc/NP6M-4HJU] (discussing child protective agencies' use of records in child abuse and neglect cases); Rachelle Hatcher & Richard E. Gutierrez, *Combating Medical Experts in Abuse and Neglect Cases Under the Juvenile Court Act*, AM. BAR ASS'N (Aug. 30, 2017), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2017/summer2017-combating-medical-experts-abuse-neglect-cases-juvenile-court-act/ [https://perma.cc/C7CS-4KBJ] (noting how attorneys utilize medical professionals in abuse and neglect cases).

[6] *See infra* notes 139–140 and accompanying text (discussing medical records' role in sexual assault cases in greater detail). Many offenses require proof of death or serious bodily injury or the risk thereof, implicating treatment records. *See, e.g.*, 18 U.S.C. § 113(a)(6) (criminalizing assaults that cause serious bodily injury); 21 U.S.C. § 841(b)(1)(A) (noting that narcotics trafficking may result in death or serious bodily injury); *see also* United States v. Santos, 589 F.3d 759, 763 (5th Cir. 2009) (finding sufficient proof that assault caused serious bodily injury based on statements admitted under Rule 803(4) of a victim to medical providers regarding their level of pain), *abrogated by* Ohio v. Clark, 135 S. Ct. 2173 (2015).

[7] *See* FED. R. EVID. 102 (stating that "[t]hese rules should be construed so as to administer every proceeding fairly . . . to the end of ascertaining the truth"); Anthony Z. Roisman, *Conflict Resolution in the Courts: The Role of Science*, 15 CARDOZO L. REV. 1945, 1958 (1994) (suggesting that "the purpose of the Federal Rules of Evidence is to enable the fact-finder to make the most informed decision possible" (quoting Brief Amici Curiae of Physicians, Scientists, and Historians of Science in Support of Petitioners at 6, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (No. 92-102))); William J. Horvath, Note, *No More Splitting: Using a Factual Inquiry to Determine Similar Motive Under Federal Rule of Evidence 804(b)(1)*, 45 VAL. U. L. REV. 157, 162 (2010) (mentioning that the purpose of these Rules is to promote fairness and judicial economy and limit waste); Jeffrey D. Waltuck, Comment, *Remaining Silent: A Right with Consequences*, 38 J. MARSHALL L. REV. 649, 668 n.141 (2004) (noting that the Federal Rules aim to provide a fair trial where the courts may uncover the truth).

[8] *See infra* notes 123–195 and accompanying text (discussing the admissibility of patient statements that are made for purposes of litigation).

We can do better.[9] By its text, Rule 803(4) already excepts from hearsay manifold statements for purposes of medical diagnosis and treatment.[10] Courts, however, undermine this text by limiting Rule 803(4)'s application to statements by patients and including in its ambit statements that logically and historically have no place there. This atextual gloss forces courts to look to other rules of evidence, principally Rule 803(6) governing "records of a regularly conducted activity," to admit the same information they just excluded under Rule 803(4).[11]

All of this strays from the point, which is *reliability*. The recent amendments to Federal Rule of Evidence 807[12] refocus courts on the trustworthiness of the statements at issue.[13] This should be a clarion call, and we take it as a jumping-off point. Notwithstanding known error rates in medical records, practitioners operating in matters of life and death rely on medical records created during actual medical practice.[14] They are demonstrably reliable, unlike statements made to individuals whose only "medical" engagement with the patient is to offer a litigation opinion, which lack this reliance and, thus, reliability.[15]

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[9] Although hearsay is a frequent subject of academic examination, Rule 803(4) has played only a small part in those discussions. The authors seek to start that conversation. Although our proposal is imperfect, it represents one way to move toward a simpler, more intuitive rule.

[10] *See* FED. R. EVID. 803(4) (allowing the admission of hearsay assertions that are made for purposes of medical diagnosis and treatment).

[11] One could reasonably critique our proposal by arguing if it ain't broke—i.e., if these records are already being admitted under Rule 803(6)—it does not need fixing. We suggest to the contrary that having these records admitted under a rule that loosely applies is the result of a broken system. As discussed, *infra* notes 208–303 and accompanying text, a rule that may be applied simply and consistently with its plain text is superior to one that forces parties, attorneys, and judges to study a volume of complex, atextual common-law history to resolve basic disputes.

[12] The 2019 amendment to Rule 807 removed the requirement that any hearsay admitted under its catch-all exception have "equivalent guarantees" of trustworthiness to hearsay admitted under other exceptions. FED. R. EVID. 807; *id.* (2019). The amendment was a deliberate step away from a strict, rules-based regime. This rule, however, did not go as far as academics and jurists, who would have done away with categorical hearsay exceptions entirely, urged. *See* Daniel J. Capra, *Expanding (or Just Fixing) the Residual Exception to the Hearsay Rule*, 85 FORDHAM L. REV. 1577, 1579–81 (2017) (discussing how the Advisory Committee could amend or improve Rule 807).

[13] Following the lead of Professor Saltzburg, we use "reliable," "reliably," and the like interchangeably with "trustworthy," "trustworthiness," and other variations thereof. Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 FORDHAM L. REV. 1485, 1487 n.16 (2016).

[14] *See infra* notes 72–82 and accompanying text (discussing the error rates that arise in medical records due to patient's inaccurate statements).

[15] Our proposal follows in part Professor Richter's recommendation for a blanket amendment to Rule 803 that would allow rebuttal of presumed admissions akin to that in Rule 803(6)(E). Liesa L. Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 WM. & MARY L. REV. 897, 902 (2018) [hereinafter Richter, *Goldilocks*]; *see also* Liesa L. Richter, *Reality Check: A Modest Modification to Rationalize Rule 803 Hearsay Exceptions*, 84 FORDHAM L. REV. 1473, 1478–82 (2016) [hereinafter Richter, *Reality Check*] (sketching the proposal). We submit that Professor Richter's proposal is particularly well-suited to the medical records context. We do not take sides in the broader ongoing discussion of whether a broad-based reliability standard would better serve the purposes of truth or efficiency than the current regime. *See* Capra, *supra* note 12, at 1580 (discussing this issue); United States

Our proposal is simple, if radical: medical records that are reliable—those prepared during actual medical treatment and the statements they contain—are presumptively admissible, subject to specific objections. Those that are not—those prepared for litigation and the statements they contain—are presumptively excluded. No new rule or textual amendment is needed to reach this goal: courts need only abandon their allegiance to a long-since abrogated version of Rule 703 and to their own ill-considered common-law pronouncements in favor of applying Rule 803(4) as it is already written. Doing so will let judges and litigants know what evidence is likely to be admitted and narrow the issues for the court's decision. Moreover, relying on cross-examination and Rule 403 to eliminate juror confusion rather than attempting to resolve every evidentiary question as a part of categorical hearsay analysis will allow courts to more justly and efficiently resolve cases, while returning credibility determinations to the trier of fact where they belong.

This Article proceeds in three Parts. Part I provides an overview of medical records and their role in judicial proceedings.[16] Part II details the complex hearsay rules implicated by the admission of medical records at trial and the internal contradictions in how those rules have been interpreted and applied.[17] Finally, this Article concludes in Part III that a presumption of admissibility would simplify and clarify the evidentiary calculus, and thus move away from the current regime of idiosyncratic and sometimes problematic decisions regarding the admission of medical records.[18]

I. Background—Medical Records Generally and in Litigation

This Part describes medical records and their role in courtroom proceedings.[19] Section A addresses medical records in general and their usual and possible contents.[20] Section B then discusses how litigators utilize medical records during trial.[21]

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v. Boyce, 742 F.3d 792, 802 (7th Cir. 2014) (Posner, J., concurring) (stating that "[w]hat [Judge Posner] would like to see is Rule 807 . . . swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee"). Rather, we argue that if the rules of hearsay continue to be founded in categorical exceptions there is a better way to interpret Rule 803(4) to accomplish the goals of the Rules of Evidence.

[16] *See infra* notes 19–32 and accompanying text.

[17] *See infra* notes 33–207 and accompanying text.

[18] *See infra* notes 208–303 and accompanying text.

[19] *See infra* notes 22–32 and accompanying text.

[20] *See infra* notes 22–26 and accompanying text.

[21] *See infra* notes 27–32 and accompanying text.

A. What Is in a "Medical" Record?

Although medical records vary in content, we use the term "medical record" to include all documents relating to a patient's treatment. For evidentiary purposes, there is no distinction between medical, surgical, dental, mental health, imaging, and laboratory records.[22] Nor do the hearsay rules distinguish between paper records and electronic health records (EHRs).[23]

These records contain multitudes of information. An individual progress note that records a single instance of care routinely contains at least three different sources of information: (1) computer-generated information documenting the medical professional making the entry and the entry's time and date; (2) information the medical professional inputs to document their observations or to record their actions; and (3) patient responses to questions. Some records include more, such as a doctor's diagnostic finding based in part on a conversation with a nurse, or a patient's history containing information provided by family or a friend.[24] Moreover, hospital records often include records of nutrition or feeding, housekeeping, or social work.[25] For our purposes, these nontraditional medical records are also "medical" records, and, for simplicity's sake, we refer to anyone who puts information into a medical record as a "medical practitioner."

Finally, medical records may contain information from law enforcement, such as when an emergency room visit stems from violence or a car crash, when a patient requires restraint, or when certain visitors are barred from seeing a patient. This additional information complicates the evidentiary analysis, particularly if the litigation involves the government.[26]

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[22] Accordingly, we use the term "medical record" to include these records and other similar ones, such as records of machines measuring or tracking a patient's vital signs.

[23] Some sources use the term Electronic Medical Record, while others use EHR. *See generally* Peter Garrett & Joshua Seidman, *EMR vs EHR—What Is the Difference?*, HEALTH IT BUZZ (Jan. 4, 2011), https://www.healthit.gov/buzz-blog/electronic-health-and-medical-records/emr-vs-ehr-difference [https://perma.cc/U3KY-R477] (noting that EHRs differ from electronic medical records in that they offer a patient's entire medical team pertinent information that empowers them provide the patient with the best care). We follow the National Coordinator for Health Information Technology in using the broader "Electronic Health Record." *Id.* Regarding the evidentiary rules pertaining to electronically stored information (ESI), see generally FED. R. EVID. 101(b)(6) (noting that written material includes ESI); Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 543–44 (D. Md. 2007) (discussing the admissibility of electronic records and concluding that the existing Rules of Evidence are adequate to test the reliability of this evidentiary form).

[24] To make matters even more complicated from the legal perspective, medical records often do not explicitly identify each source of information they contain.

[25] In faith-aligned facilities, one may find pastoral-care reports in an EHR, either standing alone or reflected in notes of doctors and nurses who rely on chaplains' views of a patient's emotional health.

[26] Law enforcement officers outside corrections settings rarely make medical record entries, but government agents may contribute to the medical records created by others for patients who were

B. Medical Records in Litigation

Litigators use medical records in a variety of ways. Depending on the particular facts at issue, a type of record—or one portion of a record—that might be essential in one case might be irrelevant in another.

Despite these areas of variation, some sections of medical records frequently arise in litigation. The most common are the two portions of medical records that address medical history. The first is the section detailing past medical conditions, prior surgeries, previously prescribed medications, and so forth, some of which may be automatically populated based on previous entries. The second is the portion of the record, often titled *History of Present Illness* or something similar, where practitioners identify the cause of the injury or condition that precipitated the visit.[27] Another section documents expressions of pain, suffering, discomfort, or capacity/incapacity, which are among the most common and routine questions a medical practitioner asks ("How are you feeling today?"). Sometimes the practitioner records this information, but other times the patient circles a face in an assessment tool or makes some other mark[28]:

victims of crimes, patients injured in car crashes, or patients against whom a government actor used force. *See infra* note 107 and accompanying text.

[27] *See* Forbis v. McGinty, 292 F. Supp. 2d 160, 161 (D. Me. 2003) (addressing how an ER physician's description in the "context" section of a medical record discussed what brought the patient to the ER). For an in-depth discussion of the admissibility of "cause" evidence, see *infra* notes 125–143.

[28] *See* Rizzi v. Hartford Life & Accident Ins. Co., 383 F. App'x 738, 743 n.12 (10th Cir. 2010) (describing a patient self-reporting pain using the Wong-Baker scale). A nurse developed "The Wong-Baker FACES® Pain Rating Scale" and copyrighted it as a mechanism to offer an unbiased way to evaluate a patient's discomfort. Julie Helter, Comment, *Selective Service: The Role of Choice in Ohio Law Enforcement Opioid Overdose Response Makes Access to Antidote Uncertain*, 44 U. DAYTON L. REV. 111, 117 (2018). Patients select one of six faces "that range from a smiling face that means 'no hurt,' to a sad face with tears that means 'hurts worst.'" *Id.* (quoting *Welcome to the Wong-Baker FACES Foundation*, WONG-BAKER FACES FOUND., https://wongbakerfaces.org/ [https://perma.cc/W75A-3SHA]). *But see Welcome to the Wong-Baker FACES Foundation*, *supra* (explaining that the scale "is not a tool to be used by a third person, parents, healthcare professionals, or caregivers, to assess the patient's pain").

Lawyers also try to admit records of prognosis, most often when the defense in a tort matter attempts to show full recovery or suggests that failure to achieve predicted improvement is due to some failure on the plaintiff's part.

Patient histories and statements of pain or improvement often appear in multiple medical records over time, not least because the increasing specialization of modern medicine and growing reliance on consultants and referrals means that the patient will have these conversations again and again with medical professionals who are new to their case.[29] Lawyers naturally will focus on the actual or arguable differences in these recitations.[30]

Finally, there is the expert litigation report, which contains medical data, conclusions, and prognoses. These reports typically draw from some combination of medical records, individual reporting, and medical examination, all intended to meet the dictates of the Federal Rules of Civil Procedure.[31] We discuss the admissibility of statements made to retained experts at length below.[32]

II. Medical Records and Today's Law of Hearsay

The complexity of medical records led to an increasingly, and unnecessarily, complicated evidentiary regime. This Part discusses the interplay of hearsay rules that govern the admissibility of medical records at trial.[33] Our analysis underscores the depth of the problem courts and litigants face in trying to navigate this judge-made labyrinth. Presently, the consideration of whether even a routine progress note is admissible requires examination—at *least*—of Rules 801, 803(4), 803(1), 803(2), 803(3), and 803(7) for statements made by the patient; Rule 803(4), 807, and potentially 803(2) for statements by those accompanying the patient; and Rules 801, 803(4), 803(6), 807 and possibly Rule 803(8) for those made by medical providers. Several of these are ap-

[29] *See* Sandeep Jauhar, *One Patient, Too Many Doctors: The Terrible Expense of Overspecialization*, Time (Aug. 19, 2014), https://time.com/3138561/specialist-doctors-high-cost/ [https://perma.cc/S7LP-EVMN] (noting how "inpatient care at hospitals has become a relay race for physicians and consultants, and [how] patients are the batons"); Jennifer P. Stevens, Laura A. Hatfield, David J. Nyweide & Bruce Landon, *Association of Variation in Consultant Use Among Hospitalist Physicians with Outcomes Among Medicare Beneficiaries*, JAMA Network Open, Feb. 2020, at 1, 5, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2761552 [https://perma.cc/2SJ6-C4BH] (documenting the frequency of consultations and showing that care is not improved by them).

[30] As we discuss in greater detail in Part II, these records are most often at issue in litigation where the declarant-patient has become a party. *See infra* notes 33–207 and accompanying text (discussing how the opposing party typically seeks to use statements that are helpful to its case under Rule 801(d)(2) while also seeking to exclude as hearsay statements that would help the declarant's case).

[31] *See* Fed. R. Civ. P. 26(a)(2) (detailing the mandatory contents of expert disclosures). Court-ordered expert reports create their own issues. *See, e.g.*, G.C. v. Sch. Bd. of Seminole Cnty., 639 F. Supp. 2d 1295, 1302 n.11 (M.D. Fla. 2009) (explaining that a patient's involuntary, court order to see a doctor lacked the usual frankness that comes with receiving adequate medical treatment from a professional).

[32] *See infra* notes 33–207 and accompanying text.

[33] *See infra* notes 33–207 and accompanying text.

plied in differential ways, depending on the declarant, and some information is non-hearsay because it does not have a declarant in the first place. Ultimately, we contend that the present system has become unworkably complex and internally contradictory.

Section A of this Part begins with a discussion of medical report usage under Federal Rules 801 and 802.[34] Section B explains how courts may admit these materials under Rule 803(4), but often do not.[35] Section C then details the unique manner in which courts may admit medical records under the business records exception to the hearsay rule, Rule 803(6).[36] Section D examines the admission of medical statements under Rule 803(3) and draws attention to similar court analysis of Rule 803(4).[37] Section E explains admission of medical records under Rule 803(2), the excited utterance exception to the hearsay rule.[38] Finally, Section F details how courts may allow these medical materials into evidence under Rule 807, the residual hearsay exception.[39]

A. Hearsay Generally: When Are Medical Records Admissible Under Rules 801 and 802?

Federal Rule of Evidence 801 defines "hearsay" as an out-of-court "statement" offered for the truth of the matter asserted.[40] Following the common law's lead, the Federal Rules of Evidence, codified in 1975,[41] generally exclude hearsay.[42] The basic evidentiary principles common to out-of-court statements apply to medical records and attempt to filter out unreliable information.[43] As exceptions, the Federal Rules admit only hearsay deemed more

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[34] *See infra* notes 40–57 and accompanying text.

[35] *See infra* notes 58–143 and accompanying text.

[36] *See infra* notes 144–184 and accompanying text.

[37] *See infra* notes 185–195 and accompanying text.

[38] *See infra* notes 196–202 and accompanying text.

[39] *See infra* notes 203–207 and accompanying text.

[40] FED. R. EVID. 801(c).

[41] G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 957 (2022). Despite their ubiquity and influence today, the Federal Rules of Evidence have existed for less than fifty years. The Supreme Court adopted the first Federal Rules of Evidence on November 20, 1972, and Congress's enactment made them effective on July 1, 1975. Before their enactment, common law governed evidence's admissibility. *See generally* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168 (1996) (noting how common law created evidentiary rules during the 1750s); Nunn, *supra*, at 950–56; Harold, *supra* note 1, at 279–81 (discussing the historical roots of the hearsay doctrine).

[42] FED. R. EVID. 802, 803, 804 (excluding hearsay, providing categorical exceptions to hearsay, and codifying a common-law view that was only a couple centuries old). The earliest common-law courts routinely admitted hearsay; later ones admitted it only if it was corroborated.

[43] 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:3, at 28 (4th ed. 2013) ("Simply put, hearsay is excludable because it is considered generally less reliable than live testimony."); *see* Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 181–82 (1948) ("The attestation of the witness must be to what he knows, and

reliable, such as when the declarant has no time to concoct a lie;[44] speaks about their own legal status or property, especially when harmful to their interests;[45] or might imperil their place in heaven by telling a lie on their deathbed.[46]

Although Rule 801's familiar hearsay definition plays out in an unexceptional way in the medical-records context, the definition has significant implications for medical records' admissibility. The Rule defines a "statement" as "a *person's* oral assertion, written assertion, or nonverbal conduct . . . ."[47] Accordingly, if the assertion is not made by a person, it is not hearsay[48] and, thus, "nothing 'said' by a machine . . . is hearsay."[49] This is critical because many EHR entries are machine-generated, starting with time and date stamps on every entry and the automated identification (or electronic signature) of each individual who created, accessed, or modified the records. Likewise, X-rays, CT scans, MRI images, medical photographs, and videos from endoscopes do not make assertions. These technologies simply show what was and make no as-

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not to that only which he hath heard, for mere hearsay is no evidence; for it is his knowledge that must direct the Court and Jury in the judgment of the fact, and not his mere credulity . . . . [T]he person who spake it was not upon oath; and if a man had been in Court and said the same thing and had not sworn it, he had not been believed in a court of justice . . . ." (quoting GEOFFREY GILBERT, THE LAW OF EVIDENCE 152 (2d ed. 1760)). The reliance on the oath as the guarantor of truth faded over the subsequent 100 to 150 years. *See* Paul W. Kaufman, Note, *Disbelieving Nonbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMANS. 395, 397–98 (2003) (describing the (un)importance of the oath in securing the honest testimony of those who do not ascribe to a theist view of a supreme being punishing falsehood); George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 656–96 (1997) (explaining the historical developments whereby juries replaced oaths as the mechanism for guaranteeing truth).

[44] *Id.* R. 803(1), (2).

[45] *Id.* R. 803(11), (13), (14), (15), 804(b)(3), 804(b)(4).

[46] *Id.* R. 804(b)(2). None of these exceptions are foolproof. For example, "[a] dying declaration by no means imports absolute verity[; t]he history of criminal trials is replete with instances where witnesses, even in the agonies of death, have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts . . . ." Carver v. United States, 164 U.S. 694, 697–98 (1897) (collecting cases and setting high standard for admission on this basis). Nonetheless, the approach survives.

[47] FED. R. EVID. 801(a) (emphasis added).

[48] Although one can draw important conclusions from documents, that does not make them hearsay. *See* United States v. Oaxaca, 569 F.2d 518, 525 (9th Cir. 1978) (noting that "[i]f every piece of tangible evidence which was capable of supporting an inference could be said, on that basis, to be an assertion, it is difficult to imagine any piece of evidence that would not be an assertion"), *overruled by* Luce v. United States, 469 U.S. 38 (1984).

[49] 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 380, at 65 (2d ed. 1994); *see* United States v. Lizarraga-Tirado, 789 F.3d 1107, 1110 (9th Cir. 2015) (holding that GPS coordinates from Google Earth are not hearsay); United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir. 2008) (finding that machine-generated statements are not hearsay); United States v. Hamilton, 413 F.3d 1138, 1142 (10th Cir. 2005) (holding that computer-generated headers containing screen names, subject matter, dates of posting, and IP addresses are not hearsay); United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003) (finding that the header on a fax was not hearsay); United States v. Channon, 881 F.3d 806, 811 (10th Cir. 2018) (holding that computer-generated spreadsheets of activities within customer accounts were not hearsay).

sertions,[50] as do automated records of patient vital signs, laboratory results, or diagnostic imagery.[51] By contrast, reports by medical practitioners interpreting images or data and what they imply are assertions by a "person" and therefore are inadmissible absent an exception or exclusion.

Similarly, use-based exceptions may render medical records that are otherwise hearsay—or that contain double hearsay[52]—admissible. Under Rule 801(d)(2) (Opposing Party's Statements), the most common exception, out-of-court statements by one party are not hearsay when introduced by the opposing party. Accordingly, a medical record is often fully admissible when introduced against a party physician or hospital.[53] Likewise, statements by a plaintiff-patient in the medical record are admissible when offered by the defendant. Assuming the record is admissible, Rule 801(d)(2)'s admission of the patient's statement is asymmetric: the defendant may use the plaintiff's statements as substantive evidence, whether they are consistent with plaintiff's trial testimony or not, but the plaintiff may not buttress his testimony with substantive evidence from any of his own prior consistent statements.[54]

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[50] *Lizarraga-Tirado*, 789 F.3d at 1109 (citing United States v. May, 622 F.2d 1000, 1007 (9th Cir. 1980)); United States v. Turner, 934 F.3d 794, 798 (8th Cir. 2019); 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.10[2][a] (Mark S. Brodin ed., Matthew Bender 2d ed. 2023) ("In the context of the rule against hearsay, photographs do not qualify as assertions."); *see also* United States v. Moskowitz, 581 F.2d 14, 21 (2d Cir. 1978) (noting that a police artist sketch is not hearsay); *Oaxaca*, 569 F.2d at 525 (stating that a photograph is not hearsay as it does not make an assertion); Collins v. Benton, 571 F. Supp. 3d 498, 512 (E.D. La. 2021) (same); CDx Holdings, Inc. v. Heddon, No. 3:12-CV-126-N, 2012 WL 13018986, at *5 (N.D. Tex. Nov. 9, 2012) (same).

[51] *See* United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008) (citing United States v. Washington, 498 F.3d 225 (4th Cir. 2007)) (stating that although analysis by individuals interpreting machine data is testimonial, the raw information generated by machines does not constitute "statements" and that machines are not "declarant[s]").

[52] Medical records documenting the author's own perceptions or actions constitute "single" hearsay. Records containing information provided to their author by someone else—for example, a patient's relative or another medical practitioner—qualify as "double" hearsay, though, because the medical record is hearsay and the statement it relates is also hearsay. Such records are inadmissible (as a whole) unless "each part of the combined statements conforms with an exception to the [hearsay] rule" or is used for a non-hearsay purpose, or the record is redacted to exclude the portion that qualifies as "double" hearsay. FED. R. EVID. 805.

[53] This situation also occurs in medical-malpractice lawsuits against government-owned or operated hospitals or community health centers. The Federally Supported Health Centers Assistance Act of 1992 extended the Federal Tort Claims Act to Federally Qualified Health Centers. *See* Federally Supported Health Centers Assistance Act of 1992, Pub. L. No. 102-501, 106 Stat. 3268 (codified at 42 U.S.C. § 233 note). Accordingly, when such a clinic is sued, the United States is substituted as the defendant and pays any judgment or settlement. *See* 28 U.S.C. § 2679. In such cases, the records of the center or the statements of center employees acting within the scope of their employment may be introduced against the United States, which stands in the clinic's shoes as the substituted defendant.

[54] Rules 803(2) and 803(4), which are discussed in Sections II.B and II.E, may provide a partial mechanism for admission of such statements. Rule 801(d)(2), however, does not. *See infra* notes 58–143 and 196–202 and accompanying text.

The second common use-based exception is impeachment, where lawyers use the medical record because it contains a statement contrary to the declarant's trial testimony.[55] Here, the hearsay question is single-layered: if the medical record is admissible, counsel will use the declarant's statement to show inconsistency. This report, thus, is not for the truth of the matter asserted and is not hearsay.[56]

Finally, parties may use medical records to prove matters other than what declarants assert in them. For example, a doctor's note containing an inaccurate diagnosis might be admitted to prove a misdiagnosis was made, not to show that the patient actually suffered that disease. Such use would not be hearsay.[57]

In sum, courts routinely and properly admit as non-hearsay machine-generated statements, a party's statement offered by their opponent, and statements offered to prove matters other than those asserted. All other statements in medical records—including the medical records themselves—must find refuge in a hearsay exception. The two most common are Rules 803(4) and 803(6).

B. Rule 803(4): The Half-Hollow Hope for Admission of Statements for Purposes of Diagnosis and Treatment

For centuries, the common law presumed declarants would not lie about their conditions to someone providing medical care because patients have a "strong motivation to be truthful"[58] when their health hangs in the balance.[59]

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[55] *See, e.g.*, R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1473 (2011) (explaining that fodder for impeachment may be found in the medical reports of casualties or spectators); Gael Strack & Eugene Hyman, *Your Patient. My Client. Her Safety: A Physician's Guide to Avoiding the Courtroom While Helping Victims of Domestic Violence*, 11 DEPAUL J. HEALTH CARE L. 33, 49 (2007) (cautioning that a "criminal defense attorney will attempt to impeach [a physician's] testimony for accuracy as a result of [his or her] failure to include important information in the original medical records"). Medical records can also be offered to attack credibility more generally. FED. R. EVID. 608.

[56] Unlike evidence admitted under Rule 801(d)(2), which is admissible for all purposes, a statement admitted for impeachment purposes is only available for use in the factfinder's assessment of the credibility of contrary testimony by a witness. *See, e.g.*, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, MODEL CIVIL JURY INSTRUCTIONS 2.10 (2020), https://www.ca3.uscourts.gov/model-civil-jury-table-contents-and-instructions [https://perma.cc/3DVL-237Q] (providing for limiting instructions and discussing their use with respect to evidence admitted under Rules 404(b) and 703).

[57] *See* FED. R. EVID. 801(c) (defining hearsay as a statement used to prove the truth of the proposition asserted); Creaghe v. Iowa Home Mut. Cas. Co., 323 F.2d 981, 985 (10th Cir. 1963) (explaining that "the proof of words spoken is made not to establish their truth, but the fact that they were spoken"); Skyline Potato Co. v. Hi–Land Potato Co., No. CIV 10–0698, 2013 WL 311846, at *19 (D.N.M. Jan. 18, 2013) (providing that a statement will not be hearsay when it does not prove the truth of the matter asserted).

[58] FED. R. EVID. 803(4) advisory committee's note.

[59] Meaney v. United States, 112 F.2d 538, 539–40 (2d Cir. 1940) (describing how "[a] man goes to his physician expecting to recount all that he feels, and often he has with some care searched his consciousness to be sure that he will leave out nothing . . . [and how] these parts of it can only rest

The Advisory Committee codified this common-law exception in the original Rules of Evidence as Rule 803(4).[60] The common-law rule was originally interpreted as applying only to treating medical personnel, but recently courts have extended its scope to "allow[] the admission of statements made to psychiatrists, psychologists[,] and other practitioners of psychotherapy, such as social workers and counselors, for the diagnosis and treatment of mental health problems"[61] because "the plain text of the Rule does not limit its application to statements made to a physician."[62] Nor does Rule 803(4) "require that the

upon his motive to disclose the truth because his treatment will in part depend upon what he says"). Modern courts still accept this logic. *See* White v. Illinois, 502 U.S. 346, 356 (1992) (stating that an inaccurate proposition from a patient may lead to misdiagnosis or mistreatment); United States v. McHorse, 179 F.3d 889, 900 (10th Cir. 1999) (noting that "[b]ecause a patient's medical care depends on the accuracy of information she provides to her doctors, the patient has a motive to be truthful"); Government of the Virgin Islands v. Joseph, 964 F.2d 1380, 1388 (3d Cir. 1992) (same). *But see* Marc D. Ginsberg, *The Reliability of Statements Made for Medical Diagnosis or Treatment: A Medical-Legal Analysis of a Hearsay Exception*, 54 UIC L. REV. 679, 683 (2021) (noting that the "Supreme Court's statement in *White* is wishful thinking"). In the Confrontation Clause context, courts even went so far as to say that "adversarial testing" of these statements through cross-examination would not strengthen their trustworthiness. Idaho v. Wright, 497 U.S. 805, 821 (1990). *But see* Crawford v. Washington, 541 U.S. 36, 60 (2004) (holding that criminal defendants have the right to confront the declarants of statements that are admitted under a "firmly rooted hearsay exception" (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980))).

[60] *See* FED. R. EVID. 803(4) (providing an exception for statements made for purposes of medical diagnosis or treatment).

[61] Philip K. Hamilton, *Should Statements Made by Patients During Psychotherapy Fall Within the Medical Treatment Hearsay Exception? An Interdisciplinary Critique*, 41 J. MARSHALL L. REV. 1, 4 (2007) (citing Tracy A. Bateman, Annotation, *Admissibility of Statements Made for the Purposes of Medical Diagnosis or Treatment as Hearsay Exception Under Rule 803(4) of the Uniform Rules of Evidence*, 38 A.L.R.5th 433 (1996)).

[62] United States v. Gonzalez, 905 F.3d 165, 199 (3d Cir. 2018). Some academics argue that mental-health counseling is different enough from medical diagnosis that Rule 803(4) should not apply. *See* John J. Capowski, *An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 GA. L. REV. 353, 380 (1999) (explaining how courts refuse to extend Rule 803(4) to mental health professionals); Hamilton, *supra* note 61, at 18–29 (detailing differences between mental and physical treatment, such as the inability to corroborate a patient's story). We believe the similarities outweigh the differences, and states seem to agree. *See* Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 429 (2015) (stating that Rule 803(4) has been "adopted verbatim or nearly verbatim in most states" (citing Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 257 n.2 (1989))); Victoria Brown et al., *Rape & Sexual Assault*, 21 GEO. J. GENDER & L. 367, 425–26 (2020) (noting that some states permit the admission of statements made to forensic nurses for both medical and forensic purposes under Rule 803(4)).

Whatever the merits of these arguments, they have been limited to law reviews. Courts uniformly admit such evidence, statements to medical professionals, under Rule 803(4). *See, e.g.*, *Gonzalez*, 905 F.3d at 200 (stating that "every Court of Appeals to consider this issue has determined that statements made to a mental health professional for purposes of diagnosis or treatment qualify under the hearsay exception in Rule 803(4)"); United States v. Kappell, 418 F.3d 550, 556 (6th Cir. 2005) (recognizing that courts may include statements made to a psychotherapist under Rule 803(4)); Danaipour v. McLarey, 386 F.3d 289, 297 (1st Cir. 2004) (noting that Rule 803(4) may extend to child therapists); United States v. Yellow, 18 F.3d 1438, 1442 (8th Cir. 1994) (admitting a patient's statement to their

speaker be the patient or that the listener be the doctor."[63] Courts, rather, may admit statements made to office or hospital staff as statements for the purpose of diagnosis or treatment.[64] Relatives and other third parties can also make statements admissible under Rule 803(4) so long as the declarant is trying to assist in diagnosis or treatment.[65]

At common law, two exceptions to this general rule emerged—each in situations where the declarant had less motivation to be truthful with the medical provider. Subsection 1 discusses how courts concluded statements made to a physician retained for litigation did not carry the same indicia of reliability.[66] In the same vein, Subsection 2 describes how common law excludes statements made by medical practitioners from Rule 803(4) for lacking important

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psychologist because they sought diagnosis or treatment); Morgan v. Foretich, 846 F.2d 941, 949 n.17 (4th Cir. 1988) (noting that courts may admit statements to psychologists under this rule); United States v. Newman, 965 F.2d 206, 210 (7th Cir. 1992) (explaining how Rule 803(4) might apply to clinical psychologist); United States v. DeNoyer, 811 F.2d 436, 440 (8th Cir. 1987) (noting that the medical diagnosis or treatment hearsay exception may extend to social workers); Townsend v. Nw. Mut. Life Ins. Co., No. 20-CV-02809, 2022 WL 602869, at *9 (D. Colo. Feb. 28, 2022) (recognizing that Rule 803(4) may apply to individuals other than medical professionals), *appeal dismissed*, No. 22-1069, 2022 WL 4016906 (10th Cir. Apr. 28, 2022).

[63] 4 MUELLER & KIRKPATRICK, *supra* note 49, § 442, at 465; *see also McLarey*, 386 F.3d at 297 (recognizing that "[t]he plain language of the rule does not require the statements to be made by the patients, or even to a physician").

[64] *See* 4 MUELLER & KIRKPATRICK, *supra* note 43, § 8:75, at 685–86 (recognizing that "[c]lerical intake people, administrative assistants, and nurses and orderlies in hospitals and clinics may be told matters that are later pertinent to diagnosis or treatment, and [that] statements to such people should fit the exception").

[65] *See, e.g.*, Bucci v. Essex Ins. Co., 393 F.3d 285, 298 (1st Cir. 2005) (noting that neither the Rules nor caselaw require the declarant to be the patient, and identifying the speaker's intent to obtain treatment or diagnosis as the most essential element in testing trustworthiness); 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 803.02[5][d] (8th ed. 2002) (recognizing that courts may admit assertions by people other than the patient for purposes of helping treat this injured person under Rule 803(4)).

[66] *See infra* notes 69–95 and accompanying text; *see also* Stewart v. Balt. & Ohio R.R., 137 F.2d 527, 530 (2d Cir. 1943) (noting that statements by a patient to a physician for purposes of treatment fall within the ambit of Rule 803(4) as they are likely to be honest assertions not made in preparation for litigation); United States v. Calvey, 110 F.2d 327, 330 (3d Cir. 1940) (same); United States v. Roberts, 62 F.2d 594, 596 (10th Cir. 1932) (noting that "[o]n the other hand, if he goes to the doctor, not for medical treatment, but for testimony, his statements are inadmissible"); United States v. Tyrakowski, 50 F.2d 766, 771 (7th Cir. 1931) (stating that a court may admit statements by a patient during an examination geared toward treating an injured person as opposed to testifying at a trial). The validity of reliability as the basis for determining the admissibility of hearsay has generated considerable academic debate. *See* Liesa L. Richter, *Posnerian Hearsay: Slaying the Discretion Dragon*, 67 FLA. L. REV. 1861, 1865–68 (2015) (examining the pitfalls of the hearsay exceptions); Sevier, *supra* note 1, at 278 (stating that "the time has come for rule makers to get out of the reliability business—and the empirical baggage that comes with it—in fashioning the rationale for the hearsay bar and its exceptions" (citing Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 644, 688 (2016))); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 896 (1992) (discussing how the current hearsay principles do not effectively aid the fact finder in uncovering the truth). For now, however, it remains the touchstone of the Rules.

guarantees of trustworthiness.[67] Subsection 3 elaborates on the second exception for declarant's statements in medical records relating to fault and causation.[68]

1. Rule 803(4) and Expert Witnesses

Undoubtedly, "people see doctors for many reasons and have varying motives for describing their present and past medical symptoms."[69] Recognizing that only a patient who wants to get better will be open and honest with her physician, courts before 1975 nearly universally found statements for purposes of actual medical treatment reliable, while expressing skepticism about statements to litigation experts.[70] This distinction was imperfect. Patients' statements to their physicians—like all human interactions—are tainted with self-interest and perspectival bias.[71] Even so, modern medical literature suggests common-law courts were onto something.

Physicians and, thus, courts should be particularly skeptical of three categories of patients. The first is patients who might face liability if they are truthful. For example, parents describing injuries to their children or caretakers describing injuries to an elderly ward.[72] The second is mental-health patients, who, even in modern society, often feel ashamed or fearful. These feelings can lead such patients to fabricate or make incomplete disclosures to medical prac-

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[67] *See infra* notes 96–122 and accompanying text.

[68] *See infra* notes 123–143 and accompanying text.

[69] Saltzburg, *supra* note 13, at 1489.

[70] *See supra* note 66 (describing how courts generally viewed patients' statements to physicians for purposes of medical treatment and diagnosis as reliable); *see also* 4 MUELLER & KIRKPATRICK, *supra* note 43, § 8:75, at 676 (noting that the exception exists because "the patient knows that [their] description helps determine treatment," which provides "a powerful reason to speak candidly and carefully" and means that "risks of insincerity and ambiguity are minimal . . . .").

[71] *See* Christopher T. Stein, *Through the Eyes of Another: Leveraging Psychological Insights in the Legal System*, NEV. LAW., Aug. 2021, at 15, 16 (emphasizing that "[m]emory is a reconstruction, drawn from interconnected sources in the mind, contaminated in myriad ways by outside information and shaped by self-image, beliefs, and frames about how things 'should have' happened"); Kristyn A. Jones, William E. Crozier & Deryn Strange, *Objectivity Is a Myth for You but Not for Me or Police: A Bias Blind Spot for Viewing and Remembering Criminal Events*, 24 PSYCH. PUB. POL'Y & L. 259, 259 (2018) (noting that experimentation on attention, understanding, and memory shows that people have biases and interests that affect what they observe and recall). *See generally* Seigel, *supra* note 66, at 896 (stating that uncovering the truth of a party's assertion is not self-evident).

[72] *See* Richter, *Goldilocks*, *supra* note 15, at 943 (citing abusive parents as an example of those who might have cause to lie). The motive to lie, however, is not limited to those trying to conceal an injury they intentionally caused. Anyone who failed to take what in hindsight might appear to be reasonable precautions may be less than truthful with medical personnel, either to avoid liability or consequences for their negligence or simply because they are embarrassed that they did not prevent the injury from occurring. The same concern arises with respect to reliability when a truthful statement might reveal a loved one's illegal conduct. An example of this is the hesitancy that an underage patient with a sexually transmitted disease might feel when identifying an adult sexual partner.

titioners.[73] The third category of patients is the most relevant here: "malingering"[74] patients who seek secondary legal gain from their medical care.[75] For example, in a peer-reviewed, retrospective study of chronic pain patients, between 20% and 50% of all patients were found to be malingering.[76] Even more significantly, the rate of malingering increased among patients who had pending workers' compensation claims or who had retained a lawyer (and thus were considering or moving toward filing for compensation). Similar studies found malingering rates of between 40% and 60% in personal injury claimants alleging neurocognitive deficits[77] and of between 30% and 45% of individuals claiming exposure to hazardous or toxic substances in the environment or at work.[78] Other studies have shown high numbers of patients malingering,[79] and

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[73] *See* Hamilton, *supra* note 61, at 21 & n.88, 27 (citing HARRY STACK SULLIVAN, THE PSYCHIATRIC INTERVIEW 218–24 (H.S. Perry & M.L. Gawel eds., W.W. Norton & Co. 1954)) (describing how to handle anxiety in a psychiatric interview); Edward M. Weinshel, *Some Observations on Not Telling the Truth*, 27 J. AM. PSYCHOANALYTIC ASS'N 503, 505 (1979); SEYMOUR L. HALLECK, EVALUATION OF THE PSYCHIATRIC PATIENT: A PRIMER 8 (1991) (discussing how patients' internal thoughts may lead them to develop distinct emotions, such as sadness and anxiety).

[74] Malingering is defined as "the falsification or profound exaggeration of illness (physical or mental) to gain external benefits . . . ." Ubaid ullah Alozai & Pamela K. McPherson, *Malingering*, NAT'L LIBR. OF MED., https://www.ncbi.nlm.nih.gov/books/NBK507837/ [https://perma.cc/CE2S-GQK8] (June 21, 2022) (collecting definitions).

[75] The range of possible secondary legal gains is wide. Malingering can be used to avoid work or (as in the case of Ferris Bueller and his faked "clammy hands") school; to obtain benefits; to establish liability; or to increase civil damages for both historical and future medical care. *See* Steven I. Friedland, *Law, Science and Malingering*, 30 ARIZ. ST. L.J. 337, 343 (1998) (detailing the typical motives of a malingerer); FERRIS BUELLER'S DAY OFF (Paramount Pictures 1986). Significant rates of malingering have been documented in the corrections and military contexts. *See* Barbara E. McDermott, Isah V. Dualan & Charles L. Scott, *Malingering in the Correctional System: Does Incentive Affect Prevalence?*, 36 INT'L J.L. & PSYCH. 287, 287 (2013) (stating that malingering prevalence is as high as 56% in the corrections setting and that the general aim of this malingering is to get more preferred housing or medications); R. Gregory Lande & Lisa Banks Williams, *Prevalence and Characteristics of Military Malingering*, 178 MIL. MED. 50, 51 (2013) (highlighting the "higher," approximately 5%, prevalence rate of malingering in the military). A more tragic modern example is malingering as a drug-seeking behavior. *See* Saltzburg, *supra* note 13, at 1489. We gratefully acknowledge the contributions of Aaron Spikol (Stanford Law School 2023) to this Article's discussion of malingering and the reliability of medical records.

[76] Kevin W. Greve, Jonathan S. Ord, Kevin J. Bianchini & Kelly L. Curtis, *Prevalence of Malingering in Patients with Chronic Pain Referred for Psychologic Evaluation in a Medico-legal Context*, 90 ARCHIVES PHYSICAL MED. & REHAB. 1117, 1117 (2009).

[77] Glenn J. Larrabee, *Exaggerated MMPI-2 Symptom Report in Personal Injury Litigants with Malingered Neurocognitive Deficit*, 18 ARCHIVES CLINICAL NEUROPSYCHOLOGY 673, 683 (2003) (summarizing previous studies that show malingering rates of 59%, 42%, and 49% in personal injury litigants).

[78] Kevin W. Greve et al., *The Prevalence of Cognitive Malingering in Persons Reporting Exposure to Occupational and Environmental Substances*, 27 NEUROTOXICOLOGY 940, 941 (2006).

[79] *See* Manfred F. Greiffenstein, W. John Baker & Thomas Gola, *Validation of Malingered Amnesia Measures with a Large Clinical Sample*, 6 PSYCH. ASSESSMENT 218, 223 (1994) (finding a high base rate for malingering in people with mild head injuries); Sean M. Rumschik & Jacob M. Appel, *Malingering in the Psychiatric Emergency Department: Prevalence, Predictors, and Outcomes*, 70 PSYCHIATRIC SERVS. 115, 115 (2019) (stating that malingering is suspected among one-third of pa-

several have demonstrated that patients who stand to gain in the legal system based on their diagnosis are more likely to malinger.[80]

Even these rates understate the overall error rates in patient statements, which would reflect not just malingering but patients' *inaccuracy*.[81] Studies show patients consistently lie about certain topics, including diet, exercise, sexual activity, and adherence to prescribed treatment regimes, whether because of embarrassment or a desire for their doctor to think well of them.[82]

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tients and that one-fifth of patients are highly or affirmatively suspected of malingering); McDermott et al., *supra* note 75, at 287 (noting that malingering prevalence is as high as 56% within the corrections setting). Other sources indicate lower, but still significant, levels of malingering. *See, e.g.*, BENJAMIN JAMES SADOCK & VIRGINIA ALCOTT SADOCK, KAPLAN & SADOCK'S SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES/CLINICAL PSYCHIATRY 887 (10th ed. 2007) (stating that the prevalence of malingering in the medico-legal context is approximately 10–20%).

[80] *See* John E. Meyers, Scott R. Millis & Kurt Volkert, *A Validity Index for the MMPI-2*, 17 ARCHIVES CLINICAL NEUROPSYCHOLOGY 157, 157 (2002) (showing very different scores for non-litigants and litigants on the malingering scale); Christopher Bass & Derick T. Wade, *Malingering and Factitious Disorder*, 22 PRAC. NEUROLOGY 96, 96 (2019) (noting that "[i]n settings associated with litigation/disability evaluation, the rate of malingering may be as high as 30%"); Wiley Mittenberg, Christine Patton, Elizabeth M. Canyock & Daniel C. Condit, *Base Rates of Malingering and Symptom Exaggeration*, 24 J. CLINICAL & EXPERIMENTAL NEUROPSYCHOLOGY 1094, 1094 (2002) (finding symptom overstatement in 29% of personal injury cases, 30% of disability cases, and 19% of criminal cases); K. Gorfinkle & D.T. Williams, *Malingering* ("The incidence of malingering has been estimated to be twice as high in forensic (15.7%) as in psychiatric settings (7.4%)."), *in* ENCYCLOPEDIA OF MOVEMENT DISORDERS 153, 153 (Leo Verhagen Metman & Katie Kompoliti eds., 2010). Although these studies are robust, well designed, and peer reviewed, there is no perfect method to assess whether a particular individual is malingering in a specific case. *Cf.* Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119, 1131 n.41 (2010) (detailing the difficulties in assessing a litigant's mental state and noting that functional brain imaging will not eliminate issues associated with "human discretion, malingering, and distortion").

[81] *See, e.g.*, Morgane Masse et al., *Risk Factors Associated with Unintentional Medication Discrepancies at Admission in an Internal Medicine Department*, 16 INTERNAL & EMERGENCY MED. 2213, 2213 (2021) (finding that approximately 47% of studied patients unintentionally failed to provide an accurate list of medications); Hong Sang Lau, Christa Florax, Arijan J. Porsius & Anthonius de Boer, *The Completeness of Medication Histories in Hospital Medical Records of Patients Admitted to General Internal Medicine Wards*, 49 BRIT. J. CLINICAL PHARMACOLOGY 597, 597 (2000) (finding that 61% of patients were taking one or more drugs not registered upon hospital admission); Mark H. Beers, Mark Munekata & Michele Storrie, *The Accuracy of Medication Histories in the Hospital Medical Records of Elderly Persons*, 38 J. AM. GERIATRICS SOC'Y 1183, 1183 (1990) (finding an error rate in excess of 60% in the elderly population and in excess of 80% when over-the-counter medications are included); Andrea Gurmankin Levy et al., *Prevalence of and Factors Associated with Patient Nondisclosure of Medically Relevant Information to Clinicians*, JAMA NETWORK OPEN, Nov. 2018, at 1, 2, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2716996 [https://perma.cc/6GCG-6UXU] (finding that approximately 81% of people in the survey failed to disclose information to their physicians to avoid potential shame, fear, or ridicule).

[82] *See* John J. Palmieri & Theodore A. Stern, *Lies in the Doctor-Patient Relationship*, 11 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 163, 164–68 (2009) (summarizing medical literature regarding patient lies); Lauren Vogel, *Why Do Patients Often Lie to Their Doctors?*, 191 CANADIAN MED. ASS'N J. E115, E115 (2019), https://www.cmaj.ca/content/191/4/E115 [https://perma.cc/34MY-43NL] (same). Patients will also lie to gain access to research trials. Chuen Peng Lee, Tyson Holmes, Eric Neri & Clete A. Kushida, *Deception in Clinical Trials and Its Impact on Recruitment and Adher-*

These documented biases and errors call into question the validity of Rule 803(4)'s presumption that patients tell doctors the truth. And if one believes the data, a patient's statement to a litigation expert is particularly untrustworthy. For this reason, the common law only permitted admission of those statements as the basis for the expert's opinion.

All of this makes even more peculiar the Advisory Committee's 1972 decision to treat a patient's statements *to litigation experts*—individuals whose presence necessarily means litigation is contemplated or underway—as substantive evidence. Still more remarkable is the Committee's stated basis for this departure: that the distinction between information the expert used to form an opinion and substantive evidence "was one most unlikely to be made by juries."[83]

Essentially, the Advisory Committee jettisoned a century of precedent based on its questionable belief that juries are unlikely to draw appropriate distinctions even when properly instructed.[84] Further complicating this matter is the interplay between Rule 803(4) and Rule 703 (as adopted in 2000), which requires juries to make exactly the kind of distinction that the Advisory Committee formerly disallowed.[85]

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ence of Study Participants, 72 CONTEMP. CLINICAL TRIALS 146, 146 (2018). Notably, although these studies only focus on lies, deception, and intentional misstatements or mischaracterizations, routine failures of memory or understanding also contribute to numerous medical errors.

[83] FED. R. EVID. 803(4) advisory committee's note on proposed rules.

[84] *See id.* (stating that its "position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field"). Perhaps this is an accurate statement. Neither Rule 703 nor its notes, however, stated that the hearsay underlying an expert's testimony was substantive evidence. *See* FED. R. EVID. 703 advisory committee's note to 2000 amendment (noting a split on this question between academic and judicial authorities). Since 2000, Rule 703 has clearly provided that "when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted." *Id.* There is also an affirmative reason to doubt that the 1972 Advisory Committee got it right: when the Advisory Committee amended Rule 703 in 2000, it did not say it was changing Rule 703 to correct a mistake. Rather, it stated that the amendment's purpose was to "emphasize" the Rule's meaning. *Id.* That word choice only makes sense if the 2000 Committee thought its amendment did *not* change the 1972 Rule.

[85] In other words, something does not add up. If the 2000 amendment was simply "emphasizing" the meaning of Rule 703 as drafted in 1972, then the 1972 Advisory Committee's Note to Rule 803(4) makes no sense. One of these Advisory Committees is wrong about Rule 703. It seems most likely that the 1972 Advisory Committee got it wrong because the principle its note articulates—that juries are "most unlikely" to draw these fine distinctions—is inconsistent with even contemporaneous rules of evidence. *See* FED. R. EVID. 803(4) advisory committee's note on proposed rules. When courts admit evidence for its effect on the listener, jurors are instructed that they cannot consider those statements as substantive evidence. And, even in 1972, Rule 404(b) demanded that juries accept evidence for one purpose without making a forbidden character-propensity inference. *Cf.* FED. R. EVID. 404(b) advisory committee's note on proposed rules. Nonetheless, it is also quite possible that in 2000, the Advisory Committee may have been hindsight-biased to the view of Rule 703 that it was adopting, or that it may have been less than candid about what it was doing. The version of Rule 703 that the Advisory Committee adopted—and that is used today—establishes that hearsay relied upon by an expert is admissible only to establish the basis of that expert's opinion and not as substantive

Courts, however, unwittingly still follow the 1972 Advisory Committee Note and the pre-2000 precedent quoting that note, misleading as it now is. For example, in 2005, the U.S. District Court for the District of New Mexico followed the U.S. Court of Appeals for the Tenth Circuit's pre-amendment decision in *United States v. Farley* and held that "Rule 803(4) 'abolished the [common-law] distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only: the latter usually refers to a doctor who is consulted only in order to testify as a witness.'"[86] That is correct as far as it goes. The Rules of Evidence as promulgated in 1972 did reverse the common-law doctrine. After the amendments to Rule 703 in 2000, however, statements to testifying experts are admissible only as a basis for the opinion, *not* as substantive evidence in their own right. In other words, after 2000, Rule 703 reestablished (or renewed the "emphasis" on) exactly that distinction.

Similarly, in 2016, in *Longoria v. Khachatryan*, the U.S. District Court for the Northern District of Oklahoma quoted the 1972 Advisory Committee guidance and cited *Farley* in suggesting that if the source of a plaintiff's expert's testimony was the plaintiff's own statement, that hearsay would be admissible as substantive evidence under Rule 803(4).[87] If so, that is contrary to the modern Rule 703's treatment of those statements and, therefore, to the very rule that the Advisory Committee in 1972 claimed it was bound to follow.

State courts have also been misled. The Supreme Court of Kentucky went so far as to add emphasis to language from the Advisory Committee's 1972 Note suggesting that the amended Rule 703 had already been abrogated.[88] Likewise, the Supreme Court of Hawaii chastised and reversed a lower court

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evidence. This prevents experts from "bootstrapping" inadmissible hearsay into substantive evidence by relying upon it. Regardless, the 1972 Advisory Committee's Note to Rule 803(4) makes no sense today. As amended, Rule 703 demands that juries make the exact distinction that the 1972 Advisory Committee's Note says they cannot.

[86] Sanchez v. Brokop, 398 F. Supp. 2d 1177, 1193 (D.N.M. 2005) (alterations in original) (quoting United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993)). *United States v. Farley* itself relied heavily on two cases that preceded the 2000 amendments to Rule 703: *Morgan v. Foretich*, 846 F.2d 941, 950 (4th Cir. 1988) and *United States v. Iron Shell*, 633 F.2d 77, 93 (8th Cir. 1980). *See Farley*, 992 F.2d at 1125. Indeed, *Farley*, *Morgan*, and *Iron Shell* are commonly cited by courts interpreting the amendments to Rule 803(4) in the period between 1980 and 2000.

[87] Longoria v. Khachatryan, No. 14-cv-70, 2016 WL 5746221, at *6 n.3 (N.D. Okla. Sept. 30, 2016); *see also* Jacquety v. Baptista, 538 F. Supp. 3d 325, 340 (S.D.N.Y. 2021) (noting how the petitioner "argue[d] that E.J.'s statements to Dr. Goslin should not be admitted for their truth pursuant to Rule 803(4) because Dr. Goslin was retained by a party to provide a forensic opinion in litigation," but concluding that "[t]he law draws no such distinction"); *Sanchez*, 398 F. Supp. 2d at 1193 (citing *Farley* and *Morgan* in holding that statements to an expert who was not a treating physician were admissible under Rule 803(4)).

[88] *See* Garrett v. Commonwealth, 48 S.W.3d 6, 11 (Ky. 2001), *as amended* (June 19, 2001) (emphasizing language from the 1972 Advisory Committee's Note to Rule 803(4)).

that refused to admit statements made to a testifying expert.[89] Remarkably, it chose to follow *Farley* and *Morgan* in interpreting the state version of Rule 803(4) even though it found in the same opinion that such statements lacked the reliability associated with statements to treating providers.[90] To be sure, not all courts follow this path. But even those that do not still sometimes acknowledge (incorrectly, in at least some sense) that they are going against the grain of Rule 803(4).[91]

But neither the Advisory Committee Note nor the unfortunate reality it generated is likely to change. The enabling rules for the Advisory Committee provide that:

> It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.[92]

The Advisory Committee quite reasonably reads this rule as *not* authorizing it to make changes to the Advisory Committee Notes unless they coincide with a rule amendment and as mandating that any Advisory Committee Note accompany only the rule that is being amended.[93] There has been no substantive

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[89] State v. Yamada, 57 P.3d 467, 467 (Haw. 2002).

[90] *Id.* at 481. Neither the Kentucky nor Hawaii court wrestled with the impact of the 2000 amendment to Rule 703 on the Advisory Committee's Note from 1972.

[91] *See, e.g.*, Turner v. White, 443 F. Supp. 2d 288, 298 (E.D.N.Y. 2005) (excluding plaintiff's self-serving statement regarding matters the court concedes are symptoms ordinarily covered by Rule 803(4) because the plaintiff's assertions did not coincide with the accident); *see also* G.C. v. Sch. Bd. of Seminole Cnty., 639 F. Supp. 2d 1295, 1302 n.7 (M.D. Fla. 2009) (excluding without further explanation statements made in anticipation of judicial proceedings because they lack the same trustworthiness as assertions made with the intent to receive medical treatment or diagnosis); Hiller v. Fletcher, No. 02-1231, 2004 WL 7337802, at *3 (D.N.M. Aug. 30, 2004) (distinguishing admissible statements in the case from those of a "non-treating physician . . . offered for reasons beyond the patient's treatment" such as "to help [the patient] secure employment benefits" (citing Gong v. Hirsch, 913 F.2d 1269, 1272 (7th Cir. 1990))). Other courts before 2000 also expressed this skepticism, albeit primarily by questioning the source of information in the record or by framing the analysis in terms of whether the information in the opinion was reliable. *See, e.g.*, *Gong*, 913 F.2d at 1272–73 (excluding statements regarding cause where they contain self-serving information that the non-treating provider likely got from the patient).

[92] JUD. CONF. FOR THE U.S., PROCEDURES FOR THE JUDICIAL CONFERENCE'S COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND ITS ADVISORY RULES COMMITTEES § 440.20.30(c) (2011), https://www.uscourts.gov/sites/default/files/guide-vol01-ch04-sec440_procedures_for_rules_cmtes_1.pdf [https://perma.cc/6UXG-AUYW].

[93] E-mails from Daniel J. Capra to Paul W. Kaufman (July 15, 2022, 10:56 EDT, 11:13 EDT) (on file with authors). Professor Capra is the Reporter to the Judicial Conference Advisory Committee on the Federal Rules of Evidence, and was the Reporter during both the 2000 amendments to Rule 703 and the 2011 restyling of the Rules. We are deeply grateful to Professor Capra for his prompt, helpful responses to our inquiries about the Advisory Committee process.

change to Rule 803(4) since 1972; accordingly, as the Advisory Committee reads its mandate, it could not have amended Rule 803(4)'s 1972 Advisory Committee Note when it amended Rule 703 in 2000. [94]

Therefore, courts interpreting Rule 803(4) face a vicious tension. They know statements made for litigation purposes are unreliable, but the most authoritative guidance interpreting the rule tells them to admit those statements anyway. [95] It is easy for courts to miss the fact that the particular guidance upon which they are relying is based on a version of Rule 703 that appears—to the authors at least—to have been amended away decades ago and that may not have made sense in the first place. Courts are entitled reasonably to assume that the Advisory Committee Notes are current, and few can be expected to know the subtleties of how the Advisory Committee interprets its enabling rules. Accordingly, it is unsurprising that the authors have found no court that has even noted that the Advisory Committee Notes to Rule 803(4) rely on an abrogated version of Rule 703, much less examined what that change may mean for the continuing validity of the guidance those Notes purport to provide.

Something needs to change.

2. Statements by Medical Care Providers for Purposes of Diagnosis and Treatment

The preceding Subsection explains why the over-inclusive application of Rule 803(4) gives substantive evidentiary weight to self-interested statements made for litigation. But that is not Rule 803(4)'s only peculiarity. Rule 803(4) is also under-inclusive because courts exclude from its scope statements made *by* medical practitioners either to parties or to one another.

Rule 803(4)'s text does not make such a distinction; it requires only that a statement have been made for or be pertinent to a medical diagnosis or treatment and be, broadly speaking, germane to medical matters. [96] Although statements made *to* medical practitioners have generally been admitted regardless of who the declarant is, [97] statements *by* medical practitioners have almost uni-

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[94] Rule 803(4) was restyled in 2011 along with the rest of the Rules of Evidence, but there was "no intent to change any result in any ruling on evidence admissibility." FED. R. EVID. 803 advisory committee's note to 2011 amendment. Nonetheless, this *was* an amendment and, therefore, an opportunity for the Advisory Committee to indicate the inapplicability of Rule 803(4)'s Advisory Committee Note in the modern evidentiary regime if the Committee had been so inclined.

[95] The only other guidance with respect to interpreting Rule 803(4) is the Note by the House Judiciary Committee regarding the Rule's lack of impact on doctor-patient privilege. H.R. REP. NO. 93-650, at 8–9 (1973).

[96] FED. R. EVID. 803(4) ("A statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.").

[97] *See supra* notes 63–65 (noting how a declarant may be a family member, bystander, or another so long as their statement is for the purpose of treatment).

versally been excluded from the scope of the rule.[98] Courts offer little basis for this conclusion in either text or logic. Most courts either just cite one another[99] or make a broad statement that Rule 803(4) is historically based in the patient's self-interest such that statements of doctors, nurses, or others do not fall under its ambit. Two courts even justified their holding by misstating the law itself, claiming that Rule 803(4) only excludes statements made by the person who pursues or receives medical treatment.[100]

To be sure, Rule 803(4) codified the common-law exception concerning statements to physicians,[101] and the Advisory Committee Note speaks of that use. But courts assume that the Rule follows the common law, even though Rule 803(4) hardly followed the common law in other respects. Worse, courts

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[98] Bulthuis v. Rexall Corp., 789 F.2d 1315, 1316 (9th Cir. 1985) (noting that "Rule 803(4) applies only to statements made by the patient to the doctor, not the reverse"). *Bulthuis* provides virtually no basis for this conclusion, but it has been cited dozens of times for this proposition. *See also* Grabin v. Marymount Manhattan Coll., 659 F. App'x 7, 10 (2d Cir. 2016) (stating that Rule 803(4) does not apply to assertions by physicians); Field v. Trigg Cnty. Hosp., 386 F.3d 729, 735–36 (6th Cir. 2004) (noting how the Rule 803(4) hearsay exception applies to assertions made by a patient receiving medical treatment or diagnosis); Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 564 (7th Cir. 1996) (same); Stull v. Fuqua Indus., Inc., 906 F.2d 1271, 1273–74 (8th Cir. 1990) (same); Roness v. T-Mobile USA, Inc., No. C18-1030, 2019 WL 2918234, at *2 (W.D. Wash. July 8, 2019) (stating that Rule 803(4) does not exclude assertions made by a person offering medical services to an injured person); Patterson v. Miller, 451 F. Supp. 3d 1125, 1145 (D. Ariz. 2020) (same), *aff'd*, 857 F. App'x 282 (9th Cir. 2021); Rangel v. Anderson, No. 2:15-cv-81, 2016 WL 6595600, at *2 (S.D. Ga. Nov. 7, 2016) (collecting cases).

[99] Professor Flanders suggests that:

> In following other circuits, a circuit court is in a sense merely anticipating the actions of the Supreme Court, and the authority of the Supreme Court *is* binding on the circuits. Other circuits are not being viewed as authorities in their own right, but merely as reflections of what the ultimate authority—i.e., the Supreme Court—might say. In this way, the Supreme Court unites all the circuits, and gives them the role of checking on one another.

Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 78 (2009) (footnote omitted). Be that as it may, these decisions seem to reflect less that courts are choosing to follow one another as a reflection of the authority of the Supreme Court. They more reflect a search for an easy, quotable way to dispose of the issue, and the effect of this herd mentality has been to foreclose the need for either Supreme Court or Advisory Committee review. *See, e.g.*, Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 21 (D.C. Cir. 2016) (noting that the existence of a circuit split may increase the chances of Supreme Court review); FED. R. EVID. 703 advisory committee's note to 2000 amendment (discussing the need for an amendment to address diverging decisional law).

[100] *Field*, 386 F.3d at 736; Bombard, 92 F.3d at 564. As note 98, *supra*, shows, *Field* and *Bombard* misstate the law. Any person can provide a statement to a physician in furtherance of treatment or diagnosis, but other courts have unthinkingly followed these courts down their fallacious path. *See* Marshall v. Rawlings Co., No. 3:14-CV-359, 2018 WL 1096436, at *4 (W.D. Ky. Feb. 28, 2018) (quoting *Field*, 386 F.3d at 736); James v. Or. Sandblasting & Coating, Inc., No. 3:15-cv-01706-HZ, 2016 WL 7107227, at *4 (D. Or. Dec. 4, 2016) (citing *Field*, 386 F.3d at 735); Phillips v. Troy Indus., Inc., No. 3:13CV272, 2015 WL 13019638, at *2 (N.D. Miss. Mar. 23, 2015) (citing *Field*, 386 F.3d at 736).

[101] *See generally* Harold, *supra* note 1, at 284–85 (collecting contemporaneous state cases regarding statements of bodily or mental condition and statements for purposes of diagnosis and treatment).

do not examine this received wisdom in light of principles of reliability. Instead, decisions like the U.S. Court of Appeals for the Seventh Circuit's in the 1996 case *Bombard v. Fort Wayne Newspapers, Inc.* stifle logic or independent thought by intoning that "Rule 803(4) . . . [cannot] reasonably be interpreted as excepting[] statements by the person providing the medical attention to the patient."[102] The Rule nowhere limits itself to statements by patients. Quotes like *Bombard*'s acquire totemic significance through their repetition even if they offer no more than assertions devoid of analysis of either the text or the principles underlying it.[103]

As a matter of reliability, this result is perverse. Take, for example, the Seventh Circuit's definition of reliability offered in interpreting Rule 803(4) in 1990 in *Gong v. Hirsch*: whether the assertions are the kind on which a reasonable expert may justifiably rely upon.[104] If that is the test, Rule 803(4) ought to

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[102] 92 F.3d at 564.

[103] For example, district courts located within the U.S. Court of Appeals for the Ninth Circuit routinely just quote *Bulthuis* and move on. *See, e.g.*, Honey v. Dignity Health, 27 F. Supp. 3d 1113, 1126 n.5 (D. Nev. 2014) (citing *Bulthuis*, 789 F.2d at 1316); Caruso v. Solorio, No. 1:15-CV-780, 2020 WL 1450559, at *6 n.8 (E.D. Cal. Mar. 25, 2020) (citing *Bulthuis*, 789 F.2d at 1316); Rodriguez v. Sugar Foods Corp., No. CV 14-03478, 2015 WL 13928164, at *2 n.31 (C.D. Cal. Apr. 2, 2015) (citing *Bulthuis*, 789 F.2d at 1316); Nehara v. California, No. 1:10-cv-00491, 2013 WL 1281618, at *9 n.3 (E.D. Cal. Mar. 26, 2013) (citing *Bulthuis*, 789 F.2d at 1316).

These judges can hardly be criticized for following binding precedent, but cases like *Bulthuis*, *Field*, and *Stull* provide no analysis, ossify the law, and start a chain of string citations without anyone noticing that a logical step has been skipped. *See also* Truschke v. Chaney, No. 5:17-CV-93, 2019 WL 1960344, at *5 (S.D. Ga. May 2, 2019) (citing *Field*, *Bombard*, *Stull*, and *Bulthuis*), *appeal dismissed*, No. 19-12138-C, 2019 WL 4252109 (11th Cir. July 11, 2019); *Marshall*, 2018 WL 1096436, at *4 (quoting *Field*, 386 F.3d at 736); *Grabin*, 659 F. App'x at 8 (citing *Bulthuis* and *Bombard*).

A striking example of this phenomenon is *Tucker v. Nelson*, in which a consulting physician reviewed an aortogram and CT scan and then advised the principal physician that the plaintiff was "likely [experiencing] a venous bleed." 390 F. Supp. 3d 858, 862 (S.D. Ohio 2019). One would imagine this to be among the most reliable statements for purposes of medical diagnosis or treatment. It is an urgent diagnosis rendered by a specialist reviewing objective test results, committed to writing in a way that would be illegal if intentionally untrue, and that could, if wrong, subject the physician to malpractice liability. Rather than analyzing the statement's inherent reliability, however, the court simply relied on *Field* and found this kind of statement for the purpose of treatment inadmissible because it was not made by a patient. *Id.* (quoting *Field*, 386 F.3d at 736).

[104] *See* Gong v. Hirsch, 913 F.2d 1269, 1274 (7th Cir. 1990) (citing 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE ¶ 803(4)[01], at 803–146 to –147 (1988)). Courts draw this reliability standard from FED. R. EVID. 702(b) and (c), which incorporate reliability concepts from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 579–80 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138–39 (1999), and their progeny. Applying this test, *Gong* concludes that practitioners rely on statements by patients. 913 F.2d at 1273–74. That is uncontroversial: medical professionals do rely, often intensely, on information from their patients, their patients' families, and others who seek to help them craft an effective diagnosis and treatment. *See, e.g.*, 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1720, at 110 (Chadbourn rev. 1976) (citing Leonard v. B.C. Hydro & Power Auth. (1964), 49 D.L.R.2d 422, 424 (Can. B.C. S.C.)) (stating that all doctors to some extent depend on the narratives provided to them by their patients); People v. Brown, 320 P.2d 5, 10 (Cal. 1958) (en banc) (stating that "[i]t cannot be doubted that a physician's diagnosis . . . will usually be based . . . in part upon the history given by the patient").

admit statements by physicians. After all, physicians rely on one another's diagnoses and counsel every day. The same Seventh Circuit that decided *Bombard* and *Gong* has even dismissed cases against physicians, holding that "[d]octors may rely on the representations of their colleagues absent clear evidence that those representations are known to be false."[105]

Decisions finding that practitioners may reasonably rely on one another are clearly correct. Modern medicine relies extensively on nurses, consultants, specialists, laboratory technicians, and imagery analysts.[106] A hospitalist might see an inpatient for perhaps ten minutes each day. The hospital could scarcely function if that physician was unable to rely on the work of the medical professionals providing care for the other twenty-three hours and fifty minutes.

The exclusion of reliable statements by medical practitioners is also inconsistent with the tests articulated by Rule 803 for other forms of evidence. Rule 803(8), for example, admits public records because of the expectation that "a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record."[107] Measured against

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[105] Smego v. Mitchell, 723 F.3d 752, 758 (7th Cir. 2013) (citing King v. Kramer, 680 F.3d 1013, 1019–20 (7th Cir. 2012)). In 2012, in *King v. Kramer*, the Seventh Circuit affirmed the dismissal of the case against a provider who relied on the lead defendant's (allegedly grossly inaccurate) statement of events, precisely because that provider was entitled to rely on that defendant's recitation. 680 F.3d at 1019–20. *Cf.* Pustejovsky v. Pliva, Inc., 623 F.3d 271, 276 (5th Cir. 2010) (discussing the "learned-intermediary" defense, which provides that a manufacturer may depend on a doctor to relay warnings for prescription drugs to patients and, thus, terminates pharmaceutical liability).

[106] The Social Security Administration recently repealed the "Treating Physician Rule," which treated the diagnosis of a treating physician as binding, for the following reason:

> Since we first adopted the current treating source rule in 1991, the healthcare delivery system has changed in significant ways that require us to revise our policies in order to reflect this reality. Many individuals receive health care from multiple medical sources, such as from coordinated and managed care organizations, instead of from one treating [provider]. These individuals less frequently develop a sustained relationship with one treating physician . . . . These final rules recognize these fundamental changes in healthcare delivery . . . .

Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844, 5853 (Jan. 18, 2017) (codified at 20 C.F.R. pts. 404, 416); *see also* Charles Terranova, Note, *Somebody Call My Doctor: Repeal of the Treating Physician Rule in Social Security Disability Adjudication*, 68 BUFF. L. REV. 931, 944 (2020) (discussing how the treating physician rule derives from the core principle that the claimant's treating source carries great evidentiary value); Section II.A, *supra* notes 40–57 and accompanying text (noting the various methods physicians use to gather information regarding their patients and to develop medical records).

[107] FED. R. EVID. 803(8) advisory committee's note; *see also* United States v. Quezada, 754 F.2d 1190, 1193 (5th Cir. 1985) (stating that public records are trustworthy as they are made in an official capacity and for necessity given the probability that a public administrator would not remember these documents otherwise); Wong Wing Foo v. McGrath, 196 F.2d 120, 123 (9th Cir. 1952) (stating that no public official would remember "his action in hundreds of entries that are little more than mechanical" and noting the inconvenience of calling officers to testify); 4 MUELLER & KIRKPATRICK, *supra* note 43, § 8:86, at 783 (noting that the reliability of these records stems from "the duty that comes with public service" (citing Village of Evanston v. Gunn, 99 U.S. 660 (1878)).

these yardsticks, statements by practitioners in medical records would surely be admissible. Virtually every state requires medical professionals to keep accurate medical records, and virtually every medical organization imposes a parallel requirement.[108] Penalties for medical practitioners include loss of their license or professional discipline.[109] Those who knowingly falsify records face potential felony charges.[110] All of these are "dut[ies] to report" accurately and truthfully, consonant with the meaning given that term by Rule 803(8), but the consequences of a failure to accurately report here are far more severe than those a public servant is likely to face.[111] Courts interpreting Rule 803(4) ignore them, though.

We eschew a detailed examination of when certain government-generated medical records are admissible under this exception because there are a vanishingly small number of cases touching the issue. This is somewhat surprising given the number of Veterans Affairs (VA), Indian Affairs, and Bureau of Prisons medical facilities. It may be, however, that many such cases are against the government. Therefore, Rule 801(d)(2) does much of the heavy lifting. In the cases we found there is some question as to whether the government-generated records meet the "duty to report" prong of Rule 803(8). Demirchyan v. Gonzales, No. CV 08-3452, 2010 WL 3521784, at *17 (C.D. Cal. Sept. 8, 2010), *supplemented by* No. CV 08-3452, 2013 WL 1338784 (C.D. Cal. Mar. 28, 2013) (noting that the evidence submitted does not fall under the public records exception because it was simply a summary of facts and the hospital was under no duty to report). Likewise, there is robust debate about whether public records also qualify as business records and, in turn, whether courts may simply admit them through the business records hearsay exception. *Compare* Six v. United States, 71 Fed. Cl. 671, 684 (2006) (stating that government records would normally be public records or business records), *with* 4 MUELLER & KIRKPATRICK, *supra* note 43, § 8:84, at 775–76 (noting that "the business records exception should not be used for public records of the sorts described in Rule 803(8)" and criticizing decisions conflating the two exceptions).

[108] *See, e.g.*, 49 PA. CODE § 16.95(a) (2023) (stating that a doctor should retain medical reports for patients that precisely, clearly, and fully account for the assessment and treatment of that person); N.J. ADMIN. CODE § 13:35-6.5(b) (2023) (requiring "contemporaneous, permanent professional treatment records" that reflect the dates of all treatments; the patient's complaint and background; the provider's findings upon assessment and progress notes; any mandates for evaluations or consultations and their results; the provider's prognosis; the treatment required by the doctor, including specific prescriptions, amount and "strengths of medications including refills if prescribed, administered or dispensed, and recommended follow-up"; and requiring an audit trail for any changes).

[109] For examples of practitioners disciplined in part for violating Pennsylvania's record-keeping obligations, see the disciplinary actions initiated against the following medical practitioners: James Richard Bollinger, license no. MD014743E (2/2020), Joseph Victor Vernace, license no. MD029810E (2/2020), Richard Happ, license no. MD009738E (02/2020), Kevin Russell Patterson license no. MD427062 (5/2019), Peter Price Tanzer, license no. MD025088E (11/2019), and Joseph Vincent Episcopio, license no. MD036932L (12/2019). *See generally Pennsylvania Licensing Verification Service*, PA. DEP'T OF STATE (2023), https://www.pals.pa.gov/#/page/search [https://perma.cc/368S-YP7F].

[110] 18 U.S.C. § 1035(a) provides that:

> Whoever, in any matter involving a health care benefit program, knowingly and willfully . . . (2) makes any materially false, fictitious, or fraudulent statements or representations . . . in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

Id. Section 1035 does *not* require a specific intent to defraud. *Id.*

[111] FED. R. EVID. 803(8)(ii).

The omnipresent threat of lawsuits also shapes the behavior of medical practitioners, as they are acutely aware that courts may use their statements against them and that records they keep will be at issue in litigation.[112] Courts have not hesitated to hold practitioners to their word.[113] All of which says nothing of the fact that, unlike the average citizen or public servant, medical practitioners understand their craft may be a matter of life and death and they respond accordingly.[114]

In sum, medical practitioners endeavor at least as hard to perform their duties as other professionals and they have at least as much "motivation . . . to foster reliance by being accurate" as someone putting together a telephone book.[115] Nor are medical practitioners more likely than anyone else to be able to "remember details independently of the record" months or years later.[116] This is not to say that medical errors are unknown; the opposite is true.[117] Alt-

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[112] John Davenport, *Documenting High-Risk Cases to Avoid Malpractice Liability*, FAM. PRAC. MGMT., Oct. 2000, at 33, 33–36, https://www.aafp.org/pubs/fpm/issues/2000/1000/p33.html [https://perma.cc/F4B9-GYXD] (recognizing the frequency of physicians facing litigation and proposing ways to minimize that risk); *see* Dr. MedLaw, *Medical Malpratice: Documenting 101*, PHYSICIAN'S WKLY. (Mar. 8, 2016), https://www.physiciansweekly.com/medical-malpractice-documenting-101 [https://perma.cc/J5EA-HQJF] (advising physicians on how to write medical reports in a way that will limit the chances of an opposing party using them in litigation).

[113] *See, e.g.*, Debiec v. Cabot Corp., 352 F.3d 117, 132 (3d Cir. 2003) (stating that patients generally tend to rely on assertions by doctors that there is not an injury or that complications are not unusual); McDonald v. United States, 843 F.2d 247, 248 (6th Cir. 1988) (citing Rosales v. United States, 824 F.2d 799, 804 (9th Cir. 1987)) (same); Raddatz v. United States, 750 F.2d 791, 795 (9th Cir. 1984) (same); Amburgey v. United States, 733 F.3d 633, 640 (6th Cir. 2013) (same); Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir. 1991) (stating that "to put upon [a patient] the duty of knowing the nature of her ailment and its relation to her prior treatment before it is ascertained with a degree of certainty by the medical profession is a great burden to impose upon her" (alteration in original) (quoting Stauffer v. Ebersole, 560 A.2d 816, 818 (Pa. Super. Ct. 1989))).

[114] 6 WIGMORE, *supra* note 104, § 1707, at 51 (noting that hospital records are reliable because they are depended on in matters of life or death).

[115] FED. R. EVID. 803(17) advisory committee's note. Rule 803(17) codifies the common-law exception from hearsay for lists and compilations, such as market reports and telephone directories, because the public relies on them. Here, lives hang in the balance, and the legal consequences of misstatements can be profound for practitioners who are found liable for malpractice or for staff who prove themselves to be unreliable.

[116] *Cf.* FED. R. EVID. 803(8) advisory committee's note (first citing Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952); and then citing Chesapeake & Del. Canal Co. v. United States, 250 U.S. 123 (1919)) (detailing the underlying justification of the public records exception). No one seriously argues that physicians or nurses recall treatment details for every patient they have ever seen, particularly years later when litigation is likely to come to a head.

[117] *See, e.g.*, Sigall K. Bell et al., *Frequency and Types of Patient-Reported Errors in Electronic Health Record Ambulatory Care Notes*, JAMA NETWORK OPEN, June 2020, at 1, 1, https://jamanetwork.com/journals/jamanetworkopen/article-abstract/2766834 [https://perma.cc/8WNZ-RNNL] (stating that 21.1% of patients surveyed found an error in their record and that 42.3% of said patients characterized that error as serious); Saul J. Weiner et al., *How Accurate Is the Medical Record? A Comparison of the Physician's Note with a Concealed Audio Recording in Unannounced Standardized Patient Encounters*, 27 J. AM. MED. INFORMATICS ASS'N 770, 772 (2020) (analyzing 105 recorded

hough medical documentation errors are real, the question is not abstract reliability, but, rather, reliability *in comparison to other admissible evidence*. Most literature examining medical errors count all errors as equal. Yet, for reliability purposes, small, easily caught mistakes may be readily corrected at trial. Similar mistakes can be found in business records admitted under Rules 803(6) and 803(8).[118] Furthermore, the same courts freely admit statements by their patients, who have neither a legal duty to tell the truth nor a concern with being sued to push them toward accuracy.

Between patients who blushingly mispresent their history or treatment compliance, patients who experience issues of memory or confusion, and the one-third of patients engaged in litigation who outright malinger, patient statements are hardly inherently reliable. Indeed, it could be argued be that no medical records should be treated as reliable notwithstanding Rule 803(4) and the hundreds of years of common law preceding it. But the Rules and the courts that interpret them do not require perfect reliability. The Rules simply require what Rule 807, the Residual Exception, calls "sufficient guarantees of trustworthiness."[119]

Moreover, courts are not actually suggesting that statements by practitioners in medical records are unreliable. To the contrary, as discussed in detail below, courts not only readily admit these statements under Rule 803(6), but also expressly *presume* the accuracy of medical records, even to the point of admitting double hearsay.[120]

VA patient encounters and finding an error in 90% of notes, with 47% including an error related to a primary complaint).

[118] Not all errors made by medical professions are inadvertent, and some of the intentional ones are intended to *support* patients. Physicians, specifically, may exaggerate patient symptoms to help patients get insurance coverage for treatment, a practice some see as "patient advocacy." *See* Kevin F. Foley, *Physician Advocacy and Doctor Deception: A Double-Edged Attack on Due Process*, FED. LAW., July 2001, at 24, 26 (criticizing traditional deference to medical records and describing "physician-advocate" trends); Norra Macready, *US Doctors Lie to Help Patients*, BRIT. MED. J., July 1997, at 143, 148 (citing results suggesting that over 50% of doctors exaggerate symptoms to deceive insurance companies on behalf of their patients).

[119] FED. R. EVID. 807.

[120] To be certain, some of this is pragmatic: courts are and should be concerned with the crippling burden imposed by forcing every provider to testify. *See* 6 WIGMORE, *supra* note 104, § 1707, at 51 (stating that "the calling of all the individual attendant physicians . . . who have cooperated to make the record . . . would be a serious interference with convenience of hospital management"); 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1421, at 253 (Chadbourn rev. 1974) (stating that calling certain officials to testify is a necessity basis for a hearsay exemption); *see also* Ginsberg, *supra* note 59, at 680–81 (referencing Professor Wigmore's conclusion that two factors, reliability and necessity of evidence, underlie the hearsay exception); Richardson v. Perales, 402 U.S. 389, 406 (1971) (noting "[t]he sheer magnitude of the administrative burden" that would be imposed by requiring oral testimony from doctors regarding statements in medical records (quoting Page v. Celebrezze, 311 F.2d 757, 760 (5th Cir. 1963))). The burden, however, could equally be addressed by Rules 803(4) or 803(6). The point remains: courts find these statements reliable, then exclude them under a rule that otherwise considers reliability its touchstone.

Thus, courts easily conceding that practitioner statements are reliable as business records exclude them as statements for diagnosis or treatment even though the Rule's text would admit them and they meet the Rule's tests for reliability. These same courts nonetheless use Rule 803(4) to admit statements by patients and their families, who may have everything to gain in litigation and nothing to lose, as uniquely truthful.[121] We argue in Part III that this gets it precisely wrong.[122]

3. Rule 803(4)'s Prohibition on Admitting Statements of Causation

Contrary to a consistent line of precedent going back generations, the Advisory Committee framed Rule 803(4) to "expand[] the common law rule to allow statements of general causation of the condition or injury, past symptoms and medical history, and statements made to a doctor *only* for the purpose of diagnosis."[123] This "significantly liberalized"[124] the existing common-law rule, opening the door to judicial interpretation inconsistent with the Rule's text, partially inconsistent with the Rule's history, and at odds with both medical practice and common sense.

The rule that statements of fault are not statements for the purpose of diagnosis and treatment is—particularly by comparison to the other issues in interpreting Rule 803(4)—logical. As Professor Collins put it:

> A doctor treating someone who is seeking treatment for injuries sustained during a physical assault, for example, will administer the same medical treatment for the injuries regardless of whether the assailant was a stranger or the patient's neighbor, boss, or friend. Knowing this, the patient has no motivation to truthfully identify the assailant, and the doctor does not rely on this [identifying] information for any medical purpose, so identity is beyond the scope of the exception.[125]

Accordingly, as the 1972 Advisory Committee Notes put it, assertions related to fault would not regularly qualify for this hearsay exception. Therefore, "a patient's statement that he was struck by an automobile would qualify[,] but not his statement that the car was driven through a red light."[126] In other

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[121] The same logic makes Rule 803(4)'s decision to admit statements made to expert witnesses, where the primary purpose is secondary legal gain, all the more baffling and galling.

[122] *See infra* notes 237–254 and accompanying text.

[123] Josephine Ross, *What's Reliability Got to Do with the Confrontation Clause After* Crawford*?*, 14 WIDENER L. REV. 383, 393 n.68 (2009) (emphasis added).

[124] United States v. Iron Shell, 633 F.2d 77, 83 (8th Cir. 1980) (citing 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE 803-125 (1979)).

[125] Collins, *supra* note 62, at 429.

[126] FED. R. EVID. 803(4) advisory committee's note.

words, Rule 803(4) is not a vehicle for plaintiffs to back-door substantive evidence into court to buttress their liability claims.

In practice, of course, this line-drawing has proved difficult. The "red light" example is facile: the color of the light has little to do with the cause or nature of the harm or the treatment needed to remedy it. Most real-life cases are closer calls, and considerable judicial resources are consumed over determinations of exactly which details in a patient's history can and cannot be considered a general cause.[127] Worse, no clear rule has emerged because the cases contradict one another on this important point.[128] Judge Friendly, in 1970 in *Felice v. Long Island Railroad Co.*, recognized in the context of the Second Circuit's business records jurisprudence on the same question that "[i]t would be hard to sustain the thesis that this court's many pronouncements . . . are wholly consistent . . . ."[129] The same decision proved his point, holding that a plaintiff's statement to a physician that he "slipped and threw [his] back out of line" while "lifting a tank" was inadmissible hearsay because it was insufficiently related to the cause of injury.[130] This is contrary to an earlier decision where the same court admitted a plaintiff's statement that his medical condition began "when he was trying to turn one of those big railroad switches,"[131] because that information *was* needed for diagnosis or treatment.

Because Rule 803(4) codified the existing, inconsistently applied common-law standard, its adoption did little to clarify matters. Take a common example: if a patient tells a doctor he was the victim of a physical attack, is that admissible? In 1986, in *Cook v. Hoppin*, the Seventh Circuit concluded that a statement to a doctor that injuries arose from "a shoving or wrestling match" were not relevant to medical diagnosis or treatment.[132] In 2005, the

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[127] *See, e.g.*, Ayotte v. Barnhart, 973 F. Supp. 2d 70, 89 (D. Me. 2013) (analyzing the admissibility of a medical record statement that a prison assault injury was caused by a padlock).

[128] *Compare, e.g.*, Jewell v. Kroger Co., No. 1:11-cv-1145, 2012 WL 2414756, at *2–3 (S.D. Ind. June 26, 2012) (concluding that plaintiff's statement that she fell due to "moisture on the floor" was admissible because doctors might otherwise be concerned with conditions that cause balance issues), *and* Polansky v. Vail Homes, Inc., No. 13-296, 2016 WL 2643253, at *6 (W.D. Pa. May 10, 2016), (finding plaintiff's statement that she fell on a wet deck admissible under 803(4)), *with* Rock v. Huffco Gas & Oil Co., 922 F.2d 272, 278 (5th Cir. 1991) (excluding evidence because doctors stated that whether plaintiff slipped in grease was only important from a legal standpoint, not a medical one), *and* Austin v. Walgreen Co., No. 2:15-CV-104, 2017 WL 3130982, at *2 (N.D. Ind. July 21, 2017) (suggesting, but not expressly stating, that plaintiff's statement regarding slipping on a wet floor is inadmissible), *aff'd*, 885 F.3d 1085 (7th Cir. 2018). *See also* Congemi v. Wal-Mart Stores E., LP, No. 19-cv-8220, 2021 WL 4066653, at *8 (S.D.N.Y. Sept. 7, 2021) (finding a statement that plaintiff tripped over their own shoes admissible).

[129] 426 F.2d 192, 196 (2d Cir. 1970).

[130] *Id.* at 196–98.

[131] Stewart v. Balt. & Ohio R.R., 137 F.2d 527, 528–30 (2d Cir. 1943).

[132] 783 F.2d 684, 689 (7th Cir. 1986) (holding that where a physician testifies that statements are not the kind regularly relied upon by medical personnel, evidence is inadmissible under Rule 803(4),

First Circuit mostly disagreed. In *Bucci v. Essex Insurance Co.*, that court more reasonably held that medical records identifying the cause of injury as being "'hit,' 'kicked,' and 'punched' in the face" were relevant to diagnose or treat those injuries and excluding only records characterizing these forms of damage as stemming from "assault" or "battery."[133] Neither court followed a 1981 Eighth Circuit decision excluding references to "excessive force," but stating that it might have allowed references to "force" or "trauma."[134] Even if the First or Seventh Circuits had done so, however, the Fourth Circuit, in 2002 in *McCollum v. McDaniel*, admitted medical records stating the plaintiff identified the cause of injury as "assault,"[135] citing a 1986 Seventh Circuit decision admitting evidence that someone twisted the defendant's left upper arm behind his back.[136] Curiously, that case was decided in the very year that the same Seventh Circuit concluded that a statement that "a shoving or wrestling match" caused an injury was *not* admissible.[137]

A lawyer trying to predict what is admissible will get vertigo.

One thing on which courts agree is that a statement identifying the perpetrator of violence will typically be irrelevant to care and, thus, inadmissible.[138] Yet even this has an exception: where the harm from an injury or the treatment that injury requires are inextricably linked to its perpetrator, courts routinely admit identification evidence under Rule 803(4). These courts posit that sexual and domestic violence—and especially sexual and domestic violence against children—causes mental health harms, and sexual or domestic violence by a loved or trusted individual exacerbates that harm and often requires different treatment.[139] Accordingly, in cases involving these special harms, courts con-

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seemingly importing a version of the Rule 703 test into a Rule 803(4) analysis and reaching a peculiar conclusion about what doctors consider).

[133] 393 F.3d 285, 287, 296 (1st Cir. 2005).

[134] Roberts v. Hollocher, 664 F.2d 200, 205 (8th Cir. 1981).

[135] 32 F. App'x 49, 55 (4th Cir. 2002).

[136] United States v. Pollard, 790 F.2d 1309, 1313–14 (7th Cir. 1986), *overruled on other grounds by* United States v. Sblendorio, 830 F.2d 1382 (7th Cir. 1987).

[137] *See Cook*, 783 F.2d at 689.

[138] *See, e.g.*, United States v. Earth, 984 F.3d 1289, 1295 (8th Cir. 2021) (noting that "statements identifying the assailant . . . are 'seldom, if ever,' sufficiently related to diagnosis or treatment to be admissible" (quoting United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 2007))); United States v. Tome, 61 F.3d 1446, 1450 (10th Cir. 1995) (stating that information regarding the identification of an attacker is not necessary for correct treatment or diagnosis); Burgos Martinez v. City of Worcester, 502 F. Supp. 3d 606, 615 (D. Mass. 2020) (admitting plaintiff's statements about his physical pain and the nature of the alleged attack, but excluding plaintiff's statements identifying the police as his attackers); United States v. Hill, 13 M.J. 882, 884 (A.C.M.R. 1982) (same); Scherbarth v. Woods, No. 1:16-CV-02391, 2022 WL 1128931, at *3 (D. Colo. Apr. 15, 2022) (collecting cases).

[139] Statements revealing the identity of a child's abuser are deemed "reasonably pertinent" to treatment because the physician must be attentive to treating the child's emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser. United States v. Renville, 779 F.2d 430, 437–38 (8th Cir. 1985). Additionally, where the abuser is a member of the family or household, the appropriate course of treatment may include removing the child from the

sistently turn to Rule 803(4) to admit evidence of the perpetrator's identity, as shared by the victim with medical professionals.[140]

Nonetheless, if special vulnerability can affect the injury or its treatment, one would expect that identifying statements by other vulnerable populations would also be admissible. Even though the psychological impact on an inmate of being assaulted by a corrections officer might be significant, and reasonable treatment might include limiting an inmate's exposure to an abusive guard, courts do not admit identifying statements in that context.[141] Similarly, as a society, we are increasingly cognizant of the emotional damage done by racially disparate law enforcement,[142] but we have located no example of a court admitting evidence that a Black patient identified a law enforcement officer as their assailant based on this particularized harm. Courts may simply be more sympathetic to some victims than others, but that uncharitable gloss is hardly necessary: their decisions in more pedestrian matters have been equally inconsistent.

In sum, on the questions of causation and identification, lawyers and judges are left with a mélange of decisions articulating inconsistent standards.

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home to prevent further abuse. *Id.* at 438. Finally, physicians often have a legal obligation to prevent an abused child from being returned to an abusive environment. *Id.*

In 1993, in *United States v. Joe*, the Tenth Circuit applied the same logic in a case where a wife was sexually abused by her husband. 8 F.3d 1488, 1494 (10th Cir. 1993). The court in *Joe* noted that the treating physician in such cases may suggest therapy sessions and tell the victim to remove herself from the abusive environment. *Id.* at 1495. Subsequent cases confirm that Rule 803(4) makes identification statements admissible "in virtually every domestic sexual assault case." *Tome*, 61 F.3d at 1450 (quoting *Joe*, 8 F.3d at 1494).

[140] *See, e.g.*, United States v. Balfany, 965 F.2d 575, 579–80 (8th Cir. 1992) (admitting a victim's assertion regarding the identity of her assailant under Rule 803(4) because it was necessary to her treatment and diagnosis); United States v. George, 960 F.2d 97, 99–100 (9th Cir. 1992) (same); Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988) (noting how child abuse "requires great caution in excluding highly pertinent evidence"); United States v. Eaves, No. 15-CR-154, 2016 WL 1391064, at *2 (N.D. Okla. Apr. 8, 2016) (recognizing that statements to a physician regarding the identity of a victim's abuser are necessary for accurate treatment and diagnosis).

[141] *See, e.g.*, Smith v. Nurse, No. 14-cv-5514, 2016 WL 4539698, at *8 (N.D. Ill. Aug. 31, 2016) (admitting statements relating to an alleged assault by corrections officers, but excluding statements relating to the identity of said corrections officers); Smith v. City of Philadelphia, No. 06-4312, 2009 WL 3353148, at *4 (E.D. Pa. Oct. 19, 2009) (same); *see also* United States v. Miller, 477 F.3d 644, 648 (8th Cir. 2007) (holding that the district court did not err in admitting the medical record under Rule 803(4) because the record did not identify the alleged corrections officer assailant by name).

[142] *See generally* Sirry Alang, Donna McAlpine, Ellen McCreedy & Rachel Hardeman, *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 AM. J. PUB. HEALTH 662, 662 (2017) (arguing that police brutality leads to poor medical treatment of Black bodies); Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2322 (2014) (analyzing how aggressive policing influences the health of its victims, who tend to be people of color); Ana Sandoiu, *Police Violence: Physical and Mental Health Impacts on Black Americans*, MED. NEWS TODAY (June 22, 2020), https://www.medicalnewstoday.com/articles/police-violence-physical-and-mental-health-impacts-on-black-americans [https://perma.cc/JHP4-NKXR] (summarizing studies indicating that Black men are more likely to be victims of police brutality and, thus, to experience increased health-related issues).

Indeed, a reasonable observer would question whether Rule 803(4) represents a legal rule at all or whether it is, in practice, just an instrumentalist proxy for the court's view of the merits.[143]

C. Rule 803(6): The Under- and Over-Inclusive Other Side of the Coin[144]

As the foregoing demonstrates, despite Rule 803(4)'s plain text, neither it nor Rule 801 provide a basis to admit the majority of statements in medical records: those made by the medical providers. Having closed the front door, however, many courts routinely admit these statements through the back door by concluding that they are records of a regularly conducted business. Some courts even declare—consistent with our analysis, but not the decisional law of Rule 803(4)—that these records are so unusually trustworthy that they are entitled to be presumed reliable. Even the courts that say this, however, may not actually treat these statements that way; rather, they actively exclude documents that would seem to be the most commonplace of all for reasons scarcely described and largely unsupported. This divergent approach further complicates the analysis of medical records as hearsay.

This Section begins in Subsection 1 with a general overview of the admissibility of medical records under Rule 803(6) (Records of a Regularly Conducted Activity), specifically highlighting the types of records covered by this exception.[145] Subsection 2 expands on this discussion and describes how medical records relate to a key principle underlying this exception: business records carry guarantees of trustworthiness because institutions rely heavily on their contents.[146] Subsection 3 then details a key limitation of the business record exception as it relates to the admissibility of these documents.[147]

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[143] *See* Sevier, *supra* note 1, at 271, 274 ("[A] discretionary approach to the admissibility of hearsay evidence . . . opens the door to a host of well-documented cognitive biases and subconscious influences that may affect trial judges." (first citing Richter, *supra* note 66, at 1865–68; and then citing Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, JUDICATURE, July–Aug. 2002, at 44, 50)). Similarly, in the context of the previous version of Rule 807, Professor Capra opined that "[t]he major problem is that . . . a court can use 'equivalence' as a result-oriented device[, meaning that] if the court wants to admit the hearsay, it can rely on comparison with exceptions that are at the bottom of the reliability barrel." Capra, *supra* note 12, at 1582.

[144] We gratefully acknowledge the contributions of Julia Lueddeke (Drexel Law School 2022) to this Section.

[145] *See infra* notes 148–162 and accompanying text.

[146] *See infra* notes 163–174 and accompanying text.

[147] *See infra* notes 175–184 and accompanying text.

1. Like the Record of Any Other Business, Rule 803(6) May Allow Admission of Records of a Medical Business

Rule 803(6), the "business records exception," permits the admission of records concerning a "regularly conducted activity,"[148] which is defined as:

> A record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.[149]

Records include memoranda, reports, and data compilations, including electronically stored information, and courts broadly construe this rule.[150]

As anyone who has visited a doctor's office or emergency room—or urgent care clinic, ambulatory surgical center, or strip mall imaging operation—can attest, modern medicine is very much a business.[151] It is unsurprising, then, that "[m]edical records can be offered into evidence under the business records exception, provided the party offering the records for admission can meet the requirements set forth in Rule 803(6)."[152] Such records neatly fit within the

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[148] Wi-LAN Inc. v. Sharp Elecs. Corp., 992 F.3d 1366, 1371 (Fed. Cir. 2021) (quoting Crash Dummy Movie, LLC v. Mattel, Inc., 601 F.3d 1387, 1392 (Fed. Cir. 2010)); *see also* FED. R. EVID. 803(6).

[149] FED. R. EVID. 803(6).

[150] 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, at R. 803(6) (9th ed. 2021); *see also* FED. R. EVID. 803(6) advisory committee's note (stating that the business records that satisfy this exception are those routinely gathered during business).

[151] *See generally* Murali Poduval & Jayita Poduval, *Medicine as a Corporate Enterprise: A Welcome Step?*, MENS SANA MONOGRAPHS, Jan.–Dec. 2008, at 157, 157 (stating that "[t]he medical profession . . . is being redesigned as a corporate enterprise"); Eli Y. Adashi, *Money and Medicine: Indivisible and Irreconcilable*, 17 AM. MED. ASS'N J. ETHICS 780, 781 (2015) (noting that "medicine is a service industry, the product of which is health care").

[152] Tucker v. Nelson, 390 F. Supp. 3d 858, 863 (S.D. Ohio 2019) (citing Lankford v. Reladyne, LLC, No. 1:14-cv-682, 2016 WL 1444307, at *2 (S.D. Ohio, Apr. 8, 2016)); *see also* Doali-Miller v. SuperValu, Inc., 855 F. Supp. 2d 510, 518–19 (D. Md. 2012) (discussing in depth the admission of medical records under Rule 803(6)). In practice, these requirements are typically met through the declaration of a records custodian. *Cf.* FED. R. EVID. 803(6)(D) and 902(11), (12). Although some business records custodians are the creators of the record, they are competent to testify if called. *See, e.g.*, United States v. Hirani Eng'g & Land Surveying, P.C., 345 F. Supp. 3d 11, 36 (D.D.C. 2018) (relying on the maker of the business records to verify the reports at issue), *aff'd in part*, *rev'd in part*, No. 19-7010, 2023 WL 1112908 (D.C. Cir. Jan. 31, 2023); United States v. Lawrence, 934 F.2d 868,

Rule's definition. Medical practitioners usually have direct knowledge of the condition, activity, or diagnosis. They prepare records at or around the time of examination, particularly as inputting information into EHRs on tablets, laptops, or floating workstations becomes nearly universal. Furthermore, they are in the business of conducting medical examinations and diagnosing and treating medical conditions.[153] Likewise, the presumption of trustworthiness created by the need to run an effective business[154] is also present with respect to medical records.[155]

The unique "reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation."[156] Medical records meet these tests. They are checked by multiple people over the course of treatment; are created in accordance with long-standing, regularized[157] prac-

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870–71 (7th Cir. 1991) ("The business records exception . . . 'does not require that the witness have personal knowledge of the entries in the records. The witness need only have knowledge [of the procedures] under which the records were created.'" (quoting United States v. Wables, 731 F.2d 440, 449 (7th Cir.1984))).

Thus, custodians who have knowledge of record-keeping as a whole, but who, more or less, are assuming procedures were followed are often sufficient. For example, in 2021, in *United States v. Osuagwu*, the Fifth Circuit affirmed a district court's admission of mortgage and loan records based on a declaration by a bank's senior vice president. 858 F. App'x 137, 144 (5th Cir. 2021). These records were admissible even though it strains credulity for such a high-level executive to say that Rule 803(6)(A)'s personal knowledge and contemporaneity requirements *were* met, rather than that they *should have* been met. *Id.*; *see also* Canatxx Gas Storage Ltd. v. Silverhawk Cap. Partners, LLC, No. H-06-1330, 2008 WL 1999234, at *13 (S.D. Tex. May 8, 2008) (accepting as sufficient a declaration that "it was [the company's] regular practice to make and/or keep these records"). Similarly, medical records are often admitted by the declaration of a custodian from the medical records or IT department who knows how those records are *generally* kept, but who has no personal knowledge of the *specific* records or the treatment they reflect.

[153] *See generally* FED. R. EVID. 803(6)(E) (requiring that the information within and the origins of the records be reliable).

[154] 4 MUELLER & KIRKPATRICK, *supra* note 43, § 8:77, at 711.

[155] In light of the possible administrative, civil, and criminal penalties for inaccurate medical records, see *supra* notes 108–110, the incentives are arguably even higher with respect to these particular business records.

[156] FED. R. EVID. 803(6) advisory committee's note; *see* Charles V. Laughlin, *Business Entries and the Like*, 46 IOWA L. REV. 276, 276–77 (1961) (noting that the trustworthiness of these records stems from the fact that people rely on them for important business purposes); 2 ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE §§ 281, 286–287 (8th ed. 2020) (stating that the hearsay exceptions pertaining to business records exist because these documents are accurate, regularly maintained, and prepared close in time to when the recorded event actually transpired).

[157] Courts do not uniformly define what they mean by "regular" business records, and the Advisory Committee does not help matters by using the word to define itself. The Advisory Committee suggests only that "regularity" is one of the touchstones for whether a record was made in the usual course of business. FED. R. EVID. 803(6) advisory committee's note. "Regular," however, might mean any or all of: "done in conformity with established or prescribed usages," "formed . . . according to some established rule, law, principle, or type," "orderly [and] methodical," or "recurring . . . at fixed, uniform, or normal intervals." *Regular*, MERRIAM-WEBSTER, https://www.merriam-webster.com/

tices in the medical community and within particular practices; relied on in matters of great importance; and subject to the legal duties discussed above.

If a record is prepared in contemplation of litigation, however, it is not regular enough to be a Rule 803(6) business record.[158] Accordingly, courts are likely to exclude statements in medical records when they are prepared in anticipation of litigation because such statements are outside the physician's regular business,[159] even if the physician's primary business is testifying as a retained expert.[160] This remains true even though litigation is a common part of

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dictionary/regular [https://perma.cc/M5X9-4VA6]. These are very different things. Arguably, this ambiguity is baked into Rule 803(6), which defines business records in the same breath as data compilations (a routine, mechanical exercise) and memoranda (which can have almost any kind of content). Nonetheless, for whatever reason, courts uniformly conclude that medical records are sufficiently "regular." By contrast, courts considering the admissibility of emails—which, like medical records, are documents prepared many times a day, but that each contain idiosyncratic information—reach divergent outcomes depending in part on which of these definitions they adopt. *Cf.* Penberg v. Healthbridge Mgmt., 823 F. Supp. 2d 166, 187–88 (E.D.N.Y. 2011) (highlighting several cases where courts have ruled differently on the admissibility of emails under Rule 803(6)).

[158] *See generally* Doali-Miller v. SuperValu, Inc., 855 F. Supp. 2d 510, 523 (D. Md. 2012) (noting that "[t]here is a clear absence of trustworthiness . . . 'when a report is prepared in the anticipation of litigation because the document is not for the systematic conduct and operations of the enterprise but for the primary purpose of litigating'" (quoting Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200, 205 (4th Cir. 2000))); *see also* Palmer v. Hoffman, 318 U.S. 109, 114 (1943) (finding records inadmissible because they were made in anticipation of litigation and were favorable to the producing party); Scheerer v. Hardee's Food Sys., Inc., 92 F.3d 702, 706–07 (8th Cir. 1996) (stating that an incident report was not admissible under Rule 803(6) because it was prepared in anticipation of litigation); Weaver v. Phx. Home Life Mut. Ins. Co., 990 F.2d 154, 159 (4th Cir. 1993) (holding that "[a]n affidavit prepared for trial is not a record of regularly conducted activity"); United States v. Simmons, 773 F.2d 1455, 1458 n.4 (4th Cir. 1985) (noting that for business records to satisfy Rule 803(6) they must be made for usual business purposes); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1258 (9th Cir. 1984) (stating that Rule 803(6) does not apply to audit reports prepared in anticipation of litigation); United States v. Houser, 746 F.2d 55, 61 (D.C. Cir. 1984) (stating that Rule 803(6) provides for the admission of business records "unless the source of information or the method or circumstances of preparation indicate lack trustworthiness" (quoting FED. R. EVID. 803(6))); United States v. Pazsint, 703 F.2d 420, 424–25 (9th Cir. 1983) (noting that tapes of emergency calls did not satisfy Rule 803(6) because they lacked regularity and reliability); United States v. Davis, 571 F.2d 1354, 1357 (5th Cir. 1978) (noting that Rule 803(6) only excludes records in the ordinary course of business from the hearsay rule). The federal hearsay exception for business records dates back, at least, to the Supreme Court's opinion in 1943, in *Palmer v. Hoffman*. 318 U.S. at 113. *See generally* Richter, *Reality Check*, *supra* note 15, at 1476–77 (describing the origins of the business records exception).

[159] *See* Bruneau v. Borden, Inc., 644 F. Supp. 894, 896 (D. Conn. 1986) (finding a doctor's note expressing the opinion that the patient was exposed to a chemical inadmissible despite that exposure to a chemical would be "of medical significance, both in diagnosis and treatment").

[160] *See, e.g.*, Hunt v. City of Portland, 599 F. App'x 620, 621 (9th Cir. 2013) (finding that an admitted expert report was impermissible hearsay even with heavy redaction, but affirming the district court's holding because said admission was not prejudicial); *id.* at 622–23 (Silverman, J., concurring in part, dissenting in part) (stating that admission of the redacted report was improper and prejudicial); Jordan v. Binns, 712 F.3d 1123, 1135 (7th Cir. 2013) (stating that the adjuster's report was not saved by the business records exception because "[i]t is well established . . . that documents prepared in anticipation of litigation are not admissible under [Rule] 803(6)"); Balfour Beatty Rail, Inc. v. Kan. City S. Ry. Co., 173 F. Supp. 3d 363, 413 (N.D. Tex. 2016) (recognizing that "expert reports are

modern business[161] and despite the suggestion in the 1972 Advisory Committee Note to Rule 803(4) that self-serving out-of-court statements to retained litigation experts be freely admitted as substantive evidence.

So much for statements made exclusively for the purpose of litigation. But some courts find that records of actual treatment, and particularly hospital records, enjoy a "presumption of reliability"[162] under Rule 803(6). Unfortunately, even these courts rarely live up to this lofty idea.

2. The Business-Reliance Doctrine and Medical Records: A Marriage Only When Convenient

As discussed above, one element of whether a statement is a business record is whether there is an "actual experience of business" reliance on the statement.[163] When applied to a business's own records, this is simply a rearticulation of the principle underlying Rule 803(6): business records are reliable in court because they must be reliably kept for the business to function.[164]

[generally] inadmissible hearsay because they are out-of-court statements offered to prove the truth of the matter asserted" (citing Bianco v. Globus Med., Inc., 30 F. Supp. 3d 565, 570 (E.D. Tex. 2014))), *aff'd as modified and remanded*, 725 F. App'x 256 (5th Cir. 2018); Rawers v. United States, 488 F. Supp. 3d 1059, 1104 (D.N.M. 2020) (collecting cases); Walsh v. Jagst, No. 15-cv-14071, 2017 WL 3712240, at *3 (E.D. Mich. Aug. 29, 2017) (noting that statements in reports by medical experts are not business records because they are prepared for litigation purposes); Alexie v. United States, No. 3:05-cv-00297, 2009 WL 160354, at *1 (D. Alaska Jan. 21, 2009) (recognizing that retained experts' reports are inadmissible hearsay); *see also* Tokio Marine & Fire Ins. Co. v. Norfolk & W. Ry. Co., 172 F.3d 44 (4th Cir. 1999) (refusing to admit an appraisal report because the business's regular activities did not include litigation-related appraisals). Hence, expert's reports are inadmissible hearsay even if the expert's business routinely (or even entirely) involves preparing reports for litigation.

[161] Consider, for example, the United States Postal Service (USPS), for which a routine part of business is addressing claims of driver negligence, slip-and-falls, and the like. If it prepares investigatory reports in each instance, are these reports truly less "regular" than the records of an enterprise that transacts a kind of business as its core function only once or twice per year? *Cf.* U.S. POSTAL SERV., POSTAL BULL. NO. 22534, DECEMBER IS USPS MOTOR VEHICLE SAFETY MONTH 3 (2019), https://about.usps.com/postal-bulletin/2019/pb22534/pb22534.pdf [https://perma.cc/3MQK-W7VU] (describing the USPS investigatory process for vehicular collisions). It would depend on which definition of "regular" Rule 803(6) adopts. It is likely, however, that no single definition will sufficiently address the variety of uses for these records. USPS may use the same record for both litigation purposes, such as preparing to defend itself in a tort action, and routine business purposes, such as deciding whether to discipline the driver as part of a core personnel question. Nor are even these defined purposes static. The same records used to conduct the human resources inquiry into the driver can become records used in litigation if the driver sues claiming discrimination. All of this further calls into question whether consistently applying this kind of test is even possible.

[162] Wilson v. Zapata Off-Shore Co., 939 F.2d 260, 271 (5th Cir. 1991); *see also Doali-Miller*, 855 F. Supp. 2d at 523 (holding that business records of hospitals and other medical practitioners "are generally presumed to be reliable and trustworthy" (quoting *Sinkovich*, 232 F.3d at 204–05)).

[163] FED. R. EVID. 803(6) advisory committee's note.

[164] *Economic* necessity is not always the basis of Rule 803(6) reliability. The rule also makes admissible the records of "clubs, citizen organizations, and other entities that are not concerned with profit and loss and that might not suffer much hardship if records are not always accurate and complete." Saltzburg, *supra* note 13, at 1490.

This principle has also been extended to the admission of records from other businesses under what we call the "business-reliance doctrine": when the records of Business A include and rely upon the business records of Business B, B's business records are admissible as A's business records.[165] Although oral statements are not "records," some courts have extended this doctrine—creating a *de facto* exception to Rule 805 (Hearsay Within Hearsay)—to admit oral statements by one declarant to another, so long as both are acting in the course of business and the records document the statement.[166]

Even though doctors and nurses communicate with one another principally through the written records of care,[167] this doctrine is unevenly applied to medical records. For example, in 2009, in *United States v. Smith*, the Eleventh Circuit considered the admissibility of a patient statement in a medical record that was entered by a nurse to whom the statement was relayed by the attending physician.[168] The patient's statement to the doctor was admissible under

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[165] *See* United States v. Flom, 558 F.2d 1179, 1182 (5th Cir. 1977) (finding that invoices prepared and sent by one company, but kept on file by another company in the regular course of business are admissible); Schmutz v. Bolles, 800 P.2d 1307, 1314 (Colo. 1990) (en banc) (citing United States v. Keplinger, 776 F.2d 678, 694 (7th Cir. 1985)) (stating that letters created by one business, but regularly received, maintained, and relied upon by another are admissible as business records of the latter business); Downing v. Overhead Door Corp., 707 P.2d 1027, 1030–31 (Colo. App. 1985) (admitting a report from a business's records even though it contained information provided by an employee of an independent distributor of the business's products); *see also* United States v. Reese, 568 F.2d 1246, 1252 (6th Cir. 1977) (admitting a hospital's scrapbook of newspaper statements); *cf.* Michael H. Graham, *Business and Public Records Hearsay Exceptions, Fed.R.Evid. 803(6) and (8); Multiple Level Hearsay, Fed.R.Evid. 805*, CRIM. L. BULL., Vol. 55, No. 2, 2019, unpaginated, *available at* https://perma.cc/M7YT-4UKN (providing as a teaching example that an MRI report, ambulance report, and laboratory report upon which a hospital relies and in which it concurs would be treated the same as any other part of the patient's medical file).

[166] Sometimes this exception is articulated expressly, *de jure*: "Even double hearsay is excepted from the hearsay rule under the business record exception where 'both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business.'" Miller v. Schindler Elevator Corp., No. 09-849, 2013 WL 12147689, at *2 (D.N.J. Feb. 15, 2013) (quoting United States v. Gurr, 471 F.3d 144, 151–52 (D.C. Cir. 2006)). Other times, courts use the business records exception to work around even non-hearsay Rules of Evidence. *See, e.g.*, Ruffin v. City of Boston, 146 F. App'x 501, 506 (1st Cir. 2005) (admitting an emergency medical technician's statement within a medical report indicating that the plaintiff in civil rights matter was "belligerent towards authority" as a personal observation under Rule 803(6)).

[167] Because hospital care is 24/7, when a hospitalist sees a patient, the night nurse might be asleep at home, and the consultant who saw the patient may be on another floor. Progress notes, consulting notes, and annotations of vital signs provide a way for practitioners to see what has occurred in the hours or days since they last saw the patient. Readers of a certain age will recall doctors literally flipping through charts hung at the end of the patient's bed to review these records. The modern equivalent of reviewing the EHR is not as visible to patients. Hospitalists, therefore, now recommend vocalizing the fact of having read the chart to reassure patients that this critical step in continuity of care occurred. *See* Trina Dorrah, *Everything We Say and Do*, THE HOSPITALIST (Dec. 16, 2016), https://www.the-hospitalist.org/hospitalist/article/120371/qi-initiatives/everything-we-say-and-do [https://perma.cc/Y78A-SF4P] (discussing methods for reviewing a patient's chart and the importance of ensuring physicians inform their patients of this activity).

[168] 318 F. App'x 780, 796 (11th Cir. 2009).

Rule 803(4), but as discussed above, the doctor's conveyance of that statement to the nurse was hearsay. Nonetheless, the Eleventh Circuit found the statement admissible under Rule 803(6), consistent with those cases holding that reliance by a business renders third-party communications admissible.[169] A similar decision by the U.S. District Court for the District of Puerto Rico seems to agree.[170]

Neither court, however, explained its logic.[171] Even though the authors agree with their holdings, reliance reasoning is both rarely seen in medical record cases and arguably in tension with the same courts' conclusion that, for Rule 803(4) purposes, statements by medical providers are not "made for—and . . . reasonably pertinent to—medical diagnosis or treatment."[172] Other courts

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[169] *Id.* at 796–97. This doctrine can be taken to troubling extremes. In 2020, in *Maui Jim, Inc. v. SmartBuy Guru Enterprises*, the U.S. District Court for the Northern District of Illinois addressed a trademark dispute where the court admitted into evidence a "Confusion Chart" showing multiple one-off interactions between individual customers and customer representatives. 459 F. Supp. 3d 1058, 1094 n.16 (N.D. Ill. 2020). The court found that all of these emails (including those from the customers) were plaintiff's regular business activities with little analysis beyond stating that they "are admissible just like emails are commonly admissible and excepted from the rule against hearsay." *Id.* We query how common this admission is or should be. As a result, the customers' emails were admitted as substantive proof of consumer confusion even though they have none of the indicia of reliability that other business records possess or that any definition of reliability suggests. *Id.* Indeed, as the Advisory Committee Note expressly states, "if . . . the supplier of the information does not act in the regular course"—as no third party could—"an essential link is broken" in the employer's reliance. FED. R. EVID. 803(6) advisory committee's note. *Maui Jim* may prove an aberration, but it demonstrates the inconsistency in the law of business records.

[170] Rosario v. Valdes, No. 07-1508, 2009 WL 712354, at *2 (D.P.R. Mar. 12, 2009) (holding that medical record notations are admissible so long as they contain either the opinions or diagnoses of the individual who made them or another individual with knowledge, like a medical co-worker who communicated with the creator of the business record as part of a regular course of business).

[171] *Smith* and *Rosario* both cite only one case, *Petrocelli v. Gallison*, in which the First Circuit, in 1982, stated that "[t]o be admissible as 'business records' under Rule 803(6), the referenced notations [in medical records] would have to represent either the opinions or diagnoses of the Massachusetts General Hospital doctors who made the notations *or the diagnoses of some other 'person with knowledge' (such as a medical colleague) who reported to the maker of the record* as part of the usual business or professional routine of Massachusetts General Hospital." 679 F.2d 286, 289 (1st Cir. 1982) (emphasis added).

Petrocelli would be the clearest example of a "reliance" doctrine in medical records, but in the same paragraph, the court *excludes* this evidence because its source is unknown. *See id.* In 1987, in *Ricciardi v. Children's Hospital Medical Center*, the First Circuit came to the same conclusion for the same reason. 811 F.2d 18, 22 (1st Cir. 1987). Another case citing the same language likewise excluded the record at issue in that case because the medical record itself was not prepared in the regular course of business. *See* Berry v. Lewis Trucking & Grading, No. 1:06-CV-0041, 2007 WL 9701930, at *18 (N.D. Ga. Mar. 23, 2007). Accordingly, the clause in *Petrocelli* upon which *Smith* and *Rosario* rely is dicta, and they are the only courts who (implicitly) follow through on a reliance theory of Rule 803(6) in the medical records context. *See infra* notes 285–289 (providing a deeper discussion of *Petrocelli*).

[172] FED. R. EVID. 803(4)(A). As discussed in Part III, courts so hold, which is consistent with the common-law history of Rule 803(4), but in seeming contravention of its text. *See infra* notes 208–303 and accompanying text.

refuse to admit similar statements without even examining the third-party reliance question.[173] This seems particularly common when a medical record contains a statement with an unknown declarant. In such cases, courts focus almost exclusively on the declarant's anonymity, not on whether the medical professional relied on the statement.[174]

In sum, the business-reliance doctrine is unevenly applied to medical records. Rule 803(6), therefore, provides neither courts nor litigants with sufficient guidance to predict whether information in medical records provided by individuals other than the record's author or a party opponent will be admissible.

3. The Peculiar Possible Limitation of Medical-Record Declarants to Doctors and Nurses

Modern medical—especially hospital—practice is multifarious. Bringing food to hospital patients and cleaning floors is just as regular a hospital activity as a physical examination. Checking in patients is just as regular an activity for a doctor's office receptionist—and, thus, for the business as a whole—as a nurse checking blood pressure.

Some courts, however, purport to limit Rule 803(6)'s application in hospital settings in atextual ways, albeit, perhaps, without actually doing so. The

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[173] *See, e.g.*, Bradley v. Sugarbaker, 891 F.3d 29, 35 (1st Cir. 2018) (refusing to apply Rule 803(6)'s exception to a patient's statement within a hospital record); United States v. Mason, 294 F. App'x 193, 199 (6th Cir. 2008) (affirming the exclusion of two letters from doctors because they were prepared specially and not in the hospital's ordinary course of business); Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14, 16 (1st Cir. 1994) (declining to apply Rule 803(6) to the business records at issue because this exception "does not render admissible information contained in the records whose source is a non-party to the business"); Manocchio v. Moran, 919 F.2d 770, 777 (1st Cir. 1990) (suggesting that admission of entire coroner's report was (harmless) error because it contained statements from unknown sources); *Ricciardi*, 811 F.2d at 23 (finding a physician's entry inadmissible under Rule 803(6) because the information was from an undisclosed source); Mueller v. Dep't of Pub. Safety, 570 F. Supp. 3d 904, 909–10 (D. Haw. 2021) (refusing to admit medical records that included double hearsay); Francois v. Gen. Health Sys., 459 F. Supp. 3d 710, 724 (M.D. La. 2020) (stating that when a business record contains a hearsay statement by an "outsider" to the business, "the outsider statement must itself qualify for admission over a hearsay objection" without consideration of whether the hospital relied on said outsider's statement (quoting 30B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 6866 (2018))); Brown v. E. Me. Med. Ctr., No. 06-60-B-H, 2007 WL 2028983, at *8 (D. Me. May 9, 2007) (holding that a physician's letter is not admissible under Rule 803(6) because the doctor did not possess personal knowledge).

[174] *See, e.g.*, *Ricciardi*, 811 F.2d at 23 ("An unknown source is hardly trustworthy."); Cook v. Hoppin, 783 F.2d 684, 690 (7th Cir. 1986) (finding that it was an abuse of discretion to admit a statement by an unknown declarant); Meder v. Everest & Jennings, Inc., 637 F.2d 1182, 1187 (8th Cir. 1981) (excluding evidence where "[w]e do not know the source of the information, or when or under what circumstances it was obtained"). Courts may be somewhat more flexible when the statement in the record is allegedly made by a known declarant, but is recorded by an unknown practitioner. *See* Keyes v. Sessions, 282 F. Supp. 3d 858, 863–64 (M.D. Pa. 2017) (admitting an alleged statement by plaintiff that manifested suicidal ideation despite an unknown recording practitioner and plaintiff's contention that he never made the statement).

root of this issue appears in 1982, in *Petrocelli v. Gallison*, where the First Circuit provided an important exemplar of what has gone wrong in this area of law.[175] *Petrocelli* involved a patient who received a hernia operation at Tobey Hospital that went poorly, which, in turn, resulted in a second surgery months later at Massachusetts General Hospital (MGH).[176] At issue in the case was whether the Tobey Hospital surgeon had cut a nerve during that surgery; indeed, two records from MGH referred to a nerve being severed during the Tobey operation, but neither provided a source for that information.[177] The district court refused to admit those statements as business records of MGH, and the First Circuit affirmed, holding that only declarants "like nurses or doctors in the case of hospitals" qualify as individuals "who report to the recordkeeper as part of a regular business routine in which they are participants" for purposes of Rule 803(6).[178]

Petrocelli's articulated basis for this holding is a mess. The court attributes its conclusion that only nurses or doctors can create hospital business records to the Advisory Committee, but it does not provide any citation to the Advisory Committee Notes.[179] Nor do the Notes offer any apparent citation; instead the notes only say that "Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility."[180] *Petrocelli* also seems to ignore that the Notes discuss statements made to "hospital attendants."[181] Although the opinion cites Professor McCormick, the doctrinal statement includes nurses, which his example does not. Nor was *Petrocelli*'s doctrinal pronouncement even necessary to its analysis: its decision to affirm exclusion of the statement at issue was because the declarant was unknown, not because the declarant was in the wrong category.[182]

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[175] *See supra* note 171 (discussing *Petrocelli*).

[176] *Petrocelli*, 679 F.2d at 288.

[177] *Id.* at 288–89.

[178] *Id.* at 290.

[179] *See id.* (providing no citation to the Advisory Committee Notes for Rule 803(6)).

[180] FED. R. EVID. 803(6) advisory committee's note.

[181] *Id.* R. 803(4) advisory committee's note; *Petrocelli*, 679 F.2d at 290. Courts routinely follow this advice. *See, e.g.*, United States v. Woody, 336 F.R.D. 293, 348 (D.N.M. 2020) (citing FED. R. EVID. 803(4) advisory committee's note).

[182] There is some question regarding the degree to which the court in *Petrocelli* meant what it said. The facts there are very specific. *See generally Petrocelli*, 679 F.2d. 286. The case involved statements in reports by a second set of treating professionals about a nerve being severed during an earlier operation. *Id.* at 288–89. There, however, was no record in the first hospital's records of any severed nerve, raising the specter in the court's mind that these records were just recording statements by plaintiff, not diagnoses by a physician competent to determine that the nerve was severed. *Id.* at 290. If the court simply intended to hold that statements by a layperson were inadmissible to draw medical conclusions, that is relatively clear under Rule 702. Nonetheless, by framing its opinion in terms of Rule 803(6), *Petrocelli* effectively crafted Chekhov's gun, and as discussed below, other courts adopt its articulated rule without limitation to its specific context.

Despite these seemingly fatal flaws, *Petrocelli*'s reformulation of the Rule has been picked up by other courts, including the Seventh Circuit, which used it to deny business-record admission to statements in a medical record by an unknown source.[183] Other courts have disagreed, though.[184]

In sum, as with statements by third parties, Rule 803(6)'s application to medical records does not live up to its promise.

D. "Tell Me Where It Hurts" and Rule 803(3)

A medical record may contain many kinds of statements from individuals other than the record's author, all of which present double-hearsay concerns. Among the most common are statements by the patient-declarant of a "then-existing . . . emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)," which are governed by Rule 803(3).[185] Because the context of these statements is medical, many of these statements are also statements for purpose of medical diagnosis or treatment. Accordingly, many common-law decisions treated these exceptions in the same category, and some courts today combine their analysis.[186] Following the passage of the Federal Rules of Evidence, though, some courts treat the Rule 803(3) and 803(4)

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[183] Cook v. Hoppin, 783 F.2d 684, 690 (7th Cir. 1986). The court then denied admission of the same statements under Rule 803(4). *Id.*; *see also* Pieters v. B-Right Trucking, Inc., 669 F. Supp. 1463, 1465 (N.D. Ind. 1987) (citing *Cook*, 783 F.2d at 689).

[184] *See, e.g.*, Foskey v. United States, 490 F. Supp. 1047, 1063 (D.R.I. 1979) (admitting a treatment plan compiled by a team of professionals); Allen v. Fletcher, No. 3:07-cv-722, 2009 WL 3103828, at *3 n.3 (M.D. Pa. Sept. 24, 2009) (admitting evidence within a medical record that came from someone on an ambulance crew even though the exact person was unknown). Many courts, however, refuse to admit information in a medical record when the specific source is unclear. *See, e.g.*, Ricciardi v. Childs. Hosp. Med. Ctr., 811 F.2d 18, 23 (1st Cir. 1987) (affirming the inadmissibility of business records where the source of the information was unknown); Pope v. Las Vegas Metro. Police Dep't, 647 F. App'x 817, 819 (9th Cir. 2016) (same); *Cook*, 783 F.2d at 690 (same); Meder v. Everest & Jennings, Inc., 637 F.2d 1182, 1187 (8th Cir. 1981) (same).

[185] FED. R. EVID. 803(3). Rule 803(3), its close cousins Rules 803(1) (the present sense impression exception) and 803(2) (the excited utterance exception), and the assumption of reliability that undergirds them have been the subject of particularly intense judicial and academic criticism. Specifically, the Seventh Circuit opinions drafted by Judges Posner and Williams, in 2014, in *United States v. Boyce* triggered much of the criticism. 742 F.3d 792, 792–99 (7th Cir. 2014); *id.* at 799–802 (Posner, J., concurring); *see* Timothy T. Lau, *Reliability of Present Sense Impression Hearsay Evidence*, 52 GONZ. L. REV. 175, 205 (2016–2017) (discussing the reliability of statements under the present sense impression exception to the hearsay rules); Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111, 114 (2017) (proposing abrogation of the excited-utterance exception); Alan G. Williams, *Abolishing the Excited Utterance Exception to the Rule Against Hearsay*, 63 KAN. L. REV. 717, 758–59 (2015) (proposing a rule that requires corroboration of excited utterances, as well as declarant unavailability). *See generally* Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 333–34 (2012) (arguing that courts and legislatures should amend the current rules regarding present sense impressions to reflect modern developments).

[186] Harold, *supra* note 1, at 283–84.

analyses distinctly. We, therefore, examine these statements briefly, even if this analysis often conflates.

Statements about a patient's level of discomfort or pain can be relevant to diagnosis or treatment by a medical provider. For litigation purposes, however, they are central to determining damages. At the same time, there is no objective, reliably tested measure of pain,[187] and patient-plaintiffs testifying at trial have a strong incentive to overstate the degree of pain they were in to maximize non-economic damages (commonly and aptly called damages for "pain and suffering"). As a result, contemporaneous statements of pain or discomfort by the patient-plaintiff found in medical records assume outsized importance.

When these statements are unhelpful to the declarant, such as when defense counsel uses them to show that the plaintiff reported his own pain as not that bad, they are usually admissible under Rule 801(d)(2) as opposing-party statements.[188] The important question arises when a declarant wants to use expressions of her own pain or suffering to buttress a later claim. Courts have been strangely permissive of this approach, giving greater weight to statements of feeling or pain to a physician. Courts, nonetheless, conclude that even if such statements are "made to any other person, they are not, on that account, rejected."[189] Remarkably, few courts have wrestled with the obvious incentives for malingering with respect to these statements.[190] Even more remarkably, the declarant's availability is not a factor. Rule 803(3) allows admission of this

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[187] *See* Agnes K. Pace et al., *An Objective Pain Score for Chronic Pain Clinic Patients*, PAIN RSCH. & MGMT, Feb. 2021, at 1, 3 (describing scales ranging from subjective assessment made objective by circling numbers to scales relying on subjective components and objective observation); Kirsten Weir, *Researchers Are Closing in on Objective Ways to Measure Pain*, AM. PSYCH. ASS'N, Nov. 2017, at 22, 22 (describing early phase grants in support of possible future objective measures of pain).

[188] *See, e.g.*, Lee v. State Farm Mut. Auto. Ins. Co., No. 2:18-cv-479, 2020 WL 1486842, at *2 (M.D. Ala. Feb. 25, 2020) (declining to reach the question of whether statements were admissible under another exception because they were not hearsay when offered against the declarant).

[189] *See* N. Pac. R.R. Co. v. Urlin, 158 U.S. 271, 275 (1895) (admitting a statement to a physician); *see also* Mabry v. Travelers Ins. Co., 193 F.2d 497, 498 (5th Cir. 1952) (admitting a statement to a husband). Courts consider present-sense impressions a part of the broader category of *res gestae*. *See* Wabisky v. D.C. Transit Sys., Inc., 309 F.2d 317, 318 (D.C. Cir. 1962) (stating that "[t]here are at least four distinct exceptions to the hearsay rule encompassed by the term res gestae: (1) declarations of present bodily condition; (2) declarations of present mental state and emotion; (3) excited utterances; [and] (4) declarations of the present sense impression"). Even after the advent of the Rules of Evidence, this tradition dies hard. Modern courts often determine evidence is admissible under both Rules 803(3) and 803(4) with limited separate analysis. *See, e.g.*, Adams v. United States, 964 F. Supp. 511, 518 n.13 (D. Mass. 1996) ("Dr. Kim's notes reflect plaintiff's state of mind and then existing physical condition. Dr. Kim's medical history reflects statements made by plaintiff for purposes of receiving medical treatment. As such, they are not hearsay."); Graham v. Sheriff of Logan Cnty., No. CIV-10-1048, 2012 WL 9509373, at *6 (W.D. Okla. Nov. 1, 2012) (stating that assertions made by plaintiff to doctors with the intent to receive medical care and assertions made by plaintiff regarding her internal and external condition would satisfy Rules 803(3) and 803(4)), *aff'd*, 741 F.3d 1118 (10th Cir. 2013).

[190] *See supra* notes 71–91 (discussing malingering and courts' treatment of patient statements to others under Rule 803(4)).

hearsay in medical records or through witnesses even when the individual is present and testifying and without meeting any of the limitations Rule 801(d)(1) imposes on prior consistent statements.[191] Indeed, some courts are even more liberal with Rule 803(3), admitting statements by physicians to patients to show the effect of those statements on the patient's state of mind.[192] Others appear more skeptical.[193]

Two limitations are common. First, courts typically limit Rule 803(3) evidence to the *feeling* at issue, not its *cause*.[194] Second, courts will often apply

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[191] Oberman v. Dun & Bradstreet, Inc., 507 F.2d 349, 351 (7th Cir. 1974); United States v. Soghanalian, 777 F. Supp. 17, 19 (S.D. Fla. 1991).

[192] *See* Strom v. Nat'l Enter. Sys., Inc., No. 09-CV-0072A, 2011 WL 1233118, at *6 (W.D.N.Y. Mar. 30, 2011) (admitting statement that "Dr. Mechtler had told me on multiple occasions to avoid mental stress, that mental stress can cause seizures" to show its effect on plaintiff's state of mind); Walker v. Kubicz, 996 F. Supp. 336, 340 (S.D.N.Y. 1998) (holding that although the prison physician's statement of the nephrologist's opinion was inadmissible to prove the truth of the matter asserted, it was admissible to prove the prison physician's state of mind regarding the proper treatment for the inmate plaintiff). Notably, in so holding, *Walker v. Kubicz* provides another example of courts agreeing that physicians may rely upon one another's judgment.

[193] Parties who try to prove the existence of their injuries by admitting medical records purportedly showing the *physician's* state of mind as to their condition have had little success. *See, e.g.*, United States v. Mason, 294 F. App'x 193, 199 (6th Cir. 2008) (noting that "[b]ecause the letters and report [from defendant's physician] were offered as evidence of [the defendant's] state of mind and emotional condition, [and] not that of the declarant . . . Rule 803(3) does not apply"); Calhoun v. Walmart Stores E., LP, 818 F. App'x 899, 904 (11th Cir. 2020) (stating that "Dr. Vicks is the declarant in the statements at issue, and [that] her state of mind was not relevant at trial"); Berry v. Lewis Trucking & Grading, No. 1:06-CV-0041, 2007 WL 9701930, at *17 (N.D. Ga. Mar. 23, 2007) (stating that "[s]ince Dr. Dawson is the declarant in these forms, Rule 803(3) is of no help to prove *Plaintiff's* state of mind" (emphasis added)). A contrary holding would open the door to admission of every physician's mental impression under a Rule conceived for an entirely different purpose.

[194] *See, e.g.*, Ball v. Book, No. 1:19-CV-01283, 2022 WL 509389, at *5 (W.D. La. Feb. 18, 2022) (admitting, under Rule 803(3), plaintiff's statements to a relative that he almost had an asthma attack, needed to go to the hospital, and did not feel well, but excluding his statements about the infrequency of medical attention he had received and his difficulty getting medication); *see also* United States v. Samaniego, 345 F.3d 1280, 1282 (11th Cir. 2003) (identifying "I'm scared" as an admissible statement and "I'm scared because [someone] threatened me" as an inadmissible statement under Rule 803(3) (alteration in original) (quoting United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980))); Rodgers v. Gusman, No. 16-16303, 2019 WL 3333106, at *7 (E.D. La. July 24, 2019) (citing *Cohen*, 631 F.2d at 1225) (stating that Rule 803(3) does not exclude a declarant's statements regarding what caused or led them to develop certain emotions).

A less clear example was provided by the Fifth Circuit, in 2012, in *Bedingfield ex rel. Bedingfield v. Deen*, wherein the court affirmed the exclusion of an individual's statement that intimidation by a warden prevented him from reporting medical problems and seeking treatment. 487 F. App'x 219, 228 (5th Cir. 2012). Specifically, the court found that "the statements do not simply demonstrate [the individual's] state of mind, but indicate *why* [the individual] held his particular state of mind." *Id.* The statement, however, does both: it shows that the declarant was intimidated, an admissible state of mind, and it identifies the basis or cause of that intimidation, which is inadmissible. The court's introduction of a "simply" test—meaning that a statement must only do the one thing to be admissible—is inconsistent with the Rule and prevailing jurisprudence. *See id.*

time limits to these statements to avoid giving the declarant time to formulate a plan to deceive.[195]

Thus, Rule 803(3) provides a broad exception widely applicable in numerous contexts to render otherwise-inadmissible prior consistent statements admissible notwithstanding the obvious incentives for—and documented rate of—malingering and exaggeration.

E. Medical Records and Excitation

Patients who suffer traumatic injuries are often in considerable distress, so medical records often contain excited utterances. Unlike the present-sense-impression exception, the excited-utterance exception only requires a state of continuing excitation, and courts routinely admit hearsay statements in medical records from well after the events if there is evidence the excitation continued.[196] Other courts are less flexible in their interpretations.[197]

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[195] This doctrinal limitation was explained in the context of statements of intent in 2019, by the U.S. District Court for the District of New Mexico in *Pueblo of Jemez v. United States*:

> This requirement is not to say that the statement must be said at the very moment of the incident, but for intent to be proved, it must be "contemporaneous" to the act. To be contemporaneous and therefore admissible under the present state-of-mind exception, a statement must be "part of a continuous mental process." In addition to the requirements that the statement be contemporaneous to the incident at hand and relevant to the case's issues, it must also be established that there was no opportunity for the declarant to "fabricate or to misrepresent his thoughts."

430 F. Supp. 3d 943, 1165–66 (D.N.M. 2019) (citations omitted) (first quoting Mut. Life Ins. Co. of N.Y. v. Hillmon, 145 U.S. 285, 295 (1892); then quoting United States v. Cardascia, 951 F.2d 474, 488 (2d Cir. 1991); and then quoting United States v. Jackson, 780 F.2d 1305, 1315 (7th Cir. 1986)), *amended by* 483 F. Supp. 3d 1024 (D.N.M. 2020); s*ee also* United States v. Allen, 416 F. App'x 875, 883 (11th Cir. 2011) (noting that although the declarant's assertion describes his existing state of mind and intentions, the declarant said it after the event and, thus, that it does not satisfy Rule 803(3)); 2 MOSTELLER ET AL., *supra* note 156, § 273 (stating that courts will exclude statements that are deficient of spontaneity). One may question how much this spontaneity requirement actually ensures reliability; a malingerer can plan to "spontaneously" declare "present" pain at any time.

[196] FED. R. EVID. 803(2) (excluding from the hearsay rule "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused"); *see, e.g.*, United States v. Earth, 984 F.3d 1289, 1297 (8th Cir. 2021) (affirming the admission of statements made "soon after" the victim had been stabbed four times, but before he received medical treatment); Swift Transp. Co. of Ariz. v. Angulo, 716 F.3d 1127, 1136 (8th Cir. 2013) (admitting an accident victim's statement at the hospital fifteen minutes after the accident as an excited utterance); United States v. Alexander, 331 F.3d 116, 124 (D.C. Cir. 2003) (admitting a 911 call describing a threat fifteen to twenty minutes after said threat even though the victim had phoned her mother beforehand and, thus, may have had time to reflect); United States v. Joy, 192 F.3d 761, 766–67 (7th Cir. 1999) (affirming a lower court's admission of a statement as an excited utterance despite that "several minutes" separated the event and statement); United States v. Sowa, 34 F.3d 447, 452–53 (7th Cir. 1994) (admitting a three-year-old child's statement as an excited utterance notwithstanding that it took place twenty minutes after she witnessed the vicious assault); Bennett v. Nat'l Transp. Safety Bd., 66 F.3d 1130, 1137–38 (10th Cir. 1995) (admitting a pilot's statement describing a near miss that was made ten minutes after the incident); United States v. Moore, 791 F.2d 566, 572 n.4 (7th

Medical records often contain evidence of traumatic precipitating events, including the sexual assault of children. One early fountainhead of these cases was the Tenth Circuit's 1993 decision in *United States v. Farley*, the tragic facts of which made for a *de facto* exception to the normal rules of contemporaneity and excitation. Farley molested a five-year-old girl.[198] Although hours passed before the girl revealed the assault to her mother and the most significant revelatory statements seemingly occurred almost a full twenty-four hours later, the court admitted the victim's statements as excited utterances.[199] Other courts have followed this flexible standard in similar cases.[200] Even this jurisprudence, however, is not uniform. In 2019, in *Zalewski v. City of New York*, the U.S. District Court for the Eastern District of New York refused to admit statements made between seven and twenty-five hours after an alleged assault

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Cir. 1986) (explaining that the present-sense impression exception requires a statement be contemporaneous with the event eliciting it , whereas the excited utterance exception only requires that a statement be contemporaneous with any excitement stemming from the event); Miller v. Keating, 754 F.2d 507, 512 (3d Cir. 1985) (noting that a statement made ten to fifteen minutes after an accident may qualify as an excited utterance under Rule 803(2)); United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979) (admitting under Rule 803(2) a statement made by a three-year-old describing an assault after he was brought home from where the defendant babysat him because he was still "suffering distress"); Government of the Virgin Islands v. Dyches, 507 F.2d 106, 107–09 (3d Cir. 1975) (admitting a statement that occurred "at some point during the hour or so after the beating").

[197] *See, e.g.*, Francois v. Gen. Health Sys., 437 F. Supp. 3d 530, 537 (M.D. La. 2020) (noting that a statement dictated by a nurse three hours after the precipitating event did not generate significant emotional excitement); Neebe v. Ravin Crossbows, LLC, 532 F. Supp. 3d 253, 257 (E.D. Pa. 2021) (refusing to admit statements made by a plaintiff ten to twenty minutes after he shot himself with a crossbow and finding that his pursuit of medical care at that point showed deliberation); Guest v. Oak Leaf Outdoors, Inc., No. 10-5288, 2012 WL 1521925, at *3–4 (E.D. Pa. Apr. 30, 2012) (finding that statements made six minutes after an incident showed insufficient immediacy and excitement).

[198] 992 F.2d 1122, 1122 (10th Cir. 1993).

[199] *Id.* at 1126.

[200] *See* United States v. Smith, 606 F.3d 1270, 1280 (10th Cir. 2010) (recognizing that a statement made during the approximately two hours between an assault and report satisfied Rule 803(2)); United States v. Hefferon, 314 F.3d 211, 223 (5th Cir. 2002) (admitting a statement made within less than an hour of an event under Rule 803(2)); United States v. Iron Shell, 633 F.2d 77, 85–86 (8th Cir. 1980) (finding that a nine-year-old's statements elicited by police between forty-five minutes and one hour and fifteen minutes after an assault fell within the excited utterance exception); *Nick*, 604 F.2d at 1202 (concluding that a three-year-old's statements within hours of molestation were admissible); United States v. Cruz, 156 F.3d 22, 30 (1st Cir. 1998) (affirming the admission of an assertion despite a four-hour delay between the underlying assault and report); *cf.* Meade v. Smith, No. 13-CV-13903, 2015 WL 1489963, at *8 (E.D. Mich. Mar. 31, 2015) (finding that the Confrontation Clause was not violated by admitting statements made by young teenage victim the next day as excited utterances because the defendant had an opportunity to cross-examine her at an earlier proceeding). At least one court noted academic criticism of earlier rulings that placed a greater emphasis on spontaneity in the context of child sex abuse cases. *See* Morgan v. Foretich, 846 F.2d 941, 947 (4th Cir. 1988) (citing Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1756 (1983) (discussing the use of the excited utterance hearsay exception in child abuse cases)).

despite noting that other courts had admitted statements made four, five, and six hours after an incident.[201]

Thus, although statements that could be excited utterances often appear in medical records, the likelihood of their admission appears to turn on the specific facts of a case, the judge's subjective view of the precipitating event, and the declarant's actions.[202]

F. The Residual Exception and Medical Records

For years, courts have considered admission of medical records under the residual exception to the hearsay rule, which was originally provided for in Rules 803(24) and 804(b)(5), but now exists within Rule 807.[203] Earlier iterations of this Rule required any evidence admitted under it to have "equivalent circumstantial guarantees of trustworthiness" as evidence admissible under other hearsay exceptions.[204] This standard made courts hesitant to admit medical records not otherwise admissible,[205] as did the Senate Judiciary Committee's notes to the exception, which emphasized that it was only to be used in "exceptional circumstances."[206] The 2019 Amendment to Rule 807 does away with the "equivalent circumstantial guarantee" standard, however, returning the court's

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[201] No. 1:13-CV-7015, 2019 WL 8324447, at *3 (E.D.N.Y. Dec. 18, 2019) (first citing White v. Illinois, 502 U.S. 346, 349–50 (1992); and then citing United States v. Scarpa, 913 F.3d 993, 1016–17 (2d Cir. 1990)).

[202] As with statements regarding a then-existing mental or physical condition, courts sometimes combine the excited-utterance and medical-records analyses. *See, e.g.*, Blowers v. Scutt, No. 2:12-CV-11015, 2014 WL 408996, at *6 (E.D. Mich. Feb. 3, 2014) (noting that the statements at issue were neither admissible under Rule 803(2) nor Rule 803(4)).

[203] FED. R. EVID. 807 (2018) (repealed 2019); *id.* R. 807 advisory committee's note; *see also* FED. R. EVID. 807 (2019) (providing a catchall hearsay exception for certain statements that are not excepted by Rules 803 or 804).

[204] *See* Capra, *supra* note 12, at 1582–84 (describing the Federal Rules' "'equivalence' standard").

[205] *See* Walker v. Spina, No. CIV 17-0991, 2019 WL 418420, at *4 (D.N.M. Feb. 1, 2019) (declining to admit a medical record under Rule 807 because it lacked "circumstantial guarantees of trustworthiness" on account of numerous additions and changes (quoting FED. R. EVID. 807 (2018) (repealed 2019))); Green v. Schroeder, No. 12-cv-761, 2016 WL 4625495, at *3 (W.D. Wis. Sept. 5, 2016) (admitting a medical record into evidence under Rule 807, but ordering the redaction of a diagnosis made by unknown physicians within it); Matewski v. Orkin Exterminating Co., No. 02-233, 2003 WL 21516577, at *7 n.26 (D. Me. July 1, 2003) (finding a medical record inadmissible under Rule 807 because it lacks "circumstantial guarantees of trustworthiness"), *aff'd in part*, No. 02-233, 2003 WL 22056378 (D. Me. Sept. 3, 2003); *see also* Capowski, *supra* note 62, at 380–81 (discussing the admissibility of statements made for the purposes of medical treatment and diagnosis under Rule 807).

[206] S. REP. 93-1277, at 19 (1974); *see also* Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79, 112 (3d Cir. 2001) (noting that Rule 807 is rarely invoked and only applied in exceptional instances); United States v. Bailey, 581 F.2d 341, 347 (3d Cir. 1978) (stating that Rule 807 "appl[ies] only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present"). Before Rule 807's recent amendment, many thought that courts set this bar too high. *See* Capra, *supra* note 12, at 1603–04 (detailing how courts tended to exclude rather than admit evidence under Rule 807 due to extremely high standards).

focus to whether statements have "sufficient guarantees of trustworthiness" rather than how closely they resemble statements admissible under some other exception.[207] Although this informs our analysis in Part III, jurisprudence has not yet developed applying the amended version of Rule 807 to medical records.

III. Toward a Presumption of Reliability for Medical Records

The current jurisprudence governing admission of medical records is fragmented, idiosyncratic, and self-contradictory in principle, even if it has by and large functioned over time.[208] A better practice would flow from the core principles that the Rules of Evidence articulate. With respect to hearsay, one could say either that Rule 807 provides the rule of decision, and each exception or exclusion is a specific context of its application, or that Rule 807 derives the general principles from the other 800-series rules. Either way, a statement will not be inadmissible hearsay if there are "sufficient guarantees of trustworthiness" under "the totality of circumstances."[209] Spontaneity, regularity, third-party reliance, or self-interest are said to guaranty this trustworthiness. Likewise, Rule 807(b)'s notice requirement impliedly and Rule 803(6)(E) expressly provide for objection to be made to particular records that are not as reliable as they first appear.[210]

This sensible approach—admit categories of particularly reliable out-of-court statements subject to particularized objection—has too often been abandoned or downplayed in the context of medical records, crowded out by a race to quote outdated Advisory Committee Notes or to unquestioningly follow

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[207] Fed. R. Evid. 807 advisory committee's note to 2019 amendment.

[208] The consistency of Rule 803(4)'s present interpretation with its common-law roots recalls the Supreme Court's famous declaration with respect to character evidence:

> [M]uch of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court.

Michelson v. United States, 335 U.S. 469, 486 (1948). The Supreme Court then warned that "[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." *Id.* We do not believe that concern is salient here, particularly because—at least some of the time—Rule 803(6) is already largely employed as we suggest. We propose not to remove a "stone," but to put a "stone" in the part of the wall where it best fits.

[209] Fed. R. Evid. 807(a)(1).

[210] In Rule 807, this secondary analysis is subsumed into the "totality of circumstances" consideration of reliability, but Rule 803(6)(E) expressly flips the burden of persuasion on this point to the opponent of the document, who must show that the information source or preparation method demonstrates some "*lack* of trustworthiness." Fed. R. Evid. 803(6)(E) (emphasis added); *id.* R. 807(a)(1).

half-century old common law.[211] The results are perverse: self-serving statements by future plaintiffs to their own testifying experts are admitted, while statements by medical care providers to one another are deemed insufficiently reliable to admit.

In this Part, we propose returning the law of medical records to these first principles by establishing a presumption of reliability.[212] Courts, using Rule 803(4), ought generally to admit records of medical treatment relied upon by medical practitioners regardless of their source (or whether that source is identifiable), and ought to exclude statements made for litigation purposes. This represents a considerable departure from current practice, where instead of simply stating their view that particular records are problematic or likely to confuse, judges have tried to pack their concerns into a hearsay analysis, where it ill fits. In so doing, they have braided a Gordian knot of one-off, common-law doctrines and pronouncements that may not mean what they say. A rebuttable presumption of admissibility cuts that knot, freeing courts and counsel from these ill-considered bonds and returning these questions to the rule and logical framework where they belong.

Section A of this Part describes the reasons why courts should accept as reliable assertions by patients or others who seek to aid in that patient's treatment or diagnosis.[213] Section B then argues that the admissibility of assertions should extend to those communications between medical professionals for the same purpose.[214] Section C contends that this rule should also encompass another group of assertions: those made by medical practitioners to their patients if these statements are within the required medical documents.[215] Section D describes a limitation on our proposal, urging the return to the common-law

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[211] Medical records are not alone in this. As noted *supra* at note 15, Professor Richter has proposed an 803(6)(E)-style rule for all of the Rule 803 exceptions. Although we support this approach, her proposal seems particularly well-suited for medical records.

[212] On its face, our proposal seems to suggest creating an unnecessary "[l]aw of the [h]orse" specific to medical records. *Cf.* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207–08, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1204&context=uclf [https://perma.cc/MVU6-NFYF] (describing a "[l]aw of the [h]orse" as an area of study where it is impossible to identify every important principle because it is actually a subject matter that lacks a unique doctrine that is distinct from traditional legal principles of contract, tort, etc., and where the in-depth study of those principles is better than a dilettantish, surface-level study of their legal principles as manifested in cases regarding a particular subject matter). We disagree with this characterization, if only because it is the Rules of Evidence that created the lawmaking statements for purposes of medical treatment or diagnosis a distinct hearsay exception, not us. FED. R. EVID. 803(4). As discussed *supra* at notes 33–207, we do not opine on whether categorical hearsay exceptions generally are justified. Likewise, we do not opine on whether a special category for statements in the medical context is justified. So long as Rule 803(4) exists, however, we favor a simple, consistent jurisprudence for it, equine or otherwise.

[213] *See infra* notes 221–229 and accompanying text.

[214] *See infra* notes 230–236 and accompanying text.

[215] *See infra* notes 237–241 and accompanying text.

standard in which courts do not admit assertions to an expert or those made for purposes of litigation.[216]

Next, Section E further proposes removing the difference in treatment between assertions in these records by medical professionals and other pertinent declarants, such as custodial staff and social workers, to the extent courts even meant to create this difference as they have.[217] Section F explains our argument, grounded in key principles of Rule 801(d)(2)(B), to admit statements in medical records that are from unknown sources.[218] Section G then clarifies our overarching argument: that all medical records are admissible unless they are shown to lack elements of reliability.[219] Specifically, where necessary, cross-examination and limiting instructions—rather than gatekeeping exclusion—should provide corrective mechanisms for particular statements, with Rule 403 continuing to serve as it does elsewhere in the Rules to limit the admission of egregiously flawed documents. Finally, Section H explains how we only seek to alter the interpretation of Rule 803(4) and highlights our underlying motivations for our aforementioned proposals.[220]

A. Statements by Treating Medical Professionals That Relay Statements of Patients Should Be Presumed Reliable

We start with the proposition that statements by patients or others seeking to foster diagnosis or treatment that are contained in medical records should be presumed reliable. This ought to be uncontroversial. Although the medical records are themselves out-of-court statements by the recording professionals, there is no reason to think these professionals misrepresent what they are told.

Indeed, there is reason to believe that statement versions contained in medical records are more reliable than statement versions provided by witness testimony. First, statements within medical records are contemporaneously recorded, so they are untainted by litigants' conscious or unconscious biases. Second, the statements in these records are intended to be relied on. Medical records are not a *verbatim* recitation or a stream of consciousness. They are, rather, summaries of those items that the recording practitioner, based on their training, skill, and experience, determined might matter to their decision-making or to that of other practitioners reviewing the chart. Therefore, each statement represents the kind of information that a reasonable practitioner could rely on or that a reasonable practitioner might wish to consider.[221]

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[216] *See infra* notes 242–254 and accompanying text.

[217] *See infra* notes 255–264 and accompanying text.

[218] *See infra* notes 265–271 and accompanying text.

[219] *See infra* notes 272–289 and accompanying text.

[220] *See infra* notes 290–303 and accompanying text.

[221] Of course, medical practitioners do not take every word in a record as gospel truth. No reasonable physician would take a patient's report that a collision occurred at thirty-five miles per hour to

In other words, the information in medical records is there because it is considered reliable enough to be a part of the constellation of data considered in diagnosing and treating a patient. Fabulous or incredible versions of events generally do not make it into the record, except perhaps as evidence of intoxication or psychiatric disturbance.

Of course, when the declarant is unknown, courts are rightly more hesitant to admit a statement. Nevertheless, carefully drawn studies have shown that jurors are "attuned to a hearsay declarant's potential motive to lie about an event, misperception of that event, faulty memory for that event, and inability to accurately express herself regarding the event."[222] Critically, these studies also show that jurors know how to sort the wheat from the chaff: "Each of these infirmities resulted in a discounting of the hearsay evidence, which was magnified when multiple levels of hearsay were present."[223] The findings of these studies echo others and demonstrate that mock jurors are responsive to hearsay declarants' conscious restrictions, inclinations toward dishonesty, and limitations in adequately corresponding.[224]

These findings should not be surprising—most of us learn in middle school that not every rumor or third-hand comment is true, and we live our lives thereafter accordingly.

If jurors, however, demonstrably exercise their common sense in weighing hearsay evidence already, perhaps it is time for courts to abandon the paternalistic perception that jurors need to be protected from hearsay.[225] Medical records, in particular, enhance jurors' ability to assess credibility. For example, there are often no records of excited utterances or present-sense impressions unless someone made those statements during a 911 call or through electronic

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define a precise impact velocity. A physician, however, could conclude that the crash was neither at low speed nor highway speed, and, as a result, might order testing that would be more appropriate for a higher-speed crash than for a fender-bender, such as tests for internal bleeding or a concussion. Thus, even perceptions that are typically inadmissible in court, like a layperson's estimate of speed, may reasonably be relied upon in a provider's diagnosis and treatment. *See* Kay v. Lamar Advert. of S.D., Inc., No. 07-5091, 2009 WL 2731054, at *3 (D.S.D. Aug. 21, 2009) (excluding a patient's statement regarding speed at the time of the collision as too speculative).

[222] Sevier, *supra* note 1, at 271–72 (discussing research outlined in Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 685 (1992)); *see also* Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 931 (2015) (providing a more detailed summary of research from Miene et al., *supra*).

[223] Sevier, *supra* note 1, at 271–72.

[224] *Id.*

[225] *See generally* Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 12 (2013) (arguing against the "much-criticized overbreadth" of the American hearsay prohibition); Nunn, *supra* note 41, at 965 (encouraging judges to "complement [their] reliance on the Federal Rules of Evidence with an equally forceful appreciation for modern scientific and cultural realities"); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1363 (1987) (arguing that the general knowledge of jurors surpasses the categorical generalizations made by those who created the Rules of Evidence).

messaging.[226] With medical records, the opposite is true. It is very rare for a practitioner to make a statement pertinent to diagnosis or treatment that is not recorded anywhere.[227] Accordingly, a jury considering the credibility of a witness's claim that a doctor said something that appears nowhere in that doctor's records provides a firmer foundation from which to assess the possibility that the witness has it wrong.[228]

In short, when a trained practitioner includes a statement in a medical record, the Rule 104[229] gatekeeping function of determining reliability has already mostly been accomplished.

B. Statements by Treating Medical Professionals for Purposes of Medical Diagnosis or Treatment Should Be Presumed Reliable

Because treating providers communicate with one another in medical records, they are intended to be reliable in principle and relied upon in fact. Courts should admit these communications between professionals in furtherance of diagnosis or treatment without insisting on a business records foundation or struggling with whether each provider is part of the same corporate enterprise.

In other contexts, this reliance matters. It can transform one business's records into another's or even provide for admission of double hearsay.[230] We

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[226] *See generally* Bellin, *supra* note 225, at 8 (giving examples of tweets or texts sent by individuals immediately after they were injured or feared death that could qualify as excited utterances or present-sense impressions under current law).

[227] *See* Peter G. Teichman, *Documentation Tips for Reducing Malpractice Risk*, FAM. PRAC. MGMT., Mar. 2000, at 29, 29–33, https://www.aafp.org/pubs/fpm/issues/2000/0300/p29.html [https://perma.cc/XG3E-UREJ] (noting that charting conversations with patients has become an important part of defensive medical training against malpractice actions); CRICO Staff, *Documentation Dos and Don'ts*, CRICO (Sept. 15, 2002), https://www.rmf.harvard.edu/Risk-Prevention-and-Education/Article-Detail-Page/Articles/2002/Documentation-Dos-and-Donts [https://perma.cc/TP5Z-JHBF] (discussing the importance of physicians documenting all information that assists them in the treatment and diagnosis of their patients).

[228] Only the business and public records exceptions expressly permit a court to exclude evidence that otherwise meets the required terms because it is missing some critical element, and only business and public records are thought reliable enough that their absence is itself admissible. *Cf.* FED. R. EVID. 803(6)(E), (7)(C), (8)(B). For all other exceptions the matter is left to the trier of fact unless the court slides its view on that question into some other portion of the analysis. We agree with Professors Sevier and Saltzburg that the same juries we trust with the ultimate issue can figure out who is telling the truth in such cases. *Cf.* Saltzburg, *supra* note 13, at 1489 (stating that "[t]he trier will know whether a patient saw a doctor for diagnosis and treatment . . . or whether the patient saw a doctor with litigation in mind"); Sevier, *supra* note 1, at 271–72 (noting that jurors may be able to detect infirmities in a hearsay declarant's assertions).

[229] FED. R. EVID. 104(a) (providing that "[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible").

[230] *See supra* notes 166–171 and accompanying text (discussing United States v. Smith, 318 F. App'x 780, 796 (11th Cir. 2009), Miller v. Schindler Elevator Corp., No. 09-849, 2013 WL 12147689, at *2 (D.N.J. Feb. 15, 2013), Rosario v. Valdes, No. 07-1508, 2009 WL 712354, at *2 (D.P.R. Mar. 12, 2009), and countervailing precedent).

agree in principle with these decisions, but we propose to skip the middleman with respect to medical records. That statements in medical records are relied on by other expert practitioners when diagnosing and treating patients means that they are, by definition, reasonably pertinent to that diagnosis or treatment. One need only take seriously the text of Rule 803(4) to admit them.

Likewise, the core principle of hearsay law supports admission of these statements. If expert practitioners rely on them in matters of great import, the totality of circumstances suggests they are trustworthy. Courts have already agreed with this logic, admitting statements by one practitioner to another under Rule 803(6).[231] Using Rule 803(6), however, to gap-fill creates risks not shared by our proposed, more intuitive use of Rule 803(4). A court following Rule 803(6) may refuse to admit communications between medical providers who are not part of the same business enterprise absent specific proof of reliance by one on the other, particularly if business custodians for each enterprise are not available or some other formality of Rule 803(6) proves difficult to meet. Such exclusion would not serve the court's truth-seeking function. A plain text reading of Rule 803(4), however, does not risk this counterproductive holding. Whether each record is a business record of each other business enterprise, these statements were all made for the purpose of diagnosis or treatment. We need not continue pounding a square peg into a round role when a round one is closer at hand.

A presumptive admission of such information is consistent with the reasoning underlying the other exceptions of Rule 803. As discussed, previously, a public servant's statements are presumed admissible because such a servant has a legal duty to be truthful.[232] But so, too, do medical practitioners. Statements by a public servant are also thought to be admissible because the public servant will be unlikely to remember the details of any particular transaction. This is also the case with medical practitioners.

Medical records, however, by their nature provide indicia of trustworthiness that idiosyncratic public records or excited utterances do not, because they provide an effective check on one another. For example, prescription errors have been a frequent subject of academic and popular attention,[233] but pre-

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[231] *See* Wilson v. Zapata Off-Shore Co., 939 F.2d 260, 271 (5th Cir. 1991) (noting that when "the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6)" (citing United States v. Baker, 693 F.2d 183, 188 (D.C. Cir. 1982))); Doali-Miller v. Super-Valu, Inc., 855 F. Supp. 2d 510, 523 (D. Md. 2012) (stating that courts typically presume the credibility and trustworthiness of the business records created by hospitals and other medical providers).

[232] *See supra* notes 108–110 and accompanying text (discussing the legal duty that requires medical practitioners to record information truthfully and accurately).

[233] *See, e.g.*, *Medication Errors and Adverse Drug Events*, PATIENT SAFETY NETWORK (Sept. 7, 2019), https://psnet.ahrq.gov/primer/medication-errors-and-adverse-drug-events [https://perma.cc/2V7V-HS88] (detailing the risk factors associated with and ways to prevent a patient's inadvertent use

scribing records can be obtained both from multiple physicians and from the pharmacies at which they are filled. A single mis-recorded prescription in a medical record is unlikely to throw either lawyers or factfinders for a loop when other records exist.[234] Indeed, that each practitioner keeps their own record makes the patient's medical records collectively more reliable than most other business records. It is unlikely private business records are mirrored wholesale in the records of multiple other businesses, but patients often have multiple doctors taking histories and making observations and diagnoses, sometimes utilizing the same or interlinked EHR systems.[235] This creates a robust data set readily checked and cross-checked through interrogatories, requests for admission, and depositions. Because this duplication and comparability reveals hidden errors for cross-examination, they should lead us to trust these records more.

In sum, the indicia of reliability and guarantees of trustworthiness surrounding statements by medical practitioners in medical records are adequate to assure reliability in most cases. If courts are willing to presume the admissibility of excited utterances, present-sense impressions, business records, and the statements of patients themselves, even knowing that some are almost certainly lies, they ought to be willing to extend the same privilege to statements by trained medical professionals with moral, ethical, and legal obligations (and incentives) to tell the truth.[236] Put simply, if trained experts rely on these

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of a prescription drug); Ann Cabri et al., *Pharmacist Intervention on Prescribing Errors: Use of a Standardized Approach in the Inpatient Setting*, 78 AM. J. HEALTH-SYS. PHARMACY 2151, 2155–56 (2021) (documenting prescribing errors that are corrected by pharmacists).

[234] This history is used by automated pharmacy systems to "flag" potentially mis-entered prescriptions. *See, e.g.*, Sabriya Rice, *Using Big Data to Prevent Drug Errors*, MOD. HEALTHCARE (July 11, 2015), https://www.modernhealthcare.com/article/20150711/MAGAZINE/307119976/using-big-data-to-prevent-drug-errors [https://perma.cc/85FK-G4RU] (discussing a software that helps detect prescription errors); BRIGHAM & WOMEN'S HOSP., HARVARD MED. SCH. & PARTNERS HEALTHCARE, COMPUTERIZED PRESCRIBER ORDER ENTRY MEDICATION SAFETY (CPOEMS): UNCOVERING AND LEARNING FROM ISSUES AND ERRORS 52 (2015), https://www.fda.gov/files/drugs/published/Computerized-Prescriber-Order-Entry-Medication-Safety.pdf [https://perma.cc/DYS8-GDBZ] (noting how the computerized prescriber order entry system can limit errors).

[235] *See* Saltzburg, *supra* note 13, at 1489–90 (noting that "[v]ery often, there will be medical records spanning large periods of time that can be compared to particular medical records that might be disputed"). This consistency can have a dark side when a flawed diagnosis or mis-entered symptom propagates an EHR, replicating itself automatically and becoming an albatross for patients to rebut at every visit, occasionally with tragic consequences. *See, e.g.*, Complaint at 7–8, Gonzalez v. United States, No. 2:16-cv-03657 (E.D. Pa. July 1, 2016) (describing how a misdiagnosis of HIV that was propagated through EHR caused plaintiff to distance himself from friends and family to protect them); Sue Bowman, *Impact of Electronic Health Record Systems on Information Integrity: Quality and Safety Implications*, PERSPS. HEALTH INFO. MGMT., Fall 2013, at 1, 2 (discussing computer errors that led to a delayed cancer diagnosis in one case and to the death of an infant from drug overdose in another).

[236] With respect to present-sense impressions, for example, Professor McCormick states that there are "almost certainly calculated misstatements," but that "a sufficiently large percentage are spontaneous [and, therefore, presumptively accurate enough] to justify this exception." 2 MOSTELLER ET AL., *supra* note 156, § 273, at 404. Whether McCormick is correct or not about the percentages necessary

statements in matters of life or death, they are at least reliable enough to be *considered* by a jury.

C. The Curious Case of (Alleged) Oral Statements by Medical Practitioners to Patients, as Testified to by Lay Witnesses

The question is closer with respect to the presumptive admission of statements by medical practitioners to patients, which a plain text reading of Rule 803(4) would admit. Courts and litigators have long recoiled from allowing patient-witnesses to tell the jury what their doctor said about medical matters, an anxiety presumptively founded in the patient's unreliability, not the practitioner's. Courts exclude these statements because of the substantial risk that the patient will mis-recollect, misunderstand, or prevaricate what the practitioner said.[237]

Here, the concern is mitigated significantly if the practitioner's statement is in the medical record. If so, all parties have equal access to it, and the risk of mis-recollection is substantially reduced. The record provides the best evidence of what a practitioner said, and a witness testifying to a different statement by a practitioner faces an appropriately high burden of persuasion.

The real risks lie with statements not found in medical records—those that exist only in the recollection of individual, lay witnesses. These risks are real, but they arise under Rules 803(4) and 803(6) less than one might think. First, in any case where the patient is simply echoing the medical record, the risks evaporate, leaving only the concern that the practitioner's conclusion was ill-conceived. While that risk is real, the testimony of other expert witnesses is sufficient to address it. Second, this concern only truly arises in cases where the practitioner cannot be called as a witness. These will be few: where the case turns on the exact words a practitioner used, the practitioner can almost always be called as a witness or subjected to a trial deposition, eliminating the concern that the witness is mis-recollecting or prevaricating by allowing the

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to justify a categorical exclusion, his logic applies to Rule 803 in its entirety. Some small number of statements by public servants, notes in family Bibles, or church records will turn out to be inaccurate. In an even more telling example, Rule 803(16) sweepingly excepts "[a]ncient documents." FED. R. EVID. 803(16). This exception exists even though no one actually believes that every word of every email, text message, or political campaign created between the republic's beginning and midnight on December 31, 1997 (Rule 803(16)'s deadline for "[a]ncient" status) to be true. *See id.* Even so, if created by the deadline these documents need only be authenticated to be admissible for the truth of the matter they assert. *Id.* Admitting a limited number of lies or misstatements in order to admit a significant number of accurate statements is the choice that every hearsay exception makes.

[237] Written records do not give rise to this concern; hence, courts are more greater willing to admit written records by physicians, albeit as business records.

jury to hear both versions of the conversation.[238] Third, in any case where the plaintiff is suing the practitioner, the applicable rule will be Rule 801(d)(2).

Even where the risk is fully realized, though, it is endemic—witness misrecollection, misunderstanding, or prevarication is a key reason that trials exist. A party could be lying about the terms of an alleged oral agreement, a cooperating witness could be inventing conversations with co-conspirators to reduce their own sentence, and a plaintiff willing to lie about the circumstances of an alleged tort can almost always survive summary judgment. This is a main reason juries exist; they are the system's lie detector.[239] There is little reason to believe that juries struggle more in discerning when witnesses are lying about what their doctors said or that they are less able to do so. Nor do courts claim they will. Courts, rather, pack into a categorical hearsay analysis their own views of witness reliability, transfiguring a matter arguably better considered by the trier of fact into a question of admissibility for the judge.

Even so, there would be cause for concern with the widespread admission of such statements in cases where the physician is not available. Allowing lay witnesses to testify to absent others' conclusions could create the perverse incentive not to call their practitioner because the witness's version is more favorable.[240] Allowing lay witnesses to testify willy-nilly to expert conclusions by an absent expert could upend both Rule 702 and Rule of Civil Procedure 26(a)(2)(c).[241] Perhaps Rule 803(4) should not apply to cases where the practitioner's testimony can be obtained.

Here again, a Rule 803(6)(E)-type standard would be helpful, as would developing a standard for early identification of the intention to raise such testimony, so that the opposing party had adequate opportunity to seek out the practitioner. Although the temptation to create a common-law exception for oral statements by practitioners that are absent from a medical record arguably serves reliability, it risks backsliding into the atextual complexity of the current

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[238] Courts could also require, as in Rule 807, that the hearsay evidence be more probative than other available information. *See* FED R. EVID. 807(a)(2) (stating that under this rule the evidence must "more probative on the point for which it is offered" than other evidence the proponent could reasonably obtain); *see also* Capra, *supra* note 12, at 1586–89 (characterizing the inclusion of the "'more probative' requirement" as a partial response to academics' calls for a "best evidence"-type rule for hearsay, but explicating its dangers). We agree, however, with Professor Capra that such requirements may lead to more mischief than they are worth because of the problematic examples that Professor Capra provides. *See* Capra, *supra* note 12, at 1586–89. Whatever the warts of the jury system, it is our system, and sorting through conflicting accounts is the jury's core function.

[239] *See* Fisher, *supra* note 43, at 577 (noting that jurors may serve as the best test for witnesses' credibility).

[240] Again, where the practitioner is available, the corrective mechanism already exists: the opposing party can depose or call as a trial witness that practitioner. At that point, the witness's testimony to a contrary version of events creates a typical credibility issue for the jury to determine.

[241] *See* FED. R. CIV. P. 26(a)(2)(C) (providing guidance regarding when a witness is not required to submit a written report to the court); FED. R. EVID. 702 (stating when a witness qualifies as an expert).

interpretive regime. Reasonable minds may differ on how to weigh these competing interests.

D. Statements to One's Own Retained Expert or for Purposes of Litigation Should Not Be Admissible

Even as we suggest the modest innovation of simply following the rule as written, we propose a common-sense return to the common-law ban on admission of statements to one's own expert. Unlike statements to or by a treating physician, statements to an expert retained for purposes of litigation have negligible indicia of trustworthiness because "[p]eople who visit medical personnel to recruit them as expert witnesses for litigation purposes have reason to exaggerate their conditions."[242] Courts universally view statements by individuals considering litigation with suspicion in the context of Rules 703 and 803(6)[243]—and they should here as well. Parties hire experts to write litigation reports and testify, not to dictate patient care.[244] Such reports are also always prepared after the precipitating event and often long after the actual treatment was provided, meaning they lack contemporaneity with respect to the incident, symptoms, and degree of recovery they describe. Under these circumstances, not only does the patient have no reason to be truthful with a litigation expert, they also have every reason not to be. By definition, such patients are already involved in litigation, and the possibility of secondary gain from litigation has a demonstrable corrupting influence.[245] Such statements are made "for" litigation, and not truly "for . . . medical diagnosis or treatment."[246]

Nor does the admission of such statements follow the other principles of hearsay. To the contrary, they fit neatly within a category—prior consistent statements—that courts reasonably exclude as unnecessary and prejudicial.[247]

The only apparent reason that courts admit a patients' prior consistent statements to litigation experts today is the Advisory Committee's 1972 belief that juries could not credibly be expected to handle evidence admitted for one

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[242] Saltzburg, *supra* note 13, at 1489.

[243] *See* Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200, 205 (4th Cir. 2000) (finding a clear lack of trustworthiness "when a report is prepared in the anticipation of litigation because the document is not for the systematic conduct and operations of the enterprise but for the primary purpose of litigating"); *see also supra* note 158 and accompanying text (citing several cases that rearticulate this principle).

[244] For our discussion regarding treating physicians who are called as experts, see *infra* notes 250–254 and accompanying text.

[245] *See supra* notes 74–80 and accompanying text (summarizing studies finding higher rates of malingering in patients who have are seeking some benefit from the legal system).

[246] FED. R. EVID. 803(4).

[247] *See supra* note 191 and accompanying text (discussing how Rule 803(4) permits the admission of assertions made by patients to physicians and memorialized in medical documents when patients testify regardless of whether those assertions meet the standards outlined in Rule 801(d)(1)).

purpose, but not another. Since 2000 at the latest, however, the Rules of Evidence have expressly concluded the opposite, and the 1972 Advisory Committee Note remains uncorrected only because either (a) the Advisory Committee thinks that the Note remains somehow consistent with the modern version of Rule 703, or (b) there has not been a textual amendment to Rule 803(4) to which the Advisory Committee could tie that correction.[248]

Today's Rules of Evidence accept that properly instructed jurors can differentiate between kinds and uses of evidence.[249] Assuming the opposite for Rule 803(4) alone makes no sense. Medical practitioners retained for purposes of litigation are no more or less credible than other retained experts, and courts should treat statements to them like statements to any other expert: admissible as a basis of the expert's opinion, but not as substantive evidence.

Admittedly, this return to common-law principles creates challenges in smaller-value matters. In these matters, the treating provider is often selected by personal injury counsel with an eye toward that provider later testifying as an expert. In some cases, this "treating" physician will only be paid from the proceeds of the suit,[250] and often both the selecting attorney and the physician understand that an important part of the physician's role is documenting billable events of care that will be used to establish damages. Abstract principles of trustworthiness or justice would counsel against admission of statements to or

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[248] *See supra* notes 94–95 and accompanying text (discussing the Advisory Committee's lack of substantive changes to Rule 803(4)).

[249] Rule 105 presumes that jurors can do so. FED. R. EVID. 105 (noting how the court must provide jury instructions regarding the admissibility of specific types of evidence). Some academics—and at least one prominent Justice of the Supreme Court—disagree. *See, e.g.*, Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (stating that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction" (citations omitted) (first citing Blumenthal v. United States, 332 U.S. 539, 559 (1947); and then citing Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54 (2d Cir. 1948))); *see also* United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (noting that "[t]o tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities"); Dora W. Klein, *"Obviate!": Addressing Magical Thinking About Limiting Instructions and Character Evidence*, 82 U. PITT. L. REV. 135, 172 (2020) (arguing that courts should amend their approach to jury limiting instructions for other-acts evidence due to its inherently prejudicial nature); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 879 (1982) (stating that the average human brain may find it difficult to understand the difference between appropriate and inappropriate use of evidence). For purposes of this Article, we accept the same conceptual priors that the Rules do.

[250] Because of the potential bias these relationships reveal to the jury if admitted, their discoverability has been the subject of intense litigation. *See* Worley v. Cent. Fla. Young Men's Christian Ass'n, 228 So. 3d 18, 23–25 (Fla. 2017) (stating the importance of protecting the referral relationship between a party's attorney and their treating doctor under the attorney-client privilege); Rodriguez v. GEICO Gen. Ins. Co., No. 6:19-cv-1862-Orl-40, 2020 WL 5983395, at *4 (M.D. Fla. Aug. 19, 2020) (noting that the details of a referral relationship are more generally privileged under *Worley*). *But see* Osgood v. Discount Auto Parts, LLC, No. 3:13-cv-1364-J-34, 2014 WL 4257864, at *2 (M.D. Fla. Aug. 27, 2014) (permitting an interrogatory).

by such individuals. If statements to every expert who was a treating physician were excluded, however, this could deny plaintiffs with smaller-value claims the ability to call experts at all. And holding that only *some* statements at *some* times in the course of treatment are admissible invites line-drawing exercises about exactly which provider is treating *enough* to be legitimate, or when *exactly* statements started to be for litigation.[251] These arguments consume litigants' resources and judicial time. Judicial efficiency counsels that courts admit the evidence and trust cross-examination and common sense to address the inherent bias, at least as a default.[252]

We emphasize that no amendment to Rule 803(4) is necessary to correct this error. As drafted, the Rule already requires that the statements admitted pursuant to it be "for . . . [purposes of] diagnosis or treatment."[253] We propose only that courts actually investigate the purpose of medical record statements, which they do already to determine whether business records are truly "regular." Demanding that statements admitted under Rule 803(4) actually be for purposes of diagnosis or treatment—not to bootstrap prior consistent statements into substantive admissibility—represents a substantial improvement in both evidentiary consistency and basic logic. The courts had it right for decades before 1972, and they have had it right in the context of Rule 703 since 2000.[254]

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[251] Some circuit courts already require a version of this analysis. *See, e.g.*, Goodman v. Staples the Off. Superstore, LLC, 644 F.3d 817, 826 (9th Cir. 2011) (requiring that even treating physicians prepare expert reports for any particular conclusion that was not reached in the course of providing treatment); Meyers v. Nat'l R.R. Passenger Corp. (Amtrak), 619 F.3d 729, 734–35 (7th Cir. 2010) (finding that a treating doctor who is used to "provide expert testimony as to the cause of the plaintiff's injury, but who did not make that determination in the course of providing treatment" is an expert who must submit a written report pursuant to Federal Rule of Civil Procedure 26(a)(2)); Vanderlaan v. Ameriprise Auto & Home Ins., No. 20-cv-00191, 2021 WL 4441518, at *2 (D. Colo. Sept. 28, 2021) (collecting cases). To the extent that such rules exist within a circuit, applying them to the Rule 803(4) analysis would be one approach. These distinctions, however, are not always easy to determine in practice, and they are unlikely to be any easier to apply under Rule 803(4) than they have proved in the context of Federal Rule of Civil Procedure 26. Accordingly, we articulate a simpler default rule.

[252] This concession has only a modest practical impact. Treating physicians (especially attorney-retained physicians) are typically only the sole expert witness in small-value cases. In the federal system, such cases are typically heard by arbitration panels. *See, e.g.*, E.D. PA. R. CIV. P. 53.2.3 (establishing mandatory arbitration for claims valued at under $150,000); D.N.J. R. CIV. P. 201.1(d) (same). Such panels are staffed by counsel who understand this form of witness bias, and they are not bound by the Rules of Evidence. *Cf.* E.D. PA. R. CIV. P. 53.2.5.E (stating that "[t]he Federal Rules of Evidence shall be used as *guides* to the admissibility of evidence" (emphasis added)); D.N.J. R. CIV. P. 201.1(f)(5) (same).

[253] FED. R. EVID. 803(4).

[254] To the extent that consideration is given to a textual amendment to Rule 803(4), either for its own sake or as a mechanism to correct the 1972 Advisory Committee Note, we would propose the addition of the following provision, which is akin to Rule 803(6)(E), as Rule 803(4)(C): so long as "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." *See* FED. R. EVID. 803(6)(E). As Professor Richter notes, such a provision could reasonably apply to all of the Rule 803 exceptions. Richter, *Goldilocks*, *supra* note 15, at 902. Another scholar recommends amendments regarding electronic messages, which

There may be no perfect way to balance the equities in every case, but any step in the right direction is one worth taking.

E. Statements in Records of Actual Medical Care by Individuals Other Than Medical Practitioners Should Be Admitted Under Rule 803(4)

Next, we propose eliminating the artificial, atextual, and internally inconsistent distinction between statements in medical records by physicians and nurses and those by other known declarants. As described above, the U.S. Court of Appeals for the First Circuit introduced this distinction in dicta in *Petrocelli v. Gallison* in 1982, but it has taken on a life of its own.[255]

This distinction is inconsistent with cases regarding business records. Just as a business can be bound by an agent acting within the scope of his or her employment,[256] a business can be bound by an employee creating a business record. For example, in 2020, in *Maui Jim, Inc. v. SmartBuy Guru Enterprises*, the U.S. District Court for the Northern District of Illinois found[257] statements by customer service representatives—arguably the most junior of businesspeople—to be business records.[258] Although *Maui Jim*'s admission of statements by third parties was questionable, its decision to admit employee statements was not. Each employee can be an important part of the business's function when acting within their sphere of responsibility.

This is even truer in healthcare than other in industries. Modern healthcare is atomized: functions are performed and recorded by specialized individuals, particularly in the hospital setting where medical record volume is at its highest. Each individual is an important link in the chain of effective healthcare, and failure at any link can create significant risks for patients and staff.[259] This specialization of function renders the lines *Petrocelli* purports to

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presumably could include statements recorded contemporaneously in an EHR. Bellin, *supra* note 225, at 51–52. Either amendment, however, would likely take considerable time to be implemented, whereas a re-orientation of courts to the text of Rule 803(4) would not. *See* Richter, *Goldilocks*, *supra* note 15, at 938. In addition, as Professor Richter notes and as the above example from the 2000 Amendment to Rule 703 shows, amendments to individual rules often have unintended consequences for others. *Id.*

[255] 679 F.2d 286, 290 (1st Cir. 1982); *see supra* notes 175–184 and accompanying text (providing an overview of *Petrocelli* and articulating this distinction).

[256] *Cf.* FED. R. EVID. 801(d)(2)(D) (noting that a statement does not qualify as hearsay when it is specifically used "against an opposing party").

[257] 459 F. Supp. 3d 1058, 1094 n.16 (N.D. Ill. 2020); *see supra* note 169 and accompanying text (describing how *Maui Jim* admitted a summary chart of customer service interactions as a business record).

[258] Indeed, under both the regularity-as-commonality and regularity-as-consistency theories, the "regularity" of statements by an employee whose job involves creating a single kind of document repeatedly and accurately over time, such as a loan officer, bank teller, or accountant, is likely greater than it is for statements made by a CEO or other high-ranking official.

[259] *See* Sharona Hoffman & Andy Podgurski, *In Sickness, Health, and Cyberspace: Protecting the Security of Electronic Private Health Information*, 48 B.C. L. REV. 331, 331 (2007) (discussing

draw nonsensical. In diabetes management, for example, information from nutritionists, food services, or physical trainers can be essential in understanding the course of illness and recovery.[260] For patients with dementia, notes from social workers or pastoral-care specialists may provide more insight than the nursing staff's periodic blood pressure checks. And as COVID-19 and MSRA remind us, linen care and surface cleaning—which are performed by custodial staff rather than medical professionals—are critical in preventing hospital-acquired infections.[261] All this information can be important to patient care, even if it is not relevant to every patient or every condition.[262]

Nor is there much reason to believe that statements by these professionals are any less reliable or trustworthy than statements by physicians or nurses.[263] After all, if regularity leads to reliability, food delivery, linen management, and

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how the electronic processing of information benefits physicians and patients by enhancing the speed and communication of information).

[260] *See generally Eat Well*, CDC, https://www.cdc.gov/diabetes/managing/eat-well.html [https://perma.cc/8Z9U-KVL7] (Sept. 20, 2022) (stating that "[m]anaging blood sugar is the key to living well with diabetes, and eating well is the key to managing blood sugar"); *Diabetes Diet, Eating, & Physical Activity*, NAT'L INST. DIABETES & DIGESTIVE & KIDNEY DISEASES, https://www.niddk.nih.gov/health-information/diabetes/overview/diet-eating-physical-activity [https://perma.cc/EX7R-WWCP] (Dec. 2016) (noting that "following a healthy meal plan and being active can help you keep your blood glucose level . . . in your target range"); Mayo Clinic Staff, *Diabetes Diet: Create Your Healthy-Eating Plan*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/diabetes/in-depth/diabetes-diet/art-20044295 [https://perma.cc/32V8-MRYC] (detailing how a person with diabetes can maintain a healthy diet to help control their blood sugar levels).

[261] *See Appendix D—Linen and Laundry Management*, CDC, https://www.cdc.gov/hai/prevent/resource-limited/laundry.html [https://perma.cc/PA3A-EF4E] (Mar. 27, 2020) (detailing the best ways to maintain clean medical establishments). Considering the COVID-19 pandemic, the Centers for Disease Control is predictably detailed in its guidance on surface cleaning as well. *See generally Appendix B1—Cleaning Procedure Summaries for General Patient Areas*, CDC, https://www.cdc.gov/hai/prevent/resource-limited/general-areas.html [https://perma.cc/9CN7-XLCG] (Apr. 15, 2020) (describing when and how staff should clean general healthcare facility areas); *Appendix B2—Cleaning Procedure Summaries for Specialized Patient Areas*, CDC, https://www.cdc.gov/hai/prevent/resource-limited/special-areas.html [https://perma.cc/8FP6-32K3] (Apr. 21, 2020) (explaining the manner in which staff should maintain specific healthcare facility areas). Such services can also affect care more directly. Consider an orderly who provides an extra blanket to a cold patient and who makes note of the reason for the blanket's provision in the medical record. The patient's request is admissible either under Rules 803(4) or 803(2). Courts following *Petrocelli*, however, might exclude the orderly's note because the orderly is not a physician or nurse even if a physician or nurse, seeing the note, changed the patient's diagnosis or treatment to account for chills. *See generally* 679 F.2d 286 (1st Cir. 1982). This unintuitive distinction ill-serves the truth-seeking function of the Rules of Evidence and demonstrates again the risks of packing courts' concerns with reliability into purportedly pithy rules of decision on elements of categorical exceptions rather than letting the jury do its job.

[262] The reliance inference is strongest when the statement is recorded in an EHR or chart, but statements may be for the purposes of treatment even if they are not written down, regardless of whether they are made by a physician to an orderly or vice versa.

[263] It is typically easier to fire an orderly or front desk staffer than a skilled nurse or neurosurgeon. Accordingly, although staff who are not licensed professionals typically are not always motivated by avoiding a malpractice suit or licensing discipline, they have strong incentives to provide reliable service to their medical employers.

the like are more consistent and programmed than the provision of idiosyncratic diagnostic and management services.

In sum, there is no reason to limit the admission of medical records to the statements made by doctors and nurses.[264] To the extent that *Petrocelli* and its progeny suggest otherwise, their atextual, judge-made limitation should be rejected.

F. Establishing a (Modest) Presumption of Admission for Statements of Unknown Origin in Medical Records

Finally, we propose that the nature of medical records should lead courts to admit statements in them more freely than they do, even when those statements' declarants are of unknown origin. We acknowledge that this is a radical proposal; under most other circumstances, double hearsay is clearly inadmissible.[265] Yet, as outlined above, the records of one business can become the records of another if the latter relies on them, and Rule 801(d)(2)(B) provides for one party to "adopt[]" the words of another, making them the party's own.[266]

We propose that information in medical records ought to function similarly. Consider the common situation in which a physician hears from a nurse that a patient is nauseated and responds by prescribing an antiemetic. The medical record note documenting this conversation reads "Advised patient nauseated. Rx." If the nurse wrote the note, it is likely admissible: the patient's statement is admissible under Rule 803(4) or Rule 803(2), and the note itself is a business record.[267] If the physician wrote it, however, many courts would find it inadmissible, largely because the declarant is unknown.[268] But the prescription is unchanged.

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[264] One could imagine certain kinds of statements, such as those about billing or insurance, that might not be for purposes of medical diagnosis. (One could also argue that such statements are made precisely because insurance or billing is impacting care.) Such statements go to the business of medicine rather than to the diagnosis or treatment of the patient and would be admissible as business records under Rule 803(6) in any case.

[265] FED. R. EVID. 805.

[266] *Id.* R. 801(d)(2)(B).

[267] The patient's statement is admissible as an exception to hearsay under Rule 803(4), and the nurse's note is admissible as a business record under Rule 803(6). *See id.* R. 803(4) (permitting assertions "made for [purposes of] medical diagnosis or treatment"); *id.* R. 803(6) (allowing courts to admit certain business records into evidence). As discussed above—and absurdly in our view-—the result might be different if the patient told an orderly cleaning the room, who told the nurse, who told the doctor, because the statement from the orderly to the nurse would be hearsay without a defined exception.

[268] *See supra* note 174 and accompanying text (discussing the judicial viewpoint that statements from unknown sources lack guarantees of trustworthiness). Such a statement would also be inadmissible under the current interpretation of Rule 803(4), even though it both reflects a change in the patient's treatment and almost certainly will cause other medical professionals to inquire about the cause of the nausea (i.e., the diagnosis) and future changes in treatment to account for it. As noted above, at least a couple of courts would already get around this issue by classifying the oral statement as a busi-

We contend that if evidence is trustworthy enough to potentially change a diagnosis or treatment, it is reliable enough for a factfinder to consider. The medical professionals recording it have greater personal knowledge of the situation than the court, and they often have specialized training and experience to assess the statement's reliability, training, and experience in context. It is an act of systemic arrogance to encourage judges to find that even though trained professionals relied on a piece of evidence to make important decisions regarding human health, the statement was actually, legally, so untrustworthy that a factfinder may not even consider it.

And, of course, a particular medical record may itself suggest that the medical practitioner did not rely on a patient's statement, but was merely recording it[269] or even actively disbelieved it.[270] Courts ought not admit statements on which the practitioner disclaimed reliance unless there is some other particularized basis to conclude that the statements are reliable enough to meet Rule 807's test.[271]

However, we respectfully contend that courts do not give adequate weight to the role of trained intermediaries in deciding what information is and is not reliable. We view the choice to record these statements in the medical record as a form of limited adoption—without reliance on every particular—by the medical practitioner. Therefore, we suggest that the rebuttable presumption of admissibility should even apply here.

G. What the Presumption of Admissibility Means (and Does Not)

We do not propose that medical records are *per se* admissible.[272] We recognize, as courts have, that there are unquestionably errors in medical records.

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ness record by virtue of its being recorded in one. Although such cases reach a sensible conclusion, they do so, *de facto*, by declaring that Rule 805 does not exist as between members of a single business pursuing a business matter, as long as one of them writes the other's statement down. It is far from clear that such a result is either demanded by Rule 803(6) or wise.

[269] The most common example is mental health counseling, where the practitioner is trained—particularly early in the relationship—to neither filter the patient's views nor confront the patient about certain illogical or irrational statements. Instead, such records are created for later review of the patient's subjective cognition and perception. *See generally* Capowski, *supra* note 62, at 373 (discussing the admissibility of statements to psychiatric professionals under Rule 803(4)); Hamilton, *supra* note 61, at 19 (describing the distinct purpose and manner of a psychological interview). Courts may need to assess whether these records reflect that the practitioner was in an evaluative mode.

[270] Of course, courts generally will not exclude a statement in a medical record just because one practitioner choose not to believe it; other practitioners reviewing the same record might have credited it in formulating diagnosis or treatment.

[271] FED. R. EVID. 807 (providing a catchall exception for statements that do not satisfy Rules 803 or 804).

[272] We also do not propose disabling the other safeguards on admissibility, such as an authentication regime that filters out fraudulent or falsified medical records. Any document—medical record or otherwise—that appears to have been cloned, doctored, or falsified should, of course, be inadmissible if offered for the truth of the matter asserted (and not, for example, in service of its creator's prosecu-

The robotic admission of these records would no better serve justice than does the current muddle of common-law and rules-based doctrinal decisions. Even our ardor for a better system is tempered by this reality.

Too often, though, the molehills these issues create are treated as mountains requiring a suffocating prophylactic rule of exclusion even when particularized admissibility concerns could be swiftly resolved.[273] We suggest, therefore, that medical records ought to be presumed admissible unless, in the words of Rules 803(6)(E) and 803(8)(B) (and consistent with the spirit of Rule 807), "the opponent [shows] that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."[274] For example, a particular medical record can be compared to other records of the same kind or from the same source to identify atypical data, unusual formatting, or other aberrations. Any differences can help lawyers and courts flag inaccurate, incomplete, or doctored records.

There will still, of course, be idiosyncratic errors that slip through.[275] For these, cross-examination (and/or voir dire) suffice. For example, in a high-value tort case that one of the authors tried, an important damages issue was the plaintiff's ability to sit or stand for long periods, such as would be required for a cross-country trip. One (unique) medical record contained a physician's statement that plaintiff had taken such a trip, from California to "Carolina."[276] On cross-examination, plaintiff denied taking such a trip. When plaintiff was confronted with the medical record, it emerged that the record actually referred to plaintiff's car trip to visit his ex-wife, Caroline, who lived only a few hours away.[277] In total, the exchange took perhaps ninety seconds, and had the matter

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tion for violations under federal law). *See, e.g.*, 18 U.S.C. §§ 287, 1035 (declaring it a criminal violation to make a false claim to any department or agency of the United States, and regarding any health care benefit program).

[273] Courts appear particularly concerned about medical records, even though errors are hardly unknown in other business records, government reports, or excited utterances. As Professor Sevier writes of the excited-utterance exception, "[a]lthough excitement may still a person's capacity for untruthfulness, it is well-established that high levels of anxiety and arousal are associated with significant cognitive deficits in event perception, event encoding, and memory retrieval." Sevier, *supra* note 1, at 272 (summarizing research by social psychologists). Or, as another scholar wrote of Rule 803(2), what parent would advise a child to "'trust what you're told an excited man said' . . . because 'excited men don't lie'"? Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 375 (1992).

[274] FED. R. EVID. 803(6)(E), (8)(B); *see id.* R. 807 (requiring that a statement have "guarantees of trustworthiness" to be admitted under this exception).

[275] Again, this is true of every Rule 803 exception, and—in other contexts—the risk is deemed acceptable. *See* Saltzburg, *supra* note 13, at 1491 (asking, rhetorically, whether "anyone believe[s] that every report prepared by every government worker" and "every fact found during a government investigation" are "accurate"). We nonetheless trust factfinders to sort the wheat from the chaff.

[276] Immaterial details of this progress note have been changed to conceal the identity of the plaintiff's ex-wife, who was not a party. Transcript of cross-examination on file with authors.

[277] *Id.*

been raised at deposition, it never would have taken even that. The trip was only mentioned briefly thereafter by either party, and life went on.

To be clear, this was medical record error that was material to the issues being tried. Although that single data point happened to be the focus of examination, it was one of dozens in that same document—the others being accurate—and this record was one of thousands in the case. The fact that only this record mentioned a trip of this length made the record more significant in the eyes of litigating counsel, an idiosyncrasy that could also have raised red flags. Regardless, cross-examination did its job: the error was corrected swiftly and the factfinder was hardly flummoxed by what occurred. The error was, in other words, no big deal.

The authors take no position on whether cross-examination is the great engine for truth that some courts and scholars assert.[278] Nonetheless, it is, at least, *an* engine for examining idiosyncratic data in robust data sets to explicate factual issues.

Of course, we do not suggest the factfinder must *believe* these records. We argue only that a competent professional's reliance on these records as part of a medical diagnosis or treatment suggests that the factfinder ought to be permitted to consider them as well.

Nor do we suggest that every court must admit every such record, context be damned. A statement's unknown source is one factor a court should consider in evaluating the totality of circumstances, along with, for example, the consistency of that statement with others in that and other medical records.[279] In

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[278] Wigmore's belief in cross-examination as an engine of truth is both well-known and influential. 5 WIGMORE, *supra* note 120, § 1367, at 32–33; *see* White v. Illinois, 502 U.S. 346, 356 (1992) (recognizing the importance of cross-examination as it aids in the court's search for truth); Maryland v. Craig, 497 U.S. 836, 844 (1990) (discussing the importance of cross-examination in the context of the Confrontation Clause as it helps reveal the truth); Perry v. Leeke, 488 U.S. 272, 283 n.7 (1989) (noting that cross-examination helps uncover the truth); Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (stating that cross-examination "ensur[es] the integrity of the factfinding process"); Ford v. Wainwright, 477 U.S. 399, 415 (1986) (describing how cross-examinations may help uncover the truth in sanity cases); Lee v. Illinois, 476 U.S. 530, 540 (1986) (noting how cross-examination helps reveal the truth); California v. Green, 399 U.S. 149, 158 (1970) (same); Watkins v. Sowders, 449 U.S. 341, 348 n.4 (1981) (recognizing the effectiveness of cross-examination in discovering the truth). Other scholars disagree, particularly when domestic violence is involved. *See* Andrew King-Ries, Crawford v. Washington*: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 327 (2005) (arguing that abused women are more credible when speaking to 911 operators than they are at trial); Melissa Moody, *A Blow to Domestic Violence Victims: Applying the "Testimonial Statements" Test in* Crawford v. Washington, 11 WM. & MARY J. WOMEN & L. 387, 399 (2005) (assuming that complainants who do not show up to trial are actual victims, and writing that under *Crawford v. Washington*, "hundreds of thousands of 'run-of-the-mill' domestic violence victims are pitted against the rare victim of a false treason charge" (footnote omitted)); Ross, *supra* note 123, at 426 (contending that out-of-court assertions by victims to physicians are more credible than those given during cross-examination).

[279] Once again, revised Rules 807, 803(6)(E), and 803(8)(B) provide the principle by which we propose that courts navigate these questions.

other words, some records may be rotten to the core. And when "the opponent [shows] that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness,"[280] courts should exclude these records. Creating an entire jurisprudence around corner cases that are so speculative, so prejudicial, or so beyond the pale that courts cannot risk their admission, however, is inefficient, ineffective, and unjust.[281] For such records, even with a presumption of *hearsay* admissibility for medical records, Rule 403 still demands exclusion.[282]

Much mischief could be avoided simply by placing the weight of exclusion on Rule 403, where it belongs, rather than shoehorning it into the hearsay analysis.[283] *Petrocelli* provides a perfect example.[284] The court in *Petrocelli* clearly concluded that the references to a nerve being severed in the later medical records came from an unreliable source, perhaps even the plaintiff himself seeding the record of later medical care with the very theory he would attempt to prove at trial.[285] In this, the court may well have been correct. It could, however, easily have made this a Rule 403 call: the probative value of these "inscrutable," uncorroborated diagnostic statements of questionable origin are low, but its potential to confuse the jury is high.[286]

Alternatively, *Petrocelli* could have been resolved by simply telling jurors what the issue was under Rule 105 and allowing them to decide under Rule 104(b) whether the evidence was appropriate.[287] For example, the court could

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[280] FED. R. EVID. 803(6)(E), (8)(B).

[281] *Cf.* FED. R. CIV. P. 1 (stating that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). We fundamentally disagree with another scholar who appears concerned with any approach that "elevat[es] credibility over admissibility." *See* Ginsberg, *supra* note 59, at 694.

[282] *See* FED. R. EVID. 403 (providing that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence").

[283] *Cf.* Old Chief v. United States, 519 U.S. 172, 173, 180–85 (1997) (stating that "[a] judge should balance these factors not only for the item in question but also for any actually available substitutes" and that "[i]f an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk").

[284] We are grateful to Mike Levy for his insight on this point.

[285] Petrocelli v. Gallison, 679 F.2d 286, 289–91 (1st Cir. 1982). It also likely found it suspicious that the plaintiff strategically tried to admit the hearsay version rather than clarifying the source of this information in discovery. *Id.* at 291–92.

[286] *Id.* at 291; *see* FED. R. EVID. 403 (stating that a court may exclude evidence if that evidence's prejudicial impact outweighs its probative value).

[287] *See* FED. R. EVID. 104(b) (stating that "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist," and that "[t]he court may admit the proposed evidence on the condition that the proof be introduced later"); *id.*

have instructed jurors that unless the diagnosis of a severed nerve was made by a competent medical professional, and not by the plaintiff, it had to be disregarded entirely. Such a decision would have put plaintiff to his proof.[288]

The court, however, did neither. Instead, *Petrocelli* tried to pack its reliability analysis where it did not belong, proclaiming that because the evidence did not demonstrably come from a doctor or nurse, it was not recorded in the regular course of business. Other courts then relied on this nonsensical conclusion in their own interpretations of Rule 803(6). Such missteps do profound violence to the logic and consistency of evidentiary interpretation.

Rule 403 is a critical safety valve, one that allows courts to avoid packing their fairness concerns with particular evidence into a hearsay analysis that has rarely been clarified serving as a proxy for the court's view of the deficiencies of a particular, singular exhibit.[289]

H. Just Because You Can Does Not Mean You Should: Why Change Course Now?

We do not propose to amend Rule 803(4), but we do propose that its interpretation substantially change. And although we do not propose any text amendment, we still test our proposal by the standards Professors Capra and Richter articulated for when a textual change is needed.[290] Because Professor

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R. 105 (noting that the court must provide jury instructions regarding the admissibility of specific types of evidence).

[288] This approach also addresses the court's concern that the plaintiff deliberately avoided adducing proof of the source of this information in discovery because he wished to conceal the fact that the source was the plaintiff himself.

[289] Of course, this application only works if courts have not disabled the safety valve, as they have, for example, with respect to bench trials. *See, e.g.*, Equal Emp. Opportunity Comm'n v. Farmer Bros., 31 F.3d 891, 898 (9th Cir. 1994) (noting that the chances a court ruling will be unfairly and overwhelmingly harmed by the admittance of evidence is lower in a bench trial); Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. 1981) (stating that the exclusion of relevant evidence on the basis of unfair prejudice does not occur in bench trials and that it is an unnecessary operation); Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1216 (E.D. Wash. 2015) (stating that "Rule 403 has a limited role, if any, in a bench trial"); United States v. De Anda, No. 18-cr-00538, 2019 WL 2863602, at *4 (N.D. Cal. July 2, 2019) (finding that the defendant's Rule 403 argument inapplicable because the case is being resolved through a bench trial). Accordingly, placing this weight on Rule 403—rather than introducing the kind of test that already exists in Rule 803(6)(E)—risks creating a different law of medical records for bench trials. Although these are certainly a minority of trials involving medical records, Federal Tort Claims Act cases, in which the government is sued for medical malpractice, are uniformly tried to the bench.

[290] *See* Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1876 (2019) (noting Chief Justice Rehnquist's statement that the Federal Rules of Evidence should experience minimal, if any, alterations (citing Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 829 (2002))); Paul R. Rice, *Back to the Future with Privileges Abandon Codification, Not the Common Law*, 38 LOY. L.A. L. REV. 739, 754–55

Capra has served for over two decades as the Reporter for the Advisory Committee, this rubric for evaluating change bears careful attention. That the change their standard justifies can be accomplished without the cost and delay of an amendment makes it all the more attractive.

By keeping the text of Rule 803(4) as is, we avoid the "[e]xcessive tinkering" and "[i]ncessant amendments" that increase the burden of litigation and many of the unintended consequences that come from wrestling with new rules.[291] And yet by returning its meaning to its text, we also avoid the danger that "[a]llowing the Rules to become fixed in their 1975 iteration threatens[, namely, undermining] the goals of uniformity, fairness, and simplicity that they were designed to foster."[292]

Still, there has to be a reason to change—one that Capra and Richter locate in constitutionality concerns, confusion in the courts, or the advance of technology. Our proposal is not driven by constitutional concerns[293] or the advance of technology, although the advent of EHRs and their proliferation of medical records provide some motivating force. Rather, the core of our argument is that this "long-standing [intra-judicial conflict] shows no signs of being resolved[] and creates divergent standards for litigants operating within the same court system . . . ."[294] Capra and Richter suggest that such a conflict should trigger a drafting committee's duty as "[r]eferees" of the judicial system.[295] As the foregoing pages amply demonstrate, litigants today have reason to fear that every federal court will apply the rules differently.[296] Therefore, a change in the interpretation of Rule 803(4) is worth considering.[297]

The reading of Rule 803(4) that we propose also meets Capra and Richter's second test, because it makes the Rules "*more* concise and *more* accessible to lawyers and judges using them in a trial or pre-trial context . . . ."[298] Today, Rule 803(4) says statements for purposes of diagnosis and treatment are admissible, but courts applying it admit neither a doctor's literal diagnosis nor

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(2004) ("Chief Justice Rehnquist has given clear instructions to all of the chairpersons he has appointed that revisions should be minimal—only those necessary to correct pressing problems.").

[291] Capra & Richter, *supra* note 290, at 1876.

[292] *Id.*

[293] To be certain, many courts wrestle with these issues in the Confrontation Clause context. *See supra* note 59 and accompanying text (discussing the adversarial testing of Rule 803(4) assertions in regard to the Confrontation Clause). Since the Supreme Court's decision in 2005, in *Crawford v. Washington*, however, that issue has been disjoined from whether the testimony in question fits within a firmly rooted hearsay exception. *See* 541 U.S. 36, 63–64 (2005). It is, therefore, beyond the scope of this Article and the proposal it makes.

[294] Capra & Richter, *supra* note 290, at 1886.

[295] *Id.*

[296] *Id.*

[297] *See* Nunn, *supra* note 41, at 977 n.220 (collecting examples of amendments to the Federal Rules of Evidence that stemmed from conflicting judicial interpretations).

[298] Capra & Richter, *supra* note 290, at 1899.

statements by doctors and nurses documenting or ordering treatment. No normal human would read the Rule that way.

But the situation is worse still. Presently, the consideration of whether even a routine progress note is admissible requires examination of Rules 801, 803(4), 803(1), 803(2), 803(3), and 803(7) for statements made by the patient; Rule 803(4), 807, and potentially 803(2) for statements by those accompanying the patient; and Rules 801, 803(4), 803(6), 807 and possibly Rule 803(8) for those made by medical providers. Each of these rules must be applied in the context of both decades of gnarled, inconsistent decisions and their respective, sometimes anachronistic Advisory Committee Notes. "[T]he[se] dizzying mental gymnastics . . . serve[] no legitimate purpose."[299] If, as Capra and Richter posit, "[s]implicity [i]s the [u]ltimate [s]ophistication,"[300] then just reading Rule 803(4) to mean what it says is the ultimate refinement.[301]

Similarly, we follow Capra and Richter's principle that the best proposals borrow from established language. Here, we propose to keep Rule 803(4) entirely intact, and our proposal for its application borrows directly from Rule 803(6)(E), which courts already use as a back-door mechanism to admit this evidence. By adopting the Rule 803(6)(E) framework of a rebuttable presumption, we fold our proposal neatly into the existing law of hearsay.

In sum, our proposal does what Capra and Richter suggest: it corrects a judicial conflict using available tools, ensuring that litigants and courts have a simpler, more accessible, and more uniform expectation when coming through the federal courthouse doors.[302] And it does all this without incurring the costs of a textual amendment.[303]

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[299] *Id.* at 1901; *cf.* FED. R. CRIM. P. 2 (noting that the "rules are to be interpreted to provide for the just determination of every criminal proceeding, *to secure simplicity in procedure and fairness in administration*, and to eliminate unjustifiable expense and delay" (emphasis added)).

[300] Capra & Richter, *supra* note 290, at 1898.

[301] It is less clear whether our proposal meets the framework proposed by another scholar. On the one hand, returning the interpretation of Rule 803(4) to its text seems facially to accord with principles of fidelity. *See* Nunn, *supra* note 41, at 966 (discussing a hypothetical application of Rule 408 based on its text). If the goal of fidelity is to return the law to its original "legal source material," however, one might reach the opposite conclusion: the font of Rule 803(4) is statements by individuals to physicians, not the reverse, and the present application of the Rule tracks pre-1972 common law in at least most respects. *Id.* at 968 (citing William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1115–16 (2017)). Similarly, whether our proposal is "justifiable" likely depends on one's view of the science surrounding the respective trustworthiness of statements by patients and their practitioners. *Cf. id.* at 971 (noting that key terms' meanings may evolve over time). If one believes that patients are no more accurate than physicians, for example, one might either find our proposal or the abolition of Rule 803(4) as a whole justifiable. If one believes, contrary to the robust scientific literature on malingering, that patients are more reliable than doctors in this respect, our proposal is unjustified.

[302] Our proposal also avoids raising any of the red flags that Capra and Richter identify. *See generally* Capra & Richter, *supra* note 290, at 1903–12 (suggesting that any amendment should comport with congressional will, not contravene important Supreme Court decisions, and not propose changes that would be unacceptable to the U.S. Department of Justice (DOJ)). Congress has never substantive-

CONCLUSION

The complexity of our current evidentiary approach to admitting medical records disserves both lawyers and courts. Judges lay down rules that fit particular cases that other courts then misunderstand or misapply in distinguishable circumstances. Worse, these common-law rules ossify, leading still other courts to make idiosyncratic exceptions that create yet more inconsistency and complexity. Over time, judicial rulings are unmoored from the sensible first principles that underlay hearsay law, becoming free-floating doctrinal pronouncements disconnected from the search for truth and the principles of reliability established by other, adjacent Rules of Evidence. There is no such thing as perfect reliability, but there is a point implied by every hearsay exception where the evidence is reliable *enough* that it ought to be admitted and weighed by the jury, absent some particular, specific, and identified basis for concern.

Every day, medical practitioners compose medical records in service both of healing their patients and of the business that is modern healthcare. Each of these statements is for a single purpose: the diagnosis and treatment of a medical condition. These practitioners have every moral and legal incentive to tell the truth in these records, and every day, patients and other medical practitioners rely upon them in making the most important of decisions. As in any enterprise of any size, the authors of these records sometimes make mistakes, and these mistakes can sometimes go unnoticed until deposition or trial. There are mechanisms to address that situation, however, and these mistakes are the exception.

Admission should be the rule.

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ly spoken on this aspect of Rule 803(4)'s application. Nor has the Supreme Court laid down contrary doctrine that needs to be respected here. Because author Kaufman is an attorney with the DOJ, even though he is writing exclusively in a personal capacity, we offer no opinion on whether the DOJ would have any issue with our proposal.

[303] Were the text of Rule 803(4) to be amended, the Advisory Committee Note to that amendment could expressly abrogate the 1972 Advisory Committee Note. That would be a very real benefit. But in calling for a change that does not require the Rule's amendment, we follow a scholar's call for "judges [to] reassume their historic position at the forefront of evidentiary change." Nunn, *supra* note 41, at 962. Courts are not powerless to amend their own interpretations when facts and circumstances dictate. *See id.* at 982 ("[T]he Law of Evidence should have a measure of flexibility if room for growth is to be afforded . . . . [S]ome play [was left] in the joints." (second and third alterations in original) (quoting Alston Jennings & John R. Baylor, *The Proposed Rules of Evidence for the United States District Courts and Magistrates*, 37 INS. COUNS. J. 565, 571 (1970))).