An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception

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AN INTERDISCIPLINARY ANALYSIS OF STATEMENTS TO MENTAL HEALTH PROFESSIONALS UNDER THE DIAGNOSIS OR TREATMENT HEARSAY EXCEPTION

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I. INTRODUCTION

A mother, charged with murder, objects to testimony by her accomplice son's psychiatrist about the controlling relationship she has with her son. The son's counsel had arranged for the psychiatrist to provide an opinion on the son's state of mind at the time of the murder.¹

A daughter and mother bring a civil action against the daughter's father and his parents, claiming sexual abuse of the daughter. The mother seeks to introduce testimony by a psychologist about the four-year-old daughter's statements to him about the abuse.²

A former patient, now dead, made statements to his psychologist that named an individual and described that person's efforts to get the patient to evade process and commit perjury. In a prosecution for witness tampering, the state now seeks to introduce the psychologist's testimony about the statements this patient made.³

These fact patterns illustrate the diverse cases in which parties may seek to introduce statements made to mental health professionals and in which these professionals may be called to testify. The increasing use of mental health professionals by individuals, litigants and the courts, as well as the adoption of Federal Rule of Evidence ("F.R.E." or "Rule") 803(4)⁴ and its state counterparts,⁵

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¹ See State v. Schreuder, 726 P.2d 1215 (Utah 1986) (finding that statements made by defendant's son to psychiatrist about mother/son relationship were admissible when psychiatrist was retained to give opinion about son's state of mind).
² See Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) (holding that psychologist's testimony about daughter's statements of sexual abuse should have been received by trial court).
³ See State v. Roberts, 622 A.2d 1225 (N.H. 1993) (holding that statements made to psychologist by patient seeking diagnosis or treatment, naming defendant, and describing anxiety caused by defendant's coercion of patient not to cooperate with prosecution, were admissible).
⁴ Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial
   The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
   
   (4) Statements for purposes of diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803.
which significantly expand the common law hearsay exception for statements for medical treatment, have greatly increased the situations in which courts are called upon to rule on the admissibility of statements made to social workers, psychologists, and psychiatrists. In ruling, the courts have been diverse in both outcomes and analysis. One of the causes of the diversity in analysis, if not outcomes, is that courts frequently fail to understand the complexity of this seemingly simple hearsay exception. A reason for the disparity in both outcomes and analysis is the willingness of courts to make assumptions about the nature of psychiatric treatment and the motivations and veracity of those pursuing treatment.

This Article addresses a number of issues raised in the interpretation and application of Rule 803(4). First, it argues that based upon the traditional rationale for admitting declarants’ statements to health providers—that persons seeking treatment will be truthful—statements to the providers of mental health services should be treated comparably to those made to somatic practitioners. While appropriate comparable treatment may require trial courts to make a searching and individualized inquiry into the

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6 See Tracy A. Bateman, Annotation, Admissibility of Statements Made for 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) (citing cases applying FED. R. EVID. 803(4) to testimony of various mental health professionals).

7 Compare United States v. Renville, 779 F.2d 430 (8th Cir. 1985) (holding that statement of child naming abuser who is family member is pertinent to treatment and admissible) with People v. LaLone, 437 N.W.2d 611 (Mich. 1989) (holding that trial court erred in admitting under diagnosis and treatment exception psychologist’s testimony that complainant named defendant, her stepfather, as her assailant).

8 See infra notes 46-55, 241-259 and accompanying text (discussing two theoretical bases for assuming reliability of declarants’ statements under FED. R. EVID. 803(4)); see also Cassidy v. State, 536 A.2d 666, 678 (Md. 1988) (discussing history of exception allowing admission of statements to physicians consulted for treatment); 5 JACK B. WEINSTEIN & MARILYN A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 803.09[1], at 803-41 (Joseph M. McLaughlin ed., 2d ed. 1998) (describing rationale for this exception); Robert P. Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C. L. Rev. 257, 259-64 (1989) (explaining rationale for this hearsay exception).

9 "[T]heir reliability is assured by the likelihood that the patient believes that the effectiveness of the treatment received will depend upon the accuracy of the information provided to the physician.” CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 277, at 488 (John W. Strong ed., 4th ed. 1992).
motivations and understanding of declarants, comparable treatment will also help avoid an often incorrect categorization and interpretation of mental health problems. Second, this Article advocates that F.R.E. 803(4) be revised to prohibit the substantive use of statements made to experts, whether psychological or somatic, consulted solely for the purpose of testifying. Third, it proposes that a separate exception be developed for the admission of children’s statements for purposes of treatment. Fourth, the author argues that the Supreme Court should re-examine whether statements for diagnosis admitted under F.R.E. 803(4) should be considered “firmly rooted” for purposes of Confrontation Clause analysis.

In the course of making these arguments, this Article discusses the common law hearsay exception from which Rule 803(4) was derived and the changes made to the common law approach by the drafters in developing Rule 803(4). It also musters the arguments made in cases and by commentators as to why statements made to psychiatrists and other mental health care professionals should not be treated the same under Rule 803(4) as those made to somatic practitioners. In addressing the strengths and weaknesses of these arguments, this Article sets forth the reasons why statements to mental health providers should be admitted under the exception. It also discusses medical literature on the differ-

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10 See infra notes 241-261 and accompanying text (proposing changes in FED. R. EVID. 803(4)).

11 See infra notes 262-279 and accompanying text (suggesting separate hearsay exception for statements by children).


13 See infra notes 280-298 and accompanying text discussing Roberts exception (“But where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the confrontation clause is satisfied.” 448 U.S. at 66). Comparable treatment for statements made to mental health professionals is only one of several factors requiring a change in Rule 803(4)’s status as a “firmly rooted” exception. Id.; see also White v. Illinois, 502 U.S 346, 356 (1992) (suggesting that “widely accepted” medical treatment/diagnosis exception to hearsay rule is firmly rooted).

14 See infra notes 22-38 and accompanying text (discussing common law hearsay exceptions).

15 See infra notes 106-153 and accompanying text (presenting arguments for treating psychological and somatic treatment and diagnosis differently).

16 See infra notes 154-240 and accompanying text (arguing for admission of psychological and somatic statements under FED. R. EVID. 803(4)). Obviously, the admission of hearsay under an exception requires findings that the statement fits the requirements of the specific
ences and similarities between somatic and psychological facts, and the distinctions and similarities between somatic and psychiatric medicine. 17

II. SOME BASICS ON STATEMENTS FOR DIAGNOSIS OR TREATMENT AND THE CONFRONTATION CLAUSE

As defined by the Federal Rules of Evidence, "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." 18 Although Rule 802 makes hearsay generally inadmissible, 19 much hearsay is admissible under the Rules, 20 and the prohibition is being engulfed by the exceptions. 21

A. THE COMMON LAW EXCEPTION

Exceptions are generally established by balancing need against reliability 22 and, for some exceptions, reliability may be marginal. 23 Rule 803(4) was derived from the common law exception for exception and that its relevance is not outweighed by prejudicial effect. See infra note 67 and accompanying text (quoting FED. R. EVID. 403). 17 See infra notes 107-131, 154-180, 206-230 and accompanying text (discussing similarities and differences between psychological and somatic medicine and treatment). 18 FED. R. EVID. 801(c).

19 Id. 802. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Id. 20 See id. 803(1)-(23), 804(b)(1)-(4), (6), and 807 (citing exceptions to hearsay prohibition).

21 See ROBERT E. OLIPHANT, BASIC CONCEPTS IN THE LAW OF EVIDENCE: AN OUTLINE OF THE YOUNGER LECTURES 83 (2d ed. 1982) ("The exceptions to a great deal have consumed the rule."); JACOB A. STEIN, TRIAL HANDBOOK FOR MARYLAND LAWYERS § 26.5, at 360 (2d ed. 1986) (discussing hearsay exceptions).

22 See, e.g., Matthews v. United States, 217 F. 2d 409, 417 (5th Cir. 1954) ("[O]ur holding is supported . . . by the absence here of the rational justification which obtains in every recognized exception to the hearsay rule; that is a circumstantial probability of trustworthiness, and a necessity for the evidence."); see also G. & C. Merriam Co. v. Syndicate Publ'g Co., 207 F. 515 (2d Cir. 1913), in which Judge Learned Hand, then a district court judge, stated: "I think it fair to insist that to reject such a statement is to refuse evidence about the truth of which no reasonable person should have any doubt whatever, because it fulfills both the requisites of an exception of the hearsay rule, necessity and circumstantial guaranty of trustworthiness." Id. at 518 (citing J. WIGMORE ON EVIDENCE, §§ 1421, 1422, 1690 (1st. ed. 1913)).

statements of a presently existing bodily condition and, more specifically, the exception for statements of present physical condition made by a patient to a doctor consulted for treatment. Reliability for the common law exception and, in part, the Federal Rule, is derived from "the likelihood that the patient believes that the effectiveness of the treatment received will depend upon the accuracy of the information provided to the physician." In addition, statements that are contemporaneous are considered more reliable than those made later by a witness. Many courts enlarged the common law exception to include statements of past symptoms. Where the reliability of the statement extended to the cause of an injury, courts have also admitted statements of cause but not fault.

B. FEDERAL RULE OF EVIDENCE 803(4)'S CHANGES TO THE COMMON LAW

Federal Rule of Evidence 803(4) incorporates much of the common law. For example, statements of present physical condition made to a treating physician are admissible. The drafters, however, made several significant changes in the common law practices. "First, the rule adopted an expansive approach by

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24 See MCCORMICK, supra note 9, § 277, at 488 ("Statements of a presently existing bodily condition made by a patient to a doctor consulted for treatment have almost been universally admitted as evidence of the facts stated."); see also Cassidy v. State, 536 A.2d 666, 667 (Md. 1988) (stating that statements to treating physician are excepted from rule against hearsay and grew out of parent exception for statements of existing bodily condition).

25 MCCORMICK, supra note 9, § 277, at 488; see also Meaney v. United States, 112 F.2d 538, 540 (2d Cir. 1940) (expressing that patient has motive to disclose truth to his doctor because his treatment will depend in part on what he says).

26 See 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1714, at 90 (James H. Chadbourn rev., 1976) (stating that contemporaneous statements to physicians are more reliable than later statements made by witness since there is less inducement for misrepresentation and no other equally satisfactory source of evidence).

27 Id.; see also Barber v. Merriam, 93 Mass. 322 (11 Allen) (1865) (expressing that admission of statements of symptoms is exception to general prohibition of hearsay evidence).

28 MCCORMICK, supra note 9, § 277, at 488-89. One may consider a statement of cause to be a generalized description of the event that precipitated the injury and a statement of fault to include the naming of the individual who caused the event and a specific description that places blame. FED. R. EVID. 803(4) advisory committee's note. "Thus 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." Id.
allowing statements concerning past symptoms\textsuperscript{29} and those which related to the cause of the injury.\textsuperscript{30}

Second, 803(4) admits statements made by persons other than the patient and statements not directly made to the physician who will be providing care.\textsuperscript{31} "Statements to hospital attendants, ambulance drivers, or even members of the family might be included."\textsuperscript{32} Third, perhaps the most salient of the changes, and certainly the one that has proven the most problematic, was the inclusion within the exception of statements made to physicians who were consulted solely for the purpose of diagnosis.\textsuperscript{33} "The archetypal statement involved here is one made to a physician who is consulted for the

\textsuperscript{29} \textit{McCormick, supra} note 9, § 277, at 488. "This is generally sound, as patients are likely to recognize the importance to their treatment of accurate statements as to past, as well as present, symptoms." \textit{Id.}

\textsuperscript{30} \textit{United States v. Iron Shell}, 633 F.2d 77, 83 (8th Cir. 1980). "Rule 803(4) admits three types of statements: (1) medical history, (2) past or present sensations, and (3) inception or general cause of the disease or injury. All three types are admissible where they are 'reasonably pertinent to diagnosis or treatment.' " \textit{Id.}

In some cases, the special assurance of reliability—the patient's belief that accuracy is essential to effective treatment—also applies to statements concerning the cause. Moreover, a physician who views cause as related to diagnosis and treatment might reasonably be expected to communicate this to the patient and perhaps take other steps to assure a reliable response. \textit{McCormick, supra} note 9, § 277, at 488-89.

\textsuperscript{31} \textit{See} \textit{Fed. R. Evid. 803(4)} (allowing admission of statements made for purposes of medical treatment if reasonably pertinent to diagnosis or treatment); \textit{see also} \textit{5 Weinstein \& Berger, supra} note 8, § 803.09[3], at 803-43 (explaining that statements provided for diagnosis or treatment are admissible, even if made by sister or made to nurse); Richard B. Gallagher, Annotation, \textit{Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment as Hearsay Exception under Rule 803(4) of the Federal Rules of Evidence}, 55 A.L.R. FED. 689, 693 (1981) ("The Advisory Committee has stated that hospital attendants, ambulance drivers, and family members may also be included within the scope of the Rule. In addition, the scope of the Rule may include statements by a person who brings a patient in for treatment, if the patient cannot talk or make himself understood, and if the person bringing the patient has personal knowledge of the patient's problem.").

\textsuperscript{32} \textit{Fed. R. Evid. 803(4)} advisory committee's note.

\textsuperscript{33} Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind . . . . The rule accordingly rejects the limitation. \textit{Id.; see Iron Shell}, 633 F.2d at 83 (noting that Rule abolished distinction between doctor consulted for treatment and examination, and doctor consulted for diagnosis only).
purpose of the doctor giving expert testimony at trial." The earlier practice was that "[w]hile these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind." The Rule abolished the distinction between simply allowing the jury to hear the statements that were used as the basis for the expert's opinion and admitting the statements as substantive evidence. From the advisory committee's note to the Rule, one discerns that the reason for abandoning the distinction was not that the statements were thought to be reliable, but rather that "[t]he distinction thus called for was one most unlikely to be made by juries." This rationale sets statements for medical diagnosis made to experts consulted to testify apart from most hearsay exceptions, which were developed for reasons of reliability and necessity and not from a realist's perspective on the limited capacity of jurors.

Since the adoption of Rule 803(4), cases and commentators have suggested that an appropriate reliability justification exists for the admission of statements made for the purpose of diagnosis

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34 Mosteller, supra note 8, at 260. When the phrase "statements for diagnosis" is used in this Article, it describes statements made to health professionals seen for the purpose of giving trial testimony. Other statements to health care providers seem to fit under the "statements for treatment" language of Rule 803(4). For example, even a statement to a doctor seen to provide a second opinion is related to or for the purpose of treatment.

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

Fed. R. Evid. 803(4) thus was clearly intended to abolish the distinction between the doctor "who is consulted for the purpose of treatment" and the doctor who examines a party "for the purpose of diagnosis only," even though the latter "is consulted only in order to testify as a witness." King v. People, 785 P.2d 596, 601 (Colo. 1990) (citing Iron Shell, 633 F.2d at 83); see also O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978) (holding that FED. R. EVID. 803(4) allows non-treating physician to testify to patient's statements and have these statements introduced as substantive evidence, so long as doctor relied upon these statements in formulating her or his opinion).

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

38 See G. & C. Merriam Co. v. Syndicate Publ'g Co., 207 F. 515, 518 (2d Cir. 1913) (stating requisites for hearsay exception are necessity and circumstantial guaranty of trustworthiness).

39 See, e.g., Gong v. Hirsch, 913 F.2d 1269, 1273-74 (7th Cir. 1990) (holding that standard for admissibility under FED. R. EVID. 803(4) should be same as that for FED. R. EVID. 703—"Is this particular fact one that an expert in this particular field would be justified in relying upon in rendering his opinion?" (citations omitted)).
to experts consulted to testify. The view is that a "fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape the hearsay proscription. To be admissible, a statement made for purposes of medical diagnosis must be one that an expert in the field would be justified in relying upon in rendering an opinion." As this Article later discusses, this defense for the reliability of statements made for diagnosis is flawed.

The addition of statements made solely for the purpose of diagnosis to the medical purposes hearsay exception not only undermined the reliability of the exception but also created significant confusion among the courts in how to apply Federal Rule of Evidence 803(4). This confusion is in large measure the result of having one exception with two bases for admitting statements—treatment and diagnosis—each with separate reliability justifications. In the case of statements made for purposes of treatment, the justification is the same as that for the common law exception—that patients are truthful in providing information upon which their treatment depends. The reliability justifications for statements made for diagnosis, including the one suggested by Judge Weinstein, are discussed later.

C. APPLYING FEDERAL RULE OF EVIDENCE 803(4)

Federal Rule of Evidence 803(4) provides for the admission of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." In applying Rule 803(4), courts need to distin-

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40 5 WEINSTEIN & BERGER, supra note 8, § 803.09[4], at 803-44 (footnote omitted).
41 See infra notes 242-247 and accompanying text (noting reasons for not relying on diagnostic statements).
42 See Mosteller, supra note 8, at 270-77 (reviewing cases involving application of Rule 803(4) in child sexual assault and abuse cases).
43 See supra notes 24-26 and accompanying text (describing common law exception). Professor Mosteller has called this justification the "selfish treatment interest." Mosteller, supra note 8, at 259.
44 See infra notes 241-261 and accompanying text (arguing no persuasive reliability justification exists for diagnosis statements).
45 FED. R. EVID. 803(4).
guish between the two bases for admitting statements—treatment or diagnosis; the analysis will vary depending upon the reason for which the statement was made and will be used.

The obvious first step in distinguishing between the two bases is to discern whether the statement was made for diagnostic purposes to a practitioner who will serve as a testifying expert or for treatment to one who will supply care. At the extremes this determination is an easy one, but there are statements that are difficult to categorize. For example, statements are difficult to categorize if made by an individual who seeks out a physician who will testify on the patient’s behalf but, at some point, also agrees to provide treatment. For some statements, the categorization may not be mutually exclusive.

1. Statements Made for Purposes of Treatment. In the case of a patient who has sought treatment, the statements should be judged under what Professor Mosteller has called the “selfish treatment interest.” Under the selfish treatment interest analysis, courts need to discern whether the declarant’s motivation at the time the statement was made provides the basis for reliability under the rule. The court must find that the patient understands that “medical personnel are treating the declarant for a physical or emotional disorder” and “must determine that the statements were elicited under circumstances which made it apparent to the patient that the [doctor] desired truthful information and that only by speaking truthfully would he receive the desired benefits of the consultation.” The focus of the court’s inquiry is the state of mind of the declarant. “The real issue is the declarant’s belief that an accurate and truthful statement is important to proper treatment.”

In addition to the court making findings that will satisfy the selfish treatment motive, the court also must find that the state-

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46 Mosteller, supra note 8, at 259.
47 “[T]heir reliability is assured by the likelihood that the patient believes that the effectiveness of the treatment received will depend upon the accuracy of the information provided to the physician.” McCormick, supra note 9, § 277, at 488.
49 Id. at 34 (citing United States v. Quarles, 25 M.J. 761, 772 (N.M.C.M.R. 1987) (quoting United States v. Deland, 22 M.J. 70, 73 (C.M.A. 1986))).
50 Mosteller, supra note 8, at 265.
ment was "reasonably pertinent to . . . treatment."

When statements for treatment are involved, the "reasonable medical pertinency [requirement] acts only as a proxy for the subjective understanding of the declarant." Alternatively expressed, the fact that a statement is medically pertinent helps one conclude that the declarant believed the statement would aid treatment and, for that reason, "the declarant’s motive guarantees trustworthiness sufficiently to allow an exception to the hearsay rule." “Pertinence may be tested by asking whether the information is of a type on which a physician could reasonably rely upon to . . . provide treatment." Applied to the selfish treatment interest, this two-part test can be summed up with the following questions: "[F]irst, is the declarant’s motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in . . . treatment."

2. Statements Made for Purposes of Diagnosis. The admission analysis is practically and analytically more difficult for statements made for purposes of diagnosis, since one finds it difficult to discern a viable justification for why statements made for diagnosis are reliable enough to be admitted into evidence despite the general proscription against the admission of hearsay. The justification for the admission of such statements set forth in the advisory committee’s notes to Rule 803(4) does not support reliability. The admission theory in the notes is simply that jurors are unable to distinguish between statements used as the basis for an expert’s

51 FED. R. EVID. 803(4).
52 Mosteller, supra note 8, at 266.
53 United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980) (citing Meaney v. United States, 112 F.2d 538 (2d Cir. 1940)).
54 Brett D. Baber, Evidentiary Issues Pertaining to the Admissibility of Medical Testimony and Records at Trial, 11 ME. B.J. 286, 288 (1996) (quoting State v. Sickles, 655 A.2d 1254, 1257 (Me. 1995)).
55 Iron Shell, 633 F.2d at 84. While the language of Rule 803(3) suggests the two-factor test set out in Iron Shell, at least one court has suggested a more gestalt or "plain language" approach to the Rule. United States v. Joe, 8 F.3d 1488, 1494 n.5 (10th Cir. 1993).
56 See infra notes 241-261 and accompanying text (arguing no viable reliability justification exists and rejecting suggested justifications). The view that statements upon which an expert might rely should be admitted stems from the inclusion in Rule 803(4) of the term “diagnosis,” the phrase “reasonably pertinent to diagnosis,” and the advisory committee’s notes to the rule. FED. R. EVID. 803(4) and advisory committee’s note.
opinion and those admitted as substantive evidence.\textsuperscript{57} The most persuasive justification that goes to the reliability of statements for purposes of diagnosis has been suggested by Professors Berger and Weinstein—that "a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape the hearsay proscription."\textsuperscript{58} They also have suggested that "[t]he test for statements made for purposes of medical diagnosis under Rule 803(4) is the same as that in Rule 703—is this particular fact one that an expert in this particular field would be justified in relying upon in rendering an opinion?"\textsuperscript{59} Although many experts are persons of integrity, the bias of experts employed by a party undermines the assurance of reliability that the expert reliance justification claims.\textsuperscript{60}

Regardless of the reliability rationale, the phrasing of the Rule indicates that the conjunctive two-part test of \textit{United States v. Iron Shell}\textsuperscript{61} applies both to statements for diagnosis and to statements for treatment.\textsuperscript{62} "[F]irst, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment."\textsuperscript{63} But, in the case of statements for diagnosis, the application and emphasis of the two-prong test differs markedly from that for statements for treatment. The application is analogous to that for treatment in that the declarant needs to be motivated by a purpose of the Rule, in this case diagnosis, but this first part of the test is of minimal importance in comparison to that for statements for treatment. As mentioned earlier, the sine qua non for statements for treatment and the basis of their reliability is the state of mind

\begin{footnotes}
\footnote{57 Id.}
\footnote{58 \textit{4 WEINSTEIN \& BERGER, supra note 8, \textsuperscript{8} 803(4)[01], at 803-154.}}
\footnote{59 Id. (citing Gong v. Hirsch, 913 F.2d 1269, 1273-74 (7th Cir. 1990) (holding that same standard for admission should apply to \textit{FED. R. EVID.} 803(4) and 703)); see also \textit{Iron Shell}, 633 F.2d at 84 (citing Weinstein's argument that because \textit{FED. R. EVID.} 803(4) rationale closely parallels Rule 703, similar tests should apply).}
\footnote{60 \textit{See infra} notes 242-247 and accompanying text (discussing bias of expert witnesses and unreliability of their testimony).}
\footnote{61 633 F.2d 77.}
\footnote{62 Id. at 83.}
\footnote{63 Id. at 84.}
\end{footnotes}
of the declarant. Since the declarant’s state of mind is not the likely reliability rationale for statements for diagnosis, the declarant’s purpose or motivation in making the statement is inconsequential in comparison to its importance in the admission of statements for treatment. The real focus for the admission of statements for diagnosis is on the second prong of the Iron Shell test, what has become known as medical pertinency. With statements for diagnosis, medical pertinency is “a direct limitation on admissibility... The pertinency requirement guarantees that the statement is relevant to a subject matter about which the [medical] expert is qualified to give an opinion.” Both because of the language of the Rule and because the most probable basis for reliability is an expert’s reliance, the focus of the issue of admissibility for statements for diagnosis is on the expert’s view of what is pertinent and not the declarant’s state of mind.

In a civil case, if the judge finds that the declarant made the statement to assist diagnosis or treatment and that the statement is reasonably medically pertinent, apart from issues such as unfair prejudice under Rule 403, the statement will be admitted. In a criminal case, the judge must also decide if the admission of the statement would violate the defendant’s Sixth Amendment confrontation rights.

3. The Confrontation Clause and Statements for Diagnosis or Treatment. In Ohio v. Roberts, one of the cases that is the basis for modern Sixth Amendment Confrontation Clause analysis, the

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64 See infra notes 46-50 and accompanying text (discussing selfish treatment interest as basis for admission).
65 Iron Shell, 633 F.2d at 84. Some courts seem to have allowed admission solely upon the fact that an expert has relied upon the statement in forming an opinion. “Rule 803(4) clearly permits the admission into evidence of what O’Gee told [her doctor] about her condition, so long as it was relied on by [her doctor] in formulating his opinion—a foundation that was properly laid.” O’Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978).
66 Mosteller, supra note 8, at 266.
67 “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.
68 448 U.S. 56 (1980).
69 The Confrontation Clause provides: “In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...” U.S. CONST. amend. VI.
Supreme Court set out a two-part test for deciding on hearsay admissibility in criminal cases: “[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’”\(^{70}\) In the later cases of *United States v. Inadi*\(^{71}\) and *White v. Illinois*,\(^{72}\) the Court found that the “unavailability rule”\(^{73}\) of *Roberts* should not apply to hearsay statements where they “provide evidence . . . that cannot be replicated, even if the declarant testifies to the same matters in court[,]”\(^{74}\) and “there is little benefit, if any, to be accomplished by imposing an ‘unavailability rule.’”\(^{75}\) The Court summed up these points by finding that the unavailability rule does not apply where the “out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.”\(^{76}\)

The Court in *Roberts*, in addition to setting out an unavailability requirement, much narrowed by later cases,\(^{77}\) stated that a judge should only admit a hearsay statement, absent confrontation, “if it bears adequate ‘indicia of reliability.’”\(^{78}\) However, “no independent inquiry into reliability is required when the evidence ‘falls within a firmly rooted hearsay exception.’”\(^{79}\)

While it is clear that statements within a firmly rooted exception are presumed reliable, one finds it somewhat more difficult to discern a test for what is a firmly rooted exception. In *Idaho v.*

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70 *Roberts*, 448 U.S. at 66.
73 “By ‘unavailability rule,’ we mean a rule which would require as a predicate for introducing hearsay testimony either a showing of the declarant’s unavailability or production at trial of the declarant.” *White*, 502 U.S. at 354 n.6.
74 *Inadi*, 475 U.S. at 395 (holding that unavailability rule does not apply to co-conspirator exception to hearsay rule).
75 *White*, 502 U.S. at 354 (providing that unavailability rule does not apply to “testimony regarding spontaneous declarations and statements made in the course of receiving medical care” (footnotes omitted)).
76 *Id.* at 355 (footnote omitted).
77 *See supra* notes 69-76 and accompanying text (discussing subsequent cases).
Wright, the Court stated that “[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.” In White v. Illinois, the Court suggested that if an exception were “widely accepted,” it would also be firmly rooted. While the Court has greatly narrowed the need for courts to apply the unavailability prong of Roberts, the Court, in finding most major hearsay exceptions to be firmly rooted, has almost eliminated a judge’s need to use the reliability analysis set out in Roberts.

The Court has found that the “medical treatment” exception to the hearsay rule is firmly rooted, and that even statements for purposes of medical diagnosis should be admitted without reliability analysis.

D. SOME PROBLEMS IN INTERPRETING AND APPLYING RULE 803(4)

Because of the complexity of Rule 803(4), courts have made various errors both in interpreting and applying the Rule. First, courts improperly have treated statements made for diagnosis under Rule 803(4) as within a “firmly rooted” hearsay exception.

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81 Id. at 817 (citing Lee v. Illinois, 476 U.S. 530, 552 (1986) (Blackmun, J., dissenting); Roberts, 448 U.S. at 66; Mattox v. United States, 156 U.S. 237, 243 (1895)).
83 Id. at 355 n.8.
84 See, e.g., id. at 356 (excited utterances); Bourjaily, 483 U.S. at 183 (co-conspirator exception); Roberts, 448 U.S. at 66 n.8 (business records exception, public records exception, and former testimony exception). In Idaho v. Wright, 497 U.S. at 817, the Court found that the residual exceptions are not firmly rooted, but it has not ruled on whether statements against interest are. See Williamson v. United States, 512 U.S. 594, 605 (1994) (leaving open question of whether statements against interest are “firmly rooted”). For a discussion of why the Court is unlikely to find the statement against interest exception firmly rooted, see John J. Capowski, Statements Against Interest, Reliability, and the Confrontation Clause, 28 SETON HALL L. REV. 471, 479–80 (1997).
85 See Wright, 497 U.S. at 820 (allowing statement because declarant is unlikely to lie).
86 See White, 502 U.S. at 356 (arguing that medical statement given at time of services has special credibility because of declarant’s concern about mistreatment or misdiagnosis). For a discussion of why the statements for diagnosis portion of Federal Rule of Evidence 803(4) should not be considered firmly rooted, see infra notes 287-298 and accompanying text.
In *White v. Illinois*, for example, the Supreme Court implied that statements made for purposes of diagnosis may be admitted without reliability analysis. While this holding is now widely accepted, it seems erroneous for several reasons. Second, courts have found that, to be admissible, a statement must both have the "selfish interest motive" and be reliable enough for an expert to rely upon. If one assumes the other dimensions of the Rule are met, only one reliability basis is sufficient for admission. Third, courts have failed to distinguish between the reliability rationales in the Rule and have admitted statements for diagnosis as freely as statements for treatment.

In addition to courts having had difficulty interpreting Rule 803(4) because of the complexity of the provision, a number of troublesome issues in the application of the Rule have added to the confusion. Three are salient among these. First, courts often have been called upon to resolve the issues in Rule 803(4) in the context of child abuse cases. In child abuse cases, and perhaps especially those dealing with sexual abuse, society’s interest in protecting children is a strong, albeit often unmentioned, factor that undoubtedly skews analysis to favor outcomes that protect this vulnerable group.

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87 502 U.S. at 355-56 n.8 ("The exception for statements made for purposes of medical diagnosis or treatment is similarly recognized in Federal Rule of Evidence 803(4), and is equally widely accepted among the States." (emphasis added) (citation omitted)).

88 See, e.g., People v. Ignacio, 10 F.3d 608, 612 (9th Cir. 1993) (holding 6 GUAM CODE ANN. § 803(4) "firmly rooted"); State v. Orelup, 492 N.W.2d 101, 105 (S.D. 1992) (finding that "[t]he medical diagnosis exception to hearsay is a ‘firmly rooted hearsay exception.’ ").

89 See infra notes 287-298 and accompanying text (arguing against considering statements for diagnosis as firmly rooted).

90 See Mosteller, *supra* note 8, at 275-76 (citing United States v. Renville, 779 F.2d 430 (8th Cir. 1985)).

91 See *id.* at 259, 270-75.

92 See, e.g., Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988) (holding child’s statement to psychologist admissible); State v. Barone, 852 S.W.2d 216, 220 (Tenn. 1993) (excluding child’s statement to psychologist). Some courts also have applied the exception in adult domestic violence cases. See United States v. Joe, 8 F.3d 1488, 1495 (10th Cir. 1993) (holding identity of abuser admissible where identity is reasonably pertinent to victim’s treatment); State v. Wyss, 370 N.W.2d 745 (Wis. 1985) (applying exception to declarant’s statement about fear of spouse made to psychiatrist), *overruled on other grounds by State v. Pogllinger*, 451 N.W.2d 752 (Wis. 1990).
Depending on the age and capacity of the child, an additional problem often raised by such cases is the question of whether the declarant understood that the statement was for treatment or diagnosis and, for that reason, candor was important. As is argued later in this Article and has been advocated by others, the most efficacious and analytically honest way to deal with child abuse cases may be to create a specific exception for them.

Second, courts have been challenged by cases where the declaration that has been or is sought to be introduced is one of identity or fault. The Advisory Committee notes to Rule 803(4) say that statements of fault, and by implication, identity, would not ordinarily qualify under the “pertinent to diagnosis or treatment” language of the Rule. “Thus 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.” On the comparable issue of identity, the Eighth Circuit Court of Appeals in United States v. Iron Shell, the leading case interpreting Rule 803(4), made an analogous point: “It is important to note that the statements concern what happened rather than who assaulted her. The former in most cases is pertinent to diagnosis and treatment.
while the latter would seldom, if ever, be sufficiently related. The assumption that underlies the view that generally neither statements of fault nor identity should be admitted is that individuals do not consider fault or identity germane to treatment. For a statement of fault or identity to be admissible when a layperson might not perceive its relevancy, the physician or other health professional should explain to the subject of the examination why such a statement is pertinent to diagnosis or treatment. This suggestion is especially true if the selfish treatment interest reliability justification is being used for admission.

One area in which courts have departed from the general principle that neither statements of fault nor identity are admissible has been where children have identified their abusers. In some of these cases, the reasoning of the decisions has been quite tortured, perhaps because of the courts' efforts to protect children.

Third, courts have had difficulty applying the exception where the declarant's statement is made to a psychiatrist or other mental health professional. Commentators have suggested excluding these statements. The main focus of this Article is on whether statements made to mental health professionals should be admitted under F.R.E. 803(4). The next Section of this Article sets out the

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100 Id. at 84 (citing United States v. Nick, 604 F.2d 1199, 1202-02 (9th Cir. 1979)). Another example concludes that a statement by a patient that he was shot would be admissible but a statement that he was shot by a white man would not. United States v. Narciso, 446 F. Supp. 252, 289 (E.D. Mich. 1977). Similarly, the fact that a patient strained himself while operating a machine may be significant to treatment, but the fact that the patient said the machine was defective may not. Stewart v. Baltimore & O. R. Co., 137 F.2d 527, 530 (2d Cir. 1943).

101 Mosteller, supra note 8, at 265.

102 See, e.g., Morgan v. Foretich, 846 F.2d 941, 948 (4th Cir. 1988) (child's statements to mother and psychiatrist); United States v. Renville, 779 F.2d 430 (8th Cir. 1985) (victim's statement identifying accuser made to physician and deputy sheriff).

103 See, e.g., Renville, 779 F.2d at 437 (holding that statements by children identifying their abusers are admissible, in part, because "[t]he general rule . . . is premised on the assumption that the injury is purely somatic").

104 Mosteller, supra note 8, at 268 ("[I]t might be reasonable, although not theoretically imperative, to limit the hearsay exception to statements with apparent significance to treatment of a physical malady."); see also Michael H. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 529 n.26 (1988) (stating "Federal Rule of Evidence 803(4) should remain restricted to statements pertinent to physical medical diagnosis or treatment").
arguments in favor of excluding or severely restricting the admission of these statements.\textsuperscript{105}

III.\hspace{0.5em} Rule 803(4) and Statements Made to Mental Health Professionals

A. Some Arguments for Excluding and Limiting the Introduction of Statements Made to Mental Health Professionals

1. Psychological Treatment and Diagnosis Differ from Somatic Treatment and Diagnosis. Most arguments for excluding or treating differently the statements of psychiatric patients stem from the view that “psychiatric diagnosis and treatment differ greatly from diagnosis and treatment of physical injuries or ailments.”\textsuperscript{106} Assumptions about patient behavior are one way in which commentators and judges have suggested psychological and somatic treatment and diagnosis differ. In \textit{People v. LaLone},\textsuperscript{107} with no supporting data, the court hypothesized that psychological patients are more likely to lie than somatic patients.\textsuperscript{108} Several commentators have suggested this trait and argued that psychological patients do not appreciate the importance of being truthful to their health care providers in the way persons being treated for

\textsuperscript{105} The Section that follows, Section III.A. (Some Arguments for Excluding and Limiting the Introduction of Statements Made to Mental Health Professionals) sets out the reasons for admitting these statements.

\textsuperscript{106} \textsc{Christopher B. Mueller} & \textsc{Laird C. Kirkpatrick}, \textit{Federal Evidence} § 442, at 468-69 (2d ed. 1994).

\textsuperscript{107} 437 N.W.2d 611 (Mich. 1989).

\textsuperscript{108} \textit{Id.} at 613.

Lying to one's health care provider about symptoms and their general causes would be detrimental to the patient, and it is, in part, for this reason that we permit the introduction of such hearsay statements. It is therefore fair to say that, while medical patients may fabricate descriptions of their complaints ... we would think it less likely that they will do so than psychological patients.

\textit{Id.}; \textit{see also}, \textit{State v. Howard}, 405 A.2d 206 (Me. 1979); \textit{Tennessee v. Barone}, 852 S.W.2d 216 (Tenn. 1993).
physical ailments do.\textsuperscript{109} The assumption these commentators and courts seem to make is that mental health patients do not expect that misstatements will be harmful to them or damage their treatment in the way that patients with physical ailments do. In \textit{Cassidy v. State},\textsuperscript{110} the court wrote:

Once the perceived end purpose of the examination moves beyond the medical treatment of a physical ailment, the reason for this particular exception ceases to exist—the fear that a doctor will do a wrong and harmful thing to the declarant's body. The strong motivation to describe present and past symptoms accurately is to avoid having the doctor take out an appendix when he ought to be treating an ulcer. When we move from the realm of physical treatment to the quite different realm of psychiatric counseling, we are involved in very different states of mind on the part of the declarant.\textsuperscript{111}

While commentators and judges have stated their belief that mental health patients lack an appreciation of the importance of honesty in statements to care providers, they are especially troubled by this lack of understanding in small children.

When the statement concerns matters related only to psychological well being, subjective appreciation of the

\textsuperscript{109} Andrew E. Taslitz, \textit{Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics}, 32 \textit{Harv. J. On Legis.} 329, 363 (1995) ("There may be a lower amount of patient self interest in accurate reporting (and thus a lower level of trustworthiness) for psychological illnesses than for somatic ones."); \textit{see also} Mosteller, \textit{supra} note 8, at 268 (noting that statements for psychological treatment generally are not made with same degree of selfish interest).

Under the selfish treatment interest rationale, while clearly all statements made for the purpose of receiving treatment of psychological, as opposed to physical, ills do not necessarily lack a selfish treatment interest, it is difficult to contend that as a group they are made with the same degree of selfish interest in preventing inappropriate treatment as when the statements relate to somatic ailments.


\textsuperscript{111} \textit{Id.} at 682.
treatment implications of a statement are likely as a class to be weak, and are likely to be particularly weak under some circumstances, such as when the statements are made by very immature children or when children are questioned in the context of play. 112

2. Psychological and Somatic Facts Differ. 113 In addition to believing that mental health patients have less incentive to be honest in their statements than patients seeking somatic care, some have argued for disparate treatment for admission purposes because of the differences between psychological facts and scientific (somatic) facts. 114 Donald Spence has suggested that the difference between scientific facts and psychoanalytic facts may be analogized to "[t]raditional philosophical discussions of the facts of the matter and the relation between fact and theory." 115 He points to the example of the cat on the mat.

What kind of evidence, they ask, is needed for us to agree that the cat is or is not on the mat? This homely example can be used to highlight the point that the facts of the case are pieces of the world out there that we can point to, finger, look at, and, in other ways, stand back from as observers. . . . But once we turn to the psycho-

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112 Mosteller, supra note 8, at 266; see also, James J. Webb, Jr., Case Comment, Evidence—State v. Barone: Limiting the Scope of the Hearsay Exception in Tennessee Rule 803(4), 25 U. MEM. L. REV. 821, 831 (1995) (stating "[c]hildren are too easily manipulated by adults for their statements to psychologists to be admitted. It is not the child's idea to seek help, and it is doubtful that a young child can really understand the concept of psychological treatment and its benefits").

113 I often use "psychological" and "psychoanalytical" interchangeably in this Section. While there are important distinctions between the two terms, for purposes of this Article the points made about them are analogous. Psychoanalysis relies on interpretation of the underpinnings of the psyche in the context of transference in the therapeutic relationship. Psychoanalytic concepts are used in other forms of psychotherapy that are not called psychoanalysis per se. See HAROLD I. KAPLAN & BENJAMIN J. SADOCK, KAPLAN AND SADOCK'S SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES/CLINICAL PSYCHIATRY 885-93 (8th ed. 1988) (explaining interchangability of "psychological" and "psychoanalytical").

114 See People v. LaLone, 437 N.W.2d 611, 612-13 (Mich. 1989) (employing different standards for admission of psychological and somatic facts); Mosteller, supra note 8 (suggesting difference between psychological and somatic treatment).

analytic situation, the rules change significantly [...]
[...] we listen carefully to what the patient tells us his mother told him some 50 years before and we encourage him to associate further to this report, thus adding a layer of perhaps to a layer of might-have-been. [...].
Freud cautioned us early on, that in the "world of the neuroses it is psychical reality which is the decisive kind."\

Spence goes on to suggest not only that facts differ from psychoanalytic facts but also that, for purposes of psychoanalysis, it is often not important whether a psychoanalytic fact is true. Regardless of their truth, "they possess enormous clinical relevance."\

While academic psychology does not question the difference between the real and the imaginary, inasmuch as its theoretical entities are all said to refer to observable facts and ultimately to real movements in space and time, psychoanalysis deals with psychical reality and not with material reality. So the criterion for this reality is no longer that it is observable, but that it presents a coherence and a resistance comparable to that of material reality.\

In addition to stating that the truth of psychological facts may not be important, Spence argues that, "because we are dealing with psychical reality, there are no general laws, comparable to the laws of gravitation or inheritability or chemical bonding, that will tell us what is permitted and what is impossible. [...]. We have no comprehensive framework for organising this wealth of material."\

Verifiability is another difference some point to for requiring different treatment of psychological and somatic facts. "[A]lthough

116 Id.
117 Id.
119 Spence, supra note 115, at 916.
there are psychological tests, fabrications of physical complaints would seem to be far easier to discover through empirical tests than are fabrications which might be heard by an examining psychologist."120

Many argue that the breadth of psychological facts is another reason to treat them differently than somatic facts under Rule 803(4). "Almost anything is relevant to the diagnosis or treatment of psychological well being."121 Since anything is relevant in psychological diagnosis or treatment, regardless of its content, "the statements may be extremely unreliable as evidence of the facts related."122 Because of this broad relevancy, some argue against the admission of statements for the purpose of psychological diagnosis or treatment under F.R.E. 803(4).123 Others argue for "particularized inquiry into the trustworthiness of the statements, especially since statements of all other experts are received only for a limited purpose."124

3. Psychological Statements May Be Skewed by Condition. In addition to the difficulty of verification, "the statements may be extremely unreliable as evidence of the facts related, since the condition for which the patient is consulting the psychiatrist may have impaired the patient's perception, memory, or veracity."125 Persons who have schizophrenia, for example, may suffer delusions and hallucinations that will create inaccuracies in their statements.126 Not only are statements likely to be inaccurate, but also they may be absurd. As is discussed later, there are many approaches to dealing with this criticism that still allow the admission of other statements to mental health professionals.127

120 People v. LaLone, 437 N.W.2d 611, 611-13 (Mich. 1989); see also, Mosteller, supra note 8, at 288 ("[T]here can be little argument that as a class psychological maladies are less subject to verification than physical maladies.").
121 Graham, supra note 104, at 529 n.26.
122 5 Weinstein & Berger, supra note 8, § 803.10[4], at 803-47.
124 Mosteller, supra note 8, at 283.
125 5 Weinstein & Berger, supra note 8, § 803.09[8], at 803-47.
126 "Schizophrenia is a disturbance that lasts for at least 6 months and includes at least 1 month of active-phase symptoms (i.e., two or more of the following: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, negative symptoms)." American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV 273 (4th ed. 1994).
127 See infra notes 186-205 and accompanying text (noting other mechanisms for insuring reliability).
4. The Range of Skills and Credentials of Mental Health Providers Varies. Another argument against the admission of statements for diagnosis or treatment made to mental health providers is the great range of skills and credentials that these individuals have. Persons who serve as therapists could include a psychiatrist, who will have earned a medical degree, served an internship and residency, and may be board certified, as well as an individual with a master’s level degree. But mental health providers also might include a volunteer counselor with no degree and minimal training.

For statements made for purposes of treatment under the selfish interest rationale, the credentials and skills of the individual are of relatively low importance since reliability is based on the motivation of the declarant and not the expertise of the practitioner.128 However, for statements made for purposes of diagnosis, the expert’s credentials and skill are of great concern. This is because the most reasonable reliability underpinning for those statements, assuming there is a reliability justification at all, is that “[a] fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape the hearsay proscription.”129 Obviously, the reliability base will be solid only if we have an expert able to make sound judgments on what is medically pertinent. Judge Weinstein has argued that “[s]ince it may be assumed that doctors do not want to waste their time with extraneous history, a doctor’s having taken down information amounts to prima facie evidence that it was pertinent.”130 Concerned about the expertise problem, some courts have limited the exception to those witnesses who are licensed to render a medical diagnosis.131

128 See supra notes 46-50 and accompanying text. Also supporting the view that a mental health provider’s credentials are of minimal importance under the selfish interest rationale is the fact that statements made by a wide range of persons other than the patient may be admitted under the exception. “Statements to hospital attendants, ambulance drivers, or even members of the family might be included.” FED. R. EVID. 803(4) advisory committee’s note.

129 5 WEINSTEIN & BERGER, supra note 8, § 803.09[4], at 803-44.

130 Id. at § 803.09[6], at 803-45, -46.

131 See, e.g., State v. J.C.E., 767 P.2d 309, 314 (Mont. 1988) (“The fact remains, however, that [the counselor] is not licensed to render medical diagnoses, and therefore cannot testify about such diagnoses under this exception.”).
5. Patients Might Seek Out Mental Health Professionals to Create Admissible Testimony. Courts have expressed the concern that if they were to include statements made to mental health professionals within the hearsay exception for statements made for purposes of diagnosis or treatment, appointments with and statements to experts would be used as a subterfuge for introducing or repeating the patient's claim. The court that decided State v. White\textsuperscript{132} may have put forth this position most forcefully. That case dealt with the defendant's sexual assault upon a seventeen-year-old and testimony from a psychiatrist that related what the victim told him.\textsuperscript{133} In deciding that it would not apply the hearsay exception for statements made for purposes of diagnosis or treatment to statements made to psychiatrists, the Court of Appeals of Nebraska stated:

[W]e are unwilling to fashion a rule that could lead to a standard operating procedure in which any sexual assault victim is sent to a psychiatrist to tell his or her story so that the psychiatrist can then retell the victim's story to the jury and thereby bolster the credibility of the victim's story by virtue of the psychiatrist's expert, professional status.\textsuperscript{134}

While such a practice would be problematic and might create Sixth Amendment confrontation right problems, there are solutions far short of a wholesale exclusion of psychiatric testimony.\textsuperscript{135}

6. Federal Rule of Evidence 803(4)’s History and Purpose Suggest Exclusion. In excluding psychological testimony from being introduced under Rule 803(4), some courts have decided that the inclusion of psychological testimony would stray from the original

\textsuperscript{133} Id. at 658.
\textsuperscript{134} Id.
\textsuperscript{135} See infra notes 194-198 and accompanying text (explaining use of Fed. R. Evid. 403 to exclude psychiatric evidence that risks unfair prejudice, confusion, or misleading jury). In fact, the court in White found another way to exclude the psychiatrist's testimony about the victim's statements. It stated that "the probative value of that evidence would be outweighed by its potential for unfair prejudice." 507 N.W.2d at 658; see Neb. Rev. Stat. § 27-403 (1989) (mirroring federal rule that even relevant evidence may be excluded when danger of unfair prejudice substantially outweighs probative value).
purpose of the Rule. In *Cassidy v. State*, although Maryland had not yet adopted Rule 803(4), Judge Moylan discussed the development of the common law and the federal rule.\(^{136}\) He was troubled by the expansion of the common law exception and Rule 803(4) by what he called the “slide by way of easy and insidious gloss from ‘physical trauma and treatment’ to ‘emotional trauma and diagnosis’” and argued that “[t]he clever use of an expanding definition of ‘medical condition’ creates a domino effect.”\(^{137}\) He believed that, by moving far from the original exception for a statement of a then-existing physical condition, one lost the original basis for reliability.\(^{138}\) Judge Moylan found this result especially problematic where statements to a mental health professional that are the basis for social disposition, such as the removal of a child from an abusive parent, are admitted under the diagnosis or treatment exception.\(^{139}\) In his view, medical treatment should not include social disposition.\(^{140}\)

Similarly, the court in *People v. LaLone* criticized the extension of the hearsay exception to mental health professionals testifying about social disposition.\(^{141}\) “In such a setting, it is likely that the nature of the psychologist’s reliance on the statement for purposes of taking protective action is of a different and more readily found type than the reliance originally intended to suggest a sufficient level of reliability for admission as hearsay.”\(^{142}\)

The original reliability basis for the exception, that persons will be candid about physical problems in discussions with their doctors, argues in the minds of many for the exclusion of statements made to mental health professionals.\(^{143}\)

7. *Statements May Be Admissible Under the Residual Exception.* Most arguments against the admission of statements to mental health professionals under the diagnosis or treatment exception

\(^{137}\) *Id.* at 682.
\(^{138}\) *Id.*
\(^{139}\) *Id.*
\(^{140}\) *Id.*
\(^{141}\) 437 N.W.2d 611 (Mich. 1989).
\(^{142}\) *Id.* at 615 (footnote omitted).
\(^{143}\) See Webb, *supra* note 112, at 827-28 (citing cases opposing expansion of hearsay exception as undermining exception’s intent and creating greater possibility of error).
focus on the differences between mental and somatic health and the variations in reliability of statements made by mental health and physical health patients.\textsuperscript{144} Another type of argument suggests that the introduction of statements to mental health professionals under F.R.E. 803(4) strains the exception and these statements would be better handled under the residual exception.\textsuperscript{145} In \textit{State v. J.C.E.}, in which the court "decline[d] to extend the medical diagnosis and treatment exception beyond medical doctors,"\textsuperscript{146} the court found that one of the predecessors to current Federal Rule of Evidence 807, Rule 804(b)(5), might appropriately apply to testimony by a counselor and family services worker.\textsuperscript{147} Because of this possibility, the court remanded the case for the lower court to rule on the applicability of the residual exception.\textsuperscript{148}

Assuming one decides not to admit statements made to mental health professionals under F.R.E. 803(4), one may argue that the catchall or residual exception of F.R.E. 807 should not apply to the admission of these statements since "failing to satisfy an exception that seems applicable makes resort to another exception improper or questionable."\textsuperscript{149} While there are exceptions where this position, referred to as the "near-miss" theory, should apply,\textsuperscript{150} and there is language in the Senate Judiciary Report to Federal Rules of Evidence 803(24) and 804(b)(5) that argues for very limited

\textsuperscript{144} See supra notes 106-112 and accompanying text (discussing perceived generalization that psychological patients misrepresent more often than somatic patients).

\textsuperscript{145} A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

\textit{FED. R. EVID. 807}; \textit{see, e.g., State v. J.C.E., 767 P.2d 309, 314 (Mont. 1988)} (concluding residual exception "is designed for use where established exceptions do not apply").

\textsuperscript{146} 767 P.2d at 313.

\textsuperscript{147} \textit{Id.} at 314. While more general and less strict by its terms, Montana Rule 804(b)(5) is the Montana equivalent of F.R.E. 807, formerly F.R.E. 804(b)(5).

\textsuperscript{148} \textit{Id.} at 314-16.

\textsuperscript{149} \textit{4 MUELLER & KIRKPATRICK, supra note 106, § 475, at 680-81.}

\textsuperscript{150} \textit{Id.}
application of the catchalls, the "near-miss" theory generally should be rejected. One should:

consider admissible those statements that are similar though not identical to hearsay clearly falling under one of the four codified exceptions, if the statements otherwise bear indicia of trustworthiness equivalent to those exceptions. The contrary reading would create an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even arguably fit into a recognized mold.

The appropriate rejection of the "near-miss" theory adds some support for excluding statements made by mental health patients under F.R.E. 803(4). That rejection and the other reasons already set out in this Section against the admission of statements made to mental health professionals present problems for those who argue for the admission of these statements under F.R.E. 803(4). The next Section of this Article rebuts the most persuasive and perhaps most salient arguments for excluding mental health statements and sets forth some of the key arguments supporting their introduction.

B. SOME ARGUMENTS IN SUPPORT OF THE ADMISSION OF STATEMENTS TO MENTAL HEALTH PROFESSIONALS UNDER RULE 803(4)

While those who argue for the exclusion of statements made to mental health professionals emphasize the differences between

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151 The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of [probativeness] and necessity could properly be admissible. . . .

152 4 MUeller & Kirkpatrick, supra note 106, § 475, at 681.

153 United States v. Fernandez, 892 F.2d 976, 981 (11th Cir. 1989).
somatic and psychological patients and practitioners, the similarities argue for similar treatment under Rule 803(4).

1. **Mental Health Patients Are Motivated To Be Candid.** Commentators and judges have suggested, with no empirical support for the proposition, that mental health patients are far less likely to make reliable statements during treatment and diagnosis. Absent incompetency or an emotional illness that is manifested in delusions, other psychotic symptoms, or dishonesty, mental health patients have the same incentive for honesty as those seeking treatment for physical ailments.

[A] person who believes that he is or may be ill or injured has a strong incentive to tell the professional from whom he seeks diagnosis or treatment the truth about his medical history, symptoms, etc. because if he doesn’t it will be harder for the professional to diagnose his problem and treat it effectively.

While not comparing the relative candor between somatic and psychological patients, the Supreme Court in *Jaffee v. Redmond* implicitly recognized that mental health patients are likely to be truthful in counseling or psychotherapy when their communications are confidential. In addition to recognizing that mental health patients are likely to be honest in such a setting, the Court suggested that honesty may be more important in the psychological area, because

[t]reatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the

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154 See supra notes 128-131 and accompanying text (discussing that credentials for mental health providers are different from those for medical doctors).

155 See supra notes 106-112 and accompanying text (stating that commentators and courts find mental health patients may make unrealistic statements because they do not expect misstatements to be harmful to them or to damage their treatment).

156 See infra notes 186-204 (noting that psychiatrists' testimony, proper jury instructions, and Fed. R. Evid. 403 are available means to deal with unreliable statements).


patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. 159

Other courts have explicitly recognized that patients being treated for emotional problems are strongly motivated to be honest. 160 Even in the case of statements by young children, 161 courts have found the required motivation to assume that the statements are truthful. 162 Under the selfish treatment reliability rationale for F.R.E. 803(4), since “[a]dmission should rest upon the actual perception of the declarant that her well being is likely to be affected as a result of the statement made,” a finding by the court of proper motivation, or at least no showing of improper motivation, should be all that should be needed to allow statements to mental health professionals to be treated similarly to statements to somatic practitioners. 163

159 Id. at 1928.
160 See, e.g., Newman, 965 F.2d at 210 (holding that psychology is “medicine” within FED. R. EVID. 803(4) and that rationale behind Rule, honesty to assist treatment, applies to psychological problems).
161 See infra notes 262-279 and accompanying text (discussing treatment of admission of statements by young children).
162 See, e.g., State v. Nelson, 406 N.W.2d 385, 392 (Wis. 1987), habeas corpus granted, Nelson v. Ferrey, 688 F. Supp. 1304 (E.D. Wis. 1988), rev’d on other grounds, Nelson v. Farrey [sic], 874 F.2d 1222 (7th Cir. 1989). The Seventh Circuit decision was based on the Sixth Amendment and not the application of F.R.E. 803(4). “A child is no less aware of the existence of emotional or mental pain than physical pain and, thus, is equally aware of the necessity and beneficial nature of therapy.” Id. at 391; see also, United States v. Deland, 16 M.J. 889, 892 (A.C.M.R. 1983) (holding that MILITARY R. EVID. 803(4) “applies to psychiatrists treating mental ailments as well as physicians treating physical ailments,” and finding that requirements of Rule were met where young patient “knew she was talking to a doctor because of her nightmares, that she was cooperative” and doctor based his diagnosis and treatment on her description of incidents).
163 Professor Mosteller has suggested that “[b]ecause of the difficulty of making this determination in each case, it might be reasonable, although not theoretically imperative, to limit the hearsay exception to statements with apparent significance to treatment of a physical malady.” Mosteller, supra note 8, at 268. While the determination may be difficult, the application of many legal concepts is fraught with similar difficulties of factual application, for example, the determination of intent in many criminal cases. See, e.g., Bryan v. United States, 118 S. Ct. 1939, 1947 (1998) (holding that willful violation of statute prohibiting dealing in firearms without license required only showing that defendant knew
2. Somatic Patients Are Often Untruthful in Statements to Their Physicians. In addition to mental health patients having a motivation for honesty in treatment statements, somatic patients are more likely to misrepresent their conditions than commentators and cases interpreting Rule 803(4) have assumed.\(^{164}\) Many studies have focused on the accuracy of disclosure by somatic patients and several have dealt specifically with the reliability of patients' statements about smoking history.\(^{165}\) Some studies on the reliability of such statements have focused on heart attack survivors and have compared their statements about smoking with such measurements as blood carboxyhemoglobin levels and urinary nicotine tests. Deception rates have ranged from 8.8% to 22-40%.\(^{166}\)

While the rates in these studies might be dismissed because the behavior studied is an addictive one, somatic patient histories concerning non-addictive behavior have also had high deception rates. One study looked at patients who were being treated for peptic ulcer attacks with a regimen of antacid. "Although patients said their intake of antacid averaged 89% of the amount prescribed, their actual intake averaged only 47%. For patients who claimed they took 100%, intake varied from 2% to 130% with a mean of 59%."\(^{167}\) The high rate of somatic patient inaccuracy is indicated in that study by the fact that patients overstated their adherence to a regimen by about 100%.\(^{168}\) Other similar studies also have found high inaccuracy rates in the histories somatic patients provide.\(^{169}\)

\(^{164}\) See supra notes 106-112 and accompanying text (comparing assumptions about somatic patients with those about mental health patients).

\(^{165}\) Risteard Mulcahy et al., Factors Influencing Longterm Prognosis in Male Patients Surviving a First Coronary Attack, 37 BRIT. HEART J. 158, 163 (1975).

\(^{166}\) G. Ronan et al., The Reliability of Smoking History Amongst Survivors of Myocardial Infarction, 76 BRIT. J. OF ADDICTION 425, 427 (1981); R.W. Sillett et al., Deception amongst Smokers, 1978 BRIT. MED. J. 1185, 1186.

\(^{167}\) Harold P. Roth, M.D. & Herbert S. Caron, Ph.D., Accuracy of Doctors' Estimates and Patients' Statements on Adherence to a Drug Regimen, 23 CLINICAL PHARMACOLOGY & THERAPEUTICS 361, 361 (1978).

\(^{168}\) Id. at 366.

\(^{169}\) See, e.g., Abraham B. Bergman & Richard J. Werner, Failure of Children to Receive Penicillin by Mouth, 268 NEW. ENG. J. MED. 1334, 1438 (1963) (finding that while 83% of families stated they had given their children all prescribed doses of penicillin, only 1 of 12 urine tests were positive for penicillin).
By pointing to surprisingly high misrepresentation rates by somatic patients, I am not suggesting that psychiatric patients are necessarily more candid; I am suggesting that their rate of inaccuracy in statements for treatment is likely to be similar to that of somatic patients. In one study of psychiatric outpatients, urine tests disclosed "that 31% of those who stated they were taking their medications as directed were not doing so."¹⁷⁰ This rate is within the range of deception by somatic patients.

Several studies of somatic patient misrepresentation found generally lower levels of misrepresentation than found in most other studies. In one such study, the researchers hypothesized that the lower rate of misrepresentation was the result of the confidence and rapport which develops when close mutual interest and regular contact exists between patient and cardiologist over a long follow-up period and when the cardiologist who attended the patient during his initial illness continues to play an active part in follow-up. In our experience rapport with patients tends to become consolidated during the long follow-up period of our study.¹⁷¹

Researchers suggested a similar theory for another somatic patient study with a finding of reasonably accurate patient reports.¹⁷² Since mental health counseling is often one-on-one and often long-term, statements made for treatment in those situations may be imbued with a relatively high level of reliability because of the rapport that is developed between therapist and patient, and the expected candor that comes from such a relationship.¹⁷³

¹⁷¹ Ronan et al., supra note 166, at 425.
¹⁷² See Roth & Caron, supra note 167, at 369 (explaining results found in Alvan R. Feinstein et al., Controlled Study of Three Methods of Prophylaxis Against Streptococcal Infection in a Population of Rheumatic Children. II. Results of the First Three Years of the Study, Including Methods for Evaluating the Maintenance of Oral Prophylaxis, 260 New Eng. J. Med. 697 (1959)).
¹⁷³ Id.
In addition to somatic patients misrepresenting histories, doctors are frequently skeptical of the statements of somatic patients and apparently poor at discerning dishonesty. In a study that looked at family practice residents' skepticism about somatic patients' statements, residents doubted patients in 54 of 277 encounters, or 19.5%. In the study mentioned earlier on peptic ulcer patients' adherence to an antacid regimen, researchers found that doctors were quite poor at estimating patient adherence. "Doctors' [sic] overestimated their patients' adherence to a regimen (ATR) by about 50%." These two studies undermine the views expressed by commentators and courts both about the reliability in somatic patients' statements and the ability of physical practitioners to discern patient misstatement.

Critics of the admission of statements to mental health professionals under Rule 803(4) have suggested that mental health patients are less likely to understand or perceive that candor is important in aiding treatment and diagnosis. A substantial body of medical research "revealed self-disclosure to be heavily influenced by the perceived appropriateness of the situation for disclosing information." As might be expected, research has shown that mental health subjects rate the importance of the disclosure of personal problems and feelings higher than health care and lifestyle. For somatic patients, the reverse was true. The research suggests that for both mental health and somatic patients, they will be honest if they perceive honesty as appropriate. Psychological counseling is likely to be just such a setting, especially if it is ongoing.

174 Douglas Woolley, M.D. & Thad Clements, M.D., Family Medicine Residents' and Community Physicians' Concerns about Patient Truthfulness, 72 ACAD. MED. 155, 156 (1997).
175 Roth & Caron, supra note 167, at 361.
176 See supra notes 106-112 and accompanying text (giving examples of view that somatic patients statements are more reliable).
177 See, e.g., Cassidy v. State, 536 A.2d 666, 680 (Md. Ct. Spec. App. 1988) (stating child could not comprehend importance of candor for accurate mental health treatment); Mosteller, supra note 8, at 266 (indicating that mental health statements, especially by children, tend to be made with little subjective appreciation of treatment implications).
179 See supra notes 171-173 and accompanying text (indicating patient honesty increases with longer physician relationship).
The misrepresentations and misrepresentation rates discussed in this Section have been about somatic and mental health patients who are being treated for an illness. There seems to be little question that rates for patients who are seeing an expert simply for the purpose of diagnosis, that is, having the expert testify in court, will be even higher than those seeking treatment. 180

3. Confidentiality and Candor Are Especially Important with Mental Health Patients. While misrepresentation may be a comparable problem in treating and diagnosing both somatic and psychiatric patients, a heightened level of confidentiality for and expectation of confidentiality by psychiatric patients is likely to promote candor. While the stigma of mental illness and of having been treated for mental illness has decreased during this century, the stigma still exists. 181 Because of this stigma and the importance of trust in the counselor-patient relationship, patients often expect a high level of confidentiality, and all states have adopted a psychotherapist-patient privilege. 182 In fact, some states accord a higher and more specific level of confidentiality to the psychotherapist-patient relationship than the doctor-patient one. 183

180 The concern is sometimes raised that, because psychiatric diagnosis deals with subjective feelings to a much greater extent than other forms of medicine, a court should exercise considerable caution in assuring itself that a party's statements to a nontreating psychiatrist do not represent a veiled effort to exaggerate or falsify the facts. See D. Louisell & C. Mueller, Federal Evidence § 444, at 611 (1980). This same concern, however, is present to some extent in other forms of medical diagnosis based in part upon a party's statements to an examining physician, including, for example, statements made by a party-plaintiff to a physician for purposes of diagnosis in connection with pending litigation, see generally O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978), and statements made by a child-victim of a sexual offense made to a psychiatrist or pediatrician for purposes of diagnosis or treatment, see, e.g., United States v. Renville, 779 F.2d 430, 435-39 (8th Cir. 1985); United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980).

181 See Jaffee v. Redmond, 518 U.S. 1, 10 (1996) (indicating disclosure of mental health information may cause "embarrassment or disgrace"). A study released by the National Alliance for the Mentally Ill found pervasive discrimination in the workplace against persons with mental illness. See Otto Wahl, Ph.D., Consumer Experience with Stigma: Results of a National Survey (May 1997) (unpublished manuscript on file with Georgia Law Review).

182 See Jaffee, 518 U.S. at 12 n.16 (listing relevant state statutes).

183 In Maryland, for example, the confidences of psychiatric patients are accorded special protection. See MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1997) (establishing separate statutory privilege between patient and psychiatrist or psychologist).
The Supreme Court emphasized the importance of confidentiality in the mental health setting when it recognized the psychotherapist-patient privilege in *Jaffee v. Redmond*.\(^{184}\) In comparing the need for confidentiality in psychotherapy with that needed for treating physical ailments, it stated:

Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.\(^{185}\)

The strong privilege and commensurate expectation of privacy in the treatment of emotional illness certainly must enhance patient candor.

4. Other Checks on Unreliability Are Available. While candor among mental health patients should be high because of both incentive and confidentiality, there will be patients who make false statements. Fortunately, there are a variety of checks upon and remedies for these statements.

A major check on the disingenuous psychological patient is the training of mental health professionals in discerning deception. As one court wrote:

[A] psychiatrist is perfectly aware of the fact that any history obtained from a patient may be distorted and self-serving. However, a psychiatrist is specifically trained to "assimilate information from a wide variety

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\(^{184}\) 518 U.S. at 15 (holding that confidential communications between a licensed psychotherapist and her patients "are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence").

\(^{185}\) Id. at 10 (footnote omitted).
of sources, to evaluate each fact, to discount some, to emphasize others, and to ignore still others. He then makes his own personal observations of his patient, puts everything together, and arrives at a conclusion. 186

Another court similarly stated that psychiatrists, and other physicians, by virtue of their training and experience are quite competent to determine whether particular information given to them in the course of a professional evaluation is "reasonably pertinent to diagnosis or treatment" and are not prone to rely upon inaccurate or false data in making a diagnosis or in prescribing a course of treatment. 187

As that court also pointed out, there are, of course, statements that patients make that are inaccurate, bizarre, or even absurd, which therapists will use in treatment or diagnosis. 188 "In deciding the issue of admissibility, the judge should consider the expert's view on the reliability of the patient." 189 A court also may deal with these unreliable statements in a number of other ways. If it is clear that the statement is false, the statement should not be considered hearsay as it would not be "offered in evidence to prove the truth of the matter asserted." 190 A court faced with statements of this character could provide a limiting instruction. 191 "An instruction telling the jury that such statements should be considered only for the limited purpose of support for the psychiatric opinion would be appropriate." 192 While some would argue

188 Id. at n.6.
189 5 WEINSTEIN & BERGER, supra note 8, § 803.09[8], at 803-47.
190 FED. R. EVID. 801(c).
191 Id. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." (emphasis added)).
192 King, 785 P.2d at 602 n.6.
that limiting instructions are ineffective, they are widely used for purposes similar to limiting the substantive impact of statements by mental health patients.\footnote{While limiting instructions may be ineffective, the substantive use of statements for purposes of diagnosis also has a downside of major proportions. If a statement is admitted as substantive evidence as a part of the expert’s testimony and it is the only evidence on that point, the jury may use it as support of a critical fact. \textit{See} Mosteller, \textit{supra} note 8, at 262 ("If the statement is received substantively . . . then it . . . could be used by the jury as proof of a critical fact.").}

Troublesome statements by mental health patients may also be excluded from admission by the use of Rule 403, which allows the "exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time."\footnote{\textit{FED. R. EVID. 403}. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." \textit{Id.}} Rule 403 requires the court to balance the probative value of evidence against the factors listed in the Rule as harmful to the fact-finding process.\footnote{1 MUELLER & KIRKPATRICK, \textit{supra} note 106, § 94, at 485, 497, 503.} The Rule also may remedy one of the very specific criticisms of the introduction of statements by psychological patients under Rule 803(4)—that victims of abuse and domestic violence routinely will be sent to psychiatrists and other mental health professionals solely for the purpose of telling the victim’s story in court and, in that way, bolstering credibility.\footnote{\textit{See} supra notes 132-135 (presenting argument against admission of statements to mental health professionals that litigants will seek out mental health professionals to create testimony).} One court wrote:

\begin{quote}
A psychiatrist or a psychologist of course cannot be made a conduit for testifying in court as to any and all out-of-court statements made. As with admission of evidence of any kind, great discretion is accorded the trial judge in the determination of admissibility. The trial court must, as with any evidence, assess the inherent reliability of the testimony, the relevance of the testimony, and undertake a balancing test, particularly of prejudice versus probativeness under Rule 403.\footnote{State v. Schreuder, 726 P.2d 1215, 1225 (Utah 1986) (footnote omitted).}
\end{quote}
While some have suggested that courts use Rule 403 sparingly, and that in close cases the better practice may be to give a limiting instruction,\textsuperscript{198} the Rule is available to deal with prejudicial, misleading, and confusing psychological testimony.

Rule 803(4), by its phrasing and the underlying selfish-treatment interest rationale, limits the admission of many unreliable statements made for purposes of treatment. Under Rule 803(4), a statement made for purposes of treatment should be admissible only if the individual who made the statement had a "subjective appreciation of the importance of the inquiry to medical treatment."\textsuperscript{199} "[T]he language of the provision focuses on the declarant's motivation in making the statement. . . ."\textsuperscript{200} Because the focus of statements for purposes of treatment is on the declarant's understanding and motivation, statements should be excluded where the declarant lacks this capacity, as may be the case with those who lack competency or are very young.

The admissibility of statements for diagnosis or treatment is further limited by the reliability standard used where the admission's decision hinges upon a preliminary question of fact. This reliability standard for admission decisions was set out by the Supreme Court in \textit{Bourjaily v. United States}.\textsuperscript{201} In \textit{Bourjaily}, the Court iterated that issues on the admission of evidence that hinge on a preliminary factual question must "be established by a preponderance of proof."\textsuperscript{202} Other courts have described the degree of reliability that is required for the admission of a hearsay statement as "unlikely to be false,"\textsuperscript{203} and as "a threshold test" of admissibility.\textsuperscript{204} The language used to describe the admission

\textsuperscript{198} 1 WEINSTEIN & BERGER, supra note 8, § 403.02[2][c], at 403-16.
\textsuperscript{199} Mosteller, supra note 8, at 266.
\textsuperscript{200} People v. LaLone, 437 N.W.2d 611, 626 (Mich. 1989).
\textsuperscript{201} 483 U.S. 171, 175 (1987).
\textsuperscript{202} Id.
\textsuperscript{204} See State v. Higginbotham, 212 N.W.2d 881, 883 (Minn. 1973); see also Hack, supra note 203, at 154 n.34 (suggesting that "[t]he degree of trustworthiness required for the admission of hearsay evidence cannot be precisely quantified," and referring to various threshold tests used).
standard for all hearsay provides another check upon the admission
of unreliable statements made to mental health practitioners. As
discussed in this Section, there are many means available to courts
to limit the effect of and exclude statements to mental health
professionals far short of their wholesale exclusion. 206

5. The Overlap of Somatic and Psychological Illnesses Justifies
Similar Treatment Under Rule 803(4). Psychological and physiological
problems have been and currently are considered separate in
a myriad of ways. 206 Montaigne, referring to Plato, analogized
the mind and body as "two horses harnessed to a coach,"207 and
Descartes's writings suggest the dualist nature of mind and
body. 208 But for over one hundred years, persons in the psychiatric
and somatic medicine fields have agreed that somatic and
emotional activities overlap. 209 The number of ways in which this
overlap occurs argues for analogous treatment under Rule 803(4).

There are instances where the psyche interacts with the soma
and creates what, in earlier times, might have been considered a
purely somatic illness. One example of this class of illnesses,
referred to as psychosomatic, is coronary artery disease. 210 The
psychological traits of persons who develop this disease have been
described by various researchers.

Flanders Dunbar first described the personality of
coronary disease patients as aggressive-compulsive
personalities with a tendency to work long hours and to
seize authority. Later, Friedman and Rosenman defined
type A and type B personalities. . . . Type A personali-
ties are action-oriented individuals who struggle to

206 See King v. People, 785 P.2d 596, 603 (Colo. 1990) (suggesting that if statement
qualifies for admission under Rule 803(4), trial judge might still exclude it as being
prejudicial, confusing, misleading, or cumulative).
the psychological with the physiological).
207 Michel Eyquem de Montaigne, Of the Education of Children in THE ESSAYS 73 (W.
206 ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN
247-52 (1994) (discussing DESCARTES, DISCOURSE ON THE METHOD (1637)).
206 KAPLAN & SADOCK, supra note 113, at 412.
210 Id. at 413.
achieve poorly defined goals by means of competitive hostility.\textsuperscript{211}

The recommended treatment for coronary artery disease includes the use of psychotropic medication to alleviate psychological distress associated with the disease and medical management "with some psychological emphasis on the alleviation of psychic stress, compulsivity, and tension."\textsuperscript{212} Other now recognized psychosomatic illnesses include ulcerative colitis, peptic ulcer, bronchial asthma, and essential hypertension.\textsuperscript{213}

In addition to there being somatic illnesses that are precipitated by psychological conditions, there are physical conditions that exhibit the characteristics of psychological illnesses. For example, hyperthyroidism (thyrotoxicosis) carries with it the psychiatric symptoms of anxiety and depression.\textsuperscript{214} Persons with hypothyroidism (myxedema) may exhibit delusions, hallucinations, anxiety, and paranoia.\textsuperscript{215} These are two examples of somatic problems with psychological symptoms, and others include Cushing's disease (hyperadrenalism), Addison's disease (adrenal cortical insufficiency) and AIDS (acquired immune deficiency syndrome).\textsuperscript{216} Current research has found that not only are there somatic illnesses that have psychiatric symptoms, but that some psychiatric illnesses are triggered by somatic disease.\textsuperscript{217} For some somatic illnesses, this phenomenon seems unremarkable—for instance, that one might become depressed after a diagnosis of cancer. But researchers at the National Institute for Mental Health (NIMH) have found that strep throat and flu-like infections can cause obsessive-compulsive disorder (OCD).\textsuperscript{218} In the NIMH study, the researchers found seventy-five children who, virtually overnight, went from well-adjusted to being locked in obsessive-compulsive rituals or whose mild OCD or Tourette's syndrome increased dramatically in

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 412-13.}
\item \textit{Id. at 423 tbl.3.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
intensity after having an inadvertently untreated strep infection. "What most people don’t realize is that psychiatric disorders like OCD and schizophrenia are also true medical illnesses. Not only can a predisposition to mental illness run in a family, just as heart disease, but it also may be sparked by the very same infections that trigger other diseases."

While it appears that some somatic diseases cause specific emotional illnesses, others may have a more general effect on mental health. In a study of Social Security disability claims, the author found that some degree of non-exertional impairment, usually emotional, existed in most disability claims.

Neurological research points not only to the existence of a strong mind-body connection but also towards a view of the unity of emotional and somatic problems and of the psyche and soma. In Descartes’ Error: Emotion, Reason, and the Human Brain, Antonio R. Damasio, a neurobiologist at the University of Iowa, persuasively argues the falsehood of the Cartesian split between the mind and body. Drawing on neuropsychological research, Damasio concludes that

the comprehensive understanding of the human mind requires an organismic perspective; that not only must the mind move from a nonphysical cogitum to the realm of biological tissue, but it must also be related to a whole organism possessed of integrated body proper and brain and fully interactive with a physical and social environment.

Damasio supports his view with research that ties reasoning to our most basic somatic functions and proposes that

human reason depends on several brain systems, working in concert across many levels of neuronal

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219 Id.
220 Id. (quoting Susan Swedo, M.D., scientific director of NIMH).
221 ROBERT G. DIXON, JR., SOCIAL SECURITY DISABILITY AND MASS JUSTICE 80 (1973) (citing MICHAEL H. ROCK & FRANCIS C. ICHNIOWSKY, SOCIAL SECURITY ADMINISTRATION OPERATIONS RESEARCH STAFF, EVALUATION, PROGRESS REPORT 3, 19 (1967)).
222 DAMASIO, supra note 208, at 247-52.
223 Id. at 252.
organization, rather than on a single brain center. Both 
"high-level" and "low-level" brain centers, from the 
prefrontal cortices to the hypothalamus and brain stem, 
cooperate in the making of reason.

The lower levels in the neural edifice of reason are the 
same ones that regulate the processing of emotions and 
feelings, along with the body functions necessary for an 
an organism's survival. In turn, these lower levels main­
tain direct and mutual relationships with virtually every 
bodily organ, thus placing the body directly within the 
chain of operations that generate the highest reaches of 
reasoning, decisionmaking, and, by extension, social 
behavior and creativity. Emotion, feeling, and biological 
regulation all play a role in human reason. The lowly 
orders of our organism are in the loop of high rea­
son.224

While the connection between the psychological and somatic is 
obviously strong and the two are more and more difficult to draw 
clear lines between, over time it is likely that we will come to view 
the mind and body as far more unified than we do now and to view 
psychological problems as having their bases in physical or 
biochemical constructs rather than merely in emotions.225 This 
concept of mind-body unity is an area where the social construction 
of fact has a great deal to say about how we currently view these 
now differentiated problems. At its extreme,

proponents [of the social construction of fact] hold that 
the natural world plays a largely insignificant role in 
the construction of scientific knowledge and that the 
social climate has more to do with the acceptance of a 
particular hypothesis than the usual kind of replication 
and cross-validation assumed by most philosophers of 
science.226

224 Id. at xiii.
225 See supra notes 206-224 and accompanying text (outlining unified view of body and 
mind).
226 Spence, supra note 115, at 917-18 (citing D.T. CAMPBELL, METHODOLOGY AND 
EPISTEMOLOGY FOR SOCIAL SCIENCE 509 (1988) (citation omitted)).
Historical examples of the social construction of fact include the acceptance of genetics and of Darwin's theories on evolution, which gained popularity in Victorian England and were readily accepted in Germany but not France. Acceptance of ideas depends upon place, time, and culture, and, while the concept of the somatic nature of emotional problems has gained acceptance in some circles, it is likely to gain widespread acceptance in the future.

Because of the strong overlap between somatic and psychological illnesses and the current and most likely future difficulty of distinguishing between them, it is a mistake to categorically exclude psychological illnesses and statements about them to mental health professionals from Rule 803(4). A categorical exclusion would keep much reliable evidence from being admitted.

6. The Drafters Did Not Explicitly Exclude Statements. If the drafters of the Federal Rules of Evidence had intended to exclude statements made to mental health professionals, especially those made to psychiatrists, from admission under Rule 803(4), they would have said so in either the Rule or the advisory committee notes to the Rule.

Under the common law before the adoption of the Federal Rules of Evidence, courts had begun to admit statements made to psychiatrists. The drafters likely were aware of this development and would have addressed it if they had wished to stop the admission of these statements. This conclusion is especially so

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227 Id. at 918 (citing CAMPBELL, supra note 226, at 511-12).
228 Spence, supra note 115, at 918.
229 See supra notes 210-220 and accompanying text (giving examples of psychosomatic conditions).
230 While statements to mental health professionals might be admitted under Rule 807, admission under this Rule would be both less frequent and more difficult than under Rule 803(4). See infra notes 236-239 and accompanying text (discussing FED. R. EVID. 807 residual exception).
231 See Louisiana & Arkansas Ry. Co. v. Johnson, 214 F.2d 290, 292-93 (5th Cir. 1954) (relying on testimony of "several reputable psychiatrists" about appellant's totally disabling mental conditions and allowing admission of appellant's statements to these doctors); Ritter v. Coca-Cola Co., 128 N.W.2d 439 (Wis. 1964) (admitting testimony of plaintiff's statements about emotional experience made to psychiatrist who was consulted by plaintiff for psychotherapeutic relief after plaintiff had retained counsel for purpose of commencing action).
given that Rule 803(4) not only incorporated various common law expansions to the exception for statements of present bodily condition but also expanded on them. In addition, the Uniform Rules of Evidence, which the Federal Rule drafters considered in their work, expressly limited the statements for purposes of treatment exception to bodily conditions. In not continuing this limitation, the Federal Rule drafters chose to expand the exception to include statements to mental health providers. After the Supreme Court's proposal of the Federal Rules, the bodily condition limitation in the Uniform Rules was dropped, apparently so that the Uniform Rule would be consistent with the Federal Rule. While including statements to mental health professionals within Rule 803(4) is both analytically and scientifically justified, it was also the intent of the drafters.

7. It Is Better to Admit Psychological Statements than to Exclude. Excluding statements made to mental health professionals would keep much reliable evidence from being considered. While some argue that these statements might be admitted best under the residual exception, it seems most appropriate to reserve that exception for "treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." Statements to mental health professionals were not hearsay statements that were unanticipated.

In addition, the Senate Judiciary Committee Report suggests that use of the residual exception should be rare. The committee believes that there are certain exceptional circumstances where

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232 See supra notes 29-36 and accompanying text (noting incorporation of common law exceptions into Rule 803(4)).

233 See, e.g., Fed. R. Evid. 803(1), (2), (6), and (7) advisory committee's notes (referencing Uniform Rules of Evidence).

234 Unif. R. Evid. 63(12).

235 See id. 803(4) (deleting bodily condition limitation).

236 Fed. R. Evid. 807; cf. Graham, supra note 104, at 529 n.26 ("Federal Rule of Evidence 803(4) should remain restricted to statements pertinent to physical medical diagnosis or treatment.").

237 Fed. R. Evid. 803(24) advisory committee's note. Former Rules 803(24) and 804(b)(5) were transferred to the newly created Rule 807 effective December 1, 1997. Id. 807 advisory committee's note.

238 See supra notes 231-235 and accompanying text (discussing exclusion of provision for psychiatric statements that appeared in Uniform Rules of Evidence).
evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of probativeness and necessity could properly be admissible.\textsuperscript{239} To require the admission of statements to mental health professionals through the residual exception, if one were faithful to the drafters' intent, would severely restrict the admission of these often highly reliable statements. It is best to admit these statements under Rule 803(4), for "[w]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without."\textsuperscript{240}

IV. NEEDED REFORMS OF RULE 803(4)

A. OMIT STATEMENTS FOR PURPOSES OF DIAGNOSIS

Rule 803(4) should be changed so that statements made solely for purposes of diagnosis, whether to psychological or somatic practitioners, are not admitted as substantive evidence.\textsuperscript{241} This would continue the admission of statements made for treatment and statements made in contemplation of treatment. The reform should be made because no viable reliability justification exists excepting statements made for purposes of diagnosis from the general prohibition against the admission of hearsay evidence.

The most viable reliability justification for the admission of diagnosis statements has been suggested by Professors Berger and Weinstein. "[A] fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape the hearsay proscrip-

\textsuperscript{239} \textit{FED. R. EVID.} 803(24) Senate Judiciary Committee Report (emphasis added).

\textsuperscript{240} \textit{Id.} art. VIII advisory committee's note, \textit{cited in Morgan v. Foretich}, 846 F.2d 941, 943 (4th Cir. 1988).

\textsuperscript{241} Others have also suggested this change. \textit{See, e.g.}, Timothy Perrin, \textit{Expert Witnesses Under Rules 703 and 803(4) of the Federal Rules of Evidence: Separating the Wheat from the Chaff}, 72 IND. L.J. 939, 992 (1997) ("A[n] ... alternative adopted by some States is to exclude all statements made by a sick or injured person solely for diagnosis or to enable a physician to testify on the person's behalf.").
The justification for reliability suggested by Professors Berger and Weinstein is weak for several reasons. First, their justification assumes an expert of integrity who is minimally subject to attorney manipulation. There is little substance to this assumption. Many experts are persons of integrity, but many factors undermine the expert's integrity and further bias the testimony of those experts lacking integrity. Experts often are picked by attorneys for their willingness to support the calling attorneys' clients; "[t]he fact that experts are often repeat performers makes partisan selection much easier, since their inclinations become known." Experts are exempted from the prohibition on paying witnesses for their testimony, and those "whose incomes depend on testimony must learn to satisfy the consumers who buy that testimony; those who do not will not get hired." Several other factors go into the manipulation of the experts by attorneys. An attorney may provide the expert with materials on a schedule favorable to the attorney and an attorney will spend time with the expert in preparation for trial. This gives an attorney the opportunity to shape the expert's opinion and testimony and to develop the expert into a partisan. These factors weigh heavily against viewing statements for purposes of diagnosis as reliable because an expert has relied upon them in

242 4 WEINSTEIN & BERGER, supra note 8, § 803(4)[01], at 803-154. Weinstein and Berger also suggest that "[t]he test for statements made for purposes of medical diagnosis under Rule 803(4) is the same as that in Rule 703—i.e., is this particular fact one that an expert in this particular field would be justified in relying upon in rendering an opinion?" Id. (citing Gong v. Hirsch, 913 F.2d 1269, 1273-1274 (7th Cir. 1990) (holding that the same standard for admission should apply to both FED. R. EVID. 803(4) and 703)); see also United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980) (holding patient's statements used in diagnosis sufficiently trustworthy to allow exception to hearsay rule as long as it is reasonable for physician to rely on these statements). One may find this analogy troubling since Federal Rule of Evidence 703 allows experts to use facts that are not admissible, while Rule 803(4) allows admission where an expert has reasonably relied upon facts pertinent to diagnosis or treatment. Federal Rule of Evidence 703 reads in part: "If [facts or data are] of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." FED. R. EVID. 703.


244 WIGMORE, supra note 26, § 2203, at 137-43, cited in Gross, supra note 243, at 1129.

245 Gross, supra note 243, at 1132 ("Expert testimony is a safe legal way to buy a verdict." (citing Thomas W. Shelton, Greater Efficacy of the Trial of Civil Cases, 32 LAW NOTES 45 (1928)).

246 Id. at 1140-41.
forming an opinion. The statements do not have the reliability that the expert reliance justification claims.

My own experience in civil litigation left me concluding that an attorney will be able to find an expert willing to say virtually anything to assist a case. In some cases, I found the greatest challenge in dealing with my own experts to be limiting their testimony so that I might remain within the rules of professional conduct. A problem that compounds the problem of the lack of integrity in expert witness testimony is that admitting statements relied upon by experts, in large measure, delegates to members of the medical profession the decision as to which statements are sufficiently trustworthy to be admitted into evidence, despite the general proscription on the admission of hearsay.

In addition to relying upon the reliability of experts in justifying the admission of statements for purposes of diagnosis, Professors Weinstein and Berger argue:

[R]eliability in medical testimony is enhanced by procedural rules, and that the hearsay dangers inherent in a rule like 803(4) are consequently diminished. Provisions in Rule 35 of the Rules of Civil Procedure and Rule 16 of the Rules of Criminal Procedure referred to by Congress entitle the parties to obtain copies of their adversaries' medical reports prior to trial, thereby enabling them to prepare for effective cross-examination. In a civil case, the threat of one-sided medical testimony is further obviated by provisions authorizing the court to order a party to submit to a physical or mental examination.

While the application of these procedural rules may marginally improve the reliability of expert testimony, and cross-examination

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247 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983) ("A lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.").

248 4 WEINSTEIN & BERGER, supra note 8, § 803(4)[01], at 803-154 to 803-155 (citation omitted).
can be an effective tool in discerning falsehood,\textsuperscript{249} it is unlikely that they much improve the reliability of the statements of the declarant, who will become aware of any of this only at trial or until ordered to an exam. Also, assuming experts of integrity who are interested in ferreting out falsehood, one may argue that the skills of medical professionals enable them to discern actual symptoms and their severity from the contrived.\textsuperscript{250} As already discussed, these judgments may be far more difficult to make than we and medical practitioners assume,\textsuperscript{251} and many experts will have little interest in the task.\textsuperscript{252}

The second major problem with the reliability rationale hypothesized by Weinstein and Berger is that, unlike the other hearsay exceptions, where reliability is based on the declarant, reliability for statements for diagnosis is based on the view of the auditor. With the exception of the diagnosis prong of Rule 803(4) and perhaps the catchall exception,\textsuperscript{253} hearsay exceptions are based on the likelihood that the declarant will be truthful—that there is an incentive for honesty or a lack of opportunity for fabrication.\textsuperscript{254}

\textsuperscript{249} Wigmore referred to cross-examination as "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, supra note 26, § 1367, at 32.

\textsuperscript{250} See McCormick, supra note 9, § 278, at 490.

The general reliance upon "subjective" facts by the medical profession and the ability of its members to evaluate the accuracy of statements made to them is considered sufficient protection against contrived symptoms. Within the medical profession, the analysis of the rule appears to be that facts reliable enough to be relied on in reaching a diagnosis have sufficient trustworthiness to satisfy hearsay concerns.

\textit{Id.}

\textsuperscript{251} See supra notes 174-176 and accompanying text (discussing low reliability of somatic patients' statements and doctors' inability to discern patient misstatement).

\textsuperscript{252} See supra notes 243-248 and accompanying text (arguing paid medical experts may give testimony unreasonably favorable to parties hiring them).

\textsuperscript{253} A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

\textbf{FED. R. EVID. 807.}

\textsuperscript{254} Exceptions include: Present sense impression, \textbf{FED. R. EVID. 803(1)} ("These statements are found to be exceptionally trustworthy because the fact that they are \textit{simultaneous} with the event eradicates possible memory deficiencies and fabrication." United States v. Narciso, 446 F. Supp. 252, 285 (E.D. Mich 1977)); Excited utterance, \textbf{FED.
The justification for statements for diagnosis instead comes from the expert's reliance and not from the state of mind of the declarant. Since it is the reliability of the declarant's statement about which one is concerned, a reliability justification that focuses on the expert is attenuated and less persuasive.255

In addition to a reliability justification that has as its foundation the integrity and skill of the expert, one may hypothesize two reliability justifications that focus on the state of mind of the declarant. Neither is persuasive in supporting the admission of statements for diagnosis. First, a declarant may be motivated to be truthful to get an accurate diagnosis. This rationale holds up well for a patient seeking a diagnosis so that effective treatment may begin,256 but not for one seeking a diagnosis so that a jury might grant a larger recovery in a civil suit or make a finding of not guilty by reason of insanity.257 The incentives run counter to

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255 In stretching outward their list of a physician's responsibilities and in pushing forward with their definition of "medical treatment and diagnosis," the expansionists have left behind, abandoned and forgotten, the state of mind of the declarant. That state of mind, however, is and always has been the *sine qua non* for every hearsay exception.

256 See White v. Illinois, 502 U.S. 346, 356 (1992) ("[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.").

257 The concern that a psychiatric patient will falsify "is present to some extent in other forms of medical diagnosis based in part upon a party's statements to an examining physician, including, for example, statements made by a party-plaintiff to a physician for purposes of diagnosis in connection with pending litigation. . . ." King v. People, 785 P.2d 596, 602 (Colo. 1990) (footnote omitted).
truthfulness rather than with it.\footnote{258} While some exceptions rely upon incentives for truthfulness, others rely upon the lack of opportunity for fabrication; however, the declarants who are the plaintiffs or defendants in actions and are seeing experts who will be testifying on their behalf have not only time to consider fabrication but also an incentive to be dishonest.

Second, a declarant may be truthful because she or he fears that a doctor or other medical professional will be able to discern a falsehood. Although this motivation probably comes into play, the justification of reliability based on this motivation is a troubling footing for a hearsay exception for several reasons. First, the justification assumes a declarant would be dishonest were it not for the likelihood of being caught lying. Second, the justification, in hypothesizing about the state of mind of the declarant, assumes he or she will presume that an expert will look skeptically upon the declarant’s statement. In fact, the patient and the patient’s attorney have hired the expert because of expected sympathy, a likely favorable view of the patient’s case, and a willingness to resolve factual questions in favor of the declarant.\footnote{259}

Although the underpinning for reliability is strong in the context of statements made for treatment purposes,\footnote{260} the underpinnings for statements for diagnosis lack persuasiveness when the medical provider is seen solely for the purpose of appearing in court to support the patient’s position. Because of this lack of reliability, Rule 803(4) should be reformed to exclude statements made solely for purposes of diagnosis.\footnote{261}

\footnote{258}{"[T]he veracity of the declarant’s statements to the physician is less certain where the statements need not have been made for purposes of promoting treatment or facilitating diagnosis in preparation for treatment." Morgan v. Foretch, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., concurring in part and dissenting in part).}

\footnote{259}{"That bias itself is due, partly to the special fee which has been paid or promised to him, and partly to his prior consultation with the party and his self-committal to a particular view." 2 WIGMORE ON EVIDENCE § 563, 761 (James H. Chadbourn rev. 1979).}


\footnote{261}{This reform also would resolve the issue of the level of expertise a mental health professional would need to have in order for a statement to be admissible. The elimination of the diagnosis prong from Rule 803(4) would place emphasis again on the state of mind of the declarant rather than reliance by the auditor—as is the case with other hearsay...}
B. ESTABLISH A SEPARATE EXCEPTION FOR STATEMENTS BY CHILDREN

Child abuse cases, the cases that in large measure have shaped F.R.E. 803(4) jurisprudence,\footnote{See supra notes 253-255 and accompanying text.} are difficult for a variety of reasons.

Few cases are more difficult to try than one of child abuse where the child is very young and does not testify in court. Moreover, there is rarely a non-party witness to alleged child abuse, with the result that rulings on admissibility of evidence on behalf of the child are particularly sensitive.\footnote{See, e.g., Morgan, 846 F.2d at 950 (Powell, J., concurring in part and dissenting in part).}

Adding to the difficulty is the fact that there is often no “unique symptomatology” that actually proves abuse.\footnote{Karen Burton and Wade C. Myers, Child Sexual Abuse and Forensic Psychiatry: Evolving and Controversial Issues, 20 BULL. AM. ACAD. PSYCHIATRY L., 439, 445 (1992).} In addition, a court needs to balance the interest of society in protecting children and the fair presentation of the prosecutor’s or plaintiff’s case with the defendant’s interest in being shielded from the admission of unduly prejudicial evidence and, in criminal cases, confrontation rights.\footnote{See, e.g., Cassidy v. State, 536 A.2d 666 (Md. Ct. Spec. App. 1988) (stating that cases interpreting FED. R. EVID. 803(4) are “totally unpersuasive”; Mosteller, supra note 8, at 257 (stating that recent developments have “undermined the coherence of the exception”); Perrin, supra note 241, at 941 (stating that judges applying FED. R. EVID. 803(4) have left “a trail of uncertainty and even confusion in their wake”).}

Because of these difficulties, courts have strained both to interpret and in their interpretations of F.R.E. 803(4), and many have criticized the decisions in this area.\footnote{Morgan, 846 F.2d at 951 (Powell, J., concurring in part and dissenting in part).} One of the criticisms is that young children have difficulty understanding that they are receiving treatment or being diagnosed and that accurate and

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exceptions. See supra notes 253-255 and accompanying text.

\footnote{See, e.g., Morgan, 846 F.2d at 950 (holding “victim's statements should have been admitted into evidence”); United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985) (“Statements of identity to a physician by a child sexually abused by a family member are of a type that physicians reasonably rely on in composing a diagnosis and a course of treatment.”); United States v. Iron Shell, 633 F.2d 77, 85 (8th Cir. 1980) (holding victim's statements to examining physician admissible).}

\footnote{Morgan, 846 F.2d at 951 (Powell, J., concurring in part and dissenting in part).}

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\footnote{See, e.g., Cassidy v. State, 536 A.2d 666 (Md. Ct. Spec. App. 1988) (stating that cases interpreting FED. R. EVID. 803(4) are “totally unpersuasive”; Mosteller, supra note 8, at 257 (stating that recent developments have “undermined the coherence of the exception”); Perrin, supra note 241, at 941 (stating that judges applying FED. R. EVID. 803(4) have left “a trail of uncertainty and even confusion in their wake”).}
truthful statements are needed to promote treatment.\textsuperscript{267} Scholars have pointed especially to this lack of understanding and incentive for accuracy, which underlies the reliability of the exception, when children are being treated for psychological ailments.\textsuperscript{268} The introduction of statements of the identity of the abuser under Rule 803(4) is another area criticized by both courts and commentators.\textsuperscript{269} The Advisory Committee notes to Rule 803(4) suggest that statements of fault, including identity, would not be admissible and the court in \textit{Iron Shell} stated that identity "would seldom, if ever, be sufficiently related" to diagnosis and treatment to be admissible.\textsuperscript{270} Despite these cautions, courts have admitted statements of identity in child abuse cases under F.R.E. 803(4). The reasoning has been that the statement of identity is reasonably pertinent to treatment in deciding where the child should be placed, especially where the alleged abuser is a family member.\textsuperscript{271} Courts and scholars have criticized this reasoning for abandoning the state of mind of the declarant as important to reliability and admission and because the reliability of a statement concerning social disposition, i.e., placement of the child, is far removed from one concerning physical treatment.\textsuperscript{272} One court has also suggested that statements of identity may be counter to reliability since "[t]ruthful answers to the identity of the abuser may well wrench a child from the reassuring presence of its mother or father or both."\textsuperscript{273}

\textsuperscript{267} There is no evidence in the record that her frame of mind was comparable to a patient seeking treatment. \ldots Thus, an important element contributing to the reliability of "physician treatment" statements \ldots i.e. the strong motive for the declarant to tell the truth in order to promote treatment, has not been established in this case.\textit{Morgan}, 846 F.2d at 952 (Powell, J., concurring in part and dissenting in part).

\textsuperscript{268} See Mosteller, supra note 8, at 281 (noting "[t]he weakness of the child's subjective appreciation of the impact of the statement").

\textsuperscript{269} See, e.g., \textit{Cassidy}, 536 A.2d at 678 (noting statements identifying accuser would not fall within logic of exception); Mosteller, supra note 8, at 281 (stating that none of exception's rationales apply when statement is one of identification).

\textsuperscript{270} 633 F.2d 77, 84 (8th Cir. 1980), \textit{citing} United States v. Nick, 604 F.2d 1199, 1201-02 (9th Cir. 1979).

\textsuperscript{271} See United States v. Renville, 779 F.2d 430, 436-37 (8th Cir. 1985) (finding this type of statement so different from what the Rule's drafters envisaged that it should not be covered by general rule).

\textsuperscript{272} See, e.g., \textit{Cassidy}, 536 A.2d at 684 (noting that "the imperative to speak truthfully is not nearly so strong when the anticipated result is a social disposition").

\textsuperscript{273} Id.
The creation of a separate exception for the admission of statements made by children about abuse would alleviate the interpretive strain on F.R.E. 803(4) and help assure that reliable statements would be admitted and the unreliable excluded. This step has been taken by over twenty-seven states, and the statutes "generally require an ad hoc determination that the nontestifying child's statement possesses the particularized guarantees of trustworthiness required under the confrontation clause, an issue that turns on the facts of the case." In controlling admissibility, the statutes often require the declarant to be unavailable, and unavailability may include the trauma to be caused by in court testimony. They also require the court to look at the characteristics of the child and those of the witness, the statement itself, and corroborative evidence. The direction to look at corroborating evidence, while appropriate for deciding upon admissibility for hearsay exception purposes, puts the review at odds with Confrontation Clause analysis: the Supreme Court in Idaho v. Wright stated that only the circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief" could be used to support a statement's reliability for Confrontation Clause purposes.

The strains that the child abuse cases have placed upon Rule 803(4) when dealing with issues of identity, credentials of the witness, and social disposition would be dramatically reduced by an exception specific to these cases.

274 Others have suggested similar solutions. See Graham, supra note 104, at 529 n.26 (suggesting that statements beyond those for physical medical treatment or diagnosis be admitted under "specific hearsay exceptions applicable solely in child sexual abuse prosecutions"); Perrin, supra note 241, at 994 (suggesting that statements by child victims be admitted under tender years version of Rule 803(4)).

275 Burton & Myers, supra note 264, at 449 (citing K. Quinn & S. White, Interviewing Children for Suspected Sexual Abuse, in CLINICAL HANDBOOK OF CHILD PSYCHIATRY AND THE LAW (D. Schetky & E. Baltimore Benedek eds., 1991)).

276 See supra note 104, at 535 (footnotes omitted).


278 See, e.g., J.C.E., 767 P.2d at 315-16 (setting forth guidelines for application of MONT. R. EVID. 804(b)(5)).

279 497 U.S. 805, 819 (1990). For a discussion of White and the dichotomy between using corroboration for hearsay admission and Confrontation Clause purposes, see Capowski, supra note 84, at 482, 509-10, 512.
V. UPROOT PORTIONS OF RULE 803(4)

As discussed earlier, in Ohio v. Roberts, the Supreme Court held that a hearsay statement, to be admitted absent cross-examination and confrontation, "is admissible only if it bears adequate 'indicia of reliability.'" The Court also held that no inquiry into reliability is necessary if the statement "falls within a firmly rooted hearsay exception." While understanding that reliability testing is not needed for "firmly rooted exceptions," knowing what test to apply in deciding whether an exception is firmly rooted is somewhat more difficult. Based on the statement in Roberts, one might assume that a firmly rooted exception would be one that would admit hearsay bearing adequate indicia of reliability. The Court in Idaho v. Wright found that "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Later, in White v. Illinois, the Court suggested that an exception's being "widely accepted" would also make it firmly rooted. As also mentioned earlier, the Court has found that both statements for purposes of treatment and statements for purposes of diagnosis under F.R.E. 804(4) are firmly rooted.

For several reasons, statements for purposes of diagnosis should not be considered a firmly rooted hearsay exception. First, reliability is, or at least should be, the linchpin for Confrontation Clause purposes. See Charles R. Nesson & Yochai Benkler, Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause, 81 Va. L. Rev. 149, 165-69 (1995) (suggesting judges should decide "foundational adequacy" of evidence and
tion Clause analysis, and since there is no reliability justification for statements made for purposes of diagnosis, statements for diagnosis should not be considered firmly rooted.

Second, to the degree that a firmly rooted hearsay exception is based upon "longstanding judicial and legislative experience," a statement for diagnosis should not be considered a firmly rooted hearsay exception. While one finds it difficult to determine how many years it takes for an exception to be longstanding, the statements for purposes of diagnosis exception was first recognized with the adoption of the Federal Rules of Evidence in 1975. These intervening years hardly seem to create an exception that is longstanding in the fashion of so many other hearsay exceptions.

Third, while the exception for statements for purposes of diagnosis is "widely accepted" because of the widespread adoption of the Federal Rules of Evidence, the widely accepted standard seems inappropriate for deciding that an exception is firmly rooted. While I could attempt some sophisticated analysis as to why this is so, a quote from my mother, and perhaps the reader's mother, should suffice. When I used the, "But Mom, everybody is going" argument, she rhetorically would ask, "If everyone jumps off the bridge, are you going to?" Although this rejoinder to the "widely accepted" standard fails if each state adopting its own version of the Federal Rules of Evidence and incorporating the substantive admission of statements for diagnosis had made a thoughtful

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288 See supra notes 241-279 and accompanying text (arguing for reform of FED. R. EVID. 803(4) by excluding from exception statements made solely for diagnosis).
291 See supra notes 84 & 289 (discussing longstanding exceptions for co-conspirator statements, excited utterances, business records, public records, and former testimony).
292 "Within the first 20 years after the Rules were adopted in the federal system in 1975, almost three-quarters of the states adopted codes that closely track them." MUELLER & KIRKPATRICK, supra note 290, § 1.2, at 4.
inquiry into the reliability of these statements, such thoughtfulness hardly seems likely.\textsuperscript{293} In addition, some states that have thoughtfully considered the inclusion of statements for purposes of diagnosis in Rule 803(4), have omitted them from their versions of the Rules.\textsuperscript{294}

Because statements for purposes of diagnosis are neither reliable nor a longstanding exception, they should not be considered firmly rooted for purposes of Sixth Amendment analysis. Conversely, to the degree that one accepts firmly rooted jurisprudence, statements for treatment made to both somatic practitioners and mental health professionals should be presumed reliable under Confrontation Clause analysis. While the inclusion of statements to mental health professionals is a more recent development than the inclusion of statements of physical condition,\textsuperscript{295} as this Article has suggested, both types of statements should be treated analogously for admission purposes.\textsuperscript{296} The "longstanding judicial and legislative experience"\textsuperscript{297} with statements made to somatic practitioners certainly is applicable for those made to mental health professionals. In addition, in the case of statements for purposes of treatment, there is a strong reliability base for their admission under the firmly rooted principle.\textsuperscript{298}

\begin{footnotesize}
\textsuperscript{293} The Federal Rules of Evidence make no argument that statements for purposes of diagnosis are reliable. Their inclusion as substantive evidence was based on the perceived inability of jurors to differentiate evidence admitted solely as a basis for an expert's opinion and substantive evidence. \textit{Fed. R. Evid. 803(4)} advisory committee's notes.

\textsuperscript{294} See, e.g., PA. \textit{R. Evid. 803(4)} (1998) ("A statement made for purposes of medical treatment, or medical \textit{diagnosis in contemplation of treatment}, and describing medical history, or past or present symptoms, pain, or sensations, or the . . . source thereof, insofar as reasonably pertinent to treatment, or \textit{diagnosis in contemplation of treatment}.") (emphasis added).

Statements made to persons retained solely for the purpose of litigation are not admissible under this rule. The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully. This rationale is not applicable to statements made for purposes of litigation.

\textit{Id.} \textsuperscript{295} See \textit{supra} notes 24, 231 and accompanying text (discussing inclusion of statements of physical condition and statements to mental health professionals).

\textsuperscript{296} See \textit{supra} notes 154-240 and accompanying text (arguing for analogous treatment of psychological and somatic statements).


\textsuperscript{298} See \textit{supra} notes 46-50 and accompanying text (discussing selfish treatment interest test).
\end{footnotesize}
VI. Conclusion

Because of the reliability of statements made by psychological patients, and the similarities between somatic and psychological patients and between physical and mental illness, statements for purposes of treatment made to mental health professionals should be admitted under F.R.E. 803(4). However, the Rule should be amended to exclude statements, whether to somatic or mental health practitioners, solely made for purposes of diagnosis.

Even with this change, courts will need to make a searching factual review of statements made for treatment to discover if the declarant's statement is sufficiently reliable to be included within the exception. This review should include a determination of whether the declarant is of an appropriate age and of sufficient competency to understand that the statements are to aid treatment and that honesty will serve this goal.

If statements for purposes of diagnosis continue to be a part of the exception, the Supreme Court should reconsider its view that these statements are "firmly rooted" for purposes of Confrontation Clause analysis. Statements for diagnosis lack the reliability rationale that should be required for inclusion as a firmly rooted hearsay exception, and, while they are widely accepted, given their 1975 inclusion as a hearsay exception, they should not be considered long-standing.