

## Connecticut Rules

### CODE OF EVIDENCE

#### Article VIII. HEARSAY

*As amended through January 1, 2011*

#### **§ 8-3. Hearsay Exceptions: Availability of Declarant Immaterial**

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

(1) Statement by a party opponent. A statement that is being offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, (B) a statement that the party has adopted or approved, (C) a statement by a person authorized by the party to make a statement concerning the subject, (D) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy, (E) in an action for a debt for which the party was surety, a statement by the party's principal relating to the principal's obligations, or (F) a statement made by a predecessor in title of the party, provided the declarant and the party are sufficiently in privity that the statement of the declarant would affect the party's interest in the property in question.

(2) Spontaneous utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Statement of then-existing physical condition. A statement of the declarant's then-existing physical condition, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.

(4) Statement of then-existing mental or emotional condition. A statement of the declarant's then-existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.

(5) Statement for purposes of obtaining medical diagnosis or treatment. A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment.

(6) Recorded recollection. A memorandum or record concerning an event about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness at or about the time of the event

recognized as a standard authority in the field by the witness, other expert witness or judicial notice.

(9) Statement in ancient documents. A statement in a document in existence for more than thirty years if it is produced from proper custody and otherwise free from suspicion.

(10) Published compilations. Market quotations, tabulations, lists, directories or other published compilations, that are recognized authority on the subject, or are otherwise trustworthy.

(11) Statement in family bible. A statement of fact concerning personal or family history contained in a family bible.

(12) Personal identification. Testimony by a witness of his or her own name or age.

#### COMMENTARY

(1) Statement by party opponent.

Section 8-3 (1) sets forth six categories of party opponent admissions that were excepted from the hearsay rule at common law: (A) The first category excepts from the hearsay rule a party's own statement when offered against him or her. E.g., *In re Zoarski*, 227 Conn. 784, 796, 632 A.2d 1114 (1993); *State v. Woodson*, 227 Conn. 1, 15, 629 A.2d 386 (1993). Under Section 8-3 (1) (A), a statement is admissible against its maker, whether he or she was acting in an individual or representative capacity when the statement was made. Although there apparently are no Connecticut cases that support extending the exception to statements made by and offered against those serving in a representative capacity, the rule is in accord with the modern trend. E.g., Fed. R. Evid. 801 (d) (2) (A). Connecticut excepts party admissions from the usual requirement that the person making the statement have personal knowledge of the facts stated therein. *Dreir v. Upjohn Co.*, 196 Conn. 242, 249, 492 A.2d 164 (1985).

(B) The second category recognizes the common-law hearsay exception for "adoptive admissions." See, e.g., *State v. John*, 210 Conn. 652, 682-83, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *Falker v. Samperi*, 190 Conn. 412, 426, 461 A.2d 681 (1983). Because adoption or approval may be implicit; see, e.g., *State v. Moye*, 199 Conn. 389, 393-94, 507 A.2d 1001 (1986); the commonlaw hearsay exception for tacit admissions, under which silence or a failure to respond to another person's statement may constitute an admission; e.g., *State v. Morrill*, 197 Conn. 507, 535, 498 A.2d 76 (1985); *Obermeier v. Nielsen*, 158 Conn. 8, 11-12, 255 A.2d 819 (1969); is carried forward in Section 8-3 (1) (B). The admissibility of tacit admissions in criminal cases is subject to the evidentiary limitations on the use of an accused's postarrest silence; see *State v. Ferrone*, 97 Conn. 258, 266, 116 A. 336 (1922); and the constitutional limitations on the use of the accused's post- *Miranda* warning silence. *Doyle v. Ohio*, 426 U.S. 610, 617-19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); see, e.g., *State v. Zeko*, 177 Conn. 545, 554, 418 A.2d 917 (1977).

(C) The third category restates the common-law hearsay exception for "authorized admissions." See e.g. *Presta v Monnier* 145 Conn 694 699 146 A 2d 404 (1958); *Collins v Lewis* 111 Conn

See Section 1-1 (d) (1). See generally *Robles v. Lavin*, 176 Conn. 281, 284, 407 A.2d 957 (1978). Because partners are considered agents of the partnership for the purpose of its business; General Statutes § 34-322 (1); a partner's declarations in furtherance of partnership business ordinarily are admissible against the partnership under Section 8-3 (1) (C) principles. See 2 C. McCormick, *Evidence* (5th Ed. 1999) § 259, p. 156; cf. *Munson v. Wickwire*, 21 Conn. 513, 517 (1852).

(D) The fourth category encompasses the hearsay exception for statements of coconspirators. E.g., *State v. Couture*, 218 Conn. 309, 322, 589 A.2d 343 (1991); *State v. Pelletier*, 209 Conn. 564, 577, 552 A.2d 805 (1989); see also *State v. Vessichio*, 197 Conn. 644, 654-55, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986) (additional foundational elements include existence of conspiracy and participation therein by both declarant and party against whom statement is offered). The exception is applicable in civil and criminal cases alike. See *Cooke v. Weed*, 90 Conn. 544, 548, 97 A. 765 (1916). The proponent must prove the foundational elements by a preponderance of the evidence and independently of the hearsay statements sought to be introduced. *State v. Vessichio*, supra, 655; *State v. Haggood*, 36 Conn. App. 753, 767, 653 A.2d 216, cert. denied, 233 Conn. 904, 657 A.2d 644 (1995).

(E) The fifth category of party opponent admissions is derived from *Agricultural Ins. Co. v. Keeler*, 44 Conn. 161, 162-64 (1876). See generally C. Tait & J. LaPlante, *Connecticut Evidence* (2d Ed. 1988) § 11.5.6 (d), p. 347; 4 J. Wigmore, *Evidence* (4th Ed. 1972) § 1077.

(F) The final category incorporates the common-law hearsay exception applied in *Pierce v. Roberts*, 57 Conn. 31, 40-41, 17 A. 275 (1889), and *Ramsbottom v. Phelps*, 18 Conn. 278, 285 (1847).

## (2) Spontaneous utterance.

The hearsay exception for spontaneous utterances is well established. See, e.g., *State v. Stange*, 212 Conn. 612, 616-17, 563 A.2d 681 (1989); *Cascella v. Jay James Camera Shop, Inc.*, 147 Conn. 337, 341-42, 160 A.2d 899 (1960); *Perry v. Haritos*, 100 Conn. 476, 483-84, 124 A. 44 (1924). Although Section 8-3 (2) states the exception in terms different from that of the case law on which the exception is based; cf. *State v. Stange*, supra, 616-17; *Rockhill v. White Line Bus Co.*, 109 Conn. 706, 709, 145 A. 504 (1929); *Perry v. Haritos*, supra, 484; *State v. Guess*, 44 Conn. App. 790, 803, 692 A.2d 849 (1997); the rule assumes incorporation of the case law principles underlying the exception.

The event or condition must be sufficiently startling, so "as to produce nervous excitement in the declarant and render [the declarant's] utterances spontaneous and unreflective." *State v. Rinaldi*, 220 Conn. 345, 359, 599 A.2d 1 (1991), quoting C. Tait & J. LaPlante, supra, § 11.11.2, pp. 373-74; accord 2 C. McCormick, supra, § 272, p. 204.

## (3) Statement of then-existing physical condition.

Section 8-3 (3) embraces the hearsay exception for statements of then-existing physical condition. *Martin v. Sherwood*, 74 Conn. 475, 481-82, 51 A. 526 (1902); *State v. Dart*, 29 Conn. 153, 155 (1860); see *McCarrick v Kealy* 70 Conn 642 645 40 A 603 (1898)

Section 8-3 (4) embodies what is frequently referred to as the "state-of-mind" exception to the hearsay rule. See, e.g., *State v. Periere*, 186 Conn. 599, 605-606, 442 A.2d 1345 (1982).

The exception allows the admission of a declarant's statement describing his or her then-existing mental or emotional condition when the declarant's mental or emotional condition is a factual issue in the case. E.g., *State v. Periere*, supra, 186 Conn. 606-607 (to show declarant's fear); *Kearney v. Farrell*, 28 Conn. 317, 320-21 (1859) (to show declarant's "mental feeling"). Only statements describing then-existing mental or emotional condition, i.e., that existing when the statement is made, are admissible.

The exception also covers a declarant's statement of present intention to perform a subsequent act as an inference that the subsequent act actually occurred. E.g., *State v. Rinaldi*, 220 Conn. 345, 358 n.7, 599 A.2d 1 (1991); *State v. Santangelo*, 205 Conn. 578, 592, 534 A.2d 1175 (1987); *State v. Journey*, 115 Conn. 344, 351, 161 A.2d 515 (1932). The inference drawn from the statement of present intention that the act actually occurred is a matter of relevancy rather than a hearsay concern.

When a statement describes the declarant's intention to do a future act in concert with another person, e.g., "I am going to meet Ralph at the store at ten," the case law does not prohibit admissibility. See *State v. Santangelo*, supra, 205 Conn. 592. But the declaration can be admitted only to prove the declarant's subsequent conduct, not to show what the other person ultimately did. *State v. Perelli*, 125 Conn. 321, 325, 5 A.2d 705 (1939). Thus, in the example above, the declarant's statement could be used to infer that the declarant actually did go to meet Ralph at the store at ten, but not to show that Ralph went to the store at ten to meet the declarant.

Placement of Section 8-3 (4) in the "availability of the declarant immaterial" category of hearsay exceptions confirms that the admissibility of statements of present intention to show future acts is not conditioned on any requirement that the declarant be unavailable. See *State v. Santangelo*, supra, 205 Conn. 592 (dictum suggesting that declarant's unavailability is precondition to admissibility).

While statements of present intention looking forward to the doing of some future act are admissible under the exception, backward looking statements of memory or belief offered to prove the act or event remembered or believed are inadmissible. See *Wade v. Yale University*, 129 Conn. 615, 618-19, 30 A.2d 545 (1943). But see *State v. Santangelo*, supra, 205 Conn. 592-93. As the advisory committee note to the corresponding federal rule suggests, "[t]he exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." Fed. R. Evid. 803 (3) advisory committee note, citing *Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933). For cases dealing with the admissibility of statements of memory or belief in will cases, see *Spencer's Appeal*, 77 Conn. 638, 643, 60 A. 289 (1905); *Vivian Appeal*, 74 Conn. 257, 260-62, 50 A. 797 (1901); *Comstock v. Hadlyme Ecclesiastical Society*, 8 Conn. 254, 263-64 (1830). Cf. *Babcock v. Johnson*, 127 Conn. 643, 644, 19 A.2d 416 (1941) (statements admissible only as circumstantial evidence of state of mind and not for truth of matter

U.S. 895, 109 S. Ct. 235, 102 L. Ed. 2d 225 (1988).

Statements concerning the cause of an injury or condition traditionally were inadmissible under the exception. See *Smith v. Hausdorf*, 92 Conn. 579, 582, 103 A. 939 (1918). Recent cases recognize that, in some instances, causation may be pertinent to medical diagnosis or treatment or advice. See *State v. Daniels*, 13 Conn. App. 133, 135, 534 A.2d 1253 (1987); cf. *State v. DePastino*, supra, 228 Conn. 565. Section 8-3 (5), thus, excepts from the hearsay rule statements describing "the inception or general character of the cause or external source" of an injury or condition when reasonably pertinent to medical diagnosis or treatment.

Statements as to causation that include the identity of the person responsible for the injury or condition ordinarily are neither relevant to nor in furtherance of the patient's medical treatment. *State v. DePastino*, supra, 228 Conn. 565; *State v. Dollinger*, 20 Conn. App. 530, 534, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990). Both the supreme and appellate courts have recognized an exception to this principle in cases of domestic child abuse. *State v. DePastino*, supra, 565; *State v. Dollinger*, supra, 534-35; *State v. Maldonado*, 13 Conn. App. 368, 372-74, 536 A.2d 600, cert. denied, 207 Conn. 808, 541 A.2d 1239 (1988); see C. Tait & J. LaPlante, supra, (Sup. 1999) § 11.12.3, p. 233. The courts reason that "[i]n cases of sexual abuse in the home, hearsay statements made in the course of medical treatment which reveal the identity of the abuser, are reasonably pertinent to treatment and are admissible. . . . If the sexual abuser is a member of the child victim's immediate household, it is reasonable for a physician to ascertain the identity of the abuser to prevent recurrences and to facilitate the treatment of psychological and physical injuries." (Citation omitted; internal quotation marks omitted.) *State v. Dollinger*, supra, 535, quoting *State v. Maldonado*, supra, 374; accord *State v. DePastino*, supra, 565.

Traditionally, the exception seemingly required that the statement be made to a physician. See, e.g., *Wilson v. Granby*, 47 Conn. 59, 76 (1879). Statements qualifying under Section 8-3 (5), however, may be those made not only to a physician, but to other persons involved in the treatment of the patient, such as a nurse, a paramedic, an interpreter or even a family member. This approach is in accord with the modern trend. See *State v. Maldonado*, supra, 13 Conn. App. 369, 374 n.3 (statement by child abuse victim who spoke only Spanish made to Spanish speaking hospital security guard enlisted by treating physician as translator).

Common-law cases address the admissibility of statements made only by the patient. E.g., *Gilmore v. American Tube & Stamping Co.*, supra, 79 Conn. 504. Section 8-3 (5) does not, by its terms, restrict statements admissible under the exception to those made by the patient. For example, if a parent were to bring his or her unconscious child into an emergency room, statements made by the parent to a health care provider for the purpose of obtaining treatment and pertinent to that treatment fall within the scope of the exception.

Early common law distinguished between statements made to physicians consulted for the purpose of treatment and statements made to physicians consulted solely for the purpose of qualifying as an expert witness to testify at trial. Statements made to these so-called "nontreating" physicians

First, the witness must have had personal knowledge of the event recorded in the memorandum or record. *Papas v. Aetna Ins. Co.*, 111 Conn. 415, 420, 150 A. 310 (1930); *Jackiewicz v. United Illuminating Co.*, 106 Conn. 302, 309, 138 A. 147 (1927); *Neff v. Neff*, 96 Conn. 273, 278, 114 A. 126 (1921).

Second, the witness' present recollection must be insufficient to enable the witness to testify fully and accurately about the event recorded. *State v. Boucino*, 199 Conn. 207, 230, 506 A.2d 125 (1986). The rule thus does not require the witness' memory to be totally exhausted. See *id.* Earlier cases to the contrary, such as *Katsonas v. W.M. Sutherland Building & Contracting Co.*, 104 Conn. 54, 69, 132 A. 553 (1926), apparently have been rejected. See *State v. Boucino*, *supra*, 230. "Insufficient recollection" may be established by demonstrating that an attempt to refresh the witness' recollection pursuant to Section 6-9 (a) was unsuccessful. See *Katsonas v. W.M. Sutherland Building & Contracting Co.*, *supra*, 69.

Third, the memorandum or record must have been made or adopted by the witness "at or about the time" the event was recorded. *Gigliotti v. United Illuminating Co.*, 151 Conn. 114, 124, 193 A.2d 718 (1963); *Neff v. Neff*, *supra*, 96 Conn. 278; *State v. Day*, 12 Conn. App. 129, 134, 529 A.2d 1333 (1987).

Finally, the memorandum or record must reflect correctly the witness' knowledge of the event as it existed at the time of the memorandum's or record's making or adoption. See *State v. Vennard*, 159 Conn. 385, 397, 270 A.2d 837 (1970), cert. denied, 400 U.S. 1011, 91 S. Ct. 576, 27 L. Ed. 2d 625 (1971); *Capone v. Sloan*, 149 Conn. 538, 543, 182 A.2d 414 (1962); *Hawken v. Dailey*, 85 Conn. 16, 19, 81 A. 1053 (1911).

A memorandum or record admissible under the exception may be read into evidence and received as an exhibit. *Katsonas v. W.M. Sutherland Building & Contracting Co.*, *supra*, 104 Conn. 69; see *Neff v. Neff*, *supra*, 96 Conn. 278-79. Because a memorandum or record introduced under the exception is being offered to prove its contents, the original must be produced pursuant to Section 10-1, unless its production is excused. See Sections 10-3 through 10-6; cf. *Neff v. Neff*, *supra*, 278.

Multiple person involvement in recordation and observation of the event recorded is contemplated by the exception. For example, A reports to B an event A has just observed. B immediately writes down what A reported to him. A then examines the writing and adopts it as accurate close to the time of its making. A is now testifying and has forgotten the event. A may independently establish the foundational requirements for the admission of the writing under Section 8-3 (6). Cf. *C. Tait & J. LaPlante*, *supra*, § 11.21, p. 408, citing *Curtis v. Bradley*, 65 Conn. 99, 31 A. 591 (1894).

The past recollection recorded exception to the hearsay rule is to be distinguished from the procedure for refreshing recollection, which is covered in Section 6-9.

#### (7) Public records and reports.

Section 8-3 (7) sets forth a hearsay exception for certain public records and reports. The exception is derived primarily from common law although public records and reports remain the

Co., 30 Conn. App. 693, 701, 622 A.2d 578 (1993), and from cases in which public records had been admitted under the business records exception. See, e.g., *State v. Palozie*, 165 Conn. 288, 294-95, 334 A.2d 458 (1973); *Mucci v. LeMonte*, 157 Conn. 566, 569, 254 A.2d 879 (1969).

The "duty" under which public officials act, as contemplated by proviso (A), often is one imposed by statute. See, e.g., *Lawrence v. Kozlowski*, 171 Conn. 705, 717-18, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977); *Hing Wan Wong v. Liquor Control Commission*, supra, 160 Conn. 8-10. Nevertheless, Section 8-3 (7) does not preclude the recognition of other sources of duties.

Proviso (C) anticipates the likelihood that more than one individual may be involved in the making of the public record. By analogy to the personal knowledge requirement imposed in the business records context; e.g., *In re Barbara J.*, 215 Conn. 31, 40, 574 A.2d 203 (1990); proviso (C) demands that the public record be made upon the personal knowledge of either the public official who made the record or someone, such as a subordinate, whose duty it was to relay that information to the public official. See, e.g., *State v. Palozie*, supra, 165 Conn. 294-95 (public record introduced under business records exception).

#### (8) Statement in learned treatises.

Exception (8) explicitly permits the substantive use of statements contained in published treatises, periodicals or pamphlets on direct examination or cross-examination under the circumstances prescribed in the rule.

Although most of the earlier decisions concerned the use of medical treatises; e.g., *Cross v. Huttenlocher*, 185 Conn. 390, 395, 440 A.2d 952 (1981); *Perez v. Mount Sinai Hospital*, 7 Conn. App. 514, 520, 509 A.2d 552 (1986); Section 8-3 (8), by its terms, is not limited to that one subject matter or format. *Ames v. Sears, Roebuck & Co.*, 8 Conn. App. 642, 650-51, 514 A.2d 352, cert. denied, 201 Conn. 809, 515 A.2d 378 (1986) (published technical papers on design and operation of riding lawnmowers).

Connecticut allows the jury to receive the treatise, or portion thereof, as a full exhibit. *Cross v. Huttenlocher*, supra, 185 Conn. 395-96. If admitted, the excerpts from the published work may be read into evidence or received as an exhibit, as the court permits. See *id.*

#### (9) Statement in ancient documents.

The hearsay exception for statements in ancient documents is well established. *Jarboe v. Home Bank & Trust Co.*, 91 Conn. 265, 270-71, 99 A. 563 (1917); *New York, N.H. & H. R. Co. v. Cella*, 88 Conn. 515, 520, 91 A. 972 (1914); see *Clark v. Drska*, 1 Conn. App. 481, 489, 473 A.2d 325 (1984).

The exception, by its terms, applies to all kinds of documents, including documents produced by electronic means, and is not limited to documents affecting an interest in property. See *Petroman v. Anderson* 105 Conn 366 369-70 135 A 391 (1926) (ancient map introduced under exception); *C. Tait*

(11) Statement in family bible.

Connecticut has recognized, at least in dictum, an exception to the hearsay rule for factual statements concerning personal or family history contained in family bibles. See *Eva v. Gough*, 93 Conn. 38, 46, 104 A. 238 (1918).

(12) Personal identification.

A witness' in-court statement of his or her own name or age is admissible, even though knowledge of this information often is based on hearsay. *Blanchard v. Bridgeport*, 190 Conn. 798, 806, 463 A.2d 553 (1983) (name); *Toletti v. Bidizcki*, 118 Conn. 531, 534, 173 A. 223 (1934) (name); *State v. Hyatt*, 9 Conn. App. 426, 429, 519 A.2d 612 (1987) (age); see *Creer v. Active Auto Exchange, Inc.*, 99 Conn. 266, 276, 121 A. 888 (1923) (age). It is unclear whether case law supports the admissibility of a declarant's out-of-court statement concerning his or her own name or age when offered independently of existing hearsay exceptions, such as the exception for statements made by a party opponent.