

THE HEARSAY PARADOX: DECLARANT-WITNESSES' OWN OUT-OF-COURT STATEMENTS

Robert R. Little and Stephen L. Rispoli\*

*Hearsay is “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”*

*-Rule 801, Texas Rules of Evidence*

*If a witness testifies to a statement he made out-of-court, is that statement hearsay? Under the plain text of the rule, the answer is yes. Even so, what’s the harm? The witness is testifying and subject to cross-examination, so shouldn’t the testimony be admitted?*

I.	Introduction.....	844
II.	The Exclusions and Exceptions to the Hearsay Rule Provide Trustworthiness and Reliability that Cross-Examination Alone Cannot Satisfy.....	848
	A. The Exclusions in Rule 801 Serve No Purpose If Having the Declarant Present and Subject to Cross-Examination Satisfies Hearsay Concerns.....	849
	1. Prior Inconsistent Statements.....	849
	2. Prior Consistent Statements.....	854
	3. Prior Statement of Identification.....	859
	4. Exceptions Under Rules 803 and 804.....	859
	5. Conclusion .....	861
	B. Textual Differences in Other Rules Support the Limited, Specific Nature of the Exclusions in the Texas Rule.....	861
	1. The Proposed Federal Rule and Recent Changes to the Federal Rule.....	861
	2. The Puerto Rican Rule.....	862
III.	Disparate Court Treatment of a Declarant-Witness’s Repetition of His Out-of-Court Statement When the Witness is Testifying	

Shows the Confusion Surrounding the Rule and How Proper Understanding Can Be Critical in Admitting Evidence.....	863
A. Cases That Expressly Hold That the Witness’s Own Out-of-Court Statement Is Hearsay When Offered for the Truth of the Matter Asserted. ....	864
1. Examples of Federal Case Law.....	864
2. Examples of State Case Law.....	866
B. Cases Holding That the Out-of-Court Statement Is Not Hearsay When the Declarant Repeats It in Court. ....	871
C. Cases That Fail to Address the Issue.....	874
D. Conclusion.....	876
IV. There is No Exception or Exclusion that States the Mere Presence of a Witness On the Stand In the Courtroom, Under Oath, and Subject to Cross-Examination is Not Hearsay. Instead, the Rules Carve Out Very Narrow Exceptions and Exclusions to the General Hearsay Rule.....	877

## I. INTRODUCTION

Rule 801 of the *Texas Rules of Evidence* defines hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”<sup>1</sup> Based on this rule, every attorney, and most non-attorneys, recognizes that when a witness takes the stand and attempts to testify about something someone else said to him or around him, such

---

\*Robert R. Little is a shareholder at Naman Howell Smith and Lee, P.L.L.C., and Adjunct Professor of Law at Baylor Law School. Stephen L. Rispoli is the Assistant Dean of Student Affairs and *Pro Bono* Programs at Baylor Law School. We are indebted to Professor Gerald Powell and Dean Brad Toben for their helpful comments and feedback, and to Kathryn Hendrix Mickan for her excellent research assistance.

<sup>1</sup>Texas Rule 801(d) is identical to Federal Rule 801(c). The federal rule does differ in its definition of *statement*. Compare Tex. R. Evid. 801(a) (“‘Statement’ means a person’s oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.”) with FED. R. EVID. 801(a) (“‘Statement’ means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.”). The Texas rule also defines “matter asserted,” where the Federal rule does not. See Tex. R. Evid. 801(c). The Texas drafters patterned the Texas rules after the federal rules, and Texas courts find interpretation of the Federal rules persuasive. See *Reed v. State*, 811 S.W.2d 582, 586 (Tex. Crim. App. 1991).

testimony is potentially objectionable hearsay. But, does the same rule apply when a witness takes the stand and attempts to testify to something that he personally said out-of-court? Of course, most of the time an exception or an exclusion will apply and the declarant-witness's out-of-court statement will be admitted. However, what happens when there is no exception or exclusion that fits the situation?

Unfortunately, there are no United States Supreme Court or Texas Supreme Court cases that directly address this issue. As a result, some courts and attorneys operate under the assumption that a witness testifying in court can testify to any out-of-court statement that the witness made, and that the hearsay rule does not prohibit such testimony because the witness is present and subject to cross-examination. According to these courts and attorneys, the presence of the witness in court, and the fact that he is subject to cross-examination, provide the sufficient safeguards of trustworthiness and credibility of such out-of-court statements.<sup>2</sup> However, the mere presence of the witness in the courtroom, and subjecting that witness to cross-examination, do not give "equivalent circumstantial guarantees of trustworthiness,"<sup>3</sup> or any other indicia of reliability that the exceptions or exclusions to the hearsay rule provide.<sup>4</sup>

Further, if an out-of-court statement is not hearsay merely because the declarant is testifying in court as a witness, then the question becomes: why then would Texas Rule of Evidence 801(e)(2) which excepts from hearsay certain party opponent's out-of-court statements, be necessary?<sup>5</sup> One would

---

<sup>2</sup> See *California v. Green*, 399 U.S. 149, 154–55 (1970).

<sup>3</sup> FED. R. EVID. 807.

<sup>4</sup> See, e.g., *Mattox v. United States*, 156 U.S. 237, 243 (1985); *Idaho v. Wright*, 497 U.S. 805, 817 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987); see also *Lee v. Illinois*, 476 U.S. 530, 552 (1986) (Blackmun, J., dissenting) ("[S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' and that fact must weigh heavily in our assessment of their reliability for constitutional purposes") (citation omitted).

<sup>5</sup> Tex. R. Evid. 801(e)(2) provides:

(e) Statements That Are Not Hearsay.

...

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

never need to ask, for example, whether a prior statement was inconsistent or made under penalty of perjury under Rule 801(e)(1)(A)(i).<sup>6</sup> The proper answer would always be that it doesn't matter because *any* out-of-court statement by a testifying witness is not hearsay, whether inconsistent or not and whether under penalty of perjury or not. One would never need to be concerned with whether a prior consistent statement was made before the motive to fabricate arose or whether there was a charge of recent fabrication under Rule 801(e)(1)(B),<sup>7</sup> because any prior statement of the witness would

---

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's conspirator during and in furtherance of the conspiracy.

<sup>6</sup>Tex. R. Evid. 801(e)(1)(A) provides:

(e) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and:

(i) when offered in a civil case, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other proceeding—except a grand jury proceeding— or in a deposition;

<sup>7</sup>Tex. R. Evid. 801(e)(1)(B) provides:

(e) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

...

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; . . .

not be hearsay, whether made pre-motive or not, and whether there was a fabrication charge or not. Indeed, if it was the law that any prior statement of a witness is not hearsay merely because declarant is testifying presently, then Rules 801(e)(1)(A), (B) and (C) would all be superfluous.<sup>8</sup>

A rule should not be interpreted in such a way that renders part of it meaningless.<sup>9</sup> In fact, Rule 801 would have to be re-written as follows: “(e) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay: (1) **A Declarant-Witness’s Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement.” There would be no need for anything which presently follows that provision.

This article will examine the various lower court opinions that address the application of the hearsay rule to out-of-court statements made by a witness who testifies during trial, along with the various state and federal rules related to hearsay, in order to show why a witness’s own out-of-court statements, if offered for the truth, should be considered hearsay, and should be excluded unless an appropriate exclusion or exception applies. Specifically, Section II of this article will discuss the various exclusions to the hearsay rule found in Rule 801(e)(1) of the *Texas Rules of Evidence*, and the cases interpreting and applying those rules, to show how the narrow text and application of those rules make it clear that there is no exclusion or exception to the hearsay rule that would apply to every out-of-court statement made by a witness. In addition, Section II will compare the text of the Texas hearsay rule with the text of other versions of the hearsay rule in other jurisdictions, and show how the Texas rule is narrower in scope than the rules in the other jurisdictions, which will further demonstrate that there is no

---

<sup>8</sup>Tex. R. Evid. 801(e)(1)(C) provides:

(e) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

...

(C) identifies a person as someone the declarant perceived earlier.

<sup>9</sup>“Because the Federal Rules of Evidence are a legislative enactment, we turn to the ‘traditional rules of statutory construction.’” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). “In construing a statute we are obliged to give effect, if possible, to every word Congress used.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

general exclusion or exception to the hearsay rule that would apply to every out-of-court statement made by a witness.

Section III of this article will review various cases at both the state and federal level that address this issue, and put those cases into three broad categories: (1) cases in which the court held that a witness' out-of-court statement is hearsay, or would be hearsay, even if that witness is testifying, or will testify, in open court; (2) cases in which the court held that a witness' out-of-court statement is not hearsay because the witness is testifying in open court; and (3) cases in which the court was presented with this issue, but failed to address it. These cases will demonstrate the confusion among lower courts with respect to this issue, the types of cases in which this issue can arise, and the potential consequences of the misapplication of the hearsay rule in this context.

Accordingly, while the text of the hearsay rule appears to be clear, the application of the rule is less clear and less certain when the courts are presented with a situation in which a witness is offering testimony about an out-of-court statement that he made himself. It is far too easy for an attorney to argue, "Your honor, the witness is here in court, so any questions opposing counsel has can be addressed on cross-examination." But that argument is neither supported by the text of the hearsay rule, nor is it supported by the logic that underpins the hearsay rule. An examination of the rules and cases in this area make that clear.

## II. THE EXCLUSIONS AND EXCEPTIONS TO THE HEARSAY RULE PROVIDE TRUSTWORTHINESS AND RELIABILITY THAT CROSS- EXAMINATION ALONE CANNOT SATISFY

Why must it be the case that declarant-witness' out-of-court statements, if offered for the truth of the matter asserted, are hearsay? If it were otherwise, the exceptions and exclusions to the rule would be meaningless for declarant-witnesses. The purpose of the exceptions and exclusions to the hearsay rule are meant to provide a further sieve of qualifications—sufficient "guarantees of trustworthiness"<sup>10</sup> or indicia of reliability—that make the out-of-court statements admissible.<sup>11</sup> Without such protections that go beyond presence in court and availability to cross examination, these out-of-court statements would be offered without giving the fact-finder the ability to accurately assess the truthfulness of such statements.

---

<sup>10</sup> See FED. R. EVID. 807.

<sup>11</sup> See, e.g., *Mattox v. United States*, 156 U.S. 237, 243 (1985).

*A. The Exclusions in Rule 801 Serve No Purpose If Having the Declarant Present and Subject to Cross-Examination Satisfies Hearsay Concerns.*

While “[e]ach of the subparagraphs of [Texas Rules of Evidence] Rule 801(e) exempts a category of statements from the hearsay rule, . . . the vast majority of prior inconsistent statements will not satisfy the requirements or meet the qualifications under the rule.”<sup>12</sup> However, some courts and attorneys treat the declarant’s presence in court as a substitute for the explicit requirements of the hearsay exclusions in Rule 801.<sup>13</sup> The Texas rule does not contain such a broad exclusion; the declarant’s testimony being subject to cross-examination is only the first of several pre-requisites.<sup>14</sup> There are explicit circumstances in which prior inconsistent statements, prior consistent statements, and prior statements of identification are admissible. To be sure, if cross-examination is enough to admit prior statements by declarant-witnesses, a major issue arises—why does Texas Rule 801(e) exist?

1. Prior Inconsistent Statements.

First, to be admissible as a prior inconsistent statement, the declarant must testify and be subject to cross-examination about the statement.<sup>15</sup> Next, the statement must be:

[I]nconsistent with the declarant’s testimony and:

- (i) when offered in a civil case, . . . given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
- (ii) when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other

---

<sup>12</sup>*In re M.G.*, No. 04-95-00752-CV, 1996 WL 721951, at \*3 (Tex. App.—San Antonio Dec. 11, 1996, no pet.) (not designated for publication).

<sup>13</sup>This incorrect treatment of hearsay statements extends to failing to require strict compliance with exceptions in Rules 803 and 804 and to failing to recognize a hearsay issue at all when the declarant repeats his own out-of-court statement. However, this discussion focuses on the exclusions in Rule 801.

<sup>14</sup>Tex. R. Evid. 801(e)(1).

<sup>15</sup>*Id.* 801(e).

proceeding—except a grand jury proceeding—or in a deposition.<sup>16</sup>

In some cases, attorneys attempt to admit (and occasionally courts do admit) out-of-court statements only because the declarant is testifying or will testify and be subjected to cross-examination.<sup>17</sup> For example, in *United States v. Pedroza*, the trial court admitted multiple hearsay statements on request of the prosecution because the declarants were going to testify later in the trial.<sup>18</sup> These included:

- (1) Lupe's testimony that on the day Luis was taken, "Carlos told me that somebody called him and said that they had our son";
- (2) Lupe's testimony that several days prior to the taking of Luis, Luis had told her that he had seen Serrano and two other men in the parking lot adjacent to their home, checking out the family's cars; and
- (3) FBI agent Jack Truax's testimony that when Truax took Luis to 2000 Fulton Street, Luis positively identified the house as the place he had been kept.

The government did not offer to limit the scope of the statements' admission.<sup>19</sup> Also, the Second Circuit noted that the statements "were not properly admitted since they were not within any exception or exclusion."<sup>20</sup>

Because the case was reversed on other grounds, the court did not address harm.<sup>21</sup> Although the declarants testified later in the trial, through some sustained objections, "Lupe's hearsay testimony was the only evidence presented to the jury as to the substance of that early communication from the abductors."<sup>22</sup> If these out-of-court statements were the only evidence of a fact in question, and they were admitted in error, then the admission of such statements, merely because the declarants were supposed to testify later on in trial, seemingly did result in harm. To be sure, the court recognized that

---

<sup>16</sup> *Id.* 801(e)(1)(A).

<sup>17</sup> *United States v. Pedroza*, 750 F.2d 187, 199 (2d Cir. 1984).

<sup>18</sup> *Id.* at 199–200.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 200.

<sup>22</sup> *Id.*



such statements are inadmissible regardless of whether the declarant repeats them. If the declarant does not reiterate the statements, hearing the statements from others “provides the jury with inadmissible material that it would not otherwise have had.”<sup>23</sup> If the declarant does testify, it is still inappropriate “since the hearsay testimony serves to bolster the testimony of the declarant.”<sup>24</sup> Such an outcome results in harm.

Another example is provided in *Martin*, a conspiracy bombing case.<sup>25</sup> In *Martin*, the police interviewed Meadows, an alleged co-conspirator to a bombing.<sup>26</sup> Meadows gave statements implicating the defendants, Martin and Hankish.<sup>27</sup> Hankish allegedly hired Meadows and Crist, another conspirator, to carry out the bombing attack, while Martin was the driver.<sup>28</sup> At trial, however, Meadows testified as a government witness that he had never had any discussion with Hankish about doing any sort of job for him.<sup>29</sup> Moreover, he stated that Martin had not been present at the scene of the firebombing and was not involved in the attack.<sup>30</sup> Meadows testified that a man named Frank offered him \$500 to throw the two fire-bombs into the tavern, and that he [Meadows] and Crist had acted alone.<sup>31</sup>

After eliciting this testimony, the government pleaded surprise and interrogated Meadows, over the objection of defense counsel, about his prior statements to police.<sup>32</sup> Defense counsel repeatedly requested that the court instruct the jury not to consider Meadows’ prior statements—brought out by the government’s cross-examination—as substantive evidence.<sup>33</sup> The court refused.<sup>34</sup> The Fourth Circuit noted that these statements were only admissible for impeachment purposes, although the government argued that

---

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* The government also argued that the hearsay statements were admissible as “background.” *Id.* The court rejected that argument because the only relevance of the hearsay statements was the truth of the matters asserted therein. *Id.* There is no general “background” exception to or exclusion from the hearsay rule, even if the declarant testifies subject to cross-examination. *Id.*

<sup>25</sup> 528 F.2d 1157, 1157 (4th Cir. 1975).

<sup>26</sup> *Id.* at 1158.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1159.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

“the substantive use of these prior statements was proper in this case since . . . the dangers against which the hearsay rule is designed to protect are largely nonexistent where, as here, the witness testifies at trial.”<sup>35</sup> The court noted that the prior statements would have been inadmissible substantively under the then-newly enacted Rule 801.<sup>36</sup> Obviously, having these prior statements admitted without limitation was highly prejudicial to the defendant; they did not fit any exception or exclusion, but they were admitted because the declarant testified.<sup>37</sup>

Likewise, in 1977, the Fifth Circuit recognized in *United States v. Palacios* the rule that “[p]rior statements of witnesses are hearsay and are generally inadmissible as affirmative proof.”<sup>38</sup> In that case, witness Garcia’s prior inconsistent statement, in which she directly implicated one of the defendants, was admitted to impeach her.<sup>39</sup> Defense counsel requested limiting instructions several times during Garcia’s examination.<sup>40</sup> The trial judge refused to instruct the jury that the statements were not substantive evidence while Garcia was on the stand.<sup>41</sup> However, in the final charge, the judge did tell the jury to consider Garcia’s prior inconsistent statements for

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1160–61 (“The government’s view has received support from some commentators, and was, at one time, embodied in Rule 801 of the proposed Federal Rules of Evidence. Those advocating admissibility premise their position on the assertion that basically the purpose of the hearsay rule has been satisfied and psychologically the one statement is as useful to consider as the other. The traditional rule which restricts the use of such evidence to impeachment purposes has even been described as pious fraud, artificial, basically misguided, mere verbal ritual, and an anachronism that still impedes our pursuit of the truth. The defenders of the conventional learning are equally emphatic. They point out that admitting such statements as substantive evidence destroys effective cross-examination and gives to the statement a special indestructible status; and that such use would increase both temptation and opportunity for the manufacture of evidence and lead to affirmative evidence being obtained by third degree methods. And Justice Douglas, in *Bridges*, 326 U.S. p. 151, n. 6, 65 S.Ct. 1443, among others, warns of the deep-rooted policy of the law toward hearsay evidence. Yet, despite the criticism of some of the commentators, the courts have justifiably and steadfastly refused to admit such statements as substantive evidence. A vast majority of the jurisdictions have adhered to the traditional view that prior self-contradictions are not to be treated as having independent testimonial value, an exception being the Second Circuit.”) (citations omitted).

<sup>37</sup> See *Martin*, 528 F.2d at 1160–61.

<sup>38</sup> 556 F.2d 1359, 1362–63 (5th Cir. 1977) (citing *United States v. Gregory*, 472 F.2d 484, 487 (5th Cir. 1973)).

<sup>39</sup> *Id.* at 1362.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

2018]

## THE HEARSAY PARADOX

853

impeachment purposes only.<sup>42</sup> Upon review, the Fifth Circuit noted that “such statements should not be introduced as substantive evidence, but should only be used to impeach credibility.”<sup>43</sup> Recognizing that the then-newly enacted Rule 607 allowed impeachment by the calling party, the court noted, “[T]his works no change in the traditional view that prior unsworn inconsistent statements are hearsay and generally should not be considered by the jury as direct evidence of guilt.”<sup>44</sup> In reversing the trial court’s judgment, the court held:

Making all such reasonable inferences and credibility choices as will support the jury’s verdict, the evidence was insufficient to sustain the convictions. Juries must not be permitted to convict on suspicion and innuendo. Under the shadow of Garcia’s prior statement, Palacios appeared to be a generally unsavory, suspicious character. The jury was allowed to speculate and infer the appellant’s guilt from this and from numerous suspicious but unconnected facts. The United States failed to prove guilt by accepted standards.<sup>45</sup>

These deviations from the proper operation of the prior inconsistent statement rule show that having the declarant-witness testify and be subject to cross-examination is not sufficient to overcome a hearsay objection. Had the prior inconsistent statement rule been properly applied, the statements would not have been admitted for the truth. As noted by the courts in this section, reliance upon such out-of-court statements for the truth of the matter asserted is inappropriate. However, using such statements for other purposes, such as impeachment, may be permissible with the appropriate limiting instruction to the jury.

---

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1363. The case focuses on the exclusions in Rule 801. However, in a footnote, the court discussed the exceptions in 803 and 804, acknowledging that such hearsay evidence could be admitted for its substance if, and only if, it fit within those parameters. *Id.* at n.7.

<sup>44</sup> *Id.*; see also *United States v. Hogan*, 763 F.2d 697, 701–03 (5th Cir. 1985) *opinion withdrawn in part*, 771 F.2d 82 (5th Cir. 1985) (“The prosecution, however, may not call a witness it knows to be hostile for the *primary* purpose of eliciting otherwise inadmissible impeachment testimony, for such a scheme merely serves as a subterfuge to avoid the hearsay rule.”).

<sup>45</sup> *Palacios*, 556 F.2d at 1365.

## 2. Prior Consistent Statements.

A statement is admissible when it “is consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying[.]”<sup>46</sup> This is known as the prior consistent statement rule.<sup>47</sup>

As shown with prior inconsistent statements, attorneys often attempt to admit prior consistent statements without limit when the declarant testifies and is subject to cross-examination.<sup>48</sup> For example, in *Nitz v. State*, an Alaska case, a defendant accused of sexual assault moved pre-trial to exclude statements by the alleged child victim.<sup>49</sup> The state argued that the statements were admissible under the first complaint of sexual assault exception and then as prior consistent statements, since the defense would likely challenge the veracity of her testimony.<sup>50</sup> The judge “broadly concluded that the balance of T. K.’s prior statements was admissible either as prior consistent statements or as prior inconsistent statements.”<sup>51</sup> However, he also cautioned the prosecutor that the statements would be admissible as “background” but not for the truth of the matter asserted.<sup>52</sup> The prosecutor referenced the statements in his opening statement without limitation, and called seven witnesses to testify about prior statements made by T. K. concerning the alleged assaults.<sup>53</sup> T. K. herself testified last.<sup>54</sup> The appellate court examined the trial court’s ruling for error and harm.<sup>55</sup> It found:

In this case, Judge Moody evidently concluded that, merely because T.K. would testify and be available for cross-examination, the parties could freely be permitted to present evidence of the child’s prior, out-of-court statements, regardless of whether the prior statements were consistent or inconsistent with her testimony and regardless of whether

---

<sup>46</sup>Tex. R. Evid. 801(e)(1)(B).

<sup>47</sup>*Id.*

<sup>48</sup>*See* *Nitz v. State*, 720 P.2d 55, 58 (ALASKA CT. APP. 1986).

<sup>49</sup>*Id.* at 59.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 60.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

their existence was established on cross-examination, in rebuttal, or as part of the state's case-in-chief, before any impeachment had occurred.<sup>56</sup>

Examining the state's arguments, the court noted that "[t]here is no generalized exception to the hearsay rule allowing the use of prior, out-of-court statements merely because a witness testifies at trial and can be cross-examined."<sup>57</sup> Citing John Henry Wigmore, the famous American evidence expert, the court further stated that such improper bolstering is unnecessary and often harmful. Prior to any impeachment, a prior consistent statement of "an improbable or untrustworthy story . . . is not made more probable or more trustworthy by any number of repetitions of it."<sup>58</sup> Ultimately, the court concluded that the timing rendered the statements inadmissible.<sup>59</sup> The prosecutor had called all seven witnesses before T. K. testified and thus before any charge of recent fabrication could have arisen.<sup>60</sup>

Similarly, a recent Supreme Court of Virginia case affirmed the general rule.<sup>61</sup> Jeffrey Ruhlin sued Marian Samaan following a car accident.<sup>62</sup> At trial, a primary damages issue was the extent of the injury to Ruhlin's shoulder attributable to the accident versus a previous surgery.<sup>63</sup> Ruhlin offered his wife Johanna's testimony on statements he made to her regarding his shoulder pain.<sup>64</sup> The court sustained a hearsay objection to Johanna's testimony. In affirming, the Supreme Court of Virginia noted that generally "[p]rior consistent statements of a witness—if offered for the truth of the facts recited—are inadmissible hearsay."<sup>65</sup> Further, the court stated:

To allow such a statement to corroborate and buttress a witness's testimony would be an unsafe practice, one which

---

<sup>56</sup> *Id.* at 61.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 69.

<sup>60</sup> *Id.* at 60. The court declined to adopt a per se rule of exclusion because the prior inconsistent statement was made after the motive to fabricate arose. *Id.* at 67–68 ("Under our interpretation of Rule 801(d)(1)(B), the admission of prior consistent statements made after a motive to falsify has arisen should be treated as a question of relevance, for determination on a case-by-case basis.").

<sup>61</sup> *Ruhlin v. Samaan*, 718 S.E.2d 447, 452 (Va. 2011).

<sup>62</sup> *Id.* at 448.

<sup>63</sup> *Id.* at 448–49.

<sup>64</sup> *Id.* at 449.

<sup>65</sup> *Id.* at 451 (internal quotations omitted). The court relied on case law throughout this discussion and did not cite to the rules of evidence.

not only would be subject to all the objections that exist against the admission of hearsay in general but also would tend to foster fraud and the fabrication of testimony. . . . [T]he repetition of a story does not render it any more trustworthy.<sup>66</sup>

The court noted that even when offered for the limited purpose of rehabilitation, the prior statement is of “doubtful value.”<sup>67</sup> In this case, the defendant’s argument was that Ruhlin’s account of his shoulder pain had been inconsistent all along, rather than that Ruhlin had “crafted a new story at trial” as required under Virginia law.<sup>68</sup> “To allow the admission of a prior consistent statement after impeachment of just ‘any sort’ would create an unreasonably ‘loose rule.’”<sup>69</sup>

Concerns such as those articulated by the Virginia Supreme Court have prompted the Utah Supreme Court to adopt the rule that the witness must make his or her prior consistent statement before the motive to falsify arises.<sup>70</sup> At the defendant’s trial for rape, the victim, K. B., testified.<sup>71</sup> After her testimony, the state called Detective Oberg, and, over defendant’s objections, allowed the detective to testify to statements K. B. made previously.<sup>72</sup> The defendant’s theory at trial was that the victim was upset because of a disciplinary incident by her father and because her father was reuniting with a former spouse (who was not her mother).<sup>73</sup> Therefore, she accused her father out of anger.<sup>74</sup> K. B. made the statements to Detective Oberg after this motive to fabricate arose, but the trial judge allowed the detective to repeat them in court.<sup>75</sup> State counsel argued as follows:

I’d be arguing *under Rule 801* this is a prior consistent statement that—[K.B.] has testified here today, and I believe the defense is trying to somehow discredit what she has said or attack whatever she has said, and Detective

---

<sup>66</sup> *Id.* (internal citations omitted).

<sup>67</sup> *Id.* at 451–52.

<sup>68</sup> *Id.* at 452.

<sup>69</sup> *Id.* (citing *Faison v. Hudson*, 417 S.E.2d 305, 310 (Va. 1992)).

<sup>70</sup> *State v. Bujan*, 190 P.3d 1255, 1256 (Utah 2008).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1256–57.

<sup>73</sup> *Id.* at 1257.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Oberg is here to show that there are consistent statements with the disclosure and with the rape.<sup>76</sup>

With that corroborating hearsay testimony by the investigating detective, the jury convicted the defendant of rape.<sup>77</sup> In adopting the reasoning of the United States Supreme Court in *Tome*, the Utah Supreme Court held that allowing such testimony without limitation was harmful.<sup>78</sup> The court stated, “Rule 801(d)(1)(B) applies only to *pre-motive*, consistent, out-of-court statements. The purpose of rule 801(d)(1)(B) is to admit statements that rebut a charge of recent fabrication or improper influence or motive, not to bolster the believability of a statement already uttered at trial.”<sup>79</sup>

In another case, in Oregon, the plaintiff made several creative arguments for admitting extrinsic evidence of out-of-court statements by the declarant because the declarant was going to testify.<sup>80</sup> Mr. Powers, a paraplegic, was treated for a re-opened wound from his recent skin graft following an encounter with police and sued.<sup>81</sup> He claimed that the injury occurred when police stopped his friend for driving recklessly while Powers was a passenger in the car.<sup>82</sup> Powers alleged that Officer Cheeley did not believe Powers could not exit the vehicle and attempted to pull him out by force, causing the injury.<sup>83</sup> In the subsequent lawsuit, Officer Cheeley testified that he did not touch Powers that night.<sup>84</sup> Mr. Beaty, the driver, testified but was not asked what he told his wife that evening.<sup>85</sup> Powers called Mr. Beaty’s wife to testify that her husband told her on the night of the incident that officers tried to pull Powers out of the car.<sup>86</sup> The plaintiff argued that because the declarant, Mr. Beaty, testified, Mrs. Beaty’s consistent testimony about his out-of-court statements was admissible.<sup>87</sup> The lower court reasoned:

---

<sup>76</sup> *Id.* at 1256–57.

<sup>77</sup> *Id.* at 1257.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1258 (emphasis added); *see also* *Tome v. United States*, 513 U.S. 150 (1995).

<sup>80</sup> *See, e.g., Powers v. Cheeley*, 771 P.2d 622, 626–27 (Or. 1989).

<sup>81</sup> *Id.* at 623.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 624.

<sup>86</sup> *Id.* at 623.

<sup>87</sup> *See id.* at 625–26.

Defendant's theory of the case was . . . based on his complete denial that he even touched plaintiff. It was clear from the start of the trial that the central question to be decided was whose version of events—plaintiff's or defendants'—was to be believed. If one party were believed, the other side must be lying . . . . In building their entire case on the theory that plaintiff's allegations were fabricated, defendants 'opened the door' to an implication that Beaty was lying.<sup>88</sup>

The Supreme Court held that the exclusion had to be strictly met and that it was not in this case.<sup>89</sup> Thus, admitting Mrs. Beaty's testimony was error, even though doing so was harmless.<sup>90</sup> The court noted:

No Oregon authority supports plaintiff's argument that a direct conflict[, not a finding of motivation to fabricate,] in the evidence that differing witnesses recount satisfies the requirement of OEC 801(4)(a)(B) that an 'implied charge' of fabricated testimony be made. The cases cited by the Court of Appeals do not support that argument. Indeed, one is actually contrary to it. Plaintiff's argument that contradictions in testimony amount to a charge of recent fabrication proves too much. Many jury trials involve a difference in testimony about facts. Plaintiff's argument would apply in many cases and, in effect, repeal the rule of OEC 801(4)(a)(B). It would reward the garrulous but not the reticent.<sup>91</sup>

As noted by these cases, allowing prior consistent statements to be used without limitation would obliterate the elements of the rule intended to assure trustworthiness. Such use would encourage declarant-witnesses to repeat their out-of-court statements merely to enhance their appearance of truthfulness at trial by repetition. Even though the declarant is subject to cross-examination, the witness cannot be enabled to add to the evidence she is providing simply by repeating a statement made after the motive to fabricate has arisen.

---

<sup>88</sup> *Id.* at 623.

<sup>89</sup> *See generally id.* at 626–28.

<sup>90</sup> *Id.* at 623.

<sup>91</sup> *Id.* at 626–27 (footnotes omitted).



### 3. Prior Statement of Identification.

A prior statement of identification is admissible if the declarant testifies and is subject to cross-examination regarding the statement and the statement “identifies a person as someone the declarant perceived earlier.”<sup>92</sup> The rule for prior statements of identification has fewer requirements than the other two exclusions for prior statements of witnesses. This contrast further supports the limited nature of the exclusions for prior consistent and inconsistent statements, and it only applies to a narrow category of out-of-court statements.

### 4. Exceptions Under Rules 803 and 804.

The presence of the declarant at trial as a witness does not alone satisfy hearsay concerns. This reasoning applies equally to extrinsic evidence admitted pursuant to the specific requirements of the hearsay exceptions in Rules 803<sup>93</sup> and 804.<sup>94</sup> Those requirements must be satisfied, or the out-of-court statement is inadmissible.

*In re Lewis* provides an example of this principle.<sup>95</sup> Tyson Lewis pled guilty to reckless homicide and spent 15 years in prison.<sup>96</sup> During that time, the parents of the man he shot obtained a wrongful death judgment against him.<sup>97</sup> Lewis subsequently filed bankruptcy.<sup>98</sup> The plaintiffs filed a complaint to except the judgment debt from discharge in the bankruptcy as a “willful and malicious injury.”<sup>99</sup> Under federal bankruptcy law, a “willful and

---

<sup>92</sup>Tex. R. Evid. 801(e).

<sup>93</sup>Texas Rule of Evidence 803 provides exceptions, whether the witness is available or not, for present sense impressions, excited utterances, then-existing conditions, statements made for medical diagnosis or treatment, recorded recollections, business records, absence of business records, public records, absence of public records, records of religious organizations concerning personal or family history, marriage certificates, baptism certificates, family records, property records, ancient documents, learned treatises, a witness’s reputation, judgments entered against a witness, and statements against interest. *See generally id.* 803.

<sup>94</sup>Texas Rule of Evidence 804 provides exceptions for unavailable witnesses’ former testimony, statements under the belief of imminent death, and statements of personal or family history. *See generally id.* 804.

<sup>95</sup>528 B.R. 885, 887 (Bankr. E.D. Wis. 2015).

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

malicious injury” is one in which “the debtor must either desire to cause the consequences of his act, or believe that the consequences are substantially certain to result from it[.]”<sup>100</sup>

In the underlying case, Lewis shot and killed his friend Douglas in Lewis’s basement.<sup>101</sup> While Lewis testified that he did not intend to shoot and kill his friend, his neighbor gave a different account.<sup>102</sup> Ms. Grabowski told police that Lewis told her the following:

[I]t was an accident, that they were playing Russian Roulette. He told her that he had emptied the cartridges out of the cylinder and he had put one cartridge back into the cylinder, spun the cylinder and closed the gun. She stated that he told her that he looked at the cylinder and saw that the cartridge was off to the side, and not underneath the hammer. At that point he put the gun up to his head and pulled the trigger, the gun did not fire. She stated that he then looked at the gun a second time and saw the cartridge was off to the side of the hammer again. He pointed the gun at his friend Douglas and pulled the trigger. This time the gun went off, striking Douglas below the left eye.<sup>103</sup>

These statements were contained in a police report that the plaintiffs wanted to introduce through the testimony of the recording police officer.<sup>104</sup> The plaintiffs called Mrs. Grabowski to testify later, but she could not recall her story.<sup>105</sup> Plaintiffs argued that several hearsay exceptions—recorded recollection, public records, and business records—applied to the report itself, but none of them addressed the second level of inadmissible hearsay in the report.<sup>106</sup> This was the only evidence of “willful and malicious” injury.<sup>107</sup> If the report’s contents had been admitted for the truth because the declarant was going to testify, the plaintiffs would have won and Tyson would not have been able to discharge the wrongful death judgment in bankruptcy.

---

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 888.

<sup>102</sup> *Id.* at 889.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 889–91.

<sup>107</sup> *See generally id.* at 891–92.

## 5. Conclusion

The hearsay rules provide specific exceptions and exclusions to the general proposition that a witness may not testify to out-of-court statements in an attempt to prove the truth of the matter asserted. This discussion provides examples as to why the rule must operate in this manner. Although there are many exceptions and exclusions, each is specifically tailored to allow out-of-court statements to be admitted for the truth. Allowing a declarant-witness to testify to her own out-of-court statements for the truth, without an applicable exception or exclusion, eliminates the elements of trustworthiness and indicia of reliability that the rules were intended to create.

### *B. Textual Differences in Other Rules Support the Limited, Specific Nature of the Exclusions in the Texas Rule.*

This section compares the language of the Texas rule with language in other jurisdictions' hearsay rules. The Texas drafters patterned the Texas Rules of Evidence after the Federal Rules of Evidence.<sup>108</sup> This section first examines the federal rule as initially proposed, as well as a recent federal amendment. Second, this section will examine the broadly-written Puerto Rican hearsay rule. As a result of the way the rule is written in Puerto Rico, courts have recognized that other hearsay exclusion rules do not reach as far. By contrasting these rules with the Texas rule, it is apparent that declarant-witnesses may not offer their out-of-court statements for the truth without an applicable exception or exclusion.

#### 1. The Proposed Federal Rule and Recent Changes to the Federal Rule.

Cases cite to the proposed Federal Rule 801 to support the proposition that not every prior inconsistent statement by a witness is admissible, even though the witness is subject to cross-examination regarding the statement.<sup>109</sup> Proposed Federal Rule 801 excluded the following as non-hearsay: a prior statement by a witness is admissible if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the

---

<sup>108</sup> See *Reed v. State*, 811 S.W.2d 582, 586 (Tex. Crim. App. 1991).

<sup>109</sup> See *United States v. Small*, 443 F.2d 497, 498-99 (3d Cir. 1971); *Gov't of Virgin Is. v. Pondt*, 456 F.2d 679 (3d Cir. 1972).

statement is . . . inconsistent with his testimony . . . .”<sup>110</sup> Although the language is similar, the adopted rule for prior inconsistent statements differs. The statement is admissible if it is “inconsistent with the declarant’s testimony *and* was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.”<sup>111</sup>

The federal rule was recently expanded to admit more prior consistent statements when the declarant testifies and is subject to cross.<sup>112</sup> It now reads:

[The statement is admissible when it] is consistent with the declarant’s testimony and is offered:

. . .

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground. . . .<sup>113</sup>

The Texas rule has not been expanded in this way, demonstrating that the Texas rule is narrower. Prior consistent statements can be used for impeachment in Texas, but not to improperly bolster the witness’s testimony through repetition.<sup>114</sup>

## 2. The Puerto Rican Rule.

The Supreme Court of Puerto Rico recognized the limitations in the federal rule by distinguishing the Puerto Rican rule.<sup>115</sup> “Our rule goes a step further than the federal version in admitting, to prove the truth of the matter

---

<sup>110</sup>Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 413. See *United States v. Tavares*, 512 F.2d 872, 874–75, n.7 (9th Cir. 1975) (discussing enacted Rule 801 as “codifying the orthodox rule” that prior inconsistent statements “may be used to impeach, but should not be treated as having any substantive or independent testimonial value. Although harshly criticized, the orthodox rule is the law of this circuit and every circuit. Exceptions have been recognized where a prior inconsistent statement occurred in a former trial or grand jury testimony.”). See *Small*, 443 F.2d at 499 and accompanying footnotes for a discussion of and sources of criticism for the “orthodox rule.”

<sup>111</sup>FED. R. EVID. 801 (emphasis added).

<sup>112</sup>*Id.*

<sup>113</sup>*Id.* 801(d)(1) (emphasis added).

<sup>114</sup>See, e.g., *Washington v. State*, 771 S.W.2d 537, 545 (Tex. Crim. App. 1989).

<sup>115</sup>*Pueblo v. Esteves Rosado*, 10 P.R. Offic. Trans. 424, 432 (P.R. 1980).

stated therein, all types of prior statements made by a witness, without limiting said admissibility to specific types of statements as is the case with Federal Rule 801(d)(1).<sup>116</sup> The Puerto Rican rule is explicit: “As an exception to the hearsay rule, a prior statement made by a witness who appears at a trial or hearing and who is subject to cross-examination as to the prior statement is admissible, provided that such statement is admissible if made by the declarant appearing as witness.”<sup>117</sup> Based on this language, the Puerto Rican court does not believe that the limitations imposed by the federal rule – such as those relating to prior inconsistent and consistent statements, and prior statements of identification—are applicable under the Puerto Rican rule.<sup>118</sup> This is vastly different than the federal, or even the Texas, rules, which require that specific exception or exclusion apply in order to admit the hearsay statement.<sup>119</sup> Even so, while the distinction in the text of the rules seem straightforward, many practitioners treat out-of-court statements by witnesses as admissible simply because the witness is present and subject to cross, even though the Texas and federal rules clearly state that such statements are hearsay unless an exclusion applies or an exception is met.

### III. DISPARATE COURT TREATMENT OF A DECLARANT-WITNESS’S REPETITION OF HIS OUT-OF-COURT STATEMENT WHEN THE WITNESS IS TESTIFYING SHOWS THE CONFUSION SURROUNDING THE RULE AND HOW PROPER UNDERSTANDING CAN BE CRITICAL IN ADMITTING EVIDENCE.

This section addresses three broad categories of cases to put the issue into context – where the out-of-court statement, offered for the truth, is a critical piece of evidence in the case. First, there are cases that expressly hold that the witness’s repetition of his or her own out-of-court statement is (or would be) hearsay when offered for the truth of the matter asserted. Second, a few cases incorrectly hold that the out-of-court statement is not hearsay if the declarant repeats it in court. Finally, some cases fail to address the issue when it arises because attorneys do not recognize the hearsay issue. By examining these cases, it will show how the disparate treatment of these out-of-court statements can be dispositive.

---

<sup>116</sup>*Id.* at 431.

<sup>117</sup>P.R. R. EVID. 63.

<sup>118</sup>Pueblo, 10 P.R. Offic. Trans. at 432–33.

<sup>119</sup>*See generally* FED. R. EVID. 803, 804; Tex. R. Evid. 803, 804.

A. *Cases That Expressly Hold That the Witness's Own Out-of-Court Statement Is Hearsay When Offered for the Truth of the Matter Asserted.*

State and federal courts have held that there is no blanket hearsay exception when a witness repeats his or her own out-of-court statement.<sup>120</sup> Included here are cases that recognize that such a statement would be hearsay if offered to prove the truth of the matter asserted, even if the conclusion is that the proponent offered the statement for a non-truth purpose. Cases that expressly hold that a hearsay exclusion or exception applies when the witness is the hearsay declarant are treated in this section as well, because these cases recognize that such a statement is still hearsay.

1. Examples of Federal Case Law.

In the appeal of a New York narcotics case, the Second Circuit discussed this issue in depth:

[T]he government adamantly maintained, and Judge Motley unfortunately agreed, that, if the out-of-court statements which Spinelli was relating during his in-court testimony could properly be regarded as his very own statements, and not merely as a subterfuge for the indirect introduction of Cali's hearsay, those statements were admissible under some exclusion from the definition of hearsay or under some exception to the hearsay rule which would permit them to be admitted as the out-of-court statements of a person who testifies at trial and who can therefore be subjected to the rigors of cross-examination as to them.<sup>121</sup>

The Court acknowledged an exception formerly contained in Rule 63(1) of the Uniform Rules of Evidence that did not become part of the Federal Rules of Evidence.<sup>122</sup> Rule 63(1) made an exception for out-of-court statements repeated by the declarant while testifying.<sup>123</sup> Since that rule was not in effect, the Court went on to describe the narrow exclusion for prior consistent statements of a witness in Rule 801(d)(1)(B).<sup>124</sup> The Court held that, other

---

<sup>120</sup> See, e.g., *United States v. Check*, 582 F.2d 668, 680 (2d Cir. 1978).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 679–80.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 680–81.

than the exclusions specifically stated for prior statements, “a witness’s prior statements offered to prove the truth of the matters asserted therein are not immunized from the proscriptive effect of the hearsay rule.”<sup>125</sup>

Shortly after the Federal Rules of Evidence became effective, the Ninth Circuit also recognized that there is no general exception to the hearsay rule just because the declarant testifies.<sup>126</sup> In a prosecution for bail jumping, the government called the defendant’s attorney as a witness.<sup>127</sup> The government asked the attorney whether he “state[d] to the court” on a particular date that he had advised the defendant of the order that she appear on May 20th.<sup>128</sup> The Ninth Circuit held that the attorney’s out-of-court statement was offered to prove the truth of the matter asserted and was hearsay.<sup>129</sup> The Court also pointed out that the government could have avoided the issue with a properly phrased question.<sup>130</sup> If the state had asked defense counsel “whether he had advised appellant of the order that she appear on May 20th,” it would have been safe from a hearsay challenge.<sup>131</sup> Citing a string of cases, the Court recognized that the statements of counsel, made while acting in the scope of his authority, could be admissible hearsay under the “admissions exception” to the hearsay rule.<sup>132</sup> In this case, “counsel made the statements under some degree of compulsion and outside the presence of his client—who was, under the circumstances, a putative defendant—and . . . the information sought was in essence an element of a potential criminal charge.”<sup>133</sup> Thus, those statements were not binding on the client “as adopted or judicial admissions in the ensuing criminal prosecution.”<sup>134</sup> Even though the attorney repeated his own previous statement on the stand, it was hearsay because it did not satisfy an exception or exclusion.<sup>135</sup>

---

<sup>125</sup> *Id.* at 681. In a footnote, the Court acknowledged that such statements could be admitted as substantive evidence if they fit the parameters of an exception in Rule 803 or 804. *Id.* at n.40.

<sup>126</sup> See *United States v. Freeman*, 519 F.2d 67, 70 (9th Cir. 1975).

<sup>127</sup> *Id.* at 69.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 70.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> In other cases, attorneys appear to be aware that a witness’s recitation of his own out-of-court statement is still hearsay. For example, in *United States v. Bauer* an attorney asked the witness: “Okay. And as part of that process prior to filing his bankruptcy, did you advise him in one form or another—I’m not asking for exact words—of the fact that a bankruptcy petition and its attachments

Similarly, in *United States v. Narviz-Guerra*, a case on appeal from the Western District of Texas, the Fifth Circuit held that a DEA agent's testimony about what he told Grant, a co-conspirator of defendant Narviz, was not hearsay.<sup>136</sup> The agent testified that he told Grant that Customs had received information that Narviz was involved in narcotics smuggling.<sup>137</sup> The defendant argued on appeal that the agent's testimony was hearsay.<sup>138</sup> The court held that the testimony was not offered for the truth of the matter asserted, but rather "to refute Grant's implication at trial that he knew nothing about [defendant's] illegal activities."<sup>139</sup> Significantly, the Fifth Circuit recognized that had the agent's statement been offered for the truth of the matter asserted ("whether Customs was actually investigating Narviz"), it would have been hearsay, even though the declarant testified to his own out-of-court statement.<sup>140</sup>

## 2. Examples of State Case Law.

In state courts, it seems that attorneys are less likely to raise hearsay objections when the declarant is sitting in the witness chair. Even in a state where some appellate courts recognize that these statements are hearsay, an attorney may encounter opposing counsel (or a judge) who disagrees. Most

---

is filed under penalty of perjury, that it's sworn?" 132 F.3d 504, 507 (9th Cir. 1997). The appeal in that case focused on attorney-client privilege, but the attorney appeared wary of asking the witness to recite his out-of-court statement verbatim, making it clear that he was not offering the testimony for the truth of anything asserted in that statement. *Id.*

<sup>136</sup> 148 F.3d 530, 537 (5th Cir. 1998).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* In another case, the Fifth Circuit ended with an ambiguous paragraph:

Finally, the trial judge should not permit a repetition of the hearsay testimony of Agent Wurster to the effect that he instructed Customs Agent Scrip to go to the Kendall Airport because of information from an undisclosed source regarding the arrival and description of the airplane carrying marijuana, and the description of the vehicles and occupants thereof who were to meet the airplane. . . . This does not mean that the Government is precluded on retrial from using Osbrach as a witness or from introducing proper testimony relative to the information to which Wurster testified. What it does mean is that the proper constitutional safeguards must be applied to the circumstances of this case.

*United States v. Tashman*, 478 F.2d 129, 132 (5th Cir. 1973). The court did not discuss Agent Wurster's testimony anywhere else in the case. The hearsay concern probably comes from the information from the undisclosed source, and not Agent Wurster's instruction to Agent Scrip.



2018]

## THE HEARSAY PARADOX

867

of the cases in this section apply an exclusion or exception, or find that the statement was not offered for its truth, but recognize that the repeated statement is hearsay.

Texas has cases that fall in this category and the third category (cases failing to address the hearsay issue when the declarant testifies). In *Bell v. State*, a murder case, a witness testified about a conversation she had with the defendant following the murder:<sup>141</sup>

[PROSECUTOR]: Okay. What happened when you saw Clifford?

[WITNESS]: *He asked me what was going on over there.*

[DEFENSE COUNSEL]: Objection, Your Honor, hearsay response.

[THE COURT]: I will overrule that.

[PROSECUTOR]: Okay. You may answer the question. What happened when you saw Clifford?

[WITNESS]: *He asked me what was going on over there and I told him that somebody—*

[DEFENSE COUNSEL]: Objection, Your Honor, this is hearsay. It's an out of court statement offered for the truth. It's not an admission by a party opponent. It's simply an out of court statement. It's unreliable.

[THE COURT]: Overruled.

[PROSECUTOR]: You told Clifford what?

[WITNESS]: *That someone over there knew that he had did it or said he did it, knew that he had did it.*<sup>142</sup>

On appeal, the defendant complained that the trial court erred in allowing the witness to repeat her own out-of-court statement to the defendant, arguing that the statement was offered to prove that the defendant committed the murder.<sup>143</sup> It is not clear whether the State argued that it was not offering the statement for the truth, but the Dallas Court of Appeals found that the

---

<sup>141</sup>877 S.W.2d 21, 23 (Tex. App.—Dallas 1994, pet. ref'd).

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 25.

witness's belief about whether the defendant committed the murder was irrelevant.<sup>144</sup> Thus, "[t]he State's purpose in offering this testimony was to show appellant's response to Opal Simon's remark, which was to walk away without saying anything in response. Because the statement was not offered for its truth, it was not hearsay."<sup>145</sup> This Texas court recognized that the witness-declarant's in-court testimony was hearsay if offered to prove the truth of the matter asserted.

In contrast, the El Paso Court of Appeals indirectly addressed this issue in *Ulloa v. State*.<sup>146</sup> The appellant complained that the trial court admitted hearsay statements by the investigating officer, Jorge Perez.<sup>147</sup> The Court held that the disputed testimony did not meet the definition of hearsay in the Texas Rules of Evidence.<sup>148</sup>

[Perez] does not recount the out of court statement of another person. He does *not recount his own out of court statement*. He does not claim to have spoken to anyone or to have *himself said anything at the scene*. He does not even imply that he spoke with anyone at the scene. Bare testimony that Perez investigated and concluded provides no evidence of a statement at which Appellant could have directed a hearsay objection.<sup>149</sup>

This discussion indicates that the El Paso Court would find that an out-of-court statement is hearsay even if recounted by the declarant on the witness stand.

Oregon state courts agree with the Ninth Circuit interpretation.<sup>150</sup> In *State v. Barkley*, the Supreme Court of Oregon held that a child's "self-quoted statement" was hearsay because it was offered to prove the truth of the matter asserted.<sup>151</sup> The court unequivocally stated: "Hearsay can include a prior out-of-court statement of the witness who is testifying."<sup>152</sup> Ten years later, the

---

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (citing Tex. R. Crim. Evid. 801(d)).

<sup>146</sup> 901 S.W.2d 507 (Tex. App.—El Paso 1995, pet. ref'd).

<sup>147</sup> *Id.* at 515.

<sup>148</sup> *Id.* at 516. (emphasis added).

<sup>149</sup> *Id.* at 515–16. (emphasis added). The complained-of testimony is recited in footnote 5 in the case.

<sup>150</sup> See *supra* Section III.A.1.

<sup>151</sup> 846 P.2d 390, 394–95 (Or. 1993).

<sup>152</sup> *Id.* at 394.

Oregon Supreme Court reaffirmed that holding. Addressing a confrontation clause challenge, the Court cited *Barkley* for the proposition that the hearsay portion of the declarant's in-court testimony still had to satisfy a firmly rooted hearsay exception.<sup>153</sup> Satisfying an exception was a requirement, even though the witness was testifying and subject to cross-examination.<sup>154</sup>

In *State v. Brzeski*, an Ohio appellate court addressed the defendant's argument that the trial court erred in overruling his hearsay objection.<sup>155</sup> The state asked the witness on direct examination: "Limiting your answer, specifically to what you said on the telephone, what did you say on the first call without any testimony as to what the other person said?"<sup>156</sup> Defense counsel objected immediately, and continued his objections throughout this line of testimony.<sup>157</sup> The state argued on appeal that the testimony was not hearsay because the declarant testified to her own out-of-court statements.<sup>158</sup> The Court held that "a witness's own out-of-court statement still may be hearsay even if he becomes a witness at trial and testifies as to that statement."<sup>159</sup> Ultimately, the statements were admissible because they were not offered for the truth of the matter asserted.<sup>160</sup> This case is another illustration that attorneys argue for a different rule, even on appeal, when the declarant testifies.

In *State v. Rioux*, a Rhode Island defendant complained that the hearing justice erred in allowing the state to question a witness regarding her statements to police.<sup>161</sup> In those statements, she alleged that the defendant had beaten her.<sup>162</sup> The defendant argued that the statements were inadmissible hearsay because the state failed to "elicit a present inconsistency," and thus, the prior inconsistent statement exception did not apply.<sup>163</sup> The court held there was not error because hearsay rules do not apply in probation-revocation hearings.<sup>164</sup> However, the court did not imply that there was a

---

<sup>153</sup> *State v. Jackson*, 69 P.3d 722, 724–25 (Or. 2003).

<sup>154</sup> *Id.* at 725.

<sup>155</sup> No. 49266, 1985 WL 8550, at \*1 (Ohio Ct. App. July 3, 1985).

<sup>156</sup> *Id.* at \*1.

<sup>157</sup> *Id.* at \*1–2.

<sup>158</sup> *Id.* at \*2.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> 708 A.2d 895, 898–99 (R.I. 1998).

<sup>162</sup> *Id.* at 899.

<sup>163</sup> *Id.* See R.I. R. EVID. 801(d)(1)(A).

<sup>164</sup> *Rioux*, 708 A.2d at 899.

special rule that the witness's prior statements were not hearsay because she was testifying about them in court.

Citing *Freeman*, the Ninth Circuit case noted above, the Supreme Court of Montana acknowledged that testimony by an attorney regarding his previous statements to the court was hearsay.<sup>165</sup> The attorney testified about a conversation he had with the defendant on the morning the defendant failed to appear, and opposing counsel objected to hearsay.<sup>166</sup> Finding no reversible error, the Supreme Court held that the state would have avoided the hearsay problem through a properly framed question:

The State asked Donovan what he stated to the court regarding the conversation he had with defendant. The State did not ask Donovan what defendant stated to him regarding the trial date and defendant's intentions to appear at trial. Properly framed, the question elicits a response which can only be called an admission, clearly recognized as an exception to the rules of evidence pertaining to hearsay.<sup>167</sup>

The Court recognized that there is no blanket exception for a declarant's testimony about his or her own prior statements.<sup>168</sup> Like other hearsay statements, that testimony must satisfy an exclusion or exception to be admitted for the truth of the matter asserted therein.<sup>169</sup> Other states have similar case law that indicates their courts would follow the rule that the declarant's in-court testimony repeating his out-of-court statement is hearsay.<sup>170</sup> The Court discussed the hearsay exclusion for prior statements of identification, calling them "classic hearsay testimony."<sup>171</sup> It held that "MRE 801(d)(1) excludes such a statement from the hearsay rule, MRE 802, and *does not limit the exclusion to testimony by the declarant himself.*"<sup>172</sup> This indicates that the exclusion is necessary to admit such statements for the truth of the matter asserted therein, whether by extrinsic evidence or by the declarant's testimony about his prior statement.

---

<sup>165</sup> *State v. Blackbird*, 609 P.2d 708, 711 (Mont. 1980); *see supra* Section III.A.1.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (citing MONT. R. EVID. 801(d)(2)) (other citations omitted).

<sup>168</sup> *Id.*

<sup>169</sup> *See id.*

<sup>170</sup> *See, e.g., People v. McCurdy*, 462 N.W.2d 775, 776 (Mich. 1990).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* (emphasis added).

*B. Cases Holding That the Out-of-Court Statement Is Not Hearsay When the Declarant Repeats It in Court.*

Cases in this category treat the testifying witness's out-of-court statement as if it is not hearsay. Some attorneys and judges expressly state that belief, while others ignore the witness's repeated out-of-court statements, objecting only when the witness recounts a third person's statement. Courts reasons for applying a different rule center around two things: (1) the declarant is present in court, so the jury can evaluate his or her demeanor and judge credibility; and (2) the declarant is subject to cross-examination regarding his or her previous statement.<sup>173</sup>

For example, in a concurrence in *United States v. McLennan*, Ninth Circuit Judge Choy expressed frustration with the "*Freeman* rule" approved by the Ninth Circuit just two years earlier.<sup>174</sup> While the majority followed *Freeman*, Judge Choy suggested a different rule:

I would reject the assumption in *Freeman* and do away with its rule that makes declarant-witness self-quoting hearsay (1) because it is so rarely encountered (possibly only in the context of "I told" or equivalent statements), (2) because the problem is so easily avoidable by a properly framed question which elicits identical information, and (3) because, in any event, the rule is without foundation either in logic or the policy considerations which underlie the hearsay safeguards, for the declarant-witness is present at trial, under oath,

---

<sup>173</sup> 5 See *supra* Section II for further discussion of these justifications.

<sup>174</sup> 563 F.2d 943, 953 (9th Cir. 1977); see discussion of *United States v. Freeman*, 519 F.2d 67, *supra* footnote 126. Many cases that cite *Freeman* address the attorney-client privilege issue when an attorney is called to testify as to what he or she told his or her client. Most of these cases do not raise any hearsay discussion, presumably because the statements are offered to prove that the client knew something, not the truth of any matter asserted in the statements. See, e.g., *United States v. Savage*, 819 F.2d 1139 (4th Cir. 1987) (unpublished opinion); *State v. Breazeale*, 713 P.2d 973, 973-74 (Kan. 1986) ("Over defendant's objection, the former attorney was permitted to testify in the case before us that, after having received the bailiff's message, he had communicated by telephone conversations with defendant that the jury had arrived at its verdicts and that defendant's appearance in court was required. . . . To convict defendant on the present charge of aggravated failure to appear, it was essential that the State prove that defendant knew on March 8, 1984, that he was to appear in court that day. Asserting the attorney-client privilege, defendant attempted to defend on the theory that his failure to appear was not willful for the reason that there was no proof that he knew he was to appear.").

subject to cross-examination, and he affirms the statement as his.<sup>175</sup>

Judge Choy believed that either (1) these statements are not hearsay; or (2) courts should always admit these statements pursuant to the federal residual exception (because they have sufficient independent indicia of reliability, and admitting them would serve the interests of justice).<sup>176</sup>

In *United States v. Rodriguez*, the defendant argued on appeal that “the trial court erred in admitting extrajudicial declarations of government agents who testified as to their own conversations with indicted co-conspirators.”<sup>177</sup> In distinguishing another case, the Court emphasized that the witness was the declarant of the out-of-court statement.<sup>178</sup> “Since the extrajudicial statements were introduced in the testimony of the extrajudicial declarant, and since each declarant could be cross-examined as to the statement he had made, the testimony was not hearsay.”<sup>179</sup> However, the court downplayed the importance of that holding by immediately qualifying it. First, the Court noted, “[I]t is doubtful that any of this testimony was used to prove the accuracy of facts asserted extrajudicially. Rather, the statements were used only to place the replies of the appellant in context.”<sup>180</sup> Second, the Court recognized that other agents corroborated the statements “already admitted into evidence in the testimony of the declarant.”<sup>181</sup> The Court assumed that this corroborative testimony was admitted without hearsay objection because the statements were not intended to “prove facts asserted in the out-of-court statements.”<sup>182</sup>

In another case, the Fifth Circuit indirectly indicated that having the declarant testify somehow negates the unreliability of out-of-court statements.<sup>183</sup> A Missouri secondary source also discusses the different

---

<sup>175</sup> *McLennan*, 563 F.2d at 953.

<sup>176</sup> *Id.* The Texas Rules of Evidence do not contain a “residual” exception. *See generally* Tex. R. Evid. Art. VIII; FED. R. EVID. 807.

<sup>177</sup> 509 F.2d 1342, 1347–48 (5th Cir. 1975).

<sup>178</sup> *Id.* at 1348.

<sup>179</sup> *Id.* (citing 5 Wigmore, Evidence § 1364 (3d ed.)).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See* *United States v. Fox*, 613 F.2d 99, 101 (5th Cir. 1980) (“An out-of-court statement is considered hearsay only if the witness (other than the declarant) is testifying to the statement in order to prove or demonstrate the truth of that statement.”) (citing FED. R. EVID. 801(c)).

treatment a witness's own out-of-court statements sometimes receive.<sup>184</sup> According to that source, “[t]raditionally, a witness’ in court testimony as to his own out-of-court statements has been considered hearsay.”<sup>185</sup> However, “some definitions of hearsay exclude the witness’ own out-of-court statements.”<sup>186</sup> Based on this reasoning, Missouri courts take two contrary positions that reach the same result:

[S]ome Missouri decisions have said that a witness’ prior statements may be hearsay but their admission into evidence will not be deemed prejudicial, [whereas] [o]ther Missouri decisions have suggested that under these circumstances a prior statement, particularly a statement under oath, by a person who appears as a witness is not hearsay.<sup>187</sup>

A pre-rules case out of the Eighth Circuit, *Kulp*, addressed a disagreement as to whether the jury could consider the testimony of an impeached witness, including the “extra-judicial” statements, as substantive evidence.<sup>188</sup> Citing Wigmore, the court emphasized the role of cross-examination in eliminating hearsay concerns:

Extra-judicial testimonial statements are rejected primarily because of the hearsay rule; but in many cases this rule is relaxed, especially in the case of such statements made by a party or his agent, and where opportunity for confrontation and cross-examination has been afforded and exercised, as in this case. After stating the orthodox rule with respect to such extra-judicial statements, Mr. Wigmore says: “It does not follow, however, that prior Self-Contradictions, when

---

<sup>184</sup> See 33 Mo. Prac. Courtroom Handbook on Mo. Evid. § 800.1 (2018 ed.).

<sup>185</sup> *Id.* (citing K. Broun, McCormick on Evidence, vol. 2, § 251 at 148–50 (6th (prac.) ed. 2006)).

<sup>186</sup> *Id.* (citing the following: *see, e.g.*, State v. Shaw, 847 S.W.2d 768, 777 (Mo. 1993); Coverdell v. Countrywide Home Loans, Inc., 375 S.W.3d 874, 884 (Mo. Ct. App. S.D. 2012) (referring to “the out-of-court statements of another person”). It has been observed that “the basic unreliability of extra judicial statements by a declarant not subject to cross-examination, which underlies the rule against hearsay, is not present where the declarant is present in court, subject to cross-examination and with the opportunity to explain the [prior statement].” State v. Henderson, 700 S.W.2d 105, 108 (Mo. Ct. App. E.D. 1985); *see also* State v. Link, 25 S.W.3d 136, 145 (Mo. 2000); State v. Placke, 290 S.W.3d 145, 156 (Mo. Ct. App. S.D. 2009) (where the declarant is available for live testimony under oath, the dangers of hearsay are largely nonexistent)).

<sup>187</sup> *Id.* (internal citations omitted).

<sup>188</sup> 102 F.2d 352, 357–58 (8th Cir. 1939).

admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the Hearsay Rule *but the theory of the Hearsay Rule is that an extra-judicial statement is rejected because it was made out of court by an absent person not subject to cross-examination. Here, however, by hypothesis, the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay Rule has been already satisfied.* Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extra-judicial statement as it may seem to deserve.”<sup>189</sup>

The arguments against applying traditional hearsay strictures to a repetition of the statement in court by the declarant are similar to those discussed in Section II below. However, as also addressed below, the rules of evidence cover the admissibility of prior statements of witnesses in narrow circumstances.<sup>190</sup> There is no textual exception or exclusion for substantively admitting prior statements by the declarant whenever the declarant testifies, whether by the declarant’s testimony or by extrinsic evidence.

### C. Cases That Fail to Address the Issue.

In many cases, attorneys fail to raise a hearsay objection when the declarant of the out-of-court statement is the testifying witness. Often, these statements could have been offered under an exception or exclusion, or were not offered to prove the truth of the matter asserted. An objection would have forced the proponent to proffer an exception, exclusion, or non-truth purpose, but attorneys fail to object when the testifying witness is the declarant rather than a third party.

For example, in *Gant v. State*, two detectives recounted the same conversation with the defendant.<sup>191</sup> The declarant officer testified first, and the state asked, “What did you say to the defendant?”<sup>192</sup> The officer replied, with no objection, “I said, ‘Yeah, you got away from me on Saturday; but

---

<sup>189</sup>*Id.* at 358. (citing 2 Wigmore, Evidence, § 1018(B) (2d ed.)), (emphasis added).

<sup>190</sup>See Tex. R. Evid. 801(e)(1); FED. R. EVID. 801(d)(1).

<sup>191</sup>153 S.W.3d 294, 297–98 (Tex. App.—Beaumont 2004, pet. ref’d).

<sup>192</sup>*Id.* at 297.



you won't get away today.”<sup>193</sup> Later in the trial, the state called a second officer who was present when the conversation took place.<sup>194</sup> The state asked the second detective: “And did Sarah Jefferson say anything to him?”<sup>195</sup> Defense counsel objected to hearsay, to which the court replied, “Did she say anything is not hearsay.”<sup>196</sup> Defense counsel objected again to the next question, and the state offered the following: “Your Honor, she's already testified; and we're just going to go into what he said in response to Sarah Jefferson. So, at this point in time we're not offering what Sarah Jefferson said for the truth of the matter but we're just going into what the defendant said.”<sup>197</sup> The trial court overruled the objection.<sup>198</sup> On appeal, the defendant argued that “Sarah Jefferson's live testimony was not hearsay; what she stated in the presence of her fellow police officers was.”<sup>199</sup> The attorneys, the trial judge, and the appellate court apparently accepted without discussion that the statement by Detective Jefferson was not hearsay when she repeated it in court herself, but was hearsay when her co-detective recounted the conversation.<sup>200</sup>

Many cases are unclear. The limited information in published opinions makes it difficult to determine what was asked of witnesses, how the questions were posed, and sometimes even which witness actually testified to the potentially hearsay statement.<sup>201</sup> *State v. Lockett* is another unclear example.<sup>202</sup> Rita Perkins was arrested and incarcerated for murdering her

---

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 298.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 298–99.

<sup>201</sup> In one case for example:

Walker subsequently consented to an interview with police detectives and told them that Hunt called him after leaving his house and stated that he had killed someone. Walker also told police that he observed that Hunt had a black semi-automatic handgun on the morning of the murder. At trial, Walker remembered telling police the information, but could no longer recall whether the information was true.

Hunt v. State, No. 04-12-00689-CR, 2014 WL 2443812, at \*2 (Tex. App.—San Antonio, May 28, 2014, pet. ref'd)

<sup>202</sup> See 869 P.2d 75, 76–77 (Wash. App. 1994).

husband.<sup>203</sup> She confessed to Ellington, another inmate, that she and defendant Luckett had been having an affair and had murdered Jonathan Perkins.<sup>204</sup> Ellington reported the conversation to police, and they arrested Luckett. Perkins, who had entered a guilty plea, refused to testify at Luckett's trial.<sup>205</sup> Since Perkins was unavailable, Ellington testified to the conversation between them.<sup>206</sup> After Ellington testified, Perkins decided to take the stand and testified to the same conversation.<sup>207</sup>

The Court denied Luckett's motion for a mistrial.<sup>208</sup> On appeal, he complained that Ellington's testimony unduly enhanced Perkin's credibility, creating a "trial irregularity" of constitutional magnitude.<sup>209</sup> The reviewing court found no substantial likelihood that the "minor irregularity" affected the verdict.<sup>210</sup> "Perkins as *declarant* and witness was subject to cross examination which satisfied any Sixth Amendment confrontational problem and allowed Luckett to test the accuracy of Perkins testimony and prior statement."<sup>211</sup> The defendant did not raise a hearsay objection to Perkin's testimony, although he did object to Ellington's recital of the conversation on hearsay grounds at the trial court and on appeal.<sup>212</sup>

#### D. Conclusion

These three categories of cases demonstrate the rule—hearsay, as defined, includes repetition of the declarant's out-of-court statements by the declarant in court. They also demonstrate that some practitioners either disagree with the rule, or fail to recognize that such statements are still hearsay. Further, these cases illustrate the importance of the proper application of the hearsay rule and the importance, in some cases, of properly phrasing questions. Misunderstanding of the rule allowed crucial evidence to be either admitted or excluded improperly, and that error had an effect on the jury in each case.

---

<sup>203</sup> *Id.* at 76.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 76–77.

<sup>208</sup> *Id.* at 77.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* (emphasis added).

<sup>212</sup> *See id.* at 76–77.

2018]

*THE HEARSAY PARADOX*

877

IV. THERE IS NO EXCEPTION OR EXCLUSION THAT STATES THE MERE PRESENCE OF A WITNESS ON THE STAND IN THE COURTROOM, UNDER OATH, AND SUBJECT TO CROSS-EXAMINATION IS NOT HEARSAY. INSTEAD, THE RULES CARVE OUT VERY NARROW EXCEPTIONS AND EXCLUSIONS TO THE GENERAL HEARSAY RULE.

A witness's own out-of-court statement offered for the truth of the matter asserted is hearsay.<sup>213</sup> It is subject to the same concerns as any other out-of-court statement, and it must fit an exclusion or exception to be admitted in court, whether by the witness himself or by extrinsic evidence.<sup>214</sup> Hearsay concerns the reliability of out-of-court statements.<sup>215</sup> The fact finder cannot assess the declarant's credibility at the time the declarant made the statement because the fact finder was not present. That problem remains even when the declarant is in court and testifies to his own out-of-court statement.

The Texas rules of evidence define hearsay to include out-of-court statements by testifying witnesses. Cases in Texas, federal, and other state courts show that this rule sometimes causes confusion, and some attorneys ignore it or argue for a different rule. Whether the declarant repeats the hearsay statement on the stand or it is admitted through extrinsic evidence, the proponent must satisfy an exclusion or an exception if that party wants the statement admitted for the truth of the matter asserted.

---

<sup>213</sup>United States v. Check, 582 F.2d 668, 681 (2d Cir. 1978).

<sup>214</sup>*Id.*

<sup>215</sup>Lee v. Illinois, 476 U.S. 530, 552 (1986) (Blackmun, J., dissenting).