

THE STATE OF TEXAS,	)	IN THE 5TH CRIMINAL DISTRICT
	)	COURT
Plaintiff,	)	
	)	DALLAS COUNTY, TEXAS
v.	)	
	)	
ZZZZ YYYY,	)	
	)	
Defendant .	)	
_____	)	

**MOTIONS IN LIMINE**

Defendant, ZZZZ YYYY, moves this Court, *in limine*, to exclude any evidence related to the subjects set forth below and, in support of this motion, she sets forth the following facts and argument:

**A. Not to Move to Introduce Any Business Records in Front of the Jury that Contain Information from a Person who did not have a Business Duty to the Business**

Mr. YYYY is concerned that the state may attempt to introduce records such as counseling records or records maintained by the Dallas Children’s Advocacy Center into evidence and put him in the position of having to object to the introduction of such evidence before the jury. To the extent those records contain statements made to the business entity by persons not having a business relationship with the business (*e.g.* the complainant or complainant’s family members), the records are not admissible in order to prove the truth of those statements.

The Court of Criminal Appeals opinion in *Garcia v. State*, 126 S.W.3d 921 (Tex. Crim. App. 2004) clearly demonstrates the point. In that case, the state offered business records from

the Bexar County Battered Women’s Shelter, however, the records also contained statements made to Shelter employees by appellant’s wife. *Id.* at 925-26 The Court of Criminal Appeals held this to be error:

The State laid a proper foundation for admission of the shelter's business records under Rule 803(6). The records themselves were admissible, but that does not mean that all information, from whatever source or of whatever reliability, contained within those business records is necessarily admissible. **When a business receives information from a person who is outside the business and who has no business duty to report or to report accurately, those statements are not covered by the business records exception.**

*Id.* at 926 (emphasis added).<sup>1</sup>

## **B. Not to Attempt to Elicit Statements Made by the Witness Out of Court**

Often parties attempt to introduce statements during a witness’ testimony that the witness made out of court for other than impeachment purposes and argue that this is not hearsay because it is the witness’ own statement. This is not the law and such testimony is inadmissible as explained in *Texas Rules of Evidence Manual* § 801.02[5][c] at 861-62:

Rule 801 (d) enunciates what is sometimes referred to as the “orthodox rule” that a witness’s prior out-of-court statements are still hearsay, even if the witness is available for cross-examination. The rationale supporting this view

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<sup>1</sup>The Court of Criminal Appeals gave an example of this principle:

For example, a delusional person might call Crimestoppers to report that George Washington was cutting down a cherry tree on the Capitol grounds. Although Crimestoppers has a business duty to accurately record all incoming calls and to keep the records as part of its business records, the caller had no business duty to report accurately. His statements may be contained within a business record, but they are not admissible to establish the fact that George Washington was, in fact, cutting down a cherry tree, although they would be admissible to establish that the person did call and make a report of some type on a given day.

is that, at the time the out-of-court statement was made, the witness-declarant was not subject to cross-examination or under oath, and the fact finder had no opportunity to observe the witness's demeanor and assess his or her credibility.

It might be arguable that the language of Rule 801(d), "while testifying at the trial or hearing," can be interpreted to mean that the testimony of a witness at trial or hearing concerning prior out-of court statements made by the witness is not hearsay. This is not a correct interpretation. Testimony concerning out-of-court statements offered for their truth constitutes inadmissible hearsay even if the declarant of the statements is the witness at trial, unless the out-of-court statements are admissible under an exemption or exception to the rule against hearsay. That interpretation is reinforced by the fact that Rule 801(e) expressly specifies the limited circumstances in which a witness's prior out -of court statements are admissible as nonhearsay.

**C. Not to Attempt to Elicit Testimony Made by the Witness' Out of Court Statements that Explicitly or Implicitly Give a Witness' Opinion that the Complainant is being Truthful**

It is well established that it is improper for a witness to offer a direct opinion that a child complainant is being truthful. *See Schutz v. State*, 957 S.W. 2d 52, 59 (Tex. Crim. App. 1997). Nevertheless, the state often attempts to offer such opinions in indirect ways and it should be precluded before trial from doing so and its witnesses should be instructed accordingly.

Specifically, courts have found the following testimony to be inadmissible:

- (1) Testimony that a complainant did not exhibit evidence of fantasizing. *Id.*
- (2) Testimony that manipulation was less likely explanation for complainant's allegations. *Id.*
- (3) Testimony from an expert testifying about what percentage of children lie about being sexually assaulted. *Wilson v. State*, 90 S.W.3d 391, 393 (Tex.

App.--Dallas 2002).<sup>2</sup> See also, *Yount v. State*, 872 S.W.2d 707 (Tex. Crim. App. 1993) (Holding that Tex. R. Evid. 702 “does not permit an expert to give an opinion that the complainant or class of persons to which the complaint belongs is truthful” and finding that question asking witness how many child sexual abuse claims she “found to be unfounded” was improper.)

(4). Testimony that the complainant was, in fact, abused. *Kirkpatrick v. State*, 747 S.W.2d 833 (Tex. App.--Dallas 1987) (“The only issue in this case was whether the complainant's allegation of sexual abuse was true. The necessary inference from the expert's testimony, "yes, [the complainant] was abused," was that the expert believed that the complainant's version was true and that she had indeed been sexually abused. We hold that such testimony was an improper comment on the complainant's credibility and was therefore, erroneously admitted.”)

(5) Testimony regarding how many complainants that witness had counselled over the years that she did not believe were telling the truth. *Simpson v. State*, 1997 Tex. App. LEXIS 2548 (Tex. App.--Dallas May 13, 1997).<sup>3</sup>

(6) Testimony regarding the factors for truthfulness observed by experts viz-a-viz the complainant. *Edwards v. State*, 107 S.W.3d 107, 115-16 (Tex. App.--Texarkana 2003) (Question “I am asking are there factors that you see there that indicate to you there's some truthfulness to what she's saying?” was improper); *Sessmus v. State*, 129 S.W.3d 242, 247, 248 (Tex. App.--Texarkana 2004) (After describing the factors for truthfulness, the witness was asked how the complainant “fit into those factors.” Held improper).<sup>4</sup>

(7) The different steps taken if a witness who has interviewed the child does not believe the child or different steps taken if a witness who has interviewed the child does believe the child. *Cloud v. State*, 2007 Tex. App. LEIXS 3299

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<sup>2</sup>The expert in this case was Cindy Alexander who the state has given notice will be an expert in this case.

<sup>3</sup>The expert in this case was Cindy Alexander who the state has given notice will be an expert in this case.

<sup>4</sup>It was also held improper for the state to argue in its closing that the complainant was truthful “because he was able to convince all four of these experts he was telling the truth.” *Sessmus*, 129 S.W. 3d at 248.

(Tex. App.--Houst. [1st], Apr. 26, 2007). (Question asking an investigator from the Children's Assessment Center "What happens--what do you if you do not believe the child?" was improper.)<sup>5</sup>

8) Testimony from a witness that the complainant "did not exhibit behavior he looks for when determining whether or not a child is making up a story about sexual abuse." *Pena-Ruiz v. State*, 2002 Tex. App. LEXIS 2100 (Tex. App.--Houst. [1st] March 21, 2002).

9) Testimony from a witness that nothing in complainant "demeanor" indicated that she was not telling the truth. 224. S.W. 3d 823 (Tex. App.-Texarkana 2007).

#### **D. Not to Attempt to Elicit Statements Made by the Witness Out of Court Which Are Implied Hearsay**

Given that a complainant's statement to another that she was abused is generally precluded as inadmissible hearsay, the state often gets creative in an effort to convey to the jury that the complainant did, in fact, make those statements to others without directly eliciting the statement. For example, the state will ask a witness, "Did the complainant tell you something that was very upsetting?" Such a back door attempt to introduce hearsay before the jury makes a mockery of the hearsay prohibitions.

Indeed, "[u]nder Texas Rule 801(c), a 'matter asserted' includes not only matters expressly asserted, but also matters that are implied." *Texas Rules of Evidence Manual* § 801.02[4][c] at 856. As noted by one court, "[w]ere the rule otherwise, the hearsay rule could easily be circumvented through clever questioning and coaching of witnesses, so that answers were framed as implied rather than as direct assertions." *Park v. Huff*, 493 F.2d 923 (5th Cir.

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<sup>5</sup>This would preclude asking a witness from the Dallas Children's Advocacy Center what the Center does if it finds an abuse complaint to be founded or unfounded.

1974).

**E. Not to Attempt to Elicit Statements Made by the Witness Out of Court Impact Testimony on Complainant Family Members**

The state often asks a complainant's family member to describe the effect that a complainant's outcry had on them in order to build sympathy with the jury. Victim impact evidence such as this is completely irrelevant in the guilt/innocence phase of a trial. *See Miller-El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App. 1990); *Garrett v. State*, 815 S.W.2d 333, 337-38 (Tex. App.--Houst. [1st Dist.] 1991). The state should be precluded from offering this evidence *in limine* given that once such emotional evidence is offered before the jury, it will be impossible for Mr. YYYY to 'unring the bell.'

WHEREFORE, ZZZZ YYYY respectfully requests this Court to grant his Motion *In Limine* in all parts and instruct the state not to introduce evidence or testimony in violation of the motion and to instruct its witnesses regarding the matters covered by this motion.

Respectfully submitted,

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F. Clinton Broden  
Tx. Bar 24001495  
Broden & Mickelsen  
2707 Hibernia  
Dallas, Texas 75204  
214-720-9552  
214-720-9594 (facsimile)

Attorney for Defendant  
ZZZZ YYYY

**CERTIFICATE OF SERVICE**

I, F. Clinton Broden, do hereby certify that, on this 12th day of OCTOBER, 2007, I caused a copy of the foregoing document to be hand delivered to the Dallas County District Attorney's Office, 133 N. Industrial Blvd., Dallas, Texas 75207.

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F. Clinton Broden