

## 8.41. State of Mind

**(1) An out-of-court statement by a declarant describing the declarant’s state of mind at the time the statement was made, such as intent, plan, motive, design, or mental condition and feeling, but not including a statement of memory or belief to prove the fact remembered or believed, is admissible, even though the declarant is available as a witness.**

**(2) An out-of-court statement by a declarant describing the declarant’s physical condition at the time the statement is made is admissible provided the declarant is unavailable at the time of the proceeding.**

### Note

**Subdivision (1)** is derived from several Court of Appeals decisions that recognize this exception (*see e.g. People v Reynoso*, 73 NY2d 816, 819 [1988] [“While such declarations may be received to show the declarant’s state of mind at the time the statement was made, they are not admissible to establish the truth of past facts contained in them,” such as a statement to a third party made after a shooting that the defendant believed the victim was armed]; *Matter of Putnam*, 257 NY 140, 145 [1931] [“mental conditions and feelings”]; *Schultz v Third Ave. R.R. Co.*, 89 NY 242, 248-249 [1882] [feelings of hostility]; *see also Hine v New York El. R.R. Co.*, 149 NY 154, 162 [1896] [statement as to motive admitted as part of *res gestae*]).

The exception for “memory or belief,” initially recognized in *Shepard v United States* (290 US 96 [1933, Cardozo, J.]), has been consistently recognized by the Court of Appeals (*see People v Vasquez*, 88 NY2d 561, 580 [1996]; *Reynoso*, 73 NY2d at 819).

Statements regarding the declarant’s present pain or then-existing physical condition are not within the exception set forth in subdivision (1) (*see Davidson v Cornell*, 132 NY 228 [1892]; *Roche v Brooklyn City & Newtown R.R. Co.*, 105 NY 294 [1887]). See subdivision (2) and the Note thereto.

For the rules governing a statement of future intent, see Guide to New York Evidence rule 8.42.

**Subdivision (2)** is derived from *Tromblee v North Am. Acc. Ins. Co.* (173 App Div 174, 176 [3d Dept 1916], *affd* 226 NY 615 [1919]), which held that a statement made by a declarant concerning the declarant's present physical condition after an accident was admissible where the declarant was deceased at the time of the trial (*but see Crawford v Washington*, 541 US 36 [2004]).

Such a statement may be admissible, however, even though the declarant is available where the statement is admissible as one made to a health care professional under Guide to New York Evidence rule 8.43 (*see People v Duhs*, 16 NY3d 405, 408 [2011]), or the statement is admissible as an excited utterance under rule 8.12 or as a present sense impression under rule 8.15 (*see e.g. People v McCray*, 102 AD3d 1000, 1009 [3d Dept 2013]; *Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]; *Hyung Kee Lee v New York Hosp. Queens*, 118 AD3d 750 [2d Dept 2014]).