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# An Introduction To The Rules Of Evidence Applicable To Collection Cases In Maryland Trial Courts

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# AN INTRODUCTION TO THE RULES OF EVIDENCE APPLICABLE TO COLLECTION CASES IN MARYLAND TRIAL COURTS

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Prof. McLain is admitted to the bars of the Maryland Court of Appeals (December 1974), the United States District Court for the District of Maryland (March 1975), and the United States Supreme Court (March 1990). She is the author of a number of law review articles, as well as several books on evidence, including Maryland Evidence: State and Federal (3 vols.) (West Group, 1st ed. 1987 and 2d ed. 2001) and Maryland Rules of Evidence (West Group, 1st ed. 1994 and 2d ed. 2002). She worked with the Maryland Court of Appeals' Rules Committee as a Special Reporter in drafting Maryland's rules of evidence. She has also been actively involved in the Maryland General Assembly with state legislation on evidentiary matters.

## I. Why Do We Need Rules of Evidence, Anyway?

To decide whether we should have rules of evidence, consider these fundamental questions:

- What are the goals of the trial system in the United States? Why did the framers of the Constitution want a trial system?

- Are there practical limitations we must face that prevent our fully reaching those goals, at least in every case? Why not just let everything in that the parties want to put in?

- What, then, should be the goals of any set of evidence rules?

**Md. Rule 5-102 PURPOSE AND CONSTRUCTION**

The rules in this Title shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

- Also consider privileges, such as the husband-wife privileges and the Fifth Amendment to the United States Constitution. How do privileges fit in with the goals you have identified?

- Should the rules of evidence apply in every court proceeding, including small claims cases ?

## II. Respective Roles of the Judge and the Jury

The judge rules on questions of law, including the admissibility of evidence. The jury decides the credibility of each piece of evidence: what weight to give to it, if any.

## III. Relevance Requirement

The most fundamental rule of evidence is the requirement that proffered evidence be relevant to (help to prove or disprove) a fact that is of legal consequence to the case. Irrelevant evidence is inadmissible.

## IV. Authentication: A Subcategory of Relevance

When a party (the "proponent" of the evidence) offers an item of evidence, the rules of authentication -- a subcategory of the relevance requirement -- generally require that the proponent offer evidence to convince the fact-finder (the jury in a jury trial; the judge in a nonjury trial) that the item is what the party offers it as. Absent sufficient evidence of authentication, an objection to the evidence will be sustained.

**Examples:**

a. In a paternity case, the baby.

b. In a murder case, blood found on the carpet at the homicide scene.

c. In a collection case,
   1. the contract on which suit is brought;
   2. a copy of the bill sent to the defendant;
   3. the business records of the plaintiff, reflecting non-payment of the bill.

Sometimes, particularly in civil cases, the parties will stipulate to the authenticity of an item, or admit its authenticity pursuant to a formal, pretrial Request for Admissions.

## A. General Rule as to Authentication: Maryland Rule 5-901

**Rule 5-901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION**

**(a) General Provision**

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the evidence in question is what its proponent claims.

Cross reference: Rule 5-104(b).

**(b) Illustrations**

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

**(1) Testimony of Witness With Knowledge**

Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

*E.g.*, the fireplace poker found at the homicide scene; a photograph of the scene; a tape-recorded conversation authenticated as accurate, either by one of the parties to the conversation or by someone who overheard it; and, upon appropriate proof of chain of custody, the cocaine seized from the defendant's car (showing a reasonable probability that no tampering or mix-up has occurred).

**(2) Non-Expert Opinion on Handwriting**

Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

-- Lay witness's testimony that the witness recognizes the handwriting on an exhibit. Familiarity need not have been gained by seeing the person write; it will suffice that the witness has seen the handwriting even once before, under circumstances suggesting that it was the writing of the person in question. But the familiarity

of the lay witness may not have been acquired for purposes of litigation.

**(3) Comparison With Authentication Specimens**

Comparison by the court or an expert witness with specimens that have been authenticated.

*E.g.*, fingerprints, hair, handwriting exemplars. If the evidence is admitted, the jury will decide ultimately whether, *e.g.*, the handwriting is the defendant's. The exemplar itself must be authenticated, but Rule 5-901(a) would seem to "trump" Code, Courts article, § 10-906, so that there is no special hurdle for authentication of handwriting exemplars. See Fed. R. Evid. 901, Advisory Committee note. The court in its discretion, under Rule 5-403, should exclude unduly prejudicial exemplars.

**(4) Circumstantial Evidence**

Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

*E.g.*, suicide note indicating how the apparent writer's possessions should be distributed; under the reply letter doctrine, a letter addressed to the writer of an earlier letter, responding to its contents; a voice on a telephone, when there is no voice recognition, but the speaker identifies himself and agrees to meet the other person at a specific time and place, and a person (now authenticated as the speaker) later meets the other person at that time and place. *See, e.g.*, *United States v. Siddiqui*, 235 F.2d 1318, 1322-23 (11th Cir. 2000) (e-mail); *Gerald v. State*, 137 Md. App. 295 (2001) (letters sufficiently authenticated by circumstances as having been written by defendant prisoner).

**(5) Voice Identification**

Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker.

*E.g.*, identification of a voice, previously known to the witness, on a tape recording; identification at a line-up, of an individual as the alleged offender, by

repetition of the words spoken during the crime, although the individual was unknown to the victim before the crime. Familiarity with the voice may have been gained either before or after the statement that is in question in the case, and it may have been gained either in person or "at any time under circumstances connecting [the voice] with the alleged speaker." See subsections (4) and (6).

**(6) Telephone Conversation** [Calls Made by Witness]

A telephone conversation, by evidence that a telephone call was made to the number assigned at the time to a particular person or business, if

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or

(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

**-- Rule 906(b)(6) provides a means for authenticating outgoing telephone calls only.**

-- The number may have been assigned either by the telephone company or internally, by the business.

**-- As to incoming calls, see subsections (4) and (5).**

**(7) Public Records or Reports**

Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation is from the public office where items of this nature are kept.

-- A public record from a public office, when evidence is offered to show that the record is from the office where items like it are authorized by law to be recorded or filed.

**-- Note, however, that *certified copies* of public records are *self-authenticating* under Rule 5-902(a)(4).** Domestic public documents under seal (5-902(a)(1)) or certified under seal (5-902(a)(2)), and foreign public documents accompanied by a final certification or, in some circumstances, an attested summary (5-902(a)(3)) are also self-authenticating.

**(8) Ancient Document or Data Compilation**

Evidence that a document or data compilation:

(A) is in such condition as to create no suspicion concerning its authenticity,

(B) was in a place where, if authentic, it would likely be, and

(C) has been in existence twenty years or more at the time it is offered.

*E.g.*, a Baltimore Sun, dated July 11, 1916, from the Enoch Pratt Library; a handwritten and signed bill of sale of the same date found in a safe deposit box -- but not if handwritten on "fax" paper.

-- A document need only be 20 years old to be "ancient" under this section (prior Maryland law was 30). See also Rule 5-803(b)(16) for a corollary hearsay exception.

**(9) Process or System**

Evidence describing a process or system used to produce the offered evidence and showing that the process or system produces an accurate result.

Committee note: This Rule is not intended to indicate the type of evidence that may be required to establish that a system or process produces an accurate result. *See, e.g.*, Rule 5-702 and its Committee note.

*E.g.*, a computer-generated bill; a Regiscope photograph; an X-ray offered as an X-ray of the plaintiff's leg; a spectrograph "voice print."

-- The Committee note makes clear that **Rule 5-902 does not address the *type* of evidence needed. As to some processes, judicial notice may be appropriate**. See Rule 5-201. **Others** (*e.g.*, radar, DNA profiles) **are recognized by statute. As to others, testimony will be required. If the evidence in question is novel scientific evidence, the *Frye-Reed* doctrine question will arise.** See Rule 5-702 and its Committee note.

**(10) Methods Provided by Statute or Rule**

Any method of authentication or identification provided by statute or by these rules.

Cross reference: Code, Courts Article, §§ 10-1001 - 1004.

*E.g.*, chain of custody of controlled dangerous substances, or of a dead body, or evidence of a DNA profile (Code, Courts Article, § 10-915).

## B. A Welcome Shortcut: Self-Authentication under Rule 5-902

Items falling under Rule 5-902 are self-authenticating, *i.e.*, no additional evidence of authentication is required. Evidence tending to show lack of authenticity will be admissible; the finder of fact will resolve any disputes as to authenticity of admitted evidence.

**Rule 5-902. SELF-AUTHENTICATION**

**(a) Generally**

**Except as otherwise provided by statute**, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

**(1) Domestic Public Documents Under Seal**

A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the trust territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

**(2) Domestic Public Documents Not Under Seal**

A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in subsection (a)(1) of this Rule, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee of any entity included in subsection (a)(1) of this Rule, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

**(3) Foreign Public Documents**

A document purporting to be executed or attested in an official capacity by a person authorized by the laws of the foreign country to make the execution or attestation and accompanied by a final certification. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

**(4) Certified Copies of Public Records**

A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with this Rule or complying with any applicable statute or these rules.

-- As to the requirements of a certificate or certification, see Rule 5-902(b) (*infra* page 11), which adopts the substance of the definition of "certifies" in Uniform Rule of Evidence 902(11).

-- As the Committee note following Rule 5-902(a) explains (*infra* page 11), the word "document" includes public records encompassed by Code, Courts Article, § 10-204.

**(5) Official Publications**

Books, pamphlets or other publications purporting to be issued or authorized by a public agency.

*E.g.*, a DMV pamphlet; the Warren Commission report.

**(6) Newspapers and Periodicals**

Printed materials purporting to be newspapers or periodicals.

*E.g.*, the Journal of American Medical Association.

**(7) Trade Inscriptions and the Like**

Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

*E.g.*, a Green Giant label, a Black & Decker chain saw.

**(8) Acknowledged Documents**

Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

-- Notarized documents.

**(9) Commercial Paper and Related Documents**

To the extent provided by applicable commercial law, commercial paper, signatures thereon, and related documents.

Cross reference: *See, e.g.,* Code, Commercial Law Article, §§ 1-202, 3-307, and 3-510.

*E.g.*, dishonored checks, bill of lading.

**(10) Presumptions under Statutes or Treaties**

Any signature, document, or other matter declared by applicable statute or treaty to be presumptively genuine or authentic.

*E.g.*, Code, Health-General, § 15-109)e) (certified copies of long term health care transaction forms); Code, Family Law, § 9-215(a) (other states' custody decrees); Code, Finance & Procurement, § 13-501(g) (certain documents necessary for the procurement of mechanics' liens); Code, Financial Institutions, § 3-514(b) (certain statements by trust company officers); the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, 28 U.S.C.A., Fed. R. Civ. P. 44, 527 U.N.T.S. 189, State Dept. T.I.A.S. 10072; the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

**(11) Certified Records of Regularly Conducted Business Activity**

The original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6), which the custodian or another qualified individual certifies (A) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (B) is made and kept in the course of the regularly conducted business activity, and (C) was made and kept by the regularly conducted business activity as a regular practice, unless the sources of information or the method of circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

**-- Certified copies or certified originals of business records, tracking foundation requirements of hearsay exception 5-803(b)(6); requirements of advance notice and opportunity to inspect.**

*See State v. Bryant*, 361 Md. 420 (2000) (custodian's certification inadequate when it was not made under oath and did not certify each and every element of the

foundation for the 5-803(b)(6) hearsay exception); McLain, *Self-Authentication of Certified Copies of Business Records*, 24 U. BALT. L. REV. 27-93 (1994).

The certification need only be by a person who could have laid the foundation for the business records hearsay exception at trial, and thus that person need not have had first-hand knowledge of the making of the record or of the facts memorialized in it.

When business records containing opinions are offered pursuant to Rule 5-902(a)(11), they must be examined under the same body of rules and cases addressing both the admissibility of business records and of opinions that would apply if the records were authenticated in a traditional way. Business records, even if adequately authenticated, should not be admitted if the court, in the exercise of its discretion, finds them untrustworthy.

In civil cases, if the opponent demonstrates a need to cross-examine an out-of-court opinion declarant, the declarant should testify at trial, unless the opponent has had the opportunity to subpoena the witness and has not done so. *See Chadderton v. Bongivonni*, 101 Md. App. 472 (1994).

In criminal cases, the accused's confrontation right--unless waived, as by failure to subpoena the declarant after notice under Rule 5-902(a)(11)--will demand that an available out-of-court declarant testify as the opinion witness when the opinion concerns nonroutine, highly significant matters. If the declarant is unavailable to testify, the otherwise admissible opinion should be admitted only if it survives an evaluation for trustworthiness, under the teachings of the United States Supreme Court in *Ohio v. Roberts*, 448 U.S. 56 (1980).

*See Reynolds v. State*, 98 Md. App. 348, 356-61, 633 A.2d 455 (1993) (reversible error to violate child sexual abuse defendant's confrontation right by admitting hospital records of his daughter's -- the complaining witness's -- stay in hospital psychiatric unit, when records contained doctors' opinions that defendant may have sexually abused her; confrontation right is violated if opinions appear to lack a legally adequate basis, as in this case, or if the opinion is too ambiguous to be helpful; an opportunity for cross-examination is required where it would not appear to be "unavailing, pointless or frivolous"; defendant had no right to confront, however, hospital personnel who merely recorded the patient's statements; patient testified and was subject to cross-examination).

-- A similar step already had been taken, as to originals or copies of hospital records, certified by their custodian, and produced, in response to a subpoena, according to the procedure set forth by Rule 2-510(g) and 3-510(g). *Cf. Chapman*

*v. State*, 331 Md. 448, 628 A.2d 676 (1993) (upholding statute regarding proof of bank records in bad check cases, by admission of bank employee's affidavit).

**(12) Items as to Which Required Objections Not Made**

Unless justice otherwise requires, any item as to which, by statute, rule, or court order, a written objection as to authenticity is required to be made before trial, and an objection was not made in conformance with the statute, rule, or order.

Committee note: As used in this Rule, **"document"** is a generic term. It includes public records encompassed by Code, Courts Article, § 10-204.

-- Trial courts may, **by pretrial order, including a scheduling order,** require written objections as to authenticity to be made before trial, or waived.

**(b) Definition**

As used in this Rule, **"certifies", "certificate", or "certification"** means, with respect to a domestic record or public document, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record or public document, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record or public document must be accompanied by a final certification as to the genuineness of the signature and official position (1) of the individual executing the certificate or (2) of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual. A final certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country who is assigned or accredited to the United States.

## C. Authentication When a Writing Contains Signatures of Subscribing Witnesses: Rule 5-903

**Rule 5-903. SUBSCRIBING WITNESS TESTIMONY UNNECESSARY**

Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

Cross reference: See Code, Courts Article, § 10-906 concerning the authentication of wills and codicils.

-- Generally, a non-self-authenticating writing may be authenticated by any means available under Rule 5-901(b). **The fact that the writing was attested to by subscribing witnesses does not require that their testimony be given, unless otherwise provided by statute** (as is the case under Code, Courts Article, § 10-906, regarding **wills and codicils**).

## V. The "Best Evidence Rule": Rules 5-1001 through 5-1008

When the particular terms or contents of a writing are important to a case, the rules establish that the contents must be proved, if possible, by introduction of the writing itself. To allow a witness to testify to his or her memory of the writing would risk a mistransmission of its terms, due either to inaccurate memory or to perjury.

**A.** Absent a claim of fraud or that the original writing never existed, photocopies are generally just as admissible as the original.

**B.** If neither the original nor a photocopy can be produced by the proponent, and the judge is satisfied that an adequate search has been made, or other steps required under Rule 5-1004 have been taken, then a witness who had seen the document may testify to what it said.

**C.** The "best evidence rule" does not preclude a witness from testifying to first hand knowledge of an event, such as a car crash, even if a writing also exists on the subject. But the "parol evidence rule" precludes a witness from testifying to or elaborating on the terms of a written contract.

## VI. Hearsay: General Framework

### A. Distinguishing between the First-Hand Knowledge Rule (5-602) and the Hearsay Rule (5-802)

1. Both rules stem from our desire to have the person on the stand as to whom direct and cross-examination will be most fruitful.

Ex. 1. TESTIMONY: I was robbed by two men. One of them shot me.

2. A witness who is testifying in court today to an out-of-court statement is not violating the first-hand knowledge rule as long as the witness heard the statement made. The issue is rather one of hearsay. If all we need to know is whether the statement was made, we are content to cross-examine the witness who says s/he heard the statement. But if we need to know whether the out-of-court statement was true, we need to cross-examine the declarant, and we have a hearsay problem.

Ex. 2. TESTIMONY: The shopkeeper told me one of them was Wally.

## B. Required Determinations as to Hearsay Issues

1. **Is the proffered evidence hearsay?**

2. **If it is hearsay, is it nonetheless admissible, because it falls within an exception to the hearsay rule?**

C. Recognizing When Evidence is Hearsay and When It is Not (MD. RULE 5-801(c): OCS + TOMA = HS). *See* MCLAIN, 6A MARYLAND EVIDENCE: STATE AND FEDERAL §§ 801:1 - 801:13.

1. First element (OCS): an out-of-court statement of a person (this person is known as the out-of-court "declarant")

   a. **"Out-of-court" means that the evidence offered today at trial is of a statement made somewhere else at another time.** (The other place may even have been another court proceeding.) **It is still out-of-court EVEN IF THE DECLARANT IS AT TRIAL TESTIFYING TO HIS OR HER OWN EARLIER STATEMENT.** We'd much prefer that a witness testify from her live memory, rather than just quoting her earlier statements. (For hearsay exceptions requiring that the declarant also testify at trial, see Rule 5-802.1--certain prior inconsistent or consistent statements, prior identification of a person, prompt report of sexual assault, and past recollection recorded.)

Ex. 3. TESTIMONY: I saw the robbery. I testified at the grand jury that Wally was the shooter.

   b. **"Statement" means an assertion of fact.** A statement may be either an oral assertion, a written assertion, or conduct intended as an assertion.

      i. The statement is usually "verbal" (in words, no matter whether written or oral).

         (A) "Wally was the shooter."
         (B) The police report, describing the police officer's observations and the witnesses' accounts.

      ii. It also may be "nonverbal *assertive* conduct" clearly intended as a substitute for particular words (nodding head to say yes or no, pointing to a person in a line-up, raising

hand to indicate affirmative, answer to a question, etc. – *not* crying, falling, fainting, etc.). You will know this when you see/hear it!

c. Statement must be of a "person" (whom opponent then would want to cross-examine as to the "four hearsay dangers" -- sincerity, intended meaning, perception, and memory). This person is referred to as the "declarant."

d. If the evidence offered is not an "out-of-court statement of a person" (OCS), it cannot be hearsay.

2. **If the evidence offered includes an OCS of a person, it is hearsay only if it is offered at trial to prove TOMA.**

a. TOMA = the truth of the matter asserted by the declarant at the time the declarant made the out-of-court statement.

b. First part of this analysis, then, is to ascertain:

i. Who was the declarant?

ii. What was the declarant asserting *at the time s/he made the OCS*?

Ex. 4. EVIDENCE: Either A or B testifies to Wally's co-worker A's remark to another, B, as Wally arrived at work on the day of the robbery and murder. "Look, Wally's late again. Two hours this time. I wouldn't be surprised if his girlfriend punched in for him. Why she would lie for that jerk is beyond me."

Ex. 5. EVIDENCE: Wally's time clock punch card at work on the day of the robbery, showing that he was punched in at 3:00 p.m. and out at 11:00 p.m.

c. For what purpose is the proponent offering the evidence? The evidence will be hearsay only if the proponent is trying to prove that what the declarant said was true (*i.e.*, that the declarant was both sincere in his/her apparent belief and that the declarant's perception and memory were accurate).

**It's TOMA if we are asking the jury to rely on what the declarant said in his/her OCS as true, accurate, correct.**

Ex. 4. above Hearsay if offered to prove, *inter alia*, that Wally was 2 hours late for work (arriving about 5:00 p.m.) (but will be admissible under Rule 5-803(b)(1), the hearsay exception for "present sense impressions").

Ex. 5. above Hearsay if offered to prove that Wally was at work from 3:00-11:00 p.m. (but will be admissible under Rule 5-803(b)(6), the hearsay exception for "business records", if the required foundation is laid).

d. **If it is relevant simply that the OCS was made, regardless whether the declarant was sincere, or had accurate perception or memory, it is nonhearsay.** In this event, the person testifying to the OCS can be fully cross-examined as to whether the OCS was made as s/he has testified.

Ex. 6. In a breach of contract case, the written contract, signed by the plaintiff and defendant, authenticated and offered into evidence, is a type of nonhearsay and will not be excluded by the hearsay rule.

e. If experts in a particular field reasonably rely on certain types of hearsay in reaching their opinions, Rule 5-703 provides that the court has discretion to admit the otherwise inadmissible hearsay basis for the *limited purpose of explaining how the expert arrived at the opinion*, rather than as substantive evidence itself.

Ex. 7. Psychiatrist relies on test results compiled by psychologist who gave the patient the tests.

f. An OCS is not hearsay if it is offered merely to impeach the declarant (as under Rule 5-613, by his prior inconsistent statement).

## D. Objections

1. If a hearsay objection is made, the proponent of the evidence must explain to the court how either (1) the evidence is offered for a nonhearsay purpose or (2) it falls within a hearsay exception.

2. Numerous "hearsay exceptions" have evolved where one or more hearsay dangers is absent or minimized, by virtue of the foundation for the particular hearsay exception. This circumstantially enhances reliability and minimizes the need for cross-examination. The OCS may even be better, more probative, and more reliable than the declarant's in-court testimony on that subject would be.

3. In order to have hearsay admitted under a hearsay exception, the proponent must first "lay the foundation" by offering evidence of every fact needed to qualify the statement under that particular exception to the hearsay rule. Under Rule 5-104(a), this evidence must satisfy the trial judge by a preponderance of the evidence that the foundation facts are true.

## E. Commonly Relied Upon Hearsay Exceptions

1. **Admission of a party opponent**, Md. Rule 5-803(a): anything the opposing party (or the party's agent or employee) said is admissible against that party, subject to relevancy rules. The statement need not have been against the party's interest at the time it was made.

a. Generally, OCS's of a party may come in against the party, but the party may deny, explain, or contradict those admissions: they are not binding.

b. *Certain judicial admissions* are binding, however, and cannot be contradicted by the party who made them:

i. Stipulations entered into in the case;
ii. Clear and unequivocal admissions in the effective pleadings in the case; and
iii. Answers to Requests for Admissions.

Other judicial admissions, such as one's deposition testimony and answers to interrogatories are admissible against one, but are not binding (one may contradict them). The same is true of one's pleadings in another case, or of superseded pleadings in this case, subject to exclusion in the discretion of the court under Rule 5-403.

2. Business Records

**Rule 5-803(b)(6) Records of Regularly Conducted Business Activity**

A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

a. The proponent of a document offered as a business record must lay the foundation of (A) through (D), either by a live witness or by certification as to those facts, under Rule 5-902(a)(11).

b. Statements of persons who are not employed by the business will not be admitted under this hearsay exception. If they do not qualify as nonhearsay or under another hearsay exception, they must be excised.

c. Self-serving records made in anticipation of litigation are not admissible as business records.