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The Maryland Rules of Evidence - the New Maryland Rules of Evidence: Survey, Analysis and Critique

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Colloquium

THE MARYLAND RULES OF EVIDENCE

THE NEW MARYLAND RULES OF EVIDENCE: SURVEY, ANALYSIS AND CRITIQUE

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I. INTRODUCTION

Title 5 of the Maryland Rules of Practice and Procedure, effective July 1, 1994, comprises the new rules of evidence for the State's courts.[1] Prior to the adoption of the new rules, Maryland evidence law consisted of a grab bag of statutory provisions, rules of practice and, primarily, common-law precedent. Consequently, the new rules mark a significant change in the organization of the law of evidence in Maryland. Fortunately for Maryland practitioners, the substantive content of the new rules of evidence embodies less substantial change than the new form might suggest.

This Survey reviews and analyzes the new Maryland Rules of Evidence.[2] It discusses changes in Maryland's law of evidence and how and why the new rules differ from the Federal Rules of Evidence on which they were modeled. Occasionally, the Survey offers predictions

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1. *See* 333 Md. XXXV-XXXVI (1993). The prior law continued to govern in trials that had begun prior to July 1. Perhaps in an excess of caution, the Court of Appeals order adopting Title 5 declared that in trials for criminal offenses allegedly committed prior to the effective date of the new rules, evidence is admissible against an accused only if it would have been admissible under the pre-rules law. *Id.* at XXXVI; *see also* Graves v. State, 334 Md. 30, 36-37 n.2, 637 A.2d 1197, 1201 n.2 (1994). Curiously, the order did not address the question of evidence that might have been admissible in favor of the accused under the pre-rules regime, but inadmissible under Title 5.

2. For a comprehensive study of Title 5 of the Maryland Rules of Practice and Procedure, see LYNN MCLAIN, MARYLAND RULES OF EVIDENCE (1994).

about how courts may interpret the new rules. Finally, the Survey critically analyzes particular rules and suggests some alternative formulations.

A. A Bit of History

A brief history of the development of the new rules may aid in understanding their substance and structure. After the adoption of the Federal Rules of Evidence in 1975, a number of states enacted substantially similar rules for their own courts. In early 1977, Maryland considered the wisdom and feasibility of such a project. Under the chairmanship of Judge Rodowsky, a subcommittee of the Committee on Rules of Practice and Procedure of the Court of Appeals prepared a report modeled on the newly enacted Federal Rules. The Court of Appeals determined that the project was, at best, premature in view of the insufficient experience with the Federal Rules. The project was abandoned.

By late 1988, however, the Federal Rules had operated for thirteen years, and thirty-five states, the military, Guam, and Puerto Rico had adopted rules based on the federal model. Thus, there was wide and deep experience with the operation of the rules. On the initiative of Judge Wilner, the Rules Committee inquired of the Court of Appeals whether it wished to reconsider the question of a set of evidence rules for Maryland. The court responded affirmatively and established an Evidence Rules Subcommittee. The Subcommittee was to review Maryland's law of evidence, the experience of the federal courts under the Federal Rules of Evidence, as well as the experience of the states that had adopted similar rules, and then make a recommendation for Maryland. The court did not wish the Subcommittee simply to propose an uncritical adoption of the Federal Rules.

The Subcommittee completed a draft in 1992, after which the project was considered by the full Rules Committee. For the next year, the Committee worked to consider and revise the Subcommittee's draft. In July 1993, the Committee issued its 125th Report, a proposed Title 5 of the Maryland Rules of Practice and Procedure—the Evidence Rules.[3] Following a comment period, the Court of Appeals held a public hearing on the proposal, after which the court voted six to one to adopt a code of evidence. Thereafter, the court held another public hearing at which the specific rules and proposed amendments were presented and considered. On December 15,

3. 20 Md. Reg. pt. II, at 1 (July 23, 1993) (issue no. 15).

1993, the Court of Appeals formally adopted Title 5 of the Maryland Rules.[4]

Judge Eldridge dissented, preferring the current, largely common-law evidence regime and perhaps out of doubt that the court had the authority to adopt the new rules.[5] Judge Chasanow, joined by Judge Bell, supported the idea of Title 5, but advanced specific criticisms of particular rules.[6] Judges Chasanow and Bell would have preferred a set of rules that followed the federal model more closely.

B. Advantages of Codification on the Federal Model

Prior to the adoption of Title 5 of the Maryland Rules, Maryland's evidence law was spread throughout the Maryland Reports and the Maryland Code. Researching a particular evidentiary issue was difficult and inefficient, particularly at the trial level where time is frequently short and objections or arguments often must be advanced without the opportunity for comprehensive research. Reducing at least the outlines of Maryland evidence law to a single volume of sixty-one rules immediately makes the law more accessible. As a result, trial level decisions will be better informed, which may reduce the portion of the appellate docket devoted to evidentiary matters.

The Federal Rules of Evidence, moreover, have had a substantial unifying effect on evidence law. Most American law schools teach evidence largely through the Federal Rules, supplemented by local law; law school graduates of the last dozen years have learned the law of evidence as reflected in the Federal Rules. Consequently, practitioners in those states whose law of evidence is modeled on the Federal Rules have an educational grounding that may produce more enlightened practice.

Because so many jurisdictions have adopted evidence rules modeled on the Federal Rules, the body of law available on evidentiary questions that share the federal format has expanded substantially the base of wisdom and experience in evidentiary matters. Similarly, there are several treatises[7] and services[8] as well as hundreds of law review articles devoted to the Federal Rules. Judges Chasanow

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4. 333 Md. XXXV (1993).

5. *Id.* at XXXVII-XXXVIII (Eldridge, J., dissenting).

6. *Id.* at XXXIX-XLVI (Chasanow, J., dissenting in part).

7. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE (1994); EDWARD CLEARY ET AL., MCCORMICK ON EVIDENCE (1994); STEPHEN SALTZBERG ET AL., FEDERAL RULES OF EVIDENCE MANUAL (1994); C.W. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (1994).

8. *See, e.g.*, JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE (1994).

and Bell may have had this body of experience in mind when they objected to Maryland's departure from the language of the Federal Rules in a number of instances.[9] Although no jurisdiction is bound by the decisions of others and each jurisdiction may have departed from the precise language of the Federal Rules, the value of such a large body of persuasive authority is impressive.

It is important, however, not to conclude that similar, or even identical, language will receive the same interpretation in one jurisdiction as it has in another. There are a number of examples of language in Title 5 of the Maryland Rules that are not intended to mirror the meaning of the same language in the Federal Rules of Evidence.[10]

Many differences between the Maryland rules and their federal counterparts are a result of the absence of federalism concerns that occasionally animate the Federal Rules but are not relevant to a state jurisdiction. Some differences are merely stylistic, done for purposes of clarification; some differences are more profound and reflect important policy differences. Yet, the similarities far outweigh the differences and are likely to nurture a more carefully considered, better developed body of evidence law in Maryland.

II. THE STRUCTURE OF TITLE 5

One of the most important similarities among the jurisdictions that model their rules on the federal format is the uniformity of structure and vocabulary. This uniformity allows research in the law of evidence to proceed much more efficiently and effectively. The drafters of Maryland's evidence rules were quite conscious of these advantages and attempted to follow the basic structure of the Federal Rules as much as possible. With only a few exceptions,[11] the numbering system of the Maryland Rules mimics the Federal Rules, with the added prefix of "5-", indicating that the rules are contained in Title 5 of the Maryland Rules of Practice and Procedure.

Chapter 100 of the Maryland Rules comprises general provisions that might be thought of as housekeeping rules. They inform the bench and bar when to apply the rules, how to apply them, and what consequences follow from the failure to apply them correctly. Structurally, Rule 5-101 combines the material contained in Federal Rule

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9. *See supra* note 6 and accompanying text.

10. *See, e.g., supra* notes 69-73 and accompanying text (standard for prior bad act evidence); *supra* notes 153-159 and accompanying text (test for admissibility of novel scientific evidence).

11. *Compare* MD. R. 5-101 *with* FED. R. EVID. 101 and Article XI; MD. R. 5-802.1 *with* FED. R. EVID. 801(d)(1); MD. R. 5-803(a) *with* FED. R. EVID. 801(d)(2). *See also* MD. R. 5-616.

101 and Article XI of the Federal Rules, providing the scope of the rules and indicating the courts and proceedings to which they are applicable, rather than dividing these issues into separate articles or chapters at opposite ends of the rules.

Chapters 200 and 300, which deal with Judicial Notice and Presumptions, respectively, are structurally substantially the same as their federal counterparts. Rule 5-301(b), however, deals with inconsistent presumptions, a topic on which the Federal Rules are silent. Federal Rule 302 is devoted to the problem of vertical choice of law: so-called *Erie* issues. The analogous Maryland Rule speaks to horizontal choice of law: the question of which state's law governs the effect of a foreign presumption applied under the law of conflict of laws.

Chapter 400 mirrors the structure of Article IV of the Federal Rules. It comprises the relevancy principle and some of the traditional standardized applications of that principle with an overlay of social policy. Rules 5-401, 5-402, and 5-403 are the holy trinity of the Rules, the animating spirit of the entire body of rules. Rule 5-401 defines "relevant evidence" as "evidence having *any tendency* to make the existence of any fact that is of consequence to the [litigation] more . . . or less probable than it would be without the evidence."[12] This broad definition of relevance collapses the common-law notion of materiality into the Rule through the "of consequence" language. Under a common-law analysis, evidence that under the Rule would not be "of consequence" would not be material.

Rule 5-402 is a rule of inclusion and exclusion. It declares a very broad principle of admissibility and states the bedrock principle of exclusion of any rational law of evidence:[13] "Evidence that is not relevant is not admissible."[14] The branch of the Rule concerned with the inclusion of evidence is the only such rule in the entire body of the Rules.[15] It declares that all relevant evidence is admissible unless excluded by some particular provision of law. Except for Rule 5-402, the entire corpus of evidence law can be viewed as a series of particular exclusionary rules.

Rule 5-403, the final rule in the central trilogy of Title 5, is the most important of the exclusionary rules. It establishes the basic

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12. MD. R. 5-401 (emphasis added).

13. *See, e.g.*, JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264-65 (1898) ("There is . . . a presupposition involved in the very conception of a rational system of evidence . . . which forbids receiving anything irrelevant, not logically probative.").

14. MD. R. 5-402.

15. With the possible exception of Rule 5-609; *see infra* notes 122-123 and accompanying text.

formula for the admission and exclusion of evidence, a formula embodied in other rules' applications to particular situations. The Rule holds that otherwise admissible evidence may be excluded "if its probative value is substantially outweighed" by a number of negative factors: the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, etc.[16] It is important to note that a rough balance between an item of evidence's probative value and these counterfactors will result in admissibility; probative value must be substantially outweighed by negative factors for the evidence to be inadmissible under Rule 5-403. Evidence that satisfies the requirements of all the other rules may nonetheless be excluded if it fails the balancing test required by Rule 5-403.[17]

The remainder of Chapter 4 comprises a series of rules that combine the underlying principle of Rule 5-403 with a number of policy overlays. The structure of Chapter 4 is essentially identical to Article IV of the Federal Rules of Evidence.

Article V of the Federal Rules of Evidence originally was drafted as a laundry list of privileges. Political opposition that threatened the passage of the Federal Rules led to the abandonment of the effort,[18] and Article V as enacted contains a single rule, declaring that a claim of privilege is to be determined in accordance with "the principles of the common law . . . in the light of reason and experience."[19] The drafters of the Maryland Rules proposed no rules pertaining to evidentiary privileges. In order to maintain a numbering system congruent with the federal model, the Maryland Rules contain no Chapter 500.

With one important exception, Chapter 600 of the Maryland Rules has essentially the same structure as Article VI of the Federal Rules. The exception, Maryland Rule 5-616, is an omnibus impeachment rule for which there is no federal counterpart. It sets out the various methods of impeachment and rehabilitation of witnesses, whether or not covered by other rules. Although the Committee Note indicates that the rule is not intended to be exhaustive or to foreclose other methods of impeachment, it would be difficult to devise a method of impeachment not covered by Rule 5-616. Some of the provisions of Rule 5-616 refer to other rules, for example, Rules 5-608, 5-609, and 5-613, while other provisions are purely self-referential.

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16. MD. R. 5-403.

17. *See* Graves v. State, 334 Md. 30, 40, 637 A.2d 1197, 1202-03 (1994).

18. *See* FED. R. EVID. 501 advisory committee's note.

19. FED. R. EVID. 501.

The subject matter of these other provisions—bias, contradiction, etc.—are treated only implicitly in the Federal Rules.[20] Thus, the Federal Rules' impeachment article largely concerns limitations on the use of relevant impeaching evidence. The explicit impeachment rules in the Federal Rules of Evidence elaborate categories of inadmissible impeachment evidence,[21] address special requirements not fairly inferred from the relevancy rules,[22] or change long-standing common-law requirements.[23]

The structure of Chapter 700 of Title 5 is in most respects identical to Article VII of the Federal Rules.[24] Unlike its Federal Rule analog, Rule 5-703 is divided into three paragraphs to make explicit what is only implicit in the Federal Rule. It is a more detailed statement of the treatment of the bases for expert opinions that may not be independently admissible in evidence.

Chapter 800, which addresses hearsay, provides the greatest departure from the structure of the Federal Rules. Both Article VIII of the Federal Rules and Chapter 800 of Title 5 of the Maryland Rules begin with an identical definition section. Rule 801(c) defines hearsay as, essentially, an out-of-court statement offered to prove the truth of the matter asserted. Paragraph (d) of Federal Rule 801 declares a number of such statements, such as various categories of party admissions and out-of-court statements made by testifying witnesses, "not hearsay." Maryland Rule 5-801, by contrast, contains no such paragraph (d). The Maryland Rules continue to treat statements meeting the definition of hearsay as hearsay.[25] Both Federal Rule 802 and Maryland Rule 5-802 declare hearsay inadmissible except as otherwise provided.

The classification of hearsay exceptions under the Maryland Rules is tripartite: Rule 5-802.1 does the work of Federal Rule 801(d)(1), providing a hearsay exception for certain out-of-court statements by persons who are testifying witnesses; Rule 5-803 deals with hearsay statements without regard to whether the declarant will testify or is available to testify; Rule 5-804 deals with statements by declarants who are unavailable to testify.

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20. *See infra* note 97.

21. *See, e.g.*, FED. R. EVID. 610 (religious beliefs).

22. *See, e.g.*, FED. R. EVID. 609 (prior conviction used to impeach must be within ten years).

23. *See, e.g.*, FED. R. EVID. 613 (abolishing the rule of *Queen Caroline's Case* in impeachment by prior inconsistent statement). *See infra* notes 101-106 and accompanying text.

24. But identical language does not necessarily mean identical interpretations. *See infra* notes 148-157 and accompanying text.

25. *See* MD. R. 5-802.1 and MD. R. 5-803(a).

Party admissions, not treated as hearsay under the Federal Rules, fall within the Title 5 definition of hearsay, but are treated as an exception to the rule against hearsay by Maryland Rule 5-803(a). Although there are some substantive differences, Maryland Rule 5-803(b)(1-24) is the analog to Federal Rule 803(1-24) with two exceptions. The hearsay exception for past recollection recorded found in Federal Rule 803(5) is addressed by Maryland Rule 5-802.1(e), as one of several categories of statements by testifying witnesses; records of prior convictions, treated by Federal Rule 803(22), is addressed by Maryland statute.[26] In both cases the original paragraph numbers are retained to comport with the numbering system of the Federal Rules. Maryland Rule 5-804, which lists exceptions to the rule against hearsay requiring the unavailability of the declarant, and Rule 5-805, treating multiple levels of hearsay, are virtually identical to their federal counterparts. Finally, Rule 5-806, governing impeachment and support of hearsay declarants, differs from its federal counterpart only to the extent necessary to accommodate the other structural changes to the hearsay rules.

Article IX of the Federal Rules of Evidence and Chapter 900 of Title 5 of the Maryland Rules are devoted to "Authentication and Identification." These rules declare the foundation necessary for the admission of certain categories of evidence. In most respects the two bodies of law are substantially the same, although the Maryland Rules are a bit more generous than their federal counterpart with respect to the authentication of business records.[27] Finally, Article X of the Federal Rules of Evidence and Chapter 1000 of Title 5 of the Maryland Rules are essentially identical in structure and content.

In addition to the rules themselves, Title 5 includes several categories of notes to the rules. Committee Notes, from the Committee on Rules of Practice and Procedure of the Court of Appeals, are not in themselves law, but provide important guidance to the interpretation of the rules. Indeed, a number of these notes were included at the express wish of the court. These notes should be distinguished from the Reporter's Notes that are found in the legislative history of Title 5.[28] The Reporter's Notes, though helpful to an understanding of the Rules, are less authoritative than the Committee Notes.

A second important category of notes to the rules are cross references to other rules or statutory provisions. Many of these references

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26. MD. CODE ANN., CTS. & JUD. PROC. § 10-904 (1989).

27. *See infra* note 259 and accompanying text.

28. Available in the files of the Rules Committee.

are attached to rules that declare: "Except as otherwise provided . . . ." In such instances the cross-reference will point to some provision of law "otherwise providing." For example, Rule 5-601 provides, "[e]xcept as otherwise provided by law, every person is competent to be a witness." Attached to the Rule are cross references to Sections 9-104 and 9-116 of the Courts and Judicial Proceedings Article of the Maryland Code. The former declares convicted perjurers incompetent to testify while the latter is a reference to the Dead Man's Statute, which survives the codification of the law of evidence.

The final category of notes is the source note, which indicates the origin of the rule to which it is attached. Most often the source note will direct the researcher to the analogous Federal Rule, but on occasion the source of a particular rule may be the Uniform Rules of Evidence[29] or a rule from another jurisdiction.[30] Although similar language does not necessarily carry the same meaning, it may be helpful to interpreting a particular rule to determine how it has been construed by the jurisdiction from which it was derived.

One further structural matter must be noted: the relationship of the newly codified rules of evidence to pre-existing statutory and common law. One will search Title 5 in vain for guidance on this issue, other than a cross-reference from Rule 5-102, "Purpose and Construction," to Rule 1-201. The cross-referenced provision of Title 1 makes it clear that the law of evidence pre-existing enactment of Title 5 continues to operate "unless inconsistent with these rules."[31] Thus, practitioners need not fear that they must discard all their knowledge of Maryland's evidence law in light of the new rules. Only so much of prior law as is inconsistent with the rules is superseded. For example, Rule 5-402 establishes relevance as a condition of admissibility. Prior case law finding a particular kind of evidence relevant to a particular proposition remains applicable under Rule 5-402's relevancy requirement. Similarly, what constitutes a "habit" under Rule 5-406 may be informed by cases pre-existing the adoption of Title 5.

III. CHAPTER 100—GENERAL PROVISIONS

The provisions of Chapter 100 combine the subject matter of Articles I and XI of the Federal Rules of Evidence. Rule 5-101 declares the proceedings to which the rules apply. In essence, Title 5 applies

29. *See, e.g.*, MD. R. 5-301.

30. *See, e.g.*, MD. R. 5-703(b) & (c) (citing KY. R. EVID. 703(b) & (c)); MD. R. 5-802.1(a) (citing HAWAII R. EVID. 802.1(1)).

31. MD. R. 1-201(c) (1994).

to all plenary contested proceedings in the Maryland courts. Rule 5-101(b) lists a number of proceedings to which the Rules are inapplicable, and Rule 5-101(c) allows the court to "decline to require strict application" of the rules in a number of other situations, but the rules on competency of witnesses apply even though other rules may be relaxed.

The Rules also apply to the determination of preliminary questions of fact on which the admissibility of evidence depends, unless, in the interest of justice, the court declines to require their strict application. Trial judges who decline strict application should note their reasons on the record in order to assure adequate appellate review. Maryland Rule 5-104(a) is stricter than its federal analog: Federal Rule 104(a) declares the Rules of Evidence inapplicable to preliminary questions of fact on which the admissibility of evidence may depend.[32] In effect, Rule 5-101(c) permits a court to relax the rules that pertain to authentication and the admissibility of hearsay evidence.

Although Rule 5-101(c) is silent on the matter, the court may not refuse to apply the law of privilege. The Rule's silence is premised on the notion that the Maryland Rules themselves contain no provision with respect to privilege, while they do address issues of competency. Thus, an explicit provision about a court's inability to relax competency rules, but not privileges, was a necessity. Should a court decline to follow the law of privilege with respect to any of the matters listed in paragraph (c), the confidentiality effected by the privilege is destroyed, as it would be in a plenary proceeding. To avoid misapprehension, it would have been better to declare privilege law exempt from the court's discretion to relax the rules, especially since the language of Rule 5-104(a) otherwise tracks Rule 5-101(c). Federal Rule 104(a), moreover, explicitly excepts privilege from the inapplicability of the Rules of Evidence to preliminary questions of admissibility.[33]

Rule 5-102 substantively mirrors its federal analog. There is some controversy within the scholarly community about the extent to which the Federal Rules of Evidence are the exclusive source of evidence law in the federal courts or whether there is any role remaining for the common law of evidence.[34] Rule 5-102's cross-reference to Maryland

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32. *See* Bourjaily v. United States, 483 U.S. 171 (1987).

33. Federal Rule 104(a) requires the court to apply the rules of privilege. FED. R. EVID. 104(a). The Federal Rules, however, unlike Title 5, do contain a privilege article, even if not particularly substantive.

34. *Compare* Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978) ("In principle, under the Federal rules no common law of evidence remains.") *and* Edward J. Imwinkelreid, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41

Rule 1-201 makes it clear that the common law of evidence continues to play a role in Maryland, despite the enactment of Title 5. Unless inconsistent with the newly enacted rules, Maryland's common and statutory law of evidence is not intended to be superseded. Of course, the existence *vel non* of such inconsistencies in particular cases must be settled in future litigation.

Rule 5-103 establishes the conditions under which an evidentiary ruling may be contested on appeal. It is consistent with current Maryland practice. In general, the Rule concerns appellate courts more than trial courts and provides the requirements for appellate review of evidentiary rulings. Although the Rule is silent on the matter, the Committee Note to Rule 5-103(a)(2) makes it clear that the standard for harmless error in criminal cases is unaffected. Similarly, the doctrine of plain error remains governed by Rule 8-131(a).[35]

Rule 5-103 preserves Maryland's general objection rule as a prerequisite to appellate review of the admission of evidence, unless the trial court specifically requests the ground of the objection or a specific objection is required by rule.[36] The corresponding federal rule and the rules of most states require a specific objection to preserve a point for appeal.[37]

It may have been justifiable to permit the general objection when Maryland's law of evidence was spread out over the volumes of the Maryland Reports, Maryland Appellate Reports, and the Maryland Code. But with the fundamental principles of the law of evidence reduced to a relatively few rules, it would hardly burden trial lawyers and judges to require that they articulate the bases for their objections and rulings. Nor is it merely a matter of technical requirements, for if the grounds of objection are routinely articulated, trial and appellate judges would be able to render more informed rulings. While perhaps not of great theoretical import, it may be that no single reform would do more to improve the quality of trial practice than the institution of the specific objection rule. As the bench and bar become in-

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VAND. L. REV. 879, 882 (1988) ("[R]ule 402 deprives the judiciary of the common-law power to prescribe exclusionary rules of evidence") *with* WEINSTEIN & BERGER, *supra* note 8, ¶ 102[01], at 102-13 ("the policy of Rule 102 authoriz[es] case-law modification of the rules of evidence").

35. *See* Batson v. Shiflett, 325 Md. 684, 700-01, 602 A.2d 1191, 1199 (1992).

36. *See* Hof v. State, No. 93-117, 1995 WL 97324 (Md. Mar. 10, 1995). *Cf.* MD. R. 2-520(e) and MD. R. 4-325(e); *see also* Bowman v. State, 337 Md. 65, 650 A.2d 954 (1994) (holding appellate review of jury instructions not permitted unless appellant's objection provided trial court with opportunity to correct deficiency). *See generally* Dinah S. Leventhal, Note, *General Evidentiary Objections Still Valid in Maryland*, 54 MD. L. REV. 1114 (1995).

37. FED. R. EVID. 103(a)(1).

creasingly familiar with the new rules comprised by Title 5, specific grounds for objections may be increasingly demanded. The application of a de facto specific objection rule in Maryland's courts within the next few years would not come as a surprise.

Interestingly, while a general objection suffices to preserve the point for appeal when the objection is directed at excluding evidence, it is necessary to make a specific offer of proof on the record where counsel's effort is the admission of evidence over objection.[38] The Committee Note makes clear that *Prout v. State*,[39] holding no offer of proof is required if the court has excluded evidence *in limine* through a ruling "clearly intended to be the final word on the matter,"[40] remains unaffected by the rule.[41]

Rule 5-104 makes no substantive change in Maryland law and, with one exception, is substantially the same as the corresponding federal rule. The Rule distinguishes two kinds of conditional admissibility. Paragraph (a) declares that the court is to determine factual questions on which the admissibility of evidence depends. The Rule is silent on the standard of proof to be applied to such questions. The Federal Rules require a preponderance of evidence,[42] but there is reason to believe that the question under Title 5 is not so simple.[43] Paragraph (b) of Rule 5-104 declares that where it is the relevance of evidence that is conditioned on some question of fact, the disputed evidence is admissible if there is evidence sufficient to support a finding that the conditioning fact exists.[44]

The rules governing authentication provide an example of conditional relevance:[45] If one party seeks to introduce a letter purportedly written by a particular person, the relevance of the letter may depend upon its authorship. If it were treated simply as a problem of admissibility conditioned on fact, the court would have to determine whether the letter had been written by the person claimed to have written it. On the other hand, as a question of conditional relevancy, the court need only determine whether a reasonable fact finder could make

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38. MD. R. 5-103(a)(2).

39. 311 Md. 348, 535 A.2d. 445 (1988).

40. *Id.* at 357, 535 A.2d at 449.

41. MD. R. 5-103(c).

42. Bourjaily v. United States, 483 U.S. 171, 175-76 (1988).

43. *See infra* text accompanying notes 70-74.

44. *See generally* Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871 (1992); Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980); Richard Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH L. REV. 439 (1994); Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447 (1990).

45. *See infra* Part X. Rule 5-901 employs the standard of 5-104(b).

such a finding. If the fact finder determines the authorship is not as claimed, the evidence is given no weight, and no prejudice will ensue

Where admissibility on grounds other than relevancy is conditioned on fact, the evidence is likely to be prejudicial whether or not the conditioning fact is found to exist. Thus, the judge rather than the jury must make the determination. It is precisely this sort of evidence that the jury ought not hear if the conditioning fact does not exist. For example, where the fruits of an allegedly illegal search are proffered, the facts underlying the determination of probable cause are for the court to determine, and the jury is not to see the evidence unless the court finds that the facts establish probable cause. If the jury were given the evidence with an instruction not to consider it unless they found facts sufficient to establish probable cause, it is likely that the jury would consider the disputed evidence regardless of their finding on the conditioning facts.

Whether a confession is that of the defendant in a criminal case is a question of conditional relevancy. If the confession is not the defendant's, it is not relevant, and the jury will not use it against her. But whether a confession, concededly the defendant's, violated *Miranda*[46] is a question of admissibility conditioned on fact. The confession is relevant to the defendant's guilt, though it may be inadmissible, and the jury well might consider it precisely because it is relevant; hence, the question of its admissibility is for the court.

Perhaps the most important difference between Rule 5-104 and its federal analog lies in how preliminary questions of fact are determined. Under the Federal Rules, the court is not bound by the rules of evidence in making such determinations. For example, if the prosecution seeks to introduce the out-of-court statement of an alleged coconspirator, it must first establish the existence of the conspiracy, the participation of the declarant and the defendant, and that the statement was in the course of and in furtherance of the conspiracy. These are the preliminary facts which condition the admissibility of the statement.[47] Because the court is not bound by the rules of evidence in this determination, however, the disputed statement itself, though plainly hearsay for this purpose, may be used to establish the conditioning facts.[48] To avoid this bootstrapping, Maryland Rule 5-104(a) envisions that the rules of evidence apply to such determinations,

46. Miranda v. Arizona, 384 U.S. 436 (1966).
47. *See* FED. R. EVID. 801(d)(2)(E); Bourjaily v. United States, 483 U.S. 171, 175 (1987).
48. *Bourjaily*, 483 U.S. at 175.

although it permits the court to decline to require their strict application in the interest of justice.[49]

Although not apparent on the face of either the Federal Rule or Maryland Rule 5-104(a), the standard of proof that must be satisfied to demonstrate the existence of a fact on which the admissibility of evidence depends is a preponderance of evidence.[50] Despite the Rule's silence, it is likely that Maryland will continue the pre-rules higher standard for certain types of conditioning fact. For example, *State v. Faulkner*[51] requires that other misconduct evidence offered pursuant to Rule 5-404(b) be established by clear and convincing evidence.[52] The higher standard is likely to survive adoption of Title 5.

Unlike its federal counterpart, Rule 5-104(c) provides no special treatment for confessions in criminal cases, but Maryland Rule 4-252 has substantially the same effect as Federal Rule of Evidence 104(c). The admissibility of confessions in criminal cases will be determined out of the presence of the jury. In general, Maryland Rule 5-104(c) is more flexible than the analogous federal rule and makes no change in prior Maryland practice.

As the Committee Note suggests, Rule 5-104(d) should be read together with Rule 5-611(b)(2). A criminal defendant may contest the admissibility of evidence preliminarily, and if she also testifies as to the facts on which admissibility is conditioned, cross-examination is limited to those matters—and, of course, to matters of credibility. Maryland permits, however, the accused to challenge the voluntariness of a confession at trial as well as preliminarily.[53] If the accused elects to testify at trial on the question of voluntariness, such testimony is no longer "a preliminary matter of admissibility," and is subject to wide open cross-examination on any relevant matter in the case.

Rule 5-105 restates the unremarkable principle, applicable under Maryland's common law, the Federal Rules, and virtually every other American system of evidence, that evidence admissible for one pur-

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49. *See supra* text accompanying note 32.

50. *See Bourjaily*, 483 U.S. at 175; State v. Jones, 311 Md. 23, 532 A.2d 169 (1987) (allowing inferences as the basis of admissibility under the present sense exception to hearsay).

51. 314 Md. 630, 634, 552 A.2d 896, 898 (1989).

52. *See infra* text accompanying notes 70-74.

53. Brittingham v. State, 306 Md. 654, 666, 511 A.2d 45, 51-52 (1986) (finding once trial judge decided to admit confession, the defense is entitled to present evidence of voluntariness); Hillard v. State, 286 Md. 145, 151, 406 A.2d 415, 418-19 (1979) (holding voluntariness of a confession must be established first with trial judge, then before the court or jury).

pose but inadmissible for another may be admitted for its permissible purpose with appropriate instructions to the jury if requested. The Committee Note makes clear that such instructions ordinarily should be given both at the time the evidence is admitted and as part of the jury's final instructions. It is unclear whether the court may, or even must, instruct the jury in the absence of a request.[54] Often the question of whether to request an instruction will turn on tactical considerations best left to the judgment of trial counsel. Counsel may elect not to call the matter to the jury's attention, which an instruction from the court might do.

Of course, there may be instances in which an impermissible use of evidence, properly admitted for a limited purpose, is so inflammatory that an instruction can not cure its prejudicial effect. In such cases the evidence should be excluded under Rule 5-403. For example, in *State v. Werner*,[55] the defendant was charged with sexual assault, and the state sought to introduce evidence that previously the defendant had sexually assaulted the victim's sister. The state argued that the evidence tended to prove the defendant's state of mind. Even if this were true, the jury would be so likely to use the evidence improperly, despite a limiting instruction, that it was error to admit the evidence.[56]

Rule 5-106 extends the rule of contemporaneous completeness, applicable to depositions,[57] to any writing or recorded statement. When a party introduces a writing or recorded statement, an adverse party may require another part of it or another writing or recorded statement to be introduced immediately if fairness requires their contemporaneous consideration. The Rule is designed to prevent the creation of a false impression through the use of a writing or recording and the maintenance of it until an adverse party has the opportunity for cross-examination. The Rule is strictly one of timing. It adds little to the inherent power of the court under Rule 5-611[58] to control the mode and order of proof, as the cross-reference to that Rule suggests. Indeed, to make writings and recordings subject to a specific rule on timing might suggest that the court lacks the authority to re-

54. *See* United States v. Billue, 994 F.2d 1562 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 939 (1994).

55. 302 Md. 550, 489 A.2d 1119 (1985).

56. *Id.* at 556, 489 A.2d at 1123.

57. *See* MD. R. 2-419; MD. R. 4-261.

58. *See infra* notes 144-147 and accompanying text.

quire immediate introduction of similar statements not written or recorded, though such a suggestion would be ill-advised.[59]

It is important to note that the common-law rule of completeness survives the adoption of Rule 5-106. Under the common law, when one party has introduced evidence of a statement or conversation or other verbal event, an adverse party is entitled to introduce other parts thereof or related material that is necessary to ensure that the initial evidence is not misleading. The difference between the common law and Rule 5-106 is that under the common law the party that introduces the contextualizing or explanatory material must await cross-examination or the case-in-chief. While the common-law rule continues to apply to oral statements, Rule 5-106 applies to written or recorded statements as defined in Rule 5-1001(a).[60] The reason for the distinction is the practical one of trial administration.[61]

As a matter of trial practice, it would be foolhardy for a party to introduce an incomplete portion of a statement that would create a false impression later revealed by the adverse party. The rule of completeness, whether contemporaneous or not, is designed to keep the parties honest. An example may help: The witness, the victim of the attempted murder for which the defendant is being tried, is cross-examined with respect to his grand jury testimony:

> Q: Did you say to the Grand Jury, and I quote, "I didn't see who shot me"?
>
> A: Yes.
>
> On redirect, the prosecutor asks the witness to read the transcript of his Grand Jury testimony immediately preceding and following that question and answer:
>
> Q: Where were you when you were shot?
>
> A: Walking by the railroad tracks.
>
> Q: Who was with you?
>
> A: The defendant.
>
> Q: Were you walking side by side?
>
> A: No, we were in a straight line because of the tracks.
>
> Q: Where was the defendant?
>
> A: He was behind me.
>
> Q: Where were you shot?
>
> A: In the back.

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59. *See* Bloodsworth v. State, 307 Md. 164, 187, 512 A.2d 1056, 1067 (1986) (holding defense witnesses permitted to testify about circumstantial evidence that occurred simultaneously with elements of the state's case).

60. *See infra* note 269 and accompanying text.

61. *See* FED. R. EVID. 106 advisory committee's note.

Q: Did you see who shot you?
A: No, I didn't see who shot me.
Q: What, if anything, did you see as you fell?
A: I turned around as I fell, and I saw the defendant holding a gun.[62]

IV. CHAPTER 200—JUDICIAL NOTICE

Rule 5-201 is the only rule dealing with judicial notice. It is consistent with both the Federal Rule as it has been interpreted and generally with prior Maryland practice. The Rule makes it plain that, except with respect to facts adverse to criminal defendants, judicially noticed facts are conclusive, and evidence that contradicts a judicially noticed fact will not be received. When a fact is to be judicially noticed by the trial court, the adverse party must be given an opportunity to respond. Failure to take this opportunity is likely to bar appellate review of the propriety of taking notice.[63]

V. CHAPTER 300—PRESUMPTIONS

Rule 5-301 was among the most controversial and contentious considered by the Subcommittee. Among the views advanced were that Title 5 should contain no rule on presumptions on the theory that "presumptions" included so many different and inconsistent notions that no uniform treatment was desirable.[64] Presumptions are based on different mixes of policy, probability, access to evidence, the need for stability, and the need for tie-breaking rules.[65] The effect given a particular presumption should reflect the varying weight of the several factors on which that presumption is based. To the extent presumptions are rooted in particular substantive policy choices, they are not matters appropriate to an evidence code.

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62. I am indebted to Hon. Joseph Murphy, Court of Special Appeals, for this variation on Worthington v. State, 38 Md. App. 487, 381 A.2d 712 (1978).

63. *See* Smith v. Hearst Corp., 48 Md. App. 135, 140-41, 426 A.2d 1, 4 (1981).

64. The Committee Note states that the Rule as adopted deals only with "true" presumptions. Permissible inferences on the one hand and "conclusive presumptions" on the other are not within the Rule.

65. Compare, for example, the presumption of legitimacy: a child conceived or born while its mother was married is the legitimate offspring of her then-husband, MD. CODE ANN., EST. & TRUSTS § 1-206(a)&(b) (1991); MD. CODE ANN. FAM. LAW § 5-1028(c) (1991), with the presumption that loss of or damage to goods in the possession of a bailee is the result of the bailee's negligence, Commodities Reserve Corp. v. Belt's Wharf Warehouses, Inc., 310 Md. 365, 529 A.2d 822 (1987), and the presumption, in cases of simultaneous death in which the descent of property depends upon the order of death, that each person survived the other, MD. CODE ANN., CTS. & JUD. PROC. §§ 10-801 to -807 (1989).

Some Subcommittee members took the position that a presumption should shift the burden of persuasion. Others believed that only the burden of production should be affected. Some thought the Thayer approach—the bursting bubble theory—was the appropriate one, while a few believed the introduction of evidence to rebut the presumption should not entirely obliterate the presumption's effect.

These issues are of interest largely to academics, but rarely to practitioners or judges. Ultimately, the rule as adopted codifies Maryland law as expounded in *Grier v. Rosenberg*.[66] Under Rule 5-301, presumptions do not affect the burden of persuasion. A presumption merely satisfies the burden of production on the fact presumed and, in the absence of rebutting evidence, may satisfy the burden of persuasion. If there is rebutting evidence, the presumption retains only enough vitality to create a jury question on the issue, and the jury is instructed on the presumption. Thus, having left no stone unturned in the investigation of the law of presumptions, Rule 5-301 left each precisely as it found it.

Finally, Rule 5-301(b), which has no federal analog, treats the problem of conflicting presumptions with the direction that the court apply "the one that is founded on weightier considerations of policy and logic." Policy and logic, however, may conflict, and it is unlikely that this formulation will prove helpful.

Rule 5-302 is essentially a conflict of laws rule.[67] It declares that the effect of a presumption should be determined by the law that supplies the presumption.

VI. CHAPTER 400—RELEVANCY AND ITS LIMITS

As already discussed in Part I, Rules 5-401, 5-402, and 5-403 provide the critical foundation of the new Maryland Rules.[68] The remainder of Chapter 400 comprises particular manifestations of those rules as applied through many years of common-law development, at times modified by particular policy choices.

Rule 5-404 codifies the common-law propensity rule for character evidence, which provides, with certain exceptions noted in the Rule, that evidence of character is not admissible to prove that a person acted in conformity therewith. Paragraph (b) makes clear that conduct evidence may be admissible if offered for some relevant proposi-

66. 213 Md. 248, 131 A.2d 737 (1957).

67. The federal analog to 5-302 treats *Erie* problems or vertical choice of law; the Maryland Rule is concerned with horizontal or interstate choice of law questions.

68. *See supra* notes 12-17 and accompanying text.

tion other than character. None of this is new to Maryland practice.[69] Although, the language of Rule 5-404 is identical to Federal Rule 404, the requirement in *State v. Faulkner*[70] that such conduct be established by "clear and convincing evidence" is retained.[71] The Maryland Rule rejects, as it should, the holding of *Huddleston v. United States*,[72] in which the Supreme Court read Federal Rule 104(b) to require only that a reasonable jury could find the other conduct.[73] The higher standard is consistent with Rule 5-403's balancing of probativity and prejudice. Given the potential prejudice that other conduct evidence may produce, it is sensible to ensure that such evidence is accurate before admitting it. Perhaps for this reason, the Federal Rules were recently amended to require that the prosecution give notice of its intention to use Rule 404(b) evidence,[74] presumably to allow the opponent of the evidence the opportunity to rebut it. This notice requirement is not part of the Maryland Rule.

The exceptions to the exclusion of character as propensity evidence are familiar: The accused in a criminal proceeding (including a child alleged to be delinquent[75]) may offer evidence of good character, although if she does, the state may rebut it with evidence of poor character for the trait in question;[76] a witness's credibility may be impeached by relevant character evidence;[77] and, a criminal defendant may offer relevant evidence of the victim's character[78]—for example, the victim's aggressive character may be offered in an assault prosecution to show the victim was the first aggressor—and the prosecution may offer rebutting evidence.

Less cogent than the justification for the prosecution's use of evidence to rebut the defendant's use of character evidence is to permit the state to offer evidence of the victim's pacific character in a homicide prosecution to rebut any evidence, whether or not character evidence, that the victim was the first aggressor. Under Rule 5-404(a)(1)(B), the state may offer character evidence of the peaceableness of the victim in a homicide case if the defendant offers, for exam-

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69. *See* Harris v. State, 324 Md. 490, 495, 597 A.2d 956, 960 (1961) (holding evidence of bad acts may be admissible if offered on a basis other than to prove propensity to commit a crime).

70. 314 Md. 630, 552 A.2d 896 (1989).

71. *Id.* at 634, 522 A.2d at 898.

72. 485 U.S. 681 (1988); *see supra* text accompanying note 52.

73. *Huddleston*, 485 U.S. at 690.

74. FED. R. EVID. 404(b). The amendment became effective December 1, 1991.

75. MD. R. 5-404(a)(2).

76. MD. R. 5-404(a)(1)(A).

77. MD. R. 5-404(a)(1)(C); *see* MD. R. 5-607, 5-608, 5-609.

78. MD. R. 5-404(a)(1)(B). *But see* MD. R. 5-412; MD. ANN. CODE art. 27, § 461A (1992).

ple, eye witness testimony that the victim was the first aggressor, even though the defendant may have offered no character evidence at all.

Finally, Rule 5-404 overrules *Bugg v. Brown*,[79] which had permitted the use of character evidence of the victim in civil cases if the nature of the conduct alleged would also have constituted a crime.[80] Under Rule 5-404 such evidence is available only in the criminal prosecution itself.

In those instances in which evidence of character is admissible, Rule 5-405 provides that the evidence may be in the form of opinion or reputation. In the relatively rare case in which character is itself in issue, where no inference of conduct is sought to be drawn from character, relevant specific instances of conduct are also admissible. The language of Rule 5-405 follows the Federal Rule. Perhaps the most important change from prior Maryland practice is the disapproval of *Hemingway v. State*,[81] in which the Court of Special Appeals permitted inquiry into prior specific conduct to provide a "basis" for a character witness's opinion.[82] Rule 5-405 recognizes the difficulty of asking a jury to master so fine a distinction as the use of specific instances as a basis for the character witness's opinion, while not considering it as evidence of character.

Rule 5-406 codifies prior Maryland law on the admissibility of habit/routine practice evidence. It is substantively identical to Federal Rule 406. While the Federal Rule explicitly eliminated the need for corroborating evidence or the lack of eyewitnesses, these prerequisites were not a part of Maryland law, and, hence, the Maryland Rule is silent about them.

Rule 5-407, which prohibits the use of subsequent remedial measures to prove culpable conduct, is based as much on policy as on probativity. Consideration of this Rule, substantively the same as Federal Rule 407, provoked enormous controversy within the bar. The Rule changes Maryland law in an important respect. Under *Wilson v. Morris*,[83] subsequent remedial measures were admissible to establish "standard of care."[84] The Rules Committee accepted the Court of Appeals' invitation to reconsider this principle, and the adoption of Rule 5-407 eliminates this too fine distinction; subsequent remedial measures are not admissible to show culpability, whether framed in terms

79. 251 Md. 99, 246 A.2d 235 (1968).
80. *Id.* at 106-07, 246 A.2d at 239-40 (assault).
81. 76 Md. App. 127, 543 A.2d 879 (1988).
82. *Id.* at 132-36, 543 A.2d at 881-83.
83. 317 Md. 284, 563 A.2d 392 (1989).
84. *Id.* at 298-301, 563 A.2d at 397-400.

of standard of care or the violation of the standard. Of course, subsequent remedial measures may be admissible for some other purpose, as delineated in Rule 5-407(b).

Consideration of Rule 5-407 provided an opportunity to clarify a number of difficult issues including whether the Rule applies to products liability cases, a matter of continuing controversy in the federal courts.[85] Courts that hold the Rule applicable must also decide the meaning of "subsequent," that is, whether the term denotes events after manufacture or after plaintiff's injury. The Subcommittee recommended that the Rule apply to products liability cases and that the relevant time be after the product entered the stream of commerce. Also unclear was whether measures taken in response to official directives should be excluded. The Rule as finally adopted, however, leaves all of these issues for case-by-case development.[86]

Rule 5-408 seeks to protect settlement negotiations by making inadmissible certain evidence that arises out of such negotiations if offered to show culpability or to impeach by prior inconsistent statement. The Rule extends Maryland's common law[87] to include conduct as well as statements and does not require artificial locutions such as "without prejudice" to insulate protected statements.[88] The Maryland Rule explicitly includes mediation, implicit in Federal Rule 408. The protection also extends to the use of civil case compromise evidence in criminal actions, although it does not bar such use to show "an effort to obstruct a criminal investigation or prosecution."

Rule 5-409 applies similar protections to offers to pay medical or similar expenses, whether deliberate, made in the course of settlement negotiations, or uttered spontaneously. The Rule does not apply to offers to pay for property damage.

Rule 5-410 applies the policies of Rule 5-408 to criminal cases by insulating, with certain exceptions, pleas, plea agreements, or statements made in the course of plea negotiations. The Rule's protection extends only to the criminal defendant.

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85. *Compare* Bizzle v. McKesson Corp., 961 F.2d 719, 721 (8th Cir. 1991) (finding evidence of subsequent measures in products liability cases admissible) *with* Raymond v. Raymond Corp., 938 F.2d 1518, 1521 (1st Cir. 1991) (holding Federal Rules do not allow introduction of subsequent safety improvements in products liability cases).

86. *See, e.g.*, Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 488 A.2d 516 (holding in strict liability cases evidence of subsequent remedial measures not admissible), *cert. denied*, 303 Md. 471, 494 A.2d 939 (1985).

87. *See, e.g.*, Mateer v. Reliance Ins. Co., 247 Md. 643, 646, 233 A.2d 797, 799 (1967).

88. *See* Brown v. Hebb, 167 Md. 535, 548, 175 A. 602, 608 (1934).

Rule 5-411 prohibits the introduction of evidence of insurance on the question of negligence or culpability. It is identical to Federal Rule of Evidence 411 and reflects prior Maryland law.[89]

Rule 5-412 serves as a pointer to Article 27, Section 461A of the Maryland Code, which restricts the use of prior sexual history of the victim in cases of rape or first degree sexual assault. The Rule makes no change in Maryland law. Proposed Federal Rules of Evidence 413, 414, and 415, as contained in the 1994 Crime Bill, were not considered by the Rules Committee or the Court of Appeals.[90] In any event, it seems likely that any such provisions would originate in the legislature.

VII. CHAPTER 600—WITNESSES

Chapter 600 can be thought of as treating three separate but related sets of issues: Rules 5-601 through 5-606 treat issues related to competency; Rules 5-608 through 5-610 and 5-616 treat impeachment and support; and Rules 5-611 through 5-615 treat questions of procedure.

A. Competency and Related Issues

Rule 5-601 is generally consistent with prior Maryland law and declares a general rule of competency, subject to particular exceptions. As the cross references adumbrate, the statutory incompetency for convicted felons[91] as well as the "Dead Man's Statute"[92] survive the adoption of the new rules. Although Rule 5-601 eliminates categorical incompetencies, the accompanying Committee Note makes it clear that a particular witness still may be held incompetent if lacking in memory, ability to narrate, or other traditional prerequisites to testify. Rule 5-602 makes explicit that one of these prerequisites is personal knowledge about the matter that is the subject of the testimony, but notes the exception for expert witnesses offering opinion evidence pursuant to Rule 5-703.[93] It is consistent with both its federal analog and prior Maryland law. Rules 5-605 and 5-606(a) prohibit the trial judge or juror, respectively, from testifying.

Rule 5-606(b) continues the prior Maryland practice that strictly precludes a juror's testimony to impeach the verdict, whether with re-

89. *See, e.g.*, Morris v. Weddington, 320 Md. 674, 680, 579 A.2d 762, 765 (1990).

90. *See* Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796 (1994).

91. MD. CODE ANN., CTS. & JUD. PROC. § 9-104 (1989).

92. *Id.* § 9-116.

93. *See infra* text accompanying notes 160-161.

spect to improper extrinsic or intrinsic influences.[94] The comparable federal rule permits a juror to testify about extrinsic influences on the jury's verdict—for example, bribery or newspaper articles improperly in the jury room.[95] The original draft of Maryland Rule 5-606(b) had proposed a similar distinction,[96] but the Court of Appeals chose, instead, a strict nonimpeachment rule. The Rule does not prohibit other evidence of improper influence, but precludes such evidence out of the mouths of the jurors themselves.

B. Impeachment and Rehabilitation

The place to begin a study of impeachment and support is at the end of Chapter 600; Rule 5-616 is an omnibus rule on impeachment and support. Although it does not claim to be exhaustive, the Rule outlines and summarizes the various modes of impeachment and support, some of which are addressed in greater detail in other rules in the chapter. The Rule is generally consistent with prior Maryland law with a few exceptions discussed below. Rule 5-616 has no counterpart in the Federal Rules of Evidence. Indeed, the Federal Rules have been criticized for a lack of completeness in coverage of the law of impeachment because, for example, they are silent on the question of impeachment by bias, an area addressed in the Maryland omnibus rule in 5-616(a)(4) and (b)(3).[97]

The structure of Rule 5-616 itself is helpful in understanding the sometimes confusing subject of impeachment and support. The Rule divides the subject matter into three parts: Part (a) addresses impeachment by cross-examination; part (b) addresses impeachment by extrinsic evidence; and part (c) addresses rehabilitation and support. The division of parts (a) and (b) helps to clarify, though not com-

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94. Harford Sands, Inc. v. Groft, 320 Md. 136, 577 A.2d 7 (1990); Wernsing v. General Motors Corp., 298 Md. 406, 470 A.2d 802 (1984).

95. FED. R. EVID. 606(b).

96. Indeed, in early publications of Title 5, Rule 5-606(b)(1), prohibiting juror impeachment of the verdict, began with an exception clause pointing to paragraph (b)(3) of the Rule. The original paragraph (b)(3) excepted evidence of extrinsic influences. When that exception was deleted, the reference to it in 5-606(b)(1) was neglected, leaving a reference to a non-existent exception. Later versions of the Rule have corrected the oversight.

97. Such criticism of the Federal Rules is misplaced. The rules permit the introduction of all relevant evidence unless excluded or limited by some particular rule. Thus, the Federal Rules function to exclude relevant evidence in particular circumstances or to require the satisfaction of some condition before the evidence is admitted. If there is no restriction on the use of bias impeachment, and if there is no particular foundation or other condition that must be established before bias evidence is admissible, there is simply no reason for a particular rule governing bias impeachment. It is relevant evidence and admissible under Rule 402.

pletely resolve, the common-law problem of "collateralness." The common law prohibited the introduction of extrinsic evidence to impeach on collateral matters, but permitted it if the matter was not collateral. It was sometimes difficult to tell what counted as "not collateral." With respect to impeachment by prior inconsistent statement[98] and impeachment by contradiction,[99] the problem remains, but the other modes of impeachment listed in Rule 616(b) permit proof by extrinsic evidence. In the parlance of the common law, these matters are not collateral.[100]

Rules 5-616(a)(1) allows cross-examination of a witness regarding that witness's prior inconsistent statements, and Rule 5-616(b)(1) permits the introduction of extrinsic evidence of the prior inconsistent statements, as provided under Rule 5-613. Rule 5-613(a) changes the Maryland common law by modifying the rule in *Queen Caroline's Case*.[101] Queen Caroline's Rule as applied in Maryland required that a witness be provided her or his written statement or informed about the contents, time, place and other circumstances of an oral statement before the witness could be asked about it.[102] The Federal Rules abolished the requirement of *Queen Caroline's Case*,[103] as did many of the state rules modeled on them.[104] Maryland steered a middle course. Under Rule 5-613(a), it is no longer necessary to disclose the statement or the circumstances in which it was made before inquiring of the witness, but such disclosure must be made before the end of the examination, and the witness must be given the opportunity to address the matter. Thus, the Rule seeks to strike an appropriate balance between the needs of impeaching counsel and fairness to witnesses.

Unlike the Federal Rule, under the Maryland Rule extrinsic evidence of the prior inconsistent statement is not admissible until this requirement has been met and the witness has denied the statement. Extrinsic evidence of prior inconsistent statements is still not admissi-

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98. MD. R. 5-616(b)(1); MD. R. 613(b).

99. MD. R. 5-616(b)(2).

100. Of course, the introduction of extrinsic evidence meeting the standards of Rule 5-616(b) may still be excluded for other reasons, including failure to meet the balancing test of Rule 5-403.

101. 129 Eng. Rep. 976, 977 (1820).

102. *See, e.g.*, Bruce v. State, 318 Md. 706, 729 n.2, 569 A.2d 1254, 1266 n.2 (1990), *cert. denied*, 113 S. Ct. 2936 (1993).

103. FED. R. EVID. 613.

104. *See, e.g.*, ARIZ. R. EVID. 613 (1977); IDAHO CT. R. 613 (1994); VT. R. EVID. 613 (1983); W. VA. R. EVID. 613 (1994).

ble if the statement concerns a collateral matter.[105] Presumably, the test of collateralness is governed by the pre-Rules cases.[106]

A final caution with respect to the scope of Rules 5-616(a)(1), 5-616(b)(1) and 5-613: These rules govern impeachment by prior inconsistent statement. Under certain circumstances, a witness's prior inconsistent statement may be used as substantive evidence of the truth of what it asserts. The use of prior inconsistent statements as substantive evidence is governed by Rule 5-802.1(a).[107] Where the inconsistent statement is admissible only for purposes of impeachment, it is impermissible to call the witness merely as a device to present that witness's prior statements.[108]

Rules 5-616(a)(2) and 5-616(b)(2) permit impeachment by contradiction. The witness may be cross-examined about the existence of contradicting facts, but extrinsic evidence of the contradictory material may be admitted only if the matter is not collateral or if the court exercises its discretion to permit extrinsic evidence of collateral matters.[109] One might expect the exercise of such discretion where the matter is collateral in a strict sense but forms the linchpin of the witness's testimony. A witness might testify, for example, that she remembers a particular event because it was coincident with some other event. Though technically collateral, extrinsic evidence of the nonexistence of this other event would tend to call into question the witness's testimony on the principal matters.[110]

Rule 5-616(a)(3) permits cross-examination testing the credibility of an opinion expressed by the witness. Rules 5-616(a)(4) and 5-616(b)(3) permit the introduction of evidence of bias, prejudice, interest, or other motive to testify falsely, either through cross-examination or extrinsic evidence, respectively. Unlike impeachment by prior inconsistent statement, the witness being impeached by extrinsic evidence need not have been given the opportunity to address the impeaching fact.[111]

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105. MD. R. 5-613(b), 5-616(b)(1).

106. *See* MD. R. 1-201.

107. *See infra* Part IX.

108. Bradley v. State, 333 Md. 593, 611-12, 636 A.2d 999, 1008-09 (1994); *cf.* Spence v. State, 321 Md. 526, 530, 583 A.2d 715, 717 (1991) (holding it error to call accomplice as state's witness in order to allow prosecution to "impeach" by prior inconsistent statement that implicated defendant). The restriction, of course, is inapplicable where the prior inconsistent statement is offered as substantive evidence. Stewart v. State, No. 94-1006, 1995 WL 136498 (Md. App. Mar. 31, 1995).

109. *See* Clark v. State, 332 Md. 77, 629 A.2d 1239 (1993).

110. Smith v. State, 273 Md. 152, 162-63, 328 A.2d 274, 280 (1974).

111. *See* Redditt v. State, 337 Md. 621, 655 A.2d 390 (1995); Petti v. State, 316 Md. 509, 560 A.2d 577 (1989).

Rule 5-616(a)(5) and 5-616(b)(4) allow impeachment by evidence of lack of knowledge or weaknesses in the witness's memory, perception or ability to communicate,[112] either through cross-examination or extrinsic evidence, respectively. Extrinsic evidence may not be introduced, however, unless the witness has first been examined about it and refused to admit it, or there is another good reason for admitting the extrinsic evidence. It should be noted that this mode of impeachment is closely related to Rule 5-602, which requires personal knowledge as a matter of witness competency.[113]

Rules 5-616(a)(6), 5-616(b)(5), and 5-616(b)(6) address impeachment by evidence of the witness's character in the form of prior bad acts or prior convictions. These Rules are merely pointers to Rules 5-608 (prior bad acts) and 5-609 (prior convictions). Rule 5-608 addresses the admissibility of evidence of a witness's character for veracity. The Rule is a substantial revision of its federal counterpart. Rule 5-608(a) provides that a witness's credibility may be challenged by the testimony of another witness, in the form of reputation or opinion, that the principal witness is not of a truthful character,[114] but the character witness may not offer an opinion that the principal witness has testified untruthfully on the particular occasion.[115] The same kind of evidence, either in the form of reputation or opinion, may be offered to rehabilitate the principal witness after her character for veracity has been attacked.[116]

The Rule essentially overturns *Hemingway v. State.*[117] *Hemingway* incongruously held that while a character witness could not testify to specific instances of conduct as evidence of the relevant trait of character, he could offer the very same testimony as the basis for his opinion. Rule 5-608(a)(3)(B) recognizes the artificiality of that distinction and prohibits the character witness from testifying to specific instances on direct examination.

Rule 5-608(b) permits any witness to be cross-examined about her or his own prior misconduct, not evidenced by conviction,[118] that is probative of veracity. The cross-examiner, however, must "take the answer"; such misconduct is not provable by extrinsic evidence.[119] If

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112. Eiler v. State, 63 Md. App. 439, 450, 492 A.2d 1320, 1325 (1985).

113. Lambert v. State, 197 Md. 22, 26, 78 A.2d 378, 379 (1951).

114. MD. R. 5-608(a)(1).

115. MD. R. 5-608(a)(3)(A); *see* Globe Sec. Sys. Co. v. Sterling, 79 Md. App. 303, 308, 556 A.2d 731, 734 (1989).

116. MD. R. 5-608(a)(2).

117. 76 Md. App. 127, 543 A.2d 879 (1988).

118. *See* MD. R. 5-609.

119. State v. Cox, 298 Md. 173, 179, 468 A.2d 319, 322 (1983).

called upon to do so, the cross-examiner must be able to demonstrate a basis for the inquiry.[120] As the Committee Note makes clear, Rule 5-608(b) addresses only specific instances of conduct offered to prove character for veracity.

While the Subcommittee worked on the Rules, the Court of Appeals asked that a rule on impeachment by prior conviction be forwarded to the court for its consideration out of order. In 1992, the court adopted Rule 1-502, and in the following year, the court construed the Rule in *Beales v. State*.[121] New Rule 5-609 is essentially the same as Rule 1-502; consequently, *Beales* remains important to its application.

Rule 5-609 governs the admissibility of evidence of convictions to impeach a witness. It is unique in at least two respects: First, it is the only rule—other than Rule 5-402—that purports to require the admission of evidence. The other rules are either rules of exclusion or rules that describe procedures for or prerequisites to the admission of evidence. The conditions necessary to invoke the mandatory admission required under Rule 5-609, the "only if" clause,[122] could just as easily have been framed as a rule of exclusion "unless" the conditions were satisfied. Nonetheless, the mandatory language suggests the political values underlying judgments about impeachment by prior convictions.[123] The political question becomes most acute when the impeached witness is a criminal defendant who testifies in her own behalf, because a prior conviction may be used by the jury for more than the light it sheds on credibility. The specter of the testifying accused drives the analysis on this issue.

Second, Rule 5-609 is one of the few rules to weigh prejudice to the witness as well as to the objecting party as a factor in determining the admissibility of the prior conviction. This is yet another indication that values other than the truth-finding function of trials are relevant to the admissibility of prior convictions.

Two conditions must be satisfied for the admission of prior convictions to impeach: first, the conviction must satisfy a category requirement, for "an infamous crime" or a crime relevant to credibility; second, the probative value of the evidence must be found to outweigh the danger of unfair prejudice. It is important to note that in

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120. Robinson v. State, 298 Md. 193, 201, 468 A.2d 328, 333 (1983).

121. 329 Md. 263, 619 A.2d 105 (1993).

122. MD. R. 5-609(a)(1)-(2).

123. *See generally* Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295 (1994); James A. Protin, Note, *What Is a "Crime Relevant to Credibility"?*, 54 MD. L. REV. 1125 (1995).

Rule 5-609 the prejudice-probativity balance, reminiscent of Rule 5-403, reverses the result necessary for admissibility. Generally, relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice.[124] The admissibility of prior convictions offered to impeach, however, requires that probative value outweigh the danger of unfair prejudice.[125] In *Prout v. State*,[126] the Court of Appeals enumerated the factors to be considered in the balance.[127] *Beales*, on the other hand, emphasizes the importance of the weighing process itself in the determination of whether to admit a witness's prior conviction on the question of credibility.[128]

Conviction of crimes relevant to credibility, of course, satisfy the categorical requirement, although what counts as a crime relevant to credibility remains a matter of some controversy. The archetypical example of such a crime is perjury, but convicted perjurers may not offer any testimony in Maryland's courts.[129] Crimes that involve dishonesty or false statement are included, and the Court of Appeals has decided that this category also includes theft.[130] The Court of Appeals more recently has held in *State v. Giddens*[131] that "a prior conviction for distribution of cocaine is relevant to credibility and, as

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124. *See supra* notes 16-17 and accompanying text.

125. MD. R. 5-609(a)(2).

126. 311 Md. 348, 535 A.2d 445 (1988).

127. Although *Prout* pre-dates Rule 5-609, the court's discussion of impeachment remains pertinent:

> We do not intend to establish rigid guidelines to be followed by the trial judges in determining the admissibility of impeachment evidence. To do so would be contrary to our suggestion that the trial judge exercise a sound discretion in each case where the issue arises. However, we do suggest a number of factors that ought be considered by the trial court when addressing this problem. First, acts of deceit, fraud, cheating, or stealing are generally regarded as reflecting adversely on one's likelihood to be truthful, while acts of violence generally have little, if any, bearing on honesty and veracity. Second, a conviction for dishonesty, if followed by a long period of exemplary living, may be too remote to have significant probative value on the truth-telling process. Another important factor to remember is that a prior conviction which is similar to the crime for which the defendant is on trial may have a tendency to suggest to the jury that if the defendant did it before he probably did it this time. The above factors are by no means exhaustive and are only offered as examples of the kind of matters which the trial judge may consider in determining the consequence of admitting this kind of impeachment evidence.

Id. at 364, 535 A.2d at 452-53.

128. *Beales*, 329 Md. at 270, 619 A.2d at 108.

129. MD. CODE ANN., CTS. & JUD. PROC. § 9-104 (1989).

130. *Beales*, 329 Md. at 270, 619 A.2d at 108.

131. 335 Md. 205, 642 A.2d 870 (1994).

such, is admissible under [Rule 5-609],"[132] but a prior conviction for simple possession of narcotics is not within the category of crimes relevant to credibility.[133] The *Giddens* court's rationale is as disturbing as its result. The conviction was relevant to credibility not because the elements of the offense involved dishonesty, but because it was the sort of crime likely to be carried out "surreptitiously."[134] Nevertheless, the Court purports to continue to articulate the notion that the particulars of the violation do not determine whether the conviction satisfies the category requirement.[135] Under the law in effect prior to the adoption of the new rules, only the fact of conviction is admissible but not the details of the offense;[136] this rule is likely to remain unchanged.

Infamous crimes also qualify for inclusion as prior convictions that may be used to impeach. Strangely, this category still includes treason and those crimes which constituted felonies under the common law before 1864, when Maryland's criminal law began to be codified.[137] At least Federal Rule of Evidence 609 speaks of prior convictions for current day felonies. The relevance of this category of infamous crimes to matters of veracity is surely problematic and, again, demonstrates the political undercurrent stirred by the question of the admissibility of prior convictions.

The last section of Rule 5-616 addresses the rehabilitation of witnesses after impeachment. The impeached witness may deny or explain the impeaching facts,[138] except to deny guilt in prior convictions proven by the witness's own testimony or by public record in accordance with Rule 5-609.[139] Prior consistent statements that tend to rebut

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132. *Id.* at 217, 642 A.2d at 876; *see also* State v. Woodland, 337 Md. 519, 654 A.2d 1314 (1995) (holding conviction for possession of a controlled dangerous substance with intent to distribute is an impeachable offense relevant to credibility).

133. Morales v. State, 325 Md. 330, 339, 600 A.2d 851, 855 (1992).

134. *Giddens*, 335 Md. at 216-17, 642 A.2d at 875-76. In the wake of *Giddens*, the court has more recently held that a charge of drug dealing operates as an attack on the defendant's credibility such that if the defendant testifies, he may also introduce evidence of his character for veracity even if his credibility is not otherwise attacked. Sahin v. State, 337 Md. 304, 310, 635 A.2d 452, 455 (1995); Wilson v. State, 103 Md. App. 722, 654 A.2d 936 (1995).

135. *See, e.g.*, State v. Duckett, 306 Md. 503, 510 A.2d 253 (1986).

136. Foster v. State, 304 Md. 439, 468-71, 499 A.2d 1236, 1251-52 (1985), *cert. denied*, 478 U.S. 1010 (1986).

137. *See* Garitee v. Bond, 102 Md. 379, 383, 62 A. 631, 633 (1905).

138. MD. R. 5-609(c); *see* Green v. State, 25 Md. App. 679, 695 n.5A, 337 A.2d 729, 738 n.5A (1975).

139. MD. R. 5-616(c)(1).

the impeachment may be introduced,[140] subject to statutory exceptions.[141] An impeached witness may be rehabilitated by character witnesses who testify in the form of reputation or opinion to the witness's character for veracity in accordance with Rule 5-608(a).[142] Rule 5-616 concludes with a catch-all provision that permits rehabilitation by other evidence relevant to the purpose.[143]

C. Procedures

Rule 5-611 makes clear the court's power to control what transpires in the courtroom. The discretion provided the trial court serves two purposes. First, it promotes greater efficiencies and, in general, allows trials to proceed more smoothly. Second, it serves to reduce appeals based on technical objections that pertain to such issues as the propriety of permitting rebuttal or leading questions.

Paragraph (b) adopts Maryland's limited cross-examination rule,[144] but permits, in the court's discretion, cross-examination beyond the scope of the direct "as if on direct," that is, without the use of leading questions. Leading is also the subject matter of paragraph (c), which states a general principle of nonleading direct examination unless the witness is hostile, an adverse party, or identified with an adverse party—a slight extension of prior Maryland law.[145]

Rule 5-611(b)(2) establishes a rule of wide open cross-examination in one circumstance: Typically, a witness who the cross-examiner wishes to question on matters beyond the scope of the direct examination may be recalled during the cross-examiner's case-in-chief. If, however, the witness is a criminal defendant, the State may be barred from recalling the defendant as its own witness. In this situation, an accused who elects to testify on the merits may be cross-examined with respect to any issue in the case. In effect, the choice to testify on the merits operates as a waiver of the accused's privilege against self-incrimination.[146] If the accused testifies only as to preliminary matters, the privilege is not waived and the accused may not be cross-examined

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140. *Cf.* MD. R. 5-802.1(b) (permitting prior consistent statements offered to rebut claim of recent fabrication or improper influence or motive as exception to hearsay rule); Boone v. State, 33 Md. App. 1, 6, 363 A.2d 550, 554 (1976).

141. MD. R. 5-616(c)(2); MD. CODE ANN., CTS. & JUD. PROC. § 9-117 (1989).

142. MD. R. 5-616(c)(3).

143. MD. R. 5-616(c)(4).

144. *See* Bruce v. State, 318 Md. 706, 726-27, 569 A.2d 1254, 1264-65 (1990), *cert. denied*, 113 S. Ct. 2936 (1993).

145. *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-113 (1989) (excluding hostile witnesses).

146. *Cf.* Booth v. State, 327 Md. 142, 165, 608 A.2d 162, 173 (1992).

except with regard to the preliminary matters and issues affecting credibility.[147]

Under Rule 5-612, if a witness, while testifying, uses a writing or other item to refresh her recollection, any other party is entitled to inspect it, examine the witness about it, and impeach the witness's recollection by introducing relevant portions in evidence. The Rule differs from its federal counterpart in two important ways. First, Federal Rule of Evidence 612 is limited by its terms to adverse parties, whereas any party may take advantage of the Maryland rule, eliminating the tedium of determining who is an "adverse party" for purposes of the Rule. Second, and perhaps more important, the Federal Rule applies to material used by the witness while on the stand and, in the court's discretion, to writings used before the witness took the stand. The Maryland Rule is limited to material used by the witness while testifying, although it extends to items beyond writings. As a consequence, the Maryland Rule will rarely be useful. Surely, Maryland's lawyers will understand that the item used to refresh recollection can be insulated by allowing the witness to review it immediately prior to taking the stand. It is questionable whether the discovery rules are sufficiently comprehensive to alleviate the dangers inherent in the Rule's limitation.

Rule 5-614 establishes the court's authority to call and question witnesses and provides certain safeguards to the parties when the court elects to do so.[148]

Rule 5-615 governs the sequestration of witnesses and provides a single locus for sequestration rules.[149] Essentially, the court must order sequestration on a party's request, and may do so on its own motion. Paragraph (b) of the Rule lists those who may not be excluded. The Rule departs from prior Maryland law by not excepting a designated representative of the State in a criminal case, typically (though not necessarily) a law enforcement official. The Rule also allows, but does not require, the court to permit the presence of a child witness's parent or other supportive adult.

VIII. CHAPTER 700—OPINIONS AND EXPERT TESTIMONY

Rule 5-701 is the only rule in Chapter 700 that is not directed at expert testimony. But for the advantages of following the Federal

147. *See* MD. R. 5-104(d).

148. *See also* MD. R. 2-514(b), 3-514(b), 5-706; *cf.* Spence v. State, 321 Md. 526, 583 A.2d 715 (1991) (holding it error to call accomplice as court's witness in order to allow prosecution to "impeach" by prior inconsistent statement that implicates the defendant).

149. *See* MD. R. 2-513, 3-513, 4-321; MD. ANN. CODE art. 27, § 620 (1992 & Supp. 1994).

Rules of Evidence organizational structure, Rule 5-701 could have been placed as easily in Chapter 600, devoted to witnesses and their testimony. Rule 5-701 is substantively identical to its Federal analog. It permits lay witnesses to testify in the form of opinion or inference if rationally based on the witness's perception and helpful to an understanding of the witness's testimony.

Rule 5-702 permits expert testimony on the same basis as lay testimony, except that the expert witness need not have perceived the matter about which the testimony is offered. The Rule provides three criteria to determine whether the testimony will assist the trier of fact: whether the expert is qualified;[150] whether the subject matter is appropriate for expert testimony;[151] and whether there is a sufficient basis for the testimony.[152] By establishing criteria that determine whether the testimony will assist the trier of fact, the Rule provides more guidance than Federal Rule 702 but is not inconsistent with its federal counterpart or with prior Maryland case law.[153]

Prior to the adoption of the Federal Rules of Evidence, the prevailing test for the admissibility of novel scientific evidence was the *Frye* test of "general acceptance" in the relevant scientific community.[154] With the adoption of the Federal Rules, the continued viability of the *Frye* test was called into question. Some courts found *Frye* superseded by the new rules;[155] others interpreted the new Rule 702 as incorporating the *Frye* test.[156] The Supreme Court resolved this conflict in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[157] The *Daubert* Court held that *Frye* did not survive the Federal Rules as a determinative test of admissibility, although acceptance in the relevant scientific community remains a factor to be considered in the application of Federal Rule 702.

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150. If the State has established licensing credentials in a particular field, the witness must meet those qualifications. *See, e.g.*, State v. Bricker, 321 Md. 86, 93, 581 A.2d 9, 13 (1990) (psychologists); *cf.* Yount v. State, 99 Md. App. 207, 215-16, 636 A.2d 50, 54 (1994).

151. *See* Stebbing v. State, 299 Md. 331, 350, 473 A.2d 903, 912, *cert. denied*, 469 U.S. 900 (1984).

152. *See* Evans v. State, 322 Md. 24, 27, 585 A.2d 204, 205 (1991).

153. *See* Oken v. State, 327 Md. 628, 659-60, 612 A.2d 258, 273 (1992), *cert. denied*, 113 S. Ct. 1312 (1993). *See generally* Kevin M. Carroll, Note, *Codifying Expert Testimony: Why Traditional Analysis Should Be Generally Acceptable*, 54 MD. L. REV. 1085 (1995).

154. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

155. *See, e.g.*, United States v. Williams, 583 F.2d 1194, 1197 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979).

156. *See, e.g.*, Christophersen v. Allied Signal Corp., 939 F.2d 1106, 1110 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992).

157. 113 S. Ct. 2786 (1993).

Because Title 5 of the Maryland Rules was promulgated after the Supreme Court's *Daubert* decision, one might infer that Maryland's version of *Frye, Reed v. State,*[158] did not survive its adoption or that adoption of new Rule 5-702 carried implicit approval of the Supreme Court's recent interpretation of its federal counterpart. The Court of Appeals, however, made it clear that Rule 5-702 did not necessarily carry with it that approval. The Committee Note to the Rule suggests neither approval nor disapproval of the *Reed* doctrine, but subsequent case law development indicates that *Reed* survives adoption of Title 5.[159]

Rule 5-703 elaborates on the basis on which the expert witness relies as a criterion of admissibility of expert testimony established by Rule 5-702. Paragraph (a) of Rule 5-703 is identical to Federal Rule 703. It establishes that the expert witness may base an opinion on first hand knowledge or on information supplied by others, including hearsay or through hypothetical questions, if the information is "of a type reasonably relied upon by experts in the particular field." The question whether the information meets this standard is for the court.[160]

Paragraphs (b) and (c) have no analog in the Federal Rule. Paragraph (b) provides for the admissibility of otherwise inadmissible bases of expert opinion in the court's discretion for the limited purpose of allowing the jury to evaluate the opinion, if the basis is "trustworthy, necessary to illuminate testimony, and unprivileged."[161] In what is, perhaps, an excess of caution, Paragraph (c) iterates the right to cross-examine an expert witness.

Rule 5-704(a) is consistent with both Federal Rule of Evidence 704 and with prior Maryland practice. Otherwise admissible opinion testimony is not rendered inadmissible simply because it embraces an ultimate issue in the case.[162] Despite the broad language of paragraph (a), Rule 704(b), like its federal counterpart, prohibits expert testimony on a criminal defendant's mental state, if it constitutes an element of the offense charged.[163] Yet, the last sentence of the Rule, in apparent contradiction, permits opinion testimony on the ultimate issue of criminal responsibility. Despite the confusing language of the

158. 283 Md. 374, 391 A.2d 364 (1978).

159. *See* United States Gypsum Co. v. Baltimore, 336 Md. 145, 182-83, 647 A.2d 405, 423 (1994) (upholding *Reed*).

160. MD. R. 5-104(a).

161. MD. R. 5-703(b); *see, e.g.*, Maryland Dep't of Human Resources v. Bo Peep Day Nursery, 317 Md. 573, 589, 565 A.2d 1015, 1023 (1989), *cert. denied*, 494 U.S. 1067 (1990).

162. *See, e.g.*, Cook v. State, 84 Md. App. 122, 142, 578 A.2d 283, 293 (1990).

163. *See* Hartless v. State, 327 Md. 558, 573, 611 A.2d 581, 588 (1992).

Rule, it continues prior Maryland law that permits an expert to opine whether an accused is sane or insane within the legal meaning of those terms, but not whether the accused lacked the specific intent that constitutes an element of the offense charged.

This seems quite backwards. The question of legal responsibility is surely governed by a legal rather than a medical standard. Under the Rule, an expert may be able to testify about whether an accused meets a particular standard, but should not have anything to contribute about what that standard comprises. On the other hand, an expert would seem qualified to testify about whether a particular person had the capacity to form a particular intent, yet the Rule prohibits the expert from doing so.

Rule 5-705 is consistent with its federal counterpart, but changes prior Maryland law. Under the Rule, an expert may offer an opinion before testifying as to its basis. Prior Maryland law required testimony as to the basis of the opinion first.[164] The change is not likely to make much of a difference, as the basis must still be provided if sought on cross-examination, and the party proffering the testimony is likely to offer the basis in any event in order to establish the soundness of the opinion. Modern discovery rules, moreover, make it unlikely that the opponent of the evidence will be unfamiliar with the basis if not offered in court before the opinion it supports.

Rule 5-706 governs the court's authority to call and examine witnesses and is the analog, for expert witnesses, of Rule 5-614.[165] Rule 5-706 supplies detail helpful to the court's exercise of its inherent authority. The Rule is essentially the same as its federal counterpart.

IX. CHAPTER 800—HEARSAY

The rules that govern the admission or exclusion of hearsay evidence mark some significant changes in Maryland's common law of evidence as well as some important departures from the Federal Rules. Yet, these differences should not be overstated. In the main, Chapter 800 of Title 5 contains few surprises; there is more similarity than difference among Maryland's common law, the Federal Rules, and the new Maryland evidence rules.

Rule 5-801, like its federal counterpart, begins with a series of definitions. The heart of the matter is found in paragraph (c), which defines hearsay as "a statement, other than one made by the declarant

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164. *See, e.g.*, Hunt v. State, 321 Md. 387, 423, 583 A.2d 218, 235 (1990), *cert. denied*, 502 U.S. 835 (1991).

165. *See supra* note 148 and accompanying text; *see also* MD. R. 2-514, 3-514.

while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Paragraphs (a) and (b) define statement and declarant, respectively. A "statement" is defined as an assertion or nonverbal conduct "intended . . . as an assertion."

Perhaps to the chagrin of some in the professoriate who reveled in creating bizarre hypotheticals to bedevil evidence students, the implied assertion doctrine of *Wright v. Tatham*,[166] which had been followed in Maryland,[167] has been laid to a merciful rest. Under the implied assertion doctrine, the conduct of a person from which one could draw an inference of that person's belief was viewed as hearsay if offered to prove the truth of the inferred belief, regardless of whether the person intended to communicate the truth of that belief. *Wright v. Tatham* provided the classic hypothetical: A ship's captain was seen to have inspected a particular vessel, after which he took his family on board and sailed off. If offered to prove the seaworthiness of the vessel, the captain's nonverbal conduct would have been classified as hearsay because the captain was unavailable for cross-examination. The danger that the captain might have been mistaken in his belief was viewed as reason enough to classify the conduct as hearsay.

The Federal Rule and Maryland Rule 5-801 would classify the ship captain's conduct as circumstantial evidence of the vessel's seaworthiness, rather than as the captain's implied assertion that the vessel was seaworthy. In the absence of an intention to assert, the conduct is unlikely to raise questions of sincerity. Any problems of ambiguity, against which the hearsay rule is designed to protect, should be apparent to the fact finder as the strength of the circumstantial inference is decided.

After defining hearsay in Federal Rule of Evidence 801(c) as an out-of-court statement offered for its truth, Federal Rule 801(d) immediately declares a number of categories of statements squarely within the definition to be non-hearsay: certain prior statements of testifying witnesses[168] and party admissions.[169] This self-contradiction dictated a different approach in the Maryland Rules, and one will look in vain for the Maryland counterpart to Federal Rule 801(d). Instead, the Maryland Rules treat these categories as hearsay exceptions within Rules 5-802.1 and 5-803(a), respectively.

Although Title 5 departs from the structure of the Federal Rules, the result is a more coherent treatment of these categories of out-of-

166. 112 Eng. Rep. 488 (1837).
167. *See, e.g.*, Waters v. Waters, 35 Md. 531, 544-45 (1872).
168. FED. R. EVID. 801(d)(1).
169. FED. R. EVID. 801(d)(2).

court statements, as well as a more rational classification scheme for exceptions to the hearsay rule. Following Rule 5-802, which states the classic prohibition against the use of hearsay evidence, Title 5 divides the hearsay exceptions into three categories: prior statements by testifying witnesses,[170] statements by those whose availability to testify is irrelevant,[171] and statements by those who are unavailable to testify.[172]

Rule 5-802.1 creates a set of exceptions to the hearsay rule for certain prior statements of testifying witnesses. It is the Maryland analog to Federal Rule 801(d)(1), although there are some important substantive differences. The Maryland Rule declares five categories of prior statements by testifying witnesses that are excepted from the rule against hearsay. For each category, it is necessary that the declarant testify and be subject to cross-examination concerning the statement. Thus, the Rule adopts the view that, for these statements, cross-examination of the declarant at the time of trial is a sufficient safeguard, and that cross-examination at the time the statements were made is not required.

Rule 5-802.1(a) excepts from the rule against hearsay prior inconsistent statements if: (1) given under oath at a trial, hearing or other official proceeding, or in a deposition, (2) written and signed by the declarant, or (3) recorded verbatim electronically or stenographically. As the Committee Note makes clear, the Rule must be carefully distinguished from Rule 5-613, which governs impeachment by prior statements.[173] The instant Rule permits the prior statement to be introduced substantively, as evidence of the truth of what it asserts, not merely to cast doubt on the credibility of the testifying witness.[174] The exception is somewhat broader than its federal counterpart with its addition of the last two categories to prior statements made under oath at a trial or in a similar proceeding. Rule 5-802.1(a) codifies and somewhat extends the Court of Appeals' decision in *Nance v. State*,[175] which allows certain prior inconsistent statements to be used as substantive evidence.

Rule 5-802.1(b) excepts from the hearsay rule prior consistent statements offered to rebut a charge that the witness's testimony has been fabricated. The exception is consistent with its federal analog,

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170. MD. R. 5-802.1.

171. MD. R. 5-803.

172. MD. R. 5-804.

173. *See supra* text accompanying notes 101-108.

174. *See* Makell v. State, No. 94-1048, 1995 WL 141215, at 30-31 (Md. App. Apr. 4, 1995); Stewart v. State, No. 94-1006, 1995 WL 136498 (Md. App. Mar. 31, 1995).

175. 331 Md. 549, 629 A.2d 633 (1993); *see supra* note 174.

but expands prior Maryland law, which had permitted prior consistent statements only to rehabilitate a witness after impeachment by prior inconsistent statement.[176] Despite the deletion of the word "recent" modifying "fabrication," as in the Federal Rule,[177] it is likely that the Maryland courts will follow the federal lead and construe the Rule to require that the prior consistent statement be made before the motive to fabricate had arisen.[178]

Rule 5-802.1(c) codifies existing Maryland law that holds prior identifications by testifying witnesses are not barred by the rule against hearsay.[179] The Rule is essentially identical to its federal counterpart.[180]

Rule 5-802.1(d) creates a hearsay exception for prompt statements of complaint of sexually assaultive behavior on the declarant if consistent with the declarant's testimony. The Federal Rules contain no special provision for such statements, and the Rule may expand prior Maryland law, which had recognized such an exception in criminal rape cases.[181]

Rule 5-802.1(e) is the traditional hearsay exception for past recollection recorded and substantively mirrors Federal Rule 803(5). The exception was moved from Rule 5-803 because it requires the declarant to testify to the foundational elements of the exception.[182] The Rule changes prior Maryland practice by eliminating the trial court's discretion to allow the introduction of the record or memorandum as an exhibit. This prevents the jury from having the material in the jury room during deliberations and, perhaps, giving it more weight than other testimonial evidence.[183]

Rule 5-803 provides a long list of exceptions to the rule against hearsay. The availability or unavailability of the declarant is irrelevant to these exceptions. Rule 5-803(a) is the Maryland analog to Federal Rule 801(d)(2), to which it is substantively identical. As noted above, the Maryland Rules treat statements by opposing parties as exceptions to the rule against hearsay rather than as non-hearsay. The Maryland Rules change the heading of this section from "Admission by Party

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176. *See* MD. R. 5-616(c)(2).

177. FED. R. EVID. 801(d)(1)(B).

178. *See* Tome v. United States, 115 S. Ct. 696 (1995).

179. Makell v. State, No. 94-1048, 1995 WL 141215; Nance v. State, 331 Md. 549, 551, 629 A.2d 633, 639 (1993); Bedford v. State, 293 Md. 172, 177-78, 443 A.2d 78, 81 (1982).

180. FED. R. EVID. 801(d)(1)(C).

181. *See* State v. Werner, 302 Md. 550, 563, 489 A.2d 1119, 1125-26 (1985).

182. Mouzone v. State, 294 Md. 692, 701, 452 A.2d 661, 666 (1982).

183. *See* Henry v. State, 324 Md. 204, 238-39, 596 A.2d 1024, 1041-42 (1991), *cert. denied*, 112 S. Ct. 1590 (1992).

Opponent"[184] to "Statement by Party-Opponent"[185] in an attempt to avoid the occasional confusion between admissions and statements against interest. The former need not be against the interest of the declarant at the time the statement was made, so long as the statement is that of a party within the meaning of the Rule and another party seeks to have it admitted.[186]

The Rule describes five categories of statements that may qualify as statements of a party-opponent. Obviously, a party's own statements qualify,[187] as do statements that the party has adopted by manifesting a belief in their truth.[188] If a party has authorized another to speak for her, statements made by the authorized speaking agent qualify as statements of the party.[189] Statements made by a party's agent or employee about matters within the scope of the relationship and made during the relationship also are considered statements by the party for purposes of the hearsay exception.[190] For similar reasons, statements by co-conspirators during the course of and in furtherance of the conspiracy are considered statements of the party.[191]

Interestingly, the theory underlying the admissions exception, that a party has no cause to complain about an inability to cross-examine her own statements,[192] fades as one proceeds through the list of what qualifies as a statement by a party opponent. Obviously, one might well wish to cross-examine a co-conspirator or a former employee who may have made a statement while in the party's employ. It may be that such statements are valuable contributions to the search for truth, but the theory on which they are admitted ought to reflect that idea rather than the tenuous notion of the party's responsibility for the declarant's words.

As the Committee Note emphasizes, the foundational elements must be satisfied before a statement is admissible under these exceptions. For example, if the statement is offered as a co-conspirator's statement under Rule 5-803(a)(5), the court must find that there was a conspiracy, that the declarant and the party against whom the state-

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184. FED. R. EVID. 801(d)(2).

185. MD. R. 5-803(a).

186. *See, e.g.*, Aetna Casualty & Sur. Co. v. Kuhl, 296 Md. 446, 457, 463 A.2d 822, 828 (1983).

187. MD. R. 5-803(a)(1).

188. MD. R. 5-803(a)(2); *see* Brandon v. Molesworth, No. 94-791, 1995 WL 131488, at 32 (Md. App. Mar. 29, 1995).

189. MD. R. 5-803(a)(3).

190. MD. R. 5-803(a)(4); *see* B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co., 324 Md. 147, 156-57, 596 A.2d 640, 645 (1991).

191. MD. R. 5-803(a)(5).

192. Brown v. State, 317 Md. 417, 420-21, 564 A.2d 772, 773-74 (1989).

ment is offered were members of the conspiracy, and that the statement was within the scope of and in furtherance of the conspiracy before the statement may be admitted.[193]

The Rule leaves open the question whether the court may use the disputed statement as evidence to decide that the foundational facts have been established.[194] The Supreme Court has held that under the Federal Rule the disputed statement may be considered as evidence of the foundational facts that must be established before the disputed statement is admissible.[195] In the past, Maryland has been reluctant to permit this sort of bootstrapping of a statement into evidence.[196]

Rule 5-803(b) is the Maryland analog to Federal Rule 803. The numbering system for the hearsay exceptions under the two rules are the same, although Title 5 leaves two numbers vacant. Rule 5-803(b)(5) is a cross reference to Rule 5-802.1(e) and corresponds substantively to Federal Rule 803(5), which provides an exception to the hearsay rule for past recollection recorded and defines the foundation necessary to invoke the exception. Rule 5-803(b)(22) would have been the analog to Federal Rule 803(22), which provides a hearsay exception for judgments of conviction to prove the facts essential to the conviction, but Maryland chose not to adopt that particular exception as part of Title 5.[197] The number is left vacant as a placeholder in order to maintain, as closely as possible, the federal numbering system.

The other hearsay exceptions in Rule 5-803(b) follow the Federal Rules in organization. With a few minor differences, these provisions are substantively equivalent to their federal counterparts and follow prior Maryland law. This is true, for example, of Rules 5-803(b)(1) and 5-803(b)(2) dealing with present sense impressions and excited utterances, respectively.

Rule 5-803(b)(3) excepts from the hearsay rule statements of the declarant's then existing mental, emotional or physical condition, and resolves a question about which the federal courts are in dispute: whether a declarant's statement of intent to act in concert with another can be used as evidence that the other person did what the

193. *See* Daugherty v. Kessler, 264 Md. 281, 291-92, 286 A.2d 95, 100-01 (1992).

194. MD. R. 5-803 committee note.

195. Bourjaily v. United States, 483 U.S. 171, 180 (1987).

196. *See, e.g., Daugherty*, 264 Md. at 292, 286 A.2d at 101; Hlista v. Altevogt, 239 Md. 43, 51, 210 A.2d 153, 157 (1965).

197. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-904 (1989).

statement contemplated.[198] A declarant's statement of his own intention is not barred by the hearsay rule if offered to prove the declarant acted consistently with his stated intention.[199] The Maryland Court of Special Appeals had limited the use of the statement proving the declarant's own post-statement conduct,[200] and the new Rule adopts the same approach. Regardless of one's view on the merits of this issue, it seems more a question of relevance than of the values underlying the rule against hearsay.

Rule 5-803(b)(4) provides an exception to the hearsay rule for statements made for purposes of diagnosis and treatment. It reflects prior Maryland practice and, thus, is a bit narrower than its federal cognate. Under Federal Rule 803(4) there is no distinction between statements made for purposes of diagnosis in contemplation of treatment and such statements made in contemplation of litigation.[201] Under the Maryland Rule, statements made for diagnosis in contemplation of litigation rather than treatment are not within the exception.[202]

Rule 5-803(b)(5), as we have seen, is merely a place holder. The hearsay exception for past recollection recorded is found in Rule 5-802.1(e).[203]

Rule 5-803(b)(6) excepts from the rule against hearsay records of regularly conducted activity. It is the modern version of the common-law business records exceptions to the hearsay rule. The Rule is consistent both with prior Maryland law[204] and with Federal Rule 803(6), except that the new Rule is more liberal in its foundational requirements than the Federal Rule. Under the Federal Rule, the foundation must be established by "the testimony of the custodian or other qualified witness."[205] The Maryland Rule permits a finding of the foundational facts circumstantially. Indeed, business records certified as meeting the foundational requirements of the Rule are self- authenti-

198. *Compare* United States v. Jenkins, 579 F.2d 840, 843 (4th Cir.), *cert. denied*, 439 U.S. 967 (1978) *with* United States v. Sperling, 726 F.2d 69 (2d Cir.), *cert. denied*, 467 U.S. 1243 (1984).

199. Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892).

200. Johnson v. State, 38 Md. App. 306, 313-15, 381 A.2d 303, 307-08 (1977).

201. Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988).

202. *See* Beahm v. Shortall, 279 Md. 321, 368 A.2d 1005 (1977); *cf.* Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995) (expert opinions developed expressly for purposes of testimony rather than based on pre-existing or independent research is not "good science" and hence not admissible under Federal Rule 702).

203. *See supra* notes 182-183 and accompanying text.

204. There are some minor differences in language between this Rule and the Maryland Code. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-101 (1989).

205. FED. R. EVID. 803(b)(6).

cating.[206] As the Committee Note indicates, restrictions on the public records exception may not be circumvented by resort to Rule 5-803(b)(6).[207]

Rule 5-803(b)(7) is the negative equivalent of the preceding exception. It provides an exception from the hearsay rule for evidence of the absence of an entry in records of regularly conducted activity to show the nonexistence of a fact or event that would have been entered therein if it had existed or occurred. It is consistent with Maryland law.[208] The language of this exception, which is a bit more stringent than its federal analog, requires evidence of a diligent search of the appropriate records.[209] It is noteworthy that there is no provision in the authentication rules for certification of the absence of a business record,[210] although there is such a provision for the establishment of the absence of a public record.[211]

Rule 5-803(b)(8) is the public records analog to the business records exception. The Court of Appeals permitted the introduction of public records in *Ellsworth v. Sherne Lingerie, Inc.*,[212] although the extent to which factual findings in such records or reports were held to include opinions remains a matter of some controversy. As the Committee Note declares, the Rule does nothing to clarify that issue. The Note is a reminder that the Supreme Court's interpretation of the comparable Federal Rule is not dispositive of how the Maryland Rule may be interpreted. Specifically, the Supreme Court had determined that "factual findings" as used in the Rule could embrace conclusions or opinions.[213] The Committee Note suggests that Maryland courts are likely to move cautiously on this issue.

As its federal analog, Rule 5-803(b)(8) prohibits the use of records of observations of law enforcement officers against the accused in criminal cases. Paragraph (D) of the exception, which has no federal counterpart, assures that specific statutory provisions that admit certain kinds of records[214] are not superseded by the more general provisions of the Rule.

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206. *See infra* notes 259-260 and accompanying text.

207. *See infra* text accompanying notes 212-214.

208. *See* Street v. State, 60 Md. App. 573, 577-79, 483 A.2d 1316, 1318 (1984).

209. Interestingly, the federal hearsay rule exception for absence of an entry in public records does contain such a requirement. *See* FED. R. EVID. 803(10).

210. *See infra* text accompanying notes 259-260.

211. *See infra* text accompanying note 217.

212. 303 Md. 581, 495 A.2d 348 (1985).

213. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 162 (1988).

214. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-306 (Supp. 1994) (permitting breathalyzer results without presence or testimony of a technician).

Application of Rule 5-803(b)(9) requires coordination with certain provisions of the Maryland Code. The Rule provides a hearsay exception for public records of vital statistics unless otherwise provided by statute. Thus, the Rule was designed to retain the statutory provisions precluding evidence of paternity contained in otherwise admissible public records of vital statistics in certain cases.[215] Similarly, medical examiners' reports continue to be governed by the Code's Health-General Article, Sections 5-310 and 5-311.[216]

Rule 5-803(b)(10) is the public records analog to Rule 5-803(b)(7). It excepts from the hearsay rule evidence of the absence of a record to show that the matter not recorded did not occur. Like the business records and public records exceptions, proof of the record may be by certification.[217]

Most of the other exceptions to the rule against hearsay contained in Rule 5-803(b) are of minor significance, and there are few recent cases reflecting the Maryland common-law view with respect to them. Some, like Rule 5-803(b)(13), which provides a hearsay exception for certain kinds of family records, probably reflect existing law.[218] Others, like Rule 5-803(b)(11), which provides an exception for certain kinds of records of religious organizations, may broaden admissibility beyond what might have been permitted under Maryland common law.[219] Rules 5-803(b)(12), marriage, baptismal and similar certificates; 5-803(b)(14), records of documents affecting an interest in property; 5-803(b)(15), statements in documents affecting an interest in property; 5-803(b)(17), market reports and published compilations; and 5-803(b)(23), judgments as to personal, family, or general history, or boundaries, expand to some extent the common-law exceptions, but again, there is scant recent authority. Title 5 does not include an analog to Federal Rule 803(22), which excepts from the rule against hearsay judgments of conviction offered to prove facts essential to the judgment.[220]

A few remaining provisions in Rule 5-803(b), however, deserve some attention. Rule 5-803(b)(16) establishes an exception to the hearsay rule that is new to Maryland law. Statements in "ancient documents" are not barred by the rule against hearsay, unless there is some

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215. MD. CODE ANN., HEALTH-GEN. § 4-223 (1994).

216. *Id.* §§ 5-310 to -311.

217. There is no provision for establishing the absence of a business record by certification. *See* MD. R. 5-803(b)(7); MD. R. 5-902.

218. *See, e.g.*, Weaver v. Leiman, 52 Md. 708, 718-20 (1880).

219. *Id.* at 721-22.

220. *See* Powell v. Maryland Aviation Admin., 336 Md. 210, 219 n.5, 647 A.2d 441, 442 n.5 (1994).

reason to suspect their trustworthiness. Maryland had permitted the authentication of certain documents by evidence of their age and other supporting circumstances,[221] but this hearsay exception goes beyond satisfaction of the authenticity requirement. Further, a document is now "ancient" if it has been in existence for twenty years; the common-law definition of ancient in the authentication context had been longer.[222]

Rule 5-803(b)(18) creates an important new exception to the hearsay rule in Maryland: an exception for learned treatises. Prior to the adoption of Title 5, learned treatises were usable either to impeach an expert witness who relied on the work or regarded it as authoritative, or to explain the basis of an expert's opinion, but not as substantive evidence of the truth of what the work said.[223] Under Rule 5-803(b)(15), the content of the work is admissible for its truth once it is established as authoritative, and no limiting instruction is given. As in the case of past recollection recorded,[224] the relevant portion of the work may be read into the record, but may not be admitted as an exhibit or taken to the jury room. The recognition of a learned treatise exception may help to level the playing field to some extent for litigants who can not bear the cost of a plethora of expert witnesses.

Perhaps the most controversial of the new hearsay exceptions in Title 5 is Rule 5-803(b)(24), the "catch-all" or residual exception. Although the exception iterates the language of its federal analog, it introduces that language with an explicit direction that the exception is intended for application only "in exceptional circumstances." The legislative history of the federal residual exceptions also suggested a limited application.[225] Nevertheless, the federal courts have construed the residual exceptions in widely disparate ways, often quite liberally. For example, despite the requirement that statements admitted under the exception must have "equivalent circumstantial guarantees of trustworthiness" to the other enumerated exceptions, there are federal cases holding it appropriate to admit hearsay under the residual exceptions that were "near misses" under one of the other exceptions.[226] Yet it is difficult to comprehend how a statement

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221. *See infra* text accompanying note 256.

222. *See* Allender v. Vestry of Trinity Church, 3 Gill. 166, 173-75 (1845) (setting a 30-year limit).

223. *See, e.g.*, Nolan v. Dillon, 261 Md. 516, 536-37, 276 A.2d 36, 47 (1971).

224. *See supra* text accompanying notes 182-183.

225. FED. R. EVID. 803(b)(24) advisory committee's note.

226. *See, e.g.*, Moffett v. McCauley, 724 F.2d 581, 583 (7th Cir. 1984); United States v. McPartlin, 595 F.2d 1321, 1350 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979). There are also

that lacks one of the elements of trustworthiness of another exception can be equivalently trustworthy under the residual exception, unless there exists some other circumstantial guarantee of trustworthiness not envisioned by the other exception.

The residual exception requires that the proffered statement bear circumstantial guarantees of trustworthiness.[227] It also must be offered as a statement of a material fact, though it is unclear whether this requirement adds anything to the relevancy and materiality requirements of Rule 5-402. The statement must be more probative than any other evidence that the proponent reasonably can procure, but the measure of probativity is not defined. For example, it is unclear whether the probative value of the proffered statement is measured against each piece of other evidence for the same proposition or all such evidence combined. The admission of the statement must likewise serve "the general purposes of these rules and the interests of justice," although it is difficult to know precisely what this requirement adds. Finally, invocation of the exception requires pre-trial notice to the opponent of the evidence, even though federal decisions widely disregard the requirement.[228]

Although there is some support in prior Maryland law for a flexible approach to exceptions to the rule against hearsay,[229] the residual exception of the new rules does not envision a policy of liberal admissibility of hearsay that does not qualify under the specific exceptions.[230] Nonetheless, the precise contours of the exception and the extent to which federal case law will guide its interpretation must be left to future case law.

Rule 5-804 contains the final category in Maryland's tripartite classification scheme of exceptions to the rule against hearsay—statements requiring the unavailability of the declarant. Rule 5-804(a) defines the conditions of unavailability consistently with its federal counterpart. A declarant who is privileged to refuse to testify is un-

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cases to the contrary, finding "near misses" inadmissible under the residual exceptions precisely because the lack of an element necessary to meet the requirements of an express exception indicates a lack of equivalent circumstantial guarantees of trustworthiness. *See, e.g.*, United States v. Love, 592 F.2d 1022, 1026-27 (8th Cir. 1979).

227. MD. R. 5-803(b)(24).

228. *See, e.g.*, Furtado v. Bishop, 604 F.2d 80, 92 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978). *But see* United States v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978); United States v. Oates, 560 F.2d 45, 72 n.30 (2d Cir. 1977).

229. *See* Brown v. State, 317 Md. 417, 425-26, 564 A.2d 772, 776 (1989).

230. *See* Jeffrey E. Greene, Note, *Residual Hearsay Exceptions: A New Opening?*, 54 MD. L. REV. 1100 (1995).

available,[231] as is a witness who refuses to testify despite a court order to do so.[232] A witness who maintains a lack of memory of the subject matter of her out-of-court statement is unavailable.[233] A declarant who is unable to testify because of physical or mental illness or infirmity, or who is deceased is unavailable under the Rule.[234] Finally, a declarant is unavailable if absent from the proceeding and the proponent of the statement has been unable to procure the declarant's attendance (if the statement is offered under Rule 5-804(b)(1) or 5-804(b)(5)) or testimony (if the statement is offered under Rule 5-804(b)(2), (3) or (4)) by process or other reasonable means.[235] These categories of unavailability do not depart significantly from prior Maryland law.[236] Also consistent with prior Maryland law is the common-sense requirement of Rule 804(a) that the proponent of a hearsay statement may not take advantage of the unavailability of the declarant if it is "due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying."[237]

Rule 5-804(b)(1) excepts from the rule against hearsay prior testimony of unavailable witnesses if the opponent of the evidence or, in civil cases, "a predecessor in interest, had an opportunity and similar motive to develop the testimony." The exception is consistent with its federal counterpart and with modern Maryland practice.[238]

Rule 804(b)(2) provides an exception to the hearsay rule for dying declarations in certain categories of cases. The Rule goes beyond its federal counterpart, which is limited to homicide prosecutions and civil cases.[239] The Maryland Rule expands what had been previously

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231. MD. R. 5-804(a)(1); *see* Bond v. State, 92 Md. App. 444, 448-51, 608 A.2d 1260, 1260-62 (1992).

232. MD. R. 5-804(a)(2); *see, e.g.*, Brown v. State, 317 Md. 417, 420-21, 564 A.2d 772, 773-74 (1991); Gaskins v. State, 10 Md. App. 666, 677-78, 272 A.2d 413, 419-20 (1971), *cert. denied*, 404 U.S. 1040 (1972).

233. MD. R. 5-804(a)(3); *see Bond*, 92 Md. App. at 449 n.3, 608 A.2d at 1262 n.3.

234. MD. R. 5-804(a)(4); *see, e.g.*, Contee v. State, 229 Md. 486, 490-92, 184 A.2d 823, 825-26 (1962), *cert. denied*, 374 U.S. 841 (1963).

235. MD. R. 5-804(a)(5). *Compare* MD. R. 4-261(h)(1) (permitting deposition testimony of a witness unable to testify at a criminal trial) *with* MD. R. 2-419(a)(3)(B) & (D) (permitting deposition testimony in civil proceedings if declarant is unavailable).

236. *See supra* notes 231-234. *But cf.* MD. R. 2-419(a)(3)(B) & (D), which arguably establish a looser standard of unavailability for admission of deposition testimony in civil cases.

237. MD. R. 5-804(a); *see, e.g.*, Lindsay v. State, 2 Md. App. 330, 332 n.1, 234 A.2d 479, 481 n.1 (1967); Bryant v. State, 207 Md. 565, 587, 115 A.2d 502, 512 (1955).

238. *See* United States Gypsum Co. v. Baltimore, 336 Md. 145, 180 n.14, 647 A.2d 405, 422 n.14 (1994); Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 439-44, 601 A.2d 633, 642-45 (1992).

239. FED. R. EVID. 804(b)(2).

restricted to homicide prosecutions in which the declarant was the victim.[240] Under Rule 5-804(b)(2), "a statement made by a[n unavailable] declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death" is not barred by the hearsay rule in cases of homicide, attempted homicide, assault with intent to commit a homicide, or civil cases. Thus, the declarant need not be deceased, although she must be unavailable, and the declarant need not be the victim.

Rule 804(b)(3) contains the declaration against interest exception to the rule against hearsay. It is substantively identical to its federal analog[241] and reflects prior Maryland law.[242] Statements against the pecuniary, proprietary, or penal interest of an unavailable declarant such that the declarant would have been unlikely to have made the statement if it were not true are excepted from the hearsay rule. It remains unclear to what extent the Maryland courts will be guided by federal precedent on such difficult questions as the admissibility of statements with self-serving or neutral aspects intermingled with their disserving aspects.[243]

Rule 804(b)(4) provides an exception to the hearsay rule for statements of personal or family history. The Rule is substantively identical to its federal analog,[244] but more liberal than prior Maryland law. Unavailability is governed by Rule 5-804(a), while prior Maryland law required the death of the declarant. The declarant need not be related by blood, marriage or adoption if of sufficient intimacy with the family as to "be likely to have accurate information."[245] The statement need not have been made before the controversy arose.

Finally, Rule 5-804(b)(5) repeats the residual exception in Rule 5-803(b)(24) in identical language; the discussion of that exception is equally applicable here.[246] Because the only difference between the two exceptions is the requirement of unavailability of the declarant under Rule 5-804 and the irrelevance of unavailability under Rule 5-803, one might think that Rule 5-804(b)(5) is simply redundant. Any statement that meets the requirements of Rule 5-804(b)(5) should

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240. *See, e.g.*, Connor v. State, 225 Md. 543, 550-54, 171 A.2d 699, 703-05, *cert. denied*, 368 U.S. 906 (1961).

241. FED. R. EVID. 804(b)(3).

242. *See, e.g.*, Aetna Casualty & Sur. Co. v. Kuhl, 296 Md. 446, 463 A.2d 822 (1983).

243. *See, e.g.*, Williamson v. United States, 114 S. Ct. 2431 (1994).

244. FED. R. EVID. 804(b)(4).

245. *But see* Rhoades v. Bussinger, 188 Md. 638, 645, 53 A.2d 419, 423 (1947) (excluding testimony of "old colored woman" because she was not a member of the family).

246. *See supra* text accompanying notes 225-230.

also qualify under Rule 5-803(b)(24). The only analysis that would give separate effect to Rule 5-804(b)(5) would require consideration of whether the other 5-804(b) exceptions have different or lesser circumstantial guarantees of trustworthiness than the other twenty-three exceptions of Rule 5-803(b). Each residual exception requires circumstantial guarantees of trustworthiness "equivalent" to the other enumerated exceptions of that rule. If the 803(b) exceptions differ from the 804(b) exceptions, each residual exception could be given its own meaning. It will be interesting to see whether the courts will adopt such a reading or will construe the two residual exceptions interchangeably, citing one if the declarant is available and the other if unavailable.

Rule 5-805 differs stylistically but not substantively from its federal analog. It makes clear that for hearsay within hearsay to be admitted, the proponent must establish an exception for each level of hearsay. The Rule is consistent with prior Maryland law.[247]

Rule 5-806 governs the impeachment of the declarant of a hearsay statement. It differs from its federal counterpart to the extent necessary to accommodate the differences in Maryland's classification scheme of hearsay exceptions. Generally, it permits impeachment as if the declarant were a witness at the trial. For obvious reasons, impeachment by prior inconsistent statement does not require an examination of the declarant about the statement nor the provision of an opportunity to explain it.[248] The Rule may change Maryland law in this respect,[249] but is otherwise consistent with prior Maryland law.

X. CHAPTER 900—AUTHENTICATION AND IDENTIFICATION

The rules governing authentication and identification of evidence are particular manifestations of the relevancy requirement of Rule 5-402. For evidence to be admitted, the proponent must establish that it is what it purports to be;[250] a condition of authenticity must be satisfied in order to conclude that the evidence is relevant. As Rule 5-901(a) makes clear, it is sufficient that there is evidence "to support a finding that the matter in question is what its proponent claims." This standard is the same as that for conditional relevance under Rule 5-104(b), as it should be.

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247. Ali v. State, 314 Md. 295, 304-05, 550 A.2d 925, 929-30 (1988).

248. *See* MD. R. 5-613.

249. *See* Matthews v. Dare, 20 Md. 248, 269 (1863).

250. MD. R. 5-901(a).

Rule 5-901(b) provides a list of illustrations, by no means exhaustive, of authentication. Any relevant evidence sufficient to meet the relatively minimal requirements of the Rule will do. Most of the illustrations are substantively similar to their federal counterparts and also reflect prior Maryland law. A few, however, require comment.

Rule 5-901(b)(1) establishes what is perhaps the most straightforward method to authenticate evidence: the testimony of a witness with personal knowledge that the evidence is what its proponent claims.[251]

Rule 5-901(b)(3), which provides for authentication by comparison with an authenticated exemplar, differs from the Federal Rule[252] and liberalizes prior Maryland practice. The Federal Rule permits the jury or an expert witness to compare the proffered evidence with authenticated exemplars. The Maryland Rule requires that the comparison be performed in the first instance by an expert witness or the court. The jury may examine the proffered evidence only if the court has first determined a sufficient similarity to support a finding of authenticity. The Rule is more liberal than prior Maryland law,[253] which required a court determination that the proffered evidence was authentic, essentially under the standard of Rule 5-104(a).

Rule 5-901(b)(7), like its federal analog, permits authentication of a public record by evidence of official custody consistent with its purported identity. It is important to note, however, that certain public documents and certified copies of public records may be self-authenticating, that is, they may not require authentication under Rule 5-901.[254]

Rule 5-901(b)(8) permits authentication of "ancient documents" by evidence that the document was found in a place where it would be expected to have been found and in a condition that created no suspicion of inauthenticity. Like the analogous federal rule,[255] it defines "ancient" as twenty years, shortening the time required under prior Maryland law.[256]

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251. *See, e.g.*, Wilson v. State, 44 Md. App. 318, 334, 408 A.2d 1058, 1066 (1979).

252. FED. R. EVID. 901(b)(3).

253. MD. CODE ANN., CTS. & JUD. PROC. § 10-906 (1989).

254. *See infra* text accompanying notes 258-263.

255. FED. R. EVID. 901(b)(8).

256. *See* Allender v. Vestry of Trinity Church, 3 Gill. 166, 173-75 (1845) (recognizing a 30-year limit).

Finally, Rule 5-901(b)(10) affirms the illustrative nature of the 5-901(b) list by recognizing that any method of authentication provided by statute is permissible.[257]

Rule 5-902 dispenses with the requirement of authentication for several types of evidence. The common feature of such evidence is the improbability that the evidence is not what it purports to be. The condition of fact on which the relevancy of the evidence depends is satisfied without the need for extrinsic evidence of authenticity. The Rule is largely consistent with prior Maryland law and with its federal analog, with a few noteworthy exceptions.

Rule 5-902(a) begins with a clause that excepts from the dispensation for authentication statutory provisions that require authentication. As a result, Maryland statutes that require authentication—and perhaps foreign statutes found applicable under relevant choice of law rules—continue to control even if the evidence would have been self-authenticating in the absence of the statute.[258]

Rule 5-902(a)(5) expands Federal Rule 902(5) somewhat. Under both rules, official publications are self-authenticating, but the Maryland Rule broadens the definition of official publication to include not only "publications purporting to be issued by a public authority" but also "publications . . . authorized by a public agency," even if undertaken by a private sponsor.

Perhaps the greatest liberalization in dispensing with the need for authentication is found in Rule 5-902(a)(11). Under that Rule, which has no federal counterpart, regularly kept business records, certified by the custodian as meeting the requirements of the hearsay exception for business records[259] need no further authentication by a testifying witness. Curiously, there is no corresponding dispensation for a certification of the absence of a record excepted from the hearsay rule by Rule 5-803(b)(7), which apparently still requires the testimony of the custodian or another with authority that a diligent search produced no result. Rule 5-902(a)(11) requires that timely notice and an opportunity to examine the records be provided to the opponent. The Rule extends prior Maryland law that dispensed with the need to authenticate certified hospital records.[260]

Finally, Rule 5-902(a)(12) provides that if pre-trial objection as to authenticity is required and not timely made, the evidence does not

257. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. §§ 10-1001 to -1004.

258. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-306 (permitting admission of breathalyzer results without presence or testimony of the technician).

259. MD. R. 5-803(b)(6).

260. *See* MD. R. 2-510(g); MD. R. 3-510(g).

require additional authentication "[u]nless justice otherwise requires." The Rule is less one of self-authentication than waiver of objections not timely made.[261]

There is no federal counterpart to Rule 5-902(b), which defines "certifies" and its nominative form.[262] Several categories of evidence declared self-authenticating in Rule 5-902(a) also require certification.[263]

Rule 5-903 establishes that documents that require a subscribing witness may be authenticated without the testimony of the subscribing witness, unless otherwise provided by statute. The Rule is consistent with prior Maryland practice and is substantively consistent with its federal counterpart, except that it contains no conflict of laws provision. The Maryland Code requires the testimony of a subscribing witness to authenticate a will or codicil.[264]

XI. CHAPTER 1000—CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Chapter 1000 addresses proof of the contents of writings, recordings or photographs, well-known at common law as "the best evidence rule" but better understood as an original documents rule. The Chapter begins with a set of definitions of the critical terms found in the rules it comprises,[265] followed by a general rule requiring the original writing, recording, or photograph to prove its contents.[266] Following the general requirement are a series of rules that provide for particular exceptions.[267] The Chapter concludes with a rule that defines the different functions of court and jury.[268]

Rule 5-1001(a) and (b) define writings and recordings, and photographs, respectively, in broad terms, including, for example, magnetic or electronic recordings, x-rays, and videotapes. The attempt is to take account of new technological methods of recordation. The definitions are consistent with pre-existing Maryland statutory law[269] and with the analogous Federal Rule. Rule 5-1001(c) and (d) define

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261. *Cf.* FED. R. CIV. P. 26(a)(3)(C).

262. MD. R. 5-902(b).

263. *See* MD. R. 5-902 (a)(3) (Foreign Public Documents); MD. R. 5-902(a)(4) (Certified Copies of Public Records); MD. R. 5-902(a)(11) (Certified Records of Regularly Conducted Business Activity).

264. MD. CODE ANN., CTS. & JUD. PROC. § 10-906 (1989).

265. MD. R. 5-1001.

266. MD. R. 5-1002.

267. MD. R. 5-1003 to -1007.

268. MD. R. 5-1008.

269. MD. CODE ANN., CTS. & JUD. PROC. § 10-103(a) (1989).

"original" and "duplicate," respectively, and are also consistent with pre-existing Maryland law[270] and with the Federal Rules.

Rule 5-1002 declares that the original of a writing, recording, or photograph is required to prove its content unless the Maryland Code or Rules provide otherwise. The Rule is consistent with prior Maryland law,[271] and with its federal counterpart.

Rule 5-1003 provides the first exception to the Rule requiring an original in an exception so broad as to change the Rule to permit duplicates in most instances in which Rule 5-1002 would require the original. The Rule provides for the admissibility of duplicates to the same extent as the original unless there is a genuine question of the original's authenticity, or if it would otherwise be unfair not to require the original. The Rule is consistent with prior Maryland law, primarily statutory,[272] and identical to the Federal Rule.

Rule 5-1004 dispenses with the requirement of the original in four circumstances: If the original has been lost or destroyed without the bad faith connivance of the proponent, evidence of content other than the original is permissible.[273] If the original cannot be obtained "by any reasonably practicable, available judicial process," evidence of content other than the original is permissible.[274] This represents some liberalization of Federal Rule 1004(2), which does not contain the phrase "reasonably practicable." If the opponent of the evidence had control of the original, had notice that its contents would be the subject of proof, and did not produce the original, other evidence of content is permissible.[275] Finally, the original is not required if the contents are offered as evidence of some collateral matter. The Rule is generally consistent with prior Maryland law[276] except that notions of degrees of secondary evidence no longer matter.[277]

Rule 5-1005 permits the content of public records to be shown by certified copy pursuant to Rule 5-902 or by testimony that the copy is accurate by one who has compared the copy to the original. The Rule

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270. *Id.* § 10-103(a)(3) & (b)(4).

271. *See, e.g.*, Trimble v. State, 300 Md. 387, 402, 478 A.2d 1143, 1151 (1984).

272. MD. CODE ANN., CTS. & JUD. PROC. § 10-103(b) (1989); *cf.* MD. CODE ANN., CTS. & JUD. PROC. § 10-102 (Supp. 1994) (photocopies of business and public records); *id.* § 10-206 (1989) (copies of worn out court records).

273. *See* Reed v. State, 35 Md. App. 472, 484-86, 372 A.2d 243, 252-53 (1977), *rev'd on other grounds*, 283 Md. 374, 391 A.2d 364 (1978).

274. *See* Summons v. State, 156 Md. 391, 398, 144 A. 497, 504-05 (1929).

275. *See* Stumpf v. Stumpf, 228 Md. 350, 355-56, 179 A.2d 893, 896-97 (1962).

276. *See* LYNN MCLAIN, 6 MARYLAND PRACTICE, MARYLAND EVIDENCE 540 (1987).

277. *See* General Builders Supply Co. v. MacArthur, 228 Md. 320, 327, 179 A.2d 868, 872 (1962).

revives the notion of degrees of secondary evidence to the extent that other evidence of contents may be introduced only if the foregoing evidence is not obtainable "by the exercise of reasonable diligence." The Rule is substantively identical to its federal counterpart and is not inconsistent with pre-existing Maryland statutes.[278]

If the relevant writings, recordings, or photographs are too voluminous and unwieldy for convenient presentation at trial, Rule 5-1006 permits the proponent to use charts or other summaries in lieu of the originals. The opponent of the evidence must be given notice and an opportunity to verify the accuracy of the summaries. The Rule is essentially consistent with prior Maryland law,[279] but exceeds the analogous federal rule by its explicit pretrial notice requirement although otherwise consistent with it.

Rule 5-1007 is essentially identical to its federal counterpart. The Rule dispenses with the need for the original if the contents of a writing, recording, or photograph are proved by the testimony of the party against whom the evidence is offered or by that party's written admission, even in the absence of an explanation for the lack of the original. The extension to a party's written admission extends prior Maryland law, although the rule is otherwise consistent with it.[280] It is not entirely clear whether the testimony of the adverse party needs to arise in the same proceeding.

Rule 5-1008 states the appropriate division of decision-making between judge and jury. It is a more detailed application to the "best evidence rule" of the more general problem addressed in Rule 5-104.[281] Under Rule 5-1008(a), the court determines questions of admissibility, including the existence of facts upon which admissibility depends.[282] Under Rule 5-1008(b), however, the trier of fact determines whether the writing, recording, or photograph ever existed, if its existence is disputed; whether a competing writing, recording, or photograph is the original; and whether other evidence of the content is accurate.[283]

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278. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-204 (1989); MD. CODE ANN., NAT. RES. § 6-108(c) (1989); MD. CODE ANN., TRANSP. § 12-113(b)(1) (Supp. 1994).

279. *See, e.g.*, Chapman v. State, 331 Md. 448, 461, 628 A.2d 676, 683 (1993); Sergeant Co. v. Clifton Bldg. Corp., 47 Md. App. 307, 313-17, 423 A.2d 257, 260-62 (1980), *cert. denied*, 289 Md. 740 (1981).

280. *See, e.g.*, Parr Constr. Co. v. Pomer, 217 Md. 539, 542, 144 A.2d 69, 71 (1958).

281. *See supra* text accompanying notes 42-43.

282. *Cf.* MD. R. 5-104(a).

283. *Cf.* MD. R. 5-104(b).

XII. CONCLUSION

The new Maryland Rules of Evidence create a number of significant changes in Maryland's law of evidence. Similarly, they differ in a few significant ways from the Federal Rules of Evidence. The differences, however, are less matters of substance than clarifications of what had been intended, though not as artfully expressed, in the Federal Rules. More important, the new Rules codify and systematize the patchwork of statutes, rules and practices that formerly comprised the law of evidence in Maryland. The current regime should facilitate and simplify trial preparation as well as improve the application of evidence law at trial and on appeal. It is a reform late in coming but no less welcome for that.