University of Baltimore Law Review

Volume 29
Issue 2 *Spring 2000*

Article 4

2000

Comments: The Medical Treatment Hearsay Exception in Maryland: A Low Point in Clarity for Practitioners and Protection for Utigants

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THE MEDICAL TREATMENT HEARSAY EXCEPTION IN MARYLAND: A *LOW* POINT IN CLARITY FOR PRACTITIONERS AND PROTECTION FOR LITIGANTS

I. INTRODUCTION

A woman enters the office of her family practitioner, worried about a recurring headache. She fears that her ailment indicates the inception of diabetes, high blood pressure, or any number of potentially life-threatening illnesses. While she suspects the possibility of a more serious malady—the treatment of which may require medical skill and knowledge exceeding that of a general practitioner—the woman visits her family doctor[1] for, if nothing else, guidance on the next step to take.

The family practitioner listens to the patient's difficulties, questions the patient about their onset,[2] and then performs basic tests in compliance with accepted medical practice. The results of these tests indicate that whatever ails the patient is clearly beyond the family practitioner's expertise and medical training. Therefore, the family practitioner refers the patient to a specialist[3] to receive neces-

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1. *See* Walter Rosser, *Doctors Have Their Own Plan for Health Care: Family Physicians Present Proposals for Reform in Ontario,* LONDON FREE PRESS, Aug. 29, 1999, at A9, *available in* 1999 WL 25332425; Jerry Adler & Adam Rogers, *The New War Against Migraines,* NEWSWEEK, Jan. 11, 1999, *available in* 1999 WL 9499226 (explaining that migraine sufferers go to headache specialists only after first seeing their family doctor).

2. Arguably, these statements would be fully admissible under the hearsay exception for then existing mental, emotional, or physical conditions. *See, e.g.,* MD. R. EVID. 5-803(b)(3); FED. R. EVID. 803(3). If the patient was not experiencing the headache at the exact moment of expression, however, this hearsay exception is inapplicable. *See, e.g.,* MD. R. EVID. 5-803(b)(3) (excluding "a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will").

3. Because the family practitioner did not "treat" the patient, that doctor may be nothing more than an examining physician under Maryland's medical treatment exception to the rule against hearsay. For a discussion of the reliability of statements made to an "examining" physician, see *infra* notes 109-22 and accompanying text. Although these statements can be used to lay the foundation for an expert's opinion or to rehabilitate an impeached witness, a party cannot use the family practitioner's testimony as substantive evidence to prove the inception, existence, or character of the headaches under current Mary-

sary treatment.[4]

Unfortunately, the patient's recovery may not end there. If the patient's ailment resulted from another person's action or negligence, the patient may pursue legal action against the tortfeasor to remedy the harm suffered. However, a litigant in the patient's position may have difficulty presenting the testimony of the family practitioner because the testimony concerning the patient's pain is based on hearsay.[5] Yet, the family doctor's testimony can be trustworthy and significant in any subsequent litigation.[6]

Although generally disfavored,[7] American courts admit hearsay as substantive evidence if such statements fulfill one of the numerous hearsay exceptions.[8] Hearsay statements meeting the criteria of

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land law. For a discussion of the implications of the treating/examining distinction, see *infra* Part III.B.

4. *See, e.g.*, Ralph Hyatt, *Can Managed Care Accommodate Mental Health?*, USA TODAY MAGAZINE, July 1, 1996, at 43, *available in* 1996 WL 9716402 (noting that general practitioners often call on the expertise of specialists to diagnose and treat complex symptoms); Arnold Birenbaum, *Managed Care: Will It Be For Everyone?*, USA TODAY MAGAZINE, July 1, 1996, at 46, *available in* 1996 WL 9716403 (explaining that in health maintenance organizations, primary care physicians make referrals to specialists when medically necessary).

5. For a definition of hearsay, see *infra* note 37 and accompanying text.

6. While it may be possible for the patient herself to testify as to the onset of the pain, the family practitioner's testimony may be useful in subsequent litigation if the plaintiff is impeached, relies on the family practitioner's opinion to determine the nature of her ailment, or if her testimony requires corroboration. Such testimony may also play a critical role in establishing the plaintiff's compliance with the statute of limitations. Under the discovery rule, the statute of limitations for a cause of action in tort begins when the plaintiff knew or reasonably should have known of the inception of the injury. *See, e.g.*, Poffenberger v. Risser, 290 Md. 631, 636, 431 A.2d 677, 680 (1981) (establishing the discovery rule for all tort causes of action); Edwards v. Demedis, 118 Md. App. 541, 553, 703 A.2d 240, 245-46 (1997), *cert. denied*, 349 Md. 234, 707 A.2d 240 (1998) (affirming the discovery rule in Maryland). Therefore, Maryland courts would likely find the preliminary exchange between the family practitioner and the patient relevant when making this determination.

7. *See infra* notes 34-46 and accompanying text. For a discussion on the desirability of hearsay statements made to physicians, in comparison to live court testimony, see *infra* note 91.

8. In the federal courts, there are eight forms of non-hearsay, 23 exceptions to the rule against hearsay, five hearsay exceptions contingent on the availability of the declarant, and a residual hearsay exception. *See* FED. R. EVID. 801 (providing for statements that are non-hearsay); 803 (enumerating the hearsay exceptions); 804 (listing instances when hearsay is admissible if the declarant is unavailable); 807 (containing the residual hearsay exception). Despite the rule against hearsay, the residual hearsay exception allows a court to admit

these exceptions do not endanger a court's interests in ensuring the trustworthiness of these statements.[9] In many jurisdictions,[10] including Maryland,[11] courts admit statements made pursuant to medical treatment under a general hearsay exception. However, Maryland courts construe this medical treatment hearsay exception narrowly.[12] This limited construction prevents litigants and prosecutors from using out-of-court statements made to "examining physicians" as substantive evidence.[13] Therefore, if the court considers the family practitioner described in the opening hypothetical as an examining physician, this testimony will not be admitted as substantive evidence, and will not support a finding of liability for the patient against an alleged tortfeasor.[14]

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out-of-court statements to prove a material fact if the statement is more probative of that fact than other admissible evidence, and the interests of the federal rules and justice would best be served by admitting the evidence. *See* FED. R. EVID. 807. Likewise, Maryland courts have similar provisions for hearsay exceptions, non-hearsay, and a residual hearsay exception. *See* MD. R. EVID. 5-802.1 (establishing the admissibility of prior statements by witnesses); 5-803 (permitting the admission of hearsay statements made by a party opponent and 24 other exceptions that apply regardless of the availability of the declarant as a witness, including a residual hearsay exception); 5-804(b) (allowing the admission of five forms of hearsay statements contingent on the inability of the party to produce the declarant). Some commentators contend, however, that the number of hearsay exceptions effectively defeats the exclusionary rule's utility. *See, e.g.*, Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723, 764 (1992) ("[A]lthough the definition of hearsay and the core exclusionary rule have survived virtually intact, the steady growth of exceptions and exemptions have hollowed out the rule, leaving a cavity largely occupied by admissible hearsay.").

9. *See infra* notes 46-54 and accompanying text.
10. *See infra* note 105 and accompanying text.
11. *See infra* Part III.B and accompanying text.
12. *See generally* Cassidy v. State, 74 Md. App. 1, 39-50, 536 A.2d 666, 684-90 (1988) (comparing the Maryland and federal approaches to the medical treatment hearsay exception).
13. There are numerous alternatives available through which a skillful litigant may nonetheless present the hearsay evidence to the jury. For a discussion of these methods and their effect on the utility of the treating/examining physician distinction, see *infra* Part IV.A and accompanying text.
14. A jury's verdict must be supported by substantive evidence to withstand an appellate challenge. *See generally* Johnson & Towers Baltimore, Inc. v. Babbington, 264 Md. 724, 728, 288 A.2d 131, 134 (1972) (noting that a jury verdict based on competent evidence "should not be disturbed"); Durant v. Perkins State Hosp., 251 Md. 467, 473, 248 A.2d 148, 151 (1968) (concluding that where there is legally sufficient evidence to support a jury verdict, the appellate court will not question its finding); Gray v. Director of Patuxent Inst.,

While Maryland courts have historically identified physicians consulted primarily in preparation for litigation as examining physicians,[15] the Court of Special Appeals of Maryland recently expanded the definition of examining physician.[16] The court defined a "non-treating" child abuse specialist as an examining physician, thereby excluding the victim's statements to the doctor from evidence.[17] In doing so, the court further (and unnecessarily) complicated and contradicted existing Maryland case law.[18]

Due to the various guarantees of trustworthiness accompanying statements to physicians,[19] the inconsistency with which Maryland courts admit physicians' testimony as substantive evidence,[20] and the realities of the courtroom,[21] Maryland should abandon the examining and treating physician distinction.[22] Rather than distinguishing between two arbitrarily drawn categories, Maryland courts should admit patients' out-of-court statements to physicians as substantive evidence, and allow the fact-finder to determine the declarant's credibility.[23] In fact, admission of these statements would better fulfill the public policy initiatives underlying the medical treatment exception to the rule against hearsay.

To that end, Part II of this Comment examines the legal and

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245 Md. 80, 84, 224 A.2d 879, 881 (1966) (refusing to overturn a jury verdict where there was "legally sufficient evidence to support the verdict of the jury"). Evidence that a trial court admits for impeachment purposes only will not satisfy the elements of a prima facie case. *See, e.g.*, Stewart v. State, 104 Md. App. 273, 279 (1995) (citations omitted).

15. *See, e.g.*, Candella v. Subsequent Injury Fund, 277 Md. 120, 126, 353 A.2d 263, 267 (1976) (concluding that statements made to a psychiatrist for the purpose of qualifying him as a witness were in preparation of litigation and the lower court properly struck the physician's conclusions because they were based solely on the information told to him by the plaintiff); Parker v. State, 189 Md. 244, 248-49, 55 A.2d 784, 786 (1947) (affirming the trial court's exclusion of a doctor's testimony regarding a criminal defendant's medical "case history" relayed to the doctor by the defendant because the defendant was not seeking treatment but "creating evidence on his own behalf").
16. For a discussion of the traditional definition of examining physician and how recent Maryland case law broadened this definition, see *infra* notes 103-203 and accompanying text.
17. *See infra* notes 175-203 and accompanying text.
18. *See infra* notes 175-203 and accompanying text.
19. *See infra* notes 76-85, 103-07 and accompanying text.
20. *See infra* Part III.B.
21. *See infra* Part IV.
22. *See infra* Part V.
23. *See infra* Part IV.B.

policy principles underlying the rule against hearsay,[24] the rationale underlying the medical treatment exception,[25] and the common-law concerns associated with this exception.[26] Part III traces, compares, and contrasts the medical treatment hearsay exception in the United States Supreme Court,[27] as well as federal[28] and Maryland courts.[29] Part IV discusses existing practices that address the dangers that the examining/treating physician distinction seeks to alleviate.[30] Finally, Part V concludes that Maryland's distinction between examining and treating physicians is unnecessary given the protections afforded by the legal system and Maryland's Rules of Evidence.[31]

II. THE UNDERLYING PRINCIPLES[32]

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24. *See infra* Part II.A.
25. *See infra* Part II.B.
26. *See infra* notes 69-73 and accompanying text. Specifically, this Comment focuses on Maryland's hearsay exception for statements made in contemplation of medical treatment. In this area, the evolution of special provisions for the admission of statements by child abuse victims has been a significant vehicle for change within the last two decades. *See generally* MCCORMICK ON EVIDENCE, § 278, at 432 (John W. Strong, ed., 5th ed. 1999) [hereinafter "MCCORMICK"]; Lynn McLain, *Children Are Losing Maryland's "Tender Years" War*, 27 U. BALT. L. REV. 21 (1997) (discussing the statutorily provided tender years exception to Maryland's rule against hearsay); Lynne E. Radke, Note, *Michigan's New Hearsay Exception: The "Reinstatement" of the Common Law Tender Years Rule*, 70 U. DET. MERCY L. REV. 377 (1993) (discussing the statutorily provided tender years exception to Michigan's rule against hearsay); Krista MacNevin Jee, Note, *Hearsay Exceptions in Child Abuse Cases: Have the Courts and Legislatures Really Considered the Child?* 19 WHITTIER L. REV. 559 (1998) (discussing judicial and legislative approaches to hearsay in child abuse cases). This Comment will not concentrate exclusively on hearsay problems in the area of child abuse cases; instead, it will discuss the general provisions and concerns underlying the medical treatment hearsay exception and the confusion created by recent Maryland case law. Therefore, while it is necessary to discuss specifically the recent case law that concerns child abuse prosecutions, the discussion and analysis will address all attempts to proffer hearsay statements to examining physicians, such as in personal injury litigation.
27. *See infra* notes 74-102 and accompanying text.
28. *See infra* notes 204-47 and accompanying text.
29. *See infra* notes 103-203 and accompanying text.
30. *See infra* notes 248-89 and accompanying text.
31. *See infra* notes 290-300 and accompanying text.
32. For an exhaustive examination of the evolution of hearsay, see 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1364 (Chadburn rev. 1974), 9 SIR WILLIAM HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 214-19 (Methuen & Co. Ltd. & Sweet & Maxwell Ltd., 3d ed. 1944).

A. The General Considerations Governing the Rule Against Hearsay

To encourage the use of in-court testimony subject to the penalty of perjury,[33] protect a party's ability to examine statements offered as substantive evidence,[34] and preserve a party's ability to cross-examine witnesses,[35] American courts exclude hearsay,[36] which has been defined as: "out-of-court assertion[s] offered in court for the truth of the matter asserted, and thus resting for [their] value on the credibility of the out-of-court declarant."[37] Hearsay statements[38] also raise concerns about the court's ability to assure the declarant's[39] memory,[40] perception,[41] narration,[42] and sincerity[43] of the

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33. For a general discussion of the importance of the oath and personal presence of the witness in court to assure the truthfulness of in-court testimony, see MCCORMICK, *supra* note 26, § 245, at 374; Wm. Garth Snider, *The Linguistic Hearsay Rule: A Jurisprudential Tool*, 32 GONZ. L. REV. 331, 338-39 (1996-97). *But see* 5 WIGMORE, *supra* note 32, § 1362, at 10 (questioning the importance of the oath).

34. *See* MCCORMICK, *supra* note 26, § 245, at 374-75. Used in conjunction with the rules of authentication, courts use the rule against hearsay to prevent a party from admitting false or altered evidence for the truth of the matter asserted. *See, e.g.*, MD. R. EVID. 5-901 to -903 (providing Maryland's requirements for authentication). *But see* Milich, *supra* note 8, at 723, 773-74 (arguing that the hearsay exceptions provide litigants opportunities to admit falsified evidence by tailoring evidence to fall within an exception).

35. *See* Anderson v. United States, 417 U.S. 211, 220 (1974) ("The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence.") (footnote omitted); MCCORMICK, *supra* note 26, § 245, at 374-75; 5 WIGMORE, *supra* note 32, § 1367, at 32 (describing cross-examination as "the greatest legal engine ever invented for the discovery of the truth"); Snider, *supra* note 33, at 337-39. *But see* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7.28, at 348 (3d ed. 1996) (noting the lack of empirical data indicating the exposition of the hearsay dangers through cross-examination).

36. *See generally* Cassidy v. State, 74 Md. App. 1, 7, 536 A.2d 666, 669 (noting that although there are numerous exceptions to the rule against hearsay, it is a "rule of exclusion").

37. *Id.* 6, 536 A.2d at 668 (setting forth "a good working definition of hearsay"); *accord In re* Rachel T., 77 Md. App. 20, 33, 549 A.2d 27, 33 (1988) (using the same terminology as *Cassidy* and naming it the "classic definition" of hearsay).

38. *See* FED. R. EVID. 801(a) (defining a "statement" as "(1) an oral assertion or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion"); *accord* MD. R. EVID. 5-801(a).

39. Throughout this Comment, "declarant" will describe an individual who initially makes a statement and "witness" will refer to an individual attesting to the statement in court. *See* FED. R. EVID. 801(b); MD. R. EVID. 5-801(b). For a discussion of the parties generally involved in the typical scenario involving

statement made.

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hearsay concerns, see Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 177-79 (1948).

40. *See* Morgan, *supra* note 39, at 188. Here, courts determine whether the witness or declarant retained an accurate impression of the perception underlying the statement. *See* MCCORMICK, *supra* note 26, § 245, at 373-74 (discussing the factors upon which credibility of testimony depends); Snider, *supra* note 33, at 335-36 (pointing out that asking a witness to recall events in great detail is often "rife with the possibility of inaccuracy"). A party's ability to cross-examine is critical to the fact-finder's determination of the strength of the declarant's memory. *See* Morgan, *supra* note 39, at 188 (labeling the "most important service" of cross-examination as exposing the witness' inability to remember details of the subject of the testimony); Snider, *supra* note 33, at 336 (noting that subjecting a witness to cross-examination allows the trier of fact to determine if the witness' recollection faded or was subconsciously altered).
41. Here, the key questions are whether the witness perceived what the witness described, and whether that witness's perception was accurate. *See* MCCORMICK, *supra* note 26, § 245, at 373; Snider, *supra* note 33, at 335 ("[T]he hearsay rule recognizes the inherent faults in man's perception and attempts to eliminate the least trustworthy testimonial evidence.") A party's ability to cross-examine is essential here as well as carelessness, inadequacy, and other detriments to an accurate perception may be exposed. *See* Morgan, *supra* note 39, at 188 (arguing that cross-examination exposes faults in perception and memory, more so than any other hearsay dangers).
42. Courts determine whether the declarant's statement accurately reflects what the declarant perceived or sensed. *See* MCCORMICK, *supra* note 26, § 245, at 373-74 (noting that it must be determined whether the declarant's language conveys the declarant's impressions accurately); Snider, *supra* note 33, at 336-37 (explaining that the narration concern exists because words have more than one meaning or interpretation). Factors to consider include the declarant's sincerity, the ability of the declarant to convey the message, and the possibility of an honest mistake. *See* Snider, *supra* note 33, at 336-37; Laurence H. Tribe, *Triangulating Hearsay,* 87 HARV. L. REV. 957, 958-61 (1974) (including "insincerity" in the testimonial triangle).
43. For this consideration, the declarant's degree of intention is emphasized. *See* MCCORMICK, *supra* note 26, § 245, at 373-74; Morgan, *supra* note 39, at 185-88, n.19 (discussing the problems associated with the improper use of the English language). Cross-examination is vitally important to clarify problems with the declarant's language. *See* Morgan, *supra* note 39, at 186-88, n.19 (noting that a witness could create a wrong impression through his word choice and that cross-examination is necessary to reveal any such deception). Although many writers couple this factor with the narration element, this Comment will consider them separately. Both concepts are important to understanding the trustworthiness of statements in pursuit of medical treatment. Such statements are often made while the declarant is in pain, without the use of certain mental and physical faculties, or highly emotional. Therefore, while the declarant may be sincere, the statements nonetheless may be ambiguous.

Although it could be argued that all hearsay statements should be admitted, and that the credibility of such testimony should be determined by the fact-finder,[44] the rule against hearsay embodies the courts' belief that out-of-court statements are inherently untrustworthy.[45] Yet, even the common law recognized numerous exceptions to the rule against hearsay.[46] Under common law, courts admitted certain hearsay statements based on their inherent trustworthiness[47] or necessity,[48] if the offeror of the hearsay statement met the burden of demonstrating the statement's admissibility.[49] Aside from necessity,[50] reasons for contemporary hearsay excep-

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44. *See* Milich, *supra* note 8, at 723 (citing 3 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 536-40, 553 (1827)); Margaret Bull Kovera, et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 719-22 (1992); Peter Miene, et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 693, 695, 699 (1992); Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655, 664 (1992) (arguing that a fact-finder is capable of making determinations of credibility). Essentially, this scenario also occurs when a proponent proffers hearsay evidence to the court, and the opposing party fails to object to its admission. *See* Morgan, *supra* note 39, at 183 (describing the rule against hearsay as a viable protection only for those who assert it). However, the jury may only use this evidence "within the bounds of reason." *Id.* (footnote omitted).

45. *See* Jee, *supra* note 26, at 563-66 (discussing the courts' belief in the critical importance of the rule against hearsay). *But see* Milich, *supra* note 8, at 767-74 (rejecting each of the historical justifications underlying the rule against hearsay).

46. *See* MCCORMICK, *supra* note 26, § 245, at 375 (arguing that hearsay can often be reliable and useful to the fact-finder and that there needs to be "liberaliz[ation of] evidence law"). The federal and state courts have imposed their specific hearsay exceptions to the rule against hearsay through their respective rules of evidence. *See* FED. R. EVID. 801(d), 803; 804;s 807; MD. R. EVID. 5-802.1. 5-803. 5-804.

47. Under the common law, courts also considered the declarant's state of mind and any motive to fabricate the statement when determining the statement's admissibility. *See* Cassidy v. State, 74 Md. App. 1, 38, 536 A.2d 666, 684 (1988) (describing the common law's consideration of the declarant's state of mind a "sine qua non for every hearsay exception").

48. *See* Milich, *supra* note 8, at 726-27 (citing 5 WIGMORE, *supra* note 32, § 1420-23) (noting that necessity applies when the declarant is unavailable and when "the need for the evidence arguably outweighs the usual concerns about the jury overvaluing hearsay evidence"). However, the author also observes: "As a practical matter, most hearsay gets admitted through the many exceptions and exemptions." *Id.* at 727.

49. *See, e.g.*, Cassidy v. State, 74 Md. App. 1, 7-8, 536 A.2d 666, 669 (1988) (providing that the burden is on the proponent to show why the evidence should be

tions[51] range from spontaneity[52] to longevity[53] to assumptions regarding the behavior of public officials.[54]

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admitted, not on the opponent to show why it should be rejected).

50. *See, e.g.*, FED. R. EVID. 804(b)(2) (permitting dying declarations as substantive evidence); *accord* MD. R. EVID. 5-804(b)(2) (permitting dying declarations only "[i]n a prosecution for an offense based upon unlawful homicide, attempted homicide, assault with intent to commit a homicide or in any civil action.").
51. *See* LILLY, *supra* note 35, § 7.28, at 348 (noting that the human nature assumptions underlying hearsay exceptions are usually those of the courts, not of behavioral scientists).
52. *See, e.g.*, 803(1) (present sense impression); 803(2) (excited utterances); s803(3) (then existing mental, emotional, or physical condition); *accord* MD. R. EVID. 5-803(b)(1) (present sense impression); 5-803(b)(2) (excited utterances); 5-803(b)(3) (then existing mental, emotional, or physical condition). *See also* LYNN MCLAIN, MARYLAND EVIDENCE STATE AND FEDERAL, § 803(1).1 (West 1987) (discussing the history of the present sense impression exception that Maryland did not adopt until 1985); § 803(2).1 (describing an excited utterance as one made as a result of an event "which is startling in nature" and the requirement that the declarant was under stress at the time of the statement); § 803(3).1 (explaining the then existing mental or emotional condition exception).
53. *See, e.g.*, FED. R. EVID. 803(16) (ancient documents); MD. R. EVID. 5-803(b)(16)(same); *see also* Dallas County v. Commercial Union Ins. Co., 286 F.2d 388, 397-98 (5th Cir. 1961) (admitting a 58 year-old newspaper because of its trustworthiness as opposed to the uncertainty of testimony that would require a 58 year-old recollection); Homewood Realty Corp. v. Safe Deposit & Trust Co., 160 Md. 457, 473, 154 A. 58, 65 (1931) (finding a deed recorded and delivered 40 years prior was trustworthy because of "its antiquity and nature"); MCLAIN, *supra* note 52, § 803(16).1, § 803(16).2 (noting that Maryland, like the majority of jurisdictions, does not recognize an exception for ancient documents, but only an exception for "ancient deeds"). *But see* FED. R. EVID. 803(16) (providing a hearsay exception for any document more than 20 years old).
54. *See, e.g.*, FED. R. EVID. 803(8) (public records, reports); FED. R. EVID. 803(10) (absence of public record, entry); MD. R. EVID. 5-803(b)(8) (public records, reports); MD. R. EVID. 5-803(b)(10) (absence of public record, entry); *see also* United States v. Rith, 164 F.3d 1323, 1335-37 (10th Cir. 1999), *cert. denied*, 528 U.S. 827 (1999) (holding that the absence of the registration of a sawed off shotgun with the Bureau of Alcohol, Tobacco, and Firearms was admissible with proper certification because the database from which it was absent had sufficient guarantees of trustworthiness); United States v. Thompson, 420 F.2d 536, 545 (3d Cir. 1970) (finding no error in admitting an affidavit of an officer regarding the absence of any relevant entry); Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 612, 495 A.2d 348, 363-64 (1985) (reasoning that the public records exception allows the admission of reliable facts); LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 260-61 (1994) (recognizing that this hearsay exception "permits proof of the absence of the record to be made by the certificate of the custodian").

B. The Hearsay Exception for Statements Made in Contemplation of Medical Treatment

The exception to the rule against hearsay for statements made pursuant to medical treatment[55] has four general dimensions. The first dimension involves a patient's statements to a doctor regarding a present bodily condition.[56] To ensure the trustworthiness of such statements,[57] courts rely on the patient's ability to recall events[58] and the patient's belief "that the effectiveness of the treatment depends on the accuracy of the information provided to the doctor."[59] For these statements, there is significant overlap between the medical treatment hearsay exception and other recognized hearsay exceptions.[60] The courts' acceptance of statements included in this di-

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55. For example, Maryland Rule of Evidence 5-803(b)(4) exempts from the rule against hearsay:

> Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

MD. R. EVID. 5-803(b)(4).

56. *See* MCCORMICK, *supra* note 26, § 277, at 430 (noting such statements are almost universally admitted for the truth of the matter asserted).

57. *See, e.g.*, MCCORMICK, *supra* note 26, § 277, at 430.

58. *See* MCLAIN, *supra* note 52, § 803(4).1 (noting that "there are no problems with perception or memory" when courts admit statements of then existing physical condition).

59. MCCORMICK, supra note 26, § 277, at 430; *see also* Goldstein v. Sklar, 216 A.2d 298, 305 (Me. 1996) ("All . . . declarations made by the patient to the examining physician as to his present or past symptoms are known by the patient who is seeking medical assistance to be required for proper diagnosis and treatment and by reason thereof, are viewed as highly reliable and apt to state true facts."); *see also* MCLAIN, *supra* note 52, § 803(4).1 (recognizing that there are guarantees of trustworthiness with statements made for purposes of medical treatment); Jee, *supra* note 26, at 567 ("Statement[s] made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility." (quoting White v. Illinois, 502 U.S. 346, 356 (1992))). For a discussion of *White*, see *infra* notes 89-98 and accompanying text.

60. For example, an individual sustaining a physical injury during a particularly traumatic event may make a statement regarding her medical condition to a physician. If the statement was made while under the stress of the event, Maryland courts will also admit such a statement under the excited utterance exception. *See* MD. R. EVID. 5-803(b)(2); *see also* FED. R. EVID. 803(2). If the statement described or explained an event during or immediately after its

mension is a natural outgrowth of these other hearsay exceptions.

A second dimension of the medical treatment hearsay exception concerns statements of medical history.[61] The common law placed significant restrictions on the use of this evidence,[62] but now, if relevant, it is admissible to prove the truth of the matter asserted.[63] Again, courts rely on the patient's self-interest in obtaining adequate medical treatment to ensure the statement's trustworthiness.[64]

The third dimension of the medical treatment hearsay exception involves statements made to a treating physician concerning the cause or external source of a condition.[65] While courts rely on the declarant's self-interest to ensure trustworthiness,[66] many courts inquire into the circumstances underlying the assertion, looking for

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occurrence, Maryland courts would admit the statement as substantive evidence under the present sense impression hearsay exception. *See* MD. R. EVID. 5-803(b)(1); *see also* FED. R. EVID. 803(1). Furthermore, if the statement relates to the declarant's then existing mental, emotional, or physical condition and is offered to prove that condition or the declarant's future action, Maryland courts will invoke the corresponding hearsay exception. *See* Md. R. Evid. 5-803(b)(3) (providing a hearsay exception for then existing mental, emotional, or physical condition); *see also* FED. R. EVID. 803(3).

61. *See* MCCORMICK, *supra* note 26, § 277, at 430 (observing that the exception evolved to include statements made by a patient regarding past symptoms).

62. *See* Paul R. Rice, *The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More than Redefining "Facts or Data,"* 47 MERCER L. REV. 495, 501, 501 n.26 (1996) (noting that the common law admitted such statements only if "history and causation were *crucial* to the doctors' diagnosis and to an understanding of the doctors' treatment" and never for the truth of the matter asserted) (emphasis added) (citations omitted).

63. *See id.* at 502 (discussing federal rule 803(4)'s requirement that the evidence be pertinent to the diagnosis of a medical condition and if so, admitted for the truth of the matter asserted); *see also* MD. R. EVID. 5-803(b)(4) (allowing courts to admit statements describing past symptoms if reasonably pertinent to treatment or diagnosis in contemplation of treatment).

64. *See supra* note 59 and accompanying text.

65. *See* MD. R. EVID. 5-803(b)(4) (admitting statements that address "the inception or general character of the cause or external sources" of the pain); MCCORMICK, *supra* note 26, § 277, at 430-31 (recognizing that a major issue involving the scope of the medical treatment exception is statements made to a doctor regarding the cause of the condition). *But see* State v. Lima, 546 A.2d 770, 774 (R.I. 1988) (excluding a father's statement that the babysitter submerged his child in scalding water because the statement was not reasonably related to treatment or diagnosis and would be highly prejudicial to the defendant babysitter).

66. *See supra* note 59 and accompanying text.

indications of insincerity or improper motive.[67]

The last dimension, for which there is far less agreement, includes statements of past symptoms or medical history made to individuals other than a treating physician.[68] Under the traditional common law, courts admitted these statements only if they were made to a treating physician in pursuit of treatment.[69] Common-law courts reasoned that statements made to non-treating individuals lacked the trustworthiness underlying the exception[70] and that, unlike the other three dimensions of the exception, the success of treatment did not hinge on such statements to non-treating individuals.[71] However, for several reasons, many modern courts admit statements made to any individual in pursuit of treatment,[72] including statements made to the much maligned examining physician.[73]

III. JURISDICTIONAL TREATMENT

A. *The Supreme Court of the United States*

Despite Sixth Amendment[74] concerns,[75] the Supreme Court pro-

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67. *See* McCORMICK, *supra* note 26, § 277, at 431 (describing the test for admissibility to be whether the statements were reasonably pertinent to diagnosis or treatment).

68. *Compare, e.g., infra* note 208 *with supra* note 55.

69. *See* McCORMICK, *supra* note 26, § 278, at 431.

70. *See id.* § 277, at 431 (noting that as long as a statement is made by the patient to secure treatment, the statement need not be made to a physician to be admissible).

71. Possible examples of non-treating individuals include physicians consulted in preparation of litigation, see *infra* note 108 and accompanying text; individuals consulted merely for examination, see *Wilhelm v. State Traffic Safety Comm'n*, 230 Md. 91, 97, 185 A.2d 715, 717 (1962); and individuals who were consulted for possible treatment but were subsequently determined to be unnecessary, see *Rossello v. Friedel*, 243 Md. 234, 242-43, 220 A.2d 537, 541-42 (1966).

72. *See infra* Part III.C and accompanying text.

73. *See infra* notes 108-09 and accompanying text.

74. The Sixth Amendment's Confrontation Clause provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Fourteenth Amendment extends such protections to state proceedings. *See* Davis v. Alaska, 415 U.S. 308, 315 (1974) (holding that Alaska's statute protecting anonymity of juvenile offenders effectively denied the petitioner his right to confront witnesses under the Sixth and Fourteenth Amendments); Pointer v. Texas, 380 U.S. 400, 403-05 (1965) (holding that the Sixth Amendment's right to confront witnesses is a fundamental right and is thus obligatory to the States through the Fourteenth Amendment).

75. *See generally* Bourjaily v. United States, 483 U.S. 171, 182 (1987) ("While a literal interpretation of the Confrontation Clause could bar the use of any out-

tects the courts' ability to admit trustworthy hearsay evidence.[76] Although the Court in *Ohio v. Roberts*[77] restricted the ability of a court to admit hearsay statements from prior proceedings,[78] it nonetheless found no infringement of the Sixth Amendment by admitting statements made under "firmly rooted" hearsay exceptions.[79] In *Roberts*, the State, seeking a conviction for check forgery and possession of stolen credit cards, sought to admit a declarant's prior testimony against the petitioner.[80] The Court held that the State normally had to show the unavailability of the declarant and an "adequate 'indicia of reliability.'"[81] However, the Court concluded that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[82] A firmly rooted excep-

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of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'" (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)); Mattox v. United States, 156 U.S. 237, 243 (1895) ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations.").

76. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 63 (1980) (rejecting the argument that the Sixth Amendment requires the exclusion of all hearsay as it is too extreme); *see also* Maryland v. Craig, 497 U.S. 836, 847-48 (1990) ("[T]he [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial.").

77. 448 U.S. 56 (1980).

78. *See* Mancusi v. Stubbs, 408 U.S. 204, 213-14 (1972) (dealing with the admission of prior testimony under a hearsay exception) (citing California v. Green, 399 U.S. 149, 149-70 (1970)); Berger v. California, 393 U.S. 314, 314-15 (1968) (per curium); Barber v. Page, 390 U.S. 719, 719-25 (1968).

79. *Roberts*, 448 U.S. at 66 (concluding that when a hearsay declarant is not present, the Confrontation Clause requires a showing that he is unavailable and that his statement is reliable).

80. *See id.* at 59-60 (laying out the underlying facts of the state's charges against the petitioner). The declarant testified at a preliminary hearing that, despite the claims of the petitioner, she had not given him permission to use her credit cards or checks. *See id.* at 58 (pointing out the declarant was the only witness at the preliminary hearing). The trial court could not ascertain the location of the declarant at the time of the trial and her mother testified that she was unaware of her whereabouts. *See id.* at 59 (noting that five subpoenas were issued to the declarant's last known address).

81. *Id.* at 66.

82. *Id.* Statements not falling under a firmly rooted hearsay exception may nonetheless be admitted if there are "'particularized guarantees of trustworthiness' drawn from the 'totality of the circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief.'" Carol A. Chase, *Confronting Supreme Confusion: Balancing Defendants' Confrontation Clause Rights Against the Need to Protect Child Abuse Victims*, 1993 UTAH L.

tion allows proponents of hearsay statements to present such evidence without showing the unavailability of the declarant.[83]

However, subsequent Supreme Court decisions created some confusion as to the applicability of the *Roberts* test. In *United States v. Inadi*,[84] the Court seemed to abandon the *Roberts* test, focusing exclusively on the trustworthiness of the statement.[85] Distinguishing the statements in *Roberts*[86] from those in *Inadi*, the Court found little utility in determining the availability of the declarant.[87] Although

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REV. 407, 411 (1993) (quoting Idaho v. Wright, 497 U.S. 805, 819-20 (1990) (holding that admission of a child's hearsay statements violated the defendant's confrontation clause rights)). For a discussion of what constitutes a firmly rooted hearsay exception, see *Wright*, 497 U.S. at 817 ("Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."); Myrna S. Raeder, White*'s Effect on the Right to Confront One's Accuser*, 7 CRIM. JUST. 2, 53-56 (1993) (questioning whether any federal hearsay exception would ever *not* be considered a firmly rooted exception); Nancy H. Baughan, Recent Development, White v. Illinois: *The Confrontation Clause and the Supreme Court's Preference for Out-of-Court Statements*, 46 VAND. L. REV. 235, 261-62 (1993) (questioning whether the Court has ever defined "firmly rooted").

83. Although there was some confusion concerning this result, subsequent case law affirmed this conclusion. *See infra* note 84-89 and accompanying text.

84. 475 U.S. 387 (1986). During the prosecution for conspiracy to manufacture and distribute methamphetamines, the State sought to introduce lawfully obtained taped admissions of co-conspirators. *See id.* at 387-90.

85. *See id.* at 393-95. This development is especially remarkable given the requirements that must be satisfied by the proponents to use the co-conspirator hearsay statements as substantive evidence. *See, e.g.*, FED. R. EVID. 801(d)(2)(E) (requiring a showing that the declarant is unavailable and that the statement was made by a co-conspirator during, and in furtherance of, the conspiracy); MD. R. EVID. 5-803(a)(5).

86. Although the *Roberts* Court characterized the co-conspirator's prior testimony as a "weaker substitute" for live testimony, the *Inadi* court concluded that a co-conspirator's statement, made to another while the conspiracy was in process, would "derive its significance from the circumstances in which it was made." *Inadi*, 475 U.S. at 395. According to the *Inadi* Court, the evidentiary significance of the co-conspirator's statements would decrease, notwithstanding the Fifth Amendment right against self-incrimination, if the prosecutor called the co-conspirator to the stand to testify to the assertion. *See id.* at 396. "Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy." *Id.*

87. *See id.* at 396-400. *But see Roberts*, 448 U.S. at 66 (requiring a showing of unavailability *and* reliability for a hearsay statement to be admissible). Among the proposal's flaws, the Court illuminated the lack of contribution to the

the Court placed some restrictions on the use of hearsay evidence,[88] this departure from *Roberts* opened the doors to the Court's decision in *White v. Illinois*.[89]

In *White*,[90] the Court specifically categorized statements made for the purpose of receiving medical treatment as embodied in a firmly rooted exception to the rule against hearsay.[91] Citing the trustworthiness inherent in such statements,[92] the Court emphasized

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truth-finding process, lack of meaningful exclusion, availability of viable alternatives (such as the defendant compelling an available declarant to testify at trial through subpoena), and the practical, yet unnecessary burden such a requirement places on the prosecution. *See Inadi*, 475 U.S. at 394-400 (holding that the Confrontation Clause does not embody an unavailability rule).

88. *See* Idaho v. Wright, 497 U.S. 805 (1990) (holding the admission of a child's hearsay statements violated the defendant's Confrontation Clause rights). Convicted of lewd conduct with a minor under the age of 16 years, the defendant contended that the trial court's admission of out-of-court statements made by the child to a doctor during an examination violated the Confrontation Clause. *See id.* at 812-13. Relying on Idaho's residual hearsay exception, the trial court admitted the doctor's testimony that the victim said: "Daddy does this with me, but he does it a lot more with my sister than with me." *Id.* at 811. Affirming the reversal of the respondent's conviction and concluding that the residual hearsay exception was not firmly rooted, the Court sought sufficient indicia of reliability to overcome the Confrontation Clause's provisions. *See id.* at 813, 817 (reasoning that the child's statements were not automatically considered reliable because the residual hearsay exception was not "firmly rooted"). The question of the witness's availability went unaddressed by the Court, however. *See id.* at 816. At trial, the defense counsel conceded that the victim was incapable of communicating with the jury and failed to preserve this issue for review. *See id.* (assuming, without deciding, that the younger daughter was an unavailable witness because the lower court never discussed it or said otherwise).

89. 502 U.S. 346 (1992).

90. Appealing his convictions for aggravated criminal sexual assault, residential burglary, and unlawful restraint, the petitioner contested the trial court's admission of hearsay statements by the four year old declarant through the testimony of her treating physician and attending nurse. *See White*, 502 U.S. at 349-50. The trial court admitted the statements under Illinois's hearsay exception for statements to medical personnel for diagnosis or treatment. *See id.* at 350-51.

91. *See id.* at 357 (concluding that the evidence was admitted under a firmly rooted hearsay exception and refusing to look for any guarantees of trustworthiness); *cf. Wright*, 497 U.S. at 817 (concluding that Idaho's residual hearsay exception was not firmly rooted and seeking particularized guarantees of trustworthiness).

92. According to the Court:

> The rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving

that such hearsay statements had "special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony."[93] Contrasting the trustworthiness of such assertions to those involved in *Roberts*,[94] the Court concluded that the admission of such statements would not violate the Sixth Amendment, and affirmed its ruling in *Roberts*.[95] The Court reasoned that the trustworthiness of statements that fall within firmly rooted hearsay exceptions did not depend on the availability of the declarant.[96] As a result, the Court rejected the petitioner's argument that the declarant must be present for admission of the hearsay statement,[97] thereby allowing a party to introduce such a hearsay statement even when the declarant is available.[98]

Therefore, while the Supreme Court discussed the constitutional complications posed by exceptions to the rule against hearsay,[99] it deferred to the state courts to define the dimensions of those exceptions.[100] Absent federal court jurisdiction,[101] it is a state's

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> medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness. But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony. A statement that has been offered in a moment of excitement — without the opportunity to reflect on the consequences of one's exclamation — may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom. Similarly, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.

White, 502 U.S. at 355-56 (footnote omitted).

93. *Id.* at 356. In making this determination, the Court also discussed the general acceptance of this hearsay exception in many state jurisdictions in the United States. *See id.* at 355 n.8 (observing that the exception is recognized in nearly four-fifths of the States).

94. *See id.* at 356.

95. *See id.* at 356-57.

96. *See id.* at 357.

97. *See id.* at 354 (reiterating that there is "little benefit, if any, to be accomplished by imposing an 'unavailability rule' ").

98. *See id.*

99. *See supra* notes 74-98 and accompanying text.

100. *See infra* note 105.

101. *See, e.g.*, United States v. Gillock, 445 U.S. 360, 368 (1980) (looking to the House Conference Committee Report on the Federal Rules of Evidence to conclude that federal privilege law must be applied in criminal cases in federal court and parenthetically explaining "the admissibility of evidence in

rules of evidence that govern the admissibility of hearsay statements.[102]

B. Evolution of the Maryland Medical Treatment Hearsay Exception

Maryland has long recognized the trustworthiness of statements made to a physician pursuant to treatment,[103] notwithstanding hearsay dangers.[104] In accord with much of the country,[105] Maryland

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criminal trials in the federal courts 'is to be controlled by common law principles, not by local statute' ") (quoting Wolfe v. United States, 291 U.S. 7, 13 (1934)); England v. Reinauer Transp. Cos., 194 F.3d 265, 273 (1st Cir. 1999) (holding that the Federal Rules of Evidence determine the evidentiary aspects of the collateral source rule of cases heard in federal court).

102. *See* MD. R. EVID. 5-101(a) (providing that the Maryland rules of evidence apply to all actions and proceedings in state courts unless otherwise provided); Attorney Grievance Comm'n v. Sabghir, 350 Md. 67, 76, 710 A.2d 926, 931 (1998) (mentioning that attorney disciplinary proceedings are not exempted from the rules of evidence); Key-EL v. State, 349 Md. 811, 816, 709 A.2d 1305, 1307 (1998) (noting that, in its order adopting the rules of evidence, the Court of Appeals of Maryland provided that the rules would govern all actions); Graves v. State, 334 Md. 30, 36-37 n.2, 637 A.2d 1197, 1201 n.2 (1994) (recognizing that after the rules of evidence took effect, they were to apply to all trials and hearings); Walker v. State, 107 Md. App. 502, 518, 668 A.2d 990, 998 (1995) ("Maryland's codified rules of evidence were made applicable to 'all actions and proceedings in the courts of this State' with some exceptions." (quoting MD. R. EVID. 5-101)), *aff'd*, 345 Md. 293, 691 A.2d 1341 (1996).

103. *See supra* note 56 and accompanying text.

104. *See* Adams v. Benson, 208 Md. 261, 266-67, 117 A.2d 881, 883 (1955) (restating the longstanding rule that an "attending physician may testify not only to facts observed about the condition of an injured patient but also to statements made by the patient about his symptoms and feelings during examinations made with a view to treatment") (discussing Sellman v. Wheeler, 95 Md. 751, 54 A. 512, 514 (1902)).

105. While most states have hearsay exceptions concerning information relayed to medical professionals, very few differ from the language of the federal rule: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." FED. R. EVID. 803(4). Twenty seven states have adopted the language of the federal rule verbatim. *See* ALA. R. EVID. 803(4) (explaining in the Committee Notes that, "Rule 803(4) supersedes prior Alabama authority to the effect that a physician could not relate statements made during a consultation held solely for the purpose of enabling the physician to testify"); ALASKA R. EVID. 803(4), *construed in* Smiley v. State, No. A-6130, 1998 WL 90897, at *3 n.1 (Alaska App. March 4, 1998) (unpublished) (holding that the motive of the declarant must coincide with the rationale behind Rule 803(4)—the declarant's statements must be motivated by the need to give truthful information in furtherance of

diagnosis or treatment); ARIZ. R. EVID. 803(4), *reviewed by* State v. Robinson, 735 P.2d 801, 809 (Ariz. 1987) (explaining the rationales behind both the federal rule and the Arizona rule as identical); ARK. R. EVID. 803(4), *analyzed in* Collins v. Hinton, 937 S.W.2d 164, 168 (Ark. 1997) (determining that testimony given by either a treating or examining physician regarding medical treatment or diagnosis is admissible); COLO. R. EVID. 803(4), *reviewed in* People v. King, 765 P.2d 608, 609 (Colo. Ct. App. 1988) (holding that the declarant's motive in making the statements to a non-treating physician must be consistent with the rationale of the rule before they may be admitted); CONN. R. EVID. 803(4), *construed in* George v. Ericson, 736 A.2d 889, 896 (Conn. 1999) (holding that treating physicians and physicians retained for trial may testify); DEL. R. EVID. 803(4) (stating that "Rule 803(4) . . . tracks F.R.E." in the historical notes); HAW. R. EVID. 803(b)(4) (providing that, "[t]his exception, which is identical with FED. R. EVID. 803(4), liberalizes the common law rule that admitted only statements made for the purpose of medical treatment" in the commentary accompanying the rule); IND. R. EVID. 803(4), *construed in* McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996) (holding that the declarant's motivation for seeking diagnosis or treatment must coincide with the rule's rationale); IOWA R. EVID. 803(4), *reviewed in* State v. Tracy, 482 N.W.2d 675, 681 (Iowa 1992) (providing that the declarant's motive must be consistent with the rationale of Rule 803(4), thereby alleviating the risk of untruthful statements); KY. R. EVID. 803(4), *explained in* Drumm v. Commonwealth, 783 S.W.2d 380, 384-85 (Ky. 1990) (adopting Federal Rule of Evidence 803(4), thereby eliminating the distinction between examining and treating physicians); ME. R. EVID. 803(4) (adopting the federal rule's language verbatim); MINN. STAT. ANN. R. EVID. 803(4) (adding that there is no longer a distinction between treating and examining physicians in the advisory committee notes); MONT. R. EVID. 803(4) (adopting the federal rule verbatim), *construed in* State v. Arlington, 875 P.2d 307, 316 (Mont. 1994) (holding that the motive of the declarant in making the statement must be to seek medical treatment); NEB. REV. STAT. § 27-803(3) (adopting the federal rule verbatim), *explained in* Vacanti v. Masters Elecs. Corp., 514 N.W.2d 319, 324 (Neb. 1994) ("At the heart of this hearsay exception lies statements made by a patient to a treating physician."); NEV. REV. STAT. ANN. § 51.115, *reviewed in* Felix v. State, 849 P.2d 220, 249 (Nev. 1993) (deciding that the statements must be necessary for treatment or diagnosis, and not made for investigation purposes); N.M. R. EVID. 11-803(D), *analyzed in In re* Esperanza M., 955 P.2d 204, 207-08 (N.M. Ct. App. 1998) (considering it immaterial whether an examination was part of an investigation, as long as it was for diagnosis and treatment); N.C. GEN. STAT. R. EVID. 803(4), *explained in* State v. Stafford, 346 S.E.2d. 463, 467 (N.C. 1986) (holding that if the sole purpose of the physician's examination is for testimony at trial, statements made by the declarant are inadmissible because they lack reliability); N.D. R. EVID. 803(4) (detailing in the explanatory note accompanying the state rules that the rules were adopted from the federal rules); OHIO R. EVID. 803(4) (observing that the rule "extends the common law doctrine to admit statements made to a physician without regard to the purpose of the examination or need for the patient's history" in the accompanying commentary); OR. REV. STAT. R. EVID. 803(4), *analyzed in* State v. Logan, 806 P.2d 137, 139 (Or.

Ct. App. 1991) (pointing out that the rule is based on the belief that the statements will be truthful and reliable when a patient is seeking diagnosis or treatment); TEX. R. EVID. 803(4), *explained in* Syndex Corp. v. Dean, 820 S.W.2d 869, 873 (Tex. App. 1991) (providing that the statements do not have to be made to a physician, so long as they are made for medical treatment); UTAH R. EVID. 803(4), *explained in* Julian v. State, 966 P.2d 249, 256 (Utah 1998) (characterizing this exception as "the 'treating physician' exception"); WASH. R. EVID. 803(a)(4) (providing that "[s]tatements made to a treating or non-treating physician . . . [may be admitted] for the purpose of proving the truth of the matter asserted" in the accompanying commentary); W. VA. R. EVID. 803(4), *reviewed in* State v. Edward, 398 S.E.2d 123, 136 (W. Va. 1990) ('"[T]he declarant's motive in making the statement must be consistent with the purposes of promoting treatment.'"); WIS. STAT. ANN. § 908.03(4) (1999), *explained in* Thompson v. Nee, 107 N.W.2d 150, 152 (Wis. 1961) (forbidding admission of statements made to a doctor solely employed for testimony); WYO. R. EVID. 803(4) (adopting verbatim the language of the federal rule without any commentary as to whether a distinction is made between an examining or treating physician).

Additionally, while not adopting the language of Federal Rule 803(4) verbatim, 10 states have adopted the spirit of the Federal Rule. *See* FLA. STAT. ANN. § 90.803(4) (admitting "[s]tatements made for purposes of medical diagnosis or treatment *by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe* medical history") (emphasis added); GA. R. EVID. CODE § 24-3-4 (permitting that statements made, "as reasonably pertinent to diagnosis or treatment *shall be admissible in evidence*") (emphasis added); IDAHO R. EVID. 803(4) (adopting the text of Federal Rule 803(4), but omitting the phrase, "or the inception or general character of the cause or external"), *construed in* State v. Moore, 965 P.2d 174, 182-83 (Idaho 1998) (holding that examining as well as treating physicians may testify); MISS. R. EVID. 803(4) (permitting the admission of statements made: "insofar as reasonably pertinent to diagnosis or treatment, *regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances substantially indicating their trustworthiness*" and defining the term "medical" to include "emotional and mental health as well as physical health") (emphasis added); N.H. R. EVID. 803(4) (adopting the test of Federal Rule 803(3) and adding that the statement may be admitted, "*regardless of to whom the statements are made, or when the statements are made, if a court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness*") (emphasis added); N.J. R. EVID. 803(c)(4) (adding that the statement must be made "in good faith"); OKLA. STAT. ANN. tit. 12 § 2803(4) (admitting "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, if reasonably pertinent to diagnosis or treatment"), *analyzed in* Kennedy v. State, 839 P.2d 667, 670 (Okla. Crim. App. 1992) (adopting the two-part test used by many other jurisdictions: that the declarant's motive must be consistent with receiving medical care and that it was reasonable for the doctor to rely on the

courts generally admit hearsay statements regarding symptoms and feelings made by a patient seeking medical treatment.[106] Like the

information to diagnose or treat); S.C. R. EVID. 803(4) (allowing admission of statements made for purposes of medical treatment); S.D. CODIFIED LAWS § 19-16-8 (providing admissibility of the statements "even though the declarant is available as a witness"); VT. R. EVID. 803(4) (permitting the admission of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations [are not excluded as hearsay]").

Six states make a distinction between treating and examining physicians with regard to the admissibility of hearsay. *See* KAN. CIV. PROC. CODE ANN. § 60-460(l) ("unless the judge finds it was made in bad faith, a statement of the declarant's . . . previous symptoms, pain or physical sensation, made to a physician consulted for treatment for diagnosis *with a view to treatment*, and relevant to an issue of declarant's bodily condition" is admissible) (emphasis added); 2 LA. CODE EVID. ANN. art. 803(4) (providing the statement must be made in connection with treatment); MICH. R. EVID. 803(4) (providing the statement must be made in connection with treatment and necessary to diagnosis and treatment); PA. R. EVID. 803(4) (distinguishing in the comment that the Pennsylvania rule differs from the federal rule because "[s]tatements made to persons retained solely for the purpose of litigation are not admissible under this rule"); R.I. R. EVID. 803(4) (excluding statements "made to a physician consulted solely for the purposes of preparing for litigation or obtaining testimony for trial"); TENN. R. EVID. 803(4) (providing in the advisory commission comment that "[t]he declaration must be for both diagnosis and treatment").

Finally, 6 states have not adopted any formal rules regarding the admissibility of statements made to physicians offered for the truth of the matter stated. *See* Johnson v. Aetna Life Ins. Co., 34 Cal. Rptr. 484, 487 (1963) (holding that statements made to physicians regarding the cause of injury for purposes of diagnosis are admitted to show basis of opinion, but not for truth of matter asserted); Borowicz v. Seuring Transit Co., 240 N.E.2d 314, 319 (Ill. App. Ct. 1968) (citing the common-law exception to the rule against hearsay for statements made to physicians in the course of diagnosis or treatment.) Commonwealth v. Costello, 582 N.E.2d 938, 941 (Mass. 1991) (recognizing the common-law exception to the hearsay rule if statements are made for the purpose of obtaining medical treatement) (citing P.J. LIACOS, MASSACHUSETTS EVIDENCE 346 (5th ed. 1981)); State v. Evans, 992 S.W.2d 275, 283 n.6 (Mo. Ct. App. 1999) (admitting statements made to treating psychiatrists under the common-law exception to the hearsay rule); State v. Bailey, 675 N.Y.S.2d 706, 708 (N.Y. App. Div. 1998) (determining that statements contained in hospital records may be admissible under the guise of the business records exception if they are germane to medical treatment); Jenkins v. Commonwealth, 492 S.E.2d 131, 134 (Va. 1997) (stating that Virginia has not adopted a rule similar to Federal Rule 803(4) and declining to adopt a similar rule judicially in a child molestation case).

106. *See, e.g.*, Cassidy v. State, 74 Md. App. 1, 25, 536 A.2d. 666, 678 (1988) (observing that most jurisdictions have admitted statements of then existing medical

Supreme Court, Maryland courts emphasize the declarant's/patient's underlying motivation of self-preservation, which guarantees the accuracy of statements made to treating physicians.[107]

Unlike many jurisdictions, however, Maryland differentiates statements made to examining[108] physicians from those made to treating[109] physicians.[110] The court of appeals considered this distinction in *Candella v. Subsequent Injury Fund.*[111] In *Candella*, the plaintiff, a maid, sought recovery for an electric shock she received while attempting to turn off her employer's vacuum.[112] Bringing her claim before the Workmen's Compensation Committee, the plaintiff of-

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conditions made to doctors because of the additional guarantee of trustworthiness); Adams v. Benson, 208 Md. 261, 267, 117 A.2d 881, 883 (1955) (stating, among other things, that a doctor may testify to a patient's statements as to injury, symptoms, and feelings).

107. *See, e.g., Cassidy*, 74 Md. App. at 26, 536 A.2d at 678 ("[N]o one would willingly risk medical injury as a result of improper treatment by withholding necessary data or furnishing false data to the physician who would determine the course of treatment on the basis of that data.").

108. Traditionally, an examining physician is a medical professional consulted primarily to qualify as an expert for litigation. *See* MCLAIN, *supra* note 52, § 2.803(p), at 255. Some courts have also referred to examining physicians as non-treating physicians. *See generally Cassidy*, 74 Md. App. at 28, 536 A.2d at 679 (1988) ("Maryland exempted from the evidentiary imprimatur statements made to a non-treating physician, such as an expert witness preparing testimony for trial.") (citing Parker v. State, 189 Md. 244, 249, 55 A.2d 784, 786 (1947)). For consistency and clarity, this Comment will use the term examining physicians.

109. As the name implies, a treating physician is one who actually performs treatment or to whom individuals describe their ailments in order to facilitate treatment. Therefore, any statements that are reasonably pertinent to treatment or diagnosis in contemplation of treatment are admissible. *See* MD. R. EVID. 5-803(b)(4) (admitting statements "made for purposes of medical treatment or medical diagnosis in contemplation of treatment"); MCLAIN, *supra* note 52, § 2.803(p), at 255 (pointing out that Maryland case law distinguishes between statements for purposes of treatment and those made for purposes of diagnosis or for litigation). However, such statements may also be admissible if the statement was made by a patient's "loved one" or, in the case of a child, by a parent. *See id.* § 2.803.4(q), at 256 (showing that the rules committee rejected the idea of limiting the rule to statements made only to health care providers).

110. Notwithstanding the rule against hearsay, Maryland's rules of evidence leave significant alternatives to the skillful practitioner looking to admit hearsay made to an examining physician. *See infra* Part IV.A and accompanying text; *see also infra* Part III.C.

111. 277 Md. 120, 353 A.2d 263 (1976).

112. *See id.* at 122, 353 A.2d at 264.

fered the expert testimony of a non-treating psychiatrist she visited in preparation of litigation,[113] along with hearsay statements she made during the examination.[114] The trial court overturned the Worker's Compensation Commission's decision to admit the testimony,[115] and the court of appeals, granting certiorari prior to consideration of the case by the court of special appeals, affirmed the trial court's ruling.[116]

The court of appeals concluded that statements made to examining physicians lack the indicia of reliability accompanying those made to a treating physician.[117] Although recognizing that other jurisdictions disagree with its perspective,[118] the court refused to deviate from its "more restrictive rule" of complete exclusion of hearsay statements made to examining physicians.[119] Discussing several indicators of untrustworthiness,[120] the court paid particular attention to the underlying purpose of the examination, commenting, "that appellant related the history to the psychiatrist knowing that it was

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113. *See id.* at 122, 126, 353 A.2d at 264, 267 (noting that the plaintiff called a psychiatrist that she had been referred to by her attorney, but who never treated her).

114. *See id.* at 126, 353 A.2d at 267 (observing that "the statements on which the physician's conclusions were based cannot withstand the close scrutiny of hearsay testimony").

115. *See id.* at 123, 353 A.2d at 265 (explaining that the trial court struck the testimony because it was based on the case history supplied by the patient for the purpose of qualifying the doctor as an expert rather than for obtaining treatment).

116. *See id.* at 121-22, 353 A.2d at 264.

117. *See id.* at 124, 353 A.2d at 265-66.

118. *See id.* at 124, 353 A.2d at 266. The court discussed that other jurisdictions allow a non-treating doctor to testify as to the history received from a patient and the conclusions made therefrom. *See id.* (citing Adams v. Benson, 208 Md. 261, 267-69, 117 A.2d 881, 883-84 (1955)). However, the Maryland courts consider such statements as untrustworthy because the patient knows that the statements "are being received primarily to enable the physician to prepare testimony on his behalf rather than for purposes of diagnosis and treatment." *Id.* at 124, 353 A.2d at 265-66.

119. *See id.* (recognizing that there has been some criticism of Maryland's rule) (citing *Adams*, 208 Md. at 267-69, 117 A.2d at 883-84); *see also* Parker v. State, 189 Md. 244, 249, 55 A.2d 784, 786 (1947) (discussing Maryland's exclusion of hearsay statements made by litigants to non-treating physicians for the purpose of qualifying a doctor as an expert).

120. *See Candella*, 277 Md. at 126, 353 A.2d at 267 (discussing the low probative value of the evidence, the subjective knowledge of the plaintiff that no treatment would be rendered, and the nature of the expert's conclusions in light of his discipline).

merely for the purpose of qualifying him as a witness on her behalf . . . . Clearly, the statements on which the physician's conclusions were based cannot withstand the close scrutiny of hearsay testimony mandated by our prior decisions."[121]

One year later, however, the Court of Appeals of Maryland modified this exception in *Beahm v. Shortall*.[122] Again, as in *Candella*, the court considered the admissibility of hearsay statements made to an examining physician.[123] To determine liability for a collision between the plaintiff's car and the defendant's tractor, the plaintiff offered the expert testimony of a neurosurgery specialist he visited four years after the accident.[124] The plaintiff's visit to the specialist was solely to qualify him as an expert for litigation.[125] Nonetheless, the trial court admitted the physician's hearsay statements concerning the patient's symptoms as substantive evidence.[126]

Had the court of appeals in *Beahm* followed *Candella*, the opposite result would have ensued; the trial court would have committed reversible error by admitting the evidence.[127] Instead, the court of appeals adopted a new rule.[128] The court held that a doctor who examines a patient solely to qualify as an expert may not only testify as to his medical conclusions, but may also testify about the history relayed by the patient if that information formed the basis of the physician's conclusion.[129] Although the court admitted the doctor's conclusions as substantive evidence, the *Beahm* court only admitted the patient's hearsay statements with a qualifying charge to the jury; those statements could only be considered as an explanation of the basis for the conclusions, rather than for the truth of the matter

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121. *Id.*

122. 279 Md. 321, 368 A.2d 1005 (1977).

123. *See id.* at 323, 368 A.2d at 1007.

124. *See id.* at 328, 368 A.2d at 1009-10.

125. *See id.*

126. *See id.* at 328, 368 A.2d at 1010.

127. *See* Candella v. Subsequent Injury Fund, 277 Md. 120, 126, 353 A.2d 263, 267 (1976) (holding that the statements on which the physician's conclusions were based were inadmissible).

128. Although the court took a broader approach than it had in *Candella*, it recognized that there are even more expansive approaches used in other jurisdictions and in the federal courts, under the Federal Rules of Evidence. *See id.* at 327 n.5, 368 A.2d at 1009 n.5 (refusing to reach as far as the federal rule by allowing the medical history given by a patient to a non-treating physician to be admissible as substantive evidence). For the text of Federal Rule 803(4), see *supra* note 105 and accompanying text.

129. *See Beahm*, 279 Md. at 327, 368 A.2d at 1009.

asserted.[130]

Applying this new rule, the court of appeals held that the trial court committed error by admitting the evidence.[131] Yet, even though the trial court failed to instruct the jury with a qualifying charge as to those statements,[132] the judgment of the trial court was nonetheless affirmed because the court of appeals considered the error harmless.[133]

As Maryland courts began admitting statements which formed the basis of an examining physician's expert opinion, the Court of Special Appeals of Maryland reinforced the narrowness of the medical treatment hearsay exception in *Cassidy v. State*.[134] There, three days after a child was allegedly abused, a representative of Child Protective Services brought the victim to a physician for examination.[135] Recognizing several signs of child abuse, the doctor repeatedly asked the victim to identify the perpetrator of the acts.[136] The child responded "Daddy" on all five occasions, and the court concluded that the defendant, the boyfriend of the victim's mother was the person to whom the child referred.[137]

While conceding the admissibility of statements concerning the cause or external source of a condition as a hearsay exception,[138] the court excluded the victim's identification[139] of her mother's boyfriend as the abuser and reversed his conviction for child abuse and

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130. *See id.*

131. *See id.* at 329, 368 A.2d at 1010.

132. *See id.* The court conceded that the plaintiff could have elicited such evidence through a hypothetical. *See id.* at 329 n.7, 368 A.2d at 1010 n.7 (citing Rosello v. Friedel, 243 Md. 234, 242, 220 A.2d 537, 541 (1966) (citing Wilhelm v. State Traffic Comm'n, 230 Md. 91, 97, 185 A.2d 715, 717 (1962))). For a discussion of this technique and how it can be used to circumvent the rule against hearsay, see *infra* Part IV.A.

133. *See id.* at 332, 368 A.2d at 1012 ("The testimony of Dr. Russo which was admitted in error . . . was not 'substantially injurious' so as to have a prejudicial effect on the outcome of the case.").

134. 74 Md. App. 1, 8-9, 536 A.2d 666, 669-70 (1988).

135. *See id.* at 6, 536 A.2d at 668.

136. *See id.*

137. *See id.* at 5, 7, 536 A.2d at 668, 669.

138. *See id.* at 26, 536 A.2d at 678 (citing Fisher Body Div. v. Alston, 252 Md. 51, 54-55, 249 A.2d 130, 132-33 (1969); Riddle v. Dickens, 241 Md. 579, 581, 217 A.2d 304, 306 (1966)).

139. However, "[w]hen there is a danger that an assault victim may have contracted a communicable disease, of course, the identity of the assailant may take on significant medical pertinence." *Cassidy*, 74 Md. App. at 34 n.14, 536 A.2d at 682 n.14.

criminal assault.[140] Focusing on the subjective knowledge of the declarant,[141] the court concluded: "[o]nce the perceived end purpose of the examination moves beyond the medical treatment of a physical ailment, the reason for this particular exception ceases to exist the fear that a doctor will do a wrong and harmful thing to the declarant's body."[142]

The *Cassidy* court criticized the practice of admitting statements made to examining physicians as substantive evidence because these admissions disregarded the declarant's subjective intent,[143] minimized guarantees of trustworthiness accompanying such statements,[144] and made "nonsensical distinctions between the doctor's recommendation as to social disposition and the social worker's recommendation as to the same thing on the same facts."[145]

In contrast to *Cassidy*, in *In re Rachel T.*,[146] the court of special appeals vacated the trial court's decision not to admit the victim's statements made to a social worker, and remanded the case to the trial court to consider the statements.[147] In that case, the State suspected the victim's father abused her.[148] Finding several signs of possible sexual abuse, the child's attending physician referred her to a

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140. *See id.* at 50, 536 A.2d at 690.

141. *See id.* at 29, 536 A.2d at 680 (discussing the doctor's inability to know the child's subjective understanding of the examination).

142. *Id.* at 34, 536 A.2d at 682.

143. *See id.* at 43-46, 536 A.2d at 686-88 (discussing United States v. Renville, 779 F.2d 430 (8th Cir. 1985)). The *Cassidy* court concluded that, by admitting statements made to examining physicians as substantive evidence, the *Renville* court ignored the declarant's subjective belief, resulting in the hearsay exception's departure from its common-law origin. *See Cassidy*, 74 Md. App. at 44-45, 536 A.2d 687-88.

144. *See id.* at 43, 536 A.2d at 686 (criticizing the *Renville* court for making "medical pertinence" the "key" issue). According to the *Cassidy* court, the federal approach hinges on the assumption that, "[s]ince doctors may be assumed not to want to waste their time with unnecessary history, the fact that a doctor took the information is *prima facie* evidence that it was pertinent." *Id.* at 47, 536 A.2d at 688; *see also id.* at 47, 536 A.2d at 688-89 (criticizing the conclusion in *People v. Wilkins*, 349 N.W.2d 815, 817 (Mich. App. 1984) that "facts reliable enough to serve as a basis for medical diagnosis are also reliable enough to escape the hearsay proscription . . ."). Disagreeing with this perspective, the court maintained Maryland's common-law position of the difference between a court's reliance on hearsay and an expert's reliance on hearsay, finding no necessity to equate the two. *See id.* at 47, 536 A.2d at 689.

145. *Id.* at 49, 536 A.2d at 689.

146. 77 Md. App. 20, 549 A.2d 27 (1988).

147. *See id.* at 40, 549 A.2d at 37.

148. *See id.* at 27, 549 A.2d at 30.

pediatric gynecologist.[149] Unwilling to speak to the gynecologist, the child spoke to a female social worker in his office, claiming that she had a "secret" with her father "and that if she told her Mom her father would be in big trouble."[150] Extending the medical treatment hearsay exception to the social worker,[151] the court concluded that Rachel's comments should have been admitted as substantive evidence.[152]

Although affirming *Cassidy*'s emphasis on the subjective belief of the declarant,[153] the court nonetheless distinguished the two cases.[154] Unlike *Cassidy*,[155] the *Rachel T.* court concluded that the cognitive development of the nearly five year old victim allowed her to comprehend the gravity of the situation.[156] To bolster this conclusion, the court further relied on the sophistication of the child's statement[157]— the child understood the concept of a secret, the importance of keeping it,[158] and the severity of the situation.[159] Furthermore, the social worker explained the consequences of Rachel's statements.[160] When meeting with Rachel, the social worker explained the reason for the pediatric gynecologist's examination,[161] noting that the doctor would treat her in accordance with the infor-

149. *See id.* at 24-25, 549 A.2d at 29.
150. *Id.* at 25, 549 A.2d at 30.
151. *See id.* at 33, 549 A.2d at 33.
152. *See id.* at 36, 549 A.2d at 35 (holding that the trial court erroneously excluded the statements).
153. *See id.* at 34, 549 A.2d at 34 (characterizing the belief of the declarant as "vitally important").
154. *See id.* at 33-36, 549 A.2d at 33-35.
155. *See id.* at 34, 549 A.2d at 34 (noting that the *Cassidy* declarant was two years old).
156. *See id.* at 35, 549 A.2d at 34 (noting the probability that Rachel was frightened at the unexplained appearance of blood in her panties, resulting in her ability to recognize her own physical self-interest and understand that her statements would be used to provide medical treatment); *see also* Jee, *supra* note 26, at 568 n.69 (recognizing that Maryland courts make case-by-case determinations using the age of the declarant as a factor in determining cognitive development).
157. *See Rachel T.*, 77 Md. App. at 35, 549 A.2d at 34 ("The content of Rachel's statement itself indicates a certain degree of sophistication.").
158. *Cf.* Cassidy v. State, 74 Md. App. 1, 6, 536 A.2d 666, 668 (1988) (noting that, in response to inquiries about the perpetrator, the child said, "Daddy").
159. *Compare Rachel T.*, 77 Md. App. at 23-24, 549 A.2d at 29 (describing the child's vaginal bleeding), *with Cassidy*, 74 Md. App. at 6, 536 A.2d at 668 (describing the child's three day-old bruises).
160. *See Rachel T.*, 77 Md. App. at 35, 549 A.2d at 34.
161. *See id.* In *Cassidy*, no such explanation took place.

mation she conveyed.[162]

The court also relied on a footnote in *Cassidy*[163] to distinguish the two cases.[164] The *Rachel T.* court noted that the evidence of abuse in *Cassidy* was external and not indicative of the transmission of a communicable disease.[165] In contrast, Rachel faced the possibility of contracting a communicable disease given the nature of the evidence of abuse.[166]

The *Rachel T.* court also concluded that the victim's pediatric gynecologist, who performed no treatment but referred Rachel to a social worker, nonetheless qualified as a treating physician.[167] Given the victim's impetus for visiting the doctor,[168] and the physician's need for an accurate medical history for effective treatment,[169] the court concluded that the hearsay declarations were fully admissible.[170] Therefore, although the treating physician remembered seeing the victim only once,[171] and the statement was made to a social worker referred by the witness, rather than directly to the physician,[172] the court determined the trial court erroneously excluded the statements.[173]

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162. *See id.* Therefore, this notification ensures that the traditional guarantee of trustworthiness underlying this exception to the rule against hearsay is present; the declarant is informed that her statements will affect the success of the impending medical treatment. For a discussion of this consideration, see *supra* note 59.

163. *See supra* note 139 and accompanying text.

164. *See Rachel T.*, 77 Md. App. at 36, 549 A.2d at 35.

165. *See id.* at 34-35, 549 A.2d at 34.

166. *See id.* at 36, 549 A.2d at 35.

167. *See id.* at 35, 549 A.2d at 35 ("[The pediatric gynecologist] was a 'treating' physician because Rachel's regular pediatrician referred Rachel and her parents in order to ascertain the cause of Rachel's bleeding.").

168. The court specifically noted that the victim did not meet with the pediatrician in preparation of litigation. *See id.* at 35, 549 A.2d at 35.

169. *See id.* at 36, 549 A.2d at 35. The court pointed out that "[a]scertaining the identity of the abuser was also important . . . because effective treatment might have required Rachel's removal from the home." *Id.*

170. *See id.* at 33, 549 A.2d at 33 (determining that the statements were admissible under the medical treatment and business record exceptions to the rule against hearsay).

171. *See id.* at 36, 549 A.2d at 35.

172. *See id.* The court emphasized that this interdisciplinary approach was common practice in the office and that the gynecologist relied directly on statements made to social workers in making his diagnosis and prescribing treatment. *See id.*

173. *See id.*

In *Low v. State*,[174] the Court of Special Appeals of Maryland muddied the distinction between treating and examining physicians by reversing the petitioner's convictions for second-degree rape, second-degree sexual offense, and child abuse because the trial court admitted the victim's hearsay statements made to a child abuse expert.[175] At trial, the victim reluctantly testified that, the "appellant touched her in a 'private part' in the 'front' and in the 'back,' and that he 'stuck something into me,' which hurt."[176] A pediatrician and child abuse expert examined the twelve year old victim and concluded, based on the physical evidence, that someone abused the child.[177] During the examination, the child stated that the appellant "put his penis in her vagina and in her 'butt' more than ten times."[178] In response, the appellant contended that the allegation resulted from his disciplining the child.[179] On cross-examination, the child admitted several lies, including at least one concerning the appellant.[180] A jury found the appellant guilty of all three offenses and sentenced him to fifty-five years of incarceration.[181]

The court of appeals concluded that the doctor was an examining physician.[182] Therefore, according to the court, the jury could not consider the doctor's recitation of hearsay statements as substantive evidence.[183] Describing her as essentially a "part of the prosecution team,"[184] the court found reversible error in the trial court's

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174. 119 Md. App. 413, 705 A.2d 67, *cert. denied*, 350 Md. 278, 711 A.2d 870 (1998).

175. *See id.* at 416-17, 705 A.2d at 68-69.

176. *Id.* at 416, 705 A.2d at 69.

177. *See id.*

178. *Id.*

179. *See id.*

180. *See id.*

181. *See id.* at 416-17, 705 A.2d at 69.

182. *See Low*, 119 Md. App. at 425, 705 A.2d at 73. The dissent, however, noted there was evidence that, had the child required treatment, the doctor would have administered it, and that the trial court accordingly found sufficient indicia of a treating physician under Maryland Rule 5-803(4). *See id.* at 428-32, 705 A.2d at 75-76 (Alpert, J., dissenting). The majority emphasized that although the doctor comprehensively reviewed the child's physical health (i.e. by examining eyes, ears, nose, and skeletal system), the Department of Social Services referred the child for a complete medical examination, rather than treatment. *See id.* at 423, 705 A.2d at 72 (revealing the physician's subjective belief as to the purpose of the examination). *But see id.* at 424, 705 A.2d at 72 (labeling the subjective belief of the doctor as "immaterial").

183. *See id.* at 420, 705 A.2d at 70.

184. *Id.* at 425, 705 A.2d at 73. In effect, the court equated statements to a social worker or pediatric gynecologist with statements made to physicians that are

unlimited admission of the victim's statements.[185]

In doing so, the court emphasized the absence of evidence tending to show the child's awareness of the importance of the medical examination.[186] According to the court, this lack of awareness would not create the impression that the doctor would be rendering treatment.[187] Thus, the court concluded that the victim did not contemplate treatment when she advised her physician.[188] Rather than affirming the factual conclusions of the trial court,[189] the court reasoned that:

> A child of twelve years, who has never before been seen by a doctor (and will never again be seen by this doctor), who is poked at and prodded in virtually every area of her body, and who is asked a multitude of questions, some quite sensitive in nature, is most likely, at the very least, an extremely intimidated little girl, who has little grasp of why she was sent to this strange doctor in a strange setting. If anything,

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consulted solely in preparation of litigation with regard to the lack of trustworthiness Maryland courts find in hearsay.

185. *See id.* at 426, 705 A.2d at 73-74.

186. *See id.* at 422, 705 A.2d at 72. *But see id.* at 428, 705 A.2d at 74-75 (Alpert, J., dissenting) (noting that the standard procedure of the doctor was to discuss the importance of the examination with the patient and that, at trial, the doctor testified that "[s]he had no reason to think she had done otherwise with [the victim]").

187. *See id.* at 424, 705 A.2d at 73. One should note, however, that when a trial court considers the admissibility of statements made to a treating physician in pursuit of treatment, it does not make a separate consideration of whether the patient subjectively did conclude or reasonably should have concluded that the success of her treatment hinged on the veracity of her statements. *But see id.* at 413, 425, 705 A.2d 67, 73 (1998); *In re* Rachel T., 77 Md. App. 20, 34, 549 A.2d 27, 34 (1988); Cassidy v. State, 74 Md. App. 1, 29, 536 A.2d 666, 680 (1988) (stating that a patient's subjective purpose is "vitally important").

188. *But see Low,* 119 Md. App. at 433-34, 705 A.2d at 77 (Alpert, J., dissenting). In his dissent, Judge Paul Alpert noted that a litigant may prove subjective purpose, like intent or motive, through extrinsic evidence if direct and objective proof does not exist. *See id.* (Alpert, J., dissenting). Therefore, because Judge Alpert emphasized Janine's consciousness throughout the examination, he did not discuss her subjective belief with her doctor. *See id.* (Alpert J., dissenting). Given the extent of the examination, he believed the court could draw an equally permissible inference that she fully understood that the examination exceeded an examination for sexual abuse. *See id.* (Alpert J., dissenting). *But see id.* at 424, 705 A.2d at 73 (characterizing such possible treatment rendered as "incidental and secondary to [the physician's] primary role as a forensic examiner").

189. *But see supra* note 14.

> [the victim] had a right to be downright suspicious as to why the doctor was examining her in body areas other than those stemming from the complained of incident, and that, in our opinion, would have promoted [the victim]'s distrust of and perhaps dishonesty with the doctor much more than it would have facilitated a relationship of trust.[190]

In so concluding, the *Low* court apparently followed the restrictiveness of *Cassidy*,[191] even though there were factual similarities to *Rachel T.*[192] For instance, one of the major concerns in *Cassidy* was the victim's young age and possible inability to understand the cause-and-effect relationship between statements to a doctor and the ensuing treatment.[193] Conversely, the court in *Rachel T.* seemed to emphasize the ability of that particular five year old victim to understand the importance of the statements in her treatment.[194] Therefore, to be consistent with Maryland case law, without reversing its own decision in *Rachel T.*, the court of special appeals should have recognized that the twelve year old victim in *Low* realized the gravity of the examination and hence, appreciated the cause-and-effect relationship between her statements and treatment. Although the court concluded otherwise,[195] being poked and prodded "in virtually every area of her body" would likely indicate such gravity to even the most "intimidated little girl."

Yet, rather than concentrating on the child's ability to understand the purpose underlying the treatment, the *Low* court highlighted the victim's inclination to deceive the physician.[196] Notwithstanding the victim's likely understanding of the situation's

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190. *Low*, 119 Md. App. at 424-25, 705 A.2d at 73.

191. For a discussion of *Cassidy*, see *supra* notes 134-45 and accompanying text. While the *Low* majority agreed there were factual dissimilarities between *Low* and *Cassidy*, the court found the victim's reticence to testify in *Low* similar to *Cassidy*, where the victim did not testify. *See id.* at 417 n.1, 705 A.2d at 69 n.1. It is interesting to note, however, that the United States Supreme Court in *White v. Illinois* concluded that the availability of the declarant is irrelevant when the evidence falls under a firmly rooted hearsay exception, such as the medical treatment exception. *See supra* Part III.A; *see also* MD. R. EVID. 5-803(b)(4).

192. For a discussion of *Rachel T.*, see *supra* notes 146-73 and accompanying text.

193. *See Cassidy*, 74 Md. App. at 30, 536 A.2d at 680.

194. *See Rachel T.*, 77 Md. App. at 35, 549 A.2d at 34.

195. *See Low*, 119 Md. App. at 424-25, 705 A.2d at 73 (concluding that the victim was very "intimidated" and likely had little grasp as to why she was sent to the doctor).

196. *See id.* at 425, 705 A.2d at 73.

consequences, the court held, as a matter of law, that the victim subjectively believed that her physician was an examining one, on whose observations her treatment would not rely.[197] Apparently in Maryland, there is an undefined age where appreciation of the cause-and-effect relationship between statement and treatment becomes a warped knowledge that insincere statements may lead to recovery in litigation or conviction for child abuse.[198] Despite this inclination to deceive, these hearsay declarations would be admissible to substantiate an expert opinion under *Beahm v. Shortall*.[199]

Furthermore, the *Low* court expressed concern over the ensuing lack of contact between the doctor and her patient.[200] However, no such concern appeared in *Rachel T.* In fact, the *Rachel T.* court found the statements made to the child abuse expert admissible, even though the physician only saw the child once.[201] Unlike the *Rachel T.* court, the *Low* court indicated that the one-time visit weakened the statement's trustworthiness.[202] Therefore, to the numerous unsettled questions concerning the use of hearsay statements in contemplation of treatment, the *Low* court added the existence or possibility of follow-up visits as a factor in determining the trustworthiness of hearsay statements. The results of this logic add more uncertainty: statements during a five-minute, one-time visit to a treating physician are admissible, but those made to a trusted, oft-visited examining physician who does not have the good fortune of finding an ailment that requires several visits, may not be admissible.

Although the *Low* court did not explicitly require treatment of the declarant for hearsay statements to be admitted under the ex-

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197. *See id.* (finding there was no evidence that the victim had the subjective intent to communicate potential ailments in "hopes of further treatment").

198. *See Cassidy*, 74 Md. App. at 30, 536 A.2d at 680 (criticizing the State's attempt to bridge this "unbridgeable gap in the orthodox syllogism" created by these competing considerations). The *Cassidy* court found that a child's lack of motive to fabricate is "quite beside the point," in that the focus is on the appreciation of the cause-and-effect relationship between statements and treatment. *Id. But see supra* note 194 and accompanying text.

199. 279 Md. 321, 368 A.2d 1005 (1977); *see infra* notes 264-77 and accompanying text.

200. *See Low*, 119 Md. App. at 424-25, 705 A.2d at 73 (noting that a child would be intimidated by a "strange doctor in a strange setting" and a child would not understand that further treatment would be rendered unless the doctor specifically communicated these intentions).

201. *See Rachel T.*, 77 Md. App. at 36, 549 A.2d at 35.

202. *See Low*, 119 Md. App. at 424-25, 705 A.2d at 73.

ception, its holding hints at the possibility that, in fact, actual treatment may be required. In the words of the *Low* court:

> At no time did [the child abuse expert] render treatment to Janine, and the doctor's subjective observation that she might have rendered treatment had treatment been necessary should not control the determination of her role for purposes of the admission of hearsay evidence. Put in general terms, the mere ability to render treatment does not automatically give rise to the inference that one is categorically a "treating physician" as Rule 5-803(b)(4) contemplates the term. Something more is needed than the mere possibility that further treatment could be rendered. If that were not the case, then any [Department of Health and Human Services] doctor who examines a child would qualify as a treating physician within 5-803(b)(4). Or, taken to its utmost extreme, any doctor who examines an individual could arguably "treat" that individual if necessity called for it. Would, then, every doctor who examines a person qualify as a "treating physician?" Certainly not, or the rule would be rendered utterly meaningless.[203]

The difficulty in precisely defining this "something more" underscores the general difficulty and arbitrariness of determining the demarcation between treating and examining. However, under the federal rules of evidence, this distinction is unnecessary.

C. An Alternative Treatment—The Federal Perspective

Unlike Maryland, federal courts do not distinguish between statements made to examining and treating physicians, opting instead to fully admit all statements pertaining to bodily condition or medical history when made in relation to diagnosis or treatment.[204] Finding jury instructions limiting the admissibility of the statements ineffective,[205] the federal courts abandoned any restrictions on the admissibility of hearsay statements to examining physicians.[206] The

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203. *Id.* at 425-26, 705 A.2d at 73.

204. *See supra* note 105 for the text of Federal Rule 803(4).

205. *But see infra* note 275 and accompanying text.

206. According to the Advisory Committee Note to Federal Rule of Evidence 803(4):

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these

federal system is intended to admit statements made to examining physicians,[207] statements made to non-physicians consulted for medical treatment or diagnosis,[208] and statements by someone other than the patient to obtain treatment for the patient.[209]

This change also has significant practical consequences. If an expert's opinion is admissible, even though it is based on an inadmissible hearsay statement,[210] the logical conclusion is that a jury could likewise depend on the statement.[211] According to one noted commentator: "[u]nder prior practice [in which courts distinguished between examining and treating physicians], contrived evidence was avoided at too great a cost and in substantial departure from the realities of medical practice."[212] This polar opposite of the Maryland perspective on the medical treatment hearsay exception is evidenced by two seminal cases in the United States Court of Ap-

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> statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of [Federal] Rule [of Evidence] 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

FED. R. EVID. 803(4), Advisory Committee's note; *see also* FED. R. EVID. 703 (providing for the admission of facts or data upon which an expert in a particular field would ordinarily rely, even though otherwise inadmissible into evidence). For a discussion of the general effectiveness of limiting instructions, see *infra* Part IV.B.

207. *See* FED. R. EVID. 803(4) (stating that examinations as required by Federal Rule of Civil Procedure 35, fall within this hearsay exception and are normally admitted).

208. *See, e.g.*, MCCORMICK, *supra* note 26, § 277, at 431 (noting that statements made to non-physicians and nurses are included under the Federal Rule); MCLAIN, *supra* note 52, § 803(4).2, at 370 (same).

209. *See, e.g.*, MCLAIN, *supra* note 52, § 803(4).2, at 370 (noting that the federal rules allow admission of statements made by persons assisting the patient in obtaining medical assistance).

210. Such an expert opinion is admissible under Maryland's rules of evidence. *See supra* notes 128-30 and accompanying text. Notably, the statements underlying this expert opinion are likewise admissible not for the truth of the matter asserted, but solely as the basis for the opinion. *See supra* notes 129-30 and accompanying text.

211. For an illustrative example of this reasoning, see *infra* notes 215-31 and accompanying text.

212. MCCORMICK, *supra* note 26, § 278, at 432 (noting that Federal Rule of Evidence 803(4) eliminates distinctions between examining and treating physicians).

peals for the Eighth Circuit—*United States v. Iron Shell*[213] and *United States v. Renville*.[214]

In *Iron Shell*, the United States Court of Appeals affirmed the defendant's conviction for assault with intent to rape, despite his contention that the victim's statements to her physician[215] were inadmissible hearsay.[216] Here, the State alleged that the defendant attempted to rape a nine year old girl.[217] The victim claimed the defendant put his arm around her, asked her to pull her pants down, and then proceeded to pull them down himself after she refused.[218] After continuously screaming, the victim drew the attention of other community members.[219] Crying, the victim emerged from the bushes, pulling up her pants.[220] During a subsequent medical examination, the child told the doctor that a man dragged her into the bushes, attempted to muffle her screams by covering her mouth and neck, pulled many of her clothes off, and then stuck something into her vagina that hurt.[221]

The United States Court of Appeals for the Eighth Circuit applied a two-part inquiry: "first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the

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213. 633 F.2d 77 (8th Cir. 1980).

214. 779 F.2d 430 (8th Cir. 1985). For a discussion of *United States v. Renville*, see *infra* notes 232-47 and accompanying text.

215. Notably, the court mentioned its past distinction between treating and non-treating physicians, describing the latter as "a doctor who is consulted *only* in order to testify as a witness." *Iron Shell*, 633 F.2d at 83 & n.8 (emphasis added). Recognizing the abandonment of this distinction by the then newly adopted Federal Rule 803(4), the court concluded that these cases may be persuasive authority in determining whether a patient's statements are pertinent for diagnosis or treatment. *But see* Low v. State, 119 Md. App. 413, 425, 705 A.2d 67, 73 (1998) (holding that an examining physician included a pediatrician/child abuse expert).

216. *See Iron Shell*, 633 F.2d at 83. The defendant contended that the doctor acted more as an investigator than as a medical examiner by asking the victim "if the man 'had taken her clothes off.'" *Id.* at 82 n.6. The defense further argued that the answer to this question did not relatively affect the nature of the medical examination, and therefore did not result from an inquiry "'reasonably pertinent' to diagnosis or treatment." *Id.* at 83 (discussing FED. R. EVID. 803(4)).

217. *See Iron Shell*, 633 F.2d at 80.

218. *See id.* at 81.

219. *See id.* at 80.

220. *See id.* at 81.

221. *See id.* at 81-82.

physician to rely on the information in diagnosis or treatment."[222] The court first determined that the declarant's motive was consistent with the underpinnings of the rule.[223] The court, illuminating factors such as the purpose of the examination[224] and the victim's age,[225] emphasized that nothing about the victim's demeanor indicated a motive other than a patient seeking treatment.[226] Therefore, the court concluded that the victim's statements to her doctor satisfied the trustworthiness requirement.[227]

The court further concluded that the information was pertinent to the diagnosis and treatment of the victim's possible ailments.[228] Notwithstanding the defendant's argument that the doctor's questions would not affect the scope of his examination, and therefore were not pertinent to diagnosis or treatment, the court refused to find this fact dispositive.[229] According to the court, "[d]iscovering what is not injured is equally as pertinent to treatment and diagnosis as finding what is injured."[230] Again, the court based its conclusion on the doctor's subjective reliance on the state-

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222. *Id.* at 84. According to the *Iron Shell* court, these considerations are an outgrowth of the policy considerations underlying the rule. *See id.* The first prong of the test results from the desire to ensure that the patient has the requisite self-interest and motive to speak truthfully and openly. *See id.* The second prong results from the court's belief that if the information is so accurate that a doctor feels comfortable basing a life and death decision on it, then the rule against hearsay should not block its admission as substantive evidence. *See id.*

223. *See id.* ("We find no facts in the record to indicate that [the victim]'s motive in making these statements was other than as a patient seeking treatment.").

224. *See id.* The doctor testified that the underlying purposes of his examination were to treat the victim and to preserve physical evidence. *See id. But see* Low v. State, 119 Md. App. 413, 433-34, 705 A.2d 67, 77 (1998) (finding the doctor's subjective belief as to the purpose of the examination irrelevant to the determination of the trustworthiness of the victim's statement).

225. *See Iron Shell*, 633 F.2d at 84 (deferring to the trial court's determination that the victim's age of nine years did not mitigate against a finding of trustworthiness). *But see Low*, 119 Md. App. at 424-25, 705 A.2d at 73 (concluding, notwithstanding the trial court's determination, that a 12 year old girl would normally be very intimidated in such a situation and would, therefore be untrustworthy).

226. *See Iron Shell*, 633 F.2d at 84. *But see Low*, 119 Md. App. at 424-25, 705 A.2d at 73.

227. *See Iron Shell*, 633 F.2d at 85.

228. *See id.* at 84-85.

229. *See id.* at 84.

230. *Id.*

ments in determining a course of treatment.[231]

In *United States v. Renville*,[232] a case highly criticized in Maryland,[233] the United States Court of Appeals for the Eighth Circuit affirmed the defendant's convictions on two counts of child abuse.[234] In this case, the victim's half-brother testified at his own detention hearing that the eleven year old victim admitted to him that Renville sexually abused her.[235] A few weeks following the victim's removal, a physician examined the child, who recounted multiple instances of sexual behavior with the defendant.[236] However, at trial, the victim recanted her story and denied telling anyone that the defendant had abused her, aside from the Deputy Sheriff.[237] Nonetheless, a jury convicted the defendant,[238] who was sentenced to two concurrent fifteen-year terms.[239]

Although the court applied the *Iron Shell* analysis,[240] it deviated significantly from a consideration explicitly mentioned in *Iron Shell*. Although both the *Iron Shell* decision and the Advisory Committee notes to the federal rules indicate otherwise,[241] the *Renville* court

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231. *See id.* at 84-85. The court also considered Weinstein's contention that a doctor's immediate need for relevant statements constitutes prima facie evidence of the statement's pertinence. *See id.* at 85 n.11 (quoting 4 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE 803-130 (1979)). The court chose not to adopt this extreme approach, opting instead to conduct a case-by-case analysis. *See Iron Shell*, 633 F.2d at 85 n.11.

232. 779 F.2d 430 (8th Cir. 1985).

233. *See* Cassidy *v.* State, 74 Md. App. 1, 45, 536 A.2d 666, 687-88 (1988) (accusing the *Renville* court of severing the medical treatment exception to the rule against hearsay from its common-law roots).

234. *See Renville*, 779 F.2d at 441.

235. *See id.* at 432 (referring allegations of sexual abuse to the Deputy Sheriff, who conducted a further investigation and removed the victim from her home, after this testimony by the defendant).

236. *See id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.* at 436-39. *See also supra* note 222 (discussing the *Iron Shell* two-prong test).

241. According to the *Iron Shell* court, "[i]t is important to note that the statements concern *what* happened rather than *who* assaulted her. The former in most cases is pertinent to diagnosis and treatment while the latter would seldom, if ever, be sufficiently related." *Iron Shell*, 633 F.2d at 84 (citing United States v. Nick, 604 F.2d 1199, 1201-02 (9th Cir. 1979) (emphasis added)). In a subsequent footnote, the court also relied on the Advisory Committee note for the following example: "a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red

held that statements of fault are pertinent to medical treatment when the incident involves a member of the child's immediate family, and are therefore admissible to prove the truth of the matter asserted.[242] While the court conceded that, ordinarily, statements of fault made during a medical examination are not pertinent to treatment,[243] it concluded that the consideration changes when the alleged assailant is a member of the victim's immediate household.[244] The court declared that the emotional and psychological trauma accompanying child abuse by a member of the child's household,[245] the cyclical nature of child abuse,[246] and the doctor's statutory obligation to report suspected victims of child abuse supported its conclusion to affirm the defendant's conviction.[247]

IV. THE NEED FOR CHANGE

If *Renville* and *Iron Shell* had been decided under Maryland law, their outcomes would have been very different. Rather than entrusting the jury to make a credibility determination,[248] Maryland courts choose to exclude trustworthy evidence[249] simply because it involves statements to examining physicians.[250] Given the significant loop-

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light." *Iron Shell*, 633 F.2d at 84 n.10 (citing FED. R. EVID. 803(4) Advisory Committee's note).

242. *See Renville*, 779 F.2d at 436.

243. *See id.*

244. *See id.* at 436-37.

245. *See id.* at 437 (comparing sexual abuse to other examples provided by the Advisory Committee's notes, concluding that "[s]exual abuse of children at home presents a wholly different situation").

246. *See id.* at 437 n.12 (relying on the physician's testimony that child abuse will continually occur if the victim is returned to the abuser's household and that 80% of child abusers today were once abuse victims themselves).

247. *See id.* at 438.

248. Under Maryland law, determinations of witness (and, by logical extension, declarant) credibility are within the province of the jury. *See infra* Part IV.B. *But see* Low v. State, 119 Md. App. 413, 424-25, 705 A.2d 67, 73 (1998) (judging the subjective intent of the declarant).

249. Obviously, with every rule of exclusion, there is the probability that trustworthy evidence will be excluded in some cases. *See, e.g.*, Milich, *supra* note 8, at 725. Therefore, rules of exclusion must be carefully tailored to meet their intended public policy considerations.

250. *See Low*, 119 Md. App. at 419, 705 A.2d at 70 (continuing to disallow a non-treating doctor to testify (citing Candella v. Subsequent Injury Fund, 277 Md. 120, 124, 353 A.2d 263 (1976) (citing Rossello v. Friedel, 243 Md. 234, 241-42, 220 A.2d 537, 541 (1966)))); Wilhelm v. State Traffic Safety Comm'n, 230 Md. 91, 97, 185 A.2d 715, 717 (1962) ("[T]he principle that a non-treating physician may not relate the history given to him by a litigant."); Wolfinger v. Frey,

holes available to a litigant looking to evade this exception, and the existence of other assurances of trustworthiness, the treating/examining distinction does little to serve the public policy considerations generally underlying the rule against hearsay.[251]

A. Pragmatic Loopholes Undermining Maryland's Treating/Examining Physician Distinction

1. The Residual Hearsay Exception

Aside from the other exceptions to the rule against hearsay that overlap the medical treatment exception,[252] another significant loophole is the residual hearsay exception.[253] While the purpose of this hearsay exception is not to swallow the entire rule against hearsay,[254] it does provide yet another alternative to be used by those liti-

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223 Md. 184, 190, 162 A.2d 745, 748 (1960) (holding an examining doctor was "not permitted to testify with regard to, or on the basis of, the case history given to him by [the plaintiff]"); Parker v. State, 189 Md. 244, 248-50, 55 A.2d 784, 786 (1947) (holding the court properly excluded "case history" testimony of a non-treating physician who examined the patient on the day of the trial); *see also supra* notes 13-15 and accompanying text.

251. For a discussion of the policy reasons underlying this exception to the rule against hearsay, see *supra* Part II.B.

252. For a discussion of other exceptions to the rule against hearsay that overlap with the medical diagnosis or treatment hearsay exception, and a hypothetical situation in which these exceptions would affect the admissibility of such evidence, see *supra* note 60.

253. Maryland's residual hearsay exception provides:

> Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement not specifically covered by any of the foregoing [twenty-three hearsay] exceptions [enumerated in this rule] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

MD. R. EVID. 5-803(b)(24). *See also* FED. R. EVID. 805 (providing a similar residual exception for the federal courts); MD. R. EVID. 5-804(b)(5) (providing a similar provision for instances in which the declarant is unavailable).

254. For a thorough discussion of the development and debate regarding Maryland's residual hearsay exception, see MCLAIN, *supra* note 52, § 2.803.4(jj), at 268-70 (discussing legislative debate over adoption of Maryland's residual hearsay rule); Howard S. Chasanow & Jose Felipe Anderson, *The Residual Hearsay Exception: Maryland's Lukewarm Welcome*, 24 U. BALT. L. REV. 1, 24-25

gants looking to admit hearsay statements made to examining physicians; namely, the residual hearsay exception.

Maryland's residual hearsay exception is not nearly as inclusive as Rule 5-803(b)(4), however. Whereas statements made in contemplation of treatment are automatically admitted,[255] a litigant's reliance on the residual hearsay exception requires a significant showing of trustworthiness[256] and probative value.[257] The notice requirement under the residual hearsay exception also provides a procedural stumbling block not included in the general medical treatment exception to the rule against hearsay.[258] Furthermore, most courts and litigants are generally reluctant to rely on this hearsay exception, choosing to limit their emphasis on the numerous recognized exceptions.[259]

(1994) (opining that the debate regarding the adoption of Maryland's residual hearsay exception indicates that the legislature and the courts expect that, although the rule is necessary, it will be used rarely and only in exceptional circumstances).

255. Since Maryland Rule of Evidence 5-803(b)(4) requires courts to admit certain hearsay statements, this evidence is not even subject to the state provisions excluding relevant, but unfairly prejudicial evidence. *See* MD. R. EVID. 5-403 (excluding such evidence); MCLAIN, *supra* note 52, § 2.403.4, at 95 ("Rule 5-403 applies even when evidence 'may' (but not if it 'shall') be admitted under a more specific Rule.").

256. Of the requirements posed by the residual hearsay exception, this is the most difficult to meet. *See* LILLY, *supra* note 35, § 7.28, at 352 (discussing the federal residual hearsay exception). Such difficulty also arises when a litigant attempts to present evidence under the residual exception when the evidence is addressed by another existing exception. *See id.* (arguing that the residual exception should not be invoked to admit evidence that is already addressed by a recognized exception); MCLAIN, *supra* note 52, § 2.803.4(jj) at 269 (discussing the possible implications of the advisory committee note's reference to "new and presently unanticipated situations").

257. *Compare* MD. R. EVID. 5-803(b)(4) (admitting statements in contemplation of medical treatment "insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment"), *with* MD. R. EVID. 5-803(b)(24) (requiring, among other things, a showing of probative value before admission). Furthermore, "[i]t is particularly appropriate for [the state courts] to exercise this power when the fact-finder is in a good position to evaluate the reliability of the hearsay evidence." MCLAIN, *supra* note 52, § 803(24).1, at 435.

258. *Compare* MD. R. EVID. 5-803(b)(4) (allowing for the automatic admission of statements falling within the stated hearsay exception); FED. R. EVID. 803(4) (same), *with* Md. R. Evid. 5-803(b)(24) (requiring notice before employing the hearsay exception); FED. R. EVID. 805 (same); MD. R. EVID. 5-804(b)(5) (providing a residual hearsay exception when the declarant is unavailable).

259. *See* MD. R. EVID. 5-803(b)(24) Advisory Committee note ("It is intended that the residual hearsay exceptions will be used very rarely, and only in excep-

Therefore, even though the residual hearsay exception does allow the admission of especially trustworthy evidence, it offers little hope for litigants and defendants looking to admit hearsay statements made to examining physicians. In fact, one could question whether a Maryland court would ever regard statements to examining physicians to be equally as trustworthy as statements admitted under an established hearsay exception. As stated by the *Cassidy* court: "[t]he heart of the exception . . . is 'the underlying rationale . . . that the patient's statements to his doctor are apt to be sincere when made with an awareness that the quality and success of the treatment may largely depend on the accuracy of the information provided the physician.'"[260]

2. Expert Testimony

Although Maryland courts distinguish between treating and examining physicians, a practitioner can undermine the distinction's value through the effective use of expert testimony.[261] By qualifying an examining physician as an expert in a field related to the patient's injury, practitioners can effectively present otherwise inadmissible hearsay evidence.[262]

Experts qualified to offer opinion testimony[263] receive relatively

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tional circumstances."); Chasanow & Anderson, *supra* note 254, at 25 (noting that the "Maryland residual [hearsay] exceptions are more restrictive than their federal counterparts."). However, federal courts may be more likely to admit evidence under this hearsay exception. *Compare* S. Rep. No. 93-1277, at 20 (1974) (declaring that the residual hearsay exception be used "very rarely, and only in exceptional circumstances."), *with* United States v. American Cyanamid Co., 427 F. Supp. 859, 866 (S.D.N.Y. 1977) (failing to find a requirement that the hearsay exception is only applicable if extraordinary circumstances exist).

260. Cassidy v. State, 74 Md. App. 1, 28, 536 A.2d 666, 679 (1988) (correlating the trustworthiness of a patient's statement to his need and desire for treatment and care) (citing Candella v. Subsequent Injury Fund, 277 Md. 120, 124, 353 A.2d 263, 265 (1976)).

261. *See* Beahm v. Shortall, 279 Md. 321, 328-29, 368 A.2d 1005, 1009-10 (1977). Of interest is the court's recognition that the physician could testify as to the physician's conclusions based on subjective symptoms for limited purposes, such as to establish that the patient complained of those symptoms and that the doctor based the conclusions upon that information. *See id.*

262. The circumstances under which one may be so qualified would likely allow a family practitioner, such as the one described in the introductory hypothetical, to be qualified as an expert. *See* MD. R. EVID. 5-702 (providing the requirements and qualifications of an expert witness).

263. *Compare, e.g.,* MD. R. EVID. 5-701 (restricting the use of lay opinion testimony to

lenient treatment from the courts.[264] If carefully directed, a qualified expert[265] may testify as to the substance of an otherwise inadmissible hearsay statement.[266] If the expert reasonably relies[267] on

instances in which the evidence is "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness's testimony or the determination of a fact in issue"), *with* MD. R. EVID. 5-702 (permitting opinion evidence offered by a qualified expert if the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue").

264. *See, e.g.*, Laurel Beeler & William R. Wiebe, *DNA Identification Tests and the Courts*, 63 WASH. L. REV. 903, 934 (1988) (discussing how admissibility of scientific evidence is more lenient under the Federal Rules of Evidence than under state rules of evidence); Beth E. Bookwalter, *Throwing the Bath Water out with the Baby: Wrongful Exclusion of Expert Testimony on Neonaticide Syndrome*, 78 B.U. L. REV. 1185, 1199-1200 (1998) (discussing the lenient standard the Supreme Court established regarding the admissibility of scientific evidence); Susan R. Poulter, *Science and Toxic Torts: Is There a Rational Solution to the Problem of Causation?*, 7 HIGH TECH. L.J. 189, 194 (1992) (examining why "a significant number of courts take a lenient posture toward scientific evidence").

265. For a traditional examining physician consulted in preparation for litigation, this requirement does not present a significant impediment. Under the Maryland Rules of Evidence:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

MD. R. EVID. 5-702; *accord* FED. R. EVID. 702.

266. *See* Beahm v. Shortall, 279 Md. 321, 329, 368 A.2d 1005, 1010 (1977).

267. *See* MD. R. EVID. 5-703 (providing that facts "reasonably relied upon by experts . . . need not be admissible in evidence."); FED. R. EVID. 703 (same). Several courts, including the Court of Appeals of Maryland in *Beahm*, recognized this technique as a valid route to the admission of otherwise inadmissible evidence. *See Beahm*, 279 Md. at 327, 368 A.2d at 1009 (holding that a doctor who examines a patient in order to qualify as an expert may testify to his medical conclusions); Maryland Dept. of Human Resources v. Bo Peep Day Nursery, 317 Md. 573, 589, 565 A.2d 1015, 1023 (1989) (holding that a medical practitioner may recount statements made by a patient for the limited purpose of explaining his expert conclusions); Attorney Grievance Comm'n v. Nothstein, 300 Md. 667, 679-80, 480 A.2d 807, 813-14 (1984) (noting that hearsay needed to explain the expert's basis for his opinion is admissible, but not as substantive evidence) (citations omitted). *Cf.* Adam T. Berkoff, *Computer Simulations in Litigation: Are Television Generation Jurors Being Misled?* 77 MARQUETTE L. REV. 829, 844 (1994) (noting the ability of evidence admitted under Federal Rule of Evidence 703 to circumvent general hearsay rules denying admissibility).

such hearsay evidence in forming an opinion or inference, the evidence would be admissible, subject to a proper limiting instruction.[268] The statement may thereby be presented to the jury as part of the expert's conclusion or as part of a hypothetical question posed by the directing attorney.[269]

By requiring this limiting instruction, Maryland courts impliedly recognize a jury's ability to differentiate between substantive evidence and evidence introduced merely to support the expert's opinion.[270] Although the Maryland courts assume that juries follow limiting instructions,[271] many notable jurists seriously question the effectiveness of these instructions, and the impact upon a court's ability to hold a fair and impartial trial.[272] Notwithstanding the ques-

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268. *See* MD. R. EVID. 5-703(b) (permitting the introduction of evidence on which an expert in the specified field would reasonably rely, notwithstanding its inadmissibility under other rules of evidence).

269. *See* MCLAIN, *supra* note 52, § 2.703.4(a), at 194. Obviously, the admissibility of this evidence is not absolute; the court must determine "the underlying facts to be 'trustworthy, necessary to illuminate testimony, and unprivileged.'" *Id.* at 195. The court may also exclude evidence if it would be "unduly confusing to the jury or unduly, unfairly prejudicial." *Id.*

270. *See Beahm*, 279 Md. at 327-28 n.5, 368 A.2d at 1009 n.5 (1977). Of note, however, is Maryland's refusal to generally admit hearsay statements in contemplation of treatment, without permitting an opposing party to question its trustworthiness, and then allowing the jury to make a credibility determination. For a discussion of how this would be a preferable treatment, see *infra* Part IV.B.

271. *See* McKnight v. State, 280 Md. 604, 615, 375 A.2d 551, 557-58 (1977) (recognizing that a court must presume that a jury will follow its instructions); Weiner v. State, 55 Md. App. 548, 559, 464 A.2d 1096, 1103 (1983) (recognizing the legal practice of admitting evidence for a limited purpose and presuming that the jury will follow its instructions). Nonetheless, the *McKnight* and *Weiner* courts conceded to the limited utility of these instructions, concluding that limiting instructions could not cure the unfair prejudice created by the admission of some evidence. *See McKnight*, 280 Md. at 615, 375 A.2d at 557 (holding that the prejudice created by the unfair admission of other crimes' evidence could not be cured by a limiting instruction); *Weiner*, 55 Md. App. at 559, 464 A.2d at 1103 (holding that the unfair admission of other crimes' evidence could not be cured by a limiting instruction).

272. *See McKnight*, 280 Md. at 615, 375 A.2d at 557 (quoting Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting)) ("The fact of the matter is that too often such admonition against misuse is intrinsically ineffective."); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Learned Hand, J.) ("[T]he recommendation to the jury of a mental gymnastic which is

tionable effectiveness of these instructions,[273] however, the failure of a court to render these instructions has dire consequences under Maryland law.[274] This tenuous difference under the common law led to the federal courts' abandonment of the distinction between treating and examining physicians.[275]

Due to the significant restrictions placed on the residual hearsay exception[276] and the strict requirements of other alternative hearsay exceptions, the presentation of hearsay statements like those in *Cassidy, Rachel T., Low,* and the introductory hypothetical may only be entered into evidence in Maryland through expert testimony. Although compelling, such evidence cannot alone sustain a conviction or a finding of liability because such evidence cannot be considered as substantive evidence.[277] While the jury's ability to make so subtle a distinction could be questioned, the fact-finder, as the final arbiter of credibility, may be in a more appropriate position to evaluate this evidence.

B. The Fact-finder as an Alternative Protection

Determinations of fact are within the province of the fact-finder, be it the jury or the presiding judge.[278] Included within this

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beyond, not only their powers, but anybody's else."); People v. Aranda, 63 Cal.2d. 518, 407 P.2d 265, 272 (1965) (Traynor, C.J.) ("A jury cannot 'segregate evidence into separate intellectual boxes.'"). Interestingly, this debate threatens the rule against hearsay itself because a jury sufficiently sophisticated to make such a distinction would also be sufficiently sophisticated to distinguish between the credibility of hearsay statements and live testimony.

273. *See McKnight,* 280 Md. at 615, 375 A.2d at 579. A jury's difficulty in distinguishing between substantive evidence and evidence solely underlying an expert opinion is increased by the courts' challenge in differentiating between a treating and examining physician. For a discussion of this blurry distinction under Maryland case law, see *supra* Part III.B.

274. *See* Low v. State, 119 Md. App. 413, 425, 705 A.2d 67, 73-74 (1998) (reversing a criminal conviction for second degree rape, second degree sexual offense, and child abuse due to the trial court's unlimited admission of hearsay statements relayed through the testimony of an examining physician); Cassidy v. State, 74 Md. App. 1, 49-50, 536 A.2d 666, 690 (1988) (reversing a child abuse and assault conviction on similar grounds).

275. *See supra* note 206 for a discussion of the relevant portion of the Advisory Committee's note to Federal Rule of Evidence 803(4).

276. *See supra* note 8 and accompanying text.

277. *See* Beahm v. Shortall, 279 Md. 321, 327, 368 A.2d 1005, 1010 (1977) (noting the limited admissibility of such evidence). However, the expert opinion grounded on such hearsay statements is substantive evidence and does support a jury finding. *See supra* notes 263-69 and accompanying text.

278. *See, e.g.,* Blumenthal Kahn Elec. Ltd. Partnership v. Bethlehem Steel Corp.,

fact-finding power is the responsibility of making credibility determinations.[279] The fact-finder is intended to be the appropriate vehicle for determining how trustworthy evidence really is.[280]

Yet, even though a Maryland jury can determine the credibility of an expert where observations are reasonably based on inadmissible hearsay,[281] Maryland courts have been reluctant to charge the jury with the responsibility of determining the credibility of the hearsay statements themselves.[282] A commentator advocating the abandonment of the rules of evidence touches upon the ultimate irony of the state's stance:

> Under today's rules, modern juries are asked to evaluate conflicting expert testimony on everything from DNA matching to post-traumatic stress syndrome. The idea that the same juries cannot handle the relatively obvious strengths and weaknesses of hearsay evidence is an odd one. . . . To claim that such problems exist means one can think of a hearsay statement that jurors would mishandle for a reason they could not appreciate, even if it were explained to them. This reflects an eighteenth-century class arrogance sorely out of place in today's society.[283]

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120 Md. App. 630, 638, 708 A.2d 1, 4-5 (1997) (describing the jury function). Only if there is *no* rational basis for the fact-finder's conclusion will an appellate court disturb this determination. *See, e.g.*, Fraidin v. State, 85 Md. App. 231, 242, 583. A.2d 1065, 1071 (1991) ("The conviction must be affirmed if, 'after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt.'") (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

279. *See, e.g.*, Binnie v. State, 321 Md. 572, 580-81, 583 A.2d 1037, 1041 (1991) (recognizing that the determination as to a witness' reliability and credibility is a jury decision); Perry v. State, 234 Md. 48, 51, 197 A.2d 833, 835, 835 (1964) ("It is axiomatic that the weights to be given to the evidence and believability *vel non* of witnesses are matters for the jury to determine.") (citing Duffin v. State, 229 Md. 434, 184 A.2d 624 (1962); Wright v. State, 222 Md. 242, 159 A.2d 636 (1960); Judy v. State, 218 Md. 168, 146 A.2d 29 (1958)); Douglas v. State, 32 Md. App. 311, 316-17, 360 A.2d 474, 477 (1976) (noting assessments and observations of a witness' conduct and demeanor are proper and imperative to the fact finding process).

280. *See, e.g.*, Muir v. State, 64 Md. App. 648, 654, 498 A.2d 666, 668 (1985), *aff'd* 308 Md. 208, 517 A.2d 1105 (1986) (noting that the fact-finder may freely accept evidence it believes and reject that which it does not).

281. *See, e.g., Beahm*, 279 Md. at 327, 368 A.2d at 1010 (citing Candella v. Subsequent Injury Fund, 277 Md. 120, 124, 353 A.2d 263, 266 (1976)).

282. *See id.*

While this commentator and the Advisory Committee writing on Federal Rule of Evidence 803(4) would disagree as to the jury's ability to comprehend a limiting instruction,[284] neither would likely challenge the fact-finder's responsibility to make credibility determinations.[285] Therefore, if properly guided, a jury could balance the importance and weaknesses of an examining physician's testimony to determine liability or guilt.[286] A properly conducted and effective cross-examination, in Wigmore's words, "the greatest legal engine ever invented for the discovery of truth,"[287] would undoubtedly expose weaknesses in an examining physician's testimony.[288] By allowing litigants to inquire into the number of times a physician interacted with a patient, whether the physician discussed the cause-and-effect relationship between the patient's statements and subsequent treatment, and any measures undertaken by the physician to relate her ability to perform treatment to the patient would expose the frailties that so concerned the *Cassidy* and *Low* courts.[289]

V. CONCLUSION

The rule against hearsay provides an effective roadblock to those looking to fabricate evidence, escape the penalty of perjury, or deprive their opponent of the right of cross-examination.[290] How-

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283. Milich, *supra* note 8, at 771-72. This Comment does not intend to argue that the courts' difficulty in handling the hearsay exception for statements in contemplation of treatment demonstrates the weaknesses of the entire rule against hearsay.

284. *See supra* note 206 for the exact language of the relevant portion of the Advisory Committee note.

285. This argument nears absurdity when one considers a judge as a fact-finder. *See* Milich, *supra* note 8, at 772.

> If, despite all the learned judge knows about the potential frailties of hearsay in general, she concludes that it is rational and fair to accord some weight to specific hearsay, what justification could exist for forbidding this? Is there something wrong with this evidence that the trial judge cannot understand and factor into her evaluation?

Id.

286. *See* MCLAIN, *supra* note 52, § 2.803.4(o), at 255 (comparing FED. R. EVID. 803 and MD. R. EVID. 5-803(b)(4)). "One might add that the fact-finder is likely to see that self-serving statements to a non-treating, but testifying, expert are suspect." *Id.*

287. *See* WIGMORE, *supra* note 32, § 1367, at 32.

288. *See id.*

289. For the analysis undertaken by these courts, see *supra* notes 135-67 and 175-208.

290. *See supra* notes 33-45 and accompanying text.

ever, to serve public policy initiatives, the law affords numerous exceptions to the rule against hearsay.[291] An example of such an exception permits trial courts to admit hearsay statements made in contemplation of medical treatment.[292] Although this exception plays an important role in Supreme Court,[293] Maryland,[294] and federal court case law,[295] the methods used by individual jurisdictions reveal a lack of unity. One point of differentiation is whether a court should fully admit the testimony of examining physicians—traditionally defined as those consulted primarily for litigation.[296] While Maryland courts relatively adhere to the common law's refusal to fully admit hearsay statements to these individuals, recent case law has significantly muddled the definition of examining physician.[297] Rather than attempting to untangle this confusion, Maryland should follow the lead of the federal courts by abandoning this arbitrary distinction.[298] In doing so, Maryland courts would recognize the realities of the courtroom[299] and finally relinquish this credibility determination to its rightful owner—the fact-finder.[300]

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291. *See supra* notes 46-54 and accompanying text.
292. *See supra* notes 55-73 and accompanying text.
293. *See supra* Part III.A.
294. *See supra* Part III.B.
295. *See supra* Part III.C.
296. *See supra* note 16 and accompanying text.
297. *See supra* Part III.B.
298. *See supra* Part III.C.
299. *See supra* Part IV.A.
300. *See supra* Part IV.B.