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SELF-AUTHENTICATION OF CERTIFIED COPIES OF BUSINESS RECORDS

Lynn McLain†

I. INTRODUCTION

In adopting Maryland Rule 5-902(a)(11),1 the Court of Appeals of Maryland created a new method of authenticating business records, an alternative available in addition to the traditional means followed at common law and still permissible under the Rules. The Rule provides that certified copies or certified originals of business records are self-authenticating.2

Although the Maryland Rule has no counterpart in the Federal Rules of Evidence,3 it is modeled on an August 1986 amendment to the Uniform Rules of Evidence4 that in turn was derived from a federal statute. Section 3505 of Article 18 of the United States

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1. See infra text accompanying note 31 for content of Maryland Rule 5-902(a)(11).
2. If an item is self-authenticating, no additional evidence is needed in order to permit a finding that the item is authentic, i.e., what it appears to be.
3. In adopting Title 5 of the Maryland Rules of Court, the Maryland Rules of Evidence, effective July 1, 1994, the Maryland court of appeals simply declined to follow the Federal Rules of Evidence. See LYNN MCLAIN, MARYLAND RULES OF EVIDENCE § 1.4, at 11-12 (1994) [hereinafter MARYLAND RULES OF EVIDENCE].

In many instances, Maryland forged its own way, either because of preexisting Maryland statutory law, see, e.g., MD. RULES 5-412, 5-903, or case law, see, e.g., MD. RULES 5-704(b), 5-802.1(a), 5-802.1(d), 5-803(b)(4), 5-1006, or rules, see, e.g., MD. RULE 5-103(a)(1), that were at odds with the federal approach, or because of the court of appeals’ distinctive resolution of relevant policy considerations, see, e.g., MD. RULES 5-613, 5-615(c), 5-802.1(a), 5-804(b)(2). The New Jersey Supreme Court Committee on Rules of Evidence took a similar approach in its drafting of Rules of Evidence that were adopted by the New Jersey Supreme Court, effective July 1, 1993. N.J. STAT. ANN. § 2A:84A, at 83-85 (West 1994).
4. UNIF. R. EVID. 902(11); see infra note 49.
Code provides that certified copies of foreign business records are self-authenticating in criminal proceedings. The Uniform Rule extended this approach to embrace both domestic business records and civil proceedings; prior to the adoption of Maryland's Rule,


§ 3505. Foreign records of regularly conducted activity
(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that —
(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
(B) such record was kept in the course of a regularly conducted business activity;
(C) the business activity made such a record as a regular practice; and
(D) if such record is not the original, such record is a duplicate of the original;
unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
(2) A foreign certification under this section shall authenticate such record or duplicate.
(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.
(c) As used in this section, the term—
(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;
(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and
(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
6. Uniform Rule of Evidence 902(11) provides:
Rule 902. Self-authentication.
Extrinsic evidence of authenticity as a condition precedent to ad-
misibility is not required with respect to the following:

(11) Certified records of regularly conducted activity. The original or a duplicate of a record of regularly conducted activity, within the scope of Rule 803(6), which the custodian thereof or another qualified individual certifies (i) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (ii) is kept in the course of the regularly conducted activity, and (iii) was made by the regularly conducted activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it. As used in this subsection, "certifies" means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and official position (i) of the individual executing the certificate or (ii) of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual. A final certification must be made by a secretary of embassy [sic] or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country who is assigned or accredited to the United States.

UNIF. R. EVID. 902(11).

7. The changes made in Maryland Rule 5-902(a)(11) and (b) from the text of the Uniform Rule are shown below. They are of style and clarification only, such as the addition of the word "business" before "activity," see MD. RULE 5-803(b)(6) (defining "business"), and the parallel use of the phrase "made and kept" in subsections (a)(11)(B) and (C):

(11) Certified Records of Regularly Conducted Business Activity

The original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6), which the custodian thereof or another qualified individual certifies (A) (i) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (B) (ii) is made and kept in the course of the regularly conducted business activity, and (C) (iii) was made and kept by the regularly conducted business activity as a regular practice, unless the sources of information or the method of circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available
of evidentiary codifications from other states permit the foundation of the hearsay exception to be established by affidavit for certain categories of business records. 11 This Article will examine Maryland Rule 5-902(a)(11), its "legislative" history, and the issues that are likely to arise under it. Some questions in this regard have already been raised by Judge

for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

(12) . . .

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

11. For example, Nevada, New York, Ohio, Tennessee, and Wisconsin, like Maryland, see infra note 76, have special provisions for proof of hospital records. NEV. REV. STAT. ANN. §§ 52.320-.375 (Michie 1986); N.Y. CIV. PRAC. L. & R. §§ 2306 (1991) & 4518(c) (McKinney Supp. 1995); OHIO REV. CODE ANN. § 2317.422 (Baldwin Supp. 1993) (see infra note 234 for cases discussing this statute); TENN. CODE ANN. §§ 68-11-301 to 411 (1992 & Supp. 1994); WIS. R. EVID., WIS. STAT. ANN. §§ 908.03(6m), 909.02(11) (West 1993 & Supp. 1994). Nevada has similar provisions for proof of hotel and casino records. NEV. REV. STAT. ANN. §§ 52.405-.435 (Michie 1986); see also N.Y. CIV. PRAC. L. & R. 4518(b)-(e) (McKinney 1992 & Supp. 1993) (hospital bills, library records, and reports of DNA and blood genetic marker tests). California's statute initially covered only hospital records but now applies to all business records. See infra note 74.

The state of Washington provides for presumptive authentication of a number of documents, including hospital records, medical and pharmaceutical bills, and estimates for property repairs, after notice, absent objection by the opponent. WASH. R. EVID. 904. If the court finds an objection to have been unreasonable, it may order the objecting party to pay expenses. Id.
Chasanow, of the Court of Appeals of Maryland, in his partial dissent to the Order adopting the new Rules. With regard to what will constitute an adequate certification under Maryland Rule 5-902(a)(11), this Article will analyze cases that have arisen under 18 U.S.C. § 3505 and the Texas rule. It also will review Maryland cases recognizing that, even before the adoption of the Maryland Rules of Evidence, some documents could be qualified as business records without the need for a testifying witness.

The Article next will evaluate the constitutionality of Rule 5-902(a)(11) under the Confrontation Clause and the Due Process Clause. Decisions of the United States Supreme Court, lower federal court cases upholding 18 U.S.C. § 3505, and a Maryland court of appeals decision upholding an analogous statute, support the conclusion that the Rule is constitutional.

Maryland Rule 5-902(a)(11) concerns only the issue of authentication. The Rule's creation of an alternative method of authentication of business records should not affect the courts' analysis of problems regarding hearsay, multiple hearsay, and opinion evidence. If, under the pre-Rules law, a business record would have been admissible in its entirety once the hearsay exception foundation was laid, then Rule 5-902(a)(11) may be used to admit a business record without the need to have any witness testify at trial concerning the record. But the same questions as to double or multiple hearsay and opinions will persist that existed under the pre-Rules law.

For example, there still will be a question as to which opinions contained within a business record will be admissible as substantive proof under the exception to the hearsay rule for business records, even when the person who expressed those opinions does not testify at the trial or proceeding. On this point, this Article will examine pre-Maryland Rules of Evidence cases, as well as cases from other jurisdictions construing rules comparable to Maryland Rule 5-803(b)(6), and will propose standards for civil and criminal cases.
Finally, the Article will comment that Rule 5-902(a)(11) does not appear to extend to proof of the absence of business records or of the absence of entries in those records. Rule 5-1006—proof by summary—may provide a useful alternative in such a situation.

An appendix will set forth suggested forms for certificates that might be used under Rule 5-902(a)(11).

II. MARYLAND RULE 5-902(a)(11)

A. Self-Authentication In General: Maryland Rule 5-902

Like its federal counterpart, Maryland Rule 5-902 as a whole is designed to eliminate the need to call foundation witnesses for evidence that is so likely to be authentic that a requirement of testimony to sufficiently show authenticity to justify admission would squander judicial time and litigants' resources. The federal Advisory Committee's note summarized the purpose of the analogous Federal Rule of Evidence 902 as follows:

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.24

The stem of Maryland Rule 5-902(a) provides: "Except as otherwise provided by statute, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following . . . ."25 The Rule then lists twelve categories including, for example, certified copies of public records.26

Thus, just as under pre-Title 5 Maryland law,27 a certified copy of a public record is sufficiently self-authenticating for the court not to exclude it for lack of authenticity. If the record is to be

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24. FED. R. EVID. 902 (Advisory Committee's Note) (emphasis added).
25. MD. RULE 5-902(a).
excluded, it would be for another reason, such as lack of relevance\(^{28}\) or failure to fall within the applicable hearsay exception.\(^{29}\) If an opposing party argues that the certified copy is unauthentic, generating an issue of lack of authenticity so that reasonable minds could differ as to that question, then the court must instruct the jury that ultimately it must decide whether the exhibit in question is authentic.\(^{30}\)

**B. Self-Authentication of Business Records: Maryland Rule 5-902(a)(11)**

The same analysis that applies to certified copies of public records applies to evidence offered as self-authenticating certified originals or duplicates of business records under Maryland Rule 5-902(a)(11). That Rule provides:

Rule 5-902 Self-Authentication  
(a) Generally—Except as otherwise provided by statute, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(11) Certified Records of Regularly Conducted Business Activity—The original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6), which the custodian or another qualified individual certifies (A) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (B) is made and kept in the course of the regularly conducted business activity, and (C) was made and kept by the regularly conducted business activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.\(^{31}\)

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28. See Md. Rules 5-401 to 5-403.
29. See Md. Rule 5-803(b)(8).
30. Maryland Rules of Evidence, supra note 3, § 2.902.1(a); see Md. Rules 5-104(b), 5-901(a); Maryland Evidence, supra note 27, § 104.2.
In practice, counsel often stipulate to the authenticity of an opposing party's documentary evidence. Absent a waiver of a possible objection by an opponent, either by such a stipulation,\textsuperscript{32} by an admission in response to a request for admissions,\textsuperscript{33} or by failing to note a pre-trial objection when required to do so by the court,\textsuperscript{34} the proponent of business records bears the burdens of (1) satisfying the fact-finder that the records are authentic, that is, they are what they appear to be, and (2) satisfying the trial judge that they fall within the hearsay exception for business records.

Under Maryland's evidence rules, litigants may continue to authenticate the documents by the trial testimony of a "person with knowledge"\textsuperscript{35} who recognizes the records—either a "custodian or other qualified witness."\textsuperscript{36} Similarly, litigants may continue to lay the foundation for the business records hearsay exception through the trial testimony of a "custodian or other qualified witness," or, as case law provides, by circumstantial evidence, if appropriate.\textsuperscript{37}

Maryland Rule 5-902(a)(11) provides a third alternative. It makes copies or originals of business records self-authenticating if they are certified as such by "either the custodian or another qualified individual."\textsuperscript{38} This process of certification essentially tracks the requirements for the business records exception to the hearsay rule, codified in Maryland Rule 5-803(b)(6).\textsuperscript{39} Such a certification also establishes a prima facie foundation for the business records exception. The Rule applies to both foreign and domestic records. "Certifies" is defined in Rule 5-902(b) as follows:

As used in this Rule, "certifies", "certificate", or "certification" means, with respect to a domestic record or public document, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record or public document, a written declaration signed in a foreign country which, if falsely made, would subject

\begin{itemize}
  \item \textsuperscript{32} See Md. Rules 2-504.2(b)(6), 3-504(b)(6).
  \item \textsuperscript{33} See Md. Rules 2-424, 2-504.2(b)(6), 3-504(b)(6).
  \item \textsuperscript{34} See Md. Rule 2-504.2(b)(8) (quoted in part infra note 194); Md. Rule 5-902(a)(12).
  \item \textsuperscript{35} Md. Rule 5-901(b)(1).
  \item \textsuperscript{36} The phrase "custodian or other qualified witness" is used in the federal hearsay exception for business records. Fed. R. Evid. 803(6).
  \item \textsuperscript{37} See infra text accompanying notes 93-97.
  \item \textsuperscript{38} This is the same group of persons who may testify to lay the foundation for the hearsay exception under Federal Rule of Evidence 803(6). See Fed. R. Evid. 803(6) (foundation for business records hearsay exception to be proven "by the testimony of the custodian or other qualified witness"); see also infra part V (18 U.S.C. § 3505 has been interpreted as the author interprets Maryland Rule 5-902(a)(11)).
  \item \textsuperscript{39} See infra note 90 for the text of Maryland Rule 5-803(b)(6).
\end{itemize}
the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record or public document must be accompanied by a final certification as to the genuineness of the signature and official position (1) of the individual executing the certificate or (2) of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual. A final certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country who is assigned or accredited to the United States.  

In order to prevent surprise or unfairness, Rule 5-902(a)(11) provides that the proponent of the evidence must give advance notice to the adverse party of the intent to authenticate a record via 5-902(a)(11). Although the Rule does not specify how much notice should be given, it provides that the proponent must give the adverse party sufficient opportunity to inspect the record so as to be afforded a "fair opportunity to challenge it." This requirement makes clear that last minute notice would be inadequate. Careful counsel should give as much notice as feasible. Notice could be accomplished through a request for admissions both as to authenticity and as to qualification under the business records hearsay exception. If the time period before a response was due was adequate to provide an ample opportunity to inspect under the circumstances of the case, such notice should suffice under the Rule.

Just as with all categories of self-authenticating evidence under Rule 5-902, the adverse party is not precluded from disputing authenticity. If the opponent merely generates a question of au-

40. Md. Rule 5-902(b).
41. Md. Rule 5-902(a)(11). Compliance with these provisions may be problematic in small claims actions in the district court due to time constraints.
42. See United States v. Tedder, 801 F.2d 1437, 1448-49 & n.9 (4th Cir. 1986) (government provided notice required by 18 U.S.C. § 3505 on day previously scheduled for pretrial motions, 14 days after § 3505 went into effect; under circumstances, notice was adequate, although government could have been more diligent); Paul W. Grimm, New Rule Covers Authentication of Business Records, 10 Md. Litigator 1, 3 (1994) ("Prudent lawyers who wish to take advantage of the self-authentication provisions of Rule 5-902(a)(11) will provide the written notice required by the rule well in advance of the trial to avoid a dispute at trial over whether sufficient notice was given.").
43. See Maryland Rules of Evidence, supra note 3, § 2.902.4(a); 2 McCormick, supra note 5, § 228, at 56 ("Presumptive authenticity, as provided for by [Fed.
authenticity as to evidence that the court has admitted, as to which reasonable minds may differ, the records will be sufficiently authenticated to be admitted, and authenticity will become an issue for the finder of fact.\footnote{Maryland Rules of Evidence, supra note 3, § 2.902.1(a); see Md. Rules 5-104(b), 5-901(a); see also Maryland Evidence, supra note 27, § 104.2, at 70-71; Maryland Rules of Evidence, supra note 3, §§ 2.104.4(b), 2.901.4(a).}

Most importantly, however, Rule 5-902(a)(11) contains the same safety valve as does Rule 5-803(b)(6): The record will not qualify for the benefits of Rule 5-902(a)(11) if the sources of information or the method or circumstances of preparation indicate a lack of trustworthiness.\footnote{Md. Rules 5-803(b)(6), 5-902(a)(11); see infra text accompanying notes 109-10.} If a party persuades the court that the records in question lack trustworthiness, they will not be self-authenticating. In that event, unless the trustworthiness required for the hearsay exception is shown by a live witness's testimony, the record will not be admissible under Rule 5-803(b)(6).

III. THE "LEGISLATIVE" HISTORY OF MARYLAND RULE 5-902(a)(11)

A. The Evidence Subcommittee's Consideration of the Uniform Rule

During its consideration of both the business records exception to the hearsay rule\footnote{Md. Rule 5-803(b)(6).} and the rule regarding self-authentication,\footnote{Md. Rule 5-902.} the Evidence Subcommittee of the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure was apprised\footnote{Memorandum from Lynn McLain on Rule 803, to Una Perez, Esq., for distribution to the Evidence Subcommittee, pp. 13-15 (June 18, 1991) [hereinafter Memorandum] (on file with author).} that a 1986 amendment to the Uniform Rules of Evidence\footnote{Uniform Rule of Evidence 902(11) provides: (11) Certified records of regularly conducted activity. The original or a duplicate of a record of regularly conducted activity, within the scope of Rule 803(6), which the custodian thereof or another qualified individual certifies (i) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (ii) is kept in the course of the regularly conducted activity, and (iii) was made by the regularly}...
a provision for the self-authentication of certified copies of business records that did not appear in the Federal Rules of Evidence, but had been followed verbatim by Alaska and in substance by Texas.

The Uniform Rules’ Commissioners’ Comment to the 1986 amendment, which was reported to the Evidence Subcommittee,²⁰ explains:

Subsection 11 is new and embodies a revised version of the recently enacted federal statute dealing with foreign records of regularly conducted activity, 18 U.S.C. § 3505. Under the federal statute, authentication by certification is limited to foreign business records and to use in criminal proceedings. This subsection broadens the federal provision so that it includes domestic as well as foreign records and is applicable in civil as well as criminal cases. Domestic records are presumably no less trustworthy and certification of such records can more easily be challenged if the opponent of the evidence chooses to do so. As to the federal statute’s limitation to criminal matters, ordinarily the rules are more strictly applied in such cases, and the rationale of trustworthiness is equally applicable in civil matters. Moreover, the absence of confrontation concerns in civil actions militates in favor of extending the rule to the civil side as well.

conducted activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it. As used in this subsection, “certifies” means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and official position (i) of the individual executing the certificate or (ii) of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual. A final certification must be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomat, or consular official of the foreign country who is assigned or accredited to the United States.

UNIF. R. EVID. 902(11).

The rule requires that the certified record be made available for inspection by the adverse party sufficiently in advance of the offer to permit the opponent a fair opportunity to challenge it. A fair opportunity to challenge the offer may require that the proponent furnish the opponent with a copy of the record in advance of its introduction and that the opponent have an opportunity to examine, not only the record offered, but any other records or documents from which the offered record was procured or to which the offered record relates. That is a matter not addressed by the rule but left to the discretion of the trial judge.51

The Evidence Subcommittee proposed the adoption of the substance of Uniform Rule of Evidence 902(11), although for reasons of style and clarity it decided to carve out the definition of “certifies” by breaking the Rule into two subparts.52 Subpart (a) lists the various methods of self-authentication; subpart (b) defines “certifies.”

B. The Court of Appeals Standing Committee on Rules of Practice and Procedure

After a meeting on May 14, 1993, when proposed Rule 5-902 was considered,53 the Rules Committee proposed the adoption of the Subcommittee draft of Rule 5-902(a)(11) nearly verbatim, the only change being the deletion of the word “thereof” after the word “custodian.”54 The Rules Committee also made one change, for purposes of clarity, to proposed Rule 5-902(b), expanding the definition from that of “certifies” to include also “certificate” and “certification.”55

C. Policy Considerations

The policy reasons driving the Rule are primarily economic—saving of time and money for the courts admitting proof of business

51. UNIF. R. EVID. 902(11) (Commissioners’ Comment) (emphasis added).
55. Id. at 141-42.
records and for the parties offering them. Any achievement of judicial economy, even a limited one such as this, is significant.

56. See Grimm, supra note 42, at 1 ("There is no more tedious chore during trial than to go through the process of laying a foundation for business records through the testimony of a sponsoring witness. Judges always seem impatient with the time required to lay the foundation, witnesses called only to authenticate documents are irritated by the intrusion into their time, and juries find the process mind-numbing. Newly adopted Maryland Rule 5-902(a)(11) will allow trial lawyers to avoid most of this aggravation through the exercise of a little advance planning before trial."). See generally 2 McCormick, supra note 5, § 218, at 38 ("[R]equiring proof of what may correctly be assumed true in 99 out of 100 cases is at best time-consuming and expensive. At the worst, the requirement will occasionally be seen to produce results which are virtually indefensible. Thus, while traditional requirements of authentication admittedly furnish some slight obstacles to the perpetration of fraud or occurrence of mistake in the presentation of writings, it has frequently been questioned whether these benefits are not outweighed by the time, expense, and occasional untoward results entailed by the traditional negative attitude toward authenticity of writings.") (citations omitted).

57. See Grimm, supra note 42, at 5 ("[I]t is clear that Rule 5-902(a)(11) makes life much easier for attorneys who are sufficiently knowledgeable to take advantage of its benefits.").

58. The concern for judicial economy is neither new nor isolated; it affects many of the rules of evidence generated by the common law and now codified. See, e.g., Md. Rule 5-403 (stating that a trial court in its discretion may exclude evidence when "its probative value is substantially outweighed . . . , by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); Md. Rule 5-608(a)(3)(B) (precluding character witnesses from testifying on direct examination to the specific instances that led to their opinion, or to the reputation, of another person); Md. Rule 5-608(b) (precluding use of extrinsic evidence to prove impeaching "prior bad acts" not having resulted in conviction of witness); Md. Rule 5-1003 (permitting proof of contents of important writing by its duplicate, "unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original"); Md. Rule 5-1004(d) (permitting proof of the contents of a writing by less than the "best evidence," when the writing is not closely related to a controlling issue in the case); see also MARYLAND EVIDENCE, supra note 27, §§ 403.1, 608.1-.2, 1001.1-.4, 1004.1; cf. Austin v. United States, 115 S. Ct. 380, 381 (1994) (per curiam) ("[T]hough indigent defendants pursuing appeals as of right have a constitutional right to a brief filed on their behalf by an attorney, that right does not extend to forums for discretionary review . . . Circuit councils should, if necessary, revise their Criminal Justice Plans so [as to] allow for relieving a lawyer of the duty to file a petition for certiorari if the petition would present only frivolous claims.") (citations omitted).
particularly when numerous reports bemoan the overload for judges and the consequent backlog for litigants. This acceleration is especially important to civil plaintiffs as opposed to criminal defendants with a constitutional guarantee to a speedy trial. No doubt inspired by the same concerns, a local rule of the United States District Court for the District of Maryland simply provides for the automatic admission into evidence of an exhibit mentioned by counsel at trial, unless an objection is made.

D. Public Comment

The Rules Committee’s draft of Maryland’s evidence rules was published for public comment in July 1993. Only one comment was received regarding proposed Rule 5-902(a)(11), and that concerned its application to computerized records, regarding the scope of opportunity to inspect.

E. The Court of Appeals of Maryland

The court of appeals held two public hearings on the proposed evidence rules. At the first hearing, on October 4, 1993, Judge


60. See, e.g., Panel Proposes Limiting Access to Federal Courts to Ease Rising Caseload, THE SUN (Balt.), Dec. 5, 1994, at 8A (“Without hiring new judges, delays would grow intolerably. . . . In the current climate, Congress is unlikely to provide the money needed for judicial hiring and budgets to keep pace with rising caseloads.”).

61. Both the prospect of delay and increased up-front litigation costs for plaintiffs also translate to better settlement leverage for defendants.


63. Local Rule 107(5)(b) of the United States District Court of Maryland provides:

b. ADMISSION INTO EVIDENCE.

Unless otherwise ordered by the Court or unless counsel requests that a particular exhibit be marked for identification only, whenever an exhibit number is first mentioned by counsel during the examination of a witness at trial, the exhibit shall be deemed to be admitted into evidence unless opposing counsel then asserts an objection to it.


64. 20 Md. Reg., issue 15, P-1 to P-38 (July 23, 1993).

65. Letter from Professor Henry H. Perritt, Jr., Villanova Law School to Sandra F. Haines, Esq. (Sept. 13, 1993) (urging that providing access to output alone would be insufficient) (on file with Rules Committee) (on file with author).
Chasanow made several comments regarding proposed Rule 5-803(b)(6). He expressed concern that clause (A) could be read to permit the qualification, as part of business records, of opinions rendered belatedly, but then recorded promptly. He also remarked that, because of proposed Rule 5-902(a)(11), a proponent might not need a live witness to qualify records as business records, but under proposed Rule 5-803(b)(7), the proponent would need a witness to testify to the absence of business records.\(^6\)

In a letter to the members of the court of appeals, dated October 29, 1993, with a memorandum attached, Chief Judge Wilner of the Court of Special Appeals of Maryland summarized and responded to a number of the questions that had been raised at the October 4, 1993, hearing. At its second open hearing, on November 18, 1993, the court of appeals voted, \textit{inter alia}, to keep the word "opinions" in the introductory provision of Rule 5-803(b)(6), but in response to Judge Chasanow's concern, to delete the words "or opinion" in 5-803(b)(6)(A). The Rule also was amended so as to employ the phrases "made and kept" and "make and keep" throughout. A conforming amendment was made to Rule 5-902(a)(11)(B) and (C) so that those parallel subsections also would read "made and kept." No further amendments to Rule 5-902 were made.

By Rules Order dated December 15, 1993, a majority of the court of appeals adopted Title 5 of the Maryland Rules of Procedure, Evidence.\(^6\) Judge Eldridge dissented, as he opposed codification of evidence rules.\(^6\) Judge Chasanow, joined by Judge Bell, although favoring adoption of the code, dissented from twelve of the sixty-one rules.\(^6\)

Judge Chasanow's opinion explained that he dissented from Rules 5-803 and 5-902 for the following reasons:

\begin{center}
\textbf{Rule 5-803}
\end{center}

There are numerous changes, particularly in business and official records, which may create interpretation problems for attorneys and judges.

\begin{center}
\textbf{Rule 5-902}
\end{center}

The most disturbing change to Federal Rule 902 is the addition of Rule 5-902(a)(11) allowing for certification of authenticity of business records. The rule ultimately may do little damage since the "custodian or [other] qualified

\begin{footnotes}
\item[67] 21 Md. Reg., issue 1, Part II, P-1 (1994).
\item[68] Id. (Eldridge, J., dissenting).
\item[69] Id. (Chasanow, J., joined by Bell, J., dissenting in part).
\end{footnotes}
individual” must certify “under oath subject to the penalty of perjury” that, among other things, the record “was made at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of these matters.” . . . Unless the affiant either prepared the record or witnessed the record being prepared, I question how such a certification can ever be made.70

This last comment raises a troublesome question about the application of Rule 5-902(a)(11). If Judge Chasanow’s suggested reading, that “the affiant [must have] either prepared the record or witnessed the record being prepared,” prevails, the Rule will have little effect, and its purpose will be frustrated.71

Maryland Rule 5-902(a)(11) tracks the language of the hearsay exception for business records as defined in Rule 5-803(b)(6), which was intended to codify the prior Maryland case law. Consequently, in an attempt to provide guidance to the trial judges applying Rule 5-902(a)(11), it becomes necessary to review pre-Title 5 Maryland law that may be instructive, as well as other jurisdictions’ case law construing provisions similar to Rule 5-902(a)(11).

IV. PRE-TITLE 5 MARYLAND LAW ON AUTHENTICATION AND ADMISSIBILITY OF BUSINESS RECORDS UNDER THE BUSINESS RECORDS HEARSAY EXCEPTION, REVISITED AFTER TITLE 5

Pre-Title 5 Maryland law did not always require that a witness testify either to authenticate business records or to lay the foundation for the hearsay exception.72

A. Authentication

Under pre-Title 5 Maryland law, the case law provided for several alternative methods of authentication of business records. Another method for authentication of hospital records was established by two rules of procedure.

The closest pre-Title 5 analog to Rule 5-902(a)(11) in enacted Maryland law73 is found in those two rules, Maryland Rules 2-

70. Id. at P-3.
71. Cf. United States v. Franks, 939 F.2d 600, 602-03 (8th Cir. 1991) (“A contrary rule, requiring the testimony of the person who prepared the records, would eviscerate the business records exception.”).
72. Thus, Maryland dropped from its business records rule language in the federal rule that appears to require testimony by “a custodian or other qualified witness.” See infra notes 93-97 and accompanying text.
73. See also Md. Ann. Code art. 27, § 142(c) (1992) (discussed infra text accompanying notes 173-89).
Self-Authentication of Business Records

510(g) and 3-510(g), applicable in civil cases in circuit court and district court, respectively. Rules 2-510(g) and 3-510(g) became effective July 1, 1984. They provide that, in response to a subpoena, a hospital records’ custodian’s certificate declaring “that [the accompanying records, or copies of records, delivered to the clerk of the court] are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the hospital” shall be prima facie evidence of the authenticity of the records.


In 1989, an amendment to the California statute added the condition that “the requirements of Section 1271 have been met.” Cal. Evid. Code § 1562 (as amended by 1989 Cal. Stats. ch. 1416, § 31). Section 1271 merely sets forth the hearsay exception for business records. Cal. Evid. Code § 1271 (West 1966). The statute continued to permit the records’ admission into evidence just as if the custodian had been present and testified to the matters stated in the affidavit. E.g., In re Troy D., 263 Cal. Rptr. 869, 876 (Cal. Ct. App. 1989).

75. Md. Rules 2-510(a), 3-510(a).
76. Md. Rules 2-510(g), 3-510(g). The complete text of the pertinent subsections reads as follows:

(g) Hospital Records.—A hospital served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The hospital may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the hospital. The certification shall be prima facie evidence of the authenticity of the
Absent such a rule, under the pre-Title 5 Maryland common law, business records generally, including hospital records, were authenticated by a witness with knowledge of that fact—usually the records' custodian. The records also could be authenticated by circumstantial evidence. If the records were produced by a process or system, such as computer-generated records, the required evidence of authentication was of the reliability of the system or process.

records.

Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the hospital but need not return copies.

When the actual presence of the custodian of medical records is required, the subpoena shall so state.

Md. Rules 2-510(g), 3-510(g). The Rules recognize that the party issuing the subpoena may desire the custodian's presence at the trial; if so, "the subpoena shall so state." Md. Rules 2-510(g), 3-510(g). Presumably, the opposing party also is free to subpoena the custodian. Cf. Cal. Evid. Code § 1564 (West Supp. 1995) (as a result of the 1984 amendment, the statute is clear that whether custodian's presence is required is "at the discretion of the requesting party"); see also State v. Spikes, 423 N.E.2d 1122 (Ohio 1981) (Ohio hospital records statute provides explicitly that opposing party may subpoena the custodian).

No reported cases attacking the validity of Rules 2-510(g) or 3-510(g) have been found, and apparently they have worked well in practice. Telephone interview with Paul Bekman, Esq., and James Archibald, Esq. (Dec. 19, 1994).

Because hospital records are a subcategory of business records, the adoption of Maryland Rule 5-902(a)(11) provides for an alternate, simpler way to certify hospital records so that they will be self-authenticating. Court of Appeals Standing Committee on Rules of Practice and Procedure, minutes of May 14, 1993, meeting, at 19-20 (comment of Linda Schuett, Esq.) (adoption of Rule 5-902(a)(11) obviates the need to authenticate hospital records via the more detailed provisions of Rules 2-510 and 3-510). In practice, in any event, counsel for both parties usually agree on what are the correct records and compile a joint records extract for use at trial. Telephone interview with Paul Bekman, Esq., (Dec. 19, 1994).

77. See generally Maryland Evidence, supra note 27, § 901.1.
78. See generally id. § 901.2.
79. See id. § 803(6).1, at 379 n.18.
80. Id. § 803(6).1, at 379 n.19; see infra notes 92-94 and accompanying text. Like Federal Rule of Evidence 901, Maryland Rule 5-901(b) lists only illustrative examples of authentication under the Rule; others may suffice. See, e.g., United States v. Hines, 717 F.2d 1481, 1491 (4th Cir. 1983), cert. denied, 467 U.S. 1214, 1219 (1984); Bury v. Marietta Dodge, 692 F.2d 1335, 1338 (11th Cir. 1982) (per curiam) (finding sufficient a certified affidavit by Federal Reserve Board division head that attached unofficial letters by staff attorneys were accurate); Finance Co. of America v. Bankamerica Corp., 493 F. Supp. 895, 900-01 (D. Md. 1980).
81. See Maryland Evidence, supra note 27, § 803(6).1, at 378 n.12, § 901.12, at
Once there was sufficient evidence of authentication to enable a reasonable fact-finder to determine that the records were what they purported to be, their proponent moved on to other hurdles, including those of relevance and the hearsay rule. In order for the records to be admitted to prove the truth of the facts contained in them, they must fall within an exception (or, in the case of multiple hearsay, exceptions) to the hearsay rule.

In order to qualify under the pre-Title 5 business records exception to the hearsay rule, documents had to comply with section 10-101 of the Courts and Judicial Proceedings Article of the Maryland Code. Section 10-101 was derived from the Commonwealth Fund of New York's Model Act for Proof of Business Transactions, similar to the later Uniform Business Records as Evidence.  

Section 10-101 provides:
(a) Definition of Business— "Business" includes business, profession, and occupation of every kind.
(b) Admissibility—A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event.
(c) Time of making records—The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.
(d) Lack of knowledge of maker—The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility.


Act, which was superseded by the original Uniform Rule of Evidence 63(13). The Maryland statute, now "trumped" by the subsequent adoption of Rule 5-803(b)(6) to the minor extent that it is inconsistent with section 10-101, was but one incarnation of the business records hearsay exception that has broadened significantly over the centuries since its inception as the "shop book rule." The modern Maryland cases, codified by Rule 5-803(b)(6), are both flexible and lenient with regard to how the foundation for business records can be established.

1. No Across-the-Board Requirement of Testimonial Foundation

Although the foundation for the hearsay exception codified in section 10-101 usually was laid by a custodian or other qualified witness, several pre-Title 5 Maryland cases had held that testimonial foundation evidence was not required, in that sometimes the court might conclude from the circumstances and the nature of the document involved that the document was made in the regular

88. UNIF. R. EVID. 63(B).
89. In the event of conflict, the more recent enactment prevails. See generally NORMAN J. SINGER, 2 SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 23.09 (5th ed. 1994).
90. Maryland Rule 5-803(b)(6) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(b) Other Exceptions

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

MD. RULE 5-803(b)(6).
91. See MARYLAND RULES OF EVIDENCE, supra note 3, § 2.803.2, at 242-43.
course of business.\textsuperscript{93} For example, a letter to the court on an organization's apparently official stationery was, under all of the circumstances, qualified properly as a business record without a testimonial foundation.\textsuperscript{94}

Some of the federal cases also had reached similar results,\textsuperscript{95} even though the federal courts had to circumvent the language of the federal rule to do it, since Federal Rule of Evidence 803(6) provides that the foundation be "shown by the testimony of the custodian or other qualified witness."\textsuperscript{96} In recognition of the apparent conflict between this result and the language of the federal rule, the drafters of Maryland Rule 5-803(b)(6) omitted the federal rule's phrase: "all as shown by the testimony of the custodian or

\textsuperscript{93} See, e.g., Pine St. Trading Corp. v. Farrell Lines, 278 Md. 363, 372-74, 364 A.2d 1103, 1110-11 (1976) (FDA reports) (quoted with approval in Chapman v. State, 331 Md. 448, 459-60, 628 A.2d 676, 682 (1993)); Morrow v. State, 190 Md. 559, 59 A.2d 325 (1948) (finding reversible error to exclude carbon copy of sales receipt on printed letterhead and form from a South Carolina gas station, offered by defendant); Beach v. State, 75 Md. App. 431, 435-39, 541 A.2d 1012, 1013-15 (1989) (letter on official stationery of a non-profit organization); Newcomb v. Owens, 54 Md. App. 597, 604-05, 459 A.2d 1130, 1134-35 (1983) (hospital records furnished to court in response to subpoena); Watkins v. State, 42 Md. App. 349, 355, 400 A.2d 464, 468 (1979) (commitment record of an inmate); Thomas v. Owens, 28 Md. App. 442, 346 A.2d 662 (1975) (medical invoice sent by a government official pursuant to statute; as alternative ground, evidence was admitted properly to corroborate other evidence). \textbf{But see} United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992) (finding that although even documentary evidence may suffice to lay the foundation for the business records exception, it was reversible error to admit bank records absent a demonstration that "the records were made contemporaneously with the act the documents purport to record by someone with knowledge of the subject matter, that they were made in the regular course of business, and that such records were regularly kept by the business"; testifying witness had no familiarity with bank's record keeping system and did not attest to any of the other requirements of Federal Rule of Evidence 803(6)); United States v. Furst, 886 F.2d 558, 572 (3d Cir. 1989) (circumstantial evidence failed to authenticate significant portions of records erroneously admitted), \textit{cert. denied}, 493 U.S. 1062 (1990).


\textsuperscript{95} See, e.g., \textit{In re} Department of Energy Stripper Well Exemption Litig. v. DOE, 874 F. Supp. 1161 (D. Kan. 1994) (the contents of the documents as well as other matters of record were sufficient to establish their status as business records kept in the course of regularly conducted business); see also 4 \textit{WEINSTEIN & BERGER}, supra note 92, ¶ 803(6)[02], at 803-199-200 & nn.5, 9 ("A foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank statements and similar documents.").

\textsuperscript{96} \textit{FED. R. EVID.} 803(6); see \textit{supra} note 38; see also 4 \textit{WEINSTEIN & BERGER}, \textit{supra} note 92, ¶ 803-195-96.
other qualified witness.\textsuperscript{97} The intent behind the Maryland Rule was to codify the pre-Title 5 Maryland case law.

Reaching a result similar to that of those pre-Title 5 cases referred to above, a pre-Title 5 Maryland statute pertaining to proof of bank records in bad check cases explicitly dispensed with the need for a bank employee to testify at trial by providing for admission of an employee's affidavit.\textsuperscript{98}

2. Limited Knowledge Needed by Witness Even When a Testimonial Foundation Was Laid

Before Title 5, even when the foundation for the business records hearsay exception had been laid by the testimony of a custodian or other qualified witness, the cases in Maryland state courts under section 10-101 of the Courts and Judicial Proceedings Article of the Maryland Code\textsuperscript{99} were clear that the witness need not have had first-hand knowledge of the event recorded, or of who recorded it, or of who reported it.\textsuperscript{100} The witness need only have had first-hand knowledge of and have been able to testify to the routine preparation, as a part of the particular business organization,\textsuperscript{101} by persons who were employees or a part of the business,\textsuperscript{102} of such records as those being offered in evidence.

\textsuperscript{97} Compare Md. Rule 5-803(b)(6) (see supra note 90 for text of Rule) with Fed. R. Evid. 803(6) (see infra note 124 for text of Rule).

\textsuperscript{98} See infra note 175 (reciting part of Chapman v. State, 331 Md. 448, 628 A.2d 676 (1993)).


\textsuperscript{101} See, e.g., Killen v. Houser, 251 Md. 70, 246 A.2d 580 (1968) (testifying custodian need not have been custodian at time records were made); Billman v. Maryland Deposit Ins. Fund Corp., 88 Md. App. 79, 128-29, 593 A.2d 684, 708-09, cert. denied, 325 Md. 94, 599 A.2d 447 (1991); Newell v. Richards, 83 Md. App. 371, 574 A.2d 370 (1990), rev'd on other grounds, 323 Md. 717, 594 A.2d 1152 (1991); accord, e.g., Koenig v. Babka, 682 S.W.2d 96, 100 (Mo. App. 1984).

\textsuperscript{102} As a general matter, if it was apparent that the recorded statements were made by someone who was not a part of the business, they did not qualify as business records. See, e.g., Aetna Casualty & Sur. Co. v. Kuhl, 296 Md. 446, 453-55, 463 A.2d 822, 827 (1983) (declarants must be a part of the business; driver's statement recorded in police report did not qualify). The business record statute could be used only when such an entry meets an additional test of "necessity and circumstantial guaranty of trustworthiness." See, e.g., Evans v. State, 304 Md. 487, 516-19, 499 A.2d 1261, 1276-78 (1985) (jail visitor's card and hotel registration form were admissible as business records when they were filled out in the regular course of business, even though the information
The same was true in federal court under both Federal Rule of Evidence 803(6)\(^{103}\) and its statutory precursor.\(^ {104}\) As explained in the

was entered by the visitors and guest; they were not offered as independent substantive evidence, however, but as corroborating evidence), \textit{cert. denied}, 478 U.S. 1010 (1986); Burroughs Int'l Co. v. Datronics Eng'r, 254 Md. 327, 347-48, 255 A.2d 341, 351 (1969); Wilson v. State, 44 Md. App. 318, 333-34, 408 A.2d 1058, 1066 (1979) (motel registration card was admitted properly as a business record, when motel proprietor testified that when anyone registered for a room she required them to complete a registration card which she then kept as a matter of routine business procedure, and she identified the card as one that had been made on the date in question, in the conduct of her regular course of business).

As to the resolution of the same issue under the federal rule, \textit{compare}, \textit{e.g.}, United States v. Saint Prix, 672 F.2d 1077 (2d Cir. 1982) (no error to admit hotel records showing individuals as guests when substantial evidence corroborated them), \textit{cert. denied}, 456 U.S. 992 (1982), and \textit{In re Ollag Constr. Equip. Corp.}, 665 F.2d 43, 46 (2d Cir. 1981) (financial statements made to bank and relied on by it were admitted properly under Federal Rule of Evidence 803(b)(6)) \textit{with}, \textit{e.g.}, United States v. Bell, 833 F.2d 272, 276 (11th Cir. 1987) (government conceded that motel registration card signed with defendant's name was inadmissible as business record, absent testimony that motel routinely verified guests' identities; but card could be admitted to show that someone using defendant's name and address had registered at motel and then could be compared by jury with defendant's handwriting exemplar so as to determine whether it was his signature), \textit{cert. denied}, 486 U.S. 1013 (1988), and United States v. Lieberman, 637 F.2d 95, 99-101 (2d Cir. 1980) (hotel guest registration card was inadmissible as business record but admitted properly as nonhearsay).

Whether to admit such evidence under Maryland Rule 5-803(b)(6) would be determined by the court's analysis of the second sentence of subsection (b)(6), read in light of cases such as Aetna Casualty & Sur. Co. v. Kuhl, 296 Md. 446, 463 A.2d 822 (1983), cited in the first paragraph of this footnote.

\(^{103}\) \textit{See}, \textit{e.g.}, United States v. Arias-Villaneuva, 998 F.2d 1491, 1503 (9th Cir. 1993) (a "'qualified witness,' for purposes of Federal Rule 803(6), need not "'know who filled out the particular document and whether that person really had knowledge of the events that were purportedly being reported in the document'"), \textit{cert. denied}, 114 S. Ct. 537 (1993); United States v. Bland, 961 F.2d 123, 127 (9th Cir. 1992) ("The fact that [the witness] did not complete Exhibit 13 [a form required by Alcohol, Tobacco & Firearms to be filled out by gun dealer] himself, and his failure to identify either the specific person who completed Exhibit 13 or when that person completed it, do not keep Exhibit 13 from being a business record. Frederickson's testimony that Exhibit 13 was ordinarily completed at the time of the purchase was sufficient to satisfy the requirement that he establish that Exhibit 13 was completed 'at or near the time of the incident recorded.'") (citations omitted), \textit{cert. denied}, 113 S. Ct. 170 (1992); United States v. Franks, 939 F.2d 600, 602-03 (8th Cir. 1991) ("Franks is simply incorrect that Rule 803(6) requires that the witness testifying to the documents have personal knowledge of their preparation. ... United States v. Keplinger, 776 F.2d 678, 693 (7th Cir. 1985) (Rule 803(6) does not require that 'qualified witness' personally participate in creation of documents or 'even know who actually recorded the information'), \textit{cert. denied}, 476 U.S. 1183 (1986). A contrary rule, requiring the testimony of the person who prepared the records, would eviscerate the business records exception. \textit{Id.}
Senate Judiciary Committee Report on Federal Rule of Evidence 803(6):

It is the understanding of the committee that the use of the phrase "person with knowledge" [also used in Maryland Rules 5-803(b)(6) and 5-902(a)(11)] is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record, or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, [sic] reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or, in the case of a computer printout, upon a report from the company's

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at 694.”) (footnote and some citations omitted); United States v. Hathaway, 798 F.2d 902 (6th Cir. 1986) (under Federal Rule of Evidence 803(6), witness needs only knowledge of the record-keeping procedures); 4 WEINSTEIN & BERGER, supra note 92, § 803(6)(02), at 803-201-03 & nn.11-12, § 803(6)(04), at 803-211-13; MARYLAND EVIDENCE, supra note 27, § 803(6).2, at n.4; cf. United States v. Bermea, 30 F.3d 1539, 1574 (5th Cir. 1994) (no abuse of discretion in admitting telephone records, when "defense counsel [had] questioned the records custodian called by the government to introduce the records and elicited from her the admission that she did not know whether the records had been maintained in their original form or altered in any way. The custodian did, however, verify that the records were business records within the definition of Federal Rule of Evidence 803(6) and that they were accurate when made. Evaluating the admissibility of evidence, of course, is a matter within the sound discretion of the trial court. ... [A]ny break in the chain of custody goes to the weight of the evidence rather than its admissibility ... ")", cert. denied, 115 S. Ct. 113 (1995).

104. 28 U.S.C. § 1732 (1988). See, e.g., United States v. Fendley, 522 F.2d 181, 184-85 (5th Cir. 1975) (custodial witness properly laid foundation for business records, even though he was not in the employ of the company making the records at the time they were made; "Similarly, nothing in the Business Records Act requires either that the foundation witness be able to personally attest to the accuracy of the information contained in the document, or that he have personally prepared the document. In fact, both these requirements have been frequently held to have been specifically eliminated by 28 U.S.C. § 1732."); United States v. Hay, 376 F. Supp. 264, 274 (D. Colo. 1974) (authentication of Swiss bank records by deposition of Swiss bank employee sufficient under 28 U.S.C. § 1732, as incorporated by 18 U.S.C. §§ 3492-93, even though deponent said he had no personal knowledge of the factual information in the documents), aff'd, 527 F.2d 990 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976).
computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be conterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.\textsuperscript{105}

The cases under the federal rule are consistent on this point with the Maryland cases that were codified by Maryland's adoption of Rule 5-803(b)(6).

3. Rule 5-902(a)(11)

Maryland Rule 5-902(a)(11) expands the situations where live testimony is unnecessary. The Rule, like similar rules in other states,\textsuperscript{106} was intended to allow proof, by certification, of the same facts that the certifying person would have needed to state in order to lay the foundation for the hearsay exception at trial. The pre-TITLE 5 Maryland cases are clear that the person laying the foundation need not have had first-hand knowledge of the making of the record or of the facts memorialized in it.\textsuperscript{107} If that person could have sworn to the required foundation facts for the hearsay exception in court, that person can certify them, "under oath subject to the penalty of perjury," under Rule 5-902(a)(11) and (b). To require more would be to undo the Rule.

Maryland Rules 5-803(b)(6) and 5-902(a)(11), as well as Federal Rule of Evidence 803(6), codify the safety valve that had existed at common law. Under the Rules, the court may exclude a proffered record as unreliable on the ground "that the information in the record lacks trustworthiness,"\textsuperscript{108} because of either (1) "the source

\textsuperscript{105}S. REP. No. 93-650, 93d Cong., 2d Sess. 16-17 (1974). \textit{But see} Rudolph J. Peritz, \textit{Computer Data and Reliability: A Call for Authentication of Business Records Under the Federal Rules of Evidence}, 80 NW. U. L. REV. 956 (1986) (arguing that a greater foundation should be laid for computerized records, by a testifying witness as to system reliability); \textit{see also supra} note 81.

\textsuperscript{106}See infra part VI.

\textsuperscript{107}See supra note 101.

\textsuperscript{108}See, e.g., United States v. Davis, 571 F.2d 1354 (5th Cir. 1978) (report made to ATF, years after shipment of gun in question, failed to meet requirements of Federal Rule of Evidence 803(6)); United States v. Miller, 500 F.2d 751, 754 (5th Cir. 1974) (In order for records to be admissible as business records: "(1) The records must be kept pursuant to some routine procedure designed to assure their accuracy, (2) they must be created for motives that would tend to assure accuracy (preparation for litigation, for example, is not such a motive), and (3) they must not themselves be mere accumulations of hearsay or uninformed opinion.")", \textit{cert. denied}, 479 U.S. 839 (1986); \textit{see also infra}
of information," such as someone outside the business;\(^{109}\) or (2) "the method or circumstances of the preparation" of the record, such as a self-serving record, made after an accident, when the motive to protect oneself in anticipated litigation might overcome the usual motive to keep reliable records.\(^{110}\) If the trial court is persuaded that the proffered record is unreliable, it should, in its discretion, find that the record does not comply with Rule 5-902(a)(11), and that it is not admissible under Rule 5-803(b)(6). Unreliability, however, should not be found simply on the basis that the certifier is not in court to testify\(^{111}\) or, for example, because the record contains an obvious typographical error.\(^{112}\)

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note 121. Judge Weinstein and Professor Berger caution:

In short, if the judge finds that the record may be helpful to the jurors and that they should be able to discount its untrustworthy aspects with adequate instructions, the judge should admit the record. Assessment of probative force should, whenever possible, be left for the jury. The jury’s function should not be reduced by excluding relevant evidence unless the court is reasonably assured that the result of the litigation will be less reliable if the evidence is revealed to the jury.

Statements by professionals expressing their opinion on a relevant matter should be excluded only in rare instances, particularly if the expert is independent of any party, and especially if the reports have been made available to the opposing party through discovery so that rebuttal evidence can be prepared.

4 Weinstein & Berger, supra note 92, ¶ 803(6)[07], at 803-233-34 (citations omitted).

109. See supra note 102; see also 4 Weinstein & Berger, supra note 92, ¶ 803(6)[04].

110. See, e.g., Masterson v. Pennsylvania R.R., 182 F.2d 793, 796-97 (3d Cir. 1950); Weishaar v. Canestrale, 241 Md. 676, 686, 217 A.2d 525, 531 (1966) (self-serving statement in anticipation of litigation was inadmissible); 4 Weinstein & Berger, supra note 92, ¶¶ 803(6)[03], [05], [07]. But cf. Chapman v. State, 331 Md. 448, 464-65, 628 A.2d 676, 684-85 (1993) (bank’s completion of affidavit, for use by State in prosecution for passing bad check, was not suspect: inter alia, “The bank has neither a position to advocate nor a stake in the outcome of a criminal trial.”).

111. See infra note 129.

112. Chapman v. State, 331 Md. 448, 453, 473-74, 628 A.2d 676, 678, 689-90 (1993) (“Upon review of the affidavit admitted at Chapman’s trial we conclude that the obvious single typographical error in the affidavit does not undermine the reliability of its otherwise trustworthy hearsay. Unlike the report submitted in Moon, the affidavit submitted at Chapman’s trial was not marred by discrepancies that undermined its reliability. The trial judge did not err in relying on the dishonored check, which was in evidence, and concluding that the Affidavit as to Account Status was trustworthy, despite the presence of an obviously typographical error. The check was also in evidence. In accordance with banking industry practice, each bank that handled the check stamped the back of the instrument with a date on which it handled the check. The check Chapman uttered contained two such stamps: (1) from the collecting bank in which Sears
V. 18 U.S.C. § 3505

This Article's suggested interpretation of Maryland Rule 5-902(a)(11) is supported by the law construing the most closely analogous federal provision, 18 U.S.C. § 3505. Section 3505 was enacted in 1984 in response to the sometimes impassable and, at the very least, "cumbersome and expensive" barriers and diplomatic brouhahas created by the American courts' insistence on far more exacting proof of the accuracy and authenticity of foreign business records than that required in foreign courts. Congress intended 18 U.S.C. § 3505 as "a simple, inexpensive substitute" for the prior, complicated procedures.

In light of this legislative history, the federal courts have adopted a "liberal approach to the introduction of documents" pursuant to 18 U.S.C. § 3505. The courts have found that the record custodian's attestation that he or she "will be subject to criminal liability for a false certification affords the records sufficient degree of reliability" for admission, despite the hearsay rule, initially deposited the check dated April 20, 1988; and (2) the drawee bank which received the check for presentment on April 21, 1988. It is clear that the date of presentment in the affidavit was not substantive and was merely a typographical error. The hearsay affidavit of the bank was admissible to establish the status of Chapman's account.

117. H.R. REP., supra note 114, at 3 (quoted in United States v. Ross, 33 F.3d 1507, 1515 (11th Cir. 1994)).
unless a showing of "untrustworthiness" is made. Untrustworthiness may be found, for example, when the documents were not made at or near the time of the acts recorded.

The federal courts have been liberal in their decisions as to what constitutes a sufficient certification under 18 U.S.C. § 3505. The statute establishes five criteria for certificates:

1. Certificates should be signed by a person acting in the capacity of custodian or by a person with knowledge of matters [certified];
2. Certificates should indicate that the records were made or received in the regular course of business;
3. Certificates should indicate the records were made as a regular business practice;
4. Certificates should indicate records were made or received at the time, or within a reasonable time thereafter, of the recorded event;
5. [Certificates should indicate either that the record is an original, or] if such record is not an original, such record is a duplicate of the original.


121. United States v. Chu Kong Yin, 935 F. Supp. 990, 995-96 (9th Cir. 1990) (finding documents listing and explaining defendant's arrests and convictions in Hong Kong sufficiently authenticated under Federal Rules of Evidence 901(b)(1), (4), and (7); declarations on four of the documents complied with 18 U.S.C. § 3505); see also supra note 108.

122. 18 U.S.C. § 3505 (1988); see United States v. Bertoli, 854 F. Supp. 974, 1030 (D.N.J. 1994). For example, the Bertoli court found sufficient, under 18 U.S.C. § 3505, affidavits from one Bechard, acting as the record custodian of Greenshields, a Cayman Islands financial institution:

First, each affidavit stated that Bechard was Resident Manager of Greenshields and that "as a result of [his] duties and responsibilities [he was] aware of the manner in which the books and records of the Company are kept." Second, as to each document of Greenshields, the Bechard affidavits indicated the document (1) was made at or near the time of the occurrence of the matters set forth therein, (2) was made by a person with knowledge of the matters recorded or from information transmitted by persons with such knowledge, (3) was prepared and kept in the course of regularly conducted business and (4) was a duplicate of an original document of Greenshields. . . .

[T]he Bechard affidavits further state[d] that it was the "regular practice" of Greenshields "to check the correctness of" and "to rely on" records of the kind being certified . . . .

Bertoli, 854 F. Supp. at 1032 (citations omitted). The Bertoli court also found that three Euro Bank documents were sufficiently authenticated:

The documents were certified by an affidavit submitted by Ivan Burgess ("Burgess"), the records custodian of Euro Bank, which
Self-Authentication of Business Records

The first four facts to be certified track the foundation requirements of the business records hearsay exception, codified in Federal Rule of Evidence 803(6). The legislative history of 18 U.S.C. § 3505 clearly states that "[s]ubsection 3505(a)(1) 'should be interpreted in the same manner as the comparable language in Rule 803(6) is interpreted.'" Thus, a certificate will suffice under 18 U.S.C. § 3505 if it states all of the facts that would have made it sufficient had the certifier testified at trial to lay the foundation under Rule 803(6).

affidavit complied with the requirements of section 3505(a)(1).

The affidavit stated that Burgess had knowledge of the manner in which the books and records of Euro Bank were kept as a result of his "duties and responsibilities" at Euro Bank, and that the documents in question (1) were made at or near the time of the occurrences set forth therein, (2) were prepared by persons with knowledge of the matters recorded or from information transmitted by persons with such knowledge and (3) were kept in the regular course of business and these types of records were made as a regular business practice.

Regarding reliability, the Euro Bank documents enjoyed a presumption of reliability given they were the documents of a Cayman Islands bank. In addition, the affidavit stated that "it was the regular practice of [Euro] Bank to check the correctness of" and to "rely on" the types of documents certified. Finally, the reliability of these documents was further supported by the fact that Rodney Bond, during his deposition, recognized and identified these documents as original Euro Bank documents.

Accordingly, Exhibits 2453(y) and 2453(aa) were admitted pursuant to 18 U.S.C. § 3505. As the Government argued, Bertoli's objection regarding the lack of underlying documentation to explain the contents of these exhibits was a comment on the weight to be given to the documents, rather than an objection to their admissibility.

Id. at 1033-34 (citations omitted).

123. Federal Rule of Evidence 803(6) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

124. H.R. REP., supra note 114, at 3 (quoted in United States v. Ross, 33 F.3d 1507, 1515 (11th Cir. 1994)).
The certifier need not have first-hand knowledge of the facts recorded, of their recording, or of who reported them. An affidavit or certificate has been held sufficient if it has tracked the business records hearsay exception foundation, especially, but not only, when the court explicitly recognizes the foreign country as one having a record-keeping system similar to that of the United States.

Indeed, the federal courts evaluating evidence offered under 18 U.S.C. § 3505 have required ""'only substantial compliance'"" with the statute. If every particular of the statute has not been met, the courts still have found the certified documents admissible, if the courts are satisfied as to the fundamental issue that the offered ""'documents bear the indicia of reliability.'"" The mere fact that

As the Bertoli court explained:

For instance, in Gleave, the court found that (1) a custodian's signature does not need to be legible or include a position and address, (2) a custodian does not need to ""'aver making false statements that would subject [him or her] to criminal sanctions'"" or say what penalties may be imposed and (3) certifications do not need to specify if the custodian ""'swore'"" or ""'affirmed'"" (swearing under oath) under penalty of perjury. 786 F. Supp. at 278-79; see also Sturman, 951 F.2d at 1489 (certification does not need to be physically attached to records or identify specific records being authenticated); Chan, 680 F. Supp. at 523 (""'copy' of a record is permissible.

854 F. Supp. at 1031-32 n.101. See United States v. Strickland, 935 F.2d 822, 831 (7th Cir. 1991) (certification ""'does not require the use of a 'magic form' upon which the employee/record-provider of foreign company must certify that he is aware that his answers come under penalty of perjury').

128. United States v. Bertoli, 854 F. Supp. 975, 1033-34 (D.N.J. 1994) (quoting Strickland, 935 F.2d at 831). See also United States v. Ross, 33 F.3d 1507, 1515-17 & nn.11, 17 (11th Cir. 1994) (no violation of Confrontation Clause to have admitted foreign business records, including ""'Aruban immigration records [computer printouts], Spanish and Italian hotel records, and Canadian passport applications, currency exchange records, car registration records, and phone tolls,'"" against defendant pursuant to 18 U.S.C. § 3505); United States v. Miller, 830 F.2d 1073, 1077 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988) (bank records from Cayman Islands were reliable); United States v. Gleave,
the certifier is not in court to testify does not demonstrate unreliability.129

VI. ALASKA, KENTUCKY, AND TEXAS RULES SUBSTANTIVELY IDENTICAL TO MARYLAND RULE 5-902(A)(11)

There is no case law construing the Kentucky Rule130 that is substantively identical to Maryland Rule 5-902(a)(11), and there is little reported case law construing the substantively identical Alaska131 and Texas132 Rules. The one case on point, a Texas appellate case,133 construing a state rule substantively identical to Maryland Rule 5-902(a)(11), however, supports the conclusion that a certification under the Rule need only track the same business records foundation requirements as if the certifier had testified at trial. That is, the certifier need not have had any more first-hand knowledge than

786 F. Supp. 258, 279 (W.D.N.Y. 1992) (because the Cayman Islands “is a member of the United Kingdom with business practices like those in the United States,” its bank records had requisite indicia of reliability), aff’d in part, rev’d in part on other grounds sub nom., United States v. Knoll, 16 F.3d 1313 (2d Cir. 1994); United States v. Hing Shair Chan, 680 F. Supp. 521, 525 (E.D.N.Y. 1988) (Hong Kong is a British colony with business practices much like those in the United States, and its hotel records are reliable); United States v. Garland, 991 F.2d 328 (6th Cir. 1993) (no showing was made that records of facts found by tribunal in Ghana were untrustworthy).

129. See United States v. Garland, 991 F.2d 328, 332-34 (6th Cir. 1993) (court of appeals judicially noticed criminal judgment in Ghana, insofar as to show the existence of detailed findings of fact by the court in Ghana, provable as foreign document under 18 U.S.C. § 3491 or § 3505; the records satisfied the trustworthiness requirements of § 3505, as “[t]here is no indication that the records presented in the instant case are unreliable or that the process by which the record was made is untrustworthy.”); Bradford Trust Co. v. Merrill Lynch Pierce, Fenner, and Smith, Inc., 805 F.2d 49, 54 (2d Cir. 1986) (opponent of Federal Rule of Evidence 803(8)(C) public records evidence must make “an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to testify”) (quoting Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 618 (8th Cir. 1983)).

130. Ky. R. Evid. 902(11).

131. ALASKA R. EVID. 902(11). In the one reported Alaska case citing Alaska Rule of Evidence 902(11), the proponent of the evidence—certified copies of calibration certificates that were offered to show that a radar unit was properly calibrated—had offered it as certified copies of public records, under Rule 902(4), and the court merely noted that the certification did not attempt to track the requirements of 902(11); nor, in the court’s opinion, was it clear “whether the preparation of calibration reports would qualify as regularly conducted [business] activity.” Buening v. State, 814 P.2d 1373, 1376 n.4 (Alaska Ct. App. 1991).

132. TEX. R. CIV. EVID. 902(10); TEX. R. CRIM. EVID. 902(10).

would authenticating witnesses under the Maryland case law.\textsuperscript{134}

That Texas appellate case held that the affidavit accompanying a laboratory analysis and an attached report of the medical examiner regarding the alcohol concentration in the blood of the deceased truck driver victim of a motor vehicle accident was sufficient to comply with the Rule.\textsuperscript{135} The court found the report to be sufficient because it was “clear as to who drew the sample and when it was drawn,”\textsuperscript{136} even though the certifier clearly had no first-hand knowledge of the acts recorded because the blood was drawn by another person at another location.\textsuperscript{137}

In rejecting the claimants’ argument that the affidavit by a toxicologist, Prouty, was inadequate to make the record self-authenticating, Justice Farris, writing for the intermediate Texas appellate court, made clear that an affidavit to facts that would have been sufficient to lay the business records foundation if the affiant had testified at the trial was sufficient under the Texas Rule:

Rule 902(10) provides that records that would be admissible under 803(6) will be admissible upon the affidavit of the person who would otherwise testify that the prerequisites were met, if the affidavit states that the record was in fact kept as required by Rule 803(6). Rule 902(10)(b) provides a sample affidavit\textsuperscript{138} and states that affidavits that follow and substantially comply with it will satisfy the requirement of authentication. Toxicologist Prouty’s affidavit tracks the sample affidavit provided in the rule almost verbatim. Prouty did not state he was the custodian of records; however, it is clear that he is a qualified witness and competent to testify to the 803(6) prerequisites.

Although Prouty did not draw the blood sample and therefore does not have personal knowledge of that act, his report is made with information transmitted by the medical examiner who did draw the blood sample. The affidavit states that it was in the regular course of the Office of the Chief Medical Examiner’s business to have an employee or representative with personal knowledge of the acts recorded to transmit information concerning the act for inclusion in the records.

As to the [claimants, the] Marches’ complaint that the affidavit is defective because it does not attest to the

\begin{thebibliography}{1}
\bibitem{134}{\textit{See supra} note 99.}
\bibitem{135}{\textit{TEX. R. CIV. EVID.} 902(10).}
\bibitem{136}{\textit{March}, 773 S.W.2d at 788.}
\bibitem{137}{\textit{Id.} at 789.}
\bibitem{138}{\textit{See infra} part XI, Appendix, and accompanying note 250.}
\end{thebibliography}
accuracy or trustworthiness of the report, we note that the requirements for authentication under Rules 803(6) and 902(10) do not require the sponsoring witness or affiant to testify as to the trustworthiness of the report. The witness or affiant is to set forth the facts upon which an assessment of trustworthiness can be made by the court.\textsuperscript{139}

Thus, the Texas court held that a statement was sufficient if it certified that the regular course of business was to have the information provided by or from someone in the business who had first-hand knowledge.\textsuperscript{140} It was not necessary that the affiant-certifier have, or state that he or she had, personal knowledge that the particular information was transmitted by or from someone in the business who had first-hand knowledge.\textsuperscript{141}

The court treated the required statements identically to those that would be sufficient if the affiant were to testify in court. The Texas court’s approach is both proper and necessary to best further the goal of the Texas Rule and of Maryland Rule 5-902(a)(11)—to preclude the necessity for that testimony in every case where the opposing party is not willing to stipulate to authenticity.

\section*{VII. CONSTITUTIONALITY}

A party in a civil case who wished to argue that Maryland Rule 5-902(a)(11) is unconstitutional likely would aver that the Rule violates the Due Process Clause;\textsuperscript{142} a defendant in a criminal case would argue that the Rule violates the accused’s confrontation right.\textsuperscript{143} Under the reasoning of the federal cases\textsuperscript{144} upholding the analogous federal statute, 18 U.S.C. § 3505, and under the general principles established by pre-Title 5 Maryland case law, the Rule contains adequate protections of these rights.

First, in order to ensure reliability of the evidence, the Rule contains an explicit safety valve identical to that under the firmly-rooted business records exception itself.\textsuperscript{145} That valve is that the

\textsuperscript{139} March, 773 S.W.2d at 789.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{143} “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI; see also Md. Code Ann., Const. Decl. of Rts. art. 21 (1981).
\textsuperscript{144} See infra note 149.
\textsuperscript{145} Md. Rule 5-803(b)(6) (see supra note 90 for text of Rule). Federal Rule of Evidence 803(6) contains the same language. See supra note 123 for text of Rule. Federal Rule of Evidence 803(8)(C), which creates a hearsay exception for factual findings made by public agencies after conducting investigations
court will not find the Rule’s requirements satisfied if “the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.” 146 Second, in the interest of fairness, the Rule not only requires that advance notice be given to the adverse party when one intends to take advantage of the Rule, but it also provides that the adverse party be given sufficient advance opportunity to inspect the evidence so as to have a “fair opportunity to challenge it.” 147

A. 18 U.S.C. § 3505

Despite the vigorous argument of at least one commentator, a criminal defense practitioner, that 18 U.S.C. § 3505 violates the Confrontation Clause because it permits the admission of business

pursuant to law, uses similar language. Fed. R. Evid. 803(8)(C) (“unless the sources of information or other circumstances indicate lack of trustworthiness”); see, e.g., In re Air Disaster at Lockerbie, Scotland, 37 F.3d 804, 827-28 (2d Cir. 1994) (district court did not abuse its discretion in not finding detective’s conclusion untrustworthy); Bradford Trust Co. v. Merrill Lynch Pierce, Fenner, and Smith, Inc., 805 F.2d 49, 54 (2d Cir. 1986) (opponent of Federal Rule 803(8)(C) public records evidence must make “an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to testify”) (quoting Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 618 (8th Cir. 1983)).

146. MD. RULE 5-902(a)(11)(c).
147. Id.; cf. Del Vecchio v. Illinois Dept. of Corrections, 31 F.3d 1363, 1388 (7th Cir. 1994) (Illinois statute, “which permits the admission of hearsay evidence at a capital sentencing hearing . . . protects the defendant by providing that he ‘shall be given a fair opportunity to rebut any information received at the hearing.’ The Constitution, also, requires that the defendant be given the opportunity to rebut evidence which makes its way into the sentencing hearing because of the lax evidentiary standards. Del Vecchio was given this opportunity. He had access to the contested hearsay reports [on which the testifying experts relied]; he could have cross-examined [the testifying experts] Drs. Rogers and Cavanaugh about the reports; he could have called his own experts. Because he was given the opportunity to be heard, he cannot now succeed on this constitutional claim.”) (citations omitted).


The bill permits the admission of foreign business records if the custodian provides a certification setting forth certain information about the records and their manner of being kept. The Committee believes, in view of the inherent trustworthiness of such records and the ability of the defendant to challenge their admission if the source of information from which they were made or the method or circumstances of their preparation indicate lack of trustworthiness, that the legislation adequately protects against the admission of unreliable evidence while at the same time facilitating the admission of a type of evidence that is being required in an ever increasing number of federal prosecutions.

H.R. Rep., supra note 114, at 5-6 (emphasis added).
Self-Authentication of Business Records

records without the appearance of a witness at trial to lay the foundation for the hearsay exception,\textsuperscript{148} the cases unanimously have upheld the statute as constitutional.\textsuperscript{149}

\textsuperscript{148} Brenner, supra note 115; see also Ronan E. Degnan, Obtaining Witnesses and Documents (Or Things), 108 F.R.D. 223, 231 (1986) (predicting that a Confrontation Clause attack on 18 U.S.C. § 3505 is “certain” to be made). Ms. Brenner relies on cases including United States v. Oates, 560 F.2d 45, 81 (2d Cir. 1977) (“To be considered for admission the [hearsay] statement [of a declarant who does not testify at trial] must bear sufficient indicia of reliability to assure an adequate basis for evaluating the truth of the declaration, for its truth will not be tested by adversary cross-examination at trial.”), and Philips v. Neil, 452 F.2d 337 (6th Cir. 1971) (Tennessee state court’s admission of medical records from mental examinations of defendant prior to alleged crime, as business records, violated accused’s confrontation right when no showing of necessity was made and an inadequate showing of reliability was made; \textit{inter alia}, bases for conclusions in records were unclear), \textit{cert. denied}, 409 U.S. 884 (1972). These cases precede the United States Supreme Court’s decision in Ohio v. Roberts, 448 U.S. 56 (1980). See \textit{infra} text accompanying notes 156-57.

As the United States Court of Appeals for the Ninth Circuit has pointed out, \textit{Oates}’ authority has been limited.

[Appellant] cites United States v. Oates, 560 F.2d 45, 81 (2d Cir. 1977), for the proposition that a statement admissible under a recognized hearsay exception may still violate a defendant’s sixth amendment rights. \textit{Oates} is no longer valid authority on this point. If Exhibit 13 was admitted under a “firmly rooted” exception to the hearsay rule, like the business records or official records exceptions, no violation of the confrontation clause occurred. Ohio v. Roberts, 448 U.S. 56, 66 & n.8, 100 S. Ct. 2531, 2539 & n.8, 65 L. Ed. 2d 597 (1980); United States v. Ray, 930 F.2d 1368, 1371 (9th Cir. 1991).


She recognizes that United States v. Leal, 509 F.2d 122 (9th Cir. 1975), is contrary to her argument. \textit{See} Brenner, supra note 115, at 364-65 n.150. \textit{Leal} upheld the admission, under Federal Rule of Civil Procedure 44 as applied through Federal Rule of Criminal Procedure 27, of the affidavit of an assistant hotel manager, to which were attached an original hotel registration card and telephone booking orders, to prove that the defendant and his wife were in Hong Kong and thus had the opportunity to commit a particular act there. \textit{Id.} at 126. But Ms. Brenner distinguishes \textit{Leal} on the theory that the particular records were “official, or at least quasi-official records,” since they were mandated by a Hong Kong ordinance. Brenner, supra note 115, at 364-65 n.150.

\textsuperscript{149} United States v. Ross, 33 F.3d 1507, 1515-16 (11th Cir. 1994) (“The central issue is whether the use of an affidavit to authenticate foreign business records offends the Confrontation Clause. Although this Court has not yet had occasion to address this question, every federal court to consider the issue has held that
Recently, the United States Court of Appeals for the Eleventh Circuit so ruled, in agreement with the other federal courts that have considered the question.\(^{150}\) In support of its decision that 18 U.S.C. § 3505 is constitutional, that federal court cited a decision by the Maryland court of appeals that upheld the constitutionality of an admission, pursuant to a Maryland statute, of an affidavit to prove the status of a bank account, without the need to have a bank employee testify at trial.\(^{151}\)

The analysis of the Court of Appeals for the Eleventh Circuit, like that of the Maryland court of appeals,\(^{152}\) follows the approach developed by the United States Supreme Court, in a line of cases beginning with *Mattox v. United States*,\(^{153}\) recognizing that the confrontation right “is not absolute.”\(^{154}\) Under the later case of *Ohio v. Roberts*\(^{155}\) and its progeny, the confrontation right is not violated if either (1) the out-of-court declarant is unavailable to testify, and the hearsay statement bears sufficient “indicia of reliability”\(^{156}\) (these indicia may be present either (a) because the statement “falls within a firmly rooted hearsay exception”\(^{157}\) or (b)  

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\(^{150}\) Ross, 33 F.3d 1507 (11th Cir. 1994).

\(^{151}\) Id. at 1516 (citing Chapman v. State, 331 Md. 448, 452-67, 628 A.2d 676, 678-86 (1993)); see infra text and accompanying notes 173-92.

\(^{152}\) Chapman, 331 Md. at 453-60, 628 A.2d at 679-82.

\(^{153}\) 156 U.S. 237 (1895).

\(^{154}\) Ross, 33 F.3d at 1516; see, e.g., Maryland v. Craig, 497 U.S. 836, 850 (1990) (accused’s confrontation right “may be satisfied absent a physical, face-to-face confrontation at trial [but] only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured”), on remand sub nom., Craig v. State, 322 Md. 418, 588 A.2d 328 (1991).

\(^{155}\) 448 U.S. 56 (1980).

\(^{156}\) Id. at 65-66.

\(^{157}\) Id. at 66; accord Idaho v. Wright, 497 U.S. 805, 816 (1990); United States v. Kelly, 892 F.2d 255, 260-63 (3d Cir. 1989) (admitting depositions of witnesses taken in Belgium, with defense attorneys present and having opportunity to
because it has been supported by "a showing of particularized guarantees of trustworthiness"), or (2) even if the declarant is available to testify, the declarant's in-court testimony likely would be less probative than the out-of-court statement.

cross-examine, and when defendants were permitted to listen to the depositions live and to speak with their attorneys by telephone, did not violate defendant's confrontation right; evidence fell within firmly-rooted hearsay exception for prior testimony of unavailable declarants, cert. denied, 497 U.S. 1006 (1990). Business records fall within a firmly-rooted hearsay exception. See, e.g., United States v. Franks, 939 F.2d 600, 603 (8th Cir. 1991); Chapman v. State, 331 Md. 448, 457 n.3, 628 A.2d 676, 680-81 n.3 (1993); see also United States v. Hudson, 479 F.2d 251 (9th Cir. 1972) (conviction of failure to report for draft upheld, based on anonymous statement in public officer's report), cert. denied, 414 U.S. 1012 (1973); Hanley v. United States, 416 F.2d 1160, 1167-68 (5th Cir. 1969) (admission of business records did not violate defendant's confrontation right), cert. denied, 397 U.S. 910 (1970).

158. Ohio v. Roberts, 448 U.S. 56, 66 (1980); accord Idaho v. Wright, 497 U.S. 805, 816 (1990); Chapman v. State, 331 Md. 448, 457, 628 A.2d 676, 681 (1993) ("[w]here hearsay statements are admitted under an exception which is not considered 'firmly rooted,' then they are 'presumptively unreliable and inadmissible for Confrontation Clause purposes' and must be excluded, at least absent a 'showing of particularized guarantees of trustworthiness.'""); Lee v. Illinois, 476 U.S. 530, 543 (1986) (quoting Roberts, 448 U.S. at 66). These guarantees of trustworthiness must be such that the evidence is "at least as reliable as evidence admitted under a firmly rooted hearsay exception" so as to assure "that adversarial testing would add little to its reliability." Wright, 497 U.S. at 821 (citations omitted).

159. White v. Illinois, 112 S. Ct. 736, 742-43 (1992) (Confrontation Clause does not require prosecution to prove the unavailability of a declarant to testify before it may prove hearsay falling within the firmly rooted "spontaneous declaration" and "medical examination hearsay exception," Fed. R. Evid. 803(2), (4); "[t]hose same factors that contribute to the statement's reliability cannot be recaptured even by later in-court testimony."); Bourjaily v. United States, 483 U.S. 171, 182-83 (1987) (no violation of Confrontation Clause in admission of out-of-court statement of an unavailable co-conspirator, pursuant to firmly rooted hearsay exception (now categorized as nonhearsay under Federal Rule of Evidence 801(d)(2)(E)); because exception is firmly rooted, "a court need not independently inquire into the reliability of such statements"); United States v. Inadi, 475 U.S. 387, 395 (1986) (Confrontation Clause does not require prosecution to show that co-conspirator is unavailable to testify before it can introduce his or her statements made during and in furtherance of the conspiracy; "[e]ven when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statement during the course of the conspiracy"); see, e.g., Minner v. Kerby, 30 F.3d 1311, 1315 (10th Cir. 1994) (New Mexico state court did not violate defendant's confrontation right by admitting police chemist's laboratory notes, showing that powder was cocaine of 43% purity, when chemist did not testify at trial—although his supervisor, as well as another chemist who also tested the powder, did testify—"the unavailability requirement of Ohio v. Roberts does not apply in situations where cross examination of the declarant would be of little value to the defense. Reardon [v. Manson], 806 F.2d [39]
Both requirements of the first of these two situations are met by 18 U.S.C. § 3505. Unavailability is established by the fact that the federal courts' subpoena powers do not extend to foreign countries. A panel of the United States Court of Appeals for the Eleventh Circuit reasoned that, because 18 U.S.C. § 3505 is an innovation, more liberal in its dispensation of the live foundation witness than the modern business records hearsay exception codified in Federal Rule of Evidence 803(6), it is not a "firmly-rooted" hearsay exception. Thus, guarantees of trustworthiness must be shown, "such that the evidence is equally reliable as evidence admitted under a firmly rooted hearsay exception to ensure that confrontation through cross-examination would add little to its believability."

The Eleventh Circuit panel agreed with the United States Court of Appeals for the Ninth Circuit that foreign business records

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160. See FED. R. CRIM. P. 17(e)(2) (cited in United States v. Ross, 33 F.3d 1507, 1515 (11th Cir. 1994)). Barber v. Page, 390 U.S. 719 (1968), requires that the government undertake reasonable, good faith efforts—not only formal, but also informal—to obtain a witness' testimony. Id. at 724-25. The cases have made clear that what is reasonable is in part a function of expense and in part a function of how critical the out-of-court statement is and whether it is disputed. See, e.g., Mancusi v. Stubbs, 408 U.S. 204, 212-16 (1972) (defense failed to show any new inquiries it would have of witness who testified at prior trial); United States v. Rivera, 859 F.2d 1204 (4th Cir. 1988) (United States Attorney's actions were reasonable under circumstances), cert. denied, 490 U.S. 1020 (1989).

161. United States v. Ross, 33 F.3d 1507, 1516-17 (11th Cir. 1994).

162. Id. at 1516 (citing Idaho v. Wright, 497 U.S. at 821 (citation omitted), and United States v. Strickland, 935 F.2d 822, 831 (7th Cir. 1991) ("[Section] 3505 did not change the benchmark question in this and every situation involving the admission of documentary evidence: do the documents bear the indicia of reliability?")}, cert. denied, 502 U.S. 917 (1991), and cert. denied, 502 U.S. 1036 (1992).
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offered under 18 U.S.C. § 3505 bore such sufficient indicia of reliability. Both courts reasoned:

The novelty of the statute is to admit the records without confrontation by the defendant with the recordkeepers. No motive is suggested that would lead [the business] officials to change, distort, or manipulate the records at issue here. The recordkeepers have, under criminal penalties in their own countries, asserted that the records are records kept in the ordinary course of business. Examination of the recordkeepers by counsel for [the defendant] could not reasonably be expected to establish anything more or less than that. If the records were in fact inaccurate, it was within [the defendant's] power to depose the recordkeepers and challenge the records.

Thus, the burden is on the opponent to generate an issue of untrustworthiness. Absent a real question as to trustworthiness, it is difficult to see how due process could be violated by admission of certified business records or how a confrontation argument could be more than a disingenuous exercise in creating a phantom for the prosecution to shadow-box. As Chief Judge Weinstein of the United

163. Ross, 33 F.2d at 1517; United States v. Miller, 830 F.2d 1073, 1077-78 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988).
164. Ross, 33 F.3d at 1517 (quoting Miller, 830 F.2d at 1077-78).
165. See supra note 129.
166. See United States v. Albert, 773 F.2d 386, 388-89 (1st Cir. 1985) (no error in admitting, to prove that robbed bank was federally insured, a certified copy of the bank's FDIC issued certificate of insurance; not only did the prosecution lay a proper foundation through a live witness, but "there was no question that the certificate was trustworthy or that the institution was, as stated in the certificate, federally insured. Indeed, Albert offered no evidence contradicting the prosecutor's evidence of the bank's insured status. United States v. Baldwin, 644 F.2d 381, 385 (5th Cir. 1981). Therefore, the district court did not abuse its discretion admitting the insurance certificate as a business record under Fed. R. Evid. 803(6). See United States v. Wingard, 522 F.2d 796, 797 (4th Cir. [1975]) [per curiam], cert. denied, 423 U.S. 1058 (1976) [FDIC certificate, self-authenticating public document under seal, was proved properly to have been hanging in bank]."); United States v. Davis, 767 F.2d 1025, 1032 (2d Cir. 1985) ("[I]t is highly unlikely that . . . the authenticating witnesses' presence at the trial . . . would have weakened the reliability of the records."); United States v. Hadley, 671 F.2d 1112, 1116 (8th Cir. 1982) (in holding that district court had not erred in admitting, to prove essential fact that bank was federally insured, a certificate of insurance and a canceled check representing payment of insurance, both identified by the bank president, the court of appeals commented: "There was no real question that the documents were genuine or that the institution was federally insured."). But see United States v. Pelullo, 964 F.2d 193, 201, 203 (3d Cir. 1992) (reversible error to admit bank records
States District Court for the Eastern District of New York wrote in admitting Hong Kong hotel records authenticated by foreign certification under 18 U.S.C. § 3505:

One could conceive of a scenario in which defendant was not at the Hotel Regal Meridien despite all this documentation. Perhaps Shum was trying to frame Chan and had someone impersonate the defendant. Defendant's counsel did not so argue to the jury. A jury, steeped in the bizarre world of television and politics, might have accepted such a far-fetched explanation and given little or no weight to the documents. But such remote possibilities do not form the basis for an exclusionary rule. We follow the more common sense approach of allowing the jury to decide probative force so long as there is a reasonable ground for the jury's evaluation of generally trustworthy hearsay.167

As Judge Weinstein explained, common sense dictates the admission of apparently trustworthy foreign business records that have been certified as authentic. Opponents, of course, may attack their weight.168

B. Maryland Law

The innovations in Maryland Rule 5-902(a)(11), derived from 18 U.S.C. § 3505, are that the Rule is extended to civil cases and

for which a Federal Rule of Evidence 803(6) foundation was not laid, even though defendant "has not stated any reason why the records are not reliable"; "an accused is under no duty to rebut bare allegations by the prosecutor that documents are what they purport to be and establish the truth of what they represent").

Similar judgments as to fairness and efficiency have been made by the Maryland General Assembly in passing statutes under which evidence of drivers' blood alcohol test results, the chain of custody of controlled dangerous substances and the chain of custody of dead bodies will be admissible without supporting live testimony, unless the defendant takes specified steps to require the witness' presence. MD. CODE ANN., CTS. & JUD. PROC. §§ 10-306, 10-1003, 10-1004(c) (1989); see MARYLAND EVIDENCE, supra note 27, § 901.2; see also Chapman v. State, 331 Md. 448, 460-67, 628 A.2d 676, 681-86 (1993) (instructive as to how to evaluate the reliability of hearsay); Bailey v. State, 327 Md. 689, 612 A.2d 288 (1992) (instructive as to how to evaluate the reliability of hearsay); 2 MCCORMICK, supra note 5, § 353; KENNETH C. DAVIS & RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE §§ 9.11, 10.4 (3d ed. 1994) (in administrative proceedings, the agency or administrative law judge, in evaluating hearsay evidence, should consider the relative importance of the subject matter versus the cost of acquiring better evidence).

168. See supra note 122.
The Maryland court of appeals decisions, like those of the United States Supreme Court, recognize that the confrontation right is not absolute—else it would preclude all hearsay, including hearsay falling within firmly rooted exceptions, such as the business records exception. Before the adoption of Maryland Rule 5-902(a)(11), the foundation for the business records exception could be laid either with a witness—who need not have any knowledge as to the substance recorded, but only as to the recordkeeping procedure—or, in some cases, without a witness. In the latter cases, Rule 5-902(a)(11) has not taken away any opportunity to cross-examine; in the former and more usual situation, the Rule had often not provided a means to take away a meaningful opportunity to cross-examine on the substantive point.


170. See supra note 95; cf. Md. Rule 5-803(b)(18) (under which an expert must testify in order for a learned treatise to be admitted). The expert could be cross-examined on the substantive points.

171. See supra notes 93-94.

172. See, e.g., Chapman v. State, 331 Md. 448, 628 A.2d 676 (1993). The Chapman court quoted the opinion in Ohio v. Roberts, 448 U.S. 56, 65 n.7 (1980): "A demonstration of unavailability, however, is not always required. In Dutton v. Evans, 400 U.S. 74 ... (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness. ..." Chapman, 331 Md. at 456, 628 A.2d at 680. The court further stated that "[i]n such instances [regarding admissibility of business or public records], the routine nature of the task, while bolstering reliability of the document, also decreases the probability that the declarant will remember the events memorialized in the entry. See State v. Sosa, 59 Wash. App. 678, 800 P.2d 839, 843 (1990) (lab experts who prepare reports are unlikely to recall details of routine report completed weeks before trial). This fact satisfies the necessity prong, since the cross-examination of the declarant would likely be futile and the most accurate evidence of the event is the affidavit itself." Chapman, 331 Md. at 471, 628 A.2d at 688; see also Reynolds v. State, 98 Md. App. 348, 633 A.2d 455 (1993); State v. Spikes, 423 N.E.2d 1122, 1127 (Ohio 1981) ("Testimony by the preparers of the
In its 1993 decision in *Chapman v. State*, the Court of Appeals of Maryland upheld, against a Confrontation Clause challenge, a somewhat analogous statute regarding proof of bank records. Part of the consolidated theft statute enacted in Maryland in 1978 provides that the dishonor of a check, including the status of a bank account, for example, the account's nonexistence or the insufficiency of funds in it, may be proved by affidavit of an authorized bank representative. When such evidence was hospital records would have added little or nothing. The possibility that their testimony would demonstrate that the records "might have been unreliable was wholly unreal." (citation omitted). *See also infra* notes 186-89 and accompanying text.

174. *Id.* at 450, 628 A.2d at 677.
175. As explained by Judge Chasanow, author of the unanimous opinion of the court of appeals:

In 1978, as part of a large-scale revision of Maryland's theft and bad check laws, the General Assembly enacted S.B. 1153, Chapter 849 of the 1978 Acts of Maryland. One section of that comprehensive statutory scheme is now Maryland Code (1957, 1992 Repl. Vol.), Article 27, § 142(c). Section 142(c) provides a narrow exception to the hearsay rule, permitting the State to introduce an affidavit of a bank to establish dishonor of a check or the status of an account without requiring any of the bank's employees to testify. Article 27, § 142(c) provides:

§ 142. [Obtaining property or services by bad check]—Presumptions.

(c) Dishonor of a check by the drawee, that the drawer had no account with the drawee at the time of utterance, and insufficiency of the drawer's funds at the time of presentation and utterance may properly be proved by introduction in evidence of a notice of protest of the check, or a certificate under oath of an authorized representative of the drawee declaring the dishonor, lack of account and insufficiency, and this proof shall constitute presumptive evidence of the dishonor, lack of account and insufficiency.

*Id.* at 450, 628 A.2d at 677 (footnote omitted).

176. The affidavit in question provided:

To: State's Attorney for Harford County

AFFIDAVIT AS TO ACCOUNT STATUS

RE: Account #001150107 Drawer John V. Chapman
Check #148
Amount $315.49 Payee Sears
Check Dated 4/19/88 Drawee (Bank) Fairfax Savings
Date Uttered: 4/19/88

I, Michael L. Stockman, of Fairfax Savings . . . at 17 Light St., Baltimore, Maryland do hereby make oath to the following facts:

1. That the above named drawer /DID NOT have the above numbered account with this bank on April 19, 1988.

3. That the above referenced check was presented for payment on
admitted against a defendant accused of obtaining property or services by a bad check, defense counsel argued that the accused's confrontation rights were violated. But, in upholding the defendant's conviction, the court of appeals unanimously upheld the statute's constitutionality, both on its face and as applied.

Judge Chasanow, writing for the court, evaluated the Maryland statute under Ohio v. Roberts and its progeny. He concluded that, although an affidavit of the type permitted by the statute did not fall within a "firmly rooted" hearsay exception, it nonetheless "generally possesses sufficient guarantees of trustworthiness so as to satisfy the reliability prong of Ohio v. Roberts," such that "there is no material departure from the reason of the general rule" requiring cross-examination. As to trustworthiness, the court recognized that the statute "is a direct derivative of the business records exception," making but two liberalizing changes to that exception:

First, the General Assembly decided to allow the State to forego the admission of the voluminous actual bank records and instead substitute a summary of the relevant information that those records would invariably reveal. Second, the General Assembly also decided to forego the need for testimony of the bank employee who prepared

April 21, 1989.

4. That at the time of the presentation of the above referenced check there were INSUFFICIENT funds in the account and the said check was dishonored.

5. That I am an authorized representative of the above named financial institution.

Michael L. Stockman
(Signature)

Id. at 452, 628 A.2d at 678.

177. Id. at 450, 628 A.2d at 677.

178. As Judge Chasanow stated:

Today, we are called upon to address whether this relatively recent exception to the hearsay rule violates an accused's confrontation rights embodied in both the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights. We hold that the admission of documentary evidence under Article 27, § 142(c), is neither per se unconstitutional nor unconstitutional under the facts of this case. We believe the evidence admissible under § 142(c) contains sufficient indicia of reliability so as not to offend a criminal defendant's right of confrontation.

Id.


180. Chapman, 331 Md. at 454, 628 A.2d at 679.

181. Id. at 456, 628 A.2d at 680.

182. Id. at 458, 628 A.2d at 681 (quoting Ohio v. Roberts, 448 U.S. 56, 65 (1980)).

183. Id. at 459, 628 A.2d at 682.
the account summary of the account in question. We believe that the General Assembly made a valid judgment in thus expanding the manner in which the State may prove an account's status, or its non-existence. These procedural "short-cuts" are well grounded and do not undermine the reliability and trustworthiness of data contained in account records created and maintained in the ordinary course of the bank's business. Rather, the General Assembly, in enacting § 142(c), invoked well-accepted evidentiary practices to prove the status of an account by means of an account summary or the lack of an account through the absence of entries in business records.184

The court further found that there was no constitutional requirement that the declarant bank representative be shown to be unavailable,185 as the reliability of the documentary evidence was not less,186 and might even be greater,187 than the representative's live testimony at trial. As Judge Chasanow explained:

Section 142(c) deviates from the [traditional] practice of using summaries of records in one way: the need to present a bank employee, as custodian of the records or as the one who prepared the summary, to lay the appropriate foundation. This deviation from the admission of the bank's business records or summaries of those records, however, is not fatal to § 142(c). The General Assembly may properly excuse the testimony of an out-of-court declarant or custodian of records where it does not undermine the reliability of the proposed evidence, as it has

184. Id. at 460-61, 628 A.2d at 682-83.
185. Id. at 470-73, 628 A.2d at 687-89 ("With Inadi and White, it appears that the Supreme Court has emphasized that Roberts contemplated a rule of necessity, not one of unavailability. Accord Moon v. State, 300 Md. 354, 366, 478 A.2d 695, 701 (1984), cert. denied, 469 U.S. 1207 (1985) (exceptions to rule requiring cross-examination permitted in past ""after close scrutiny has disclosed that this type of evidence is both necessary and so intrinsically reliable that it need not be subjected to the rigors of cross-examination") (emphasis in original").
186. As to reliability, Judge Chasanow concluded:
Considering § 142(c)'s adoption of familiar evidentiary principles, its close similarity to business and public records exceptions and the indicia of reliability associated with those exceptions, the lack of any apparent motive to fabricate, and the corroborative quality of the canceled check, we conclude that Article 27, § 142(c) is generally so reliable that "adversarial testing would add little to its reliability."
Id. at 467, 628 A.2d at 686 (quoting Idaho v. Wright, 497 U.S. 805, 821 (1990)).
187. See infra text accompanying note 189.
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He drew an analogy between bank records and public or official records:

Similar policies that underlie the official records exception to the hearsay rule also support § 142(c). First, in light of the great reliability accorded the banking records and the absence of any motive on the part of the bank employees to fabricate, the General Assembly could legitimately assume that the bank would accurately complete its task of examining and summarizing its records. Additionally, the very purpose of § 142(c) was to avoid the unnecessary burdening and disruption of the banking system by requiring the bank to present ministerial witnesses to carry to court a bank’s business records. Furthermore, these decisions are buttressed by the limited utility that cross-examination of a record’s custodian would provide the criminal defendant in a bad check prosecution. Bank employees generate and utilize the bank’s records with great frequency. With the routine of repetitive examination of the bank’s records comes the probability that the details concerning any given transaction will fade. The affidavit recording the summary of the account, that the bank employees contemporaneously generate, might even constitute better evidence than the subsequent live testimony of the witness who examined the records. The live custodian could say little more than the affidavit—“I searched the record and this is what I found.” Cross-examination is, thus, unlikely to clarify the record or jog the declarant’s memory beyond the recorded information in the affidavit.

Due to the limited utility to criminal defendants of cross-examining bank employees and the substantial burden to banks associated with it, we find that the Confrontation Clause does not require the State to establish the unavailability of the bank employee who compiled the Affidavit as to Account Status. Accordingly, we hold that Article 27, § 142(c) does not violate the mandates of the Confrontation Clause by omitting such an unavailability requirement.189

188. Chapman, 331 Md. at 462-63, 628 A.2d at 683.
189. Id. at 472-73, 628 A.2d at 688-89.
In reaching its conclusion that the Maryland statute met the requirements of Ohio v. Roberts,\textsuperscript{190} the court of appeals cited with approval federal cases that have upheld the constitutionality of 18 U.S.C. § 3505.\textsuperscript{191} Both these cases and Chapman\textsuperscript{192} support the conclusion that Rule 5-902(a)(11) will withstand a Confrontation Clause challenge.

In any event, the touchstone of admissibility remains reliability.\textsuperscript{193} The opposing party is free to argue that the records authenticated under Rule 5-902(a)(11) and offered under Rule 5-803(b)(6) are untrustworthy and should be excluded—an argument that should be made pretrial, if feasible. The trial court may use the management of litigation rules,\textsuperscript{194} in conjunction with Maryland Rule 5-902(a)(12),\textsuperscript{195} to require pretrial objections. Even if the court rules the certified records admissible, the objecting party is free to subpoena a witness or witnesses from the business and to examine such witnesses in an attempt to diminish the weight to be given the records by the finder of fact.

Provisions for pretrial notice prevent surprise to the opponent. If the opponent makes no attack on the record’s trustworthiness, that party should be held to have waived any objection on the foundation issue. If the custodian or other witness is equally available to both parties and the opponent does not call the witness, the opponent should not be permitted to attack the evidence on the basis that the witness in question did not testify, and counsel was not able to question the witness.\textsuperscript{196}

\textsuperscript{190} 448 U.S. 56 (1980).
\textsuperscript{191} Chapman, 331 Md. at 460, 628 A.2d at 682.
\textsuperscript{192} It should be noted, however, that the Chapman court’s analysis emphasized the special reliability of “the banking industry” as a “quasi-public agency.” Id. at 464, 628 A.2d at 684. Nonetheless, the court’s general rationale should extend to all regularly kept business records.
\textsuperscript{193} See supra note 128.
\textsuperscript{194} Maryland Rule 2-504.2(b)(8) provides in part:

The following matters may be considered at a pretrial conference:

- A listing of the documents and records to be offered in evidence by each party at the trial, other than those expected to be used solely for impeachment, indicating which documents the parties agree may be offered in evidence without the usual authentication; . . .

Md. Rule 2-504.2(b).

\textsuperscript{195} Maryland Rule 5-902(a)(12) provides that the following is self-authenticating: “Unless justice otherwise requires, any item as to which, by statute, rule, or court order, a written objection as to authenticity is required to be made before trial, and an objection was not made in conformance with the statute, rule, or order.” Md. Rule 5-902(a)(12).

\textsuperscript{196} This conclusion is an application of the well-established principle that a negative inference against a party for the failure to produce particular evidence is available only if that party has superior access to the evidence. See Maryland Evidence, supra note 27, § 301.4, at n.9.
Maryland Rule 5-902(a)(11) provides only a means for authenticating an exhibit as a business record, without the need for a custodian or other witness to testify to the keeping of the records to lay the foundation under Maryland Rule 5-803(b)(6). Any business records, including those of hospitals or of doctors’ offices, will qualify under the liberal definition of “business” in Rule 5-803(b)(6). In order for a record to be admissible, however, it also must meet the requirements of relevance, and, if the contents of the record are very important to a critical issue in the case, the copy or original must be offered in accordance with the “best evidence rule.”

Moreover, the fact that a record qualifies as a trustworthy business record does not necessarily mean that all of its contents will be admissible under the hearsay exception for business records. Either the hearsay rule or the opinion rules may exclude parts of it. If the record contains statements of someone who is not a part of the business or statements not made in the regular course of business, those statements must be qualified either as nonhearsay or under other exceptions to the hearsay rule. Even if the hearsay rule does not exclude the evidence, the opinion rules may. Maryland Rule 5-902(a)(11) has not changed the law on any of these other points.

The pertinent case law states the general rule that opinions stated in business records, when apparently stated by someone who is a part of the business and made in the course of that business, will be admissible if that person would be qualified to state that

197. See Md. Rule 5-803(b)(6); supra note 90.
198. See Md. Rules 5-401 to 5-403 (defining and explaining “relevant evidence”).
199. See Md. Rules 5-1001 to 5-1008 (defining and explaining “best evidence rule”); see also Goodman v. State, 2 Md. App. 473, 477, 235 A.2d 560, 562 (1967) (error to admit opinion testimony based on business records, when business records had not been admitted into evidence).
200. See supra note 115.
201. See supra note 110.
203. See Md. Rules 5-701 to 5-705 (explaining opinion testimony); see generally 2 McCormick, supra note 5, § 287, at 268, § 293, at 280-81; Powell, supra note 202, at 37-45, 57-58.
opinion on the stand if he or she testified at the trial. But both

204. Smith v. Jones, 236 Md. 305, 310, 203 A.2d 865, 868 (1964) ("A written opinion of a doctor, if properly authenticated, may be admissible as part of a hospital record.") (dictum) (holding opinion stated by foreman of District of Columbia Street Sign Shop, in response to an inquiry, was admitted improperly); Dunn v. State, 226 Md. 463, 478, 174 A.2d 185, 192 (1961) (hospital records); Fuget v. State, 70 Md. App. 643, 653-54, 522 A.2d 1371, 1375-76 (1987) (hospital records); In re Colin R., 63 Md. App. 684, 692-93, 493 A.2d 1083, 1087 (1985) (hospital records); Raithel v. State, 40 Md. App. 107, 118-20, 388 A.2d 161, 167-68 (1978) (psychiatrists' opinions contained in Clifton T. Perkins State Hospital report were admissible), aff'd on other grounds, 285 Md. 478, 404 A.2d 264 (1979); Marlow v. Cerino, 19 Md. App. 619, 636, 313 A.2d 505, 515 ("Where . . . it appears from the hospital record that the opinion [contained in it] is expressed by a qualified person, such an expression is admissible.") cert. denied, 271 Md. 739, 331 A.2d 115 (1974); Sarrio v. Reliable Contracting Co., 14 Md. App. 99, 103-04, 286 A.2d 183, 185-86 (1972) (hospital records containing intern's notations that plaintiff was drunk properly admitted); accord, e.g., Baker v. State, 473 So. 2d 1127, 1129 (Ala. Crim. App. 1984) ("To the extent that [an autopsy] report contains opinions, those opinions are admissible on the theory that if the physician who performed the autopsy was a witness, his testimony would be admissible as that of an expert."); cert. quashed by 473 So. 2d 1130 (Ala. 1985); River Dock & Pile, Inc. v. O & G Indus., 595 A.2d 839, 846 (Conn. 1991) ("An opinion included within an otherwise admissible business record is admissible if the entrant would be qualified to give that opinion in oral testimony."); City of Bay St. Louis v. Johnston, 222 So. 2d 841, 847 (Miss. 1969) ("The hearsay objection being obviated by the Uniform Business Records Act, a proper expert medical opinion contained in a hospital record is accorded dignity equal to that of a similar opinion from the witness stand.") (citing Allen v. St. Louis Pub. Serv. Co., 285 S.W.2d 663 (Mo. 1956)); State v. Taylor, 486 S.W.2d 239, 242 (Mo. 1972) ("The contention that [police criminalist] Cordell Brown was not available for cross-examination is answered by Allen v. St. Louis Public Service Co. . . . where it was ruled: 'Objections to such [business] records as hearsay and as depriving a party of the right of cross-examination are, therefore, not effective if the records have been properly qualified under the Uniform Business Records Act. . . Since the hearsay objection is obviated, we see no reason why a proper expert medical opinion contained in a hospital record should not be accorded dignity equal to that of a similar opinion from the witness stand; to preserve the right of cross-examination intact as to such matters would be to repeal the statute.'"); Graham v. State, 547 S.W.2d 531, 538 (Tenn. 1977) (reversible error to exclude hospital records because they did not establish doctor's qualification as a psychiatrist; "The qualifications of the individual preparing the report may be inquired into, may be challenged or may be disputed, but this goes to weight and not admissibility."); see also Dassing v. Fred Frederick Motors, Inc., 240 Md. 621, 625, 214 A.2d 925, 927 (1965) (figure on application for transfer of title of automobile was not sufficient evidence of automobile's value, where there was no testimony as to who expressed that opinion); West v. Fidelity-Baltimore Nat'l Bank, 219 Md. 258, 264-65, 147 A.2d 859, 862-63 (1959) (statute relating to admissibility of business records "did not modify or alter the rule which forbids an expression of opinion by a person who is not competent to express an opinion.") Entries made by nurses as to testator's mental condition, rather than physical condition,
the case law\textsuperscript{205} and the Maryland Rules\textsuperscript{206} require that, before admitting opinion evidence, the court must find that there is a sufficient basis for the opinion and that the subject matter is an appropriate subject for opinion testimony.

Thus, even though, by virtue of Rule 5-902(a)(11), the custodian or other qualified witness is not needed to authenticate the record as a business record, a live witness still will be needed if either:

1. the business record does not establish all the facts needed to be proved, such as that the proved medical bills were "reasonable and customary,"\textsuperscript{207}

2. the business record contains opinions but does not disclose a sufficient basis for those opinions;\textsuperscript{208}


\textsuperscript{206} MD. RULES 5-701, 5-702(3).

\textsuperscript{207} Grimm, supra note 42, at 5; see In re Gloria T., 73 Md. App. 28, 33-34, 532 A.2d 1095, 1097-98 (1987) (medical bills would not be admissible to support restitution award without evidence of their reasonableness; a representative of the hospital should have been called to testify to that), cert. denied, 311 Md. 718, 537 A.2d 272 (1988). But see OHIO REV. CODE ANN. § 2317.421 (Baldwin 1993) (providing that medical or funeral bills are prima facie evidence of their reasonableness, if a copy is delivered to opposing counsel at least five days before trial).

\textsuperscript{208} E.g., Hartless v. State, 327 Md. 558, 578-79, 611 A.2d 581, 590-91 (1992); see
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(3) even if a sufficient basis for the opinion appears, it is not an appropriate subject of opinion evidence;\(^2\)

(4) the out-of-court declarant is not qualified to opine on the subject;\(^2\)

(5) even if a sufficient basis for relevant opinions appears in the record, due process or the confrontation clause requires that the person whose opinion is offered must testify at the trial.\(^2\)

\(^2\) also Reynolds v. State, 98 Md. App. 348, 356-61, 633 A.2d 455, 459-61 (1993) (defendant’s confrontation right was violated by admission of victim’s hospital records, containing opinions of health care providers about sexual abuse, when defendant could not cross-examine those providers, and opinions appeared to lack adequate factual basis, as they appeared to be based only on an ascertainment of credibility of persons involved); Grimm, \textit{supra} note 42, at 5 (medical records would not establish “that the treatment itself was appropriate”); People v. Young, 234 Cal. Rptr. 819, 831-32 (Cal. Ct. App. 1987) (no error in excluding psychiatric records of defendant, offered by state, when, although doctors testified, state had not examined them “as to the source and preparation of the psychiatric records”).


210. See \textit{supra} note 204; see generally \textit{MARYLAND EVIDENCE, supra} note 27, §§ 701.1, 702.1.

211. Ward v. State, 76 Md. App. 654, 659-62, 547 A.2d 1111, 1113-15 (1988) (admission of forensic psychiatrist’s testimony that state hospital staff’s diagnosis of defendant was unanimous violated his confrontation right and was reversible error); Cirincione v. State, 75 Md. App. 166, 183-84, 540 A.2d 1151, 1159-60 (proper to refuse to permit testifying defense doctor to make reference to statements in a report of Clifton T. Perkins Hospital that three other doctors had concluded that defendant was voluntarily intoxicated on PCP), \textit{cert. denied}, 313 Md. 611, 547 A.2d 188 (1988); Leuschner v. State, 41 Md. App. 423, 435-36, 397 A.2d 622, 629-30 (no error in permitting psychiatrist, who had examined accused upon court’s referral for a psychiatric evaluation following his filing a plea of insanity, to refer to hospital record, and to read part of a filled-out form, that showed results of a staff conference, when the psychiatrist read only the diagnosis and not an opinion as to accused’s legal sanity), \textit{cert. denied}, 444 U.S. 933 (1979); Gregory v. State, 40 Md. App. 297, 325-28, 391 A.2d 437, 454-56 (1978) (although hospital record fell within business records exception, admission of that part of it containing three doctors’ opinions as to accused’s sanity violated his right to confrontation); see also Birdsell v. United States, 346 F.2d 775, 779 (5th Cir.) (under 28 U.S.C. § 1732, the statutory predecessor to Federal Rule 803(6), opinions as to sanity, contained in hospital records, are inadmissible if expert-declarant is unavailable for cross-examination; but same result does not apply as to all “the records of a hospital performing psychiatric investigations with respect to the symptoms recounted by the subject or the results of recognized psychological tests”), \textit{cert. denied}, 382 U.S. 963 (1965); Hopkins v. State, 19 Md. App. 414, 425, 311 A.2d 483, 489 (1973) (under facts of case, harmless error, if error at all, to admit copy of autopsy report, over defendant’s objection that pathologist who prepared the report was not present to be cross-examined). \textit{But see} Sangster v. State, 70 Md. App. 456, 466-69, 521 A.2d 811, 815-17 (1987) (report from Clifton T. Perkins Hospital was admitted properly in competency hearing; \textit{Gregory}
The first four of these principles are relatively straightforward. The fifth, the most elusive, is addressed below.

A. Opinions That Are Generally Held Admissible Without the Declarant's Testimony

Examination of the cases from Maryland and other jurisdictions reveals a panoply of positions on the issue of when the person who expressed the opinion must testify at trial in order for the opinion to be admissible as substantive evidence. The question is made all the more difficult because there is no bright line between "fact" and "opinion"; rather, they are linked by a continuum of gray. Several threads emerge from the case law, however.
The jurisdictions generally seem to agree that "opinions" are admissible as part of business records, without the need for live testimony by the person who stated the opinion, if they are "incident to or part of factual reports of contemporaneous events or transactions." Such opinions include medical conditions observed by an admitting physician, the recording by hospital personnel that "Coast Guard report, inclusive of its opinions and conclusions, is admissible pursuant to Rule 803(8)(C)," and commenting that the "District Courts in the Third and Second Circuits have interpreted the Beech Aircraft decision broadly in admitting Coast Guard investigatory reports into evidence.").

Before the Maryland Court of Appeals embraced the public records hearsay exception in Ellsworth, it analyzed such reports under the business records statute. See Pine St. Trading Corp. v. Farrell Lines, Inc., 278 Md. 363, 372-74, 364 A.2d 1103, 1110-11 (1976) (reports of the Food and Drug Administration, including an analysis of food samples that allegedly contained adulterated sugar, were encompassed within the Business Records Act).

215. Forward Communications Corp. v. United States, 608 F.2d 485, 511 (Ct. Cl. 1979) (per curiam); see Hanley v. United States, 416 F.2d 1160, 1166-68 (5th Cir. 1969) (bank vice-president's notations on checks, identifying them as belonging to defendant, were admissible under business records exception); People v. Moore, 85 Cal. Rptr. 194, 199 (Cal. Ct. App. 1970) (commitment to mental institution); Ross v. State, 78 Md. App. 275, 283-86, 552 A.2d 1345, 1349-51 (no violation of confrontation right in admission of telephone company's business records against defendant), cert. denied, 316 Md. 365, 558 A.2d 1207 (1989).

216. See Bethlehem-Sparrows Point Shipyard v. Scheperpense, 187 Md. 375, 380-81, 50 A.2d 256, 259-60 (1946) (no error in admission into evidence of that part of claimant's hospital record that gave the history of the case, particularly the statement, "[p]atient cut left foot and developed an infection involving entire leg"); Ledford v. State, 568 S.W.2d 113, 118 (Tenn. Crim. App. 1978) (error to exclude hospital records offered by defendant, which included statements by physician and nurse that the defendant had been "badly beaten" with metal tipped belt, had "voided [urine] involuntarily," and had been "apparently beaten"); Loper v. Andrews, 404 S.W.2d 300, 305 (Tex. 1966) (hospital record of a "severed limb or an open wound" would have been admissible).

As the United States Court of Appeals for the District of Columbia explained in New York Life v. Taylor:

Records must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic reflection of an observation. Regularly recorded facts as to the patient's condition or treatment on which the observations of competent physicians would not differ are of the same character as records of sales or payrolls. Thus, a routine examination of a patient on admission to a hospital stating that he had no external injuries is admissible. An observation that there was a deviation of the nasal septum is admissible. Likewise, an observation that the patient was well under the influence of alcohol.

In other words, it is not the absence of a motive to misrepresent which is the basis of the Shop Book exception to the hearsay rule. Purely clerical entries come within the rule regardless of the fact that
of statements by the patient, and laboratory test results. These
the party making them has an interest in what they may be used to
prove. Conversely where the accuracy of the entries depends on
opinion, conjecture or judgment in selecting the particular entries
from a larger mass of data which some other observer might consider
equally relevant, the entries are not within the Rule regardless of
motive.

The reasons for the Shop Book Rule are well stated by Wigmore
to be (1) that the influence of habit may be relied on, by very inertia
to prevent casual inaccuracies; (2) that errors or misstatements in a
regular course of business transactions are easily detected and mis-
statements cannot safely be made if at all except by a systematic and
comprehensive plan of falsification; (3) that since the entrant is under
a duty to an employer or other superior there is a risk of censure or
disgrace from the superior in case of inaccuracy. The records of
opinion and hearsay accounts of conversations involved in this case
fail to satisfy any one of these tests.

The Court's rule as to admissibility is clearly based upon the subject
matter of the entries, their routine character, and their similarity to
payrolls and the like. The opinion is not intended to 'open the door
to avoidance of cross-examination' on the mass of opinion, conjecture
and observation now regularly reported in the course of modern
business . . .

. . . [The test should be whether they are records of a readily
observable condition of the patient or of his treatment. . . . Some
diagnoses are a matter of observation, others are a matter of judgment,
still others a matter of pure conjecture. . . .

omitted).

(defendant's confrontation right did not extend to hospital personnel who
merely recorded what patient-victim had said; patient's statement was admissible
under another hearsay exception).

218. Minner v. Kerby, 30 F.3d 1311, 1314-15 (10th Cir. 1994) (no violation of
Confrontation Clause in admission of police chemist's notes showing results
of testing of powder for drugs); State v. Garlick, 313 Md. 209, 215-26, 545
A.2d 27, 30-35 (1988) (hospital records made in regular course of business and
pathologically germane to treatment are admissible under business records
hearsay exception; foundation was laid by emergency room physician for
records containing laboratory test results; no need to produce lab technician
or show technician's unavailability) (distinguishing Moon v. State, 300 Md.
354, 478 A.2d 695 (1984), cert. denied, 469 U.S. 1207 (1985), where record
bore serious facial indicia of unreliability); Peace v. Director of Revenue, 765
S.W.2d 382, 383 (Mo. Ct. App. 1989) (error not to admit breathalyzer report
as business record); State v. Martorelli, 346 A.2d 618, 622 (N.J. Super. Ct.
alyzer falls under both business records and public records hearsay exception,
but proponent failed to authenticate it and failed to lay foundation as to
Ct. 1983) (CPLR § 4518(c) regarding reports of blood genetic markers tests
"exists, of course, for the specific purpose of relieving the proponent of any
opinions are seen as closer to the fact side of the fact-opinion continuum, thus there is a greater chance of their having been accurately reported.

B. Approaches with Regard to Other Kinds of Opinions

Where the courts differ widely is as to the admissibility of "opinions" closer to the opinion side of the fact-opinion continuum. Three recurring positions may be summarized as follows:

(1) The most liberal position: Expert opinions are admissible as part of business records if a sufficient showing of expert qualifications is made;219

of the enumerated records from the burden of producing a witness to lay a business record foundation. However, it is well established that it also permits the scientific opinions and conclusions of physicians which are contained in hospital records to come into evidence without any requirement that those physicians be called to give expert testimony.

But see United States v. Allen, 7 M.J. 345 (C.M.A. 1979) (error to admit laboratory reports as business records, but harmless error because they also were used as basis for testifying doctor's opinion). See generally 4 WEINSTEIN & BERGER, supra note 92, 803(6) [06].

219. See, e.g., Bruneau v. Borden, Inc., 644 F. Supp. 894, 896 (D. Conn. 1986) ("While the rationale may vary, courts have focused on the ultimate untrustworthiness of opinion beyond diagnosis in medical reports when they are not subjected to the test of cross-examination. As explained in Skogen v. Dow Chemical Co., 375 F.2d 692, 704-05 (8th Cir. 1967): 'Hospital records are generally admissible as business records to show the case history and the injuries suffered, even though the information is technically hearsay. Though such records may of necessity contain some basic conclusions, there is a point at which opinion evidence and expert opinions as to how an accident occurred will be objectionable. . . . If plaintiffs desired the jury to have the benefit of this expert conclusion, they should have called the person who made it, properly qualify him as an expert, and have him so testify in front of the jury. . . . We do not believe plaintiffs should be allowed to present to the jury this otherwise inadmissible conclusion as to the cause of plaintiffs' condition simply because it fortuitously appears in a hospital record, and thereby deny to defendants the protection afforded by an oath and the opportunity to cross-examine the witness. This type of conclusion on the highly controversial ultimate issue of the cause of plaintiffs' condition does not qualify as an entry made "in the regular course of . . . business" . . . "); see also Hopkins v. State, 19 Md. App. 414, 311 A.2d 483 (1973) (harmless error to admit copy of autopsy report over defendant's objection that pathologist who prepared the report was not present to be cross-examined); Goodman v. State, 2 Md. App. 473, 235 A.2d 560 (1967) (reversible error to admit, at a trial for forging a physician's prescription, opinion testimony of a telephone company employee regarding business records for the telephone number listed on the prescription when records were not admitted into evidence and witness had not been qualified to give an opinion); supra note 204.
(2) **The most restrictive position:** "[R]eports which are prepared to state or to support expert opinions are not admissible without the preparer being present in court to testify as to his qualifications as an expert and to be cross-examined on the substance, pursuant to Rules 702 and 705;"\(^220\) and

(3) **The moderate position:** If the would-be cross-examiner can show the need to cross-examine, then the expert opinions should not be admitted as parts of business

\(^{220}\) Forward Communications Corp. v. United States, 608 F.2d 485, 510-11 (Ct. Cl. 1979) (per curiam) ("[U]nless [Federal] Rule [of Evidence] 803(6) is deemed to override the opinion rules, it should not be construed to allow the introduction of expert opinions without opportunity to ascertain the qualifications of the maker, the extent of his study or for other reasons to cross-examine him."); see Oldham v. State, 422 S.E.2d 38, 40 (Ga. Ct. App. 1992) ("Business records containing only test results must be distinguished from those records that contain conclusions and opinions in addition to the test results or in lieu of the test results. Such opinions, conclusions and diagnoses constitute additional hearsay and unless the person who [sic] diagnosis, conclusion or opinion which is contained on the business record is available to testify and can be qualified as an expert capable of rendering such an opinion, the portion of the business record containing the hearsay is inadmissible.") (citations omitted); B & O R.R. v. Zapf, 192 Md. 403, 411-12, 64 A.2d 139, 142-43 (1949) (report of findings of radiologist from X-ray taken of a claimant for worker's compensation did not qualify as business record and was admitted erroneously in evidence during the testimony of the physician who had referred the claimant for the X-ray; "When such a technical medical report is offered, the doctor should be subject to cross-examination as to the reasons for his findings."); Hopkins v. State, 19 Md. App. 414, 311 A.2d 483 (1973) (harmless error to admit copy of autopsy report over defendant's objection that pathologist who prepared the report was not present to be cross-examined); Commonwealth v. Chong Xiong, 630 A.2d 446, 451 (Pa. Super. Ct. 1993) ("[U]nder the Uniform Business Records as Evidence Act . . . ‘hospital records have been admitted to show the fact of hospitalization, treatment prescribed and symptoms found.’ Opinion evidence contained in hospital records, however, is not admissible. 'The rationale for excluding medical opinion in hospital records lies in the fact that such evidence is expert testimony and is "not admissible unless the doctor who prepared the report is available for in-court cross-examination regarding the accuracy, reliability and veracity of his opinion.""") (citations omitted); see also Masterson v. Pennsylvania R. Co., 182 F.2d 793, 796-97 (3d Cir. 1950) (business records exception does not embrace doctors' opinions, made to a third party, regarding a patient's condition; physician should have been called at trial); People v. Young, 234 Cal. Rptr. 819, 831-32 (Cal. Ct. App. 1987) (questioning whether psychiatric records qualify as business records at all); Robert A. Lanier, *Medical Records as Evidence: Can a Paper Witness Have Opinions?*, 24 TENN. B.J. 32, 37 (No. 2, Mar.-Apr. 1988) ("There is, of course, no theoretical difference between the disadvantage to a party against whom factual records, as opposed to opinion records, are offered. In both instances, the opposing party is denied cross-examination. But it would seem that there is a difference in the circumstantial reliability of factual, as opposed to *post facto*, conclusory observations.").
See United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979) (no error to admit business record containing opinion of appraiser, when opponent failed to alert trial court to specific facts raising any doubt as to appraiser's qualifications), cert. denied, 446 U.S. 935 (1980). The Licavoli court stated: "We see no reason to adopt an inflexible rule that every case requires the proponent of a business record containing expert opinion to affirmatively establish the qualifications of the person forming the opinion. Rule 803(6) expressly provides for the exclusion of a business record if the source of information indicates a lack of trustworthiness. That provision allows the trial judge, in the exercise of his or her discretion, to exclude from evidence a record of the opinion of an expert whose qualifications are seriously challenged." Id. at 622-23 (cited with approval in 2 MCCORMICK, supra note 5, § 288, at 268 n.15: "The approach in Licavoli is . . . consistent with the structure of the Federal Rule, which explicitly admits opinions, and accordingly should allow their admission if they are made and recorded in the regular course of a business unless the opponent raises a challenge to their trustworthiness."); Bruneau v. Borden, Inc., 644 F. Supp. 894, 896-97 (D. Conn. 1986) (defense had raised sufficient questions about trustworthiness of opinion to exclude it in report form; "While the rationale may vary, courts have focused on the ultimate untrustworthiness of opinion beyond diagnosis in medical reports when they are not subjected to the test of cross-examination. As explained in Skogen v. Dow Chemical Co., 375 F.2d 692, 704-05 (8th Cir. 1967): 'Hospital records are generally admissible as business records to show the case history and the injuries suffered, even though the information is technically hearsay. Though such records may of necessity contain some basic conclusions, there is a point at which opinion evidence and expert opinions as to how an accident occurred will be objectionable. . . . If plaintiffs desired the jury to have the benefit of this expert conclusion, they should have called the person who made it, properly qualify him as an expert, and have him so testify in front of the jury. . . . We do not believe plaintiffs should be allowed to present to the jury this otherwise inadmissible conclusion as to the cause of plaintiffs' condition simply because it fortuitously appears in a hospital record, and thereby deny to defendants the protection afforded by an oath and the opportunity to cross-examine the witness. This type of conclusion on the highly controversial ultimate issue of the cause of plaintiffs' condition does not qualify as an entry made "in the regular course of . . . business" and is consequently inadmissible."); see Clowes v. Terminix Int'l, Inc., 538 A.2d 794, 806 (N.J. 1988) (citing with approval Gunter v. Fischer Scientific Am., 475 A.2d 671, 674 (N.J. Super Ct. App. Div. 1984) (in court's discretion "expert opinion contained in business records may be excluded if it relates to diagnoses of complex medical conditions difficult to determine or substantiate"); State v. Martorelli, 346 A.2d 618 (N.J. Super Ct. App. Div. 1975) ("It should be noted that not all diagnostic findings are admissible. The degree of complexity of such procedures is the crucial issue"), cert. denied, 354 A.2d 642 (N.J. 1976); State v. Matusiewicz, 499 A.2d 1363, 1366 n.1 (N.J. 1985) ("A similar limitation with respect to Evidence Rule 63(13) was expressed in Gunter v. Fischer Scientific American, 475 A.2d 671 (N.J. Super Ct. App. Div. 1984), where it was recognized that 'expert opinion contained in a business record may be excluded if it relates to diagnoses of complex medical conditions . . . .' Conversely, routine observations, findings and complaints included in such a record were termed clearly admissible. See also Lazorick v. Brown, 480 A.2d 223 (N.J. Super Ct. App. Div. 1984) (which cited approvingly the
1. Proposal for Civil Cases

The third or moderate position best advances both concerns for fairness and judicial economy, at least in civil cases. It is thus most consonant with the intention behind Rule 5-902(a)(1) — to advance judicial economy as much as possible, if this can be achieved at no real cost to fairness.

This Article proposes that, in civil cases, opinions in business records should be admissible in the court's exercise of its discretion regarding the record's trustworthiness, as long as three criteria have been established: (1) the helpfulness tests of Rules 5-701 or 5-702 have been met, including the fact that the opinions are not so ambiguous as to be unhelpful; (2) the opinions are of the type regularly made in the course of the particular business activity; and (3) no serious challenges have been raised either to a purported expert's qualifications or to the adequacy of the basis of the opinion. On this last point, the complexity of the opinion,

view that a doctor's opinion, expressed in a business record otherwise admissible under Evidence Rule 63(13), may be excluded as substantive proof if the opinion relates to a diagnosis of a complex medical condition which is difficult to determine or substantive.\(^{222}\) Hunt v. Mayfield, 583 N.E.2d 1349, 1352 (Ohio App. 1989) (error to exclude hospital records); Murray, supra note 202, at 211.


\(^{223}\) See Md. Rule 5-701; Maryland Rules of Evidence, supra note 3, §§ 2.701.1, 2.701.4.

\(^{224}\) Md. Rule 5-702; see Maryland Rules of Evidence, supra note 3, §§ 2.702.1-4; see also Dubs v. State, 2 Md. App. 524, 533-37, 235 A.2d 764, 769-72 (1967) (trial court correctly excluded certificates signed by physicians, stating that defendant was "insane," when no proffer was made of testimony that term was used not in broader medical sense but in narrower legal sense of McNaughten-Spencer rule).


\(^{226}\) This requirement, in line with one of the requirements for the business records hearsay exception, enhances the opinions' reliability. See generally 2 McCormick, supra note 5, §§ 286-88.

\(^{227}\) See generally Maryland Evidence, supra note 27, § 702.2.

\(^{228}\) See Beatty v. Trailmaster Prods., Inc., 330 Md. 726, 741, 625 A.2d 1005, 1013 (1993) ("The premises of fact must disclose that the expert is sufficiently familiar with the subject matter under investigation to elevate his opinion above the realm of conjecture and speculation, for no matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown. The opinion of an expert, therefore, must be based on facts, proved or assumed, sufficient
including whether other experts reasonably might disagree,\textsuperscript{229} also should be considered.

If the opponent can demonstrate no need to cross-examine, then it is frivolous to require the proponent to call the expert at trial.\textsuperscript{230} If this position is adopted, in many cases the proponent of the record then would be free to make a tactical and economic decision as to whether to call a live witness to present and explain the record.\textsuperscript{231} If the proponent of the record chooses to offer it without calling the expert or other opinion witness, the opponent still could call the expert or other opinion witness to the stand.

If the need to cross-examine has become clear through discovery, the would-be cross-examiner should subpoena the expert\textsuperscript{232} or

\textsuperscript{229} See, e.g., State v. Martorelli, 346 A.2d 618 (N.J. Super. 1975) (discussing differences between simple tests and complex diagnoses), cert. denied, 354 A.2d 642 (N.J. 1976); Loper v. Andrews, 404 S.W.2d 300, 305 (Tex. 1966) (a noncontroversial diagnosis of leukemia would have been admissible, but a speculative conclusion as to cause of injuries being a skull fracture was admitted improperly); 4 Weinstein & Berger, supra note 92, ¶ 803(6)(b)(6) at 803-23 ("If the expert is available and the diagnostic opinion is of a kind competent physicians may disagree upon, the judge has discretion to require the expert to testify to ensure trustworthiness through cross-examination, particularly if the medical issue is critical, and the patient’s liberty is at stake.") (footnote omitted); see also 2 McCormick, supra note 5, § 293, at 281 & nn.21-22 ("In the absence of the availability of the expert for explanation and cross-examination, the court may conclude that probative value of this evidence is outweighed by the danger that the jury will be misled or confused. Exclusion here would be under Federal Rule 403 or its state law counterpart. See Nauni v. State, 670 P.2d 126, 131 [(Ok. Crim. App. 1983)] (diagnoses of mental or psychiatric conditions are too complex and speculative to be admitted without cross-examination). See generally [2 McCormick, supra note 5,] § 185. This is of particular concern if the opinion involves difficult matters of interpretation and a central dispute in the case, such as causation. Under these circumstances, a court operating under the Federal Rules, like earlier courts, is likely to be reluctant to permit a decision to be made upon the basis of an un-cross-examined opinion and may require that the witness be produced. Skogen v. Dow Chemical Co., 375 F.2d 692 [(8th Cir. 1967)] (not error to exclude entry that plaintiff’s condition was caused by inhalation of insecticide.").

This factor is similar to McCormick’s and Davis’s point that in evaluating the probative value of hearsay, an administrative law judge should consider the degree of efficacy that cross-examination would have: Is credibility at issue? Or would the opportunity to rebut by other evidence suffice? See Davis & Pierce, supra note 166, §§ 9.11, 10.4; 2 McCormick, supra note 5, § 353.

\textsuperscript{230} Note also the possibility, in civil cases, of the taking and offering in evidence of videotaped depositions of experts. See Md. Rule 2-419(a)(4).

\textsuperscript{231} Offering an opinion without supporting live expert testimony, even if permitted, may not be the best tactical decision.

\textsuperscript{232} See Md. Rule 5-607 (parties may impeach their own witnesses); Marlow v.
be held to have waived the right to complain about the lack of opportunity to cross-examine the expert. If the expert or other opinion witness is equally available to both parties and the opponent does not call the witness, the opponent should not be permitted to attack the evidence on the basis that the witness in question did not testify, and counsel was not able to question the witness. If the business records are offered pursuant to Maryland Rule 5-902(a)(11), that Rule's provision for notice prevents surprise; failure to subpoena the declarant under similar circumstances has been viewed as a waiver of one's confrontation right.

Cerino, 19 Md. App. 619, 636-37, 313 A.2d 505, 515 (1974) (where it appears from a hospital record that an opinion is expressed by a qualified person, such an expression is admissible in evidence and it is incumbent upon the person seeking to attack those opinions to call the declarant as a witness and examine him or her for weakness or error); Gunter v. Fischer Scientific Am., 475 A.2d 671, 674 (N.J. Super. Ct. App. Div. 1984) ("If respondent wanted to call Dr. Glass to explain any statements in the records, respondent would have had an opportunity to do so."); State v. Martorelli, 346 A.2d 618, 622 (N.J. Super. Ct. App. Div. 1975) ("It should be noted, of course, that the evidential controversy herein involves only the admissibility of the [blood alcohol] test. The weight which is to be accorded to the test is still subject to attack by one who questions either the qualifications of or the results reached by the person who performs the same. Such an attack may include the presentation of retained experts or the production by defendant of the very personnel who administered the laboratory test and noted the result in the admitted record. The business records exception permitting the admissibility of the test result merely relieves the offering party from producing the witness who participated in the routine activity involved."); cf. Chapman v. State, 331 Md. 448, 473, 628 A.2d 676, 688 (1993)

233. See supra note 196.

234. See State v. Spikes, 423 N.E.2d 1122, 1126-30 (Ohio 1981) (no violation of confrontation right in admission of hospital record—authenticated by written, sworn certification—concerning victim's injuries, when, having received notice of state's intent to offer the record and a copy of the record, pursuant to Ohio statute, accused had opportunity to depose doctors or subpoena them for trial, but did neither); see also supra text accompanying note 151; cf. United States v. Tedder, 801 F.2d 1437, 1448-49 (4th Cir. 1986) (defense waived evidentiary objections under 18 U.S.C. § 3505(b) by failing to file motion in opposition before trial), cert. denied, 480 U.S. 938 (1987); United States v. Johnpoll, 739 F.2d 702, 710 (2d Cir.), cert. denied, 469 U.S. 1075 (1984) (deposition testimony of five Swiss witnesses obtained pursuant to treaty properly admitted over Sixth Amendment objections; witnesses were unavailable at trial and defendants had waived objections by not attending taking of depositions at government's expense as offered); Chapman v. State, 331 Md. 448, 473, 628 A.2d 676, 688 (1993) ("[I]f Chapman believed there was anything in the bank records that would have aided his defense, he was free to subpoena those records."); State v. Miller, 326 N.E.2d 259 (Ohio 1975) (error to admit probation officer's report on accused's attendance record, when, inter alia, accused was not on notice that the evidence would be offered and thus could not have compelled the officer's attendance to trial).
2. Proposal for Criminal Cases

Absent such notice to and waiver by the accused in a criminal case, however, the Confrontation Clause would seem to demand that the declarant of an opinion as to nonroutine, highly significant matters testify at trial unless the declarant is unavailable to testify. If the prosecution demonstrates that the declarant is unavailable, then the court should examine the out-of-court statement for circumstantial guarantees of trustworthiness, and admit it only if these are found, in accordance with Ohio v. Roberts and its progeny.

IX. PROOF OF ABSENCE OF A BUSINESS RECORD OR OF ABSENCE OF AN ENTRY IN A BUSINESS RECORD

Maryland Rule 5-902(a)(11) does not appear to permit authentication by certification of the absence of a business record or the absence of an entry in a business record. This conclusion follows from a comparison of Maryland Rules 5-803(b)(7) and (10).

Rule 5-803(b)(10) provides that the hearsay rule need not exclude evidence of the absence of a public record or of an entry in a public record, which likely would have existed had a particular fact been true. Rule 5-803(b)(7) provides similarly as to the absence of a business record or of an entry in one. But Rule 5-803(b)(10) explicitly provides that such proof regarding public records may be made either "in the form of testimony or certification in accordance with Rule 5-902." In contrast, Rule 5-803(b)(7), which concerns such proof regarding business records, uses only the nonspecific term, "evidence." Since that Rule does not refer explicitly to proof by certification and neither does Rule 5-902(a)(11) refer to proof of absence of business records or the absence of entries in them.

235. See supra notes 211, 218, 220-21.
236. See, e.g., State v. Henderson, 554 S.W.2d 117 (Tenn. 1977) (harmless error, under circumstances, to admit laboratory reports when State made no effort to secure presence at trial of persons who conducted laboratory tests); State v. Fears, 659 S.W.2d 370, 377-78 (Tenn. Crim. App. 1983) (admission of laboratory tests without live testimony held a violation of defendant's constitutional confrontation rights); see also Munro v. Privratsky, 209 N.W.2d 745, 751-52 (N.D. 1973) (no abuse of discretion in excluding letter from deceased doctor).
238. See supra notes 155-59, 173-89.
240. This point was raised in passing at the October 4, 1993 hearing held by the court of appeals on Title 5. Judge Chasanow commented that counsel would need a witness under Rule 5-803(b)(7), but because of Rule 5-902(a)(11), counsel would not need a witness under Rule 5-803(b)(6). Cf. Ky. R. Evid. 902(11) (referring to records of regularly conducted activity within the scope of Kentucky Rule of Evidence 803(6) or 803(7)).
Self-Authentication of Business Records

application of the canon of statutory construction—that enacted law in derogation of the common law should be strictly construed,\textsuperscript{241} or that changes from the common law ought not be implied—would lead to the conclusion that “evidence” under Rule 5-803(b)(7) should take the form of testimony at trial, as it did under the few pre-Title 5 Maryland cases on point.\textsuperscript{242} If the records are voluminous, proof by summary, under Maryland Rule 5-1006, would be appropriate.\textsuperscript{243}

It is this writer’s recollection that the Evidence Subcommittee was of the opinion that under Rule 5-803(b)(7) a witness should testify at trial because of the importance of questions as to the reliability and completeness of the record-keeping system and as to the diligence of the search undertaken for the record or entry.\textsuperscript{244}

\textsuperscript{241} See, e.g., 2 Singer, supra note 89, § 61.01. The provisions for proof by certificate, under Rules 5-803(b)(10) and 5-902(a)(11), are changes from the Maryland common law. See Hammond v. Norris, 2 H. & J. 130, 132 (1807) (proof of absence of public record required live testimony).


On the other hand, the California proof of business records statute, for example, is explicit as to proof of absence of records or of an entry in them: “If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and such records as are available in the manner provided in Section 1560.” CAL. EVID. CODE § 1561(b) (West Supp. 1994). But the California Court of Appeals for the First District has held that admission of such evidence against a criminal defendant would violate the Confrontation Clause. People v. Dickinson, 130 Cal. Rptr. 561 (Cal. Ct. App. 1976).


\textsuperscript{244} See Dickinson, 130 Cal. Rptr. at 562-64 (error to admit, in proceeding for perjury by defendant in a prior trial in which he had testified as an expert witness, affidavits to prove that he had not been employed or educated as he had testified: “[A]dmitted into evidence was an affidavit by the custodian of records for Lockheed Aircraft Corporation, stating that defendant had not been employed by or associated with Lockheed in any capacity. An affidavit by the custodian of business records of U.C.L.A. School of Engineering and another by Dean O’Neill of the School of Engineering were admitted, disclosing that defendant had never been employed by the School of Engineering of U.C.L.A. A like affidavit was introduced to disclose that defendant had not been employed as a director for the C stage of Saturn Five. . . . Assuming arguendo that [CAL. EVID. CODE § 1561] would permit evidence, over objection, of the absence of an entry in a record by affidavit in a civil action, it is clear that in criminal proceedings such evidence would violate the defendant’s right to confront witnesses against him guaranteed by the Sixth Amendment.
On the other hand, judicial economy would seem to warrant proof by certificate, at least where the evidence in question was not disputed. The issue is one of policy for the Court of Appeals of Maryland.

X. CONCLUSION

Maryland Rule 5-902(a)(11) creates an alternative means for authentication of business records. Under the Rule, originals or copies of business records will be self-authenticating if they are certified as fulfilling the foundation requirements for the hearsay exception set forth in Rule 5-803(b)(6), by a person who would have been qualified to testify at trial to those foundation requirements. No further evidence will be needed in order to comply with Rule 5-803(b)(6). Rule 5-902(a)(11)'s requirements for advance notice to and opportunity to inspect by the adverse party, coupled with its safety valve for the nonself-authentication of records when the source of the information or other circumstances are shown to betray a lack of trustworthiness, satisfy the fairness concerns of the Due Process Clause and the Confrontation Clause of the United States Constitution.

Rule 5-902(a)(11) is consistent with the pre-Maryland Rules of Evidence cases that sometimes permitted the introduction of busi-

245. See State v. Chapman, 331 Md. 448, 463-64, 628 A.2d 676, 684 (1993); cf. State v. Rogers, 426 A.2d 1035, 1040 (N.J. Super. Ct. App. Div. 1981) (affidavit of local government official stating that defendant had no permit for revolver in prosecution for possession of a revolver without a permit did not violate defendant's right of confrontation); United States v. Cruz, 492 F.2d 217, 220 (2d Cir.), cert. denied, 417 U.S. 935 (1974) (holding admission of certificate of non-registration of destructive device, which recited that a diligent search was conducted and disclosed no registration, did not violate the defendant's right of confrontation); Md. Rule 2-504.2(b)(8); supra note 194.
ness records without live witnesses. Like both Maryland Rules 2-510(g) and 3-510(g) regarding hospital records, and the statute regarding bank records upheld in Chapman v. State, Rule 5-902(a)(11) advances judicial economy at no real cost to fairness.

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

In civil cases, if the opponent demonstrates a need to cross-examine an out-of-court opinion declarant, the declarant should testify at trial, unless the opponent has had the opportunity to subpoena the witness and has not done so.

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

Rule 5-902(a)(11) does not appear to extend to proof of absence of a business record or absence of an entry in a business record, which is a question for the Court of Appeals of Maryland. Rule 5-803(b)(7) is clear that such proof may be made by a live witness with knowledge. That witness's testimony may well take the form of summary evidence, governed by Rule 5-1006.

246. See supra text accompanying notes 173-89.
XI. APPENDIX: SUGGESTED FORMS FOR CERTIFICATION OF A DOMESTIC BUSINESS RECORD UNDER MARYLAND RULE 5-902(A)(11)

Although, just as under 18 U.S.C. § 3505, there is no "magic form" for compliance with Maryland Rule 5-902(a)(11), it may be helpful to provide examples of what should suffice. The Texas Rules provide the following sample affidavit:

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249. The author expresses her gratitude to Walter A. Pennington, Esq., who shared with her the following sample form he prepared for consideration by the Montgomery County Bar Association:

IN THE DISTRICT COURT FOR MONTGOMERY COUNTY, MARYLAND

ABC CORPORATION
Plaintiff, Civil 123,456-94

vs.

XYZ CORPORATION
Defendant.

CERTIFICATE UNDER 5-902(A)(11)

I, ___________________, am a custodian of the records and am qualified by (name of business) to testify regarding the records that are kept by the above listed corporation and I hereby state the following:

1. That I am over the age of 18. That my business address is ____________________________.

2. That the record(s) attached to this certificate were made at or near the time of the occurrence of the matters set forth in the record(s) by a person with knowledge of the matters contained in the record(s), or from information transmitted by a person with knowledge of the matters contained in the record(s).

3. The record(s) were made and kept in the course of the regularly conducted business activity.

4. The record(s) were made and kept by the regularly conducted business activity as a regular practice.

I solemnly declare and affirm under the penalties of perjury that the foregoing statements are true and correct.

______________________________

Custodian of Records

State of ________________________
County of ________________________

Subscribed and Sworn to before me this ________ day of ________, 199____.

______________________________

Notary Public


Attachment to letter from Walter Allen Pennington, Esq. to Lynn McLain (October 18, 1994).
AFFIDAVIT

Before me, the undersigned authority, personally appeared ___________, who, being by me duly sworn, deposed as follows:

My name is ___________, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of ___________. Attached hereto are ______ pages of records from ___________. These said ______ pages of records are kept by _______ in the regular course of business, and it was the regular course of business of ___________ for an employee or representative of ___________, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_________________________  Affiant

SWORN TO AND SUBSCRIBED before me on the ___ day of ___________, 19__.
Notary Public, State of Texas ______________________
Notary’s printed name:
My commission expires: ___________

The Texas Rules properly make clear that the form is not mandatory: "A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form, though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice . . . ."251

Texas’ sample form simply traces the requirements explicitly stated in the Rule.252 A similar skeletal form with a few stylistic changes follows:

250. TEX. R. CIV. EVID. 902(b); TEX. R. CRIM. EVID. 902(b).
251. TEX. R. CIV. EVID. 902(b); TEX. R. CRIM. EVID. 902(b).
252. Such a skeletal certification generally should be constitutionally sufficient. See United States v. Miller, 830 F.2d 1073, 1077 (9th Cir. 1987) ("The Bank of Zurich records are accompanied by a statement under criminal penalty for falsity before the Public Prosecutor for the District of Zurich by Charles Zurrer, vice director of the bank. Zurrer certifies the authenticity and accuracy of the records and that they were kept in the ordinary course of business and prepared at or around the time the events occurred by a person familiar with those matters or on the basis of information given by such a person."); see also supra note 122.
Affidavit

1. I, (name of individual), am of sound mind and over 18 years of age.

2. I am the custodian of the records of (name of business entity), a (corporation) (limited liability company) (partnership) (sole proprietorship) (unincorporated association) (business entity). [Alternative for noncustodians: I am employed by (name of business entity), a (corporation) (limited liability company) (partnership) (sole proprietorship) (unincorporated association) (business entity) in the position of (job) and in the fulfillment of my duties have gained sufficient knowledge to qualify me to attest to the following facts].

3. The (number of pages) pages attached to this affidavit are made and kept by (name of business entity) in the regular course of business; it was the regular course of business of (name of business entity) for an employee or representative of (name of business entity) with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit the information to be included in such record, and the record was made at or near the time of the act, event, condition, opinion, or diagnosis, or reasonably soon thereafter.

4. The attached pages are (the original) (the exact duplicates of the original) records.

Affiant

[Notary’s Certificate]

On the other hand, if counsel anticipates questions about the reliability of the records, counsel might wish to use a more elaborate form, so as to enhance the court’s ability to make a finding of trustworthiness. Additional information describing the type of business activity in which the business entity is engaged would be useful to the court in evaluating whether the statements in the records in question are related to and made in the ordinary course of that activity. A provision that the records are used and relied upon by

253. Cf. Cal. Evid. Code § 1561(a)(3) (West Supp. 1994) (records “were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event”).
the business for a stated purpose also would be helpful. Such an affidavit could add paragraphs 5 and 6 to the above example, using language such as the following:

5. (Name of the business entity) is engaged in (type of business activity), and records of the type certified are made routinely, to further the business purpose(s) of (business purposes for the records).

6. Records of the type attached, including those attached, are used and relied upon by (name of business entity) for the purpose(s) of (purposes for which records are relied on by the business).

254. See, e.g., Hanley v. United States, 416 F.2d 1160, 1166-68 (5th Cir. 1969); Louisville & Nashville R.R. v. Knox Homes Corp., 343 F.2d 887, 896 (5th Cir. 1965) ("The theory underlying the [federal Business Records Act, 28 U.S.C. § 1732 (1984), the statutory precursor of Federal Rule of Evidence 803(6),] is that business records in the form regularly kept by the company and relied on by that company in the ordinary course of its business have a certain probability of trustworthiness."); Rivcom Corp. v. Agricultural Labor Relations Bd., 670 P.2d 305, 323 n.28 (Cal. 1983) (en banc) ("According to [the custodian's] affidavit, [the records] were prepared in the 'normal' course of business and are 'the payroll records used and relied upon by [NPMS] in paying the employees who worked at Rancho Sespe and . . . to comply with various wage payment laws.' As such, they necessarily were up-to-date employee records, and NPMS' reliance on them amply establishes their trustworthiness. They were properly admitted."); Chapman v. State, 331 Md. 448, 459, 628 A.2d 676, 681-82 (1993) ("Hearsay evidence admitted under the business records exception is generally regarded as reliable since any risk of 'insincerity will be minimized, because the business will want accurate records to rely on,' Lynn McLain, Maryland Evidence § 803(6.1, at 380 (1987) and '[t]he very regularity and continuity of the records are calculated to train the recordkeeper in habits of precision.' 2 McCormick on Evidence § 286, at 265."); cf. United States v. Blake, 488 F.2d 101 (5th Cir. 1973) (under 28 U.S.C. § 1732 (1984), precursor to Federal Rule of Evidence 803(6), error to admit evidence as business records, absent evidence that they were made in the ordinary course of business, and absent testimony explaining the system under which the records were made and the efforts employed to ensure their accuracy).