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Updating the Medical Hearsay Exception: Maryland Should Modernize Its Approach to the Medical Treatment Hearsay Exception

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I. INTRODUCTION

Imagine you are a pediatrician employed by the Baltimore City Department of Social Services. A six-year-old child victim of alleged sexual abuse has been referred to you by a social worker. When the child comes to your office, you explain to the child that she is at your office because there is a concern about her health due to an experience that may have happened to her. You perform a complete physical examination of the child and order routine laboratory tests. Your physical examination of the child reveals evidence of trauma and penetration to the vagina and anus by a foreign object. During the examination, the child tells you that a particular person hurt her when he put his penis in her “privates” and her “bottom” more than ten times.

When the alleged perpetrator of the sexual abuse is put on trial, the prosecution informs you that, based on how the Court of Special

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1 B.S. Cornell University, Candidate for J.D. in May 2008, University of Baltimore School of Law. Editor-in-Chief of Journal of Environmental Law at University of Baltimore School of Law. Special thanks to Professor Lynn McLain.

2 See, e.g., Low v. State, 119 Md. App. 413, 416, 705 A.2d 67, 69 (1998) (holding that the prosecution’s expert was only an examining physician and not a treating physician, thus the guarantee of trustworthiness was not present, and therefore the pediatrician’s testimony to statements made by the child patient to her during a physical examination did not fall under the medical diagnosis/treatment hearsay exception and was inadmissible). This fact pattern is derived, in part, from the facts of Low.

3 The pediatrician’s testimony that it was her habit to explain to her child-patients that they were at her office because of concern about their health, following an unhappy experience that might have happened to them, met the requirements of Maryland Rule 5-406. See Low, 119 Md. App. at 422-23, 428, 705 A.2d at 72. The pediatrician’s testimony about this habit showed that the pediatrician had made such a statement to this particular child. See 5 LYNN MCLAIN, MARYLAND EVIDENCE – STATE AND FEDERAL § 406:1 (2d ed. 2001) (discussing how, under Maryland Rule 5-406, it must be shown that the person had “an established, regular response to a repeated, specific situation” in order for the hearsay evidence to be admissible as evidence of habit).

4 Id. at 416, 705 A.2d at 69.

5 Id. at 416, 705 A.2d at 69.
Appeals of Maryland has interpreted the Maryland Rules of Evidence, your testimony about statements the child made to you during your examination are inadmissible hearsay. Your testimony would not fall within the hearsay exception of statements made by a person seeking medical treatment “for purposes of medical treatment or medical diagnosis in contemplation of treatment”6 (“medical treatment hearsay exception”) and therefore you cannot testify to the child’s statements.7

The inadmissibility of this evidence as substantive evidence is the sad reality for Maryland prosecutors, pediatricians, child sexual abuse victims, and others who are trying to protect victims of child sexual abuse.8 The plain language of Maryland Rule 5-803(b)(4) (“Md. Rule 5-803(b)(4)”) is quite broad and includes statements made by a person seeking treatment not only “for purposes of medical treatment” but also for “medical diagnosis in contemplation of treatment.”9 However, Maryland courts have narrowly construed the rule’s language10 which was intended to codify the common law medical treatment exception that “admit[s] certain hearsay statements based on their inherent trustworthiness.”11 Maryland courts have undertaken the trustworthiness analysis in many cases involving the medical treatment

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6 MD. RULE 5-803(b)(4) (LexisNexis 2007).
7 The child’s statements to you may possibly be admitted for only the limited purpose of giving the basis for your opinion and not for any substantive purpose. See MD. RULE 5-703 (describing the limiting jury instruction and stating that upon request, the court must instruct the jury to use those facts and data “only for the purposes of evaluating the validity and probative value of the expert’s opinion or inference”); 7 LYNN McLAIN, MARYLAND RULES OF EVIDENCE 165 (3d ed. 2007) [hereinafter McLAIN RULES] (explaining that “[u]pon request, the court must give a limiting instruction to the jury that those facts and data are admitted not as substantive evidence” but as non-substantive evidence).
8 This evidence may also be inadmissible in a criminal case because it violates the Confrontation Clause under the testimonial analysis. A discussion of the Confrontation Clause in relation to the medical treatment hearsay exception is beyond the scope of this paper. See generally Crawford v. Washington, 541 U.S. 36 (2004) (analyzing the testimonial aspect of medical treatment statements made for the purpose of diagnosis); MCCORMICK ON EVIDENCE § 278, at 291 n.12 (Kenneth S. Broun ed., 6th ed. 2006) (explaining that Confrontation Clause issues may arise under the “testimonial” analysis); Robert P. Mosteller, Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. RICH. L. REV. 511, 600-01 (2005) (discussing the scope and meaning of the testimonial concept).
9 MD. RULE 5-803(b)(4) (emphasis added).
10 See infra part III.
11 David S. Gray, The Medical Treatment Hearsay Exception in Maryland: A Low Point in Clarity for Practitioners and Protection for Litigants, 29 U. BALT. L. REV. 237, 244 (2000).
hearsay exception. The courts, however, have applied multiple, conflicting standards that have created confusion.

To avoid this confusion, Maryland should adopt the modern approach of the federal rules, and the rules of a vast majority of the states, and extend the hearsay exception to patients’ out-of-court statements made to physicians, including those hired as expert witnesses in preparation for litigation, “for the purposes of” medical treatment or diagnosis. This would relieve the courts from making nice distinctions between treating and non-treating physicians, decrease the possibility of reversible error and retrial, avoid the need for limiting instructions that could confuse jurors, and allow the fact-finder to hear and weigh the credibility of all statements made for purposes of medical treatment or diagnosis.

Part II of this article provides background on the rationale underlying the common law medical treatment hearsay exception. Part III gives a chronology of the Maryland common law and describes how Maryland courts have applied the common law rationale. Part IV describes the modern federal approach to the medical treatment hearsay exception and gives examples of how the approach has been applied in federal courts. Part V proposes that Maryland amend Md. Rule 5-803(b)(4) to mirror the fairer approach of Federal Rule of Evidence 803(4) (“FRE 803(4)”).

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12 See infra part III.
13 See infra part III. Compare Low, 119 Md. App. at 425-26, 705 A.2d at 73-74 (1998) (holding that a pediatrician’s testimony to statements made by a child sexual abuse victim to the pediatrician did not fall under the medical treatment hearsay exception and were therefore inadmissible because the pediatrician was only an examining physician and not a treating physician which meant the guarantee of trustworthiness was not present), with In re Rachel T., 77 Md. App. 20, 34-36, 549 A.2d 27, 33-36 (1988) (holding that a social worker’s testimony to statements made by a child sexual abuse victim to the social worker did fall under the medical treatment hearsay exception and were therefore admissible because the child was almost five years old and her injuries were internal and possibly indicative of the transmission of a “communicable disease”), and Cassidy v. State, 74 Md. App. 20, 30-34, 536 A.2d 666, 680-83 (1988) (holding that a pediatrician’s testimony to statements made by a child sexual abuse victim to the pediatrician did not fall under the medical treatment hearsay exception and were therefore inadmissible because the child was too young to have “a purposeful motivation” to accurately describe her injuries in order to receive proper medical treatment and therefore her statements lacked trustworthiness guarantees).
14 See infra part IV.
15 See infra part IV.
16 See Fed. R. Evid. 803(4) and accompanying Advisory Committee’s Note. The Advisory Committee’s Note states, in part:

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling [the physician] to testify. While these statements
concludes that the federal approach is fairer, more understandable, and easier to administer than Maryland's current approach by applying the medical treatment hearsay exception to all of a patient's statements made to a physician that are relevant to medical diagnosis if the statements are otherwise admissible under the rules of evidence and, in criminal cases, admissible subject to the Confrontation Clause. 17

II. COMMON LAW RATIONALE UNDERLYING THE MEDICAL TREATMENT HEARSAY EXCEPTION

Under common law, statements made by a person seeking medical treatment to a physician for the purpose of receiving medical treatment fall under a well-established and long-standing exception to the hearsay rule. 18 Similar to most hearsay exceptions, admission of statements made for the purpose of medical treatment is generally based on trustworthiness. 19

Under common law, four types of statements have been included under the medical treatment hearsay exception. 20 First, a patient's statements to a physician about the patient's then existing bodily condition are admissible under this hearsay exception because "there are no problems with perception or memory." 21 There is no perception

17 A discussion of the Confrontation Clause in relation to the medical treatment hearsay exception is beyond the scope of this paper. See generally McCORMICK, supra note 8, § 278, at 291 n.12 (explaining that Confrontation Clause issues may arise under the "testimonial" analysis); see also Crawford v. Washington, 541 U.S. 36 (2004) (analyzing the testimonial aspect of medical treatment statements made for the purpose of diagnosis); Mosteller, supra note 8, at 600-01 (2005) (discussing the scope and meaning of the testimonial concept).


19 Gray, supra note 11, at 242-45. The common law is also based to a lesser degree on necessity. See 5 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE §§ 1420, 1421, 1423 (James H. Chadbourn rev. 1974) (describing necessity as when the declarant is unavailable such as after a dying declaration or when evidence of equal value is not available, such as under the excited utterance hearsay exception).

20 Gray, supra note 11, at 246-49.

21 6A LYNN McLAIN, MARYLAND EVIDENCE — STATE AND FEDERAL § 803(4):1, at 216 (2d ed. 2001); see Sellman v. Wheeler, 95 Md. 751, 754-55, 54 A. 512, 514 (1902) (physician's testimony about patient's statements to him were admissible, despite the hearsay rule, because the patient's statements were based on the patient's then existing physical condition).
problem because a patient is in the best position to perceive her own physical sensations, and there is no memory problem because the patient is describing her present physical condition.\textsuperscript{22} Courts also find these statements to be trustworthy based on the patient’s belief “that the effectiveness of the treatment depends on the accuracy of the information provided to the doctor” by the patient.\textsuperscript{23} Under common law, the declarant’s selfish interest in obtaining proper medical treatment guarantees that the declarant’s statement about her symptoms is truthful.\textsuperscript{24} Some statements of this type that fall under the medical treatment hearsay exception may also fall under other hearsay exceptions including the excited utterance exception, the present sense impression exception, and the then existing mental, emotional, or physical condition exception.\textsuperscript{25}

Second, a patient’s statements to a physician about the patient’s past symptoms are also now admissible under the medical treatment hearsay exception.\textsuperscript{26} Even though a memory problem exists when a patient gives medical history to a physician by describing past symptoms, it has been accepted that, similar to describing her then existing bodily condition, the patient’s desire to be truthful in order to receive proper medical diagnosis and treatment outweighs any memory problems.\textsuperscript{27}

Third, statements made by a patient to a physician about the patient’s medical history that do not describe past symptoms, but rather, describe the cause or external source of a condition, also fall

\textsuperscript{22} McLAIN, supra note 21, § 803(3):2, at 210.

\textsuperscript{23} MCCORMICK, supra note 8, § 277, at 284.

\textsuperscript{24} See McLAIN, supra note 21, § 803(4):1, at 216-17 (noting that the patient’s “desire to receive a proper medical diagnosis and, thus, proper treatment, provides a strong incentive for sincerity”) (citing, e.g., Candella v. Subsequent Injury Fund, 277 Md. 120, 123-24, 353 A.2d 263, 265 (1976)).

\textsuperscript{25} Gray, supra note 11, at 246-47 n.60. For example, if a person makes a statement to a physician while the person is “under the stress” of a traumatic event, Maryland courts will admit the statement under the excited utterance exception. MD. RULE 5-803(b)(2); see also FED. R. EVID. 803(2). If a person makes a statement to a physician that describes or explains an event or condition “while the declarant was perceiving the event or condition, or immediately thereafter,” Maryland courts will admit the statement under the present sense impression exception. MD. RULE 5-803(b)(1); see also FED. R. EVID. 803(1). In addition, if a person makes a statement to a physician that relates to the person’s “then existing state of mind, emotion, sensation, or physical condition” and is offered to prove then existing condition or future action, Maryland courts will admit the statement under the then existing mental, emotional, or physical condition exception. MD. RULE 5-803(b)(3); see also FED. R. EVID. 803(3).

\textsuperscript{26} Gray, supra note 11, at 247.

\textsuperscript{27} McLAIN, supra note 21, § 803(4):1, at 216-17.
within this exception. The statements must be "pathologically germane" which means a person would reasonably believe that the statement would have "sufficient bearing upon and relation to the disease or injury from which one suffers." The statement must be particularly related to the medical condition for which the patient is visiting the physician. Again, the patient's desire to receive appropriate medical diagnosis and treatment "provides a strong incentive for sincerity." Many courts inquire further into the factual circumstances underlying the patient's statement and if they find apparent insincerity or improper motive, they exclude the evidence.

Finally, only statements made in pursuit of treatment by a patient to a treating physician qualify under the common law hearsay exception; statements made to a non-treating physician do not qualify. Under the common law, courts have held that statements made by patients to non-treating physicians lack the trustworthiness guarantee that underlies the exception because proper treatment does not "hinge on such statements." Common law allows only treating physicians to testify to prove the truth of out-of-court statements made by patients.

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28 Gray, supra note 11, at 247. In certain situations, a physician may view the cause of a medical condition as related to diagnosis and treatment while in other situations, such as when establishing fault, "neither the patient nor the physician is likely to regard [the statements] as related to diagnosis or treatment." MCCORMICK, supra note 8, § 277, at 285.

29 The scope of the exception has been examined from the view of the patient as well as the physician. See MCCORMICK, supra note 8, § 277, at 285 (discussing statements about the cause of a condition or injury from the patient's and physician's point of view).

30 Marlow v. Cerino, 19 Md. App. 619, 635, 313 A.2d 505, 514 (1974) (holding that out-of-court statements made by a patient to a physician about her alcoholism and schizophrenia were sufficiently related to the illness for which she was admitted to the hospital to be admissible under the hearsay exception).

31 See MCCORMICK, supra note 8, § 278, at 286-87 (describing the test for admissibility to be "reasonably pertinent to diagnosis or treatment" which is an objective standard).

32 McLAIN, supra note 2, § 803(4):1, at 217.

33 See MCCORMICK, supra note 8, § 278, at 284-87 (describing the common law test for admissibility of medical treatment hearsay evidence).

34 Gray, supra note 11, at 248; see MCCORMICK, supra note 8, § 278 at 287 (describing how courts were hesitant to admit statements made by patients to physicians who were hired as expert witnesses for litigation because the trustworthiness guarantee did not exist).

35 Non-treating physicians include purely "examining" physicians who are consulted in preparation for litigation. See Rossello v. Friedel, 243 Md. 234, 242-43, 220 A.2d 537, 541-42 (1966) (excluding testimony from an orthopedist who was hired by the patient's employer's worker's compensation insurance carrier to provide orthopedic evaluation and not treatment); Wilhelm v. State Traffic Safety Comm'n, 230 Md. 91, 97, 185 A.2d 715, 717 (1962) (excluding statements made by a patient to a physician about her medical history because the physician was not employed by the patient to provide or even recommend treatment).

36 Gray, supra note 11, at 248.
about physical conditions in order to exclude the testimony of medical experts who are hired by litigants to testify at trial.\textsuperscript{37}

\textbf{III. THE MARYLAND COMMON LAW APPROACH TO THE MEDICAL TREATMENT HEARSAY EXCEPTION}

Over the last three decades, there has been a trend toward abandoning the common law approach and adopting a broader approach which allows the trier of fact to hear all statements made by patients to physicians whether for the purpose of treatment or diagnosis.\textsuperscript{38} Only seven states, including Maryland, follow the common law approach to the medical treatment hearsay exception.\textsuperscript{39}

Maryland’s Rules of Evidence require that, in order for a patient’s statement to qualify under the medical treatment hearsay exception, the statement must have been made “for purposes of medical treatment or medical diagnosis in contemplation of treatment.”\textsuperscript{40} The rule became effective in 1994 but it codified the long-standing Maryland common law rule.\textsuperscript{41} The rule distinguishes, then, between “treating” and “non-treating” physicians on the ground that the patient’s underlying selfish motivation to receive proper medical treatment is essential to the hearsay exception.\textsuperscript{42} This distinction has provided greater protection for insurance companies that must litigate actions against dishonest policy holders or tort claimants who are feigning or exaggerating injury. Unfortunately, however, this narrow approach results in the denial of adequate protection to honest policy holders and tort claimants, child abuse victims, and others who have suffered serious injury. The case law construing this approach is conflicting, requires confusing limiting instructions, and has resulted in the unnecessary creation of reversible error.\textsuperscript{43}

\textsuperscript{37} See supra note 34 and accompanying text.
\textsuperscript{38} See, e.g., Gray, supra note 11, at 253-56 n.105 (noting that twenty-seven states have adopted the federal rule, which broadens the common law approach).
\textsuperscript{39} Gray, supra note 11, at 253-56 n.105. The seven states that follow the common law approach include Kansas, Louisiana, Maryland, Michigan, Pennsylvania, Rhode Island, and Tennessee. Id. Twenty-seven states have adopted the federal rule language verbatim. Id. Ten states have “adopted the spirit” of the federal rule. Id. Six states have made a distinction between treating and examining physicians. Id.
\textsuperscript{40} MD. RULE 5-803(b)(4).
\textsuperscript{41} MCLAIRN RULES, supra note 7, § 3(c)(iii), at 217.
\textsuperscript{42} Gray, supra note 11, at 257.
\textsuperscript{43} See supra note 13 and accompanying text.
A. General Rule Under Pre-Codification Case Law

Prior to the adoption of Title 5 of the Maryland Rules, the Court of Appeals of Maryland applied the restrictive common law approach to the medical treatment hearsay rule. For example, in 1976, in *Candella v. Subsequent Injury Fund*, the plaintiff, a hotel maid, had suffered an electrical shock when she attempted to turn off the power on a vacuum cleaner while she was working at the hotel. The plaintiff claimed she suffered from post-traumatic stress and sought worker's compensation from her employer, its insurer, and the Subsequent Injury Fund.

The employee's attorney referred her to a psychiatrist who examined, but did not treat, the employee. The non-treating psychiatrist testified as the employee's expert witness in the hearing before the Worker's Compensation Commission (WCC), who decided in favor of the employee. On appeal, the Circuit Court for Anne Arundel County granted the defendants' motion to strike the testimony of the non-treating psychiatrist, reversed the decision of the trial court, and entered judgment for the defendants. The Court of Appeals of Maryland granted a writ of certiorari prior to the Court of Special Appeals of Maryland hearing the case and affirmed the trial court's decision in favor of the employer, insurer, and Subsequent Injury Fund.

The Court of Appeals of Maryland applied the “universally recognized principle that an attending physician may testify as to the medical history related to him by his patient.” The Court held that testimony by the psychiatrist was inadmissible hearsay because the psychiatrist was a non-treating physician. The Court found the psychiatrist was a non-treating physician because he did not render “treatment of any kind,” the plaintiff did not contemplate treatment by

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44 277 Md. 120, 124-26, 353 A.2d at 264-67 (1976). The Court of Appeals of Maryland acknowledged that “a number of states make a distinction which permits the nontreating physician to present his conclusions,” including the patient’s medical history as the basis for his conclusions, but not as substantive evidence. *Id.* at 124, 353 A.2d at 266. The Court “declined, however, to adopt this view despite the criticism aimed at our own more restrictive rule.” *Id.* at 124, 353 A.2d at 266.
45 *Id.* at 122, 353 A.2d at 264.
46 *Id.* at 121-22, 353 A.2d at 264.
47 *Id.* at 122, 353 A.2d at 264.
48 *Id.* at 121, 353 A.2d at 264.
49 *Id.* at 121, 353 A.2d at 264.
50 *Id.* at 121-22, 353 A.2d at 264.
51 *Id.* at 123, 353 A.2d at 265.
52 *Id.* at 126, 353 A.2d at 267.
the psychiatrist, and the plaintiff "related the history to the psychiatrist knowing that it was merely for the purpose of qualifying him as a witness on her behalf." Candella stated that the out-of-court statements on which the psychiatrist based his conclusions "cannot withstand the close scrutiny of hearsay testimony mandated by our prior decisions."54

B. Nonhearsay Limited Purpose Exception

In 1977, the Court of Appeals of Maryland adopted a new rule in Beahm v. Shortall, which slightly loosened restrictions on the common law medical treatment hearsay exception.55 Defendant Beahm was driving a tractor during the course of his employment with the defendant, Atlantic Furniture Products Co. Inc. (“Atlantic”), when he struck an automobile driven by the Plaintiff Shortall.56 Shortall visited a neurological surgeon the day after the accident because he suffered from double vision, pain behind the left eye, and persistent headaches following the accident.57 Four years later, in preparation for litigation, defendants hired Dr. Russo, a neurosurgeon, to examine Shortall.58 Shortall related his subjective symptoms to Dr. Russo during the examination.59 Dr. Russo testified at trial on behalf of Shortall as to Shortall’s statements to him as they related to his conclusion that the symptoms described by Shortall were disabling.60 The trial court found in favor of Shortall and the defendants appealed.61 The Court of Appeals of Maryland affirmed the decision of the trial court.62

In contrast to the Candella decision, Beahm concluded that a physician who examined a patient solely to qualify as an expert, could testify about the medical history63 statements the patient made to the

53 ld. at 126, 353 A.2d at 267.
54 ld. at 126, 353 A.2d at 267.
56 ld. at 328, 368 A.2d at 1009.
57 ld. at 328, 368 A.2d at 1012.
58 ld. at 328, 368 A.2d at 1009-10.
59 ld. at 328, 368 A.2d at 1010.
60 ld. at 328, 368 A.2d at 1010.
61 ld. at 328, 368 A.2d at 1009.
62 ld. at 344, 368 A.2d at 1018.
63 The term "medical history" encompasses not only statements made by the patient about "past events concerning the injury or illness" but also statements made by the patient "in giving his symptoms, in describing his feelings or in complaining about the pain he experienced." Id. at 324 n.1, 368 A.2d at 1007 n.1; see Rossello v. Friedel, 243 Md. 234, 242, 220 A.2d 537, 541 (1966) (stating that what the Court has said about "medical history" applies with equal force to "subjective symptoms").
physician, as long as the court gave a limiting instruction to the jury.\textsuperscript{64} The instruction would have to explain to the jury that it was to consider the patient’s statements “as an explanation of the basis of the physician’s conclusions and not as proof of the truth of those statements.”\textsuperscript{65} Based on the new rule announced by \textit{Beahm}, the statements in \textit{Candella} would have been admissible for this nonhearsay purpose with a limiting instruction.

\textbf{C. Medical v. Social Disposition Distinction}

If a limiting instruction requirement were not confusing enough, in 1988, the Court of Special Appeals of Maryland further complicated the understanding of the exception in contradictory decisions by two different panels, in \textit{Cassidy v. State}\textsuperscript{66} and \textit{In re Rachel T.}\textsuperscript{67} Both cases involved two questions: (1) Do statements pertinent to psychological or psychiatric diagnosis and treatment qualify under this hearsay exception?,\textsuperscript{68} and (2) Is the identity of a sexual abuser or aggressor pertinent to medical treatment?\textsuperscript{69} The court answered “no” to both of these questions in \textit{Cassidy} and answered “yes” to both of these questions in \textit{In re Rachel T.}\textsuperscript{70}

In \textit{Cassidy}, a two-year-old child abuse victim was brought to the hospital by a representative of Child Protective Services three days after the abuse and examined by Dr. Amie Pullman.\textsuperscript{71} During her examination, Dr. Pullman observed numerous bruises on the girl’s arms, legs, and buttocks, and she saw signs of irritation to the girl’s genital area.\textsuperscript{72} During the examination, Dr. Pullman asked the little

\begin{itemize}
  \item \textsuperscript{64} \textit{Beahm}, 279 Md. at 327, 368 A.2d at 1009.
  \item \textsuperscript{65} \textit{ld.} at 327, 368 A.2d at 1009.
  \item \textsuperscript{67} \textit{In re Rachel T.}, 77 Md. App. 20, 549 A.2d 27 (1988).
  \item \textsuperscript{68} See \textsuperscript{MCLAIN, supra} note 21, § 803(4):1, at 220 (citing \textit{Cassidy}, 74 Md. App. 1, 536 A.2d 666; \textit{In re Rachel T.}, 77 Md. App. 20, 549 A.2d 27); see generally John J. Capowski, \textit{An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception}, 33 GA. L. REV. 353 (1999) (arguing that statements made to mental health professionals should qualify under the medical treatment hearsay exception).
  \item \textsuperscript{69} \textsuperscript{MCLAIN, supra} note 21, § 803(4):1 at 220 (citing \textit{Cassidy}, 74 Md. App. 1, 536 A.2d 666; \textit{In re Rachel T.}, 77 Md. App. 20, 549 A.2d 27).
  \item \textsuperscript{70} \textsuperscript{MCLAIN, supra} note 21, § 803(4):1, at 220 (citing \textit{Cassidy}, 74 Md. App. 1, 536 A.2d 666; \textit{In re Rachel T.}, 77 Md. App. 20, 549 A.2d 27).
  \item \textsuperscript{71} \textit{Cassidy}, 74 Md. App. at 6, 536 A.2d at 668.
  \item \textsuperscript{72} \textit{Id.} at 6, 536 A.2d at 668. “Dr. Pullman also found significant the fact that the child, instead of resisting examination of the vaginal area, took her hands and pulled her labia apart. This, to her, indicated that the child had been sexually molested.” \textit{ld.} at 6, 536 A.2d at 668.
girl approximately five times, "Who did this?" and each time, the child answered "Daddy."\textsuperscript{73}

The Court of Special Appeals of Maryland found that the out-of-court statements made by the child victim to Dr. Pullman did not qualify for admission under the common law medical treatment hearsay exception because the child's statements identifying her abuser were not pertinent to her medical treatment.\textsuperscript{74} Relying on the common law philosophy, \textit{Cassidy} stated that "[t]he doctrinal predicate—the underlying reassurance of trustworthiness — upon which this entire exception to the Hearsay Rule rests was . . . entirely lacking in this case."\textsuperscript{75} The Court of Special Appeals of Maryland found that the two-year-old child victim was too young to understand the purpose of her examination by Dr. Pullman and "appreciate the critical cause-and-effect connections between accurate information, correct medical diagnosis, and efficacious medical treatment."\textsuperscript{76} \textit{Cassidy} stated that "information about the cause or source of the condition that would influence the course of treatment came under the qualifying guarantee of trustworthiness" but that "other statements as to causation that simply fixed fault or identified the culprit would not come within the logic of the guarantee."\textsuperscript{77} \textit{Cassidy} held that although the identity of an abuser may be of "social importance," it is "not ordinarily of strictly medical importance."\textsuperscript{78} Based on this reasoning, the removal of a child from a home in order to prevent future abuse by a member of the household is not considered as providing medical treatment to the child.

\textsuperscript{73} \textit{Id.} at 6, 536 A.2d at 668. For convenience, \textit{Cassidy} treats the five repetitions of the hearsay statement as a single instance and treats the combined question by the physician and answer by the patient as one statement by the patient—"Daddy did this." \textit{Id.} at 6, 536 A.2d at 668. The word "this" in Dr. Pullman's question to the child victim referred to the bruises on her arms, legs, and buttocks. \textit{Id.} at 7, 536 A.2d at 669. The appellant in this case cohabitated with the child's mother and, while they lived together, the child referred to the appellant as "Daddy" even though the appellant was not the child's father. \textit{Id.} at 5, 536 A.2d at 668.

\textsuperscript{74} \textit{Id.} at 33-34, 536 A.2d at 682.

\textsuperscript{75} \textit{Id.} at 30, 536 A.2d at 680.

\textsuperscript{76} \textit{Id.} at 30, 536 A.2d at 680.

\textsuperscript{77} \textit{Id.} at 27, 536 A.2d at 678. The court made an exception to its assertion that the identity of an abuser is "not ordinarily of strictly medical importance" by stating, in a footnote, that "[w]hen there is a danger that an assault victim may have contracted a communicable disease . . . the identity of the assailant may take on significant medical pertinence." \textit{Id.} at 33-34 n.14, 536 A.2d at 682 n.14.

\textsuperscript{78} \textit{Id.} at 33-34, 536 A.2d at 682.
In re Rachel T., 79 on the other hand, found that the abuser’s identity was of medical importance and stated that “[a]scertaining the identity of the [child] abuser was . . . important . . . because effective treatment might have required Rachel’s removal from the home.” 80 In Rachel T., an almost five-year-old child sexual abuse victim was referred to a pediatric gynecologist by her pediatrician after the pediatrician examined the child victim and found “a fresh tear in her hymen, a significant amount of blood in the vaginal vault, and clotted blood in Rachel’s rectum.” 81 A female social worker who was part of the pediatric gynecologist’s team 82 took Rachel’s history and Rachel told the social worker “that she had a secret with her Dad and that if she told her Mom her father would be in big trouble.” 83 After examining Rachel, the pediatric gynecologist opined that Rachel was a victim of ongoing sexual abuse. 84

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80 Id. at 36, 549 A.2d at 35.
81 Id. at 24, 549 A.2d at 29. The pediatrician also found “that her rectal sphincter muscle was abnormally dilated” and that Rachel’s “vaginal hymenal opening measured 15 millimeters, a serious abnormal finding because a measurement exceeding five millimeters is considered to be significantly enlarged.” Id. at 24, 549 A.2d at 29. During his examination of Rachel, the pediatrician also “found remarkable the relaxed ease with which Rachel endured his examination.” Id. at 24, 549 A.2d at 29.
82 Id. at 25, 549 A.2d at 29. Rachel was treated at Chesapeake Clinic at the Francis Scott Key Medical Center. Id. at 25, 549 A.2d at 29. The clinic uses an interdisciplinary approach where “a female social worker may be asked to interview a young female child to gather a medical history, if the child seems to be uncomfortable with an adult male.” Id. at 25, 549 A.2d at 29. Here, the pediatric gynecologist asked the female social worker to take Rachel’s history because Rachel was unwilling to talk to him. Id. at 25, 549 A.2d at 30.
83 Id. at 25, 549 A.2d at 30.
84 Id. at 25, 549 A.2d at 30. The pediatric gynecologist examined Rachel and “discovered that Rachel’s vaginal opening and hymen were extremely dilated, and the widest he had seen in any child under the age of 10.” Id. at 25, 549 A.2d at 30. The physician also “found diminished anal sphincter tone, which is a sign of sexual abuse if found in conjunction with a gaping hymenal orifice.” Id. at 25, 549 A.2d at 30. A staff member of the Department of Social Services of Maryland referred Rachel to Dr. Sweeney, a clinical psychologist who specialized in child sexual abuse cases. Id. at 25, 549 A.2d at 30. During Dr. Sweeney’s examination:

Rachel took the male adult doll, pulled his pants down, showed Dr. Sweeney the doll’s penis and said, ‘[T]his is his tutor.’ When asked if she had ever seen a tutor, Rachel replied, ‘Yes, my daddy’s.’ Rachel grabbed the male doll’s penis, put it in the female doll’s genitalia and said, ‘Tutor goes in here, too.’ Rachel named the female doll ‘Cindy’ and said that the male doll was Cindy’s daddy. She told Dr. Sweeney that Cindy’s daddy had hurt Cindy by putting his ‘tutor’ inside her. When asked to show what had happened, Rachel depicted intercourse with the dolls.

Id. at 26, 549 A.2d at 30.
The trial court, relying on *Cassidy*, excluded Rachel’s statements to the social worker and physician as inadmissible hearsay and ordered that Rachel be returned to her parents because she was not in need of court protection. On appeal, the Court of Special Appeals of Maryland vacated the decision and remanded for proper consideration. It held that Rachel’s statements to the social worker and the physician fell under the medical treatment exception and were admissible. The court justified this decision by distinguishing *Rachel T.* from *Cassidy* in two ways. First, the court found that five-year-old Rachel had higher “cognitive development” than the two-year-old child victim in *Cassidy* and that Rachel’s statements indicated a higher “degree of sophistication” than the statements made by the child in *Cassidy*. Therefore, Rachel understood that her statements to the physician would be used to provide her with appropriate treatment. Second, the court held that the identity of the abuser in *Rachel T.* was related to medical treatment because Rachel had internal injuries, may have contracted a communicable disease, and “effective treatment might have required Rachel’s removal from the home.”

The distinction that the Court of Special Appeals of Maryland makes between statements of medical versus social importance is, understandably, confusing to the trial courts. The Court of Special Appeals of Maryland weighs different factors in similar cases leaving it unclear how the trial courts should rule on the admissibility of such statements. This confusion causes unnecessary reversible error at the trial level and increases the possibility of a retrial. Retrial creates unnecessary additional litigation costs and inefficiency in our judicial system.

D. Treating v. Non-treating Physician Distinction

Subsequent to *Cassidy* and *Rachel T.*, in *Low v. State*, the Court of Special Appeals of Maryland further confused the case law in its

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85 *Id.* at 27-28, 549 A.2d at 31.
86 *Id.* at 23, 549 A.2d at 29.
87 *Id.* at 35-36, 549 A.2d at 34-35.
88 See McLain, *supra* note 21, § 803(4):1, at 221 (explaining how the court distinguished *Rachel T.* from *Cassidy*).
89 In re *Rachel T.*, 77 Md. App. at 35, 549 A.2d at 34.
90 *Id.* at 35, 549 A.2d at 34.
91 *Id.* at 35-36, 549 A.2d at 35.
“treating versus non-treating physician” analysis. In Low, a twelve-year-old child sexual abuse victim was examined by a pediatrician who was employed by the Montgomery County Department of Health and Human Services. The pediatrician found that the child’s “vagina and anus both showed evidence of trauma and penetration by a foreign object.” The pediatrician testified that the child told her that “the perpetrator” hurt her when he “put his penis in her vagina and in her ‘butt’ more than ten times.” The trial court determined that the out-of-court statements made by the child to the pediatrician fell under the medical treatment hearsay exception and admitted the testimony of the pediatrician. The defendant was convicted and he appealed.

The Court of Special Appeals of Maryland reversed the conviction, holding that the testimony by the pediatrician about the child’s statements did not fall under the medical treatment hearsay exception because: (1) the pediatrician who was employed by the Montgomery County Department of Public Health and Human Services examined the child “for the sole purpose of examining and detecting child abuse” on behalf of the prosecution; and (2) there was insufficient evidence to show that the twelve-year-old child’s subjective intent while being examined and interviewed by the pediatrician was “to communicate potential ailments or abuse in hopes of further treatment.” In a footnote, the Low court stated the following about the age discrepancy between the child in Cassidy and the child in Low:

Although [the child victim in Low] was significantly older than the child victim in Cassidy, given the facts in this case we do not believe that a twelve-year-old child any more than

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93 See supra notes 34-54 and accompanying text. This is a reference to the distinction made by the Court of Appeals of Maryland in Candella between treating and non-treating physicians. See Candella, 277 Md. 120, 353 A.2d 263 (1976).
94 See McLAIN, supra note 2, § 803(4):1, at 223 (explaining that Md. Rule 5-803(b)(4) does not require that treatment actually be provided).
95 119 Md. App. at 416, 705 A.2d at 69, 71; cf. Crawford v. Washington, 541 U.S. 36 (2004) (analyzing questioning by a government agent in relation to the Confrontation Clause). The Confrontation Clause analysis in Crawford relieves some of the pressure that the Maryland appellate courts have felt to exclude medical treatment hearsay statements especially when the statements were made to physicians hired by the government.
96 Low, 119 Md. App. at 416, 705 A.2d at 69.
97 Id. at 416, 705 A.2d at 69.
98 Id. at 416-17, 705 A.2d at 69.
99 Id. at 416-17, 705 A.2d at 69.
100 Id. at 425, 705 A.2d at 73.
101 Id. at 425, 705 A.2d at 73.
a two-year-old child would have assumed that [the pediatrician] was examining her for the purpose of subsequent treatment. The age discrepancy in the two cases presents no meaningful distinction for purposes of our analysis.102

This is a surprising statement by the court after it dedicated three paragraphs in *Cassidy* to discussing “maturity,” “cause-and-effect connections,” “conscious sophistication,” and “purposeful motivation” in relation to the age of the declarant.103

The *Low* court stated that it was “not entirely convinced by the record that [the pediatrician] ‘could have’ provided” treatment to the child victim.104 However, the rule does not require that the physician actually provide treatment.105 The rule states that the statements need only be made “for purposes of medical treatment” or for “medical diagnosis in contemplation of treatment.”106 Physicians first *diagnose* a patient and then, if necessary, they *treat* the patient or refer the patient to another physician for treatment.107 Medical treatment statements made by the patient to the physician during the diagnosis step are no less reliable when the diagnosis happens to be a diagnosis that does not require treatment.108 As long as the patient “knows that the diagnosis is intended to determine whether treatment is needed . . . the guarantee of sincerity is present.”109

E. Additional Factors Considered When Determining Admissibility of Statements

Most recently, in *Coates v. State of Maryland*,110 the Court of Special Appeals of Maryland added more factors to consider when determining whether the medical treatment hearsay exception applies to statements made by child sexual abuse victims to a treating medical

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102 *Id.* at 425 n.5, 705 A.2d at 69 n.5.
103 See *supra* notes 71-78 and accompanying text.
104 *Low*, 119 Md. App. at 423, 705 A.2d at 72. Here, the child victim’s laboratory and examination results showed no infections or abnormalities and therefore it was not necessary for the pediatrician to treat the child with medication or refer the child to another physician. *Id.* at 428-36, 705 A.2d at 75-78.
105 See *Md. RULE 5-803(b)(4)* (stating that the statement by the patient to the physician need only be made in contemplation of treatment).
106 *Id.* (emphasis added).
107 See *McLAIN, supra* note 21, § 803(4):1, at 224 (describing how diagnosis without treatment still falls under “in contemplation of treatment” found in the rule).
108 *Id.*
109 *Id.*
professional. The court held that statements made by a seven-year-old sexual abuse victim to a pediatric nurse practitioner during a medical examination were not admissible under the medical treatment hearsay exception because (1) the nurse practitioner’s questions “seemed to have an ‘overarching investigatory purpose’”; (2) the child did not see the nurse practitioner until “more than a year after the end of the sexual abuse”; and (3) there was no indication that the seven-year-old child understood that “she was at continued risk of developing a latent, sexually transmitted disease or HIV.”

In Coates, the mother of Jazmyne, a child sexual abuse victim, noticed that her daughter began to exhibit strange behavior in the fall of 2003. In November 2003, Jazmyne asked her mother: “[C]an little kids have babies?” Her mother responded: “No. Because if they do, they’ll die.” Upon hearing this from her mother, Jazmyne began to scream for no apparent reason. The mother, Ms. Jenkins, testified that this was when Jazmyne “revealed that she had sex with [Coates],” Jenkins’ former boyfriend whom Jenkins dated from spring 1999 until September 2002. Jazmyne told her mother that she had not told her mother about the abuse because “she was scared and didn’t want to.” On November 14, 2003, Ms. Jenkins took Jazmyne to a medical facility where Jazmyne was examined by Heidi Bresee, while in the tub, Jazmyne would ‘sit on the soap or run the hot water on her body and just [exhibit] mannerisms that didn’t seem normal for her.’ In addition, Jazmyne would put the back of her heel near her vagina and she would just wiggle her ankle. Jenkins also observed Jazmyne insert the leg of a Barbie doll into her vagina.

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111 Id. at 627-28, 930 A.2d at 1163.
112 Id. at 627-29, 930 A.2d at 1162-63 (quoting State v. Snowden, 385 Md. 64, 91, 867 A.2d 314, 330 (2005)).
113 Id. at 628-29, 930 A.2d at 1163.
114 Id. at 628-29, 930 A.2d at 1163.
115 Id. at 598, 930 A.2d at 1146. The mother, Ms. Jenkins, recalled that,

while in the tub, Jazmyne would ‘sit on the soap or run the hot water on her body and just [exhibit] mannerisms that didn’t seem normal for her.’ In addition, Jazmyne would put the back of her heel near her vagina and she would just wiggle her ankle. Jenkins also observed Jazmyne insert the leg of a Barbie doll into her vagina.

116 Id. at 598-99, 930 A.2d at 1146 (alteration in original). Ms. Jenkins testified that that the child disclosed the information to her in November 2003, but a police report indicates that the authorities were told of the accusations on October 24, 2003. Id. at 599 n.10, 930 A.2d at 1146 n.10.
117 Id. at 599, 930 A.2d at 1146.
118 Id. at 599, 930 A.2d at 1146 (internal quotations omitted). Specifically, Jazmyne told her mother that Coates “put [his] dingy inside of her coochie.” Id. at 599, 930 A.2d at 1146 (alteration in original).
119 Id. at 599, 930 A.2d at 1146.
who was a Sexual Assault Forensic Examination (SAFE) nurse and a pediatric nurse practitioner.\textsuperscript{120}

The Court of Special Appeals of Maryland held that the nurse practitioner’s questions to Jazmyne about what had happened to her had an “overarching investigatory purpose.”\textsuperscript{121} The nurse practitioner’s questions elicited the identity of the abuser and did not pertain to a medical purpose or Jazmyne’s health needs.\textsuperscript{122} The court found that the identity of the abuser was of no concern for medical treatment purposes because Jazmyne was not in contact with Coates, no longer was in any immediate danger, and therefore would not need to be removed from the home.\textsuperscript{123}

In addition, the court “consider[ed] it significant that Jazmyne saw [the nurse practitioner] more than a year after the end of the sexual abuse, and at a time when she had no physical manifestations of illness or injury.”\textsuperscript{124} It is interesting, for several reasons, that the court found this time lapse significant. First, child sexual abuse victims often cope with the abuse by trying not to think about the abuse.\textsuperscript{125} Sexual abuse, especially of children, is often not disclosed by victims until some time after the abuse has occurred when the victim is reminded of the past traumatic experience and has an intense emotional reaction to a present situation.\textsuperscript{126} Second, the absence of an obvious physical injury does not foreclose the possibility that the child was abused.\textsuperscript{127} The short and long term effects of sexual abuse can include less obvious, psychological symptoms such as anxiety, fear, nightmares and sleep problems, acting out and general misbehavior, withdrawal, regression, poor self-concept, depression, developmentally inappropriate sexual behavior, and post-traumatic stress disorder.\textsuperscript{128}

Finally, the court found that Jazmyne did not have any understanding “that she was at continued risk of developing a latent, sexually transmitted disease or HIV.”\textsuperscript{129} Most children do not have

\begin{footnotes}
\footnotetext[120]{Id. at 599, 930 A.2d at 1146.}
\footnotetext[121]{Id. at 627, 930 A.2d at 1162 (quoting State v. Snowden, 385 Md. 64, 91, 867 A.2d 314, 330 (2005)).}
\footnotetext[122]{Id. at 627, 930 A.2d at 1162.}
\footnotetext[123]{See id. at 628, 930 A.2d at 1163.}
\footnotetext[124]{Id. at 628, 930 A.2d at 1163.}
\footnotetext[125]{JOHN E. B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT PRACTICE 10 (2d ed. 1998).}
\footnotetext[126]{Id. at 14.}
\footnotetext[127]{See id. at 10-17}
\footnotetext[128]{Id.}
\footnotetext[129]{Coates, 175 Md. App. at 628, 930 A.2d at 1163 (2007).}
\end{footnotes}
this level of understanding. But, most children can understand that if they are visiting a hospital, talking with a uniformed nurse practitioner, and being examined in an examination room that the nurse practitioner is generally providing them with medical treatment.

In Maryland, it follows, in order for her statements to the medical professional to be admitted as evidence against her abuser, a seven-year-old child sexual abuse victim must, at a minimum, (1) understand that she has been sexually abused, (2) notify a responsible adult about the abuse promptly after she is abused,\(^{130}\) (3) hope that the adult seeks immediate medical treatment for her, (4) not reveal the identity of her abuser during questioning by a medical professional unless she knows it is important to prevent her continued exposure to the abuser, and (5) comprehend that there is a medical purpose for the medical examination. This is a lot to ask of a child sexual abuse victim. The factors which were given weight by the Court of Special Appeals of Maryland are understandable to lawyers and fit into nice, neat factor categories in a judicial opinion but are unrealistic when applied to real life situations like Coates.

Maryland’s common law approach has caused its courts to struggle with how to categorize statements made by patients to physicians under Md. Rule 803(b)(4) because the common law rationale is confusing and not conducive to drawing bright lines.\(^{131}\) For example, during a physician-patient relationship, a physician can assume multiple, different roles along a continuum that may vary or go back and forth between diagnosing and treating roles. In addition, in certain circumstances, the physician-patient relationship never reaches the treating phase on the physician role continuum because the patient is seeking the physician’s opinion in preparation for litigation or the patient is simply not seeking treatment.

By relying on the common law approach to the medical treatment hearsay exception, Maryland excludes, as substantive evidence, statements made by patients to physicians hired for litigation purposes.\(^{132}\) The failure of Maryland trial courts to exclude such statements has resulted in reversible error and costly and time-

\(^{130}\) Cf. MD. RULE 5-802.1(d) (stating that “[a] statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony” is not excluded by the hearsay rule if the statement was previously made by a witness who is now subject to cross-examination).

\(^{131}\) See supra part III.

\(^{132}\) See McLain RULES, supra note 7, § 3(c)(iii), at 217; see also supra note 34 and accompanying text (noting the rationale for the common law approach).
In order to avoid reversible error and also comply with the common law principles, Maryland’s trial courts are forced to be more conservative and decline to admit medical treatment statements, even though they have sufficient indicia of reliability and trustworthiness, simply because the statements were made to a non-treating physician.

Maryland’s approach is underinclusive because it excludes reliable and trustworthy statements made by patients to non-treating physicians. Maryland’s common law approach to the medical treatment hearsay exception does not allow the trier of fact to hear all statements made by patients to physicians, whether treating or non-treating, and decide, based on the totality of the circumstances, if the statements are reliable and trustworthy.

IV. THE MODERN FEDERAL APPROACH TO THE MEDICAL TREATMENT HEARSAY EXCEPTION

The federal approach to the medical treatment hearsay exception simplifies the trial procedure by obviating the need for limiting instructions which are of doubtful utility and avoids “overexclusion” by not distinguishing between treating and non-treating physicians. It makes it unnecessary for the trial court to separate physical medical treatment from emotional medical treatment; to establish different rules for internal versus external injuries; or to divide the role of medical professionals into two separate and distinct roles—one of social importance and one of medical importance.

Under FRE 803(4), as under the Maryland rule, there are three types of statements made by patients to physicians “for purposes of medical diagnosis or treatment” that may be admitted as substantive evidence: (1) “medical history”; (2) “past or present symptoms, pain, or sensations”; and (3) “the inception or general character of the cause or external source thereof.” These three types of statements are admissible if they are “reasonably pertinent to [either] diagnosis or treatment.” Thus, FRE 803(4) changed prior law in two major ways. First, FRE 803(4) “adopted an expansive approach by

134 McCormick, supra note 8, § 278, at 288.
135 Fed. R. Evid. 803(4).
136 Fed. R. Evid. 803(4); United States v. Iron Shell, 633 F.2d 77, 83 (8th Cir. 1980).
137 Iron Shell, 633 F.2d at 83.
allowing statements concerning past symptoms and those which related to the cause of the injury.”138 Second, FRE 803(4) “abolished the distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only.”139

**A. No Limited Purpose Exception**

The Advisory Committee’s Note to FRE 803(4) discounts the common law approach of giving limiting instructions to jurors with regard to statements made by patients to physicians who have been hired only for litigation purposes.140 The Committee asserts that a limiting instruction to a jury which requires the jury to use certain evidence only to prove the basis of an expert witness’ conclusion, and not to prove the truth of the matter asserted, is a distinction that is “most unlikely to be made by juries.”141

Although the limiting instruction that distinguishes the basis of an expert’s conclusion and the truth of the matter asserted may be confusing for jurors, jurors are insightful in other ways. Jurors bring a variety of experiences and points of reference to a jury. Armed with these real-life experiences and common sense, a juror “is likely to view with suspicion a patient-client’s self-serving statements to a ‘hired gun’ expert witness.”142 Under the federal approach, juries hear the evidence, assess the credibility of the statements, and apply the appropriate weight to the testimony in making its decision. The federal approach is fairer, more understandable, and far easier to administer than the Maryland common law approach as can be seen from the case law applying the federal rule.

**B. No Treating v. Non-treating Physician Distinction**

The United States Court of Appeals for the Eighth Circuit, which has been the leading circuit on this issue, clarified the federal approach

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138 *Id.*
139 *Id.*
140 *See* FED. R. EVID. 803(4) advisory committee’s note (asserting that a limiting instruction to a jury which requires the jury to use certain evidence only to prove the basis of an expert witness’ conclusion and not the truth of the matter asserted, is a distinction “most unlikely to be made by juries”). At common law, statements made by a patient to a treating physician may be admitted as substantive evidence while statements made by a patient to a non-treating physician may only be admitted to explain the basis of the non-treating physician’s conclusions. *See supra* part II.
141 FED. R. EVID. 803(4) advisory committee’s note.
by applying a two-part test in 1980 in *United States v. Iron Shell*. 143 In *Iron Shell*, a nine-year-old child victim of sexual abuse was examined by a physician, Dr. Mark Hopkins, approximately two hours after the alleged sexual assault. 144 During the medical examination, Dr. Hopkins posed questions to the child, and the child answered them. 145

Dr. Hopkins testified at trial that the child told him that “she had been drug into the bushes, that her clothes, jeans and underwear, were removed and that the man had tried to force something into her vagina which hurt.” 146 Dr. Hopkins testified further that the child told him that she had tried to scream for help but couldn’t because “the man put his hand over her mouth and neck.” 147 Dr. Hopkins’ physical examination of the child revealed that there was “a small amount of sand and grass in the perineal area but not in the vagina,” the child had “superficial abrasions on both sides of [her] neck,” and there was “no physical evidence of penetration, the hymen was intact and no sperm was located.” 148 The defendant was convicted of assault with the intent to commit rape and he appealed. 149

The court of appeals found that the child’s statements to Dr. Hopkins fell primarily within the “inception or general character of the cause” category of FRE 803(4). 150 The court held that the child had a strong motive to tell the truth and her statements were “reasonably pertinent to diagnosis or treatment” and were therefore admissible under this hearsay exception. 151 Thus, the court developed a two-part test based on the common law rationale and on a reasonableness standard to help it apply FRE 803(4). 152

The first part of the test considers whether the patient’s motive is “consistent with the purpose of the rule.” 153 This step focuses on the subjective intent of the patient and relies on a patient’s strong motive to tell the truth to a physician because the patient wants to receive

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143 633 F.2d at 84-85.
144 See id. at 81.
145 Id. at 81-82.
146 Id. at 82.
147 Id.
148 Id.
149 Id. at 80. The defendant raised ten different issues on appeal. Id. at 82. This article addresses only one of the ten issues—the admission of statements made by the child to Dr. Hopkins during his examination of the child. Id.
150 See id. at 83 (citing FED. R. EVID. 803(4) (setting out the requirements for admission of statements under the medical treatment hearsay exception)).
151 *Iron Shell*, 633 F.2d at 83-84.
152 Id. at 84.
153 Id.
proper diagnosis or treatment. The purpose of the physician’s examination was to diagnose the child, treat the child, if necessary, and preserve any evidence. The child’s statements concerned “what happened rather than who assaulted her” and “were related to her physical condition,” and therefore, the statements “were pertinent to diagnosis and treatment” and fell “within the scope of the rule.”

The second step of the test considers whether it is “reasonable for the physician to rely on the information in diagnosis or treatment.” This step is different from the first step in that it is an objective, instead of subjective, analysis. It is also different in that it focuses on the reliance of the physician, instead of on the trustworthiness of the patient. The court held that Dr. Hopkins reasonably relied on the child’s statements in order to properly diagnose and treat the child and therefore the statements also satisfied the second part of the test.

Iron Shell analogizes the second part of the test to the principle underlying the Federal Rule of Evidence 703 (“FRE 703”). Under FRE 703, underlying facts or data need not be admissible in order for an expert opinion to be admitted as long as the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions.” The corollary part of the Iron Shell test “recognizes that life and death decisions are made by physicians in reliance” on statements made by patients that are pertinent to diagnosis or treatment and therefore those statements should have “sufficient trustworthiness to be admissible in a court of law.” If the statement is trustworthy enough for a doctor to use it in making life and death decisions about medical diagnosis or treatment, it is trustworthy enough for a court to admit it as substantive evidence at trial.

154 Id. (citing Meaney v. United States, 112 F.2d 538, 539-40 (2d Cir. 1940) (describing how a patient has a motive to speak the truth when the patient speaks to the physician about present and/or past symptoms because the information is important to the patient’s treatment); see supra part II.
155 Iron Shell, 633 F.2d at 84.
156 Id.
157 Id.
158 Id. at 84-85. Dr. Hopkins testified that a “discussion of the cause of the injury was important to provide guidelines for his examination by pinpointing areas of the body to be examined more closely and by narrowing his examination by eliminating other areas.” Id. at 84.
159 Id.
160 FED. R. EVID. 703.
161 Iron Shell, 633 F.2d at 84.
162 Id. However, FRE 703 was amended in 2000 and the “new language tips more against admissibility” for the limited nonhearsay purpose than the pre-2000 language did. McLAIN RULES, supra note 7, § 3, at 166 (emphasis added). The 2000 amendment to
The Eighth Circuit applied the *Iron Shell* two-part test in *United States v. Renville*. In *Renville*, an eleven-year-old child sexual abuse victim was examined by a family practice physician, Dr. Clark Likness, after the child’s stepfather alleged sexually abused her. Dr. Likness testified that the child told him that her stepfather had had anal intercourse with her and performed cunnilingus on her. The jury found Renville guilty and he appealed. The court of appeals held that the statements by the child to the physician passed the two-part test from *Iron Shell* and were therefore admissible. First, the child’s motive in making the statement was consistent with the purposes of promoting treatment. Second, the content of the statement was such as is reasonably relied upon by a physician in treating or diagnosing a patient.

The court focused on the second part of the test in its analysis in order to understand if the identity of the abuser was reasonably pertinent to treatment. Although *Iron Shell* did not involve a statement that identified an abuser, *Iron Shell* had cautioned that the defendant’s identity “would seldom, if ever” be reasonably pertinent to

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The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The 2000 amendment added: “Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” FED. R. EVID. 703. The current FRE 703 is intended to cover “facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert’s opinion.” FED. R. EVID. 703 advisory committee’s note. This intention “provides a presumption against disclosure to the jury of information used as the basis of an expert’s opinion and not admissible for any substantive purpose.”
treatment or diagnosis. The Renville court reasoned that one of the "seldom" times that the identity of an abuser might be reasonably pertinent to treatment is when a child makes a statement to a physician that identifies her abuser as someone who is a member of the child’s household. In this situation, the identity of the sexual abuser is imperative to proper treatment of the child because the "exact nature and extent of the psychological problems that ensue from child abuse often depend on the identity of the abuser."

V. MARYLAND SHOULD ADOPT THE FEDERAL APPROACH

Maryland’s common law approach to the medical treatment hearsay exception is outdated and is causing confusion in Maryland courts. The federal approach allows jurors to hear statements made by patients to physicians for the purpose of diagnosis or treatment, no matter if the physician is a treating or non-treating physician. The jury can then assess the appropriate weight to the credibility of those statements.

171 Id. at 436 (quoting United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980)); see also United States v. Nick, 604 F.2d 1199, 1201-02 (9th Cir. 1979). Iron Shell relied partly on the Advisory Committee’s Note to FRE 803(4) that gave an example that “a patient’s statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light.” FED. R. EVID. 803(4) advisory committee’s note; see also United States v. Narciso, 446 F. Supp. 252, 289 (E.D. Mich. 1977) (statement by a patient to a physician that he was shot is admissible but a statement that he was shot by a white man is not admissible because the shooter’s skin color is not pertinent to medical treatment or diagnosis). Statements concerning the identity of a sexual abuser are different from statements about a car running through a red light or a white man shooting someone. In child sexual abuse cases, the identity of the abuser is critical to proper treatment of the child, whereas the identity of the defendant or of who was at fault in an accident has nothing to do with treatment. Id.

172 Renville, 779 F.2d at 436-37.

173 Id. at 437. Dr. Likness testified that ""there is an ongoing emotional trauma, and an emotional trauma that is sometimes extremely hard to define, but it shows up and affects all of those people that have been abused in some way or form."" Id. at n.11. He stated that emotional trauma is something that does not ""necessarily show up in a physical exam, but are definitely important in the well being of this child."" Id. Dr. Likness further testified that understanding emotional trauma helps him understand ""how I then will be able to take care of her in the future, what type of sexual care does she need medically, psychiatrically, and how is it going to affect her life."" Id. In addition, he testified that the identity of the abuser is ""extremely important"" for the purpose of diagnosis and treatment of the child. Id. at n.12. He stated that if the abuser is someone that is close to the child—""someone who she lives with, someone who she spends time with and if she can tell [him] that there have been several"" ongoing incidents of abuse, then the chances of that abuse continuing is ""very, very high."" Id.

174 See supra part III.

175 See supra part IV.

176 See supra part IV. A.
Juries are insightful when it comes to distinguishing between a patient’s interest in receiving proper medical diagnosis and treatment and a patient’s interest in enhancing symptoms to get a larger damage award. Maryland does not need to follow a confusing common law approach to the medical treatment hearsay exception to “weed out” money hungry plaintiffs looking to win big from employers and insurers. Juries can do that very effectively.

VI. CONCLUSION

Under Maryland’s common law approach to the medical treatment hearsay exception, Maryland juries are not given the opportunity to hear and evaluate whether to rely on statements made by patients to physicians, unless those statements fit into a very narrow and underinclusive category. Maryland case law applying the common law approach to the medical treatment hearsay exception is unduly complicated and confusing. The federal approach to the medical treatment hearsay exception is fairer and easier for trial courts to apply. The federal approach does not require the trial court to separate physical medical treatment from emotional medical treatment, to establish different rules for internal versus external injuries, or to divide the roles of medical professionals into two separate and distinct roles. Maryland should therefore adopt the federal approach to the medical treatment hearsay exception and allow the jury to weigh the credibility of statements made by patients to physicians, no matter whether the physicians are treating or merely diagnosing.

177 See supra part IV. A.