To the Maryland legal community:

I wish to congratulate the editors of the *University of Baltimore Law Forum* for another outstanding issue. The *Law Forum* has a 35-year history of contributing to the discussion and development of law in the State of Maryland, as does the School of Law. The School of Law creates an environment that fosters outstanding scholarship such as *Law Forum* by fostering a vibrant community of scholars and activists whose work impacts regionally, nationally, and globally. I would like to highlight a few activities at the School of Law this fall 2004 that illustrate this vibrancy.

We began the academic year by welcoming our returning students and the faculty and staff who have enjoyed a summer respite, and by welcoming our new students—incoming first-year J.D. students, students transferring from other schools, and new LL.M. candidates. We also welcomed new faculty members—Patience Crowder, Dan Hatcher, Tova Kasdin, Jim Kelly, James Maxeiner, and Will Tress, as well as new members of the administrative staff. The University welcomed Wim Wiewel, our new Provost and Senior Vice President, as well as Larry Thomas, the new Dean of the Yale Gordon College of Liberal Arts.

In addition to new faces, we welcomed physical changes to the School of Law. There is a new teaching and collaborative learning space, a new public reference area, more efficient administrative office spaces in the Law Library, and wireless Internet connectivity throughout the Angelos Law Center. Moreover, we have commenced the renovation of the Venable Baetjer Howard Moot Court Room, and during the winter break we will renovate at least one classroom.

This fall, in keeping with our tradition of scholarly and public service activities, staff and faculty organized speaker events covering topics from white collar crime to homeland security and student organizations fundraised for causes ranging from internships in
public interest law, to breast cancer, to the Lawyers’ Campaign Against Hunger.

Moreover, faculty members have been recognized for their contributions to the scholarly and legal communities that are an integral part of the School of Law. Professor Elizabeth Samuels recently received an Angel of Adoptions Award, from Congressman Albert Wynn, for her scholarship and lobbying efforts to make adoption records more accessible. Professor F. Michael Higginbotham has been designated by the University System of Maryland as a Wilson Elkins Professor for his nationally-recognized scholarship and teaching. Additionally, Professor Jane Murphy was recognized with the President’s Faculty Award by University of Baltimore President Robert Bogomolny at the September 14th convocation.

While we have much to accomplish and a challenging road ahead of us, these and other markers of our success remind us that we — faculty, students, alumni, staff, and friends — play an important role in realizing the vision of the University of Baltimore School of Law as a dynamic institution that provides access and excellence in educating lawyers and leaders, and generating doctrine and solutions that will shape the future of our society. Overall, we are beginning to understand and instill a new sense of *Pride* in the University of Baltimore School of Law; an increased *Visibility* of the accomplishments of the School and its students, faculty, staff and alumni; a higher level of *Involvement* in our programs and activities; and a renewed commitment to *Investment* in our future. As always, I invite your input, ideas, and capital — fiscal and human — as we forward our mission of access and excellence in training the future leaders and social engineers of the legal profession in the local, regional, national, and world communities.

Sincerely,

Dean Gilbert Holmes
Letter from the Editor-in-Chief

To the Maryland legal community:

It is with tremendous pride that I introduce the new face of the University of Baltimore Law Forum.

As many of our readers may be aware, this journal has overcome a number of obstacles in recent years. The previous editorial board, under the tireless leadership of Brenda Taylor, accomplished the admirable feat of publishing three previously unpublished volumes electronically and four volumes in print. Thanks to that effort, the journal is now current for the first time in three years. While the focus of the last board was necessarily on publishing in quantity, the current editorial board is committed to marked improvement in the quality of the Law Forum. In this, the first of two volumes we will publish in the 2004-05 academic year, we hope this commitment is evident.

In volume 35, we have the great fortune of publishing an important article co-authored by two distinguished members of the Maryland Bar. In *Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, a Reassessment of the Confrontation Clause*, the Honorable Paul W. Grimm and Professor Jerome E. Deise, Jr., advocate for the adoption of a “forfeiture by wrongdoing” exception to the hearsay rule in Maryland equivalent to that provided by the Federal Rules of Evidence. In the 2004 legislative session, Governor Robert L. Ehrlich, Jr., introduced a bill proposing the adoption of such a rule that was defeated amid concerns about the constitutional rights of defendants. As the incidence of witness intimidation in criminal cases is reaching epic proportions across the State, and particularly in Baltimore City, it is hoped that this article eases those concerns and encourages members of the General Assembly to reconsider this bill in the coming 2005 legislative session. The support of our readership in this effort is greatly appreciated.

This volume additionally features a number of “Recent Development” articles discussing developing trends in Maryland law.
These articles are written by the journal’s staff editors, and selected by the editorial board for publication based on the quality of scholarship and impact of the decision reported. The selection process is highly competitive, and we congratulate the authors of these articles for their achievements.

Finally, the “Forum Faces” feature of the current volume highlights the extraordinary career of the Honorable Clayton Greene, Jr., who was recently appointed to the Court of Appeals of Maryland. Judge Greene has served at every level of the state judiciary, and brings a wealth of knowledge and experience to the job that is rivaled only by his long-standing commitment to the community.

In assisting the journal in making some notable changes this year, we owe debts of gratitude to many. Most notably, we thank our esteemed faculty advisor, Professor Barbara Ann White, for her unqualified support. We also owe thanks to Dean Gilbert Holmes, Dean Tony Torain, Dean Stephen Wilson, and Ms. Karen Taylor. We are eternally grateful to our graphic designer, Ms. Clara Teufel, who helped us invent our new, modern face. Last, but certainly not least, we thank you, the members of the Maryland Bar, for your continued suggestions and support as we endeavor to reach our goal of becoming the finest legal journal in the State of Maryland.

Sincerely,

Bryan C. Hughes
Editor-in-Chief
During the 2004 legislative session, the Governor of Maryland introduced two bills designed to address the issue of witness intimidation in criminal cases. The bills, Senate Bill 185 and House Bill 296, contained numerous measures aimed at combating the problem of witness intimidation. Among the provisions was a proposal to add to the Courts and Judicial Proceedings Article of the Annotated Code of Maryland a “forfeiture by wrongdoing” exception to the hearsay rule, patterned after Federal Rule of Evidence 804(b)(6), which has been in existence for more than twenty years. Neither bill was enacted into law. Legislators interviewed by the press during the legislative session expressed concern about the proposed hearsay exception, specifically citing the Supreme Court’s March 8, 2004 decision in Crawford v. Washington as evidence that the Governor’s proposal was unconstitutional under the Sixth Amendment Confrontation Clause. In fact, Crawford does not directly address the
constitutionality of the forfeiture by wrongdoing hearsay exception; in *dicta*, the Court clearly expressed its approval of this Rule.

This article first examines the *Crawford* decision, then the forfeiture by wrongdoing exception to the hearsay rule, and demonstrates that the proposed exception is not constitutionally infirm.

Michael Crawford allegedly stabbed Kenneth Lee after learning that Lee tried to rape Crawford’s wife. In a recorded statement to police, Crawford’s wife, Sylvia, said that Lee did not draw a weapon before Crawford stabbed him. The State intended to use Sylvia’s statement to controvert Crawford’s claim of self-defense. At trial, Sylvia invoked the marital privilege, and was, therefore, “unavailable” to testify for the State against her husband. Under Washington law, the marital privilege does not extend to a spouse’s out-of-court statement that is otherwise admissible under an exception to the hearsay rule. The State, therefore, sought to introduce Sylvia’s statement as admissible hearsay.

The State argued that, by invoking the state marital privilege, which generally bars a spouse from testifying without the other spouse’s consent, Sylvia was an “unavailable” witness, under the Washington evidence rule equivalent of Federal Rule of Evidence 804(a)(1). Further, noting that Sylvia admitted leading Crawford to Lee’s apartment, thereby facilitating the assault, the State contended that her statement qualified as an exception to the hearsay rule as a statement against penal interest, under the Washington evidence rule equivalent of Fed. R. Evid. 804(b)(3). The prosecutor played the tape of Sylvia’s statement to the jury during Crawford’s trial for assault and attempted murder, and, in closing, argued that the tape was “damning evidence that completely refute[d] [Crawford’s] claim of self-defense.” Sylvia’s tape-recorded statement was offered against Crawford without affording him the opportunity to confront or cross-examine her, and the jury subsequently convicted Crawford of first degree assault.

The crucial issue presented was whether this procedure complied with the Sixth Amendment guarantee that, “in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.” *Crawford* presented the Court with an old dilemma. On the one hand, the Government has a legitimate

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5 WASH. REV. CODE §5.60.060 (West, WESTLAW through 2004 legislation).
6 *Crawford*, 124 S. Ct. at 1358.
7 U.S. CONST. amend. VI.
interest in prosecuting criminal defendants, and therefore, should be allowed to offer relevant and otherwise admissible evidence to prove a defendant’s guilt. On the other hand, the Constitution provides rights to the accused in criminal proceedings and bars the admissibility of certain evidence violative of those rights, even though the evidence is otherwise admissible under the rules of evidence.

_Crawford_ also raises a host of intriguing questions. These are but a few: What does the phrase, “witnesses against him,” as provided in the Sixth Amendment, actually mean? When is a statement a “testimonial” statement and when is it “non-testimonial?” Which statements implicate the Confrontation Clause? Are certain hearsay statements beyond the scope of the Confrontation Clause? Do the Constitutional rights of an accused “trump” (if that is an appropriate metaphor) the rules of evidence? Do the rules of evidence ever “trump” the Constitutional rights of an accused, or does neither “trump” the other? Under what circumstances must the defendant have the opportunity to confront and cross-examine a now “unavailable” hearsay declarant before those statements can be admitted? Can a criminal defendant, by his conduct, “waive” or “forfeit” an objection to the admissibility of certain hearsay statements? Can he “waive” or “forfeit” his right to Confrontation?

No doubt, in the fullness of time, scholars and judges will answer many of these questions, or die trying. There are already available excellent analyses of _Crawford_ by various legal scholars; therefore, any further attempt by us to do so is unnecessary. Rather, for our comprehension and appreciation of the broader and finer points of _Crawford_, we go to the “horse’s mouth,” so to speak. For our understanding of _Crawford_, we rely principally upon the comments, thoughts, and observations of Jeffrey L. Fisher, lead counsel for Michael D. Crawford in the United States Supreme Court.

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9 The authors wish to thank Jeffrey L. Fisher, Attorney at Davis Wright Tremaine LLP, Seattle, WA, for his kindness and generosity in allowing us to draw upon the outline notes of his lecture, entitled _Crawford v. Washington: Reframing The Right To Confrontation_. This outline incorporates post-_Crawford_ decisions through August 3, 2004. We owe an additional debt of gratitude to Professor Lynn McLain of the University of Baltimore School of Law for her thoughtful suggestions.
The article begins, in Part I, with an historical review of the Confrontation Clause. In Part II, we discuss Crawford’s impact on the Confrontation Clause. Finally, in Part III, we argue that, in light of Crawford, Maryland should adopt Fed. R. Evid. 804(b)(6), which provides that statements made by witnesses that are unavailable to testify at trial because of threat, intimidation, chicanery, or elimination by the defendant or his agents are admissible as an exception to the hearsay rule.  

Although the facts in Crawford did not involve forfeiture by wrongdoing, the Court, in passing, made clear that when a criminal defendant wrongfully prevents witnesses from testifying, his conduct “extinguishes confrontation claims on essentially equitable grounds.” We discuss “forfeiture by wrongdoing” more fully in sections II and III. As will be seen, not all hearsay statements are excluded by the Confrontation Clause where a defendant does not have a prior opportunity to cross-examine.

I. Crawford v. Washington: An Historical Overview

Crawford provides an interesting glimpse of the Court’s approach to Constitutional interpretation. It begins by looking to the language of the Constitution – in this case, the Sixth Amendment. When the Constitution’s text alone is inadequate to resolve a particular issue, the Court turns to the history of the Confrontation

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10 Fed. R. Evid. 802.
11 Crawford, 124 S. Ct. at 1370 (citing Reynolds v. United States, 98 U.S. 145, 158-59 (1879)); see also United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir. 2001) (“threats, actual violence, or murder” forfeit confrontation rights); People v. Moore, 2004 Colo. App. LEXIS 1354, (declarant’s death at the hands of the defendant was a “forfeiture of the constitutional right of confrontation with respect to a witness or potential witness whose absence the defendant wrongfully procures”). Id. at 10; see post-Crawford cases: State v. Meeks, 277 Kan. 609 (2004) (Defendant’s right of confrontation forfeited because he killed the declarant). Id. at 793-94. (The Court cited Crawford as support for the extinction of a confrontation claim. Statement by witness was admitted under K.S.A. 2003 Supp. 60-460(d)(3). That statutory exception requires (1) that the declarant be unavailable, (2) that the statement was made at a time when the declarant recently perceived the matter, while declarant’s recollection was clear, and (3) that the statement was made in good faith prior to the commencement of the action and with no incentive to falsify or distort). Id. at 613. (The Court decided on the grounds of “forfeiture by wrongdoing,” and declined to assess whether the statement was testimonial or not). Id. at 614; State v. Fields, 679 N.W. 2d 341 (Minn. 2004) (In its analysis of Crawford as applied in the case at bar, the Court held that the defendant’s right to confrontation was not violated, as he forfeited that right by his wrongdoing). Id. at 346-47. (The Court also noted that FED. R. EVID. 804(b)(6) “probably amounts as well to a forfeiture of an objection based on the right of confrontation” and that the Minnesota Rules of Evidence do not include such a rule). Id. at 347 n.2.
While the right to confront one’s accusers can be traced to Roman times, the founding generation’s immediate source was common law. English common law differs from the civil law tradition in the manner in which witnesses provide testimony in criminal trials. The former is a tradition of live testimony, while the latter condones examination in private by judicial officers.

England adopted some elements of civil law practice, including the practice of admitting ex parte statements of accusers against the accused at trial. This practice “occasioned frequent demands by the prisoner to have his ‘accusers’ brought before him face to face.”

During the 16th Century reign of Queen Mary, justices of the peace were appointed, under the Marian bail and committal statutes, to examine suspects and witnesses in felony cases and certify the results to the court. While it is unlikely the original purpose of these examinations was to produce evidence admissible at trial, they were used this way in subsequent cases, thereby adopting the continental, civil law procedure.

Perhaps the most notorious example of this practice was the 1603 trial of Sir Walter Raleigh. Raleigh was charged with treason. Damning evidence against him consisted of a letter and a statement, obtained by the Privy Council, of Raleigh’s alleged accomplice, Lord Cobham, which was read to the jury over Raleigh’s objections. Raleigh believed Cobham made the statement to save his own life and that he would recant if he was required to face Raleigh at trial. Raleigh, protesting that he was being tried “by the Spanish Inquisition,” demanded that the judges call Cobham to appear. Raleigh argued, unsuccessfully, that “the Proof of the Common Law is by witness and jury: Let Cobham be here, let him speak it. Call my

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12 The Court’s opinion provides a detailed and informative discussion of the historical development of the right to confrontation; it is, therefore, unnecessary, for the purposes of this article, to repeat it here. We have included only those historical facts needed to aid in our discussion.
14 Crawford, 124 S. Ct. at 1359 (See 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1768)).
15 Crawford, 124 S. Ct. at 1359-60 (citing 1 James F. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (London, MacMillan 1883)).
16 Id. (See John H. Langrein, PROSECUTING CRIME IN THE RENAISSANCE 21-34 (Harvard Univ. Press 1974)).
17 Crawford, 124 S. Ct. at 1359-60 (See M. Hale, PLEAS OF THE CROWN 284 (1736); 9 W. HOLDsworth, HISTORY OF ENGLISH LAW 528-30 (3d ed. 1944)).
18 Crawford, 124 S. Ct. at 1359 (See Raleigh’s Case, 2 HOW. ST. TR. 15-16 (H.L. 1603)).
accuser before my face.” Cobham did not appear at trial, however, and Raleigh was convicted and sentenced to death.

Following considerable dissatisfaction with the process used to convict Raleigh, English law, through a series of statutory and judicial reforms, developed a right of confrontation to limit such abuses in certain cases, such as treason. Courts developed relatively strict rules of unavailability, admitting ex parte examinations only when the witness was demonstrably unable to testify in person.20

Throughout this period, a “recurring question was whether the admissibility of an unavailable witness’s pretrial examination depended on whether the defendant had had an opportunity to cross-examine him.”21 This question was answered in the affirmative in 1696 by the Court of the King’s Bench, which ruled that the statement of a deceased witness was inadmissible “where ‘the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of cross-examination.””22

Following the Crawford Court’s discussion of the development of the right to confrontation in England, the Court turned its attention to the colonies, where similar practices were employed.23 “Early in the 18th Century, the Virginia Council protested against the Governor for having ‘privately issued several commissions to examine witnesses against particular men ex parte,’ complaining that ‘the person accused is not admitted to be confronted with, or defend against his defamers.””24 The Court also noted that, prior to the American Revolution, England allocated jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil law, and thus regularly took testimony by deposition or private judicial examination.25

“Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation.”26 While the proposed Federal Constitution did not, the First Congress, responding to

19 Id.
20 Crawford, 124 S. Ct. at 1359 (See Lord Morley’s Case, 6 How. St. Tr. 769-71 (H.L. 1666)).
21 Crawford, 124 S. Ct. at 1360.
22 Id. at 1360-61 (quoting King v. Paine, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (1896)).
23 Crawford, 124 S. Ct. at 1362.
24 Id. (quoting A MEMORIAL CONCERNING THE MAL-ADMINISTRATION OF HIS EXCELLENCY FRANCIS NICHOLSON, reprinted in 9 ENGLISH HISTORICAL DOCUMENTS 253, 257 (D. Douglas ed. 1955)).
25 Crawford, 124 S. Ct. at 1362.
26 Id. See MARYLAND DECLARATION OF RIGHTS, Article 21 (1867), providing, inter alia, right to confrontation and examination of witnesses under oath to citizens of Maryland.
objections to its exclusion, included the Confrontation Clause in what became the Sixth Amendment.  

While all states adopted the Confrontation Clause, some went so far as to hold out-of-court statements inadmissible even where the accused had a prior opportunity to cross-examine the declarant. Many states rejected this view, but only after reaffirming that admissibility depended on the prior opportunity of the accused to cross-examine.

II. Crawford and the Right to Confrontation

Crawford argued that, state law notwithstanding, the admission of Sylvia’s tape-recorded statement violated his federal constitutional right to be confronted with the witnesses against him. Applying the then-current standard set forth in Ohio v. Roberts, the Washington trial court held that the Confrontation Clause does not bar the statement of an unavailable witness (such as Sylvia) against a criminal defendant if the statement bears “adequate indicia of reliability.” To meet that standard, evidence must either fall within a “firmly rooted hearsay exception,” or “bear particularized guarantees of trustworthiness.” The trial court admitted the statement on the latter ground, offering as proof of the statement’s trustworthiness that Sylvia was not shifting blame to Crawford, but rather corroborating his story that he acted in self-defense or “justified reprisal.” The trial court found persuasive that Sylvia had direct knowledge as an eyewitness, that she was describing recent events, and that a “neutral” law enforcement officer questioned her.

The Washington Court of Appeals reversed, applying a nine-factor test to determine if Sylvia’s statement bore particularized guarantees of trustworthiness. In concluding that it did not, the court offered several reasons: The statement contradicted one she had previously given; it was made in response to specific questions; and, at one point, Sylvia admitted that she closed her eyes during the stabbing. The court considered and rejected the State’s argument that Sylvia’s statement was reliable because it coincided with

27 Id. at 1362-63.
28 Id. at 1363.
29 Id.
30 Id.
31 448 U.S. 56 (1980).
33 Crawford, 124 S. Ct. at 1359 (Emphasis added).
34 Id.
35 Id. at 1358.
36 Id.
Crawford’s to such a degree that the two “interlocked.”\textsuperscript{37} Although the two statements were consistent in their accounts of events leading up to the stabbing, they differed on the crucial issue of self-defense. “[Crawford’s] version assert[ed] that Lee may have had something in his hand when Crawford stabbed him; but Sylvia’s version [had] Lee grabbing for something only after he [had] been stabbed.”\textsuperscript{38}

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia’s statement did not fall within a firmly rooted hearsay exception, it bore guarantees of trustworthiness. The court found that “when a co-defendant’s confession is virtually identical [\emph{i.e.}, interlocks] to that of a defendant, it may be deemed reliable.”\textsuperscript{39}

This procedural history reflects both the Supreme Court’s struggle to resolve the controversy and the inadequacies of the \textit{Roberts} two-pronged standard. The failings of \textit{Roberts} were indeed “on full display in the proceedings below.”\textsuperscript{40} As Professor George Fisher points out:

\begin{quote}
[T]he Court’s many attempts to reconcile the hearsay exception with the Confrontation Clause’s command have been halting and nonlinear . . . . In the \textit{pre-Roberts} era, beginning with \textit{Mattox v. United States}, the Court issued a number of \textit{ad hoc} judgments to resolve particular controversies, but made little attempt to systematize the Confrontation Clause’s impact on the admission of hearsay. The Court first undertook this task in earnest in \textit{Ohio v. Roberts}, 448 U.S. 56 (1980). There the Court launched an ultimately
\end{quote}
aborted attempt to crystallize Confrontation doctrine around the familiar hearsay principles of necessity and reliability. Early in 2004, after tinkering with the Roberts framework for nearly a quarter-century, the Court finally abandoned the task. In Crawford v. Washington, 124 S. Ct. 1354 (2004), it set Confrontation on an entirely new footing, focused on the “testimonial” nature of the out-of-court statement. After Crawford, it seems, Roberts and its reliability-based analysis are dead.41

The Supreme Court drew two inferences from its exhaustive historical analysis about the meaning of the Sixth Amendment. “First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.”42 The English Crown employed “these practices in notorious treason cases like Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right of confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.”43

Second, the Court determined that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”44 As will be seen, neither of these two evils are implicated by the Constitution or the hearsay exception provided by Fed. R. Evid. 804(b)(6). So then, when does the Sixth Amendment right to confrontation apply?

The Sixth Amendment right to confrontation applies only in a criminal case and only when the prosecutor offers a hearsay statement

42 Crawford, 124 S. Ct. at 1363.
43 Id.
44 Id. at 1365.
against the accused. If the declarant testifies in court and is, therefore, subject to cross-examination, the right is not violated. If the accused had the opportunity to cross-examine the declarant previously, the right is not violated. If the statement offered is the declarant’s, it is not hearsay if it is offered as a prior statement, under Fed. R. Evid. 801(d)(1), or as an admission of a party-opponent, under Fed. R. Evid. 801(d)(2); therefore, the right is not violated.

Under Maryland Rule 5-802(1), certain prior statements by witnesses are not excluded by the hearsay rule. Nor are statements, otherwise admissible, made by the accused when offered by the State, under Md. Rule 5-803(a) as a statement by a party-opponent. Furthermore, under Md. Rule 5-803(a), statements of a party-opponent are not excluded by the hearsay rule, even though the defendant is available as a witness. If a statement is not offered to prove the truth of the matter asserted, it is not hearsay and the right is not violated. If the statement is offered for its truth, the prosecutor must offer an appropriate exception; if she cannot, the hearsay statement is excluded and the right is not violated. It is only when a statement is offered for its truth and falls within an exception that we consider the statement’s effect on the Confrontation Clause. If the statement is “testimonial,” then we turn to Crawford to determine whether it violates the Confrontation Clause, even though it may be admissible under the rules of evidence. If the statement is not testimonial, then it appears that, despite Justice Scalia’s severe criticism of Roberts’s reliance upon such an “amorphous” concept as reliability, its unpredictability, and its “unpardonable vice” (i.e., its capacity to admit core testimonial statements that the Confrontation Clause clearly meant to exclude), states may continue to rely upon the Roberts standard.

When Is a Statement a “Testimonial?”

While it is clear that Crawford applies to “testimonial” statements, it is not entirely clear what that term means. In a concurring opinion, Chief Justice Rehnquist, joined by Justice O’Connor, severely criticized the majority opinion for both its linguistic ambiguity and its difficult implementation for judges and lawyers alike. The Court opted to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial;’” nevertheless, there is language in the opinion from which we may attempt to glean

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45 Id. at 1371.
46 Id. at 1374-78.
its meaning. According to the Court, “testimonial” statements include:

*Ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. . . [and] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.48

The Court described these as “core” testimonial statements, but suggested that this list was not exhaustive.49 As Jeffrey L. Fisher, lead counsel for Michael Crawford in his case before the Supreme Court, points out, “the confrontation right does not apply only to abuses at the time of the Founding; it also applies to modern types of statements that the Framers would have barred.”50

Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial [] and to police interrogations, . . . all allocutions, guilty

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47 *Id.* at 1374.
48 *Crawford*, 124 S.Ct. at 1364 (Internal citations omitted).
49 Fisher notes (p. 3) (citing *Crawford*, 124 S. Ct. at 1364).
50 Fisher notes (p. 3) (citing *Crawford*, 124 S. Ct. at 1365 n.3). (In addition, Fisher suggests several “clues” within the Court’s jurisprudence that might provide meaning to the term. For example: “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. . . . Involvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse. . . . Sylvia’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition . . . . *When the government is involved in the statements’ production and when the statements describe past events . . . [the statements] implicate the core concerns of the old *ex parte* affidavit practice . . . . *An out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.*” While this definition would seem to include excited utterances, opinions differ about whether such statements are, or should be, included. Fisher’s “clues”, however, are more problematic and several are likely to be the subject of considerable debate.).
51 Fisher notes (p. 3) (quoting *Crawford*, 124 S. Ct. at 1374) (“We use the term ‘interrogation’ in its colloquial, rather than any technical legal, sense. . . . ‘*Structured* police questioning’ qualifies as an interrogation ‘under any conceivable
pleas, and other formal statements admitting guilt\textsuperscript{52}. . . . [In addition,] “letters” to police or other governmental officials accusing someone of wrongdoing are testimonial.\textsuperscript{53}. . . . Coroner reports, drug chemist reports, etc. [] should be testimonial because they are statements made for the purpose of producing evidence for litigation.\textsuperscript{54}. . . [S]tatements of elderly or dependent adult victims to law enforcement officials . . . are by definition testimonial,\textsuperscript{55}. . . . [as are] [d]omestic violence accusations,\textsuperscript{56}. . . .

Fisher, taking a decidedly pro-defense spin, argues that the following statements are “testimonial”; however, others would disagree, urging that their status as “testimonial statements” is by no means clear nor have they been universally accepted as such by the courts:

\begin{quote}
[c]hild hearsay statements,\textsuperscript{57} . . . [w]itness statements to officers investigating a
\end{quote}
crime,\textsuperscript{58} . . . 911 calls,\textsuperscript{59} . . . [s]tatement to private investigators or to private

person would know that the statements would likely be used for evidentiary purposes. \textit{See Snowden v. State}, 846 A.2d 36 (Md. App. 2004) (holding that statements obtained under Maryland’s child interview statute are testimonial); \textit{See People v. Sisavath}, 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004) (child’s statement to child interview specialist at private victim assessment center was testimonial); \textit{State v. Courtney}, 682 N.W. 2d 185 (Minn. Ct. App. 2004) (interview with child protective services worker testimonial); \textit{Blanton v. State}, 880 So. 2d 798 (Fla. Dist. Ct. App. 2004) (child’s statement to police investigator testimonial); \textit{People v. Vigil}, 2004 WL 1352647 (Colo. App. June 17, 2004) (child’s statements to police officer and to a physician who was a member of a child protection team and a frequent prosecution witness in child abuse cases were testimonial, but prior statements to father and father’s friend were not.). It is worth noting that the child’s statements in \textit{Idaho v. Wright}, 497 U.S. 805 (1990), were given to a doctor in conjunction with the police’s investigation; the Court suggested these statements were testimonial at oral argument in \textit{Crawford} and arguably by its silence in the section of the opinion canvassing its prior holdings. \textit{See} 124 S. Ct. at 1367-68 (‘Our case law has largely been consistent with these two principles.’). If statements are given to a nongovernmental addressee before the police are involved and before litigation is contemplated, the question gets harder. \textit{See} 124 S. Ct 1368 n.8 (stating that the child’s statements to the police officer in \textit{White v. Illinois}, 502 U.S. 326 (1992), were testimonial but not mentioning the child’s statements to parent and others)\textsuperscript{58}).

\textsuperscript{58} Fisher notes (p. 5-6) (stating, “Since these statements generally are given for evidentiary purposes, they ordinarily are testimonial. \textit{See} [\textit{Crawford}], 124 S. Ct. [at] 1368 n.8 (statement in \textit{White v Illinois}, 502 U.S. 346 (1992), ‘to an investigating police officer’ was testimonial) . . . (defining police ‘interrogation’). It does not matter whether the statements are reproduced in police reports that ordinarily would satisfy ‘business records’ or any other hearsay exception . . . . The United States Solicitor General, in fact, has agreed that ‘statements made to officers at the scene by a disinterested bystander who directly observed the commission of a crime and promptly reported it to the police’ are testimonial. Brief for the United States as \textit{Amicus Curiae in Crawford} at 26. Early court decisions, however, [are] divided on this issue. [\textit{Cf}] \textit{United States v. Neilsen}, 371 F.3d 574 (9th Cir. 2004) (statement to an officer during execution of search warrant testimonial); \textit{Bell v. State}, 597 S.E.2d 350 (Ga. 2004) (alleged victim’s statement to police officers ‘during the officers’ investigations of complaints made by the victim’ testimonial); \textit{Heard v. Commonwealth}, 2004 WL 1367163 (Ky. App. June 18, 2004) (unpublished) (agitated victim’s statements to responding police officer were testimonial even though they qualified as excited utterances); and \textit{People v. Sisavath}, 13 Cal. Rptr.3d 753 (Cal. Ct. App. 2004) (alleged victim statement to investigating officer testimonial); \textit{State v. Clark}, 598 S.E.2d 213 (N.C. Ct. App. 2004) (statement made to officer ‘during his initial investigation’ at the scene of crime is testimonial) \textit{with Leavitt v. Arave}, 371 F.3d 663, n. 22 (9th Cir. 2004) (alleged victim statement to officer responding to 911 call not testimonial); \textit{State v. Fowler}, 809 N.E.2d 960 (Ind. Ct. App. 2004) (“[W]hen police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not ‘testimonial.’”); \textit{People v. Cage}, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004) (same); \textit{State v. Forrest}, 596 S.E.2d 22 (N.C. Ct. App. 2004) (holding, over a dissent, that such a statement not testimonial because given right after event) \textit{and Cassidy v. Texas}, 2004 WL 1114483 (Tex. App. May 20, 2004) (alleged victim’s statement in police interview right after event not testimonial). For a very good
discussion of this issue in an article prior to the Roberts era that advocated a rule similar to the testimonial approach, see Michael H. Graham, The Confrontation Clause, the Hearsay Rule and the Forgetful Witness, 56 Tex. L. Rev. 151, 194-95 (1978) (distinguishing nontestimonial spontaneous declaration to robber in midst of robbery from a testimonial spontaneous declaration to a police officer immediately after robbery)).

59 Fisher notes (p. 6) (stating, “A call to report a crime (especially when followed by questions and answers with an operator) is testimonial, but a call solely for help may not be. See Friedman & McCormack, Dial-In Testimony, 150 Pa. L. Rev. 1171, 1240-42 (2002). But even in the latter situation, statements made in a call in the heat of the moment that say more than ‘come help me’ should still be considered testimonial. Id.; People v. Cortes, 781 N.Y.S.2d 401 (2004) (holding that 911 call was testimonial) but see People v. Muscat, 777 N.Y.S.2d 875 (2004) (suggesting that all 911 calls that include requests for help are nontestimonial in their entirety). If statements in a 911 call explicitly accuse a particular person of wrongdoing, it may also be worth citing the ‘accusatory’ language . . . to bolster the argument. A case involving a 911 call is currently pending in the Washington Supreme Court and is set for oral argument . . . See State v. Davis, 64 P.3d 661 (2003), review granted, 75 P.3d 969 (2003) (supplemental briefing ordered in light of Crawford)).

60 Fisher notes (p. 6) (stating, “If the setting was like an interview in that a reasonable witness would have expected his statements to be used for evidentiary purposes, then it seems testimonial even without governmental involvement. See People v. Sisavath, 13 Cal. Rptr.3d 753 (Cal. Ct. App. 2004) (child’s statement to child interview specialist at private victim assessment center was testimonial); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. Rev. 1011,1038-43 (1998); but see People v. Geno, 261 Mich. App. 624 (2004) (statement to director of Children’s Assessment Center not testimonial because addressee was ‘not… a government employee.’)

61 Fisher notes (p.7) (stating, “If the police already are involved so that the examination is, in a sense, part of the investigation, then statements to the doctor are testimonial. Cf. Idaho v. Wright, 497 U.S. 805 (1990) (holding, prior to Crawford, that the Confrontation Clause barred admission of victim’s statement to doctor performing examination in coordination with police investigation). If, however, the police are not yet involved, this presents a closer question. But accusatory statements that are unnecessary for the medical treatment – such as identifying ‘who did this’– are probably still testimonial, especially when laws impose reporting requirements on doctors. Early decisions on this score have not yet really dealt with the subtleties of this issue. See State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (holding that statement to doctor identifying perpetrator was not testimonial simply because ‘there was [no] indication of government involvement in the initiation or course of the examination’); People v. Cage. 15 Cal Rptr. 3d 846 (Cal. Ct. App 2004) (same)”).

62 Fisher notes (p. 7) (stating, “A statement to such a person in the course of allegedly criminal activity is probably not testimonial. See [Crawford.] 124 S. Ct. at 1368 (‘[a]nd Bourjaily v.United States, 483 U.S. 171, 181-84 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did not make prior cross-examination an indispensable requirement.’); United States v. Saget, 377 F.3d 223 (2d Cir. 2004) (statement to undercover informant not testimonial). But if the government really is trying to produce testimony rather than
The Crawford Court held that “the constitutional admissibility of statements that declarants would reasonably expect to be used for evidentiary purposes no longer turns in any way on ‘the vagaries of the rules of evidence, much less [on] amorphous notions of ‘reliability.’”\(^\text{64}\) Rather, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”\(^\text{65}\) Constitutional consideration requiring testimonial statements to be subject to cross-examination in criminal cases, “do[es] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.”\(^\text{66}\)

“Crawford continues to require that the defendant [have] an opportunity to cross-examine the witnesses against him prior to trial.”\(^\text{67}\) “If the defendant was represented by counsel who had an

capture evidence of ongoing crime, the statements could be testimonial, especially if governmental involvement becomes a clearer touchstone in future cases for the testimonial inquiry. In other words, if one can argue that the government is really trying to circumvent the ‘testimonial’ rule in order to insulate a witness’s narrative from a confrontation challenge, the declarant’s statements may be testimonial even without the declarant’s knowledge that his statement could be used for evidentiary purposes.

\(^63\) Fisher notes (p.7) (stating, “‘If this exception must be accepted on historical grounds, it is sui generis.’ [Crawford,] 124 S. Ct. [at] 1367 n.6. Dying declarations that obviously are accusations for purpose of future prosecutions might also . . . be viewed as admissible under the forfeiture doctrine, rather than as exception to realm of testimonial statements. . . . McDaniel v. State, 16 Miss. 401 (1847) (‘It would be a perversion of [the Constitution’s] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness by causing his death.’); State v Meeks, 88 P.3d 789 (Kan. 2004) (same)

\(^64\) Fisher’s notes (p. 2) (quoting Crawford, 124 S. Ct. at 1370); cf. Roberts.

\(^65\) Fisher’s notes (p. 2) (quoting Crawford, 124 S. Ct. at 1374).

\(^66\) Fisher’s notes (p. 3) (quoting Crawford, 124 S. Ct. at 1367 n. 7) (citing United States. v. Gonzalez-Marchal, 317 F.Supp. 2d 1200 (S.D. Cal. 2004) (irrelevant whether testimonial statement falls within hearsay exception for personal and family history); State v. Cox, 876 S.2d 932 (La. Ct. App. 2004) (same with regard to co-conspirator statements). “The Court’s further notation that ‘to the extent that a hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made “immediate[ly]” upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage,’ 124 S. Ct. at 1367 n. 7, was only by way of saying that to the extent that hearsay rules even existed as such at the time of the Founding, they respected the confrontation right’s restrictions on testimonial statements. In other words, the scope of hearsay exceptions in criminal cases in 1791 gives us clues as to how broadly the Framers’ conception of ‘testimonial’ evidence was.” (Fisher notes (p. 3)).

\(^67\) Fisher notes (p. 8-9) (stating, “If the defendant was represented by counsel who had an adequate opportunity to cross-examine the witness and the same or similar motive for doing so, this satisfies the Confrontation Clause for statements given at that time. [Cf.] Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (adequate cross
adequate opportunity to cross-examine the witness and the same or similar motives for doing so, this satisfies the Confrontation Clause for statements given at the time.” Similarly, “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of prior statements[;] . . . the Clause does not bar the admission of a statement so long as the declarant is present at trial to defend or explain it.”

Crawford does not change the law regarding the “unavailability” of a witness. The burden of proving that a witness is unavailable lies with the Government and requires a good faith effort to procure the witness, or, in the alternative, prove unavailability. Unavailability can be occasioned by a witness who is physically unavailable, such as when a witness has died, or when the Government is unable to locate a witness after making good faith efforts. Most frequently, a finding that a witness is unavailable is the result of a valid waiver, such as the Fifth Amendment or marital

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68 Fisher notes (p. 9).
69 Fisher notes (p. 9) (stating, “This is so even if the witness cannot, or claims not to be able to, remember her prior testimonial statement. United States v. Owens, 484 U.S. 554 (1988) (no confrontation violation even though head injury impaired witness’s memory after he gave testimonial statement, so cross-examination was of limited utility); California v. Green, 399 U.S. 149 (1970) (same with respect to witness [who] claimed memory loss at trial); See also People v. Martinez, 810 N.E.2d 199 (Ill. Ct. App. 2004) (testimonial statement admissible because witness took the stand); Cooley v. State, 849 A.2d 1026 (Md. App. 2004) (same where witness recanted on the stand). If, however, the witness is forced to take the stand but refuses on privilege grounds to answer any questions at all, this does not suffice to make his prior testimonial statement admissible. See Douglas v. Alabama, 380 U.S. 415 (1965). Finally, if the defendant fails to ask for a witness he knows is available to take the stand, he may be found to have had an adequate opportunity for cross-examination. [Cf.] In re Personal Restraint of Suave, 692 P.2d 818 (Wash. 1985) (failing to call witness foreclosed confrontation claim) and State v. Salazar, 796 P.2d 773 (Wash. 1990) (same) with State v. Cox, 876 So.2d 932 (La. Ct. App. 2004) (confrontation rights violated even though trial court offered defendant opportunity to subpoena witness”).

privilege.\textsuperscript{71} “Perhaps when a witness (usually a young child) is incompetent to testify, she is unavailable as well.”\textsuperscript{72} Failure by the Government to produce a witness may also violate the Confrontation Clause if the Government fails either to make a good faith effort to produce the witness, or to prove that the witness is legitimately unavailable.\textsuperscript{73}

Finally, we turn to the issue of “forfeiture by wrongdoing.” The Crawford Court stated, “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds.”\textsuperscript{74} Although the terms “waiver” and “forfeiture” are frequently used interchangeably, they are distinct concepts. “Forfeiture is a penalty against a party who engages in conduct of which a court disapproves.”\textsuperscript{75} In this context, causing a witness to be

\begin{itemize}
\item \textsuperscript{71} Fisher notes (p. 8) (stating, “See Lilly v. Virginia, 527 U.S. 116, 124 (1999) (plurality opinion) (Fifth Amendment) (Assuming Fifth Amendment invocation establishes unavailability); State v. Crawford, 147 Wn.2d 424 (2002) (marital privilege)).
\item \textsuperscript{72} Fisher notes (p. 8) (stating, “e.g. State v. C.J., 63 P.3d 765, 771 (2003) (incompetence establishes unavailability); [cf.] Idaho v. Wright, 497 U.S. 805, 816 (1990) (‘assuming without deciding’ that incompetence satisfies unavailability test”).
\item \textsuperscript{73} Supra fn. 65.
\item \textsuperscript{74} Crawford, 124 S. Ct. at 1370 (citing Reynolds v. United States, 98 U.S. 145, 150 (1879) (a defendant who “voluntarily keeps the witness away . . . cannot insist on his privilege” of confrontation) (Emphasis added).
\item \textsuperscript{75} Valdez and Dahlberg, Tales from the Crypt: An Examination of Forfeiture by Misconduct and Its Applicability to the Texas Legal System, 31 St. Mary's L.J. 99, n.32 (citing Alycia Sykora, Comment, Forfeiture by Misconduct: Proposed Federal Rule of Evidence 804(b)(6), 75 Or. L. Rev. 855, 860-61 (1996)) (“distinguishing forfeiture from waiver because forfeiture is punishment by wrongdoing, unlike waiver, which occurs through other forms of defendant conduct.”); United States v. Potamitis, 739 F.2d (2d Cir. 1984) (citing United States v. Mastrangelo, 693 F.2d. at 272-73) (stating that a defendant who causes the unavailability of a witness as an example of giving rise to a waiver of a right.) (explaining that “if [the] witness’ silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights in order to prevent [use of] prior grand jury testimony.” Although this behavior has often been referred to as waiver, it is more accurately characterized as misconduct that results in forfeiture of confrontation rights. See Alycia Sykora, Comment: Forfeiture By Misconduct: Proposed Federal Rules of Evidence 804(b)(6), 75 Or. L. Rev. 855, 860-61 (1996), United States v. Bolano, 618 F.2d at 629-30 (10th Cir. 1979) (recounting how a witness who threatened a witness waived his right of confrontation, resulting in the introduction of the witness’s grand jury testimony into evidence); United States v. Carlson, 547 F.2d 1346, 1352-53 (8th Cir. 1976) (allowing grand jury testimony into evidence because the defendant threatened the witness). See also, John R. Kroger, “The Confrontation Waiver Rule, 76 B.U. L. Rev. 835, 846 (1996) (describing the effect of the waiver of the right of confrontation);” See Simon & Shuster, Inc. v Members of the New York State Crime Victims Board, 502 U.S. 105, 118 (1991) (noting that “no man shall ‘take advantage of his own wrong’”); City of Oklahoma City v. Tuttle, 471 U.S. 808, 838 n.6 (Stevens, J. dissenting) (citing the “standing maxim that no man shall be allowed to
unavailable through misconduct operates as a forfeiture of both the right to confrontation and the right to object on hearsay grounds.76

III. Confrontation and “Forfeiture by Wrongdoing”

Fed. R. Evid. 804(b)(6), titled “forfeiture by wrongdoing,” creates a hearsay exception permitting the introduction into evidence of “a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”77

The exception was added to the rules by the 1997 changes:

[T]o provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant’s prior statement when the party’s deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself’. . . . The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government. It applies to actions taken after the event to prevent a witness from testifying.78

make any advantage of his own wrong”). See United States v. White, 116 F. 3d 903, 912 (D.C. Cir. 1997) (agreeing with a majority of the courts that misconduct resulting in the loss of confrontation rights necessarily causes the forfeiture of the hearsay exception.).

76 United States v. Houlihan, 92 F.3d 1271, 1281-82 (1st Cir. 1996) (holding that the murder of a witness results in the simultaneous waiver of confrontation rights and a hearsay objection) (See Tales From The Crypt, 31 ST. MARY’S L. J. 99, n. 130: “[O]nce the waiver occurs through defendant misconduct, the need for the evidence grows.”). Although the courts refer to this concept as waiver, it is more accurately described as forfeiture. Because the cases uniformly refer to this concept as waiver, however, this article will do the same; United States v. Smith, 792 F.2d 441, 442 (4th Cir. 1986) (holding that the defendant waived all hearsay objections by procuring the witness’s absence); See also United States v. Balano, 618 F.2d 624, 626 (10th Cir. 1979).

77 Fed. R. Evid. 804(b)(6).

78 Commentary to the 1997 changes to the Federal Rules of Evidence. (Internal citations omitted).
Although only added to Rule 804 as its own “stand-alone” exception in 1997, Rule 804(b)(6) previously had been widely recognized by many courts of appeals as a hearsay exception under the residual hearsay rule, then codified as Rule 804(b)(5). The origin of the Rule can be traced to a 1982 decision from the Second Circuit. In *United States v. Mastrangelo*, the defendant was charged with various drug offenses, though only one eyewitness could tie him to the drug conspiracy. The Government had undercover wiretap evidence of the defendant threatening the witness and warning him not to testify against him at the grand jury. During trial, the witness was murdered on the way to the courthouse to testify. The trial judge, Chief Judge Jack Weinstein, declared a mistrial and denied the defendant’s motion to preclude his re-prosecution based on the double jeopardy clause. In denying the motion, Chief Judge Weinstein expressed his belief that a preponderance of the evidence showed the defendant was either directly involved or indirectly acquiesced to the murder of the eyewitness.

At the second trial, presided over by a different district judge, the Government moved to admit the grand jury testimony of the murdered eyewitness against the defendant under the residual hearsay rule, then codified as Rule 804(b)(5). The defendant objected on the basis of the hearsay rule and the Sixth Amendment Confrontation Clause. The trial judge overruled both objections, finding particularized indicia of trustworthiness sufficient to admit the grand jury testimony under Rule 804(b)(5). The defendant was convicted and appealed.

The Court of Appeals for the Second Circuit remanded the case for an additional evidentiary hearing to determine the involvement, if any, of the defendant in the murder of the eyewitness. In doing so, however, the court clearly agreed with the district court that an issue was raised regarding whether the defendant waived his Sixth Amendment rights and hearsay objection by directly causing or acquiescing to the murder of the eyewitness. It stated:

> If [the defendant] was involved in [the witness’s] death, his involvement waived his confrontation clause objections to the admission of [the

79 The 1997 changes to the Rules of Evidence deleted separate but identical “residual hearsay” exceptions in Rule 803 and 804 and codified them as a new Rule, Rule 807, the text of which was the same as the previous exceptions. Commentary to the 1997 changes to the Rules of Evidence, 171 F.R.D. 708, 709 (1997).
80 *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982).
81 Id. at 272.
witness’s] testimony. Because a waiver, if factually supported, will allow us to avoid resolution of the difficult legal and constitutional issues arising under the confrontation clause and Rule 804(b)(5), we remand the case to the District Court for an evidentiary hearing on the question of [the defendant’s] involvement in the murder of [the witness].82

As authority for its holding that a defendant may waive his or her Confrontation Clause rights by misconduct, the second circuit cited a series of Supreme Court decisions, as well as a host of circuit court cases standing for the principle that in either criminal or civil cases, “the law will not allow a person to take advantage of his own wrong.”83 The court summed up this point as follows:

Thus, if a witness’ silence is procured by the defendant himself, whether by chicanery, by threats, or by actual violence or murder, the defendant cannot then assert his confrontation clause rights in order to prevent prior grand jury testimony of that witness from being admitted against him. Any other result would mock the very system of justice the confrontation clause was designed to protect.84

In addition, the court set forth the procedural requirements needed to establish the foundation to support a finding of waiver by wrongdoing. First, an evidentiary hearing is needed in the absence of the jury to determine the involvement of the party against whom the statement will be offered in procuring the unavailability of the declarant. Because the purpose of this hearing is to enable the trial court to determine, as a preliminary matter, whether a waiver by wrongdoing has occurred, the hearing is governed by Fed. R. Evid.

82 Id.
83 Id. at 272-73 (See also Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Diaz v. United States, 223 U.S. 442, 452-53; and Reynolds v. United States, 98 U.S. 145, 159 (1878)).
84 Mastrangelo, 693 F.2d at 272-73.
Further, the court held that the party seeking to introduce the statement of the unavailable declarant bears the burden of proof to establish the waiver. The court noted, however, that there was a split in authority as to the burden of proof that must be shown to establish the waiver – preponderance of the evidence (the standard typically applying to Fed. R. Evid. 104(a) preliminary determinations), or clear and convincing evidence. The court ultimately concluded:

[w]e see no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where waiver by misconduct is concerned. Such a claim of waiver is not one which is either unusually subject to deception or disfavored by the law. To the contrary, such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself.

The second circuit did caution, however, that despite its preliminary finding that the proper standard of proof was preponderance of the evidence, it was prudent for the district court, on remand, to make its fact-findings under the clear and convincing standard as well. The court further announced its intention to retain jurisdiction to address the issue again if raised in a subsequent appeal. As will be seen, the issue of what standard of proof governs preliminary hearings to determine whether to apply the waiver by wrongdoing doctrine continued to be a subject of disagreement among the federal courts for many years thereafter.

85 Id. at 273 (See FED. R. EVID. 104(a), which requires the Court to make preliminary determinations regarding the admissibility of evidence, the qualifications of witnesses, and the existence of privileges. In doing so, it need not strictly adhere to the rules of evidence, except for privilege. See also Rule 1101(d)(1)).
86 Mastrangelo, 693 F.3d at 273.
87 Id. at 274.
88 Id.
89 Id.
The cases following *Mastrangelo* acknowledge its importance in shaping the doctrine of forfeiture of Confrontation Clause rights and hearsay objections by wrongdoing. In understanding this doctrine, it is important to recognize the narrow foundation on which it rests. It was not adopted following a comprehensive examination of the substantive issues associated with either the Confrontation Clause or the hearsay rule; rather, it rests on a single concept – one whose wrongdoing directly or indirectly procures the unavailability of the declarant whose statement is offered at trial, by his own misconduct, waives the right to object. It is, therefore, an unapologetic rule of necessity recognizing that any other outcome produces a result that is repugnant to a society that values the rule of law.

The waiver doctrine on which *Mastrangelo* was premised has long been accepted in both the United States and Great Britain, which was the “immediate source” of our own Confrontation Clause protections. 91

*Reynolds v. United States*92 was the first case in which the Supreme Court recognized that Sixth Amendment Confrontation Clause rights could be waived by a party’s own misconduct. It continues to have vitality today, as it was cited with approval by the majority opinion in *Crawford*.93 Reynolds was charged with bigamy and prosecuted in the territorial courts of the Utah Territory. Prior to trial, the Government attempted to serve a subpoena on his second wife, but Reynolds and his first wife prevented the marshal from serving the subpoena by falsely representing that the second wife was not present. At trial, the Court allowed the prosecution to offer the testimony of the second wife against Reynolds in a prior bigamy charge, over Reynolds’s objection.94 Reynolds was convicted, and subsequently appealed on a number of grounds, including an alleged violation of the Sixth Amendment Confrontation Clause. The Supreme Court affirmed the trial court, analyzing the Confrontation Clause issue as follows:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his

90 Id. at 272.
91 *Crawford*, 124 S. Ct. at 1359.
92 98 U.S. 145 (1878).
93 *Crawford*, 124 S. Ct. at 1370.
94 *Reynolds*, 98 U.S. at 149.
own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him, but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.95

As authority for this ruling, the Court cited a series of cases from Great Britain, most notably Lord Morley’s Case,96 in which the House of Lords discussed the forfeiture of confrontation rights by misconduct of a defendant, stating:

[I]n case oath should be made that any witness, who has been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination [by the coroner] might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships.97

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95 Id. at 158.
96 Lord Morley’s Case, 6 State Trials, 770 (1666).
97 Reynolds, 98 U.S. at 158 (quoting Lord Morley’s Case).
The Reynolds Court noted that the ruling in Lord Morley's Case was “recognized as the law in England” following that decision, citing a series of English precedents that followed the rule in Lord Morley’s Case.\(^98\) The Supreme Court also explained the policy underlying the rule of forfeiture of Confrontation Clause rights by misconduct as follows:

The Rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony [of the unavailable witness]. We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.\(^99\)

Finally, the Court noted that the determination of whether a party committed misconduct that would waive confrontation rights was for the trial court to decide as a preliminary matter.\(^100\) In Diaz v. United States,\(^101\) the Court reaffirmed its ruling in Reynolds, stating, “[t]he view that this right [of confrontation of witnesses in a criminal trial] may be waived also was recognized by this court in Reynolds v. United States . . . where testimony given on a first trial was held admissible on a second, even against a timely objection, because the witness was absent by the wrongful act of the accused.”\(^102\) The Court reiterated this position in Snyder v. Commonwealth of Massachusetts,\(^103\) by stating “[n]o doubt [a constitutional privilege] . . . may be lost by

\(^{98}\) Reynolds, 98 U.S. at 158 (citing Lord Morley’s Case) (citing Harrison’s Case, 12 Id. 851; Regina v. Scaife, 17 Ad. & El. N.S. 242; Drayton v. Wells, 1 Nott & M. (S.C.) 409; and Williams v. State of Georgia, 19 Ga. 403).

\(^{99}\) Reynolds, 98 U.S. at 159.

\(^{100}\) Id.

\(^{101}\) 223 U.S. 442 (1912).

\(^{102}\) Id. at 452 (Internal citations omitted).

\(^{103}\) 291 U.S. 97, 106 (1934).
consent or at times even by misconduct,”104 and most recently in\n\textit{Crawford} itself, where the Court stated, importantly:\n
\begin{quote}
The \textit{Roberts} test\textsuperscript{105} allows a jury to hear

evidence, untested by the adversary

process, based on a mere judicial
determination of reliability. It thus

replaces the constitutionally prescribed

method of assessing reliability with a

wholly foreign one. In this respect, it is

very different from exceptions to the

Confrontation Clause that make no

claim to be a surrogate means of

assessing reliability. For example, the

rule of forfeiture by wrongdoing (which

we accept) extinguishes confrontation

claims on essentially equitable grounds;

it does not purport to be an alternative

means of determining reliability.\textsuperscript{106}
\end{quote}

Thus, the key to understanding the constitutionality of Rule
804(b)(6), as measured by the Confrontation Clause, is to recognize
that it is predicated not on the assumption that the out-of-court
statement of the unavailable declarant is admissible because there is
some underlying indicia of reliability (such as with the other hearsay
exceptions in Rules 803, 804, and 807, which excuse the need to
produce the declarant for in-court testimony, cross examination, and
to be confronted by the defendant), but instead on the equitable
principle of forfeiture, or, less accurately, waiver. This outcome is
viewed as necessary upon a finding that the unavailable witness’s
absence was caused by wrongful conduct initiated by, or acquiesced
in, by a party, and done with the intent to render the witness
unavailable. Thus, confrontation rights are not lost absent a showing
of wrongful conduct by the defendant intended to induce a declarant
not to testify, which in fact produces that result. If properly
established, it is difficult to summon much sympathy for the
defendant who complains that introduction of the prior statement of
the unavailable witness is unfair and violative of the Sixth Amendment.

\textsuperscript{104} \textit{Id.} (citing \textit{Diaz v.United States}).
\textsuperscript{105} The \textit{Roberts} test was overruled in \textit{Crawford}.
\textsuperscript{106} \textit{Crawford v. Washington}, 124 S. Ct. at 1370.
Every federal circuit court of appeal, and a number of state courts, has found that, under these circumstances, forfeiture of Sixth Amendment rights is appropriate. The constitutionality of the doctrine of forfeiture by wrongdoing has been accepted by every federal circuit court of appeal that has considered it, without exception, as reflected in the following table:

First Circuit  
*United States v. Houlihan*, 92 F. 3d 1271, 1279 (1st Cir. 1996).  

“Though the Confrontation Clause is a cornerstone of our adversary system of justice, it is not an absolute . . . Moreover, a defendant may waive his right to confrontation by knowing and intentional relinquishment . . . While a waiver of right to confront witnesses typically is express, the law is settled that a defendant also may waive it through his intentional misconduct . . . By the same token, courts will not suffer a party to profit by his own wrongdoing. Thus, a defendant who wrongfully procures a witness’s absence for the purpose of denying the government that witness’s testimony waives his right under the Confrontation Clause to object to the admission of the absent witness’s hearsay statements.” (Internal citations omitted).

Second Circuit  

“A defendant who procures a witness’s absence waives the right of confrontation for all purposes with regard to that witness, not just to the admission of sworn hearsay statements. We may assume that the admission of facially unreliable hearsay would raise a due process issue, although it is hard to imagine circumstances in which such evidence would survive Fed. R. Evid. 403’s test of weighing probative value against prejudicial effect, an objection that is not waived by procuring a witness’s
absence."

Fourth Circuit
United States v. Johnson,
219 F.3d 349, 355
(4th Cir. 2000).

“The district court appears to have admitted Thomas’ hearsay because, inter alia, Raheem forfeited his hearsay objections, under Fed. R. Evid. 804(b)(6), by having caused the unavailability of Thomas as a witness . . . . The district court did not abuse its discretion in so holding.”

Fifth Circuit
United States v. Thevis,
665 F.2d 616, 630
(5th Cir. 1982).

“We conclude that a defendant who causes a witness to be unavailable for trial for the purpose of preventing that witness from testifying also waives his right to confrontation . . . . A defendant who undertakes this conduct realizes that the witness is no longer available and cannot be cross-examined. Hence in such a situation the defendant has intelligently and knowingly waived his confrontation rights. The policy interests underlying the confrontation clause, moreover, mandate this result. We recognize that the right of confrontation is so fundamental to our concept of a fair trial that it is a privilege specifically guaranteed by the Constitution. Nevertheless . . . the right is not absolute, and must give way at times to stronger state interests. Similarly, when confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived. The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution ‘would be contrary to public policy,
common sense, and the underlying purpose of the confrontation clause’ . . . and make a mockery of the system of justice that the right was designed to protect.” (Internal citations omitted).

Sixth Circuit
*Steele v. Taylor,* 684 F.2d 1193, 1201-03 (6th Cir. 1982).

“From these cases we derive essentially the same rule as the one stated by the state trial judge. A prior statement given by a witness made unavailable by the wrongful conduct of a party is admissible against the party if the statement would have been admissible had the witness testified. The rule . . . is based on a public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness. The rule is also based on a principle of reciprocity similar to the equitable doctrine of ‘clean hands.’ The law prefers live testimony over hearsay, a preference designed to protect everyone, particularly the defendant. A defendant cannot prefer the law’s preference and profit from it . . . while repudiating that preference by creating the condition that prevents it.”

Seventh Circuit
*United States v. Scott,* 284 F.3d 758, 762 (7th Cir. 2002).

“It is, of course, well-established that a defendant forfeits his Confrontation Clause rights by wrongfully procuring the unavailability of a witness.”

Eighth Circuit
*United States v. Carlson,* 547 F.2d 1346, 1359 (8th Cir. 1977).

“The law will not place its imprimatur on the practice of threatening Government witnesses into not testifying at trial and courts should not permit the accused to derive any
direct or tangential benefit from such conduct . . . [n]or should the law permit an accused to subvert a criminal prosecution by causing witnesses not to testify at trial who have, at the pretrial stage, disclosed information which is inculpatory as to the accused. To permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the confrontation clause.”

“Tenth Circuit
*United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979)(rev’d on other grounds).

“We agree that, under the common law principle that one should not profit by his own wrong, coercion can constitute voluntary waiver of the right of confrontation.”

“District of Columbia Circuit

“Even though the right of confrontation is both constitutional and critical to the integrity of the fact-finding process . . . the defendant may lose it through misconduct . . . . It is hard to imagine a form of misconduct more extreme than the murder of a potential witness. Simple equity supports a forfeiture principle, as does a common sense attention to the need for fit incentives. The defendant who has removed an adverse witness is in a weak position to complain about losing the chance to cross-examine him. And where a defendant has silenced a witness through the use of threats, violence or murder, admission of the victim’s prior statements at least partially offsets the perpetrator’s rewards for his misconduct. We have no hesitation in finding, in league with all circuits to have considered the matter, that a defendant who wrongfully procures
the absence of a witness or potential witness may not assert confrontation rights as to that witness.” (Internal citations omitted).

Although the circuit courts have not always agreed entirely on how the Rule should be administered,107 not one has expressed any serious reservations about the need for the Rule. What was absent prior to Crawford was any direct comment from the United States Supreme Court on the constitutionality of Rule 804(b)(6) following its codification as a separate hearsay exception in 1997. Crawford supplied this missing link: “For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”108

Critics of the forfeiture by wrongdoing rule certainly can argue that Crawford principally addresses a different rule (i.e. statements of an unavailable declarant against a penal, proprietary, or pecuniary interest),109 and therefore, the comments of the majority constitute mere dicta. This view, however, offers scant support for a conclusion that there is any serious constitutional infirmity in Rule 804(b)(6), given the breadth of Crawford’s examination of the hearsay rule and Confrontation Clause, as well as its discussion of many hearsay exceptions other than Rule 804(b)(3).

107 For example, most of the circuit courts, and the drafters of Rule 804(b)(6), conclude that because the determination whether the defendant actively, or indirectly, procured by wrongdoing the absence of the witness whose prior statement is offered under the Rule is a preliminary determination under FED. R. EVID. 104(a), the foundational facts need only be shown by a preponderance of evidence. See United States v. Dhinsa, 243 F.3d 635, 653-54 (2d Cir. 2001); United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000); United States v. Scott, 284 F.3d 758, 762 (7th Cir. 2002); United States v. Emery, 186 F.3d 921, 926-27 (8th Cir. 1999); United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001); Commentary to the Federal Rule of Evidence 804(b)(6), 171 F.R.D. 719 (“The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage”). One circuit court, however, has ruled that the foundational facts must be shown by clear and convincing evidence. United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982). Similarly, some circuit courts have required that the court hold a hearing outside the presence of the jury to hear the evidence supporting the introduction of a statement under Rule 804(b)(6). United States v. Dhinsa, 243 F.3d 635 (2d. Cir. 2001) (“[T]he district court must hold an evidentiary hearing outside the presence of the jury in which the government has the burden of proving [the foundational facts] by a preponderance of the evidence”). Other courts have not required a separate evidentiary hearing. United States v. Emery, 186 F.3d 921, 926; United States v. White, 116 F.3d 903, 914-15 (D.C. Cir. 1997).

108 Crawford, 124 S. Ct. at 1370 (Emphasis added).

109 Fed. R. Evid. 804(b)(3).
In addition to the federal courts, at least ten state courts have adopted the forfeiture by wrongdoing exception to the hearsay rule:

Arizona

*State v. Valencia,*
924 P.2d 497, 502

“If a defendant silences a witness by violence or murder, the defendant cannot then assert his Confrontation Clause rights in order to prevent the admission of prior testimony from that witness . . . . In such circumstances, a defendant is deemed to have waived both his Confrontation Clause and hearsay objections to the admission of the witness’s statements . . . . Prior to admitting testimony pursuant to this principle, the trial court must hold a hearing at which the government has the burden of proving by a preponderance of the evidence that the defendant was responsible for the witness’ absence.” (Internal citations omitted).

District of Columbia

*Devonshire v. United States,*
691 A.2d 165, 168
(D.C. 1997).

“We agree with the overwhelming weight of authority that appellant’s Confrontation Clause rights must fall in these circumstances. As the trial judge correctly observed, a defendant’s rights under the Confrontation Clause are not absolute. A defendant may waive his right to confrontation by express waiver . . . or through his own intentional misconduct . . . . Nor is a defendant protected when he ‘does away with witnesses against him.’ All federal and state courts that have addressed this issue, that we could find, have concluded that when a defendant procures a witness’s unavailability for trial with the purpose of preventing the witness from testifying, the defendant waives his rights under the Confrontation Clause to object to the admission of the absent witness’ hearsay statements.” (Internal citations omitted).
“A waiver is an intentional relinquishment of a known right . . . . A forfeiture, on the other hand, is the loss of a right as a result of misconduct . . . . As a review of the case law shows, the focus of the courts holding that a defendant has lost his right to object to the admission of an out-of-court statement falls more clearly within the common definition of a forfeiture . . . . When a court finds that a defendant has procured a witness’s unavailability, the defendant is precluded from asserting his constitutional right to confront the witnesses against him as a basis to prevent the admission of prior statements given by the witness . . . . Hearsay objections are also forfeited.” (Internal citations omitted).

“The Sixth Amendment to the United States Constitution and § 10 of the Bill of Rights of the Kansas Constitution provide criminal defendants with the right to confront witnesses against them . . . . A defendant, however, can waive the right to confrontation. ‘[W]hen confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived. The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him.’” (Internal citations omitted).

Adopting as the Law of Louisiana the rulings in the federal cases, including Mastrangelo, Thevis and Balano, supra.

“The law is clear that if a witness is unavailable because of the wrongdoing of the defendant, the defendant cannot
complain if other competent evidence is introduced to take the place of the witness’ testimony.” (Internal citations omitted).

New Jersey  
Adopting the position taken by the Supreme Court in *Reynolds*, and the forfeiture by wrongdoing rule articulated in other federal cases.

New York  
Adopting the forfeiture by wrongdoing rule articulated in *Mastrangelo*, *Balano*, *Thevis*, and other federal cases.

Pennsylvania and Tennessee  
Penn. R. Evid. 804(b)(6) and Tenn. R. Evid. 804(b)(6).  
Adopting the forfeiture by wrongdoing rule articulated by *Reynolds*, *Snyder*, *Diaz* and *Mastrangelo*.

The Maryland Rules do not contain an equivalent to Rule 804(b)(6). During the 2004 legislative session, however, the Office of the Governor introduced bills in the House of Delegates and the Senate to add such a rule. Senate Bill 185 and House Bill 296 proposed to add to the Courts & Judicial Proceedings Article, section 10-901, the following:

(A) A statement is not excluded by the hearsay rule if the statement is offered against a party that has engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the Witness as defined in Maryland Rule 5-804 who was the declarant of the statement.  
(B) The court shall determine the admissibility of a statement under this section in the manner provided in the Maryland Rules.
Proposed section 10-901(a) is substantially identical to Fed. R. Evid. 804(b)(6). The provision in 10-901(b) of the proposed Rule directs that, in determining whether to admit statements under the Rule, the trial court is governed by the Maryland Rules. The effect of this provision would be to incorporate by reference Rule 5-104(a) of the Maryland Rules, which governs preliminary evidentiary determinations and applies a preponderance of the evidence standard. Neither bill passed, and the effort to adopt the Rule failed.

Given the likelihood that the Rule again will be proposed in future legislative sessions, or, alternatively, that it will be proposed for consideration to the Rules Committee of the Maryland Courts for incorporation into the Maryland Rules, it is appropriate to consider whether Maryland should have the Rule. With respect to the constitutionality of the forfeiture by wrongdoing rule, the case law discussed above, particularly the Supreme Court’s decision in Crawford, disposes of any credible Sixth Amendment Confrontation Clause argument against the Rule. It cannot be argued seriously that there is any independent basis for opposing the Rule under the Confrontation Clause provisions of Article 21 of the Maryland Declaration of Rights, given that the origin of the forfeiture by wrongdoing rule comes from the English Common law, and the Maryland Declaration of Rights is in pari materia with the Sixth Amendment Confrontation Clause.

If it is accepted that there is no viable Confrontation Clause challenge to adopting a forfeiture by wrongdoing exception to the hearsay rule, the only remaining question to address is whether there is a need for it. While there is no useful empirical evidence to answer this question, there is an abundance of anecdotal evidence demonstrating a compelling need for adopting the forfeiture by wrongdoing rule in Maryland.

110 L. McLAIN, MARYLAND RULES OF EVIDENCE (1994), § 2.104.4, at p. 69.
112 See, e.g. Protecting Witnesses, Editorial, THE BALTIMORE SUN, July 14, 2004, 2004 WL 84123923 (Discussing witness intimidation in Baltimore City and Prince George’s County. Reporting that in May, 2004 Baltimore City prosecutors dropped 13 of 52 shooting cases because of witness problems); Gail Gibson, Drug Trial Witness Helps Efforts to Convict Ex-Friends: U.S. Prosecutors Say Men Were Members of Gang, THE BALTIMORE SUN, Mar. 6, 2004 at Local 1B (Recounting evidence of witness intimidation in drug prosecution in federal court in Baltimore City); Conspiracy of Silence, Editorial, THE BALTIMORE SUN, Feb. 16, 2004 at 18A (Stating that in the past year Baltimore City prosecutors relocated 95 witnesses for their protection, dismissed 90 non-fatal shootings because of witness problems, primarily witness intimidation); Gail Gibson, Survivor Tells Jury of Attack that Left
The problem does not seem to be restricted to Maryland and Washington D.C. Commentators have noted the increasing problem of witness intimidation throughout the country:

[A] Department of Justice Study found evidence that there had indeed been an increase in witness intimidation in the late 1980s and continuing into the 1990s. A number of prosecutors linked this increase in violent victim and witness intimidation to the advent of gang-controlled crack sales in the mid to late 1980s. Several prosecutors estimated that victim and witness intimidation is

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Two Friends Dead, Federal Death-Penalty Trial Focuses on Drug Activity, THE BALTIMORE SUN, Feb. 12, 2004 at Local 2B (Describing killing of key witness in federal drug prosecution in Baltimore City); Allison Klein, Ehrlich Targets Witness Threats Under Bill, Intimidation or Harm Would Carry Increased Penalties: Measure Could Allow Hearsay Opponents Include Defense Attorneys, THE BALTIMORE SUN, Feb. 9, 2004 at Local 1B (Reporting comments of a Baltimore City homicide prosecutor that in 90 percent of his cases, witnesses are afraid to testify; commenting on 2002 arson death of Baltimore family as act of retaliation; and describing other cases where witness intimidation hampered or prevented prosecution of criminal cases); Neely Tucker, Girl’s Slaying Opens Window on Intimidation, THE WASHINGTON POST, Feb. 2, 2004 at A01 (Reporting efforts to address witness intimidation in Maryland, Virginia, and the District of Columbia; reporting opinions of District of Columbia Superior Court judge and Prince George’s County Circuit Court judge that witness intimidation is a frequent event; reporting estimate of the U.S. Attorney that in last decade, drug gangs have killed more than two dozen informants or witnesses in the District of Columbia); Robert Redding, Jr., Annapolis Mayor Wants Assembly to Protect Witnesses, THE WASHINGTON TIMES, Dec. 1, 2003 (Reporting efforts of Annapolis mayor to introduce legislation before the Maryland General Assembly to offer protections against witness intimidation; reporting that witness problems in Baltimore City prevented 60 percent of city’s criminal cases); Allison Klein, Spain Gets 25 Years in Shooting: W. Baltimore Boy, 10, Hit with Stray Bullet on Stoop in July 2002; Judge Calls Crime ‘Vicious’; Case Heard in Two Trials; Key Witness Also Killed, THE BALTIMORE SUN, Oct. 24, 2003 at Local 1B (Reporting “catastrophic loss” to prosecution case caused by killing of key witness); Kimberly A.C. Wilson, Suspect in Shooting is Killed Days After Charge Is Dropped, THE BALTIMORE SUN, Jan. 26, 2003 at Local 8B (Reporting comments of representative of city prosecutor’s office regarding killing of prosecution witness, describing an “escalating pattern”); Caitlin Francke, Changing Stories Tangle City Courts: Recanting Witnesses Frequently Switch Statements When They Get on the Stand, Frustrating Judges and Prosecutors, THE BALTIMORE SUN, Nov. 20, 2000 at Telegraph 1A (Reporting that prosecutor’s and judges in Baltimore City say that witness recantations seriously hamper criminal prosecution, estimating that witnesses change stories in approximately 50 percent of cases).

suspected in up to 75-100 percent of the violent crimes committed in some gang-dominated neighborhoods. A National Institute of Justice assessment found that “51 percent of prosecutors in large jurisdictions and 43 percent in small jurisdictions said that intimidation of victim and witnesses was a major problem”. . . An additional 30 percent of prosecutors in large jurisdictions and “25 percent in small jurisdictions labeled intimidation a moderate problem.”

Those who oppose the adoption of the forfeiture by wrongdoing exception to the hearsay rule often raise objections other than constitutional challenges. They talk about the danger of criminal convictions based upon false testimony of witnesses who make incriminating pretrial statements to police, or in grand jury testimony, but who do not testify at trial where they may be cross-examined and must confront the defendant against whom they testify. Candor requires an acknowledgment that adoption of a forfeiture by wrongdoing exception to the hearsay rule does pose some risk of admitting unreliable testimony. The existing rules of evidence, however, offer abundant safeguards to address this risk. Proper administration of the Rule by trial judges, with oversight by the appellate courts, would reduce any realistic degree of risk such that, when compared to the societal harm posed by not having the Rule, the risk is substantially outweighed.

First, if the Rule proposed by the Governor, which is in substance Fed. R. Evid. 804(b)(6), is adopted, it would require prosecutors to lay a proper foundation before the statement of the unavailable witness may be admitted. The State would be required to show: (1) that the witness was unavailable to testify because of any of the reasons stated in Md. Rule 5-804(a); (2) that the party against

114 Allison Klein, Ehrlich Targets Witness Threats Under Bill: Intimidation or Harm Would Carry Increased Penalties; Measure Could Allow Hearsay Opponents Include Defense Attorneys, THE BALTIMORE SUN, Feb. 9, 2004 at Local 1B (Reporting the opposition to the legislation proposed to adopt the forfeiture by wrongdoing exception to the hearsay clause of Baltimore criminal defense attorney).
115 Rule 5-804(a) identifies five circumstances in which a witness is deemed unavailable: if exempted from testifying by asserting a privilege; by refusing to testify despite a court order to do so; if the witness testifies to a lack of memory about the subject of the testimony; if the witness may not testify because of death, infirmity or physical or mental illness; and if the witness is beyond the power of the
whom the statement would be offered at trial (typically the criminal defendant) either personally acted, or acquiesced in, the action of others; (3) that the action was wrongful; (4) that the action was intended to procure the unavailability of the witness; and (5) that the action actually did procure the unavailability of the witness.

The trial court has discretion, under Md. Rule 5-104(a), not to relax application of the rules of evidence and to require the prosecutor to make this showing through facts that are admissible under the rules of evidence. Furthermore, Md. Rule 5-104(c) permits the trial judge to require that the prosecutor lay the foundation for the statement out of the presence of the jury, so it cannot be prejudiced if the court rules that the statement is not admissible. Even after the prosecutor has made the preliminary showing required by the Rule, the trial judge may still examine the content of the statement to be offered and exclude it if it otherwise would be inadmissible, even if the witness was present to testify. Thus, if the absent witness’s statement contains inadmissible speculation or opinion, it may be excluded under Md. Rules 5-701 or 5-702. If it appears that the witness did not have personal knowledge of the facts contained in the statement, it may be excluded under Md. Rule 5-602. The credibility of the witness could be attacked if (1) he had a qualifying prior criminal conviction affecting his truthfulness; (2) he is biased against the defendant; (3) he has a poor reputation for truthfulness; (4) there is some defect in the ability of the witness to perceive, remember and relate facts; or (5) the witness has given an inconsistent version of the facts, all of which are impeaching facts that may be brought out by the defendant under Md. Rule 5-806. Additionally, if the trial court determines that the probative value of the witness’s statement is substantially outweighed by the danger of unfair prejudice to the defendant, the statement may be excluded under Md. Rule 5-403. Finally, if the trial judge admits the statement over the defendant’s objection and the defendant is convicted and appeals, the appellate courts can review the trial judge’s ruling for error.

These procedural protections, combined with the preliminary foundation that must be shown by the prosecutor, provide powerful protections against convictions based on unreliable evidence.

court to compel his or her presence at trial. Importantly, the rule also states “[a] statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.” Thus, if there is evidence that the prosecution or law enforcement authorities have engaged in any wrongdoing to induce the declarant to be unavailable, the absent witness’s statement would not be admissible.
Moreover, it must be remembered that, in the federal system, the rule of forfeiture by wrongdoing has been in widespread use for more than twenty years. There has been no credible showing that its use has resulted in unfair convictions.

In the end, the question of whether to adopt the forfeiture by wrongdoing exception to the hearsay rule requires the making of a choice between possible harmful outcomes. On one hand, there is overwhelming anecdotal evidence that witness intimidation is widespread in Maryland, and that this problem is imposing a serious burden on prosecutors in obtaining convictions in very serious cases. Defendants have literally been able to get away with murder by killing or intimidating the witnesses who could prove their guilt. On the other hand, there is the theoretical possibility that, notwithstanding the procedural and substantive safeguards built into the forfeiture by wrongdoing rule and the rules of evidence in general, there may be instances of convictions based, in part, on unreliable witness statements. The evidence of the harm done by not having the Rule is voluminous and immediate. The evidence of harm in adopting the Rule is conjectural and unsupported by more than twenty years of experience in the federal system. On balance, the time is long overdue to adopt this Rule.
SNOWDEN v. STATE OF MARYLAND:

Introduction of Testimonial Hearsay Statements Made by an Available Witness who Does Not Testify Violates the Sixth Amendment’s Confrontation Clause

By: Larna Cutter

The Court of Special Appeals of Maryland held that the introduction of testimonial hearsay statements made by an available witness who does not testify violates the Sixth Amendment’s Confrontation Clause. Snowden v. State, 156 Md. App. 139, 846 A.2d 36 (2004). In so holding, the court ruled that a social worker’s testimony encompassing statements from children she previously interviewed, who did not testify, were barred from being introduced against the children’s alleged abuser. Id.

In late January 2002, three young girls, all under the age of twelve, told their mothers that Michael Snowden ("Snowden") touched them inappropriately. Snowden adamantly denied the accusations. The police were notified of the incidents and Snowden was arrested. During police questioning, Snowden wrote letters of apology to the children, explaining that he never intended to touch them improperly. Snowden was later charged with six counts of third degree sexual offense and one count of child abuse. Eleven days after the arrest, Amira Abdul-Wakeel, a social worker employed by the Child Protective Services Division of the Montgomery County Department of Health and Human Services, interviewed the three children.

Prior to trial, the State filed a motion pursuant to MD. CODE ANN., CRIM. PROC. § 11-304, to introduce Abdul-Wakeel’s testimony in place of the children’s testimony. Snowden objected to Abdul-Wakeel’s testimony on the ground that the testimony would violate his right of confrontation, but the circuit court overruled his objection. Snowden was convicted of all charges, then filed an appeal to the Court of Special Appeals of Maryland. Snowden challenged the constitutionality of section 11-304 and the trial court’s admission of Abdul-Wakeel’s testimony. Snowden also alleged that there was insufficient evidence to prove he touched the girls for the purpose of sexual arousal.

The court of special appeals first noted the implications of the Sixth Amendment’s Confrontation Clause, specifically a criminal
defendant’s right to confront and cross-examine witnesses testifying against them. *Id.* at 149-50, 846 A.2d at 42-43. The court recognized that hearsay statements may be introduced without violating a defendant’s rights when the statement is either a firmly rooted hearsay exception or has particularized guarantees of trustworthiness. *Id.* at 150, 846 A.2d at 43.

The Maryland Legislature responded to the particularized guarantee of trustworthiness exception by enacting section 11-304, also known as the “tender years statute.” *Id.* at 151, 846 A.2d at 44. Section 11-304 permits hearsay declarations to be introduced regardless of whether the child testifies. *Id.* at 146, 846 A.2d at 40. If the child does not testify, however, section 11-304 requires the existence of corroborative evidence that the defendant had the opportunity to commit the alleged crime. *Id.* In determining whether a statement contains particularized guarantees of trustworthiness, section 11-304 mandates that a court evaluate thirteen factors, interview the child, then record a finding specifically stating the statement’s guarantees of trustworthiness. *Id.* at 151, 846 A.2d at 43. In this case, the court, without explanation, was satisfied that the circuit court completed the statutory procedures. *Id.* at 151, 846 A.2d at 44.

Before reaching a conclusion, the court recognized the mandates of witness unavailability and previous opportunity for cross examination that were established by the recent Supreme Court case, *Crawford v. Washington*, 124 S. Ct. 1354 (2004). *Snowden*, 156 Md. App. at 156, 846 A.2d at 46. In *Crawford*, the defendant’s conviction was reversed based on the violation of his confrontation rights. *Id.* at 153-54, 846 A.2d at 44. The trial judge allowed police officers to testify about disclosures made to them by the defendant’s wife. *Id.* at 153, 846 A.2d at 45 (discussing *Crawford*, 124 S. Ct. at 1358). The trial court in *Crawford* found the statements contained particularized guarantees of trustworthiness, but the Washington Court of Appeals disagreed and reversed the conviction. *Snowden*, 156 Md. at 153, 846 A.2d at 45. Thereafter, the Supreme Court of Washington reversed by concurring with the trial court’s finding of trustworthiness. *Id.* Crawford challenged the conviction’s reinstatement and appealed to the United States Supreme Court. *Id.*

The United States Supreme Court, in *Crawford*, distinguished two types of out-of-court statements: “those that are ‘testimonial’ and those that are not.” *Id.* at 155, 846 A.2d at 46. Simplistically reasoned, testimonial statements violate the Confrontation Clause because the Confrontation Clause only deals with testimony. *Id.* Although the court never provided a concrete list of testimonial or non-testimonial
statements, it did consider *ex parte* in-court testimony, or its equivalent (i.e. affidavits, custodial examinations) and “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” to be testimonial statements. *Id.* at 155 n.26, 846 A.2d at 46.

In the case at bar, the court of special appeals found Abdul-Wakeel’s statements to be testimonial, and therefore, they violated the Confrontation Clause. *Id.* at 157, 846 A.2d at 47. The court reasoned the children were only interviewed with the purpose of developing Abdul-Wakeel’s testimony. *Id.* Further, the court noted that the State did not establish that the children were unavailable to testify, and as such, failed to satisfy *Crawford’s* foundational requirements of the declarant’s unavailability and the accused’s prior opportunity for cross-examination. *Id.* at 157 n.31, 846 A.2d at 47. The court, in examining whether section 11-304 violated the Confrontation Clause, only stated that

> when the admissibility of nontestimonial hearsay is at issue, the individual states are entitled to determine what statements should be admitted and what statements should be excluded, but when testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination.

*Id.* at 156-57, 846 A.2d at 47.

Finally, the court held that sufficient evidence did exist to convict Snowden of child abuse and third-degree sexual offense. *Id.* at 158, 846 A.2d at 48. The court noted the facts of the case. First, the children were interviewed by Abdul-Wakeel only in regards to a child sexual abuse case, pursuant to statutory provisions. *Id.* Second, the children believed they were improperly touched by Snowden, regardless of whether the incidents actually occurred. *Id.* at 159, 846 A.2d at 48. Third, Snowden was arrested and voluntarily wrote letters of apology to the children, which indicated the incidents did occur in the manner and locations Abdul-Wakeel described. *Id.* at 159, 846 A.2d at 48-49. Finally, Snowden, by writing the letters, hoped the children, or more importantly, their mothers, would accept his apology and forgo pursuing the charges. *Id.*
Accordingly, the court explored the issue of double jeopardy and concluded that when an appellate court reverses on the basis of an erroneous admission of hearsay testimony, rather than on the basis of insufficient evidence, the accused is entitled to a new trial. *Id.* at 161, 846 A.2d at 50 (See *State v. Boone*, 284 Md. 1, 393 A.2d 1361 (1978)). Hence, the court remanded the case and ordered a new trial, which barred the introduction of Abdul-Wakeel’s testimony. *Id.* at 161-62, 846 A.2d at 50.

In *Snowden v. State*, the Court of Special Appeals of Maryland clearly followed the new requirements concerning hearsay declarations set by *Crawford v. Washington*. Maryland courts must follow the rigid preconditions of the declarant’s unavailability and the accused’s prior opportunity for cross-examination in order to allow the introduction of hearsay testimony without violating the accused’s Sixth Amendment rights. Because of these prerequisites, and because the court failed to formally address whether section 11-304 was unconstitutional, Maryland may now have to reconsider its evidentiary guidelines. Consequently, in order to comply with the recent federal transformation in evidentiary rules, Maryland may have to either revise section 11-304 or propose a new statute to replace section 11-304 altogether.

Editor’s Note: The Court of Appeals of Maryland heard the State’s appeal on December 3, 2004. This journal will report on that decision in Volume 35.2, which will be published in the spring of 2005.
ATTORNEY GRIEVANCE COMMISSION
OF MARYLAND v. CULVER:

Attorney’s Sexual Relationship with his Client Violated the
Maryland Rules of Professional Conduct

By: Brian Casto

The Court of Appeals of Maryland held that an attorney’s sexual relationship with his client violated the Maryland Rules of Professional Conduct (“MRPC”). *Att’y Grievance Comm’n of Md. v. Culver*, 381 Md. 241, 849 A.2d 423 (2004). In so holding, the court relied primarily on language it recently added to the Comments to the MRPC. *Id.* at 268-69, 849 A.2d at 440.

Client (opinion does not disclose client’s identity) retained Allan J. Culver, Jr. (“Culver”) to represent her in a divorce action in March 1993. On the evening of September 9, 1993, following a hearing earlier in the day, Culver arrived unexpectedly at Client’s home. Client allowed Culver into her home on the premise that he needed to inspect the condition of the house to prepare a response to an allegation asserted by Client’s estranged husband. Culver eventually led Client to the basement of her home where he physically forced Client to have sexual intercourse with him. According to Client, during two subsequent meetings with Culver at his office, Culver induced Client to perform oral sex on him. Client conceded at the disciplinary hearing that these two events were consensual. Client, fearing that revealing Culver’s conduct would cause her to lose custody of her children, continued to be represented by him throughout her divorce proceedings and her appeal. Culver withdrew his representation of Client after receipt of his fee for her appeal. Subsequently, Culver did not refund the fees paid and she retained an attorney to institute a civil claim against Culver for legal malpractice and forcible sexual contact.

Bar Counsel subsequently filed a Petition for Disciplinary Action against Culver for various violations of the MRPC. The court of appeals referred the matter to a judge in the Circuit Court for Baltimore County for an evidentiary hearing, and proposed conclusions of law. At the close of the hearing, the circuit court judge found Culver in violation of numerous Rules, including MRPC 1.7
and 8.4, for his sexual relationship with Client. The court of appeals then reviewed the circuit court judge’s finding de novo.

The court of appeals looked first at the circuit court judge’s finding that Culver violated MRPC 1.7 and 8.4 by engaging in a sexual relationship with Client. Id. The court agreed with the hearing judge’s conclusion that the sexual encounters between Culver and Client were non-consensual because of their “exploitative and coercive” nature. Id. at 267, 849 A.2d at 438. In reaching this conclusion, the court noted that there was no relation between a finding of non-consensual sexual activity for purposes of an attorney disciplinary proceeding and the relation necessary to sustain criminal charges. Id. at n. 12.

The court next discussed recent developments in the field of attorney ethical rules that resulted from an amendment of the American Bar Association’s Model Rules. Id. at 267-68, 849 A.2d at 438-39. The revised Model Rules include a black-letter prohibition on attorney-client sexual relationships. Id. at 267, 849 A.2d at 439. The court noted that this Rule has not been unanimously adopted by the states. Id. at 268, 849 A.2d at 439.

The court observed that Maryland considered, but rejected, adopting the black-letter prohibition on attorney-client sexual relationships in its Rules. Id. at 269 n.15, 849 A.2d at 440. Thus, the MRPC contains no black-letter restriction on attorney-client sexual relationships. Id. at 269, 849 A.2d at 440. Instead, the MRPC relies on language in the Comments to construe MRPC 1.7 and 8.4 to encompass sexual relationships between attorneys and their clients. Id. at 269-70, 849 A.2d at 440.

The Comment to MRPC 1.7 explains that a sexual relationship between an attorney and client creates an impermissible conflict when “the representation of the client would be materially limited by the sexual relationship.” Id. at 269, 849 A.2d at 440 (quoting MRPC 1.7 cmt.). The Comment to MRPC 8.4 adds that “sexual harassment involving . . . clients . . . may violate paragraph (d)[,]” which precludes “conduct prejudicial to the administration of justice.” Id. (quoting MRPC 8.4 & cmt.). Without analyzing whether Culver’s conduct actually limited the representation of Client or constituted sexual harassment, the court found Culver in violation of both MRPC 1.7 and 8.4. Id. at 269-70, 849 A.2d at 440.

The court found support for its conclusion in a Louisiana opinion stating that a black-letter rule prohibiting conduct similar to Culver’s is not necessary to find a violation of MRPC 1.7 and 8.4. Id. (citing In re Ashy, 721 So.2d 859, 864 (La. 1998)). Further, the court found that the Arizona Supreme Court deemed that any unwanted
sexual advances violated MRPC 1.7. *Id.* (citing *In re Piatt*, 951 P.2d 889, 891 (Az. 1997)). Finally, the court pointed to an Indiana decision holding that a sexual relationship between attorney and client violates MRPC 1.7. *Id.* (citing *In re Grimm*, 674 N.E.2d 551, 554 (Ind. 1996)). Based on its analysis of the relevant case law, the court opined that although “approaches” to dealing with attorney-client sexual relations may vary from state-to-state, it is unquestionable that exploitative sexual advances by an attorney are in violation of the disciplinary rules. *Culver*, 381 Md. at 271, 849 A.2d at 441.

The court further noted that a sexual relationship between an attorney and his or her domestic relations client creates an “inherent conflict in violation of Rule 1.7.” *Id.* at 272, 849 A.2d at 442. The court recognized that an attorney-client sexual relationship in the context of a divorce proceeding would likely impede the execution of the client’s case. *Id.* at 274, 849 A.2d at 443. For instance, the opposing spouse in a divorce proceeding may gain an advantage should an attorney-client sexual relationship constituted adultery. *Id.* Also, the relationship may result in the attorney becoming a witness to the action. *Id.* Thus, an attorney-client sexual relationship, in the context of a domestic proceeding, is a *per se* violation of Rule 1.7. *Id.* at 275, 849 A.2d at 443.

The Court of Appeals of Maryland held an attorney’s sexual relationship with his client violates the Maryland Rules of Professional Conduct. The Rule is simple, yet the method by which it is derived, at least with respect to MRPC 8.4, is troublesome. In an attempt to govern attorney conduct, while allowing ample room for judicial discretion, the court of appeals relies heavily on the non-authoritative Comments to the MRPC. Such reliance leads one to consider the actual weight of the Comments. It leaves open the question of whether they are merely guides to interpretation, as indicated by the Preamble to the Rules, or whether they should be heeded with the same respect as the black-letter law. Until the court of appeals conclusively answers this question, attorneys will be left to guess the effect of future amendments to the Comments.
ATTORNEY GRIEVANCE COMMISSION
OF MARYLAND v. GOODMAN:

Intentionally Dishonest Conduct by Attorney
Results in Disbarment

By: Rebecca A. Romig

The Court of Appeals of Maryland held that intentionally dishonest conduct by an attorney results in disbarment. *Att’y Grievance Comm’n of Md. v. Goodman*, 381 Md. 480, 850 A.2d 1157 (2004). In so holding, the court determined that the most severe sanction of disbarment will be imposed in cases involving intentionally dishonest conduct by an attorney, unless compelling extenuating circumstances mitigate against imposing such a sanction. *Id.* at 497-98, 850 A.2d at 1167-68.

Ellis H. Goodman (“Goodman”) was admitted to the Maryland Bar on June 23, 1966. Prior to this case, no other disciplinary action had been filed against him. At the time of this action, Goodman was employed as an Assistant Public Defender in Baltimore City.

In 1991, Goodman founded Heroes of Hope, a charitable organization designed to raise money for families of children with life-threatening illnesses. Thereafter, Goodman developed InterMall, a program to raise money for his organization through advertising kiosks located in shopping malls. Goodman sold advertising space to Fairfield Communities, Inc. (“Fairfield”). Fairfield allegedly failed to pay for the space, and Goodman filed an action in district court on behalf of InterMall to collect damages in the amount of $2,176.80. In his complaint, Goodman provided the name of D. David Herman (“Herman”) as his attorney.

During this time, Herman, who was residing in Hawaii, was not aware of this lawsuit, and did not give Goodman permission to use his name. Goodman pretended to be Herman throughout the pendency of the case and negotiated a settlement in Herman’s name over the telephone with Thomas W. Jones, counsel for Fairfield. When Goodman appeared in court under his own name, Jones recognized his voice and informed the judge of the deception. Goodman denied the allegations and lied to the judge by failing to acknowledge that Herman was not the attorney of record in the case.
On June 26, 2003, based on Jones’ complaint to Bar Counsel, the Attorney Grievance Commission filed for remedial or disciplinary action against Goodman in the Court of Appeals of Maryland. The complaint alleged that Goodman violated Maryland Rules of Professional Conduct (“MRPC”) 3.3(a), 3.4(c), 8.4(b)-(d), and section 8-606 of the Criminal Law Article. The court of appeals turned the case over to the Circuit Court for Baltimore City for that court to make findings of fact and conclusions of law. The circuit court judge found that Goodman violated MRPC 3.3(a)(1), by “knowingly mak[ing] a false statement of material fact or law to a tribunal,” and MRPC 3.4(c), by “knowingly disobey[ing] an obligation under the rules of a tribunal. . . .” The court further found that Goodman disobeyed MRPC 8.4(c) when he “engage[d] in conduct involving dishonesty, fraud, deceit or misrepresentation,” and violated section 8-606 of the Criminal Law Article by “willfully making a false entry in a public record.” However, the judge determined that Goodman’s conscientious and diligent performance of his job and his supervisor’s willingness to allow him to continue working in the public defender’s office mitigated his conduct.

Goodman filed numerous exceptions to the circuit court’s findings of facts and conclusions of law, and asserted that he should be sanctioned with a stern reprimand. The Attorney Grievance Commission recommended disbarment and filed an exception to the circuit court’s decision not to find a violation of MRPC 8.4(b). The court of appeals overruled Goodman’s exceptions, sustained the exception of the Attorney Grievance Commission, and found that the appropriate sanction was disbarment.

The court began its analysis by reasoning that the circuit court’s finding that Goodman committed a criminal act should have led the lower court to conclude that Goodman violated MRPC 8.4(b). Id. at 491, 850 A.2d at 1164. This rule provides that professional misconduct occurs when an attorney commits a criminal act that reflects negatively on the honesty and integrity of the lawyer. Id.

The court of appeals went on to address Goodman’s exceptions, including his claim that the lower court failed to make a number of factual findings. Id. The court found that the circuit court was not required to make any of the findings asserted by Goodman. Id. at 492, 850 A.2d at 1164. The court also found that the circuit court judge was aware of the facts in the case, discussed the evidence, but was not compelled to believe the testimony presented. Id.

The court next addressed Goodman’s claim that the circuit court failed to find that he “did not act with intentional dishonesty,” and that he “would not have taken the actions but for the mental and
physical conditions from which he suffered at the time.” Id. at 493, 850 A.2d at 1165. Furthermore, the court found that the lower court did not err, and that its findings were supported by evidence proving Goodman intentionally pretended to be someone he was not. Id. Goodman asserted that the lower court erred by failing to find that he had a “reputation for honesty, integrity, good character, and commitment to charitable causes,” that he was qualified to practice law, and that the public would not be harmed by this practice. Id. at 494, 850 A.2d 1165. The court of appeals disagreed, stating, “intentional dishonest conduct is closely entwined with the most important matters of basic character to such a degree as to make intentional dishonest conduct by a lawyer almost beyond excuse.” Id. (quoting Att’y Grievance Comm’n v. Vanderlinde, 364 Md. 376, 418, 773 A.2d 463, 488 (2001)).

Next, Goodman contended that the lower court erred in finding that he was required to prove a mental disorder. Goodman, 381 Md. at 495, 850 A.2d at 1166. The court of appeals noted that the lower court made no such finding, and, in fact, the lower court found that evidence presented by Goodman failed to support his claim that a mental health disorder caused him to be unable to comply with the law. Id. at 495-96, 850 A.2d at 1166-67. The court elaborated by stating that “in cases of intentional dishonesty, misappropriation cases, fraud, stealing, serious criminal conduct and the like, we will not accept, as ‘compelling extenuating circumstances,’ anything less than the most serious and utterly debilitating mental or physical health conditions. . . .” Id. (quoting Vanderlinde, 364 Md. at 413-14, 773 A.2d at 485).

Turning to the issue of sanctions, the court of appeals considered similar cases involving attorney misconduct when deciding the appropriate sanction to be imposed on Goodman. Goodman, 381 Md. at 496-96, 850 A.2d at 1167-68. The court explained that the goal of sanctions is threefold: to protect the public, to deter other lawyers from violating the MRPC, and to preserve the integrity of the legal profession. Id. at 497, 850 A.2d at 1167. The court compared the case at bar to previous cases involving intentional dishonest conduct where it found disbarment appropriate. Id. at 497-98, 850 A.2d at 1167-68. The court noted that absolute honesty is fundamental to the integrity of the judicial system. Id. at 498, 850 A.2d at 1168. The court concluded that, in cases of dishonesty and fraudulent behavior, only compelling extenuating circumstances could justify a sanction less severe than disbarment. Id. at 498-99, 850 A.2d at 1168. Those circumstances were not present in Goodman’s case. Id.
In *Goodman*, the court sends a clear message that dishonesty and fraud are among the most severe violations of the rules of professional conduct, and that attorneys who participate in such behavior will be prohibited from practicing law. A less severe sanction may only be warranted in cases where compelling extenuating circumstances lead to the dishonest conduct.
Cook v. Grierson:

Pursuant to the Maryland Slayer Rule, Grandchildren Have no Right to Inherit from their Grandfather’s Intestate Estate when Death is a Result of an Act of Patricide by the Children’s Father

By: Jigita A. Patel

In January 2002, Frederick Charles Grierson, Jr. (“Frederick”) died intestate, survived by his widow, his son Charles, and three grandchildren. Frederick died as a result of multiple stab wounds inflicted by his son, Charles. Charles pled guilty to second-degree murder and was sentenced to thirty years in prison.

The decedent’s widow, Deborah Grierson (“Deborah”), as personal representative of her husband’s estate, filed a notice of disinherition in the Orphans’ Court for Anne Arundel County (“Orphans’ Court”), asserting that Charles was not entitled to a share in his father’s estate under the Maryland Slayer’s Rule. Subsequent to this action, the grandchildren petitioned the Orphans’ Court to declare their rights to inherit a share of the decedent’s estate. The Orphans’ Court denied the grandchildren’s claims, and the Circuit Court for Anne Arundel County affirmed this ruling. Thereafter, the Court of Appeals of Maryland granted certiorari prior to any proceedings in the Court of Special Appeals of Maryland.

The court of appeals began its analysis with a review of the Maryland Slayer’s Rule. Id. at 505-09, 845 A.2d at 1232-35. The court acknowledged that Maryland does not have a slayer statute; rather, the judiciary has formulated a Slayer’s Rule in Maryland through case law. Id. at 505-06, 845 A.2d at 1233. The purpose of the Rule is to
prevent someone from “profiting by his own fraud . . . or acquiring property by his own crime.” Id. at 505, 845 A.2d at 1233.

The present court relied on an interpretation of the Slayer’s Rule as enunciated in the seminal Maryland case, Price v. Hitaffer, 164 Md. 505, 165 A. 470 (1933), in which the court concluded a murderer failed to acquire a beneficial interest in the victim’s estate due to his murderous acts. Id. at 506, 845 A.2d at 1233-34. Next, the court summarized the Slayer’s Rule as set forth in Ford v. Ford, 307 Md. 105, 111-12, 512 A.2d 389, 392-93 (1986), in which the court opined:

“a person who intentionally and feloniously kills another may not share in the distribution of the decedent’s estate as an heir by the way of statutes of descent and distribution, or as a devisee or a legatee under the decedent’s will . . . . These principles also apply to anyone claiming through or under the slayer.”

Id. at 508-09, 845 A.2d at 1235 (quoting Ford, 307 Md. at 111-12, 512 A.2d at 392-93).

The grandchildren offered two theories for claiming a right to inherit. Cook, 380 Md. at 510-11, 845 A.2d at 1263. First, they proposed Charles be treated as having predeceased the victim, thereby making the grandchildren “issue” pursuant to the intestacy statutes. Id. Second, they asserted a constructive trust theory, whereby Charles’ interest would be held in trust for the benefit of the grandchildren. Id. The court flatly denied the constructive trust theory in light of the Price holding that a murderer never acquires an interest in the decedent’s estate. Id.

In response to the grandchildren’s first theory, the court noted that, out of the forty-two states that have adopted slayer statutes, twenty-seven statutes treat the slayer as having predeceased the decedent, thereby distributing the slayer’s share of the estate to the slayer’s heirs. Id. at 510-11, 845 A.2d at 1235-36. The remaining statutes regard the slayer as having disclaimed his share, or provide for other heirs of the decedent to split the slayer’s portion. Id. Because there is no statute or legislative intent that elucidates the treatment of a slayer in Maryland, the court of appeals relied on the reasoning of the Tennessee Court of Appeals in Carter v. Hutchison, 707 S.W.2d 533 (Tenn. Ct. App. 1985). Cook, 380 Md. at 511-12, 845 A.2d at 1236-37.
Carter involved the efforts of a great-grandchild to inherit from his great-grandfather who was slain by the great-grandchild’s father. Id. The Carter court recognized two goals of the Tennessee slayer statute: (1) forfeiture of all rights by the slayer in the decedent’s estate, and (2) property distribution pursuant to the Tennessee intestate statute. Id. After the slayer forfeited his rights in the victim’s estate, the court distributed the property to the slayer’s child because, pursuant to Tennessee’s intestate statute, the child qualified as “issue.” Id. The Tennessee intestate statute defined “issue” as “all direct, lineal descendents of the deceased.” Id.

Applying Tennessee’s construction of the slayer statute to the present matter, the court of appeals treated Charles as having forfeited his rights in the decedent’s property. Id., 380 Md. at 512-13, 845 A.2d at 1237-38. Thereafter, the court looked to Maryland’s intestacy statute to determine whether Frederick’s grandchildren would independently qualify as “issue” of the decedent. Id. Recognizing that only the Maryland legislature has the authority to regulate the distribution of property, the court noted the Maryland intestacy statute’s definition of “issue” explicitly excludes lineal descendents of a living descendent. Id. Thus, because Charles was still alive, the court determined that the grandchildren were not “issue” within the meaning of the Maryland intestacy statute. Id. at 513, 845 A.2d at 1237. Therefore, the court concluded that the grandchildren could not independently claim a share in their grandfather’s estate pursuant to the intestacy statute. Id.

In assessing its decision, the court of appeals stated that prohibiting the grandchildren from inheriting is not analogous to punishing them for the acts of their father. Id. at 514, 845 A.2d at 1237-38. The court reasoned, if Frederick had died naturally, then pursuant to the Maryland intestacy statute, only Frederick’s surviving spouse and his son, Charles, would inherit. Id. Thus, the court of appeals determined, adopting the legal fiction that Charles had predeceased his father would place the grandchildren in a better position than if their grandfather had died of natural causes. Id. In conclusion, the court stated that a change in the statutes of descent and distribution allowing children of the slayer to inherit “should come from the legislature and not the judiciary.” Id.

The interpretation of the Slayer’s Rule by the court of appeals in Cook summons the legislature to clarify and codify the Slayer’s Rule in Maryland so that an equitable solution is provided to the slayer’s children. The Cook court’s ruling removes all possibility for the slayer’s children to inherit from their intestate ancestor. For instance, under Cook’s court interpretation of the Slayer’s Rule, a slayer’s child
in Maryland will never be able to inherit from any intestate ancestor if the child’s parent caused the ancestor’s death, and the parent is alive at the time of the ancestor’s death. Conversely, if the ancestor had died naturally, the children may likely inherit some share of the ancestor’s estate through their parents. Thus, to avoid punishing slayer’s children for the acts of their parents, the Maryland legislature should either codify the Slayer’s Rule, requiring the slayer be treated as “predeceased,” or change the definition of “issue.”
Recent Developments

EHRlich v. MARYLAND STATE EMPLOYEES UNIONS:

The Governor must Take Affirmative Steps to Ratify and Make Effective Memoranda of Understanding Following a Collective Bargaining Agreement

By: Mark Patrick Johnson

The Court of Appeals of Maryland held that the Governor must take affirmative steps to ratify and make effective memoranda of understanding ("MOU") following a collective bargaining agreement. Ehrlich v. Md. St. Employees Unions, 382 Md. 597, 856 A.2d 669 (2004). In so holding, the court concluded that the trial court incorrectly ruled that the MOUs were ratified by Governor Glendening. Id. at 610, 856 A.2d at 677.

In 2002, the American Federation of State, County, and Municipal Employees ("AFSCME") contacted the Secretary of the Department of Budget and Management ("DBM"). AFSCME questioned the designation of new regulations for the State Labor Relations Board ("SLRB") regarding unfair labor practices and the procedures required to implement the regulations. DBM did not answer the letter.

Governor Glendening agreed to negotiate with AFSCME regarding economic and non-economic issues surrounding compensation and work agreements. Governor Glendening and AFSCME agreed to bifurcate the negotiations, dealing with non-economic issues before the November 2002 election and economic issues after the election. The collective bargaining committee and AFSCME reached an agreement as to the non-economic issues in July, and reached a tentative agreement regarding economic issues, including a two percent wage increase for all state employees, in November.

Problems with the agreement’s language halted the process, and the drafts of the MOUs were not completed until December 13, 2002. The MOUs were submitted to the employees on December 18, 2002, and were declared ratified on January 13, 2003. The next
day, the MOUs were signed by the collective bargaining committee and approved by Governor Glendening’s chief-of-staff, Gene Lynch. The MOUs did not contain a signature line for the Governor, and neither Governor Glendening, nor his successor, Governor Ehrlich, signed the MOUs. Governor Ehrlich, who had to submit a balanced budget four days later, refused to fund the salary increases in his budget. AFSCME filed suit in the Circuit Court for Anne Arundel County against Governor Ehrlich, the State, DBM, and SLRB, seeking declaratory and mandatory injunctive relief. The court held a summary judgment hearing and entered a memorandum opinion stating that Lynch effectively ratified the MOUs. The court concluded that the parties did not end negotiations on the economic terms requiring budget allocation prior to January 1, thus the economic terms were not binding. The circuit court ordered that Governor Ehrlich was bound only by the non-economic provisions of the MOUs.

The defendants appealed the circuit court order, complaining that Governor Glendening did not ratify the MOUs, and therefore, the MOUs were ineffective. AFSCME cross-appealed, asking that SLRB be required to adopt regulations concerning unfair labor practices. The Court of Appeals of Maryland granted certiorari on its own initiative.

The court began by referring to the relevant statutory authority regarding the collective bargaining process. Id. at 601-02, 856 A.2d at 672. The court referred to the Maryland Code, which states that the parties involved in negotiations are to “make every reasonable effort to conclude negotiations in a timely manner ‘for inclusion by the principal unit in its budget request to the Governor,’” and requires that the parties finish negotiations before January 1 for any item requiring a funding appropriation in the fiscal year that begins on the following July 1. Id. at 602, 856 A.2d at 672 (quoting MD. CODE ANN., STATE PERS. & PENS. § 3-501(c) (2001)). The court then directed its attention to the execution of MOUs, finding that MOUs are not effective until they have been ratified by the Governor and pass with a majority vote of the
employees in the collective bargaining unit. *Ehrlich*, 382 Md. at 602, 856 A.2d at 672.

The court then discussed the significance of the ratification clause, stating that the circuit court believed that the Governor could effectively ratify the MOUs by charging his chief-of-staff to do so. *Id.* at 607, 856 A.2d at 675. The court of appeals rejected this reasoning because the statute expressly states that the MOUs must be ratified by the Governor, and no other signature would suffice. *Id.* at 608, 856 A.2d at 675-76. The court concluded that, even though section 3-501(c)(2)(ii) requires the Governor to include any amounts in the budget to accommodate the additional costs resulting from the collective bargaining negotiations, the legislature still wanted the Governor to personally understand and approve what was in any signed MOUs. *Id.* at 608, 856 A.2d at 676.

In the case at bar, the Governor did not sign the MOUs; as such, the court next pondered the requirements of ratification. *Id.* Examining Black’s Law Dictionary, the Restatement Second of Agency, and common law, the court concluded that ratification requires a positive act or declaration, while general statements or simple consent will not suffice. *Id.* at 609, 856 A.2d at 676. Although the Governor discussed main issues with AFSCME, Lynch summarized the MOUs for the Governor, and the Governor conferred discretion to his staff, the court stated that there was no evidence to show that Governor Glendening took affirmative action to read the final MOUs or sign them. *Id.* at 610, 856 A.2d at 677. Accordingly, the MOUs were ineffective. *Id.*

Next, the court examined DBM’s role in adopting proposed regulations. *Id.* at 610-11, 856 A.2d at 677-78. The court referred to statutory law, specifying that the Secretary of DBM has power to create and impose regulations to define unfair labor practices and institute legitimate labor activities on the work site. *Id.* at 610, 856 A.2d at 677. The court also examined the statute permitting persons to ask SLRB to adopt regulations. *Id.* at 611, 856 A.2d at 677. The statute requires an interested person to present a petition for adoption of a regulation, and, within 60
days of submission, SLRB must either reject the petition and state the reasons for disapproval, or begin the adoption process. *Id.*

The court of appeals also addressed the issue of mandatory adoption of regulations, stating that the statutes do not require the agency to adopt the regulation, but make it voluntary. *Id.* at 612-13, 856 A.2d at 678-79. The court also addressed the petition process for promulgating new regulations, determining that the letter sent from AFSCME to the Secretary of DBM did not comply with the requirement to start the petition process. *Id.* at 613, 856 A.2d at 679. The court considered the petition requirement, codified in C.O.M.A.R. 17.01.01-.02, requiring that the petition contain a brief statement of the regulation or proposed amendment. *Id.* The court ultimately denied AFSCME any relief, stating that the letter only expressed interest and inquired into the procedure to follow, but did not start the procedure. *Id.*

In *Ehrlich v. Md. State Employees Union*, the Court of Appeals of Maryland affirmed the role of the Governor in executing policy concerning collective bargaining agreements. The court directed the Governor to take an active role in the collective bargaining process, requiring the Governor to take affirmative steps to understand and sign any final agreement. This decision limits the Governor’s ability to assign responsibilities to members of his staff who may be more familiar with the subject, consequently, demanding the Governor to be more involved in State issues. This demand presents a higher degree of responsibility on the State’s leader, requiring a higher degree of dependability when it comes to making decisions that effect its constituents.
EVANS v. WILSON:

A Man Seeking to Establish Paternity of a Child Born During the Marriage of the Mother to Another Man must Show that Genetic Testing Is in the Child’s Best Interest

By: Julia J. Messick

The Court of Appeals of Maryland held that in order to establish paternity of a child born during the marriage of the mother to another man, a man must show that genetic testing is in the child’s best interest. Evans v. Wilson, 382 Md. 614, 856 A.2d 679 (2004). In so holding, the court concluded that the determination of whether paternity testing of a child born during a valid marriage should be granted is governed by provisions under the Estates and Trusts Article, not under the Family Law Article. Evans, 382 Md. at 628, 856 A.2d at 688.

On October 7, 2000, Trina Wilson (“Wilson”) married Askahie Harris (“Harris”). During that marriage, Wilson had an affair with Brett Evans (“Evans”). On January 19, 2002, Wilson gave birth to a daughter, Kendi. Although both Harris and Evans were not present on the day of Kendi’s birth, Wilson invited Evans’s parents to visit her at the hospital. While at the hospital, Wilson prepared a birth announcement indicating that Evans was Kendi’s father, but the announcements were never sent.

Once home from the hospital, Wilson continued to communicate with Evans, though she claimed she knew that he was not Kendi’s father. Specifically, Wilson sent Evans a letter wishing him “Happy Parenting,” and on another occasion, sent Evans a birthday card from Kendi, which read, “Happy Birthday Daddy.” Despite these communications, at the time of this action, Evans had not seen Kendi since she was six weeks old. In contrast, Harris brought Wilson and Kendi home from the hospital, lived with Kendi, and supported her. Several months after her birth, Harris completed an Affidavit of Parentage wherein he was named Kendi’s father.

On December 2, 2002, Evans filed a Complaint for Order of Visitation in the Circuit Court for Baltimore City. In his answer, Wilson asserted that Evans was not Kendi’s father. On June 23, 2003, Evans filed a complaint seeking a determination of paternity. The circuit court denied Evans’s request and Evans appealed to the court of special appeals. Prior to any proceedings in that court, however,
the Court of Appeals of Maryland issued a *writ of certiorari* to decide whether Evans was entitled to the paternity testing he sought.

In analyzing this matter, the court of appeals addressed whether MD. CODE ANN., EST. & TRUSTS §§ 1-206, 1-208, or MD. CODE ANN. FAM. LAW §§ 5-1001—5-1048 should apply in paternity proceedings where the child at issue is born during a valid marriage. *Evans*, 382 Md. at 626-28, 856 A.2d at 686-88. Relying on *Turner v. Whisted*, 327 Md. 106, 113, 607 A.2d 935, 938 (1992), the court found that because Kendi was born during a valid marriage, the Estates and Trusts Article applied. *Evans*, 382 Md. at 628, 856 A.2d at 688.

In deciding that the Family Law Article was not applicable, the court reasoned that there is a presumption that a child born during a valid marriage is the product of that marriage. *Evans*, 382 Md. at 627-28, 856 A.2d at 687. The court explained that, in order to overcome this presumption, a man claiming to be the father of such a child must prove that granting paternity testing is in the “child’s best interest.” *Id.* at 628, 856 A.2d at 688.

In further reliance on *Turner*, the court cited factors to be considered in making a determination of the child’s best interest. *Evans*, 382 Md. at 628, 856 A.2d at 688 (citing *Turner*, 327 Md. at 116-17, 607 A.2d at 940). Some factors the court of appeals found significant were (1) the stability of the child’s home, (2) whether there is an intact family unit, and (3) the relationship between the child and the man presumed to be the father. *Evans*, 382 Md. at 628-29, 856 A.2d at 688.

Moreover, the court of appeals rejected Evans’s argument that recent amendments to the Family Law Article granting putative fathers an absolute right to demand genetic testing served to expand his right to establish paternity of Kendi. *Evans*, 382 Md. at 629, 856 A.2d at 688. The court determined that a “putative father” is “the alleged biological father of a child born out of wedlock.” *Evans*, 382 Md. at 633, 856 A.2d at 690-91 (quoting Black’s Law Dictionary, 623 (7th ed. 1999)). The court explained that because Kendi was born to a married mother, she was not born out of wedlock, so Evans could not be a putative father. *Evans*, 382 Md. at 629, 856 A.2d at 688.

The court, relying on *Stubbs v. Colandrea*, 154 Md. App. 673 at 689, 841 A.2d 361 at 370 (2004), distinguished that a putative father trying to exclude himself from child support responsibilities is entitled to genetic testing without proving that testing is in the best interest of the child, whereas a father trying to establish paternity is not guaranteed the same result. *Evans*, 382 Md. at 635, 856 A.2d at 692.
Relying on the United States Supreme Court case, *Michael H. v. Gerald D.*, 491 U.S. 110 (1991), the court of appeals also rejected Evans’s claim that his due process rights had been violated, holding that Evans did not have a constitutional right to a relationship with Kendi because she was born during Wilson’s marriage to Harris. *Evans*, 382 Md. at 641, 856 A.2d at 695. The court concluded that if the Family Law Article was expanded to include persons outside of marriage, the result could be devastating to the intact family unit. *Id.* at 636, 856 A.2d at 692. Additionally, the court reasoned that because § 5-1029 of the Family Law Article states that the court will have no discretion in whether or not to allow genetic testing, anyone claiming paternity could threaten the family unit. *Id.* at 632, 856 A.2d at 690-91.

*Evans v. Wilson* is critical to Maryland family law because it establishes the importance of an intact family unit. While the court protects the stability of a child’s family life, it may also deny a child the presence of a man who may be her biological parent. The rights of putative fathers who want to take responsibility for their children are now clearly limited. In order to prove that genetic testing is in the best interest of a child born during a marriage, putative fathers will have to show more than a mere suspicion of paternity. In this case, the court of appeals has taken a strong stance to ensure a stable home environment for children.
The Court of Appeals of Maryland held that the lower cost of raising a child in a different country or state does not justify a downward deviation from the child support guidelines, as set forth in sections 12-201—12-204 of the Family Law Article. Gladis v. Gladisova, 382 Md. 654, 856 A.2d 703 (2004). In a case of first impression, the court concluded that "a lower cost of living in the child’s locality is not a proper basis for deviating from the [g]uidelines." Id. at 662, 856 A.2d at 708.

Slavomir Gladis ("Gladis") married Eva Gladisova ("Eva") in the Slovak Republic in 1993. The same year, the couple’s daughter, Ivana, was born. Gladis moved to the United States in 1994, and he obtained an absolute divorce in 1998. The divorce decree granted custody of Ivana to Eva, and charged Gladis with Ivana’s general support, although no amount was specified.

In 2002, Eva filed a Petition to Establish Child Support in the Circuit Court for Baltimore City. Following a hearing, the Master issued a recommendation that Gladis pay $300.00 per month to Eva, which was $197.00 per month less than the amount prescribed by the guidelines. The Master reasoned that the downward deviation was in the best interest of the child, enabling her to benefit from her father’s income while allowing Gladis to meet the needs of his new family in the United States.

Both parties filed exceptions to the Master’s recommendation. Gladis claimed the Master incorrectly calculated the daughter’s monthly care and expenses at $275.88, as opposed to $233.00, by listing some items as monthly, rather than annual expenses. Eva argued that the Master erred by deviating from a strict application of the guidelines.

After a hearing, the court required Gladis to pay $225.00 per month in child support, reasoning that “applying the [g]uidelines is inappropriate when there is a wide disparity in the cost of living.” Id. at 660, 856 A.2d at 707. In response to Eva’s motion to amend, the court later altered its order and instructed Gladis to pay $497.00 per month pursuant to a strict application of the guidelines. Gladis filed a timely appeal.
However, prior to a hearing in the intermediate appellate court, the Court of Appeals of Maryland granted certiorari on its own initiative to determine whether the circuit court erred by strictly applying the guidelines in the instant case.

In order to determine whether a downward deviation from the guidelines is permissible when the child lives in a country with a lower standard of living, the court of appeals began its analysis by reiterating its previous holding in Goldberg v. Miller, 371 Md. 591, 603-04, 810 A.2d 947, 954 (2002), stating, “trial court[s] must adhere to the Legislature’s plan for calculating the amount and character of a child support award.” Gladis, 382 Md. at 662, 856 A.2d at 708. Thus, under MD. CODE ANN. FAMILY LAW §§ 12-202(a)(1), 12-204(d) (1990), it is mandatory that the child support guidelines be used to calculate the proper amount of support in all proceedings where the parents’ combined monthly income does not exceed $10,000.00. Id. Additionally, under MD. CODE ANN. FAM. LAW § 12-202(a)(2)(i) (1990), the amount of child support awarded as a result of strict application of the guidelines is presumptively correct unless it can be shown that the amount is unjust or inappropriate. Id.

No Maryland court has addressed the precise issue in the instant case—whether a disparity in standards of living in two geographic areas justifies a deviation from the guidelines. Id. at 665, 856 A.2d at 710. Moreover, the few out of state cases addressing this issue represent conflicting views on the subject. Id at 666-69, 856 A.2d at 710-12. Nevertheless, the court of appeals relied on two such cases in its analysis. Id. at 666, 856 A.2d at 710.

In the case of In re Marriage of Beecher, 582 N.W.2d 510, 514 (Iowa 1998), the Supreme Court of Iowa held that the higher cost of living in California, as opposed to Iowa, did not justify a departure from the guidelines. Id. Additionally, the court cited a case more on point, Edwards v. Dominick, 815 So.2d 236, 239 (La. App. 2002), in which a father claimed that disparate standards of living between South Africa and Louisiana are relevant in determining an award of child support; however, the court found application of the guidelines equitable to the parties and within the best interest of the child. Id. at 666-67, 856 A.2d at 710. Alternatively, other jurisdictions have held that a deviation from the guidelines is appropriate when parents enjoy disparate standards of living in different localities. Id. at 667, 856 A.2d at 710-11.

Although the court of appeals recognized the conflicting views of other jurisdictions, it found that deviation from the guidelines based on different standards of living was inconsistent with the Legislature’s intent when enacting Maryland’s child support law. Id. at 668, 856 A.2d at 711. Specifically, according to Voishan v. Palma, 327 Md. 318, 322, 609 A.2d 319, 321 (1992), the legislative purpose of the guidelines was to ensure the child...
receives and enjoys the same standard of living he or she would have experienced had the child’s parents remained together. *Gladis*, 382 Md. at 669, 856 A.2d at 712. The belief was that awarding child support based on the guidelines would meet the needs of the children, while improving consistency, equity, and efficiency. *Id.* at 668, 856 A.2d at 712. In *Voishan*, the court tried to reconcile these goals by holding that the trial court had discretion to award a presumptive minimum basic award when using guidelines in a case where the parents’ income exceeds the $10,000.00 limit; however, the Legislature did not cap the basic award at the upper limit of the scale. *Id.* at 669, 856 A.2d at 712 (citing *Voishan*, 327 Md. at 325, 609 A.2d at 323).

Analogizing the holding in *Voishan* to the instant case, the court of appeals concluded that although the child support award exceeded the minimum amount needed for care and support of Ivana, it was nonetheless within her best interest to enjoy the standard of living she would have experienced if her parents had not divorced. *Id.* Moreover, the guidelines limit the trial court’s need for factual findings, thereby avoiding inconsistent child support awards. *Id.* at 670, 856 A.2d at 712. The court of appeals reasoned that determining the precise value of currency in two different countries will lead to the inconsistent awards the Legislature hoped to avoid. *Id.* at 670, 856 A.2d at 713.

Further support exists in *Smith v. Freeman*, 149 Md. App. 1, 33, 814 A.2d 65, 84 (2002), where a professional football player argued that his child should not benefit from his recent salary boost because the child was not accustomed to her father’s wealthy economic status. *Gladis*, 382 Md. at 671, 856 A.2d at 713. Although the guidelines did not apply because the parties’ income exceeded $10,000.00 per month, the court in *Smith*, noted “many people have far more than they ‘need’ to survive, or even to live comfortably.” *Id.* at 671, 856 A.2d at 713 (quoting *Smith*, 149 Md. App. at 32, 814 A.2d at 83). Thus, the court in *Smith*, held that the “concept of ‘need’ is relative . . . and varies with the particular circumstances of the people involved.” *Gladis*, 382 Md. at 671, 856 A.2d at 713 (quoting *Smith*, 149 Md. App. at 33, 814 A.2d at 84).

In comparing the instant case to the holding in *Smith*, the court of appeals held that the advantages of Gladis’s economic position should flow to his child whether she lives in Maryland or Slovak Republic; thus, the guidelines apply regardless of the child’s geographical location. *Id.* at 672, 856 A.2d at 714. As a result, the court of appeals affirmed the circuit court holding that “the lower cost of raising a child in a different country or state does not justify a downward deviation from the guidelines;” therefore, the court below did not abuse its discretion in awarding child support that far exceeds the standard of living in the Slovak Republic, but satisfies the guidelines. *Id.* at 670, 856 A.2d at 713.
The court’s holding in *Gladis v. Gladisova* clarifies the Legislature’s intent that strict application of the child support guidelines ensures that child support awards reflect the actual cost of raising children instead of resulting in an insufficient award. In so holding, the court protects the best interest of the child by ensuring each child is provided with the best possible lifestyle within the means of the family structure. The protection also shields the court from a potential floodgate of child support modifications that could result if awards must be modified each time a custodial parent moves to a different state or country. Thus, use of the guidelines prevents disastrous results for both children and courts alike.
LEJEUNE v. COIN ACCEPTORS, INC:

The “Inevitable Disclosure” Theory Cannot Serve as a Basis for Granting Injunctive Relief Under the Maryland Uniform Trade Secrets Act

By: Mark Patrick Johnson

The Court of Appeals of Maryland held that the theory of “inevitable disclosure” could not serve as a basis for granting injunctive relief under the Maryland Uniform Trade Secrets Act (“MUTSA”). *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 849 A.2d 451 (2004). In so holding, the court concluded that the trial court, despite sufficient evidence to demonstrate past misappropriation of trade secrets, erred by issuing an injunction limiting future employment. *Id.* at 323, 849 A.2d at 472. The court of appeals vacated the circuit court’s injunction restricting employment, thus preserving Maryland’s policy in support of employee mobility. *Id.*

In 1993, William LeJeune (“LeJeune”) began working as a Sales and Field Service Representative with Coin Acceptors, Inc. (“Coinco”), selling currency equipment and performing field maintenance for Coinco customers. By 1997, LeJeune was promoted, and after Coinco’s restructuring in 2002, LeJeune’s job title changed to Area Account Manager, in which capacity he was primarily responsible for selling Coinco vending products in the region. While a Coinco employee, LeJeune gained an extensive understanding of Coinco’s products, pricing strategies, and business initiatives. Despite this knowledge and familiarity with company information, LeJeune never signed a non-compete or confidentiality agreement with Coinco.

In 2003, LeJeune accepted new employment with Mars, Coinco’s principal competitor, as an Amusement Original Equipment Manufacturer Manager responsible for sales in the Amusement
industry. Subsequently, LeJeune met with Coinco, informed his supervisor that he accepted employment with Mars, and returned his laptop computer and Coinco company documents. However, prior to the meeting, LeJeune, on three different occasions, transferred digital copies of Coinco budgeting software, specialty markets strategic plans, and other company documents from his laptop to compact disc. After transferring the files and software into his possession, LeJeune erased information from his laptop computer attempting to conceal his downloads. LeJeune alleged that he did not discuss or share any of Coinco’s information with Mars, and that he did not know that Coinco was concerned about his knowledge of confidential information.

On July 24, 2003, Coinco filed a complaint for injunctive and other relief in the Circuit Court for Anne Arundel County. After concluding the hearing on Coinco’s motion for a preliminary injunction, the trial judge determined it was likely that Coinco would be able to establish that Coinco’s technical information and business strategy qualified as trade secrets under the MUTSA, and that it would be inconceivable for LeJeune to perform his job at Mars without considering the information acquired while employed with Coinco. The trial judge enjoined LeJeune from working for Mars, and from using or disclosing any of Coinco’s confidential information because Coinco would be “irreparably harmed.” The court further determined that issuing an injunction would not run contrary to the public interest.

LeJeune appealed, and the Court of Appeals of Maryland, on its own initiative, granted certiorari. After providing the standard of review for preliminary injunctions, the court began its discussion of the first question presented—whether LeJeune misappropriated Coinco’s trade secrets. Id. at 300-307, 849 A.2d at 458-62. The court stated that the two requirements of a trade secret are: “the information must (1) hold ‘independent economic value’ because it is not ‘generally known’ to or readily ascertainable by others who stand to benefit economically if they use or disclose it, and (2) be the subject of reasonable efforts

The court determined that because Coinco’s cost and profit information would give Mars a clear economic advantage in the unique and competitive currency acceptor industry, the information had commercial and economic value, and satisfied the first prong of the trade secret test. *Id.* at 310, 849 A.2d at 464. Satisfying the second prong, the court stated that Coinco did not publicly release product information, and Mars would have needed to spend an excessive amount of resources to obtain the information. *Id.* Furthermore, Coinco reasonably protected the information, as Coinco entered non-disclosure agreements with clients, and labeled files as “confidential.” *Id.* at 310-11, 849 A.2d at 464-65.

Next, the court examined the misappropriation issue, discussing whether, “(1) the actual or threatened acquisition of a trade secret by improper means, or (2) the actual or threatened disclosure of a trade secret” occurred. *Id.* at 312, 849 A.2d at 466. The court of appeals agreed with the circuit court, which found that the trade secrets were acquired by improper means. *Id.* at 313-15, 849 A.2d at 466-67. The court stated that LeJeune selected specific confidential Coinco files containing trade secrets, and did not simply refuse to return files that were sent to him. *Id.* at 314, 849 A.2d at 467. Persuaded by LeJeune’s intent to hide his possession of the trade secrets, the court found the evidence sufficient to support the finding of misappropriation. *Id.* at 314-15, 849 A.2d at 467.

The second question presented to the court was whether to enjoin LeJeune from working based on the prospect that he would inevitably disclose confidential information. *Id.* at 315, 849 A.2d at 467. First, the court agreed that injunctive relief can not remedy past misconduct, but can only remedy future action. *Id.* The court recognized that courts outside of Maryland’s jurisdiction have utilized the “inevitable disclosure” theory to allow a company to guard confidential marketing strategies and secret technology. *Id.* at 318, 849 A.2d at 469. However, the court of appeals decided differently on this issue of first impression in Maryland. *Id.* at 322-23, 849 A.2d at 471-72.

Similar to California courts, the Court of Appeals of Maryland favored a public policy of employee mobility and vacated the preliminary injunction. *Id.* at 322, 849 A.2d at 471. The court found
that the employees were harmed by court injunctions that restricted not only disclosure of trade secrets, but also all employment. *Id.* at 323, 849 A.2d at 472. The court agreed that because Coinco did not sign a confidentiality agreement or a covenant not to compete with LeJeune, the “inevitable disclosure” doctrine should not be employed to proffer “an ex post facto covenant not to compete.” *Id.* at 321, 849 A.2d at 471 (quoting *Int’l Bus. Mach. Corp. v. Seagate Technology, Inc.*, 941 F.Supp. 98, 101 (D. Minn. 1992)). Therefore, the court rejected the “inevitable disclosure” doctrine because issuing an injunction rooted in the theory would alter the terms of employment and have the legal effect of rewriting employment contracts without permitting the employee to negotiate the individual terms. *Id.* at 322, 849 A.2d at 471.

In *LeJeune v. Coin Acceptors, Inc.*, the Court of Appeals of Maryland reaffirmed the policy in favor of employee mobility by not allowing employers to attain court-ordered benefits after employees leave their employment. Furthermore, the court expanded the pro-employee policy allowing employees to gather company trade secrets; courts will not base an inference of disclosure solely on exposure to trade secrets. The ruling in *LeJeune* painted a picture of employers taking advantage of employees by using the court system to obtain quasi-covenants not to compete. The court promptly rejected that picture, and in turn, refused to accept the theory of “inevitable disclosure.” By refusing to recognize the “inevitable disclosure” theory, the court may have shifted the pendulum too far in favor of the employees. This ruling may lead to employees taking advantage of their employers, using their trade secrets knowledge to force employers to compensate them for costly non-compete and confidentiality agreements.
Recent Developments

MOLÉ v. JUTTON:

A Patient Suing a Doctor for Medical Negligence Due to Lack of Informed Consent Is Not Entitled to a Jury Instruction on Battery when the Doctor Exceeds the Scope of Consent Given

By: April M. Urban

The Court of Appeals of Maryland held that a patient suing a doctor for medical negligence due to lack of informed consent is not entitled to a jury instruction on battery when the doctor exceeds the scope of consent given. *Molé v. Jutton*, 381 Md. 27, 846 A.2d 1035 (2004). In a case of first impression, the court concluded that a doctor must deliberately intend to deviate from the consent given by the patient in order for an action for battery to be sustained. *Id.* at 47, 846 A.2d at 1047.

Tasha Molé (“Molé”) consulted a doctor after discovering a painful lump in her breast. A sonogram revealed two cysts, one of which contained a mural nodule that required a biopsy to rule out the possibility of malignancy. On her doctor’s advice, Molé consulted a surgeon, Dr. Jutton, who attempted to aspirate the cyst; however, Dr. Jutton was unable to complete the procedure because Molé’s cyst was too tender to aspirate with a needle. As a result, Dr. Jutton recommended a surgical procedure to remove the nodule. Dr. Jutton explained the risks involved including post-operative infection.

Molé signed a consent form which explained that unknown conditions might be revealed during the procedure that could necessitate either an extension of the original procedure or a different procedure. Moreover, the consent form extended permission to Dr. Jutton to render additional treatment as necessary or advisable in the exercise of professional judgment. During the surgical procedure, Dr. Jutton removed tissue surrounding the two cysts and cut Molé’s milk ducts.

Molé filed an action in the Circuit Court for Anne Arundel County alleging medical negligence and battery. Her battery claim was premised on the doctor having exceeded the scope of consent by cutting the milk ducts leading to Molé’s left nipple. At trial, Molé requested that the court issue a jury instruction on battery, but her request was denied. The court did, however, provide instructions on
medical negligence and lack of informed consent. The jury returned a verdict in favor of Molé and awarded her $22,500.00.

Molé filed a timely appeal challenging the trial court’s refusal to instruct the jury on battery. However, prior to a hearing in the intermediate appellate court, the Court of Appeals of Maryland granted certiorari on its own initiative to determine whether a patient suing a doctor for lack of informed consent is entitled to a jury instruction on battery when the doctor exceeds the scope of consent given.

In order to determine whether a physician’s operation exceeding the scope of informed consent isbattery, the court of appeals began its analysis by reiterating its previous holding in Sard v. Hardy, 281 Md. 432, 379 A.2d 1014 (1977). Molé, 381 Md. at 39, 846 A.2d at 1042. In Sard, the court held that a claim under the doctrine of informed consent is correctly plead as a tort of negligence, not battery or assault. Id. (citing Sard, 281 Md. at 435, 379 A.2d at 1017).

The negligence-based doctrine of informed consent requires physicians to disclose material risks and available alternatives so the patient can make an informed decision about what should be done with his or her body. Id. at 40, 846 A.2d at 1043. In Sard, the patient sued her doctor after becoming pregnant following a bilateral tubal ligation. Id. (citing Sard, 281 Md. at 435, 379 A.2d at 1017). Sard alleged negligent performance of the procedure and lack of informed consent for the doctor’s failure to advise her that the procedure was not absolutely certain to succeed. Id.

The court of appeals disagreed with Molé’s argument that the doctrine of informed consent, as set forth in Sard and subsequent decisions, does not “rise to the level of stare decisis.” Molé, 381 Md. at 40, 846 A.2d at 1043. In fact, the court reaffirmed that the doctrine of informed consent as enumerated in Sard, was in fact a holding and not dicta. Id. However, the court agreed with Molé that no Maryland court has addressed the precise issue in the instant case—whether a doctor who exceeds the scope of consent in a medical procedure is committing battery. Id.

In deciding this issue of first impression, the court looked to the United States District Court for the District of Maryland. Specifically, the court in Robinson v. Cutchin, 140 F. Supp.2d 488 (D. Md. 2001), addressed the same issue presented in the instant case. Molé, 381 Md. at 44, 846 A.2d at 1045. Although not mandatory authority, the court of appeals found Robinson persuasive and chose to adopt the analysis and rationale from that case, rather than Sard. Id. at 46, 846 A.2d at 1046. In essence, the court aligned itself with the majority of courts that have addressed the issue in the instant case. Id.
In Robinson, a doctor performed a bilateral tubal ligation during an emergency caesarean section without informed consent. Id. at 44-45, 846 A.2d at 1045 (citing Robinson, 140 F.Supp.2d at 490). Robinson sued her doctor, alleging lack of informed consent and battery. Molé, 381 Md. at 45, 846 A.2d at 1045. The district court held that the “touching” of Robinson by her doctor was not battery because no proof existed that the doctor acted by “intending to cause a harmful or offensive contact.” Id. (quoting Robinson, 140 F.Supp.2d at 490). In fact, Robinson consented to the initial touching during the emergency operation, which was not harmful because it did not cause any additional physical pain, injury, or illness more than the pain attributed to the original procedure. Molé, 381 Md. at 46, 846 A.2d at 1046. Most importantly, Robinson testified that she was not aware that the procedure occurred until twenty-one months after it transpired. Id. Additionally, the court reasoned that the procedure did not offend Robinson’s reasonable sense of dignity because she had previously given birth to six children. Id. (citing Robinson, 140 F.Supp.2d at 493).

Furthermore, the court of appeals found significant the case of Cobbs v. Grant, 502 P.2d 1 (1972). Molé, 381 Md. at 46, 846 A.2d at 1046. In Cobbs, the court held that the intentional tort of battery is reserved for instances where either no consent is obtained, or the patient consents to one treatment but a substantially different one is performed. Id. at 47, 846 A.2d at 1046-47 (citing Cobbs, 502 P.2d at 8). Moreover, the intent to deviate from the consent given must be deliberate, as opposed to merely failing to meet the duty of care to disclose pertinent information. Molé, 381 Md. at 47, 846 A.2d at 1047 (citing Cobbs, 502 P.2d at 8). In the latter case, the action should be pleaded in negligence. Molé, 381 Md. at 47, 846 A.2d at 1047.

Applying the findings in the previously mentioned cases to the instant case, the court of appeals concluded that Dr. Jutton inadequately disclosed the potential risks associated with the procedure, namely, that the required incision may result in the cutting of milk ducts. Molé, 381 Md. at 47, 846 A.2d at 1047. However, Molé consented to the procedure that was performed and to any necessary extension that the doctor deemed medically necessary. Id. Accordingly, the court of appeals reasoned that the cutting of the milk ducts was a necessary part of the expected procedure, thus it was not unrelated or independent from the consent given. Id. Consequently, the case was one of lack of informed consent, not battery. Id. As a result, the court of appeals affirmed the trial court’s ruling holding that the denial of Molé’s request for a jury instruction on battery was proper and created no reversible error. Id.
The court’s holding in *Molé v. Jutton* distinguishes between a situation in which the patient alleges that there was no consent for the touching, and one in which consent was not informed. In so holding, the court’s distinction ensures that patients are able to make informed decisions about what happens to their bodies while protecting doctors from rising insurance rates resulting from lawsuits. In particular, unlike an informed consent case where the patient must show that the injury involved a material risk that was not explained, an action for battery does not require such expert testimony and is much easier to prove. Thus, the court’s distinction protects doctors and patients alike from rising costs associated with medical malpractice litigation, and also results in decreased medical fees for patients.
Recent Developments

SIFRIT v. STATE:

The State May Present Inconsistent Legal Theories at Separate Trials for a Single Crime if the Underlying Facts Are Consistent

By: Victoria Emanuele

In a case of first impression, the Court of Appeals of Maryland held that separate trials for the same crime in which inconsistent theories of the case are presented does not violate a defendant’s right to due process so long as the underlying facts presented in both cases are consistent. Sifrit v. State, 383 Md. 77, 857 A.2d 65 (2004).

Erika Sifrit (“Erika”), and her husband, Benjamin Sifrit (“Benjamin”), were tried separately and convicted of theft and murder. Both convictions arose out of events that occurred in Ocean City, Maryland over the 2002 Memorial Day weekend, resulting in the deaths of Martha Crutchley (“Martha”) and Joshua Ford (“Josh”).

According to the facts of this case, Erika and Benjamin had befriended Martha and Josh on a bus while headed for Seacrets, a nightclub. Erika and Benjamin did not have exact change to pay the fare, so Martha and Josh provided the fare in exchange for a round of drinks at the nightclub. Erika and Benjamin agreed, and the couples spent the rest of the evening together at Seacrets.

Later that weekend, police responded to an alarm call from the Hooters Restaurant and Bar on 122nd Street in Ocean City. When they arrived, police found Erika and Benjamin loading Hooters merchandise into their car. The couple was placed in handcuffs and searched. Police found a 9 millimeter handgun and a knife on Benjamin, a fully-loaded .357 magnum revolver and knife on Erika, and a .45 caliber gun, ski masks, flex cuffs, and tape in the car. The couple was arrested.

Subsequent to the arrest, Erika asked police to retrieve anti-anxiety medication from her purse. In locating the medication, police discovered four spent .357 magnum shell casings and one live round, as well as identification cards for Martha and Josh. Fearing for the safety of Martha and Josh, police searched the Sifrit’s condominium and discovered photographs of Martha and Josh, a bullet covered in blood and tissue (later determined to be Josh’s), a key to the condominium, several blood stains (later determined to be Martha’s and Josh’s), and evidence that the condominium had been recently cleaned and painted. Erika later confessed to police that she and...
Benjamin cut-up Martha and Josh, placed their body parts in garbage bags, then disposed of the parts in several dumpsters just across the Delaware border.

Erika and Benjamin were arrested for the murders of Martha and Josh. Subsequent to their arrests, Erika entered into a Memorandum of Understanding (“MOU”) with the Office of the State’s Attorney wherein the State’s Attorney agreed not to prosecute Erika for homicide, as long as she testified against Benjamin and revealed the location of the victims’ bodies. The agreement was conditioned upon Erika submitting to, and passing, a polygraph exam. Although Erika led police to some of the victims’ remains and provided details regarding the murders, the MOU was not honored because during a pre-polygraph test interview, Erika admitted to being involved in the murders, specifically, to giving commands to Benjamin. As a result of her inculpatory statements, Erika was charged with the murders of Martha and Josh.

Due to extensive pre-trial publicity, Erika’s case was removed from the Circuit Court for Worcester County and transferred to the Circuit Court for Frederick County. The circuit court convicted Erika of the first-degree murder of Josh, the second-degree murder of Martha, and theft related to the burglary at Hooters. She was sentenced to life in prison plus twenty years. Erika appealed and the Court of Appeals of Maryland granted certiorari.

Erika first claimed that the State violated her right to due process by presenting factually inconsistent theories of the case at her trial and that of her husband, Benjamin. She asserted four ways in which she believed the State’s case differed in the two trials and in which these differences rose to the level of a due process violation. *Id.* at 106-107, 857 A.2d at 82. These differences were: (1) ownership and possession of the murder weapon, (2) the testimony of Michael McInnis, a friend of Benjamin, called by Erika in her case-in-chief, (3) the testimony of Melissa Seling, a witness who befriended the couple in Ocean City just a few days after the murders of Martha and Josh, and (4) the number of shots fired by Erika and Benjamin, respectively. *Id.*

Looking to other jurisdictions for guidance, the court addressed each of Erika’s points, and held that none of the differences in the two trials alleged by Erika went to the State’s underlying theory of the case, which remained consistent throughout both trials. *Id.* at 107, 857 A.2d at 82. The theory was that Erika and Benjamin committed the crimes together. *Id.* With respect to the issue of ownership and possession of the murder weapon, the court reasoned that the identity of the actual owner of the guns was irrelevant.
because both Erika and Benjamin were in possession of the guns and were present at the time the crime was committed. \textit{Id.} Regarding the testimony of McInnis and Seling, the court reasoned that while the State attempted to create different inferences through the use of these witnesses at the two trials, their testimony was fundamentally consistent throughout both trials, and therefore, did not amount to a due process violation. \textit{Id.} at 113, 857 A.2d at 85-86. Finally, on the issue of the number of shots fired by Erika and Benjamin, the court concluded that whether Erika’s participation in the murders was limited to firing shots, or simply to aiding Benjamin luring Martha and Josh to their deaths, it did not affect her culpability. \textit{Id.} at 83, 857 A.2d at 108. Under either theory, a jury could find both participants guilty of murder. \textit{Id.}

The court concluded that the differences raised by Erika were differences in emphasis and inference, but in no way exculpated the other defendant. \textit{Id.} at 107, 857 A.2d at 82. According to the court, evidence tending to show Benjamin’s guilt was not necessarily relevant to show Erika’s guilt. \textit{Id.} As such, the court determined that when the evidence remains consistent with underlying facts, any inconsistent emphasis or inference will not amount to a due process violation. \textit{Id.}

In \textit{Sifrit v. State}, the court of appeals held that the State is permitted to present inconsistent theories at the severed trials of co-defendants so long as the underlying facts are consistent. Moreover, where a defendant violates the terms of a plea agreement, the State is no longer bound by the terms of that agreement.
TIERCO MARYLAND, INC. v. WILLIAMS:

Injection of Racial Considerations Is Improper when Statements Are Irrelevant to the Causes of Action Pledged or Relief Sought

By: John C. Morton

The Court of Appeals of Maryland held that a trial court’s denial of a motion for mistrial, where attorneys made improper and irrelevant race-based arguments for the purpose of inflaming the passions of jurors, was an abuse of discretion. Tierco Maryland, Inc. v. Williams, 381 Md. 378, 849 A.2d 504 (2004). Specifically, the court of appeals ruled that such statements are improper when not related to the theory of recovery. Id. at 381, 849 A.2d at 506.

On July 31, 1999, the Williams family went to Six Flags America (“Six Flags”), an amusement park in Prince George’s County. After several hours of enjoying the amusement park, five family members (“Respondents”), including four-year old, Shaniqua, attempted to ride the Typhoon Sea Coaster. Once Respondents seated themselves in the ride, a ride attendant approached them and explained that Shaniqua was not tall enough to go on the ride. The ride attendant further informed them that the ride would not be restarted until she disembarked. They refused to get off the ride and insisted that Shaniqua be allowed to stay on the ride. Respondents claimed that they had seen white children smaller than Shaniqua on the ride. At some point, they agreed to disembark the ride.

There are varying accounts of what occurred next, but it is undisputed that an altercation broke-out, and Respondents were physically restrained and handcuffed (with the exception of Shaniqua), after which they were taken to the park’s security headquarters.

Respondents sued Six Flags in the Circuit Court for Prince George’s County for assault, battery, false imprisonment, and negligent supervision. The jury collectively awarded Respondents $1,000,000 in compensatory damages and $1,500,000 in punitive damages. However, the trial judge vacated the punitive damages award. Judgment was ultimately entered against Tierco Maryland, Inc. (“Tierco”), the company which operates the amusement park, and was responsible for the Six Flags employees’ actions. Tierco appealed
to the Court of Special Appeals of Maryland, which reinstated the original jury verdict, including the punitive damages award.

The Court of Appeals of Maryland granted certiorari to consider several questions, including whether the trial court erred in denying Tierco’s motion for judgment notwithstanding the verdict (“JNOV”), motion for new trial, or in the alternative, motion for remittitur. Tierco argued that it was prejudiced by Respondents’ counsel’s repeated acts of undertaking race-based arguments to sway and impassion the minds of jurors. Tierco asserted that the large damages award, in light of Respondent’s de minimus injuries, was evidence of its position. Id. at 385-86, 849 A.2d at 509.

In analyzing this matter, the court of appeals began by acknowledging that, at trial, Respondents sought “to cast as an act of racial discrimination at least the conduct of Six Flags and its employees in not extending to an African-American family the same benefits allegedly extended to white patrons.” Id. at 401, 849 A.2d at 518. The court found the maltreatment of individuals on the basis of race inexcusable and, “if properly pled, actionable.” Id. However, the court explained, such claims cannot be the focus of a trial where [those claims are] not relevant to proof of any element of the theories of recovery.” Id. The court noted that Respondents did not assert an allegation of racial discrimination, or even mention race, anywhere in their complaint or in any pre-trial motion. Id. at 403, 849 A.2d at 519. Yet, the court stated, “race was injected as an issue from the beginning of the trial.” Id. at 404, 849 A.2d at 520. In reviewing the record, the court of appeals found approximately sixty-three references to African-Americans and racism against African-Americans. Id. Upon review of the record, the court stated, “[s]ome Respondents, Respondents’ counsel, and several of Respondents’ non-party witnesses apparently intended to convey to the jury an explicit racial animus element attributed to at least certain of Petitioner’s alleged employees.” Id. at 406, 849 A.2d at 521.

The court concluded that racial inferences are improper when used to inflame the jury; “[s]uch statements, ‘if irrelevant and unjustified and calculated or tending to arouse racial, national, or religious prejudice or feeling, [are] universally condemned.’” Id. at 409, 849 A.2d at 523 (quoting C.R. McCorkle, STATEMENT BY COUNSEL RELATING TO RACE, NATIONALITY, RELIGION IN CIVIL ACTION AS PREJUDICIAL, 99 A.L.R.2d 1249, 1254 (1965)). In so concluding, the court of appeals determined that, in order to be properly introduced at trial, racial inferences must be relevant to the cause(s) of action pled or the relief sought. Id. at 410, 849 A.2d at 523. With respect to the instant matter, the court opined, “[t]he ultimate question is whether
the prejudice was so great that it denied Tierco a fair trial.” *Id.* at 413, 849 A.2d at 526. The court answered that question in the affirmative. *Id.*

Upon these findings, the court of appeals found the million-dollar verdict of the trial court excessive, as there was no evidence of wrongful confinement or severe permanent physical or mental injuries. *Id.* at 408, 849 A.2d at 522. The damages, combined with the number of references to race, led the court of appeals to conclude that there was a significant probability that the jury’s verdict was improperly influenced by racial considerations. *Id.* at 409, 849 A.2d at 523. Notably, the court reached this decision even though Tierco failed to object to Respondents’ race-based arguments during trial, and therefore, arguably failed to preserve the record in this regard. *Id.* at 416-17, 849 A.2d at 527. However, the court still found error in the instant matter due to the extreme and rare circumstances of this case. *Id.*

*Tierco Maryland, Inc. v. Williams* sets a very stringent requirement upon the litigation of cases in the State of Maryland. Unless involved in an element of the claim, race should not be mentioned, except for the limited purpose of description, where necessary. Should a party otherwise inject race into argument, courts will most likely strike such comments for fear of being found to have abused their discretion. If a judge does not address such argument/testimony, the unoffending party may have very strong grounds for JNOV.
Recent Developments

TWEEDY v. STATE:

**A Trial Judge May Not Impose a Sentence Greater than the Outlined Punishment of an Accepted Plea Agreement, even when the Added Condition Immediately Follows the Defendant’s Acceptance**

By: James Hanratty

The Court of Appeals of Maryland held that a trial judge’s imposition of a sentence greater than one already accepted in a plea agreement is an illegal sentence. *Tweedy v. State*, 380 Md. 475, 845 A.2d 1215 (2004). A trial judge is, therefore, prohibited from adding any additional conditions to a plea agreement after a defendant has assented to the terms of the deal, even if the judge’s added conditions immediately follow a defendant’s consent. *Id.*

Millard Tweedy ("Tweedy") was indicted by a Baltimore City Grand Jury on several narcotics charges, including possession with the intent to distribute. Subsequent to the indictment, Tweedy appeared in the Circuit Court for Baltimore City and entered a guilty plea for possession with the intent to distribute. Tweedy’s counsel advised him of the terms of the plea, specifically, that in exchange for his guilty plea, Tweedy’s sentence would be limited to five years with all but six months suspended. As an additional provision, Tweedy’s sentence would be further reduced if he agreed to perform certain remedial activities prior to the sentencing date. Tweedy verbally agreed to the above-stated terms. Thereafter, the trial judge ruled, if Tweedy failed to appear for sentencing, his sentence would be increased to the full five-year term. Tweedy failed to appear for sentencing and the trial judge entered a sentence of five years.

Tweedy filed a Motion to Correct an Illegal Sentence and requested that, pursuant to the terms of the plea agreement, the five-year sentence be suspended except for six months. The trial judge denied Tweedy’s motion without a hearing. Thereafter, Tweedy filed a timely appeal to the Court of Special Appeals of Maryland, which upheld the trial court’s decision in an unreported opinion. The Court of Appeals of Maryland granted *certiorari* to consider whether a trial judge may impose a sentence greater than that outlined in an accepted plea agreement.
The court of appeals began its analysis by comparing plea agreements to contracts, noting that neither may be “unilaterally broken with impunity or without consequence.” *Id.* at 482, 845 A.2d at 1219. The court explained that plea agreements are commonly accepted procedures throughout the country, which have been recognized by the Maryland General Assembly by way of Maryland Rule 4-243(c). *Id.* at 484-85, 845 A.2d at 1220-21. This Rule states, “the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement.” *Id.*

Tweedy contended that he accepted the plea agreement before the trial judge supplemented it with the added requirement of Tweedy’s presence. *Id.* at 483, 845 A.2d at 1219-20. By contrast, the State argued, the plea had not yet been accepted by the court; therefore, the trial judge was free to compel Tweedy’s presence at sentencing as an additional condition of the agreement. *Id.* The State further argued that Tweedy’s failure to object to the added term operated as an implied consent. *Id.*

The court of appeals focused on the chronology of the trial procedures to establish when the plea agreement was accepted. *Id.* at 486, 845 A.2d at 1221. The court found Tweedy assented to the terms of the agreement, the court accepted the plea agreement, and the trial judge advised Tweedy of the consequences of his failure to appear at sentencing. *Id.* Thus, the additional increased punishment occurred after the plea was accepted and was, therefore, illegal. *Id.* (Emphasis added). In this regard, the court of appeals recognized that conditions requiring appearance at sentencing are valid if the plea agreement is presented to the defendant and the plea agreement is accepted. *Id.* at 486-87, 845 A.2d at 1221-22.

Upon this finding, the court of appeals granted Tweedy’s request that the original plea agreement be specifically performed. *Id.* at 489, 845 A.2d at 1223. The court stated, “it is well settled that where the defendant has not received the benefit of a plea bargain to which he is entitled, the defendant may elect to have the bargain specifically enforced or withdraw the guilty plea.” *Id.* at 488, 845 A.2d at 1222. Moreover, even though the present case involved a court’s failure, not a prosecutor’s failure, to uphold a plea agreement, the defendant’s options remained the same. *Id.* at 489, 845 A.2d at 1223.

As an additional matter, in *dicta*, the court expressed its concern over the trial court’s decision to continue with sentencing despite Tweedy’s absence. *Id.* at 498, 845 A.2d at 1228. The court explained that sentencing in absentia is contrary to a criminal defendant’s right to be present at every stage of their trial. *Id.* at 490, 845 A.2d at 1225. The court of appeals also stated that sentencing in
absentia deprives a defendant of the opportunity to explain his/her absence, thereby limiting the evidence gathering function of the trial court. Id. at 490, 845 A.2d at 1224. The court utilized the test established in Pickney v. State, 350 Md. 201, 711 A.2d 205 (1998), for when a defendant can waive his/her right to be present. Id. at 493, 845 A.2d at 1226. The test requires that the defendant know of the time and place of the proceeding, and that nonappearance be knowing and deliberate. Id. at 493, 845 A.2d at 1226. The court must then balance the interests of efficient criminal justice against the rights of the defendant. Id. The court of appeals found that only in “extraordinary cases” after analyzing all of the “relevant circumstances” should in absentia proceedings be permitted. Id. The trial court’s failure to investigate the reasons for Tweedy’s absence and the court’s refusal to employ alternative methods to compel his appearance were particularly troublesome for the court of appeals. Id. at 498-99, 845 A.2d at 1228-29.

The concurrence by Judge Harrell centered on the issue of in absentia sentencing and questioned the methodology the majority employed to invalidate Tweedy’s sentence. Id. at 500-01, 845 A.2d at 1229-30. The concurrence shared the majority’s disfavor of in absentia criminal proceedings, but favored a holistic view of plea acceptances, rather than the majority’s concentration on a “particular part” of the plea procedure. Id.

In Tweedy v. State, the court of appeals’ view of when a plea is accepted is based on a rigid, compartmentalized analysis of criminal proceedings. The court of appeals has established a protocol which requires that all terms of a plea agreement be stated before the defendant accepts the offer. This standard will theoretically protect defendants from harsher sentences after they have pled guilty, but the practical effects of this decision may lead to an overemphasis on procedure. If a judge inadvertently forgets to add a term to the agreement before the defendant accepts, the omitted term is eliminated. This standard may prove to be too onerous for trial judges, who are often faced with large dockets and hectic timetables.
Recent Developments

YOX v. TRU-ROL, CO:

The Court of Appeals of Maryland Established a Rule for Determining when the Statute of Limitations Will Begin to Run for Workers’ Compensation Claims Arising out of Occupational Deafness

By: Ayodeji O. Badaki

In Yox v. Tru-Rol Co., 380 Md. 326, 844 A.2d 1151 (2004), the Court of Appeals of Maryland held that claims for compensation stemming from occupational deafness must be filed within two years after the date when the employee (1) first suffered the requisite degree of hearing loss; and (2) first had actual knowledge that the disablement was caused by the employment. Id. at 328, 844 A.2d at 1152. In establishing this two-part test, the court clarified uncertainty surrounding occupational deafness claims in Maryland, and set forth the criteria under which the statute of limitations on such claims will begin to run. Id.

Arnold C. Yox (“Yox”) worked for Tru-Rol Company, Inc. (“Tru-Rol”) for more than forty-seven years as a press operator. Throughout his employment, Yox was exposed to loud noise. In September 1987, Yox visited an ear, nose, and throat specialist seeking treatment for hearing loss and throat pain. The tests conducted by the specialist in 1987 revealed that Yox suffered hearing loss significant enough to rise to the level of compensable hearing loss under Maryland’s Workers’ Compensation laws. Yox acknowledged that he was aware in 1987 that his hearing loss was directly related to his employment, but continued to work for Tru-Rol until 1999. Yox did not receive any further medical attention until 2000.

In July 2000, Yox filed a workers’ compensation action against Tru-Rol claiming occupational hearing loss due to prolonged exposure to industrial noise. In response to this claim, Tru-Rol raised a statute of limitations defense, pursuant to Md. Code Ann., Lab. & Empl. § 9-711 (“Section 9-711”), asserting that Yox’s claim was barred because it was brought more than two years after Yox first had actual knowledge that the hearing loss was caused by the employment. The Workers’ Compensation Commission (“Commission”) determined that the test for occupational deafness is whether there was a disablement and whether the employee knew he had a hearing loss
attributable to his employment. The Commission further determined that because the record revealed an affirmative answer to both, Yox’s claim was barred by the statute of limitations.

Thereafter, the Circuit Court for Baltimore County reversed the decision of the Commission on grounds that the Section 9-711 limitation does not begin to run until the hearing loss gives rise to the incapacity to work. The circuit court found that because Yox did not suffer any wage loss or earning impairment, his hearing loss did not give rise to “incapacity to work” and the limitations period, under Section 9-711, did not begin to run. The court of special appeals reversed the circuit court’s judgment, holding that the limitations period in an occupational deafness case begins to run when the hearing loss becomes compensable under MD. CODE ANN., LAB. & EMPL. § 9-505 (“Section 9-505”), or when the employee first has actual knowledge that the disability was caused by the employment. The Court of Appeals of Maryland granted certiorari to review the court of special appeals’ decision.

The court began its analysis by examining the law in Maryland regarding occupational deafness. Id. at 330-36, 844 A.2d at 1153-57. In so doing, it paid particular attention to three sections of the Labor & Employment Article of the Maryland Code: Section 9-502 (regarding compensation for occupational disease), Section 9-505 (specifically dealing with occupational deafness as an occupational disease) and Section 9-711 (the statute of limitations provision for claims arising out of occupational disease). Id. at 336, 844 A.2d at 1156-57.

The court noted that Section 9-502 is the general section requiring compensation for injuries due to occupational disease. Id. at 335, 844 A.2d at 1156. Section 9-502 specifically requires an employee seeking compensation for occupational disease to be “disabled,” as defined under Section 9-502. Id. Disablement under Section 9-502 is defined as “the event of a covered employee becoming partially or totally incapacitated: (1) because of an occupational disease; and (2) from performing the work of the covered employee in the last occupation in which the covered employee was injuriously exposed to the hazards of the occupational disease.” Id.

The court noted, however, that under Section 9-505, occupational deafness claims do not share the same “disablement” requirement as all other occupational disease claims. Id. at 337, 844 A.2d at 1157. Section 9-505 requires an employer to provide compensation to a covered employee for hearing loss due to industrial noise in the frequencies of 500, 1,000, 2,000, and 3,000 hertz. Id. at 336, 844 A.2d at 1157. The court of appeals observed that
Section 9-505 makes no mention at all of “disablement,” but only requires a certain level of hearing loss be present in order for a covered employee to be entitled to compensation. *Id.* Given this language, the court reasoned, the definition of “disabled” provided under Section 9-502 does not apply to Section 9-505 claims for occupational deafness. *Id.* at 337, 844 A.2d at 1157.

The court next attempted to reconcile the provisions of Section 9-505 with the statute of limitations provisions in Section 9-711. *Id.* at 336, 844 A.2d at 1157. Section 9-711 provides that all compensation claims stemming from occupational disease must be filed either within two years after the date of “disablement” or death, or within two years after the date when the covered employee or the dependents of the covered employee first had actual knowledge that the “disablement” was caused by the employment. *Id.* The court reasoned that although Section 9-505 makes no mention of “disablement” directly, the specified levels of hearing loss detailed in Section 9-505, in effect, set forth an objective standard for determining “disablement” for the purpose of establishing the commencement of Section 9-711’s statute of limitations. *Id.* at 337, 844 A.2d at 1157.

The court held that, with regard to occupational deafness, Section 9-711’s statute of limitations must be read to mean that a claim for occupational hearing loss must be filed within two years after the date when the employee (1) first suffered the requisite degree of hearing loss (as defined in Section 9-505), and (2) first had actual knowledge that the disablement was caused by the employment. *Id.* at 338, 844 A.2d at 1158. Utilizing this interpretation of Section 9-711, the court of appeals held that Yox’s claim was properly rejected because Yox suffered hearing loss under Section 9-505, and had actual knowledge that this hearing loss was caused by his employment almost thirteen years before he filed his claim. *Id.*

*Yox v. Tru-Rol* marks an important clarification of Maryland law regarding workers’ compensation cases stemming from occupational deafness. Before *Yox*, the language of Section 9-505 appeared to excuse occupational deafness claims from the two year limitations period applicable to all other occupational disease claims. Plaintiffs claiming occupational deafness were able to bring claims for an indefinite period after the onset of their work-related hearing loss. *Yox*, however, establishes a clear rule under which commencement of the statute of limitations for occupational deafness claims can be easily identified.
On January 22, 2004, the Honorable Clayton Greene, Jr., was sworn in as an Associate Judge of the Court of Appeals of Maryland. Judge Greene’s impressive professional career has encompassed private practice, as well as many years of dedicated public service to the citizens of Maryland.

As the newest member of the court, he represents the Fifth Appellate Circuit – Anne Arundel, Calvert, Charles, and St. Mary’s Counties – and has been a citizen of Anne Arundel County for his entire life. He was born in Glen Burnie, Maryland, and attended Northeast High School in Pasadena, Maryland. He received a Bachelor of Arts degree from the University of Maryland, College Park in 1973, and a Juris Doctorate from the University of Maryland School of Law in 1976. He has been a member of the Maryland Bar since 1977.

Judge Greene began his law career as an Assistant County Solicitor for Anne Arundel County. For ten years, he practiced law as a solo practitioner. He also served as an Assistant Public Defender for Anne Arundel County from December 1978 to August 1985, and Deputy Public Defender for Anne Arundel County from September 1985 to March 1988.

In 1988, he was appointed, by Governor William Donald Schaefer, to the District Court of Maryland for Anne Arundel County, and served as an Associate Judge from March 1988 to December 1990. In December 1990, he was appointed Administrative Judge of the District Court of Maryland for Anne Arundel County, and served in that capacity until he was appointed Associate Judge of the Circuit Court for Anne Arundel County in October 1995 by Governor Parris N. Glendenning. On November 7, 1996, he was appointed Administrative Judge for the Fifth Judicial Circuit and Administrative Judge for the Anne Arundel County Circuit Court.

On January 4, 2002, he was appointed by Governor Parris N. Glendenning to the position of Associate Judge on the Court of Special Appeals of Maryland, and served in that capacity until his appointment to the Court of Appeals of Maryland by Governor Robert L. Ehrlich, Jr., on January 22, 2004.

Reflecting upon his role as the newest member of the court, Judge Greene states, “the biggest challenge is budgeting my time. I am committed to the work of the court, committee work, community
and family. It is not unusual for me to spend 12, 16 or 18 hours a day reading. I devote a lot of my time on the weekends to reading and writing. This past weekend, my only time outdoors was to pick up the newspapers! My goal, however, is to establish greater balancing of my workload, and reduce the reading and writing to no more than 6-to-8 hours a day. My ultimate goal is to devote a greater portion of every day to thinking.”

Judge Greene offers the following advice to attorneys appearing before the court: “Know your case better than any member of the court. Your brief and oral argument combined should in essence persuade the ultimate opinion of the court. In other words, what you are telling us should be how we should write the opinion. This is no easy task, but it is a most effective approach to appellate advocacy. Second, remember that oral argument is a colloquy. Please do not turn it into a lecture.”

Despite the demands of his job, Judge Greene remains active in educating young people in the area of law. He has served as an adjunct professor at Anne Arundel Community College in the paralegal studies, program and has participated in the Judicial Outreach Program, which provides assistance to students and organizations in Maryland. He also lectures at the Judicial Institute of Maryland.

Judge Greene’s achievements and activities provide insight to his dedication to the legal system as a whole, and in particular, to the Maryland judiciary. He has served as a co-chairperson of the Ad Hoc Committee for Implementation of Family Law Division, and was a member of the Conference of Circuit Court Judges, the Circuit Court Judges’ Association, and the Administrative Judges’ Committee. He has served on the Court of Appeals Standing Committee on Practice and Procedure, and was a Sub-Committee member and Chairman of the District Court Sub-Committee from 1991 to 1995.

He has also actively participated in his community for many years as an assistant coach of the St. Jane Frances Clinic Soccer League, and as coach and assistant basketball coach for Arthur Slade Regional Catholic School and the Severna Park Green Hornets, respectively. He has been a guest speaker for youth and senior citizens on Careers Day and Law Day, and has spoken in elementary and secondary schools in Anne Arundel County, Prince George’s County, and Baltimore City on a variety of topics. Additionally, he has served as a Mock Trial Judge in a citizenship law-related education program, and has taught MICPEL trial advocacy courses. He is also active on an annual basis with the Military Youth Corp. Academy of Aberdeen, where he mentors young people.
Judge Greene is a member of the Anne Arundel County Bar Association, the Maryland State Bar Association, the District of Columbia Bar Association, and a former Barrister, American Inns of Court (Annapolis Chapter). Throughout his career, he has been admitted to practice law before the Court of Appeals of Maryland, the United States District Court for the District of Maryland, the United States Bankruptcy Court, and the Court of Appeals for the District of Columbia.

Many organizations have honored and recognized him throughout his career. In 1987, he received the Public Service Award from the University of Maryland, and in 1988, he received a Governor’s Citation. One year later, he received the Civic Betterment Award from Frontiersmen’s International, and in 1995, he received the Morris H. Blum Humanitarian Award. In 2002, he received the Distinguished Citizenship Award from the Mayor and City of Annapolis.

Upon his appointment to the Court of Special Appeals of Maryland, Judge Greene received an award from the Maryland Senate, the House of Delegates, and the Sheriff of Anne Arundel County for his appointment to the Court of Special Appeals, and in 2002, he received an award from the Clerk of the Circuit Court for Anne Arundel County in recognition of his service as a judge to the citizens of Maryland.

In his spare time, Judge Greene enjoys playing tennis, basketball, alto-saxophone, and the clarinet.