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Impeachment and Rehabilitation under the Maryland Rules of Evidence: An Attorney's Guide

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**IMPEACHMENT AND REHABILITATION UNDER
THE MARYLAND RULES OF EVIDENCE:
AN ATTORNEY'S GUIDE**

Paul W. Grimm†

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I. INTRODUCTION

Broadly viewed, all trial evidence falls into one of four categories: testimonial, documentary, real, or demonstrative. Through these four types of evidence attorneys hope to persuade the finder of fact to accept their theory of the case. Although each type of evidence is important, most lawyers regard the elicitation of testimonial, or spoken-word evidence, as the most challenging aspect of trial. Conducting good direct and effective cross-examination is difficult because it always involves the element of unpredictability that accompanies any process which relies on the human element.

The goal of direct examination is to have a credible witness tell a truthful story that is understandable, sympathetic, and therefore persuasive. Impeachment is the process by which the opposing party seeks to undermine the credibility of the witness through examination or the introduction of extrinsic evidence, designed to directly attack, or at least diminish, the believability of the witness. Rehabilitation is the process by which the proponent of a witness's testimony attempts to undo any damage done to the believability of the witness through impeachment.

The key to the entire evidentiary process is, of course, persuasion. Legal publications are full of articles that attempt to explain how juries are persuaded. While these articles are undoubtedly useful, no one has been able to substantially improve on Aristotle's theory that when the spoken word is involved, persuasion occurs as a result of three interrelated concepts: *ethos*—the ethical appeal or character of the speaker, *pathos*—the emotion, compassion, or sympathy of the subject matter, and *logos*—the spoken word, or logic.¹ Thus, for

1. Of the modes of persuasion furnished by the spoken word, there are three kinds. The first kind depends on the personal character of the speaker; the second on putting the audience into a certain frame of mind; the third on the proof, or apparent proof, provided by the words of the speech itself. Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others Secondly, persuasion may come through the hearers, when the speech stirs their emotions. Our judgments when we are pleased and friendly are not the same as when we are pained and hostile Thirdly,

example, a sympathetic story told logically may still be rejected by the jury if it perceives the witness to be a liar—poor *ethos*. A truthful, prominent, expert witness who testifies logically may nonetheless have little impact on the jury's decision if his or her testimony is so dry and technical that it fails to interest the jury—poor *pathos*. Finally, a respectable witness who tells a sympathetic story will not be persuasive if the testimony itself is confused, contradictory, or implausible—poor *logos*.

Through the process of impeachment, trial lawyers attempt to juggle these three components of persuasion in an effort to highlight for the jury shortcomings in the witness's character, the believability of the testimony, or to negate any sympathy the witness may have developed with the jury. Through rehabilitation, attorneys seek to address these same three aspects of the witness's testimony to repair any damage that has occurred. The newly enacted Maryland Rules of Evidence² provide an assortment of rules that are the tools with which attorneys may accomplish these goals. Accordingly, a full understanding of these rules is essential in order to be a competent and artful trial attorney. This Article will address these rules and how they interrelate.³

II. OVERVIEW

The Maryland Rules of Evidence that affect the process of impeachment and rehabilitation reflect three important concepts. These concepts also underlie the Maryland Rules of Evidence in

persuasion is effected through the speech itself when we have proved a truth or an apparent truth by means of the persuasive arguments suitable to the case in question. RICHARD MCKEON, *THE BASIC WORKS OF ARISTOTLE (RHETORIC)* 1329-30 (1968).

2. MD. RULES 5-101 to 5-1008 (effective July 1, 1994).
3. It is beyond the scope of this Article to comprehensively discuss the background and development of each rule, or to extensively compare them with their federal counterparts. Fortunately for the reader, that has already been done by Professor McLain in her new book. LYNN McLAIN, *MARYLAND RULES OF EVIDENCE* (1994) [hereinafter *MARYLAND RULES OF EVIDENCE*]. The focus of this Article will be on the interrelationships between the various Maryland Rules of Evidence to show how they govern the process of impeachment and rehabilitation. It must be recognized that no serious analysis of the law of evidence in Maryland may be undertaken without noting the enormous contribution of two people, Professor Lynn McLain of the University of Baltimore School of Law, and Judge Joseph F. Murphy, Jr., of the Court of Special Appeals of Maryland. For years, Professor McLain's work on Maryland Evidence, state and federal, and Judge Murphy's *Maryland Evidence Handbook*, JOSEPH F. MURPHY, JR., *MARYLAND EVIDENCE HANDBOOK* (2d ed. 1993), have provided the attorneys and judges of this state with guidance and counsel on evidentiary issues. They are owed an enormous debt of gratitude, which this writer respectfully acknowledges.

general. First, evidence that has no tendency to establish or negate some fact that is important to the litigation is not relevant under Maryland Rule 5-401,⁴ and is therefore inadmissible under Maryland Rule 5-402.⁵ Second, even if the evidence is relevant, it will not be admitted if doing so would sidetrack the jury or improperly delay the trial. Thus, relevant evidence is excluded under Maryland Rule 5-403⁶ if it will confuse or mislead the jury, waste time, or is simply repetitive.⁷ The third principle underlying the Maryland Rules of Evidence is that the presentation of evidence during trial must be done fairly. Indeed, Rule 5-102 directs that all of the rules of evidence shall be construed to "secure fairness in administration."⁸ Rule 5-403 prohibits the introduction of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Similarly, Rule 5-404⁹ generally prohibits proof of character traits to show propensity to act in conformity with a trait¹⁰ because of the unfairness associated with inviting the jury to conclude that "because he did it before, he must have done it in this case."¹¹ Therefore, in

4. MD. RULE 5-401.

5. MD. RULE 5-402.

6. MD. RULE 5-403.

7. This principle also underlies the provisions in Rule 5-608(b) and Rule 5-616(b) regarding when extrinsic impeaching evidence is allowed. MD. RULES 5-608(b), 5-616(b). Further, the general requirements of Rule 5-611(a) that the court control the examination of witnesses to make the presentation of evidence effective and timely, and the general requirement of Rule 5-611(b) that the scope of cross-examination be limited to the subject matter of direct examination and matters which affect the credibility of witnesses also evidence this principle. MD. RULE 5-611.

8. MD. RULE 5-102.

9. MD. RULE 5-404.

10. However, an important exception to this general rule prohibiting character evidence to show propensity is Rule 5-608 that does permit opinion and reputation testimony about a witness's character trait for truthfulness or untruthfulness.

11. Concepts of fair play are found in Maryland Rule 5-106 (allowing introduction of the remainder of or related writings or recorded statements), Rule 5-412 (limiting the evidence relating to a victim's sexual history in a rape or sexual offense case), and Rule 5-609 (regarding impeachment by evidence of conviction of a crime). Similarly, Rule 5-613(b)'s general requirement that extrinsic evidence of a witness's prior inconsistent statement may not be introduced unless the witness has first been confronted with the contents of, and circumstances surrounding the making of, the statement, and an opportunity to explain or deny is also based upon notions of fairness. MD. RULE 5-613(b). The same is true for the requirements of Rule 5-608(a)(4) and (b) that, upon objection, the court must conduct a hearing to determine whether a reasonable factual basis exists to permit certain types of impeachment. Finally, Rule 5-610's prohibition against attempts to impeach or enhance a witness's credibility by inquiring into matters of religious belief or opinion is also based on notions of fairness. MD. RULE 5-610.

planning how impeachment and rehabilitation will be conducted during trial, counsel must keep these principles of relevance, economy, and fairness in mind.

From a structural point of view, impeachment and rehabilitation can occur either through the direct or cross-examination of a witness, or through the introduction of extrinsic testimony or documentary evidence.¹² Attorneys need to know when each method is appropriate. Maryland Rule 5-616 provides guidance in this regard. Rule 5-616(a) identifies the six most frequent methods of impeachment¹³ of a witness's credibility through examination.¹⁴ Rule 5-616(b) sets out the seven most frequent methods of attacking credibility through the introduction of extrinsic evidence.¹⁵ Keeping these important principles in mind, this Article will now examine in greater detail the applicable Maryland Rules of Evidence relating to the process of impeachment and rehabilitation.

The primary rules of evidence relating to impeachment and rehabilitation deal with witnesses and are found in Title 5, Chapter 600 of the Maryland Rules. However, it is important not to overlook a collection of evidentiary rules found in other chapters of Title 5 that also affect this process. These rules will be examined before turning to Chapter 600.

III. RELEVANCE AND RELATED CONCEPTS—RULES 5-401, 5-402, 5-403

Rule 5-401 defines relevant evidence as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

12. MURPHY, *supra* note 3, § 1300, at 636.

13. As Professor McLain notes, Rule 5-616 has no counterpart in the Federal Rules of Evidence. It is "consistent with and declaratory of the pertinent federal case law construing Fed. R. Evid. 401-04, and is intended merely to organize the Maryland law so as to make it more accessible." MARYLAND RULES OF EVIDENCE, *supra* note 3, at 183. While Rule 5-616 tantalizingly implies that other methods of impeachment may exist, those listed certainly are the primary means to attack credibility, and will be the most frequently used. Indeed, it has been said that there are only five main lines of attack on the credibility of a witness: prior inconsistent statement, bias, poor character for truthfulness, defect in capacity, and contradiction of the witness's testimony by other witnesses. CHARLES T. MCCORMICK, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 33, at 66 (Edward Cleary ed., 2d ed. 1972).

14. Because Rule 5-607 allows the credibility of a witness to be attacked by "any party, including the party calling the witness," the methods of impeachment listed in Rule 5-616(a) may be employed during either direct examination or cross-examination. MD. RULES 5-607, 5-616(a).

15. MD. RULE 5-616(b)(1) to (7).

it would be without the evidence.”¹⁶ Thus, this Rule includes within the definition of relevance the concept of “materiality,” in that only facts that are “of consequence to the determination of the action” are material.¹⁷ Rule 5-402 states that “[e]vidence that is not relevant is not admissible.”¹⁸ Further, Rule 5-403 permits the court to exclude evidence that is relevant if any of the following factors substantially outweigh the probative value of the evidence: (1) the evidence will create unfair prejudice; (2) the evidence will cause confusion of the issues or mislead the jury; or (3) the introduction of the evidence would involve undue delay, waste of time, or needless presentation of cumulative evidence.

The effect of these rules on the process of impeachment and rehabilitation is clear. Rule 5-401 embraces the concept of “weight versus admissibility,” meaning that to be admissible a particular fact need not have sufficient weight by itself to fully prove a fact of consequence to the litigation, but need only make that fact more probable, or less probable if the goal is to disprove a material fact, than it would have been without the evidence. For example, if a witness’s trial testimony differs from her pretrial deposition testimony on a number of points, any one of which viewed alone would not greatly affect her credibility, the opposing attorney is still allowed under Rule 5-401 to explore each example of prior inconsistency.¹⁹ The existence of each inconsistent statement makes her credibility less convincing than it would have been without the evidence.

Rule 5-403 provides balance by enabling the court to restrict the introduction of impeaching evidence if its probative value is so slight that to introduce it would unduly delay the trial, waste time, or be needlessly cumulative. The tension created by the interaction between Rule 5-401 and Rule 5-403 is important to the process of impeachment and rehabilitation. Lawyers planning the impeachment of a witness are allowed under Rules 5-401 and 5-402 to offer all facts that detract from the credibility of the witness, including the following: (1) that the witness has testified inconsistently with prior statements; (2) that the facts that the witness testified to are not as stated; (3) that opinions stated by the witness are not believable; (4) that the witness is biased, prejudiced, interested in the outcome of the trial, or has a motive to testify falsely; (5) that the witness lacks personal knowl-

16. MD. RULE 5-401.

17. MARYLAND RULES OF EVIDENCE, *supra* note 3, at 91.

18. MD. RULE 5-402.

19. This is true provided that counsel complies with Rule 5-613 that requires the examining party (1) to disclose the transcript of the deposition to the witness and the parties prior to completing examination of the witness, and (2) to give the witness the opportunity to explain or deny the inconsistency. *See* MD. RULE 5-613(a)(1), (2).

edge of the facts testified to or has defective abilities to perceive, remember, or communicate; and (6) that the witness has a bad character for truthfulness either because of prior bad acts that affect his/her truthfulness or because of a prior conviction of an infamous crime or crime relevant to credibility.²⁰

Indeed, Rule 5-616 invites attorneys to consider each of these areas of impeachment. The counterbalance to Rule 5-616 is provided by Rule 5-403, which allows opposing counsel to object to efforts to impeach that would cause any of the undesirable consequences identified in that Rule. Because Rule 5-403 allows the court to employ a balancing test, prudent counsel will adopt a common sense approach to impeachment. Evidence that has minimal impeaching weight is less likely to be admitted if objected to, and may even backfire if introduced. For example, the fact that the witness once made a comment about the plaintiff that reflects dislike for the plaintiff could be offered under Rule 5-616(a)(4) as impeaching evidence of bias. However, if the remark was a single statement made ten years before the trial, it may be of such slight value in impeaching the witness that offering it may appear trivial, even unfair, in the eyes of the jury resulting in sympathy for the witness, *pathos*, and a concomitant reduction of the *ethos* of the cross-examiner.²¹ Counsel must also be mindful that if an objection to the evidence is sustained by the court, the lawyer offering the evidence may lose credibility, *ethos*, in the eyes of the jury.²² In preparing for impeachment, therefore, lawyers must take into account not only all facts which under Rule 5-401 would be relevant to the credibility of the witness, but also the impact of these facts, singly and collectively, on how persuasive the impeachment will be to the jury.

20. MD. RULE 5-616(a)(1) to (6).

21. This danger is often associated with efforts to impeach by prior inconsistent statements, where the cross-examiner painstakingly points out each and every inconsistent statement made by the witness during a prior deposition, a process which juries often find tedious, dull, and petty. The fact that the rules broadly permit many forms of impeachment does not mean that using each available one is the most persuasive way to undermine the credibility of the witness. Knowing which method of impeachment to use with a particular witness involves the art of advocacy, the careful assessment of the three factors of spoken word persuasion, experience, and often luck.

22. It is important to keep in mind that both the *ethos* of the witness and the attorney questioning the witness are at work in determining how the fact finder is persuaded. A poor assessment of the examining attorney can diminish or negate the persuasive effect of what a witness says during testimony. For example, a lawyer who bullies a witness into making impeaching statements during cross-examination may evoke sympathy for the witness, and cause the jury to disregard the effect of the impeaching evidence. Again, Aristotle's concepts of *ethos*, *pathos*, and *logos* are instructive. See *supra* note 1 and accompanying text (discussing Aristotle's concepts).

IV. CHARACTER EVIDENCE AND IMPEACHMENT
CONCEPTS—RULE 5-404

There is an interesting dichotomy in the Maryland Rules of Evidence regarding character evidence. Rule 5-404(a)(1) states the general rule that evidence of a person's character, or a particular character trait, is not admissible to prove that on a particular occasion that person acted in conformity with that trait.²³ This Rule recognizes that attempting to prove conduct in a particular instance simply by showing conduct in a prior, unrelated instance, "is of somewhat inferior persuasive force"²⁴ and involves a substantial danger of prejudice.²⁵ However, when the credibility of a person is at issue, instead of his or her conduct in a particular instance, that person's character trait for truthfulness or untruthfulness is valuable evidence to provide to the jury. Accordingly, Rule 5-404(a)(1)(C) carves out an exception to the general prohibition against propensity character evidence and permits a Rule 5-608 inquiry into a witness's character for truthfulness or untruthfulness. Rule 5-608, however, contains its own safeguards against possible unfair prejudice by restricting the methods of proving character for truthfulness or untruthfulness to the two methods approved in Rule 5-405(a)—reputation and opinion.²⁶ Proof of this character trait by specific acts evidence that is "most likely to create prejudice and hostility" is also excluded.²⁷ Thus, Rules 5-404 and 5-608 demonstrate another important concept of evidence law that is embodied in the Maryland Rules of Evidence—evidence may be inadmissible for one purpose, yet admissible for

23. Rule 5-404(a)(1)(A) and (B), however, provide important exceptions and qualifications to this general rule.

24. McCORMICK, *supra* note 13, at 442.

25. *Id.*; see also 5 LYNN MCLAIN, MARYLAND PRACTICE—MARYLAND EVIDENCE STATE AND FEDERAL § 404.1 n.1 (1987) [hereinafter MARYLAND PRACTICE] (citing *Braxton v. State*, 11 Md. App. 435, 274 A.2d 647 (1971) (holding that in a criminal case neither prosecution nor defense may offer evidence of general good or bad character; holding that character evidence is only relevant if probative of a particular character trait, the existence or lack of which would be involved in the commission of the crime; and discussing circumstances when character evidence is admissible)); MARYLAND RULES OF EVIDENCE, *supra* note 3, at 98 (citing *State v. Faulkner*, 314 Md. 630, 552 A.2d 896 (1989) (holding that evidence of a defendant's prior criminal acts may not be introduced to prove guilt in a particular case; such evidence is confusing, and may unfairly prejudice their minds; stating exception to general rule excluding such evidence, *i.e.*, proof of motive, intent, absence of mistake, common scheme or plan, identity, opportunity, preparation, or knowledge)); MURPHY, *supra* note 3, at 262, (citing *Wise v. Ackerman*, 76 Md. 375 (1892) (holding that evidence of prior similar occurrence is inadmissible as collateral, distracting to jury, and not probative as to causation)).

26. MD. RULE 5-608(a)(3)(B).

27. McCORMICK, *supra* note 13, at 443.

another.²⁸ With respect to the process of impeachment, attorneys must be able to distinguish when proof of character evidence is permitted; when it is allowed, they must understand how it may be proven. Maryland Rules 5-404, 5-405, and 5-608 provide this direction.

V. PRELIMINARY QUESTIONS AND HEARSAY—RULES 5-104, 5-806

The importance attached to preserving the ability of attorneys to explore the credibility of witnesses is highlighted by two Maryland Rules of Evidence: Rule 5-104 addressing preliminary questions and Rule 5-806 regarding hearsay and the credibility of the declarant.

Rule 5-104(a) allows the court, when deciding preliminary questions regarding a person's qualifications to be a witness, the existence of a privilege, or the admissibility of evidence, to "decline to require strict application of the rules of evidence, except those relating to privilege and competency of witnesses."²⁹ Simple expediency requires this Rule because "to hold applicable the rules of evidence (such as those regarding hearsay and authentication) in determining whether the foundation facts necessary to the admission of evidence have been proved would create an insuperable Catch-22."³⁰

Although Rule 5-104(a) may allow the judge to relax the Rules of Evidence in determining a preliminary matter, Rule 5-104(e) states that "[t]his rule does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility."³¹ This is an important qualification. For example, assume that the trial court has made a preliminary determination under Rule 5-104(a) that a witness offered as an expert is qualified in accordance with Rule 5-702. The effect of this ruling is that the expert's opinion will then be admitted to the jury. However, Rule 5-104(e) preserves for opposing counsel the right to attack the credibility of that opinion by any of the methods recognized by Rule 5-616.³² Similarly, a judge's

28. See, e.g., MD. RULES 5-105, 5-610 (precluding introduction of evidence of religious beliefs or opinions to attack or enhance credibility, but allowing such evidence if introduced to show interest or bias). When evidence is admitted for one purpose but is inadmissible for another, the attorney opposing the introduction of the evidence should ask for a limiting instruction from the court in accordance with Rule 5-105.

29. MD. RULE 5-104(a).

30. MARYLAND RULES OF EVIDENCE, *supra* note 3, at 67.

31. MD. RULE 5-104(e).

32. Actually, Rule 5-616 is not intended to provide the exclusive methods of impeachment. Instead, it is merely intended to reflect the most frequently used methods of impeachment in a single place in order to facilitate the use of those methods by counsel. As the Committee Note for Rule 5-616 states, "[t]his

preliminary determination that a document is admissible under Rule 5-803(b)(6) as a business record exception to the hearsay rule would not deprive opposing counsel of the right to attack the credibility of the maker of the business record by showing that he or she had a motive to mislead.³³

Rule 5-806 contains another significant, but easy to overlook, safeguard regarding the ability of counsel to impeach the credibility of witnesses. It provides:

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the parties against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.³⁴

The logic of this Rule is apparent. The exceptions to the hearsay rule all function to provide the fact finder with "statements"³⁵ made by a "declarant."³⁶ Each recognized exception to the rule against the admissibility of hearsay is based on the existence of some circumstantial indicia of trustworthiness. Generally, this circumstantial guarantee is sufficient to warrant the introduction of the statement without the protection afforded to opposing counsel who may test the credibility of the declarant on cross-examination. Rule 5-806 returns to opposing counsel a large measure of the protection usually afforded by the process of cross-examination. It enables him to impeach the credibility of the "absent witness" who made the hearsay statement by any method that could have been employed had the declarant actually been present to testify.

Rule 5-608 also relaxes the requirement of Rule 5-613, regarding impeachment by prior statements of the declarant, by suspending the

Rule is intended to illustrate the most frequently used methods of impeachment and rehabilitation. It is not intended to be exhaustive or to foreclose other legitimate methods." MARYLAND RULES OF EVIDENCE, *supra* note 3, at 181.

33. MARYLAND RULES OF EVIDENCE, *supra* note 3, at 72.

34. MD. RULE 5-806(a).

35. A "statement" is defined by Rule 5-801(a) as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MD. RULE 5-801(a).

36. A "declarant" is defined by Rule 5-801(b) as "a person who makes a statement." MD. RULE 5-801(b).

provisions of Rule 5-613(a) that provide that the declarant be afforded an opportunity to deny or explain the statement before it may be introduced. Therefore, for example, if a hearsay statement is admitted, under Rule 5-803(b)(3), as evidence of a declarant's then existing state of mind to prove his future action, opposing counsel may impeach the credibility of the declarant by introducing extrinsic evidence of a prior inconsistent statement without having to confront the declarant with the inconsistent statement and afford him the chance to deny or explain it. Rule 5-806 also permits the proponent of the hearsay statement to subsequently rehabilitate the credibility of the declarant once it has been attacked.³⁷

Finally, Rule 5-806 further underscores the importance of the process of impeachment as a vehicle for determining the truth. This is accomplished by allowing the party opposing the hearsay statement to actually call the declarant to the stand and cross-examine him through leading questions in accordance with Rule 5-616(a).³⁸

VI. IMPEACHMENT IN GENERAL

A. *Who May Impeach—Rule 5-607*

Maryland Rule 5-607 provides that "the credibility of a witness may be attacked by any party, including the party calling the witness."³⁹ This Rule mirrors the old Maryland Rule 1-501⁴⁰ that was adopted as part of the Maryland Rules of Civil Procedure in 1988 in order to eliminate the common-law "voucher" rule.⁴¹ Under the

37. Rule 5-806(b) contains an exception that is necessary in the interests of fairness. It prohibits a party from introducing an admission of a party opponent under Rule 5-803(a)(1) and (a)(2) when that party has not testified, and then proceed to impeach that admission. MD. RULE 5-608(b); *see also* MARYLAND RULES OF EVIDENCE, *supra* note 3, at 286.

38. Rule 5-806 may also be important during pretrial proceedings. Assume, for example, that counsel learns through discovery that her opponent intends to offer at trial a hearsay statement of a witness who will be unavailable at trial, as defined by Rules 5-804(a) and 2-419(a)(3). Using Rule 5-806, she could take the deposition of the witness for the purpose of impeaching the credibility of the witness. Then, under Rule 2-415(b), she may cross-examine the witness during the deposition using leading questions, and subsequently offer the transcript of the deposition of the cross-examination into evidence at trial under Rule 5-804(b)(1) and Rule 2-419(a)(3). Of equal importance, the attorney for the party who intends to offer the hearsay statement at trial would have to use nonleading questions during the deposition. *See* Rule 2-415(b).

39. MD. RULE 5-607.

40. MD. RULE 1-501 (1994) (rescinded as of July 1, 1994).

41. *See, e.g.,* *Brown v. State*, 80 Md. App. 187, 560 A.2d 605 (1989); PAUL V. NIEMEYER & LINDA M. SCHUETT, MARYLAND RULES COMMENTARY 67-68 (2d ed. 1992).

voucher rule, which had been followed in Maryland, a party was generally prohibited from impeaching a witness who it called to testify.⁴² The rationale behind the voucher rule was that the act of calling the witness was viewed as an indication that party's belief in the credibility of the witness.⁴³ At first blush, such a concept has appeal, however, it frequently worked hardships, especially in criminal cases where the prosecution was often forced to rely on the testimony of witnesses whose character and credibility were not always of sterling quality. Like its predecessor, Rule 1-501, Rule 5-601 eliminates the voucher rule and allows an attorney to impeach any witness, even her own.⁴⁴

As a cautionary note, however, counsel should think carefully about whether impeachment of her own witnesses helps her case. Ordinarily, Rule 5-607 will be most helpful if used sparingly, for example, when counsel is surprised at trial by testimony inconsistent with an earlier statement made by the witness, or in circumstances where it is impossible to avoid calling a witness who has an obvious bias against the party calling the witness. In deciding whether to impeach her own witness, an attorney should also consider the possible effect on her *ethos*, and whether the *pathos* of the opposing party will be enhanced by the impeachment. The Committee Note to Rule 5-607 contains an important limitation designed to prevent use of the Rule as a subterfuge to introduce inadmissible evidence. It states:

This Rule eliminates the common law "voucher" rule. It does not permit a party to call a witness solely as a subterfuge to place an otherwise substantively inadmissible statement before the jury. It is not intended to otherwise affect existing law concerning the court's discretion to control direct and cross-examination.⁴⁵

While Rule 5-607 allows impeachment of a witness during direct examination, it is still true that in most instances the process of impeachment occurs during cross-examination. Therefore, trial attorneys must fully understand the rules governing this mode of examining witnesses. Rule 5-611 provides this guidance.

42. See, e.g., *Poole v. State*, 290 Md. 114, 118, 420 A.2d 434, 437 (1981); *General Motors v. LaHock*, 286 Md. 714, 410 A.2d 1039 (1980); MARYLAND PRACTICE, *supra* note 25, § 607.1.C. n.20.

43. See MARYLAND PRACTICE, *supra* note 25, § 607.1.C.

44. MD. RULE 5-601.

45. MD. RULE 5-607 (Committee Note); see MARYLAND RULES OF EVIDENCE, *supra* note 3, at 144. Professor McLain points out that the Committee Note likely was based on *Spence v. State*, 321 Md. 526, 583 A.2d 715 (1991). MARYLAND RULES OF EVIDENCE, *supra* note 3, at 144.

B. Mode of Interrogation—Rule 5-611

First, Rule 5-611(a) vests the trial court with the authority to control cross-examination. It states that “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time and, (3) protect witnesses from harassment or undue embarrassment.”⁴⁶ This Rule follows the approach taken under Maryland common law.⁴⁷ In planning for cross-examination, counsel should be mindful of Rule 5-611(a) and avoid overly aggressive questioning that might be considered by the court as harassment. Counsel should also be mindful of overly tedious examination on small inconsistencies that contribute little to the overall assessment of the witness’s believability and, therefore, may be excluded by the court as a waste of time.⁴⁸ Such questioning is also likely to diminish the *ethos* of the attorney, and generate sympathy, *pathos*, for the witness.

Rule 5-611(b) defines the scope of cross-examination which, with the exception of cross-examination of a defendant in a criminal trial,⁴⁹ should be limited to (1) the subject matter of the direct examination and (2) matters affecting the credibility of the witness.⁵⁰ Thus, the scope of cross-examination will be governed by the *content* of the direct examination and the *credibility* of the witness.⁵¹

46. MD. RULE 5-611(a).

47. See MARYLAND RULES OF EVIDENCE, *supra* note 3, at 162 (citing *Bruce v. State*, 318 Md. 706, 569 A.2d 1254 (1990); *Bowers v. State*, 298 Md. 115, 468 A.2d 101 (1983); *Cumberland & Westernport Transit Co. v. Metz*, 158 Md. 424, 149 A. 4 (1930)).

48. Counsel must also keep in mind that if the trial judge forecloses cross-examination on a subject that counsel believes is important to pursue, Rule 5-103 must be followed to preserve the record for appeal. Rule 5-103(a)(2) states that “[e]rror may not be predicated on a ruling that admits or excludes evidence unless the party is prejudiced by the ruling” and, in the case where evidence is excluded, the party makes an offer of proof detailing the substance of the evidence, unless it was “apparent from the context within which the evidence was offered.” MD. RULE 5-103. In responding to a ruling that the attorney feels improperly restricts a line or method of cross-examination, the attorney should be aware of Rule 5-103(c), which favors making proffers under that Rule outside the presence of the jury. In making the proffer, the attorney should stress to the court why the party will suffer prejudice if the ruling stands, as well as offer the substance of the evidence that was excluded by the ruling.

49. Maryland Rule 5-611(b)(2) provides that when a defendant in a criminal trial testifies on a nonpreliminary matter, he or she may be cross-examined on “any matter relevant to any issue in the action.” MD. RULE 5-611(b)(2).

50. MD. RULE 5-611(b)(1).

51. MURPHY, *supra* note 3, § 1206(A), at 626.

With respect to the "content" component of cross-examination, case law that fleshes out the boundaries of what constitutes matters brought up during direct examination will still be important to keep in mind.⁵² Most helpful are the cases from the Court of Appeals of Maryland that clarify that trial courts should not be overly restrictive in their rulings on what was covered on direct examination.⁵³ In this regard, the following rule of thumb is very useful in determining what is within the scope of direct examination, and, therefore, fair game during cross-examination: "The 'scope of cross' must be measured by two standards: (1) what has been actually stated and (2) what inferences logically flow from the words that were spoken. Cross-examination that responds to either standard is within the 'scope of direct.'"⁵⁴

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52. For an excellent discussion of these cases see MARYLAND PRACTICE, *supra* note 25, § 611.1 & n.4. (citing *Glover v. Gar-Bern Bldg. & Dev. Co.*, 264 Md. 388, 284 A.2d 434 (1972)) (cross-examination should be limited to matters covered on direct, and subjects relevant to issues in the case, but inasmuch as purpose of cross is to elicit the truth, the trial court has broad discretion to allow inquiry during cross-examination into collateral matters); *Bowers v. State*, 298 Md. 115, 468 A.2d 101 (1983) (discussing the limits on the "doctrine of completeness" rule that allows an opponent of evidence to require the remainder of written or oral utterances to be introduced, or to inquire into them during cross-examination; even during cross-examination utterances irrelevant to issues in cases are not admissible, only so much of the utterance as is needed to explain the first part may be offered, and nothing more, unless it aids in understanding the utterance as a whole), *cert. denied*, 497 U.S. 890 (1986).
53. MARYLAND PRACTICE, *supra* note 25, at § 611.1 n.10 (citing *State Rds. Comm'n v. Wyvill*, 244 Md. 163, 223 A.2d 146 (1966)) (scope of cross-examination of expert witness is not limited by specific details brought out during direct, but includes full inquiry into the subject matter of the testimony); *Emery ex rel. Calvert Ins. Co. v. F.P. Asher, Jr. & Sons, Inc.*, 196 Md. 1, 75 A.2d 333 (1950) (where a general subject is raised during direct, cross-examining attorney may ask any relevant question on that general subject); *Williams v. Graff*, 194 Md. 516, 71 A.2d 450 (1950) (discussing the differences between the "English Rule" of cross-examination, *i.e.*, once testifying on direct, a witness is open on cross to full exploration of all matters material to the case, and the "American Rule," *i.e.*, cross-examination limited to subject matter of direct, as well as inquiry into possible bias, prejudice, or to lay foundation of prior contradictory statements; noting that cross-examination is not limited to the specific details of direct, but includes any relevant questions on the general subjects brought out on direct; pointing out that in applying the rule that identifies the limits of cross-examination, a court should not defeat the real object of cross-examination—to elicit all the facts of any observation or transaction that have not been fully explained).
54. MURPHY, *supra* note 3, § 1206(A), at 628. The authority granted to the trial court to control both direct and cross-examination to avoid "needless consumption of time" also allows the cross-examining attorney to ask the court to permit examination of the witness regarding matters not fairly considered to be within the scope of direct in order to save time by avoiding having to recall the witness later during the cross-examiner's case. If the court allows

With regard to the "credibility" component of cross-examination, the Maryland Rules of Evidence now provide a greater measure of certainty in identifying what is appropriate for cross-examination. Any of the six methods of impeachment listed in Rule 5-616(a)⁵⁵ would be appropriate for inquiry during cross-examination.⁵⁶ In planning cross-examination, therefore, counsel would be well served by making a list of each method of impeachment under Rule 5-616(a) that she intends to pursue. If an objection is made to the cross as being outside the scope of direct, counsel can respond by explaining to the court that the cross-examination is appropriate under Rule 5-611(b)(1), as affecting the credibility of the witness, and by referring to the methods recognized by Rule 5-616(a) for doing so.

Additionally, Rule 5-611 addresses the use of leading questions, which impacts directly on the process of impeachment and rehabilitation. Rule 5-611(c) states:

The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be allowed (1) on cross-examination or (2) on the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party.⁵⁷

Rule 5-611(c) teaches two key lessons. First, it establishes that a judge has great latitude in deciding whether to allow the use of leading questions during an examination of a witness. As a result, the judge is unlikely to be reversed on appeal with respect to such a

such examination, however, the questioning will have to comply with Rule 5-611(c) regarding when leading and nonleading questions may be asked. See also MURPHY, *supra* note 3, § 1206(A), at 627.

55. The six methods of impeachment are: (1) proof of prior inconsistent statements; (2) proof that the facts are not as stated by the witness; (3) proof that an opinion expressed by the witness is not held by the witness or otherwise not worthy of belief; (4) proof that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely; (5) proof that the witness lacks personal knowledge or has a weakness in capacity to perceive, remember or communicate; or (6) proof that the witness has the character trait of untruthfulness under Rule 5-608(b) or prior conviction of a crime adversely affecting credibility in accordance with Rule 5-609. MD. RULE 5-616(a)(1) to (6).
56. The list contained in Rule 5-616(a) is not exclusive, and any other legitimate method of impeachment by examination that can be identified may also be employed during cross-examination. See MARYLAND RULES OF EVIDENCE, *supra* note 3, at 181 (quoting the Committee Note to Rule 5-616(a)).
57. MD. RULE 5-611(c).

ruling.⁵⁸ Second, Rule 5-611(c) teaches that there are no absolutes with respect to the use of leading questions. Leading questions "ordinarily" cannot be used on direct examination, unless to develop the testimony of the witness, but, "ordinarily," are permitted on cross-examination.⁵⁹

The key to understanding when it is permissible to use leading questions is to fully understand the definition of a leading question. Contrary to popular belief, a leading question is not one that is capable of being answered with a simple "yes" or "no," although such questions can, under certain circumstances, be leading. Nor does the use of the phrase "if any" automatically transform a leading question into a non-leading one. Simply put, a leading question is one in which the desired answer to the question is suggested by the attorney, rather than the witness. This may be accomplished by the words selected for use in the question, the tone of voice of the questioner, the body language of the questioner, or any combination of the above.⁶⁰

Leading questions are usually not allowed during direct examination based on the assumption that there will exist a sympathy between the attorney conducting the direct examination and the witness. Accordingly, suggestions made by the attorney as to the desired answer will be picked up by the witness, who will merely agree with the suggested answer embodied in the lawyer's question. Under this view, a leading question during direct examination threatens to undermine the process of determining the true facts by allowing the advocate to effectively replace the witness.

In contrast, it is generally assumed that during cross-examination the witness will be hostile to the examining attorney. Greater control over the witness's testimony, afforded by leading questions, is necessary to allow the examining attorney to probe for and develop matters that undermine the credibility of the witness. A witness is not normally expected to divulge shortcomings in his or her credibility absent the controlling influence of leading questions. While these general assumptions are usually correct, there are circumstances where leading questions are appropriate, even desirable, during direct examination, as well as circumstances where leading questions may be inappropriate during cross-examination.

The use of leading questions can be extremely helpful, even during certain direct examinations, because they can help to move

58. See MARYLAND RULES OF EVIDENCE, *supra* note 3, at 163; MURPHY, *supra* note 3, § 1205(A), at 619.

59. See MD. RULE 5-611(c).

60. See MURPHY, *supra* note 3, § 1205(A), at 620. Judge Murphy defines a leading question as one that contains a material fact and clearly suggests the desired answer. *Id.*

the case along and avoid “needless consumption of time,”⁶¹ a goal that Rule 5-611(a) seeks to promote. For example, during direct examination it would be petty to object to the question—“You reside at 620 Maple Street, don’t you?”—when the residence of the witness is not an important issue in the case. The proper function of Rule 5-611(c)’s general prohibition against leading questions on direct is to prevent the attorney from putting words into the mouth of the witness with respect to important and disputed issues of fact.

Rule 5-611(c) does permit leading questions during direct examination to “develop the witness’s testimony,” yet it does not define what is meant by this phrase. Judge Joseph F. Murphy, Jr., of the Court of Special Appeals of Maryland, provides the following guidance on when leading questions may be used to develop the witness’s testimony during direct examination: (1) leading questions may be used to establish an essential element of proof which is not disputed or in contest; (2) leading questions may be used to establish preliminary information (*e.g.*, name, age, address, place of employment); (3) leading questions may be used as transition questions to change the subject matter of the examination (*e.g.*, “now, I would like to direct your attention to”); (4) leading questions may be used to lay the foundation for admissibility of other evidence (*e.g.*, to authenticate a photograph or lay the foundation for a business record); (5) leading questions may be used to refresh the recollection of a witness who goes “blank” during examination; (6) leading questions may be used when questioning young children, elderly witnesses, witnesses who have difficulty communicating, or witnesses who are marginally competent; (7) leading questions may be used in questioning an emotional witness about a traumatic incident, or about a delicate subject matter (*e.g.*, questioning a rape victim); (8) leading questions may be used to question a hostile witness or “turncoat” witness; (9) leading questions are permitted when questioning an adverse party or a witness identified with an adverse party;⁶² (10) leading questions are allowed when questioning a witness called by the court; and (11) leading questions may be used when impeaching a witness during direct examination in accordance with Rule 5-607.⁶³

If leading questions are not automatically barred during direct examination, it is concomitantly true that Rule 5-611(c) does not automatically permit leading questions during cross-examination. Thus, if a lawyer is “cross-examining” her own client, who has been called

61. MD. RULE 5-611(a).

62. See MD. RULE 5-611(c)(2).

63. See MURPHY, *supra* note 3, § 1205(a), at 620-21 (explaining examples one through ten).

during the opposing party's case as an adverse witness, cross-examination ordinarily should not be permitted by leading questions.⁶⁴ Similarly, cross-examination of a friendly witness or a witness clearly identified with the party whose attorney is cross-examining the witness should not be allowed by leading questions regarding disputed material issues.

The importance of Rule 5-611(c) on the process of impeachment and rehabilitation is clear. This Rule preserves the traditionally accepted general right of the cross-examiner to use leading questions to control the testimony of the witness, which greatly facilitates the process of impeachment. Indeed, it is hard to imagine successful impeachment by any of the means described in Rule 5-616 without use of leading questions at some point during the examination.⁶⁵

Rule 5-611(c) also means that when the process of rehabilitation is to be undertaken by redirect examination, instead of by introducing extrinsic evidence, non-leading questions generally will be required. However, because redirect examination, by definition, requires the questioning attorney to address points brought out during cross-examination by the opponent, it is almost unavoidable that the attorney conducting redirect will want to use leading questions. To the extent that leading questions would develop the testimony of the witness under Rule 5-611(c), or avoid needless consumption of time as provided by Rule 5-611(a), an attorney conducting redirect examination should be allowed greater latitude to use leading questions than on direct examination.

C. Requirement of Personal Knowledge—Rule 5-602

Rule 5-602 requires that, with the exception of expert witnesses qualified in accordance with Rule 5-703, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony."⁶⁶ The Committee Note explains that this Rule is not intended to prevent a witness from testifying as to his or her age, date of birth, or similar matters of personal history, where firsthand knowledge cannot be established.⁶⁷

64. *See id.* at 621.

65. For a helpful article describing how to use leading questions to control a witness during cross-examination, see JAMES W. McELHANEY, McELHANEY'S TRIAL NOTEBOOK 299-317 (2d ed. 1987).

66. MD. RULE 5-602. Exceptions to this Rule are contained in Rule 5-703, regarding expert testimony.

67. Rule 5-804(b)(4) permits hearsay testimony regarding facts relating to personal or family history; MD. RULE 5-804(b)(4); *see also* MARYLAND RULES OF EVIDENCE, *supra* note 3, at 134.

The function of Rule 5-602 is obvious; it is designed to prevent witnesses from giving testimony that is based on speculation or conjecture, rather than fact. The policy that underlies Rule 5-602 does not prevent a witness from testifying to otherwise admissible hearsay statements, provided that the witness actually heard the hearsay statement made by the absent declarant.⁶⁸ Rule 5-602 also does not preclude a lay witness from testifying in the form of an opinion or inference, because Rule 5-701, which governs such non-expert opinion testimony, requires as a condition precedent that the opinion must be rationally based on the perception of the witness.

Rule 5-602 plays an important role in the process of impeachment. In theory, there is a tidy distinction between what lay witnesses may testify to⁶⁹ and what experts may testify to.⁷⁰ In real life, however, the lines of demarcation are frequently less clear. During direct examination witnesses often testify in narrative fashion, and, indeed, lawyers are trained to ask as few questions on direct examination as possible to let the witness "tell her story." Human nature is such that a witness will seldom begin the statement by announcing, "I was present during the accident, paying attention, and personally observed that" Often, it is apparent from the context of the testimony that the witness was present when the events occurred, and thus has firsthand knowledge of them. It is not unusual, however, for witnesses to include speculation, conjecture, and opinions along with a recitation of facts actually perceived. Moreover, the distinction between "fact" and "opinion" is often difficult to define.⁷¹

Rule 5-602's chief utility during impeachment is to allow the cross-examiner to explore whether the witness had personal knowledge of the facts testified to. However, this is a risky process. If the cross-examining attorney does not know in advance whether the witness has personal knowledge, it is hazardous to address this matter on cross-examination due to the possibility that the credibility of the witness may be enhanced if she testifies that she in fact does have personal knowledge of the facts. Fortunately, however, the Maryland Rules of Evidence provide the alert attorney with an alternative method of determining whether a witness has personal knowledge of the facts to be testified to.

Rule 5-104(a) requires the *court* to determine "[p]reliminary questions concerning the qualification of a person to be a witness"⁷²

68. See McCORMICK, *supra* note 13, § 274, at 586.

69. Generally, lay witnesses may only testify regarding facts actually perceived and opinions or inferences based directly thereon. See MD. RULE 5-701.

70. In general, experts may testify to opinions and inferences, if based upon information told to the expert by others, including inadmissible facts, if reliable. See MD. RULE 5-703.

71. See MURPHY, *supra* note 3, § 603(A), at 328.

72. MD. RULE 5-104(a).

and Rule 5-104(c) provides that “[h]earings on preliminary matters shall be conducted out of the hearing of the jury when required by rule or the interests of justice.”⁷³ Thus, if a witness is called to testify and the opposing party does not know whether the witness has personal knowledge, and it is not apparent from the early stages of direct examination that the witness has such knowledge, opposing counsel may object and request, during a bench conference, that the court conduct a preliminary inquiry to determine whether the witness has the personal knowledge required by Rule 5-602. The court will likely require the sponsoring attorney to proffer whether the witness has personal knowledge, which will educate the opposing counsel without the risk of having the jury hear this information.⁷⁴ As with all evidentiary objections, however, attorneys must use common sense in determining when to use such an approach. Factors such as the availability of pretrial discovery to determine the content of a witness’s testimony and the importance of the facts of that testimony should govern an attorney’s decision.

If it is determined that the witness has testified to matters about which she did not have personal knowledge, opposing counsel should move to strike the offending testimony in accordance with Rule 5-103 and request a curative instruction. If this will not fairly ameliorate the situation, counsel may have to request a mistrial. Finally, impeachment of a witness by demonstrating that she lacks the personal knowledge required by Rule 5-602 may be done either through examination of the witness⁷⁵ or through the introduction of extrinsic impeaching evidence, testimonial or documentary.⁷⁶

VII. PRIMARY MEANS OF IMPEACHMENT—RULE 5-616

Maryland Rule 5-616 was derived, in part, from an analysis of federal case law construing Federal Rules of Evidence 401 through 403,⁷⁷ and, in part, from a proposal made by Professor Schmertz of

73. MD. RULE 5-104(c).

74. As an alternative to asking the court to conduct the preliminary inquiry after the witness has started to testify, counsel could simply raise the issue of whether the witness can comply with Rule 5-602’s requirement for personal knowledge in a bench conference before the witness takes the stand. A court’s willingness to entertain such a request will be influenced by whether the requesting attorney diligently pursued available pretrial methods of determining who the trial witnesses would be and what their testimony would entail. Thus, a court is more likely to act favorably in situations where a “surprise” witness is called or, in criminal matters, where extensive pretrial discovery is unavailable.

75. MD. RULE 5-616(a)(5).

76. MD. RULE 5-616(b)(4).

77. FED. R. EVID. 401-03.

Georgetown Law School.⁷⁸ Although there is no counterpart in the Federal Rules of Evidence, Maryland Rule 5-616 is consistent with and declaratory of the federal rules.⁷⁹ Further, as the Committee Notes to Rule 5-616 state, the Rule is intended to illustrate the most frequent methods of impeachment and rehabilitation, but is not intended to be an exhaustive list or to foreclose other legitimate methods of impeachment and rehabilitation.⁸⁰

The chief utility of Rule 5-616 is that it collects in one place a succinct summary of the primary means of impeachment and rehabilitation, organized in a way that is logical and easy to follow at a glance. It is especially helpful for practitioners and judges, and it is easy to refer to in the middle of a trial. Rule 5-616 is organized into three parts. Rule 5-616(a) identifies six methods of impeachment of witnesses through direct and cross-examination.⁸¹ Rule 5-616(b) identifies seven methods of impeachment through the introduction of extrinsic evidence,⁸² and Rule 5-616(c) describes the four most frequent means of rehabilitation.⁸³

78. Court of Appeals Standing Committee on Rules of Practice and Procedure, 125th Report, proposed Title 5 of the Maryland Rules of Procedures: Evidence (July 1993) [hereinafter July 1993 Committee Report] (citing John R. Schmertz, Jr., *The First Decade under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion*, 30 VILL. L. REV. 1367, 1414-17 (1985)).

79. *Id.* at 86; MARYLAND RULES OF EVIDENCE, *supra* note 3, at 183.

80. July 1993 Committee Report, *supra* note 78, at 86; MARYLAND RULES OF EVIDENCE, *supra* note 3, at 181.

81. The six methods are:

- (1) proof under Rule 5-613 that the witness has made a prior inconsistent statement;
- (2) proof that the facts are not as testified to by the witness;
- (3) proof that an opinion expressed by the witness is not held by the witness, or that the opinion is otherwise not worthy of belief;
- (4) proof that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely;
- (5) proof that the witness lacks personal knowledge or has a weakness in the capacity in his/her capacity to perceive, remember or communicate;
- (6) proof that the witness has a poor character for truthfulness by establishing prior bad acts in accordance with Rule 5-608(b) or establishing a prior conviction as allowed by Rule 5-609.

MD. RULE 5-616(a)(1) to (6).

82. The seven methods are:

- (1) extrinsic evidence of prior inconsistent statements, as allowed by Rule 5-613(b);
- (2) other extrinsic evidence contradicting the witness's testimony, provided the subject is a non-collateral matter, unless, in the discretion of the court, collateral extrinsic evidence is permitted;
- (3) extrinsic evidence of bias, prejudice, interest, or other motive to testify falsely, regardless of whether the witness has been confronted

Although the drafters of Rule 5-616 took pains to point out that the methods described in the Rule for impeachment and rehabilitation were not exhaustive and not meant to foreclose other legitimate methods of impeachment and rehabilitation,⁸⁴ examples of such additional legitimate methods do not readily spring to mind. Indeed, an examination of learned treatises on evidence suggests that Rule 5-616 contains the universe of impeachment and rehabilitation techniques which one can reasonably expect to encounter.⁸⁵ Nonetheless, there is wisdom in the approach taken by the drafters of the Maryland Rules of Evidence.

Although the techniques for impeachment and rehabilitation may be finite, the factors in a particular case that contribute to whether the fact finder will believe the testimony of a witness are not. A jury may choose to disregard entirely the testimony of an apparently credible witness, whose testimony was not impeached through cross-examination or extrinsic evidence simply because the witness appeared insincere, mean spirited, or unfair. As Aristotle would no doubt point out, even if the *ethos* and *logos* of a witness remains intact, the testimony of that witness may still emerge as unpersuasive if the

with these facts during examination;

(4) extrinsic evidence of a witness's lack of personal knowledge, or weakness in the capacity of the witness to perceive, remember, or communicate, provided the witness has been confronted with these facts during examination, or unless the court otherwise permits the introduction of such extrinsic evidence;

(5) extrinsic evidence of the character of a witness for untruthfulness, as permitted by Rule 5-608;

(6) extrinsic evidence of prior convictions as allowed by Rule 5-609; and

(7) extrinsic evidence that prior consistent statements offered under Rule 5-616(c)(2) in fact were not made.

MD. RULE 5-616(b)(1) to (7).

83. The four means of rehabilitation are:

(1) permitting the witness to deny or explain impeaching facts (except that a witness impeached by prior conviction may not deny the guilt of the earlier crime);

(2) except as provided by statute, evidence of the witness's prior statements that are consistent with the witness's present testimony, provided the statement detracts from the prior impeachment;

(3) evidence through other witnesses of the impeached witness's character for truthfulness, as provided by Rule 5-608(a); and

(4) other evidence that the court finds relevant for the purposes of rehabilitation.

MD. RULE 5-616(c)(1) to (4).

84. See MD. RULE 5-616 (Committee Note).

85. MARYLAND RULES OF EVIDENCE, *supra* note 3, at 180-85; MURPHY, *supra* note 3, at 635; MARYLAND PRACTICE, *supra* note 25, § 607, at 37; McCORMICK, *supra* note 13, at 66.

pathos was unfavorable to the party who calls the witness.⁸⁶ Lawyers' lore is full of examples of cases that should have been lost, but which were won, and vice-versa, and of "jury nullification" of cases that were technically unassailable. Experienced trial lawyers always acknowledge with a shake of the head that "anything can happen in trial." No matter how well one organizes and understands the methods of impeachment and rehabilitation, the ultimate decision whether the witnesses are believable, and therefore persuasive, will rest with the fact finder.

Because the human factors that go into the judgment rendered by jurors and judges in particular cases are infinite, it would approach hubris to assert that a single rule of evidence has captured all the ways to credit and discredit the testimony of a witness. Fortunately, it is enough to do what Rule 5-616 does well—to thoughtfully collect and set forth the primary methods of impeachment and rehabilitation. With this in mind, each of the primary methods of impeachment and rehabilitation will now be examined.

VIII. CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS—RULE 5-608

Maryland Rule 5-608 governs the use of evidence regarding the character of a witness for truthfulness or untruthfulness. The Rule addresses both impeachment and rehabilitation. As previously stated, Rule 5-608 constitutes an exception to the general prohibition against the use of character evidence to show propensity, which is found in Rule 5-404. Thus, when evidence is introduced under Rule 5-608 to show that a witness has the character trait of untruthfulness, the fact finder is invited to reach the conclusion that the witness is not telling the truth because he has a reputation for untruthfulness or because some other witness is of the opinion that he is an untruthful person.

Rule 5-608 must be carefully read. It contains a great deal of information and was intentionally structured differently from Federal Rule of Evidence 608, on which Maryland Rule 5-608 was partially based, to address criticism that the federal rule is confusing.⁸⁷

Rule 5-608 is best understood if viewed as covering distinct facets of a witness's character for truthfulness or untruthfulness. Rule 5-608(a) addresses two different situations. The first is the situation in which witness *B* is called as a character witness to impeach or rehabilitate the credibility of a previous witness, witness *A*, by testifying as to witness *A*'s reputation for truthfulness or untruthfulness or as to *B*'s opinion of whether *A* is a truthful or untruthful

86. See generally MCKEON, *supra* note 1.

87. July 1993 Committee Report, *supra* note 78, at 67.

person.⁸⁸ The second situation to which Rule 5-608(a) applies is when an effort is made to impeach *B*'s character testimony regarding the credibility of *A*, by cross-examining *B* about prior acts of truthfulness or untruthfulness of *A*, or about convictions of *A* for crimes that are relevant to *A*'s truthfulness or untruthfulness, in accordance with Rule 5-609.⁸⁹ Rule 5-608(b) deals with the separate situation in which any witness, character witness or otherwise, is impeached by that witness's *own* prior bad acts, other than convictions, which are relevant to truthfulness or untruthfulness.⁹⁰

Expressed more simply, Rule 5-601(a) focuses on the use of a character witness to provide reputation or opinion testimony about some *other witness's* character for truthfulness. Rule 5-608(b) focuses on the impeachment of any witness by that witness's *own* prior acts that are probative of his own truthfulness or untruthfulness. With this distinction in mind, Rule 5-608 may now be examined in greater detail.

A. Use of Character Witnesses

1. Impeachment of Witness *A* Through the Use of Character Witness *B*

Rule 5-608(a)(1) allows a party to call an impeaching character witness (witness *B*) to testify that a prior witness (witness *A*) has a reputation for untruthfulness or that, in *B*'s opinion, *A* is an untruthful person. Rule 5-608(a)(3)(A) prohibits *B* from offering an opinion regarding the truthfulness of *A*'s testimony in the present action, and Rule 5-608(a)(3)(B) prohibits *B* from testifying during *direct* examination, as to any specific instances of truthfulness or untruthfulness of *A*. *B* is allowed, however, by Rule 5-608(a)(3)(B) to give a reasonable basis for the reputation or opinion of *A*, short of testimony as to specific acts. Therefore, Rule 5-608(a) adopts the provisions of Rule 5-405(a) that proof of a character trait may be made by reputation or opinion testimony, but not by testimony as to specific acts. Rule 5-608(a) also overrules *Hemingway v. State*⁹¹ to the extent that it permitted a character witness to testify during direct examination as to the specific acts which formed the basis for the character witness's reputation or opinion testimony.⁹²

88. *Id.*

89. *Id.*

90. *Id.*

91. 76 Md. App. 127, 543 A.2d 879 (1988).

92. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.608.4, at 149. However, the Committee Note for Rule 5-608 clarifies that the Rule does *not* address when

Rule 5-608(a)(3)(B) does not define what is meant by the statement that a character witness may give a "reasonable basis" for her reputation or opinion testimony during direct examination. However, Professor McLain offers the following comments that flesh out this provision:

A "reasonable basis" for reputation testimony under [Rule 5-608(a)(3)(B)] . . . would be that the character witness and the other witness have both been members of a particular community for a certain period of time, and that the character witness had heard of the other witness's reputation there.

Similarly, a "reasonable basis" for opinion testimony would be how long and under what circumstances the character witness knows the other witness, *e.g.*, they have worked side by side on the assembly line for ten years and they eat lunch together every work day.⁹³

2. Cross-Examination of Character Witness *B*

Once character witness *B* has been called to impeach the credibility of witness *A* by testifying as to *A*'s reputation for untruthfulness or *B*'s opinion that *A* is an untruthful person, Rule 5-608(a)(4) governs how witness *B* may be impeached through cross-examination. The Rule states: "The Court may permit a character witness to be cross-examined about specific instances in which a witness has been truthful or untruthful or about prior convictions of the witness as permitted by Rule 5-609."⁹⁴ Thus, once character witness *B* has testified about *A*'s character for untruthfulness, the prohibition against the use of specific acts is inapplicable during cross-examination. In order to permit the cross-examiner to attack the basis for the character witness's reputation or opinion testimony, the cross-examiner may ask if the character witness took into account specific acts that

proof of specific instances of conduct may be introduced for a purpose other than impeachment by establishing a character for untruthfulness. *Id.* at 146. Thus, evidence of specific acts may be admissible to show bias, interest, or hostility under Rule 5-616(a)(4); or to show shortcomings in ability to observe, remember, or relate facts under Rule 5-608(5); or to show motive, opportunity, intent, common scheme or plan, knowledge, identity, or lack of mistake or accident under Rule 5-404(b); or to prove a character trait of a person which is an essential element of a charge, claim, or defense under Rule 5-405(b); or under the "open door theory" to rebut evidence introduced by the opposing side. *Id.* Once again, Rule 5-608 underscores the importance of Rule 5-105 that evidence may be admissible for one purpose, but inadmissible for another.

93. *Id.* at 149.

94. MD. RULE 5-608(a)(4).

are inconsistent with the reputation or opinion testimony offered by the character witness. When character witness *B* testifies that witness *A* has a bad reputation for veracity or that, in *B*'s opinion, *A* is not a truthful person, the specific instances that may be probed during cross-examination of *B* would involve instances of truthfulness by *A*.

While Rule 5-608(a)(4) provides, as a matter of fairness, a balance to the character witness's ability to impeach another witness's credibility by allowing inquiry during cross-examination into specific acts, there are important procedural restrictions on the ability of the cross-examiner to do so. First, provided the attorney who called the character witness to testify *objects*, the cross-examiner of a character witness may not inquire into specific acts unless she, outside the presence of the jury, "establishes a reasonable factual basis for asserting that the prior instances occurred or that the convictions exist, and . . . the prior instances or convictions are relevant to the witness's reputation or the character witness's opinion, as appropriate."⁹⁵ Therefore, it is essential that an attorney who calls a character witness to attack the truthfulness of a prior witness be alert during cross-examination of the character witness and make a timely objection and request for an out-of-court inquiry before specific instances are raised during cross-examination. Otherwise, under Rule 5-103 any objection to the propriety of the inquiry will be waived.

Although Rule 5-608(a) is silent in this regard, if the character witness denies knowledge of the specific acts properly inquired into during cross-examination, the attorney conducting the cross-examination may not subsequently offer into evidence extrinsic evidence of these facts.⁹⁶ Such a result is also consistent with Rule 5-608(b), which prohibits proof through extrinsic evidence of prior bad acts of a witness brought out during cross-examination. Finally, although Rule 5-608(a)(4) addresses one means of impeachment of a character witness through inquiry into specific acts, it does not preclude any other appropriate method of impeachment, such as those listed in Rule 5-616(a).⁹⁷ Once character witness *B* has been impeached as described in the preceding section, he or she may then be rehabilitated as provided by Rule 5-616(c).⁹⁸

3. Use of Character Witness *B* to Rehabilitate the Character of Witness *A*

Character witnesses may also be used to rehabilitate a prior witness whose credibility has been attacked. Rule 5-608(a)(2) provides

95. *Id.*

96. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.608.4, at 150.

97. *Id.*

98. Rule 5-616(c) identifies four methods of rehabilitation. *See supra* note 83 (listing the methods).

that “[a]fter the character for truthfulness of a witness has been attacked, a character witness may testify (A) that the witness has a good reputation for truthfulness or (B) that in the character witness’s opinion the witness is a truthful person.”⁹⁹ When a character witness is used to rehabilitate, the same limitations contained in Rule 5-608(a)(3)(A) and (B) apply. Thus, rehabilitating character witness *B* may testify on direct only as to the reputation of prior witness *A* for truthfulness or may express an opinion that prior witness *A* is a truthful person and may not testify on direct examination as to specific instances of truthfulness.¹⁰⁰ However, *B* will be permitted to give a reasonable basis for his reputation or opinion testimony. The cross-examination of a rehabilitating character witness is the same as permitted by Rule 5-608(a)(4) for impeachment of a character witness, save for the fact that the specific instances inquired into will be of the untruthful conduct of *A*, instead of the truthful conduct. Accordingly, the provisions of Rule 5-608(a)(4) regarding the holding of an inquiry into the basis for specific acts of untruthful conduct during cross-examination will also be required if a timely objection has been made. Rehabilitation of a rehabilitating character witness may also be accomplished in accordance with Rule 5-616(c).

B. Impeachment of a Witness, Character Witness or Otherwise, by Examination Regarding the Witness’s Own Prior Conduct Other Than Convictions

Rule 5-608(b) permits the examination of any witness, regardless of whether or not he is called as a character witness, regarding that witness’s own prior conduct that did not result in a conviction¹⁰¹ if the court finds that the prior conduct is probative of a character trait for untruthfulness. Rule 5-608(b) further provides, however, that upon objection, the court may permit inquiry into the witness’s prior bad acts only if the examining attorney demonstrates, outside the presence of the jury, that there is a reasonable factual basis for asserting that the conduct occurred. Moreover, Rule 5-608(b) also states that the prior bad acts may not be proved by extrinsic evidence. Thus, if the examining attorney asks the witness about a prior bad act and the witness denies it, the examiner is bound by the answer and may not prove the prior bad act through other means.¹⁰² Finally,

99. MD. RULE 5-608(a)(2).

100. MD. RULE 5-608(a)(3)(B).

101. Rule 5-608(b) does not preclude impeachment by proof of a prior conviction, it merely requires that it be done in accordance with Rule 5-609.

102. In the words of the Court of Appeals Standing Committee on Rules of Practice and Procedure, “the questioner is bound by the witness’s answer.” July 1993 Committee Report, *supra* note 78, at 68.

Rule 5-608(c) gives further protection to witnesses who are examined regarding prior bad acts by stating that the giving of testimony does not operate as a waiver of the privilege against self-incrimination when the witness is examined regarding matters that relate only to credibility.¹⁰³

Rule 5-608 embodies several important principles of evidence law. First, it highlights the importance that the character of a witness plays on the process of persuasion by allowing a character witness to testify as to the character trait of a prior witness for truthfulness or untruthfulness and also by allowing the character of any witness, whether character, lay, expert, primary, or rebuttal, to be examined regarding prior bad acts probative of truthfulness. Thus, Rule 5-608 focuses the attention of the fact finder directly on the *ethos* of the witnesses.

Second, Rule 5-608 contains safeguards necessary in the interest of fairness to prevent abuse of inquiries into character. Accordingly, the character witness cannot testify as to specific acts on direct examination, but may have the basis for her opinion or reputation testimony challenged by inquiry into specific acts during cross-examination. Similarly, Rule 5-608 promotes fairness by delaying inquiry into specific acts until after the questioner has demonstrated outside the hearing of the jury that there is a reasonable basis for asserting that the prior acts in fact occurred, provided a timely objection has been made.¹⁰⁴

Third, Rule 5-608 incorporates the principles of Rule 5-403 in its prohibition against proof through extrinsic evidence of prior acts under either 5-608(a) or (b). To allow such proof could confuse the issues, mislead the jury, waste time, and unduly delay the trial by turning the trial court's attention away from the real issues and into a side show mini-trial regarding prior conduct of each witness called.¹⁰⁵

Once witness *A* has been impeached by witness *B* who testified that witness *A* has a poor character for truthfulness, witness *A* may be rehabilitated by testimony from a rehabilitating character witness stating that witness *A*'s character for truthfulness is good.¹⁰⁶ This

103. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.608.4(c), at 150.

104. MD. RULE 5-608(a)(4).

105. It is interesting to note that Rule 5-616(b)(2) allows the trial judge the discretion, in general, to permit the introduction of extrinsic evidence on collateral matters. One could argue that because Rule 5-616(b)(2) gives the court the discretion to allow extrinsic evidence of collateral matters, this would include allowing proof by extrinsic evidence of prior bad acts that Rule 5-608(a) and (b) do not allow. However, because Rule 5-608 specifically prohibits extrinsic proof of prior bad acts, and because Rule 5-616(b)(2) is a general rule, it should not be read as enabling a court to override the specific prohibition contained in Rule 5-608. Moreover, because Rule 5-608 allows inquiry into prior acts in certain circumstances, such evidence cannot fairly be regarded as "collateral" and, thus Rule 5-616(b)(2) would not govern at all.

106. MD. RULE 5-616(c)(3).

rehabilitation, however, must comply with the requirements of Rule 5-608(a)(2) and (3). Additionally, the witness may be rehabilitated by any other means that the court determines is relevant for that purpose,¹⁰⁷ including recalling the impeached witness to the stand to deny or explain the impeaching facts.¹⁰⁸

Rule 5-608 presents some tactical challenges to attorneys. Suppose, for example, that the plaintiff's attorney learns that the defendant's expert witness claims in his resumé to have published certain articles and to have received certain awards that he did not. Obviously, making a false claim regarding publications and awards is probative of the character trait of truthfulness. Armed with this information, how can it be exploited to the maximum advantage to impeach the expert? If the expert is confronted with the false information for the first time during cross-examination, and denies the fabrication of his qualifications, the plaintiff's attorney is bound by the answer and cannot introduce extrinsic evidence to disprove it. However, if raised during a pretrial deposition, the expert may have time before trial to think of a plausible explanation, or the defendant's attorney may simply select another expert. There is no risk-free solution to this problem. The illustration merely underscores the fact that counsel must pay careful attention to the limits imposed by Rule 5-608 on proving prior acts relating to the character of a witness for truthfulness or untruthfulness.

Additionally, Rule 5-608 highlights an area generally overlooked during pretrial discovery. Rule 5-608 allows a character witness to provide *opinion testimony* regarding the veracity of other witnesses.¹⁰⁹ When such testimony is provided by a credible, sincere witness, supported by a good factual basis, it can have a dramatic effect on the *ethos* and *pathos* of the case. While it is common practice during pretrial discovery to uncover through interrogatories and depositions the factual basis to support expert opinions, it is almost unheard of to see such discovery directed at the identity of a character witness or the factual basis for opinion evidence under Rule 5-608 or 5-701.¹¹⁰ There is no doubt that under Rule 2-402¹¹¹ the scope of discovery is broad enough to permit an inquiry into the factual basis of any opinion or reputation evidence to be offered under Rule 5-608 and, indeed, an interrogatory directed to such information would not be difficult to draft.¹¹² Accordingly, in a case where the credibility

107. MD. RULE 5-616(c)(4).

108. MD. RULE 5-616(c)(1).

109. MD. RULE 5-608(a)(1)(B).

110. Rule 5-701 pertains to the limitations of opinion testimony by lay witnesses.

111. MD. RULE 2-402.

112. An example of an interrogatory follows:

If you intend to offer testimony under Rule 5-608 regarding the character for truthfulness or untruthfulness of any witness, including

of a witness is likely to be an important factor in the outcome of the trial, prudent counsel should attempt to develop during discovery the identity of character witnesses and the factual basis for their testimony.

Finally, when attempting to impeach the veracity of one witness by calling another character witness to attack the credibility of the prior witness under Rule 5-608, the attorney calling the character witness must not overlook the *ethos*, or ethical appeal, of the character witness. Unless the character witness's ethical appeal is sufficiently greater than that of the prior witness and the factual basis for the character witness's opinion or reputation testimony sufficiently strong, the jury may be unwilling to afford greater credit to the testimony of the character witness and may simply disregard it entirely.

IX. IMPEACHMENT BY EVIDENCE OF CONVICTION OF A CRIME—RULE 5-609

Maryland Rule 5-609 governs impeachment of witnesses by proof of conviction of a crime. The Rule is based on Maryland Rule 1-502¹¹³ which was adopted by the Court of Appeals of Maryland in

the plaintiff/defendant, identify each character witness you expect to testify, and for each one identified state with particularity the factual basis to support the opinion or reputation testimony you expect that witness to give.

113. Rule 1-502, Impeachment by Evidence of Conviction of Crime stated:

(a) Generally.—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime was an infamous crime or other crime relevant to the witness's credibility and the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

(b) Time Limit.—Evidence of a conviction under this Rule is not admissible if a period of more than 15 years has elapsed since the date of the conviction.

(c) Other Limitations.—Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:

- (1) the conviction has been reversed or vacated;
- (2) the conviction has been the subject of a pardon; or
- (3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.

(d) Effect of Plea of *Nolo Contendere*.—For purpose of this Rule, "conviction" includes a plea of *nolo contendere* followed by a sentence, whether or not the sentence is suspended.

MD. RULE 1-502 (1994). This Rule was rescinded, effective July 1, 1994, and replaced by Maryland Rule 5-609.

November 1991 and went into effect on January 1, 1992.¹¹⁴ Rule 5-609 is a perfect example of how the three general concepts of evidence law—relevance, economy, and fairness—are applied. For example, the fact that a witness has been convicted of a crime is not, in and of itself, helpful in determining whether he or she is a truthful person. The nature of the crime is an important factor. A witness with a prior criminal conviction for a simple assault may very well be expected to give honest testimony, while the testimony of a witness with a prior conviction for mail fraud is more likely to be suspect. The distinction is whether there is any logical connection between the nature of the crime and the honesty of the person. Expressed differently, the fact that a person was once convicted of simple assault does not make it less likely that he will testify truthfully and, therefore, under Rule 5-401 this evidence is not relevant to the issue of credibility. Under Rule 5-403, the introduction of this evidence would probably create unfair prejudice or confusion, or mislead the jury. To permit the introduction of the prior assault conviction for the purpose of impeachment would be to invite the jury to disbelieve the witness simply because he once did something that was criminal, which would be unfair.

There are three important requirements imposed by Rule 5-609. First, it requires that there be both a logical nexus between the prior conviction and the credibility of the witness,¹¹⁵ and a showing that the probative value of the evidence of prior conviction outweighs the danger of unfair prejudice.¹¹⁶ Second, Rule 5-609 recognizes that even if a person has been convicted of a crime that is logically connected to whether he is believable, the relevance of this information diminishes over time. Thus, for example, the fact that at age eighteen a woman was convicted of theft has little tendency to undermine her credibility if she testifies twenty years later. Thus, Rule 5-609 imposes a fifteen-year time limit on the introduction of evidence of prior conviction of a crime.¹¹⁷ Third, even if a person has been convicted of a crime that is relevant to credibility, this evidence cannot fairly be introduced unless the conviction is final, and should not be admitted if the conviction was vacated or reversed, or a pardon was issued.¹¹⁸ Rule 5-609(c) addresses these “fairness factors” that further restrict the introduction of such impeaching evidence. With these general comments in mind, Rule 5-609 may now be examined in more detail.

114. July 1993 Committee Report, *supra* note 78, at 70; MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.609.1, at 153.

115. MD. RULE 5-609(a)(1).

116. MD. RULE 5-609(a)(2).

117. MD. RULE 5-609(b).

118. MD. RULE 5-609(c) to (d).

Rule 5-609(a) sets out the general requirements governing impeachment of a witness by evidence of a prior conviction. It allows evidence of a prior conviction to be proved either by eliciting this information from the witness during examination or by establishing it by public record during the examination of the witness, but only if "(1) [t]he crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or objecting party."¹¹⁹

Rule 5-609(a) contains several important features. First, it requires that the impeachment occur during the examination of the witness, either through admission by the witness or the introduction of the public record of the conviction.¹²⁰ Second, the use of the phrase "during examination" includes direct examination and is intended to allow an attorney who calls as a witness a person with a prior conviction to "draw the sting" of this fact by bringing it out first during direct.¹²¹ Third, Rule 5-609(a) restricts the type of crime for which conviction may be used for impeachment to "infamous crime[s] or other crime[s] relevant to the witness's credibility,"¹²² but offers no further guidance regarding the definition of these crimes. Judge Murphy points out that there are four distinct categories of prior convictions: (1) treason and all common-law felonies; (2) *crimen falsi*—involving dishonesty, fraud, theft or obstruction of justice; (3) other crimes that reasonably bear on the issue of credibility; and (4) other crimes that do not reasonably bear on the issue of credibility.¹²³ The answer to whether convictions in

119. MD. RULE 5-609(a).

120. The requirement that proof of the conviction be established during the actual testimony of the witness does not apply if the "witness" is a nontestifying hearsay declarant, in which case the conviction may be proved through extrinsic evidence. See MD. RULE 5-806(a); July 1993 Committee Report, *supra* note 78, at 70; MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.609.4, at 157.

121. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.609.1, at 153.

122. MD. RULE 5-609(a).

123. MURPHY, *supra* note 3, § 1302(B), at 648 (citing *Prout v. State*, 311 Md. 348, 366, 535 A.2d 445, 454 (1988) (identifying the four different categories of crimes with respect to impeachment: treason and common law felonies; *crimen falsi*; other crimes reasonably bearing on credibility; and other crimes not reasonably bearing on credibility)); see also MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.609.4, at 156 (citing *Prout v. State*, 311 Md. 348, 360, 535 A.2d 445, 451-52 (1988) (defining the *crimen falsi* as perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense involving some element of deceitfulness, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully); *Beales v. State*, 329 Md. 263, 269-70, 619 A.2d 105, 108-09 (1993) (stating that theft is among the *crimen falsi*)).

the first three categories are admissible for impeachment requires the court to examine “the elements essential to a conviction for that crime, not the circumstances of the witness’s conviction.”¹²⁴ If this analysis results in a conclusion that the prior conviction is relevant to credibility, the court must then employ the balancing test required by Rule 5-609(a)(2)¹²⁵ to determine whether the evidence is admissible. The requirement that the balancing test be used in all cases is taken from *Beales v. State*.¹²⁶ Professor McLain offers the following helpful list of factors to be employed during this balancing test:

- (1) the impeachment value of the prior crime;
- (2) the remoteness of the conviction;
- (3) the witness’s subsequent history;
- (4) the importance of the witness’s credibility to the case, and thus of evidence relevant to the witness’s credibility;
- (5) the risk of unfair prejudice, which is particularly high if the witness sought to be impeached is the accused and the prior conviction is for a crime similar to that for which the accused is on trial.¹²⁷

Fourth, although Rule 5-609(a) is silent in this regard, only evidence of the conviction itself is admissible, not the underlying details,¹²⁸ introduction of which would almost certainly confuse the issues, sidetrack the jury, and cause undue delay. Thus, Rule 5-609(a) also promotes the goals of economy and clarity.

Assuming the analysis of Rule 5-609(a) militates in favor of admissibility of the evidence of prior conviction on the issue of credibility of a witness, the court must then determine whether the requirements of Rule 5-609(b) and 5-609(c) have been met before the evidence is actually admitted. Rule 5-609(b) prohibits admissibility of evidence of a conviction that is more than fifteen years old and Rule 5-609(c) imposes additional restrictions on admissibility of such evidence that has passed the threshold tests of 5-609(a) and (b). Rule

124. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.609.4(c), at 156.

125. This is the same balancing test described in Rule 5-403, except that it mandates exclusion of the evidence of prior conviction unless the test is met, while Rule 5-403 mandates admissibility of evidence unless overriding prejudice is shown.

126. 329 Md. 263, 274, 619 A.2d 105, 110 (1993); *see* 1993 Committee Report, *supra* note 78, at 70; MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2-609.4, at 155-56.

127. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.609.4, at 156.

128. *Id.* (citing *Foster v. State*, 304 Md. 439, 468-71, 499 A.2d 1236, 1251-52 (1985), *cert. denied*, 478 U.S. 1010 (1986); *Robinson v. State*, 53 Md. App. 297, 304, 452 A.2d 1291, 1292 (1982)).

5-609(c) states that evidence of a conviction otherwise admissible under Rule 5-609(a) and (b) shall nonetheless be excluded if:

- (1) the conviction has been reversed or vacated;
- (2) the conviction has been the subject of a pardon; or
- (3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.¹²⁹

Finally, Rule 5-609(d) addresses what is meant by a "conviction," stating that for purposes of the Rule "conviction includes a plea of *nolo contendere* followed by a sentence, whether or not the sentence is suspended."¹³⁰ A witness who has been found guilty but who received probation before judgment under Article 27, section 641 of the Maryland Code¹³¹ has not received a "conviction" for the purposes of the Rule, and therefore proof of this criminal disposition is not admissible under Rule 5-609.¹³² Similarly, juvenile adjudications are not considered "convictions"¹³³ and, therefore, are not admissible under Rule 5-609.¹³⁴

129. MD. RULE 5-609(c).

130. MD. RULE 5-609(d).

131. MD. ANN. CODE art. 27, § 641 (1992) (probation prior to judgment).

132. See MURPHY, *supra* note 3, § 1302(B), at 649. However, if after receiving a probation before judgment the witness violates the probation conditions and the court subsequently imposes a judgment of conviction, this may be introduced if otherwise admissible under Rule 5-609. *Id.* at 650 (citing *Myers v. State*, 303 Md. 639, 647-48, 496 A.2d 312, 316 (1985) (a person who receives probation before judgment under § 641 is not convicted of a crime *unless* he violates the probation order and the court enters a judgment on the finding of guilt)). Further, if a witness receives probation before judgment for conduct that is relevant to the character trait of untruthfulness, the witness may be asked whether he or she in fact committed the acts that resulted in the finding of guilt and imposition of probation before judgment, in accordance with Rule 5-608(b). *Id.* If the witness denies the prior bad acts, however, the cross-examiner is bound by the answer. MD. RULE 5-608(b) ("The conduct may not be proved by extrinsic evidence.").

133. MD. CODE ANN., CTS. & JUD. PROC. § 3-824(a)(1) (1989) ("An adjudication of a child pursuant to this subtitle is not a criminal conviction for any purpose")

134. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.609.3(5), at 155. Professor McLain observes that the Committee Note at the end of Rule 5-609 points out that the evidence of juvenile adjudications may be admissible under the Sixth Amendment Confrontation Clause as evidence of bias. *Id.* at 154; *see, e.g., Davis v. Alaska*, 415 U.S. 308 (1974) (Sixth Amendment right of confrontation requires a defendant in a criminal case to be allowed to impeach the credibility of a prosecution witness by inquiry into possible bias relating to that witness's status as a juvenile delinquent).

A witness impeached by proof of a prior conviction may be rehabilitated by permitting the witness to deny or explain the impeaching facts, although the witness may not deny his or her guilt of the earlier crime.¹³⁵ Professor McLain notes that this Rule is intended to codify the Maryland case law that grants the trial court discretion to allow a witness impeached by evidence of a prior conviction to explain any extenuating or mitigating circumstances.¹³⁶ Additionally, the credibility of the witness may be rehabilitated by any other facts that the court determines are relevant to such rehabilitation.¹³⁷

Perhaps more than any other rule of evidence, Rule 5-609 emphasizes the importance of careful pretrial preparation for impeachment. Counsel should make a diligent effort during pretrial discovery¹³⁸ to determine whether the opposing party or any other person who is likely to be an important witness has been convicted of a crime. If a potential witness has in fact been convicted, counsel should: (1) analyze the conviction to determine whether it meets the "nexus to credibility" requirements of Rule 5-609(a)(1); (2) analyze the balancing factors of Rule 5-609(a)(2) to enable counsel to argue to the court why they have or have not been met; (3) determine whether the date of conviction is more than fifteen years old; (4) determine whether the conviction was vacated reversed, or whether a pardon was granted, or with regard to a recent conviction, whether the time to appeal has expired; (5) obtain a certified copy of the record of conviction to comply with Rule 5-902(a)(4) on self-authentication, and Rule 5-803(b)(8), the hearsay exception for public records and reports; (6) review Rule 5-609(a)(4) and be prepared to establish the factual basis required in that Rule if counsel seeks to question a character witness about a criminal conviction of a witness who has previously testified; (7) analyze, if an attorney attempts to call a witness who has a criminal conviction that would be admissible under Rule 5-609, whether or not to bring that out first during direct examination to "draw the string"; (8) give consideration to filing a motion *in limine* or requesting a bench conference before cross-examination if counsel knows that a witness he or she intends to call has a prior criminal conviction the admissibility of which is not

135. MD. RULE 5-616(c)(1).

136. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.616.4(c), at 184; *see, e.g.*, *Donnelly v. Donnelly*, 156 Md. 81, 86, 143 A. 648, 650 (1928) (if impeached by evidence of conviction of a crime, a witness may be allowed to explain the circumstances of the offense in extenuation and mitigation).

137. *See* MD. RULE 5-616(c)(4).

138. MD. RULE 2-402 (civil discovery, circuit court); MD. RULE 3-421 (civil discovery, district court); MD. RULE 4-263 (criminal discovery, circuit court); MD. RULE 4-262 (criminal discovery, district court).

certain under Rule 5-609; (9) consider filing a motion *in limine* or requesting a preliminary determination of admissibility under Rule 5-104 if counsel intends to impeach a witness with evidence of a prior criminal conviction, and counsel is not certain that the court will allow such impeachment.

With regard to impeachment by proof of a prior conviction under Rule 5-609, as with impeachment by proof of the character trait of untruthfulness under Rule 5-608, the impeachment results from diminishing the *ethos* or ethical appeal of the witness rather than by demonstrating the inaccuracy or inconsistency of the testimony itself, or by diminishing the ability of the witness to perceive, remember, or relate. Accordingly, if efforts to impeach based on these two rules are to be successful, the magnitude of the prior bad act or the nature of the prior conviction must be of sufficient weight to cause a fair minded jury to form a negative opinion of the character of the witness, and therefore not want to believe that witness. This must be kept in mind when planning impeachment under these two rules because if it is unlikely that the prior bad act or conviction will be sufficient, alone or in combination with the other methods of impeachment, to diminish the character of the witness in the eyes of the jury, counsel should rethink whether the impeachment should be attempted.

X. IMPEACHMENT BY PRIOR STATEMENTS OF THE WITNESS—RULE 5-613

It has been observed that the "first, and probably the most effective and most frequently employed [line of attacking the credibility of a witness] is an attack that the witness on a previous occasion has made statements inconsistent with his present testimony."¹³⁹ When properly employed, impeachment by prior inconsistent statements of a witness causes the fact finder to discredit the testimony of a witness by concluding that the witness, at best, cannot really remember what happened, or, at worst, that the witness is a liar. When improperly employed attempts to impeach by showing prior inconsistent statements fail to diminish the believability of the witness in the eyes of the jury, the *ethos* of the attorney may be diminished and the *pathos* of the witness may be enhanced. Knowing

139. McCORMICK, *supra* note 13, § 33, at 66; see also MURPHY, *supra* note 3, § 1302(F), at 675 ("[P]roof that a witness has given a prior inconsistent statement is a most important impeachment technique.').

how to effectively impeach by prior inconsistent statements starts with knowing the provisions of Rule 5-613, which governs that form of impeachment.

Rule 5-613 is divided into two parts. Rule 5-613(a) addresses the process of examining a witness about prior oral or written inconsistent statements. Rule 5-613(b) pertains to the introduction of extrinsic evidence to prove a prior inconsistent statement. There are important differences between the two.

Rule 5-613(a) allows a lawyer who is examining a witness about a prior oral or written statement to question the witness about the statement without first showing it to the witness or making its contents known to the witness provided that

before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.¹⁴⁰

Rule 5-613(a), therefore, departs from the prior common law of Maryland, which followed Queen Caroline's Rule.¹⁴¹ Queen Caroline's Rule required the examiner to allow the witness to see a prior written statement before questioning him or her about it, or, in the case of an oral statement, the attorney was required to orient the witness with respect to the time, place, date, circumstances, and content of the prior statement.¹⁴² The primary disadvantage of Queen Caroline's Rule was that it "allow[ed] the liar additional time to conjure up false explanations for the inconsistency."¹⁴³ Accordingly, Rule 5-613(a) changed the common law and now allows the examining attorney to question the witness about a prior inconsistent statement

140. MD. RULE 5-613(a).

141. MARYLAND PRACTICE, *supra* note 25, § 613.1, at 162-63 (citing 2 Br. & B. 284, 129 Eng. Rep. 976 (1820) (the source of Queen Caroline's Rule)).

142. *See generally* State v. Kidd, 281 Md. 32, 46 n.8, 375 A.2d 1105, 1114 n.8, *cert. denied*, 434 U.S. 1002 (1977) (citing requirements for impeachment by prior inconsistent statements); Whisner v. Whisner, 122 Md. 195, 207, 89 A. 393, 395 (1914) (witness cannot be impeached by prior written inconsistent statement unless document has first been shown to him); July 1993 Committee Report, *supra* note 78, at 77; MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.613.2, at 168 (citing Bruce v. State, 318 Md. 706, 729 n.2, 569 A.2d 1254, 1266 n.2 (1990) (before introduction of prior inconsistent statement is allowed, witness must be informed of time, place of statement, as well as its substance)); MARYLAND PRACTICE, *supra* note 25, § 613.1, at 163; MURPHY, *supra* note 3, § 1302(F)(1), at 677.

143. MURPHY, *supra* note 3, § 1302(F)(1), at 677.

without first having to provide him or her with the details regarding the making of the statement or its content. However, in the interest of fairness, the examining attorney must, prior to the end of his or her examination, provide the witness with the information regarding the statement as required in Rule 5-613(a)(1),¹⁴⁴ as well as afford the witness an opportunity to explain or deny the statement.

Further protection is provided by Rule 5-613(b) which, as a general practice, prohibits introduction of extrinsic evidence of a prior inconsistent statement until the requirements of Rule 5-613(a)(1) and (2) have been met. Rule 5-613(b) also provides that, with regard to extrinsic proof of prior inconsistent statements,

[u]nless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.¹⁴⁵

The general prohibition against introduction of extrinsic evidence of prior inconsistent statements on collateral matters is consistent with the principles of Rule 5-403 that seek to avoid confusing the issues, misleading the jury, and wasting court time. Balance is provided, however, by granting the trial court discretion in the interest of justice to allow introduction of extrinsic evidence of a prior inconsistent statement even if the proponent of this evidence failed to comply with Rule 5-613(a)(1) and (2), or to allow extrinsic evidence of prior inconsistent statements regarding a collateral matter.

Rule 5-613 does not give a definition of a "statement," but Professor McLain notes that a statement would not encompass prior conduct inconsistent with the subsequent statement.¹⁴⁶ However, a statement would include a prior expression of an opinion that is inconsistent with subsequent testimony.¹⁴⁷

Similarly, Rule 5-613 provides no guidance with respect to what is meant by an "inconsistency." However, one commentator analyzed the issue as follows:

144. The cross-examiner must, under Rule 5-613(a)(1), disclose a written statement, or, if an oral statement, the attorney must disclose its contents, the circumstances under which it was made, and the persons to whom it was made. MD. RULE 5-613(a)(2).

145. MD. RULE 5-613(b).

146. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.613.4, at 170. However, silence might, under proper circumstances, qualify as a "statement" if that silence is inconsistent with another statement. See MURPHY, *supra* note 3, § 1302(F), at 676 (citing *Devan v. State*, 17 Md. App. 182, 300 A.2d 705 (1973) (silence may qualify as a "statement" for purposes of impeachment by prior inconsistent statements)).

147. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.613.4, at 170.

[W]hat degree of inconsistency between the testimony of the witness and his previous statement is required? The language of some of the cases seems over strict in suggesting that a contradiction must be found, and under the more widely accepted view any material variance between the testimony and the previous statement will suffice. Accordingly, if the former statement fails to mention a material circumstance presently testified to, which it would have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent. Again, an earlier statement by the witness that he had no knowledge of facts now testified to, should be provable. Seemingly the test should be, could the jury reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make a prior statement of this tenor. Thus, if the previous statement is ambiguous and according to one meaning would be inconsistent with the testimony, it should be admitted for the jury's consideration. In applying the criterion of material inconsistency reasonable judges will be likely to differ, and a fair range of discretion should be accorded to the trial judge. Moreover, it is to be hoped that instead of restricting the use of prior statements by a mechanical use of the test of inconsistency, the court will lean towards receiving such statements in case of doubt, to add in evaluating the testimony. These statements, indeed, having been made when memory was more recent and when less time for the play of influence has elapsed, are often inherently more trustworthy than the testimony itself.¹⁴⁸

Judge Murphy is in accord. He notes that "flat contradiction" between the statements is not required.¹⁴⁹ An omission of significant facts, a contrast in emphasis of the same facts, or even a different order of treatment of the same facts qualify as inconsistencies under Rule 5-613.¹⁵⁰ Thus, what is an inconsistency under Rule 5-613 and therefore eligible for testing during cross-examination, should be broadly interpreted.

148. MCCORMICK, *supra* note 13, § 34, at 68-69.

149. MURPHY, *supra* note 3, § 1302(F), at 676 (citing *Jencks v. United States*, 353 U.S. 657, 667 (1957) (Brennan, J.) ("Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency.")).

150. *Id.* (citing *Jencks*, 353 U.S. at 667 (Brennan, J.) ("The omission from the report of facts related at trial, or a contrast in emphasis upon the same facts, even if a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness's trial testimony.")).

Another important issue that arises in connection with impeachment by prior inconsistent statements is whether the introduction of the earlier statement is for the purpose of establishing the truth of that statement, its "substantive truth," or only for the purpose of impeaching the credibility of the witness by showing that at different times she has given different accounts of the same event. The answer to this question cannot be found in Rule 5-613, but lies instead in the rules of hearsay. Rule 5-802.1 identifies five types of "prior statements" made by witnesses that are not excluded from introduction into evidence for the truth of the assertions contained within at a subsequent trial. The first is

[a] statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.¹⁵¹

Thus, if a prior statement made by a non-party witness meets the qualifications under Rule 5-802.1(a) it is admissible for its substantive truth as well as to discredit the believability of the witness by showing that he or she has made inconsistent statements.¹⁵² This marks an important departure from the prior common law that usually precluded admissibility of a prior inconsistent statement to prove its substantive truth.

In *Nance v. State*,¹⁵³ the Court of Appeals of Maryland examined the issue of whether a statement introduced to impeach a witness as a prior inconsistent statement was also admissible to prove its substantive truth.¹⁵⁴ *Nance* involved "turncoat" witnesses who gave written statements and made photo identifications of two defendants in a criminal case prior to trial.¹⁵⁵ At trial, the witnesses repudiated their pretrial statements and identifications, and the prosecution introduced both.¹⁵⁶ The trial judge admitted the prior photo identifications as substantive evidence of guilt, but did not rule as to whether the prior written statements were admissible as substantive evidence.¹⁵⁷ He did, however, instruct the jury that, ordinarily, prior

151. MD. RULE 5-802.1(a).

152. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.613.4, at 170, § 2.802.1(1), at 221.

153. 331 Md. 549, 629 A.2d 633 (1993).

154. *Id.* at 560, 629 A.2d at 638.

155. *Id.* at 553-56, 629 A.2d at 635-36.

156. *Id.* at 556-58, 629 A.2d at 636-37.

157. *Id.* at 558-59, 629 A.2d at 637-38.

inconsistent statements were admissible only for impeachment purposes.¹⁵⁸ The defendants were convicted and appealed.¹⁵⁹ The Court of Special Appeals of Maryland affirmed,¹⁶⁰ and the court of appeals granted certiorari to address the evidentiary issues raised.¹⁶¹

The Court of Appeals of Maryland noted that under the "orthodox rule" followed by Maryland courts, prior inconsistent statements are not treated as substantive evidence, but only as an impeachment device.¹⁶² The court observed, however, that Maryland was one of only a handful of states that still adhered to the "orthodox rule" and noted that the more widely embraced "modern rule" permitted introduction of inconsistent statements substantively, provided the declarant was present in court to testify.¹⁶³ It also noted that because the prior statement was nearer in time to the event in question, it was likely to be more complete and accurate.¹⁶⁴ Additionally, the court opined that allowing the prior statement to be introduced substantively "eliminates the need for a limiting instruction which asks jurors to carry out the difficult task of separating substantive proof from impeachment evidence bearing solely on a witness's credibility."¹⁶⁵

Although the court appreciated the merits of the modern rule over the orthodox rule, it declined to adopt it, adopting instead an intermediate approach.¹⁶⁶ Under that approach, "a prior inconsistent statement may be used as substantive evidence when that statement was *reduced to a writing signed or adopted* by the declarant, and when the declarant is a witness at trial and subject to cross-examination."¹⁶⁷ The court held that

the factual portion of an inconsistent out-of-court statement is sufficiently trustworthy to be offered as substantive evidence of guilt when the statement is based on the declarant's own knowledge of the facts, is reduced to writing and signed or otherwise adopted by him, and he is subject to cross-examination at the trial where the prior statement is introduced. To the extent it is inconsistent with this holding, our opinion in *Mouzone v. State* is overruled.¹⁶⁸

158. *Id.* at 559, 629 A.2d at 638.

159. *Id.*

160. *Id.*; *Nance v. State*, 93 Md. App. 475, 613 A.2d 428 (1992).

161. *Nance*, 331 Md. at 559, 629 A.2d at 638.

162. *Id.* at 564, 629 A.2d at 641.

163. *Id.* at 565, 629 A.2d at 641.

164. *Id.* at 566, 629 A.2d at 642.

165. *Id.*

166. *Id.* at 567-69, 629 A.2d at 642-43.

167. *Id.* at 567-68, 629 A.2d at 642 (emphasis added).

168. *Id.* at 569, 629 A.2d at 643. In *Mouzone v. State*, the court of appeals declined

The *Nance* decision marked the court's first step, albeit a cautionary one, away from the orthodox rule that prior inconsistent statements were admissible only for impeachment of credibility.¹⁶⁹

In *Sheppard v. State*,¹⁷⁰ the Court of Special Appeals of Maryland addressed the issue of admissibility of prior inconsistent statements as substantive evidence.¹⁷¹ In *Sheppard*, the defendant appealed a criminal conviction, asserting that the trial judge committed error by not admitting as substantive evidence prior inconsistent statements of two prosecution witnesses.¹⁷² The State witnesses had given the police two pretrial statements, and the second ones were inconsistent with their subsequent trial testimony.¹⁷³ The defense sought the introduction of the two statements as substantive evidence, citing *Nance*, but the trial judge admitted them only for impeachment.¹⁷⁴ The court of special appeals reversed because it found that the statements satisfied all of the prerequisites for substantive admissibility identified in *Nance*.¹⁷⁵ The court also commented on the impact of the newly adopted rules of evidence, particularly Rule 5-802.1(a).¹⁷⁶ Judge Moylan, writing for the court, concluded the opinion with the following observation:

Theoretically, there is no reason why a jury could not look upon a witness and consider his sworn testimony and then be presented with a smorgasbord of earlier versions of events given by that witness—some resolutely consistent with the trial testimony, some wildly inconsistent, and others at various points between. Opposing counsel could then have a field day testing, probing, impeaching, and rehabilitating. It would fall the ultimate lot of the juror to choose on

to admit pretrial identifications as substantive evidence because it refused to view such statements differently from broader out of court statements containing information beyond an identification, but which did not fall within a recognized hearsay exception. *Mouzone v. State*, 294 Md. 692, 702, 452 A.2d 661, 666 (1982).

169. See *Nance*, 331 Md. at 569, 629 A.2d at 643.

170. 102 Md. App. 571, 650 A.2d 1362 (1994) (decided after the new rules of evidence went into effect but applying the law which existed before the rules became effective).

171. *Id.* at 574-75, 650 A.2d at 1363-64.

172. *Id.* at 573, 650 A.2d at 1363.

173. *Id.* at 574, 650 A.2d at 1363-64.

174. *Id.* at 575, 650 A.2d at 1364.

175. *Id.*

176. A statement which is inconsistent with the declarant's testimony is not excluded by the hearsay rule if the statement was given under oath at a trial, hearing, or other proceeding; or if the statement was written and signed by the declarant; or if the statement was recorded electronically. See MD. RULE 5-802.1(a).

which, if any, version—or amalgam or versions—to bestow decisive weight and credibility.¹⁷⁷

Although *Nance* and *Sheppard* marked an important departure from the prior orthodox rule that had existed in Maryland, Rule 5-801.1(a) goes farther still. Because prior deposition testimony is included in Rule 5-802.1(a) as an example of inconsistent statements that are admissible for the truth of their substance,¹⁷⁸ any statement made during a deposition that is inconsistent with the witness's later testimony at trial may be offered for both its impeachment value and for the truth of the earlier statement, provided it is otherwise admissible. Similarly, Rule 5-803 identifies five types of "admissions" by a party-opponent that also qualify as exceptions to the hearsay rule¹⁷⁹ and are therefore admissible for their substantive truth as well as their impeachment value. If a prior statement does not meet the qualifications of Rule 5-802.1(a) or 5-803, then the earlier statement is admissible only for its impeachment value and not for its substantive truth, unless during cross-examination the witness testifies that the earlier statement was in fact true.¹⁸⁰

A witness impeached by proof of a prior inconsistent statement may be rehabilitated by permitting the witness to explain the impeaching statement.¹⁸¹ The witness also may be rehabilitated by introduction of evidence of prior statements made by the witness that are consistent with the witness's trial testimony, provided that the timing of when the prior consistent statements were made detracts from the impeachment and also providing that such rehabilitation is not prohibited by statute.¹⁸² The "statute" referred to in Rule 5-616(c)(2) is Section 9-117 of the Courts and Judicial Proceedings Article in the Annotated Code of Maryland, which states:

It is not competent, in any case, for any party to the cause who has been examined therein as a witness, to corroborate his testimony when impeached by proof of his own declaration or statement made to third persons out of the presence and hearing of the adverse party.¹⁸³

177. *Sheppard*, 102 Md. App. at 577, 650 A.2d at 1365.

178. MD. RULE 5-802.1(a).

179. MD. RULE 5-803(a)(1) to (5).

180. MURPHY, *supra* note 3, § 1302(F), at 675-76 (citing *Ali v. State*, 314 Md. 295, 550 A.2d 925 (1988) (differentiating between when a prior statement may be offered for its substantive truth and when it may be offered only for its impeaching value; explaining that the key is whether the statement is covered by a recognized exception to the hearsay rule)).

181. See MD. RULES 5-613(a)(2), 5-616(c)(1).

182. See MD. RULE 5-616(c)(2).

183. MD. CODE ANN., CTS. & JUD. PROC. § 9-117 (1989 & Supp. 1994).

Professor McLain points out that with respect to rehabilitation by prior consistent statements, the key to determining whether the statement is admissible is to focus on when it was made.¹⁸⁴ Thus, if the prior consistent statement was made before the inconsistent statement that is used to impeach the witness, the prior consistent statement should be admissible.¹⁸⁵ However, if the prior consistent statement was made after the prior inconsistent statement, but before the trial when the witness testifies to the facts that resulted in the impeachment, it should not be admissible.¹⁸⁶ Thus, section 9-117¹⁸⁷ is applicable only to rehabilitation by prior consistent statements of a *party*, not a non-party witness.¹⁸⁸ Further, a failure to timely object to rehabilitation that violates this statute will waive the objection.¹⁸⁹ The approach taken by this statute has been criticized as unsound because there is no principled reason to distinguish between prior consistent statements by parties as opposed to non-parties.¹⁹⁰ Nevertheless, it continues to exist. Finally, a witness impeached by a prior inconsistent statement may also be rehabilitated by any other means which the trial court finds relevant for this purpose.¹⁹¹

Perhaps because it is viewed as the most effective means of impeachment, there is a tendency to over-use, or at least misuse, impeachment by prior inconsistent statements. In planning to use this method of impeachment, lawyers must not forget their knowledge of human nature. Memory is imperfect, and when people are subjected to the stress of testifying and placed in the usually unfamiliar surroundings of a courtroom, even honest people with excellent memories may suffer a momentary lapse. Judges and juries can relate to this situation, they can also be sympathetic to it. In contrast, if a person gives two different versions of the same events that differ in a material way and the subject matter of the different versions is important to the outcome of the trial, the fact finder, upon learning of the inconsistent statements, may reach the conclusion that the witness has intentionally lied. When this occurs, the effect of im-

184. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2.616.4, at 184-85.

185. *Id.*

186. *Id.*

187. MD. CODE ANN., CTS. & JUD. PROC. § 9-117 (1989 & Supp. 1994).

188. See *Cross v. State*, 118 Md. 660, 671, 86 A. 223, 227 (1912) (“[O]nly parties to the cause, who have been examined as witnesses, are forbidden or prohibited from corroborating their testimony when impeached by proof of their own declarations or statements made to third person.”).

189. See *Krouse v. Krouse*, 94 Md. App. 369, 388, 617 A.2d 1098, 1107 (1993).

190. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2-616.4, at 185 (citing 4 JOHN H. WIGMORE, EVIDENCE AT TRIALS AT COMMON LAW § 1126, at 267 n.8 (James H. Chadbourn ed., rev. 1972)).

191. See MD. RULE 5-616(c)(4).

peachment is the most dramatic because it undermines both the accuracy of the witness's testimony—the *logos*, as well as the character of the witness—the *ethos*.

Impeachment by a prior inconsistent statement occurs on a continuum. At one end of the scale, the fact finder may simply conclude that a witness whose character is still intact simply is confused or mistaken. At the other end, the fact finder rejects both the testimony and the character of the witness. The key to successfully impeaching a witness by use of prior inconsistent statements is to know how to approach the witness to develop the inconsistency. Because not every inconsistency will be perceived as a lie, coming down too hard on a witness over a relatively innocent inconsistency will not result in impeachment, and may well diminish the *ethos* of the attorney in the eyes of the jury. The following factors, which may be generally grouped into two categories—those that focus on the statements made by the witness, and those that focus on the character of the witness—should be evaluated in determining what approach to take with a witness during impeachment by prior inconsistent statement:

- (1) the number of inconsistencies;
- (2) the importance of the subject matter of the inconsistent statements to the outcome of the trial;
- (3) the degree of inconsistency between the statements;
- (4) the certainty with which the witness made the inconsistent statements (“I think the light was green” versus “there is no doubt about it, the light was green”);
- (5) whether there are any other mitigating circumstances which can explain the inconsistent statements;
- (6) whether there is credible corroboration of the witness's trial testimony from other sources;
- (7) the overall impression the witness has made on the jury during direct—was the witness sympathetic and likeable, or defensive and unlikable;
- (8) the role the witness plays in the case (party or independent fact witness);
- (9) whether the witness is biased, has a motive to testify a certain way, or has an interest in the outcome of the case; and
- (10) whether the witness is subject to impeachment by other methods in addition to a prior inconsistent statement.

Based upon an evaluation of these factors, an attorney can plan how to effectively approach impeachment by a prior inconsistent statement. If the witness is a sympathetic one and the number, nature, and importance of the inconsistencies are slight, the lawyer is best advised to use “a gentle impeachment” with a prior statement that may sound more like a helpful reminder to the witness than

open warfare.¹⁹² Under this "soft approach" the prior statement is used in a manner akin to refreshing the recollection of the witness under Rule 5-612, to point out to the witness, and the fact finder, that inconsistent statements have been made, but not to attack the character of the witness for having done so. In contrast, a hard, confrontational approach to impeachment by a prior inconsistent statement may be appropriate, or even essential, when "the witness has made a strong statement on direct examination that cannot be explained away as inadvertence, and he shows every sign of being a partisan for the other side."¹⁹³

In addition to the approach selected, an attorney who wants to be effective at impeachment by prior inconsistent statements must also keep in mind the pace and organization of the impeachment. To be successful, the attorney must be well prepared and have the prior statements readily available. Confused efforts to find the inconsistent statement will not impress the jury and will diminish the control the attorney has over the witness, which is essential in this method of impeachment.

Finally, timing is critical. Before confronting the witness with the inconsistent statement, the lawyer must be sure that either during the direct or cross-examinations the witness has been firmly pinned down to the version that he is presenting to the jury. Prematurely confronting the witness with the earlier statement before the witness has been committed to the trial version will allow the witness an opportunity to explain away the apparent inconsistency.

Through a proper evaluation of the factors described regarding how to impeach by prior inconsistent statement and an understanding of the different approaches to this method of impeachment, attorneys will develop the flexibility to effectively use this important tool.

XI. IMPEACHMENT BY BIAS, INTEREST, OR IMPROPER MOTIVE—RULE 5-616(a)(4), 5-616(b)(3)

Next to impeachment by prior inconsistent statement, perhaps the most frequent means of impeaching a witness is to demonstrate "that the witness is biased on account of emotional influences such as kinship for one party or hostility towards another, or motives of pecuniary interest, whether legitimate or corrupt."¹⁹⁴ This form of impeachment is favored because it causes the fact finder to discredit

192. McElhaney, *supra* note 65, at 288. Professor McElhaney provides an excellent illustration of this technique. *See id.* at 290-92.

193. *Id.* at 289-90. Once again, Professor McElhaney gives an excellent example of how the "hard approach" may be used. *See id.* at 290-92.

194. McCORMICK, *supra* note 13, § 33, at 66.

the witness's testimony where an ulterior motive exists.¹⁹⁵ Moreover, this form of impeachment is quite broad, encompassing any facts which tend to prove bias, prejudice, or interest including: a family relationship between the witness and a party; the witness's status as a party; an employment relationship between the witness and a party; the witness's financial interest in the affairs of a party or in the outcome of the litigation; the witness's affection for or dislike of a party, or a group or entity associated with a party, or that the witness has been influenced in some manner to testify, either through threat or other improper motivation.¹⁹⁶

The Maryland Rules of Evidence preserve the ability to impeach a witness through demonstration of bias, interest, or improper motive. Rule 5-616(a)(4) allows a witness to be impeached by direct or cross-examination by "[p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely."¹⁹⁷ This right is reinforced by Rule 5-611(b)(1), which defines the scope of cross-examination to include "matters affecting the credibility of the witness."¹⁹⁸ These matters include bias, interest, and improper motive.¹⁹⁹ Similarly, even the general prohibition against attempts to impeach or rehabilitate a witness by introducing evidence of religious beliefs or opinions is relaxed to permit introduction of such evidence "to show interest or bias."²⁰⁰

Factors that influence the effectiveness of this method of impeachment include: (1) the nature and extent of the bias, interest, or improper motive; (2) how recent the evidence of these factors is; (3) whether the credibility of the witness is subject to impeachment by other means as well (*e.g.*, prior inconsistent statements, prior bad

195. MURPHY, *supra* note 3, § 1302(E)(1), at 662 (calling this form of impeachment "the most effective mode of impeachment").

196. MARYLAND RULES OF EVIDENCE, *supra* note 3, § 607.2, at 43-45 (citing Kantor v. Ash, 215 Md. 285, 290, 131 A.2d 661, 664 (1958) (dictum) (cross-examination permitted to show that witness is related to a party)); Johnson v. State, 221 Md. 177, 178, 156 A.2d 441, 442 (1959) (finder of fact entitled to determine whether evidence that prosecution witness was a paid informant with a criminal record affected his credibility), *cert. denied*, 363 U.S. 816 (1960); Adkins v. Hastings, 138 Md. 454, 462, 114 A. 288, 291 (1921) (evidence was insufficient to prove that witness had an interest in the outcome of the case by virtue of witness's financial interest in a business); Hutchinson v. State, 41 Md. App. 569, 573-74, 398 A.2d 451, 453 (1979) (cross-examination permitted to show that witness was biased in favor of a party), *aff'd on other grounds*, 287 Md. 198, 411 A.2d 1035 (1980); Daugherty v. Robinson, 143 Md. 259, 266-67, 122 A. 124, 127 (1923) (cross-examination permissible to show bias against testatrix—*i.e.*, resentment).

197. MD. RULE 5-616(a)(4).

198. MD. RULE 5-611(b)(1).

199. See MD. RULES 5-616(a)(4), (b)(3).

200. See MD. RULE 5-610.

acts, prior convictions, or poor character for veracity); and (4) whether the witness can explain away, minimize, or mitigate the bias, motive or interest.

In addition, Rule 5-616(b)(3) allows a party to impeach a witness by "[e]xtrinsic evidence of bias, prejudice, interest, or other motive to testify falsely . . . whether or not the witness has been examined about the impeaching fact and has failed to admit it."²⁰¹ Accordingly, an attorney is not required to confront a witness with the existence of possible bias, interest, or improper motive, but may instead elect to prove the condition solely through extrinsic evidence.²⁰² In this sense the Rule makes it clear that evidence of bias, interest, or improper evidence is never deemed a "collateral matter."²⁰³

If a witness is impeached through the introduction of evidence of bias, interest, or improper motive, the proponent of that witness's testimony may attempt to rehabilitate the credibility of the witness by allowing her to deny or explain the impeaching facts²⁰⁴ or by other evidence that the court finds relevant for the purpose of rehabilitation.²⁰⁵ Such evidence includes extrinsic evidence to rebut the bias or motive evidence or, if the impeachment amounted to an attack on the credibility of the witness, evidence given by a character witness as to the witness's good character for truthfulness.²⁰⁶

As with impeachment by prior inconsistent statements, the effect of impeachment by demonstrating bias, interest, or improper motive on the *ethos* of the witness occurs on a continuum. At one end of the continuum, the fact finder may conclude that the weight of the witness's testimony must simply be reduced because of the influence of the witness's interest, bias, or motive. At the other end, the evidence of bias, interest, or improper motive may be so strong that impeachment becomes tantamount to a successful attack on the character of the witness.

Despite the preferential treatment afforded to this method of impeachment under the Maryland Rules of Evidence, counsel must

201. MD. RULE 5-616(b)(3).

202. See *supra* note 201 and accompanying text.

203. MARYLAND PRACTICE, *supra* note 25, § 607.2, at 43-46 (citing *Stockham v. Malcolm*, 111 Md. 615, 622-23, 74 A. 569, 572 (1909) (collateral evidence that would be inadmissible if used to contradict a witness would be admissible to show bias)).

204. See MD. RULE 5-616(c)(1).

205. See MD. RULE 5-616(c)(4).

206. See MARYLAND PRACTICE, *supra* note 25, § 607.2, at 46 (citing 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1107 (James H. Chadbourne ed., rev. 1972)); *Lassiter v. State*, 47 So. 2d 230, 231-32 (Ala. Ct. App.) (rehabilitation by showing good character for truth and veracity not triggered by showing family relationship of witness to victim), *cert. denied*, 47 So. 2d 233 (Ala. 1950).

remember that the trial court has broad discretion to control the level of inquiry into the subject matter during cross-examination²⁰⁷ as well as to determine the extent of extrinsic evidence of these matters that will be allowed.²⁰⁸

XII. IMPEACHMENT BY CONTRADICTION—RULE 5-616(a)(2), 5-616(b)(2)

Another recognized method of impeachment is to discredit the testimony of one witness by proving that the facts are not as testified to by the witness.²⁰⁹ This method of impeachment—referred to as impeachment by contradiction—may be accomplished through examination of the witness or through introduction of extrinsic testimonial or documentary evidence.²¹⁰ If extrinsic evidence is used, Rule 5-616(b)(2) limits the admissibility of such evidence to non-collateral matters. In the court's discretion, however, extrinsic evidence may be admitted on collateral matters.²¹¹

Although Rule 5-616 does not define the word "collateral," collateral facts are those which are not material to the case,²¹² that is, facts which are not "of consequence to the determination of the action."²¹³ Because there is no bright line test to clearly differentiate

207. See MD. RULE 5-611(b).

208. See MURPHY, *supra* note 3, § 1302(E)(1)(b), at 665 (citing *Collins v. State*, 318 Md. 269, 568 A.2d 1 (1990) (finding, in death penalty case, no prejudice to defendant, and therefore no error, in refusal by trial court to allow introduction of certain evidence relevant to bias of an accomplice, a prosecution witness)).

209. See McCORMICK, *supra* note 13, § 33, at 66. Maryland Rule 5-616(a)(2) allows this form of impeachment to be accomplished through questioning on direct or cross-examination. See MD. RULE 5-616(a)(2).

210. See MARYLAND PRACTICE, *supra* note 25, § 607.4, at 50.

211. MD. RULE 5-616(b)(2).

212. MARYLAND PRACTICE, *supra* note 25, § 607.4, at 50-51.

213. MD. RULE 5-401. For example, assume that in a criminal case the defendant's alibi witness testifies that at the time the crime was committed, the witness was with the defendant in a Chinese restaurant called "The Asian Inn." The Asian Inn, however, specializes in Korean food. If the prosecutor calls the restaurant owner to the stand during rebuttal to testify that The Asian Inn is a Korean restaurant, this testimony would clearly contradict the alibi witness's testimony that the restaurant is Chinese. Despite this contradiction, the testimony of the restaurant owner would almost certainly be inadmissible as a collateral matter, because whether The Asian Inn is a Chinese or a Korean restaurant is not material to establishing the elements of the crime with which the defendant is charged. Allowing extrinsic evidence of such a minor factual contradiction would contribute little to an assessment of the witness's credibility, yet would almost certainly increase the likelihood of confusing the issues, and would waste time.

collateral facts from material ones, Rule 5-616(b)(2) vests the trial court with the discretion to determine, in a particular case, whether extrinsic evidence on a collateral matter may be introduced for the purposes of impeachment by contradiction.²¹⁴ This discretion is, of course, subject to the relevancy requirement of Rule 5-401 and the balancing test of Rule 5-403.²¹⁵

It is noteworthy, then, that there is a difference in approach between impeachment by introduction of extrinsic evidence of bias, interest, or improper motive under Rule 5-616(b)(3), and impeachment through introduction of extrinsic evidence to contradict a witness's prior testimony under Rule 5-616(b)(2). Rule 5-616(b)(3) unqualifiedly allows extrinsic evidence of bias, prejudice, interest, or other motive, while Rule 5-616(b)(2) allows extrinsic evidence of contradicting facts only if it is non-collateral.²¹⁶ In its discretion, however, the court may allow the introduction of extrinsic evidence on a collateral matter.²¹⁷

If a witness is impeached through contradiction during cross-examination, the witness may be rehabilitated on direct by offering an explanation of the impeaching facts.²¹⁸ If the impeachment through contradiction occurs through introduction of extrinsic evidence, rehabilitation may be accomplished by introduction of any other evidence that the court finds relevant for rehabilitative purposes.²¹⁹

Impeachment by contradiction also occurs on a continuum. If the number of contradictions in a witness's testimony are few, and they do not deal with facts of central importance to the case, the effect of such impeachment may be to simply persuade the jury that the witness is an honest person who is mistaken regarding some details. However, if the number and nature of the contradicting facts are great, then the jury may both disregard the accuracy of the witness's testimony and also conclude that the witness is deliberately lying. Thus, the impact of impeachment through contradiction on the *ethos* of the witness may be great or slight. Further, because impeachment by contradiction involves the introduction of new facts

214. See MD. RULE 5-616(b)(2).

215. Maryland Rule 5-401 defines "relevant evidence" as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probable than it would be without the evidence." MD. RULE 5-401. The balancing test of Maryland Rule 5-403 weighs the probative value of the evidence against "unfair prejudice, confusion of the issues, or misleading the jury, or . . . undue delay, waste of time, or needless presentation of cumulative evidence." MD. RULE 5-403.

216. See MD. RULE 5-616(b)(2), (3).

217. See MD. RULE 5-616(b)(2).

218. See MD. RULE 5-616(c)(1).

219. See MD. RULE 5-616(c)(4).

to the jury, it impacts upon the *logos*, or logical support, for the position impeached.

XIII. IMPEACHMENT OF OPINION TESTIMONY—RULE 5-616(a)(3)

The final method of impeachment that is specifically identified by the Maryland Rules of Evidence is Rule 5-616(a)(3). This Rule permits impeachment of the credibility of a witness by an examination “[p]roving that an opinion expressed by the witness is not held by the witness or is otherwise not worthy of belief.”²²⁰ There is no counterpart to this Rule among the methods of impeachment by introduction of extrinsic evidence listed in Rule 5-616(b). Accordingly, Rule 5-616(a)(3) impeachment may be accomplished through examination only.

The Committee Notes and Reporter Notes provide no details about Rule 5-616(a)(3).²²¹ It is a somewhat curious rule because its apparent goal—permitting a party to attack the credibility of an opinion witness—may already be accomplished by many of the other forms of impeachment. For example, proof that an opinion witness is insincere in the expression of an opinion may be accomplished by showing that the witness is biased, or has an interest in the outcome of the litigation, such as a paid expert, under Rules 5-616(a)(4) or 5-616(b)(3). Similarly, an opinion witness’s testimony may be impeached by demonstrating that the facts are not as testified to by the witness,²²² or by contradicting the opinion through the testimony of another witness.²²³ Further, the veracity of an opinion witness may be attacked by proof of poor character for truthfulness, prior bad acts,²²⁴ or conviction of a crime.²²⁵ These methods of impeachment may be accomplished both by examination and through the introduction of extrinsic evidence.

Rule 5-616(a)(3), therefore, should not be viewed as a limitation on the methods by which a witness’s opinion testimony may be impeached. Instead, given that opinion testimony may address an ultimate issue in the case,²²⁶ it should be viewed as an additional tool for impeachment. As an example, Rule 5-616(a)(3) should give a cross-examining attorney additional latitude in exploring whether an opinion expressed by a lay witness is rationally based on perception

220. MD. RULE 5-616(a)(3).

221. See July 1993 Committee Report, *supra* note 78, at 86.

222. See MD. RULE 5-616(b)(2).

223. *Id.*

224. See MD. RULES 5-616(a)(6), 5-616(b)(5), 5-608.

225. See MD. RULES 5-616(a)(6), 5-616(b)(6), 5-609.

226. See MD. RULE 5-704(a).

or is helpful in determining a fact at issue as required by Rule 5-701. Similarly, with respect to expert opinion testimony, Rule 5-616(a)(3) should be viewed as affording a cross-examining attorney greater latitude to explore the qualifications of the expert,²²⁷ the sufficiency and factual basis of the expert's opinion,²²⁸ and any other relevant factor that would effect the opinion of the expert.²²⁹ Further, on cross-examination an expert's opinion may be challenged under Rule 5-616(a)(3) by the use of a learned treatise in accordance with Rule 5-803(b)(18).²³⁰ Once the opinion of a witness has been impeached under Rule 5-616(a)(3), it may be rehabilitated by permitting the witness to explain or deny the impeaching facts²³¹ or other evidence that the court finds relevant for this purpose.²³²

XIV. CONCLUSION

It does not require Napoleonic insight to realize that the ability to successfully impeach and rehabilitate witnesses requires not only a sound understanding of the Maryland Rules of Evidence that govern this process, but also an appreciation of the three components of testimonial persuasion—*ethos*, *pathos*, and *logos*. Perhaps the most helpful practical advice regarding impeachment is to keep the effort *focused*. It is better to successfully employ a single effective method, rejecting other less viable, but nonetheless available options, than to thoughtlessly employ every one in the hope that one will find its mark.

Before beginning, the cross-examiner should take advantage of all available information regarding the witness and the available methods of impeachment and plan a line of attack accordingly. If nothing suggests itself, it may be advantageous to forego all cross-examination of the witness, and instead to impeach by contradiction through extrinsic evidence, introduced pursuant to Rule 5-616(b)(2).

The Maryland Rules of Evidence discussed in this Article teach attorneys to analyze the factors affecting testimonial persuasion and

227. See MD. RULE 5-702. In determining whether expert testimony is admissible, the court "shall determine (i) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (ii) the appropriateness of the expert testimony on the particular subject, and (iii) whether a sufficient factual basis exists to support the expert testimony." *Id.*

228. See *id.*

229. Pursuant to Maryland Rule 5-703(a), the opinion of an expert witness may be based upon "facts or data . . . perceived by or made known to the expert at or before the hearing." MD. RULE 5-703(a).

230. However, this Rule requires that statements from learned treatises which are admitted may only be read into evidence, the treatise itself may not be admitted. See also MARYLAND RULES OF EVIDENCE, *supra* note 3, § 2-616.1, at 182.

231. See MD. RULE 5-616(c)(1).

232. See MD. RULE 5-616(c)(4).

foster preparation, a focused and logical approach, fairness, and economy. There are no loftier goals that a dispute resolution method can hope to achieve.

