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Comments: A Comparison of the Use of Character Witness Testimony in Maryland Versus the Federal Practice: Distinguishing Reasonable Basis from Specific Instances of Conduct After *Jensen v. State*, 355 Md. 692, 736 A.2d 307 (1999)

Michael P. O'Day
University of Baltimore School of Law

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A COMPARISON OF THE USE OF CHARACTER WITNESS TESTIMONY IN MARYLAND VERSUS THE FEDERAL PRACTICE: DISTINGUISHING REASONABLE BASIS FROM SPECIFIC INSTANCES OF CONDUCT AFTER *JENSEN V. STATE*, 355 MD. 692, 736 A.2D 307 (1999)

I. INTRODUCTION

The fundamental rule of character evidence is the “propensity rule,” establishing a general prohibition against the use of character evidence to prove that a person acted in conformity with a specific character trait on a particular occasion.¹ When a witness testifies at trial, the credibility of that witness automatically becomes relevant, directly impinging on the propensity rule by raising the question whether that person testified in conformity with the character trait for truthfulness.² Accordingly, Federal Rule of Evidence 608 (“Rule 608”)³ and Maryland Rule of Evidence 5-608 (“Maryland Rule 5-608”)⁴

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1. See FED. R. EVID. 404(a) (“Evidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .”). Accord MD. R. EVID. 5-404. Character evidence is defined as proof of general moral character or a specific character trait, such as honesty, carefulness, generosity, violence, sobriety, or truthfulness and other traits relevant to litigation. See 5 LYNN McLAIN, MARYLAND PRACTICE § 404.1, at 338-39 (1987).
 2. See JOSEPH F. MURPHY, MARYLAND EVIDENCE HANDBOOK § 507(B) (3d ed. 1999); EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 108 (3d ed. 1995); James W. McElhaney, *An Impeachment Checklist: Attacking the Witness’s Credibility*, 78 A.B.A. J. 62 (1992); see also *State v. Duke*, 123 A.2d 745, 746 (N.H. 1956) (“No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know.”).
 3. FED. R. EVID. 608. Federal Rule of Evidence 608, entitled Evidence of Character and Conduct of Witness, provides:
 - (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
 - (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the wit-

carve out an exception to the propensity rule.⁵

Rule 608 and Maryland Rule 5-608 govern the admissibility of character witness testimony used to impeach or rehabilitate a principal witness's specific trait for truthfulness or untruthfulness.⁶ Even though character evidence may be relevant proof as to whether a principal

ness's credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED. R. EVID. 608.

4. MD. R. EVID. 5-608. Maryland Rule of Evidence 5-608, entitled Evidence of Character of Witness for Truthfulness or Untruthfulness, provides:

(a) Impeachment and Rehabilitation by Character Witnesses. (1) Impeachment by a Character Witness. In order to attack the credibility of a witness, a character witness may testify (A) that the witness has a reputation for untruthfulness, or (B) that, in the character witness's opinion, the witness is an untruthful person.

(2) Rehabilitation by a Character Witness. After 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.

(3) Limitations on Character Witness's Testimony. (A) A character witness may not testify to an opinion as to whether a witness testified truthfully in the action. (B) On direct examination, a character witness may give a reasonable basis for testimony as to reputation or an opinion as to the character of the witness for truthfulness or untruthfulness, but may not testify to specific instances of truthfulness or untruthfulness by the witness.

(4) Impeachment of Character Witness. The court may permit a character witness to be cross-examined about specific instances in which a witness has been truthful or untruthful

Id.

5. See FED. R. EVID. 404(a)(3); MD. R. EVID. 5-404(a)(1)(C); 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 920, at 723 (John H. Chadborn ed., rev. 1970) (Professor Wigmore opined: "that which induces us to believe that a witness is or is not likely to be speaking truthfully is usually some circumstance of his actual personality.").
6. A principal witness is defined as "a witness who has given substantive testimony – thus, usually, a witness who has previously testified." LYNN MCLAIN, MARYLAND RULES OF EVIDENCE § 2.608.3, at 148 (1994). A character witness is defined as "both the reputation witness who testifies as to the accused person's community reputation and the opinion witness who testifies that in his opinion the accused possesses certain character traits." BLACK'S LAW DICTIONARY 1604 (6th ed. 1990).

witness is credible, extreme caution is required when admitting such given the dangers.⁷

Consequently, evidentiary rules operate to limit the use of evidence that can obstruct the truth.⁸ Rule 608 and Maryland Rule 5-608 contain various safeguards to limit the occurrences of the underlying dangers to character evidence.⁹ It is undisputed that a character witness is strictly prohibited from testifying about specific acts of the principal witness's conduct on direct examination.¹⁰ Due to the Court of Appeals of Maryland recent holding in *Jensen v. State*,¹¹ however, testimony about specific instances of a principal witness's conduct may be admissible if disguised as proper "reasonable basis" testimony.¹²

The purpose of this Comment is to demonstrate that the court of appeals went too far with its holding in *Jensen*. No longer is it clear in Maryland what separates a permissible "reasonable basis" from an impermissible "specific instance of conduct."¹³ This is especially troublesome because character evidence plays a significant role in the outcome of a trial.¹⁴

7. See JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 608.02[02] (Joseph M. McLaughlin ed., 2d ed. 2000); *infra* Part III.A.

8. The Federal Rules of Evidence represent a compromise between supplying the trier of fact with relevant evidence used to estimate the truth, and excluding otherwise relevant evidence that in the long-term tends to obstruct the truth. See Federal Rule of Evidence 102 ("[T]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that *the truth may be ascertained and proceedings justly determined.*") (emphasis added). See also Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 534 (1992). Certain rules of evidence prohibit otherwise relevant evidence because of the danger that the admission of the evidence may undermine the truth. Examples of this concept include the rules against hearsay, the best evidence rule, and in the instant case, the rules against propensity evidence. See *id.*

9. See *infra* Part III.B.

10. See *infra* Part III.B.3.

11. 355 Md. 692, 736 A.2d 307 (1999).

12. See *infra* Part III.C.2.a.; note 275 and accompanying text.

13. Compare *infra* Part III.C.2.a. with Part III.C.2.b

14. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 8.3, at 408 (3d ed. 1996); see also Fred Warren Bennett, *Is the Witness Believable? A New Look at Truth and Veracity Character Evidence and Bad Acts Relevant to Truthfulness in a Criminal Case*, 9 ST. THOMAS L. REV. 569, 602 (1997) (recognizing that in a criminal trial the verdict is based on who the jury believes, therefore, the credibility of witnesses is critical to guilt or innocence);

Part II of this Comment discusses the evolution of using character witness testimony from common law to the adoption of Rule 608,¹⁵ other jurisdictions' rules on character evidence,¹⁶ and Maryland Rule 5-608.¹⁷ Part III outlines the dangers underlying character evidence and explains the limitations imposed to restrict the use of character witness testimony.¹⁸ This section focuses on the foundational requirements for admitting character evidence by comparing the federal practice to the Maryland practice.¹⁹ Part IV describes the difficulty and importance of distinguishing reasonable basis testimony from specific instances of conduct, and scrutinizes the court's holding in *Jensen*.²⁰ Finally, this Comment concludes by recommending that Maryland adopt a more restrictive approach to the use of character witness testimony.²¹

II. THE HISTORY OF ALLOWING A CHARACTER WITNESS TO TESTIFY TO THE TRUTHFULNESS OR UNTRUTHFULNESS OF A PRINCIPAL WITNESS

A. *Proving Character at Common Law: Limiting the Methods of Proof*

At common law, a witness's character for truthfulness was always relevant, causing evidence of that trait to be admissible.²² Prior to the 1700s, a character witness could testify to an opinion of the principal witness's general character supported by testimony of specific instances of conduct.²³ By the 1800s, a character witness could still testify in the form of an opinion, but was limited to the principal witness's character for truthfulness, and prohibited from testifying to specific instances of conduct.²⁴

THOMAS A. MAULT & WARREN D. WOLFSON, TRIAL EVIDENCE § 2.1, at 9 (1997); David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1172 (1992).

15. See *infra* Part II.A & B.

16. See *infra* Part II.C.

17. See *infra* Part II.D.

18. See *infra* Part III.A & B.

19. See *infra* Part III.C.

20. See *infra* Part IV.

21. See *infra* notes 326-32 and accompanying text.

22. See 3A WIGMORE, *supra* note 5, § 922, at 726.

23. *Id.* § 923, at 728.

24. *Id.* The past use of general character testimony influenced the form of inquiry. The question asked was "knowing [the principal witness's] general character, would you believe him under oath?" *Id.* The character witness was limited to testifying about veracity, but could base an opinion on knowledge of the principal witness's general character. See *id.*

Over time, character evidence was further limited by prohibiting the use of opinion testimony, but permitting the use of reputation testimony about the principal witness's character for truthfulness.²⁵ Opinion testimony was prohibited based on the fear that it generated extraneous issues about specific conduct of the principal witness.²⁶ This common-law practice was the backdrop for the codification of formal rules of evidence, and still provides a source of guidance for identifying problems and suggesting solutions to evidentiary issues.²⁷

B. Adopting Rule 608: Permitting Opinion and Reputation Testimony

There was some debate over whether to adopt formal rules of evidence. Proponents of codification found utility in formal rules to improve the quality of judges and attorneys,²⁸ to promote uniformity and predictability in the application of evidentiary rules,²⁹ and to increase the amount of admissible evidence based on a case-by-case exercise of judicial discretion leading to better admissibility determinations.³⁰ Conversely, opponents disregarded the "quality of judges and attorneys" argument,³¹ found error in the reasoning that uniformity and predictability could be achieved through formal rules,³² and proffered that increased admissibility and enhanced judi-

25. *Id.* § 922, at 726.

26. 1 MCCORMICK ON EVIDENCE § 43, at 156-57 (John William Strong et al. eds., 4th ed. 1992). When a character witness expresses an opinion, side issues are provoked because the character witness may be cross-examined about the grounds for the opinion. *Id.*

27. See Edward W. Cleary, *Introduction to FED. R. EVID.*, at V. (West eds., 1999).

28. See Margaret Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 258 n.21 (1984) (citing Stephen A. Saltzburg, *The Federal Rules of Evidence and the Continuing Education of Judges and Lawyers*, 5 VA. L. SCH. REP. 6 (1981) and Stephen A. Saltzburg, *The Federal Rules of Evidence and the Quality of Practice in Federal Courts*, 27 CLEV. ST. L. REV. 173 (1978)).

29. *Id.* at 259 n.22 (citing Gradl F. Tollison, Jr., *A Plea for Adoption of the Mississippi Rules of Evidence*, 53 MISS. L.J. 49 (1983) and Thomas F. Green, *A Preliminary Report on the Admissibility and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 109-10 (1962)).

30. *Id.* at 259 n.23 (citing JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE T-2, at iii-iv (1982); Jack B. Weinstein, *The Ohio and Federal Rules of Evidence*, 6 CAP. U.L. REV. 517 (1977); Paul F. Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 FED. B.J. 21, 29 (1974)).

31. *Id.* at 259 n.24 (citing John H. Wigmore, *The American Law Inst. Code of Evidence Rules. A Dissent*, 28 A.B.A. J. 23, 24 (1942)).

32. *Id.* at 259 n.25 (citing JOHN H. WIGMORE, CODE OF EVIDENCE (3d ed. 1942)).

cial discretion does not lead to better admissibility determinations.³³ Despite such resistance, in 1965, an advisory committee was formed to draft the Federal Rules of Evidence.³⁴ What eventually became Rule 608 was the subject of debate among the drafters and Congress concerning the proper balance between the value and dangers of character witness testimony.³⁵ A major issue was the admissibility of opinion character evidence.

In 1969, the preliminary draft of Rule 608 expressly permitted opinion testimony but excluded reputation testimony.³⁶ This was a complete reversal from the pre-rules practice.³⁷ In response, the revised draft permitted both opinion and reputation testimony.³⁸ In addition, a higher level of probative value was required for the admission of specific instances of conduct evidence on cross-examination.³⁹ This change represented a heightened awareness of the prejudicial effect of admitting specific instances.⁴⁰ Finally, greater restrictions were placed on the admissibility of character evidence by requiring that evidence be "clearly probative of truthfulness or untruthfulness and not remote in time."⁴¹

The Department of Justice (DOJ) responded to the Revised Draft by protesting that the heightened standard for admissibility of character evidence was too demanding.⁴² The DOJ also opposed the admissibility of opinion evidence arguing it would cause distracting and time-consuming direct examinations concerning specific acts that were the basis for the opinion testimony.⁴³

In consideration of the DOJ's concerns, the Judicial Conference Draft of Rule 608 relaxed the standard of admissibility⁴⁴ and added a

33. Berger, *supra* note 28, at 259 n.26 (citing J. Clay Smith, *Codification of the Rules of Evidence: An Unreadiness*, 33 FED. B.J. 44 (1974)).

34. See Cleary, *supra* note 27, at III.

35. 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6111, at 8 (1993).

36. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 260, at 135 (2d ed. 1994) (citing 46 F.R.D. 161, 292-95 (1969)).

37. See *supra* notes 25-27 and accompanying text.

38. 28 WRIGHT & GOLD, *supra* note 35, § 6111, at 11-13.

39. 28 *id.* at 13.

40. 28 *id.*

41. 28 *id.* at 14.

42. 28 *id.* (arguing the "clearly probative . . . and not remote in time" requirements were too stringent).

43. 28 *id.* at 17.

44. 28 *id.* at 17 (retaining the "and not remote in time" language but deleting the word "clearly" from the clearly probative standard).

cross-reference to the Advisory Committee's Note for Rule 405.⁴⁵ The Supreme Court Draft made no changes to the Judicial Conference Draft.⁴⁶ Throughout the drafting process of Rule 608, however, objections were voiced and renewed against the admissibility of opinion evidence.⁴⁷

The Second Committee Print prohibited the use of opinion evidence, and instead favored the common-law practice of permitting only reputation evidence.⁴⁸ This committee action was challenged during floor debate where an amendment proposing the reinstatement of opinion evidence as a permissible method of proving character was passed.⁴⁹ Both the U.S. Senate and House of Representatives agreed to a final draft, and the current version of Rule 608 was enacted in 1975.⁵⁰ Subsequently, Rule 608 served as a model for the codification of state rules of evidence on character witness testimony.⁵¹

45. 28 *id.* at 18. The Advisory Committee's note explained that opinion testimony regarding a person's character ought to be limited to "the nature and extent of observation and acquaintance upon which the opinion is based." FED. R. EVID. 405 advisory committee's note.

46. See 28 WRIGHT & GOLD, *supra* note 35, § 6111, at 20-21.

47. 28 *id.* at 18-20. A series of letters were exchanged between the DOJ, the Attorney General, and the drafters of Rule 608 over the concern of admitting opinion testimony. 28 *id.* at 18-20 nn.27-29.

48. 28 *id.* at 24 (acknowledging that the Judiciary Committee concurred in this action to restrict the method of proof to the common-law practice).

49. See 28 WRIGHT & GOLD, *supra* note 35, § 6111, at 25 (restoring the language proposed by the Advisory Committee).

50. 28 *id.*

51. 28 *id.* at 27. A general overview of the effects of the codification of the Federal Rules of Evidence reveals a transformation in the process of evidentiary decision making. See generally Berger, *supra* note 28.

C. *Other Jurisdictions' Rules on Character Evidence*⁵²

A majority of jurisdictions followed the federal practice and adopted Rule 608(a) and (b) verbatim.⁵³ Some jurisdictions adopted rules consistent with Rule 608, but made minor changes in word choice⁵⁴ or added provisions to clarify the federal rule.⁵⁵

The added provision limited the use of character evidence.⁵⁶ For example, some jurisdictions permitted character evidence only in the form of reputation testimony,⁵⁷ while other jurisdictions expressly and categorically prohibited the use of specific instances of conduct, even

52. The extent of this particular comparison centered around the text of the evidentiary rules on character witnesses. No research or analysis was completed as to the judicial application of other jurisdictions' rules. The following acknowledgement is relevant, that "[i]t is important . . . not to conclude that similar, or even identical, language will receive the same interpretation in one jurisdiction as it has in another." Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 MD. L. REV. 1032, 1034 (1995). Other commentators have undertaken an analysis of state rules of character evidence. See generally MUELLER & KIRKPATRICK, *supra* note 36, § 260, at 140 nn.20-23; 28 WRIGHT & GOLD, *supra* note 35, § 6111, at 27-28 nn.49-51.
53. ALA. R. EVID. 608; ARIZ. R. EVID. 608; ARK. R. EVID. 608; COLO. R. EVID. 608; IDAHO R. EVID. 608; IND. R. EVID. 608; IOWA R. EVID. 608; MICH. R. EVID. 608; MINN. R. EVID. 608; MISS. R. EVID. 608; NEB. R. EVID. 608; N.H. R. EVID. 608; N.M. R. EVID. 11-608; N.C. R. EVID. 608; N.D. R. EVID. 608; OHIO R. EVID. 608; OKLA. R. EVID. 2608; R.I. R. EVID. 608; S.D. R. EVID. 19-14-9; VT. R. EVID. 608; W.VA. R. EVID. 608; WYO. R. EVID. 608.
54. CONN. R. EVID. 6-6; HAW. R. EVID. 608; MONT. R. EVID. 608; WIS. R. EVID. 906.08.
55. See *infra* notes 56-59 and accompanying text.
56. ALA. R. EVID. 608 (adding subsection (c) that requires judicial balancing of probative value and prejudicial effect before allowing specific instances of conduct on cross examination); KY. R. EVID. 608 (permitting opinion and reputation testimony limited to general reputation, but no mention of specific instances of conduct); NEV. REV. STAT. 50.085 (1996) (permitting opinion testimony but prohibiting reputation testimony); S.C. R. EVID. 608 (adding subsection (c) that permits evidence of bias to impeach witness); TENN. R. EVID. 608 (adding subsections that require judicial determination of probative value and reasonable basis before inquiry of specific instances of conduct on cross examination); UTAH R. EVID. 608 (adding subsection (c) that permits evidence of bias or prejudice to impeach witness).
57. DEL. R. EVID. 608; FLA. STAT. ANN. § 90.609 (West 1999); GA. CODE ANN. § 24-9-84 (1995); LA. CODE EVID. ANN. art. 608 (West 1995); ME. R. EVID. 608; MASS. GEN. LAWS ANN. ch. 233, § 21A (West 2000); PA. R. EVID. 608; WASH. R. EVID. 608.

if on cross-examination and probative of truthfulness.⁵⁸ In the later instance, by disallowing specific instances of conduct, these jurisdictions alleviated some of the dangers that accompany proof of character.⁵⁹

D. Maryland Rule 5-608: An Adaptation of Federal Rule 608

In Maryland, prior to the adoption of formal rules, the body of evidence law was contained in the Maryland Reports and Maryland Code.⁶⁰ The scope and use of character witnesses were governed by Maryland Code, Courts and Judicial Proceedings Article, section 9-115.⁶¹ Shortly after section 9-115 was enacted, the Court of Appeals of Maryland commented that section 9-115 “made a drastic change in the substantive law” by abrogating the common law to allow both personal opinion and reputation evidence,⁶² and the Court of Special Appeals of Maryland interpreted section 9-115 as “the common law rule with a vastly broadened field of vision.”⁶³

In 1977, Maryland began the process of adopting formal rules of evidence modeled after the Federal Rules.⁶⁴ This attempt was rejected by the Court of Appeals of Maryland, who opted to allow more time for the newly codified Federal Rules of Evidence to settle.⁶⁵

While waiting for the Federal Rules to settle, the Court of Special Appeals of Maryland held in *Hemingway v. State*,⁶⁶ that a character witness should be permitted to give an opinion of a principal witness’s violent character and the basis for that opinion, even if the testimony constitutes a specific instance of conduct.⁶⁷ This holding was significant as it departed from the Federal Rules, common law, and statutory

58. CAL. EVID. CODE §§ 786-87 (West 1995); N.J. STAT. ANN. § 608 (West 1994); OR. EVID. CODE 608; TEX. R. EVID. 608.

59. See *infra* Part II.A.; note 125 and accompanying test.

60. See Hornstein, *supra* note 52, at 1034.

61. MD. CODE ANN., CTS. & JUD. PROC. § 9-115 (1974). This section stated: Where character evidence is otherwise relevant to the proceeding, no person offered as a character witness who has an adequate basis for forming an opinion as to another person’s character shall hereafter be excluded from giving evidence based on personal opinion to prove character, either in person or by deposition, in any suit, action or proceeding, civil or criminal, in any court or before any judge, or jury of the State.

Id.

62. Taylor v. State, 278 Md. 150, 155, 360 A.2d 430, 433-34 (1976).

63. Nishchuk v. State, 32 Md. App. 403, 407, 362 A.2d 91, 94 (1976).

64. Hornstein, *supra* note 52, at 1033.

65. See *id.*

66. 76 Md. App. 127, 543 A.2d 879 (1988).

67. *Id.* at 136-37, 543 A.2d at 883.

practice that prohibited character witnesses from testifying about specific instances of conduct on direct examination.⁶⁸

In *Hemingway*, Eric Dwayne Hemingway was convicted of manslaughter for the shooting death of Randall Hickman.⁶⁹ There was conflicting evidence presented as to the events leading up to the shooting.⁷⁰ Hemingway testified that Hickman and his party were the initial aggressors, and, fearing an imminent attack, Hemingway reached for his gun.⁷¹ Hemingway claimed he panicked when Hickman attacked him, causing him to shoot and kill Hickman.⁷² The defense called retired Officer Phillip Lance as a character witness to testify that Hickman had a reputation for violence.⁷³ Lance gave his opinion that Hickman was a very violent person based upon two investigations of prior crimes committed by Hickman.⁷⁴ The trial court determined, out of the presence of the jury, that Lance's investigations of Hickman supported a reasonable basis for his opinion.⁷⁵ The trial court, however, limited Lance to testifying that he was well-acquainted with Hickman, and that in Lance's opinion, Hickman was a violent person.⁷⁶ Hemingway appealed this decision.⁷⁷

68. See MD. CODE ANN., CTS. & JUD. PROC. § 9-115 advisory committee's note (discussing modification of the common-law practice that prohibited testimony by character witness regarding specific acts); see also *supra* Part II.A. and II.B.

69. *Hemingway*, 76 Md. App. at 129-30, 543 A.2d at 880.

70. *Id.* at 130-31, 543 A.2d at 880. The confrontation between Hemingway and Hickman took place at a gas station parking lot. *Id.* Mary Louise Johnson, Susie Murphy and Anthony Vernon arrived first at the scene and were waiting for Hemingway when they were approached by Randall Hickman, Steve Hickman and Randy Mullins. *Id.*

71. *Id.*

72. *Id.* at 131, 543 A.2d at 880. Hemingway's testimony generated the issue of self-defense. *Id.* at 132-33, 543 A.2d at 881-82. The court of appeals explained that when self-defense is raised, character evidence of the victim as a violent person is admissible to corroborate evidence that the victim was the initial aggressor. *Id.* The admissibility of opinion evidence regarding the victim's character trait of violence is governed by section 9-115. *Id.* at 133-34, 543 A.2d at 881-82; see also MD. R. EVID. 5-404 (permitting the admissibility of character evidence where a defendant in a homicide trial claims that the victim was the first aggressor, since the victim's character trait of violence becomes relevant and admissible).

73. *Hemingway*, 76 Md. App. at 131, 543 A.2d at 880-81.

74. *Id.* at 132, 543 A.2d at 881 (citing Lance's involvement in Hickman's conviction for manslaughter in 1979, and an unexecuted warrant for Hickman's arrest based upon a charge of malicious wounding in 1981).

75. *Id.* at 131-32, 543 A.2d at 880-81.

76. *Id.* at 132, 543 A.2d at 881.

On appeal, the court of special appeals analyzed the admissibility of the opinion evidence by interpreting section 9-115.⁷⁸ The court held that on remand, during direct examination, Lance could give his opinion of Hickman's violent character and support this opinion with details of the 1978 and 1981 criminal investigations of Hickman.⁷⁹

At the same time the court decided *Hemingway*, Maryland undertook the project of adopting state rules of evidence.⁸⁰ A subcommittee was created to draft proposed rules of evidence for consideration by the Rules Committee for Practice and Procedure and present them before the Court of Appeals of Maryland.⁸¹ In 1994, the Maryland Rules of Evidence became effective, codified as Title 5 of the Maryland Rules of Procedure. Title 5 was based substantially on the Federal Rules of Evidence.⁸² In addition, through the promulgation of Maryland Rule 5-608, the drafters of the Maryland Rules of Evidence expressly overruled *Hemingway*.⁸³

III. RESTRICTING THE USE OF CHARACTER WITNESS TESTIMONY: APPLICATION OF RULE 608 AND MARYLAND RULE 5-608

Under Rule 608 and Maryland Rule 5-608, character evidence focuses on the credibility of the individual witness, rather than setting forth reasons why specific testimony in the case should or should not be believed.⁸⁴ Despite the content of the principal witness's testimony, it is the principal witness's character for veracity that is the subject of a character witness's testimony.⁸⁵

77. *Id.* at 130, 543 A.2d at 880.

78. *Id.* at 133-35, 543 A.2d at 882.

79. *Id.* at 135-36, 543 A.2d at 882-83 ("No longer is a character witness prevented from speaking of specific acts or precluded from demonstrating a basis of knowledge leading to his own independent opinion.").

80. See Hornstein, *supra* note 52, at 1033.

81. See *id.*

82. See McLAIN, *supra* note 6, at VII.

83. McLAIN, *supra* note 6, § 2.608.4, at 149. This subsection abrogated the former Maryland practice that allowed a character witness to testify on direct examination about specific acts of truthfulness of the principal witness. *Id.*

84. See 28 WRIGHT & GOLD, *supra* note 35, § 6113, at 43.

85. See *United States v. Malady*, 960 F.2d 57, 58 (8th Cir. 1992) (preventing a character witness from being asked whether he believed the testimony of a principal witness); see also 3 MUELLER & KIRKPATRICK, *supra* note 36, § 6.38, at 813 (declaring that the proper question of a character witness is not whether a particular statement is true, but whether the principal witness is a truthful person); MURPHY, *supra* note 2, § 1302(A), at 494 (stating that, in Maryland, an impeaching witness can state whether he would believe the

The probative value of character evidence is measured by the weight of its effect on the trier of fact's perception of the principal witness's credibility.⁸⁶ Some commentators have raised doubts regarding the probative value of character evidence.⁸⁷ Psychological research suggests that evidence of the principal witness's character trait for truthfulness may be less probative than the witness's response to contextual factors, such as the courtroom and witness stand.⁸⁸ Additional scientific research concludes that there may be no single identifiable character trait indicative of truthfulness.⁸⁹ These theories undermine the basic premise upon which the probative value of character evidence rests—how one acts in one situation is determinative of how he or she will act in another situation.⁹⁰ Accordingly, the debate over probative value lends itself to a restrictive rule of evidence.

The court's role when determining the admissibility of character evidence is to promote "accurate fact-finding, protect witnesses from

testimony of the other witness); 6 MCLAIN, *supra* note 1, § 608.2, at 71 (stating a character witness in Maryland may testify that she would not believe the principal witness under oath).

86. See Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 U.C.L.A. L. REV. 637, 655 (1991). The probative value of evidence is determined "by comparing how probable [the] proposition appeared before the evidence was presented with how probable it appears afterwards." *Id.*

87. The California Law Revision Commission in rejecting Uniform Rule 47 opined:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

FED. R. EVID. 404 advisory committee's note (quoting Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence: Art. VI Extrinsic Policies Affecting Admissibility and Cal. Law Revision Comm'n, Rep., Rec. & Studies, 615 (1964)); see also *infra* Part III.A.

88. See Friedman, *supra* note 86, at 646-47 (discussing situationist theories).

89. See Okun, *supra* note 8, at 547-48. A five-year study, subjecting over 11,000 children to situations where the trait of honesty was implicated, found that the children did not exhibit a "unified character trait for honesty." *Id.*

90. See *supra* note 1 and accompanying text. These theories must be addressed in conjunction with the considerations that lying is a "particularly difficult type of behavior to study." Friedman, *supra* note 86, at 652. It is also very difficult to simulate the jury decision-making process. Okun, *supra* note 8, at 559 (acknowledging that most empirical studies are performed under situations dramatically different from actual jury deliberations).

harassment, and eliminate unjustifiable expense and delay."⁹¹ Conversely, the dangers underlying character evidence are: (1) erosion of accurate fact-finding; (2) witness harassment; and (3) delay of the trial.

A. *The Underlying Dangers*

1. Prejudicial Impact Erodes Accurate Fact-Finding

Character evidence can erode accurate fact-finding because of the tendency of juries to accord it too much weight despite its "dubious" probative value.⁹² One of the dangers of admitting character evidence is the creation of collateral issues that distract the jury.⁹³ For example, a juror may form an image of a principal witness based on evidence conveying minimal information that is noteworthy or unusual.⁹⁴ When the character evidence is seemingly more interesting than the material facts, the jury may get bogged down in collateral issues and minor points that bear no specific link to the facts or parties in the case.⁹⁵

Character evidence can also undermine the jury's decision-making process through its prejudicial effects. For example, if the character witness is permitted to testify about conduct of the principal witness that is morally reprehensible, then the jury may associate the principal witness with the party who called the witness and, therefore, be inclined to punish that party.⁹⁶ Some psychologists believe that character evidence can be especially interesting to jurors who have been taught the importance of truthfulness since childhood.⁹⁷

91. 28 WRIGHT & GOLD, *supra* note 35, § 6112, at 32.

92. See WEINSTEIN & BERGER, *supra* note 7, § 608.02[2] (warning "despite its somewhat dubious probative value, the character evidence may have an overwhelming impact"); see also 28 WRIGHT & GOLD, *supra* note 35, § 6112.

93. See 28 WRIGHT & GOLD, *supra* note 35, § 6112. Collateral issues are questions or issues not directly involved with the matter in question. See BLACK'S LAW DICTIONARY 835 (7th ed. 1999).

94. Okun, *supra* note 8, at 550.

95. 28 WRIGHT & GOLD, *supra* note 35, § 6112, at 34 n.9. The author cited Kerper & MacDonald, *Federal Rule of Evidence 608(b): A Proposed Revision*, 22 AKRON L. REV. 283, 291 (1989), which explained that other modes of impeachment focus on the present, whereas character impeachment focuses on the past creating additional links in the chain of inferences.

96. Okun, *supra* note 8, at 550 n.77. The author cited Gustar Ichheiser, *Misunderstandings in Human Relations: A Study in False Social Perceptions*, 55 AM. J. SOC. 1, 28 (1949), which stated that "we have the tendency to consider a partial structure of personality which happens to be visible to us as if this partial structure were the total personality 'itself.'"

97. 28 WRIGHT & GOLD, *supra* note 35, § 6113, at 42 n.12.

2. Witness Harassment

A principal witness, who is not the accused, is not on trial and can be found guilty of nothing.⁹⁸ Overly broad character evidence creates an atmosphere of hostility for the principal witness.⁹⁹ Professor Wigmore stated that common decency called for limits on character evidence: “[The] ruthless flaying of personal character in the witness box is not only cowardly—because there is no escape for the victim—and brutal—because it inflicts the pain of public exposure of misdeeds to idle bystanders—but it has often not the slightest justification of necessity.”¹⁰⁰ The threat of overly broad character evidence makes coming forward and testifying significantly less palatable for witnesses.¹⁰¹

3. Delay of the Trial

Allowing a character witness wide latitude in testifying about the principal witness’s character trait for veracity may dissolve a case into a series of mini-trials, exposing the character and life history of a principal witness.¹⁰² Consequently, this excursion prolongs the length of the trial. After a character witness is brought forward to impeach a principal witness, the sponsoring party may call a second character witness to impeach the first character witness.¹⁰³ This stacking of character witnesses drowns the material issues of the case in a sea of witness testimony.¹⁰⁴

B. Preventing the Underlying Dangers: Limitations on Character Witness Testimony

Other rules of evidence, incidental to Rule 608 and Maryland Rule 5-608, operate to limit occurrences of the underlying dangers. For

98. 3A WIGMORE, *supra* note 5, § 921, at 724.

99. 3A *id.* (“[W]ithout any charge and without any trial, [the witness] may be condemned by public opinion and disgraced before the community.”).

100. 3A *id.* at 841.

101. 3A *see id.* (resulting in the deprivation of justice to fully obtain useful testimony).

102. *See* 28 WRIGHT & GOLD, *supra* note 35, § 6112.

103. *See* 3A WIGMORE, *supra* note 5, § 894, at 658 (noting that when “B is brought forward to impeach A, and C to impeach B, it is obvious that not only might there be no end to this process, but the real issues of the case might be wholly lost sight of in the mass of testimony . . .”).

104. *See* *Michelson v. United States*, 335 U.S. 469, 480 (1948) (recognizing that in the “frontier phase of the law’s development, calling friends to vouch for good character and its counterpart—calling the rivals and enemies of a witness to impeach [the witness] . . . were favorite and frequent ways of converting an individual litigation into a community contest and a trial into a spectacle.”).

example, Rule 403¹⁰⁵ gives the trial court discretion to exclude relevant evidence where the harm likely to result from its admission substantially outweighs the probative value of, and the need for, the evidence.¹⁰⁶ Similarly, Rule 611¹⁰⁷ grants the trial court power to reject cumulative or irrelevant testimony¹⁰⁸ and to exclude harassing forms of evidence.¹⁰⁹

Most importantly, Rule 608 and Maryland Rule 5-608 contain internal safeguards. When offering character evidence pursuant to these rules, the character witness is limited to testifying: (1) for impeachment or rehabilitation purposes only after the principal witness has testified; (2) about the principal witness's specific trait of truthfulness or untruthfulness; and (3) in the form of an opinion or reputation.

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105. FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). *Accord* MD. R. EVID. 5-403. Rule 403 is the most commonly cited Federal Rule of Evidence in cases determining the admissibility of impeachment evidence, while Maryland Rule 5-403 has been designated as "the all-important 'clean-up batter' of evidence." Hornstein, *supra* note 52, at 1036; 5 McLAIN, *supra* note 1, § 403.1, at 552.
106. FED. R. EVID. 608 advisory committee's note ("[T]he overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury . . ."); *see also* United States v. Saunders, 166 F.3d 907, 920 (7th Cir. 1999) (recognizing that the probative value of character evidence for truthfulness must "outweigh the danger of unfair prejudice, confusion of issues, or misleading the jury"); United States v. Bedonie, 913 F.2d 782, 801-02 (10th Cir. 1990) (invoking Rule 403 where the probative value of reputation character evidence was outweighed by potential prejudice); United States v. Leake, 642 F.2d 715, 718-19 (4th Cir. 1981) (noting that the trial court has discretion when applying Rule 608 to ensure the overriding safeguards of Rules 403 and 611 are fulfilled).
107. FED. R. EVID. 611(a) ("The 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 the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."). *Accord* MD. R. EVID. 5-611(a).
108. *See* Geders v. United States, 425 U.S. 80, 87 (1976) (citing Hamling v. United States, 418 U.S. 87, 127 (1974) and County of Mason v. Shores, 97 U.S. 272 (1877)).
109. *See* United States v. McMillon, 14 F.3d 948, 956 (4th Cir. 1994) (upholding the trial court's decision to prevent counsel from cross-examining a witness regarding his sexual life because it was not probative of truthfulness and would constitute harassment).

1. Procedural Safeguards

Because it is presumed that all persons are truthful, the use of character evidence to prove truthfulness is only admissible after a character attack has been waged.¹¹⁰ According to Rule 608 and Maryland Rule 5-608, the sponsoring party cannot bolster the principal witness's credibility for truthfulness through the use of a character witness prior to an attempt to impeach by the adverse party.¹¹¹ Absent any attack on the principal witness's credibility, the presumption remains intact that the principal witness is a truthful person.¹¹²

Under Rule 608 and Maryland Rule 5-608, all witnesses are impeachable once they testify.¹¹³ For example, if a criminal defendant testifies, the prosecution may offer a character witness to testify about the defendant's character for untruthfulness.¹¹⁴ Once impeached, the defense may offer a character witness to rehabilitate the criminal defendant's credibility.¹¹⁵

2. Only the Specific Trait for Truthfulness is Relevant

The use of general character evidence increases the likelihood of error and prejudice against the principal witness.¹¹⁶ As a result, Rule 608 and Maryland Rule 5-608 prohibit testimony about the general character of the principal witness, but permit testimony about the

110. See 4 WIGMORE, *supra* note 5, § 1104, at 233-34; MURPHY, *supra* note 2, § 507(B), at 189-90.

111. See FED. R. EVID. 608(a)(2); MD. R. EVID. 5-608(a)(2); see also *United States v. Taylor*, 900 F.2d 779, 782 (4th Cir. 1990) (holding that it was improper for the government to offer a police officer as a character witness to bolster the credibility of an informant, who testified as a principal witness, before the informant's credibility was attacked); *United States v. Hicks*, 748 F.2d 854, 859 (4th Cir. 1984) (noting that the sponsoring party could not question the principal witness on direct examination about the absence of a prior criminal record because such an action bolstered the credibility of the witness before the witness's truthfulness had been established). *But see* *United States v. Schatzle*, 901 F.2d 252, 255-56 (2d Cir. 1990) (ruling that the sponsoring party could question the principal witness on direct examination regarding a failure to list an arrest on a bar application because it was a permissible line of questioning by the opposing party, thus, presenting the fact in the least damaging light possible).

112. 28 WRIGHT & GOLD, *supra* note 35, § 6116, at 66 n.4.

113. FED. R. EVID. 608; MD. R. EVID. 5-608. Neither rule distinguishes between a party who testifies and a non-party who testifies.

114. WEINSTEIN & BERGER, *supra* note 7, § 608.22[2][c][iii], at 608-61 (citing *United States v. Goodson*, 155 F.3d 963, 968 (8th Cir. 1998)).

115. *Id.*

116. See 3A WIGMORE, *supra* note 5, § 923, at 728.

principal witness's character for veracity.¹¹⁷ The distinction between veracity and general character relates to the breadth of the testimony about the principal witness's pertinent trait.¹¹⁸ For example, veracity limits the scope of examination to the specific trait for truthfulness,¹¹⁹ while general character broadens the scope to include any of the principal witness's character traits.¹²⁰ By restricting character witness testimony to truthfulness, the goals are to sharpen relevancy, to reduce surprise, time, and confusion, and to make the witness's role somewhat more attractive.¹²¹

3. Limited Methods of Proof

The method of proving character evidence plays a large part in anticipating where potential abuses may arise.¹²² Generally, evidence of pertinent character traits may be presented through testimony in the form of an opinion, reputation, and specific instances of conduct.¹²³ Of the three methods, opinion and reputation evidence are the most common forms of admissible character evidence, while evidence of specific instances of conduct possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.¹²⁴ The previ-

117. FED. R. EVID. 608 advisory committee's note. "In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally." 56 F.R.D. 183, 267-68 (1973); *accord* MD. R. EVID. 5-608. *See also* United States v. Greer, 643 F.2d 280, 283 (5th Cir. 1981) (finding no error in sustaining objection to question asked to character witness about principal witness's general reputation because it was not properly limited to the trait for truthfulness).

118. *See* 3A WIGMORE, *supra* note 5, § 922, at 727.

119. 28 WRIGHT & GOLD, *supra* note 35, § 6112, at 35.

120. 3A WIGMORE, *supra* note 5, § 922, at 727.

121. *See* FED. R. EVID. 608 advisory committee's note; 56 F.R.D. 183, at 268 (citing CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 44 (1954)).

122. *See generally* Leonard, *supra* note 14, at 1164-76 (discussing the safeguards in Federal Rule 608 regarding specific instances).

123. FED. R. EVID. 405. The methods of proving character are:

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Id.; *accord* MD. R. EVID. 5-405.

124. *See* FED. R. EVID. 405 advisory committee's note; 56 F.R.D. 183, 222 (1973).

ously discussed underlying dangers of character evidence are most apparent when a character witness testifies about a specific instance of the principal witness's conduct.¹²⁵ Consistent with the goal of limiting underlying dangers, Rule 608 and Maryland Rule 5-608 permit only reputation or opinion testimony as the methods of proving veracity to impeach or rehabilitate the credibility of a witness.¹²⁶

Generally, both Rule 608(b) and Maryland Rule 5-608(b), prohibit a character witness from testifying to specific instances of the principal witness's conduct on direct examination.¹²⁷ Rule 608(b) provides that when attacking or supporting a witness's credibility, specific instances of conduct "may not be proved by extrinsic evidence."¹²⁸ Similarly, Maryland Rule 5-608(a)(3)(B) expressly states that a character witness "may not testify to specific instances of truthfulness or untruthfulness by the witness."¹²⁹ In contrast, on cross-examination, opposing coun-

125. See *supra* Part III.A. Testimony of specific acts leads to the presentation of irrelevant evidence used to prove whether some specific act, committed by a principal witness, occurred. See WEINSTEIN & BERGER, *supra* note 7, § 608.21 (citing FED. R. EVID. 608(b)). When specific acts of a principal witness are improperly presented before the jury, it may have an enormous prejudicial impact. See Paul W. Grimm, *Impeachment and Rehabilitation Under the Maryland Rules of Evidence: An Attorney's Guide*, 24 U. Balt. L. Rev. 95, 102 (noting that "proof of character trait by specific acts evidence is 'most likely to create prejudice and hostility'" (quoting CHARLES T. McCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 33, at 66 (2d ed. 1972))). Finally, allowing testimony about specific instances of conduct causes witness harassment and forces a witness to be prepared to defend any prior bad acts. See JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 78 (4th ed. 1970); WEINSTEIN & BERGER, *supra* note 7, §§ 608.01[3], 611.01[1](a); GLEN WEISSENBERGER, FEDERAL EVIDENCE §§ 608.9, 611.2 (2d ed. 1995).

126. See generally FED. R. EVID. 404(a)(3); MD. R. EVID. 5-404(a)(1)(C).

127. FED. R. EVID. 608(b); MD. R. EVID. 5-608(a)(3)(B).

128. FED. R. EVID. 608(b) (indicating that, on direct examination, character witness testimony relating to specific conduct of a principal witness constitutes extrinsic evidence); see also *United States v. Hoskins*, 628 F.2d 295 (5th Cir. 1980). In *Hoskins*, a federal officer testified that he was struck by the defendant. *Id.* at 296. The defense put forward a character witness to testify that the officer was untruthful. *Id.* at 297. The trial court prohibited the character witness from testifying to specific examples of the officer's dishonesty. *Id.* The court of appeals held that the trial court correctly refused extrinsic evidence of specific acts to support the opinion of the character witness. *Id.* at 296-97. In limited instances the rules of evidence permit extrinsic evidence of specific acts on direct examination of a witness. See FED. R. EVID. 609(a)(2) ("[E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement . . ."); see also Bennett, *supra* note 14, at 581.

129. MD. R. EVID. 5-608(a)(3)(B).

sel may question a character witness about specific acts of the principal witness's conduct in limited situations to impeach the character witness's knowledge of the principal witness, the trustworthiness and accuracy of the character witness's knowledge, the basis for the character witness's opinion, and the character witness's candor and credibility.¹³⁰ A character witness may also be questioned as to specific acts of his or her own conduct that would be probative of truthfulness or untruthfulness.¹³¹

At common law, a character witness could only testify about the principal witness's reputation for truthfulness or untruthfulness.¹³² Although subjected to considerable debate, the formal rules of evidence broadened the scope of character witness testimony to allow opinion evidence.¹³³ Admitting both forms of character evidence swept away the "artificial distinction between reputation and opinion," because at common law, a witness describing an untruthful reputation was actually "giving disguised opinion testimony."¹³⁴ As one commentator described, "Now 'reputation witnesses' can also give their personal opinions about the honesty of the principal witness – which is what they were really doing all along. The underlying idea is still the same."¹³⁵

Opinion evidence may be a more effective form of proof than reputation evidence because a jury is likely to give more weight to a character witness's personal endorsement of another witness as opposed to a mere "endorsement purporting to convey what nameless others think."¹³⁶ Conversely, opinion character evidence might also be more

130. See Bennett, *supra* note 14, at 581.

131. Md. R. EVID. 5-608(b).

132. See *supra* notes 25-26 and accompanying text. Reputation is the total sum of how we are known and seen by others. See Taylor v. State, 28 Md. App. 560, 563 n.3, 346 A.2d 718, 720 n.3 (1975). The reputation of the principal witness is based on what the character witness has heard others say about the principal witness or what the character witness has discussed with others regarding the principal witness. See Michelson v. United States, 335 U.S. 469, 477 (1948). In the alternative, a character witness may also testify that the principal witness has no reputation, if it is probable that the character witness would have heard of any reputation for veracity if it existed. See *id.* at 478 (basing reputation testimony on the assumption that if no ill is reported of one, his or her reputation must be good).

133. See *supra* notes 36-51 and accompanying text.

134. 3 MUELLER & KIRKPATRICK, *supra* note 36, § 261, at 142-43 (noting that the mechanical repetition of a set formula by the reputation witness has been seen for what it usually is—a thinly veiled form of personal opinion).

135. McElhaney, *supra* note 2, at 62.

136. 3 MUELLER & KIRKPATRICK, *supra* note 36, § 261, at 143; see also Mason Ladd, *Techniques and Theory of Character Evidence*, 24 IOWA L. REV. 498, 511 (1939).

prejudicial than reputation evidence,¹³⁷ and is more likely to infringe on the trier of fact's decision-making process.¹³⁸ Nevertheless, opinion evidence is the prominent method of proof.

C. *The Foundation for the Proof of Character*

1. Requiring a Character Witness to Have a Reasonable Basis

The overall admissibility and weight of character evidence is based upon an assumption that the character witness has an adequate foundation to support an opinion or testimony about the principal witness's reputation.¹³⁹ In addition to the previously discussed requirements expressly contained in Rule 608 and Maryland Rule 5-608, both rules require the character witness to support his or her testimony with an adequate foundation.¹⁴⁰

Requiring an adequate foundation has two components. First, it has a prophylactic component that protects a principal witness from an unsupported character attack.¹⁴¹ This part is aimed at convincing the trial court.¹⁴² Second, requiring an adequate foundation gives weight and credibility to a character witness's testimony.¹⁴³ This part is aimed at convincing the trier of fact. The trial court retains both

Opinion evidence is often the most trustworthy form of character evidence because personal judgment is better than reputation evidence based on the hearsay gossip of a community. *Id.* Moreover, evidence of reputation does not necessarily equate to character. *Id.* at 506 (“[C]haracter is an existent quality apart from any reputation . . . [c]haracter is what a person actually is, while reputation is what his neighbors and those with whom he associates say he is.”).

137. Ladd, *supra* note 136, at 510-11.

138. *See id.* at 510 (“[C]haracter is the fact in issue from which other facts may be inferred, to permit a witness to express opinion of character would be an invasion of the province of the jury.”).

139. *See* 29 AM. JUR. 2D *Evidence* § 376 (1994).

140. *See supra* Part III.C.1.a-b.

141. *See* MD. R. EVID. 5-405 advisory committee's note (acknowledging that it is unfair to allow opinions without a proper basis); MD. R. EVID. 5-608 advisory committee's note (finding that a required reasonable basis is a protection of Rule 5-608).

142. *Hemingway v. State*, 76 Md. App. 127, 134, 543 A.2d 879, 882 (1988) (“[T]he party who offers the personal opinion of a character witness must first convince the trial judge that the witness possesses an adequate basis for forming an opinion as to another person's character.”) (citations omitted).

143. *See id.* at 135, 543 A.2d at 882 (“Clearly, the bald conclusion of the [character] witness without any reason to support it hardly commends the opinion for serious consideration by the trier of fact.”).

the responsibility to ensure a character witness is qualified to testify, and the discretion to control the scope of that testimony.¹⁴⁴

Normally, the trial court will excuse the jury from the courtroom before determining whether the character witness is qualified to testify.¹⁴⁵ This qualifying procedure is completed outside the presence of the jury to shield the jury from any improper testimony.¹⁴⁶ The applicable standards for qualifying a character witness depends, in part, on the form of the testimony.¹⁴⁷ For example, reputation evidence requires that the character witness have contact with the principal witness's community for a length of time sufficient to become aware of the reputation.¹⁴⁸ Similarly, opinion evidence requires the character witness to have first-hand knowledge of the principal wit-

144. When analyzing character evidence, the trial court is relied upon to factor in all the underlying policies, considerations, and rules. See *McLAIN*, supra note 6, § 2.104.4, at 69 (discussing the role of the judge on questions of admissibility of evidence); see also *Durkin v. State*, 284 Md. 445, 453, 397 A.2d 600, 605 (1979) (referring to the trial judge's decision as a "threshold function" for the admissibility of character evidence).

145. The trial court has discretion to determine which preliminary matters should be conducted out of the hearing of the jury. FED. R. EVID. 104(c) advisory committee's notes. In *Jensen and Hemingway*, the trial court dismissed the jury from the courtroom before qualifying the character witnesses. See *infra* Part III.C.2.a for a discussion of *Jensen*. See *supra* notes 66-83 and accompanying text for a discussion of *Hemingway*.

146. In jury cases, an evidentiary ruling may be made out of the hearing of the jury to prevent inadmissible evidence from being suggested to the jury. FED. R. EVID. 103(c). A court ruling excluding evidence is useless if the excluded evidence ultimately comes before the jury. FED. R. EVID. 103(c) advisory committee's note (citing *Bruton v. United States*, 389 U.S. 818 (1968)).

147. See *infra* notes 148-50 and accompanying text.

148. *United States v. Ruiz-Castro*, 92 F.3d 1519, 1529-30 (10th Cir. 1996) (excluding character witnesses because they did not have sufficient acquaintance with the principal witness); *United States v. Bedonie*, 913 F.2d 782, 802 (10th Cir. 1990) (finding that a principal witness's reputation for veracity formed by a high school principal over a three year period was admissible); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1552 (10th Cir. 1988) (permitting reputation testimony where character witness was a member of community for eleven years and dealt regularly with the principal witness for two years); *United States v. Watson*, 669 F.2d 1374, 1381-82 (11th Cir. 1982) (excluding reputation testimony, in part, because the character witness had contact with the witness for only a short time); *United States v. Mandel*, 591 F.2d 1347, 1370 (4th Cir. 1979) (allowing reputation testimony to be based on the workplace community).

ness,¹⁴⁹ however, there is no requirement of a sufficient period of acquaintance.¹⁵⁰

This adequate foundation consists of a "reasonable basis" to support a character witness's testimony.¹⁵¹ Although both Rule 608 and Maryland Rule 5-608 require this foundation, there are slight differences in the way this requirement is articulated. Unlike Maryland Rule 5-608, Rule 608 makes no express reference to permitting a character witness to give a "reasonable basis."¹⁵² One commentator recognized the flaw that "the Federal Rules of Evidence never even mention what has to happen before you can impeach a witness."¹⁵³ Consequently, we look to case law for guidance.

a. Federal Case Law Establishing the Reasonable Basis Requirement

In 1979, the United States Court of Appeals for the Fifth Circuit in *United States v. Lollar*¹⁵⁴ recognized that although it is more desirable for counsel to first ask the character witness about the foundation supporting opinion testimony, Rule 608(a) does not require this foundation.¹⁵⁵ Three years later, the United States Court of Appeals for the Eleventh Circuit in *United States v. Watson*¹⁵⁶ distinguished the requisite basis for admitting reputation testimony¹⁵⁷ from admitting opin-

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149. *United States v. Cortez*, 935 F.2d 135, 139 (8th Cir. 1991) (stating that Rule 701 limits witness testimony regarding truthfulness to first-hand knowledge); WEINSTEIN & BERGER, *supra* note 7, § 608.13[2] (stating that witness testimony based on personal knowledge is a requirement of Rule 701); *see also* FED. R. EVID. 602 (requiring an evidentiary finding that a witness has "personal knowledge" of the subject).
150. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 12.03[2], at 12-30 (4th ed. 1999) ("There are no prerequisites of long acquaintance . . . cross-examination can be expected to expose defects of lack of familiarity . . .").
151. *See* 3 MUELLER & KIRKPATRICK, *supra* note 85, § 6.38, at 813-14; MURPHY, *supra* note 2, § 1302(A), at 495.
152. *Compare* FED. R. EVID. 608 with MD. R. EVID. 5-608(a)(3)(B). Maryland Rule of Evidence 608(a)(3)(B) states that "a character witness may give a reasonable basis for testimony." MD. R. EVID. 608(a)(3)(B). Federal Rule 608 does not contain such a provision. FED. R. EVID. 608.
153. McElhaney, *supra* note 2, at 62.
154. 606 F.2d 587 (5th Cir. 1979).
155. *Id.* at 589 (acknowledging that character witnesses may be asked for an opinion of the principal witness's character for truthfulness, but Rule 608 imposes no prerequisite testimony).
156. 669 F.2d 1374 (11th Cir. 1982).
157. *Id.* at 1382 (recognizing that reputation testimony requires the character witness to have sufficient acquaintance with the principal witness's commu-

ion testimony.¹⁵⁸ The court emphasized that Rule 602¹⁵⁹ imposed a “personal knowledge” requirement on Rule 608 opinion testimony.¹⁶⁰ The court held that the trial court erred by excluding the testimony of opinion witnesses who satisfied the personal knowledge requirement.¹⁶¹

In *United States v. Dotson*,¹⁶² the United States Court of Appeals for the Fifth Circuit further established the requirement of a reasonable basis for opinion testimony. The court held that it was error for the trial court to allow opinion testimony absent a reasonable basis.¹⁶³ At trial, Frederick Dotson was charged with three counts of receiving firearms.¹⁶⁴ In defense, Dotson testified that the firearms were obtained prior to his earlier convictions, and he reclaimed the firearms because of various threats on his life.¹⁶⁵ Dotson offered his own exculpatory testimony and the testimony of four principal witnesses.¹⁶⁶ In response, the government offered the testimony of character witnesses to give opinions that “Dotson and one or more of his witnesses were not of truthful character” and would lie under oath.¹⁶⁷ The defense counsel objected to the government’s character witnesses claiming that they lacked the proper basis for giving opinion testimony.¹⁶⁸ The trial court overruled the objection and allowed the character witnesses

nity to ensure that the testimony adequately reflects the community assessment) (citing *Michelson v. United States*, 335 U.S. 469, 478 (1948)).

158. *Id.* at 1382 (noting that opinion testimony does not require a long acquaintance with the principal witness as a foundation for admissibility).

159. Rule 602 states in pertinent part, “[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.” FED. R. EVID. 602.

160. *Watson*, 669 F.2d at 1382.

161. *Id.* (noting that the four opinion witnesses were improperly excluded because the trial court applied the wrong foundational standard for opinion testimony). The voir dire of the four witnesses revealed that they had first-hand knowledge of the principal witness because they worked with him. *Id.* at 1382-83, 1382 n.6.

162. 799 F.2d 189 (5th Cir. 1986).

163. *Id.* at 193.

164. *Id.* at 190 (noting that the charges were related to defendant’s past criminal history because, “[a]s a result of [Dotson’s] status as a convicted felon on parole, federal law [18 U.S.C. § 922(h)] prohibited Dotson from knowingly receiving firearms”).

165. *Id.*

166. *Id.*

167. *Id.* at 190-91 (noting that the government called two FBI agents, a state narcotics agent, and an IRS agent to opine as to the truthfulness of Dotson and his principal witnesses).

168. *Id.* at 191.

to testify.¹⁶⁹ Dotson was convicted and sentenced to five years imprisonment.¹⁷⁰

On appeal, the court agreed with Dotson's argument that there was no reasonable basis for the opinions of the government's character witnesses.¹⁷¹ The court's analysis distinguished its prior holding in *United States v. Lollar*.¹⁷² Recognizing that Rule 701 operated to ensure the reliability and relevance of opinion character evidence,¹⁷³ the court held that "[i]n the absence of some underlying basis to demonstrate that the opinions were more than bare assertions that the defendant and his witnesses were persons not to be believed, the opinion evidence should not have been admitted."¹⁷⁴

In later cases, federal appellate courts found the reasoning in *Dotson* persuasive and held that before opinion testimony is admissible the character witness must have a reasonable basis.¹⁷⁵ In effect, this case law imposed the requirement that a reasonable basis exist to support Rule 608 opinion evidence.¹⁷⁶

169. *Id.*

170. *Id.*

171. *Id.* at 193 (declaring that opinion testimony based solely on an investigation constitutes an inadequate basis). The court noted one exception: that the IRS agent had a reasonable basis for his opinion of Erma Dotson's truthfulness based upon a series of interviews, an investigation of her tax returns and financial information, and a study of her earlier grand jury testimony. *Id.*

172. *Id.* at 191-92 (contrasting that in *Lollar* the challenge to character evidence was to the method of proof, whereas in the instant case, the challenge raised an issue on the limits to the introduction of opinion testimony).

173. *Id.* at 192. Federal Rule 701, entitled Opinion Testimony by Lay Witnesses, provides:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

FED. R. EVID. 701; accord MD. R. EVID. 5-701.

174. *Dotson*, 799 F.2d at 193.

175. See *United States v. McMurray*, 20 F.3d 831, 834 (8th Cir. 1994) (permitting a character witness to testify if there is an adequate showing "that the opinions were more than bare assertions" (quoting *Dotson*, 799 F.2d at 189)); *United States v. Cortez*, 935 F.2d 135, 139-40 (8th Cir. 1991) (rejecting opinion testimony that lacked a sufficiently reliable basis).

176. See Cindy F. Willard, *United States v. Dotson: When Should Opinion Testimony as to the Truth and Veracity of a Witness be Allowed?*, 12 AM. J. TRIAL ADVOC. 497, 506-08 (1988) (discussing the impact of the holding in *Dotson* on subsequent cases). Willard concluded in her article that as a result of *Dotson*, "[w]hen courts are faced with allowing or disallowing impeaching, opinion

b. Expressly Permitting a Reasonable Basis in Maryland

The pre-rules practice governing the admissibility of character evidence in Maryland was contained in section 9-115 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland.¹⁷⁷ Courts interpreted section 9-115 as “requiring” a reasonable basis.¹⁷⁸

When Maryland Rule 5-608 was codified, the drafters expressly included subsection (a)(3)(B). This subsection is consistent with the federal courts interpretation of the corresponding federal rule,¹⁷⁹ and expressly states: “on direct examination, a character witness *may give a reasonable basis* for testimony as to reputation or an opinion as to the character of the witness for truthfulness or untruthfulness, but may not testify to specific instances of truthfulness or untruthfulness by the witness.”¹⁸⁰ Consistent with the pre-rules practice,¹⁸¹ Maryland Rule 5-608 was interpreted to “require” a reasonable basis.¹⁸²

2. What Constitutes a “Reasonable Basis?”

Once the trial court is satisfied the character witness possesses the requisite foundation to testify, the court must still ensure that the character witness’s testimony, when elicited in the jury’s presence, complies within the scope of Rule 608 or Maryland Rule 5-608. While it is clear that a character witness is required to provide a reasonable basis, it is less than certain what that constitutes.¹⁸³ The authors of the

testimony, they must determine if the impeaching witness has a substantial basis on which to form his opinion.” *Id.* at 510.

177. *See supra* notes 60-63 and accompanying text. More specifically, section 9-115 stated in pertinent part, “no person offered as a character witness who has *an adequate basis* for forming an opinion as to another person’s character shall hereafter be excluded from giving evidence based on personal opinion to prove character. . . .” MD. CODE ANN., CTS. & JUD. PROC. § 9-115 (emphasis added).

178. *See* Hemingway v. State, 76 Md. App. 127, 134, 543 A.2d 879, 882 (1988) (citing Kelley v. State, 288 Md. 298, 418 A.2d 217 (1980) and Durkin v. State, 284 Md. 445, 397 A.2d 600 (1979)).

179. *See supra* note 300 and accompanying text. In general, Maryland Rule 5-608 is a substantial revision of its federal counterpart. *See* Hornstein, *supra* note 52, at 1057.

180. MD. R. EVID. 5-608 (emphasis added).

181. *See supra* note 178 and accompanying text. When admitting character witness testimony, the courts must apply both Maryland Rule 5-608 and section 9-115. *See* Jensen v. State, 355 Md. 692, 700, 736 A.2d 307, 311 (1999).

182. *See infra* Part III.C.2.a.

183. *See infra* Part III.C.2.a & b; *see also* United States v. McMurray, 20 F.3d 831, 834 (8th Cir. 1994) (permitting a character witness to testify who knew the character witness through business dealings); Kelley v. State, 288 Md. 298,

Federal Rules of Evidence envisioned that a reasonable basis consisted of testimony as to the nature and extent of the acquaintance.¹⁸⁴ Similarly, the authors of the Maryland Rules of Evidence envisioned that a reasonable basis consisted of testimony covering "such matters as how long the witnesses have been acquainted, under what circumstances, etc."¹⁸⁵ Of course, what the authors envisioned may be quite different from a court's interpretation.

a. *Jensen v. State*

In *Jensen v. State*,¹⁸⁶ the Court of Appeals of Maryland held that the trial court erred by restricting a character witness from testifying to the full basis for her opinion.¹⁸⁷ On June 17, 1996, on a rural road in Virginia, Adrian Pilkington was stabbed two times by the defendant, Jason Jensen, and while still alive, placed in the trunk of his car.¹⁸⁸

302-04, 418 A.2d 217, 219-20 (1980) (stating that there was an insufficient basis when basis for opinion was intertwined with results of a polygraph test); *Durkin v. State*, 284 Md. 445, 453-54, 397 A.2d 600, 605 (1979) (stating that there was an insufficient basis where character witness was police chief who had a "brief and limited encounter with the witness"); *Wilson v. State*, 103 Md. App. 722, 726, 654 A.2d 936, 937 (1995) (permitting a character witness to testify who knew the principal witness for over one year as a friend and instructor); *Barnes v. State*, 57 Md. App. 50, 59, 468 A.2d 1040, 1044 (1984) (permitting opinion testimony where witness had repeatedly interviewed principal witness for over two years); *Chadderton v. State*, 54 Md. App. 86, 96, 456 A.2d 1313, 1319 (1983) (excluding opinion testimony of a twelve-year old where no basis was proffered besides the witness's inability to remember when he met the principal witness).

184. The Advisory Committee's Note for Rule 608 states: "[a]s to the use of specific instances on direct by an opinion witness, see the Advisory Committee's Note to Rule 405." FED. R. EVID. 608 advisory committee's note. Citing Rule 701, the Advisory Committee's Note in Rule 405 states: "[o]pinion testimony on direct . . . ought in general to correspond to reputation testimony as now given, i.e., be confined to the nature and extent of observation and acquaintance upon which the opinion is based." FED. R. EVID. 405 advisory committee's note.

185. 20 MD. REG. Issue 15 pt. II at P-14 (July 23, 1993); see also MCLAIN, *supra* note 6, § 2.608.4, at 149 ("[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 workday.").

186. 355 Md. 692, 736 A.2d 307 (1999).

187. *Id.* at 708, 736 A.2d at 315. The holding was of little significance to Jensen's conviction because of the finding of harmless error. See *infra* notes 226-42 and accompanying text.

188. *Jensen*, 355 Md. at 694, 736 A.2d at 308.

Jensen drove Pilkington's car accompanied by Brian Wooldridge, Jean Nance and Rachel Whitman. The car stopped at a bridge in Frederick, Maryland, where Pilkington was removed from the trunk and thrown into the Potomac River.¹⁸⁹ On June 21, 1996, Pilkington's dead body was removed from the Potomac River a few miles from the Route 17 bridge in Brunswick City.¹⁹⁰ Jensen, Wooldridge, Nance and Whitman were arrested and tried separately for the murder of Pilkington.¹⁹¹

At Jensen's trial, the jury was presented with conflicting testimony about events occurring the night of Pilkington's death. Wooldridge testified on behalf of the State against Jensen,¹⁹² and Jensen testified to his own exculpatory version of events.¹⁹³ In response to Wooldridge's testimony, the defense called Melissa Goff as a character witness to impeach his credibility.¹⁹⁴ The defense posed preliminary questions to Goff regarding her familiarity with Wooldridge.¹⁹⁵ Goff testified she knew Wooldridge for over a year, during which time she saw him approximately once a week and spoke to him every day.¹⁹⁶ Defense counsel next asked Goff, "[D]o you have an opinion as to [Wooldridge's] veracity to tell the truth?"¹⁹⁷ At this point, the State objected to the question on the grounds of insufficient basis to give an opinion.¹⁹⁸ The court dismissed the jury from the courtroom and allowed defense counsel to continue questioning Goff.¹⁹⁹ Goff responded as to the basis of her opinion:

189. *Id.* at 694-95, 736 A.2d at 308.

190. *Id.*

191. *Id.*

192. *Id.* at 695, 736 A.2d at 308. Pursuant to a plea agreement, Wooldridge testified against Jensen in exchange for his guilty plea of conspiracy to commit first degree murder with a maximum of fifteen years imprisonment. *Id.* at 712, 736 A.2d at 317. Wooldridge testified that Jensen delivered the mortal stab wound, that Jensen and Nance threw Pilkington's body over the bridge, and that during these events he fearfully remained in the car at Jensen's threatening command. *Id.* at 713-14, 736 A.2d at 318-19.

193. *Id.* at 695, 736 A.2d at 308. Jensen claimed that he had no intent to harm Pilkington, that Wooldridge removed the knife from the trunk, and that he feared he was the intended victim of a conspiracy to commit assault and murder. *Id.* at 714-15, 736 A.2d at 319. Jensen admitted that he accidentally stabbed the victim once in the shoulder acting out of self-defense.

194. *Jensen*, 355 Md. at 695, 736 A.2d at 308.

195. *Id.* at 695-96, 736 A.2d at 308-09.

196. *Id.*

197. *Id.* at 697, 736 A.2d at 309.

198. *Id.*

199. *Id.*

A lot of the stories that [Wooldridge] told me didn't add up, saying that—one day he would tell me something that happened on that day and then a couple days later he would tell me something else that had happened on that day that wouldn't have been able to happen if what he said before was true.²⁰⁰

Goff then stated that this type of exchange with Wooldridge happened "repeatedly."²⁰¹

The court determined that this testimony supported a reasonable basis for Goff's opinion and directed the jury to return to the courtroom.²⁰² Once the jury returned, Goff was asked to state her opinion regarding Wooldridge's truthfulness.²⁰³ She responded, "I think that he's a compulsive liar."²⁰⁴ The defense attorney then asked, "What do you base that opinion on?"²⁰⁵ Again, the State objected, and the judge called a bench conference.²⁰⁶

The State argued at the bench conference that defense counsel was attempting to elicit testimony of specific instances of conduct from Goff on direct examination.²⁰⁷ The court agreed with the State's argument that allowing testimony of specific instances would violate Maryland Rule 5-608.²⁰⁸ Goff's testimony was restricted to her opinion that Wooldridge was a compulsive liar based on her one year relationship with him.²⁰⁹ At the close of the trial, Jensen was found guilty.²¹⁰ He appealed the trial court's decision to limit the testimony of Goff.²¹¹

On appeal, Jensen complained that "without allowing for some evidence of reasonable basis, a jury 'will not be impressed with a bald conclusion of personal opinion.'"²¹² Jensen argued that if Goff were allowed to further explain why she believed that Wooldridge was a

200. *Id.* at 697, 736 A.2d at 309.

201. *Id.*

202. *Id.*

203. *Id.* at 697, 736 A.2d at 309-10.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Jensen*, 355 Md. at 697-98, 736 A.2d at 310.

208. *Id.*

209. *Id.*

210. *Id.* at 698, 736 A.2d at 310. Jensen was convicted of first-degree murder, conspiracy to murder, and assault with intent to commit murder. *Id.*

211. *Id.* The Court of Special Appeals of Maryland affirmed the trial court's decision, and the Court of Appeals of Maryland granted *certiorari* to determine whether Goff should have been allowed to give the basis underlying her opinion that Wooldridge was a compulsive liar. *Id.*

212. *Id.* (quoting Petitioner Jensen's argument on appeal).

compulsive liar, the jury would disregard Wooldridge's testimony and accord more weight to Jensen's version of events.²¹³

According to the State, Goff's proffered testimony was properly excluded by the trial court as "a number of specific events tied together"²¹⁴ that amounted to specific acts of conduct, which was prohibited by Rule 5-608(b).²¹⁵ The State further contended that Rule 5-608 "embodies a restrictive approach designed to avoid diverting the jury's attention and creating mini-trials on the issue of a witness's credibility,"²¹⁶ and that the proper limits of reasonable basis testimony consist of "how long and under what circumstances the witnesses have been acquainted."²¹⁷ After reviewing the arguments, the court of appeals held that the trial court abused its discretion in limiting Goff's testimony.²¹⁸

The court of appeals analyzed the content of Goff's statement and applied it to the definition of specific instance.²¹⁹ The court found "specific" defined as "of an exact or particular nature," "particular," "precise."²²⁰ The court concluded that Goff did not testify to a particular incident.²²¹ Rather, she testified as a general matter to Wooldridge's tendency to tell inconsistent stories.²²² The court recognized the danger that "once a character witness testifies to a specific instance" of the principal witness's conduct, "the jury's focus necessarily turns to whether in fact that particular event occurred"²²³ The court found, however, that danger was nonexistent in the instant case. Contrasting the effect of Goff's statement to the effect of specific instance testimony, the court concluded that Goff's testimony "would not serve to distract and confuse the jury, nor would it consume time

213. *Id.*

214. *Id.* (quoting Respondent State's argument on appeal).

215. *Id.*

216. *Id.* (quoting Respondent State's argument on appeal).

217. *Id.*

218. *Id.* at 708-09, 736 A.2d at 315-16 (affirming the trial court's conviction upon a finding that the improper restriction of Goff's testimony was *harmless error* because even assuming the trier of fact found Wooldridge's testimony untruthful, the remainder of the State's evidence proved Jensen's guilt beyond a reasonable doubt).

219. *Jensen*, 355 Md. at 699-700, 736 A.2d at 310-11.

220. *Id.* at 699, 736 A.2d at 310 (citing BLACK'S LAW DICTIONARY 1398 (6th ed. 1990)).

221. *Id.*

222. *Id.* at 699, 736 A.2d at 311.

223. *Id.* at 699-700, 736 A.2d at 311 (referencing the relationship of Maryland Rule 5-608(a)(3)(B) to Rules 608(b) and 405(b) to highlight the dangers of specific instances).

by altering the focus of the trial to other particular events."²²⁴ Finally, the court found that Goff's proffered testimony was permissible because "a character witness [is] entitled to some latitude in informing the jury as to the basis for an opinion" ²²⁵

Next, the court analyzed whether the trial court abused its discretion in limiting Goff's testimony.²²⁶ To answer this question, the court addressed section 9-115 of the Courts and Judicial Proceedings Article and Maryland Rule 5-608.²²⁷ The court defined the phrase "reasonable basis for testimony" in light of the law at the time Maryland Rule 5-608(a)(3) was adopted.²²⁸

The court recognized that the 1971 enactment of section 9-115 abrogated the common law.²²⁹ Section 9-115 was broadly interpreted and applied by the Maryland courts in *Durkin v. State*,²³⁰ *Kelley v. State*,²³¹ and *Hemingway v. State*.²³²

In addition, the court reviewed the legislative history of Maryland Rule 5-608 and determined that the final draft was a compromise between expressly overruling the admissibility of specific instances on direct examination and a broadening of Maryland Rule 5-608 beyond the scope of Rule 608.²³³ The court found "a strong indication" that the 1994 court of appeals intended that Maryland Rule 5-608 exceed Rule 608 in what was allowed before the trier of fact as the basis for an

224. *Id.* at 700, 736 A.2d at 311.

225. *Id.* at 708, 736 A.2d at 315.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 701, 736 A.2d at 311-12.

230. 284 Md. 445, 453, 397 A.2d 600, 605 (1979). Here the court emphasized that section 9-115 permitted the reasonable basis for the personal opinion of character to be presented for the trier of fact's consideration along with the bare opinion. *Id.*; see also *Jensen*, 355 Md. at 702, 736 A.2d at 312.

231. 288 Md. 298, 302, 418 A.2d 217, 219 (1980) (asserting that "[9-115] permits the admission of a broad range of testimony which may aid the jury in assessing the credibility of a witness"); see also *Jensen*, 355 Md. at 702, 736 A.2d at 312.

232. 76 Md. App. 127, 133-35, 543 A.2d 879, 882 (1988) (noting that the court went so far as to admit specific instances of conduct to impeach a witness's credibility on direct examination under section 9-115). Since then *Jensen* has overruled *Hemingway*. See *Jensen*, 355 Md. at 724, 736 A.2d at 324.

233. *Jensen*, 355 Md. at 707-08, 736 A.2d at 315. In 1988, the first proposed draft of Maryland Rule 5-608 mirrored Federal Rule 608 in language and substance but was not reported to the Court of Appeals of Maryland. Instead, a second draft, which added section (a)(3)(B) expressly permitting a reasonable basis, was reported and adopted as Maryland Rule 5-608. See *id.* at 704-05, 736 A.2d at 313-14.

opinion.²³⁴ The court recognized that Federal Rule 405 confines the permissible basis for supporting opinion testimony under Rule 608 to the nature and extent of observation and acquaintance.²³⁵ The court found, however, that the Federal Rule 405 standard was not a limit on Maryland Rule 5-608 because of the intent of Maryland Rule 5-608 to extend beyond Rule 608.²³⁶

The court also distinguished Rule 608 from Maryland Rule 5-608 based upon the language in the text and also the reporters' notes.²³⁷ First, the text in Maryland Rule 5-608 differed from that used in Rule 608 because where Rule 608 is silent, Maryland Rule 5-608 expressly allows the character witness to give a reasonable basis for an opinion.²³⁸ Second, the content of the respective reporters' notes differed.²³⁹ The court found that the Federal Reporter's notes were restrictive, while the Maryland language was illustrative.²⁴⁰ These differences further supported a finding of intent to distinguish the two rules.

After reviewing the history and language of Maryland Rule 5-608, the court concluded that a character witness should be allowed latitude to offer something to the jury beyond a bare conclusion that the witness is or is not a truthful person, but should not offer specific instances of conduct.²⁴¹ The court held that a character witness's testimony supporting a "reasonable basis" is not restricted only to the length and manner of acquaintance with the principal witness.²⁴²

Judge Chasanow concurred with the majority's affirmance of Jensen's conviction, but dissented with finding error in the trial court's restriction on Goff's reasonable basis testimony.²⁴³ Judge Chasanow

234. *Id.* at 707, 736 A.2d at 315.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Jensen*, 355 Md. at 706-07, 736 A.2d at 314.

240. *Id.* at 708 n.6, 763 A.2d at 315-16 n.6 (making the distinction that the Federal Rule Advisory Committee provided that opinion testimony ought in general to be *confined* to the nature and extent of observation and acquaintance, as opposed to the Maryland Rule Reporter's Note, which *envisioned* that reasonable basis cover such matters as how long and under what circumstances).

241. *Id.* at 708, 736 A.2d at 315 (recognizing that it is fair to infer from Maryland Rule 5-608 and its history that a character witness can give meaningful opinion testimony).

242. *Id.* at 707, 736 A.2d at 315.

243. *Id.* at 722-23, 736 A.2d at 323 (Chasanow, J., concurring in part and dissenting in part).

argued that the majority's holding allowed character witness testimony that improperly exceeded the scope of Maryland Rule 5-608.²⁴⁴ He opined that the trial court had not abused its discretion by limiting Goff's testimony.²⁴⁵ Judge Chasanow advocated a strict interpretation of Maryland Rule 5-608, emphasizing that the adoption of Maryland Rule 5-608 overruled *Hemingway v. State*.²⁴⁶ He pointed out that the majority failed to recognize a vital distinction in the application of Maryland Rule 5-608(a)(3)(B) that, "[i]t is quite clear that the rule is intended to allow the character witness to express the reasonable basis for arriving at an opinion, not the reasonable basis for the opinion arrived at."²⁴⁷ This position supports a more restrictive approach to the admissibility of character evidence.²⁴⁸

b. United States v. Murray

In *United States v. Murray*,²⁴⁹ the United States Court of Appeals for the Third Circuit was faced with the same challenge of defining the scope of what constitutes a reasonable basis. Michael Murray was charged with the murder of Juan Carlos Bacallo and conspiracy to distribute cocaine.²⁵⁰ The government called Richard Brown as a

244. *Id.* at 725-26, 736 A.2d at 325 (applying a strict interpretation of "reasonable basis" that limits testimony to "how long and under what circumstances the character witness knew the primary witness, or how often and under what circumstances the character witness discussed the reputation of the primary witness").

245. *Id.* at 725-26, 736 A.2d at 325 (finding that Goff's testimony was more similar to specific instances of conduct than a reasonable basis for an opinion, and, therefore, was properly excluded by the trial court pursuant to Maryland Rule 5-608(b)).

246. *Id.* at 724-25, 736 A.2d at 324 (quoting LYNN McLAIN, MARYLAND RULES OF EVIDENCE § 2.608.4 at 149 (West 1994) (citing *Hemingway v. State*, 76 Md. App. 127, 543 A.2d 879 (1988))).

247. *Id.* at 724, 736 A.2d at 324. Judge Chasanow also condemned the usage of the nomenclature "compulsive liar" to describe the principal witness's character for veracity. *Id.* at 723, 736 A.2d at 323 (arguing that "compulsive" was inappropriate because it added an indication of psychological defect, because there is an obvious difference between an untruthful person and a person who has an uncontrollable compulsion to lie).

248. *Id.* at 723, 736 A.2d at 323. Judge Chasanow recognized that the trier of fact has a brief opportunity to observe a witness and little basis for making critical judgments about a witness's veracity. To alleviate the trier of fact's dilemma without violating the rights of a witness, the evidence should be presented in a manner that minimizes its inflammatory nature. *Id.*

249. 103 F.3d 310 (3d Cir. 1997).

250. *Id.* at 313.

principal witness to testify against Murray.²⁵¹ Brown was vigorously cross-examined by the defense, which was considered by the court as an attack on Brown's credibility.²⁵² In response, the government offered Lieutenant Goshert as a character witness to rehabilitate Brown's character.²⁵³ Goshert testified that in his opinion Brown was "extremely reliable."²⁵⁴ Additionally, Goshert testified that based on Brown's help as an informant, the police department had "made" in "excess of sixty-five" cases and obtained search warrants "numerous times."²⁵⁵ The defense argued that Goshert's testimony violated Rule 608(b) because it was extrinsic evidence of Brown's character for truthfulness.²⁵⁶ The trial court found that Goshert's testimony was proper, thereby constituting a reasonable basis supporting his opinion.²⁵⁷ Murray was convicted on all counts and sentenced to life in prison.²⁵⁸

On appeal, Murray argued that Goshert's testimony was improperly admitted into evidence.²⁵⁹ The government argued that Goshert's testimony was proper as supporting a reasonable basis for his opinion.²⁶⁰ The Third Circuit held that admitting Goshert's entire testimony was error in violation of Rule 608(b).²⁶¹ The court dissected Goshert's

251. *Id.* at 314. Brown, a taxi-cab driver, picked up Murray on the night of the murder. *Id.* Brown testified that, after Murray and the victim walked away from the cab, he heard gunshots and he saw Murray return to the cab with a pistol. *Id.* Brown further testified that he was told by Murray "that is what someone gets for being in violation," but he never saw the victim return to the cab. *Id.*

252. *Id.* at 321 (eliciting from Brown, on cross-examination, an admission of his past involvement in various illegal activities).

253. *Murray*, 103 F.3d at 321.

254. *Id.* (noting this reliability in terms of accuracy of the information Brown provided the Harrisburg Police Department since 1988).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 316.

259. *Id.* at 321 (arguing that Goshert's testimony that Brown had "made" cases for the police department was an improper quantification constituting specific instances of Brown's conduct).

260. *Id.* The government argued that:

[T]here has got to be some basis for the jury to know [Goshert] can give that opinion as to [Brown's] reputation. And by letting the jury know they have a close working relationship over a period of time and that they have been involved in all of these incidents, then there is a basis for him giving that opinion.

Id.

261. *Id.* (recognizing that extrinsic evidence of specific instances of a principal witness's conduct as proof of truthfulness violates Rule 608(b)).

testimony, separating the admissible from inadmissible portions.²⁶² The court explained that Goshert's testimony regarding the police use of Brown as a confidential informant on "numerous occasions" since 1988 was admissible to establish a reasonable basis for his opinion as to Brown's character for truthfulness.²⁶³ The portion of Goshert's testimony that Brown had "made" sixty-five cases, however, was inadmissible because it was more specific than can be justified as necessary to establish a foundation.²⁶⁴ The court found that the error was not harmless and remanded the case with instructions that the court should limit Goshert's testimony.²⁶⁵

The *Murray* court relied in part on the reasoning used by the United States Court of Appeals for the Fourth Circuit to decide a similar issue.²⁶⁶ In *United States v. Taylor*,²⁶⁷ a police informant, Tony Phillips, testified as a principal witness against the defendant, Henry Taylor, who was charged and convicted of possession and intent to distribute an illegal substance.²⁶⁸ The government introduced the testimony of Officer Black to support the credibility of Phillips.²⁶⁹ Black testified that Phillips had acted as a buyer for the government on fifteen to eighteen drug buys, and that Phillips had given reliable information and testimony that resulted in the guilty pleas and convictions of drug sellers.²⁷⁰ The jury returned a guilty verdict, which Taylor appealed.²⁷¹ The United States Court of Appeals for the Fourth Circuit held that Black's testimony was improper as extrinsic evidence used to bolster the credibility of Phillips.²⁷² The court vacated the conviction and remanded the case for retrial.²⁷³

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 322 (emphasizing that the government's case depended largely on the testimony of an informant, which created the need for a character witness to testify as to the informant's reliability).

266. *Id.*

267. 900 F.2d 779 (4th Cir. 1990).

268. *Id.* at 780-81 (citing Phillips' testimony as the only direct testimony of Taylor's guilt).

269. *Id.*

270. *Id.*

271. *Id.* at 781.

272. *Id.* (citing Rule 608(b) as prohibiting a character witness from testifying on direct examination to specific instances of the principal witness's conduct for the purpose of supporting the principal's credibility).

273. *Id.* at 782-83 (emphasizing that Phillips was central to the government's case, and, therefore, improper bolstering of Phillips' testimony could have been quite prejudicial to the defendant).

IV. UNDERMINING THE EFFICACY OF CHARACTER EVIDENCE:
WHEN DOES A REASONABLE BASIS BECOME A SPECIFIC
INSTANCE OF CONDUCT?

A. *The Importance of Distinguishing Reasonable Basis from Specific Instances of Conduct*

The dangers underlying character evidence are most apparent when a character witness testifies about specific instances of a principal witness's conduct.²⁷⁴ When determining if a reasonable basis exists, the court must then distinguish admissible testimony constituting a reasonable basis from inadmissible testimony of specific instances of conduct.²⁷⁵

Recently, both the Court of Appeals of Maryland, in *Jensen*, and the United States Court of Appeals for the Third Circuit, in *Murray*, have been challenged by this distinction.²⁷⁶ In both *Jensen* and *Murray*, the sponsor of a character witness argued that the jury was unable to appreciate or properly weigh the opinion of the character witness without hearing a basis for the opinion, and therefore, the character witness should be entitled to give testimony beyond a mere opinion.²⁷⁷

274. For general damages see *supra* Part III.A and accompanying text. For the proliferation of dangers when evidence take the form of specific instances of conduct, see *supra* note 125 and accompanying text. As a result of the fear of permitting specific instances of conduct as a method of proof, it has been suggested that there be a total ban on the use of specific instances of conduct to prove credibility of a witness; therefore, testimony of specific instances of conduct should be inadmissible on both direct and cross examination. See MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 461 (2d ed. 1986); see also McCORMICK, *supra* note 26, § 48, at 182 (recommending "a blanket prohibition upon cross-examination as to specific acts of the principal witness"). Some jurisdictions have responded to this fear by drafting rules of evidence that expressly exclude specific acts of conduct as a method of proof. See *supra* note 58-59 and accompanying text.

275. See GRAHAM, *supra* note 274, § 608.3 n.5 (1999 Supp.) ("Sometimes the line between properly establishing an adequate basis for character witness testimony in the form of an opinion and the improper introduction of extrinsic evidence may be difficult to locate."); see also WEINSTEIN & BERGER, *supra* note 7, § 608.21, §§ 608-44 to 608-45 ("[T]his Rule [608(b)] has also been applied to prevent testimony about specific instances of conduct on the direct examination of a character witness in the guise of qualifying the witness by showing the basis for his or her knowledge of the person's character.").

276. See *United States v. Murray*, 103 F.3d 310, 321 (3d Cir. 1997); *Jensen v. State*, 355 Md. 692, 700, 736 A.2d 307, 311 (1999).

277. *Murray*, 103 F.3d at 322; *Jensen*, 355 Md. at 708, 736 A.2d at 315.

In *Murray*, the Third Circuit correctly determined that the reasonable basis should have been limited to: (1) the nature of the acquaintance—the principal witness was an informant for the character witness; and (2) the extent of the acquaintance—the principal witness had worked for the character witness on numerous occasions since 1988.²⁷⁸ This distinction by the *Murray* court provided the jury with more than a bare opinion, yet was properly limited to the nature and extent of acquaintance.

When faced with a similar challenge in *Jensen*, the Court of Appeals of Maryland concluded that the trial court erred by restricting the reasonable basis testimony to the nature and extent of acquaintance. At trial, when the character witness was asked to give her opinion, she had already testified to: (1) the length of acquaintance—that she knew the principal witness for over one year; and (2) the circumstances of the acquaintance—she saw the principal witness approximately once a week and spoke to him almost daily.²⁷⁹ This limitation by the trial court was not error because it was consistent with Maryland Rule 5-608 and the federal practice.

B. *Where the Jensen Court Went Wrong*

The interpretation of what constitutes a reasonable basis in Maryland diverges from the federal practice.²⁸⁰ The Court of Appeals of Maryland explained this divergence by asserting that the Maryland practice was intended to “go beyond” the federal practice.²⁸¹ This is a dangerous and unsupported assertion.

In 1993, Judge Chasanow, joined by Judge Bell, filed a partial dissenting opinion to the codification of the Maryland Rules of Evidence.²⁸² Judge Chasanow warned of the potential pitfalls resulting from redrafting and modifying over 80% of the Federal Rules.²⁸³ He opined, “[a]ttempting to clarify but not change the substance of a specific Federal Rule, by rewriting the rule, may create, rather than allevi-

278. *Murray*, 103 F.3d at 322.

279. *Jensen*, 355 Md. at 708, 736 A.2d at 315.

280. *See supra* Part III.C.2.b.

281. *See supra* notes 233-34 and accompanying text.

282. MARYLAND RULES, *Maryland Rules Orders*, at p. 33 (Michie 2000) (Chasanow, J., Partial Dissenting Opinion).

283. *Id.* Judge Chasanow observed that “[i]n disregard of the common sense maxim, ‘if it ain’t broke, don’t fix it,’ the Rules Committee recommended, and [the Court of Appeals of Maryland] adopted, rules patterned after the Federal Rules, but which alter the language in over four-fifths of the Federal Rules.” *Id.*

ate, confusion."²⁸⁴ This statement foreshadowed the conflict present in *Jensen*.

It is indisputable that the language adopted in Maryland Rule 5-608 is different from that used in Rule 608. Further analysis indicates that the language of Maryland Rule 5-608 is unique from that used in any other state rule on character evidence, however, the mere fact that, on its face, Maryland Rule 5-608 is different does not justify expanding the substance of the rule.

In *Jensen*, the majority of the court of appeals relied primarily on the history of Maryland Rule 5-608 to support its holding.²⁸⁵ The court placed great weight on the Reporter's Note statement that Maryland Rule 5-608 "goes beyond the Federal Rule somewhat by providing that on direct examination, a character witness may give a 'reasonable basis' for testimony as to reputation or an opinion as to truthfulness of the previous witness."²⁸⁶ The court interpreted the phrase "goes beyond" as an indicator that the drafters of Maryland Rule 5-608 intended to allow a reasonable basis to contain more substance than that allowed under its federal counterpart.²⁸⁷ This assertion is unsupported because the true intent of the language used in Maryland Rule 5-608(a)(3)(B) was for clarification purposes, not substantive purposes.²⁸⁸

In a letter from the Chairman of the Standing Committee on Rules of Practice and Procedure ("the Committee") to the court of appeals, Judge Wilner explained three scenarios relevant to the drafting of the Maryland Rules of Evidence.²⁸⁹ First, where the current Maryland practice and law were consistent with the federal rule and the federal rule was unambiguous, the Committee recommended the same language as the federal rule.²⁹⁰ Second, where the current Maryland practice and law were different from the federal rule, the Committee recommended changes consistent with Maryland practice and law.²⁹¹ Finally, where the current Maryland practice and law was consistent with the federal rule but the federal rule was ambiguous, the Commit-

284. *Id.*

285. *Jensen v. State*, 355 Md. 692, 704-09, 736 A.2d 307, 313-16 (1999).

286. *Id.* at 706-07, 736 A.2d at 314 (citing 20 MD. REG. Issue 15 pt. II at P-14 (July 23, 1993)).

287. *Id.* at 707, 736 A.2d at 315.

288. *See supra* notes 237-40 and accompanying text.

289. 20 MD. REG. issue 15 pt. II at P-1 (July 23, 1993).

290. *Id.*

291. *Id.*

tee recommended new language.²⁹² As applied to Maryland Rule 5-608, the latter of these three circumstances was present.²⁹³

The authors of Maryland Rule 5-608 codified the substance of Rule 608, but modified the style, language and organization.²⁹⁴ These modifications should not be read to broaden the substance of Rule 608. The Reporter's Note explained that, in 1988, the Maryland Rules of Evidence Committee ("Rules Committee") conducted considerable debate as to the meaning of Rule 608.²⁹⁵ As a result of the three-year drafting process, the Rules Committee developed a proposal that "attempts to separate the 'apples' from the 'oranges' in [Federal Rule] 608 to make *explicit* what is *implicit* in that Rule."²⁹⁶

There is an implicit understanding that, pursuant to Rule 608, opinion testimony is only admissible if based on a reasonable basis. Although Rule 608 is silent on this point, the Advisory Committee's Note for Rule 608 refers to the Advisory Committee's Note for Rule 405 for guidance.²⁹⁷ At the time of drafting Maryland Rule 5-608, the federal interpretation of Rule 608(a) required a reasonable basis for supporting opinion testimony.²⁹⁸ The Rules Committee drafting Maryland Rule 5-608(a)(3)(B) was cognizant of, and made explicit, the implicit federal practice.²⁹⁹ The Commentary to Maryland Rule 5-608 also recognized that, "[s]ubsection (a)(3)(B) is consistent with the reading that the federal courts have given to the federal rule."³⁰⁰ Ac-

292. *Id.* Judge Wilner wrote:

In some cases, the Committee opted for the substance of the Federal rule but found the rule, as written, to be unclear or misleading, and in those instances it adopted style changes to the Federal rule to bring the text in closer conformity with how the courts have construed the rule.

Id.

293. *See supra* notes 237-40 and accompanying text.

294. *See* STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE NOTES (Feb. 12, 1993) (Maryland Rule 5-608 "is substantially the same as the federal statute but has been rewritten and reorganized to enhance clarity"); STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE NOTES (Jan. 8, 1993) (Maryland Rule 5-608 "is based on the federal rule but has been totally rewritten for clarity").

295. 20 MD. REG. issue 15 pt. II at P-14 (July 23, 1993).

296. *Id.* (emphasis added).

297. *See supra* note 45 and accompanying text.

298. *See supra* Part III.C.1.a.

299. *See* 20 MD. REG. issue 15 pt. II at P-9 (July 23, 1993) ("Typically, under [] Federal Rule [405], the court makes an initial determination whether the witness has a sufficient basis on which to have formed an opinion of the subject's character, in accordance with Rule 104(a).").

300. McLAIN, *supra* note 6, § 2.608.3, at 148.

cordingly, the Rules Committee was aware of and acquiesced in the federal practice of requiring a reasonable basis to support opinion testimony. Considering this recognition, it is troublesome that the *Jensen* court expanded the substance of Maryland Rule 5-608.

Prior to the codification of Maryland Rule 5-608, the Maryland practice and law permitted a character witness to give a reasonable basis for an opinion on direct examination.³⁰¹ In *Durkin v. State*,³⁰² the court found that the admissibility of an opinion "should be limited to the situation where the opinion was relevant and had a sufficient basis." In fact, the Maryland practice and law required a reasonable basis.³⁰³ Subsequently, in *Hemingway v. State*,³⁰⁴ the court broadened this practice to permit a character witness to testify to specific instances of conduct as a reasonable basis.³⁰⁵ The Rules Committee was aware of these implications when codifying the Maryland Rules of Evidence.³⁰⁶

The *Jensen* court erred in finding no indication that the "reasonable basis" was to be restricted to the length and manner of acquaintance between the character witness and principal witness.³⁰⁷ When analyzing the language used in the Reporter's Note of Maryland Rule 5-608, the court recognized that the language "goes beyond" is contradictory with the subsequent assertion that "[t]he Committee envisions 'reasonable basis' evidence as covering such matters as how long the witnesses have been acquainted, under what circumstances, etc.," because the later provision seems to mirror Rule 608.³⁰⁸ The court resolved the apparent inconsistency by ignoring the phrase "covering such matters as" and relying on the phrase "goes beyond."³⁰⁹ This is the incorrect outcome when reconciling the two phrases. Because the

301. See *supra* notes 177-78 and accompanying text.

302. 284 Md. 445, 453, 397 A.2d 600, 605 (1979).

303. *Id.* The court explained further, "it is clear from the language and legislative history of § 9-115 that the extent of the basis for the personal opinion character testimony relates to admissibility, and not just to the weight to be given the testimony by the trier of fact." *Id.*

304. 76 Md. App. 127, 543 A.2d 879 (1988).

305. *Id.* at 136-37, 543 A.2d at 883 (allowing specific records of a witness's violent acts to be admissible as a basis for an opinion).

306. See 20 MD. REG. issue 15 pt. II at P-14 (July 23, 1993) (acknowledging that the second sentence of Maryland Rule 5-608(a)(3) is inconsistent with *Hemingway*); 20 MD. REG. issue 15 pt. II at P-9 (July 23, 1993) ("The Court of Appeals of Maryland has not spoken on the question but it is unlikely that *Hemingway* could survive adoption of [] proposed Rule [405].").

307. See *Jensen v. State*, 355 Md. 692, 706, 736 A.2d 307, 314 (1999).

308. *Id.* at 708 n.6, 736 A.2d at 315 n.6.

309. *Id.*

Reporter's Note does not define either what "goes beyond" means or how far "beyond" Rule 608 is permissible, but does define the matters covered by reasonable basis, more weight should be given to the concrete examples, namely, how long the witnesses have been acquainted and under what circumstances.

The finding that a reasonable basis is not restricted by the length and manner of acquaintance blatantly disregards the Maryland Reporter's Note statement that reasonable basis evidence covers such matters as "how long the witnesses have been acquainted, under what circumstances, etc."³¹⁰ Although the term "etc." does not restrict a reasonable basis to consist of only "how long" and "under what circumstances," the term does restrict a reasonable basis to categories similar to the preceding phrases.³¹¹ A canon of statutory interpretation, *ejusdem generis*, provides that where the general term ("etc."), follows the specific terms ("how long" and "under what circumstances"), the general is limited to the nature of the specific. This limitation, therefore, is a restriction on the content of reasonable basis testimony.

The Rules Committee clearly intended to abandon the practice in *Hemingway*,³¹² however, the *Jensen* majority relied on the allegedly broad interpretation of section 9-115 in *Durkin v. State*, *Kelley v. State* and *Hemingway v. State*.³¹³ Although the court properly recognized that Maryland Rule 5-608 "unquestionably intended to modify Maryland law, in particular, *Hemingway v. State* . . . to the extent that specific instances of truthfulness or untruthfulness were not admissible on direct examination of a witness,"³¹⁴ the court found "no indication that the Rule intended to restrict the latitude previously given to character witnesses in testifying as to the reasons underlying their opinions."³¹⁵ The cases that the *Jensen* majority relied upon must be placed into context. The courts in *Durkin* and *Kelley* were interpreting section 9-115, which had recently abrogated the common law by admitting character evidence in the form of opinion testimony and per-

310. 20 MD. REG. issue 15 pt. II at P-14 (July 23, 1993).

311. *Et cetra* is defined and explained as "after reciting the initiatory words of a set formula . . . *etc.* is added . . . for the sake of convenience. And other things of like kind or purpose as compared with those immediately theretofore mentioned." BLACK'S LAW DICTIONARY 553 (6th ed. 1990).

312. The holding in *Hemingway* is irreconcilable with the codification of Maryland Rules 5-405 and 5-608. Compare *Hemingway v. State*, 76 Md. App. 127, 134-36, 543 A.2d 879, 882-83 (1988) with MD. R. EVID. 5-405, 5-608. See *supra* note 306.

313. See *Jensen*, 355 Md. at 701-03, 736 A.2d at 312-13; see also *supra* notes 229-32 and accompanying text.

314. *Jensen*, 355 Md. at 706, 736 A.2d at 314.

315. *Id.*

mitting a reasonable basis.³¹⁶ The focus of the court in those cases was separating character testimony that was sufficient for a reasonable basis, and admissible, from testimony that was insufficient, and inadmissible.³¹⁷ At the time of the decisions, the court was broadening character witness testimony by admitting opinion testimony only if supported by a sufficient reasonable basis. The courts were requiring a reasonable basis rather than permitting a wide range of testimony.

Specifically, the *Durkin* court was challenged by the distinction between a narrow interpretation of section 9-115, where the reasonable basis relates to the weight of the evidence,³¹⁸ and a broad interpretation, where the reasonable basis relates to admissibility and the weight of the evidence.³¹⁹ The legislative history of section 9-115 revealed concern that without a reasonable basis, opinion testimony might be too freely admitted into evidence.³²⁰ The impetus for the amended "adequate basis" language to section 9-115 was a desire to limit the admissibility of opinion testimony to situations where it was relevant and had a sufficient basis.³²¹ The *Durkin* court only addressed whether a trial court could exclude opinion testimony for lack of a reasonable basis; the court did not address the permissible scope of reasonable testimony.³²²

In *Kelley v. State*,³²³ the issue on appeal centered upon a determination of what was sufficient for a reasonable basis.³²⁴ The *Jensen* court relied upon the assertion in *Kelley* that section 9-115 "permits the ad-

316. See *Kelley v. State*, 288 Md. 298, 299, 418 A.2d 217, 219 (1980) ("The starting point for our analysis is Maryland Code (1974, 1979 Cum. Supp.), § 9-115."); *Durkin v. State*, 284 Md. 445, 448, 397 A.2d 600, 602 (1979) ("The issue in this case centers upon § 9-115.").

317. See *Kelley*, 288 Md. at 302-03, 418 A.2d at 219; *Durkin*, 284 Md. at 453, 397 A.2d at 605.

318. *Durkin*, 284 Md. at 452, 397 A.2d at 604. The defendant argued that section 9-115 required a character witness to give an opinion with some basis in personal experience where the sufficiency of the basis for the opinion goes to the *weight* of the evidence, *not to the admissibility* of the evidence. *Id.*

319. *Id.* (basing the admissibility of character evidence on the court's determination that the character witness has a proper foundation).

320. *Id.* at 453, 397 A.2d at 604-05.

321. *Id.*

322. *Id.* at 454 (affirming the trial court's refusal to admit opinion testimony based on an unclear and unproved assertion that the principal witness filed a false police report).

323. 288 Md. 298, 418 A.2d 217 (1980).

324. *Kelley*, 288 Md. 298, 304, 418 A.2d 217, 220 ("Since the character testimony was based, at least, in part on the polygraph test, we conclude that its basis was inadequate and it was an abuse of the trial court's discretion to admit it.").

mission of a broad range of testimony which may aid the jury in assessing the credibility of a witness."³²⁵ The remainder of the assertion in *Kelley*, however, goes on to state that "such testimony must not be used as a subterfuge to indirectly convey evidence which is otherwise inadmissible."³²⁶ The *Jensen* court should have relied on the second part of the assertion. Instead, as a result of *Jensen*, a character witness may do exactly what the *Kelley* court warned against: use reasonable basis testimony as a "subterfuge" to testify to the basis for the opinion.

V. CONCLUSION

As previously discussed, the history of using character witness testimony to impeach or rehabilitate a principal witness's character for truthfulness or untruthfulness reveals that the rules of evidence operate to limit the dangers of character evidence.³²⁷ One such limitation is the prohibition of character witness testimony about specific instances of a principal witness's conduct on direct examination.³²⁸ Recently, the strictures of the prohibition have been tested and challenged through the presentation of "reasonable basis" testimony used to support a character witness's opinion.³²⁹

When distinguishing between "reasonable basis" testimony and testimony constituting specific instances of conduct, the court of appeals holding in *Jensen* went too far.³³⁰ Permitting the character witness to go beyond "how long" and "under what circumstances" the character witness knows the principal witness creates the likelihood that the additional information takes the form of specific instances of conduct.³³¹ The court created a state of uncertainty by failing to define exactly the parameters of the character witness's testimony and how far beyond those parameters the testimony may go before it is inadmissible as spe-

325. *Jensen v. State*, 355 Md. 692, 702, 736 A.2d 307, 312 (1999) (quoting *Kelley v. State*, 288 Md. 298, 302, 418 A.2d 217, 219 (1980)).

326. *Kelley*, 288 Md. at 301, 418 A.2d at 219.

327. See *supra* Part II & III.

328. See *supra* Part III.B.3.

329. See *supra* Part III.C.2.a & b.

330. Interview with Professor Lynn McLain, Professor of Law at University of Baltimore School of Law in Baltimore, Md. (Nov. 12, 1999). Professor McLain expressed concern over the Court of Appeals of Maryland's holding in *Jensen*. *Id.* As the Special Reporter for the 1994 Maryland Rules of Evidence, Professor McLain opined that the intent of promulgating Maryland Rule 5-608 was to avoid the admissibility of specific acts of conduct on direct examination of a character witness. *Id.* According to Professor McLain, Judge Chasanow's dissent more effectively captured the intended practice of admitting character witness testimony in Maryland. *Id.*

331. See *supra* Part III.C.2.a.

cific instances of conduct.³³² By allowing a character witness to give a reasonable basis that goes beyond the length and manner of acquaintance, the Maryland practice strays from the majority.³³³ When given the opportunity to address the issue again, a more restrictive approach to character witness testimony is appropriate given Maryland Rule 5-608's history and should be adopted by the court.

Michael P. O'Day

332. *See supra* Part III.C.2.a.

333. *See supra* Part IV.B.