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**THE RULES OF EVIDENCE
APPLICABLE IN MARYLAND TRIAL COURTS**

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§ 1. Why Do We Need Rules of Evidence, Anyway?

To decide whether we should have rules of evidence, consider these fundamental questions:

- What are the goals of the trial system in the United States? Why did the framers of the Constitution want a trial system?
- Are there practical limitations we must face that prevent our fully reaching those goals, at least in every case? Why not just let everything in that the parties want to put in?
- What, then, should be the goals of any set of evidence rules?

Md. Rule 5-102 PURPOSE AND CONSTRUCTION

The rules in this Title shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

- Also consider privileges, such as the husband-wife privileges and the Fifth Amendment to the United States Constitution. How do privileges fit in with the goals you have identified?
- Should the rules of evidence apply in every court proceeding, including small claims cases ?

§ 2. Respective Roles of the Judge and the Jury

The judge rules on questions of law, including the admissibility of evidence. The jury decides the credibility of each piece of evidence: what weight to give to it, if any.

§ 3. Direct Evidence and Circumstantial Evidence

“Direct evidence” of a fact is provided only by an eyewitness to that fact. For example, if W testifies that she saw D stab V with a butcher knife, that is “direct evidence” that D did so -- even if W is lying or mistaken.

“Circumstantial evidence” is all other evidence, from which one or more inferences must be made in order to prove the fact at issue in the case. If W testifies that she saw D emerge from V’s office, holding a bloody knife, and then she went in and saw V bleeding from his abdomen, that would be circumstantial evidence that D stabbed V. Testimony that D’s fingerprints were found on a knife, and that that knife was of the size and shape that could have made the cuts in V, would also be circumstantial evidence.

Juries seem to favor direct evidence over circumstantial, despite the fact that physical evidence is often much more reliable than eyewitness testimony. Eyewitness identifications of strangers, particularly cross-racial identifications, are notoriously unreliable.

§ 4. The Most Basic Rule: The Requirement of Relevance

The most basic rule of evidence is the requirement that admissible evidence be relevant, either (1) as substantive evidence, relevant to an issue in the case as to who did what, or (2) as impeachment or rehabilitation evidence, relevant to the credibility of a witness who has given substantive evidence.

Md. Rule 5-402 RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible.

Md. Rule 5-401 DEFINITION OF “RELEVANT EVIDENCE”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The remaining rules of evidence serve only to exclude relevant evidence.

Therefore, the first question for the opposing lawyer to ask of any evidence offered is, “Is it relevant (either as substantive evidence or with regard to credibility of the substantive evidence)?” If not, the lawyer should object, as the evidence is inadmissible.

If the evidence is relevant, the opposing lawyer should then consider whether any other specific rules preclude or limit its admission. If the evidence passes muster under those rules, the

final inquiry is whether the court, in its discretion, should exclude the evidence under Rule 5-403.

§ 5. The “Clean-Up Batter”: Rule 5-403

Md. Rule 5-403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

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.

Rule 5-403 provides that relevant evidence may be excluded, in the trial court's discretion, when its probative value is substantially outweighed by the risk of any or all of the following:

1. Unfair prejudice (emotional rather than logical; also, the risk that evidence will be used for a forbidden purpose);
2. Confusing the issues in the case, misleading the jury, or creating unduly distracting side issues (the adequacy of alternative, less confusing means of proving the fact in question will be evaluated); and
3. Undue consumption of time (including whether the evidence would be cumulative; a cost-benefit type of analysis -- how much probative value we will reap for the time spent admitting this evidence and any evidence the opponent would then offer to counter it?)

§ 6. An Example of a Specific Application of These General Principles: Character Evidence and the “Propensity Rule”

Character evidence may be offered either as substantive evidence (Rules 5-404 - 5-406) or only as to credibility (impeachment or rehabilitation, Rules 5-608, 5-609, and 5-616).

"The propensity rule" generally excludes evidence of a person's other acts or a person's reputation for having a particular character or character trait when offered as substantive evidence to show that the person acted "in character" on the occasion at issue in the case. Rules 5-404(a)(1) and (b).

- Why do we have this rule? How does it work? Does it make sense?

Md. Rule 5-404 CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally

(1) In General

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, . . .

*** * ***

(b) Other Crimes, Wrongs, or Acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Examples in civil cases:

- (a) P sues for severe injuries she alleges were caused by D's driving his truck through a red light.
 - (i) Evidence that P or D is generally a bad driver is offered to show that P or D drove badly this time. How will the court rule? Will the jury get to hear this evidence?
 - (ii) Evidence that either one has driven through other red lights at other times is offered. Ruling?
- (b) P sues D for civil assault. P offers evidence that:
 - (i) D has assaulted other people before. Ruling?
 - (ii) D has a bad reputation in his neighborhood for violence. Ruling?
 - (iii) D has taken part in several fraudulent commercial transactions. Ruling?
- (c) P sues D-Employer for sexual harassment of P by S-Supervisor. P offers evidence that other victims had reported S's sexual harassment of them to D. The evidence is offered to prove:
 - (i) Propensity, *i.e.*, that S also harassed P. Ruling under Rule 5-404? (Note that Federal Rules differ from Maryland's as to prior sexual assaults, etc.)

- (ii) Notice to D of S's propensities. Ruling?
- (d) In (c), P offers evidence that her sweat pants were removed from her locker in the company gym and found in S's apartment. "Objection, propensity rule! Accusing S of theft!" Response by P's lawyer?

§ 7. Exceptions to the Propensity Rule that are Available Only in Criminal Cases

Md. Rule 5-404(a)(1)(A) and (B) create limited exceptions to the propensity rule. These exceptions are available only in criminal cases, and, by virtue of Rule 5-405(a), permit only reputation or opinion evidence of the accused's or the victim's pertinent character trait, as circumstantial, substantive evidence of what happened. Under these Rules, specific instances of the accused's or victim's prior conduct may be inquired into only on cross of the character witnesses, not on direct examination.

Md. Rule 5-404 CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally

(1) In General

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(A) Character of Accused

Evidence of a pertinent trait of character of an accused offered by the accused, or by the prosecution to rebut the same;

(B) Character of Victim

Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

* * *

Md. Rule 5-405 METHODS OF PROVING CHARACTER

(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.

* * *

Under Md. Rule 5-404(a)(1)(A), the accused may offer reputation or opinion evidence of his or her own character for the trait pertinent to the crime. Once the defense has opened this door, the prosecution may both cross the defense witness as to specific instances of the defendant's past behavior, and also rebut with unfavorable reputation or opinion testimony by calling its own character witnesses. All of this fallout occurs, even if the accused has not testified.

- Examples:
- (a) What is the "pertinent" character trait of the accused when the accused is charged with:
 - (i) Attempted murder?
 - (ii) Embezzlement?
 - (iii) Perjury?
 - (b) What is the pertinent trait of a homicide victim, when the accused argues self-defense and that the victim was the first aggressor?
 - (c) Which of the three possible methods of proving character (reputation, opinion, and specific instances) is the most probative? The most time-consuming? Why does Rule 5-405(a) make the choice it does?
 - (d) State v. D for assault of V.
 - (i) In its case in chief, the prosecution calls W to testify that D has a bad reputation for a nasty temper and violence at their workplace. Admissible?
 - (ii) In its case in chief, the prosecution calls a neighbor of V, who will testify that V is a peaceful sort. Admissible?
 - (iii) In D's case in defense, D claims self-defense. D wants to call Preacher-Man, to testify that
 - (A) He has known D, as a member of his church since 1992, and, in Preacher-Man's opinion, D is as peaceful as an angel. Admissible?
 - (B) That he has left his kids in D's care many times. Admissible?

- (C) That he has seen D back away from confrontations on numerous occasions. Admissible?
- (D) But he has seen V pick fights, even in church. Admissible?
- (iv) On cross-examination of Preacher-Man, the prosecutor asks if he knows that D was convicted of assault with a deadly weapon in 1994. Admissible?
- (v) In its case in rebuttal after (iii), the prosecution calls W to testify as in (i) above. Admissible?

- What do you think of the results under these Rules? What do you think a jury might think, when it does not know about these Rules? Are there ways in which the system might be improved?