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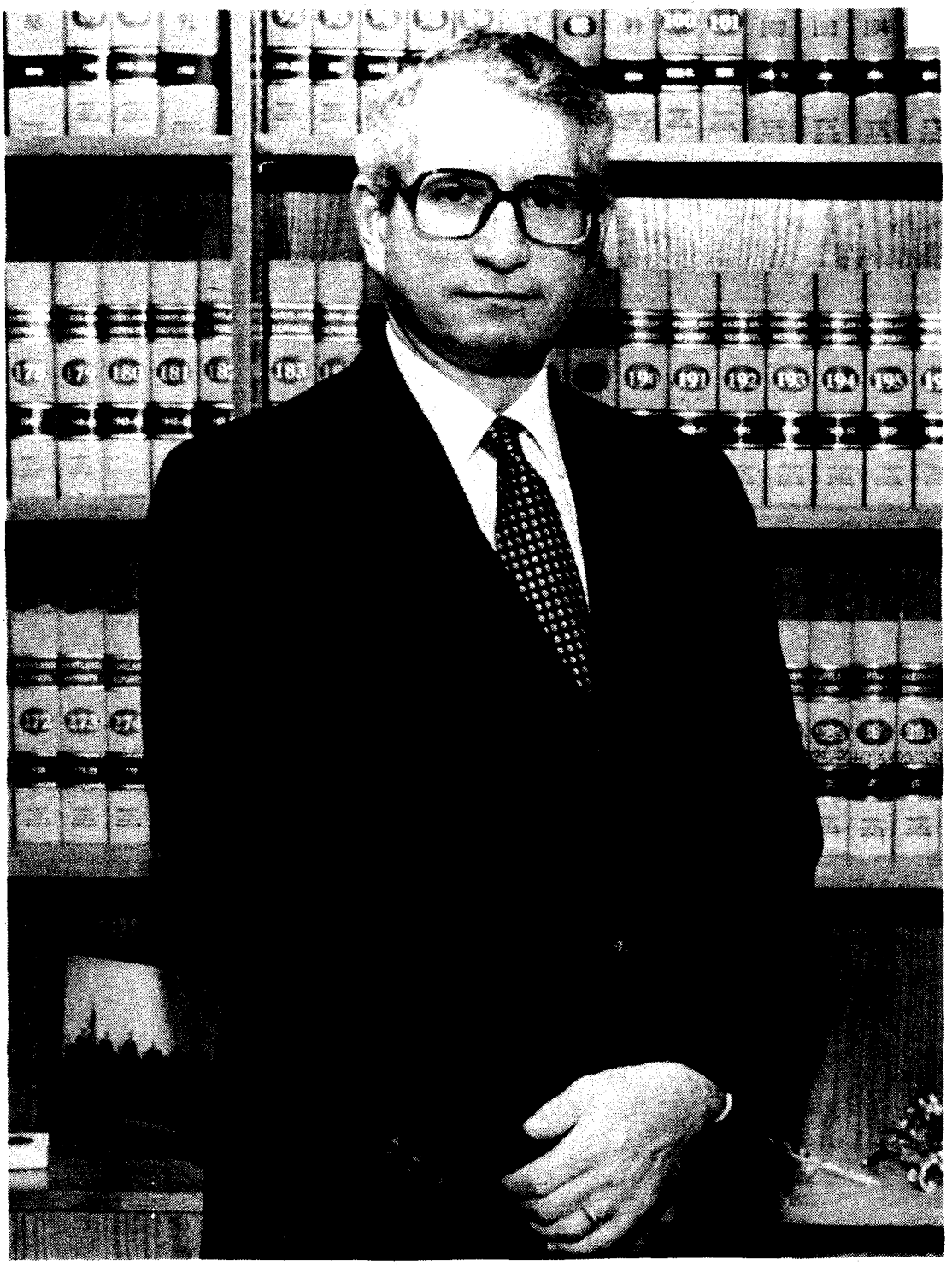

Court of Special Appeals Chief Judge Alan Wilner led the Rules Committee's revamp of the state's evidence code.

Court of Appeals Adopts New Maryland Code of Evidence

Authors Say New Code Based Largely on Federal Rules of Evidence, But Some Judges Protest Revision, Arguing That Old One "Ain't Broke"

BY C. JANE BOWLING
Special to the Daily Record

The Maryland Court of Appeals has adopted new rules of evidence, based largely on the Federal Rules of Evidence, that will be effective for state courts July 1.

The new rules are codified in New Title 5 of the Maryland Rules of Procedure, Evidence. Any deletion or amendment of a significant portion of the current Maryland evidentiary rules will take effect July 1, and will apply in all trials and hearings commenced on or after that date.

Trials or hearings commenced prior to July 1 will continue to be governed by the current law, and no evidence will be admitted against a criminal defendant in proof of a crime committed prior to July 1 unless it would have been admissible under the law in effect on June 30.

Under the revised code:

• Evidence of payment of medical expenses is no longer admissible to prove civil or criminal liability for an injury, under Rule 5-409.

• The common law "voucher" rule is eliminated by adoption of Rule 5-607 allowing any party — including the party calling a witness — to attack the credibility of the witness.

• Adoption of Rule 5-613, derived from Federal Rule 613, allows examination of a witness regarding a prior written or oral statement without first disclosing the prior statement to the witness, if the prior statement is disclosed before the end of examination, and the witness is given an opportunity to explain or deny it.

• Adoption of Federal Rule 703 allows an expert opinion

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based on inadmissible facts or data to be entered in evidence if the facts or data are of a type reasonably relied upon by experts.

• Adoption, in slightly modified form, of Federal Rule 705,
allowing an expert to testify to an opinion or inference without first testifying to underlying facts or data. Under the Maryland version of the rule, the court may require testimony as to the underlying facts or data. Prior Maryland law required such testimony in every case.

• Adoption of the federal definition of hearsay, specifically requiring that oral or written statements or nonverbal conduct be intended as an assertion to fall within the definition. Committee notes indicate the definition of "assertion" must be developed in case law.

• Rule 5-802.1(a), expanding a recent Court of Appeals decision allowing substantive admission of prior inconsistent statements of a witness. A statement may be used to prove the truth of its assertion if given under oath subject to penalty of perjury, if reduced to writing and signed by the declarant, or if recorded in substantially verbatim fashion by contemporaneous stenographic or electronic means.

• Rule 5-804(bj(2) extends the use of dying declarations to attempted homicide, assault with intent to commit homicide and civil cases, and, rather than requiring the declarant actually be dead, merely requires the declarant be "unavailable" within the broader definition in the rule.

• Codification of "catchall" hearsay rules in Rule 5-803(b)(24) and Rule 5-804(b)(5), allowing judiciary development, [illegible] tions to the hearsay rule not previously categorized. The rule requires guarantees of trustworthiness equivalent to recognized exceptions to the hearsay rule, and that the statement be offered as evidence of a material fact and more probative on the point than other reasonably available evidence.

• Rule 5-902(a)(11) allows certified copies of business records to be self-authenticating if notice of the intent to offer the records is given the opposing party, and if the records are made available for inspection by the opposing party sufficiently in advance to allow challenge prior to admission.

Development of Maryland Evidence Rules

Maryland's existing evidentiary law consists largely of common law principles, with a few statutes and rules. The codification of evidence rules adopted by the court is patterned after the Federal Rules of Evidence.

More than 80 percent of the Federal Rules have been modified in the Maryland adaptation, however. Court of Special Appeals Judge Alan M. Wilner, Chairman of the Court of Appeals' Standing Committee on Rules of Practice and Procedure, which recommended adoption of the new rules, said, "Early on, it was decided to adopt the format of the Federal Rules, not necessarily the content."

Wilner stated in a Court of Appeals hearing on the new rules that other states are adopting evidence codes similarly based on the Federal Rules and that law school evidence courses are based on the Federal Rules as well.

Court of Appeals Judge Howard S. Chasanow, joined by Judge Robert M. Bell in a partial dissent from the order adopting the new rules, noted that the Federal Rules "are familiar to and acclaimed by courts, and they incorporate a significant body of interpretative case law."
Chasanow questioned the court's justifying the new rules' by citing the success of the Federal Rules, when only 10 of the 61 new Maryland rules are effectively identical to their federal counterpart.

Judge John C. Eldridge declined to sign the order, stating in his dissent, "I am not persuaded that there are sound public policy reasons for this Court to adopt a new code of evidence and to repeal the existing Maryland law of evidence on matters governed by the new code."

Eldridge said that neither verbal comments at hearings, nor written comments sent to the court yielded evidence of dissatisfaction with Maryland's existing evidence law, and the relatively infrequent appeals based on presenting constitutional evidence law issues in the state. Invoked the same "common sense maxim" cited by Chasanow in his partial dissent, Eldridge said "if it ain't broke, don't fix it."

Eldridge anticipates an influx of appeals presenting constitutional evidence law issues with the adoption of the new rules.

Wilner: Not a Radical Change

Wilner says the new rules do not constitute a major shift in Maryland evidentiary law. "Most (of the new rules) simply capture the state of the law in Maryland. In a number of instances, there are changes, but nothing earth-shattering."

He indicates that seminars and presentations will be held over the next six months to familiarize judges and lawyers with all of the new evidence rules. Some very old Court of Appeals holdings have been abandoned in the new rules, he said, but practitioners "aren't going to miss them."

Citing the abolition of Queen Caroline's rule, which requires a witness be shown a lenge on cross-examination, Wilner said, "there are certainly things lawyers are going to need to know."

A codification of evidence rules based on the Federal Rules was first recommended by the Rules Committee in 1977. The Court of Appeals refused to order the change, waiting to see how the relatively new Federal Rules worked. Wilner says more than a decade passed with "no activity" on the matter, and in the meantime 30-35 states adopted evidence codes modeled on the Federal Rules.

He wrote to the Court of Appeals four years ago, asking them to reconsider Maryland's stance, and the court requested a "truly independent review. They wanted the commission to give thought to what Maryland law ought to be." The committee proposed a new code, taking into account interpretations of the Federal Rules and of Maryland case law.

Professor Lynn McLain of the University of Baltimore School of Law, who consulted with the Rules Committee in its development of the evidence code, says the new evidence rules fall into four categories. In some cases, they codify existing Maryland practice which differs from the Federal Rules, such as admissibility of a psychologist's or psychiatrist's testimony as to whether a criminal defendant is legally insane, an issue left to the fact finder under the Federal Rules.

In other cases, she says, "the Maryland rules are more explicit, but don't deviate from the Federal Rules." Review of numerous state evidence codes already patterned on the Federal Rules enabled the Rules Committee to incorporate "refinements" those states had made, McLain says.

In a third category are new Maryland rules which change Maryland practice in favor of the federal practice, such as adop-

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tion of the federal definition of hearsay. Finally, some rules represent a sort of "compromise" according to McLain, changing Maryland practice without adopting federal practice in its entirety.

Chasanow and Bell specifically dissented from the Court of Appeals' adoption of 12 of the new rules, citing confusing or substantive deviation from the Federal Rules as the reason for dissent. Chasanow said in the opinion:

"Adopting codified rules of evidence should prove to be a great benefit to the bench and bar. My enthusiasm for the new rules is only slightly dampened by my belief that the Federal Rules were not in need of such extensive 'clarification' by the Rules Committee and this Court. . . . (T)he modified rules are still far better than no rules at all."