

PROPONENT Talking Points for HB 150 Testimony on 3/11/09**A. Responses to Criticisms We have Heard to Date (March 6, 2009) on HB 150**1. It's not needed.

In the current insurance climate, having a state such as Montana decline to recognize any of the normal defenses available to commercial recreation operators effectively creates an environment where land administrators and insurers will not allow programs to operate. Many insurers that underwrite in the outdoor recreation areas are making it clear that, in the State of Montana, where the climate is decidedly tilted towards suing plaintiffs because of a recreational operators inability to use pre-recreational releases, the legislatures' refusal to codify or recognize the inherent risk doctrine creates an unattractive environment for the insurance business resulting in a lack of competition and so higher rates by fewer companies offering underwriting in MT occurs. In addition, an environment where normal defenses (like releases and inherent risk legislation) are non-existent means that underwriting risks are higher, the state is less attractive and common coverages or programs that are offered in other states will not be offered or underwritten or coverages will be exponentially higher than those in other states. Very few programs will stay in business without proper CGL (comprehensive general liability) coverages in place. In fact, most property owners or administrators of property will not allow or permit programs to operate on their properties without appropriate insurance in place. No insurance, no place to operate, no programs. As a recreation oriented and supported state, Montana should not stand by and watch this type of result. Beyond the negative impact on the businesses of the commercial operators, the most problematic impact is that the recreational opportunities enjoyed by all of Montana's citizens and visitors and the recreational programs which are so healthy for Montana's children will steadily be destroyed. If the courts do not hear from the legislators that, in Montana, the consideration of whether a recreational incident was caused by an inherent risk of the sport needs to be made by the courts, organizations such as little league, youth soccer or hockey, after school programs and individuals who volunteer their time as coaches could well decide that the risk of large legal fees in a state and climate where no defenses are available (remember, pre-recreational releases are not allowed in Montana) are simply too significant to justify the existence of these programs. The result is that thousands of children will be deprived of the valuable opportunities afforded by recreational sports and organized sports. Once again, no insurance, no place to operate, no programs.

Some statistics to consider on the over-all importance of the recreation industry. The Forest Service, the second largest administrator of public lands in the United States (second only to BLM) now acknowledges recreation as the dominant use of the National Forests (between 1980 - 1996 the reported number of recreation visits in national forest went from 560 million to about 860 million). According to US Department of Labor stats, recreation/tourism and its various components is considered to be the third or fourth largest industry in the United states (however - when you consider that the United States has 6% of the world's population and 51% of the world's lawyers it isn't surprising to know that litigation and claims made in the outdoor recreation business are on the rise). From 2003 Department of Justice stats: 5 of the 15 largest jury verdicts in 2003 involved recreation activities with verdicts ranging in size from 27 to 104 million; in 2003 the United States experienced the world's most expensive

tort system, more than double that of all other industrialized nations in the world combined; and, over the past 50 years, annual tort costs in the United States have grown from less than 2 billion to a staggering \$233 billion. There is no doubt that this industry is being hit hard with litigation and claims (remember too that litigation numbers say nothing of the cases that are never filed but are dealt with through the insurance claims process). Especially in this current economy - in order to keep public lands open and to remain competitive in our jobs and in the recreational experiences available to state and national citizens, these trends must stop. We have all seen in the last number of months the national economy crumble due at least in part to the federal governments' unwillingness to regulate markets - state governments should learn from this mistake and be willing to institute some regulatory or codified requirements for those who wish to prosecute actions against Montana businesses. "Entrepreneurs are the fertile soil for job growth and recovery. Small companies represent 99.7 percent of all employer firms, Commerce department data show. They pay nearly 45% of U.S. private payroll and have generated 60-80 percent of net new jobs annually over the past decade." See, Washington Post - Tuesday March 3, 2009 "Let Start Ups Bail Us Out" by Reid Hoffman (founder and CEO of LinkedIn). In this case - taking the small step of codifying the inherent risk principal so that judges make this consideration when faced with litigation - especially where recreational operators are faced with being one of only three states in the union that can not use pre-recreational releases - is a small but good faith effort on the part of law makers to recognize the trends going against the very important recreation industry.

Also consider very specific facts about Montana's recreation industry and how important this industry is to the State's economy. The Institute for Tourism and Recreation Research at the University of Montana in Missoula released its 2006 Economic Review (see, <http://www.itrr.umt.edu/ecorev/economicreview2006.pdf>) and included the following statistics in its Executive Summary: In 2005, travel expenditures by nonresident visitors totaled over \$2.75 billion, which generated over \$3.90 billion in total economic impact; approximately 10.13 million individual nonresident travelers visited Montana in 2005, up 3.3 percent from 2004. This amounts to nearly 4.13 million nonresident travel groups (2.45 people per group). [NOTE: up from 9.5 million visitors in 2000]; nonresident visitor spending generated over 34,500 direct travel jobs to Montana and 46,000 total jobs contributing to over \$1.0 billion in total personal income for Montana residents. [NOTE: up from 2000, 32,400 jobs and >\$525 million in personal income]; Montana state and local governments received an estimated \$211 million in taxes attributable to nonresident traveler spending; the federal government collected over \$377 million in taxes from nonresident spending in Montana; the nonresident travel industry in Montana comprises 7.5 percent of the state's total employment structure, on par with construction, finance/real estate industries and agriculture and forestry; resident and nonresident visitation to Montana State Parks increased 5.0 percent in 2005 over 2004; employment in Montana's arts, entertainment and recreation services industry increased 4.2 percent in 2005 over 2004, while personal income rose 2.7 percent after a small decrease in 2004. See also the home page: <http://travelmontana.state.mt.us/research/estimates.asp> And see, The Institute for Tourism and Recreation Research at the University of Montana's 2007 Report on the economic impacts of Montana's Outfitter and Guide Industry attached hereto.

2. It's unconstitutional and will not hold up when tested in court.

The common law created the inherent risk doctrine and current case law, from studied courts, perpetuates the doctrine quite nicely. It has already been upheld in the courts and had an extensive legal history. The primary assumption of risk doctrine, often referred to as the inherent risk doctrine, provides generally that individual participants assume the inherent risks of recreational activities and all liability or responsibility for injuries resulting from those risks. Put another way, providers of recreational activities have no duty, ergo no responsibility, to protect participants from the inherent risks and dangers of recreational activities. What the principle of inherent risk specifically says is that, “[o]ne who takes part in such a sport accepts the dangers so far as they are obvious and necessary.” Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786 791 (D. Vt. 1951).

Frankly – it is actually pretty disingenuous for the trial lawyers (or anyone else) to be arguing that this won’t hold up. In point of fact – the MT legislature has already codified the application of ‘inherent risk’ as to specific sports. See: MCA 27-1-727 Equine Activity Liability Limitations (“equine professional is not liable for an injury to or death of a participant...resulting from risks inherent in equine activities...”); MCA 23-2-651, 653 Snowmobiling Act (§651 “The state has a legitimate interest in...maintaining the economic interest of the snowmobiling industry by discouraging claims based on damages resulting from risks inherent in the sport” and at §653 “...a snowmobile area operator has no duty to eliminate, alter, control or lessen the risks inherent in the sport of snowmobiling...”); MCA 23-2-731, 736 Ski Areas (§731 “The state has a legitimate interest in maintaining the economic viability of the ski industry by discouraging claims based on damages resulting from the inherent dangers and risks of skiing...” and at §736 “...a skier shall accept all legal responsibility for injury or damage of any kind to the extent...it results from inherent dangers and risks of skiing...”); MCA 23-2-822 Off-Highway Vehicle Operators (“...an off-highway vehicle operator shall accept all legal responsibility ...for damage resulting from inherent risks...”); MCA 27-1-741 Amusement Rides (§3 “there are inherent risks associated with machinery, equipment or animals that are impracticable or impossible for an amusement ride owner or operator to eliminate...” and §4 “an informed patron is in the best position to avoid risk inherent to amusement rides...”). As such – this is really nothing new in terms of the Montana codes – this just applies an existing and accepted principal across the entire outdoor recreation industry – in other words – provides an umbrella application of the inherent risk principal across the outdoor recreation industry.

Further – the courts in MT have also recognized and applied inherent risk as a legal theory. In a recent case which is especially notable because the Montana Supreme Court upheld a trial court ruling allowing a recreational defendant from the equine industry to introduce into evidence a release and waiver document (which, in MT, is an otherwise illegal and unenforceable attempt to prospectively release the operator from tort liability – see, MCA 28-2-702 and Haynes v. County of Missoula, 517 P.2d 370, 377 (MT 1973) as relevant evidence to prove that the participant had been warned of inherent risks for which the operator would have no duty to protect him under the equine activities statute. McDermott v. Carie, LLC d/b/a/ Horse Prairie Ranch, 124 P.3d 168, 174 (2005).

3. It will give a free ride to outfitters to get out of negligent behavior.

See, Moore v. Hartley Motors, Inc., 36 P.3d 628, 633 (Alaska 2001) holding that, a risk/danger will not be considered inherent to the sport if it could be A...eliminated or

mitigated through the exercise of reasonable care.® In other words, the current common law relieves recreation providers from any duty® to protect participants from the inherent risks of the associated activity, but allows participants to sue if their injuries are due to non-inherent risks created through provider negligence. See also, McDermott v. Carie LLC d/b/a Horse Prairie Ranch, 124 P.3d 168, 174 (MT 2005) discussing inherent risk under the equine statute as meaning that equine operators retain liability when the participant acts in a safe/responsible manner but remains ignorant of the inherent risks so that the practical effect of the inherent risk relief enunciated under the equine statute is that, if an injury is due to an inherent risk of equine activities and the participant expected the risk, the operator could not have breached a duty to the participant so there can be no liability. *Critics who complain that this legislation will create a safety disincentive or that operators will not have to maintain their equipment or otherwise be safety conscious are simply wrong. If an operator could have eliminated the risk through the exercise of reasonable care, then we are not talking about an inherent risk and this defense will not apply.*

4. It will end up costing the outfitters more money because insurance agency lawyers will claim every accident or loss is a result of inherent risk and court costs will be increase - check this note out sent to one of our supporters: Hi Pat - this bill passed out of the House today and will go to the Senate. I voted NO on the bill because there were conflicting opinions on the litigation this would cause. One argument was that attorneys for insurers, paid by the hour, will argue that virtually ALL recreational injuries are "inherent risks" necessitating more extensive litigation, including appeals.

Interesting argument or thought process – but backwards. Think about it this way. The most expensive option out there is to start a lawsuit and then take it all the way through trial. When we say expensive we don't just mean \$, we mean energy, time, judicial resource, the time and job loss of all the jurors and witnesses, etc. Trials also generate far more appeals than pretrial summary dismissal by the court. So – that said – it is clear that anything that cuts the process short results in savings. What “inherent risk” does, is makes the issue of whether a risk that was encountered that produces a result/injury a question of law that a judge can decide (only a jury can decide questions of disputed fact...). Therefore the defense atty can/will bring a pretrial summary judgment motion asking the court to rule that the risk that produced the injury/death/damage was an inherent risk meaning the case should be disposed of early on. Summary judgment or dispositive motion practice is a time and cost savings – period. Defense attorneys can tell you from experience (years and years of it) that in other states where we are allowed to use pre-activity exculpatory documents (release and waiver contracts) we as defense counsel do the same type of thing. We do a very limited set of discovery – just enough to cover the release issues – then we bring a motion for summary judgment and ask the court to dismiss the suit early on because of the release contract. Having a codified defense in MT that will allow the court to take up – as a question of law – whether an injury producing risk was inherent to the activity WILL shorten litigation and all the other attendant resource expenditure associated with litigation. Period. The result of this is that defense costs go down – your state market becomes more insurable – etc.

Very specifically – in MT – the existence of a legal duty owed by one party to another is a question of law for the court. Buhr v. Flathead County, 886 P.2d 381, 388 (MT 1994), citing

Nautilus Ins. v. First National Ins., Inc., 837 P.2d 409, 411 (MT 1992). Since the question of duty is a matter for the court and since inherent risk raises the question of whether a duty exists, these cases ordinarily are subject to summary dismissal by the court.

5. It is too broad and does not specify what inherent risk is.

It is true that this bill is an "umbrella" approach that applies the principal of inherent risk to the outdoor recreation service providers in general (as opposed to the previous pieces of inherent risk legislation that have been passed in MT that are sport specific like the snowmobile and ski acts...) and so it doesn't really define specific risks. However, many courts have already weighed in on what are inherent risks in various activities. There is no doubt in my mind that the MT judges will consider these cases when they decide these issues. See generally:

- 1 Regents of the Univ. of Calif. V. Sup.Ct. Of Alameda County, 41 Cal. App. 4th 1040 (1996). Failure of top rope anchor system is an inherent risk of climbing; falling, whether it be by participant's fault or coparticipant's fault or anchor system failure is an inherent risk of the sport.
- 1 Allan v. Snow Summit, Inc., 51 Cal. App. 4th 1358 (1996). Participant fell several times during a lesson and allegedly injured his back. Participant sued, and court dismissed on grounds of express assumption due to the release *and* on grounds that falling is an inherent risk of skiing. A Learning a new sport involves attempting new skills. A coach or instructor will often urge a student to go beyond what the student has already mastered. That's the nature of inherent risk in sports instruction. @
- 1 Vorum v. Joy Outdoor Ed. Center, 1998 Ohio App. Lexis 6139. Slipping (ropes course) from a rope or having feet contact the ground is an ordinary foreseeable risk of rope swinging or of a ropes course and risk couldn't be eliminated so it was inherent.
- 1 Cooperman v. Wyoming Rivers & Trails, 214 P. 3d 1162 (10th Cir. June 2000). Saddle slipping is an inherent risk of horseback riding as cinching is not an exact science. Participant's own expert stated that judgment is involved in cinching so human imprecision is an inherent risk of cinching and thus riding. Relied on the Wyoming Equine Act.
- 1 Distefano v. Forester, 85 Cal. App. 4th 1249 (Jan. 2001). 2 motorcycles collide as they approach the crest of a hill from opposite directions. Court cites the Knight case and finds other driver's conduct not so reckless as to be totally outside the range of the ordinary activity of the sport. Court also says that the careless conduct of others is treated as an *inherent risk* of the sport and so recovery is barred. (Co-participant liability)
- 1 Loney v. Adirondack River Outfitters, Inc., 30 A.D. 2d 747 (N.Y. Supp. App. Ct. July 2003). Negligence v. inherent risk. She claims negligence; operator says inherent risk. Court says that getting tossed about inside or outside a raft is an inherent risk and is known and apparent and reasonably foreseeable.

6. The insurance companies don't support it.

This is simply not true -- the insurers (from K&K to Sattler to Schneider and WOGA) have all put letters in the House record supporting this bill.

7. The Judges in this state are overworked and do not have time to determine what is inherent risk.

Please see the answer to number 4. Also -- please keep in mind that the issue (once again...) with inherent risk is that it is a legal construct that says a provider has no "duty" to protect participants from risks that are inherent. Questions of duty are always for a court and questions of fact are for a jury. So truthfully -- a judge will always (already) have to make the legal analysis as to whether a duty existed in any case that comes before it. As such -- the bill doesn't really alter the workload of a judge -- but *does* give the judge the additional power to dispose of a case without expending the incredible amounts of judicial and juror resources that a trial consumes.

8. The trial lawyers are the best gatekeeper and would never take on a frivolous lawsuit, people in the industry cannot point to a frivolous recreation industry lawsuit that has been filed here in Montana; this bill is an anti lawyer bill and being pushed by people that buy into the concept that all trial lawyers are evil.

A couple of comments were made in House testimony that the best gate keepers of the claims/litigation process are plaintiffs counsel. I am not sure how to gently disabuse the plaintiffs bar of this notion, but the final figure above on the annual tort costs in the United States may address this claim. What the plaintiffs bar thinks is a frivolous suit and what the rest of industry, the defense bar and the judiciary think are "non-meritorious" lawsuits (or lawsuits that will not sustain legal *liability*) I can guarantee you are very diverse opinions. What the *law* recognizes is that *judges* and *law makers* are the appointed gate keepers on questions of law - and this issue of codifying the inherent risk principal is a question of law which is appropriately in front of the elected law makers. Interestingly - see also George F. Will's recent Washington Post Column *Litigation Nation* at <http://www.washingtonpost.com/wp-n/content/article/2009/01/09/AR2009010902353.html>

9. Non-profits would not benefit by this bill because the plaintiff bar would never take on a case against them.

This comment indicating a belief that non-profit style entities rarely get sued in the recreation world it is absolutely fallacious. Nonprofits, schools and even church groups regularly get sued. To wit: Fintzi V. New Jersey YMHA-YWHA, 2001 N.Y. Lexis 3791 (N.Y. 2001); Dunn v. So. Calif. 7th Day Adventists, San Bernadino Sup. Ct. 1998; Bendik v. Crossroads School, (Ca. 1998); Sander v. Kuna Joint School District, 876 P. 2d 154 (1994); Ward v. Mount Calvary Lutheran Church, 873 P. 2d 688 (Ariz App 1994); Rollins v. Concordia Parish School Board, 465 So. 2d 749 (1999); Kahn v. East Side Union High School, 2002 Cal. App. Lexis 2204 (February 2002); Rendine v. St. Johns University, 289 A.D. 465 (2001). This is actually more and more common. It is notable that these entities generally operate on public lands (requiring permits) or private properties are almost always required

to maintain insurance policies. When claims against those policies or claims against an insurance program in general are too high for the claims administrators, the insurance dries up. The result is that with no insurance, no access to lands/properties on which to operate, etc. and so after-school programs, church programs, things like Boy Scouts, etc. are all critically impacted. It has also become very common to sue public lands administrators at all levels - from state and federal to city - the result being that in times of ever decreasing budgets for land administrators more and more monies are spent defending claims and less money is available to maintain and administer lands for the benefit of the public. See: Smith v. No. Carolina DNR, 436 SE 2nd 878 (1993); Estate of Harshman v. Jackson Hole and USA/USFS, 2002 US District Lexis 7946 (2002); Spooner v. City of Camilla, 568 SE 2d 109 (2002). Codification of a simple instruction to the judiciary that a legal inquiry should be made as to whether the risk encountered in any given incident was an inherent risk gives these entities - and the commercial operators - a more level playing field in a state like Montana where pre-activity exculpatory documents (release and waiver documents) are disfavored under the law. There will be non-profits that testify in favor of this bill

10. The bill only helps greedy commercial outfitters and would be of no benefit to everyday Montana citizens.

See, answer to Number 1. This benefits all of MT citizens – not just commercial outfitters.

11. This is “tort reform.” This bill will create a disincentive toward safety on the part of the operators.

It is important to recognize that the “inherent risk” defense or theory exists under the common law because critics of the effort to codify this common law defense like to say that this is tort reform. Codifying the inherent risk doctrine is NOT tort reform; codifying this doctrine does nothing to limit the rights of putative plaintiffs or persons who would want to sue a recreational operator and does not create anything new under the law. See, Answer to #3, above. The current common law relieves recreation providers from any duty to protect participants from the inherent risks of the associated activity, but allows participants to sue if their injuries are due to non-inherent risks created through provider negligence. Critics who complain that this legislation will create a safety disincentive or that operators will not have to maintain their equipment or otherwise be safety conscious, are simply wrong. If an operator could have eliminated the risk through the exercise of reasonable care, then we are not talking about an inherent risk and this defense will not apply.



Niche News: Montana's Outfitter and Guide Industry

Research Methods: Business Survey - Outfitter names were obtained from USFS, BLM, NPS, MTFWP, MT Board of Outfitters, Travel MT, MOGA, & FOAM. Duplicates and undeliverables were eliminated identifying 998 active outfitters in Montana in 2005. 33% of outfitters (n=333) returned the mailed business survey. Phone surveys to 70 non-respondents found no difference between respondent/non-respondent outfitters. **Client Survey** - Clients on outfitted trips were either intercepted by researchers or given a survey by the guides and returned by mail. 238 client surveys were returned for the 2006 client study. Client surveys were weighted according to the number and type of clients reported by outfitters to accurately represent all types of outfitted clients.



OUTFITTED CLIENTS

318,600 outfitted clients in 2005

- 124,000 (39%) - Rafting/floating/canoeing/kayaking
- 63,800 (20%) - Fishing
- 48,270 (15%) - Other (Includes birding, snowmobiling, tours, photography, wildlife watching, snowcoach, wagon train, dog sledding, etc.)
- 45,100 (14%) - Horse trips
- 19,500 (6%) - Hunting
- 18,000 (6%) - Hiking/Backpacking

85% of all guided clients are involved in either hunting, angling, rafting/floating, horseback riding, or hiking/backpacking.

Primary purpose for being in MT (91,000 in MT for the outfitted trip)

- **Hunters:** 82% of hunters came to MT for the outfitted trip; 16% say it's one part of their trip.
- **Anglers:** 33% of anglers came to MT for the outfitted trip; 43% say it's only one part of their MT trip; 13% say they are here for business and vacation including guided trip; 13% MT residents.
- **All others:** 23% of other activity clients came to MT for the guided trip; 60% say it's only one part of their trip; 8% on business and vacation including guided trip; 10% MT residents.

\$119.6 million in Client Expenditures (includes all trip cost, not just outfitted)

- 39% of all expenditures from Hunting (\$46.4 million)
- 31% of all expenditures from Fishing (\$37.2 million)
- 30% of all expenditures from all other trips (\$35.9 million)

OUTFITTER BUSINESS

- ❖ 48% have some full-time employees (approx. 1,500)
- ❖ 71% have some part-time employees (approx. 4,600)
- ❖ Approx. 4,300 guides in MT
- ❖ 18.25 average # of years outfitting
- ❖ 21.14 average # more years to outfit
- ❖ 7% of outfitters are non-profit (church, scouts, camps, etc.)
- ❖ Over 600,000 client days represented in 2005

| % on waterways | % of Trips on Each Type |
|----------------|-------------------------|
| 56% Rivers | 55% Forest Service |
| 26% Lakes | 48% Other private prop. |
| 19% Reservoirs | 31% My private property |
| | 38% State lands |
| | 32% BLM |
| | 13% Nat'l Park Service |
| | 2% Tribal lands |

| Outfitter Revenues | Outfitter Expenses |
|--------------------------|--------------------------|
| 43% Hunting | 21% Payroll |
| 33% Fishing | 14% Contract labor |
| 25% all other activities | 12% Food/fuel/equipment |
| | 11% Land leases |
| | 6% Travel |
| | 5% Insurance |
| | 5% Advertising/promotion |

Economic Impact of the Outfitting Industry in Montana

| | IMPACTS | Direct | Indirect | Induced | Combined |
|--------------------------|---------------------|---------------|--------------|--------------|---------------|
| All Guided Trips | Industry Output | \$110,438,000 | \$27,174,000 | \$30,021,000 | \$167,633,000 |
| | Employment (# jobs) | 1,956 | 276 | 358 | 2,590* |
| | Employee Income | \$37,435,000 | \$6,029,000 | \$7,972,000 | \$51,435,000 |
| | Proprietors' Income | \$4,035,000 | \$1,751,000 | \$1,632,000 | \$7,417,000 |
| | State & Local taxes | \$8,471,000 | \$1,283,000 | \$1,881,000 | \$11,635,000 |
| <i>(Subset of above)</i> | | | | | |
| Guided Hunting Trips | Industry output | \$43,694,000 | \$10,800,000 | \$12,252,000 | \$66,745,000 |
| Guiding Fishing Trips | | \$34,221,000 | \$8,238,000 | \$9,189,000 | \$51,649,000 |
| All other Guided Trips | | \$32,298,000 | \$8,096,000 | \$8,513,000 | \$48,907,000 |

Economic Impact based on visitors ONLY in MT because of their guided trip (29% of all trips but 50% of total impact)

| | | | | |
|-----------------|--------------|--------------|--------------|--------------|
| Industry Output | \$54,638,000 | \$13,452,000 | \$15,063,000 | \$83,153,000 |
|-----------------|--------------|--------------|--------------|--------------|

Definitions: Direct impacts result from outfitted client purchases of goods and services; Indirect impacts result from purchases made by outfitter related businesses; and Induced impacts result from purchases by those employed in outfitter-related occupations.

*Does not represent seasonal jobs

The Institute for Tourism and Recreation Research

© ITRR

Funding for this summary and study comes from the Accommodations Tax, Montana Outfitters and Guides Assoc., & Fishing Outfitters of Montana

#B 295

Rule 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.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Cross-References

Cumulative evidence defined, 26-1-102.

Witnesses — protection from harassment, 26-2-401.

Rule 404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.

(a) Character evidence generally. 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:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

(2) 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 or in an assault case where the victim is incapable of testifying to rebut evidence that the victim was the first aggressor.

(3) Character of witness. Evidence of the character of a witness, as provided in Article VI.

(b) Other crimes, wrongs, 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, plan, knowledge, identity, or absence of mistake or accident.

(c) Character in issue. Evidence of a person's character or a trait of character is admissible in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977; amd. Sup. Ct. Ord. June 7, 1990, eff. June 7, 1990.

Rule 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.

(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, or where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of that person's conduct.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977; amd. Sup. Ct. Ord. June 7, 1990, eff. June 7, 1990.

Cross-References

Opinion testimony by lay witnesses, Rule 701, M.R.Ev. (see Title 26, ch. 10).

Rule 406. Habit; routine practice.

(a) Habit and routine practice defined. A habit is a person's regular response to a repeated specific situation. A routine practice is a regular course of conduct of a group of persons or an organization.

(b) Admissibility. Evidence of habit or of routine practice, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that conduct on a particular occasion was in conformity with the habit or routine practice.

(c) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.