COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on January 4, 2002.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Hon. William D. Missouri
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Ms. Becky Feldman, Rules Committee Intern
Kate Masterton, Esq., Attorney Generals Office
Ronnie Frank, Esq.
Brian J. Frank, Esq.
C. Carey Deeley, Jr., Esq.
Elizabeth B. Veronis, Esq., Legal Officer, Administrative Office of the Courts
Hon. James N. Vaughan, Chief Judge, District Court of Maryland
Mrs. Roberta Roper
Russell Butler, Esq.
Albert "Buz" Winchester, MSBA, Office of Legislative Relations
Hon. Lawrence R. Daniels, Circuit Court for Baltimore County
Bradley A. Kukuk, Esq., Maryland Family Law News
Joe Surkiewicz, The Daily Record

The Chair convened the meeting. He said that there were two sets of minutes from the meetings of September 7, 2001 and

October 12, 2001 for the Rules Committee to approve. Judge Kaplan moved to approve both sets of minutes, the motion was seconded, and it passed unanimously.

Agenda Item 1. Consideration of proposed amendments to certain rules and form, recommended by the Criminal Rules Subcommittee: Rule 4-216 (Pretrial release), Rule 4-217 (Bail Bonds, Rule 4-243 (Plea Agreements), Rule 4-342 (Sentencing - Procedure in Non-Capital Cases), Rule 4-343 (Sentencing - Procedure in Capital Cases), Rule 4-351 (Commitment Record), Rule 4-504 (Petition for Expungement When Charges Filed), Rule 4-508 (Court Order for Expungement of Records), and Form 4-508.1 (Order for Expungement of Records).

The Chair announced that several guests were present to discuss the pretrial release rules. Mr. Karceski, who was not present at the meeting, because he was out of the country, had sent a letter requesting that the Rules Committee defer taking action today on Rules 4-216, Pretrial Release, and 4-217, Bail Bonds, because of his absence and also the absence of Professor Douglas Colbert of the University of Maryland Law School, who is attending a conference of the American Association of Law Schools in New Orleans, Louisiana. (See Appendix 1). Professor Byron Warnken also had contacted the Chair because he is representing clients who are interested in the pretrial release rules. Professor Warnken had requested deferral of the matter until February. The Chair had responded to Professor Warnken that the matter could not be deferred entirely because many interested persons would be attending the meeting in January, but final action on the Rules could be deferred. The Committee can hear from those in attendance at today's meeting.

The Honorable Martin O'Malley, Mayor of Baltimore City, had drafted legislative changes to some of the statutes pertaining to pretrial release of persons charged with violent crimes and persons having prior convictions. A representative from the mayor's office called today, stating that material from that office would be faxed, so it could be distributed at today's meeting. (See Appendix 2). The changes are similar to the procedures in the federal system. The Chair and Judge Johnson, who is chair of the Criminal Subcommittee, spoke about possible deferral of the matter until the 2002 legislative session is over, and their decision was to hear from those present at today's meeting but to defer final action until the Committee can review the bills enacted by the General Assembly.

The first speaker was C. Carey Deeley, Jr., Esq., Chair of the Pretrial Release Project Advisory Committee ("the Advisory Committee"), Chief Judge Robert M. Bell's committee to study the proposed changes to the bail system. Mr. Deeley told the Committee that throughout his practice over the past 22 years he had heard about members of the Rules Committee, and he met Mr. Titus when Mr. Deeley joined the law firm of Venable, Baetjer, and Howard. He said that he was honored to speak to the Committee, and he thanked the members for allowing him to speak. He explained that had been appointed as chair of the Advisory Committee by Chief Judge Bell to take a broader look at the subject of pretrial release than Professor Douglas Colbert's committee had. Chief Judge Bell's committee is a diverse one,

composed of Professor Colbert, two prosecutors, a District Court judge, an appellate judge, an assistant public defender, the head of the Legal Aid Bureau, the head of the Department of Public Safety, the president of the Criminal Bar Association, and a District Court commissioner, and staffed by Elizabeth B. Veronis, Esq., from the Administrative Office of the Courts, who has been a tremendous help to the Advisory Committee. (See Appendix 3).

Mr. Deeley noted that he began working on the matter with a fresh view, because his practice is mainly civil, and his criminal practice has been limited to mostly misdemeanors. The Advisory Committee heard from many speakers in its consideration of the rules and statutes. The Advisory Committee is making nine recommendations. (See Appendix 4).

The first recommendation is that a statewide agency pertaining to pretrial release should be instituted. Seven other jurisdictions have this type of agency.

The second recommendation is that attorneys, including defense attorneys and prosecutors, should be participating very early in the pretrial process.

The third recommendation is that a prosecutor should be present at bail review hearings.

The fourth recommendation is that the Rules should clarify that monetary bail should be used sparingly.

Recommendation number five is that the Rules should be conformed to Code, Criminal Procedure Article, §5-205, Bail in District Court, as to automatic 10% bonds.

The sixth recommendation is that resources should be dedicated to other modes of pretrial release, such as pretrial supervision of the defendant, and alcohol and drug monitoring.

Recommendation number seven is to train and educate judicial officers with regard to pretrial release determinations prior to their assuming judicial duties and at annual seminars.

The eighth recommendation is to give commissioners the ability to set conditions of pretrial release for bailable offenses after due consideration of the factors affecting release, thus avoiding preset bails.

The last recommendation is that section (j) of Rule 4-216 should be clarified to specify that weekly reports are made to the appropriate administrative judge, containing the information necessary to monitor and assess prolonged pretrial incarceration and to provide for pretrial release personnel to give information that a judge should consider with respect to change in detention status.

Judge Johnson presented Rules 4-216, Pretrial Release and 4-217, Bail Bonds, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 to add a sentence to section (a) explaining the Rule's purpose, to add new Code references to section (b), to add new section (c) pertaining to personal recognizance, to delete section (d), to add a

new reference to the Code in new section (d), to change the word "assure" to the word "ensure" throughout the Rule, to add a requirement to section (e) that the judicial officer state the reasons in writing if the bail bond is set higher than 10% of the full penalty amount, and to add language to section (h) providing for the power of a judge to alter conditions set by another judge, as follows:

Rule 4-216. PRETRIAL RELEASE

~~(a) Interim Bail~~

~~Pending an initial appearance by the defendant before a judicial officer pursuant to Rule 4-213 (a), the defendant may be released upon execution of a bond in an amount and subject to conditions specified in a schedule that may be adopted by the Chief Judge of the District Court for certain offenses. The Chief Judge may authorize designated court personnel or peace officers to release a defendant by reference to the schedule.~~

(a) Construction of Rule

This Rule shall be construed liberally to carry out the purpose of relying on criminal sanctions instead of financial loss to ensure the appearance of a defendant in a criminal case before verdict or pending a new trial.

~~(c)~~ (b) ~~Defendants Eligible for Release by Commissioner or Judge~~ Release on Personal Recognizance

~~Except~~ In accordance with this Rule and Code, Criminal Procedure Article, §5-101 and except as otherwise provided in ~~section (d) of this Rule or by law~~ Code, Criminal Procedure Article, §§5-201 and 5-202, a defendant is entitled to be released before verdict in conformity with this Rule on personal recognizance or with one or more conditions imposed ~~unless the judicial~~

~~officer determines that no condition of release will reasonably assure (1) the appearance of the defendant as required and (2) the safety of the alleged victim~~.

~~Cross reference: See Code, Criminal Procedure Article, §5-101 (c) concerning defendants who may not be released on personal recognizance.~~

~~(b)~~ (c) Probable Cause Determination

A defendant arrested without a warrant shall be released on personal recognizance under terms that do not significantly restrain the defendant's liberty unless the judicial officer determines that there is probable cause to believe that the defendant committed an offense.

~~(d) Defendants Eligible for Release Only by a Judge~~

~~A defendant charged with an offense for which the maximum penalty is death or life imprisonment or with an offense listed under Code, Criminal Procedure Article, §5-202 (a), (b), (c), (d), or (e) may not be released by a District Court Commissioner, but may be released before verdict or pending a new trial, if a new trial has been ordered, if a judge determines that all requirements imposed by law have been satisfied and that one or more conditions of release will reasonably assure (1) the appearance of the defendant as required and (2) if the defendant is charged with an offense listed under Code, Criminal Procedure Article, §5-202 (b), (c), (d), or (e), that the defendant will not pose a danger to another person or the community while released.~~

~~(e)~~ (d) Duties of Judicial Officer

(1) Consideration of Factors

In determining whether a defendant should be released and the conditions of release, the judicial officer, on the basis of information available or developed in a pretrial release inquiry, may take into

account:

(A) The nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction, insofar as these factors are relevant to the risk of nonappearance;

(B) The defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) The defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

(D) The recommendation of an agency which conducts pretrial release investigations;

(E) The recommendation of the State's Attorney;

(F) Information presented by defendant's counsel;

(G) The danger of the defendant to another person or to the community;

(H) The danger of the defendant to himself or herself; and

(I) Any other factor bearing on the risk of a wilful failure to appear, including prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult and prior convictions.

(2) Statement of Reasons - When Required

Upon determining to release a defendant to whom ~~section (d) of this Rule~~ Code, Criminal Procedure Article, §5-202 applies or to refuse to release a defendant to whom section ~~(c)~~ (b) of this Rule applies,

the judicial officer shall state the reasons in writing or on the record.

(3) Imposition of Conditions of Release

If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set out in section ~~(f)~~ (e) of this Rule that will reasonably:

(A) ~~Assure~~ Ensure the appearance of the defendant as required,

(B) Protect the safety of the alleged victim by ordering the defendant to have no contact with the alleged victim or the alleged victim's premises or place of employment or by other appropriate order, and

(C) ~~Assure~~ Ensure that the defendant will not pose a danger to another person or to the community if the charge against the defendant is an offense listed under Code, Criminal Procedure Article, §5-202 ~~(b), (c), (d), or (e)~~.

(4) Advice of Conditions and Consequences of Violation

The judicial officer shall advise the defendant in writing or on the record of the conditions of release imposed and of the consequences of a violation of any condition.

~~(f)~~ (e) Conditions of Release

The conditions of release imposed by a judicial officer under this Rule may include:

(1) Committing the defendant to the custody of a designated person or organization that agrees to supervise the defendant and assist in ~~assuring~~ ensuring the defendant's appearance in court;

(2) Placing the defendant under the supervision of a probation officer or other

appropriate public official;

(3) Subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

(4) Requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer including any of the following:

(A) without collateral security,

(B) with collateral security of the kind specified in Rule 4-217 (e)(1)(A) equal in value to the greater of $25.00 or 10% of the full penalty amount~~,~~ or, for reasons stated in writing, a larger percentage as may be fixed by the judicial officer,

(C) with collateral security of the kind specified in Rule 4-217 (e)(1) equal in value to the full penalty amount,

(D) with the obligation of a corporation that is an insurer or other surety in the full penalty amount;

(5) Subjecting the defendant to any other condition reasonably necessary to:

(A) ~~assure~~ ensure the appearance of the defendant as required,

(B) protect the safety of the alleged victim, and

(C) ~~assure~~ ensure that the defendant will not pose a danger to another person or to the community if the charge against the defendant is an offense listed under Code, Criminal Procedure Article, §5-202 ~~(b), (c), (d), or (e)~~;

(6) Imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, Article 27, §763 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation of Code, Article 27, §26, §761, or

§762.

Cross reference: See Code, Criminal Procedure Article, §5-201 (b), and Code, Business Occupations and Professions Article, Title 20, concerning private home detention monitoring as a condition of release.

~~(g)~~ (f) Review of Commissioner's Pretrial Release Order

(1) Generally

A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court. The District Court shall review the commissioner's pretrial release determination and take appropriate action. If the defendant will remain in custody after the review, the District Court shall set forth in writing or on the record the reasons for the continued detention.

Cross reference: See Rule 4-231 (d) concerning the presence of a defendant by video conferencing.

(2) Juvenile Defendant

If the defendant is a child whose case is eligible for transfer to the juvenile court pursuant to Code, Criminal Procedure Article, §4-202 (b), the District Court, regardless of whether it has jurisdiction over the offense charged, may order that a study be made of the child, the child's family, or other appropriate matters. The court also may order that the child be held in a secure juvenile facility.

~~(h)~~ (g) Continuance of Previous Conditions

When conditions of pretrial release have been previously imposed in the District Court, the conditions continue in the circuit court unless amended or revoked pursuant to

section ~~(i)~~ (h) of this Rule.

~~(i)~~ (h) Amendment of Pretrial Release Order

After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of pretrial release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record. This section includes the power of a judge to alter conditions set by another judge.

~~(j)~~ (i) Supervision of Detention Pending Trial

In order to eliminate unnecessary detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.

~~(k)~~ (j) Violation of Condition of Release

A court may issue a bench warrant for the arrest of a defendant charged with a criminal offense who violates a condition of pretrial release. After the defendant is presented before a court, the court may (1) revoke the defendant's pretrial release or (2) continue the defendant's pretrial release with or without conditions.

~~(l)~~ (k) Title 5 Not Applicable

Title 5 of these rules does not apply to proceedings conducted under this Rule.

Source: This Rule is derived in part from former Rule 721, M.D.R. 723 b 4, and is in part new.

Rule 4-216 was accompanied by the following Reporter's Note.

The Pretrial Release Project Advisory Committee in its report issued October 11, 2001 recommended modification to the pretrial release system. Several of its recommendations involved changes to Rules 4-216 and 4-217. The Criminal Subcommittee recommends that the changes suggested by the Advisory Committee be approved.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-217 to change the word "insure" to the word "ensure" in subsection (e)(3) and to make certain stylistic changes, as follows:

Rule 4-217. BAIL BONDS

(a) Applicability of Rule

This Rule applies to all bail bonds taken pursuant to Rule 4-216, and to bonds taken pursuant to Rules 4-267, 4-348, and 4-349 to the extent consistent with those rules.

(b) Definitions

As used in this Rule, the following words have the following meanings:

(1) Bail Bond

"Bail bond" means a written obligation of a defendant, with or without a surety or collateral security, conditioned on the appearance of the defendant as required and providing for the payment of a penalty sum according to its terms.

(2) Bail Bondsman

"Bail bondsman" means an authorized agent of a surety insurer.

(3) Bail Bond Commissioner

"Bail bond commissioner" means any person appointed to administer rules adopted pursuant to Maryland Rule 16-817.
Cross reference: Code, Criminal Procedure Article, §5-203.

(4) Clerk

"Clerk" means the clerk of the court and any deputy or administrative clerk.

(5) Collateral Security

"Collateral security" means any property deposited, pledged, or encumbered to secure the performance of a bail bond.

(6) Surety

"Surety" means a person other than the defendant who, by executing a bail bond, guarantees the appearance of the defendant, and includes an uncompensated or accommodation surety.

(7) Surety Insurer

"Surety insurer" means any person in the business of becoming, either directly or through an authorized agent, a surety on a bail bond for compensation.

(c) Authorization to Take Bail Bond

Any clerk, District Court commissioner, or other person authorized by law may take a bail bond. The person who takes a bail bond shall deliver it to the court in which the charges are pending, together with all money or other collateral security deposited or pledged and all documents pertaining to the bail bond.

Cross reference: Code, Criminal Procedure Article, §§5-204 and 5-205 ~~and Code (1957, 1991 Repl. Vol.), Article 87, §6~~.

(d) Qualification of Surety

(1) In General

The Chief Clerk of the District Court shall maintain a list containing: (A) the names of all surety insurers who are in default, and have been for a period of 60 days or more, in the payment of any bail bond forfeited in any court in the State, (B) the names of all bail bondsmen authorized to write bail bonds in this State, and (C) the limit for any one bond specified in the bail bondsman's general power of attorney on file with the Chief Clerk of the District Court.

(2) Surety Insurer

No bail bond shall be accepted if the surety on the bond is on the current list maintained by the Chief Clerk of the District Court of those in default. No bail bond executed by a surety insurer directly may be accepted unless accompanied by an affidavit reciting that the surety insurer is authorized by the Insurance Commissioner of Maryland to write bail bonds in this State.

(3) Bail Bondsman

No bail bond executed by a bail bondsman may be accepted unless the bondsman's name appears on the most recent list maintained by the Chief Clerk of the District Court, the bail bond is within the limit specified in the bondsman's general power of attorney as shown on the list or in

a special power of attorney filed with the bond, and the bail bond is accompanied by an affidavit reciting that the bail bondsman:

(A) is duly licensed in the jurisdiction in which the charges are pending, if that jurisdiction licenses bail bondsmen;

(B) is authorized to engage the surety insurer as surety on the bail bond pursuant to a valid general or special power of attorney; and

(C) holds a valid license as an insurance broker or agent in this State, and that the surety insurer is authorized by the Insurance Commissioner of Maryland to write bail bonds in this State.

Cross reference: Code, Criminal Procedure Article, §5-203 and Rule ~~1285~~ 16-817 (Appointment of Bail Bond Commissioner - Licensing and Regulation of Bail Bondsmen).

(e) Collateral Security

(1) Authorized Collateral

A defendant or surety required to give collateral security may satisfy the requirement by:

(A) depositing with the person who takes the bond the required amount in cash or certified check, or pledging intangible property approved by the court; or

(B) encumbering one or more parcels of real estate situated in the State of Maryland, owned by the defendant or surety in fee simple absolute, or as chattel real subject to ground rent. No bail bond to be secured by real estate may be taken unless (1) a Declaration of Trust of a specified parcel of real estate, in the form set forth at the end of this Title as Form 4-217.1, is executed before the person who takes the bond and is filed with the bond, or (2) the bond is secured by a Deed of Trust to the State or

its agent and the defendant or surety furnishes a verified list of all encumbrances on each parcel of real estate subject to the Deed of Trust in the form required for listing encumbrances in a Declaration of Trust.

(2) Value

Collateral security shall be accepted only if the person who takes the bail bond is satisfied that it is worth the required amount.

(3) Additional or Different Collateral Security

Upon a finding that the collateral security originally deposited, pledged, or encumbered is insufficient to ~~insure~~ ensure collection of the penalty sum of the bond, the court, on motion by the State or on its own initiative and after notice and opportunity for hearing, may require additional or different collateral security.

(f) Condition of Bail Bond

The condition of any bail bond taken pursuant to this Rule shall be that the defendant personally appear as required in any court in which the charges are pending, or in which a charging document may be filed based on the same acts or transactions, or to which the action may be transferred, removed, or if from the District Court, appealed, and that the bail bond shall continue in effect until discharged pursuant to section (j) of this Rule.

(g) Form and Contents of Bond - Execution

Every pretrial bail bond taken shall be in the form of the bail bond set forth at the end of this Title as Form 4-217.2, and shall be executed and acknowledged by the defendant and any surety before the person who takes the bond.

(h) Voluntary Surrender of the Defendant

by Surety

A surety on a bail bond who has custody of a defendant may procure the discharge of the bail bond at any time before forfeiture by:

(1) delivery of a copy of the bond and the amount of any premium or fee received for the bond to the court in which the charges are pending or to a commissioner in the county in which the charges are pending who shall thereupon issue an order committing the defendant to the custodian of the jail or detention center; and

(2) delivery of the defendant and the commitment order to the custodian of the jail or detention center, who shall thereupon issue a receipt for the defendant to the surety.

Unless released on a new bond, the defendant shall be taken forthwith before a judge of the court in which the charges are pending.

On motion of the surety or any person who paid the premium or fee, and after notice and opportunity to be heard, the court may by order award to the surety an allowance for expenses in locating and surrendering the defendant, and refund the balance to the person who paid it.

(i) Forfeiture of Bond

(1) On Defendant's Failure to Appear - Issuance of Warrant

If a defendant fails to appear as required, the court shall order forfeiture of the bail bond and issuance of a warrant for the defendant's arrest. The clerk shall promptly notify any surety on the defendant's bond, and the State's Attorney, of the forfeiture of the bond and the issuance of the warrant.

Cross reference: Code, Criminal Procedure

Article, §5-211.

(2) Striking Out Forfeiture for Cause

If the defendant or surety can show reasonable grounds for the defendant's failure to appear, notwithstanding Rule 2-535, the court shall (A) strike out the forfeiture in whole or in part; and (B) set aside any judgment entered thereon pursuant to subsection (4)(A) of this section, and (C) order the remission in whole or in part of the penalty sum paid pursuant to subsection (3) of this section.

Cross reference: Code, Criminal Procedure Article, §5-208 (b)(1) and (2) and *Allegany Mut. Cas. Co. v. State*, 234 Md. 278, 199 A.2d 201 (1964).

(3) Satisfaction of Forfeiture

Within 90 days from the date the defendant fails to appear, which time the court may extend to 180 days upon good cause shown, a surety shall satisfy any order of forfeiture, either by producing the defendant in court or by paying the penalty sum of the bond. If the defendant is produced within such time by the State, the court shall require the surety to pay the expenses of the State in producing the defendant and shall treat the order of forfeiture satisfied with respect to the remainder of the penalty sum.

(4) Enforcement of Forfeiture

If an order of forfeiture has not been stricken or satisfied within 90 days after the defendant's failure to appear, or within 180 days if the time has been extended, the clerk shall forthwith:

(A) enter the order of forfeiture as a judgment in favor of the governmental entity that is entitled by statute to receive the forfeiture and against the defendant and surety, if any, for the amount of the penalty sum of the bail bond, with interest from the date of forfeiture and costs including any

costs of recording, less any amount that may have been deposited as collateral security; and

(B) cause the judgment to be recorded and indexed among the civil judgment records of the circuit court of the county; and

(C) prepare, attest, and deliver or forward to any bail bond commissioner appointed pursuant to Rule 16-817, to the State's Attorney, to the Chief Clerk of the District Court, and to the surety, if any, a true copy of the docket entries in the cause, showing the entry and recording of the judgment against the defendant and surety, if any.

Enforcement of the judgment shall be by the State's Attorney in accordance with those provisions of the rules relating to the enforcement of judgments.

(5) Subsequent Appearance of Defendant

When the defendant is produced in court after the period allowed under subsection (3) of this section, the surety may apply for the refund of any penalty sum paid in satisfaction of the forfeiture less any expenses permitted by law. If the penalty sum has not been paid, the court, on application of the surety and payment of any expenses permitted by law, shall strike the judgment against the surety entered as a result of the forfeiture.

(6) Where Defendant Incarcerated Outside this State

(A) If, within the period allowed under subsection (3) of this section, the surety produces evidence and the court finds that the defendant is incarcerated in a penal institution outside this State and that the State's Attorney is unwilling to issue a detainer and subsequently extradite the defendant, the court shall strike out the forfeiture and shall return the bond or collateral security to the surety.

(B) If, after the expiration of the period allowed under subsection (3) of this section, but within 10 years from the date the bond or collateral was posted, the surety produces evidence and the court finds that the defendant is incarcerated in a penal institution outside this State and that the State's Attorney is unwilling to issue a detainer and subsequently extradite the defendant, the court shall (i) strike out the forfeiture; (ii) set aside any judgment thereon; and (iii) order the return of the forfeited bond or collateral or the remission of any penalty sum paid pursuant to subsection (3) of this section.

(j) Discharge of Bond - Refund of Collateral Security

(1) Discharge

The bail bond shall be discharged when:

(A) all charges to which the bail bond applies have been stetted, unless the bond has been forfeited and 10 years have elapsed since the bond or other security was posted; or

(B) all charges to which the bail bond applies have been disposed of by a nolle prosequi, dismissal, acquittal, or probation before judgment; or

(C) the defendant has been sentenced in the District Court and no timely appeal has been taken, or in the circuit court exercising original jurisdiction, or on appeal or transfer from the District Court; or

(D) the court has revoked the bail bond pursuant to Rule 4-216 or the defendant has been convicted and denied bail pending sentencing; or

(E) the defendant has been surrendered by the surety pursuant to section (h) of this Rule.

Cross reference: See Code, Criminal Procedure Article, §5-208 ~~(c)~~ (d) relating to discharge of a bail bond when the charges are stetted. See also Rule 4-349 pursuant to which the District Court judge may deny release on bond pending appeal or may impose different or greater conditions for release after conviction than were imposed for the pretrial release of the defendant pursuant to Rule 4-216.

(2) Refund of Collateral Security - Release of Lien

Upon the discharge of a bail bond and surrender of the receipt, the clerk shall return any collateral security to the person who deposited or pledged it and shall release any Declaration of Trust that was taken.

Source: This Rule is derived from former Rule 722 and M.D.R. 722.

Rule 4-217 was accompanied by the following Reporter's Note.

See Reporter's Note to Rule 4-216.

Mr. Deeley pointed out that the Criminal Subcommittee approved the changes to Rules 4-216 and 4-217 based on the Advisory Committee's recommendations. The changes to Rule 4-217 are stylistic only. The Advisory Committee recommended deleting section (a), because the District Court schedules were only used when the transition from the former People's Court to the District Court took place. The new section (a) is taken directly from Code, Criminal Procedure Article, §5-101 (a), Release on Personal Recognizance. The Chair questioned as to whether the Advisory Committee considered the scenario of an inebriated

person who has been arrested for a minor offense but should not be released on his or her own recognizance, because the person has no fixed address and probably will not appear for trial. The best way to ensure a prompt trial date would be to avoid releasing the person on his or her recognizance. Mr. Deeley answered that the Advisory Committee had considered this type of situation.

The Vice Chair asked why the language at the end of new section (b) which reads "unless the judicial officer determines that no condition of release will reasonably assure (1) the appearance of the defendant as required and (2) the safety of the alleged victim" was deleted. Ms. Veronis replied that the former Code section, which was Article 27, §616 ½, Bail Generally; Special Provisions in Second and Seventh Circuits, had been amended, and the language has been suggested for deletion, because it is too narrow. The Code references added to the body of section (b) are intended to cover the deleted language, which has been subsumed into the Code provisions. Section (d) also has been deleted, because it is covered by the references to the statute. The Vice Chair commented that deleting the language in section (b) is a substantial shift in emphasis. The new language does not refer to the safety of the victim or the inability to ensure the appearance of the defendant. There should be some mention of this in the Rule. Mr. Dean pointed out that subsection (e)(5) refers to ensuring the appearance of the

defendant and protecting the safety of the victim. The Vice Chair noted that this language only refers to conditions that judicial officers may impose when a defendant is released, rather than to the threshold decision to release or not to release the defendant.

The Chair referred to the issue of not releasing defendants if they are not likely to appear for trial, but instead scheduling an early trial date. Mr. Deeley said that recommendation number 6 is to provide other forms of pretrial release to allow more support for defendants between their arrest and the trial. The Chair remarked that some defendants who have been assigned to home-monitoring have been arrested before they even reached home.

Mr. Deeley noted that the Advisory Committee feels that there should be a 10% cash alternative to bail. The public defender representative had observed that judges often jump from considering release on personal recognizance to full bail, in spite of the apparent hierarchy of the Rule which provides the following list of conditions of release: personal recognizance; bail without collateral security; bail with collateral security in the amount of $25 or 10% of the penalty amount, or a larger amount fixed by the decision-maker; and bail with collateral security in the full amount. The Advisory Committee is in favor of the bail of 10% of the penalty amount, with a requirement that the decision-maker state in writing the reasons for setting any

higher percentage. This encourages the decision-maker to consider why he or she is deciding that the bail should be that way. Asking for written reasons results in conscious thought and better decisions. The next decision-maker who reviews the case will have the benefit of the prior decision-maker's judgment if circumstances change. The Vice Chair inquired if there had been any discussion of the sanction for not stating the reasons. Mr. Deeley responded that this had not been discussed, and the Rules Committee could add this.

Mr. Deeley pointed out that in section (h) of Rule 4-216, the Advisory Committee added language which provides that a judge may alter conditions set by another judge, because there is some existing sentiment that one judge cannot change the conditions of bail set by another judge. Clarifying this can a benefit to both the defense and the prosecution. It respects the needs of victims and the rights of defendants.

Mr. Deeley said that he had been asked by a reporter from The Baltimore Sun which of the nine recommendations would be covered in the Rules. The answer is that the Rule does not exactly match up with the nine recommendations. There are different ways to address the nine recommendations. The request for funding for pretrial services is not meant to undermine the bail bond industry. The Advisory Committee neither rejects nor accepts the statistics gathered by Professor Colbert's committee. The purpose of changes to the Rules is to follow the law.

The Chair commented that he and the Honorable Dana Levitz of the Circuit Court for Baltimore County are concerned about the situation in which a defendant fails to appear for a circuit court hearing on a violation of probation. The court issues a bench warrant which states that when the defendant is found, he or she should be held without bail until the court issuing the warrant can hear the matter. When the defendant is found and brought before a District Court commissioner, Judge Levitz is of the opinion that the commissioner should not get involved in the case. The Rule could be interpreted to mean that the defendant goes before a commissioner and then before a District Court judge who can release the defendant on personal recognizance. The Rule should distinguish between bench warrants which identify the amount of the bail specifically as opposed to a warrant based on a statement of charges or an indictment. The Vice Chair inquired as to whether a defendant who is arrested on a bench warrant goes before a commissioner. Mr. Deeley replied in the affirmative. Judge Johnson added that the bench warrant can be designated as returnable to one named judge only. Mr. Dean noted that section (c) of Rule 4-347, Proceedings for Revocation of Probation, gives and preserves the authority of the judge issuing the warrant to set the conditions of release on a violation of probation. The Chair suggested that Rule 4-347 (c) be cross referenced in Rule 4-216.

Mr. Deeley observed that only a judge, and not a

commissioner, can change bail. The Chair said that his understanding was that defendants who were arrested were taken before a commissioner and then before a District Court judge. Mr. Deeley remarked that the District Court commissioners' manual instructs that if there seems to be any injustice in the details of the bench warrant, the commissioner should contact the judge who issued the warrant or the duty judge for further instructions. The Chair responded that this information should be included in the Rule. Ms. Veronis pointed out that although the warrant provides that the defendant is to go before a specific judge, there are times when that judge may be unavailable, such as if the judge is on vacation, and it may be an injustice to wait. Judge Missouri said that a judge may issue a warrant returnable to one judge only, which is not pursuant to a violation of probation; it may be issued when the defendant did not appear for trial. The effect is one judge changing another judge's warrant. As Administrative Judge in Prince George's County, Judge Missouri has to resolve these types of disputes. A judge may feel that he or she knows more about the defendant's history than another judge. The best way to handle such disputes is through judicial education. This is a big problem in the larger counties that have many judges.

Judge McAuliffe expressed the view that one judge has to be able to change another judge's decision as to bail. If there is a subsequent matter before another judge, and the State's

Attorney alleges new circumstances asking for an increase or revocation of bail, there is no reason to defer to the original judge. The Vice Chair asked if there is a different procedure for pretrial release as opposed to release after a bench warrant has been issued. Judge Missouri answered that this depends on the circumstances. In Prince George's County, there is pretrial release from the detention center and private release with the understanding that the released defendant will abide by monitoring. If the defendant fails to cooperate, the warrant goes back to Judge Missouri. Judge Dryden commented that in Anne Arundel County, the judges give deference to preset bond in other jurisdictions. It is not always practical to call the judge who preset the bond or to return the defendant to the first judge. There may be circumstances shown to the second judge which were not in existence when the first judge preset the bond. The Chair said that Rule 1-361, Execution of Warrants and Body Attachments, provides that a person arrested on a warrant is to be brought before the judicial officer designated in the specific instructions in the warrant. If a defendant fails to appear, the judge does not have to state in the warrant that the defendant must be brought before that judge, but if the judge does so state, the Rule provides for that situation. If the specified judge is away, then the administrative judge can be contacted to give guidance.

Mr. Titus remarked that the language added to section (h)

may be an open invitation to judge-shopping, and that adding the language only to this Rule may create an inference that this is not applicable to other rules. Judge McAuliffe noted that he had looked at Professor Warnken's materials, adding that he agrees with Professor Warnken that the proposed changes to Rule 4-216 are creating a "sea change." The Chair thanked Mr. Deeley for his work and presentation. The Chair said that Professor Warnken would speak next.

Professor Warnken thanked the Rules Committee for the opportunity to speak. He explained that he had been a law professor for the past 25 years, often speaking publicly in that role. He disclosed to the Rules Committee that he has been retained as counsel and is advocating a position today. He distributed two documents to the Committee for today's discussion. (See Appendix 5). One is an outline suggesting why it is premature to proceed today on this matter. The second document, which sets forth some problems with the proposed changes to Rule 4-216, is for consideration today or at a future time.

Professor Warnken stated that the background of this matter is that Professor Colbert conducted the Pretrial Release Project Study from August 1998 to August 1999. There were many problems with the results of the study including statistical errors and factual data that do not support the conclusions set forth. Professor Colbert concluded that the bail bond industry should be

eliminated. As Mr. Deeley reported today, Professor Colbert was a member of Chief Judge Bell's Pretrial Release Project Advisory Committee. Professor Colbert became chair of the Maryland State Bar Association's Correctional Reform Section which recommended to Chief Judge Bell that a second study, by Professor Colbert be funded. Professor Colbert became the main researcher for Mr. Deeley's Advisory Committee, and that Committee used data from Professor Colbert's study, although the study did not use information from the bail bond industry which was available. No one from that industry was a member of the Advisory Committee.

Professor Warnken told the Rules Committee that Brian Frank, Esq., who had worked with the Rules Committee when he was a former law clerk of the Honorable Alan M. Wilner, then Chief Judge of the Court of Special Appeals and Chair of the Rules Committee, is currently the president of the Lexington National Insurance Corporation, which underwrites bails for bail bonds. Mr. Frank has retained Professor Warnken to represent his company. Professor Warnken commented that when he learned of the Colbert report and the work of the Advisory Committee, he wrote to that Committee asking for an opportunity to present information to it. The Advisory Committee did not accept this offer.

Professor Warnken said that although the Advisory Committee did not recommend eliminating the bail bond industry as Professor Colbert's report did, if the recommendations of the Advisory

Committee are adopted, a *de facto* result is that the bail bond industry would be eliminated. The Baltimore City Criminal Justice Coordinating Council, which was previously chaired by the Honorable David Mitchell, and is now chaired by the Honorable Stuart Berger, had allowed the Maryland Bail Bond Association to make a presentation.

Two weeks ago, Professor Warnken learned that the Rules Committee would be considering changes to Rules 4-216 and 4-217 based on the Advisory Committee's recommendations. Mr. Deeley had sent the report of the Advisory Committee to Chief Judge Bell on October 9, 2001. On October 23, 2001, the Chief Judge wrote to the Rules Committee to inform the Committee of the nine recommendations made by the Advisory Committee. The Criminal Subcommittee of the Rules Committee met on November 16, 2001, with four of its six members present. Professor Warnken said that he is completing a report by January 16, 2002, which is in response to the reports of Processor Colbert and the Advisory Committee. The view of Professor Warnken and his clients is that the Rules Committee's deliberative process should take advantage of this new report, and this is why Professor Warnken asked the Chair of the Rules Committee to defer discussion of the subject. However, the Chair could not promise that it would be deferred.

Professor Warnken expressed the opinion that there are flaws in Rule 4-216. He acknowledged Judge McAuliffe's earlier statement of agreement with his views. He noted that the Federal

Bail Reform Act of 1966 provided that a judge could only consider in a bail review whether someone would be likely to appear. This law influenced the states. In 1978, the Maryland Rule was changed to provide that the judicial officer determining bail should begin with the first factor to consider, and if there was reason to deny bail under the first factor, no further consideration was necessary. This was consistent with the federal statutory approach.

By 1984, the federal approach was changed, because the earlier philosophy regarding bail was not working. People were not appearing for trial and were committing crimes while out on bail. The federal system was changed to make it more difficult for someone to be released. If the judicial officer had a reasonable belief that the defendant would cause harm to the victim or to the public if released, the defendant would not be released. This was a change from the philosophy of considering only whether a person would be likely to appear for trial. In 1987, the U.S. Supreme Court had held that this newer federal approach was constitutional.

The Maryland General Assembly enacted Article 27, §616 ½, which listed many offenses, as to some of which a commissioner may make a pretrial release decision and as to some of which the decision is required to be made by a judge. A rebuttable presumption was created that a defendant should not be released if the judicial officer determines that the defendant is not

likely to appear and is a danger to society. The legislature broadened the statute, and then the Rules were modified accordingly to reflect that a judicial officer may examine a defendant to determine if bail is appropriate by ascertaining if the defendant is likely to appear before trial and if he or she is likely to be a danger to the victim and society. An increasing number of defendants were not released under this standard.

The Chair said that the Office of the Mayor of Baltimore City had sent in a fax suggesting that the bail statute should be changed to provide that a defendant charged with a crime of violence should not be released pretrial if the defendant previously had been convicted of the same offense. This would change the rebuttable presumption to an irrebuttable presumption. Professor Warnken suggested that this should be changed further to a judge being able to allow pretrial release under these circumstances, so the presumption would be rebuttable if a judge hears the matter.

Both the Advisory Committee and Professor Colbert had suggested that the bail determination should be the least onerous. The 1978 language of the Rule provided that only one factor should be considered in a bail determination, but the change to the Rule in 1998 provided that all of the factors should be considered. Prior to the enactment of the new Criminal Procedure Article, the laws providing for release on personal

recognizance and conditions to consider in determining bail were in a different location in the statute. In the new statute, all of the old law pertaining to release on personal recognizance, which had been in Code, Article 27, §638A, Release of Person on Own Recognizance, and the conditions to consider, which had been in Code, Article 27, §616 ½, are housed together in Title 5 of the Criminal Procedure Article. Subtitle 1 pertains to release on personal recognizance, and Subtitle 2 contains the provisions relating to conditions of pretrial release.

Professor Warnken pointed out that first the judicial officer determines whether to release a defendant, and then the judicial officer has to decide whether to release on the defendant's own recognizance or whether conditions have to be set. The proposed changes to Rule 4-216 are based on the statutory construction only as to Code, Criminal Procedure, §5-101. This has been placed into the front of the Rule, but the entire Rule pertains to pretrial release and relates back to the Federal Bail Reform Act of 1966, the failure of which resulted in the enactment of the Bail Reform Act of 1984.

Also implicit in the proposed Rule in subsection (c)(3) is the presumption of the least onerous condition of pretrial release being imposed. Even when bail is imposed, setting a bail bond of a collateral security equal to 10% of the full penalty amount should be considered before a full bail is decided. This is not the law. The law provides that a judicial officer decides

whether the defendant should be released on personal recognizance or whether any conditions should be imposed. If there are conditions, since 1998 the law is that the judicial officer is to consider all of the factors before determining the bail. In the Advisory Committee report, nothing indicates that if the judge or commissioner does not release a defendant on personal recognizance with no conditions imposed, then the judicial officer may release the defendant on personal recognizance with conditions imposed. The Chair commented that the Rule as drafted could be interpreted to prohibit the judicial officer from releasing the defendant on personal recognizance with conditions, such as being in a drug treatment center or having no contact with the victim. The question is if a judge or commissioner can consider imposing other conditions when deciding to release a defendant on personal recognizance. The answer is definitely that a person can be released on his or her own recognizance with conditions added.

Professor Warnken reiterated that in 1998, the Rule was changed to provide that a judicial officer could consider all of the conditions of pretrial release and then choose the least onerous. He referred to the Vice Chair's comments concerning proposed section (b) of Rule 4-216. He suggested that the language "a defendant is entitled to be released before verdict in conformity with this Rule on personal recognizance" should be changed so that the word "is" becomes the word "may." Code,

Criminal Procedure Article, §5-101 states that if the court believes that a minor or adult defendant in a criminal case will appear as required, "the defendant may be released on personal recognizance." Consideration as to whether the defendant will appear is not enough for the judicial officer to consider; he or she may consider all of the factors, including the risk to the victim and the risk to society, even if the defendant will appear. The legislative history behind the change to the federal statute in 1984 indicates the dilemma between not punishing people unnecessarily and protecting society. There is no perfect answer, but it is important to make sure that the court has flexibility. The Rule appears to provide that everyone is entitled to be released, contrary to the legislative history. This creates an anomaly if the Rule provides that every defendant is released, while the statute provides for fewer circumstances when someone can be released. A rule can supersede a statute, but generally the Rules implement the statutes. Professor Warnken expressed the opinion that the issue of statutory construction needs to be considered carefully.

Judge McAuliffe asked if the legislative intent of the statute is that the judicial officer should choose a bail of collateral security equal in value to 10% of the full penalty amount, unless there is a good reason not to make this the bail amount. Professor Warnken replied that the statute contains no preference for the 10% amount instead of full bail. The

statistics gathered will show that nationwide in Maryland and other areas, releasing people on their own recognizance or releasing them on 10% of the full penalty amount leads to a significantly greater failure to appear rate than releasing people on the full bail amount. The Chair remarked that his recollection is that when a judge sets bail, the judge expressly states whether the bail is 10% or fully secured. Mr. Dean said that this still happens.

Professor Warnken said that Rule 4-216 and the statute allow the option of uncollaterized bail, 10% of the full penalty amount, or full bail. The Chair suggested that language could be added to the Rule to require the court to expressly state on the record when bail is required, whether the bail is 10% or full. Professor Warnken observed that a 1992 national study revealed that in the 75 largest counties in the United States, those defendants released on personal recognizance were the least likely to appear for trial. The Chair added that many of those people have a poor quality of life with no fixed address and are not likely to appear for trial. Professor Warnken commented that there are three types of bail: 10% cash, 100% full bail, and 100% full bail with 10% paid to a bail bondsman. The statistics demonstrate that those out on 10% bail or 100% bail paid on their own fail to show at the same rate, which is higher than those out on bail with money paid to a bail bondsman. The reason is that when the money is paid to a court clerk, the clerk is unconcerned

if the defendant does not appear. However, if a bail bondsman is involved, the bondsman has 90 days to get the person into court, or the bondsman has to put up 100% of the bail. With this kind of responsibility, the bondsman takes great pains to ensure that the defendant appears. The bondsman checks with the defendant's parents and friends, continually calling the defendant to make sure that he or she appears. Only the bail bondsman has a financial reason to ensure the defendant's appearance at trial. The bail bond industry became privatized by historic accident. Without the industry function, the government would have to take over the bail bond industry's function, and the report of Professor Warnken's committee is that it would take $20 million a year to fund this.

The Chair commented that judicial philosophy plays a major role in all of this, notwithstanding what the Rule provides. In a particular case, it is up to the judge to determine pretrial release, given a wide variety of choices. Professor Warnken remarked that legal minds think differently, but there is some confusion. The Advisory Committee report suggests that the 10% bail should have the first priority. Some judges are influenced by the report and feel that they have no discretion. The fact that there is discretion needs to be very clear to judges. The Vice Chair pointed out that the Rule may be structured inappropriately. She said that she was less concerned about whether bail bondmen should be used than with her personal

inability to understand the Rule. She questioned whether conditions can be imposed on someone who is released on personal recognizance. Professor Warnken noted that Code, Article 27, §638A did not provide for any conditions to be added to release on personal recognizance.

The Chair expressed the view that the Rule tries to accomplish too much. The Rule tells the judge that if no probable cause is shown on the charging document, then the defendant should be released on personal recognizance, no matter how serious the offense is. The Rule also needs to clarify that someone can be released on personal recognizance with conditions imposed. The Vice Chair observed that, with certain exceptions, the law mandates that if a defendant will appear for trial, he or she will be released on personal recognizance. What should happen is that if the defendant will appear for trial, the judicial officer should still consider all of the factors to determine if release on personal recognizance is appropriate or if conditions should be imposed. Professor Warnken noted that the judicial officer must look at whether the defendant is likely to appear as well as the other factors to determine if release on personal recognizance is appropriate, if personal recognizance with conditions should be imposed, or if bail is appropriate. The rule change in 1998 provided that the judicial officer is to impose the least onerous condition on the defendant after considering all of the factors, such as the safety of the victim,

and the protection of society. However, the "least onerous" language causes confusion leading to the addition of proposed new section (a), which on its face, appears to be supported by Code, Criminal Procedure Article, §5-101.

The Vice Chair pointed out that the deleted language at the end of new section (b) provides for personal recognizance or the imposition of one or more conditions, but section (c) is not consistent. The Chair suggested that the word "or" in section (b) could be changed. The Vice Chair noted that section (c) requires that a defendant be released on personal recognizance if the charging document does not provide probable cause. The Chair said that the court should have discretion to be able to exercise judgment, because the police officer may not have written the charging document properly. Mr. Maloney remarked that this is an issue for a preliminary hearing. Professor Warnken responded that the reality is that at the preliminary hearing, there is a determination of probable cause to make the person stand trial, as opposed to a determination as to whether the person should be detained. By the time of the preliminary hearing, the person may already have been detained, even though there is no probable cause.

Mr. Maloney commented that Professor Warnken's request to defer a decision on the Rule until his report is released is reasonable. Mr. Maloney observed that the suggested statutory change from the Baltimore City's Mayor's office does not address

the issues discussed today. A critical problem in the criminal justice system is the number of people being held on a nominal bond. Sixty percent of people being held in pretrial detention are held on $5000 bonds or less. Chief Judge Vaughan stated that the number of people being held on these bonds after a failure to appear and a subsequent arrest is 12. A recent newspaper editorial had incorrectly stated that the number was much higher. He said that he was unaware of any individual arrested on a first-time minor charge held on any bond at all. The concern is a small bond on an arrest for failure to appear when someone has failed to appear several times. The bond provides a mechanism to ensure that the individual appears for trial. Commissioners do call judges when the commissioners are presented with a bench warrant with a preset bail. In 19 years as a District Court judge, Chief Judge Vaughan had five or six calls from commissioners, because the commissioner was convinced that the case could be disposed of with no bond for a charge of failure to appear. Chief Judge Vaughan expressed the concern that when there is a violation of probation, a bench warrant should be used last, as opposed to a show cause order. In his 19 years on the bench, he has never seen bail bondsmen produce defendants in District Court cases; the bail bondsmen usually appear to file motions to extend time.

The Chair asked the Rules Committee for their position on the elimination of current section (a) of Rule 4-216, explaining

that there had been schedules adopted by the Chief Judge of the District Court in the past. Chief Judge Vaughan said that the problem with this type of schedule is that it creates mischief. The Chair commented that years ago in the former municipal court, individuals picked up on vagrancy charges paid bail to the desk sergeant who had a bail schedule, and the defendant returned the next morning for trial. Now people released on minimal bonds for vagrancy charges rarely appear. They should be held and tried the next day. Chief Judge Vaughan responded that a quick disposition is good, but it may not always work in the smaller counties. The Chair remarked that this can be worked out. A person can be released based on the schedule, but if not released, the person can go before a judge within 24 hours. Those defendants who do not need to be held should be released. If there is a schedule, a person may be able to be released in 20 minutes. Although the schedule is not a panacea, it should not be totally eliminated.

Judge Kaplan commented that Baltimore City has a problem with people charged with quality of life offenses, such as vagrancy, who often fail to appear for trial. The warrant on the failure to appear charge may set bail at $5000, when the fine for the offense is less than that amount. The defendants are taken to the Baltimore City detention center where they may be kept for 20 or more days without being taken before a judicial officer. Chief Judge Vaughan said that everyone taken before a

commissioner is advised as to why the person is being arrested. Judge Kaplan responded that even if the person goes before a commissioner, he or she will not touch the amount of bail, and no other District Court judge will change it, either. There is an unwritten rule not to change the bail set by another judge.

Mr. Maloney moved to send the Rule back to the Criminal Subcommittee so that the Subcommittee can look at the upcoming legislation, read Professor Warnken's report, and hear from Professor Colbert and the Advisory Committee. The motion was seconded.

Mr. Maloney remarked that due to the large-scale deinstitutionalization of people, many mentally ill people are being picked up by the police, and it is difficult to set a bond. In Montgomery County, there is a pretrial service agency which is providing services, such as next-day urinalysis and daily telephone communication, to people who are being released pretrial. These defendants appear for trial. Judge Dryden added that Anne Arundel County provides similar services. Professor Warnken noted that historically the public does not like bail bondsmen. What often happens when a bail bondsman locates a defendant is that the person is turned over to the police, who get the credit for finding the person.

Mr. Deeley commented that he had been called upon to chair the Advisory Committee. The Advisory Committee consulted many people, and Professor Colbert was one of the main researchers,

but was not accepting or rejecting the statistics of Professor Colbert. The Advisory Committee's report was the product of the wisdom of a diverse group of people and refers to enough data to support its findings. The nine recommendations were not meant to protect or to take aim at the bail bond industry. The Rule can be tightened up, but it should allow a judge to change the bail set by another judge originally.

Mr. Sykes referred to Professor Warnken's comments about the language in section (b) which provides that a defendant "is entitled to be released before verdict ... on personal recognizance." The Rule as originally drafted with the language at the end of section (b) which read "unless the judicial officer determines that no condition of release will reasonably assure (1) the appearance of the defendant as required and (2) the safety of the alleged victim" is inconsistent. Subsection (d)(1) lists the factors which the judicial officer may take into account when determining if someone should be released. If all of the factors are taken into account and result in favor of the defendant, then the defendant is entitled to release on personal recognizance or with conditions. If section (b) is written to list all of the conditions which are to be considered before a defendant is released, section (b) can retain the language "is entitled." The Vice Chair commented that the structure of the Rule is a problem. The Chair said that the Rule can be redrafted to conform to the statute without superseding it. Judge Daniel

commented that crimes of violence are defined by statute. The Chair remarked that the statute needs to be reworked to provide which crimes of violence apply to the statutory provision, which does not allow pretrial release of a defendant charged with a crime of violence if the defendant has been previously charged with a crime of violence.

The Chair called for a vote on Mr. Maloney's motion to send Rule 4-216 back to the Criminal Subcommittee. The motion was passed unanimously.

Judge Johnson presented Rule 4-243, Plea Agreements, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-243 to add a new section (e) providing for notice to victims, as follows:

Rule 4-243. PLEA AGREEMENTS

(a) Conditions for Agreement

The defendant may enter into an agreement with the State's Attorney for a plea of guilty or nolo contendere on any proper condition, including one or more of the following:

(1) That the State's Attorney will amend the charging document to charge a specified offense or add a specified offense, or will file a new charging document;

(2) That the State's Attorney will enter a nolle prosequi pursuant to Rule 4-247 (a) or move to mark certain charges against the defendant stet on the docket pursuant to Rule 4-248 (a);

(3) That the State's Attorney will agree to the entry of a judgment of acquittal on certain charges pending against the defendant;

(4) That the State will not charge the defendant with the commission of certain other offenses;

(5) That the State's Attorney will recommend, not oppose, or make no comment to the court with respect to a particular sentence, disposition, or other judicial action;

(6) That the parties will submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration pursuant to section (c) of this Rule.

(b) Recommendations of State's Attorney on Sentencing

The recommendation of the State's Attorney with respect to a particular sentence, disposition, or other judicial action made pursuant to subsection (a)(5) of this Rule is not binding on the court. The court shall advise the defendant at or before the time the State's Attorney makes a recommendation that the court is not bound by the recommendation, that it may impose the maximum penalties provided by law for the offense to which the defendant pleads guilty, and that imposition of a penalty more severe than the one recommended by the State's Attorney will not be grounds for withdrawal of the plea.

(c) Agreements of Sentence, Disposition, or Other Judicial Action

(1) Presentation to the Court

If a plea agreement has been reached pursuant to subsection (a)(6) of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant pleads. The judge may then accept or reject the plea and, if accepted, may approve the agreement or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.

(2) Not Binding on the Court

The agreement of the State's Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.

(3) Approval of Plea Agreement

If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

Committee note: As to whether sentence imposed pursuant to an approved plea agreement may be modified on post sentence review, see *Chertkov v. State*, 335 Md. 161 (1994).

(4) Rejection of Plea Agreement

If the plea agreement is rejected, the judge shall inform the parties of this fact and advise the defendant (A) that the court is not bound by the plea agreement; (B) that the defendant may withdraw the plea; and (C) that if the defendant persists in the plea of guilty or nolo contendere, the sentence or other disposition of the action may be less favorable than the plea

agreement. If the defendant persists in the plea, the court may accept the plea of guilty only pursuant to Rule 4-242 (c) and the plea of nolo contendere only pursuant to Rule 4-242 (d).

(5) Withdrawal of Plea

If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.

(d) Record of Proceedings

All proceedings pursuant to this Rule, including the defendant's pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any of its terms would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.

(e) Notice to Victims

The State's Attorney shall give notice to each victim or victim's representative who has filed a Crime Victim Notification Request form or who has submitted a request to the State's Attorney pursuant to Code, Criminal Procedure Article, §11-104 of the terms of any plea agreement. No proceedings pertaining to guilty pleas shall be held until the court determines that the requirements of notice to victims or to victim's representatives have been satisfied.

Source: This Rule is derived from former Rule 733 and M.D.R. 733.

Rule 4-243 was accompanied by the following Reporter's Note.

> The Criminal Subcommittee is recommending the addition of a new section providing for victim's rights concerning plea agreements. This is based on a request made by the Stephanie Roper Committee, Inc.

Judge Johnson explained that this change had been recommended by the Stephanie Roper Committee, Inc., whose representatives had attended the Criminal Subcommittee meeting and are present today. (See Appendix 6). The changes which are suggested are to section (e). The Vice Chair inquired as to whether a victim is entitled to notice of plea agreements. Judge Johnson said that an agreement between the State and the defense may not have been enunciated previously, and the victim may be short changed, because he or she was not aware of the agreement. The Vice Chair asked if this refers to plea agreements or to guilty pleas. The Chair suggested that the second sentence of the proposed language could be modified to read as follows: "No guilty plea agreement shall be approved until the court determines ...". Mr. Butler, counsel to the Roper Committee, remarked that he approved of the Chair's suggested change. Mr. Bowen pointed out that the word "guilty" is not necessary in the Chair's suggested language. Judge Dryden added that it may not be a guilty plea, but an agreed statement of facts.

Judge Daniels questioned whether a cross reference to Rule 4-243 should be added to Rule 4-242, Pleas, which provides for the litany the judge must give a defendant who is pleading guilty. Judge Missouri said that his first question when he

conducts a guilty plea proceeding is whether the victim has been notified about the proceeding. Judge Daniels suggested that this should be added to Rule 4-242 (c) by a cross reference. Judge McAuliffe inquired as to at what point in time the victim receives notification to get the right to file a request. Mr. Butler answered that Code, Criminal Procedure Article, §11-104, Victim Notification, provides that within 10 days after the filing of an indictment or information, the State's Attorney must give notice to the victim. The Chair remarked that this procedure works very well. Mrs. Roper added that the proposed changes to the Rules conform them to the law. The change is similar to the change made to Rule 4-345, Sentencing--Revisory Power of Court, regarding reconsideration of sentences.

Judge McAuliffe asked if this is a policy consideration for the legislature or whether the Rule can be changed without prior action of the legislature. Delegate Vallario expressed the concern that the proposed change to the Rule will cause court proceedings to come to a standstill. The defendant may agree to a guilty plea at the last minute, and because the victim has not been notified, the plea cannot go forward. Judge Johnson responded that this is the purpose of the Rule. Delegate Vallario noted that even if the victim had been notified about the proceedings, but chose not to attend, if there is a guilty plea at the last minute, it would not be able to go forward because the victim did not know about the plea agreement.

Mr. Dean commented that he understands Delegate Vallario's position. If there is a motions hearing on a Friday, and a plea agreement is reached at that hearing, it might take a week or two until the victim can be notified for the court to be able to take the guilty plea. Judge Daniels added that the defendant may change his or her mind if there is a delay in the proceedings. The Chair pointed out that the Subcommittee recommended not mere notice of a motions hearing or trial, but rather notice of the terms of a plea agreement. The statutory requirement is specifically for notice to a victim of a plea agreement. Mr. Butler observed that the statute addresses this situation by providing that the State is to notify the victim about a plea agreement "if ... prior notice is practicable ...". The statute then provides that as soon as after a proceeding as practicable, the State's Attorney shall tell the victim of the terms of any plea agreement.

Delegate Vallario inquired as to why the proposed language has to be added to the Rule if it is already in the statute. The Chair suggested that the proposed language could be keyed to the statute by providing that the court will determine if the requirements of Code, Criminal Procedure Article, §11-104 have been met. Mrs. Roper observed that the State will carry out the responsibility of notifying the victim about a motions hearing. The victim is often told that it is not necessary for him or her to attend, because a motions hearing is routine. However, at the

hearing, the defendant agrees to plead guilty, and the victim is not present. The Chair commented that this is analogous to a plea agreement in the circuit court where the judge is willing to impose the sentence that was agreed upon by the prosecution and the defense conditioned on the fact that the defendant's background information is as good as the defendant has presented, but if the presentence investigation report shows that the defendant has a more extensive history of crime, the judge will permit the defendant to withdraw the plea. The Chair reiterated that the Rule can be keyed to the statute. Judge McAuliffe suggested that a cross reference could be added which would provide that notice to victims or victims' representatives is to be given according to the statute unless it is not practicable to do so.

The Vice Chair pointed out that the second sentence of proposed section (e) is inaccurate, because the law provides for notice after the fact. The Chair suggested that the second sentence of section (e) could read as follows: "No plea agreement shall be approved until the court determines that the requirements of Code, Criminal Procedure Article, §11-104 have been satisfied." Delegate Vallario expressed the view that the concept of notice if practicable should be included in section (e). The Chair responded that the "if practicable" language is in the Code section to which the proposed sentence refers. The Vice Chair noted that the changed language in Rule 4-345 (c)

provides that the court shall not hold a hearing unless the notice requirements have been complied with. Delegate Vallario said that the new language which provides that no proceedings shall go forward unless the victim has been notified is not part of the law. The Chair commented that the redrafted language is consistent with the statute. The victim is to be told about the proposed plea agreement and restitution. He questioned whether sentencing judges are asking if victims have been notified. The Vice Chair pointed out that judges should ask this. The State's Attorney can explain why he or she is unable to notify the victim. The law provides for notice after the fact.

Judge Kaplan suggested that the second sentence of section (e) could begin with the language "if practicable." Mr. Sykes noted that the language "if practicable" is in the statute currently. If the Rule provides that the judge has to be satisfied that statutory requirements are met, the practicability requirement will be included. Delegate Vallario agreed that the victim needs notice, but he said that this is conditioned upon notice being practicable. There will be times when giving notice to victims is not practicable. Mr. Butler inquired as to who determines what is practicable. The Chair said that if the language "if practicable" is spelled out in the first sentence of section (e), it is implied in the second sentence. Delegate Vallario suggested that the second sentence be deleted from section (e).

Mr. Bowen agreed with Delegate Vallario that the second sentence should not be part of the Rule. He suggested that the first sentence of section (e) be placed in section (a), and that in subsection (c)(3), language should be added providing for the requirement of compliance with the statute. The Vice Chair pointed out that the concept of the court determining compliance is not in the statute. Mr. Bowen remarked that section (e) is misconceived as a separate section. The issue of determining whether notice has been given should go into subsection (c)(3) as a condition of approval of the plea agreement. The Committee agreed by consensus with Mr. Bowen's suggestions. Mr. Butler asked to see the Rule once it is modified. The Chair replied that the Rule will be brought back to the Rules Committee after it has been revised.

Mr. Bowen said that the captions of the modified sections will have to be changed. The Style Subcommittee will take care of this. The Vice Chair inquired if a corresponding change should be made to Rule 4-345. The Reporter replied that this is a different situation, and a change is not necessary.

The Chair said that Kathleen Masterton, Esq., an Assistant Attorney General in the Courts and Judicial Affairs Division, had been present all morning to discuss the Expungement Rules, so they would be considered next.

Judge Johnson presented Rule 4-504, Petition for Expungement When Charges Filed, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule to add a cross reference referring to Code, Criminal Procedure Article, §10-104, as follows:

Rule 4-504. PETITION FOR EXPUNGEMENT WHEN CHARGES FILED

(a) Scope and Venue

A petition for expungement of records may be filed by any defendant who has been charged with the commission of a crime and is eligible under Code, Criminal Procedure Article, §10-105 to request expungement. The petition shall be filed in the original action. If that action was commenced in one court and transferred to another, the petition shall be filed in the court to which the action was transferred. If an appeal was taken, the petition shall be filed in the circuit court that had jurisdiction over the action.

Cross reference: See Code, Criminal Procedure Article, §10-104 which permits the District Court to order expungement of court, police, and certain other records if the State enters a nolle prosequi as to all charges in a criminal case within the District Court's jurisdiction with which the defendant has not been served.

(b) Contents - Time for Filing

The petition shall be substantially in the form set forth at the end of this Title as Form 4-504.1. The petition shall be filed within the times prescribed in Code, Criminal Procedure Article, §10-105. When required by law, the petitioner shall file with the petition a duly executed General Waiver and Release in the form set forth at the end of

this Title as Form 4-503.2.

(c) Copies for Service

The petitioner shall file with the clerk a sufficient number of copies of the petition for service on the State's Attorney and each law enforcement agency named in the petition.

(d) Procedure Upon Filing

Upon filing of a petition, the clerk shall serve copies on the State's Attorney and each law enforcement agency named in the petition.

(e) Retrieval or Reconstruction of Case File

Upon the filing of a petition for expungement of records in any action in which the original file has been transferred to a Hall of Records Commission facility for storage, or has been destroyed, whether after having been microfilmed or not, the clerk shall retrieve the original case file from the Hall of Records Commission facility, or shall cause a reconstructed case file to be prepared from the microfilmed record, or from the docket entries.

Source: This Rule is derived from former Rule EX3 b and c.

Rule 4-504 was accompanied by the following Reporter's Note.

Kathleen J. Masterton, an Assistant Attorney General in the Courts and Judicial Affairs Division of the Office of the Attorney General, pointed out that the expungement rules in Title 4, Chapter 500 do not address the situation presented by Code, Criminal Procedure Article, §10-104, which permits the District Court to order expungement of court records and related police or other records in cases in which the State's Attorney enters a nolle prosequi as to all charges in a criminal case within the jurisdiction of the District Court with which

a defendant has not been served. Rule 4-508 (c) provides that the clerk sends the expungement order to the parties, but in the case of the District Court expunging the record *sua sponte*, there are no parties. Form 4-508.1 does not fit the circumstance where there is no petitioner. The Subcommittee recommends the addition of a cross reference to the Code provision in Rule 4-504, and changes to Rule 4-508 (c) and Form 4-508.1, so that they are applicable to the situation addressed by Code, Criminal Procedure Article, §10-104.

Judge Johnson explained that a cross reference has been added at the end of section (a) to cover the situation of expungement being ordered by a District Court judge without a petition for expungement being filed. The Vice Chair inquired as to why the cross reference is being suggested for addition at the end of section (a), which pertains to the filing of a petition. Judge Johnson replied that there is no other obvious place in the Rules for it. The Committee agreed by consensus to the addition of the cross reference and approved the Rule as presented.

Judge Johnson presented Rule 4-508, Court Order for Expungement of Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-508 to change the language "all parties" to "any party," as follows:

Rule 4-508. COURT ORDER FOR EXPUNGEMENT OF RECORDS

(a) Content

An order for expungement of records shall be substantially in the form set forth at the end of this Title as Form 4-508.1, as modified to suit the circumstances of the case. If the court determines that the procedures for expungement of court records set forth in Rule 4-511 are not practicable in the circumstances, the order shall specify the alternative procedures to be followed.

Cross reference: Code, Criminal Procedure Article, §§10-103 (f) and 10-105 (f).

(b) Finality

An order of court for expungement of records, or an order denying an application or petition for expungement, is a final judgment.

Cross reference: Code, (1957, 1989 Repl. Vol.) Courts Article, §12-301.

(c) Service of Order and Compliance Form

Upon entry of a court order granting or denying expungement, the clerk forthwith shall serve a true copy of the order on ~~all parties~~ any party to the proceeding. Thirty days after the entry of an order granting expungement or upon expiration of any stay, the clerk shall serve on each custodian of records designated in the order and on the Central Repository a true copy of the order together with a blank form of Certificate of Compliance set forth at the end of this Title as Form 4-508.3.

Source: This Rule is derived from former Rule EX7.

Rule 4-508 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 4-504.

Judge Johnson explained that the change being suggested in

section (c) is a result of the comment by the Office of the Attorney General regarding expungements without a petition being filed. Mr. Sykes suggested that in place of the language "any party", it would be preferable to substitute the language "each party." Judge McAuliffe expressed the opinion that no change to the Rule is necessary. The Chair asked whether the Committee wanted to make the change suggested by the Subcommittee or by Mr. Sykes, or whether no change should be made. The Committee agreed by consensus that no change should be made.

Judge Johnson presented Form 4-508.1, Order for Expungement of Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

BAIL BOND FORMS

AMEND Form 4-508.1 to add the word "defendant" after the language "applicant/petitioner," as follows:

Form 4-508.1. Order for Expungement of Records

(Caption)

ORDER FOR EXPUNGEMENT OF RECORDS

The applicant/petitioner/defendant _____
(Name)
of_____
(Address)
having been found to be entitled to expungement of the police

records pertaining to the arrest, detention, or confinement of the applicant/petitioner/defendant on or about _____, (Date) at _____ , Maryland, by a law enforcement officer of the _____ _____ (Law Enforcement Agency) and the court records in this action, it is by the _____ _____ Court for _____ _____ City/County, Maryland, this _____ day of _____ , _____. (Month) (Year)

ORDERED that the clerk forthwith shall serve a true copy of this Order on each of the parties to this proceeding; and it is further

ORDERED that 30 days after entry of this Order or upon expiration of any stay, the clerk shall serve on each custodian of police and court records designated in this Order and on the Central Repository a copy of this Order together with a blank form of Certificate of Compliance; and it is further

ORDERED that within 30 days after service of this Order the clerk and the following custodians of court and police records and the Central Repository shall (1) expunge all court and police records pertaining to this action or proceeding in their custody, (2) file an executed Certificate of Compliance, and (3) serve a copy of the Certificate of Compliance on the applicant/ petitioner/defendant.

_____

(Custodian) (Address)

_____

_____

_____

_____

_____

_____

Date Judge

Form 4-508.1 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-504.

Judge Johnson explained that the Subcommittee is suggesting the addition of the word "defendant" after the words "applicant/petitioner" to cover the situation when there is no applicant or petitioner. The Committee agreed by consensus to the changes to Form 4-508.1 and approved the form as presented.

Agenda Item 3. Consideration of proposed amendments to Rules 2-541 (Masters) and 9-208 (Referral of Matters to Masters)

_____

After the lunch break, the Chair presented Rules 2-541, Masters, and 9-208, Referral of Matters to Masters, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-541 to clarify that no domestic relations matter may be referred to a master except in accordance with Rule 9-208, as follows:

Rule 2-541. MASTERS

OPTION 1

. . .

(b) Referral of Cases

(1) No domestic relations matter may be referred to a master under this Rule. Referral of domestic relations matters to a master shall be in accordance with Rule 9-208 and shall proceed only in accordance with that Rule.

(2) On motion of any party or on its own initiative, the court, by order, may refer to a master any other matter or issue not triable of right before a jury.

. . .

Rule 2-541 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-541 clarifies that any referral of a domestic relations matter to a master must be in accordance with Rule 9-208 and may not be made under Rule 2-541.

Option 1 is the proposed change that is recommended by the Trial Subcommittee, in response to a letter dated September 19, 2001 from Chief Judge Robert M. Bell. "Options 2A and 2B" attached, are two alternative approaches for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-541 to allow referral of matters to a master under the Rule only on agreement of the parties, as follows:

Rule 2-541. MASTERS

(a) Appointment -- Compensation

(1) Standing Master

A majority of the judges of the circuit court of a county may appoint a full time or part time standing master and shall prescribe the compensation, fees, and costs of the master. No person may serve as a standing master upon reaching the age of 70 years.

(2) Special Master

The court may appoint a special master for a particular action and shall prescribe the compensation, fees, and costs of the special master and assess them among the parties. The order of appointment may specify or limit the powers of a special master and may contain special directions.

(3) Officer of the Court

A master serves at the pleasure of the appointing court and is an officer of the court in which the referred matter is pending.

OPTION 2A

(b) Referral of Cases

(1) Referral of domestic relations matters to a master shall be in accordance with Rule 9-208 and shall proceed in accordance with that Rule.

(2) ~~On motion of any party or on its own initiative, the court, by order, may refer to a master~~ By agreement of the parties, any other matter or issue ~~not triable of right before a jury~~ may be referred to a master by order of the court.

OPTION 2B

(b) Referral of Cases

(1) Referral of domestic relations matters to a master shall be in accordance with Rule 9-208 and shall proceed in accordance with that Rule.

(2) ~~On motion of any party or on its own initiative, the court, by order, may refer to a master~~ By agreement of the parties, any other matter or issue not triable of right before a jury may be referred to a master by order of the court.

(c) Powers

Subject to the provisions of any order of reference, a master has the power to regulate all proceedings in the hearing, including the powers to:

(1) Direct the issuance of a subpoena to compel the attendance of witnesses and the production of documents or other tangible things;

(2) Administer oaths to witnesses;

(3) Rule upon the admissibility of evidence;

(4) Examine witnesses;

(5) Convene, continue, and adjourn the

hearing, as required;

(6) Recommend contempt proceedings or other sanctions to the court; and

(7) Recommend findings of fact and conclusions of law.

(d) Hearing

(1) Notice

The master shall fix the time and place for the hearing and shall send written notice to all parties.

(2) Attendance of Witnesses

A party may procure by subpoena the attendance of witnesses and the production of documents or other tangible things at the hearing.

(3) Record

All proceedings before a master shall be recorded either stenographically or by an electronic recording device, unless the making of a record is waived in writing by all parties. A waiver of the making of a record is also a waiver of the right to file any exceptions that would require review of the record for their determination.

(e) Report

(1) When Filed

The master shall notify each party of the proposed recommendation, either orally at the conclusion of the hearing or thereafter by written notice served pursuant to Rule 1-321. Within five days from an oral notice or from service of a written notice, a party intending to file exceptions shall file a notice of intent to do so and within that time shall deliver a copy to the master. If the court has directed the master to file a report or if a notice of intent to file exceptions is filed, the master shall file a written report with the recommendation.

Otherwise, only the recommendation need be filed. The report shall be filed within 30 days after the notice of intent to file exceptions is filed or within such other time as the court directs. The failure to file and deliver a timely notice is a waiver of the right to file exceptions.

(2) Contents

Unless otherwise ordered, the report shall include findings of fact and conclusions of law and a recommendation in the form of a proposed order or judgment, and shall be accompanied by the original exhibits. A transcript of the proceedings before the master need not be prepared prior to the report unless the master directs, but, if prepared, shall be filed with the report.

(3) Service

The master shall serve a copy of the recommendation and any written report on each party pursuant to Rule 1-321.

(f) Entry of Order

(1) The court shall not direct the entry of an order or judgment based upon the master's recommendations until the expiration of the time for filing exceptions, and, if exceptions are timely filed, until the court rules on the exceptions.

(2) If exceptions are not timely filed, the court may direct the entry of the order or judgment as recommended by the master.

(g) Exceptions

(1) How Taken

Within ten days after the filing of the master's written report, a party may file exceptions with the clerk. Within that period or within three days after service of the first exceptions, whichever is later, any other party may file exceptions. Exceptions shall be in writing and shall set forth the asserted error with particularity. Any

matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.

(2) Transcript

Unless a transcript has already been filed, a party who has filed exceptions shall cause to be prepared and transmitted to the court a transcript of so much of the testimony as is necessary to rule on the exceptions. The transcript shall be ordered at the time the exceptions are filed, and the transcript shall be filed within 30 days thereafter or within such longer time, not exceeding 60 days after the exceptions are filed, as the master may allow. The court may further extend the time for the filing of the transcript for good cause shown. The excepting party shall serve a copy of the transcript on the other party. Instead of a transcript, the parties may agree to a statement of facts or the court by order may accept an electronic recording of the proceedings as the transcript. The court may dismiss the exceptions of a party who has not complied with this section.

(h) Hearing on Exceptions

The court may decide exceptions without a hearing, unless a hearing is requested with the exceptions or by an opposing party within five days after service of the exceptions. The exceptions shall be decided on the evidence presented to the master unless: (1) the excepting party sets forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the master, and (2) the court determines that the additional evidence should be considered. If additional evidence is to be considered, the court may remand the matter to the master to hear the additional evidence and to make appropriate findings or conclusions, or the court may hear and consider the additional evidence or conduct a de novo hearing.

(i) Costs

Payment of the compensation, fees, and costs of a master may be compelled by order of court. The costs of any transcript may be included in the costs of the action and assessed among the parties as the court may direct.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 596 b.
Section (b) is derived in part from former Rule 596 c.
Section (c) is derived in part from former Rule 596 d.
Subsections (6) and (7) are new but are consistent with former Rule 596 f 1 and g 2.
Section (d) is in part new and in part derived from former Rule 596 e.
Section (e) is derived from former Rule 596 f.
Section (f) is new.
Section (g) is derived from former Rule 596 h 1, 2, 3, 4 and 7 except that subsection 3 (b) of section h of the former Rule is replaced.
Section (h) is derived from former Rule 596 h 5 and 6.
Section (i) is derived from former Rule 596 h 8 and i.

Rule 2-541 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-541 allows referrals to a master under the Rule only on agreement of the parties. In Option 2A, the phrase "not triable as of right before a jury" is proposed to be deleted as unnecessary because if the parties have agreed to have a matter heard by a master, they implicitly have waived the right to have the matter heard by a jury. In Option 2B, that phrase is retained, so that no matter or issue triable of right before a jury may be heard by a master.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-208 (a) to delete a certain phrase as unnecessary, as follows:

Rule 9-208. REFERRAL OF MATTERS TO MASTERS

(a) Referral

(1) As of Course

If a court has a full-time or part-time standing master for domestic relations matters and a hearing has been requested or is required by law, the following matters arising under this Chapter shall be referred to the master as of course unless the court directs otherwise in a specific case:

(A) uncontested divorce, annulment, or alimony;

(B) alimony pendente lite;

(C) child support pendente lite;

(D) support of dependents;

(E) preliminary or pendente lite possession or use of the family home or family-use personal property;

(F) subject to Rule 9-205, pendente lite custody of or visitation with children or modification of an existing order or judgment as to custody or visitation;

(G) subject to Rule 9-205 as to child access disputes, constructive civil contempt by reason of noncompliance with an order or judgment relating to custody of or visitation with a minor child, the payment of alimony or support, or the possession or use of the

family home or family-use personal property, following service of a show cause order upon the person alleged to be in contempt;

(H) modification of an existing order or judgment as to the payment of alimony or support or as to the possession or use of the family home or family-use personal property;

(I) counsel fees and assessment of court costs in any matter referred to a master under this Rule;

(J) stay of an earnings withholding order; and

(K) such other matters arising under this Chapter and set forth in the court's case management plan filed pursuant to Rule 16-202 b.

Committee note: Examples of matters that a court may include in its case management plan for referral to a master under subsection (a)(1)(J) of this Rule include scheduling conferences, settlement conferences, uncontested matters in addition to the matters listed in subsection (a)(1)(A) of this Rule, and the application of methods of alternative dispute resolution.

(2) By Order on Agreement of the Parties

By agreement of the parties, any other matter or issue arising under this Chapter ~~that is not triable of right before a jury~~ may be referred to the master by order of the court.

. . .

Rule 9-208 was accompanied by the following Reporter's Note.

Rule 9-208 (a) is proposed to be amended to delete the phrase "that is not triable of right before a jury" as unnecessary, because no matter or issue arising under Title 9, Chapter 200 is triable of right before a jury.

The Chair said that Chief Judge Bell had written a letter to him regarding a possible conflict between Rule 2-541 (b)(2) and new Rule 9-208. A copy of the letter is included in the meeting materials. (See Appendix 7). The Rules Committee thought that the problems with the Rules had been solved. The problem seemed to be that the Court of Appeals was concerned that when one party objects to a master hearing the case, the circuit court would still able to send the case to a master. The Chair commented that Mr. Johnson is the chair of the Trial Subcommittee, but due to illness, he is not present today to discuss the Rules. Judge Missouri can explain the situation. The Reporter pointed out that Mr. Johnson had spoken to Chief Judge Bell who had told Mr. Johnson that any of the drafts of the Rules which had been circulated were appropriate. Judge Missouri explained that there is no concern about subsection (b)(2) of Rule 2-541. Subsection (a)(2) addresses the special master. The Reporter pointed out that subsection (b)(2) pertains to referrals to special masters appointed pursuant to subsection (a)(2), as well as to referrals to standing masters appointed pursuant to subsection (a)(1). Under Option 2A or 2B, subsection (b)(2) would require the agreement of the parties before a matter is referred to a master under Rule 2-541. Rule 2-541 is not a domestic relations rule, but Rule 9-208 is.

The Vice Chair inquired as to what kinds of cases Rule 2-541 would apply. Judge Missouri answered that an example would be a

construction case where the special master would take testimony as to cost overruns. The Chair referred to a case where a special master was appointed to find out what inheritance money was owed to the sister of someone who commingled the funds of his father's estate with other money. The Chair suggested that this matter be deferred until the February meeting, at which time Mr. Johnson can report on his discussions with Chief Judge Bell. Judge McAuliffe added that a special master can be appointed to handle boundary and title disputes. There is statutory authority to appoint special masters in matters not triable of right by a jury. Mr. Bowen suggested that instead of the language "not triable of right by a jury", the following language should be substituted "one that is not scheduled for trial by jury." The Chair stated that this issue would be deferred until Mr. Johnson is present.

Agenda Item 2. Consideration of proposed amendments to certain rules, recommended by the District Court Subcommittee: Rule 3-311 (Motions), Rule 3-115 (Attachment Before Judgment), Rule 3-303 (Form of Pleadings), Rule 3-401 (General Provisions Governing Discovery), Rule 3-421 (Interrogatories to Parties), Rule 3-643 (Release of Property from Levy), and Rule 3-325 (Jury Trial)

Judge Dryden presented Rule 3-311, Motions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 3-311 to establish a time to respond to a motion, to change the time within which a party who is served with a motion may file a request for a hearing, and to make hearings on certain motions discretionary, as follows:

Rule 3-311. MOTIONS

(a) Generally

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, and shall set forth the relief or order sought.

(b) Response

Except as otherwise provided in this section, a party against whom a motion is directed shall file a response within ten days after being served with the motion, or within the time allowed for the filing of a notice of intention to defend by the party pursuant to Rule 3-307 (b), whichever is later. Unless the court orders otherwise, no response need be filed to a motion filed pursuant to Rules 1-204, 3-533, or 3-534. If a party fails to file a response required by this section, the court may proceed to rule on the motion.

~~(b)~~ (c) Statement of Grounds; Exhibits

A written motion and a response to a motion shall state with particularity the grounds. A party shall attach as an exhibit to a written motion or response any document that the party wishes the court to consider in ruling on the motion or response unless the document is adopted by reference as permitted by Rule 3-303 (d) or set forth as permitted by Rule 3-421 (g).

~~(c)~~ (d) Hearing - Motions for New Trial or to Amend the Judgment

When a motion is filed pursuant to Rule 3-533 or 3-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.

~~(d)~~ (e) Hearing - Other Motions

A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 3-533 or 3-534, shall file a timely written request. The request of the moving party shall be included in the motion under the heading "Request for Hearing," and the request of a party served with a motion shall be made by filing a "Request for Hearing" within ~~five~~ ten days after service. ~~Upon a timely request, a hearing shall be held except as provided in Rule 3-421 (g).~~ Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but it may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section. If the court decides to hold a hearing, ~~The~~ the court may hear and decide the motion before or at trial. If no hearing is requested, the court may decide the motion without a hearing at any time.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 321 a.
Section (b) is new.
Section ~~(b)~~ (c) is derived from former M.D.R. 321 a.
Section ~~(c)~~ (d) is derived from former Rule 321 d.
Section ~~(d)~~ (e) is derived in part from former M.D.R. 321 b and is in part new.

Rule 3-311 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 3-311 are twofold and are based upon recommendations of former Chief Judge Martha F. Rasin and the administrative judges of the District Court. The Honorable James N. Vaughan, the current Chief Judge of the

District Court, concurs in the recommendations.

New section (b) is proposed to be added to the Rule to establish a specific period of time within which a party against whom a motion is directed may file a response. The District Court Subcommittee recommends that the time allowed for the response be ten days after the party is served with the motion, with certain exceptions set out in the section. The language of the section is patterned after Rule 2-311 (b).

Section (d) is proposed to be relettered (e) and amended to allow the Court discretion as to whether a hearing will be held on a motion, except that a decision that is dispositive of a claim or defense may not be rendered without a hearing if one was requested as provided in the section. The language proposed to be added to the section is patterned after Rule 2-311 (f). The time within which a party who is served with a motion may file a request for a hearing is changed from five days to ten days, in conformity with the time for filing a response set out in section (b).

As requested by the Rules Committee at its February 2001 meeting, the District Court Subcommittee also considered two questions pertaining to Rule 3-311:

(1) Should an “Affidavit” requirement similar to Rule 2-311 (d) be added to Rule 3-311?

(2) Should a provision be added to the Rule to the effect that the filing of a motion will not delay the trial date?

The Subcommittee answered both in the negative. The Subcommittee believes that adding an affidavit requirement would make the Rule unnecessarily complicated and would result in a potential “trap” for *pro se* litigants. As to the second question, the Subcommittee believes it is desirable for the Court to maintain flexibility in determining whether a postponement is appropriate.

> In conjunction with its discussion of Rule 3-311, the Subcommittee also considered two proposals that had been referred to it concerning adding two pretrial procedures to the Rules in Title 3 –- summary judgment (similar to Rule 2-501) and a request for admission of facts and genuineness of documents (similar to Rule 2-424). Because the District Court is intended to be a "people's court" in which cases proceed quickly to trial and there are numerous *pro se* litigants, the Subcommittee believes that neither proposal is advisable at this time.

Judge Dryden explained that the amendments to Rule 3-311 resulted from recommendations of former District Court Chief Judge Martha F. Rasin and the administrative judges of the District Court. Chief Judge James N. Vaughan is in agreement with the proposed changes. Proposed new section (b) provides for a ten-day response time to a motion. The first time this proposal was presented to the Rules Committee, the members questioned whether the District Court administrative judges were in agreement with it. The Committee also was concerned that time requirements be consistent. The District Court administrative judges committee and the District Court Subcommittee of the Rules Committee felt that ten days was an appropriate time to file a response after being served with a motion.

Judge Dryden stated that section (e) also contains changes. The time for filing a request for a hearing has been extended from five to ten days. New language has been added which provides that other than when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing

will be held, but it may not render a decision that is dispositive of a claim or defense without a hearing if one was properly requested. The response time was added, because the cases in the District Court have become more complex, since the jurisdictional limit was increased. Nothing currently in the Rules provides for a response time, and it is different in various jurisdictions.

The Chair pointed out the danger of an increase in postponements. One party may have filed a motion and a request for a hearing, and the answer of the other side is not due. Judge Dryden responded that that issue had been raised and could cause a problem. The trial date could be changed to become the motion hearing date, and the trial postponed. Alternatively, the motion could be heard on the trial date before the trial commences and, if the case were to go forward to trial on the merits, the parties can be warned ahead of time to be prepared. One of the attributes of the District Court is that cases are moved through inexpensively and efficiently. The Chair suggested that the Rule provide that when a motion or a request for a hearing is filed within ten days of the trial date, the motion should be heard on the trial date. No postponements should be allowed just because the motion was filed within ten days of the trial date. He expressed his concern that any ambiguity could cause the opposite effect of the requirement of a hearing, suggesting that the trial should be postponed. The Reporter noted that Rule 2-311, Motions, does not provide anything to

safeguard the trial date. Ms. Ogletree observed that the parties should be prepared to argue the motion and then proceed to trial.

The Vice Chair remarked that there may be times when a valid dispositive motion is filed within a relatively short time before the trial. The motion should be heard on either the trial date or at another time -– if the trial is not going to take place, there is no point in having the witnesses attend. Mr. Klein noted that it would be helpful to have summary judgment in District Court cases. The Chair suggested that the following language be added to section (a) of Rule 3-311: "unless the court orders otherwise, the motion shall be decided on the day of but before trial."

Mr. Titus suggested that there could be a date set, such as ten days before the trial date, after which no dispositive motion may be filed. It should be made clear, however, that any such prohibition does not authorize the clerk to refuse to accept a late-filed motion.

Ms. Ogletree commented that a problem arises when one party is *pro se*, and the other side hires an attorney. The *pro se* party may decide to hire an attorney at the last minute, and then the attorney files a motion. The District Court should be user-friendly. The motion may be legitimate. Lay people cannot be expected to understand a ten-day limit on motions. Mr. Titus suggested that language could be added to the notice of intention to defend form which would explain about the ten-day time

requirement to file a motion. Judge Dryden responded that it would be difficult to adapt the form to give this information and make it easy to understand.

Ms. Potter suggested that a cross reference to Rule 1-203, Time, should be added to Rule 3-311, which would explain how to compute the ten-day response time set out in section (b). The Committee agreed by consensus to this suggestion. Mr. Sykes remarked that Rule 2-311 provides that a party "shall" file a response within a certain time limit. The Vice Chair pointed out that parties in circuit court commonly file a response, or they risk having the matter decided by default. The same principle applies to Rule 3-311. Judge McAuliffe noted that this would not be a default; the judge would decide the motion on the merits. The use of the word "shall" in the first sentence of proposed section (b) could mean that failure to file a response is a default. The Vice Chair pointed out that the use of the word "shall" in Rule 2-311 has not caused a problem. Judge McAuliffe suggested that the circuit court rule should be changed, also. The Chair expressed the view that Rule 2-311 is worded correctly. Judge Daniels suggested that Rule 3-311 could provide that a response, if any, is to be filed within an agreed upon time period. Judge Dryden suggested that the word "shall" be changed to the word "may." The Vice Chair responded that this change would not be clear. Mr. Sykes said that the Style Subcommittee can reword the new provision.

Judge McAuliffe suggested that language could be added to

section (e) of Rule 3-311 which would provide that a motion filed within ten days of trial may be heard on the trial date, and the filing of the motion does not provide grounds for a continuance of the trial. Ms. Potter pointed out that the request for a continuance may be for a meritorious reason, such as because the star witness is in the hospital. The Chair suggested that the Rule provide as follows: "Unless the court orders otherwise, a motion filed within ten days of the trial date shall be decided on the trial date." Ms. Ogletree remarked that this is what happens in District Court. Judge Dryden expressed his agreement with the Chair's suggestion.

Ms. Potter asked if there is any discretion to change the date of the motion hearing. The Vice Chair pointed out that the language "unless the court orders otherwise" would provide discretion. The Chair said that the motion would be decided before the merits of the case are decided. Ms. Ogletree noted that the motion could raise the issue of personal jurisdiction. The Chair said that the concept of the court ordering otherwise can take care of this. The Committee agreed by consensus to the Chair's suggested change.

The Vice Chair pointed out that the existing part of section (e) can be conformed to section (f) of Rule 2-311. Previously, no response time was provided for in District Court, but with the addition of section (b), section (e) can be conformed to the circuit court rule plugging in the language "[a] party desiring a hearing on a motion ... shall so request in

the motion." Ms. Ogletree remarked that *pro se* parties may not know what a response is. The Chair said that the language in the last sentence of Rule 2-311 (f) and the third sentence of section (e) of Rule 3-311, which provides that the court shall determine in each case whether a hearing will be held, takes care of the problem. The Style Subcommittee can redraft section (e).

Judge Dryden noted that the time period for filing a notice of intention to defend to which proposed section (b) refers is 15 days. The Vice Chair commented that a motion filed prior to any time for filing a notice of intention to defend affords a longer period of time. She observed that the references to Rule 3-311 (d) in section (h) of Rules 3-115, Attachment Before Judgment, and section (f) of Rule 3-643, Release of Property from Levy, will have to be changed, because of the addition of the new section (b) to Rule 3-311. Ms. Potter remarked that the language in section (b) of Rule 3-311 referring to the time to file a response, which is the later of ten days after being served with a motion or the time allowed for the filing of a notice of intention to defend, may not be understood by a *pro se* individual. The Vice Chair commented that this language may need to be rewritten. The time period allowed for the filing a notice of intention to defend runs from the date of service. The Chair said that it could be worded as the date the person is served with a motion or served with a complaint. Judge Dryden remarked that he reads the language in section (b) as providing for 15

days to file a response.

The Chair suggested that section (b) could provide that if a motion is filed with the complaint or within five days, a response may be filed within the time allowed for the filing of a notice of intention to defend. The Reporter pointed out that Rule 3-307 (b) allows a defendant who is served outside of the state 60 days to file a response, and commented that the Style Subcommittee can change the language so that it is clear how much time is allowed. Ms. Ogletree asked if a problem exists with filing motions on the eve of trial. Judge Dryden said that *pro se* parties have to be given some leeway.

The Committee approved the Rule as amended.

Judge Dryden presented Rule 3-115, Attachment Before Judgment, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE — DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 3-115 to conform it to the relettering of Rule 3-311, as follows:

Rule 3-115. ATTACHMENT BEFORE JUDGMENT

. . .

(h) Release of Property or Dissolution of Attachment

A defendant who has appeared may

obtain release of the attached property by posting a bond in an amount equal to the value of the property, as determined by the court, or in the amount of the plaintiff 's claim, whichever is less, conditioned upon satisfaction of any judgment that may be recovered.

Upon motion of a defendant who has appeared, the court may release some or all of the attached property if it finds that (1) the complaint has been dismissed or settled, (2) the plaintiff has failed to comply with the provisions of this Rule or an order of court regarding these proceedings, (3) the plaintiff fails to demonstrate the probability of success on the merits, (4) property of sufficient value to satisfy the claim and probable cost will remain subject to the attachment after the release, or (5) the attachment of the specific property will cause undue hardship to the defendant and the defendant has delivered to the sheriff or made available for levy alternative property sufficient in value to satisfy the claim and probable costs.

Upon motion of a defendant or garnishee, the court may release some or all of the attached property on the ground that by law the property is automatically exempt from attachment without the necessity of election or it may dissolve the attachment on the ground that the plaintiff is not entitled to attachment before judgment. If the motion is filed before the defendant's notice of intention to defend is due pursuant to the Rule 3-307, its filing shall be treated as an appearance for that purpose only. A party desiring a hearing on a motion filed pursuant to this section shall so request pursuant to Rule 3-311 ~~(d)~~ (e) and, if requested, a hearing shall be held promptly.

. . .

Rule 3-115 was accompanied by the following Reporter’s Note.

The proposed amendment to Rule 3-115 conforms the Rule to the relettering of Rule

3-311.

The Committee approved the Rule as presented.

Judge Dryden presented Rule 3-303, Form of Pleadings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 3-303 to conform it to the relettering of Rule 3-311, as follows:

Rule 3-303. FORM OF PLEADINGS

. . .

(e) Construction of Pleadings

All pleadings shall be so construed as to do substantial justice.

Cross reference: Rules 1-301; 1-311 through 1-313.

. . .

Committee note: This Rule, authorizing the adoption by reference of statements in "papers of record" other than pleadings, must be read in conjunction with Rule 3-311 ~~(c)~~ (d), which requires documents to be attached to a motion or response, incorporated by reference, or set forth verbatim as permitted by Rule 3-421 (g). The court need not consider a document in ruling on a motion unless the document is (1) attached as an exhibit, (2) filed and incorporated by reference, or (3) set forth verbatim in a motion to compel discovery. Since Rule 3-401

(b) prohibits the routine filing of discovery materials, any party who wishes the court to consider them will have to use one of these methods.

. . .

Rule 3-303 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 3-303 conforms the Rule to the relettering of Rule 3-311.

The Committee approved the Rule as presented.

Judge Dryden presented Rule 3-401, General Provisions Governing Discovery, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 3-401 to conform it to the relettering of Rule 3-311, as follows:

Rule 3-401. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods

Except as otherwise provided in this Title, a party may obtain discovery by written interrogatories and, if a written stipulation is filed in the action, by deposition upon oral examination or written questions. The taking and use of a deposition permitted under this Rule shall be in accordance with Chapter 400 of Title 2.

(b) Discovery Materials

(1) Defined

For purposes of this section, the term "discovery material" means a notice of deposition, an objection to the form of a notice of deposition, the questions for a deposition upon written questions, an objection to the form of the questions for a deposition upon written questions, a deposition transcript, interrogatories, and a response to interrogatories.

(2) Not to be Filed with Court

Except as otherwise provided in these rules or by order of court, discovery material shall not be filed with the court. Instead, the party generating the discovery material shall file with the court a notice stating (A) the type of discovery material served, (B) the date and manner of service, and (C) the party or person served. The party generating the discovery material shall retain the original and shall make it available for inspection by any other party. This section does not preclude the use of discovery material at trial or as exhibits to support or oppose motions.

Cross reference: Rule 3-311 ~~(b)~~ (c).

Committee note: Rule 1-321 requires that the notice be served on all parties. Rule 1-323 requires that it contain a certificate of service.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 401 b and 405.
Section (b) is new.

Rule 3-401 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 3-401 conforms the Rule to the relettering of Rule 3-311.

The Committee approved the Rule as presented.

Judge Dryden presented Rule 3-421, Interrogatories to

Parties, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 3-421 (g) to conform a certain time requirement to a proposed amendment to Rule 3-311 and to delete the phrase "without a hearing," as follows:

Rule 3-421. INTERROGATORIES TO PARTIES

(a) Scope

Unless otherwise limited by order of the court in accordance with this Rule, the scope of discovery by interrogatories is as follows:

(1) Generally

A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not ground for objection that the information sought is already known to or otherwise obtainable by the party seeking discovery or that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. An interrogatory otherwise proper is not objectionable merely because the response involves an opinion or contention that relates to fact or the application of law to fact.

(2) Insurance Agreements

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement.

(3) Request for Documents by Interrogatory

A party by interrogatory may request the party upon whom the interrogatory is served to attach to the response or submit for inspection the original or an exact copy of the following:

(A) any written instrument upon which a claim or defense is founded;

(B) a statement concerning the action or its subject matter previously made by the party seeking discovery, whether a written statement signed or otherwise adopted or approved by that party, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement made by that party and contemporaneously recorded; and

(C) any written report, whether acquired or developed in anticipation of litigation or for trial, made by an expert whom the responding party expects to call as an expert witness at trial. If the responding party fails to furnish a written report requested pursuant to this subsection, the court, upon motion of the discovering party, may enter any order that justice requires, including an order refusing to admit the testimony of the expert.

(b) Availability; Number; Time for Filing

Any party may serve written interrogatories directed to any other party. Unless the court orders otherwise, a party may serve only one set of not more than 15 interrogatories to be answered by the same party. Interrogatories, however grouped, combined or arranged and even though subsidiary or incidental to or dependent upon other interrogatories, shall be counted separately. The plaintiff may serve interrogatories no later than ten days after the date on which the clerk mails the notice required by Rule 3-307 (d). The defendant may serve interrogatories no later than ten days after the time for filing a notice of intention to defend.

(c) Protective Order

On motion of a party filed within five days after service of interrogatories upon that party, and for good cause shown, the court may enter any order that justice requires to protect the party from annoyance, embarrassment, oppression, or undue burden or expense.

(d) Response

The party to whom the interrogatories are directed shall serve a response within 15 days after service of the interrogatories or within five days after the date on which that party's notice of intention to defend is required, whichever is later. The response shall answer each interrogatory separately and fully in writing under oath, or shall state fully the grounds for refusal to answer any interrogatory. The response shall set forth each interrogatory followed by its answer. An answer shall include all information available to the party directly or through agents, representatives, or attorneys. The response shall be signed by the party making it.

(e) Option to Produce Business Records

When (1) the answer to an

interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of those business records or a compilation, abstract, or summary of them, and (2) the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, and (3) the party upon whom the interrogatory has been served has not already derived or ascertained the information requested, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(f) Supplementation of Response

A party who has responded to interrogatories and who obtains further material information before trial shall supplement the response promptly.

(g) Motion for Order Compelling Discovery

Within five days after service of the response, the discovering party may file a motion for an order compelling discovery in order to challenge an answer or refusal to answer an interrogatory. The motion shall set forth the interrogatory, the answer or objection, and the reasons why discovery should be compelled. A response to the motion may be filed within ~~five~~ ten days after its service. Promptly after the time for the response has expired, the court shall decide the motion ~~without a hearing~~.

(h) Sanctions for Failure to Respond

When a party to whom interrogatories

are directed fails to serve a response after proper service of the interrogatories, the discovering party, upon reasonable notice to other parties, may move for sanctions. The court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including an order refusing to allow the failing party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence, or an order striking out pleadings or parts thereof, staying further proceedings until the discovery is provided, dismissing the action or any part thereof, or entering a judgment by default against the failing party if the court is satisfied that it has personal jurisdiction over that party.

Cross reference: Rule 1-341.

(i) Use of Answers

Answers served by a party to interrogatories may be used by any other party at the trial or a hearing to the extent permitted by the rules of evidence. If only part of an answer is offered in evidence by a party, an adverse party may require the offering party to introduce at that time any other part that in fairness ought to be considered with the part offered.

Cross reference: Rule 1-204.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 417 e.
Section (b) is derived from former M.D.R. 417 a.
Section (c) is derived from former M.D.R. 417 f.
Section (d) is derived from former M.D.R. 417 b.
Section (e) is derived from former M.D.R. 417 e 4.
Section (f) is new.
Section (g) is derived from former M.D.R. 417 c.
Section (h) is derived from former M.D.R. 417 d.

> Section (i) is derived from former M.D.R. 417 g.

Rule 3-421 was accompanied by the following Reporter's Note.

> The proposed amendment to Rule 3-421 (g) conforms the time allowed for filing a response to a motion for an order compelling discovery to a proposed amendment to Rule 3-311 that allows ten days for responses to motions, generally.
>
> Additionally, the phrase "without a hearing" is proposed to be deleted. The deletion harmonizes the Rule with the proposed amendments to Rule 3-311, which gives the Court discretion as to whether or not a hearing will be held.

Judge Dryden explained that the District Court Subcommittee is proposing to amend section (g) to change the time to respond to a motion for an order compelling discovery from five to ten days and to delete the language in the fourth sentence which reads "without a hearing." The Vice Chair asked if the third sentence of section (g) is necessary, since there is a general response provision relating to motions. The Committee agreed by consensus to delete the third sentence. The Reporter pointed out that the last sentence is intended to encourage the judge to rule more promptly on the motion. The Vice Chair suggested that the language "the response" be changed to the language "a response." The Committee agreed by consensus to this suggestion. Mr. Titus suggested a change to Rule 3-421 to include the last sentence of section (a) of Rule 2-421 which reads as follows: "Each form interrogatory contained in the Appendix to these Rules shall

count as a single interrogatory." He moved that a version of this language be added to section (b) of Rule 3-421 after the third sentence. The Committee approved this suggestion by consensus. The Committee approved the Rule as amended.

Judge Dryden presented Rule 3-643, Release of Property From Levy, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 3-643 to conform it to the relettering of Rule 3-311, as follows:

Rule 3-643. RELEASE OF PROPERTY FROM LEVY

. . .

(f) Hearing

A party desiring a hearing on a motion filed pursuant to this Rule shall so request pursuant to Rule 3-311 ~~(d)~~ (e) and, if requested, a hearing shall be held promptly.

. . .

Rule 3-643 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 3-643 conforms the Rule to the relettering of Rule 3-311.

The Committee approved the Rule as presented.

Judge Dryden presented Rule 3-325, Jury Trial, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 3-325 to add language to section (c) allowing the District Court to determine that an action is not triable of right by a jury, as follows:

Rule 3-325. JURY TRIAL

(a) Demand - Time for Filing

(1) By Plaintiff

A plaintiff whose claim is within the exclusive jurisdiction of the District Court may elect a trial by jury of any action triable of right by a jury by filing with the complaint a separate written demand therefor.

(2) By Defendant

A defendant, counter-defendant, cross-defendant, or third-party defendant may elect a trial by jury of any action triable of right by a jury by filing a separate written demand therefor within ten days after the time for filing a notice of intention to defend.

(b) Waiver

The failure of a party to file the demand as provided in section (a) of this Rule constitutes a waiver of trial by jury of the action for all purposes, including trial on appeal.

(c) Transmittal of Record to Circuit Court

When a timely demand for jury trial is filed, the clerk shall transmit the record to the circuit court within 15 days. At any time before the record is transmitted pursuant to this section, the District Court may determine, on its own initiative or on motion of a party, that the demand for jury trial was not timely filed or that the action is not triable of right by a jury.

Cross reference: Code, Courts Article,

§4-402 (e)(2).

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 343 b and c.
Section (b) is derived from former M.D.R. 343 a.
Section (c) is derived from former M.D.R. 343 d and e.

Rule 3-325 was accompanied by the following Reporter's Note.

In response to Pickett v. Sears, 365 Md. 67 (2001), the District Court Subcommittee recommends an amendment to Rule 3-325 that allows the District Court to determine, after a demand for a jury trial has been filed, whether the action is triable of right by a jury. The amendment allows the Court to prevent the automatic transfer of the case to the circuit court if the action is not triable of right by a jury (e.g., if the amount in controversy does not exceed $10,000).

Judge Dryden explained that the case of Pickett v. Sears, 365 Md. 67 (2001) holds that a District Court judge has the authority to deny a prayer for a jury trial only if it is untimely filed. In the area of landlord-tenant law, there has been a change so that the District Court has authority over timeliness, the amount of the controversy, and whether or not a valid waiver exists. The Subcommittee recommends that Rule 3-325 (c) be changed to reflect that the judge can determine whether an action is triable of right by a jury. This solves the problem of frivolous requests for a jury trial being sent to the circuit court. This is consistent with Code, Courts and Judicial Proceedings, §4-402 (e)(2). The Committee agreed by consensus to

the addition of the language to section (c) and approved the Rule as presented.

Agenda Item 1. Consideration of proposed amendments to certain rules and form, recommended by the Criminal Rules Subcommittee: Rule 4-216 (Pretrial Release), Rule 4-217 (Bail Bonds, Rule 4-243 (Plea Agreements), Rule 4-342 (Sentencing - Procedure in Non-Capital Cases), Rule 4-343 (Sentencing - Procedure in Capital Cases), Rule 4-351 (Commitment Record), Rule 4-504 (Petition for Expungement When Charges Filed), Rule 4-508 (Court Order for Expungement of Records), and Form 4-508.1 (Order for Expungement of Records) (Continued)

Judge Johnson presented Rule 4-342, Sentencing–Procedure in Non-Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 to add a new section providing for the right of victims or victim's representatives to address the court, as follows:

Rule 4-342. SENTENCING -- PROCEDURE IN NON-CAPITAL CASES

(a) Applicability

This Rule applies to all cases except those governed by Rule 4-343.

(b) Statutory Sentencing Procedure

When a defendant has been found guilty of murder in the first degree and the State has given timely notice of intention to seek a sentence of imprisonment for life without the possibility of parole, but has not given

notice of intention to seek the death penalty, the court shall conduct a sentencing proceeding, separate from the proceeding at which the defendant's guilt was adjudicated, as soon as practicable after the trial to determine whether to impose a sentence of imprisonment for life or imprisonment for life without parole.

Cross reference: Code, Article 27, §§412 and 413.

(c) Judge

If the defendant's guilt is established after a trial has commenced, the judge who presided shall sentence the defendant. If a defendant enters a plea of guilty or nolo contendere before trial, any judge may sentence the defendant except that, the judge who directed entry of the plea shall sentence the defendant if that judge has received any matter, other than a statement of the mere facts of the offense, which would be relevant to determining the proper sentence. This section is subject to the provisions of Rule 4-361.

(d) Presentence Disclosures by the State's Attorney

Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing. If the court finds that the information was not timely provided, the court shall postpone sentencing.

(e) Right of Victim to Address Court

(1) Generally

During the sentencing hearing, the court, if practicable, (A) shall allow the victim or victim's representative to address the court under oath before the imposition of sentence or other disposition at the request

of the State's Attorney or if the victim or victim's representative has filed a notification request form under Code, Criminal Procedure Article, §11-104 or (B) may allow the victim or victim's representative to address the court under oath before the imposition of sentence or other disposition at the request of the victim or victim's representative.

(2) Determination of Notice to Victims or Victim's Representatives

The sentencing hearing shall not be held until the court determines that the requirements for notice to victims or to victim's representatives have been satisfied.

(3) Right to Address Court Denied

A victim or victim's representative who has been denied a right to address the court may file an application for leave to appeal in the manner provided under Code, Criminal Procedure Article, §11-103.

[(e)**]** (f) Allocution and Information in Mitigation

Before imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

[(f)**]** (g) Reasons

The court ordinarily shall state on the record its reasons for the sentence imposed.

[(g)**]** (h) Credit for Time Spent in Custody

Time spent in custody shall be credited against a sentence pursuant to Code, Criminal Procedure Article, §6-218.

[(h)**]** (i) Advice to the Defendant

At the time of imposing sentence, the

court shall cause the defendant to be advised of any right of appeal, any right of review of the sentence under the Review of Criminal Sentences Act, any right to move for modification or reduction of the sentence, and the time allowed for the exercise of these rights. At the time of imposing a sentence of incarceration for a violent crime as defined in Code, Correctional Services Article, §7-101 and for which a defendant will be eligible for parole as provided in §7-301 (c) or (d) of the Correctional Services Article, the court shall state in open court the minimum time the defendant must serve for the violent crime before becoming eligible for parole. The circuit court shall cause the defendant who was sentenced in circuit court to be advised that within ten days after filing an appeal, the defendant must order in writing a transcript from the court stenographer.

Cross reference: Code, Criminal Procedure Article, §§8-102 - 8-109.

Committee note: Code, Criminal Procedure Article, §6-217 provides that the court's statement of the minimum time the defendant must serve for the violent crime before becoming eligible for parole is for informational purposes only and may not be considered a part of the sentence, and the failure of a court to comply with this requirement does not affect the legality or efficacy of the sentence imposed.

[(i)**]** (j) Terms for Release

On request of the defendant, the court shall determine the defendant's eligibility for release under Rule 4-349 and the terms for any release.

[(j)**]** (k) Restitution from a Parent

If restitution from a parent of the defendant is sought pursuant to Code, Criminal Procedure Article,§11-604, the State shall serve the parent with notice of intention to seek restitution and file a copy

of the notice with the court. The court may not enter a judgment of restitution against the parent unless the parent has been afforded a reasonable opportunity to be heard and to present evidence. The hearing on parental restitution may be part of the defendant's sentencing hearing.

Cross reference: Parent's liability, hearing, recording and effect, Rule 11-118.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 772 a.
Section (b) is new.
Section (c) is derived from former Rule 772 b and M.D.R. 772 a. Section (d) is derived from former Rule 772 c and M.D.R. 772 b.
Section (e) is new.
Section **[**(e)**]** (f) is derived from former Rule 772 d and M.D.R. 772 c.
Section **[**(f)**]** (g) is derived from former Rule 772 e and M.D.R. 772 d.
Section **[**(g)**]** (h) is derived from former Rule 772 f and M.D.R. 772 e.
Section **[**(h)**]** (i) is in part derived from former Rule 772 h and M.D.R. 772 g and in part new.
Section **[**(i)**]** (j) is new.
Section **[**(j)**]** (k) is new.

Rule 4-342 was accompanied by the following Reporter's Note.

The Criminal Subcommittee is recommending the addition of a new section which provides for the right of a victim or victim's representative to address the court at sentencing. This change has been requested by the Stephanie Roper Committee, Inc.

Judge Johnson pointed out that the Criminal Subcommittee has suggested changes to subsections (e)(1) and (2). The Vice Chair stated that the proposed language would be changed to conform to the changes made to Rule 4-243. Delegate Vallario asked why the

proposed change to Rule 4-342 is necessary. The Vice Chair responded that the victim might be denied the right to address the court. Mr. Dean remarked that if the victim has filed a notification request form, the court shall allow the victim to address the court, and otherwise, the court may allow the victim to address the court.

The Reporter inquired if there is any language proposed to be added to the Rule which is not already in the statute. Mr. Butler replied that the statute does not contain the language which provides that the court has to determine whether the notice to victims or victims' representatives has been satisfied. Judge Dryden asked if this Rule applies to sentencings in District Court. Mr. Butler answered that according to subsection (e)(1)(B), the court would have the discretion to hear the victim. Judge Dryden noted that no notice is given to victims in District Court. Judge McAuliffe added that in District Court, the State's Attorney can request that the judge hear the victim.

Delegate Vallario commented that this is a legislative matter. The victim or the victim's representative is not a party to the proceedings. Subsection (e)(3) provides that a third party, the victim, can file an application for leave to appeal. Technically, only a party can note an appeal. The Chair pointed out that this language is taken from Code, Criminal Procedure Article, §11-103, Application for Leave to Appeal Denial of Victim's Rights. The Vice Chair observed that the legislature already approved this concept. The Reporter suggested that the

material from the Code could be referred to by a cross reference. Mr. Sykes said that he agreed that a cross reference would be appropriate. Judge McAuliffe pointed out that this language tells judges that the statute has to be followed. The Vice Chair suggested that subsection (e)(3) become a cross reference which would read as follows: "For the right of a victim to file an application for leave to appeal, see....". The Committee agreed by consensus to this suggestion.

Delegate Vallario expressed his concern that the requirement of ascertaining that notice to victims has been given could cause a delay in sentencing. The Vice Chair commented that the court has to determine if the notice is given in a manner similar to the determination in Rule 4-243. She expressed the opinion that the determination as to whether notice has been given should be placed first in section (e), then the language referring about the right to speak should be next. She pointed out that the Rule should provide that notice should be given, if practicable.

Judge McAuliffe remarked that the Style Subcommittee can change the language. The Reporter suggested that section (e) should first refer to the notice and the right of the victim, then the determination that notice has been given, then a cross reference to Code, Criminal Procedure Article, §11-103. The Chair said that the Rules will be given to the Style Subcommittee, and then the Rules Committee can look at them again. The Vice Chair asked that all of the appropriate statutes accompany the Rules when the Rules Committee looks at them again.

The Committee approved the Rule as amended.

Judge Johnson presented Rule 4-343, Sentencing–Procedure in Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-343 to add a new section providing for the right of victims' representatives to address the jury, as follows:

Rule 4-343. SENTENCING -- PROCEDURE IN CAPITAL CASES

(a) Applicability

This Rule applies whenever a sentence of death is sought under Code, Article 27, §413.

(b) Statutory Sentencing Procedure

When a defendant has been found guilty of murder in the first degree, the State has given the notice required under Code, Article 27, §412 (b)(1), and the defendant may be subject to a sentence of death, a sentencing proceeding, separate from the proceeding at which the defendant's guilt was adjudicated, shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, §413. A separate Findings and Sentencing Determination form that complies with sections **[**(g) and (h)**]** <u>(h) and (i)</u> of this Rule shall be completed with respect to each death for which the defendant is subject to a sentence of death.

(c) Presentence disclosures by the State's Attorney

Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court or jury for consideration in sentencing. Upon request of the defendant, the court may postpone sentencing if the court finds that the information was not timely provided.

(d) Reports of Defendant's Experts

Upon request by the State after the defendant has been found guilty of murder in the first degree, the defendant shall produce and permit the State to inspect and copy all written reports made in connection with the action by each expert the defendant expects to call as a witness at the sentencing proceeding, including the results of any physical or mental examination, scientific test, experiment, or comparison, and shall furnish to the State the substance of any such oral report or conclusion. The defendant shall provide this information to the State sufficiently in advance of sentencing to afford the State a reasonable opportunity to investigate the information. If the court finds that the information was not timely provided, the court may postpone sentencing if requested by the State.

(e) Judge

Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(f) Right of Victim's Representative to Address Court or Jury

(1) Generally

Except as provided in subsection (f)(3) of this Rule, during the sentencing hearing, the victim's representative has the rights provided in subsection (f)(1) of Rule 4-342, as well as the right to address the jury.

(2) Determination of Notice to Victim's Representatives

The sentencing hearing shall not be held until the court determines that the requirements for notice to victim's representatives have been satisfied.

(3) Limitations

On motion of a defendant, the State, or on the court's own initiative, the court may hold a hearing outside of the presence of the jury to determine whether a victim's representative may present an oral address to the jury. If the court determines that part of a victim's representative's oral address will be so unduly prejudicial that it renders the jury sentencing proceeding fundamentally unfair, the court may limit the prejudicial portion of the oral address.

(4) Right to Address Court or Jury Denied

A victim's representative who has been denied a right to address the court or jury may file an application for leave to appeal in the manner provided under Code, Criminal Procedure Article, §11-103.

[(f)**]** (g) Allocution

Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement, and shall afford the State the opportunity to respond.

Committee note: A defendant who elects to allocate may do so before or after the State's rebuttal closing argument. If allocution occurs after the State's rebuttal closing argument, the State may respond to the allocution.

[(g)**]** (h) Form of Written Findings and Determinations

Except as otherwise provided in

section [(h)] (i) of this Rule, the findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proven" has been proven BEYOND A REASONABLE DOUBT and that each of those statements marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The defendant was a principal in the first degree to the murder.

_____ proven _____ not proven

2. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

_____ proven _____ not proven

3. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons, and the defendant was a principal in the second degree who: (A) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (B) was a major participant in the murder; and (C) was actually present at

the time and place of the murder.

_____	_____
proven	not proven

(If one or more of the above are marked "proven," proceed to Section II. If all are marked "not proven," proceed to Section VI and enter "Life Imprisonment.")

Section II

Based upon the evidence, we unanimously find that the following statement, if marked "proven," has been proven BY A PREPONDERANCE OF THE EVIDENCE or that, if marked "not proven," it has not been proven BY A PREPONDERANCE OF THE EVIDENCE.

At the time the murder was committed, the defendant was mentally retarded.

_____	_____
proven	not proven

(If the above statement is marked "proven," proceed to Section VI and enter "Life Imprisonment." If it is marked "not proven," complete Section III.)

Section III

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "proven" has been proven BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons.

_____ proven _____ not proven

2. The defendant committed the murder at a time when confined in a correctional institution.

_____ proven _____ not proven

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

_____ proven _____ not proven

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

_____ proven _____ not proven

5. The victim was a child abducted in violation of Code, Article 27, §2.

_____ proven _____ not proven

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of

remuneration to commit the murder.

_____ proven _____ not proven

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

_____ proven _____ not proven

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

_____ proven _____ not proven

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

_____ proven _____ not proven

10. The defendant committed the murder while committing or attempting to commit a carjacking, armed carjacking, robbery, arson in the first degree, rape in the first degree, or sexual offense in the first degree.

_____ proven _____ not proven

(If one or more of the above are marked "proven," complete Section IV. If all of the above are marked "not proven," do not complete Sections IV and V and proceed to Section VI and enter "Life Imprisonment.")

Section IV

Based upon the evidence, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson in the first degree, carjacking, armed carjacking, escape in the first degree, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

5. The defendant was of a youthful age at the time of the crime.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

6. The act of the defendant was not the sole proximate cause of the victim's death.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

8. (a) We unanimously find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(If the jury unanimously determines in Section IV that no mitigating circumstances exist, do not complete Section V. Proceed to Section VI and enter "Death." If the jury or any juror determines that one or more mitigating circumstances exist, complete Section V.)

Section V

Each individual juror shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstance found by that individual juror to exist.

We unanimously find that the State has proven BY A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proven" in Section III outweigh the mitigating circumstances in Section IV.

_____ yes _____ no

Section VI

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "not proven," enter "Life Imprisonment."

2. If the answer in Section II is marked "proven," enter "Life Imprisonment."

3. If all of the answers in Section III are marked "not proven," enter "Life Imprisonment."

4. If Section IV was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death."

5. If Section V was completed and marked "no," enter "Life Imprisonment."

6. If Section V was completed and marked "yes," enter "Death."

We unanimously determine the sentence to be _____.

Section VII

If "Life Imprisonment" is entered in Section VI, answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of life imprisonment previously entered shall be without the possibility of parole?

_____ yes _____ no

_____	_____
Foreman	Juror 7
_____	_____
Juror 2	Juror 8
_____	_____
Juror 3	Juror 9
_____	_____
Juror 4	Juror 10
_____	_____
Juror 5	Juror 11
_____	_____
Juror 6	Juror 12

or, _____
JUDGE

[(h)**]** (i) Deletions from Form

Section II of the form set forth in section **[**(g)**]** (h) of this Rule shall not be submitted to the jury unless the issue of mental retardation is generated by the evidence. Unless the defendant requests otherwise, Section III of the form shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Article 27, §412 (b)(1) of its intention to seek a sentence of death. Section VII of the form shall not be submitted to the jury unless the State has given the notice required under Code, Article 27, §412 (b)(2) of its intention to seek a sentence of imprisonment for life

without the possibility of parole.

Committee note: Omission of some aggravating circumstances from the form is not intended to preclude argument by the defendant concerning the absence of those circumstances.

[(i)**]** (j) Advice of the Judge

At the time of imposing a sentence of death, the judge shall advise the defendant that the determination of guilt and the sentence will be reviewed automatically by the Court of Appeals, and that the sentence will be stayed pending that review. At the time of imposing a sentence of life imprisonment, the court shall cause the defendant to be advised in accordance with Rule 4-342 (h).

Cross reference: Rule 8-306.

[(j)**]** (k) Report of Judge

After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

A. Date of Birth

B. Sex

C. Race

D. Address

E. Length of Time in Community

F. Reputation in Community

G. Family Situation and Background

1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)

2. Family history (describe family history including pertinent data about parents and siblings)

H. Education

I. Work Record

J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)

K. Military History

L. Pertinent Physical or Mental Characteristics or History

M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)

B. Was there any evidence that the defendant was impaired by alcohol or drugs at the time of the offense?

If so describe.

C. Did the defendant know the victim prior to the offense?

Yes ..... No .....

1. If so, describe relationship.

2. Did the prior relationship in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim

1. Name

2. Date of Birth

3. Sex

4. Race

5. Length of time in community

6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:

Not guilty .....; guilty .....; not criminally responsible .....

B. Mode of Trial:

Court ..... Jury .....

If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel

1. Name

2. Address

3. Appointed or retained

(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity - Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pretrial notice.

B. Was the proceeding conducted

before same judge as trial? .....

before same jury? .....

If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel - If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life imprisonment

Death

Life imprisonment without the possibility of parole

V. Chronology

Date of Offense

Arrest

Charge

Notification of intention to seek penalty of death

Trial (guilt/innocence) - began and ended

Post-trial Motions Disposed of

Sentencing Proceeding - began and ended

Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

.....
Judge

CERTIFICATION

I certify that on the ..... day of ....., ... (month) year, I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

.....
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court and with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

Committee note: The report of the judge is filed whenever a sentence of death is sought, regardless of the sentence imposed.

Source: This Rule is derived from former Rule 772A, with the exception of sections (c) and (d), which are new, and section **[**(f)**]** (g), which is derived from former Rule 772 d and M.D.R. 772 c.

Rule 4-343 was accompanied by the following Reporter's Note.

> The Criminal Subcommittee is recommending the addition of a new section providing for the right of a victim's representative to address the jury under certain circumstances. This change was requested by the Stephanie Roper Committee, Inc.

Judge McAuliffe commented that this Rule presents a significant problem. The history of victim impact evidence is that previously it was not allowed in criminal cases for fear that the jury would lose sight of the facts and become clouded with emotion. The U.S. Supreme Court has allowed victim impact evidence, with the admonition that the judge has to be careful in admitting it. If necessary, the evidence may have to be

sanitized and redacted. Mr. Butler pointed out that the proposed language of the Rule is consistent with the language in the case of Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed. 2d 720 (1991). Judge McAuliffe added that this case reversed Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed. 2d 440 (1987), which had held that victim impact evidence was inadmissible. Mr. Dean expressed the view that the holding in Payne provides no direction to the jury or to the prosecutor as to how to handle victim impact evidence. Judges and attorneys struggle with this.

Judge McAuliffe remarked that it would be prudent for State's Attorneys to obtain a written victim impact statement before the victim testifies. The Chair pointed out that there may be times when the prosecutor or judge fears that no matter what instruction is given ahead of time to the victim, the victim will say something prejudicial which will result in a new sentencing hearing for the defendant. He suggested that the Rule provide that the right of a victim to address the jury is governed by Code, Criminal Procedure Article, §11-404, Right of Victim's Representative to Address Jury in Death Penalty Proceeding. Judge Johnson questioned whether language stating that the victim's statement has to be reduced to writing should be added to the Rule. Judge McAuliffe commented that this could create further problems.

The Chair suggested that the following language be added to the Rule: "The right of the victim's representative to address

the jury is governed by Code, Criminal Procedure Article, §ll-104." The Committee agreed by consensus to this suggestion. The Vice Chair pointed out that the order of subsections (f)(1) through (4) needs to be changed. The Chair said that the Rule will be revised, and then the Rules Committee can reconsider it.

Judge Johnson presented Rule 4-351, Commitment Record, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-351 to add restitution judgments to the contents of the commitment record, as follows:

Rule 4-351. COMMITMENT RECORD

(a) Content

When a person is convicted of an offense and sentenced to imprisonment, the clerk shall deliver to the officer into whose custody the defendant has been placed a commitment record containing:

(1) the name and date of birth of the defendant;

(2) the docket reference of the action and the name of the sentencing judge;

(3) the offense and each count for which the defendant was sentenced;

(4) the sentence for each count, the date the sentence was imposed, the date from which the sentence runs, and any credit allowed to the defendant by law;

(5) a statement whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of the preceding term or to any other outstanding or unserved sentence; and

(6) any judgment for restitution.

Cross reference: See Code, Criminal Procedure Article, §6-216 (c) concerning Maryland Sentencing Guidelines Worksheets prepared by a court.

(b) Effect of Error

An omission or error in the commitment record or other failure to comply with this Rule does not invalidate imprisonment after conviction.

Source: This Rule is derived from former Rule 777 and M.D.R. 777.

Rule 4-351 was accompanied by the following Reporter's Note.

The Stephanie Roper Committee, Inc. has requested the addition of judgments of restitution to the contents of the commitment record to avoid the situation of facilities failing to collect the restitution because they were not notified by the clerk that restitution was ordered.

Judge Johnson noted that the Subcommittee is recommending the addition of the language "any judgment for restitution" at the end of section (a). The Chair suggested that the new language should be "any judgment of restitution." The Committee agreed by consensus to this change. The Vice Chair asked what the commitment record looks like –- does it contain a statement about the judgment or does it include a written order which

embodies the judgment of restitution? Judge Johnson replied that the record includes a reference to the judgment. The Chair commented that there is a distinction between a judgment of restitution and a commitment order with a statement of the amount of any judgment of restitution. He suggested that the Rule should be restyled to provide that a copy of any judgment of restitution shall be attached to the commitment order. Mr. Shipley commented that this could cause a logistical nightmare. The commitment is issued from the courtroom, but it is not entered until later. It is not a judgment until it is entered.

The Chair said that whether the judgment is final or appealable is not important. It is the duty of the clerk to make sure that a copy of the judgment is attached to the commitment record. Judge Johnson added that the purpose of this is to inform the Division of Correction. The Chair remarked that there is an order of restitution and a judgment of restitution. A judgment can be indexed and is collectible. Judge Daniels added that when there is an order of restitution, the defendant is subject to a motion for contempt for failure to pay. The Vice Chair commented that it does not matter if this refers to a judgment or an order, the point is that the Division of Correction needs to know about the restitution. The Chair suggested that the new language should be: "a copy of any order or judgment for restitution." The Vice Chair suggested that the language should be: "the details of any order or judgment for restitution." The Chair said that it might be a burden for the

clerk to be required to write this out if there are numerous victims and a different amount of restitution for each. The clerk should not be forced to put all of the details in the commitment paper, which may be of a limited size. It is preferable to tell the clerk to include a copy of the order or judgment of restitution with the commitment record. The Vice Chair suggested that the new language should be: "the details of or a copy of any order or judgment of restitution." The Committee agreed with this suggestion by consensus. The Committee approved the Rule as amended.

The Chair thanked Mr. Butler and Ms. Roper for attending the meeting. The Chair adjourned the meeting.