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 November 19, 2004.

Members present:

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

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Twilah S. Shipley, Esq.
Sen. Norman R. Stone, Jr.
Del. Joseph F. Vallario, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Sandra A. O'Connor, Esq., Baltimore County State's Attorney
Robert B. Riddle, Esq., Calvert County State's Attorney's Office
Laurie Albin, Esq., Maryland Criminal Defense Attorneys' Association
Nancy Forster, Esq., Public Defender
Russell Butler, Esq., Maryland Crime Victims Resource Center
Paul DeWolfe, Esq.
Cynthia M. Boersma, Esq., Office of the Public Defender
Timothy S. Mitchell, Esq., Maryland Criminal Defense Attorneys' Association
Claire Rooney, Esq., Department of Legislative Services
Mark Holtschneider, Lexington National Insurance Corporation
Professor John Lynch, University of Baltimore School of Law

The Chair convened the meeting. Mr. Brault announced that Mr. Karceski had been inducted as a fellow into the American College of Trial Lawyers.

Agenda Item 1. Reconsideration of proposed amendments to: Rule 2-401 (General Provisions Governing Discovery) and Rule 3-401 (General Provisions Governing Discovery)

Mr. Klein presented Rules 2-401 and 3-401, General Provisions for Discovery, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-401 to require the prompt filing of a certain notice, as follows:

Rule 2-401. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods

Parties may obtain discovery by one or more of the following methods: (1) depositions upon oral examination or written questions, (2) written interrogatories, (3) production or inspection of documents or other tangible things or permission to enter upon land or other property, (4) mental or physical examinations, and (5) requests for admission of facts and genuineness of documents.

(b) Sequence and Timing of Discovery

Unless the court orders otherwise, methods of discovery may be used in any

sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. The court may at any time order that discovery be completed by a specified date or time, which shall be a reasonable time after the action is at issue.

(c) Discovery Plan

The parties are encouraged to reach agreement on a plan for the scheduling and completion of discovery.

(d) Discovery Material

(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, a response to interrogatories, a request for discovery of documents and property, a response to a request for discovery of documents and property, a request for admission of facts and genuineness of documents, and a response to a request for admission of facts and genuineness of documents.

(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 serve the discovery material on all other parties and shall promptly 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 2-311 (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. Parties exchanging discovery material are encouraged to comply with requests that the material be provided in a word processing file or other electronic format.

(e) Supplementation of Responses

Except in the case of a deposition, a party who has responded to a request or order for discovery and who obtains further material information before trial shall supplement the response promptly.

(f) Substitution of a Party

Substitution of a party pursuant to Rule 2-241 does not affect the conduct of discovery previously commenced or the use of the product of discovery previously conducted.

(g) Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties by written stipulation may (1) provide that a deposition may be taken before any person, at any time or place, upon any notice, and in any manner and, when so taken, may be used like other depositions and (2) modify the procedures provided by these rules for other methods of discovery, except that the parties may not modify any discovery procedure if the effect of the modification would be to impair or delay a scheduled court proceeding or conference or delay the time specified in a court order for filing a motion or other paper.

Source: This Rule is derived as follows:
Section (a) is derived from the 1980 version of Fed. R. Civ. P. 26 (a).

Section (b) is derived from the 1980 version of Fed. R. Civ. P. 26 (d).
Section (c) is new.
Section (d) is new.
Section (e) is derived from former Rule 417 a 3.
Section (f) is derived from former Rule 413 a 5.
Section (g) is derived in part from the 1993 version of Fed. R. Civ. P. 29 and former Rule 404 and is in part new.

Rule 2-401 was accompanied by the following Reporter's Note.

In *Attorney Grievance v. Hermina*, 379 Md. 503 (2004), a party claimed that it had served "discovery material" (as defined in Rule 2-401 (d)(1)) on the opposing party a year earlier than the date on which the serving party actually filed the "notice of service of discovery materials." The Court observed that Rule 2-401 (d)(2) is silent as to when such a certificate of service must be filed, but the Court stated that "the Court certainly anticipated that the notice would be filed contemporaneously with service of the material, not a year later. The purpose of the notice filed with the court is to document both the fact that the discovery was served and when it was served. An *ex post facto* filing of the notice hardly serves either purpose and, indeed, can lead to considerable mischief, if not outright fraud." *Attorney Grievance v. Hermina*, 379 Md. 503 (2004) (at p. 514, footnote 3).

The Rules Committee considered an amendment to Rule 2-401 that would have added the word "contemporaneously" to subsection (d)(2). The Committee reviewed the results of a search of the Maryland Rules for the use of the word "contemporaneously." There are eight uses of the word, all but one of which deal with witnesses statements that are "contemporaneously recorded" and the other (Rule 5-106) deals with contemporaneous consideration of related writings or witnesses statements.

The Committee instead recommends that Rule 2-401 (d)(2) be amended by adding the word “promptly” to it. The Committee believes the proposed addition is consistent with the 196 other instances in which the word “promptly” is used in the Maryland Rules and addresses the concerns that the Court expressed in footnote 3 of *Hermina*.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 3-401 to require the prompt filing of a certain notice, as follows:

Rule 3-401. GENERAL PROVISIONS GOVERNING DISCOVERY

. . .

(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 promptly 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 (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 adds the word "promptly" to subsection (b)(2), conforming the Rule to a proposed amendment to Rule 2-401 (d)(2).

Mr. Klein explained that the Rules were discussed at the October Rules Committee meeting. At that meeting, the Committee had decided to add the word "promptly" to subsection (d)(2) of Rule 2-401 and to add a conforming amendment to subsection (b)(2) of Rule 3-401 in response to the case of *Attorney Grievance Commission v. Hermina*, 379 Md. 503, 514 (2004) in which one of the parties waited until one year after service to file the notice of service of discovery required by Rule 2-401 (d)(2).

In a footnote in the case, the Court commented that not filing the notice in a timely fashion could lead to mischief. The Committee had approved the addition of the word "promptly" to Rules 2-401 and 3-401 but deferred the matter to consider recent federal rules changes. As chronicled in the Reporter's Memorandum of November 9, 2004 that was included in today's meeting materials, the federal rules have abandoned requiring notice of service filed in federal court. See Appendix 1. The matter is before the Committee today to determine whether the word "promptly" should be added to Rules 2-401 and 3-401 or whether the requirement of filing a notice of service should be eliminated.

Mr. Klein said that the local federal rule, U.S. District Court (MD) L.R. 104 (5), implies that although the notice of service is not filed, the party serving the discovery should prepare a notice of service and retain it with the original copies of the discovery materials. Rule 2-401 has been drafted in the alternative, to allow the Committee to see how the Rule could be amended to conform to federal practice.

ALTERNATIVE DRAFT

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-401 to require the

preparation of a certain certificate of service that is not filed with the court and

to delete a certain portion of a Committee note, as follows:

Rule 2-401. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods

Parties may obtain discovery by one or more of the following methods: (1) depositions upon oral examination or written questions, (2) written interrogatories, (3) production or inspection of documents or other tangible things or permission to enter upon land or other property, (4) mental or physical examinations, and (5) requests for admission of facts and genuineness of documents.

(b) Sequence and Timing of Discovery

Unless the court orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. The court may at any time order that discovery be completed by a specified date or time, which shall be a reasonable time after the action is at issue.

(c) Discovery Plan

The parties are encouraged to reach agreement on a plan for the scheduling and completion of discovery.

(d) Discovery Material

(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, a response to interrogatories, a request for

discovery of documents and property, a response to a request for discovery of documents and property, a request for admission of facts and genuineness of documents, and a response to a request for admission of facts and genuineness of documents.

(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 serve the discovery material on all other parties and shall ~~file with the court a notice~~ sign, date, and attach to the discovery material a certificate of service 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 discovery material (including the certificate of service) 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 2-311 (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.~~ Parties exchanging discovery material are encouraged to comply with requests that the material be provided in a word processing file or other electronic format.

(e) Supplementation of Responses

Except in the case of a deposition, a party who has responded to a request or order for discovery and who obtains further material information before trial shall supplement the response promptly.

(f) Substitution of a Party

Substitution of a party pursuant to

Rule 2-241 does not affect the conduct of discovery previously commenced or the use of the product of discovery previously conducted.

(g) Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties by written stipulation may (1) provide that a deposition may be taken before any person, at any time or place, upon any notice, and in any manner and, when so taken, may be used like other depositions and (2) modify the procedures provided by these rules for other methods of discovery, except that the parties may not modify any discovery procedure if the effect of the modification would be to impair or delay a scheduled court proceeding or conference or delay the time specified in a court order for filing a motion or other paper.

Source: This Rule is derived as follows:
Section (a) is derived from the 1980 version of Fed. R. Civ. P. 26 (a).
Section (b) is derived from the 1980 version of Fed. R. Civ. P. 26 (d).
Section (c) is new.
Section (d) is new.
Section (e) is derived from former Rule 417 a 3.
Section (f) is derived from former Rule 413 a 5.
Section (g) is derived in part from the 1993 version of Fed. R. Civ. P. 29 and former Rule 404 and is in part new.

Alternative Rule 2-401 was accompanied by the following Reporter's note.

This alternative draft amendment to Rule 2-401 conforms State court practice to the current federal practice that neither discovery material nor any notice concerning the discovery material is filed with the court. See Fed. R. Civ. P. 5 (d) and United States District Court (MD) Local Rule 104 (5).

> Because under the proposed amended Rule no notice is filed with the court, the provisions of Rule 1-323 (Proof of Service) do not apply. Therefore, a "certificate of service" requirement is proposed to be added to section (d) of Rule 2-401, and the portion of the Committee note following section (d) that refers to Rule 1-323 is proposed to be deleted.

Mr. Klein remarked that he did not feel strongly about the two options. The Vice Chair noted that when Rules 2-401 and 3-401 were drafted as part of the 1984 revision, one of the goals of the revision was to conform Maryland State court procedures to the federal rules whenever possible, so that lawyers can easily go back and forth between State and federal courts. She expressed the view that filing a notice of service does not serve any purpose in 99.9% of cases. The Chair agreed with the Vice Chair, but he pointed out that he had observed many debates over related issues when he was a trial judge. Federal cases are managed more aggressively by the judges, and there is less danger of discovery abuse.

Mr. Klein suggested that the Rules be submitted to the Court of Appeals with both options. Judge Heller expressed the opinion that the Rules Committee's decision to add the word "promptly" is the preferable way. The Chair suggested that the language "unless the parties otherwise agree" could be added to the Rules, so that parties have the choice of agreeing that notice of service need not be filed. Mr. Klein remarked that requiring the filing of the notice of service does not significantly burden the

court.

Mr. Brault inquired as to whether there is a penalty if the notice of service is not filed. The Vice Chair answered that nothing in the Rule provides for a penalty. Under Rule 1-201 (a), it is up to the trial judge to determine the consequences of noncompliance. The Reporter commented that if the notice is filed, the date of the docket entry provides at least some neutral evidence as to the date of service of discovery, if that is in dispute. Mr. Brault observed that there is a certificate of service on the interrogatories even if no notice is filed. The certificate of service creates a presumption that the interrogatories were properly served. The Vice Chair said that the certificate of service creates as much of a presumption that the mailing occurred as does the notice filed in court.

Mr. Klein commented that if the courts see filing the notice of service as valuable, then it should be part of the Rules. The Chair noted that judges will prefer it to be a part of the Rules. When there is a disagreement over discovery, the court can consider the notice. The Vice Chair remarked that disputes over service of discovery are rare, and Judge Kaplan agreed. The Chair suggested that both alternatives be presented to the Court of Appeals. The Vice Chair expressed the view that the Court should be told what the Rules Committee's opinion is. Judge Norton said that filing the notice of service helps with organizing the case. Judge Missouri told the Committee that this issue had not been before the Conference of Circuit Court Judges,

but he preferred the addition of the word "promptly."

The Chair asked for a vote on whether to add the word "promptly" to Rules 2-401 and 3-401, and the Committee voted 13 to 4 in favor of adding the word. Mr. Klein said that the Court would also be apprised of the alternative of conforming the Rules to federal practice.

Agenda Item 4. Consideration of proposed new Rule 1-326 (Proceedings Regarding Victims and Victims' Representatives)

Mr. Zarnoch presented Rule 1-326, Proceedings Regarding Victims and Victims' Representatives for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

ADD new Rule 1-326, as follows:

Rule 1-326. PROCEEDINGS REGARDING VICTIMS AND VICTIMS' REPRESENTATIVES

(a) Entry of Appearance

An attorney may enter an appearance on behalf of a victim or a victim's representative in a proceeding under Title 4 or Title 11 of these Rules for the purpose of representing the interests of the victim or victim's representative.

(b) Service of Pleadings and Papers

A party shall serve pursuant to Rule 1-321 upon counsel for a victim or a victim's

representative copies of all pleadings or papers that pertain to: (1) the right of the victim or victim's representative to be informed regarding the criminal or juvenile delinquency case, (2) the right of the victim or victim's representative to be present and heard at any hearing, and (3) restitution. Any additional pleadings and papers shall be served only if directed by the court.

(c) Duties of Clerk

The clerk shall (1) send to counsel for a victim or victim's representative a copy of any court order or ruling pertaining to the interests of the victim referred to in section (b) of this Rule and (2) notify counsel for a victim or a victim's representative of any hearing that may affect the victim or victim's representative's interest.

Cross reference: "Victim" means a victim as defined under Article 47 of the Maryland Declaration of Rights. Pursuant to §14, Ch. 10, Acts of 2001, a "victim's representative" is listed separately for stylistic purposes to include a person acting for a victim.

Source: This Rule is derived in part from Article 47 of the Maryland Declaration of Rights and from Canon 3A (5) of Rules 16-813 and 16-814.

Rule 1-326 was accompanied by the following Reporter's note.

Russell P. Butler, Esq., who represents the rights of victims, requested a new Rule that establishes procedures allowing counsel to enter an appearance to represent a victim or victim's representative in proceedings under Title 4 or Title 11 of these Rules.

Judge Missouri stated that the Conference of Circuit Court Judges was opposed to the concept of this new Rule, although the Conference had not seen the exact language. He requested a

deferral of consideration of the Rule until the Conference sees the language. Mr. Zarnoch inquired as to whether the Conference has a specific objection to the Rule. Judge Missouri replied that most of the judges felt that the Rule was unnecessary and that it imposed another layer of representation. The State's Attorneys adequately represent victims, and if they are not doing so, they should be held accountable. Mr. Zarnoch inquired as to whether Mr. Butler, who is Executive Director of the Maryland Crime Victims' Association, would be able to appear before the Conference. Judge Missouri answered that he and Mr. Dean both had spoken to the Conference, but did not present the exact proposed language of the Rule. Mr. Zarnoch remarked that the specific suggested language can go back to the Conference. Judge Missouri said that the Conference would be meeting in January.

Mr. Dean commented that he wanted to clarify that in Prince George's and other counties, lines of appearance are filed by attorneys in criminal cases. The clerks do not have the time to sort through these filings to find a line filed on behalf of a victim. The Rules of Procedure do not have a provision authorizing an attorney to represent a victim. He and Mr. Butler had spoken with Judge Missouri on the issue of potential problems with respect to representation of victims. The lines of authority between an attorney who represents a victim and the State's Attorney are blurred. Not all counsel who represent victims are as diligent as Mr. Butler, and it would be useful to

have a rule to forestall any problems. Judge Missouri stated that he had initiated the drafting of a rule providing for representation of victims, because he felt that there should be a uniform procedure, not an *ad hoc* one.

Mr. Butler thanked Judge Missouri. He said that he had been entering his appearance on behalf of victims since 1993, and he has had no particular problems. However, he thinks that the Rule is a good idea. The Vice Chair pointed out that Rule 2-131, Appearance, pertaining to civil matters, does not state for whom the attorney is entering an appearance, but Rule 4-214, Defense Counsel, pertaining to criminal matters, provides that counsel is entering an appearance of behalf of the criminal defendant. It is understandable how one could conclude that counsel in a criminal case can enter an appearance only on behalf of a criminal defendant. The Chair remarked that if a witness is represented by counsel, there is no formal entry of appearance by the attorney. The Vice Chair noted that proposed new Rule 1-326 provides that the attorney representing a victim shall receive copies of the papers filed in the case.

Judge Missouri said that it is important to make sure that the Rule is crafted narrowly to avoid appeals in criminal cases on this issue. The Conference will consider it as it has been drafted.

Agenda Item 2. Reconsideration of proposed amendments to: Rule 4-263 (Discovery in Circuit Court) and Rule 4-262 (Discovery in District Court)

Judge Missouri presented Rule 4-263, Discovery in Circuit Court, and Rule 4-262, Discovery in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to clarify the disclosure obligation of the State's Attorney under subsection (a)(1), to require that the State's Attorney file a certain written statement, to add language to subsection (b)(1) referring to a certain statute, to add the phrase "or required" to section (f), and to require the exercise of due diligence in identifying material and information to be disclosed, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

(a) Disclosure Without Request

Without the necessity of a request, the State's Attorney shall furnish to the defendant:

(1) Any material or information ~~tending to~~ in any form, whether or not admissible, that tends to (A) exculpate the defendant, (B) demonstrate interest or bias of a witness for the State, (C) mitigate the offense, or (D) negate or mitigate the ~~guilt or~~ punishment of the defendant as to the offense charged. The State's Attorney shall provide to the defendant a written statement that reasonably identifies the materials furnished.

Committee note: The State's disclosure obligation under subsection (a)(1) of this Rule is coextensive with that established by *Brady v. Maryland*, 373 Md. 83, 83 S. Ct. 1194 (1963). The requirement of a written statement is intended to establish a written record of what the prosecutor actually disclosed to the defense.

Cross reference: See Rule 3.8 of the Maryland Rules of Professional Conduct.

(2) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

(b) Disclosure Upon Request

Upon request of the defendant, the State's Attorney shall:

(1) Witnesses

Disclose to the defendant the name and, except as provided under Code, Criminal Procedure Article, §11-205, the address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony;

(2) Statements of the Defendant

As to all statements made by the defendant to a State agent that the State intends to use at a hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(3) Statements of Codefendants

As to all statements made by a

codefendant to a State agent which the State intends to use at a joint hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(4) Reports or Statements of Experts

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion;

(5) Evidence for Use at Trial

Produce and permit the defendant to inspect, copy, and photograph any documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State intends to use at the hearing or trial;

(6) Property of the Defendant

Produce and permit the defendant to inspect, copy, and photograph any item obtained from or belonging to the defendant, whether or not the State intends to use the item at the hearing or trial.

(c) Matters Not Subject to Discovery by the Defendant

This Rule does not require the State to disclose:

(1) Any documents to the extent that they contain the opinions, theories, conclusions, or other work product of the State's Attorney, or

(2) The identity of a confidential informant, so long as the failure to disclose the informant's identity does not infringe a

constitutional right of the defendant and the State's Attorney does not intend to call the informant as a witness, or

(3) Any other matter if the court finds that its disclosure would entail a substantial risk of harm to any person outweighing the interest in disclosure.

(d) Discovery by the State

Upon the request of the State, the defendant shall:

(1) As to the Person of the Defendant

Appear in a lineup for identification; speak for identification; be fingerprinted; pose for photographs not involving reenactment of a scene; try on articles of clothing; permit the taking of specimens of material under fingernails; permit the taking of samples of blood, hair, and other material involving no unreasonable intrusion upon the defendant's person; provide handwriting specimens; and submit to reasonable physical or mental examination;

(2) Reports of Experts

Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the State with the substance of any such oral report and conclusion;

(3) Alibi Witnesses

Upon designation by the State of the time, place, and date of the alleged occurrence, furnish the name and address of each person other than the defendant whom the defendant intends to call as a witness to show that the defendant was not present at the time, place, and date designated by the State in its request.

(4) Computer-generated Evidence

Produce and permit the State to inspect and copy any computer-generated evidence as defined in Rule 2-504.3 (a) that the defendant intends to use at the hearing or trial.

(e) Time for Discovery

The State's Attorney shall make disclosure pursuant to section (a) of this Rule within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. Any request by the defendant for discovery pursuant to section (b) of this Rule, and any request by the State for discovery pursuant to section (d) of this Rule shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. The party served with the request shall furnish the discovery within ten days after service.

(f) Motion to Compel Discovery

If discovery is not furnished as requested or required, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters that have not been furnished. A response to the motion may be filed within five days after service of the motion. The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

(g) Obligations of ~~State's Attorney~~ the Parties

Each party who is obligated to provide

materials or information under this Rule shall exercise due diligence in identifying all of the material and information that must be disclosed. The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

(h) Continuing Duty to Disclose

A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

(i) Protective Orders

On motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 741 a 1 and 2.
Section (b) is derived from former Rule 741 b.
Section (c) is derived from former Rule 741 c.
Section (d) is derived in part from former Rule 741 d and is in part new.
Section (e) is derived from former Rule 741 e 1.
Section (f) is derived from former Rule 741

e 2.

Section (g) is derived in part from former Rule 741 a 3 and is in part new.

Section (h) is derived from former Rule 741 f.

Section (i) is derived from former Rule 741 g.

Rule 4-263 was accompanied by the following Reporter's Note.

Albert D. Brault, Esq. brought to the attention of the Rules Committee a 2003 Report of the American College of Trial Lawyers, describing the problem that some federal prosecutors fail to provide information required to be furnished to a criminal defendant pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Brault spoke with local criminal defense attorneys in Montgomery County, who noted similar problems with some State prosecutors. To address this, the Honorable Albert J. Matricciani and the Honorable M. Brooke Murdock, Judges of the Circuit Court for Baltimore City, drafted a proposed amendment to Rule 4-263 (a)(1), the concept of which has been approved by the Rules Committee. The Committee's proposal blends language suggested by Judges Matricciani and Murdock with language currently in the subsection and adds a requirement that the State's Attorney file a written statement identifying with particularity the information supplied. A proposed new Committee note following subsection (a)(1) makes clear that the disclosure obligation set forth in the subsection is coextensive with that established by *Brady*.

Robert L. Dean, Esq. brought to the Committee's attention a problem with subsection (b)(1) of Rule 4-263 and section (a) of Rule 4-262. Some witnesses in criminal cases are reluctant to testify because their address is given to the defendant pursuant to the Rules. Russell Butler, Esq., suggested that to address this problem, a reference to Code, Criminal Procedure Article, §11-205 should be added to

Rules 4-263 and 4-262. The Code provision states that upon request of the State, a victim of or a witness to a felony, or a victim's representative, the address of a victim or a witness may be withheld before a trial unless a judge determines that good cause has been shown for the release of the information. The Committee agrees with Mr. Butler's suggestion.

The words "or required" are proposed to be added to section (f) to clarify that a motion to compel discovery may be based on a failure to provide required discovery as well as a failure to provide requested discovery.

Section (g) is proposed to be amended to require that each party who is obligated to provide material or information under the Rule exercise due diligence in identifying the material and information to be disclosed.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-262 to add language to section (a) referring to a certain statute, as follows:

Rule 4-262. DISCOVERY IN DISTRICT COURT

(a) Scope

Discovery and inspection pursuant to this Rule is available in the District Court in actions for offenses that are punishable by imprisonment, and, except as provided under Code, Criminal Procedure Article, §11-

205, shall be as follows:

(1) The State's Attorney shall furnish to the defendant any material or information that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged.

(2) Upon request of the defendant the State's Attorney shall permit the defendant to inspect and copy (A) any portion of a document containing a statement or containing the substance of a statement made by the defendant to a State agent that the State intends to use at trial or at any hearing other than a preliminary hearing and (B) each written report or statement made by an expert whom the State expects to call as a witness at a hearing, other than a preliminary hearing, or trial.

(3) Upon request of the State the defendant shall permit any discovery or inspection specified in subsection (d)(1) of Rule 4-263.

Committee note: This Rule is not intended to limit the constitutional requirement of disclosure by the State. See *Brady v. State,* 226 Md. 422, 174 A.2d 167 (1961), aff'd, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

(b) Procedure

The discovery and inspection required or permitted by this Rule shall be completed before the hearing or trial. A request for discovery and inspection and response need not be in writing and need not be filed with the court. If a request was made before the date of the hearing or trial and the request was refused or denied, the court may grant a delay or continuance in the hearing or trial to permit the inspection or discovery.

(c) Obligations of the State's Attorney

The obligations of the State's Attorney under this Rule extend to material and information in the possession or control

> of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.
>
> Source: This Rule is new.

Rule 4-262 was accompanied by the following Reporter's Note.

> See the second paragraph of the Reporter's note to Rule 4-263.

Judge Missouri told the Committee that Rule 4-263 has been a topic of discussion for some time. Ms. Forster, the Public Defender for the State of Maryland, sent a comment letter which has been distributed to the Committee this morning. See Appendix 2. She is requesting that the Chair remand the matter to the Criminal Subcommittee for further work, because the way the Rule is drafted does not fully encompass the case of *Brady v. Maryland*, 373 U.S. 83 (1963), as it has been interpreted. The Chair asked Ms. Forster to speak.

Ms. Forster said that she is pleased that the Committee is taking up this issue. She introduced two attorneys from her office, Paul DeWolfe, Esq. and Michele Nethercott, Esq. Ms. Forster explained that her concern about the Rule is the language in subsection (a)(1) which reads, "...information...that tends to exculpate the defendant...". This is narrower than the language of *Brady*, which is "mitigates or negates guilt." The word "exculpate" is more restrictive. *Brady* material includes

favorable evidence that could be impeachment evidence. Prior inconsistent statements are not covered by the language of the proposed amendment to the Rule. The Office of the Public Defender is asking that the Rule be returned to the Criminal Subcommittee for more work on this language. Ms. Forster said that her office would be happy to work with the Subcommittee on this.

The Vice Chair commented that in subsection (a)(1)(D), the words "guilt or" had been stricken. She asked Ms. Forster if it would be helpful if they were added back in. Ms. Forster replied that this would not solve the problem of including the duty to turn over impeachment evidence within the scope of the Rule. The Vice Chair inquired as to whether the current language of the Rule covers this. Ms. Forster answered that there is no definition of the concept in the Rule. The Chair said that one way to approach solving this problem is to refer to Rule 5-616, Impeachment and Rehabilitation -- Generally, which lists all of the ways that a witness can be impeached. The Chair noted that the cases after *Brady* do not address pure impeachment material. Judge Heller questioned as to what the federal language is pertaining to this issue. Ms. Forster responded that the American College of Trial Lawyers ("the American College") has recommended a change to the parallel federal rule. Mr. Brault added that the Criminal Procedure Committee of the American College has made a recommendation to the federal rules committee.

Judge Heller asked whether the current federal rule has the *Brady* requirements, and Mr. Brault replied that the lack of these requirements in the rule motivated the American College to recommend a change to the rule.

Mr. Dean commented that there have been numerous Subcommittee meetings at which Rule 4-263 was discussed, and the issue discussed today was never brought up at any of the meetings. It is not appropriate to remand the Rule again to the Subcommittee. Judge Heller suggested that the Rule provide that the State must disclose information favorable to the defendant in any form, whether or not admissible, that exculpates the defendant, adversely impacts witnesses, mitigates the offense, or mitigates the punishment. Mr. Dean expressed the opinion that to impose a duty on the prosecutor to discover potential impeachment evidence is burdensome, because it is an impossible task.

The Vice Chair pointed out that subsection (a)(1) covers what evidence must be disclosed. Mr. Dean said that subsection (a)(1)(A) to (D) captures everything that is constitutionally required to be disclosed. The Vice Chair asked whether the fact that a State's witness lied in previous proceedings would tend to exculpate the defendant. Mr. Dean replied that that would not mitigate the offense, but may demonstrate bias of the witness. Mr. Brault remarked that he had listened to comments when this issue was presented by the American College. The comments pertained to how to recognize favorable information. This is the

core of the problem. Prosecutors look through the files and do not see anything favorable to the defendant, but later on during the trial, *Brady* material appears.

Judge Heller inquired as to why the words "guilt or" were deleted from subsection (a)(1). The Chair answered that the language in subsection (A) "exculpate the defendant" covers this. Mr. Brault disagreed, noting that the defendant may not be exculpated, but his or her murder charge may be lowered to manslaughter. The Chair questioned as to how the offense can be mitigated without the guilt being mitigated. It is splitting hairs -- the prosecution says that the information does not mitigate the defendant's guilt, but it may mitigate the offense, such as murder to manslaughter. Judge Heller inquired why the language that was always in the Rule should be deleted. The Vice Chair commented that the new language does not clearly cover what is intended to be conveyed.

The Chair reiterated his suggestion that Rule 4-263 could be tied to Rule 5-616. Judge Dryden inquired whether this would mean that the prosecutor would have to ask the witness whether the witness has good eyesight, appropriate mental capacity, etc. The Chair remarked that good prosecutors ask those questions, but Mr. Dean countered that it should not be necessary to ask those questions in every case. Judge Dryden observed that to prepare a good case, a prosecutor has to ask questions, even if those questions are helpful to the defense.

Ms. O'Connor commented that at the Subcommittee meetings where the Rule was discussed, the Office of the Public Defender supported the decisions that had been made. Requiring the prosecutor to anticipate the defenses of the defendant's attorney is not fair. It is not the job of the prosecutor to do a background check on all of the witnesses. The requirements of *Brady* are clearly laid out. Trial judges can check to see if the prosecutor has complied with the requirements and can deal with this just as they do now. Mr. Karceski noted that Ms. Forster had not attended the last Subcommittee meeting, but Ms. O'Connor clarified that Ms. Forster had been at previous meetings where the decisions leading to the proposal before the Rules Committee had been made. At the last meeting, only the substance of the proposed Committee note had been discussed.

Mr. Karceski said that he is sympathetic to Ms. Forster's position, but he also understands the State's perspective. The State is not required to hire a private investigator to conduct a private investigation for the benefit of the defendant. However, to properly do their jobs, prosecutors must cover both their files and the files of the police when they make *Brady* disclosures. It is important to require the State's Attorney to exercise due diligence in locating all information known to the State, including the police, that is favorable to the defendant. The minimum the State has to do is to speak to the police officers involved to determine what is favorable to the

defendant. The State's Attorneys who have expressed their opinion have said that this is a herculean task. However, in a generic sense, *Brady* is applied on a sliding scale. For minor offenses, prosecutors are not required to take the time that a more serious offense would require. The State must do more, but the State is not required to function as an investigator for the defense. Mr. Karceski expressed his personal opinion that compliance with *Brady* is not done on a consistent basis throughout the State.

The Chair said that if a prosecutor knows that a witness who takes the stand and says that the defendant is guilty had given a prior inconsistent statement, the prosecutor is obligated to tell the defense attorney about the prior statement. Mr. Karceski observed that prosecutors are not always doing this, and he commented that it is important that prosecutors be taught how to handle the *Brady* requirements. In Baltimore City District Court, there is a significant problem -- the prosecutors often do not talk to the police officer investigating the crime and do not provide *Brady* materials to the defense. The Chair commented that a rule cannot be written to solve all of the problems in various jurisdictions. Mr. Karceski remarked that the prosecutors should certify what they have done regarding disclosure, so that the defense attorney can note any inconsistencies.

The Chair said that setting the issue of certification aside, everyone is in agreement that the State must provide to

the defense the fact of any prior inconsistent statement. The defense is entitled to know about an out-of-court statement made by a State's witness, prior to cross-examination, for possible impeachment material pursuant to *Carr v. State*, 284 Md. 455 (1979) and *State v. Leonard*, 290 Md. 295 (1981). Subsection (a)(4) of Rule 5-616 provides that a witness may be impeached by questions that are directed at proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely. The State should provide to the defense evidence of which it is aware concerning this subsection of Rule 5-616. Other provisions of Rule 5-616 also can be incorporated into Rule 4-263.

Mr. Karceski remarked that there is no easy way to assure that a prosecutor is complying with *Brady*. The Rule may never resolve all of the issues, but the addition of a certification requirement to the Rule would be an important improvement.

Mr. Riddle told the Committee that he had previously written a letter as President of the Maryland State's Attorneys' Association, dated August 1, 2003 opposing recommendations by the Office of the Public Defender for changing Rule 4-263. The Office of the Public Defender had cited problems with prosecutors providing exculpatory evidence and judges failing to impose meaningful sanctions as a justification for making sweeping changes to Rule 4-263. The Association disagreed with the Office of the Public Defender who had their opportunity to express their

concerns at several Criminal Subcommittee meetings. The language pertaining to certification was drafted by the Conference of Circuit Court Judges, and the language in the version of the Rule that is before the Committee today is the result of the work done by the Subcommittee using the Conference draft. The current draft is the result of compromise by the various groups, and Mr. Riddle asked that the Committee consider it carefully and act on it.

Mr. Klein commented that he does not practice criminal law, and although the stakes are not as high in civil practice as in criminal, there is a certification requirement in Fed. R. Civ. P. 26 (g)(1). The attorney or party who signs the disclosure certifies "that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." Rule 4-263 should require at least this type of certification.

Mr. Dean observed that in a civil case, the attorney manages the entire case. This is not the situation in a criminal case. Most cases come to the State's Attorney with a charging document and a police report. The State's Attorney usually does not manage the police investigation, except in some jurisdictions if it is a homicide case. Often, it is a member of the public who has initiated the case, and there is no police investigation. It is understandable as to why no certification is made in criminal cases.

Judge Heller remarked that it is not onerous for the State's

Attorney to be required to certify that he or she has exercised due diligence in locating all information favorable to the defendant within its files or the files of others who have participated in the investigation. However, an investigation requirement should not be imposed.

The Chair expressed the opinion that the language in section (g), which includes the due diligence concept applicable to both the State and the defendant, should be in the body of the Rule, rather than in a Committee note, as it was in an earlier draft of the Rule. He suggested that section (g) be moved to become new section (a), and that current subsection (a)(1) be amended to read as follows:

> ... (1) Any material or information in any form, whether or not admissible, that tends to (A) exculpate the defendant, (B) establish that a witness has made a statement that is inconsistent with the witness's anticipated testimony, (C) demonstrate interest or bias of a State's witness, (D) mitigate the offense, or (E) negate or mitigate the punishment of the defendant as to the offense charged and a written statement that reasonably identifies that materials furnished; ...

Judge Norton questioned whether the version of the Committee note that the Committee is considering today is an improvement over earlier drafts of the Committee note. Timothy Mitchell, who represents the Maryland Criminal Defense Attorneys Association, had never submitted the comments he has pertaining to this issue. Judge Norton expressed his agreement with Ms. Forster that the Rule should go back to the Subcommittee. Judge Missouri stated

that requests were sent out for anyone who wanted to appear before the Subcommittee. He asked that the Rule not be sent back to the Subcommittee. The Conference of Circuit Judges is opposed to certification, which had appeared in earlier drafts, because there is no sanction. He questioned as to how someone can certify in all files in all jurisdictions.

Mr. Dean reiterated the Chair's suggestion as to the language of current subsection (a)(1) and moving section (g) to become new section (a). Judge Heller remarked that it is a good idea to put the "due diligence" language at the beginning of the Rule. She suggested that the words "guilt or" be put back into subsection (a)(1)(D) of the Rule.

The Vice Chair pointed out that an earlier draft of the Rule would have required the State's Attorney to certify that the State's Attorney had exercised due diligence in locating all information favorable to the defendant within its files or the files of any others who had participated in the investigation or evaluation of the action. This concept does not appear in section (g) of the Rule that the Committee is considering today. The Chair said that the reference to the information within the files should not be part of the Rule. Mr. Brault remarked that if a witness talks to someone, that is information that is not in the file. The Vice Chair inquired as to whether the addition of a witness's prior inconsistent statement in subsection (a)(1) is broad enough. How would the Rule handle the situation where the witness hates the defendant? The Chair answered that this would

be covered by the principle of bias. Mr. Dean noted that the witness to which the Rule refers is the State's witness. The Chair suggested that the word "State's" be added before the word witness.

Mr. Dean moved that section (g) be moved to become section (a) and that current subsection (a)(1) be amended in accordance with the language suggested by the Chair, with the addition of the word "State's" before the word "witness." Judge Kaplan seconded the motion, and it passed with 16 in favor.

The Vice Chair reiterated the suggestion of Judge Heller that the words "guilt or" should be put back into subsection (a)(1)(D). The Committee agreed by consensus to the addition of the words "guilt or."

Mr. Karceski said that he was concerned about a comment that Mr. Dean previously made in response to Mr. Klein's statement about civil cases. Mr. Karceski stated that although he agrees with Mr. Dean that civil cases are different than criminal cases, he is concerned about compliance with *Brady* in the District Court. How can a rule be written that would assure that the prosecutor in District Court complies with the *Brady* requirements? To require that the State has to aver that they complied does not resolve the State's obligation to comply. Why is the certification requirement unnecessary? The Chair replied that it could be an imposition on a State's Attorney with a busy docket. Senator Stone agreed with Mr. Karceski that

requiring a certification is a small thing to ask. Mr. Brault noted that the signing requirement is a certification. Mr. Karceski expressed the view that there will not be full compliance with the Rule. The Chair responded that if the Rule is violated, the defendant will get a new trial or other appropriate remedy, such as post conviction relief.

The Vice Chair asked if there were any proposed changes to Rule 4-262, other than the addition of the reference to Code, Criminal Procedure Article, §11-205. Mr. Dean answered that no other changes were made to Rule 4-262. The Vice Chair said that she is concerned about the fact that there is a long list of changes that are being made to Rule 4-263, but no changes are being made to Rule 4-262, the parallel District Court Rule. Mr. Dean explained that sometimes in District Court, the first time the prosecutor sees the file is on the day of trial. The Vice Chair noted that since the language of Rule 4-262 will be very different from that of Rule 4-263, the implication is that different principles apply. The Chair commented that regardless of how the Rule is worded, *Brady* applies. Rule 4-262 does not have to mirror Rule 4-263. The Vice Chair remarked that even if Rule 4-262 does not mirror Rule 4-263, a description of what *Brady* requires should be stated in some way in the District Court Rule.

Judge Norton pointed out that when the Subcommittee had discussed whether Rule 4-262 should be changed, the exact

language of Rule 4-263 had not yet been determined. In District Court, it is difficult to provide a written statement of *Brady* materials furnished to the defendant because in many instances, the prosecutor does not even know who the witnesses are until the day of the trial. The Chair said that the Vice Chair makes a good point about the District Court Rule. One way to handle it may be to broaden the Committee note that follows subsection (a)(3) of Rule 4-262. Rule 4-262 will go back to the Criminal Subcommittee for further work. By consensus, the Committee approved Rule 4-263 as amended, and remanded Rule 4-262 to the Criminal Subcommittee.

The Chair stated that Agenda Item 3, Rule 4-216, Pretrial Release, will not be discussed today, because Professor Byron Warnken is unable to attend today's meeting.

Agenda Item 5. Consideration of proposed amendments to certain rules recommended by the Appellate Subcommittee: Rule 8-204 (Application for Leave to Appeal to Court of Special Appeals), Rule 8-205 (Information Reporters), and Rule 8-511 (Amicus Curiae)

The Vice Chair presented Rule 8-204, Application for Leave to Appeal to Court of Special Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN COURT OF APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 200 - OBTAINING REVIEW IN COURT OF SPECIAL APPEALS

AMEND Rule 8-204 to reorganize sections (b) and (g) and to add language to sections (b), (c), (d), and (g) referring to an application for leave to appeal the denial of victims' rights, as follows:

Rule 8-204. APPLICATION FOR LEAVE TO APPEAL TO COURT OF SPECIAL APPEALS

(a) Scope

This Rule applies to applications for leave to appeal to the Court of Special Appeals.

Cross reference: For Code provisions governing applications for leave to appeal, see Courts Article, §3-707 concerning bail; Courts Article, §12-302 (e) concerning guilty plea cases; Courts Article, §12-302 (g) concerning revocation of probation cases; Criminal Procedure Article, §11-103 concerning victims of violent crimes; Criminal Procedure Article, §7-109 concerning post conviction cases; Correctional Services Article, §10-206 et seq. concerning inmate grievances; and Health-General Article, §§12-117 (e)(2), 12-118 (d)(2), and 12-120 (k)(2) concerning continued commitment, conditional release, or discharge of an individual committed as not criminally responsible by reason of insanity or incompetent to stand trial.

(b) Application

(1) How Made~~; Time for Filing~~

An application for leave to appeal to the Court of Special Appeals shall be filed in duplicate with the clerk of the lower court.

(2) Time for Filing

(A) Generally

The application shall be filed within 30 days after entry of the judgment or order from which the appeal is sought~~, except~~

~~that an application for leave to appeal with regard to bail pursuant to Code, Courts Article, §3-707 shall be filed within ten days after entry of the order from which the appeal is sought~~.

(B) Interlocutory Appeal by Victim

An application with regard to an interlocutory appeal by a victim pursuant to Code, Criminal Procedure Article, §11-103 alleging that the trial court denied or failed to consider a victim's right may be filed at the time the victim's right is actually being denied or within 10 days after the request is made on behalf of the victim, whether or not the court has ruled on the request.

Committee note: An application for leave to appeal by a crime victim under Criminal Procedure Article, §11-103 may be filed both when a victim's right is denied and when a court fails to consider a right secured by a victim. A victim who believes the court has failed to consider the victim's right may file an application when the right is in fact being denied or when the court has failed to timely determine a request to apply the victim's right. The court's failure to consider including failure to timely rule constitutes a *de facto* order of court that is subject to an interlocutory or final appeal by a victim.

(C) Bail

An application for leave to appeal with regard to bail pursuant to Code, Courts Article, §3-707 shall be filed within ten days after entry of the order from which the appeal is sought.

~~(2)~~ (3) Content

The application shall contain a concise statement of the reasons why the judgment should be reversed or modified and shall specify the errors allegedly committed by the lower court.

~~(3)~~ (4) Service

If the applicant is the State of Maryland, it shall serve a copy of the application on the adverse party in compliance with Rule 1-321. Any other applicant shall serve a copy of the application on the Attorney General in compliance with Rule 1-321. If the applicant is not represented by an attorney, the clerk of the lower court shall promptly mail a copy of the application to the Attorney General.

(c) Record on Application

(1) Time for Transmittal

Within (A) five days after the filing of an application by a victim for leave to file an interlocutory appeal pursuant to Code, Criminal Procedure Article, §11-103, (B) 30 days after the filing of an application for leave to appeal in any other case, or ~~within~~ (C) such shorter time as the appellate court may direct, the clerk of the lower court shall transmit the record, together with the application, to the Court of Special Appeals.

(2) Appeals from Post Conviction Proceedings

On application for leave to appeal from a post conviction proceeding, the record shall contain the petition, the State's Attorney's response, any subsequent papers filed in the proceeding, and the statement and order required by Rule 4-407.

(3) Appeals from Habeas Corpus Proceedings

On application for leave to appeal from a habeas corpus proceeding in regard to bail, the record shall contain the petition, any response filed by the State's Attorney, the order of the court, and the judge's memorandum of reasons.

(4) Appeals by Victims

On application by a victim for leave to appeal pursuant to Code, Criminal Procedure Article, §11-103, the record shall contain (A) the application; (B) any response to the application filed by the defendant, the State's Attorney, or the Attorney General; (C) any pleading regarding the victim's request including, if applicable, a statement that the court has failed to consider a right of the victim; and (D), if applicable, any order or decision from the court.

(5) Other Appeals

On any other application for leave to appeal, the record shall contain all of the original papers and exhibits filed in the proceeding.

Cross reference: Code, Courts Article §3-707.

(d) Response

Within 15 days after service of the application, any other party may file a response in the Court of Special Appeals stating why leave to appeal should be denied or granted, except that any response to an application for leave to appeal with regard to bail pursuant to Code, Courts Article, §3-707 or with regard to an interlocutory appeal by a victim pursuant to Code, Criminal Procedure Article, §11-103 shall be filed within five days after service of the application.

(e) Additional Information

Before final disposition of the application, the Court of Special Appeals may require the clerk of the lower court to submit any portion of the stenographic transcript of the proceedings below and any additional information that the Court may wish to consider.

(f) Disposition

On review of the application, any

response, the record, and any additional information obtained pursuant to section (e) of this Rule, without the submission of briefs or the hearing of argument, the Court shall:

(1) deny the application;

(2) grant the application and affirm the judgment of the lower court;

(3) grant the application and reverse the judgment of the lower court;

(4) grant the application and remand the judgment to the lower court with directions to that court; or

(5) grant the application and order further proceedings in the Court of Special Appeals in accordance with section (g) of this Rule.

The Clerk of the Court of Special Appeals shall send a copy of the order disposing of the application to the clerk of the lower court.

(g) Further Proceedings in Court of Special Appeals

(1) Generally

Further proceedings directed under subsection (f)(5) of this Rule shall be conducted pursuant to this Title and as if the order granting leave to appeal were a notice of appeal filed pursuant to Rule 8-202. If the record on application for leave to appeal is to constitute the entire record to be considered on the appeal, the time for the filing of the appellant's brief shall be within 40 days after the date of the order granting leave to appeal.

(2) Further Proceedings in Appeals of Denial of Victims' Rights

(A) Appeals from Final Orders

If the order involves an appeal by

a victim from a final order pursuant to Code, Criminal Procedure Article, §11-103, the Court may consolidate the appeal with any other appeal filed in the criminal case.

(B) Appeals from Interlocutory Orders

If the order granting leave to appeal involves an interlocutory appeal by a victim pursuant to Code, Criminal Procedure Article, §11-103, the Court may schedule oral argument without the submission of briefs and shall consider the application and any responses in lieu of briefs.

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is derived from former Rules 1093 a, 1095 a 1, 2 and 4, and 1096 a 1, 2, and 4.
Section (c) is derived from former Rules 1093 b, 1095 a 3, and 1096 a 3.
Section (d) is new.
Section (e) is derived from former Rules 1093 c, 1095 b, and 1096 b.
Section (f) is new.
Section (g) is derived from former Rules 1093 d, 1095 c, and 1096 c.

Rule 8-204 was accompanied by the following Reporter's Note.

Russell Butler, Esq. pointed out that Code, Criminal Procedure Article, §11-103 provides that a victim of a violent crime may file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider certain statutory rights provided to the victim. The Appellate Subcommittee recommends changing Rule 8-204 to conform to the statute.

The Vice Chair explained that the issue of leave to appeal the denial of victims' rights has been clarified in the Rule. The language pertaining to the time for filing the application for leave to appeal has been deleted from the tagline for

subsection (b)(1). She pointed out that the language "except as otherwise provided in subsection (b)(2)(B)" should be added to subsection (b)(2)(A). Subsection (b)(2)(B) is new and provides that the victim may file an interlocutory appeal alleging that the trial court denied or failed to consider a victim's right at the time the right was denied or within 10 days after the request has been made on behalf of the victim. Subsection (c)(1) has been changed to shorten the period of time to file the record to make the procedure of a victim's application for leave to file an interlocutory appeal meaningful. Subsection (c)(4) describes what is to be in the record. In section (d), the words "or granted" were added, and subsection (g)(2) is a new provision allowing consolidation of appeals in denial of victims' rights cases with other appeals filed in the criminal case and scheduling of oral argument without the submission of briefs.

The Chair said that Mr. Butler was present to discuss the changes to the Rule. The Chair pointed out that in subsection (c)(1), language should be added to clarify that the clerk of the lower court is not transmitting the record of the criminal case. The Vice Chair responded that the Style Subcommittee can draft a description of what the record is that is to be transmitted. Judge McAuliffe inquired as to whether the filing of the application stays the proceedings. The Chair replied that section (c) of Code, Criminal Procedure Article, §11-103 states that the filing of an application for leave to appeal does not stay other proceedings in a criminal case unless all parties

consent. Judge McAuliffe suggested that language be added to section (c) to indicate that pursuant to the statute, an application for leave to appeal does not stay the proceedings in a criminal case unless the parties consent. By consensus, the Committee agreed to this suggestion.

The Vice Chair expressed her dislike for the Committee note after subsection (b)(2)(A). The Chair asked Mr. Butler if the Committee note could be deleted, and Mr. Butler answered affirmatively. The Committee agreed by consensus to the deletion.

Ms. Forster questioned whether the defendant is considered a party if the victim takes an appeal pursuant to Rule 8-204. The Chair responded that the best way to answer this procedurally may be to refer to the Rules pertaining to intervention, Rules 2-214 and 3-214. If the defendant believes that he or she should be a party in the victim's appeal, the defendant can intervene. This is better than stating that the defendant is or is not a party. Judge Norton questioned whether the interlocutory appeal may exclude the defendant. The statute does not make the distinction between a final and an interlocutory appeal. Is there a different level of involvement for a final appeal as opposed to an interlocutory appeal?

Mr. Butler pointed out that subsection (c)(4)(B) implies that the defendant was served with the application for leave to appeal. There is no intent to exclude the defendant. The Chair said that the defendant may file a response, although he or she

is not automatically a party to the proceeding if the court grants the application for leave to appeal. The defendant may be opposed to the victim being present in the courtroom, because the defense intends to call the victim as a witness, and the victim files an application for leave to appeal. Both the defendant and the State can file a response to the application. If the court grants the application, there is a different set of procedures. Judge Norton pointed out that this may be inconsistent with the requirement of intervention. The Chair explained that if the application is granted, the appellants are the victim and the State. In the cases he has seen, the appellee is the circuit court judge who denied the relief requested by the victim. At this point in the case, the defendant can be heard, but the defendant must take action to be part of the appeal. Language could be added to the Rule that would state that if the application for leave to appeal is granted, the court may designate the defendant as an appellee. The Vice Chair commented that it may be difficult to know in advance the cases in which the defendant should be designated as an appellee, so it is preferable not to provide automatically in the Rule that the defendant is a party.

By consensus, the Committee approved the Rule as amended.

The Vice Chair presented Rule 8-205, Information Reports, for the Committee’s consideration.

TITLE 8 - APPELLATE REVIEW IN COURT OF APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 200 - OBTAINING REVIEW IN COURT OF SPECIAL APPEALS

AMEND Rule 8-205 (a) by adding another category of cases that are excluded from the Rule, as follows:

Rule 8-205. INFORMATION REPORTS

(a) Applicability

This Rule applies to appeals in all civil actions in the Court of Special Appeals except juvenile causes, appeals from guardianships terminating parental rights, and applications and appeals by prisoners seeking relief relating to confinement or conditions of confinement.

(b) Report by Appellant Required

Upon the filing of a notice of appeal, the clerk of the lower court shall provide to the appellant an information report form prescribed by the Court of Special Appeals. Unless an expedited appeal is elected pursuant to Rule 8-207, the appellant shall file with the Clerk of the Court of Special Appeals a copy of the notice of appeal and a complete and accurate information report.

(c) Time for Filing

When a notice of appeal is filed more than ten days after the entry of judgment, the information report shall be filed within ten days after the filing of the notice. When the notice of appeal is filed within ten days after the entry of judgment, the information report shall be filed within ten days after the expiration of that ten-day period, if no post-judgment motion pursuant to Rule 2-532, 2-533, or 2-534 or a notice for in banc review pursuant to Rule 2-551 has been timely filed.

Cross reference: Rule 8-202 (c).

(d) Report by Appellee

Within seven days after service of appellant's information report, each appellee may file with the Clerk of the Court of Special Appeals a supplemental report containing any other information needed to clarify the issues on appeal or otherwise assist the prehearing judge.

(e) Disclosure of Post-judgment Motions

If the filing, withdrawal, or disposition of a motion pursuant to Rule 2-532, 2-533, or 2-534 has not been disclosed in an information report or supplemental report, the party filing the motion shall notify the Clerk of the Court of Special Appeals of the filing and of the withdrawal or disposition.

(f) Confidentiality

Information contained in an information report or a supplemental report shall not (1) be treated as admissions, (2) limit the disclosing party in presenting or arguing that party's case, or (3) be referred to except at a prehearing or scheduling conference.

Source: This Rule is derived from former Rule 1023 with the exception of section (a) which is derived from former Rule 1022 and section (f), the substance of which was transferred from Rule 8-206.

Rule 8-205 was accompanied by the following Reporter's Note.

The Office of the Attorney General requested that appeals from guardianships terminating parental rights be added as another category of cases excluded from the scope of Rule 8-205. The amendment would eliminate the requirement of filing civil appeal prehearing information reports in termination of parental rights cases. This is appropriate because these reports inform

the court as to whether a prehearing conference would be helpful in resolving the issues of the case, and most termination of parental rights cases are almost impossible to resolve. When a party fails to file a prehearing information report, delay often results, and the termination cases need to be resolved as quickly as possible. Eliminating the requirement of filing the prehearing information reports will lead to more rapid resolution of the cases. The Appellate Subcommittee is in agreement with this suggestion.

The Vice Chair explained that the Office of the Attorney General had requested that appeals from guardianships terminating parental rights be added to the other categories of cases excluded from the applicability of Rule 8-205. This would eliminate the requirement of filing information reports in these cases. By consensus, the Committee approved the Rule as presented.

The Vice Chair presented Rule 8-511, Amicus Curiae, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 500 - RECORD EXTRACT, BRIEFS, AND ARGUMENT

AMEND Rule 8-511 to include language requiring amicus curiae to disclose certain information, as follows:

Rule 8-511. AMICUS CURIAE

(a) Generally

A person may participate as an amicus curiae only with permission of the Court.

(b) Brief

The Court, on motion of an amicus curiae or a party or on its own initiative, may grant permission to the amicus curiae to file a brief. A motion requesting permission for an amicus curiae to file a brief shall (1) identify the interest of the amicus curiae, (2) state the reasons why the amicus brief is desirable, ~~and~~ (3) state the issues that the amicus curiae intends to raise, and (4) identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary or other contribution to the preparation or submission of the brief, and identify the nature of the contribution. The style (except for the color of the cover), content, and time for filing of the amicus brief shall be the same as prescribed by these rules for the brief of the party whose position as to affirmance or reversal the amicus curiae supports.

(c) Oral Argument

The amicus curiae shall not participate in oral argument without permission of the Court. Permission shall be granted only for extraordinary reasons.

Source: This Rule is derived from FRAP 29.

Rule 8-511 was accompanied by the following Reporter's Note.

Judge Murphy has suggested the addition of a provision to Rule 8-511 which would require that an amicus curiae disclose any outside payments or other contributions toward the preparation of the amicus brief and the identity of the person making the payment or contribution. The Appellate Subcommittee concurs with this suggestion and recommends that the new language to be added to the Rule be derived from language in Rule 37 of the Rules of the U.S. Supreme Court.

The Vice Chair explained that the Chair had suggested that language be added to Rule 8-511 requiring that an amicus curiae disclose any outside payments or other contributions toward the preparation of the brief and the identity of the person making the payment or contribution. The Chair added that this was a suggestion from the Honorable Irma Raker, Judge of the Court of Appeals. Mr. Klein inquired if the word "contribution" included getting assistance from someone in another state by asking for a copy of the brief the person had previously filed in that state. The Chair responded that a contribution includes the contribution of written material. Judge Heller clarified that this would not include a law clerk's written research. By consensus, the Committee approved the Rule as presented.

Agenda Item 6. Consideration of a certain policy question from the Process, Parties & Pleading Subcommittee

---

Mr. Brault told the Committee that the Honorable Thomas P. Smith of the Circuit Court for Prince George's County by letter dated May 8, 2003 had expressed the concern that there may be a rule conflict that could interfere with the right of the court to specify when amendments to pleadings may be made. See Appendix 3. Rules 2-504, Scheduling Order, and 2-504.2, Pretrial Conference, provide that the court may require amendments to pleadings to be filed by a certain date, but Rule 2-341, Amendment of Pleadings, states that a party may file an amended

complaint any time prior to 15 days before the date of trial. Judge Smith requested a change to Rule 2-341 that would provide that a scheduling order issued pursuant to Rule 2-504.2 takes precedence over Rule 2-341.

When the Process, Parties, and Pleading Subcommittee discussed this issue, the Honorable Paul Hackner, of the Circuit Court for Anne Arundel County, pointed out that other rules also may be affected, such as Rule 2-311, Motions, and Rule 2-501, Motion for Summary Judgment. The question for the Committee to answer is whether time allowances in other Rules should be abandoned in favor of the time periods put into the scheduling order. Mr. Brault expressed his concern that to do this would decrease the authority of the Rules. However, in complicated litigation, scheduling deadlines must be observed. There needs to be a balance. His view is that generally, the scheduling order should control, but he had not been aware of any conflicts.

Judge Heller remarked that this was part of the problem presented in the case of *Pittman v. Atlantic Realty Co.*, 359 Md. 513 (2000). The plaintiff filed affidavits in opposition to a motion for summary judgment after the deadline in the scheduling order. Judge Heller noted that she had seen conflicts in other cases between the scheduling order and the time frames in other rules.

Judge Kaplan expressed the opinion that there is a danger in adopting a rule that provides that the scheduling order overrides

other rules, because this could eventually cause a reversion back to local rules. Each jurisdiction may put different time periods in the scheduling orders, which can be confusing. The system has been working well, and no change is necessary. The Chair commented that the Honorable Roger Titus, of the U.S. District Court for the District of Maryland, a former member of the Rules Committee, had often expressed the view that the scheduling order is the "son of local rules."

The Vice Chair pointed out that in the not-so-distant past, the phrase "at any time" was removed from many Rules. Now, deadlines in cases are handled by what is provided in the scheduling order. It should not be difficult to make Rule 2-341 consistent with Rules 2-504 and 2-504.2. It will be confusing if the Rules do not recognize the mandatory nature of the scheduling order. Judge Missouri commented that there have been problems in complex litigation when all of the parties agree to the contents of the scheduling order, but the Rules allow procedures past the cutoff date in the order. The Chair suggested that where appropriate in the Rules, the language "unless the court orders otherwise pursuant to Rule ____" could be added. There could also be a Committee note that would indicate that a party must comply with the scheduling order. One cannot rely on a particular rule where the scheduling order has superseded it. Mr. Brault observed that the parties should be allowed to agree otherwise. In Montgomery County, the computer assigns artificial dates in the scheduling order. Some of the judges allow the

parties to work out their own schedule, but some do not.

Judge Missouri noted that in Prince George's County, the complex litigation cases have a specialized scheduling order with the dates set in it, but the dates can be amended. Judge Heller added that in Baltimore City, the scheduling orders are generated by a computer, but the dates in the orders are subject to change if a request is timely made. A motion for summary judgment under Rule 2-501 may be made at any time, even at trial, as occurred in *Beyer v. Morgan State*, 369 Md. 335 (2002). In the scheduling order, the judge sets a deadline for filing motions and other papers, so there is sufficient time to process everything. When a Rule such as Rule 2-501 overrides the deadlines in the scheduling order, the entire process is undermined. Scheduling orders should mean what they say.

The Chair suggested that appropriate language could be added to the applicable Rules providing that the scheduling order supersedes the time limits in the Rules. Mr. Brault remarked that this should be subject to an order of the court. Judge Dryden pointed out that a renegade judge could set up a very stringent scheduling order in violation of the Rules. He expressed the concern that this may be giving too much authority to the judge. The Vice Chair noted that there are not that many cases in which this would be a problem. Judge Missouri added that in most courts, the scheduling order is generated by computer. Mr. Michael observed that scheduling orders are

different around the State, and the scheduling conferences are run differently. Judge Missouri said that he will bring this issue up at the next meeting of the Conference of Circuit Court Judges. The Chair suggested that a Committee note be added to Rule 2-504.2 that would provide that where the parties have agreed to the content of the scheduling order, ordinarily the court should implement this.

Mr. Brault commented that the philosophy of court management is to manage the court docket and not necessarily to do justice. Trial attorneys may be put in an awkward situation. Rocket dockets, such as the one in federal court in the eastern District of Virginia, get awards, but it may be impossible for the defendant in a civil action to meet the deadlines. Frequently, counsel are in agreement that deadlines should be extended and stipulate to the extension. If no exceptions are permitted, great injustice can result. Although judges should have the authority to impose time limits, it is important to keep in mind that the purpose of management of litigation is also to insure that justice is accomplished.

Judge Heller noted that the last 15 years of management of civil litigation in Maryland courts is reflected in the scheduling orders that are now being entered. For example, in complex cases, such as those dealing with lead paint and asbestos, Baltimore City has gone to great lengths to meet with attorneys to draft workable scheduling orders. These can be modified for individual cases. She stated that no changes to the

Rules should be made that would render the deadlines meaningless.

The Vice Chair remarked that 20 years ago, it was difficult to get a case to trial timely. Since that time, changes to the Rules have resulted in great strides made toward solving this problem. However, there are too many examples of judges who place greater emphasis on the management of caseloads than on the facts of the case. Mr. Bowen pointed out that when the scheduling order is negotiated between the parties and the judge, and this overrides the Rules, there is no problem. The problems occur when the scheduling order is computer-generated, and no one necessarily agrees to the contents of the order.

The Chair suggested that language be added to Rule 2-504 that allows the parties to move for changes to the scheduling order. Judge Missouri responded that this is already permissible. The Vice Chair said that some judges may ignore the parties' requests for changes. The Chair suggested that a Committee note could provide that when the parties have agreed to the contents of a scheduling order, ordinarily the court should enter that order. The Chair suggested that all of the Rules in Title 2 be reviewed and amended to ensure that the scheduling order controls if there is a conflict between the time frames in the Rules and the deadlines in the scheduling order. The Committee agreed by consensus to refer this matter to the Management of Litigation Subcommittee.

Agenda Item 7. Reconsideration of certain proposed amendments to Rule 2-341 (Amendment of Pleadings)

Mr. Brault presented Rule 2-341, Amendment of Pleadings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-341 to add certain requirements concerning the highlighting of amendments to pleadings, as follows:

Rule 2-341. AMENDMENT OF PLEADINGS

(a) Prior to 15 Days of Trial Date

A party may file an amendment to a pleading at any time prior to 15 days of a scheduled trial date. Within 15 days after service of an amendment, any other party to the action may file a motion to strike setting forth reasons why the court should not allow the amendment. If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading or within 15 days after service of the amendment, whichever is later. If no new or additional answer is filed within the time allowed, the answer previously filed shall be treated as the answer to the amendment.

(b) Within 15 Days of Trial Date and Thereafter

Within 15 days of a scheduled trial date or after trial has commenced, a party may file an amendment to a pleading only by written consent of the adverse party or by leave of court. If the amendment introduces new facts or varies the case in a material respect, the new facts or allegations shall

be treated as having been denied by the adverse party. The court shall not grant a continuance or mistrial unless the ends of justice so require.

Committee note: By leave of court, the court may grant leave to amend the amount sought in a demand for a money judgment after a jury verdict is returned.

(c) Scope

An amendment may seek to (1) change the nature of the action or defense, (2) set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended, (4) correct misnomer of a party, (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, (6) add a party or parties, (7) make any other appropriate change. Amendments shall be freely allowed when justice so permits. Errors or defects in a pleading not corrected by an amendment shall be disregarded unless they affect the substantial rights of the parties.

(d) If New Party Added

If a new party is added by amendment, the amending party shall cause a summons and complaint, together with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action, to be served upon the new party.

Alternative 1

(e) Highlighting of Amendments

Unless otherwise ordered by the court, a party filing an amended pleading shall provide to all counsel and to the clerk a copy of that portion of the amended pleading in which stricken material has been lined through or enclosed in brackets and new material has been underlined or set forth in bold-faced type.

Alternative 2

(e) Highlighting of Amendments

Unless otherwise ordered by the court, a party filing an amended pleading shall provide to all counsel and to the clerk (1) a clean copy of the amended pleading and (2) a copy of that portion of the amended pleading in which stricken material has been lined through or enclosed in brackets and new material has been underlined or set forth in bold-faced type.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 320.
Section (b) is new and is derived in part from former Rule 320 e.
Section (c) is derived from sections a 2, 3, 4, b 1 and d 5 of former Rule 320 and former Rule 379.
Section (d) is new.
Section (e) is derived from the 2001 version of L.R. 103 (6)(c) of the Rules of the District Court for the United States District of Maryland.

Rule 2-341 was accompanied by the following Reporter's Note.

Based on a suggestion from the Honorable Paul A. Hackner, the Process, Parties & Pleading Subcommittee recommends that Rule 2-341 be amended to require that a party filing an amended pleading highlight the changes made by the amendment. The Subcommittee recommends a procedure similar to the procedure set forth in L.R. 103 (6)(c) of the Rules of the United States District Court for the District of Maryland.

The Subcommittee recommends that the new material regarding the highlighting of amendments be added as part of the Rule and feels that it is not necessary to give a clean copy of the amended pleading to the parties and to the clerk. This is shown as Alternative 1. The Honorable William Missouri, a member of the Rules Committee and Vice-Chair of the Conference of Circuit Judges, has expressed the Conference's preference that the clean copy of the amended pleading also be provided to counsel and the clerk. This is shown as Alternative 2. The Conference feels that the same changes should

be made to Rule 3-341, but the Subcommittee does not.

Mr. Brault explained that the Process, Parties, and Pleading Subcommittee recommends amending Rule 2-341 to require that a party filing an amended pleading highlight the changes made to the pleading. Local Rule 103 (6)(c) of the Rules of the United States District Court for the District of Maryland has a similar provision. Without a provision like this, a party would have to compare the amended and unamended versions of the pleading to find out what the changes are. One of the issues to determine is whether it is necessary to file both an unmarked and a marked draft with the amendments in it. The Conference of Circuit Judges would like both copies to be filed. He asked what the position of the circuit court clerks is. The Reporter answered that the Conference of Circuit Court Clerks at its November 17, 2004 meeting unanimously agreed upon Alternative 2. By consensus, the Committee decided to recommend Alternative 2.

The Vice Chair suggested out that the words “that portion of” should be removed from the language of Alternative 2, so that the entire marked amended pleading is provided. By consensus, the Committee agreed to this suggestion. Alternative 2 of Rule 2-341 was approved as amended.

The Chair adjourned the meeting.