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 April 6, 2001.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Joyce H. Knox, Esq.
Hon. John F. McAuliffe
Hon. William D. Missouri
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Hon. James N. Vaughan

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Mike Lytle, Rules Committee Intern
John Amato, Esq.
Patricia Platt, Chief Clerk, District Court of Maryland

The Chair convened the meeting. He said that the Vice Chair had been selected as one of Maryland's Top 100 Women. She joins Judge Heller in this prestigious selection. The Chair congratulated both the Vice Chair and Judge Heller.

The Chair asked if there were any additions or corrections to the minutes of the January 5, 2001 and February 9, 2001 Rules Committee meetings. The Reporter identified several typographical

errors. Judge Missouri moved to adopt the minutes with the errors corrected, the motion was seconded, and it passed unanimously.

The Chair said that since Ms. Patricia Platt, Chief Clerk of the District Court, and Mr. John Amato, Esq. were present to discuss Rule 7-112, one of the Rules listed under Agenda Item 2, that Rule would be discussed first.

Agenda Item 2. Consideration of proposed amendments to certain rules, recommended by the Appellate Subcommittee: Rule 4-349 (Release After Conviction), Rule 7-112 (Appeals Heard De Novo), Rule 7-206 (Record), Rule 8-411 (Transcript), and Rule 16-405 (Videotape Recording of Circuit Court Proceedings)

Mr. Titus presented Rule 7-112, Appeals Heard De Novo, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 100 - APPEALS FROM THE DISTRICT COURT TO THE CIRCUIT COURT

AMEND Rule 7-112 to add a new section providing for the clerk of the circuit court to notify the clerk of the District Court when there is a superseding circuit court judgment and to add new language providing for the circuit court to issue a warrant for a defendant to be taken into custody and brought before a judicial officer of the District Court when an appeal has been withdrawn by a defendant who was already sentenced to a term of confinement and released pending the appeal,

as follows:

Rule 7-112. APPEALS HEARD DE NOVO

(a) Scope

This Rule applies only to appeals heard de novo in the circuit court.

(b) District Court Judgment

The District Court judgment shall remain in effect pending the appeal unless and until superseded by a judgment of the circuit court or, in a criminal action, a disposition by nolle prosequi or stet entered in the circuit court.

(c) Procedure in Circuit Court

(1) The form and sufficiency of pleadings in an appeal to be heard de novo are governed by the rules applicable in the District Court. A charging document may be amended pursuant to Rule 4-204.

(2) If the action in the District Court was tried under Rule 3-701, there shall be no pretrial discovery under Chapter 400 of Title 2, the circuit court shall conduct the trial de novo in an informal manner, and Title 5 of these rules does not apply to the proceedings.

(3) Except as otherwise provided in this section, the appeal shall proceed in accordance with the rules governing cases instituted in the circuit court.

Cross reference: See Rule 2-327 concerning the waiver of a jury trial on appeal from certain judgments entered in the District Court in civil actions.

(d) Circuit Court Judgment

Upon the entry of a superseding judgment of the circuit court, the clerk of the circuit

court shall send notice thereof to the clerk of the District Court.

~~(d)~~ (e) Withdrawal of Appeal; Entry of Judgment

(1) An appeal shall be considered withdrawn if the appellant files a notice withdrawing the appeal or fails to appear as required for trial or any other proceeding on the appeal.

(2) Upon a withdrawal of the appeal, the circuit court shall dismiss the appeal, and the clerk shall promptly return the file to the District Court. Any statement of satisfaction shall be docketed in the District Court.

(3) On motion filed in the circuit court within 30 days after entry of a judgment dismissing an appeal, the circuit court, for good cause shown, may reinstate the appeal upon the terms it finds proper. On motion of any party filed more than 30 days after entry of a judgment dismissing an appeal, the court may reinstate the appeal only upon a finding of fraud, mistake, or irregularity. If the appeal is reinstated, the circuit court shall notify the District Court of the reinstatement and request the District Court to return the file.

(4) In criminal cases in which an appeal has been withdrawn by a defendant who was sentenced to a term of confinement and released pending appeal pursuant to Rule 4-349, the circuit court shall issue a warrant pursuant to Rule 1-361 providing for the defendant to be taken into custody and brought before a judicial officer of the District Court for the entry of a commitment that conforms to the entry of judgment in the District Court. The warrant shall fully identify the District Court case number.

Source: This Rule is derived in part from former Rule 1314.

Rule 7-112 was accompanied by the following Reporter's Note.

> John Amato, IV, Esq., sent a letter explaining that his client had appealed a judgment in the District Court for an unpaid hospital bill. Because there is no mechanism for the circuit court to notify the District Court that the judgment was reversed, even though the client won in the circuit court on appeal, the District Court judgment still appeared in the records of that court, and the hospital attorney served a wage garnishment against Mr. Amato's client. The Appellate Subcommittee is proposing to add a new section to Rule 7-112 which will require the circuit court clerk to notify the District Court clerk when a superseding circuit court judgment has been entered.
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> To solve the problem caused by the fact that there is no means to take immediate custody of a defendant who has withdrawn or dismissed an appeal in circuit court after previously being convicted in District Court, the Subcommittee is recommending that language be added to Rule 7-112 which will provide that the circuit court shall issue a warrant for the defendant to be taken into custody and brought before a judicial officer of the District Court for the entry of a commitment that conforms to the entry of judgment in the District Court. Because the circuit court case has an entirely different number from the District Court case, the Subcommittee is suggesting that the warrant identify the District Court case number.

Mr. Titus explained that the Honorable Martha F. Rasin, Chief Judge of the District Court, had asked the Appellate Subcommittee to look into a problem involving the following scenario: someone who has been convicted in the District Court and sentenced to prison, then appeals his or her case and is released on bond. At the circuit

court level, the defendant either dismisses the appeal or does not appear. There is no mechanism in the Rules to arrange for the defendant to go to the District Court so that a new commitment can be issued and the defendant can begin serving his or her sentence. The suggested amendment to subsection (e)(4) provides a mechanism and improves communication between the District and circuit courts. The Subcommittee is proposing that once the case is dismissed in the circuit court, that court will issue a warrant providing for the defendant to be taken into custody and brought before a judicial officer of the District Court for the entry of a commitment.

The Vice Chair inquired if the problem is that the District Court is not being notified. The Chair responded that that is one of the problems. Mr. Hochberg asked if this Rule applies only to criminal cases. Mr. Titus replied that the Rule applies to all cases, including civil. Mr. Hochberg questioned what notice changes the record in the District Court if the criminal defendant is convicted in the District Court and found not guilty on appeal. Mr. Titus answered that the notice is triggered by the entry of a judgment in the circuit court. The problem occurs when there is no superceding judgment entered in the circuit court in a criminal action.

The Chair commented that another problem with the Rule was pointed out in a letter from Mr. Amato. See Appendix 1. The Subcommittee is proposing an amendment to section (d) which addresses

the problem of the District Court not being notified when a District Court judgment is superseded by a circuit court judgment. Mr. Amato explained that his client had been sued by a hospital for an allegedly unpaid bill. After a judgment against the client in District Court, the client took a de novo appeal to the circuit court. The circuit court judgment was in the client's favor, but there was no mechanism in place to provide a way for the circuit court to notify the District Court that the judgment was reversed. Because of this, the hospital continued its effort to collect on the judgment and served a wage garnishment on the defendant's employer. Mr. Amato then ordered a credit report, and the District Court judgment was still appearing on the client's record.

Mr. Brault asked what the procedure is for giving notice to the District Court. Ms. Platt responded that when the District Court receives notice, the clerk enters on the computer the fact that there has been a superseding circuit court judgment in the case. Currently, the District Court is not always being notified about the circuit court judgment. The Chair inquired if the Rule should provide expressly the procedure the District Court uses to indicate that there has been a superseding circuit court judgment. The Reporter suggested that language could be added to section (d) to the effect that the clerk shall enter the information on the docket.

Judge Vaughan remarked that in a traffic case, if someone is convicted of speeding, the fact of the conviction is entered into the

computer, which is located in the courtroom. If the defendant appeals to the circuit court, the person's conviction, including any points, is shown on the record. The computer also shows the disposition of the case. Ms. Platt said that circuit court clerks actually are entering the disposition of traffic cases in the circuit court into the District Court computer system, which has an automatic link to the Motor Vehicle Administration. The Vice Chair observed that even if the proposed change to the Rule is not needed for traffic cases, it will not cause any harm. Mr. Amato said that he also brought to the attention of the Subcommittee the fact that the file is not returned to the District Court. Ms. Platt noted that the District Court does not want the file returned.

The Chair stated that at this point in the proceedings, there is a circuit court judgment. He asked what can be done to alert the District Court. Ms. Platt answered that the District Court needs notification that there has been a judgment in the circuit court, so that the case can be removed from the District Court system. Mr. Sykes questioned as to how the District Court removes the judgment from its records if the file is not returned from the circuit court. Ms. Platt replied that the system is coded, and the code is taken out of the computer record.

Judge Missouri inquired as to why enforcement of the District Court judgment is not stayed pending appeal. The Chair answered that this is up to the judge. Judge Vaughan added that a supersedeas bond

would have to be filed; otherwise, the plaintiff can collect on the judgment. Judge Missouri commented that he is not opposed to adding to the Rule a provision for notice to the District Court. He thought that the circuit court clerks were already notifying the District Court. The Vice Chair pointed out that this is the same issue as when after an appeal on the record the judgment is modified or vacated. She expressed concern about the placement of this issue in Rule 7-112 and suggested that the language in proposed new section (d) could be placed in the general rules relating to notification. Judge McAuliffe responded that after the circuit court hears an appeal on the record, the circuit court enters an order in accordance with Rule 7-113 (g). The District Court receives notification when a copy of the order is transmitted to the District Court with the return of the record, as required by Rule 7-115.

Judge McAuliffe suggested that subsection (e)(4) of Rule 7-112 could be amended to delete the language "a judicial officer of the District Court" and replace it with "a judge or Commissioner." The term "judicial officer" is not defined in Title 7 as it is in Title 4, and the term should be spelled out. The Committee agreed by consensus to make this change. Mr. Bowen suggested that in the last sentence of subsection (e)(4), the word "fully" should be deleted, and the words "by name and" should be added before the word "number." The Committee agreed by consensus to this suggestion.

The Vice Chair said that the Rule should clarify the term

"superseding judgment" to which the Rule refers. It is not only a judgment of the circuit court that reverses the judgment of the District Court. The term also includes a judgment that affirms a judgment of the lower court. The Chair suggested that section (d) be reworded to read: "Upon the entry of a judgment of the circuit court, the clerk of the circuit court shall send notice of the superseding judgment to the clerk of the District Court, who shall enter the notice on the docket." Mr. Brault suggested that the introductory language should be "the judgment of the circuit court" instead of "a judgment," and the Committee agreed by consensus to these changes.

Judge Missouri expressed his concern about the use of the word "shall" in the fourth line of subsection (e)(4). If a defendant appeals, and a bond is issued, this wording would require the judge to issue a bench warrant without giving the defendant's attorney a chance to surrender his or her client to the court. Judge Dryden remarked that this is the current procedure. Judge Missouri observed that the warrant should be issued for those defendants not represented by counsel. If a person, who is out on bond when a circuit court case is appealed to the Court of Special Appeals, does not appear after a 30-day period, the court does not issue a warrant immediately but contacts the person's attorney. Mr. Titus commented that this is appropriate for appeals to the Court of Special Appeals, but he pointed out that the volume of appeals from the District Court

to the circuit court is much greater than those from the circuit court to the Court of Special Appeals. The Chair added that when a defendant is sentenced to incarceration by a District Court judge, and the defendant withdraws his or her appeal, the defendant must go to prison. This is not necessarily true when a defendant has appealed a circuit court decision to the Court of Special Appeals, because the defendant has the opportunity to seek reconsideration or file a petition for a writ of *certiorari*.

Ms. Platt commented that different courts have different practices within the District Court system, but there is no existing mechanism to take the defendant, who withdrew an appeal, to a commissioner in order to start the prison time for the defendant.

Judge Missouri reiterated that he was concerned about the use of the word "shall" in subsection (e)(4). Judge McAuliffe commented that often after the warrant has been issued, the defendant's attorney will call to surrender his or her client.

Even if the Rule requires that a warrant be issued, the attorney can still be contacted. Mr. Titus remarked that if a warrant is ordered after an appeal is withdrawn, it would take some time before the warrant is issued and served. Judge Heller added that a judge can hold the issuance of a warrant until a certain time. Judge Dryden said that the District Court judges often notify counsel that a warrant is to be issued, even though the Rules do not provide for this.

Mr. Karceski pointed out a potential problem when sentences are being meted out in the District Court on a weekend basis. One of his clients was sentenced to one weekend a month for the purpose of attending a class in the detention center. If this type of sentence were appealed, and then the appeal withdrawn, the client could be incarcerated and ordered to serve the sentence consecutively instead of one weekend a month. The Chair said that this would not happen. The defendant would be taken to a District Court Commissioner who would put together a commitment conforming to the original judgment of the District Court. Mr. Karceski expressed the opinion that as a practical matter, this might not happen. He agreed with Judge Missouri that the use of the word "shall" in subsection (e)(4) is not necessary. Judge Vaughan estimated that one-half of one percent of criminal cases, not including serious traffic cases, are appealed to the circuit court. The Chair said that probably no more than 10 percent of those involve the withdrawal of an appeal. A clever criminal can maneuver the system by filing an appeal and then withdrawing it, so that the criminal is out on the street. This can be avoided if the circuit court initiates the process of incarcerating the defendant as soon as the appeal is withdrawn.

Mr. Karceski commented that he had read Judge Rasin's letter which refers to the time lag when a case is returned to the District Court from the circuit court. See Appendix 2. The proposed change to the Rule may be creating problems of a different kind. If an

appeal is withdrawn, the file is sent back to the District Court, and there should not be a problem. If someone at the District Court level requests a jury trial in a same day/next day jury trial county, the matter can be before the circuit court within two hours. Why is there a long delay when the file is transferred in the other direction? Judge McAuliffe commented that circuit court judges are frustrated because the defendant withdraws the appeal in front of the circuit court judge, who is powerless to send the defendant back to the District Court. The Chair added that the defendant can walk out of the courtroom and go back on the street. Mr. Karceski pointed out that this situation is not that different from an appeal from the circuit court to the Court of Special Appeals. Mr. Titus responded that he had been informed that the appeals from the District Court to the circuit court were a bigger problem than appeals from the circuit court to the Court of Special Appeals.

Mr. Titus suggested that one way to solve Judge Missouri's problem concerning mandatory issuance of the warrant would be to add to subsection (e)(4) language which would provide that in appropriate cases, the circuit court may defer the issuance of the warrant. Judge Heller expressed the view that this additional language is not necessary, because the circuit court judge has the discretion to delay the issuance of the warrant. Judge Missouri said that he still preferred that the word "may" should be used in place of the word "shall" in subsection (e)(4). Judge Johnson added that the

defendants in these cases have not committed serious crimes. The Chair remarked that a person, who has been sentenced to prison and is out on the street because he or she withdrew an appeal, should be the subject of a commitment that reflects the District Court judgment. Should the circuit court issue a warrant or send a notice? Mr. Karceski suggested that there could be a small window of time allowed before the warrant is issued.

Mr. Sykes pointed out that the proposed language of subsection (e)(4) which reads: "...the circuit court shall issue a warrant..." does not use the adverbs "promptly" or "forthwith" indicating when the warrant should be issued. The proposed language is flexible enough -- anything else would not give the right message. The Chair said that the circuit court judge should enter an order providing for the defendant to be brought before a judicial officer of the District Court. The judge could order a warrant or other form if the defendant's attorney so requests. The language could be something similar to: "...the circuit court shall issue a warrant or enter an order providing for the defendant to be brought before a judicial officer...". Mr. Sykes suggested that the Rule could provide that the circuit court "shall require the defendant to be brought before a judicial officer," which would leave open the mechanism to use. The Chair commented that the judge must be satisfied that the defendant will obey the order to go before the District Court Commissioner. If a defendant is sentenced only to weekends, the attorney can be

allowed to take the defendant before a commissioner the next day, and an appropriate commitment can be prepared then. The judge would have an alternative to immediately issuing a warrant. The Committee agreed by consensus to the Chair's suggested change.

Mr. Titus noted that four changes have been suggested for Rule 7-112. One change is to section (d) providing for the clerk to send notice of the superseding judgment. The second is language to be added at the end of section (d) providing for entering notice on the docket. The Chair asked about the addition of language pertaining to recording the notice. Mr. Titus suggested that the language read: "who shall enter the notice on the docket." The Committee agreed by consensus with this suggestion. The third change is the change to subsection (e)(4) providing for the alternative of a judge entering an order instead of issuing a warrant. The fourth change is the deletion of the word "fully" and addition of the words "by name and" in the last line of subsection (e)(4). The Reporter said that this will be styled by the Style Subcommittee. The Committee approved the Rule as amended.

Mr. Titus thanked Mr. Amato for bringing up the issue about notice being given to the District Court of a circuit court action. The Chair thanked Ms. Platt for her assistance.

Agenda Item 1. Consideration of proposed amendments to Rule 4-217 (Bail Bonds)

The Chair presented Rule 4-217, Bail Bonds, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-217 (c) to delete the terms "commissioner" and "judge," to add the term "judicial officer," to change the term "peace officer" to "law enforcement officer" and to "person," and to add the language "except as prohibited by law" in place of the language "authorized by law," as follows:

Rule 4-217. BAIL BONDS

(a) Applicability of Rule

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

(b) Definitions

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

(1) Bail Bond

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

(2) Bail Bondsman

"Bail bondsman" means an authorized

agent of a surety insurer.

(3) Bail Bond Commissioner

"Bail bond commissioner" means any person appointed to administer rules adopted pursuant to Maryland Rule 16-817.
Cross reference: Code (1957, 1987 Repl. Vol.), Article 27, §6161/2 (f).

(4) Clerk

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

(5) Collateral Security

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

~~(6) Commissioner~~

~~"Commissioner" means a commissioner of the District Court.~~

~~(7)~~ (6) Surety

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

~~(8)~~ (7) Surety Insurer

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

(c) Authorization to Take Bail Bond

~~Any commissioner,~~ Except as prohibited by law, any clerk, ~~judge, or peace~~ law enforcement officer, or judicial officer ~~authorized by law,~~ is authorized to take a bail

bond. ~~A peace officer~~ The person who takes a bail bond shall return it to the court in which the charges are pending, together with all money or other collateral security deposited or pledged and all documents pertaining to the bail bond.

Cross reference: Code (1957, 1992 Repl. Vol.), Article 27, §6161/2 (a) and (b) and Code (1957, 1991 Repl. Vol.), Article 87, §6. The term "law enforcement officer" is defined in Code, Article 27, §727 (b). The term "judicial officer" is defined in Rule 4-102 (f).

. . .

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

The Honorable Dana Levitz, of the Circuit Court of Baltimore County, has suggested a change to section (c) of Rule 4-217. Adding the term "judicial officer" and broadening the class of persons who can return the bail bond to the court will clarify that a District Court Commissioner, who is defined in Rule 4-102 as a judicial officer, can take a bail bond and forward it to the appropriate court. The Subcommittee is recommending that the phrase "except as otherwise prohibited by law" be added in case there are Code provisions which may prohibit certain persons from taking a bail bond. This is stronger than the language "authorized by law" which the Subcommittee proposes to delete. The Subcommittee is also recommending that the term "law enforcement officer" be substituted for the term "peace officer" which is obsolete.

The Chair explained that the Honorable Dana Levitz, of the Circuit Court for Baltimore County, suggested changing section (c) of Rule 4-217. The District Court believes that the bond has to be taken by the Commissioner. The Chair noted that in his experience,

the system works properly. A Commissioner would not modify a circuit court order that no bond is to be taken. Rule 1-361 resolves any conflict that may occur. The former practice was that police officers took bonds. In Baltimore City, the desk sergeants could take the bond. Code, Article 87, §6 allows sheriffs to take the bond. The proposed change to the Rule would identify who could take the bond and provide that the person who takes the bond shall return it to the court.

Judge Missouri commented that Judge Levitz had brought this issue up before the Conference of Circuit Judges. Judge Missouri spoke with Judge Johnson about a judge, who ordinarily should not be doing so, taking bond. The word "commissioner" should stay in the Rule. Another issue for discussion is the authority of the District Court commissioner to take action on a warrant of the circuit court if a bail is preset. Judge Johnson said that he spoke with Judge Levitz who told him that a District Court commissioner in Judge Levitz' jurisdiction had refused to take action on a circuit court bench warrant.

Judge Vaughan commented that in the discussion today, people are referring to the term "District Court commissioner", but the word "commissioner" transcends the District Court. Judge Levitz is concerned about the commissioners changing the bail set in the warrant. A commissioner will never touch a preset bail (either set by the circuit or the District Court). Judge Vaughan had told Judge

Levitz that the commissioners are regularly taking circuit court bonds when the circuit court is closed. As a practical matter, the commissioners have been taking these bonds for years. The commissioners are hired by the District Court and have a unique position in the law. The District Court commissioner is a judicial officer, whose role is established by Md. Const., Art. IV, §41G. Judge Vaughan expressed the view that the proposed changes to section (c) are appropriate. Judge Kaplan commented that in Baltimore City when there is a circuit court warrant with no bail set, the defendant is brought before a judge on the next day that the court is open. Some commissioners were changing the warrant to put in a bail. They have stopped doing this, and this is Judge Levitz' concern. Judge Kaplan expressed his agreement with the proposed change to the Rule.

The Chair referred to Judge Missouri's comment that judges should not take bonds. The Chair said that his recollection was that there was a time when a Grand Jury indictment would be handed down and State's Attorneys would send the sheriff to arrest the defendant on Friday night. The defendant would have to sit in jail unless he or she could contact an attorney who would try to find a judge to take a bail. This is no longer necessary because there are commissioners available around the clock. A judicial officer includes a commissioner. The change from the indefinite term "peace officer" is being proposed, because the term "law enforcement officer" is defined in the Law Enforcement Officer Bill of Rights in

Code, Article 27, §727 (b). The Rule will clarify that judges do not take bail. The Vice Chair pointed out that the term should be "commissioner" and not "judicial officer" since the latter term includes judges. The Chair said that the commissioner takes the bail. Mr. Hochberg questioned whether a commissioner is always available. Ms. Ogletree replied that there are three commissioners within Somerset and Caroline counties, and one is always on call but cannot necessarily come in at 2 o'clock a.m. The Chair said the Rule will permit a law enforcement officer to take a bond when a warrant has been issued, and a bail has been set. This will help if no commissioner is available. Judge Dryden questioned whether a law enforcement officer actually takes bond. In his county (Anne Arundel), a commissioner is on duty 24 hours a day. Judge Vaughan added that giving cash to a police officer may cause some mischief. Judge Johnson asked whether the sheriff can take a bond, and the Chair responded that under Code, Article 87, §6, a sheriff is authorized to take a bond.

The Chair suggested that the term "law enforcement officer" should be changed. The Reporter suggested that the language in section (c) could be: "...any clerk, District Court Commissioner, or anyone authorized by law is authorized to take a bail bond." Mr. Hochberg argued that the Rule should spell out who is authorized by law. The Chair noted that there is a "bail bond commissioner," and this should be distinguished. The Reporter suggested that the term

used in the Rule should be the one to which the Maryland Constitution refers. Mr. Sykes suggested that the word "return" in section (c) should be changed to the word "deliver." The Committee agreed by consensus to this suggestion. Mr. Bowen suggested that the introductory language in section (c) should be "[e]xcept as may be prohibited by law" because the Reporter's note explaining the phrase "except as prohibited by law" is not carried forward if the change to the Rule is adopted.

The Vice Chair commented that she liked the term "law enforcement officer" in place of the term "peace officer," and suggested that this substitution should be made throughout the Rules of Procedure. The Chair agreed that the term "law enforcement officer" is the preferable term. Judge Dryden expressed his agreement with the Reporter's idea to use the language "person authorized by law," as opposed to listing the authorized persons so as not to encourage law enforcement officers to take bail. The Vice Chair observed that this Rule has not been modified since its 1984 inception. The changes the Reporter has suggested are improvements, since all agree that commissioners take the bail bonds. The Vice Chair remarked that she could not envision police officers taking the bail. She agreed with the addition of the language in section (c) which reads "...any clerk, District Court Commissioner, or other person authorized by law...", and she said that the Style Subcommittee can tighten up the language. The Committee agreed by

consensus with the Vice Chair to make the Reporter's suggested changes. The Committee approved the Rule as amended.

Agenda Item 2 (continued). Consideration of proposed amendments to certain rules, recommended by the Appellate Subcommittee: Rule 4-349 (Release After Conviction), Rule 7-112 (Appeals Heard De Novo), Rule 7-206 (Record), Rule 8-411 (Transcript), and Rule 16-405 (Videotape Recording of Circuit Court Proceedings)

Mr. Titus presented Rule 4-349, Release After Conviction, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-349 to add a section providing that an appellate court may review a decision to release a defendant pending appeal on the conditions thereof, as follows:

Rule 4-349. RELEASE AFTER CONVICTION

(a) General Authority

After conviction the trial judge may release the defendant pending sentencing or exhaustion of any appellate review subject to such conditions for further appearance as may be appropriate. Title 5 of these rules does not apply to proceedings conducted under this Rule.

(b) Factors Relevant to Conditions of Release

In determining whether a defendant should be released under this Rule, the court may consider the factors set forth in Rule 4-216 (f) and, in addition, whether any appellate review sought appears to be frivolous or taken for delay. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(c) Conditions of Release

The court may impose different or greater conditions for release under this Rule than had been imposed upon the defendant pursuant to Rule 4-216 before trial. When the defendant is released pending sentencing, the condition of any bond required by the court shall be that the defendant appear for further proceedings as directed and surrender to serve any sentence imposed. When the defendant is released pending any appellate review, the condition of any bond required by the court shall be that the defendant prosecute the appellate review according to law and, upon termination of the appeal, surrender to serve any sentence required to be served or appear for further proceedings as directed. The bond shall continue until discharged by order of the court or until surrender of the defendant, whichever is earlier.

(d) Amendment of Order of Release

The court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record.

(e) Review by Appellate Court

The court before which an appeal is pending may, upon petition filed by the State

or the defendant, review a decision to release a defendant pending appeal or the conditions thereof. The court, with or without a hearing, in its discretion may increase, decrease, or fix the amount of any bond, enter an order as to the surety or security on the bond, or enter an order as to any other security.

Source: This Rule is derived as follows:

Section (a) is derived from former Rule 776 a and M.D.R. 776 a.
Section (b) is derived from former Rule 776 c and M.D.R. 776 c.
Section (c) is derived from former Rules 776 b and 778 b and M.D.R. 776 b and M.D.R. 778 b.
Section (d) is new.
Section (e) is new.

Rule 4-349 was accompanied by the following Reporter's Note.

The case of Long v. State, 16 Md. App. 371 (1972) held that the Court of Special Appeals cannot review a bail decision for a defendant who is appealing his or her conviction until the defendant has sought a writ of habeas corpus from the refusal of the trial court to grant bail, again be denied bail, and have the habeas proceeding reviewed by the Court of Special Appeals. Chief Judge Murphy has requested a change to Rule 4-349 which would allow the Court of Special Appeals to be able to modify a bail decision pending appeal, in place of the circuitous method described by the Long case. Once the circuit court sentences the defendant, there is a final judgment, and after the defendant files an appeal, the case is within the jurisdiction of the Court of Special Appeals. Judge Murphy pointed out that the Long case is no longer controlling, and it is unfair to require a defendant to file a petition for habeas corpus to obtain a bail review when the defendant has already filed an appeal.

Mr. Titus explained that the Chair had requested the change to Rule 4-349 because the procedure for review of a bail decision involving a defendant who is appealing his or her conviction is so complicated. The case of Long v. State, 16 Md. App. 371 (1972) requires the defendant to first seek a writ of *habeas corpus* from the refusal of the trial court to grant bail, again be denied bail, and then have the *habea*s proceeding reviewed by the Court of Special Appeals. The Chair said that he had spoken with a representative of the Appellate Division of the Office of the Public Defender, and he had asked what the impact of this proposed change would be on that Office, since most indigent defendants ask for reconsideration. Under current law, the Public Defenders are not involved in bail hearings. A bill is pending in the legislature to require Public Defenders to represent defendants in bail hearings. The Chair expressed the opinion that the case law established by Long should be changed. Once the defendant is sentenced and appeals, the Court of Special Appeals has jurisdiction. The lengthy bail review procedure is unfair. It is unnecessary to make a defendant go through the *habeas corpus* procedure.

Judge Vaughan asked if the proposed change to the Rule would apply to the circuit court on an appeal from the District Court. Mr. Titus answered that the Rule includes appeals from the District Court to the circuit court. Judge Vaughan expressed the concern that if there are requests for changes in bond, no change will be made

without a hearing. The Chair commented that as a practical matter, once the District Court appeal is perfected, the circuit court judge has jurisdiction to do whatever is appropriate. Judge Johnson inquired if there is an evidentiary hearing or a hearing on the record. The Chair replied that the hearing could be based on the papers. Judge Johnson expressed a concern about the Court of Special Appeals changing the trial judge's decision based on the papers, particularly if the trial record has not been transmitted. The Chair clarified that there is a petition and response.

Mr. Brault remarked that this is similar to stays of enforcement of judgments in civil cases. The Rules provide that the Court of Special Appeals or the Court of Appeals has the authority to review the stay or lack of a stay. Judge Heller pointed out that currently, when there is a *habeas corpus* proceeding, there is a record to review. The proposed change would theoretically result in no record. The Chair responded that the Court of Special Appeals can order a transcript, or the attorney who files the petition can provide one, or the State can provide one. Mr. Brault noted that it is not that easy to obtain a transcript so rapidly. The three-day turnaround for transcripts in Montgomery County is the fastest in the State, but it is very expensive unless the court orders it at no cost.

Judge Johnson questioned whether the appellate court can change the trial judge's decision on bond with no record. The Chair

responded that there will be a record; however, there may or may not be a transcript. Judge Missouri noted that an appeal from the District Court to the circuit court is a trial de novo. This is different from an appeal to the Court of Special Appeals. He expressed his view that he would like the Court of Special Appeals to look at what the trial judge looked at in making his or her decision. If the circuit court judge issues an order allowing the defendant to be released on bail pending appeal, can the Court of Special Appeals order the defendant incarcerated pending appeal? The Chair replied in the affirmative. Mr. Karceski remarked that the only change being proposed is taking away the second step in the bail review process. All of the other steps are the same as they exist now. There is no difference in the fact that the Court of Special Appeals can review the matter at the second hearing without a transcript. The percentage of appeals that reverse a conviction is low; the percentage of bail determinations reversed on appeal is even less. There is no major change being proposed to the process.

Judge Heller commented that her concern with the proposed change is that in essence the appellate judge can change the decision of the trial judge, and no response is required. The Vice Chair suggested that the word “petition” be changed to the word “motion.” She expressed the opinion that this proposed provision is not in the correct place in the Rules of Procedure. It should be in the section concerning rules which relate to what actions the appellate court

does or does not take. Mr. Sykes remarked that an appropriate cross reference should be added. The problem with changing the word "petition" to the word "motion" is that a 15-day response time is built in. The tradeoff is (1) due process -- the defendant may have already served the sentence by the time the review is held, and the purpose of the stay pending the appeal is frustrated and (2) the shortcut results in a loss of accuracy in bail determinations and is unfair to the trial judge. The proposed change is a policy decision.

The Chair commented that the new language could be put into Rule 8-422, Stay of Enforcement of Judgment, rather than in a Title 4 rule. The Vice Chair pointed out that the proposed change applies in other appellate courts, including the circuit courts in their appellate role. The Chair noted that the purpose of the proposed rule change is to eliminate the requirement, set out in the Long case, that there be a *habeas corpus* proceeding prior to a review by the Court of Special Appeals of a circuit court's decision as to the release of a defendant on bail pending appeal.

Mr. Brault noted that review of supersedeas bonds and stays of execution are initiated by motion. Rule 8-425, Injunction Pending Appeal, strikes a good balance. When the rules revision process was started, the intent was to retain only complaints, answers, and motions. The Chair said that this procedure could be used. There could be a motion with a five-day response time. Mr. Brault observed

that if there is no record on appeal, the court can refer to affidavits. Mr. Hochberg pointed out that Rule 2-311, Motions, requires affidavits. Mr. Brault said that section (d) of Rule 8-425 contains a parallel requirement for motions and responses under that Rule. Judge Johnson remarked that if the defendant is represented by counsel, the defendant may have the same attorney at the appellate level, but the State would be represented by the Attorney General, rather than by the State's Attorney who prosecuted the case in the trial court.

Judge Vaughan agreed with the suggestion to eliminate the *habeas corpus* proceeding prior to review by the Court of Special Appeals of the circuit court's bail determination. The Chair clarified the proposal, explaining that someone could still seek *habeas corpus*. For example, a defendant would have to seek *habeas corpus* between conviction and sentencing because there is no final judgment and the Court of Special Appeals would not have acquired jurisdiction over the case at that time. Judge McAuliffe asked if the proposed language is broad enough to apply to the situation where the sentencing judge denies any bond pending appeal. The Chair suggested that the parallel language from Rule 8-422 (b) could be used. This language is as follows: "[u]pon motion of a party, the Court of Special Appeals may review the action of the lower court in fixing or refusing to fix the amount of a supersedeas bond...". Judge McAuliffe pointed out that the difference is that the court is

supposed to set a supersedeas bond, but this is not true for a bond pending appeal. The concept of releasing or refusing to fix a bond should be incorporated. The Style Subcommittee can take care of this.

Judge Dryden asked about revoking the bond. Judge McAuliffe answered that this is a different concept. Judge Dryden inquired about a condition of release being violated. Judge McAuliffe responded that the appellate court sets the bond. If a condition of the bond is violated, the appellate court has no fact-finding capabilities. The matter would have to go to the circuit court. Judge Missouri remarked that the circuit court judge may say that he or she did not set the bond. Judge Dryden noted that it is possible that the District Court judge sets the conditions on *habeas corpus*, and there is a violation of the conditions the judge set. The Chair responded that the bond could be adjusted in circuit court. Judge Dryden observed that the judge may have set the bond, and the defendant is violating the conditions the judge set. The Chair commented that the State could petition for a revocation of the bond and ask the circuit court to hold a hearing. He noted that the same thing can happen after a *habeas corpus* proceeding. These issues are applicable to the existing process, also. The question is whether to force people to go through the circuitous process.

Judge Heller inquired as to what is being saved by the proposed change to the Rule. The Chair reiterated that someone who wants to

challenge the circuit court's refusal to set a bail has to file a *habeas corpus* proceeding and wait for that process to be completed at a time when an appeal has already been filed in the Court of Special Appeals, and the Court of Special Appeals has jurisdiction over the case. He added that as a practical matter, nothing more is developed in a *habeas corpus* hearing. If an attorney asks for bail pending an appeal, in a *habeas corpus* proceeding, there is no fully developed record. Judge Heller remarked that if a circuit court judge sentenced someone, and then there is a *habeas corpus* proceeding, the review will be by a colleague of the original judge, which can be awkward. If the review is by the Court of Special Appeals, it is not as awkward. In either case, the review is not by the original trial judge. The Rule should provide that there could not be immediate ex parte action without some ability to respond.

The Chair said a procedure could be built into the Rule. The Subcommittee should take another look at it. Mr. Brault added that the Rule should be put into the Appellate Rules. It should not apply to appeals from the District Court to the circuit court. Judge Heller pointed out that subsection (b)(2)(B) of Rule 15-303, Procedure on Petition, provides: "A circuit court judge to whom a petition for a writ of habeas corpus is directed shall not enter an order under subsection (2)(A) of this section if the petition is by or on behalf of an individual confined as a result of a conviction in the District Court that has been appealed to a circuit court." The

Reporter stated that the Rule will go into the Title 8 Rules. The Vice Chair asked if it should be broadened to include a review of a denial of a bond, and the Chair replied in the affirmative. He said that the Rule will go back to the Appellate Subcommittee.

Mr. Titus presented Rule 7-206, Record, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

AMEND Rule 7-206 (a) to add language referring to Rule 2-603, requiring the first petitioner to prepare and file with the agency a certification of costs, and requiring the agency to include the certification in the record, as follows:

Rule 7-206. RECORD

(a) Contents; Expense of Transcript

The record shall include the transcript of testimony and all exhibits and other papers filed in the agency proceeding, except those papers the parties agree or the court directs may be omitted by written stipulation or order included in the record. If the testimony has been recorded but not transcribed before the filing of the petition for judicial review, the first petitioner, if required by the agency and unless otherwise ordered by the court or provided by law, shall pay the expense of transcription, which shall be taxed as costs

and apportioned as ~~the court directs~~ directed by Rule 2-603. The first petitioner shall file with the agency a certification of costs. The agency shall include the certification in the record.

(b) Statement in Lieu of Record

If the parties agree that the questions presented by the action for judicial review can be determined without an examination of the entire record, they may sign and, upon approval by the agency, file a statement showing how the questions arose and were decided and setting forth only those facts or allegations that are essential to a decision of the questions. The parties are strongly encouraged to agree to such a statement. The statement, any exhibits to it, the agency's order of which review is sought, and any opinion of the agency shall constitute the record in the action for judicial review.

(c) Time for Transmitting

Except as otherwise provided by this Rule, the agency shall transmit to the clerk of the circuit court the original or a certified copy of the record of its proceedings within 60 days after the agency receives the first petition for judicial review.

(d) Shortening or Extending the Time

Upon motion by the agency or any party, the court may shorten or extend the time for transmittal of the record. The court may extend the time for no more than an additional 60 days. The action shall be dismissed if the record has not been transmitted within the time prescribed unless the court finds that the inability to transmit the record was caused by the act or omission of the agency, a stenographer, or a person other than the moving party.

(e) Duty of Clerk

Upon the filing of the record, the clerk shall notify the parties of the date that the record was filed.

Committee note: Code, Article 2B, §175 (e)(3) provides that the decision of a local liquor board shall be affirmed, modified, or reversed by the court within 90 days after the record has been filed, unless the time is "extended by the court for good cause."

Source: This Rule is in part derived from former Rule B7 and in part new.

Rule 7-206 was accompanied by the following Reporter's Note.

Julia M. Andrew, Esq., Assistant Attorney General, wrote a letter pointing out that Rule 2-603 (b) was amended to provide that the circuit court clerk, when assessing costs in a case, shall include the costs specified by Rule 7-206 (a). She points out the clerk cannot always comply with this requirement because the cost of the transcription is not a matter of record in the circuit court file. The clerks need a statement of costs transmitted with the record to the circuit court. The Committee had proposed that new language be added to Rule 7-206 (a) requiring the agency to prepare a statement of the costs of the transcript when the petitioner is required to pay the expenses of transcription. The Court of Appeals rejected the proposed language, suggesting that the burden to file a statement of the costs should not be placed on the agency, but rather, on the first petitioner. The Subcommittee is proposing new language consistent with the Court's direction. The Subcommittee is also proposing new language to ensure that the Rule is consistent with Rule 2-603 regarding the apportionment of costs.

Mr. Titus explained that the Court of Appeals had considered changes to the Rule transmitted by the 148th Report. The Court

remanded the Rule to the Committee because the Court felt that the burden of filing a statement of the costs of transcription should not be placed on the agency but on the first petitioner. The statement provides information that the circuit court clerk needs in order to assess costs. The Rule now provides that the expense of transcription shall be taxed as costs and apportioned as directed by Rule 2-603. Mr. Hochberg asked if the word "apportion" means that all of the costs cannot be attributable to one party. The Vice Chair answered that the apportionment concept is explained in Rule 2-603.

Mr. Bowen suggested that the new language in section (a) should be "... and may be apportioned as provided in Rule 2-603." The Committee agreed by consensus to this suggestion. The Vice Chair said that the Style Subcommittee can change the wording, if necessary. She asked what happens when the agency does not require payment for the transcript. Mr. Titus commented that if the agency prepares the transcript and does not charge for it, it is not taxed to anyone. The Vice Chair questioned who pays when there are five petitioners. Mr. Titus responded that it is the first petitioner who files the certification of costs. Which petitioner, if any, pays is up to the court. The Vice Chair pointed out that if the court orders petitioner #2 to pay the initial cost, and the Rule requires that the certification of costs be filed by the first petitioner, the first petitioner may not know what the costs are, because the second petitioner is the person who paid. Mr. Titus responded that this

will not happen. If someone loses a case against an agency and files a petition for judicial review, the agency is notified, and in the process assembles the record. During that period, the first petitioner is required to order the transcript. That petitioner will include the costs of the transcript in the total costs.

Mr. Bowen suggested that the Rule could state that the person paying shall file the certification of costs. Mr. Titus noted that the existing Rule provides that the first petitioner pays the expense of transcription. The Reporter commented that some agencies do not require any payment for the transcript, so this has to be worded carefully. The Vice Chair remarked that using the word "party" would limit the Rule. She suggested that the third sentence of the Rule should read as follows: "A petitioner who pays the cost of the transcription shall file with the agency a certification of costs." The Committee agreed by consensus to this change. The Committee approved the Rule as amended.

Mr. Titus presented Rules 8-411, Transcript, and 16-405, Videotape Recording of Circuit Court Proceedings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN COURTS OF APPEAL

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-411 (a)(2) to change an internal reference to a rule which has been renumbered, as follows:

Rule 8-411. TRANSCRIPT

(a) Ordering of Transcript

Unless a copy of the transcript is already on file, the appellant shall order in writing from the court stenographer a transcript containing:

(1) a transcription of (A) all the testimony or (B) that part of the testimony that the parties agree, by written stipulation filed with the clerk of the lower court, is necessary for the appeal or (C) that part of the testimony ordered by the Court pursuant to Rule 8-206 (d) or directed by the lower court in an order; and

(2) a transcription of any proceeding relevant to the appeal that was recorded pursuant to Rule 16-404 ~~d~~ e.

(b) Time for Ordering

The appellant shall order the transcript within ten days after:

(1) the date of an order entered pursuant to Rule 8-206 (a) (1) that the appeal proceed without a prehearing conference, or an order entered pursuant to Rule 8-206 (d) following a prehearing conference, unless a different time is fixed by that order, in all civil actions

specified in Rule 8-205 (a), or

(2) the date the first notice of appeal is filed in all other actions.

(c) Filing and Service

The appellant shall (1) file a copy of the written order to the stenographer with the clerk of the lower court for inclusion in the record, (2) cause the original transcript to be filed promptly by the court reporter with the clerk of the lower court for inclusion in the record, and (3) promptly serve a copy on the appellee.

Source: This Rule is derived from former Rule 1026 a 2 and Rule 826 a 2 (b).

Rule 8-411 was accompanied by the following Reporter's Note.

Because of a change to Rule 16-404, section (d) will now become section (e). This entails a housekeeping amendment to change the internal references to Rule 16-404 (d) which appear in Rules 8-411 (a)(2) and 16-405 a.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT AND OTHER PERSONS

AMEND Rule 16-405 a to change an internal reference to a rule which has been renumbered, as follows:

Rule 16-405. Videotape Recording of Circuit Court Proceedings.

a. Authorization.

The Circuit Administrative Judge for a judicial circuit, after consultation with the County Administrative Judge for a county, may authorize the recording by videotape of proceedings required or permitted to be recorded by Rule 16-404 ~~d~~ e in courtrooms or hearing rooms in that county.

b. Identification.

The clerk shall affix to the videotape a label containing the following information:

1. the name of the court;

2. the date on which the videotape was recorded;

3. the docket reference of each proceeding included on the tape; and

4. any other identifying letters, marks, or numbers.

c. Trial Log; Exhibit List.

The clerk or other designee of the court shall keep a written log identifying each proceeding recorded on a videotape and, for each proceeding recorded on the tape, a log listing the tape references for the beginning and end of each witness's testimony and an exhibit list. The original logs and exhibit list shall remain with the original papers in the circuit court. A copy of the logs and the exhibit list shall be kept with the videotape.

d. Presence of Court Reporter Not Necessary; Conflicts With Other Rules.

1. If circuit court proceedings are

recorded by videotape, it is not necessary for a court reporter to be present in the courtroom.

2. In the event of a conflict between this Rule and another Rule, this Rule shall prevail.

Source: This Rule is former Rule 1224A.

Rule 16-405 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 8-411 (a)(2).

Mr. Titus explained that Rules 8-411 and 16-405 contained "housekeeping" amendments changing the reference from "Rule 16-404 (d)" to "Rule 16-404 (e)" due to the fact that Rule 16-404 has been renumbered. By consensus, the Committee approved the Rules as presented.

The Chair asked the Reporter about the May Rules Committee meeting. She replied that the meeting will be held at the Engineering Society in Baltimore, and H. Thomas Howell, Esq., a former Rules Committee member, will be invited to the meeting. The Reporter said that the 149th Report will be sent to the Court of Appeals next week. It contains rules pertaining to Pro Bono Practice, Interest on Lawyers' Trust Accounts (IOLTA), Alternative Dispute Resolution, and Communication with Persons Represented by Counsel. The revised Code of Judicial Conduct has been sent to the

Court of Appeals and to the Judicial Ethics Commission.

The Chair adjourned the meeting.