STANDING COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held at the Engineering Society of Baltimore, 11 West Mount Vernon Place, Baltimore, Maryland on May 18, 2001.

Members present:

Hon. Joseph F. Murphy, Jr., Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Timothy F. Maloney, Esq.
Hon. William D. Missouri
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
Roger W. Titus, Esq.
Hon. James N. Vaughan, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Mike Lytle, Rules Committee Intern
Hon. J. Frederick Sharer
Hon. Lawrence R. Daniels
William Roessler, Esq.
H. Thomas Howell, Esq.
Ms. Shakun

The Chair convened the meeting. He said that Judge Missouri had called to say that he would be arriving late for the meeting because of a meeting with the Prince George's County Executive. Judge Missouri has requested that the discussion of the first two rules in Agenda Item 1 be deferred until he is present. The Chair told the Committee that the Honorable J. Frederick Sharer of the Circuit Court of Allegany County and William Roessler, Esq. were present to discuss Agenda Item 1.

The Chair asked if there were any additions or corrections to the minutes of the March and April meetings. There being none, Mr. Klein moved that both sets of minutes be adopted as presented, the motion was seconded, and it carried unanimously.

The Reporter announced that Judge Johnson was unable to attend the meeting because he was having surgery. She also said that H. Thomas Howell, Esq., a former member of the Rules Committee, would be joining the Committee for lunch. She thanked Barry Casanova, Esq., for arranging the meeting at the Engineering Society.

Agenda Item 1. Consideration and reconsideration of certain proposed rules changes concerning jury trials: Consideration of proposed: New Rule 2-523 (Post Verdict Contact With Jurors), New Rule 4-362 (Post Verdict Contact With Jurors), Amendments to Rule 2-511 (Trial by Jury), Amendments to Rule 2-512 (Jury Selection), Amendments to Rule 4-312 (Jury Selection), Reconsideration of proposals set out in the 141st Report - proposed amendments to: Rule 2-521 (Jury — Review of Evidence — Communications), Rule 4-326 (Jury — Review of Evidence — Communications), and Rule 5-606 (Competency of Juror as Witness)

Mr. Johnson stated that the Council on Jury Use and Management, which was created by the Conference of Circuit Judges and chaired by Judge Sharer, had written a report which included recommendations for rule changes or the addition of new rules. A Subcommittee of the Board of Governors of the Maryland State Bar Association (MSBA) of which Mr. Roessler was a member had written a report responding to the Council's report.

Mr. Johnson presented the Report of the Trial Subcommittee Concerning the Report and Recommendations of the Council on Jury

Use and Management, for the Committee's consideration:

Report of the Trial Subcommittee
Concerning the Report and Recommendations of the
Council on Jury Use and Management

The Trial Subcommittee met on April 17, 2001 and May 3, 2001, and considered the Report and Recommendations of the Council on Jury Use and Management, the M.S.B.A.'s position paper on that Report, and other matters concerning jury trials.

Many of the Council's recommendations are directed toward enhancing the quality of a juror's experience and making it more meaningful. The Trial Subcommittee is supportive of that goal but, as a subcommittee of the Rules Committee, believes that it would be inappropriate to comment on the specific proposals designed to attain the goal that are administrative, statutory, educational, or otherwise not subject to implementation by rule. Proposals in this category include the topics in the Report that are captioned as follows:

Employer Compensation
Facilities
Juror Waiting
Day Care
Post Trial Services
Peremptory Challenges - Election Law
Language
Juror Notebooks
Trial Management
Juror Understanding
Verdict Sheets
Final Argument - Time Estimates
Judicial Training
Attorney Training
Jury Bailiffs
Cases Subject to Jury Trial
Citizen Awareness
Source Lists
Juror Information
Summoning
Length of Service
Excuses and Postponements
Jury Service Statutes
Oversight of Jury Systems

Qualification
Right to Trial by Jury - *de novo* appeals

The Subcommittee is neutral on the recommendations captioned **"Peremptory Challenges - General"** and **"Deliberation Guide,"** except to suggest that if a "deliberation guide" is to be used it should be part of jury orientation, and should not be included in materials that are taken into the jury room when the jurors retire for their deliberation.

The Subcommittee has identified other recommendations as not requiring a Rule change because they are already provided for by existing rules. The captions of these recommendations are:

Jury Instructions - Case Initiation (Rule 2-520)
Jury Instructions - (Rule 2-521 (a))
Trial Testimony - (Rule 2-521)
Unanimous Verdicts - (Rules 2-522 and 4-327)

The Subcommittee is not in agreement with the policy of some of the Council's Recommendations, and therefore is proposing no rules changes to implement the Recommendations captioned as follows:

Mini-Opening Statements
Juror Questions
Juror Discussion
Verdict Sheets
Interim Summation
Foreperson Selection
Re-closing Argument
Deadlocked Juries

Upon review of the following Recommendations:

Judges Speaking to Jurors Post Trial
Judges should not comment as to the judge's personal opinion about the jury's verdict
Advance Written Questionnaires and
Alternate Jurors,

the Subcommittee has concluded that certain Rules changes are necessary or desirable. Attached to this Report are proposed new Rules 2-523 and 4-362 and proposed amendments to Rules 2-511, 2-512, and 4-312, all recommended by the Trial Subcommittee for consideration by the full Rules Committee in light of the Recommendations of the Council on Jury Use and Management.

Also attached to this Report are proposed amendments to Rules 2-521, 4-326, and 5-606 that had been transmitted to the Court of Appeals by the 141st Report of the Rules Committee. By Rules Order dated January 20, 1999, the Court remanded the proposed changes to the Committee for "further study." Members of the Court indicated that they did not wish to make piecemeal amendments to the Rules pertaining to jury trials. Instead, they preferred to consider proposed changes after the Council on Jury Use and Management had completed its work. The Trial Subcommittee has reviewed the original proposals and recommends that they be re-transmitted to the Court, without change.

The Trial Subcommittee considered both reports and categorized each recommendation as to whether it should be a rule change, a new rule, an administrative matter for the court, or a policy determination. Mr. Johnson stated that the Reporter did an excellent job organizing all of the materials. The Subcommittee's recommended rules changes are located in the meeting materials.

Judge Sharer told the Committee that he had served as the chair of the Council on Jury Use and Management at the behest of the Conference of Circuit Judges and the Honorable Robert M. Bell, Chief Judge of the Court of Appeals. The Council's report was written about one year ago. The report is in the meeting materials for today's meeting, but the letter of transmittal which went with the report to Chief Judge Bell and the Honorable Paul Weinstein, Chair of the Conference of Circuit Judges, was not included. (See Appendix 1). The letter of transmittal cites the history and the various recommendations. Judge Sharer clarified that the Council did not reach a consensus on all issues. Several of the recommendations represent a departure

from current practice and may be appropriate for a pilot project. The Trial Subcommittee is not in agreement with all of the recommendations of the Council. The Council is not asking for a blanket approval of the recommendations and recognizes that some of the concepts will have to be tested in circuit courts throughout the State. The meeting materials contain a letter from the current president of the MSBA, the Honorable Richard H. Sothoron, Jr. (See Appendix 2). Although the letter indicates that the MSBA was not consulted by the Council, Judge Sharer clarified that when the Council was formed, Charles M. Preston, Esq., then-president of the MSBA, was consulted. Mr. Preston designated two members of the MSBA to serve on the Council. One of the members was extraordinarily active and helpful, although the other member did not participate at all. The Council made itself available to lay and professional groups, other bar associations and specialty groups, as well as to specific sections of the MSBA, including the Criminal Law Section. Participation of the bar was actively solicited.

Mr. Roessler told the Committee that he was the Deputy State's Attorney for Anne Arundel County and a member of the Board of Governors of the MSBA. Judge Sothoron had asked three members of the Board to be on an *ad hoc* committee to review the Council's report. These individuals were the Honorable Lawrence Daniels, Circuit Court Judge in Baltimore County; Gary Crawford, Esq.; and Mr. Roessler. Out of 37 topics, they found that 24 were not controversial. The three committee members discussed

the remaining 13 topics and reported on them to the Board of Governors. The Board voted on each topic, and the results of the vote are in the meeting materials.

Mr. Johnson presented Rule 2-511, Trial by Jury, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-511 (b) to allow for the possibility of more than six persons on the jury in lieu of alternate jurors, as follows:

Rule 2-511. TRIAL BY JURY

(a) Right Preserved

The right of trial by jury as guaranteed by the Maryland Constitution and the Maryland Declaration of Rights or as provided by law shall be preserved to the parties inviolate.

(b) Number of Jurors

The jury shall consist of not fewer than six and not more than 12 persons. ~~With the approval of the court, the parties may agree to accept a verdict from fewer than six jurors if during the trial one or more of the six jurors becomes or is found to be unable or disqualified to perform a juror's duty.~~ All jurors shall participate in the verdict unless excused from service during trial or deliberation by the court for good cause. Unless the parties otherwise agree in writing or on the record, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six jurors.

(c) Separation of Jury

The court, either before or after submission of the case to the jury, may permit the jurors to separate or require that they be sequestered.

(d) Advisory Verdicts Disallowed

Issues of fact not triable of right by a jury shall be decided by the court and may not be submitted to a jury for an advisory verdict.

Cross reference: Rule 2-325.

Source: This Rule is derived as follows:
Section (a) is new and is derived in part from FRCP 38 (a).
Section (b) is derived from ~~former Rule 544 and~~ FRCP 48 and FRCP 47 (c).
Section (c) is derived from former Rule 543 a 8.
Section (d) is derived from former Rule 517.

Rule 2-511 was accompanied by the following Reporter's Note.

The Council on Jury Use and Management has recommended that alternate jurors should no longer be designated as "alternate," and those extra jurors should be allowed to fully deliberate and participate in the verdict. This would entail a change to Rule 2-511 (b) to allow for more than six jurors and a change to Rule 2-512 removing the term "alternate jurors" and modifying the computation of peremptory challenges.

The proposed amendment to Rule 2-511 (b) is based on Fed.R.Civ.P. 48 and Fed.R.Civ.P. 47 (c).

Mr. Johnson explained that based on the November 3, 1999 letter from the Honorable Robert E. Cahill, Sr., a Circuit Court judge in Baltimore County, the Subcommittee proposed changes to

the Rule. In the letter, a copy of which is included in the meeting materials (See Appendix 3), Judge Cahill had reported that an alternate juror in his court had been upset when she was dismissed before the jury was to deliberate. The Subcommittee proposes that the alternate jurors should be allowed to deliberate with the rest of the jury. Currently, judges will ask counsel if they have any objection to alternate jurors deliberating with the other jurors, even if this would mean that more than six jurors will be on the jury. Mr. Roessler commented that the Board of Governors had voted against allowing alternate jurors to vote. The reason is that this would result in more jurors which would increase the chance of hung juries. The idea behind the recommendation is make alternate jurors feel better about their service, but it may cause problems. Judge Sharer stated that the Rule comports with the view of the Council concerning civil cases.

Mr. Klein said that he wished to respond to the issue of hung juries. He pointed out that beginning in the mid 1980's, there was a trend to reduce the size of the civil jury from 12 to six persons. At that time, he was president of the Maryland Defense Bar. He had read many studies on this issue, and each study suggested that an increase in the size of the jury produces a more even-handed result with the possibility of outlying verdicts less likely. The defense bar is opposed to six-person juries. Larger juries result in less abnormal verdicts on either side. Mr. Brault expressed the opinion that he was opposed to

six-member juries and said that he is a strong advocate of juries with 12 members. The argument in favor of six-member juries had been that the jury process would be faster and less expensive. It is clear historically that the 12-member jury is superior. Mr. Brault commented that he had just received the report of the American College of Trial Lawyers on the 12-member jury, and the report emphasizes that it was a mistake to go to the smaller jury. The discussion of the Rule provides an opportunity to correct a major mistake. The Rule should be rewritten to provide for 12-member juries. Mr. Brault added that he disagreed with the MSBA as to their opinion that alternates should not deliberate. In the District of Columbia Superior Court, if nine jurors, including alternates, are seated, all nine deliberate. If there are 12 jurors, and three are excused for cause prior to the beginning of deliberations, that still leaves nine to deliberate. A minimum of six members are required for a verdict. Regardless of the number of jurors who deliberate, the jury must be unanimous in its decision. Changing to a 12-member jury would be going back to the historical base. Six member juries have only been used for a few years, while the 12-member jury has been around since the English jury system was started. This issue should be studied further.

Mr. Hochberg questioned whether those jurors who know that they are alternates will pay proper attention to the case. He expressed his agreement with the proposed Rule. Mr. Brault suggested that the alternates not be informed that they are the

alternates. Senator Stone commented that the proposed Rule may be in conflict with the 1992 Constitutional amendment to Article 5 of the Maryland Declaration of Rights and the statute, Code, Courts and Judicial Proceedings Article, §8-306. The Chair pointed out that the statute provides for six persons on the jury. The Reporter said that the proposed Rule would be consistent with the Constitutional amendment, but the statute would have to be changed to be consistent.

The Chair stated that several issues are being discussed. One is the frustration on the part of alternate jurors who do not find out until the jury goes to deliberate that the alternates will not deliberate with the rest of the jury. Another is whether alternates should be informed that they are alternates at the outset or whether they are told at the end of the case. A separate issue is whether the alternates deliberate. Mr. Johnson remarked that sending jurors away before the deliberations may discourage the public from wanting to serve as jurors. Mr. Karceski suggested that at the *voir dire* stage of the proceedings, the jurors could be told what their role is and asked whether they have any objections to sitting as an alternate. The Chair responded that too many may state that they are not willing to be alternate jurors. Mr. Karceski observed that any juror who would make up an answer to get off the jury would not be a worthwhile juror. The Chair said that it is unfair to attorneys and parties to force an uncooperative juror to stay.

Judge Vaughan asked if there is any information to suggest that many people are unhappy as alternate jurors. The only indication so far is the letter from Judge Cahill about one person. Judge Sharer answered that Judge Cahill's letter did not prompt the Council's view that alternate jurors should be allowed to deliberate. The Council's reasoning was that if the alternate juror invests the time and energy to listen to the case, that person should be allowed to deliberate. The empirical data shows that the larger the group of jurors, the more reasonable the verdict. Judge Sharer said that his practice is to ask counsel if they will permit the alternate jurors to deliberate. None of the attorneys ever refuses. Ms. Potter inquired as to whether the Maryland Trial Lawyers Association or the insurance defense bar has given any feedback about this issue. Mr. Johnson replied that the Council report was widely circulated. Judge Sothoron sent it out to various sections of the MSBA.

Ms. Potter pointed out that the discussion has moved from assuaging alternates to returning to a 12-person jury. Mr. Johnson responded that the purpose of the proposed Rule is not to suggest a return to 12 jurors. The Subcommittee is proposing that alternate jurors be allowed to sit and deliberate. This does not necessarily mean that the number of jurors will equal 12, but the Rule allows flexibility in the courts. Mr. Dean remarked that if the parties agree, all of the jurors can deliberate. The last clause of the proposed language suggests that there could be a waiver of unanimity. The jury could be

larger than six. The Chair responded that this is already taking place.

Mr. Maloney agreed with Mr. Dean that the parties can agree to the alternates deliberating with the other jurors. In the General Assembly, there was a debate over the size of the jury, and many legislators were in agreement with Mr. Brault. However, the prevailing view was that the jury should consist of six persons. The legislature enacted the statute which requires a six-member jury. Is it up to the Rules Committee to interfere with the legislative determination? If judges are allowed to circumvent the six-member requirement by adding alternates, this may be exceeding judicial power. The Rule should go back to the Judicial Proceedings Committee in the legislature to ask the position of the General Assembly. The proposed changes to the Rule would require a statutory change. Mr. Brault commented that he had never been a member of the General Assembly, but his understanding was that there was a national movement to change to six-person juries. This idea did not originate in the General Assembly. Senator Stone noted that this issue had been debated long and hard in the legislature. He said that he agreed with Mr. Maloney that the General Assembly should be the forum in which this issue is addressed.

The Chair asked if the portion of the Rule that provides that all jurors participate conflicts with the statute. Mr. Maloney answered that the legislature expected the number of jurors to be exactly six, and this policy question is up to the

legislature to decide. Mr. Johnson pointed out that currently, six does not always mean six if counsel agree or the judge says at the outset that there will be a different number. Mr. Maloney pointed out that if there has been an agreement of counsel that more than six jurors will deliberate, there will be no judicial review as to whether the statute has been violated. Mr. Brault said that the Rules Committee should adopt a position even if the General Assembly reviews this matter. The defense bar is opposed to six-member juries. A larger jury results in a more considered decision and a fairer trial with more analysis of evidence.

Judge Heller commented that her experience with six-member juries is that the trials are fair and less expensive. There is nothing to indicate that the verdicts of those juries are less considered. She also pointed out that in protracted civil cases, two to four alternates may be needed, but in one-day trials, sometimes there are five jurors with the agreement of counsel, because other jurors are needed for the criminal cases. Judge Heller added that she would like to review the statute. She is not hesitant about permitting alternate jurors to deliberate, but it is not necessary to require those alternates to deliberate. She asked if this provision about alternate jurors would apply to criminal cases, but the Reporter replied that under the Maryland Constitution, the Rule could not be applied to criminal cases.

The Chair stated that one approach would be to alert the General Assembly, asking them to consider amending the statute to provide that alternate jurors can sit in civil cases and to

consider replacing the six-person jury with a larger number of people. Mr. Brault pointed out that six-person juries are not trusted for criminal cases, but in a civil case, someone's entire economic future may be at stake, and the six people on the jury decide the case in one hour.

Mr. Titus observed that no approval of the Rule seems to be forthcoming. He suggested that some modifications could be made to the Rule to gain a consensus. Language could be added which would provide that the identification of the alternate jurors not be made until the time for deliberations, so that all jurors will pay close attention to the proceedings. He also suggested that language could be added which would provide that with the consent of the parties, alternate jurors may deliberate. This could be added to section (b) of Rule 2-512, Jury Selection. The Chair suggested that Rule 2-511 could provide that unless parties agree in writing or on the record, no alternate jurors will deliberate, the verdict has to be unanimous, and not fewer than six can sit on the jury during its deliberations.

Mr. Bowen asked why the jury could not be increased to 12 by having six members and six alternates. This Rule does not affect the issue of six as opposed to 12 members. The Reporter explained that the revised Rule is adapted from Fed.R.Civ.P. 48 with some parts adapted from Fed.R.Civ.P. 47 (c).

Mr. Brault noted that if the alternate jurors are sent home before the deliberations begin and six jurors deliberate, one or more of them may get sick, and the result could be no verdict

after weeks of trial unless the parties agree to a lesser number of jurors. Sending in the alternates to deliberate would solve this problem. Mr. Hochberg questioned as to whether the Rules Committee has the authority to draft a rule providing for a verdict by more than six jurors. The Chair responded that currently the decision is by six people unless all of the parties agree. Any violation of the statute is waived by the agreement of the parties. Mr. Bowen suggested that the Committee approve the Rule as the recommendation of the Committee, and send that recommendation to the legislature. Proposing a 12-person jury should be handled separately.

Judge Daniels commented that the plaintiff's bar takes exception to any requirement that alternate jurors should deliberate. The plaintiff has the burden of proof to convince six people; why should the plaintiff have to convince seven, eight, or nine people? The position of the plaintiff's attorneys is that the more jurors who deliberate, the more difficult the case is for the plaintiff. If the Rule is changed, the plaintiffs' bar will see this as an anti-plaintiff rule. Mr. Johnson expressed the concern that the current practice of judges obtaining the agreement of counsel to allow deliberations by more than six jurors may be contrary to the statute.

Senator Stone expressed the view that this issue should be referred to the legislature. Judge Dryden moved to table the decision on the Rule pending consideration by the General Assembly. The motion was seconded. Judge Heller asked if a

consensus as to alternates participating in jury deliberations could be reached. The Chair said that the Committee can vote on the concept. He asked if a letter should be drafted by the Committee and sent to Senator Walter M. Baker and Delegate Joseph F. Vallario, Jr. attaching the minutes of today's meeting. The letter would request that the General Assembly consider the issue of alternate jurors deliberating. Ms. Potter inquired as to whether jury size would be addressed. Mr. Johnson responded that if the alternates deliberate, then, by implication, the size of the jury is increased. The Subcommittee's proposal did not adopt 12 as the number of jurors; the number depends on the number of alternates.

Mr. Bowen said that he was opposed to tabling the issue. He expressed the view that the Committee should make a recommendation as to how the issue should be handled, and then refer the matter to the legislature with the Rules Committee's proposal. Mr. Titus also expressed his opposition to tabling the issue. He reiterated that he had suggested some amendments to the Rule. The Chair suggested that the Committee identify the problem to the legislature. The Rule can then be conformed to whatever action the legislature takes.

The Chair asked the Committee to vote on the following question: Should alternate jurors be allowed to deliberate whether or not there has been an agreement to this by counsel and parties? The vote was nine to eight in favor of alternate jurors deliberating. The Chair then asked the Committee to vote on

whether they are in favor of 12-person juries. The vote was four in favor and 10 opposed, with three abstentions.

Judge Dryden withdrew the motion to table. The Chair suggested that the letter to the General Assembly could address three topics: (1) increase in size of civil juries, (2) deliberation by alternates, and (3) determination by the judge as to the size of the jury, with the agreement of counsel. He added that the result of the deliberations at today's meeting should be included in the letter. On a vote of nine to eight, the Committee supports the idea that all jurors, including alternates, participate throughout the case. The Committee believes that in light of the statute, the legislature should decide the issue. The proposed Rule can be attached to the letter. Mr. Brault asked if the statute provides for six jurors exactly. The Reporter answered that the statute provides for six jurors, and the Constitution provides for "at least six" jurors.

Mr. Titus commented that notwithstanding sending a letter, he had suggested two changes to the Rules: identifying the alternate jurors just before the jury deliberations begin and obtaining the parties' consent to allow alternate jurors to deliberate. The Chair noted that if the concept of allowing all jurors to deliberate is approved, it will not be necessary to identify the alternate jurors. He said that it is not a good idea to send the Rule to the Court of Appeals in the fall only to have the Rule superseded by legislative action. Mr. Maloney suggested that the Rules Committee ask the General Assembly to

change the wording of the statute to “at least six jurors,” and he expressed the opinion that the General Assembly would act favorably. He remarked that he would not like to see the 1992 debate reopened. The issues presented to the legislature should be narrowly framed.

Mr. Johnson presented Rule 2-512, Jury Selection, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-512 by eliminating alternate jurors, by adding a new section (c) providing for an advance questionnaire to be sent to the jury panel, and by changing the number of peremptory challenges in section (h) to four plus one more for each group of one to three extra jurors beyond six, as follows:

Rule 2-512. JURY SELECTION

(a) Challenge to the Array

A party may challenge the array of jurors on the ground that its members were not selected, drawn, or summoned according to law or on any other ground that would disqualify the panel as a whole. A challenge to the array shall be made and determined before any individual juror from that array is examined, except that the court for good cause may permit it to be made after the jury is sworn but before any evidence is received.

~~(b) Alternate Jurors~~

~~The court may direct that one or more~~

~~jurors be called and impanelled to sit as alternate jurors. Any juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty shall be replaced by an alternate juror in the order of selection. An alternate juror shall be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as a juror. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict.~~

~~(c)~~ (b) Jury List

Before the examination of jurors, each party shall be provided with a list of jurors that includes the name, age, sex, education, occupation, and occupation of spouse of each juror and any other information required by the county jury plan. When the county jury plan requires the address of a juror, the address need not include the house or box number.

(c) Advance Questionnaire

Upon the request of a party or on its own initiative, the court may direct that advance questionnaires be sent to prospective jurors requesting information in writing before the jury selection process takes place. Before the questionnaire is sent, the court shall give the parties a reasonable opportunity to propose questions to be included in the questionnaire and to object to questions proposed by another party or the court. The responses to the questionnaire shall be provided to each party before the court begins the jury selection process. The court shall determine how the cost of the questionnaire is to be apportioned.

Committee note: Advance questionnaires are recommended for use in complex or protracted litigation. The use of the questionnaire is intended to reduce the amount of time required for the examination of jurors under

section (d) of this Rule and increase the privacy of jurors who may be reluctant to respond to certain questions in open court.

(d) Examination of Jurors

The court may permit the parties to conduct an examination of jurors or may itself conduct the examination after considering questions proposed by the parties. If the court conducts the examination, it may permit the parties to supplement the examination by further inquiry or may itself submit to the jurors additional questions proposed by the parties. The jurors' responses to any examination shall be under oath. Upon request of any party the court shall direct the clerk to call the roll of the panel and to request each juror to stand and be identified when called by name.

(e) Challenges for Cause

A party may challenge an individual juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown.

(f) Additional Jurors

When the number of jurors of the regular panel may be insufficient to allow for selection of a jury, the court may direct that additional jurors be summoned at random from the qualified jury wheel and thereafter at random in a manner provided by statute.

(g) Designation of List of Qualified Jurors

Before the exercise of peremptory challenges, the court shall designate from the jury list those jurors who have qualified after examination. The number designated shall be sufficient to provide the number of jurors ~~and alternates~~ to be sworn after allowing for the exercise of peremptory challenges. The court shall at the same time prescribe the order to be followed in selecting the jurors ~~and alternate jurors~~ from the list.

(h) Peremptory Challenges

Each party is permitted four peremptory challenges plus one peremptory challenge for each group of three or less ~~alternate~~ jurors beyond the first six jurors to be impanelled. For purposes of this section, several plaintiffs or several defendants shall be considered as a single party unless the court determines that adverse or hostile interests between plaintiffs or between defendants justify allowing to each of them separate peremptory challenges not exceeding the number available to a single party. The parties shall simultaneously exercise their peremptory challenges by striking from the list.

(i) Impanelling the Jury

The jurors ~~and any alternates~~ to be impanelled shall be called from the qualified jurors remaining on the list in the order previously designated by the court and shall be sworn. The court shall designate a juror as ~~foreman~~ foreperson.

Source: This Rule is derived as follows:

Section (a) is derived from former Rule 754 a and is consistent with former Rule 543 c.

~~Section (b) is derived from former Rule 751 b and is consistent with former Rule 543 b 3.~~

Section ~~(c)~~ (b) is new.

Section (c) is new.

Section (d) is derived from former Rules 752 and 543 d.

Section (e) is derived from former Rule 754 b.

Section (f) is consistent with former Rule 543 a 5 and 6.

Section (g) is new with exception of the last sentence which is derived from former Rule 753 b 1.

Section (h) is derived from former Rule 543 a 3 and 4.

Section (i) is derived from the last sentence of former Rule 753 b 3 and former Rule 751 d.

Rule 2-512 was accompanied by the following Reporter's Note.

> The Trial Subcommittee is recommending that Rules 2-512 and 4-312 be amended to add to each Rule a provision for an advance juror questionnaire based on the recommendation of the Council of Jury Use and Management. One of the questionnaire's benefits is the protection of privacy for potential jurors who will be able to answer questions, which may be of a personal nature, in writing instead of orally in front of an entire array of jurors. Another benefit is a reduction in the amount of time needed for the examination of jurors under Rules 2-512 (d) and 4-312 (e).
>
> Other changes to Rule 2-512 are proposed to implement the Subcommittee's recommendation that the concept of "alternate jurors" be eliminated, as stated in the Reporter's Note to Rule 2-511.

Mr. Johnson pointed out that the first recommendation by Mr. Titus is to modify Rule 2-512 to provide that the alternate jurors should not be identified until the time for the jury to deliberate. The Chair commented that the judge should not be put in the position of "unpicking" two of the jurors. Mr. Titus suggested that the two jurors who do not deliberate can be picked out of a hat. Mr. Johnson said that the Rule can be redrafted to include Mr. Titus' idea that the alternate jurors not be initially identified. This has to be carefully drafted because it could affect the computation of the number of strikes each side is allowed. The Trial Subcommittee can take care of redrafting this. Mr. Titus added that the redrafted Rule also should mention the option of obtaining the parties' consent to allowing the alternates to deliberate, which would obviate the

need for “unpicking” any jurors. The Committee agreed by consensus to have the Subcommittee redraft the Rule.

Mr. Johnson drew the Committee’s attention to section (c) of Rule 2-512. He explained that in some protracted and complex cases, such as asbestos cases in Baltimore City, counsel had available information from questionnaires which provided more information than *voir dire* questioning. Judge Missouri had told the Subcommittee that these questionnaires are already being sent out in capital cases. The Subcommittee feels that sending out these questionnaires in protracted cases is a sound policy. Mr. Johnson pointed out that the questionnaires can be sent out upon the request of a party or on the court’s own initiative. It is important for counsel to have the opportunity to comment on the questions that will be provided to the parties before jury selection. Mr. Titus pointed out that the word “sent” in the first sentence of section (c) implies that the questionnaires will be mailed as opposed to using the word “provided” or “distributed.” Mr. Johnson explained that the questionnaires have to go out in advance to get the necessary information, such as asking if a potential juror would be able to sit on a case for six months. There would be no point in bringing the person who is not available to sit for six months into the jury pool for a protracted case.

Mr. Titus commented that written questionnaires in shorter cases should not be foreclosed, and said that he is in favor of a jury questionnaire being used more often than it is now. He

expressed his dislike for preliminary strikes and group questions to the jury pool. Mr. Brault remarked that this issue has been debated in Montgomery County. In the longer cases, the jury commissioner pre-strikes the jury by handing out a questionnaire or verbally asking if any of the potential jurors are not available to sit for a certain number of weeks. Some attorneys object to this, arguing that this practice amounts to administrative rather then judicial oversight of the jury selection process. He said that his understanding is that the questionnaires ask all kinds of questions, including about bias and lifestyle. The lawyers read the answers in advance and exercise their peremptory challenges based on that information. Mr. Johnson responded that no one is preselected out. In Baltimore City, potential jurors come in large numbers and are asked questions based on the questionnaire. Judge Kaplan added that the pool is 30 to 60 people. Mr. Karceski observed that this has been used in many cases.

The Chair suggested that the first sentence of section (c) read as follows: "Upon the request of a party or on its own initiative, the court may direct that prospective jurors answer questions in writing before jury selection takes place." The Chair commented that one way to address Mr. Brault's concern about administrative versus judicial oversight over the jury selection process would be to add language to section (c) providing that the court shall not excuse a juror unless counsel has the opportunity to be heard. Judge Vaughan asked at what

point in the selection process the court is excusing people before they are called in to court. The Chair replied that this may not be on the basis of fact-specific information. Mr. Dean remarked that often, based on information contained in advance questionnaires, counsel will agree to excuse people. He questioned whether the statements made by potential jurors should be under oath if they fill out a written questionnaire. Mr. Hochberg inquired whether a sworn statement will discourage people from returning the questionnaires. The Chair expressed the view that filling out the questionnaire under oath is a good idea. The Committee agreed by consensus.

Mr. Brault pointed out that the information in the answers to the questionnaire should be confidential. The Chair said that the last sentence of section (c) could provide that the court, in its discretion, determines the cost of the questionnaire and whether the information elicited is confidential. Mr. Johnson noted that the judge should determine the confidentiality and not an administrative employee of the court. Mr. Maloney remarked that based on the proposed wording of the last sentence of section (c), the judge may think that he or she is required to impose costs. Mr. Titus asked who pays for the questionnaire. Mr. Johnson answered that Judge Missouri had said that his county pays for the questionnaires. The Reporter added that this applies in criminal cases. Judge Heller observed that the court may impose the costs of the questionnaire on the parties.

Mr. Titus inquired if the answers to the questionnaire

become public if there is a dispute about an attorney exercising a strike. The Chair replied that the questionnaire is available to the parties, and to no one else, except upon order of court. Mr. Johnson remarked that the Sunpapers had tried to access juror questionnaires in a case. The circuit court denied the newspaper's request, and on appeal, the court held that the questionnaires were confidential. Mr. Titus suggested that the Rule could provide that the questionnaires should be placed under seal but maintained, and the court will determine access to them. The Chair pointed out that the language to be added can be similar to the language in Rule 4-341, Sentencing--Presentence Investigation. The parties and the court get the presentence report, but it is not a public record. Judge Kaplan commented that this is also similar to the way video recordings of court proceedings are handled under Rule 16-406. The Committee agreed by consensus to conform section (c) to Rule 4-341 or to Rule 16-406, Access to Videotape Recordings of Proceedings in the Circuit Court.

Mr. Brault remarked that there may be a concern about the access the parties have to the jurors' addresses. Mr. Titus said that the jurors put two categories of information in the answers to the questionnaire. Personal information is restricted, but information concerning the jurors' bias or prejudice is not protected. Mr. Brault pointed out that the information exchanged at the *voir dire* proceeding is public. Mr. Titus suggested that the jurors could be identified by number, such as Juror #4.

Judge Daniels expressed his concern about the issues presented today. If the word gets out that the information from the questionnaires is available to the public and not confidential, either the potential jurors will not answer the questions truthfully, or they will not answer the questions at all.

The Reporter asked if the confidentiality provisions of proposed new section (d) of Criminal Rule 4-312, Jury Selection, could be adapted to Rule 2-512, the parallel civil rule. Mr. Johnson explained that the Subcommittee felt that a potential juror should not have to make any disclosure that would publicly embarrass him or her. It might be preferable for the potential juror to write such an answer to the questionnaire. Judge Daniels noted that if the pretrial questionnaire is to be a useful tool, concerns about confidentiality will have to be assuaged. The Chair added that it is important not to give a false sense of security. The public has a right to some information, and it has the right to watch the *voir dire* process, which is on the record and not secret. Language concerning confidentiality patterned after Rule 4-312 could be added to Rule 2-512, and a more elaborate system for confidentiality could be put into place. Mr. Johnson cautioned that the Rule should not micro-manage the questionnaire. The court with the help of counsel should have the flexibility to devise the questionnaire. The specifics of the questionnaire should not be in the Rule.

The Chair stated that the Trial Subcommittee will redraft Rule 2-512 (c) based on the comments made during today's

discussion. Mr. Brault asked if any thought had been given to doing away with the judge selecting the foreperson of the jury. Judge Sharer responded that the Council report had recommended doing away with this idea based on the theory that not every person wishes to have the responsibility of being the foreperson of the jury. He explained that he has handled the selection in two ways. In some cases, he inquires in advance of the person chosen to be foreperson to ascertain that the person is amenable to this designation. In other cases, particularly cases lasting more than a day, Judge Sharer requests that the jury select its own foreperson which may provide a measure of comfort to some jurors. He then designates the person selected by the jury. Mr. Roessler remarked that the Board of Governors is opposed to eliminating the court's selection of the foreperson. Mr. Johnson commented that the Subcommittee was against the idea of the jurors choosing the foreperson. The current selection process is not causing any problems.

The Chair said that the word "shall" could be changed to the word "may" in the second sentence of section (i). The Gender Bias Committee discussed what judges should and should not do. It is better not to move a female juror from seat #1 so that a male juror can take the seat. The word "designate" does not mean that the jurors choose the foreperson. Mr. Karceski stated that this experience is that most of the time whoever is seated in seat #1 is the foreperson. This is the easiest way to make the choice. Juror #1 may not be the most attentive or educated

juror, but moving another juror to the first position may cause the problem the Chair just pointed out. Designation of the foreperson by the judge may also cause problems. Judge Heller pointed out that different judges handle this situation differently. In a civil case, she reviews the list of jurors before the jurors have taken their seats, and based on their level of education and their job description, she selects the foreperson. When the case is criminal, counsel selects the foreperson from among the jurors sitting in the jury box. It is insensitive to move Juror #1, but Judge Heller has moved that juror if it is necessary. In one case, a deaf juror was seated as Juror #1, and with the agreement of counsel, that juror was moved to another seat. Judge Heller expressed the view that there is no need to modify the system because it is working well.

Judge Missouri commented that he rarely chooses Juror #1 to be the foreperson. He had served on the Gender Bias Committee, and he alternates male and female forepersons from one trial to the next. He tells each jury that the foreperson will not be selected until after the jury has taken a break. With 120 circuit court judges, there has to be discretion for judges to handle this in their own way.

The Chair suggested that the word “shall” should be changed to the word “may” in the second sentence of section (i) to make it clear that the court has discretion as to whether to designate the foreperson. The Reporter observed that the Rule could provide for a foreperson and for the judge to determine the

method of selection of the foreperson. The Committee agreed by consensus with this approach. Mr. Brault noted that in the District of Columbia, the jury elects the foreperson. The Chair stated that the Rule will go back to the Subcommittee for clarification that there shall be a foreperson and that the judge shall provide for the method of selection of the foreperson. Mr. Brault asked if the federal rule has been considered, and Mr. Johnson replied that the Subcommittee will look at it.

Mr. Johnson presented Rules 2-523, Post Verdict Contact With Jurors, and 4-362, Jury — Review of Evidence — Communications, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-523, as follows:

Rule 2-523. POST VERDICT CONTACT WITH JURORS

After all verdicts of a jury have been returned, the judge before discharging the jury may meet with jurors in open court with all parties and counsel present. The judge may thank the jurors for their service and release them from prior admonitions which may have included refraining from discussing, reading about, or watching broadcasts about the case. The judge may not comment as to the judge's personal opinion about the jury's verdict or the substance of the case but may discuss with the jurors the administrative aspects of their service.

Committee note: Administrative aspects of

jury service include parking, the jury assembly room, access to the court building, the examination of jurors and the jury selection process, the jury deliberation room, obligations as to further jury service, and, in appropriate cases, the availability of post verdict counseling by mental health professionals.

Cross reference: See Rule 16-813, Maryland Code of Judicial Conduct, Canon 3A (8).

Source: This Rule is new.

Rule 2-523 was accompanied by the following Reporter's Note.

The Council on Jury Use and Management, created by the conference of Circuit Judges and chaired by the Honorable J. Frederick Sharer of the Circuit Court for Allegany County, issued its Report and Recommendations on April 12, 2000. One of its recommendations involved judges speaking to jurors post trial. Proposed new Rules 2-523 and 4-362 are based on the Council's recommendation.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

ADD new Rule 4-362, as follows:

Rule 4-362. POST VERDICT CONTACT WITH JURORS

After all verdicts of a jury have been returned, the judge before discharging the jury may meet with jurors in open court with

all parties and counsel present. The judge may thank the jurors for their service and release them from prior admonitions which may have included refraining from discussing, reading about, or watching broadcasts about the case. The judge may not comment as to the judge's personal opinion about the jury's verdict or the substance of the case but may discuss with the jurors the administrative aspects of their service.

Committee note: Administrative aspects of jury service include parking, the jury assembly room, access to the court building, the examination of jurors and the jury selection process, the jury deliberation room, obligations as to further jury service, and, in appropriate cases, the availability of post verdict counseling by mental health professionals.

Cross reference: See Rule 16-813, Maryland Code of Judicial Conduct, Canon 3A (8).

Source: This Rule is new.

Rule 4-362 was accompanied by the following Reporter's Note.

See the Reporter's Note to proposed new Rule 2-523.

Mr. Johnson explained that both Rules reflect the same recommendation made by the Council on Jury Use and Management. At the Subcommittee meeting, Judge Missouri had commented that at the close of a criminal case, jurors often are concerned as to safety issues, and if the crime is particularly heinous, some jurors may require post-trial counseling. One concern about the change is that some judges handle the closure of the case differently. A judge may send his or her law clerk in to talk to the jury. In a civil case, there is some concern that after the

trial, the judge speaks to the jury without counsel present, before any post-trial motions have been filed. A judge may hear something while speaking with the jurors that counsel would not know the judge heard. It is appropriate for the judge to speak with the jurors about certain issues, such as administrative aspects of the case. There are many issues which are not the subject of post-trial motions. The Subcommittee's proposal is in the meeting materials, and it includes the requirement that if the judge meets with the jurors, the meeting occurs in open court, with the parties and counsel present.

Judge Sharer pointed out that within the Council on Jury Use and Management, a vocal minority of members expressed the concern that by meeting with the jurors after the trial is over, the judge could learn information with regard to post-trial motions which the judge could take into account in deciding the motions. His view as a trial judge is that it is not necessary for the meeting to be in open court with all counsel and parties present. He speaks with the jury occasionally, and more often when the jury on the case is scheduled to serve on one one-day trial. He said that he is careful not to influence the jurors who may serve on another jury in the future. He often speaks with the jury after a serious homicide or protracted child abuse case, or in civil cases after a lengthy malpractice or personal injury case. The jurors appreciate unrestricted conversation with the judge. Judge Sharer told the Committee that he is mindful of Canon 3A of the Code of Judicial Conduct which cautions judges about not

commenting on the verdict. Jurors will not respond candidly if the proceedings are on the record with counsel and the defendant present. The final meeting between the judge and the jurors can serve as a tool as each learns from the other. It is an anomaly that after discharge, the jurors can discuss the case with the press, counsel, and the entire world except for the trial judge. The trial judges should be allowed some discretion.

Mr. Roessler remarked that this issue elicited some controversy from the Board of Governors of the MSBA. The Rule was proposed to them without the caveat of the parties and the counsel being present, and the Board was opposed to it as it was presented. The Board could feel differently if the judge were to speak with the jurors only in the courtroom with the parties and counsel present. Mr. Johnson noted that the Subcommittee looked at the position of the Board of Governors. Many judges speak to jurors in open court now with the parties present. The Rule was drafted with the idea of the discussion between the judge and jurors pertaining to the administrative aspects of the case.

Judge Missouri expressed the concern that the judge should be allowed to speak to the jurors without being in open court on the record, and this is what happens in his circuit. He often goes to the jurors' lounge to talk to the jurors. Judges can be trusted to speak to jurors post-trial.

Judge Daniels told the Committee that he came to the meeting to speak against the Rule. Depriving the judge of the opportunity to speak to the jury in private after a verdict takes

away a public relations tool. The legislators feel that the judges do not speak to the public enough. In his seven years as a trial judge, he has spoken to each and every jury post-verdict. Jurors appreciate the judges speaking to them. It is a very effective way for the courts to ensure confidence in the judicial system. Jurors often have questions about how the case was presented to them, such as why no fingerprint or breathalyzer evidence was presented. The way Rules 2-523 and 4-362 are drafted could undermine the public's confidence in the jury system. Sometimes jurors make some less than flattering comments about counsel, and the court can address these issues, explaining counsel's action and lessening the impact. In the courtroom, there would be no candid feedback from the jury.

Judge Vaughan pointed out that what this Rule is trying to address is a situation such as when a juror says to the judge after the case, "I hope the defendant gets 10 years." The judge could discover juror animosity before a JNOV motion is filed. The Chair responded that on one hand, the juror may say something on the record which will cause a problem entitling the losing party to a new trial. This does not happen often enough to impose an open court requirement which is the equivalent of prohibiting the judge from talking to the jurors. Judge Sharer observed that the jurors are not likely to tell the judge anything he or she does not already know. He said that his answer to Judge Vaughan is that the meeting with the jurors gives the judge an opportunity to explain the sentencing process, the

presentence investigation, the sentencing guidelines, and how the judiciary works. Judge Vaughan expressed his opposition to the Rule, although he noted that a defense attorney who has filed a post-trial motion may have concerns about the judge talking to the jury. Judge Sharer expressed his agreement with the Chair that enough problems would not arise to impose an open court requirement.

Mr. Brault commented that he has tried hundreds of jury cases in many jurisdictions, and in the vast majority of them, the trial judge spoke to the jury in private, either in chambers or in the jury room. As counsel, this has never bothered him. He expressed his disagreement with the Rule because its focus is on the wrong point. On the question of discussions with jurors, the problem is the lawyers discussing with the jurors the nature of and reasons for the verdict. The federal rules preclude this to avoid lawyers pressuring jurors. Judge Dryden observed that jurors may ask questions pertaining to the evidence in the case which could lead to comments by jurors to the effect that if they had known certain information, they would not have decided the way they did.

Mr. Titus expressed the opinion, “If it “ain’t broke, don’t fix it.” He noted that Canon 3A (8) already covers the subject of judges speaking to jurors. Mr. Johnson expressed the view that the Canon does not go far enough. Mr. Titus responded that the Report of the Council on Jury Use and Management does not ask for a rule pertaining to judges’ discussions with jurors. This

is an administrative matter, and no rule is needed. The Report provides that judges are encouraged to speak with jurors. Mr. Johnson pointed out that encouraging 126 circuit court judges may not mean anything. Mr. Titus suggested that the Rule could provide that judges are encouraged to have contact with jurors consistent with Canon 3A (8).

Mr. Hochberg inquired as to whether there have been any problems with judges speaking to jurors. Judge Missouri replied that there have been no problems in his circuit. The Honorable Steven I. Platt, a Prince George's County Circuit Court judge, spoke to jurors at the close of a murder case. Even though there were six eyewitnesses to the crime, the jurors asked why there was no DNA evidence presented, and Judge Platt was able to explain why to the jurors. Judge Missouri pointed out that in a smaller jurisdiction, the judge will probably know most of the jurors and will see them in the community. Judge Heller remarked that in Baltimore City, some of the 30 circuit court judges talk to jurors when a case is over. She has never spoken with the jurors alone, but she thanks them in open court, following the instructions of Canon 3A (8). She said that she would not like to hear something from the jurors which she should not hear. She has not heard of any problems with judges speaking to jurors, and she feels it is up to the discretion of the judges.

Mr. Karceski expressed the concern that problems can be created for the defense attorneys in jurisdictions which carry over jurors to other cases. Some jurisdictions carry over jurors

for two weeks. The Chair responded that the *voir dire* process provides some protection by asking questions about a juror's previous service. He pointed out that the Committee seems opposed to the Rules before it today. He asked if there should be a rule restating Canon 3A (8). The Rule would provide that the judge may meet with jurors after they have been discharged from a case. Mr. Brault moved that there should not be such a rule, the motion was seconded, and it passed unanimously. Mr. Titus commented that the minutes should reflect that judges are encouraged to meet with jurors. The Chair inquired if a rule should be written which would provide that the judge may meet with jurors to thank them and which would also restate the essence of Canon 3A (8). None of the Committee was in support of such a rule.

Mr. Johnson told the Committee that the remainder of the Rules in the meeting materials listed under Agenda Item 1 were from the 141st Report to the Court, and they had been sent back to the Rules Committee for further consideration after the Council on Jury Use issued its Report. (See Appendix 4). The Committee has already approved these Rules, and the Subcommittee recommends no further changes. There was no motion to make any additional changes to Rules 2-521 (Jury -- Review of Evidence -- Communications), 4-326 (Jury -- Review of Evidence -- Communications), or 5-606 (Competency of Jury was Witness).

The Chair stated that the rules pertaining to jury issues that were remanded to the Subcommittee will be reconsidered at

the June meeting of the Committee.

Agenda Item 2. Consideration of proposed amendments to Rule 2-510 (Subpoenas) and Rule 3-510 (Subpoenas).

At the request of Mr. Johnson, Mr. Hochberg presented Rules 2-510, Subpoenas and 3-510, Subpoenas, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-510 to provide additional methods of service of a subpoena, as follows:

Rule 2-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before a master, auditor, or examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition. A subpoena shall not be used for any other purpose. If the court, on motion of a party alleging a violation of this section or on its own initiative, after affording the alleged violator a hearing, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court may impose an

appropriate sanction upon the party or attorney, including an award of a reasonable attorney's fee and costs, the exclusion of evidence obtained by the subpoena, and reimbursement of any person inconvenienced for time and expenses incurred.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On the request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service.

(c) Form

Every subpoena shall contain: (1) the caption of the action, (2) the name and address of the person to whom it is directed, (3) the name of the person at whose request it is issued, (4) the date, time, and place where attendance is required, (5) a description of any documents or other tangible things to be produced, and (6) when required by Rule 2-412 (d), a notice to designate the person to testify.

(d) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 2-121 (a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney as permitted by Rule 1-321 (a). A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the

materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production.

(g) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

Cross reference: For the availability of sanctions for violations of this section, see Rules 1-201 (a) and 1-341.

(h) Hospital Records

(1) A hospital served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The hospital may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the hospital. The certification shall be prima facie evidence of the authenticity of the records.

(2) Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial

or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the hospital but need not return copies.

(3) When the actual presence of the custodian of medical records is required, the subpoena shall so state.
Cross reference: Code, Courts Article, §10-104 includes an alternative method of authenticating medical records in certain cases transferred from the District Court upon a demand for a jury trial.

(i) Attachment

A witness served with a subpoena under this Rule is liable to body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former Rules 114 a and b, 115 a and 405 a 2 (b).
Section (d) is derived from former Rules 104 a and b and 116 b.
Section (e) is derived from former Rule 115 b.
Section (f) is derived from FRCP 45 (d) (1).
Section (g) is derived from FRCP 45 (c) (1).
Section (h) is new.
Section (i) is derived from former Rules 114 d and 742 e.

Rule 2-510 was accompanied by the following Reporter's Note.

> Proposed amendments to Rules 2-510 and 3-510 provide in each Rule two additional methods of serving a subpoena.
>
> The first additional method is "as permitted by" subsection (a)(3) of Rule 2-121 or 3-121. That subsection reads as follows:
>
> (a) Generally
>
> Service of process may be made within this State or, when authorized by the law of this State, outside of this State . . . (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery – show to whom, date, address of delivery." Service by certified mail under this Rule is complete upon delivery. Service outside of the state may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.
>
> The second additional method applies to service of a subpoena on a party represented by an attorney. The proposed amendment allows service to be made on the attorney "as permitted by Rule 1-321 (a)." Rule 1-321 (a) reads as follows:
>
> (a) Generally
>
> Except as otherwise provided in these rules or by order of court, every pleading and other paper filed after the original pleading shall be served upon each of the parties. If service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address. Delivery of a copy within this Rule means:

handing it to the attorney or to the party; or leaving it at the office of the person to be served with an individual in charge; or, if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of that person with some individual of suitable age and discretion who is residing there. Service by mail is complete upon mailing.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 500 - TRIAL

AMEND Rule 3-510 to provide additional methods of service of a subpoena, as follows:

Rule 3-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before an examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition taken pursuant to Rule 3-401 or 3-431. A subpoena shall not be used for any other purpose. If the court, on motion

of a party alleging a violation of this section or on its own initiative, after affording the alleged violator a hearing, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court may impose an appropriate sanction upon the party or attorney, including an award of a reasonable attorney's fee and costs, the exclusion of evidence obtained by the subpoena, and reimbursement of any person inconvenienced for time and expenses incurred.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On the request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service.

(c) Form

Every subpoena shall contain: (1) the caption of the action, (2) the name and address of the person to whom it is directed, (3) the name of the person at whose request it is issued, (4) the date, time, and place where attendance is required, (5) a description of any documents or other tangible things to be produced.

(d) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 3-121 (a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney as permitted by Rule 1-321 (a). A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18

years of age. Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before an examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The

objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production.

(g) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

Cross reference: For the availability of sanctions for violations of this section, see Rules 1-201 (a) and 1-341.

(h) Hospital Records

(1) A hospital served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The hospital may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the hospital. The certification shall be prima facie evidence of the authenticity of the records.

(2) Upon commencement of the trial, the

clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the hospital but need not return copies.

(3) When the actual presence of the custodian of medical records is required, the subpoena shall so state.

Cross reference: Code, Courts Article, §10-104 includes an alternative method of authenticating medical records in certain cases.

(i) Attachment

A witness served with a subpoena under this Rule is liable to body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former M.D.R. 114 a and b and 115 a.
Section (d) is derived from former M.D.R. 104 a and b and 116 b.
Section (e) is derived from former M.D.R. 115 b.
Section (f) is derived from FRCP 45 (d) (1).
Section (g) is derived from FRCP 45 (c) (1).

Section (h) is new.
Section (i) is derived from former M.D.R. 114 d and 742 e.

Rule 3-510 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendment to Rule 2-510.

Mr. Hochberg explained that several attorneys had suggested a change to Rules 2-510 and 3-510 which would permit service of a subpoena by certified mail requesting restricted delivery and a signature as to who received the subpoena. This is the procedure set out in section (a) of Rule 2-121, Process--Service--In Personam. The current procedure requiring delivery of the subpoena is very costly. The sheriff charges $30 to $35 to deliver the subpoena, and a private process server charges $40 to $45. Most people do not want the sheriff to make the delivery of the subpoena. Service which is carried out in the same manner that an original complaint is served is just as effective. When the party is represented by counsel, the adverse party may serve the subpoena on counsel. A subpoena is an order of the court, and any violations could result in sanctions by the court. As to the question of whether there is sufficient evidence that a person received the subpoena, a return receipt signed by the person should be sufficient.

Mr. Maloney moved to adopt the changes proposed in Rules 2-510 and 3-510. The motion was seconded. Mr. Dean questioned as to whether the parallel criminal rule, Rule 4-265, Subpoena for

Hearing or Trial, could be changed accordingly. The Chair responded that the Criminal Subcommittee can look at this Rule.

Judge Vaughan expressed the concern that "restricted delivery mail" is a fiction. He noted that 80% of the return receipt cards coming into the court have an illegible signature. In any number of cases, Judge Vaughan said that he would not be inclined to issue a body attachment for a missing witness who was subpoenaed by restricted delivery. The Chair noted that the court is not required to issue a body attachment. Mr. Brault remarked that it may be difficult to get good service using this method. Often the mail receipt is signed by whoever is at home and not necessarily the person named in the subpoena. Mr. Shipley stated that in Carroll County, the criminal and civil subpoenas are mailed first class, and cases do not have to be postponed because of lack of service. The Chair added that the subpoenas are served by restricted delivery mail in the District Court. Mr. Brault commented that first class mail may be more reliable.

The Chair called for a vote on Mr. Maloney's motion to approve the Rules, and the Rules were approved unanimously.

Judge Sharer thanked the Committee for its thoughtful consideration of the rules pertaining to jury trials. The Chair thanked Judge Sharer for his hard work and the work of the other members of the Council. Jurors and litigants will benefit from the suggestions made by the Council.

The Chair presented H. Thomas Howell with a testimonial

signed by the members of the Rules Committee. The testimonial reads as follows:

The Standing Committee on Rules of
Practice and Procedure

of the

Court of Appeals of Maryland

expresses its gratitude to

H. Thomas Howell, Esq.

for fifteen years of outstanding service to the Committee. During those years, Tom chaired the Trial Subcommittee and the Continuing Legal Education Liaison with MSBA Subcommittee. He worked tirelessly on the revision of the Attorney Disciplinary Rules and the revision of the Judicial Disabilities Rules, and also served with distinction on the Special Subcommittee that developed the Rules of Evidence and the Special Subcommittees on Management of Litigation and Visual and Electronic Evidence. Above all, Tom was the measured voice of reason as the Committee debated proposed revisions.

Tom, for each of these contributions, the Committee, the Bench, and the Bar are indebted to you.

The Chair stated that Mr. Howell had been an invaluable member of the Committee, helping attorneys, parties, and judges. He added that Mr. Howell's work on the Attorney Discipline Rules alone merits more of an award than the Committee is able to give. Mr. Howell thanked the Committee and said that his service on the Committee was the highlight of his career.

The Chair adjourned the meeting.