COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on May 21, 2004.

Members present:

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

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. Joseph H. H. Kaplan
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Twilah S. Shipley, Esq.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
George W. Liebmann, Esq.

The Chair convened the meeting. He asked if there were any corrections to the second half of the minutes of the January 9, 2004 meeting. There being none, the Vice Chair moved to approve the minutes, the motion was seconded, and it passed unanimously.

Judge Missouri told the Committee that the Court of Appeals held a hearing on May 10, 2004 on Rule 4-345, Revisory Power. Since the Rules Committee had voted on a change to the Rule with a close vote of 11 to 10 in favor of the change, the Committee,

at the wise suggestion of the Vice Chair, had decided to let the Court of Appeals make the decision as to whether or not to change the Rule. Judge Missouri said that along with the Chair, the Vice Chair, the Reporter, and himself, the Honorable Daniel Long, Chair of the Conference of Circuit Judges, Glenn Ivey, Esq., who is the State's Attorney for Prince George's County, and Richard Finci, Esq., representing the Maryland Defense Lawyers' Association were present at the hearing.

The Honorable Dale R. Cathell, Judge of the Court of Appeals, read into the record a three-page statement that expressed his opposition to changing the Rule. The Honorable Alan M. Wilner, Judge of the Court of Appeals, proposed two amendments to Rule 4-345 –- that the proposed five-year limitation apply not only to crimes of violence but to all crimes and that the Rule should not contain the language providing that the prosecutor and defense attorney could agree to eliminate the five-year limitation. By a vote of five to one, the Court of Appeals approved the Rule with Judge Wilner's amendments. The Honorable Robert M. Bell, Chief Judge of the Court of Appeals, did not vote on the Rule. The Rule will take effect prospectively, applying to sentences imposed on or after July 1, 2004.

The Chair said that the Criminal Subcommittee will be asked to look into why there is a 90-day period for filing a motion under Rule 4-345, when other comparable provisions in the Rules have a 30-day period for filing. Judge Missouri noted that the

Honorable Lynne A. Battaglia, Judge of the Court of Appeals, had asked this question. The Vice Chair added that Judge Battaglia was interested in the historical reasons for the time period. The Vice Chair hypothesized that one of the reasons may have been that the time period was tied into the former "terms of court." Judge Kaplan added that these began in September and March of every year. The Chair said that their times varied. The Reporter observed that some terms of court had been on a quarterly basis. The Chair questioned whether the original time period came from the former Rules of the Supreme Bench, which was what the circuit court in Baltimore City was previously named.

Judge Kaplan noted that the longer time period allows *pro se* prisoners sufficient time to file the motions from prison, and it prevents attorneys from being accused of malpractice by not limiting them to filing these motions within only 30 days. The Chair said that many citizens testified in support of the amended Rule limiting the revisory period. Judge Missouri remarked that Delegate Vallario had indicated that further legislation on this issue may be filed.

The Reporter stated that she had asked the Assistant Reporter to research this issue, and the law school intern who will be working at the Rules Committee Office this summer can help with the research.

Agenda Item 1. Consideration of a policy issue concerning peremptory challenges (See Appendix 1)

Judge Missouri told the Committee that although the issue of changes to peremptory challenges was not discussed at the meeting of the Conference of Circuit Judges that took place on May 17, 2004 the Chair of the Conference, Judge Long, had told Judge Missouri that the Conference most likely will be opposed to changing the number of challenges or to including more informational items on the jury questionnaires.

Mr. Liebmann said that the number of peremptory challenges is embodied in the Rules of Procedure, a creation of the Rules Committee and the Court of Appeals. Changing the court rules would not be making an abrupt policy decision, but it would be doing what is normally done in response to a change in circumstances. Since the Rule was created, the law has changed, and the United States Supreme Court decided the case of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). Mr. Liebmann said that he became interested in the topic of peremptory challenges when some dissension arose between the State's Attorney for Baltimore City and the Mayor of Baltimore City on this subject. To provide insight, the Calvert Institute for Policy Research, the organization for which he works, became involved in the matter. The issue was discussed at a symposium on the criminal justice system. Four judges participated in the symposium: the Honorable Charles E. Moylan, retired judge of the Court of Special Appeals; the Honorable J. Frederick Motz, U.S. District Court Judge for the District of Maryland; the Honorable John M.

Glynn, of the Circuit Court for Baltimore City; and the Honorable Timothy J. Doory, of the District Court of Maryland in Baltimore City. Each of these individuals has a different perspective.

Mr. Liebmann told the Committee that Judge Moylan had made an eloquent opening statement which Mr. Liebmann then read to the Committee as follows:

> I now move on to the second topic, the peremptory challenge. Intervention in the operation of the day-to-day criminal courts by the Supreme Court of the United States under the guise of constitutionally imposing upon us the so-called protections of the Bill of Rights, that is no mere problem, that is an unfettered catastrophe. In the world of peremptory challenges, I think the 1986 decision of *Batson v. Kentucky* is the catastrophe of catastrophes.
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> I remember at the time about two months after the promulgation of Batson, I had to write an opinion for the Court of Special Appeals applying Batson here locally. I looked at the intellectual chaos of Batson. Nine judges were able to produce a majority opinion, multiple dissenting opinions and multiple concurring opinions, no less than seven opinions for the Supreme Court of the United States. And I remember thinking at the time, and I think I even was rash enough to write at the time, albeit by way of dicta to be absolutely sure, that the Supreme Court thought that it was supplying a solution to what it perceived as a very limited problem of the moment, which at the moment was the use of peremptories in the southern states of the United States, the old confederacy, probably by white prosecutors against black jurors in cases against black defendants. But as I read through those seven opinions, the bottom line was, wait a minute, this cannot possibly happen. There is no way once you unlimber the heavy artillery of the equal protection clause of the 14th Amendment on this little thing called the peremptory challenge that you will ever be able to

confine it to that limited problem.

Indeed, as we embarked on that slippery slope, another prophecy within five years came true and that is: Once on the slippery slope, there is no principled place to stop short of the absolute bottom of the hill and I think that will ultimately be the absolute elimination of the peremptory challenge because as the months went by in the immediate wake of *Batson v. Kentucky*, lo and behold it is applied not simply in the case of black jurors and black defendants, but white defendants/black jurors, white defendants/white jurors, any race whatever. Soon in *Alabama, Ex rel T.V. v. J.E.D.*, it was applied to gender. It was applied to the civil case as well as the criminal case. It was applied to the defense side of the trial table as well as the state side of the trial table. And as far as I'm concerned, there was nothing wrong with the original use of the peremptory challenge.

I offer just one example. Imagine for a moment anyone here in the room is a prosecutor. Fred was, as I was. And your case of the moment is to prosecute a middle-aged woman of the name of Minnie O'Brien for having thrown a rock through the window of the local abortion clinic. You as the prosecutor I dare say knowing nothing about the background of the potential jurors brought before you would instinctively strike with the peremptory challenge from your jury anybody whose last name was Clancy or Rafferty or Flynn.

Now, were you in such a situation utilizing group generalization? You're damned right you were. Would you be well advised to do it notwithstanding? You're doggone right you would. But the difficulty with the system as it has evolved is that the system, and a little bit of the myth that we have promulgated, would insist that you be intellectually dishonest in attempting to disguise what you were doing with all kinds of other reasons.

> You would be explaining to the judge, who might or might not believe you, that you had struck Clancy because you didn't like the look of that funny little mustache he was wearing, or you had struck Flynn because he declined to make square eye contact with you as you put a question to him.
>
> I think that the bottom line is that as we apply the equal protection clause ultimately to any grouping whatsoever, that demands we look at something with extreme or even heightened scrutiny, that you reach the point where we have totally lost sight that the criminal trial is about the guilt or innocence of the defendant, not about all of these other procedural peripheral questions.
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> I think as a matter of pure efficiency the only way out will be as Thurgood Marshall and Warren Burger both predicted back in 1986, the ultimate elimination of the peremptory challenge and probably should be. If we could overrule *Batson v. Kentucky*, I'd be happy to keep it with us forever. But absent that overruling, I think the only intelligent thing to do is to get rid of it.

Mr. Liebmann noted that the use of peremptory challenges once involved striking names, but now that is only the beginning of the process. Inquiry into the use of invidious criteria is an elaborate process that protracts the choosing of juries and creates new issues for appeal in criminal cases.

Mr. Bowen referred to the excerpt of Judge Moylan's introduction discussing the trial of Minnie O'Brien and the striking of Irish names from the jury pool. He expressed the view that the justification for peremptory challenges fails, but this is not perceived as a problem in most counties. Apart from the dysfunctional aspect of peremptory challenges, the large

number of peremptory challenges allowed in Maryland has always been a problem. It results in wholly unrepresentative juries. The purging of minority racial groups results in white juries in the counties and black juries in the cities. Why is it necessary to do this? Maryland is more generous than most states in allowing a great amount of peremptory challenges. For cases involving death or life imprisonment, the defense is permitted 20 peremptory challenges, and the State is permitted 10. For cases involving imprisonment for 20 years or more, but less than life imprisonment, the defense is permitted 10 peremptory challenges and the State is permitted five. In a trial with multiple defendants, there is wholesale carnage of the jury pool. If the case has three defendants, there could be as many as 90 peremptory challenges, in addition to those excused for cause and nine challenges for each alternate juror. It is sometimes necessary to summon 300 jurors for each criminal trial, because of challenges for cause, peremptory strikes, and people who fail to appear for jury duty. Citizens may have to serve jury duty once every 15 months. One of the reasons some individuals fail to appear when summoned is that they are called too often.

Mr. Liebmann commented that when civil trials are added in, several hundred jurors may need to come to court. The peremptory challenges wreak carnage on the jury pool. Judge Missouri pointed out that the peremptory challenge system is controlled by Code, Courts Article, §8-301. Mr. Liebmann noted that peremptory challenges also are controlled by Rule 4-313.

The Chair asked whether, after *Batson* was decided, any state had eliminated peremptory challenges. Mr. Liebmann answered that no state has totally abolished peremptory challenges, but there have been substantial reductions in the number of challenges. There is a University of Chicago Law Review article on this subject, written by M. Hoffman entitled "Peremptory Challenges Should be Abolished," at 64 U. Chi. L Rev. (1997). Maryland is one of 10 states with unequal numbers of challenges for the defense and the prosecution. The General Assembly has encountered resistance from the criminal defense bar to reduce the number of peremptory challenges. Changing the Rule would be a good place to start. Even if the statute were to be repealed, the Rule could be changed. The Rules Committee could make a statement as to the need for change. What would be more useful than peremptory challenges is to provide more information about potential jurors. The challenges for cause could be handled more expeditiously. This would save time, because otherwise the judge would have to elicit the information from the prospective juror. Mr. Liebmann said that he did not see the harm in adding questions to the juror questionnaire.

Mr. Liebmann noted that a larger question is the fact that the ruling in each dispute under *Batson* may be the subject of further appeals. The British system has very few peremptory challenges. Rather than abolish peremptory challenges totally, the goal could be to reduce the numbers. Some justification

exists to retain two or three challenges to give defendants greater confidence in the system. A defendant has more confidence in the system if a potential juror who appears to be malevolent can be stricken.

The Chair inquired as to whether there were any changes to the federal system of peremptory challenges after the *Batson* decision. Mr. Liebmann replied that he did not know the answer but said that there are less peremptory challenges in federal court. The ramifications of *Batson* expanded in the late 1990's. It is better to move slowly toward change. The goal is to avoid creating a host of issues for appeal. The Vice Chair questioned as to whether the request for the Rules Committee to consider this issue includes a consideration of civil juries. Mr. Liebmann replied that a great amount of racial exclusion exists in criminal juries, burdening a system that is already heavily burdened. It is better to fight one battle at a time.

Mr. Michael remarked that juries often lack balance, and judges are not discharging their duties under *Batson*. Mr. Liebmann responded that it is difficult for judges to discharge their duties when there are so many peremptory challenges and excuses for cause. It is an exercise in hypocrisy. The Chair pointed out that the *Batson* case creates a mini-trial, causing jury selection to take substantially longer than it took before *Batson*. Attorneys are not always candid about why they are striking someone from the jury panel, and the trial judges have

to handle this. If the prosecutor exercises a peremptory challenge as to a juror, and the defense attorney objects, the judge will ask the prosecutor for an explanation. If the judge is not satisfied with the explanation, the juror will not be disqualified. The process can be very lengthy. If peremptory challenges are reduced in number but not eliminated, the *Batson* problem would not be eliminated.

Judge Kaplan said that his concern about this issue is not the *Batson* problem. He explained that in Baltimore City, for a case in which there is one defendant, about 55 potential jurors are summoned. When he asks the usual questions as to whether any of the jurors have been a victim of a crime or convicted of a crime, as many as 40 of the 55 respond affirmatively and have to be interviewed by him to see if they feel that they can decide the case impartially. The ones who had been convicted of a crime or who have family members who had been convicted of a crime often answer that they can decide the case impartially. Many of these individuals are eliminated for cause. After this point in Baltimore City, about 15 people are left in the courtroom. The hope is that 14 people can be retained for the jury, including alternates. It now takes two or more hours to select a jury, and it used to take 20 minutes. The great fear is that someone who has been stricken for cause will go back to the jury assembly room and then become part of another panel. Judge Kaplan expressed the view that the availability of challenges for cause

should be increased and the number of peremptory challenges reduced because they are a waste of time.

Judge McAuliffe commented that this problem cannot be solved today. It is a significant problem and one that is worthy of study. Once the Rules Committee studies this, it can then make a recommendation. The Committee should ask Senator Stone and Delegate Vallario about the legislature's view concerning reduction of peremptory challenges. Judge McAuliffe stated that he is inalterably opposed to completely eliminating peremptory challenges. Some potential jurors are not capable of making good decisions, and it is beneficial to have a method of eliminating such individuals. The number of peremptory challenges should be re-examined. In death penalty cases, the current numbers of 20 for the defendant and ten for the State should be retained. For life imprisonment cases, there should be ten for each side. Likewise, for all other cases, the numbers for each side should be equal – perhaps seven for each. One of the problems with Rule 4-313 is that it allows the parties to remove jurors who have already been seated in the jury box. This amounts to game-playing and is time-consuming. It also looks ridiculous to seat jurors in the jury box and then ask them to leave. Judge Missouri and Mr. Dean also expressed their opposition to the procedure of "striking from the box."

The Chair suggested that the problem of the shrinking potential pool of jurors in Baltimore City should be studied. This may require a change to the Maryland Constitution, perhaps

to allow jurors from other counties. Mr. Dean commended Mr. Liebmann for his interest in the peremptory challenge issue. As a prosecutor, Mr. Dean expressed his opinion that peremptory challenges should be abolished, although he noted that not all prosecutors take this position. The legislature should take steps to reduce the number of peremptory challenges. The question of whether the public, including criminal defendants, is benefitting from these challenges needs to be asked.

Mr. Brault commented that there have been problems with limiting peremptory challenges in jury trials in other jurisdictions, including New York City and the District of Columbia. Limiting peremptory challenges would exacerbate post-trial questioning of jurors as to possible defects in trials. Mr. Brault agreed with Judge McAuliffe that peremptory challenges should not be totally eliminated. The Vice Chair remarked that part of any study should include how Maryland compares to other states regarding the number of peremptory challenges. The Chair said that the Criminal Subcommittee should reconsider this issue. Judge Missouri added that he will bring it to the attention of the Conference of Circuit Judges in September.

As to jury questionnaires, mentioned in Mr. Liebmann's letter of October 10, 2003, which is part of Appendix 1, Judge Missouri pointed out that the Rules Committee does not participate in the drafting of these forms. The forms are prepared in accordance with the individual jury plans of each jurisdiction.

The Reporter noted that the *Batson* mini-trial to which the Chair previously referred is really a trial as to the veracity of the attorney who seeks to use the peremptory challenge. If the trial judge denies the use of the peremptory challenge, is there an implicit finding that the attorney has lied to the court? *Batson* appears to have generated a difficult ethical conundrum which may be unable to be solved. Mr. Brault told the Committee about a recent case in Montgomery County that involved a co-defendant who had been born in India. The co-defendant wanted foreign-born jurors on the panel, but those jurors ended up as alternates, and the plaintiff eliminated the alternates with strikes. The Chair observed that the judge has to make a credibility assessment as to the way the jury sets up to see if minorities are being eliminated. This matter will be studied in the criminal context by the Criminal Subcommittee.

Agenda Item 2. Consideration of proposed amendments to: Rule 7-204 (Response to Petition), Rule 7-209 (Disposition), and Rule 8-604 (Disposition)

The Vice Chair presented Rules 7-204, Response to Petition; 7-209, Disposition; and 8-604, Disposition, 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 7-204 by adding a new sentence to section (b) providing for a procedure to implead the Subsequent Injury Fund, as follows:

Rule 7-204. RESPONSE TO PETITION

(a) Who May File; Contents

Any person, including the agency, who is entitled by law to be a party and who wishes to participate as a party shall file a response to the petition. The response shall state the intent to participate in the action for judicial review. No other allegations are necessary.

(b) Preliminary Motion

A person may file with the response a preliminary motion addressed to standing, venue, timeliness of filing, or any other matter that would defeat a petitioner's right to judicial review. Except for venue, failure to file a preliminary motion does not constitute waiver of an issue. A preliminary motion shall be served upon the petitioner and the agency. In addition, a party desiring to implead the Subsequent Injury Fund shall file a notice of impleader pursuant to COMAR 14.09.01.13B before responding to the petition.

Committee note: The filing of a preliminary motion does not result in an automatic extension of the time to transmit the record. The agency or party seeking the extension must file a motion under Rule 7-206 (d).

(c) Time for Filing Response; Service

A response shall be filed within 30 days after the date the agency mails notice of the filing of the petition unless the court shortens or extends the time. The response need be served only on the

petitioner, and shall be served in the manner prescribed by Rule 1-321.

Source: This Rule is derived from former Rule B9.

Rule 7-204 was accompanied by the following Reporter's Note.

In the case *Carey v. Chessie Computer Services, Inc.*, 369 Md. 741 (2002), the Court of Appeals noted that there is no express procedure in Title 7, Chapter 200 or elsewhere in the Rules that provides for impleading the Subsequent Injury Fund (SIF) in a Workers' Compensation action pending in a circuit court. To address this gap, the Appellate Subcommittee recommends that a sentence be added to section (b) of Rule 7-204 providing a specific reference to impleading the SIF.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

AMEND Rule 7-209 by adding a new section pertaining to appeals from the Workers' Compensation Commission, as follows:

Rule 7-209. DISPOSITION

(a) Generally

Unless otherwise provided by law, the court may dismiss the action for judicial review or may affirm, reverse, or modify the agency's order or action, remand the action

to the agency for further proceedings, or an appropriate combination of the above.

(b) Appeal from Decision of Workers' Compensation Commission

In an appeal from a decision of the Worker's Compensation Commission, if a notice of impleader of the Subsequent Injury Fund is filed at least 60 days before trial in the circuit court, the court shall suspend further proceedings and remand the case to the Commission for further proceedings to give the Fund an opportunity to defend against the claim. If a notice of impleader of the Subsequent Injury Fund pursuant to COMAR 14.09.01.13B is filed less than 60 days before the trial, the court may, for good cause shown, suspend further proceedings and remand the case to the Commission for further proceedings to give the Fund an opportunity to defend against the claim.

Source: This Rule is in part derived from former Rule B13 and in part new.

Rule 7-209 was accompanied by the following Reporter's Note.

Chapter 276, Acts of 2003 (HB 122) modified Code, Labor and Employment Article, §9-807 by adding a good cause showing before proceedings are suspended and remanded to the Workers' Compensation Commission when the Subsequent Injury Fund is impleaded less than 60 days before a trial in the circuit court or a hearing in the Court of Special Appeals. Thomas Patrick O'Reilly, Chairman of the Commission, in conjunction with the Appellate Subcommittee, has proposed changes to Rules 7-209 and 8-604 to conform to the statutory changes.

CHAPTER 600 - DISPOSITION

AMEND Rule 8-604 by adding a new subsection (d)(3) pertaining to appeals from a decision of the Workers' Compensation Commission, as follows:

Rule 8-604. DISPOSITION

(a) Generally

As to each party to an appeal, the Court shall dispose of an appeal in one of the following ways:

(1) dismiss the appeal pursuant to Rule 8-602;

(2) affirm the judgment;

(3) vacate or reverse the judgment;

(4) modify the judgment;

(5) remand the action to a lower court in accordance with section (d) of this Rule; or

(6) an appropriate combination of the above.

(b) Affirmance in Part and Reversal, Modification, or Remand in Part

If the Court concludes that error affects a severable part of the action, the Court, as to that severable part, may reverse or modify the judgment or remand the action to a lower court for further proceedings and, as to the other parts, affirm the judgment.

(c) Correctible Error

(1) Matters of Form

A judgment will not be reversed on grounds of form if the Court concludes that there is sufficient substance to enable the Court to proceed. For that purpose, the appellate court shall permit any entry to be made by either party during the pendency of

the appeal that might have been made by that party in the lower court after verdict by the jury or decision by the court.

(2) Excessive Amount of Judgment

A judgment will not be reversed because it is for a larger amount than claimed in the complaint if the plaintiff files in the appellate court a release of the excess.

(3) Modified Judgment

For purposes of implementing subsections (1) and (2), the Court may modify the judgment.

(d) Remand

(1) Generally

If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

Committee note: This Rule is not intended to change existing case law regarding limited remands in criminal cases; see *Gill v. State*, 265 Md. 350 (1972); *Weiner v. State*, 290 Md. 425 (1981); *Reid v. State*, 305 Md. 9 (1985).

(2) Criminal Case

In a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing.

(3) Appeal from a Decision of the Workers' Compensation Commission

In an appeal from a decision of the

Workers' Compensation Commission, if a notice of impleader of the Subsequent Injury Fund is filed at least 60 days before a hearing in the Court of Special Appeals, the court shall suspend further proceedings and remand the case to the Commission for further proceedings to give the Fund an opportunity to defend against the claim. If a notice of impleader of the Subsequent Injury Fund pursuant to COMAR 14.09.01.13B is filed less than 60 days before the hearing, the court may, for good cause shown, suspend further proceedings and remand the case to the Commission for further proceedings to give the Fund an opportunity to defend against the claim.

(e) Entry of Judgment

In reversing or modifying a judgment in whole or in part, the Court may enter an appropriate judgment directly or may order the lower court to do so.

Source: This Rule is derived as follows:
Section (a) is derived from former Rules 1070 and 870.
Section (b) is derived from former Rules 1072 and 872.
Section (c) is derived from former Rules 1073 and 873.
Section (d) is in part derived from former Rules 1071 and 871 and in part new.
Section (e) is derived from former Rules 1075 and 875.

Rule 8-604 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-209.

The Vice Chair said that in *Carey v. Chessie Computer Services, Inc.*, 369 Md. 741 (2002), the Court noted that there is no express procedure in the Rules for impleading the Subsequent Injury Fund in Workers' Compensation actions. The Honorable Alan M. Wilner, author of the opinion, had pointed out the pertinent

provision in COMAR, but stated that no parallel provision exists in the Rules of Procedure for Workers' Compensation cases on review in a circuit court or in the Court of Special Appeals. The COMAR provision is in today's meeting materials. The language proposed for addition to Rule 7-204 (b) limits the notice provision in that it requires that the notice of impleader be filed before the party responds to the petition. The Subsequent Injury Fund can be impleaded at any time.

Judge McAuliffe commented that the Subsequent Injury Fund worked out these procedures and put them in COMAR. He suggested that the proposed new language in Rule 7-204 could be taken out, since this matter is covered in the proposed amendments to Rule 7-209. The Vice Chair noted that the new language of Rule 7-209 provides that the procedures are dependent on when the notice of impleader is filed. There should be language stating what happens whenever the notice of impleader is filed, since it can be filed at any time. The Chair said that the new language in Rule 7-204 is not appropriate, but the language in Rule 7-209 is. A party who seeks to implead the Fund may be someone other than the respondent. Either side can implead the Fund. The danger is that the filing is done for a frivolous purpose, such as to postpone the proceedings. Judge Missouri expressed his concern that the 60-day period in Rule 7-209 may not be appropriate if someone files the notice of impleader the day before the trial. The Vice Chair pointed out that if the notice of impleader is filed less than 60 days before the trial, there is a good cause

requirement that must be met before the court suspends further proceedings and remands the case to the Workers' Compensation Commission.

Judge McAuliffe remarked that Rule 7-204 should provide that anyone who desires to do so may file a notice of impleader pursuant to Rule 7-209. Judge Missouri suggested that the Style Subcommittee can draft this language. The Chair said that language could be added to Rule 7-205, Stays, that would refer to the filing of a petition or an impleader.

Judge Missouri moved to approve Rules 7-204 and 7-209 with style adjustments. The motion was seconded and passed unanimously. Judge Missouri suggested that the Style Subcommittee make parallel changes to Rule 8-604. The Committee agreed by consensus with this suggestion.

Agenda Item 3. Consideration of proposed amendments to: Rule 2-506 (Voluntary Dismissal) and Rule 3-506 (Voluntary Dismissal)

Mr. Michael presented Rules 2-506 and 3-506, Voluntary Dismissal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-506 to clarify that a stipulation of dismissal is signed by the parties to the complaint, counterclaim, cross-claim, or third-party claim being dismissed, as follows:

Rule 2-506. VOLUNTARY DISMISSAL

(a) By Notice of Dismissal or Stipulation

Except as otherwise provided in these rules or by statute, a plaintiff may dismiss an action without leave of court (1) by filing a notice of dismissal at any time before the adverse party files an answer or a motion for summary judgment or (2) by filing a stipulation of dismissal signed by all parties ~~who have appeared in the action~~ to the complaint, counterclaim, cross-claim or third-party claim being dismissed.

(b) By Order of Court

Except as provided in section (a) of this Rule, a plaintiff may dismiss an action only by order of court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded prior to the filing of plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who pleaded the counterclaim unless the counterclaim can remain pending for independent adjudication by the court.

(c) Effect

Unless otherwise specified in the notice of dismissal, stipulation, or order of court, a dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a party who has previously dismissed in any court of any state or in any court of the United States an action based on or including the same claim.

(d) Costs

Unless otherwise provided by stipulation or order of court, the dismissing party is responsible for all costs of the action or the part dismissed.

Cross reference: Code, Courts Art., §7-202.

(e) Dismissal of Counterclaims, Cross-claims, or Third-party Claims

The provisions of this Rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim, except that a notice of dismissal filed by a claimant pursuant to section (a) of this Rule shall be filed before the filing of an answer.

Source: This Rule is derived as follows:
Section (a) is derived in part from the 1968 version of Fed. R. Civ. P. 41 (a) (1) and is in part new.
Section (b) is derived from former Rule 541 b and the 1968 version of Fed. R. Civ. P 41 (a) (2).
Section (c) is derived from former Rule 541 c.
Section (d) is derived from former Rules 541 d and 582 b.
Section (e) is derived from the 1968 version of Fed. R. Civ. P. 41 (c).

Rule 2-506 was accompanied by the following Reporter's Note.

The proposed amendments to Rules 2-506 and 3-506 clarify that a stipulation of dismissal is signed by the parties to the complaint, counterclaim, cross-claim or third-party claim that is being dismissed. The stipulation need not be signed by any of the other parties who remain in the lawsuit. See *Garlock v. Gallagher*, 149 Md. App. 189 (2003) (allowing a cross-claim to be dismissed by the parties to the cross-claim only), *cert. denied*, 274 Md. 359 (2003).

AMEND Rule 3-506 to clarify that a stipulation of dismissal is signed by the parties to the complaint, counterclaim, cross-claim, or third-party claim being dismissed, as follows:

Rule 3-506. VOLUNTARY DISMISSAL

(a) By Notice of Dismissal or Stipulation

Except as otherwise provided in these rules or by statute, a plaintiff may dismiss an action without leave of court (1) by filing a notice of dismissal at any time before the adverse party files a notice of intention to defend, or if the notice of dismissal specifies that it is with prejudice, at any time before judgment, or (2) by filing a stipulation of dismissal signed by all parties ~~who have appeared in the action~~ to the complaint, counterclaim, cross-claim or third-party claim being dismissed.

(b) By Order of Court

Except as provided in section (a) of this Rule, a plaintiff may dismiss an action only by order of court and upon such terms and conditions as the court deems proper.

(c) Effect on Claim

Unless otherwise specified in the notice of dismissal, stipulation, or order of court, a dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a party who has previously dismissed in any court of any state or in any court of the United States an action based on or including the same claim.

(d) Effect on Counterclaim

If a counterclaim has been pleaded before the filing of a notice of dismissal or motion for voluntary dismissal, the dismissal

of the action shall not affect the continued pendency of the counterclaim.

(e) Costs

Unless otherwise provided by stipulation or order of court, the dismissing party is responsible for all costs of the action or the part dismissed.

Cross reference: Code, Courts Art., §7-202.

(f) Dismissal of Counterclaims, Cross-claims, or Third-party Claims

The provisions of this Rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

Source: This Rule is derived as follows:
Section (a) is derived in part from the 1968 version of Fed. R. Civ. P. 41 (a)(1) and is in part new.
Section (b) is derived from former Rule 541 b and the 1968 version of Fed. R. Civ. P. 41 (a)(2).
Section (c) is derived from former M.D.R. 541 b.
Section (d) is derived from former Rule 541 b and the 1968 version of Fed. R. Civ. P. 41 (a)(2).
Section (e) is derived from former Rules 541 d and 582 b.
Section (f) is derived from the 1968 version of Fed. R. Civ. P. 41 (c).

Rule 3-506 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 2-506.

Mr. Michael explained that a change is being suggested for Rules 2-506 and 3-506 that would clarify which parties sign a stipulation of dismissal. *Garlock v. Gallagher*, 149 Md. App. 189 (2003), is an asbestos case in which the Court held that a

manufacturer's dismissal of its cross-claims against two other manufacturers was valid and that the dismissal of the cross-claims did not have to be signed by the other parties not involved in the cross-claim. The current language of the Rule is not specific as to who is involved when parties enter into a stipulation to dismiss. Included in the meeting materials is a memorandum from Mr. Klein, who is not present today. See Appendix 2. In the memorandum, Mr. Klein pointed out that the current wording of the Rule could be read to require that all of the parties in a lawsuit would have to sign the stipulation of dismissal, and this could be very cumbersome in a multi-party lawsuit. He had suggested that the Rule be amended to require that only the parties involved in the dismissal would have to sign the stipulation. Mr. Michael expressed the opinion that this is a good change.

The Chair asked if the word "plaintiff" in the second line of section (a) should be changed to the word "party." Ms. Ogletree cautioned that the defendant should not be dismissing the action. Mr. Michael suggested that the second phrase of section (a) should read as follows: "... an action may be dismissed without leave of court ...". The Vice Chair suggested that the language "all or part of" should be placed before the words "an action." The Committee agreed by consensus to the changes to Rules 2-506 and 3-506 suggested by Mr. Michael and the Vice Chair. The proposed changes to section (a) of Rule 2-506 and 3-506 were approved as amended.

Agenda Item 4. Consideration of certain proposed rules changes recommended by the District Court Subcommittee

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Judge Norton presented proposed new section (b) of Rule 3-506, Voluntary Dismissal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 500 - TRIAL

AMEND Rule 3-506 by adding a new section (b) pertaining to dismissal upon stipulated terms, as follows:

Rule 3-506. VOLUNTARY DISMISSAL

. . .

(b) Dismissal Upon Stipulated Terms

If an action is settled upon written stipulated terms and dismissed, upon the request of any party to the settlement agreement, the action may be reopened at any time to enforce the terms of the settlement agreement through the entry of judgment or other appropriate relief.

~~(b)~~ (c) By Order of Court

Except as provided in section (a) of this Rule, a plaintiff may dismiss an action only by order of court and upon such terms and conditions as the court deems proper.

~~(c)~~ (d) Effect on Claim

Unless otherwise specified in the notice of dismissal, stipulation, or order of court, a dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by

a party who has previously dismissed in any court of any state or in any court of the United States an action based on or including the same claim.

~~(d)~~ (e) Effect on Counterclaim

If a counterclaim has been pleaded before the filing of a notice of dismissal or motion for voluntary dismissal, the dismissal of the action shall not affect the continued pendency of the counterclaim.

~~(e)~~ (f) Costs

Unless otherwise provided by stipulation or order of court, the dismissing party is responsible for all costs of the action or the part dismissed.

Cross reference: Code, Courts Art., §7-202.

~~(f)~~ (g) Dismissal of Counterclaims, Cross-claims, or Third-party Claims

The provisions of this Rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

Source: This Rule is derived as follows:

. . .

(b) is new.

Section ~~(b)~~ (c) is derived from former Rule 541 b and the 1968 version of Fed. R. Civ. P. 41 (a)(2).

Section ~~(c)~~ (d) is derived from former M.D.R. 541 b.

Section ~~(d)~~ (e) is derived from former Rule 541 b and the 1968 version of Fed. R. Civ. P. 41 (a)(2).

Section ~~(e)~~ (f) is derived from former Rules 541 d and 582 b.

Section ~~(f)~~ (g) is derived from the 1968 version of Fed. R. Civ. P. 41 (c).

Rule 3-506 was accompanied by the following Reporter's Note.

The Committee on Civil Procedures, which is an arm of the Administrative Judges of the District Court, has asked that a new

> provision be added to Rule 3-506, pertaining to dismissal upon stipulated terms. No uniform procedure exists to handle cases that have been settled by the parties but are not ready to be dismissed. The new language would allow judges to pass a case for settlement, especially when the case has been settled but the defendant needs some time to complete the terms of settlement. It would provide a viable mechanism to settle cases without the entry of a judgment, allow for an agreed-upon payment schedule, and make the court more responsive to the needs of pro se and other litigants. The District Court Subcommittee recommends the proposed change.

Judge Norton explained that the District Court Subcommittee had met the previous Monday to look at several rules. The one on the agenda for today is a result of a letter from the Honorable Neil Edward Axel, Judge of the District Court of Maryland for Howard County. Judge Axel had pointed out that no uniform procedure exists to handle cases that have been settled by the parties but where a dismissal of the action would be premature. These are usually collection cases in which the parties agree as to the amount of money that is owed and as to a payment schedule, but the plaintiff does not want to dismiss the case until all of the money has been paid. The incentive of the dismissal upon stipulated terms is to avoid a judgment against the defendant. The present practice is to term the procedure "passed for settlement." The procedures vary from county to county. It is not clear whether these cases are subject to dismissal pursuant to Rule 3-507, Dismissal for Lack of Jurisdiction or Prosecution, for inactivity. Some structure is needed. A written stipulation

is presented to the court so that it is not necessary to obtain a transcript to see what the agreement was, but it is not clear what happens if the defendant defaults. A small number of cases are reopened. The Committee on Civil Procedures of the District Court of Maryland has requested the change to the Rule. The District Court Subcommittee of the Rules Committee did not make a recommendation for a parallel change to Rule 2-506, since circuit court rules are not in the bailiwick of the Subcommittee.

Judge McAuliffe asked whether the procedure could be that a judgment is entered, but there is a stay of execution on the terms to which the parties agree. Judge Norton replied that defendants want to have no judgment entered, so that no judgment appears on their credit record. The Vice Chair commented that one way to avoid entry of a judgment is that the plaintiff holds a consent judgment, which only is entered in the event of a default. Ms. Potter remarked that problems can occur in collection cases in which the litigants are *pro se*. Paperwork is not signed and filed when it should be, the case is dismissed under Rule 3-507, and a motion to vacate the order of dismissal must be filed. Mr. Brault noted that under case law, settlements are enforceable, but does the District Court have equitable power to order specific enforcement of the agreement? Mr. Bowen observed that enforcement could be through the entry of the judgment.

The Vice Chair asked if the dismissal under Rule 3-506 (b)

would be without prejudice, and Judge Norton answered affirmatively. Ms. Ogletree inquired as to whether a judgment dismissing the action is entered, and the Reporter answered affirmatively. Judge Missouri questioned as to how limitations affect the procedure. When a case is marked as settled, should there be a certain time period within which the case may be reopened? The Chair suggested that the Rule could provide, as follows: "If the case has been dismissed upon written stipulated terms, then any party to the settlement agreement may file a motion to reopen the case for entry of a judgment that conforms to the terms of the agreement." Mr. Brault added that the judgment would be based on the written stipulated terms. The Chair said that the Style Subcommittee can draft the exact language. Mr. Brault noted that this is calling for an entry of judgment upon a default. The Chair cautioned that if the defendant is doing what he or she is supposed to do, and the plaintiff is overreaching, no judgment should be entered. Judge Norton added that if there is a disagreement as to the terms and compliance, the case can be set in for a hearing.

The Vice Chair expressed her disagreement with the proposed change to the Rule. A judgment of dismissal is a judgment, and the proposed procedure interferes with the court's revisory power over judgments. A better procedure is to enter a stay or provide for a consent judgment that is filed if there is a default. The Chair observed that the proposed procedure set forth in new section (b) is appropriate for minor, unsophisticated cases, but

agreed with the Vice Chair's conclusion that the revisory power over judgments is affected. The Vice Chair suggested that the case could be dismissed without prejudice, but the plaintiff would hold a consent judgment that could be filed later. The Chair remarked that it is important to avoid multiple cases arising out of the same case.

Mr. Shipley asked if proposed new section (b) should be added to Rule 2-506. The Vice Chair replied that it should not. Mr. Shipley expressed the view that it could be appropriate for circuit court cases. The Chair suggested that the Style Subcommittee can draft the language for Rule 3-506, and then it can be transmitted to the Conference of Circuit Judges and the Conference of Circuit Court Clerks to see if they request a similar procedure for the circuit courts. The Committee agreed by consensus to this. Mr. Shipley pointed out that there is a problem with cases passed for settlement. Does Rule 2-507 apply to those cases? Judge Missouri commented that under differentiated case management, no cases should be passed for settlement.

The Committee approved Rule 3-506 (b), subject to revision by the Style Subcommittee.

Judge Missouri told the Committee that a request to amend Rules 4-262, Discovery in District Court, and 4-263, Discovery in Circuit Court, was sent by the Honorable Albert J. Matricciani, Jr. and the Honorable M. Brooke Murdock to the Conference of Circuit Judges. See Appendix 3. The initial request to

reconsider the Rules was made by Mr. Brault. Judges Matricciani and Murdock suggested a change to subsection (a)(1) and suggested a new section (j). The changes to subsection (a)(1) were unanimously approved by the Conference, but the vote on the latter was not unanimous. The proposal will be submitted to the Rules Committee for discussion. The Chair noted that he has heard from prosecutors that providing discovery can be very burdensome. In some jurisdictions, there is open file discovery that is working well, but in some jurisdictions, discovery does not work well. Judge Missouri noted that the last time this issue was before the full Committee, many interested persons were present at the meeting. The issue should be addressed first by the Criminal Subcommittee. The Chair said that the interested prosecutors and defense attorneys will be invited to the meeting at which it is discussed.

The Chair adjourned the meeting.