COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Training Center, 2011-D Commerce Park Drive, Annapolis, Maryland on May 26, 2006.

Members present:

Hon. Joseph F. Murphy, Jr., Chair

Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Hee Smith, Rules Committee Intern
James Willett, Rules Committee Intern
Eileen King, Esq., Justice for Children
Cynthia Landesberg, Esq., Justice of Children
Richard Abbott, Esq.
Peter J. Lally, Baltimore County Court Administrator
Hon. Ann N. Sundt, Circuit Court for Montgomery County
Hon. Larnzell Martin, Jr., Circuit Court for Prince George's County
Michele Nethercott, Esq., Office of the Public Defender
Alan C. Drew, Esq., Office of the Public Defender
Erica LeMon, Esq., Administrative Office of the Courts
John R. Greene, Esq.
Dawn Musgrave, Esq.
Hon. Deborah S. Eyler, Court of Special Appeals
Delegate Kathleen M. Dumais
Rhonda Lipkin, Esq.
Barbara R. Trader, Esq., Chair, Family & Juvenile Law Section, MSBA

Paul Ethridge, Esq.
Hon. Albert J. Matricciani, Jr.
Richard Montgomery, Legislative Relations, MSBA

The Chair convened the meeting. He noted that Mr. Sykes had received the first lifetime achievement award presented to a Maryland attorney by the American College of Trial Lawyers. He stated that Mr. Sykes is very deserving of the honor.

The Reporter introduced Ms. Hee Smith, a student at the University of Baltimore School of Law, who is completing her internship with the Rules Committee, and Mr. Jim Willett, also a student at the University of Baltimore School of Law, who is beginning a summer internship with the Rules Committee.

Mr. Karceski announced that this will be the last Committee meeting for Mr. Dean. Mr. Dean said that he has served for 12 years on the Committee, and it has been a wonderful experience for him. He added that he is humbled by the appreciation of the Committee. He will be going overseas again to Kosovo, leaving in July. He will be working with the United Nations Kosovo Judicial Prosecuting Council. His work there shows that the American legal system is a very good one.

The Chair asked the Committee if they had any additions or corrections to the minutes of the Rules Committee meetings of January 6, 2006 and March 10, 2006. There being none, Mr. Klein moved to approve the minutes as presented, the motion was seconded, and it passed unanimously.

Agenda Item 1. Reconsideration of proposed revised Title 9, Chapter 100 (Adoption and Guardianship that Terminates Parental Rights) (See Appendix 1)

Ms. Ogletree told the Committee that the Family and Domestic Subcommittee had been directed to redraft the Rules pertaining to adoption and guardianship. Instead of spelling out the provisions of the new statute as the Rules had been previously drafted, the Subcommittee was instructed to reference the statute. Ms. Lipkin, one of the consultants to the Subcommittee, played an important role in the second draft of the Rules, and she revised them to follow the directive of the Committee. This necessitated reworking some of the Rules. Whenever the statute is referenced, Ms. Lipkin has noted which type of proceeding to which the statute refers.

Ms. Ogletree pointed out that on page 8, there is a minor correction. Subsections (b)(1)(A)(iii) and (v) have been deleted. A similar change needs to be made to Rule 9-105. She commented that the Committee can consider the changes to each Rule. The consent forms were approved at the April Rules Committee meeting.

The Chair stated that the consultants did an excellent job drafting the Rules and consent forms. Ms. Lipkin explained that subsection (b)(1), beginning on page 8 of the Rules, is an example of the changes the Rules Committee directed the Subcommittee to make to the Rules. Instead of spelling out the various times for revocation, the Rule now refers to the

appropriate section of the statute. Ms. Musgrave, a lawyer for the private adoption agency, Adoptions Together, remarked that she is very satisfied with the redrafting of the Rules. She had helped draft the new statute, which is very explicit, and she said that she approved of the new Rules referencing the statute. Mr. Greene said that he is an attorney in Annapolis specializing in adoptions. He helped draft the portion of the statute pertaining to independent adoptions. He commented that the new consent forms are a very good addition, and he commended Ms. Ogletree and Ms. Lipkin for their contributions to the new Rules.

Mr. Shipley pointed out that section (b) of Rule 9-112, Court Records, refers to the "sealing" of court records. The word "seal" means that the clerk puts the records in an envelope. The Rules pertaining to court access use the word "shield" to mean that records are not open to inspection. The Chair suggested that the Style Subcommittee can coordinate Rule 9-112 with the rules pertaining to access to court records, so that there is no confusion as to the meaning of Rule 9-112.

The Chair stated that the Adoption Rules are approved, subject to being styled, and he thanked the consultants for their assistance.

Agenda Item 2. Reconsideration of proposed new Appendix: Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access; and New Rule 9-205.1 (Appointment of Child Counsel); Amendments to: Rule 2-504 (Scheduling Order); Appendix: Maryland Lawyers' Rules of Professional Conduct: Preamble and

Scope, Rule 1.7, Conflict of Interest: General Rule, and Rule 1.14, Client with Diminished Capacity

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Ms. Ogletree presented the new Appendix: Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: MARYLAND GUIDELINES OF PRACTICE

FOR COURT-APPOINTED LAWYERS REPRESENTING

CHILDREN IN CASES INVOLVING CHILD CUSTODY

OR CHILD ACCESS

ADD new Appendix: Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access, as follows:

APPENDIX: MARYLAND GUIDELINES FOR PRACTICE FOR COURT-APPOINTED LAWYERS REPRESENTING CHILDREN IN CASES INVOLVING CHILD CUSTODY OR CHILD ACCESS

INTRODUCTION AND SCOPE

These Guidelines for practice are intended to promote good practice and consistency in the appointment and performance of lawyers for children in cases involving child custody and child access decisions in Maryland courts. However, failure to follow a Guideline does not itself give rise to a cause of action against a lawyer nor does it create any presumption in such a case that a legal duty has been breached. These Guidelines apply to divorce, custody, visitation, domestic violence, and

other civil cases where the court may be called upon to decide child custody or visitation issues. Nothing contained in the Guidelines is intended to modify, amend, or alter the fiduciary duty that an attorney owes to a client pursuant to the Maryland Lawyers' Rules of Professional Conduct.

These Guidelines do not apply to Child In Need of Assistance "CINA," Termination of Parental Rights "TPR," or adoption cases. The appointment and performance of attorneys appointed to represent children in those cases is addressed by the Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings.

1. DEFINITIONS

A court that appoints counsel for a minor child in a case involving child custody or child access issues should clearly indicate in the appointment order, and in all communications with the attorney, the parties, and other counsel, the role expected of child counsel. The terminology and roles used should be in accordance with the definitions in Guidelines 1.1 - 1.3.

1.1. BEST INTEREST ATTORNEY

"Best Interest Attorney" means a lawyer appointed by a court for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives. This term replaces the term "*guardian ad litem*." The Best Interest Attorney makes an independent assessment of what is in the child's best interest and advocates for that before the court, even if it requires the disclosure of confidential information. The best interest attorney should ensure that the child's position is made a part of the record even if different from the position that the attorney advocate.

1.2. CHILD ADVOCATE ATTORNEY

"Child Advocate Attorney" means a lawyer appointed by a court to provide independent legal counsel for a child. This term replaces the less specific phrase, "child's attorney." A Child Advocate Attorney owes the child the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client. A Child Advocate Attorney should be appointed when the child is need of a voice in court, such as in relocation cases, when there are allegations of child abuse, or where the child is sufficiently mature and sees his or her interests as distinct from the interests of the child's parents.

1.3. CHILD'S PRIVILEGE ATTORNEY

"Child's Privilege Attorney" means a lawyer appointed by a court in a case involving child custody or child access to decide whether to assert or waive, on behalf of a minor child, any privilege. This term replaces the term "*Nagle v. Hooks* Attorney." (*Nagle v. Hooks*, 296 Md. 123 (1983)). The court may combine the roles of Child's Privilege Attorney with either of the other two roles.

2. RESPONSIBILITIES

2.1. DETERMINING CONSIDERED JUDGMENT

The attorney should determine whether the child has considered judgment. To determine whether the child has considered judgment, the attorney should focus on the child's decision-making process, rather than the child's decision. The attorney should determine whether the child can understand the
risks and benefits of the child's legal position and whether the child can reasonably communicate the child's wishes. The attorney should consider the following factors when determining whether the child has considered

judgment:

(1) the child's developmental stage:

    (a) cognitive ability,
    (b) socialization, and
    (c) emotional and mental development;

(2) the child's expression of a relevant position:

    (a) ability to communicate with the attorney, and
    (b) ability to articulate reasons for the legal position; and

(3) relevant and available reports, such as reports from social workers, psychiatrists, psychologists, and schools.

A child may be capable of considered judgment even though the child has a significant cognitive or emotional disability.

In determining considered judgment, the attorney may seek guidance from professionals, family members, school officials, and other concerned persons. The attorney also should determine whether any evaluations are needed and request them when appropriate.

An attorney should be sensitive to cultural, racial, ethnic, or economic differences between the attorney and the child.

2.2. BEST INTEREST ATTORNEY

A Best Interest Attorney advances a position that the attorney believes is in the child's best interest. Even if the attorney advocates a position different from the child's wishes, the attorney should ensure that the child's position is made a part of

the record. A Best Interest Attorney may perform the following duties in exercising the attorney's obligation to the client and the court, as appropriate:

(a) Meet with and interview the child, and advise the child of the scope of the representation.

(b) Investigate the relative abilities of the parties in their roles as parents or custodians.

(c) Visit the child in each home.

(d) Conduct individual interviews with parents, other parties, and collateral witnesses.

(e) Observe the child's interactions with each parent and each other party, individually.

(f) Review educational, medical, dental, psychiatric, psychological, or other records.

(g) Interview school personnel, childcare providers, healthcare providers, and mental health professionals involved with the child or family.

(h) File and respond to pleadings and motions.

(i) Participate in discovery.

(j) Participate in settlement negotiations.

(k) Participate in the trial, including calling witnesses and presenting evidence and argument, as appropriate.

(l) If the child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and

questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.

(m) When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.

A Best Interest Attorney shall not testify at trial.

2.3. CHILD ADVOCATE ATTORNEY

If the Child Advocate Attorney determines that the child has considered judgment, the attorney advances the child's wishes and desires in the pending matter. If the Child Advocate Attorney determines that the child does not have considered judgment, the Child Advocate Attorney should petition the court to (1) alter the attorney's role to permit the attorney to serve as a Best Interest Attorney or (2) appoint a separate Best Interest Attorney. A Child Advocate Attorney may perform the following duties in exercising the attorney's obligation to the child and the court, as appropriate:

(a) Meet with and interview the child, and advise the child of the scope of the representation.

(b) Investigate the relative abilities of the parties in their role as parents or custodians.

(c) Visit the child in each home.

(d) Conduct individual interviews with parents, other parties, and collateral witnesses.

(e) Observe the child's interactions with each parent and each other party, individually.

(f) Review educational, medical, dental, psychiatric, psychological, or other

records.

(g) Interview school personnel, childcare providers, healthcare providers, and mental health professionals involved with the child or family.

(h) File and respond to pleadings and motions.

(i) Participate in discovery.

(j) Participate in settlement negotiations.

(k) Participate in the trial, including calling witnesses and presenting evidence and argument, as appropriate.

(l) If the child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.

(m) When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.

A Child Advocate Attorney shall not testify at trial.

2.4. CHILD'S PRIVILEGE ATTORNEY

A Child's Privilege Attorney notifies the court and the parties of the attorney's decision to waive or assert the child's privilege by (1) filing a "line" or other document prior to the hearing or trial at which the privilege is to be asserted or waived or (2) placing the waiver or assertion of privilege on the record at a pretrial proceeding or the trial.

A Child's Privilege Attorney may perform the following duties in exercising the attorney's obligation to the child and

the court, as appropriate:

(a) Meet with and interview the child, and advise the child of the scope of the representation.

(b) Interview any witnesses necessary to assist the attorney in determining whether to assert or waive the privilege.

(c) Review educational, medical, dental, psychiatric, psychological, or other records.

3. CONFLICTS OF INTEREST

An attorney who has been appointed to represent two or more children should remain alert to the possibility of a conflict that could require the attorney to decline representation or withdraw from representing all of the children.

If a conflict of interest develops, the attorney should bring the conflict to the attention of the court as soon as possible, in a manner that does not compromise either client's interests.

4. TRAINING AND CONTINUING EDUCATION

An attorney appointed as a Best Interest Attorney, Child Advocate Attorney, or Child's Privilege Attorney should have completed at least six hours of training that includes the following topics:

(a) Applicable representation guidelines and standards;

(b) Children's development, needs, and abilities at different stages;

(c) Effectively communicating with children;

(d) Preparing and presenting a child's

viewpoint, including child testimony and alternatives to direct testimony;

(e) Recognizing, evaluating, and understanding evidence of child abuse and neglect;

(f) Family dynamics and dysfunction, domestic violence, and substance abuse;

(g) Recognizing the limitations of attorney expertise and the need for other professional expertise. The course may include professionals who can provide information on evaluation, consultation, and testimony on mental health, substance abuse, education, special needs, or other issues;

(h) Available resources for children and families in child custody and child access disputes.

Each court should require attorneys seeking appointments as child counsel to maintain knowledge of current law and complete a specific amount of additional training over a defined interval.

5. QUALIFICATIONS

An attorney appointed to serve as a Best Interest Attorney, Child Advocate Attorney, or Child's Privilege Attorney should, as a minimum:

(a) be a member of the Maryland Bar in good standing, with experience in family law, or have been approved to represent children through a *pro bono* program approved by the bench; and

(b) have successfully completed the six hours of training specified in Guideline 4, unless waived by the court.

In addition, courts should seek to appoint attorneys who:

(a) are willing to take at least

one *pro bono* appointment as child counsel per year, and

(b) have at least three years of family law experience or other relevant experience. In evaluating relevant experience, the appointing court may consider the attorney's experience in social work, education, child development, mental health, healthcare, or other related fields.

6. COMPENSATION

6.1. COMPENSATION STRUCTURE

Each court should develop a compensation structure for the three roles of child counsel: Best Interest Attorneys, Child Advocate Attorneys, and Child's Privilege Attorneys.

6.2. COMPENSATION MECHANISM

Each court should take steps to ensure that child counsel are compensated adequately and in a timely fashion, unless the attorney has been asked to serve *pro bono publico.* Courts may use the following mechanisms to ensure attorney compensation:

(a) Require one or more of the parties to deposit a significant retainer amount or a fixed fee determined by the court into an attorney escrow account or the court's registry.

(b) If a party qualifies for a fee waiver, compensate child counsel out of available funds. See Guideline 6.3.

(c) Enter a judgment for any unpaid fees.

6.3. FEE WAIVERS

Each court should prepare its

budget to ensure that it has sufficient funds to cover the costs of child counsel fees when the parties are not able to pay the full cost, or the court should develop a *pro bono publico* component to its child counsel program.

Each court should apply the same fee waiver procedure, forms, and standard for the appointment of child counsel that is set forth in the *Guidelines for Grant Recipients* for all family services funded by the Family Division/Family Services Program Grants. If a fee waiver is granted, the court should apply a cap on compensation that is appropriate to the role for which child counsel is appointed.

The Maryland Guidelines of Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child or Child Access was accompanied by the following Reporter's Note.

The Attorneys Subcommittee recommends that Guidelines of Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access be added as an Appendix to the Maryland Rules, in a manner similar to the addition of Appendix: Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings (the "CINA Guidelines").

The proposed new Guidelines for child counsel in custody and child access cases are based upon the Maryland Standards of Practice for Court-Appointed Lawyers Representing Children in Custody Cases that were approved and adopted by the Conference of Circuit Judges at its September 19, 2005 meeting.

As with the CINA Guidelines, the Subcommittee has substituted the word "Guideline" for "Standard" wherever it appeared in the original document. Although

neither set of Guidelines is part of the Maryland Lawyers' Rules of Professional Conduct, both are referenced in Comment 1 to Rule 1.14 (Client with Diminished Capacity) of those Rules.

In the "Introduction and Scope" section of the proposed new Guidelines, the second and fourth sentences of the first paragraph have been added by the Subcommittee. The second sentence is derived from the first sentence of paragraph 20 of the Preamble and Scope portion of the Maryland Lawyers' Rules of Professional Conduct. The fourth sentence is borrowed *verbatim* from the penultimate sentence of the "Statement of the Issue" portion of the CINA Guidelines.

In paragraph 2.1, Determining Considered Judgment, the list of factors that the attorney should consider is borrowed *verbatim* from CINA Guidelines B1 a and b.

In Paragraph 3, a statement concerning conflicts of interest for Best Interest Attorneys appointed to represent siblings has been transferred to the Commentary following Rule 7.1 of the Maryland Lawyers' Rules of Professional Conduct.

Although the word "should" is used throughout the Guidelines, the Subcommittee recommends the use of the words "shall not" with respect to the issue of whether a Best Interest Attorney or Child Advocate Attorney may testify at trial.

Provisions concerning the appointment of child counsel have been transferred to a separate Rule, proposed new Rule 9-205.1. Because the child who is the subject of a child custody or child access dispute is not a party to the action, additional provisions in Rule 9-205.1 implement the service, notice, and discovery portions of the Guidelines. Specifically, the proposed new Rule requires that an order appointing child counsel specify the role of the attorney, permit the attorney to participate in discovery, and provide that the service and

notice provisions of Title 1 apply as though the child were a party. Rule 2-504 is proposed to be amended to permit a scheduling order to include appointment of child counsel in accordance with proposed new Rule 9-205.1.

Ms. Ogletree said that the Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access had been previously before the Committee in March. In the "Definitions" section, there are changes in terminology for counsel of children. The "best interest" attorney represents the best interest of the child, similar to a guardian ad litem but does not necessarily have to agree with the child. The "child advocate attorney" is the voice of the child in court, expressing the child's preferences. The "child's privilege attorney" as defined in *Nagle v. Hooks*, 296 Md. 123 (1983) is appointed to waive privileges on behalf of the child. The understanding is that following the Guidelines would not result in a malpractice situation. Since changes to the Guidelines were made at the last Committee meeting, they need to be looked at again.

Ms. King stated that her organization, Justice For Children, advocates for children who "fall between the cracks." She said that she is attending today's meeting on behalf of Gregory Jacob, Esq., an attorney who argued the case of *Fox v. Wills*, 390 Md. 620 (2006). The Guidelines address many problems in the area of child advocacy, but some other issues need to be considered before the Guidelines are adopted. The Guidelines do not take

into account the activities of the National Conference of Commissioners of Uniform State Laws ("NCCUSL"), which will meet this summer to develop comprehensive model legislation dealing with the issues of child representation.

Ms. King told the Committee that she had submitted a three-page memorandum regarding the Guidelines, a copy of which was distributed at the meeting today. See Appendix 2. She had pointed out the problem that the Guidelines do not contain a statement of the ethical duties of "best interest" attorneys, but there is a statement for "child advocate" attorneys. This may imply that "best interest" attorneys do not owe duties of loyalty or competent representation to their clients. There are other problems with the Guidelines. One is that they provide that the duties listed in Sections 2.2 and 2.3 "may" be performed by court-appointed attorneys for children. It is better to state that attorneys "should" perform the listed duties. Section 2.4 states that a "child's privilege" attorney decides whether to waive or assert the child's privilege but does not provide attorneys with guidance on how to make such determinations. Ms. King suggested that the training and qualifications of attorneys who represent children should be strengthened. She expressed the view that she liked the direction in which the Guidelines are headed and that they are a tremendous improvement and will dramatically increase the well-being of children. She thanked the members of the Committee for the opportunity to speak to them.

Mr. Brault commented that the annual meeting of the NCCUSL will be held in South Carolina on July 7, 2006. He plans to attend the meeting. The first agenda item will be model legislation to deal with issues of child representation. He asked the Rules Committee if it should take action on the Guidelines today or wait to compare them with the model legislation. The uniform laws passed in July will be available by the September Rules Committee meeting.

Ms. Ortiz noted that the Guidelines bring together the American Bar Association (ABA) standards for representing children as well as the standards for child welfare and child custody cases. The Child Custody Subcommittee began the work on the Guidelines by looking at the ABA standards. There are Child in Need of Assistance (CINA) - Termination of Parental Rights (TPR) Guidelines in place already. It would be helpful to adopt the child custody representation guidelines immediately. Mr. Brault added that the Guidelines could be amended later to conform to the Uniform Laws.

The Chair stated that the Rules Committee can either wait or examine the Guidelines in order to approve them now and take a later look for any necessary changes. Mr. Brault expressed his preference for the latter approach. Delegate Dumais told the Committee that she represents Montgomery County in the House of Delegates and is a family law lawyer. She expressed her appreciation that Ms. King had attended today's meeting. She agreed with Mr. Brault that the Guidelines should be adopted as

soon as possible. In response to Ms. King's comment that there are no ethical duties provided for "best interest" attorneys, she referred to House Bill 700 signed by the Governor which provides that "best interest" attorneys and "child advocate" attorneys owe a duty of "ordinary care and diligence" in the representation of their clients. The Chair suggested that language could be added to the Guidelines referencing House Bill 700 and providing that to the extent there is any inconsistency with the Guidelines, the legislation is controlling.

Delegate Dumais referred to Ms. King's statement in her memorandum that the bar on attorney testimony must be clarified. Delegate Dumais said that she had spoken about this issue with Judge Sundt, who is present at the meeting today. Delegate Dumais noted her agreement with the prohibition against a "child advocate attorney" or "best interest" attorney testifying. She added that the Guidelines also should prohibit an attorney in either of these categories from filing a report with the court. Ms. Ortiz remarked that the Family Division of the Administrative Office of the Courts (AOC) and the courts are awaiting the Guidelines for training attorneys and improving child attorney panels. House Bill 700 uses the new term "best interest" attorney but does not define or clarify the role. She said that judges are requesting that the term "best interest attorney" should be defined clearly in the Guidelines and distinguished from the term that it replaces, "guardian *ad litem*." House Bill

700 takes effect on June 1, 2006, so it is necessary to move forward now.

The Chair stated that Judge Sundt had expressed to him that there is a problem recruiting guardians *ad litem* because of the *Wills* case. In the legislation she sponsored, Delegate Dumais had tried to obtain immunity for these attorneys, but the legislature eliminated it from the bill. Judge Sundt told the Committee that there is an exodus of attorneys from representing children. Those who are representing children do not always have the necessary training and qualifications. The fact that there are no standards of practice makes the situation more difficult. Attorneys are very concerned about potential personal liability. If standards are in place and an attorney does what the standards require, a lawsuit against him or her should not be successful. Some of the attorneys Judge Sundt calls upon will take these cases, but it can be difficult finding attorneys.

Mr. Brault said that he had received a telephone call from an attorney in Prince Frederick who no longer represents children and who requested that the Guidelines be put into place so that he can take these cases again. Apparently, it is difficult to find attorneys to represent children in Calvert County. The Chair cautioned that the Guidelines cannot provide immunity to the bar. They also cannot be guaranteed as a safe harbor for attorneys. Ms. Ogletree pointed out that attorneys may have practiced in this field for 20 years or more, but they did not

have the required six hours of training. It is difficult for many attorneys to get the training unless the court offers it. It also is difficult to obtain seasoned attorneys to handle these cases. Many of the guardians *ad litem* are younger attorneys. The Guidelines will help younger attorneys learn the appropriate protocol.

The Chair said that Rule 17-105, Qualifications and Selection of Persons Other than Mediators and Neutral Experts, one of the Alternative Dispute Resolution ("ADR") Rules, has a provision that allows a person who has "equivalent or specialized knowledge or experience" to qualify to conduct certain ADR proceedings. Similar language could be added to the Guidelines. Ms. Ogletree remarked that in her county, the cases in which children are represented are handled *pro bono*. Any required education should be funded by the court system itself, instead of the attorneys paying for training to do *pro bono* work. Ms. Ortiz responded that the Family Law Committee has discussed this issue. At a minimum, training on a regional basis will be provided. Her office is willing to help with the training. Ms. Ogletree inquired as to whether the number of hours stated in the Guidelines is sufficient. Ms. Ortiz replied that the Custody Subcommittee of the Family Law Committee discussed this and felt that six hours was a feasible amount. The amount of hours suggested ranged as high as 12 in some discussions.

Judge Sundt commented that even participating in 50 hours of

training does not necessarily make someone a good attorney in child representation cases. The Maryland Institute for the Continuing Professional Education of Lawyers (MICPEL) began to offer courses in how to represent children ten years ago, taking the lead from Montgomery County which was offering similar courses. The Judicial Institute has offered a three-day course on family law. Judge Sundt expressed her agreement with Ms. Ogletree that to require a six-hour training for lawyers who have practiced for many years in this area is a waste of time. The phrase "unless waived by the court" should be added on to the requirement that the attorneys representing children must complete at least six hours of training. The Chair pointed out that subsection (a)(5) of Rule 17-105 begins as follows: "unless waived by the court, have completed a training program...". He suggested that Guideline 4., appearing on page six of the meeting materials, should begin with the same phrase, "unless waived by the court."

Mr. Brault remarked that when the Rules of Procedure were revised in 1984, programs were set up to educate attorneys on the new procedures. Programs were conducted by the Honorable Paul V. Niemeyer, now a judge of the U.S. Court of Appeals for the Fourth Circuit, who was then an attorney-member of the Rules Committee, and Julia M. Freit, Esq., who was then the Reporter to the Rules Committee. Tapes were made of the educational program that were then disseminated throughout the State. Judge McAuliffe added that those viewing the tapes were not charged. Ms. Ortiz noted

that there may be funding for courses on child representation through Family Division grants through her office.

The Chair stated that adding the phrase "unless waived by the court" to Guideline 4 will eliminate any argument about the incompetency of the attorney. Judge Sundt pointed out that Guideline 5 provides that the court can waive the required six hours of training by using the phrase "unless waived by the court." The Chair said that the same phrase should be added to Guideline 4 as he had previously suggested. Ms. Ogletree agreed that it cannot hurt to repeat this phrase. By consensus, the Committee approved the Chair's suggestion.

Mr. Michael asked Delegate Dumais if he were correct in reading the statute to mean that any of the types of attorneys representing a child must exercise due care. Delegate Dumais replied in the affirmative. The bill was signed last Tuesday and will go into effect on June 1, 2006. Barbara R. Trader, Esq., representing the Maryland State Bar Association Family and Juvenile Law Section, asked the Committee to approve the Guidelines. She explained that practitioners need them, and newer attorneys in the field can take advantage of the standards. Mr. Dean referred to Mr. Brault's comments about the NCCUSL considering the issue of child representation, and he questioned as to whether this is a reason to hold off deciding on the Guidelines to make sure that nothing has been overlooked. Delegate Dumais remarked that she has not previously considered the Uniform Laws completely, but she had looked at the ABA

standards. She expressed the view that the Uniform Laws should be carefully considered. Mr. Brault said that the Guidelines should be looked at now, or else there could be a major delay in getting them before the Court of Appeals. The Chair commented that the Guidelines can be fine-tuned later for subsequent developments. They could be presented to the Court in October which would allow for an examination of the Uniform Laws. Ms. King noted that a memorandum on the ABA Model Legislation for child representation is available, and the Chair asked her to send it to the Rules Committee.

Judge McAuliffe referred to the May 26, 2006 Memorandum Regarding the Proposed Appendix to the Rules which Ms. King had distributed at today's meeting. This contains a list of several problems with the Guidelines. He said that solutions for Problems 1. (Section 1.1 on "Best Interest Attorneys" Should Contain A Statement Of Duties) and 5. (The Training and Qualifications Sections Should Be Strengthened) had been discussed today, but he questioned as to how to handle Problems 2. (The Bar on Attorney Testimony Must Be Clarified) and 4. (Guidance Should be Provided on When a Child's Privilege Should Be Waived). Ms. Ogletree pointed out that Problem 2. presents a major change in practice. The "best interest" attorney currently prepares a report to the court to summarize the case, and this has been treated as testimony. It would be appropriate to change this, since it is odd to allow hearsay from the attorney as evidence. However, requiring non-hearsay testimony from other

persons will make the trials at least one-third longer. Judge Sundt remarked that formulating standards for attorney testimony had been discussed, but the Guidelines put an immediate end to this procedure. It is understood that the attorney is not a witness in the proceeding. Ms. Ogletree observed that this should be made explicit in the Guidelines. Ms. Ortiz observed that the last sentence of Guidelines 2.2 and 2.3 provides that the "... Attorney shall not testify at trial." Ms. Ogletree remarked that the attorney's report could be used as substantive evidence if there is some cross-examination allowed. This depends on the judge handling the case. Ms. Ortiz noted that the Family Law Committee briefly had discussed a provision concerning submission of a report, but it was taken out.

The Chair hypothesized a scenario in which the "best interest" attorney representing a child inadvertently witnesses the child's parents in a fight with each other at a restaurant. He asked whether this type of testimony from the attorney would ever be admissible. To allow for this kind of situation, he suggested that the word "ordinarily" be added to the sentence that prohibits the attorney's testimony. Judge Sundt explained that these cases involve a two-step procedure. There is a pretrial settlement/status conference which is very informal. If the case goes to trial, nothing stops the attorney from eliciting from the mother or father of the child what took place previously. The attorney should not become a witness in the case. The last sentence of Ms. King's memorandum states that the

trend to treat statements that are made by court-appointed attorneys as critically important evidence, even though the statements are not made under oath or subject to cross-examination, must be counteracted. Evidence not subject to cross-examination is very dangerous. The Chair expressed concern that a blanket statement not allowing in attorney testimony forecloses what could be very important evidence.

Judge McAuliffe inquired as to whether the Family and Domestic Subcommittee of the Rules Committee accepted the change proposed by Ms. King, and Ms. Ogletree answered affirmatively. The Chair stated that the proposed change would be the addition of the phrase, "or file a report" at the end of Guidelines 2.2 and 2.3. By consensus, the Committee approved this additional language.

The Chair referred to Problem 3. (The Optional Duty Statements in Sections 2.2 and 2.3 Should Be Strengthened) in Ms. King's memorandum. Judge Sundt commented that the use of "should" or "shall" in Sections 2.2 and 2.3 had been discussed. Some of the suggested duties listed in those sections will not happen in every case, such as in-person interviews of parents who live too far away. The duties should be discretionary, not mandated. Judge McAuliffe expressed his agreement with this. The Chair observed that interpretations of the language in Sections 2.2 and 2.3 range from "an attorney can do so if he or she wants to" to "an attorney should do so." Ms. Ortiz noted that the Custody Subcommittee had discussed how strong the

language should be. A survey of child counsel revealed differing opinions.

Mr. Brault pointed out that the word "may" is preferable to "should," to help avoid liability problems. Ms. Ogletree added there is more of a comfort level with the word "may." The Chair said that the minutes will reflect the concern over the responsibilities of these attorneys and the comfort level with the word "may" in describing the responsibilities.

Judge McAuliffe asked about Problem 4. (Guidance Should Be Provided on When a Child's Privilege Should Be Waived) in Ms. King's memorandum. Judge Sundt explained that the best example of the problem is when an attorney refuses to let a child's therapist testify. The *Nagle v. Hooks* attorney is now called a "child's privilege attorney." The attorney faces a dilemma, particularly when the child's therapist requests not to testify. The child has told the therapist something in confidence. If the therapist testifies, the child may lose trust in the therapist and the therapeutic relationship may be irreparably harmed. Generally, an attorney who recognizes that the therapist has valuable information goes another route, such as obtaining an independent psychological examination of the child or finding another witness who has the same information. This issue is a matter of concern. Ms. King commented that the Guidelines should not tie the hands of the attorney. Many attorneys are refusing across the board to allow the therapist to testify. It is

agonizing to watch a child stay in a bad situation, when information is not getting to the court. Delegate Dumais agreed that sometimes the court only hears one side of the story in these cases. The attorney often struggles in the *Nagle v. Hooks* role. If a child indicates that he or she has been abused, the therapist has a duty to report this. Some bad cases are handled inappropriately, but there are many appropriate cases for every bad one.

The Chair commented that Section 1.3 is clear that the "child's privilege attorney" has to decide whether to assert or waive a privilege to which the child is entitled. The health care provider receives information about the child and may have a duty to report this. There is also a clergy privilege. Mr. Brault noted that there is no privilege if abuse is occurring. Whether the abuse is psychological or physical is often difficult to determine. The Chair suggested that after the words "any privilege" in the first sentence of Section 1.3, the following language should be added: "if an adult is entitled to waive or assert that privilege." The purpose of the attorney is not to suppress evidence. Ms. Ogletree expressed her agreement with this concept. Judge McAuliffe noted that this could be handled in the education program. Judge Sundt added that the training for guardians *ad litem* spent time on this issue.

Mr. Brault moved that the Guidelines be approved as amended. The motion was seconded, and it passed unanimously. Ms.

Ogletree stated that the Guidelines should be considered again after the NCCUSL meets. The Chair said that the Family and Domestic Subcommittee will meet to discuss the Guidelines, and the consultants will be invited to the meeting.

Ms. Ogletree presented Rule 9-205.1, Appointment of Child Counsel, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY,

CHILD SUPPORT, AND CHILD CUSTODY

ADD new Rule 9-205.1, as follows:

Rule 9-205.1. APPOINTMENT OF CHILD COUNSEL

(a) Applicability

This Rule applies to the appointment of child counsel in actions involving child custody or child access.

Cross reference: See Code, Family Law Article, §1-202 and the Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access.

(b) Factors

In determining whether to appoint child counsel, the court is to consider the nature and adequacy of the potential evidence to be presented, other available methods of obtaining information, including social service investigations and evaluations by mental health professionals, and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations, or concerns:

(1) Request of one or both parties;

(2) High level of conflict;

(3) Inappropriate adult influence or manipulation;

(4) Past or present child abuse or neglect;

(5) Past or present mental health

problems of a child or party;

(6) Special physical, educational, or mental health needs of a child that require investigation or advocacy;

(7) Actual or threatened family violence;

(8) Alcohol or other substance abuse;

(9) Consideration of terminating or suspending parenting time, or awarding custody or visitation to a non-parent;

(10) Relocation that substantially reduces the child's time with a parent, sibling, or both; or

(11) Any other factor that the court considers important.

Committee note: A court should provide for adequate and effective child counsel in all cases in which appointment is warranted, regardless of the economic status of the parties. The court should make the appointment as soon as practicable after it determines that appointment is warranted. A court should appoint only lawyers who have agreed to serve in child custody and child access cases in the assigned role, and have been trained in accordance with Guideline 4 of the Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in cases involving child custody or child access. In making appointments, the court should fairly and equitably distribute cases among all qualified attorneys, taking into account the attorney's availability and caseload. Before asking an attorney to provide representation *pro bono publico* to a child, the court should consider the number of other similar cases the attorney has recently accepted on a *pro bono* basis from the court.

(c) Appointment Order

An order appointing child counsel

shall:

(1) specify whether the attorney is to serve as a Best Interest Attorney, Child Advocate Attorney, or Child's Privilege Attorney;

(2) authorize the appointed attorney to have reasonable access to the child and to all otherwise privileged or confidential information about the child, without the necessity of any further order of court or the execution of a release;

(3) permit the attorney to participate in discovery;

(4) provide that the service and notice provisions in Title 1 of these Rules apply as though the child were a party;

(5) state any other duties or responsibilities required by the court;

(6) state when the appointment terminates; and

(7) unless the attorney has agreed to serve *pro bono publico*, include provisions concerning compensation for the attorney. Cross reference: As to the attorney's compensation, see Guideline 6 of the Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access.

Committee note: The court should write an appointment order in plain language, understandable to non-lawyers, and send a copy of the order to counsel of record and to each party, whether or not represented by an attorney.

Source: This Rule is new.

Rule 9-205.1 was accompanied by the following Reporter's Note.

Proposed new Rule 9-205.1 contains

provisions concerning the appointment of child counsel based on provisions in the Maryland Guidelines for Practice for Court-Appointed Lawyers representing Children in Cases Involving Child Custody or Child Access, approved by the Conference of Circuit Judges.

Ms. Ogletree explained that the Rule presents the factors to consider when child counsel is being appointed. Mr. Klein suggested that the language that appears in subsection (c)(4) that reads "as though the child were a party" should also be added to the end of subsection (c)(3), and it should be keyed to the Rules in Title 2. Ms. Ogletree said that Title 2 applies to proceedings under Title 9. The Reporter suggested that the language of subsection (c)(3) should be "permit the attorney to participate in discovery under Title 2 of these Rules as though the child were a party." The Chair agreed that this should be keyed to Title 2. The Committee agreed by consensus to this change. The Committee agreed by consensus to approve the Rule as amended.

Ms. Ogletree presented Rule 2-504, Scheduling Order, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 to add to the permitted contents of a scheduling order an order appointing child counsel under certain circumstances, as follows:

Rule 2-504. SCHEDULING ORDER

(a) Order Required

(1) Unless otherwise ordered by the County Administrative Judge for one or more specified categories of actions, the court shall enter a scheduling order in every civil action, whether or not the court orders a scheduling conference pursuant to Rule 2-504.1.

(2) The County Administrative Judge shall prescribe the general format of scheduling orders to be entered pursuant to this Rule. A copy of the prescribed format shall be furnished to the Chief Judge of the Court of Appeals.

(3) Unless the court orders a scheduling conference pursuant to Rule 2-504.1, the scheduling order shall be entered as soon as practicable, but no later than 30 days after an answer is filed by any defendant. If the court orders a scheduling conference, the scheduling order shall be entered promptly after conclusion of the conference.

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule 16-202;

(B) one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402 (f) (1);

(C) one or more dates by which each party shall file the notice required by Rule 2-504.3 (b) concerning computer-generated evidence;

(D) a date by which all discovery must be completed;

(E) a date by which all dispositive motions must be filed; and

(F) any other matter resolved at a scheduling conference held pursuant to Rule 2-504.1.

(2) Permitted

A scheduling order may also contain:

(A) any limitations on discovery otherwise permitted under these rules, including reasonable limitations on the number of interrogatories, depositions, and other forms of discovery;

(B) the resolution of any disputes existing between the parties relating to discovery;

(C) a date by which any additional parties must be joined;

(D) a specific referral to or direction to pursue an available and appropriate form of alternative dispute resolution, including a requirement that individuals with authority to settle be present or readily available for consultation during the alternative dispute resolution proceeding, provided that the referral or direction conforms to the limitations of Rule 2-504.1 (e);

(E) an order designating or providing for the designation of a neutral expert to be called as the court's witness;

(F) in an action involving child custody or child access, an order appointing child counsel in accordance with Rule 9-205.1;

~~(F)~~ (G) a further scheduling conference or pretrial conference date; and

~~(G)~~ (H) any other matter pertinent to the management of the action.

Cross reference: See Rule 5-706 for authority of the court to appoint expert witnesses.

Source: This Rule is new.

Rule 2-504 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed new Appendix to the Maryland Rules: Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access.

Ms. Ogletree told the Committee that a new subsection (b)(2)(F) has been added to Rule 2-504. By consensus, the Committee approved the Rule as presented.

Ms. Ogletree presented paragraph 20 of the Preamble and Scope of the Maryland Lawyers' Rules of Professional Conduct for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

Amend the Preamble and Scope of the Maryland Lawyers' Rules of Professional Conduct to substitute the word "does" twice in the first sentence of Paragraph 20, as follows:

Preamble: A Lawyer's Responsibilities.

. . .

[20] Violation of a Rule ~~should~~ does not itself give rise to a cause of action against a lawyer nor ~~should~~ does it create any presumption in such a case that a legal

> duty has been breached. In addition, violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, in some circumstances, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct. Nothing in this Preamble and Scope is intended to detract from the holdings of the Court of Appeals in *Post v. Bregman*, 349 Md. 142 (1998) and *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 349 Md. 441 (1998).
>
> . . .

Paragraph 20 of the Preamble: A Lawyer's Responsibilities was accompanied by the following Reporter's Note.

> The proposed amendment to Paragraph 20 conforms the Preamble and Scope of the Maryland Lawyers' Rules of Professional Conduct to the terminology used in the Introduction and Scope of the proposed new Guidelines for Practice for Court Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access.

Ms. Ogletree explained that in the first sentence of paragraph 20, the word "should" has been changed to the word "does." This conforms the Preamble and Scope to the language of

the Introduction and Scope of the Guidelines. By consensus, the Committee approved the Rule as presented.

Ms. Ogletree presented Rule 1.7, Conflict of Interest: General Rule, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND the Comment to Rule 1.7 of the Maryland Lawyers' Rules of Professional Conduct to add a certain comment concerning the representation of minor siblings by a court-appointed Best Interest Attorney, as follows:

Rule 1.7. CONFLICT OF INTEREST: GENERAL RULE

. . .

COMMENT

. . .

Special Considerations in Common Representation. - [29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to

be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29.1] Rule 1.7 may not apply to an attorney appointed by a court to serve as a minor child's Best Interest Attorney in the same way that it applies to other attorneys. For example, because the Best Interest Attorney is not bound to advocate a client's objective, siblings with conflicting views may not pose a conflict of interest for a Best Interest Attorney, provided that the attorney determines the siblings' best interests to be consistent. A Best Interest Attorney should advocate for the children's best interests and ensure that each child's position is made a part of the record, even if that position is different from the position that the attorney advocates.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

. . .

Rule 1.7 was accompanied by the following Reporter's Note.

Proposed new Comment 29.1, with the addition of the phrase, "provided the attorney determines the siblings' best

interests to be consistent" is transferred from the draft Maryland Guidelines for Court Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access that was approved by the Conference of Circuit Judges.

Ms. Ogletree explained that proposed new Comment 29.1 with the addition of the phrase "provided that the attorney determines the siblings' best interests to be consistent" was transferred from the Guidelines to the Rules of Professional Conduct. The Reporter pointed out that this transfer was based on the discussion of the Guidelines at the April 24, 2006 Rules Committee meeting. By consensus, the Committee approved the Rule as presented.

Ms. Ogletree presented Rule 1.14, Client with Diminished Capacity, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

AMEND Rule 1.14 of the Maryland Lawyers' Rules of Professional Conduct to add to the Comment a reference to the Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access, as follows:

Rule 1.14. CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection

with a representation is diminished whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, to an increasing extent the law recognizes intermediate degrees of competence. Indeed, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, it is recognized that some persons of advanced age can be quite capable of handling routine financial

matters while needing special legal protection concerning major transactions. In addition, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. Consideration of and, when appropriate, deference to these opinions are especially important in cases involving children in Child In Need of Assistance (CINA) and related Termination of Parental Rights (TPR) and adoption proceedings. With respect to these categories of cases, the Maryland Foster Care Court Improvement Project has prepared Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings. The Guidelines are included in an appendix to the Maryland Rules. Also included in an Appendix to the Maryland Rules are Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access, developed by the Maryland Judicial Conference Committee on Family Law.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the

lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action. - [5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, delaying action if feasible to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive

fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition. - [8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the

appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance. - [9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

Model Rules Comparison.-- Rule 1.14 is substantially similar to the language of the

> Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of retaining elements of existing Maryland language in Comment [1] and further revising Comments [5] and [10].

Rule 1.14 was accompanied by the following Reporter's Note.

> See the Reporter's Note to the proposed new Appendix to the Maryland Rules: Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access.

Ms. Ogletree told the Committee that a reference to the proposed new Guidelines is being added to the list in the Comment to Rule 1.14 of the various bodies of guidelines for cases involving children. The Committee agreed by consensus to add this sentence to the Comment. By consensus, the Committee approved the comment to the Rule as presented.

The Chair thanked Ms. Ogletree for presenting the Guidelines and the Rules associated with them.

Agenda Item 3. Reconsideration of proposed amendments to: Rule 4-263 (Discovery in Circuit Court) and Rule 4-262 (Discovery in District Court)

Mr. Karceski explained that a few years ago, Mr. Brault had brought to the attention of the Rules Committee a report of the American College of Trial Lawyers, which noted the problem that some prosecutors fail to furnish to defendants information required by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. The prosecutor must disclose to the defendant any

"favorable evidence" known to the prosecutor -- information in any form that tends to exculpate the defendant, attacks the credibility of a witness for the government, or mitigates the offense. Both Rules 4-262, Discovery in District Court, and 4-263, Discovery in Circuit Court, may require modification, but the latter is the one in the forefront. After considering Rule 4-263, the Committee needs to consider to what extent its proposed changes to that Rule also should be made to Rule 4-262. Crimes tried in the District Court may result in a prison sentence, so the stakes are high there, also. With 20 or 30 cases on the docket every day, the District Court is different from the circuit court. In the District Court, many cases originate from charges filed by citizens, rather than by the government, so the onus on the State's Attorney's office is different.

Mr. Karceski presented Rule 4-263, Discovery in Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to require each party to exercise due diligence in identifying material and information to be disclosed, to reletter certain sections, to clarify the disclosure obligation of the State's Attorney under subsection (b)(1), to require that the State's Attorney file a certain written statement, to add a new subsection (b)(2) referring to providing prior written

statements by witnesses, to add language to subsection (c)(1) referring to a certain statute, to add a new subsection (c)(2) referring to providing inconsistent statements of witnesses, to add to subsection (c)(5) a reference to providing the substance of an unavailable report, to add to subsection (e)(2) a reference to providing the substance of an unavailable written report, to add the phrase "or required" to section (g), and to provide that ordinarily discovery material is not filed with the court, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

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

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

~~(a)~~ (b) Disclosure Without Request

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

(1) Any material or information ~~tending to~~ in any form, whether or not admissible, that tends to (A) exculpate the defendant, or (B) negate or mitigate the guilt or punishment of the defendant as to the offense charged and a written statement that

reasonably identifies the materials furnished; and

(2) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, ~~and~~ (C) pretrial identification of the defendant by a witness for the State, and (D) within ___ days of the first scheduled trial date any prior written statements by witnesses as defined in Rule 5-802.1.

~~(b)~~ (c) Disclosure Upon Request

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

(1) Witnesses

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

(2) Inconsistent Statements of Witnesses

Disclose to the defendant any material or information, in any form, whether or not admissible, [that leads to the admission of evidence] allowing a defendant to prove under Rule 5-613 that a witness has made statements that are inconsistent with the anticipated testimony and that would prove (A) the witness' bias, prejudice, interest in the outcome of the proceeding, or motive to testify falsely, or (B) the character of a witness for untruthfulness by establishing prior bad acts as permitted under Rule 5-608 (b).

~~(2)~~ (3) Statements of the Defendant

As to all statements made by the defendant to a State agent that the State intends to use at a hearing or trial, furnish

to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

~~(3)~~ (4) Statements of Codefendants

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

~~(4)~~ (5) Reports or Statements of Experts

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, or state the substance of the written report, if the report is unavailable, **[Query: Should this provision be added to Rule 4-262?]** including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion;

~~(5)~~ (6) Evidence for Use at Trial

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

~~(6)~~ (7) Property of the Defendant

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

~~(c)~~ (d) Matters Not Subject to Discovery by

the Defendant

This Rule does not require the State to disclose:

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

(2) The identity of a confidential informant, so long as the failure to disclose the informant's identity does not infringe a constitutional right of the defendant and the State's Attorney does not intend to call the informant as a witness, or

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

~~(d)~~ (e) Discovery by the State

Upon the request of the State, the defendant shall:

(1) As to the Person of the Defendant

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

(2) Reports of Experts

Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, or state the substance of the written report, if the report is unavailable, including the results of any physical or mental examination,

scientific test, experiment, or comparison, and furnish the State with the substance of any such oral report and conclusion;

(3) Alibi Witnesses

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

(4) Computer-generated Evidence

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

~~(e)~~ (f) Time for Discovery

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

~~(f)~~ (g) Motion to Compel Discovery

If discovery is not furnished as requested or required, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters

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

(h) Continuing Duty to Disclose

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

(i) Not to be Filed With Court

Except as otherwise provided in these rules or by order of court, discovery material shall not be filed with the court. The party generating the discovery material shall retain the original and shall make it available for inspection by any other party. This section does not preclude the use of discovery material at trial or as exhibits to support or oppose motions.

~~(i)~~ (j) Protective Orders

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

Source: This Rule is derived as follows:

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

Section ~~(a)~~ (b) is derived from former Rule 741 a 1 and 2.

Section ~~(b)~~ (c) is derived from former Rule 741 b.

Section ~~(c)~~ (d) is derived from former Rule 741 c.

Section ~~(d)~~ (e) is derived in part from former Rule 741 d and is in part new.

Section ~~(e)~~ (f) is derived from former Rule 741 e 1.

Section ~~(f)~~ (g) is derived from former Rule 741 e 2.

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

Section (i) is new.

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

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

Albert D. Brault, Esq. brought to the attention of the Rules Committee a 2003 Report of the American College of Trial Lawyers, describing the problem that some federal prosecutors fail to provide information required to be furnished to a criminal defendant pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Brault spoke with local criminal defense attorneys in Montgomery County, who noted similar problems with some State prosecutors. To address this, the Honorable Albert J. Matricciani and the Honorable M. Brooke Murdock, Judges of the Circuit Court for Baltimore City, drafted a proposed amendment to current subsection (a)(1), which is proposed to be relettered (b)(1), of Rule 4-263, the concept of which has been approved by the Rules Committee. The Committee's proposal blends language suggested by Judges Matricciani and Murdock with language currently in the subsection and adds a requirement that the State's Attorney provide to the defendant a written statement that reasonably identifies the material furnished. A proposed cross reference to Rule 3.8 of the Maryland Lawyers' Rules of Professional

Conduct highlights certain special ethical responsibilities applicable to prosecutors.

The Criminal Subcommittee proposes a new subsection (b)(2) requiring disclosure of prior written statements by witnesses a few days before trial to conform to the holding in *Jencks v. U.S.*, 353 U.S. 657 (1957).

Robert L. Dean, Esq. brought to the Committee's attention a problem with subsection (b)(1), which is proposed to be relettered (c)(1) of Rule 4-263 and section (a) of Rule 4-262. Some witnesses in criminal cases are reluctant to testify because their address is given to the defendant pursuant to the Rules. Russell Butler, Esq., suggested that to address this problem, a reference to Code, Criminal Procedure Article, §11-205 should be added to Rules 4-263 and 4-262. The Code provision states that upon request of the State, a victim of or a witness to a felony, or a victim's representative, the address of a victim or a witness may be withheld before a trial unless a judge determines that good cause has been shown for the release of the information. The Committee agrees with Mr. Butler's suggestion.

New subsection (c)(2) is proposed as an addition to Rule 4-263 in lieu of language proposed earlier for subsection (b)(1) which reads "establish that a State's witness has made a statement that is inconsistent with the witness' anticipated testimony." and "demonstrate interest or bias of a state's witness." The language suggested by the Office of the Public Defender for this provision is "impeach a witness under Maryland Rule 5-616 (a) or (b)." To clarify this issue, the Subcommittee has borrowed relevant language directly from Rule 5-616 (a).

The Subcommittee recommends amending subsections (c)(5) and (e)(2) by requiring that an expert provide the substance of his or her report, if the actual report is unavailable. This would alleviate situations in which a party does not obtain necessary

information in discovery because the witness is unable to produce the actual written report about which he or she will be testifying and gives the requesting party no information at all.

> The words "or required" are proposed to be added to section (f) to clarify that a motion to compel discovery may be based on a failure to provide required discovery as well as a failure to provide requested discovery.
>
> Current section (g), Obligations of State's Attorney, is proposed to be amended to require that each party who is obligated to provide material or information under the Rule exercise due diligence in identifying the material and information to be disclosed. Because of the importance of this obligation, section (g) is proposed to be moved to the beginning of the Rule and relettered (a).
>
> Proposed new section (i) provides that, with certain exceptions, discovery material is not filed with the court. In light of the adoption of Title 16, Chapter 1000, Access to Court Records, proposed new section (i) is intended to eliminate unnecessary materials in court files and reduce the amount of material in the files for which redaction, sealing, or other denial of inspection would be required. The language of the section is borrowed *verbatim* from the first, third, and fourth sentences of Rule 2-401 (d)(2). The section conforms the Rule to current practice in many jurisdictions.

Mr. Karceski told the Committee that Nancy Forster, Esq., Public Defender, sent in a letter yesterday suggesting some changes to Rule 4-263, including the suggested new language in subsection (c)(2) concerning impeachment evidence. (See Appendix 3.) Ms. Forster discussed the proposed change to section (a) that requires any party providing material or information under Rule 4-263 to exercise due diligence in identifying the material and information being disclosed. This applies to all parties and not simply the State's Attorney. Section (b) sets out the materials that the State's Attorney must provide without the

necessity of a request. Ms. Forster has asked that the requirement that the State's Attorney furnish to the defense a written statement that reasonably identifies the disclosed materials be added not only to Rule 4-263 but also to Rule 4-262. She has also requested that a copy of the written statement should be filed with the District Court or circuit court to ensure that defendants are able to obtain merited relief on post conviction review.

Mr. Karceski pointed out that section (c) has proposed new language pertaining to impeachment material. Should this be moved to section (b)? The definition of favorable evidence would include impeachment evidence. Subsection (b)(1) now states that without a request, the State's Attorney shall furnish to the defendant "any material or information in any form, whether or not admissible, that tends to (A) exculpate the defendant, or (B) negate or mitigate the guilt or punishment of the defendant as to the offense charged and a written statement that reasonably identifies the materials furnished." The written statement is an important consideration. Not all documents have to be filed with the court. It is necessary to memorialize that the appropriate materials were disclosed.

Mr. Karceski noted that subsection (b)(2) has new language added that provides that prior written statements have to be furnished to the defendant within a certain number of days of the first scheduled trial date. He expressed his preference for the number of days to be 30. This is a sufficient amount of time to

be able to investigate the information that was provided. Mr. Dean commented that the current practice varies from jurisdiction to jurisdiction. The reference to the "prior written statements" is derived from *Jencks v. U.S.*, 353 U.S. 657 (1957). Some prosecutors wait until the last minute to provide this, a practice that may be legitimate, but it should be provided at some reasonable period in advance of trial. Mr. Dean cautioned that he was not speaking for all prosecutors, but he expressed the view that the language to be filled in the blank in subsection (b)(2) should be "within a reasonable time before trial," a phrase used in the Evidence Rules. He remarked that the issues, problems, and concerns about the inconsistent statements of witnesses in subsection (c)(2) can be handled by requiring the prosecutor to provide all statements, whether written or oral, up front. This would avoid the need to follow the cumbersome procedures in subsection (c)(2).

The Chair said that a requirement to furnish the substance of the oral statement takes care of the discovery obligation. He asked Mr. Dean how the prosecutors feel about this issue. Mr. Dean replied that in practice, most prosecutors attempt to do this. If the Rule requires this, some prosecutors may complain. The Chair suggested that the language "unless the court orders otherwise" could be added to protect the safety of witnesses or to be applied in specially assigned cases where the court holds a pretrial conference. Mr. Dean remarked that either party could

rely on a protective order.

Judge Dryden noted that Rule 4-262 refers back to Rule 4-263 (b)(1) for procedures pertaining to the obligation of the State's Attorney to furnish the defendant with material or information. These procedures will not work in District Court. Judge Norton added that with the volume of cases in District Court, the State must provide *Brady* material, but not every statement. The Chair responded that he is aware of this problem. Rule 4-263 will be discussed first, and then Rule 4-262 can be adjusted.

Judge Matricciani said that he and the Honorable Brooke Murdock, judges of the Circuit Court for Baltimore City, had previously met with Ms. Forster and then spoken with the Criminal Subcommittee. Ms. Forster's point was to avoid ancillary litigation which would result if the Rules are not clear. Subsection (b)(1) refers to all materials that tend to exculpate the defendant or negate or mitigate the guilt or punishment of the defendant. A specific time period needs to be added to subsection (b)(2). The Chair suggested that the word "ordinarily" be added to subsection (b)(2) along with a specific time period. Judge Matricciani commented that the process should be formalized. Prosecutors who use an "open file" discovery approach are complying with the requirements of *Brady*, except that the files do not always contain police department materials. He and Judge Murdock wanted a written certification as to what was disclosed.

Judge Matricciani said that Ms. Forster had pointed out that if a list of the written materials that were given out is contained in the court file, this would help avoid factual disputes in post conviction proceedings. The Chair agreed that it is a good idea for a list to be prepared. He cautioned that in light of the rules pertaining to access to court records, if the list is in the court file, identification of all persons who had given a statement would be part of the court record that is open to public inspection. He suggested that when the requirement of the description of what was provided is added to the Rule, the requirement that this is not to be filed with the court should also be added.

Mr. Karceski asked the Committee what the number of days filled in the blank in subsection (b)(1) should be. He asked if the language, "a written statement that reasonably identifies the materials provided by the parties" would be more appropriately placed in section (i) of Rule 4-263. The Chair replied in the affirmative. Mr. Karceski expressed his agreement with Mr. Dean as to the latter's comments that the inconsistent statements of witnesses referred to in subsection (c)(2) can be handled by requiring the prosecutor to provide all statements up front. He asked Mr. Dean whether any of the language of subsection (c)(2) could be collapsed into subsection (b)(2). Mr. Dean responded that if the State gives to the defendant all written and oral statements, this would take care of the requirement that the defendant be given any consistent or inconsistent statements.

This is helpful to the prosecutor who can then use the prior inconsistent statement to rebut testimony.

The Chair commented that all of subsection (c)(2) could go into subsection (b)(1). At this point in the proceedings, the prosecutor knows that the witness has given a statement that is inconsistent with the anticipated testimony. Mr. Dean suggested that everything could be swept in together. The Rule could provide that all statements are to be provided by the prosecutor. This eliminates the problem of determining if the statements are inconsistent. The Rule should be made as simple as possible.

The Chair remarked that the federal practice is to provide the statements within days after the arraignment of the defendant. Mr. Maloney said that this varies from prosecutor to prosecutor. He agreed with Mr. Dean that all statements, not just inconsistent ones, should be turned over to the defendant. The Chair commented that this will be easy to administer. He recommended that all of subsection (c)(2) be moved into section (b) as subsection (b)(1)(C). Mr. Karceski asked if the language would be changed, and the Chair replied that it would be changed.

Mr. Karceski told the Committee that Michele Nethercott, Esq., an Assistant Public Defender, was present to speak to them. Ms. Nethercott said that many prosecutors do not understand what needs to be disclosed to the defendant. Several attorneys from the Office of the Public Defender worked on the proposed draft of Rule 4-263. The suggestion to include all prior statements of witnesses is a good one and solves the problem of determining

whether the statements are inconsistent. Language requiring a description of what has been turned over to the defendant is necessary to aid in post conviction cases. In a recent case, there were three eyewitnesses to a murder and only one statement was turned over to the defense. The third eyewitness gave a different version of what had occurred. At the trial, one eyewitness testified, and there were severe credibility problems. Mr. Karceski noted that the change to the Rule solves this problem. Ms. Nethercott said that it may not solve the problem because the statement came from a witness who was not intended to be called to testify at trial. The Chair stated that the Rule cannot solve all of the problems. Some will have to be resolved by case law.

Mr. Maloney commented that Ms. Forster said in her letter that not only *Brady* material but the material described in *Giglio v. United States*, 405 U.S. 150 (1972) and other cases should be produced. The Chair commented that the Court of Appeals had looked at the October 26, 2005 letter from Ms. Forster (included in the meeting materials – see Appendix 4), which contained a philosophical discussion of discovery and whether the *Brady* requirements should be supplemented. Mr. Maloney observed that Rule 4-263 may supersede *Brady*. The Chair said that a series of examples could be drafted for addition to the Rule. Ms. Nethercott remarked that the United States District Court in Massachusetts has a local rule to deal with this. The

prosecutors there look at a list. At a practical level, there is a lack of understanding as to what State prosecutors must give to the defense. The Chair noted that the federal court does not have the same volume of cases as in state courts.

Mr. Karceski observed that in the last paragraph on page 2 of Ms. Forster's letter dated October 26, 2005, she lists examples of what must be disclosed under *Brady*: "witness statements that are mutually inconsistent; the mental health status of a witness that may impair his or her ability to testify truthfully or accurately; pending charges against a witness for whom no deal was being offered at the time of trial; the fact that a witness may have failed a polygraph exam; the failure of a witness to make an identification; evidence that might adversely impact the credibility of the state's evidence; and the prior criminal record of a witness." Mr. Karceski added that it is impossible to name all situations. The Chair said that there are cases dealing with this issue, and it would be helpful to include a Committee note identifying the cases. This would aid the judge who resolves the discovery issues and also the prosecutor and law enforcement officers.

Mr. Karceski remarked that although the criminal record of witnesses can be subpoenaed, it is difficult for the defense to obtain the full record. The State, however, can access the complete criminal history from the Criminal Justice Information System (CJIS). The Chair said that allowing the defense the same

access to CJIS as the State has been discussed. He had been told that the people who run CJIS cannot provide for this access. Mr. Maloney noted that the U.S. Attorney's office cannot gain access to CJIS. The Chair expressed the opinion that the State should be required to provide the criminal history if the witness has a criminal record. Mr. Dean stated that submitting a record check on every civilian would be onerous for the State. He commented that it is not necessary to deal with this issue now. It would be taken care of if defense counsel is given access to Maryland police records. Mr. Karceski cautioned that counsel may get inaccurate information.

Mr. Karceski asked what number of days should be filled in the blank in subsection (b)(2). The Chair stated that the Rule could provide that unless the court orders otherwise, prior written statements by witnesses must be given to the defendant within 30 days after the earlier of the first appearance of counsel or the first appearance of the defendant. Mr. Dean pointed out that section (f) provides that the State's Attorney must make disclosure within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court. The Chair observed that subsection (c)(2) may not be necessary. Mr. Karceski pointed out that subsection (c)(1) states that the State's Attorney has to provide the name and address of each person that the State intends to call as a witness at the hearing or trial to prove its case-in-chief.

Mr. Karceski told the Committee that subsection (c)(5) has

language added that allows the defendant to inspect and copy the substance of written reports made in connection with the action if the report itself is unavailable. A query asks whether this new language should be added to Rule 4-262. The Chair expressed the view that although it may be redundant, the new language could be: "... or state the substance of the written report if the expert has not prepared the report or if the report is unavailable." Mr. Sykes inquired as to what happens if there is no report by the expert. Ms. Potter suggested that the Rule could require a statement as to the expert's opinion.

The Chair suggested that the language of subsection (f)(1)(A) of Rule 2-402, Scope of Discovery, pertaining to providing the opinions of experts, could be tracked. That language reads as follows: "...to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion...". The State is required by case law to give the defense the information about the opinions of every expert that the State consulted. By consensus, the Committee agreed to add the language of Rule 2-402 (f)(1)(A) to subsection (c)(5) of Rule 4-263.

The Chair noted that the defense may have expert witnesses. Mr. Dean said that subsection (e)(2) provides that the State can inspect and copy the written report of an expert that the defense intends to call as a witness. Mr. Karceski said that this will be conformed to the changes to subsection (c)(5), except that the defense must furnish the information only with respect to experts

whom they intend to call as witnesses.

Mr. Maloney asked if the 25-day time period in section (f) is being retained, and the Chair replied that it will be changed to 30 days unless the court orders otherwise. The Committee agreed by consensus to this change.

Mr. Karceski pointed out that section (g) has the language "or required" added to it.

Mr. Karceski told the Committee that section (i) is new. It has been suggested that language be added to include reference to the written statement not to be filed. Mr. Johnson remarked that the language "not to be filed" may be misleading. The Reporter suggested that the tagline should be changed. The Chair said that it may be useful to include a requirement that the party providing the discovery include a statement certifying that the materials were provided. Mr. Johnson suggested that the requirement of a written statement identifying the materials provided be moved out of section (b) and into section (i). Mr. Michael pointed out that subsection (d)(2) of Rule 2-401, General Provisions Governing Discovery, is the parallel civil provision. Judge Matricciani suggested that there could be a section pertaining to when discovery material is and is not to be filed. Mr. Dean commented that he was involved in the dispute regarding whether to require a certification. It was agreed that the prosecutor would file a statement as to what is provided.

The Chair said that the language of Rule 2-401 (d)(2) can be adapted to add to Rule 4-263. The tagline will remain the same,

and the second sentence will be as follows: "Instead, the party generating the discovery material shall serve the discovery material on all other parties and promptly file with the court a notice stating (A) the type of discovery material served, (B) the date and manner of service, and (C) the party or person served." By consensus, the Committee agreed to this suggestion.

Mr. Klein remarked that on the civil side of practice, there is no itemization as to what is given to the other parties. The Chair responded that there does not have to be an itemization. The Rule provides that the party generating the discovery material shall retain the original and make it available for inspection by any other party. Ms. Nethercott inquired as to whether there should be a certification in the court file to describe or identify the material or whether the party simply lists what was turned over. Mr. Dean answered that most prosecutors file with the court a copy of the letter listing the various documents.

Judge McAuliffe asked how long the prosecutor has to retain everything, and Mr. Dean replied that it depends on the time period of the defendant's sentence. Judge Matricciani commented that if a petition for post conviction relief is filed three years later, a list of documents furnished as discovery at the time of the trial may not be helpful. Mr. Karceski suggested that a document can be identified by noting something like "Report of Officer Smith, June 2, 2006, five pages." Mr. Dean responded that in a large jurisdiction, this would not be

feasible. Every page of a document cannot be numbered and listed in a serious felony case. Judge McAuliffe questioned as to the form in which the documents are retained. Mr. Dean answered that they could be in microfiche in some jurisdictions, but not in Prince George's or Montgomery Counties. Judge McAuliffe pointed out that the documents must be retained in case of a later post conviction action. Ms. Nethercott remarked that often the attorney will try to reconstruct the file. Mr. Dean added that sometimes this is impossible. The State has the burden of preparing for a possible post conviction action. It is difficult to solve the problem of file maintenance.

Mr. Johnson commented that the important issue on post conviction is what is in the record. Mr. Dean said that whenever a file has been lost, he was able to reconstruct the case. Ms. Nethercott noted that most prosecutors do not do this. Mr. Dean stated that in his experience, prosecutors are able to reconstruct cases. The Chair suggested that in the second sentence of section (i) after the words "any other party," the following language should be added: "and shall not destroy it until permitted to do so by order of court." The same issue is handled for warrants, which are not destroyed until an administrative order is issued. This is an alternative to a numbering system and a storage requirement. Mr. Johnson noted that if a post conviction action is filed, the defendant who is incarcerated is the person with the problem, not the prosecutor. A listing of documents numbered 1 to 500 will not help in a post

conviction case.

The Chair suggested that the new language at the end of the second sentence of section (i) could be: "... and shall retain the original until the expiration of any sentence imposed on the defendant." Mr. Maloney suggested that the words "and copying" could be added after the word "inspection" in the second sentence of section (i). He suggested that the documents can be identified in an index, or the file can be held. Mr. Dean remarked that the prosecutor needs to preserve the integrity of the file. The Chair said that imposing requirements to preserve the file will not hurt.

The Chair commented that the prosecutor retains the original documents in the file. Mr. Karceski inquired as to whether the Office of the Public Defender retains each document. Ms. Nethercott responded that their policy is to retain the files of each case, but they have some difficulty in locating them. This seems to be true for private defense counsel as well. Mr. Karceski suggested leaving in a requirement to itemize what was disclosed. It may be difficult to maintain the records. Mr. Dean expressed the concern that it is too burdensome to require a detailed index within 30 days of all pieces of paper disclosed in discovery. The universe of post conviction actions is limited. If the prosecutor knows that the case will be litigated for many years, he or she will take the appropriate steps to preserve the file. File retention should be at the prosecutor's discretion.

The Chair suggested that the Rule provide that if the

defendant is sentenced to a term of imprisonment greater than 10 years, the party generating the discovery shall retain it until further order of court. Mr. Dean said that he would talk to prosecutors around the State to ask them how they handle file retention. Sue Schenning, Esq., Deputy State's Attorney for Baltimore County, has put together a very good system for file retention. In a perfect world, all files would be retained. The Chair pointed out that in a perfect world, everything pertaining to the case would be in the court file. In reality, with the new access to court records Rules, names and addresses go out into cyberspace. Privacy concerns must be addressed by not putting the information in the court file.

Mr. Dean expressed the opinion that before a time limit is imposed on retaining the files, it would be important to consider the enormous costs of imposing such a limit. It would be helpful to see what Baltimore City is doing to preserve files. A scanning program similar to one in Seattle, Washington might aid prosecutors.

Ms. Potter questioned as to whether any other jurisdictions require an index of the materials turned over to the other side in discovery. Mr. Karceski suggested that the prosecutors around the State be told about the proposed Rule change so that they can give feedback about any potential problems. Mr. Johnson noted that the Rule would pertain to the defense, also. The Chair agreed, explaining that the proposal is that the party generating the discovery shall retain the originals until further order of

court and make them available for inspection by any other party. Mr. Michael pointed out that the language would be "available for inspection or copying." Mr. Dean reiterated that he would let other State's Attorneys around the State know about the proposed language. Ms. Potter commented that the private criminal defense bar also should be apprised of the language.

Judge McAuliffe remarked that file retention is not necessarily the same as the exhibits in the case, and he asked the meaning of the word "file." Mr. Dean answered that the file contains physical evidence, such as controlled dangerous substances and cash. Judge Matricciani suggested that the Rule provide that the party will identify the physical evidence. Judge McAuliffe asked why the defendant has to retain the contents of the file. The burden should be on the State, because it is too heavy a burden for the defense. The Chair said that the prosecutors and defense attorneys will be able to comment on the language of section (i).

Mr. Dean observed that only the first sentence of section (j) pertains to protective orders. He suggested that the remainder of the section be placed into a new section pertaining to sanctions.

Mr. Dean remarked that some, but not all, prosecutors give "open file" discovery to the defense. He said that it is important to recognize that the parties may agree to furnish discovery in a manner different from the manner stated in the Rule. A statement to this effect could be added to section (i).

Judge Matricciani inquired as to how one would know later in the proceedings about an agreement. The Chair replied that Ms. Nethercott had suggested that any informal agreement must be memorialized and filed with the court.

Judge Matricciani observed that when there is a same day/next day jury trial transferred from District Court to circuit court, there is no circuit court discovery. Mr. Karceski noted that neither side has the benefit of circuit court discovery. The Chair commented that it would be difficult to comply with discovery rules when there is a same day/next day jury trial. The Rule could state that the District Court discovery rules apply in that situation. The State files the case in District Court, but the defendant chooses to move the case to circuit court. The defendant could have prayed a jury trial in advance, which would have required the State to comply with the circuit court rules.

Mr. Dean cautioned that much time and effort went into setting up the same day/next day jury trial procedure, and it is important that the suggested change not interfere with it. The Chair explained that since the defendant had the opportunity to have circuit court discovery if he or she had prayed a jury trial in advance, then the defendant will have to accept that the District Court discovery rules apply if the defendant waited to pray a jury trial until the day of trial. The Reporter asked how far in advance the jury trial would have to be prayed to avoid the District Court discovery rules. Mr. Karceski suggested that

earlier than 10 days before the trial, the circuit court rules would apply. Judge McAuliffe suggested that the number of days should be 15. He added that this would help discourage frivolous demands for a jury trial. The Chair said that this will be combined with the 15-day jury trial provision in Rule 4-301, Beginning of Trial in District Court.

By consensus, the Committee approved the Rule as amended.

Mr. Karceski presented Rule 4-262, Discovery in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-262 to require each party to exercise due diligence in identifying material and information to be disclosed, to reletter certain sections, to add language to section (b) referring to a certain statute, to clarify the disclosure obligation of the State's Attorney under subsection (b)(1), and to provide that ordinarily discovery material is not filed with the court, as follows:

Rule 4-262. DISCOVERY IN DISTRICT COURT

~~(c)~~ (a) Obligations of the ~~State's Attorney~~ Parties

Each party obligated to provide material or information under this Rule shall exercise due diligence to identify all of the material and information that must be disclosed. The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and

any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

~~(a)~~ (b) Scope

Discovery and inspection pursuant to this Rule is available in the District Court in actions for offenses that are punishable by imprisonment, and, except as provided under Code, Criminal Procedure Article, §11-205, shall be as follows:

(1) The State's Attorney shall furnish to the defendant any material or information ~~that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged~~ provided for in Rule 4-263 (b)(1), except that the State is not required to file a written statement that reasonably identifies the material furnished.

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

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

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

~~(b)~~ (c) Procedure

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

(d) Not to be Filed With Court

Except as otherwise provided in these Rules or by order of court, discovery material shall not be filed with the court. The party generating the discovery material shall retain the original and shall make it available for inspection by any other party. This section does not preclude the use of discovery material at trial or as exhibits to support or oppose motions.

Source: This Rule is new.

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

The proposed amendments to Rule 4-262 track the proposed amendments to Rule 4-263, to the extent the Committee believes desirable in the District Court.

Section (c) of Rule 4-262 is proposed to be moved to the beginning of the Rule and relettered (a). The amended language of the section tracks the language of the comparable amendments to Rule 4-263, verbatim.

In section (b), a reference to Code, Criminal Procedure Article, §11-205 is proposed to be added for the reason stated in the Reporter's note to Rule 4-263.

Subsection (b)(1) is proposed to be amended to clarify that the disclosure obligations of *Brady v. Maryland*, 373 U.S. 83 (1963) apply in the District Court, as well as in circuit court. The amendment requires the State's Attorney to furnish to the defendant the material and information provided for in Rule 4-263 (b)(1). Due to

> the volume of cases in the District Court, State's Attorneys believe that the "written statement that reasonably identifies the materials furnished," which is included in the proposed amendments to Rule 4-263, would be burdensome in Rule 4-262. The Committee agrees, and has expressly excluded this written statement from the provisions of Rule 4-262 (b)(1).
>
> Proposed new section (d) tracks the language of new section (i) in Rule 4-263. It is added for the reasons stated in the Reporter's note to that Rule.

Mr. Karceski explained that the provisions pertaining to expert witnesses are different than in Rule 4-263. Should the expert witness provisions be strengthened in Rule 4-262? There are not many expert witnesses in District Court cases. Judge Dryden asked why the Rule is being changed. He had not heard any complaints as to discovery in District Court. Mr. Karceski responded that a defendant in District Court can be sent to prison, so there must be some level of compliance with *Brady*. However, it would be difficult for prosecutors in District Court to comply with the circuit court rules. The turnabout in District Court is much quicker. It is difficult for a prosecutor to exercise due diligence in identifying what must be disclosed in District Court, because often the prosecutor does not see the case file or the witnesses until the day of the trial. Judge Dryden inquired as to whether there have been complaints as to the level of compliance. Mr. Karceski answered that he had not heard of any complaints.

The Chair noted that when the defense attorneys and prosecutors meet to discuss retention of discovery materials, they can address whether or not, and to what extent, the District Court rule should be changed to mirror the circuit court rule. It is easy to put the "due diligence" requirement up front, because it is not debatable. He asked how much of subsection (b)(1) should be modified for District Court practice. Senator Stone responded that he practices often in District Court and has had very few problems with discovery there. Most cases proceed on a statement of facts. The prosecutor gets the file on the day of the trial. Once in a while a prosecutor will call him about the case prior to the trial date, but this does not happen very often. The Chair remarked that the Rule should not be overly burdensome. Judge Norton said that it would not cause problems to modify subsection (b)(2) pertaining to expert witnesses, because 99% of the cases in District Court do not have expert witnesses.

Mr. Johnson commented that in some District Court criminal cases, a State's Attorney is not involved in the initiation of the case. A citizen may go to a District Court commissioner to file charges. Are the discovery rules imposing the obligations on citizens? The Chair responded that he and Mr. Dean had been before the House Judiciary Committee in favor of a bill to involve the State's Attorney in the initiation of every case, so the State's Attorney can evaluate whether charges should be brought. The Judiciary Committee was not sympathetic to their

cause. It would be helpful to hear what the defense bar and the prosecutors suggest about changing Rule 4-262. Judge Dryden pointed out that an appeal from a District Court judgment of conviction is *de novo*. Mr. Karceski remarked that nevertheless, the Rule may need to be changed. The "due diligence" requirement is not in the existing Rule, and sometimes there is as close to zero effort as possible to speak to witnesses. The Rule should strike a balance between providing *Brady* information to the defendant and not putting an undue burden on the State. The Chair stated that the Rule will be considered by the prosecutors and the defense bar around the State.

Agenda Item 4. Reconsideration of proposed amendments to Rule 4-343 (Sentencing - Procedure in Capital Cases)

Mr. Karceski presented Rule 4-343, Sentencing - Procedure in Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-343 to conform Part IV of section (h) to the recommendations of the Pattern Jury Instructions Committee and to change the word "proven" to "proved," as follows:

Rule 4-343. SENTENCING - PROCEDURE IN CAPITAL CASES

. . .

(h) Form of Written Findings and Determinations

Except as otherwise provided in section (i) of this Rule, the findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

Section I

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

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

_____	_____
~~proven~~	not
proved	~~proven~~
	proved

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

_____	_____
~~proven~~	not
proved	~~proven~~
	proved

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

the time and place of the murder.

_____	_____
~~proven~~ proved	not ~~proven~~ proved

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

Section II

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

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

_____	_____
~~proven~~ proved	not ~~proven~~ proved

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

Section III

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

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

~~proven~~	not
proved	~~proven~~
	proved

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

~~proven~~	not
proved	~~proven~~
	proved

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

~~proven~~	not
proved	~~proven~~
	proved

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

~~proven~~	not
proved	~~proven~~
	proved

5. The victim was a child abducted in violation of Code, Criminal Law Article, §3-503 (a)(1).

~~proven~~	not
proved	~~proven~~

proved

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

~~proven~~ proved	not ~~proven~~ proved

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

~~proven~~ proved	not ~~proven~~ proved

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

~~proven~~ proved	not ~~proven~~ proved

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

~~proven~~ proved	not ~~proven~~ proved

10. The defendant committed the murder while committing or attempting to commit a carjacking, armed carjacking, robbery, under Code, Criminal Law Article, §3-402 or §3-403, arson in the first degree, rape in the first degree, or sexual offense in the

first degree.

~~proven~~ proved	not ~~proven~~ proved

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

Section IV

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

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

(As used in the preceding paragraph, "crime of violence" means abduction, arson in the first degree, carjacking, armed carjacking, escape in the first degree, kidnapping, mayhem, murder, robbery under Code, Criminal Law Article, §3-402 or §3-403, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above

circumstance exists.

[ ] (b) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, ~~find by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

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

murder.

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

7. It is unlikely that the defendant will engage in further

criminal activity that would constitute a continuing threat to society.

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that it is more likely than not that the above circumstance exists.

8. (a) We unanimously find ~~by a preponderance of the evidence~~ that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

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

Section V

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

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

_____ yes _____ no

Section VI

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

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

2. If the answer in Section II is marked "~~proven~~ proved,"

enter "Imprisonment for Life."

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

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

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

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

We unanimously determine the sentence to be _____.

. . .

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

> To conform Rule 4-343 to modern usage and to the Maryland Pattern Jury Instructions, the Criminal Subcommittee recommends changing the word "proven" to "proved."
>
> In footnote 5 of *Conyers v. State*, 354 Md. 132 (1999), the Court of Appeals pointed out that the language "facts or circumstances" might be more appropriate in Part IV of the capital sentencing form than the word "evidence," because the judge or jury considers more than evidence in determining mitigating circumstances. The Pattern Jury Instructions Committee recommends substituting the language "that it is more likely than not" in place of the language "by a preponderance of the evidence." This leaves in a burden of proof standard, yet avoids the use of the word "evidence."

Mr. Karceski explained that in the verdict sheet form for

capital cases that is set forth in the Maryland Pattern Jury Instructions, the word "proven" has been changed to the word "proved." Therefore, this change is being made to the Findings and Sentencing Determination form in Rule 4-343. In *Conyers v. State,* 354 Md. 132 (1999), the Court remarked that the word "evidence" may not be appropriate in Section IV of the form, because what the jury considers in determining mitigating circumstances goes beyond a consideration of evidence. In her letter of May 25, 2006, Ms. Forster addresses this issue, suggesting that the Rules Committee consider replacing the word "evidence" in the introductory clause to Section IV with "evidence, facts, circumstances, and considerations." Mr. Karceski asked the Committee if the word "evidence" should be expanded, and by consensus, the Committee agreed that it should.

The Chair questioned as to what facts and circumstances would not be part of the evidence. Mr. Dean replied that allocution of the defendant and argument of counsel would not be part of the evidence yet would be considered by the jury. Judge McAuliffe suggested that the language should be "based upon the facts and circumstances of the case." He questioned the use of the word "considerations," stating that the word "circumstances" encompasses it. The Chair suggested that the language should be "from our consideration of the facts and circumstances of this case." By consensus, the Committee agreed to this suggestion. Mr. Sykes asked if this change would be made to all of the

sections of the form, and Mr. Dean answered that the change would only be made to the introductory portion of Section IV. He stated that in the rest of Section IV, the Criminal Subcommittee recommends that the phrase "by a preponderance of the evidence" be replaced by the phrase "that it is more likely than not." Mr. Sykes remarked that other than in Section IV, determinations must be made on facts based on the evidence. By consensus, the Committee approved the Rule as amended.

Agenda Item 5. Consideration of a certain policy question concerning Rule 4-345 (Sentencing – Revisory Power of Court) (See Appendix 5)

Mr. Karceski presented Rule 4-345, Sentencing -- Revisory Power of Court, for the Committee's consideration.

Mr. Karceski told the Committee that Judge Battaglia had raised a question as to whether the 90-day period for a motion to modify a sentence should be changed to 30 days. In her letter of May 25, 2006, Ms. Forster expresses the view that the 90-day time period should not be changed. Mr. Karceski commented that he did not know the derivation of the 90-day period and he asked the Committee if there are any serious drawbacks to changing the period to 30 days. The Chair said that this issue had been discussed previously, and Judge McAuliffe had recommended that the 90-day period be retained. Criminal practitioners understand the 90-day period, and it works well. Judge Kaplan added that another reason the Committee decided to keep the 90-day time period was to avoid trapping anyone not familiar with the

potential 30-day period. The Chair stated that he would explain

to Judge Battaglia why the Committee feels the 90-day period should be retained.

The Chair adjourned the meeting.