COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on June 22, 2001.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Hon. John F. McAuliffe
Hon. William D. Missouri
Anne C. Ogletree, Esq.
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter

The Chair convened the meeting. He announced that Agenda Item 1 has been withdrawn at the request of the Honorable Martha F. Rasin, Chief Judge of the District Court of Maryland, because she would like to revisit at the subcommittee level some of the issues associated with electronic filing. The e-filing program in Baltimore City is going well. Judge Heller confirmed this, explaining that the new program is efficient and has eliminated the use of paper. The main problem is the accessibility of e-filing to pro se litigants who may not have computers. However, in this situation, the District Court may be able to set up

computer terminals which are available to the public.

Agenda Item 2. Consideration of certain proposed rules changes recommended by the Criminal Subcommittee: Amendments to: Rule 4-216 (Pretrial Release), Rule 4-251 (Motions in District Court), Rule 4-252 (Motions in Circuit Court), Rule 4-266 (Subpoenas – Generally), Rule 4-271 (Trial Date), Rule 4-343 (Sentencing – Procedure in Capital Cases), Rule 4-346 (Probation), Rule 5-615 (Exclusion of Witnesses), and Form 4-504.1 (Petition for Expungement of Records)

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The Chair welcomed Judge Johnson back after his surgery. Judge Johnson explained that the first group of rules listed in Agenda Item 2 contain substantive changes, and the remainder are simply "housekeeping" changes.

Judge Johnson presented Rule 4-216, Pretrial Release, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 to remove a reference in sections (c),(e)(3)(B), and (f)(6)(B) to an outdated Code provision, to add a cross reference to a statute in section (c), to add a new subsection (f)(5) which provides for a judicial officer requiring that the defendant have no contact with the alleged victim as a condition of release, to add a new section (l) providing for certain procedures when the defendant is a juvenile, and to correct references to Article 27 provisions which have been moved into the new Criminal Procedure Article, as follows:

Rule 4-216. PRETRIAL RELEASE

(a) Interim Bail

Pending an initial appearance by the defendant before a judicial officer pursuant

to Rule 4-213 (a), the defendant may be released upon execution of a bond in an amount and subject to conditions specified in a schedule that may be adopted by the Chief Judge of the District Court for certain offenses. The Chief Judge may authorize designated court personnel or peace officers to release a defendant by reference to the schedule.

(b) Probable Cause Determination

A defendant arrested without a warrant shall be released on personal recognizance under terms that do not significantly restrain the defendant's liberty unless the judicial officer determines that there is probable cause to believe that the defendant committed an offense.

(c) Defendants Eligible for Release by Commissioner or Judge

Except as otherwise provided in section (d) of this Rule, a defendant is entitled to be released before verdict in conformity with this Rule on personal recognizance or with one or more conditions imposed unless the judicial officer determines that no condition of release will reasonably assure (1) the appearance of the defendant as required and (2) ~~if the defendant is charged with an offense listed under Code, Article 27, §616 ½ (k),~~ the safety of the alleged victim.

Cross reference: See Code, ~~Article 27, §616 ½ (d)~~ Criminal Procedure Article, §5-101 (c) concerning defendants who may not be released on personal recognizance. See Code, Criminal Procedure Article, §5-202 for limitations on a Commissioner’s authority to release a defendant charged with violating certain protective orders.

(d) Defendants Eligible for Release Only by a Judge

A defendant charged with an offense for which the maximum penalty is death or life imprisonment or with an offense listed under Code, ~~Article 27, §616 ½ (c), (i), (j), (l), or (n)~~ Criminal Procedure Article, §5-202 (a), (b), (c), (d), or (e) may not be

released by a District Court Commissioner, but may be released before verdict or pending a new trial, if a new trial has been ordered, if a judge determines that all requirements imposed by law have been satisfied and that one or more conditions of release will reasonably assure (1) the appearance of the defendant as required and (2) if the defendant is charged with an offense listed under Code, ~~Article 27, §616 ½ (c), (j), (l), or (n)~~ Criminal Procedure Article, §5-202 (b), (c), (d), or (e), that the defendant will not pose a danger to another person or the community while released.

(e) Duties of Judicial Officer

(1) Consideration of Factors

In determining whether a defendant should be released and the conditions of release, the judicial officer, on the basis of information available or developed in a pretrial release inquiry, may take into account:

(A) The nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction, insofar as these factors are relevant to the risk of nonappearance;

(B) The defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) The defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

(D) The recommendation of an agency which conducts pretrial release investigations;

(E) The recommendation of the State's Attorney;

(F) Information presented by defendant's counsel;

(G) The danger of the defendant to another person or to the community;

(H) The danger of the defendant to himself or herself; and

(I) Any other factor bearing on the risk of a wilful failure to appear, including prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult and prior convictions.

(2) Statement of Reasons - When Required

Upon determining to release a defendant to whom section (d) of this Rule applies or to refuse to release a defendant to whom section (c) of this Rule applies, the judicial officer shall state the reasons in writing or on the record.

(3) Imposition of Conditions of Release

If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set out in section (f) of this Rule that will reasonably:

(A) Assure the appearance of the defendant as required,

(B) Protect the safety of the alleged victim ~~if the defendant is charged with an offense listed under Code, Article 27, §616 ½ (k)~~, and

(C) Assure that the defendant will not pose a danger to another person or to the community if the charge against the defendant is an offense listed under Code, ~~Article 27, §616 ½ (c), (j), (l), or (n)~~ Criminal Procedure Article, §5-202 (b), (c), (d), or (e).

(4) Advice of Conditions and Consequences of Violation

The judicial officer shall advise the defendant in writing or on the record of

the conditions of release imposed and of the consequences of a violation of any condition.

(f) Conditions of Release

The conditions of release imposed by a judicial officer under this Rule may include:

(1) Committing the defendant to the custody of a designated person or organization that agrees to supervise the defendant and assist in assuring the defendant's appearance in court;

(2) Placing the defendant under the supervision of a probation officer or other appropriate public official;

(3) Subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

(4) Requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer including any of the following:

(A) without collateral security,

(B) with collateral security of the kind specified in Rule 4-217 (e)(1)(A) equal in value to the greater of $25.00 or 10% of the full penalty amount, or a larger percentage as may be fixed by the judicial officer,

(C) with collateral security of the kind specified in Rule 4-217 (e)(1) equal in value to the full penalty amount,

(D) with the obligation of a corporation that is an insurer or other surety in the full penalty amount;

(5) Requiring no contact by the defendant with the alleged victim or the alleged victim's premises or place of employment, if the alleged victim has requested reasonable protections for safety.

~~(5)~~ (6) Subjecting the defendant to any other condition reasonably necessary to:

(A) assure the appearance of the defendant as required,

(B) protect the safety of the alleged victim ~~if the charge against the defendant is an offense listed under Code, Article 27, §616 ½ (k)~~, and

(C) assure that the defendant will not pose a danger to another person or to the community if the charge against the defendant is an offense listed under Code, ~~Article 27, §616 ½ (c), (j), (l), or (n)~~ Criminal Procedure Article, §5-202 (b), (c), (d), or (e);

(6) Imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, Article 27, §763 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation of Code, Article 27, §26, §761, or §762.

Cross reference: See Code, ~~Article 27, §616 ½ (m)~~ Criminal Procedure Article, §5-201 (b), and Code, Business Occupations and Professions Article, Title 20, concerning private home detention monitoring as a condition of release.

(g) Review of Commissioner's Pretrial Release Order

A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court. The District Court shall review the commissioner's pretrial release determination and take appropriate action. If the defendant will remain in custody after the review, the District Court shall set forth in writing or on the record the reasons for the continued detention.

Cross reference: See Rule 4-231 (d) concerning the presence of a defendant by video conferencing.

(h) Continuance of Previous Conditions

When conditions of pretrial release have been previously imposed in the District Court, the conditions continue in the circuit court unless amended or revoked pursuant to section (i) of this Rule.

(i) Amendment of Pretrial Release Order

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

(j) Supervision of Detention Pending Trial

In order to eliminate unnecessary detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.

(k) Violation of Condition of Release

A court may issue a bench warrant for the arrest of a defendant charged with a criminal offense who violates a condition of pretrial release. After the defendant is presented before a court, the court may (1) revoke the defendant's pretrial release or (2) continue the defendant's pretrial release with or without conditions.

(l) Juvenile Defendant

If the defendant is a child whose case is eligible for transfer to the juvenile court pursuant to Code, Criminal procedure Article, §4-202 (b)(1), (b)(2), and (c), the District Court may order that a study be made concerning the child, the family of the

child, the environment of the child, and other matters concerning the disposition of the case, or that the child be held in a secure juvenile facility, regardless of whether the District Court has criminal jurisdiction over the case.

~~(l)~~ (m) Title 5 Not Applicable

Title 5 of these rules does not apply to proceedings conducted under this Rule.

Source: This Rule is derived in part from former Rule 721, M.D.R. 723 b 4, and is in part new.

Rule 4-216 was accompanied by the following Reporter's Note.

The legislature created a new Criminal Procedure Article which contains many of the provisions currently in Article 27. The cross references to Article 27 in the Rule are being corrected to reflect their new placement.

House Bill 254, enacted by the 2001 legislature, made a minor change to new Criminal Procedure Article, §5-202 (former Article 27, §616 ½ (n)). After reviewing the legislation, the Subcommittee is suggesting that a cross reference to §5-202, which prevents commissioners from authorizing pretrial release when a defendant is charged with violating certain protective orders, should be added to Rule 4-216 (c).

House Bill 507, also passed in the 2001 General Assembly, has broadened the use of reasonable protections for the safety of a victim as a condition of pretrial release by eliminating the requirement that the defendant has to be charged with the crime of stalking before the safety protections are available as a pretrial release condition. The Subcommittee is proposing to delete the language referring to Article 616 ½ (k) in section (c) and subsections (e)(3)(B) and (f)(6)(B). The deleted language sets out the requirement that the defendant has to be charged with the crime of stalking in order for the protections for the safety of the alleged victim to be included as a condition of pretrial release.

> The legislature also added a new provision which allows the court or commissioner to require that the defendant have no contact with the alleged victim, the alleged victim's premises, or the alleged victim's place of employment as a condition of pretrial release. The Criminal Subcommittee is suggesting that this new condition of pretrial release be added to the other conditions in section (f) of Rule 4-216.
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> House Bill 294, enacted by the 2001 legislature, provides that at a bail review hearing before the District Court involving a child whose case is eligible for transfer to the juvenile court pursuant to certain provisions of Code, Criminal Procedure Article, §4-202, the District Court may order that a study be made of the child, the child's family, environment, and other matters concerning disposition of the case, or that the child be held in a secure juvenile facility regardless of whether the District Court has jurisdiction over the case. Because this fills a gap in the Rules, the Subcommittee is recommending the addition of language to this effect into Rule 4-216.

Judge Johnson explained that the Subcommittee has added language, which refers to Code, Criminal Procedure Article, §5-202, to the cross reference at the end of section (c). The Vice Chair pointed out that section (d) already references that Code provision, and it is not necessary to include it in the section (c) cross reference. She said that section (c) is inaccurate, because in addition to the exceptions listed in section (d), Criminal Procedure Article, §5-101(c) is also an exception. The Chair suggested that the reference to §5-101 (c) could be moved into the body of the Rule. The Reporter noted that section (c) is applicable when either a commissioner or a judge can release a defendant, and section (d) is applicable when

only a judge can release a defendant. The Vice Chair observed that despite the language of the tagline to section (c) which refers to "commissioner or judge," the body of that section only refers to "judicial officer." The Reporter commented that the term "judicial officer" is defined in Rule 4-102 (f) as a "judge or District Court Commissioner," and she suggested that the language "if allowed by law" could be added to section (c). The Vice Chair said that the Style Subcommittee can rewrite this provision. The Reporter asked if the cross reference after section (c) should be deleted, and the Committee agreed by consensus to this deletion.

Judge Johnson drew the Committee's attention to subsection (f)(5) which the Subcommittee is proposing to add. The Chair asked if the judicial officer should be able to impose a condition of no contact with the defendant even if the victim has not requested reasonable protections for safety. Judge Vaughan responded that case law limits the amount of authority a commissioner has. Judge Dryden pointed out that subsection (f)(6)(B) provides that a judicial officer may subject a defendant to any other condition reasonably necessary to protect the safety of the alleged victim. The Chair remarked that he preferred an express provision. Judge Dryden noted that the proposed language tracks the language of House Bill 507. He agreed with the Chair that the judicial officer should be able to impose a condition of no contact with the defendant, even if the victim has not requested this. The Vice Chair looked at the statutory language, and she noted that deleting the phrase "if

the alleged victim has requested reasonable protections for safety" from the Rule would not be in conflict with the statute. Mr. Sykes pointed out that section (f) provides that the conditions of release "may include" and then lists the factors the judicial officer is able to take into account in determining whether a defendant should be released. He suggested that subsection (f)(5) should be stricken entirely, and then language could be added to subsection (f)(6)(B) which would provide that, if appropriate, the judicial officer can require that the defendant have no contact with the alleged victim. The Chair added that the substance of subsection (f)(5) can be included in subsection (f)(B)(6), but the language concerning the request by the victim can be eliminated. The Committee agreed to these changes by consensus.

Judge Johnson drew the Committee's attention to section (l). He explained that the legislature has given the District Court the authority to order a study of a child who is eligible for transfer to the juvenile court even though the District Court has no jurisdiction to hear the substantive charge against the juvenile. Judge McAuliffe expressed the concern that section (l) is not placed appropriately. It might be more appropriate to put it in section (g) as subsection (g)(2). This happens at a bail review hearing. Judge Heller inquired as to the purpose of the report. The Chair replied that the District Court has the authority to start the transfer process. By ordering the study at this point, the circuit court will be able to hold the waiver hearing more quickly. Judge Heller noted that this study does

not appear to be the type of report the circuit court uses. Judge McAuliffe commented that this is not a full transfer report. Where it appears likely to the District Court that the case will be transferred to the juvenile court, a quick study can be done. Judge Heller suggested that the study should be completed within a time limit that should be added to the Rule. The Chair agreed that placement of proposed section (l) into section (g) is appropriate.

Judge Johnson said that the "disposition" of the case is whether or not it is waived to juvenile court or retained in circuit court. The Vice Chair expressed the view that the language "disposition of the case" is ambiguous. Mr. Sykes remarked that it is the decision as to the appropriate tribunal. Judge Johnson observed that in the circuit court, the defense attorney files a motion to waive the case down to juvenile court, and then the circuit court orders a study. In this situation, the District Court requests a study when the defendant is arrested. Judge Dryden agreed with Judge Heller that the information in the District Court study is not the same as in the circuit court study. Judge Heller asked who undertakes the studies, and Judge Missouri responded that they are done by the Department of Juvenile Justice (DJJ). The Chair noted that the statute does not provide which agency undertakes the studies. The DJJ may not be enthusiastic about these studies.

Judge Johnson commented that one of the concerns is juvenile defendants being placed in an adult detention center. The idea is for the court to gather enough information to get the child

into a secure juvenile facility. The Chair pointed out that proposed section (l) refers to five categories which the study can cover. Judge Heller pointed out that the statute provides that the District Court may order the study at a bail review or a preliminary hearing. The Chair agreed with Judge McAuliffe's suggestion to move section (l) into section (g), and the Committee agreed by consensus with this suggestion. The Vice Chair suggested that the language of proposed section (l) should be modified, and Judge Johnson commented that the Style Subcommittee can redraft the language. The Vice Chair expressed the opinion that the language in section (l) which reads "disposition of the case" should be changed. The idea is that the defendant is in custody whether or not the District Court has jurisdiction over the case. Judge Heller remarked that the District Court has jurisdiction until the waiver occurs or until the waiver hearing occurs at the circuit court. Judge Dryden observed that in response to the case, the question is whether the District Court has jurisdiction to take certain steps pertaining to the juvenile. The Vice Chair pointed out that section (g) provides that the District Court reviews the commissioner's pretrial release determination and can take appropriate action. If the defendant remains in custody, the District Court has to explain the reason in writing or on the record. Judge McAuliffe added that if the defendant is in custody, the District Court reviews the matter as part of its jurisdiction.

Mr. Sykes commented that the new provision needs to clarify

that the object of the study is to find out whether the juvenile should be held, and if so, where. The Vice Chair said that she did not understand why proposed section (l) should be moved to section (g) as a new section (g)(2). Section (g) applies to all defendants in pretrial release, but the proposed subsection (g)(2) applies only to juveniles. The relationship of the last sentence of current section (g) is unclear. Does the District Court or the commissioner order the study, and how does current section (g) apply to juvenile defendants? Judge Heller responded that the person has been denied pretrial release and comes before the District Court for review. The person is in a detention center. Judge Vaughan commented that some young people stay in an adult facility for a long time. Judge Missouri added that that is so if the juvenile has been charged as an adult. Section (g) applies to adult defendants, and proposed subsection (g)(2) applies to persons who are chronologically juveniles.

Judge Johnson noted that the disposition of the case is disposing of the request that the person be released on bail or detained. Judge Heller said that she was not sure that District Court judges have the authority to order someone who has not been waived to juvenile court to stay in an adult facility. The Reporter commented that if a juvenile commits a crime, the person is likely to be tried in either the juvenile or circuit court. Judge Dryden noted that a juvenile could be tried in the District Court on a handgun violation. The Chair added that a prosecutor may drop a flagship charge to bring a child to District Court. Mr. Hochberg asked if the District Court has jurisdiction to

order a bail review. The Chair answered that the District Court has jurisdiction to establish conditions of release. Judge Heller observed that the District Court will not have ultimate jurisdiction over a juvenile charged with attempted murder. The Vice Chair remarked that there is no question that the District Court has jurisdiction to determine pretrial release. Judge Dryden pointed out that this language may have been added to the statute in response to In Re Darren M., 358 Md. 104 (2000). Mr. Sykes said that this jurisdiction is different from the jurisdiction to try the case. The Vice Chair noted that this is the same for adults -- there are some cases in which the District Court has no jurisdiction over an adult. She stated that she prefers that proposed section (l) be put into a Committee note. Judge Heller added that the note could reference the case which Judge Dryden mentioned. The Chair stated that since the Committee has approved the substance of the new language, the Style Subcommittee can find a place for it.

Judge Johnson presented Rule 4-251, Motions in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-251 (c)(2) to add language providing for a hearing when a motion to transfer jurisdiction to the juvenile court is filed and for a hearing when a motion requesting that a child be held in a juvenile facility pending a transfer determination is filed, and to correct a reference to an Article 27 provision which has been moved to

the new Criminal Procedure Article, as follows:

Rule 4-251. MOTIONS IN DISTRICT COURT

(a) Content

A motion filed before trial in District Court shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth the relief sought. A motion alleging an illegal source of information as the basis for probable cause must be supported by precise and specific factual averments.

(b) Determination

A motion asserting a defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense shall be made and determined before the first witness is sworn or evidence is received on the merits, whichever is earlier. A motion filed before trial to suppress evidence or to exclude evidence by reason of any objection or defense shall be determined at trial. Other motions may be determined at any appropriate time.

(c) Effect of Determination Before Trial

(1) Generally

The court may grant the relief it deems appropriate including the dismissal of the charging document with or without prejudice.

(2) Transfer of Jurisdiction to Juvenile Court

If a motion to transfer jurisdiction of an action to the juvenile court is filed, the court shall make a transfer determination within 10 days after the date of a transfer hearing. A hearing on a motion requesting that a child be held in a juvenile facility pending a transfer determination shall be held not later than the next court day, unless extended by the court for good cause

shown. If the court grants a motion to transfer jurisdiction of an action to the juvenile court, the court shall enter a written order waiving its jurisdiction and ordering that the defendant be subject to the jurisdiction and procedures of the juvenile court. In its order the court shall (A) release or continue the pretrial release of the defendant, subject to appropriate conditions reasonably necessary to ensure the appearance of the defendant in the juvenile court or (B) place the defendant in detention or shelter care pursuant to Code, Courts Article, §3-815. Until a juvenile petition is filed, the charging document shall be considered a juvenile petition for the purpose of imposition and enforcement of conditions of release or placement of the defendant in detention or shelter care.

Cross reference: Code, ~~Article 27, § 594A~~ Criminal Procedure Article, §4-202.

Source: This Rule is derived from former M.D.R. 736.

Rule 4-251 was accompanied by the following Reporter's Note.

The 2001 legislature passed House Bill 294 which expands the procedure for transferring a case to the jurisdiction of the juvenile court. The legislature has added language to Code, Criminal Procedure Article, §4-202 (formerly Article 27, §594A) providing for a hearing to be held before the court makes its transfer determination which is to be made within 10 days of the hearing. The new language also provides for a hearing on a motion requesting that a child be held in a juvenile facility pending a transfer determination. The hearing is to be held not later than the next court day after the motion is filed, unless extended by the court for good cause shown. The Criminal Subcommittee is recommending changes to Rules 4-251 and 4-252 to comply with the new statutory language. A cross reference to Article 27 is being changed to reflect its new placement into the Criminal Procedure Article.

Judge Johnson explained that the language in subsection

(c)(2) is derived from House Bill 294 passed by the 2001 Maryland legislature to expand the procedure for transferring a case to the jurisdiction of the juvenile court. Mr. Bowen suggested that the second sentence of subsection (c)(2) should be taken out of Rule 4-251 and placed in Rule 4-216. The Reporter pointed out that Rule 4-251 pertains to motions. The Vice Chair commented that the tagline of subsection (c)(2) is not correct. The Chair suggested that there be a separate tagline which would read: "Motion Requesting Child be Held in Juvenile Facility." The Vice Chair noted that in proposed section (l) of Rule 4-216, no motion is required, and the court can put the child in a juvenile facility on its own. Judge Johnson observed that this could be a burden on the administrative judge who has to get involved. The Chair said that the Style Subcommittee could handle this matter. The Committee approved the Rule, subject to changes by the Style Subcommittee.

Judge Johnson presented Rule 4-252, Motions in Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-252 to add language providing for a hearing when a motion to transfer jurisdiction to the juvenile court is filed and for a hearing when a motion requesting that a child be held in a juvenile facility pending a transfer determination is filed, to make a stylistic change in section (h), and to correct references to Article 27 provisions which have been moved into the new Criminal Procedure Article, as follows:

## Rule 4-252. MOTIONS IN CIRCUIT COURT

(a) Mandatory Motions

In the circuit court, the following matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise:

(1) A defect in the institution of the prosecution;

(2) A defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense;

(3) An unlawful search, seizure, interception of wire or oral communication, or pretrial identification;

(4) An unlawfully obtained admission, statement, or confession; and

(5) A request for joint or separate trial of defendants or offenses.

(b) Time for Filing Mandatory Motions

A motion under section (a) of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213 (c), except when discovery discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished.

(c) Motion to Transfer to Juvenile Court

A request to transfer an action to juvenile court pursuant to Code, ~~Article 27, §594A~~ Criminal Procedure Article, §4-202 shall be made by separate motion entitled "Motion to Transfer to Juvenile Court." The motion shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213 (c) and, if not so made, is waived unless the court, for good cause shown, orders otherwise.

(d) Other Motions

A motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time. Any other defense, objection, or request capable of determination before trial without trial of the general issue, shall be raised by motion filed at any time before trial.

(e) Content

A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth the relief sought. A motion alleging an illegal source of information as the basis for probable cause must be supported by precise and specific factual averments. Every motion shall contain or be accompanied by a statement of points and citation of authorities.

(f) Response

A response, if made, shall be filed within 15 days after service of the motion and contain or be accompanied by a statement of points and citation of authorities.

(g) Determination

Motions filed pursuant to this Rule shall be determined before trial and, to the extent practicable, before the day of trial, except that the court may defer until after trial its determination of a motion to dismiss for failure to obtain a speedy trial. If factual issues are involved in determining the motion, the court shall state its findings on the record.

(h) Effect of Determination of Certain Motions

(1) Defect in Prosecution or Charging Document

If the court granted a motion based on a defect in the institution of the prosecution or in the charging document, it may order that the defendant be held in

custody or that the conditions of pretrial release continue for a specified time, not to exceed ten days, pending the filing of a new charging document.

(2) Suppression of Evidence

(A) If the court grants a motion to suppress evidence, the evidence shall not be offered by the State at trial, except that suppressed evidence may be used in accordance with law for impeachment purposes. The court may not reconsider its grant of a motion to suppress evidence unless before trial the State files a motion for reconsideration based on (i) newly discovered evidence that could not have been discovered by due diligence in time to present it to the court before the court's ruling on the motion to suppress evidence, (ii) an error of law made by the court in granting the motion to suppress evidence, or (iii) a change in law. The court may hold a hearing on the motion to reconsider. Hearings held before trial shall, whenever practicable, be held before the judge who granted the motion to suppress. If the court reverses or modifies its grant of a motion to suppress, the judge shall prepare or dictate into the record a statement of the reasons for the action taken.

(B) If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise. A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction.

(3) Transfer of Jurisdiction to Juvenile Court

If a motion to transfer jurisdiction of an action to the juvenile court is filed, the court shall make a transfer determination within 10 days after the date of a transfer hearing. A hearing on a motion requesting that a child be held in a juvenile facility pending a transfer determination shall be held not later than the next court day, unless extended by the court for good cause

shown. If the court grants a motion to transfer jurisdiction of an action to the juvenile court, the court shall enter a written order waiving its jurisdiction and ordering that the defendant be subject to the jurisdiction and procedures of the juvenile court. ~~The order~~ In its order the court shall (A) release or continue the pretrial release of the defendant, subject to appropriate conditions reasonably necessary to ensure the appearance of the defendant in the juvenile court or (B) place the defendant in detention or shelter care pursuant to Code, Courts Article, §3-815. Until a juvenile petition is filed, the charging document shall have the effect of a juvenile petition for the purpose of imposition and enforcement of conditions of release or placement of the defendant in detention or shelter care.

Cross reference: Code, ~~Article 27, §594A~~ Criminal Procedure Article, §4-202.

Committee note: Subsections (a)(1) and (2) include, but are not limited to allegations of improper selection and organization of the grand jury, disqualification of an individual grand juror, unauthorized presence of persons in the grand jury room, and other irregularities in the grand jury proceedings. Section (a) does not include such matters as former jeopardy, former conviction, acquittal, statute of limitations, immunity, and the failure of the charging document to state an offense.

Source: This Rule is derived from former Rule 736.

Rule 4-252 was accompanied by the following Reporter's Note.

The 149th Report of the Rules Committee, which is pending before the Court of Appeals, added the words "and file" to the last sentence of subsection (h)(2)(A). A stylistic change is being suggested for subsection (h)(3) to make it parallel to subsection (c)(2) of Rule 4-251. For an explanation of the other changes, see the Reporter's Note to Rule 4-251.

Judge Johnson explained that the issue in Rule 4-252 is the same as for Rule 4-251. The Reporter pointed out that the circuit courts in the Eastern Shore counties may not always sit everyday. Mr. Johnson responded that the same issue was raised in the Juvenile Rules, and the language "the next court day" will cover this. The Committee approved the Rule as presented.

Judge Johnson presented Rule 4-266, Subpoenas--Generally, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-266 to provide additional methods of service of a subpoena, as follows:

Rule 4-266. SUBPOENAS -- GENERALLY

(a) Form

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

(b) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named or, if the administrative judge of the court so directs, as permitted by Rule 2-121 (a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney as permitted by

Rule 1-321 (a). A subpoena may be served by a sheriff of any county or by a person who is not a party and who is not less than 18 years of age, and in the District Court, if the administrative judge of the district so directs, by mail.

(c) Protective Order

Upon motion of a party or of the witness named in the subpoena filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may, for good cause shown, enter an order which justice requires to protect the party or witness from annoyance, embarrassment, oppression, or undue burden or expense, including one of the following:

(1) that the subpoena be quashed;

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

(3) that certain matters not be inquired into or that the scope of examination or inspection be limited to certain matters;

(4) that the examination or inspection be held with no one present except parties to the action and their counsel;

(5) that the transcript of any examination or matters produced or copies, after being sealed, not be opened or the contents be made public only by order of court; or

(6) that a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way.

(d) Attachment

A witness personally served with a subpoena under this Rule is liable to a body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff

> or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.
>
> Source: This Rule is derived as follows:
> Section (a) is derived from former Rule 742 c and M.D.R. 742 b.
> Section (b) is derived from former Rule 737 b and M.D.R. 737 b.
> Section (c) is derived from former Rule 742 d and M.D.R. 742 c.
> Section (d) is derived from former Rule 742 e and M.D.R. 742 d.

Rule 4-266 was accompanied by the following Reporter's Note.

> The Rules Committee approved changes to Rules 2-510 and 3-510 allowing for service of subpoenas by certified mail, restricted delivery. The suggestion was made to look into the feasibility of criminal subpoenas being served this way. The Criminal Subcommittee is recommending that Rule 4-266 be amended to conform to the changes made to the civil rules pertaining to subpoenas except for adding the requirement that the administrative judge must approve this type of service.

Judge Johnson explained that a parallel change had been made to Rules 2-510 and 3-510 at the May, 2001 Rules Committee meeting, and the same change is being proposed for Rule 4-266. The administrative judge would make the decision as to whether service by certified mail would be allowed.

The Vice Chair commented that she had asked to look at the draft minutes of the May Rules Committee meeting. She expressed her concern as to service on an attorney. She stated that she

believes that a subpoena is an order of court and that a failure to obey it can have significant consequences, such as issuance of a body attachment or a contempt charge. Allowing service on an attorney puts attorneys, clients, and judges in a bad situation. The Chair observed that this is subject to abuse in domestic relations cases. Some Baltimore County judges are upset because subpoenas are being served right before the hearing. The Vice Chair said that a subpoena is a court order which is not directed to an attorney, and service of the subpoena on an attorney is not appropriate. Mr. Sykes added that a sole practitioner may be involved in a lengthy trial and not be able to reach the client who is the subject of the subpoena. The Vice Chair noted that this also applies to civil cases. Judge Heller remarked that abuse of subpoenas in family law cases already exists. The Vice Chair added that this includes late service of subpoenas.

The Chair said that the parties in a criminal case are the State and the defendant. Serving notice of trial on the attorney constitutes notice on the defendant, but the attorney may not be able to notify the defendant. Judge Vaughan pointed out that an Assistant Attorney General had commented that the cost of requiring certified mail in criminal cases could be prohibitive. Judge Missouri expressed the concern that it is difficult to know who signed for the mail. Judge Heller remarked that people who live in urban areas tend to move more frequently than people who live elsewhere and, if a warrant is issued, it may be unclear as to who received the notice. Judge McAuliffe observed that restricted delivery has to be signed by the person to whom it is

addressed or that person's designated agent. Judge Missouri commented that the post office will accept any signature. Judge McAuliffe responded that if the signature is not that of the designated person, service has not been achieved. The Vice Chair noted that at the May meeting, the Rules Committee approved service of a subpoena on an attorney in a civil case. She asked the Committee to reconsider this concept both in civil and criminal cases. Judge Heller said that in the context of Rule 4-266, the subpoenas go to witnesses, not to parties. The Chair suggested the following language in place of the complete sentence in the proposed language: "Upon motion and for good cause shown, the court may order service upon an attorney as permitted by Rule 1-321 (a)." Mr. Sykes observed that this may flood the court with papers. Judge Heller reiterated that this is service on witnesses, not parties. The Vice Chair remarked that serving the attorney makes less sense in a criminal case.

Judge Johnson suggested that the sentence of the proposed language that begins with "Service of a subpoena" be stricken. The Vice Chair suggested that it also be stricken from Rules 2-510 and 3-510. Judge Vaughan commented that service on an attorney in civil cases is common. The attorney often accepts pleadings, and there is no reason why the attorney cannot accept a subpoena. If there is a problem with abuse of subpoenas, it can be addressed by motion. The Vice Chair asked if the issue of service of subpoenas on attorneys in civil cases can be brought back for reconsideration. The Chair replied that it would be brought back. The Reporter asked if the sentence in section (b)

providing for service of subpoenas on attorneys in criminal cases should be deleted, and the Committee agreed by consensus to delete the sentence.

Judge McAuliffe inquired if the proposed changed language which is remaining in the Rule means that it is a blanket rule or that it is a case by case determination. Judge Johnson replied that it is the latter. Judge McAuliffe pointed out that the Rule should state this, or the administrative judge can pass a blanket order. Mr. Johnson cautioned that a case by case determination may result in local rules. The Vice Chair said that there should not be a blanket order in one county, but not in another county, because practitioners would not know. Judge Johnson remarked that this needs to be clarified.

Judge Missouri asked about the language at the end of section (b) which reads: "and in the District Court, if the administrative judge of the district so directs, by mail." The Reporter answered that this language tracks the statute, Code, Courts Article, §2-605 (b). The Chair suggested that the proposed language which reads "if the administrative judge of the court so directs" should be deleted. Judge Dryden remarked that it is cost-effective to serve by mail. The Vice Chair questioned as to how subpoenas are served when litigants request them. Judge Missouri responded that Mr. Dean, who is not present at today's meeting, had suggested service by mail in criminal cases. The problem existing with criminal cases is the difficulty in serving subpoenas. Because of the lack of resources in some jurisdictions, the sheriff cannot serve all of the subpoenas.

Judge Missouri expressed the concern that a bench warrant could be issued after an alleged mailing of the subpoena.

Judge Johnson asked if the proposed change should be withdrawn. The Chair said that his concern with the new language is the phrase which reads: "if the administrative judge of the court so directs." If that phrase is eliminated, service by certified mail can be authorized. Mr. Brault observed that this change could result in continuances, because people may not pick up their certified mail. The Chair stated that he was satisfied that the Rule could be changed by eliminating the introductory phrase and the following complete sentence. The Committee agreed to this change by consensus. Mr. Shipley commented that subpoenas have been served by mail for ten years in both civil and criminal cases in Carroll County. A case has never been postponed because the recipient of the subpoena did not receive it. This was started because of the substantial cost of sheriffs' fees for serving subpoenas in criminal cases. The Committee approved the Rule as amended. The Chair stated that Rules 2-510 and 3-510 will be reconsidered at another meeting.

Judge Johnson presented Rule 4-271, Trial Date, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-271 to add a sentence providing for a procedure for subsequent changes of the trial date, and to make a stylistic change to the Committee note at the

end of section (b), as follows:

Rule 4-271. TRIAL DATE

(a) Trial Date in Circuit Court

(1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. When a case has been transferred from the District Court because of a demand for jury trial, and an appearance of counsel entered in the District Court was automatically entered in the circuit court pursuant to Rule 4-214 (a), the date of the appearance of counsel for purposes of this Rule is the date the case was docketed in the circuit court. On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date. If a circuit court trial date is changed, any subsequent changes of the trial date may only be made by the county administrative judge or that judge's designee for good cause shown.

(2) Upon a finding by the Chief Judge of the Court of Appeals that the number of demands for jury trial filed in the District Court for a county is having a critical impact on the efficient operation of the circuit court for that county, the Chief Judge, by Administrative Order, may exempt from this section cases transferred to that circuit court from the District Court because of a demand for jury trial.

(b) Change of Trial Date in District Court

The date for trial in the District Court may be changed on motion of a party, or on the court's initiative, and for good cause shown.

Committee note: ~~Section~~ Subsection(a)(1) of this Rule is intended to incorporate and continue the provisions of Rule 746 from

which it is derived. Stylistic changes have been made.

Source: This Rule is derived as follows:
Section (a) is in part derived from former Rule 746 a and b, and is in part new.
Section (b) is derived from former M.D.R. 746.

Rule 4-271 was accompanied by the following Reporter's Note.

House Bill 398 enacted by the 2001 legislature added language to Code, Criminal Procedure Article, §6-103 (formerly Article 27, §591) providing that subsequent changes of the trial date after the first change may only be made by the county administrative judge or that judge's designee for good cause shown. The Criminal Subcommittee is recommending that a parallel change be made to Rule 4-271.

A stylistic change is being suggested for the Committee note to make it consistent with citations of rules provisions in other Rules.

Judge Johnson noted that a change has been proposed for subsection (a)(1) stating that subsequent changes of trial date may only be made by the county administrative judge or that judge's designee. The Vice Chair pointed out that the previous sentence before the proposed language is similar. Judge Vaughan suggested that in place of the proposed language, the following language could be added to the existing last sentence of subsection (a)(1): "or any subsequent change." He suggested that the Style Subcommittee can finalize the best way to show the change, and the Committee agreed.

Judge Johnson 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 (j) by changing the language in Section II B of the Report of Trial Judge to be consistent with statutory changes, as follows:

Rule 4-343. SENTENCING -- PROCEDURE IN CAPITAL CASES

. . .

(j) Report of Judge

After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

A. Date of Birth

B. Sex

C. Race

D. Address

E. Length of Time in Community

F. Reputation in Community

G. Family Situation and Background

1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)

2. Family history (describe family history including pertinent data about parents and siblings)

H. Education

I. Work Record

J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)

K. Military History

L. Pertinent Physical or Mental Characteristics or History

M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)

B. Was there any evidence that the defendant was ~~under the influence of~~ impaired by alcohol or drugs at the time of the offense? If so describe.

C. Did the defendant know the victim prior to the offense?

Yes ..... No .....

1. If so, describe relationship.

2. Did the prior relationship in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim

1. Name

2. Date of Birth

3. Sex

4. Race

5. Length of time in community

6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:

Not guilty .....; guilty .....; not criminally responsible ......

B. Mode of Trial:

Court ..... Jury .....

If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel

1. Name

2. Address

3. Appointed or retained

(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity - Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pretrial notice.

B. Was the proceeding conducted

before same judge as trial? .....

before same jury? .....

If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel - If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life imprisonment

Death

Life imprisonment without the possibility of parole

V. Chronology

Date of Offense

Arrest

Charge

Notification of intention to seek penalty of death

Trial (guilt/innocence) - began and ended

Post-trial Motions Disposed of

Sentencing Proceeding - began and ended

Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of

Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

.....
Judge

CERTIFICATION

I certify that on the ..... day of ....., ..... (month) ....., I sent copies of this report to counsel for the parties (year) for comment and have attached any comments made by them to this report.

.....
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court and with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

. . .

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

> The 2001 General Assembly enacted House Bill 3 which changed the language in Code, Article 27, §§388A and 388B as well as in other provisions which currently reads "under the influence of" alcohol or drugs to the language "impaired by" alcohol or drugs. This change was made in conjunction with lowering the requisite alcohol level in the blood from 0.10 to 0.08 for someone to be

designated as “under the influence of alcohol.” The Criminal Subcommittee is recommending changing the language in section (j) of Rule 4-343 to be consistent with the statutory change.

Judge Johnson explained that the General Assembly passed House Bill 3 which changed the language in certain Code provisions from “under the influence of” alcohol or drugs to “impaired by” alcohol or drugs. The change was made in conjunction with lowering the blood level from 0.10 to 0.08 to be designated as under the influence of drugs or alcohol. The Subcommittee is recommending that subsection (j)(2)(B) be changed to reflect the statutory change. The Committee agreed by consensus to this change, approving the Rule as presented.

Judge Johnson presented Rule 4-346, Probation, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-346 to add a cross reference to the Uniform Act for Out-of-State Parole Supervision, as follows:

Rule 4-346. PROBATION

(a) Manner of Imposing

When placing a defendant on probation, the court shall advise the defendant of the conditions and duration of probation and the possible consequences of a violation of any of the conditions. The court also shall file and furnish to the defendant a written order stating the conditions and duration of

probation.

(b) Modification of Probation Order

During the period of probation, on motion of the defendant or of any person charged with supervising the defendant while on probation or on its own initiative, the court, after giving the defendant an opportunity to be heard, may modify, clarify, or terminate any condition of probation, change its duration, or impose additional conditions.

Cross reference: For orders of probation or parole requiring or permitting a defendant to reside in or travel to another state as a condition of probation or parole, see the Uniform Act for Out-of-State Parole Supervision, Code, Correctional Services Article, §6-201 et seq.

Source: This Rule is derived from former Rule 775 and M.D.R. 775.

Rule 4-346 was accompanied by the following Reporter's Note.

Michael Berman, Esq., Deputy Chief, and Kathleen Morse, Esq., Assistant Attorney General, of the Civil Litigation Division of the Office of the Attorney General ("OAG"), requested an additional criminal rule providing that any court order requiring or permitting a probationer or parolee to reside or travel out-of-state must ensure compliance with the requirements of the Uniform Act for Out-of-State Parole Supervision ("the Compact"). The OAG is representing the State of Maryland in a lawsuit in a Colorado court arising out of the murder of the plaintiff's daughter by a Maryland probationer following his release from prison in Maryland. Supervision of the probationer was not transferred from Maryland to Colorado, and the plaintiff alleges that Maryland violated the Compact by failing to notify Colorado when the probationer was released to go to a drug and alcohol treatment center in Colorado. The OAG attorneys are concerned that some attorneys and judges may not be aware of the requirements of the Compact, because the statute is in the Correctional Services Article and not in Article 27 or the

> Courts Article of the Annotated Code or the Maryland Rules related to sentencing. The Criminal Subcommittee is recommending that, in place of a new rule, a cross reference to the appropriate Correctional Services Article provision be placed at the end of Rule 4-346.

Judge Johnson explained that the Office of the Attorney General had requested the change to Rule 4-346 because of a case against the State of Maryland in which a Maryland probationer was sent to Colorado attending a rehabilitation program, and while in Colorado, the probationer committed a heinous crime. During the transfer process, the Uniform Act for Out-of-State Parole Supervision (the Compact) was not complied with. The Subcommittee added a cross reference to the Compact at the request of the Attorney General.

Judge McAuliffe suggested that the words "requirements of the" should be added to the cross reference after the word "the" and before the word "Uniform." He explained that the Attorney General wanted the reference to the Compact to be stronger, and the additional language will make the cross reference clearer. Mr. Sykes suggested that the cross reference should begin as follows: "See the statute requiring that orders of probation..." with appropriate modifications to the remainder of the cross reference. The Committee agreed by consensus to this suggestion. Delegate Vallario commented that sometimes another state is informed of the transfer of a probationer or parolee, and the state does not reply. To avoid this, some judges will not put someone on probation, especially if a place in an out-of-state program is available immediately. The Committee approved the

Rule as amended.

Judge Johnson presented Rule 5-615, Exclusion of Witnesses, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 400 - WITNESSES

AMEND Rule 5-615 to add language permitting the court to order that a witness not be excluded, as follows:

Rule 5-615. EXCLUSION OF WITNESSES

(a) In General

Except as provided in sections (b) and (c) of this Rule, upon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. When necessary for proper protection of the defendant in a criminal action, an identification witness may be excluded before the defendant appears in open court. ~~The court may order the exclusion of a witness on~~ On its own initiative or upon the request of a party at any time, the court may order that a witness be excluded or that a witness not be excluded. The court may continue the exclusion of a witness following the testimony of that witness if a party represents that the witness is likely to be recalled to give further testimony.

(b) Witnesses Not to be Excluded

A court shall not exclude pursuant to this Rule

(1) a party who is a natural person,

(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney,

(3) an expert who is to render an opinion based on testimony given at the trial,

(4) a person whose presence is shown by a party to be essential to the presentation of the party's cause, such as an expert necessary to advise and assist counsel, or

(5) a victim of a crime of violence or the representative of such a deceased or disabled victim to the extent required by statute.

Cross reference: Code, Article 27, §773; Rule 4-231.

(c) Permissive Non-exclusion

The court may permit a child witness's parents or another person having a supportive relationship with the child to remain in court during the child's testimony.

(d) Nondisclosure

(1) A party or an attorney may not disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.

(2) The court may, and upon request of a party shall, order the witness and any other persons present in the courtroom not to disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.

(e) Exclusion of Testimony

The court may exclude all or part of the testimony of the witness who receives information in violation of this Rule.

Cross reference: *McGill v. Gore Dump Trailer Leasing, Inc.*, 86 Md. App. 416 (1991).

Source: This Rule is derived from F.R.Ev. 615 and Rules 2-513, 3-513, and 4-321.

Rule 5-615 was accompanied by the following Reporter's Note.

The case *Tharp v. State*, 362 Md. 77

(2000) held that the court has the discretion to determine that a witness should not be excluded from the courtroom. Since Rule 5-615 does not provide for this, Robert Dean, Esq., Deputy State's Attorney for Prince George's County, has suggested that Rule 5-615 be amended accordingly, and the Criminal Subcommittee is in agreement.

Judge Johnson explained that the Subcommittee is recommending a change to section (a) to clarify that a judge can order that a witness not be excluded from the courtroom during a trial. This change is in response to the case of Tharp v. State, 362 Md. 77 (2000). The Vice Chair pointed out that a judge is always able to look into whether someone has been added to the witness list as a sham to keep the person out of the courtroom. She suggested that in place of the proposed language, a cross reference to the Tharp case could be added. The Committee agreed by consensus to this suggestion.

Mr. Sykes pointed out that the Rule is internally inconsistent, because the party can request that a witness be excluded, and the court can order that a witness not be excluded. The Style Subcommittee needs to look at this problem. The Chair stated that a cross reference to the Tharp case will be added to the Rule. The Committee approved the Rule as amended.

Judge Johnson presented Form 4-504.1, Petition for Expungement of Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

BAIL BOND FORMS

AMEND Form 4-504.1 to add a reference to Code, Article 27, §388A or §388B which would comply with statutory changes and to correct a reference to an Article 27 provision which has been moved into the new Criminal Procedure Article, as follows:

Form 4-504.1. PETITION FOR EXPUNGEMENT OF RECORDS

(Caption)

PETITION FOR EXPUNGEMENT OF RECORDS

1. (Check one of the following boxes) On or about _____, (Date) I was [ ] arrested, [ ] served with a summons, or [ ] served with a citation by an officer of the _____ (Law Enforcement Agency) at _____, Maryland, as a result of the following incident _____ _____ _____.

2. I was charged with the offense of _____ _____.

3. On or about _____, (Date) the charge was disposed of as follows (check one of the following boxes):

[ ] I was acquitted and either three years have passed since disposition or a General Waiver and Release is attached.

[ ] The charge was dismissed or quashed and either three years have passed since disposition or a General Waiver and

Release is attached.

[ ] A judgment of probation before judgment was entered on a charge that is not a violation of Code*, Transportation Article, §21-902 or Code, Article 27, §388A or §388B and either (a) at least three years have passed since the disposition, or (b) I have been discharged from probation, whichever is later. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] A Nolle Prosequi was entered and either three years have passed since disposition or a General Waiver and Release is attached. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] The proceeding was placed on the Stet docket and three years have passed since disposition. Since the date of disposition, I have not been convicted of any crime, other

than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] The case was compromised pursuant to Code*, Article 27, §12A-5 or former Code*, Article 10, §37 and three years have passed since disposition.

[ ] On or about _____ , I was granted
(Date)
a full and unconditional pardon by the Governor for the one criminal act, not a crime of violence as defined in Code*, Article 27, §643B (a), of which I was convicted. More than five years, but not more than ten years, have passed since the Governor signed the pardon, and since the date the Governor signed the pardon I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

WHEREFORE, I request the Court to enter an Order for Expungement of all police and court records pertaining to the above arrest, detention, confinement, and charges.

I solemnly affirm under the penalties of perjury that the

contents of this Petition are true to the best of my knowledge, information and belief, and that the charge to which this Petition relates was not made for any nonincarcerable violation of the Vehicle Laws of the State of Maryland, or any traffic law, ordinance, or regulation, nor is it part of a unit the expungement of which is precluded under Code, ~~Article 27, §738~~ Criminal Procedure Article, §10-107.

_____ _____
(Date) Signature

_____
(Address)

_____

_____
(Telephone No.)

* References to "Code" in this Petition are to the Annotated Code of Maryland.

Form 4-504.1 was accompanied by the following Reporter's Note.

> House Bill 261, passed by the 2001 legislature, added another category of crimes with which someone is charged which would prohibit the expungement of criminal records, even though a probation before judgment has been entered. The additional crimes are causing the death or the life-threatening injury of another by driving or operating a motor vehicle or a vessel while the person is intoxicated or under the influence of alcohol, drugs, or controlled dangerous substances. (Code, Article 27, §388A and §388B). The Criminal Subcommittee is recommending the addition of a reference to these Code provisions in Form 4-504.1.
>
> A cross reference to Article 27, §738 at the end of the form is being changed to reflect its new placement in the Criminal Procedure Article.

Judge Johnson explained that the General Assembly passed House Bill 261 which added another category of crimes with which someone is charged which would prohibit the expungement of criminal records, even though a probation before judgment has been entered. The added category is Code, Article 27, §§388A and 388B, causing the death or the life-threatening injury of another by driving or operating a motor vehicle or a vessel while under the influence of alcohol, drugs, or controlled dangerous substances. The Subcommittee is recommending that the reference to this Code provision be added to Form 4-504.1, and the Committee agreed by consensus to this recommendation. The Committee approved the Form as presented.

Agenda Item 3. Consideration of proposed "housekeeping" amendments to rules affected by the new Criminal Procedure Article: Rule 4-217 (Bail Bonds), Rule 4-221 (Preliminary Hearing in District Court), Rule 4-248 (Stet), Rule 4-301 (Beginning of Trial in District Court), Rule 4-324 (Motion for Judgment of Acquittal), Rule 4-331 (Motions for New Trial, Rule 4-340 (Procedures Required After Sentencing in Controlled Dangerous Substance Cases), Rule 4-342 (Sentencing – Procedure in Non-Capital Cases), Rule 4-344 (Sentencing – Review), Rule 4-351 (Commitment Record), Rule 4-361 (Disability of Judge), Rule 4-406 (Hearing), Rule 4-501 (Applicability), Rule 4-502 (Expungement Definitions), Rule 4-503 (Application for Expungement When No Charges Filed), Form 4-503.2 (General Waiver and Release), Rule 4-504 (Petition for Expungement When Charges Filed), Rule 4-505 (Answer to Application or Petition), Rule 4-507 (Hearing), Rule 4-508 (Court Order for Expungement of Records), Rule 4-509 (Appeal), Rule 4-512 (Disposition of Expunged Records), Rule 4-601 (Search Warrants), Rule 5-615 (Exclusion of Witnesses), Rule 8-204 (Application for Leave to Appeal to Court of Special Appeals), Rule 8-422 (Stay of Enforcement of Judgment), Rule 11-102A (Transfer of Jurisdiction from Court Exercising Criminal Jurisdiction), Rule 11-118 (Parents' Liability – Hearing – Recording and Effect), Rule 11-601 (Expungement of Criminal Charges Transferred to the Juvenile Court), Rule 15-207 (Constructive Contempt; Further Proceedings), Rule 15-304 (Alternate Remedy – Post Conviction Procedure Act), Rule 16-101 (Administrative Responsibility), Rule 16-308 (Court Information System), Rule 16-503 (Court Information System), and

Judge Johnson explained that all of the rules listed in Agenda Item 3 contained "housekeeping" changes, reflecting the change in references to Article 27 which have now been moved to the new Criminal Procedure Article in the Code. The Vice Chair commented that in section (c) of Rule 4-217, Bail Bonds, the Committee had decided to eliminate the reference to "law enforcement officer." Judge Dryden responded that Code, Article 87, §6 allows law enforcement officers to take the bail bonds. The Committee did not want to emphasize this. The Vice Chair suggested that the court can decide who can accept bail bonds, and the legislature should reconsider the statute allowing law enforcement officers to take the bonds. Judge Vaughan remarked that he was not enthusiastic about judges accepting the bonds. The Reporter suggested that the minutes of the April 2001 meeting at which this was discussed should be checked to see how the Committee resolved this issue.

Judge McAuliffe noted that Rule 5-615, Exclusion of Witnesses, which contains the change in Code references was discussed earlier on another issue, and a change was recommended. He cautioned that the Rule needs to reflect all of the proposed changes.

The Reporter stated that Cathy Cox, Administrative Assistant, and the Assistant Reporter had spent many hours working on all of the necessary "housekeeping" changes to the Rules, and she expressed appreciation for their diligence.

The Committee approved all of the changes to the Rules in Agenda Item 3.

Agenda Item 4. Consideration of a proposed amendment to Rule 10-301 (Petition for Appointment of a Guardian of Property)

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Mr. Sykes presented Rule 10-301, Petition for Appointment of a Guardian of Property, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 10 - GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 300 - GUARDIAN OF PROPERTY

AMEND Rule 10-301 (d) to add language providing for substitution for physician's certificates, as follows:

Rule 10-301. PETITION FOR APPOINTMENT OF A GUARDIAN OF PROPERTY

(a) Who May File

Any interested person may file a petition requesting a court to appoint a guardian of the property of a minor or an alleged disabled person.

(b) Venue

(1) Resident

If the minor or alleged disabled person is a resident of Maryland, the petition shall be filed in the county where the minor or alleged disabled person resides, even if the person is temporarily absent.

(2) Nonresident

If the minor or disabled person does not reside in this State, the petition shall be filed in the county in which a petition for guardianship of the person may be filed, or in the county where any part of the property is located. For purposes of determining the situs of property, the situs of tangible personal property is its location; the situs of intangible personal property is the location of the instrument, if any, evidencing a debt, obligation, stock or chose in action, or the residence of the debtor if there is no instrument evidencing a debt, obligation, stock, or chose in action; and the situs of an interest in property held in trust is located where the trustee may be sued.

(c) Contents

The petition shall be captioned "In the Matter of . . ." [stating the name of the minor or alleged disabled person]. It shall be signed and verified by the petitioner and shall contain at least the following information:

(1) The petitioner's name, address, age, and telephone number;

(2) The petitioner's familial or other relationship to the alleged disabled person;

(3) Whether the person who is the subject of the petition is a minor or an alleged disabled person and, if an alleged disabled person, a brief description of the alleged disability;

(4) The reasons why the court should appoint a guardian of the property and, if the subject of the petition is an alleged disabled person, allegations demonstrating an inability of the alleged disabled person to manage the person's property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance;

Cross reference: Code, Estates and Trusts Article, §13-201 (b) and (c).

(5) An identification of any instrument nominating a guardian for the minor or alleged disabled person or constituting a durable power of attorney;

Cross reference: Code, Estates and Trusts Article, §13-207 (a) (2) and (5).

(6) If a guardian or conservator has been appointed for the alleged disabled person in another proceeding, the name and address of the guardian or conservator and the court that appointed the guardian or conservator. If a guardianship or conservatorship proceeding was previously filed in any other court, the name and address of the court, the case number, if known, and whether the proceeding is still pending in that court.

(7) The name, age, sex, and address of the minor or alleged disabled person, the name and address of the persons with whom the minor or alleged disabled person resides, and if the minor or alleged disabled person resides with the petitioner, the name and address of another person on whom service can be made;

(8) To the extent known or reasonably ascertainable, the name, address, telephone number, and nature of interest of all interested persons and all others exercising any control over the property of the estate;

(9) If the minor or alleged disabled person is represented by an attorney, the name, address, and telephone number of the attorney.

(10) The nature, value, and location of the property of the minor or alleged disabled person;

(11) A brief description of all other property in which the minor or alleged disabled person has a concurrent interest with one or more individuals;

(12) A statement that the exhibits required by section (d) of this Rule are attached or, if not attached, the reason that they are absent; and

(13) A statement of the relief sought.

(d) Required Exhibits

The petitioner shall attach to the petition as exhibits (1) a copy of any instrument nominating a guardian; (2) any physician's or psychologist's certificates required by Rule 10-202; (3) if the petition is for the appointment of a guardian for an alleged disabled person who is a beneficiary of the Department of Veterans Affairs, a certificate of the Administrator of that Department or duly authorized representative may be substituted in lieu of the physician's or psychologist's certificates in accordance with Rule 10-202 (a)(2); and ~~(3)~~ (4) if the petition is for the appointment of a guardian for a minor who is a beneficiary of the Department of Veterans Affairs, a certificate

> of the Secretary of that Department or any authorized representative of the Secretary, in accordance with Code, Estates and Trusts Article, §13-802.
>
> Source: This Rule is derived as follows:
> Section (a) is derived from former Rule R71 a.
> Section (b) is derived from former Rule R72 a and b.
> Section (c) is in part derived from former Rule R73 a and is in part new.
> Section (d) is new.

Rule 10-301 was accompanied by the following Reporter's Note.

> Former Rule R73 b 2 allowed the Department of Veterans Affairs to substitute its own internal procedures in place of the requirement that two physicians must certify that the person who is the subject of the guardianship petition is disabled. At first this provision was not carried forward when the Fiduciary Rules were revised, but in 1998, Rule 10-202 (a)(2) was changed so that when a guardianship of the person of a Department of Veterans Affairs beneficiary is filed, a certificate of the Veterans Affairs Administrator may substitute for physician's certificates setting forth the fact that the person has been rated disabled. A request has been made on behalf of the Department of Veterans Affairs to extend the Veterans Administrator beneficiary exception to guardianships of the property of an alleged disabled person. This would entail a change to Rule 10-301 (d), so that it is consistent with subsection (a)(2) of Rule 10-301. The lawyer requesting this change had intended for it to be made at the time Rule 10-202 (a)(2) was modified.

Mr. Sykes explained that this change was requested by the Department of Veterans Affairs ("the Department"). Some time ago, the Department had been concerned about its ability to obtain the two professionals' certificates as to the competency

or incompetency of a veteran, as required by the Rules. The Department has its own internal procedures for certifying incompetency, and when it asked for a substituted procedure in the Rules, Rule 10-202 (a)(2), Certificates -- Requirement and Content, in guardianship of the person cases, was changed accordingly. The Department is asking for conforming language in Rule 10-301 which pertains to guardianship of the property.

The Vice Chair suggested that in subsection (d)(2) the language "physician's or psychologist's" should be deleted, and the language in subsection (d)(2) should be changed to read "any certificates required by Rule 10-202." Mr. Sykes pointed out that ordinarily, problems do not arise. The Department is able to handle the cases. If the veterans were reasonably aware, they could complain. Mr. Hochberg inquired as to who "any interested person" could be, but the reality is that contests do not often arise. Judge Kaplan remarked that the Medical Committee in Baltimore City decides whether a person is incompetent, and this has never been contested. Judge Johnson commented that in 15 years on the bench in Prince George's County, there has never been a contest about competency in a case involving the Department.

The Committee approved the Rule as presented.

Agenda Item 5. Consideration of a proposed amendment to Form Interrogatories, Form No. 8 (Personal Injury Interrogatories)

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The Reporter presented Form Interrogatories, Form No. 8, for the Committee's consideration.

AMEND Form Interrogatories, Form No. 8, to change certain terminology, as follows:

Form 8. Personal Injury Interrogatories.

Interrogatories

1. Describe each injury sustained by you as a result of the occurrence, and state whether the injury was temporary or is permanent. (Standard Personal Injury Interrogatory No. 1.)

2. Describe all current symptoms, ~~handicaps~~ disabilities, and other physical or mental conditions that you claim are a result of the occurrence. (Standard Personal Injury Interrogatory No. 2.)

3. Identify each health care provider who has examined or treated you as a result of the occurrence, and for each provider state the date and purpose of each examination or treatment. (Standard Personal Injury Interrogatory No. 3.)

4. Identify all hospitals or other facilities at which you have been examined or treated as a result of the occurrence, and for each state the dates of your examinations or treatments and, if you were admitted, the dates of your admissions and discharges. (Standard Personal Injury Interrogatory No. 4.)

5. Identify all health care providers, other than those otherwise identified in your answers, who have examined or treated you during the period commencing five years before the occurrence and extending to the present, identify all hospitals and other facilities at which you were examined or treated, and describe the condition for which you were examined or treated. (Standard Personal Injury Interrogatory No. 5.)

6. State whether you claim past or

future loss of earnings or earning capacity as a result of the occurrence and, if so, state for each category the amount claimed, the method by which you computed that amount, the figures used in that computation, and the facts and assumptions upon which your claim is based. (Standard Personal Injury Interrogatory No. 6.)

7. State the amount you reported as earned income on your federal income tax returns for each of the past three years and whether you have a copy of the returns. (Standard Personal Injury Interrogatory No. 7.)

8. Itemize all expenses and other economic damages, past and future, that you claim are a result of the occurrence and as to each item claimed identify the item, the amount claimed for that item, the method, if any, by which you computed the amount, the figures used in that computation, and the facts and assumptions upon which your claim is based. (Standard Personal Injury Interrogatory No. 8.)

9. State whether prior or subsequent to the occurrence you have sustained any accidental injury for which you received medical care or treatment. If so, describe the date and circumstances of the accidental injury and identify all health care providers, including hospitals and other institutions, that furnished care to you. (Standard Personal Injury Interrogatory No. 9.)

Form No. 8 was accompanied by the following Reporter's Note.

Chapter 255, Acts of 2001 (HB 678) changes all statutory references describing a person as "handicapped" to describing the person as an "individual with a disability." The proposed amendment to Form 8 conforms the Form to that terminology change.

The Reporter explained that House Bill 678, enacted in 2001, changes all statutory references to a "handicapped" person to an "individual with a disability." The Legislative Subcommittee

directed that all of the Rules of Procedure be searched to find any uses of the old terminology. Section 2 of Form No. 8 contained the only reference that needed to be changed.

The Committee agreed by consensus to make this change.

Agenda Item 6. Reconsideration of certain proposed rules changes concerning jury trials: Rule 2-511 (Trial by Jury), Rule 2-512 (Jury Selection), and Rule 4-312 (Jury Selection)

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Mr. Johnson presented Rules 2-511 (Trial by Jury), 2-512 (Jury Selection), and 4-312 (Jury Selection) for the Committee's reconsideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-511 (b) to allow the parties to enter into certain agreements concerning the deliberations and verdict of the jury, as follows:

Rule 2-511. TRIAL BY JURY

(a) Right Preserved

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

(b) Number of Jurors

The jury shall consist of six persons and any alternate jurors selected in accordance with Rule 2-512 (b). ~~With the approval of the court, the parties may agree to accept a verdict from fewer than six jurors if during the trial one or more of the six jurors becomes or is found to be unable~~

~~or disqualified to perform a juror's duty.~~ Unless the parties otherwise agree in writing or on the record, (1) no more than six jurors may deliberate, (2) the verdict shall be unanimous, and (3) no verdict shall be taken from a jury reduced in size to fewer than six jurors.

(c) Separation of Jury

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

(d) Advisory Verdicts Disallowed

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

Cross reference: Rule 2-325.

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

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

The proposed amendment to Rule 2-511 allows the parties to agree that alternate jurors may deliberate and participate in the verdict. It also allows the parties to agree to accept a verdict that is not unanimous. Additional changes to section (b) of the Rule are stylistic.

AMEND Rule 2-512 to add certain provisions concerning alternate jurors, to add a new section (d) that provides for an advance questionnaire to be completed by prospective jurors, to delete a certain phrase concerning the identification of jurors, and to clarify that the jury foreperson may either be selected by the court or elected by the jury, as follows:

Rule 2-512. JURY SELECTION

(a) Challenge to the Array

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

(b) Alternate Jurors

The court may direct that one or more jurors be called and impanelled to sit as alternate jurors. Before the jury selection process begins, the court shall inform the parties, but not the prospective jurors, which seats in the jury box will be occupied by alternate jurors. Each alternate juror shall be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as a juror. If the parties have not agreed to allow the alternates to deliberate, the court shall inform the jury that only six of them will deliberate and participate in the verdict. The court may disclose to the jurors which of them are alternates either immediately following the jury selection process or when the jury retires to consider its verdict. Any juror who, before the time the ~~jury retires to consider its verdict,~~ juror's service is completed, becomes or is found to be unable or disqualified to perform a juror's duty

shall be replaced by an alternate juror in the order of selection. ~~An alternate juror shall be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as a juror.~~ Unless the parties agree otherwise, ~~An~~ an alternate juror who does not replace a juror shall ~~be discharged when the jury retires to consider its verdict~~ not deliberate or participate in the verdict and shall be discharged at such time as the court concludes that the juror's service is completed.

Cross reference: See Rule 2-511 (b).

(c) Jury List

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

(d) Advance Questionnaire

Upon the request of a party or on its own initiative, the court may direct that prospective jurors answer questions in writing, under oath, before the jury selection process takes place. The court may require appropriate safeguards to protect disclosure of the identities of the prospective jurors, including identification of responses to the questionnaires only by juror numbers. Before the questions are asked, the court shall give the parties a reasonable opportunity to propose questions to be included in the questionnaire and to object to questions proposed by another party or the court. The responses to the questionnaire shall be provided to each party before the court begins the jury selection process. The court shall give the parties an opportunity to be heard before it excuses a prospective juror on the basis of a fact-specific case-related response. Except as otherwise provided in this section or ordered by the court, the responses are confidential

and not available for public inspection. The court may in its discretion determine if costs should be imposed and how they may be apportioned.

Committee note: Advance questionnaires are recommended for use in complex or protracted litigation. The use of the questionnaire is intended to reduce the amount of time required for the examination of jurors under section (e) of this Rule and increase the privacy of jurors who may be reluctant to respond to certain questions in open court.

~~(d)~~ (e) Examination of Jurors

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

~~(e)~~ (f) Challenges for Cause

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

~~(f)~~ (g) Additional Jurors

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

~~(g)~~ (h) Designation of List of Qualified Jurors

Before the exercise of peremptory challenges, the court shall designate from the jury list those jurors who have qualified after examination. The number designated

shall be sufficient to provide the number of jurors and alternates to be sworn after allowing for the exercise of peremptory challenges. The court shall at the same time prescribe the order to be followed in selecting the jurors and alternate jurors from the list.

~~(h)~~ (i) Peremptory Challenges

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

~~(i)~~ (j) Impanelling the Jury

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

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 754 a and is consistent with former Rule 543 c.
Section (b) is derived from former Rule 751 b and is consistent with former Rule 543 b 3.
Section (c) is new.
Section (d) is new.
Section ~~(d)~~ (e) is derived from former Rules 752 and 543 d.
Section ~~(e)~~ (f) is derived from former Rule 754 b.
Section ~~(f)~~ (g) is consistent with former Rule 543 a 5 and 6.
Section ~~(g)~~ (h) is new with exception of the last sentence which is derived from former Rule 753 b 1.
Section ~~(h)~~ (i) is derived from former Rule 543 a 3 and 4.

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

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

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

Additionally, proposed changes to section (b) of Rule 2-512 provide that if alternate jurors are impanelled, the court may disclose to the jury panel which of them are alternates either immediately following their selection or when the jury retires to consider its verdict. The Subcommittee believes that allowing flexibility as to when the judge tells the jurors which of them are alternates is preferable to establishing a point in time from which there can be no deviation. The Subcommittee also proposes a change as to when an alternate juror is discharged, allowing the judge to keep the alternates as such until all of the jurors have been discharged. If, for example, in a case in which punitive damages may be awarded, one of the original jurors becomes ill and is unable to serve during the punitive damage phrase of the case, the alternate would be available to serve in place of that juror.

A proposed amendment to section (d) (relettered section (e)) allows jurors to be identified by a method other than the juror's name during a roll call.

A proposed amendment to current section (i) (relettered section (j)) makes clear that the jury foreperson may be either selected by the court or elected by the jury.

The above recommendations of the Trial Subcommittee concerning alternate jurors are intended only as an interim measure. The Subcommittee believes that the concept of the "alternate juror" should be eliminated in civil cases and that all jurors who have not been excused from service during trial or deliberation by the court for good cause should participate in the verdict. The Subcommittee strongly endorses the proposed amendments to Rules 2-511 and 2-512 concerning alternate jurors that were presented to the Rules Committee at its May 2001 meeting and would conform those Rules to federal practice (Fed.R.Civ.P. 48 and Fed.R.Civ.P 47 (c)). The Subcommittee urges prompt legislative consideration of an appropriate amendment to Code, Courts Article, §8-306.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-312 to add a new section (d) that provides for an advance questionnaire to be completed by prospective jurors, to delete a certain phrase concerning the identification of jurors, and to clarify that the jury foreperson may either be selected by the court or elected by the jury, as follows:

Rule 4-312. JURY SELECTION

(a) Challenge to the Array

A party may challenge the array of jurors on the ground that its members were not selected, drawn, or summoned according to law or on any other ground that would disqualify the panel as a whole. A challenge to the array shall be made and determined

before any individual juror from that array is examined, except that the court for good cause may permit it to be made after the jury is sworn but before any evidence is received.

(b) Alternate Jurors

(1) Generally

An alternate juror shall be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as a juror.

(2) Capital Cases

In cases in which the death penalty may be imposed, the court shall appoint and retain alternate jurors as required by Code, Article 27, §413 (m).

(3) Non-Capital Cases

In all other cases, the court may direct that one or more jurors be called and impanelled to sit as alternate jurors. Any juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty, shall be replaced by an alternate juror in the order of selection. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict.

(c) Jury List

Before the examination of jurors, each party shall be provided with a list of jurors that includes the name, age, sex, education, and occupation of each juror, the occupation of each juror's spouse, and any other information required by the county jury plan. When the county jury plan requires the address of a juror, the address shall be limited to the city or town and zip code and shall not include the juror's street address or box number, unless otherwise ordered by the court.

(d) Advance Questionnaire

The court may, and in cases in which the death penalty may be imposed shall, direct that advance questionnaires be sent to prospective jurors answer questions in writing, under oath, before the jury selection process takes place. The court may require appropriate safeguards to protect disclosure of the identities of the prospective jurors, including identification of responses to the questionnaires only by juror numbers. Before the questions are asked, the court shall give the parties a reasonable opportunity to propose questions to be included in the questionnaire and to object to questions proposed by another party or the court. The responses to the questionnaire shall be provided to each party before the court begins the jury selection process. The court shall give the parties an opportunity to be heard before it excuses a prospective juror on the basis of a fact-specific case-related response. Except as otherwise provided in this section or ordered by the court, the responses are confidential and not available for public inspection. The Clerk of the Court shall pay the cost of the questionnaires.

Committee note: In addition to cases in which the death penalty may be imposed, advance questionnaires are recommended for use in complex or multi-defendant criminal cases. The use of the questionnaire is intended to reduce the amount of time required for the examination of jurors under section (e) of this Rule and increase the privacy of jurors who may be reluctant to respond to certain questions in open court.

~~(d)~~ (e) Examination of Jurors

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

stand and be identified ~~when called by name~~.

~~(e)~~ (f) Challenges for Cause

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

~~(f)~~ (g) Additional Jurors

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

~~(g)~~ (h) Designation of List of Qualified Jurors

Before the exercise of peremptory challenges, the court shall designate from the jury list those jurors who have qualified after examination. The number designated shall be sufficient to provide the number of jurors and alternates to be sworn after allowing for the exercise of peremptory challenges pursuant to Rule 4-313. The court shall at the same time prescribe the order to be followed in selecting the jurors and alternate jurors from the list.

~~(h)~~ (i) Impanelling the Jury

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

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 754 a.
Section (b) is derived from former Rule 754 b.
Section (c) is new.
Section (d) is new.
Section ~~(d)~~ (e) is derived from former Rule 752.
Section ~~(e)~~ (f) is derived from former Rule 754 b.

Section ~~(f)~~ (g) is new.
Section ~~(g)~~ (h) is derived from former Rule 753 b 1.
Section ~~(h)~~ (i) is derived from former Rule 751 c and d.

Rule 4-312 was accompanied by the following Reporter's Note.

The Trial Subcommittee recommends the addition of proposed new section (d) to Rule 4-312 for the reasons stated in the first paragraph of the Reporter's Note to the proposed amendment to Rule 2-512.

Additionally, a proposed amendment to section (d) (relettered section (e)) allows jurors to be identified by a method other than the juror's name during a roll call and a proposed amendment to current section (h) (relettered section (i)) makes clear that the jury foreperson may either be selected by the court or elected by the jury.

Mr. Johnson said that at the May 2001 meeting, the Committee discussed some of the Rules relating to jurors. The Trial Subcommittee modified section (b) of Rule 2-511 based on that discussion. The concern is the wording of Code, Courts Article, §8-306, which provides that a jury shall consist of six jurors. Because of the language of the statute, the Rule cannot provide that alternates are to be included in the jury. Mr. Brault had suggested that one approach could be for the statute to be changed to conform to the District of Columbia approach, which provides for nine jurors and no alternates. At least six have to remain to deliberate and reach a verdict. Mr. Maloney had pointed out at the May meeting that the change to the Rule proposed at that meeting violates the statute, and any change must be made by the legislature. The Rules Committee's view is that the legislature should be asked to amend the statute to

conform it to the Maryland Constitution which provides in Article 5 of the Declaration of Rights that a jury must consist of "at least six" jurors. Mr. Brault had stated that his preference is for a return to the 12-person jury. This is in accordance with the view of the American College of Trial Lawyers.

The Vice Chair asked how long the District of Columbia has been using 9-person juries, and Mr. Brault replied that it has been that way for three to five years. Mr. Johnson commented that the Trial Subcommittee did not recommend nine jurors, but recommended that the alternates could remain. The Subcommittee noted that the statute was different than the Declaration of Rights. In practice, alternates have been allowed to participate in deliberations by agreement of the parties. This results in jurors feeling good about their jury service. The Rule in the meeting materials conforms to the suggestions at the May discussion, which included a direction not to circumvent the statute. The Chair said that he had spoken with some circuit court judges on this issue. The Honorable Robert Cahill of the Circuit Court for Baltimore County had sent a letter to the Rules Committee regarding an alternate juror who was unhappy about being excused before deliberations. On the other hand, the Honorable James Smith of the Circuit Court for Baltimore County mentioned a case in which alternates who had the opportunity to deliberate stated that they would prefer to go home.

Mr. Johnson pointed out that in the discussion of Rule 2-512, the Committee considered when to identify the alternates as alternates. If they are told at the beginning of the case that

they are alternates, they may not pay attention during the trial. If they find out at the end of the case and do not deliberate, they may be angry. Different judges have different practices concerning the alternates. The Subcommittee proposal is set out in section (b) of Rule 2-512. Mr. Brault questioned whether the discussion should be tabled to see if the legislature takes any action. The Reporter said that the proposed amendments to the jury trial rules that were transmitted to the Court of Appeals by the 141st Report, dated October 26, 1998, were noncontroversial. They were remanded to the Committee for its reconsideration after the Council on Jury Use and Management issued its report. That Report was issued April 12, 2000, and the Committee has considered it. She suggested that the Rules not be delayed further. The Vice Chair expressed her opposition to sending the Rules back to the Court of Appeals until after the legislature has considered the matter.

Judge Heller expressed the opinion that the version of the Rules in today's meeting materials is preferable to the version of the Rules currently in effect. It should be up to the Court of Appeals, not the legislature, to decide these issues. Mr. Johnson noted that at the May meeting, the vote on the Rules was very close, nine to eight. The Committee is concerned that the Rule not interfere with the legislative intent. The Chair said that the Committee can send to the legislature a draft of a Rule that provides for all of the jurors who are alternates and were present throughout the trial to deliberate, and ask the legislature whether it prefers a jury of six or if the Rule can

be changed to provide that the jury will consist of the number of jurors present at the end of the trial. The legislature can determine if it wishes to change the statute.

Mr. Brault remarked that his understanding was that the concept of alternates would be eliminated. Mr. Johnson responded that in its original proposals that were considered at the May 2001 meeting, the Subcommittee eliminated the concept of alternates. A certain number of jurors would be seated, and the verdict would be taken from no less than six jurors. The Reporter explained that that proposed Rule change had been based on Fed.R.Civ.P. 48 and portions of Fed.R.Civ.P. 47 (c). Mr. Johnson added that although the concept of alternates had been removed from the Rule, the Subcommittee added it back in, following the discussions at the May meeting.

The Chair said that Rule 2-511 is consistent with the Maryland Constitution and the statute. Mr. Brault remarked that the Rule does not address the problem of an incapacitated juror who has to leave the deliberations. The Chair pointed out that Rule 4-312, Jury Selection, refers to Code, Article 27, §413 (m) which provides a procedure for alternates when a death penalty case is being tried, and he suggested that this statute may provide some guidance for Rule 2-511. Mr. Johnson commented that in asbestos trials in Baltimore City, alternates are held in abeyance until a certain stage of the trial is reached. Judge McAuliffe added that once the second stage of an asbestos trial is reached, an alternate cannot be used to replace a juror. Mr. Johnson responded that the proposed changes to Rule 2-512 take

care of this. Judge McAuliffe observed that if more than the appropriate number of jurors are available for the deliberation, some can be excused.

Judge Heller questioned whether the jury provisions in the Criminal Rules could be modified similarly. The Reporter noted that this would require an amendment to the Maryland Constitution. Mr. Bowen suggested that the legislature should be informed as to the problem of losing jurors during the deliberations. The Vice Chair expressed the opinion that a larger jury better reflects a cross-section of society. The Chair suggested that the legislature should be asked to change the statute, so the Rules will not supersede the statute. Drafts of a letter to the legislature will be available at the September Rules Committee meeting. He stated that Rule 2-512 would be held until the legislature takes action.

Mr. Bowen pointed out that there is a typographical error in the first sentence of Rule 4-312 (d). The third line should provide that the questions shall be answered in writing under oath. Mr. Johnson noted that the cost issue was handled by providing that the clerk of the court should pay for the cost of the questionnaires. Judge Missouri had said that the questionnaires are used in death penalty cases, and there is some money available from the counties to pay for this. The Reporter pointed out that section (d) of Rule 4-312 was intended to conform to section (d) of Rule 2-512. The Vice Chair said that the Style Subcommittee will check the two provisions for consistency.

Mr. Titus commented that at the May meeting, he had suggested that in the first sentence of section (d) of Rule 4-312, the word "sent" should be changed to the word "submitted." It may be appropriate to hand the questionnaires to the jurors on the day of trial. This change in wording eliminates the idea that the questionnaires must be mailed to the jurors before the trial date. The Reporter responded that the Committee had agreed with this suggestion, and that the Style Subcommittee will review the language. The Committee approved the substance of Rule 4-312. The Chair stated that Rules 2-511 and 2-512 will be reconsidered.

The Reporter said that the Report of the Trial Subcommittee concerning Rule 2-541 is included in the meeting materials as an Information Item. The Report reads as follows:

**REPORT OF THE TRIAL SUBCOMMITTEE CONCERNING RULE 2-541**

By Rules Order dated June 6, 2000, effective October 1, 2000, the Court of Appeals adopted the following amendment to subsection a 2 of Rule 9-207 (Referral of Matters to Masters):

> (2) By Order <u>on Agreement of the Parties</u>.
>
> **[**On motion of any party or on its own initiative**]** <u>By agreement of the parties</u>, **[**the court, by order, may refer to a master**]** any other matter or issue arising under this Chapter that is not triable of right before a jury <u>may be referred to the master by order of the court</u>.

This provision was carried forward and renumbered Rule 9-208 (a)(2) in the revision of Title 9, Chapter 200 that was adopted by the Court by Rules Order dated March 5, 2001, effective July 1, 2001.

During its consideration of this change, the Rules Committee observed that the comparable subsection of Rule 2-541 (Masters) reads as follows:

> (b) Referral of Cases
>
> . . .
>
> (2) On motion of any party or on its own initiative, the court, by order, may refer to a master any other matter or issue not triable of right before a jury.

The Committee directed that the Trial Subcommittee consider whether Rule 2-541 (b)(2) should be amended to conform to Rule 9-208 (a)(2), that is, to allow the court to refer a matter to a master under Rule 2-541 (b)(2) only if the parties agree to the referral.

> The Trial Subcommittee recommends no change to Rule 2-541 (b)(2). The Subcommittee believes that it is important for the court to retain the authority to order referral of matters to a master on the court's own initiative, with or without the agreement of the parties. This authority is particularly important when the subject matter of the litigation involves complex technical or financial matters or highly esoteric issues. Additionally, the Subcommittee notes that Rule 2-541 (b)(2) is parallel to the first sentence of section (b) of Rules 2-542 (Examiners) and 2-543 (Auditors), which provides for the appointment of examiners and auditors on the court's own initiative and should continue to do so.

The Subcommittee had been asked whether subsection (b)(2) should be conformed to Rule 9-208 (a)(2) allowing the court to refer a matter to a master only if the parties agree to the referral. The Vice Chair stated that she strongly disagreed with the Subcommittee report. The way the Rule is written now, in theory, the court could send the entire case to a master to be tried. She moved that the Rule be amended to require the agreement of the parties.

The Chair said that the role of masters is in transition, and the Court of Appeals is considering what that role should be in the future. He asked if there was a second to the Vice Chair's motion to amend Rule 2-541 (b)(2), and there was no second. The Vice Chair commented that the Committee should inform the Court of Appeals that Rule 2-541 is not being changed. The Rules prohibit the transfer of an entire domestic case to a master without the consent of the parties, but in all other areas of the law, the entire case could be sent to a master. Judge

Missouri responded that this has not been the practice. Throughout the state, when a judge appoints a special master, it is for a specific purpose. The Vice Chair reiterated her concern that the Rule as it is currently worded permits the transfer of the entire case. Ms. Ogletree remarked that if it has not happened up until now, it probably will not.

The Chair adjourned the meeting.