

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

NOTICE OF PROPOSED RULES CHANGES

The Rules Committee has submitted its One Hundred Sixty-Fifth Report to the Court of Appeals, transmitting thereby proposed new Rule 16-110 and proposed amendments to Rules 1-322, 4-216, 4-242, 5-404, 5-804, 16-109, and 16-901 and Rule 13 of the Rules Governing Admission to the Bar of Maryland.

The Committee's One Hundred Sixty-Fifth Report and the proposed new rules and amendments are set forth below.

Interested persons are asked to consider the Committee's Report and proposed rules changes and forward on or before October 12, 2010 any written comments they may wish to make to:

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Reporter, Rules Committee  
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Annapolis, Maryland 21401

BESSIE M. DECKER

Clerk

Court of Appeals of Maryland



Throughout the rest of the State, the policies in both the Circuit and District Courts vary in their details but generally preclude members of the public from possessing those devices in court facilities. Most seem to allow employees to have the devices. Some permit lawyers and uniformed law enforcement personnel to have them. Some draw distinctions between cell phones and lap top computers or between cell phones with cameras and those without cameras. Some allow anyone not required to pass through the metal detector to have the devices but not anyone who must go through such a detector. In some courts that do not permit electronic devices, the security personnel will take and hold the device until the person leaves. In others, that service is not available, and the person must find some place outside the court facility for the device.

Initially, after several hearings at both the subcommittee and full Committee level, the Committee voted to leave the matter in the hands of the various Circuit and District administrative judges. Shortly thereafter, however, the Maryland State Bar Association formally recommended a uniform policy permitting members of the Association to bring such devices into the courthouses, which was followed by similar recommendations by the Maryland-Delaware-D.C. Press Association, the Washington Post, the Baltimore Sun, and the Maryland-D.C.-Delaware Broadcasters Association. In light of those recommendations, the Chair of the Committee inquired whether the Court desired the Committee to attempt to develop a proposal for a uniform policy and was advised that the Court did desire such a policy, the substance of which, of course, was for the Court to determine.

Proposed Rule 16-110 was then developed. It follows the basic practice in Baltimore City and Anne Arundel, Baltimore, Howard, Montgomery, and Prince George's Counties (except for the District Court in Baltimore County) and in the U.S. District Court, of generally allowing such devices to be brought into the courthouses but controlling their use in courtrooms and other designated areas. A majority of the Committee was persuaded that:

(1) these devices, particularly cell phones and their progeny, have become so commonplace and are so routinely carried and relied upon that it would be a huge inconvenience to prohibit the public from bringing them into court facilities;

(2) drawing distinctions between those who may bring such devices into the courthouse - court officials and employees, officials and employees of other agencies occupying the courthouse, attorneys, jurors, law enforcement personnel - and everyone else is not advisable;

(3) to the extent these devices present a security issue, which they may, the courts in which that issue is likely the most serious have concluded that it may be dealt with by regulating the use of the devices rather than prohibiting them altogether; and

(4) there is no substantial justification for having different policies from county to county or between the Circuit Court and the District Court in the same county.

The proposed Rule recognizes the legitimate security concerns and attempts to strike a balance by (i) carefully regulating the use of these devices in courtrooms, (ii) allowing the local administrative judge to prohibit their possession in jury deliberation rooms and in certain other designated areas when special circumstances justify such a prohibition, and (iii) providing sanctions for the violation of restrictions.

**Category Two** consists of amendments to Rule 1-322 that would require a Maryland court to accept a mandate from the United States Supreme Court transmitted by electronic means. The Committee was asked by the Court, through its Clerk, to develop such a Rule.

**Category Three** consists of amendments to two rules of evidence, Rules 5-404 and 5-804. The proposed amendment to Rule 5-404 would conform to a change in the comparable Federal Rule 404 (a) (1), to provide that if a defendant in a criminal case or a respondent in a juvenile delinquency case offers evidence attacking a victim's character trait, the prosecutor may offer evidence of the same trait in the defendant. The change arose from the practice in certain gang-related cases of a defendant gang member accusing the victim of being a violent person and the prosecutor being unable to bring out a similar trait in the accused. Some style changes are also recommended.

The proposed amendment to Rule 5-804 was recommended by the Office of the Public Defender and would conform to a change in the comparable Federal Rule 804 (b) (3) that will take effect in December 2010. The present Rule provides that a hearsay statement tending to expose the declarant to criminal liability, when offered for the purpose of exculpating the accused, is inadmissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. The proposed amendment would provide the same condition on the admissibility of such a statement when offered by the prosecution in a criminal case.

**Category Four** consists of proposed amendments to Rule 16-901 that were recommended by the Standing Committee on Pro Bono Legal Services. They would (i) permit the addition to the Standing Committee of two Circuit Court judges, two District Court judges,

and a representative from the Legal Aid Bureau, the Maryland Volunteer Lawyers Service, the Pro Bono Resources Center, and one other pro bono referral organization, (ii) provide a three-year term for the members, subject to reappointment for additional terms, and (iii) permit the Standing Committee to make recommendations to the Court concerning the appointment and reappointment of members.

**Category Five** consists of "housekeeping" amendments to Rules 4-216 and 4-242 and Bar Admission Rule 13.

For the further guidance of the Court and the public, following each proposed rules change is a Reporter's Note describing in some further detail the reasons for the proposal and any changes that would be effected in current law or practice. *We caution that the Reporter's Notes are not part of the Rules, have not been debated or approved by the Committee, and are not to be regarded as any kind of official comment or interpretation.* They are included solely to assist the Court in understanding some of the reasons for the proposed changes.

Respectfully submitted,

Alan M. Wilner  
Chair

Linda M. Schuett  
Vice Chair

AMW/LMS:cdc

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE, JUDICIAL  
DUTIES, ETC.

ADD new Rule 16-110, as follows:

Rule 16-110. CELL PHONES; OTHER ELECTRONIC DEVICES; CAMERAS

(a) Definitions

In this Rule the following definitions apply:

(1) Court Facility

"Court facility" means the building in which a circuit court or the District Court is located, but if the court is in a building that is also occupied by county or State executive agencies having no substantial connection with the court, then only that part of the building occupied by the court.

(2) Electronic Device

"Electronic device" means (A) a cell phone, a computer, and any other device that is capable of transmitting, receiving, or recording messages, images, sounds, data, or other information by electronic means or that, in appearance, purports to be a cell phone, computer, or such other device; and (B) a camera, regardless of whether it operates electronically, mechanically, or otherwise and regardless of whether images are recorded by using digital technology, film, light-sensitive plates, or other means.

(3) Local Administrative Judge

“Local administrative judge” means the county administrative judge in a circuit court and the district administrative judge in the District Court.

(b) Possession and Use of Electronic Devices

(1) Generally

Subject to inspection by court security personnel and the restrictions and prohibitions set forth in this section, a person may (A) bring an electronic device into a court facility and (B) use the electronic device for the purpose of sending and receiving phone calls and electronic messages and for any other lawful purpose not otherwise prohibited.

(2) Restrictions and Prohibitions

(A) Rule 5-615 Order

An electronic device may not be used to facilitate or achieve a violation of an order entered pursuant to Rule 5-615 (d).

(B) Photographs and Video

Except as permitted in accordance with this Rule, Rule 16-109, Rule 16-405, or Rule 16-504 or as expressly permitted by the local administrative judge, a person may not (i) take or record a photograph, video, or other visual image in a court facility, or (ii) transmit a photograph, video, or other visual image from or within a court facility.

Committee note: The prohibition set forth in subsection (b) (2) (B) of this Rule includes still photography and moving visual images. It is anticipated that permission will be granted for the taking of photographs at ceremonial functions.

(C) Interference with Court Proceedings or Work

An electronic device shall not be used in a manner that interferes with court proceedings or the work of court personnel.

Committee note: An example of a use prohibited by subsection (b) (2) (C) is a loud conversation on a cell phone near a court employee's work station or in a hallway near the door to a courtroom.

(D) Jury Deliberation Room

Except with permission from a judge of the court, an electronic device may not be brought into a jury deliberation room while the jury is deliberating.

(E) Courtroom

(i) Except with the express permission of the presiding judge or as otherwise permitted by this Rule, Rule 16-109, Rule 16-405, or Rule 16-504, all electronic devices inside a courtroom shall remain off and no electronic device may be used to receive, transmit, or record sound, visual images, data, or other information.

(ii) Subject to subsection (b) (2) (F), the court shall liberally allow the attorneys in a proceeding currently being heard and persons associated with the attorney to make reasonable and lawful use of an electronic device in connection with the proceeding.



(F) Security or Privacy Issues in a Particular Case

Upon a finding that the circumstances of a particular case raise special security or privacy issues that justify a restriction on the possession of electronic devices, the local administrative judge or the presiding judge may enter an order limiting or prohibiting the possession of electronic devices in a courtroom or other designated areas of the court facility. The order shall provide for notice of the designated areas and for the collection of the devices and their return when the individual who possessed the device leaves the courtroom or other area. No liability shall accrue to the security personnel or any other court official or employee for any loss or misplacement of or damage to the device.

(c) Violation of Rule

(1) Security personnel or other court personnel may confiscate and retain an electronic device that is used in violation of this Rule, subject to further order of the court or until the owner leaves the building. No liability shall accrue to the security personnel or any other court official or employee for any loss or misplacement of or damage to the device.

(2) An individual who willfully violates this Rule or any reasonable limitation imposed by the local administrative judge or the presiding judge may be found in contempt of court and sanctioned in accordance with the Rules in Title 15, Chapter 200.

(d) Notice

(1) Notice of the provisions of sections (b) and (c) of this Rule shall be:

(A) posted prominently at the court facility;

(B) included on the main judiciary website and the website of each court; and

(C) disseminated to the public by any other means approved in an administrative order of the Chief Judge of the Court of Appeals.

(2) Notice that the possession and use of cell phones and other electronic devices may be limited or prohibited in designated areas of the court facility shall be included prominently on all summonses and notices of court proceedings.

Source: This Rule is new.

REPORTER'S NOTE

The Chief Judge of the Court of Appeals has requested that the Rules Committee transmit to the Court for its consideration a State-wide Rule on cell phones. The Committee considered draft proposals at its March 2010 and April 2010 meetings. Those proposals generally prohibited cell phones and other electronic devices from being brought into a court facility, with certain exceptions.

At the April meeting, the Committee voted to recommend a proposal that generally allows cell phones and other electronic devices to be brought into a court facility, with certain restrictions on the use of the devices once they are inside the facility. Proposed new Rule 16-110, drafted in accordance with the directive, was approved by the Committee at its June 2010 meeting.

Because (1) cell phones, computers, and other similar electronic devices usually are capable of taking photographs, and (2) digital cameras and mechanical (film) cameras have the same primary purpose (taking photographs) and have similar external appearances, provisions concerning the possession of *all* cameras and the general prohibition against photography in a court facility are contained in Rule 16-110. The exceptions to that prohibition are contained in Rule 16-109, Rule 16-405, and Rule 16-504.

MARYLAND RULES OF PROCEDURE  
TITLE 16 - COURTS, JUDGES, AND ATTORNEYS  
CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE, JUDICIAL  
DUTIES, ETC.

AMEND Rule 16-109 to provide that possession of an electronic device in a court facility is governed by Rule 16-110, as follows:

Rule 16-109. PHOTOGRAPHING, RECORDING, BROADCASTING OR TELEVISIONING IN COURTHOUSES

. . .

b. General Provisions.

1. Unless prohibited by law or this Rule, extended coverage of proceedings in the trial and appellate courts of this State is permitted in accordance with this Rule.

Committee note: Code, Criminal Procedure Article, §1-201 prohibits extended coverage of criminal proceedings in a trial court or before a grand jury.

2. Outside a courtroom but within a courthouse or other facility extended coverage is prohibited of persons present for a judicial or grand jury proceeding, or where extended coverage is so close to a judicial or grand jury proceeding that it is likely to interfere with the proceeding or its dignity and decorum.

3. Possession of ~~cameras and recording[s] or transmitting equipment, including camera-equipped cellular phones or similar handheld devices capable of capturing images, is prohibited in~~

~~all courtrooms, jury rooms, and adjacent hallways except when required for extended coverage permitted by this rule or for media coverage not prohibited by this rule~~ an "electronic device" in a "court facility" as those terms are defined in Rule 16-110 is governed by that Rule.

4. Nothing in this Rule is intended to restrict in any way the present rights of the media to report proceedings.

5. Extended coverage shall be conducted so as not to interfere with the right of any person to a fair and impartial trial, and so as not to interfere with the dignity and decorum which must attend the proceedings.

6. No proceeding shall be delayed or continued to allow for extended coverage, nor shall the requirements of extended coverage in any way affect legitimate motions for continuance or challenges to the judge.

7. This Rule does not apply to:

(i) The use of electronic or photographic equipment approved by the court for the perpetuation of a court record;

(ii) Investiture or ceremonial proceedings, provided, however, that the local administrative judge of a trial court and the Chief Judge of an appellate court shall have complete discretion to regulate the presence and use of cameras, recorders, and broadcasting equipment at the proceedings.

(iii) The use of electronic or photographic equipment approved by the court to take the testimony of a child victim under Code, Criminal Procedure Article, §11-303.

. . .

REPORTER'S NOTE

The proposed amendment to Rule 16-109 coordinates the Rule with proposed new Rule 16-110, so that Rule 16-109 does not appear to prohibit a possession that Rule 16-110 otherwise permits.

MARYLAND RULES OF PROCEDURE  
TITLE 1 - GENERAL PROVISIONS  
CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-322 to change the title of the Rule, to clarify section (a), to add a reference to Rule 14-209.1, to add a new section (b) addressing electronic transmission of U.S. Supreme Court mandates, and to make stylistic changes, as follows:

Rule 1-322. FILING OF PLEADINGS AND OTHER ~~PAPERS~~ ITEMS

(a) Generally

The filing of pleadings and other ~~papers~~ items with the court ~~as required by these rules~~ shall be made by filing them with the clerk of the court, except that a judge of that court may accept the filing, in which event the judge shall note on the ~~papers~~ item the filing date and then forthwith transmit ~~them~~ the item to the office of the clerk. No ~~filing of a pleading or paper~~ item may be made by transmitting it filed directly to the ~~court~~ by electronic transmission, except (1) pursuant to an electronic filing system approved under Rule 16-307 or 16-506, (2) as permitted by Rule 14-209.1, or (3) as provided in section (b) of this Rule.

(b) Electronic Transmission of Mandates of the U.S. Supreme Court

A Maryland court shall accept a mandate of the Supreme Court of the United States transmitted by electronic means unless

the court does not have the technology to receive it in the form transmitted, in which event the clerk shall promptly so inform the Clerk of the Supreme Court and request an alternative method of transmission. The clerk of the Maryland court may request reasonable verification of the authenticity of a mandate transmitted by electronic means.

~~(b)~~ (c) Photocopies; Facsimile Copies

A photocopy or facsimile copy of a pleading or paper, once filed with the court, shall be treated as an original for all court purposes. The attorney or party filing the copy shall retain the original from which the filed copy was made for production to the court upon the request of the court or any party.

Cross reference: See Rule 1-301 (d), requiring that court papers be legible and of permanent quality.

Source: This Rule is derived in part from the 1980 version of Fed. R. Civ. P. 5 (e) and Rule 102 1 d of the Rules of the United States District Court for the District of Maryland and is in part new.

REPORTER'S NOTE

The Chief Deputy Clerk of the Supreme Court of the United States asked the Clerk of the Court of Appeals whether the Court of Appeals of Maryland will accept electronically transmitted mandates of the U.S. Supreme Court. The Executive Director of Legal Affairs of the Administrative Office of the Courts and his assistant researched this issue and concluded that the Court of Appeals may accept the U.S. Supreme Court mandates transmitted electronically by construing Rule 1-322 as not applying to those mandates. To clarify that Maryland courts can accept the mandates transmitted electronically and to address the issues of verification of the authenticity of the e-mail as well as the technological ability of a court to receive it, changes to section (a) and the addition of a new section (b) are proposed for Rule 1-322.



The amendments to section (a) make clear that the Rule applies to all items filed with the court, regardless of whether the item is a "pleading," a "paper," or something else. The Rule also applies regardless of whether the filing of the item is "required by these rules." The title of the Rule is changed to conform to this change in terminology.

Additionally, because new Rule 14-209.1 permits certain information concerning foreclosure mediations to be transmitted by electronic means between the Office of Administrative Hearings and the Judiciary, a reference to Rule 14-209.1 is added to section (a).

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 400 - RELEVANCY AND ITS LIMITS

AMEND Rule 5-404 to reorganize the format of section (a), to add language to new subsection (a)(2)(B) allowing the prosecution to offer certain evidence under certain circumstances, and to make stylistic changes, as follows:

Rule 5-404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence ~~Generally~~

(1) ~~In General~~ Prohibited Uses

Subject to subsections (a)(2) and (3) of this Rule,  
~~Evidence~~ evidence of a person's character or ~~a~~ character trait of character is not admissible ~~for the purpose of proving action in conformity therewith~~ to prove that the person acted in accordance with the character or trait on a particular occasion, ~~except:~~

~~(A) Character of Accused~~

~~Evidence of a pertinent trait of character of an accused offered by the accused, or by the prosecution to rebut the same;~~

~~(B) Character of Victim~~

~~Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of~~

~~peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;~~

(2) Criminal and Delinquency Cases

Subsection (a) (2) of this Rule applies in a criminal case and in a delinquency case. For purposes of subsection (a) (2), "accused" means a defendant in a criminal case and an individual alleged to be delinquent in an action in juvenile court, and "crime" includes a delinquent act as defined by Code, Courts Article, §3-8A-01.

(A) Character of Accused

An accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it.

(B) Character of Victim

Subject to the limitations in Rule 5-412, an accused may offer evidence of an alleged crime victim's pertinent trait of character. If the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the accused's same trait.

(C) Homicide Case

In a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

~~(C)~~ (3) Character of Witness

Evidence of the character of a witness with regard to

credibility, ~~as provided in~~ may be admitted under Rules 5-607, 5-608, and 5-609.

~~(2) Definitions~~

~~For purposes of subsections (a) (1) (A) and (B) of this Rule, "accused" means a defendant in a criminal case and a child alleged to be delinquent in an action in juvenile court, and for purposes of subsection (a) (1) (B), "crime" includes a delinquent act as defined by Code, Courts Article, §3-801.~~

(b) Other Crimes, Wrongs, or Acts

Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, §3-801 is not admissible to prove the character of a person in order to show action in conformity therewith. ~~It may~~ Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Source: This Rule is derived from F.R.Ev. 404.

REPORTER'S NOTE

Rule 5-404 (a) is proposed to be amended to conform to Fed.R.Ev. 404 (a) (1) which was amended in 2000 so that if a defendant offers evidence attacking a victim's character trait, the prosecutor may offer evidence of the defendant's same trait. The reason for the change was due to the abundance of gang cases in which a defendant gang member could accuse the victim of being violent, but the prosecution could not bring out similar evidence about the accused. The Rules Committee recommends a corresponding change to the Maryland Rule for similar reasons. Some stylistic changes are derived from pending amendments to Fed.R.Ev. 404 (a). Unlike the pending federal rule, the Maryland proposal retains the subheadings "Character of Accused" and "Character of Victim." The forms of admissible character evidence remain governed by Rule 5-405.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-804 (b) (3) by deleting the language "to exculpate the accused" and adding the language "in a criminal case," as follows:

Rule 5-804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability

"Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b) (2), (3), or (4) of this Rule, the declarant's attendance or

testimony) by process or other reasonable means.

A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony

Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death

In a prosecution for an offense based upon an unlawful homicide, attempted homicide, or assault with intent to commit a homicide or in any civil action, a statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement Against Interest

A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability,

or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Cross reference: See Code, Courts Article, §10-920, distinguishing expressions of regret or apology by health care providers from admissions of liability or fault.

(4) Statement of Personal or Family History

(A) A statement concerning the declarant's own birth; adoption; marriage; divorce; legitimacy; ancestry; relationship by blood, adoption, or marriage; or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated.

(B) A statement concerning the death of, or any of the facts listed in subsection (4) (A) about another person, if the declarant was related to the other person by blood, adoption, or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

(5) Witness Unavailable Because of Party's Wrongdoing

(A) Civil Actions

In civil actions in which a witness is unavailable because of a party's wrongdoing, a statement that (i) was (a)

given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and was signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is offered against a party who has engaged in, directed, or conspired to commit wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness, provided however the statement may not be admitted unless, as soon as practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it.

Committee note: A "party" referred to in subsection (b) (5) (A) also includes an agent of the government.

(B) Criminal Causes

In criminal causes in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by Code, Courts Article, §10-901.

Committee note: Subsection (b) (5) of this Rule does not affect the law of spoliation, "guilty knowledge," or unexplained failure to produce a witness to whom one has superior access. See *Washington v. State*, 293 Md. 465, 468 n. 1 (1982); *Breeding v. State*, 220 Md. 193, 197 (1959); *Shpak v. Schertle*, 97 Md. App. 207, 222-27 (1993); *Meyer v. McDonnell*, 40 Md. App. 524, 533, (1978), rev'dd on other grounds, 301 Md. 426 (1984); *Larsen v. Romeo*, 254 Md. 220, 228 (1969); *Hoverter v. Director of Patuxent Inst.*, 231 Md. 608, 609 (1963); and *DiLeo v. Nugent*, 88 Md. App. 59, 69-72 (1991). The hearsay exception set forth in subsection (b) (5) (B) is not available in criminal causes other than those listed in Code, Courts Article, §10-901 (a).



Cross reference: For the residual hearsay exception applicable regardless of the availability of the declarant, see Rule 5-803 (b) (24).

Source: This Rule is derived from F.R.Ev. 804.

#### REPORTER'S NOTE

The Rules Committee recommends a change to Rule 5-804 (b) (3). This was requested by the Office of the Public Defender, and it is based on an amendment to Fed.R.Ev. 804 (b) (3) that will go into effect December 2010. The proposed amendment would require both sides in a criminal case to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against pecuniary or proprietary interest. Currently, the Rule requires only the defendant to make this showing. The Office of the Public Defender points out that under the current Rule, there is a risk of wrongful convictions based on unreliable statements against interest by unavailable witnesses who cannot be cross-examined. Unavailable State's witnesses' testimony should be subject to the same requirement of corroboration as that of defense witnesses.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 900 - PRO BONO LEGAL SERVICE

AMEND Rule 16-901 to delete the limitation on the number of members who may serve on Standing Committee on Pro Bono Legal Service; to provide that a maximum of three Circuit Court judges may serve on the Standing Committee; to delete the requirement that there be three nominees for each Circuit Court position; to provide that a maximum of three District Court judges may serve on the Standing Committee; to delete the requirement that there be three nominees for each District Court position; to specify that the Legal Aid Bureau, Maryland Volunteer Lawyers Service; Pro Bono Resource Center, and one other pro bono referral organization have representatives on the Standing Committee; to delete the requirement that the representative from a legal services provider organization not serve on a Local Pro Bono Committee; to permit the Standing Committee to recommend appointments to the Court of Appeals; and to provide that the terms of Standing Committee members shall be three years and may be renewed; as follows:

Rule 16-901. STATE PRO BONO COMMITTEE AND PLAN

(a) Standing Committee on Pro Bono Legal Service

(1) Creation

There is a Standing Committee of the Court of Appeals on

Pro Bono Legal Service.

(2) Members

The Standing Committee consists of ~~13~~ the following members appointed by the Court of Appeals, ~~as follows:~~

(A) eight members of the Maryland Bar, including one from each appellate judicial circuit and one selected from the State at large;

(B) ~~a circuit court judge~~ a maximum of three Circuit Court judges selected from ~~among at least three~~ nominees submitted by the Conference of Circuit Judges;

(C) ~~a District Court judge~~ a maximum of three District Court judges selected from ~~at least three~~ nominees submitted by the Chief Judge of the District Court;

(D) the Public Defender or a designee of the Public Defender;

(E) a representative ~~from a legal services provider organization who does not serve on a Local Pro Bono Committee from the Legal Aid Bureau, Maryland Volunteer Lawyers Service, Pro Bono Resource Center, and one other pro bono referral organization;~~ and

(F) a member of the general public.

(3) Terms; Chair

~~The Court of Appeals shall fix the terms of the each~~ members is three years. A member may be reappointed to serve one or more additional terms. and The Court of Appeals shall designate one of the members as ~~the~~ chair.

(4) Consultants

The Standing Committee may designate a reasonable number of consultants from among court personnel or representatives of other organizations or agencies concerned with the provision of legal services to persons of limited means.

(b) ~~Duties~~ Functions of the Standing Committee

(1) Required

The Standing Committee shall:

~~(1)~~ (A) develop standard forms for use by the Local Pro Bono Committees in developing and articulating the Local Pro Bono Action Plans and making their annual reports;

~~(2)~~ (B) recommend uniform standards for use by the Local Pro Bono Committees to assess the need for pro bono legal services in their communities;

~~(3)~~ (C) review and evaluate the Local Pro Bono Action Plans and the annual reports of the Local Pro Bono Committees;

~~(4)~~ (D) collect and make available to Local Pro Bono Committees information about pro bono projects;

~~(5)~~ (E) at the request of a Local Pro Bono Committee, provide guidance about the Rules in this Chapter and Rule 6.1 of the Maryland Lawyers' Rules of Professional Conduct;

~~(6)~~ (F) file with the Court of Appeals an annual report and recommendations about the implementation and effectiveness of the Local Pro Bono Action Plans, the Rules in this Chapter, and Rule 6.1 of the Maryland Lawyers' Rules of Professional Conduct; and

~~(7)~~ (G) prepare a State Pro Bono Action Plan as provided in

section (c) of this Rule.

(2) Permitted

The Standing Committee may make recommendations to the Court of Appeals concerning the appointment and reappointment of its members.

(c) State Pro Bono Action Plan

(1) Generally

Within three years after the effective date of this Rule, the Standing Committee shall submit to the Court of Appeals a State Pro Bono Action Plan to promote increased efforts on the part of lawyers to provide legal assistance to persons of limited means. In developing the Plan, the Standing Committee shall:

(A) review and assess the results of the Local Pro Bono Action Plans;

(B) assess the data generated by the reports required by Rule 16-903;

(C) gather and consider information pertinent to the existence, nature, and extent of the need for pro bono legal services in Maryland; and

(D) provide the opportunity for one or more public hearings.

(2) Contents

The State Pro Bono Action Plan may include a recommendation for increasing or decreasing the aspirational goals for pro bono publico legal service set forth in Rule 6.1 of the Maryland Lawyers' Rules of Professional Conduct. The Plan

should include suggestions for the kinds of pro bono activities that will be most helpful in meeting the need for pro bono legal service throughout the State and should address long-range pro bono service issues.

Committee note: Examples of long-range issues that may be addressed include opportunities for transactional lawyers, government lawyers, business lawyers, and in-house counsel to render pro bono legal service; opportunities for pro bono legal service by lawyers who are unable to provide direct client representation; "collective responsibility" for pro bono legal service when a law firm designates certain lawyers to handle only pro bono matters; and encouraging pro bono legal service among law students and in the legal academic setting.

(d) Publication

The Clerk of the Court of Appeals shall cause the State Action Plan submitted by the Standing Committee to be published in the Maryland Register and such other publications as the Court directs and shall establish a reasonable period for public comment.

(e) Consideration by the Court of Appeals

After the comment period, the Court of Appeals shall hold a public hearing and take appropriate action on the Plan.

Source: This Rule is new.

REPORTER'S NOTE

The proposed amendments to Rule 16-901 are based on the recommendations of the Standing Committee on Pro Bono Legal Services.

MARYLAND RULES OF PROCEDURE  
TITLE 4 - CRIMINAL CAUSES  
CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 by adding Code references to section (c),  
as follows:

Rule 4-216. PRETRIAL RELEASE

. . .

(c) 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, Criminal Procedure Article, §5-202 (a), (b), (c), (d), ~~or~~ (e), (f) or (g) 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 ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community.

. . .

REPORTER'S NOTE

Chapter 184, Laws of 2010 (HB 1046) prohibits a District Court commissioner from authorizing the pretrial release of a defendant who is a registered sex offender. The Rules Committee recommends adding to section (c) a reference to this new provision, Code, Criminal Procedure Article, §5-202 (g), and also a reference to §5-202 (f) that lists other crimes with which a defendant has been charged and for which a District Court commissioner cannot authorize pretrial release.

MARYLAND RULES OF PROCEDURE  
TITLE 4 - CRIMINAL CAUSES  
CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-242 to change a Code reference in section (e),  
as follows:

Rule 4-242. PLEAS

. . .

(e) Collateral Consequences of a Plea of Guilty or Nolo  
Contendere

Before the court accepts a plea of guilty or nolo  
contendere, the court, the State's Attorney, the attorney for the  
defendant, or any combination thereof shall advise the defendant  
(1) that by entering the plea, if the defendant is not a United  
States citizen, the defendant may face additional consequences of  
deportation, detention, or ineligibility for citizenship, (2)  
that by entering a plea to the offenses set out in Code, Criminal  
Procedure Article, §11-701, the defendant shall have to register  
with the defendant's supervising authority as defined in Code,  
Criminal Procedure Article, §11-701 ~~(i)~~ (p), and (3) that the  
defendant should consult with defense counsel if the defendant is  
represented and needs additional information concerning the  
potential consequences of the plea. The omission of advice  
concerning the collateral consequences of a plea does not itself



mandate that the plea be declared invalid.

. . .

REPORTER'S NOTE

Chapter 175, Laws of 2010 (HB 936) amended Code, Criminal Procedure Article, §11-701 pertaining to registration of sex offenders. The Code reference in section (e) is proposed to be amended to conform to the new statute.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Bar Admission Rule 13 to correct an internal reference, as follows:

Rule 13. OUT-OF-STATE ATTORNEYS

. . .

(c) Practitioner of Law

(1) Subject to paragraphs (2), and (3), ~~and (4)~~ of this section, a practitioner of law is a person who has regularly engaged in the authorized practice of law

(A) in a state;

(B) as the principal means of earning a livelihood; and

(C) whose professional experience and responsibilities have been sufficient to satisfy the Board that the petitioner should be admitted under this Rule.

(2) As evidence of the requisite professional experience, for purposes of subsection (c) (1) (C) of this Rule, the Board may consider, among other things:

(A) the extent of the petitioner's experience in general practice;

(B) the petitioner's professional duties and responsibilities, the extent of contacts with and responsibility to clients or other beneficiaries of the petitioner's professional skills, the extent of professional contacts with

practicing lawyers and judges, and the petitioner's professional reputation among those lawyers and judges; and

(C) if the petitioner is or has been a specialist, the extent of the petitioner's experience and reputation for competence in such specialty, and any professional articles or treatises that the petitioner has written.

(3) The Board may consider as the equivalent of practice of law in a state practice outside the United States if the Board concludes that the nature of the practice makes it the functional equivalent of practice within a state.

. . .

REPORTER'S NOTE

The Secretary of the State Board of Law Examiners observed a reference in subsection (c)(1) to a non-existent paragraph. The proposed amendment to Rule 13 deletes this reference.