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 September 10, 2004.

Members present:

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

Lowell R. Bowen, Esq.
Robert L. Dean, Esq.
Hon. Ellen M. Heller
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Twilah S. Shipley, Esq.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Philip Tyson Bennett, Esq.
Lawrence Doan, Esq.
Antonio Gioia, Esq.
Robert Riddle, Esq.
Alice Neff Lucan, Esq.
Patricia Jessamy, Esq., State's Attorney for Baltimore City
Timothy S. Mitchell, Esq., Maryland Criminal Defense Attorneys' Association
Hon. Brooke Murdock, Conference of Circuit Court Judges
Sally Rankin, Court Information Officer
Nancy S. Forster, Esq., Public Defender
Richard Montgomery, Director, Legislative Relations, Maryland State Bar Association
Sandra A. O'Connor, Esq., State's Attorney for Baltimore County
Elizabeth B. Veronis, Esq., Special Assistant to the Chief Judge of the Court of Appeals
Christopher Townsend, Rules Committee Intern

The Chair convened the meeting. He welcomed J. Brooks Leahy, Esq., the newest member of the Committee. He asked if there were any additions or corrections to the minutes of the meetings of April 16, 2004; May 21, 2004; and June 25, 2004. There being none, Mr. Bowen moved to approve the minutes as presented, the motion was seconded, and it passed unanimously.

The Chair said that many guests were present for Agenda Item 2. Ms. Lucan, who was present for Agenda Item 1, consented to allow Agenda Item 2 to be presented first.

Agenda Item 2. Consideration of certain proposed rules changes recommended by the Criminal Subcommittee: Amendments to: Rule 4-262 (Discovery in District Court), Rule 4-263 (Discovery in Circuit Court); Amendments to: Rule 4-343 (Sentencing - Procedure in Capital Cases); New Rule 4-329 (Advice of Expungement); Amendments to: Rule 4-247 (Nolle Prosequi), Rule 4-248 (Stet); and Amendments to: Rule 4-252 (Motions in Circuit Court), Rule 8-204 (Application for Leave to Appeal to Court of Special Appeals), Rule 4-346 (Probation), Rule 4-347 (Proceedings for Revocation of Probation), Form 4-504.1 (Petition for Expungement of Records)

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Mr. Dean presented Rules 4-262, Discovery in District Court, and 4-263, Discovery in Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-262 to require that information furnished by the State's Attorney to the defendant be in writing describing the nature of the information to be provided and

to add language to section (a) referring to a certain statute, as follows:

Rule 4-262. DISCOVERY IN DISTRICT COURT

(a) Scope

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

(1) The State's Attorney shall furnish to the defendant <u>in writing</u> any material or information that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged. <u>This shall include all information in any form, whether or not admissible, that (A) exculpates the defendant, (B) demonstrates interest or bias of witnesses for the State, and (C) mitigates the offense.</u>

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

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

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

(b) Procedure

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

(c) Obligations of the State's Attorney

The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

Source: This Rule is new.

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

Albert D. Brault, Esq., a member of the Rules Committee, pointed out a problem with prosecutors' withholding the information required to be furnished to a criminal defendant pursuant to the case of *Brady v. Maryland*, 373 U.S. 83 (1963). The American College of Trial Lawyers had written a report describing this problem in federal criminal cases. The Report stated that federal prosecutors are not always in compliance with the *Brady* requirements because they often withhold information that is required to be furnished. Mr. Brault spoke with local criminal defense attorneys in Montgomery County, who noted similar problems with State prosecutors. To address this, the Honorable Albert J. Matricciani and the Honorable M. Brooke Murdock, Circuit Court Judges for Baltimore City, drafted a change to Rule 4-

263 (a)(1), the language of which was modified slightly by the Criminal Subcommittee. The Subcommittee proposes to add the same language to Rule 4-262. The new language is not intended to broaden the scope of *Brady*.

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to add language to subsection (a)(1) to require that information furnished by the State's Attorney to the defendant be in writing describing the nature of the information to be provided and to add language to subsection (b)(1) referring to a certain statute, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

(a) Disclosure Without Request

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

(1) ~~Any~~ In writing any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged. This shall included information in any form, whether or not admissible, that (A) exculpates the defendant, (B) demonstrates interest or bias of witnesses for the State, and (C) mitigates the offense;

(2) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

(b) Disclosure Upon Request

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

(1) Witnesses

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

(2) Statements of the Defendant

As to all statements made by the defendant to a State agent that the State intends to use at a hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written

or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

(3) Statements of Codefendants

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

(4) Reports or Statements of Experts

Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion;

(5) Evidence for Use at Trial

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

(6) Property of the Defendant

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

(c) Matters Not Subject to Discovery by the Defendant

This Rule does not require the State to disclose:

(1) Any documents to the extent that they

contain the opinions, theories, conclusions, or other work product of the State's Attorney, or

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

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

(d) Discovery by the State

Upon the request of the State, the defendant shall:

(1) As to the Person of the Defendant

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

(2) Reports of Experts

Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the State with the substance of any such oral report and conclusion;

(3) Alibi Witnesses

Upon designation by the State of the

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

(4) Computer-generated Evidence

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

(e) Time for Discovery

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

(f) Motion to Compel Discovery

If discovery is not furnished as requested <u>or required</u>, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters that have not been furnished. A response to the motion may be filed within five days after service of the motion. The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that

they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

(g) Obligations of State's Attorney

The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

(h) Continuing Duty to Disclose

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

(i) Protective Orders

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

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 741 a 1 and 2.
Section (b) is derived from former Rule 741 b.
Section (c) is derived from former Rule 741 c.
Section (d) is derived in part from former

Rule 741 d and is in part new.
Section (e) is derived from former Rule 741 e 1.
Section (f) is derived from former Rule 741 e 2.
Section (g) is derived from former Rule 741 a 3.
Section (h) is derived from former Rule 741 f.
Section (i) is derived from former Rule 741 g.

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

See the Reporter's Note to Rule 4-262.

Mr. Dean told the Committee that Rule 4-262 had not been considered by the Criminal Subcommittee. The changes proposed today as explained in the Reporter's note after Rule 4-262 are more applicable to Rule 4-263. Mr. Brault, a member of the Rules Committee who was not able to attend today's meeting, had sent a letter to the Rules Committee expressing concern that discovery practice among certain State's Attorneys may not always be meeting the standards set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Brault had advised the Subcommittee that his knowledge of the problem in State courts was anecdotal. He had provided to the Subcommittee and full Committee a Report by the American College of Trial Lawyers that described the problem at the federal level and proposed solutions to it. See Appendix 1. The Criminal Subcommittee discussed possible changes to the Rules to clarify the *Brady* standards at its August 26, 2004 meeting and agreed by consensus to the language that is proposed for

placement into Rule 4-263. This language gives further guidance as to the materials that must be provided to the defendant by the State. Judge Missouri, Chair of the Criminal Subcommittee, presided at the August 26th meeting, but he was not able to attend today's meeting. Rule 3.8, Special Responsibilities of a Prosecutor, provides additional guidance, and there is case law on this issue.

Mr. Dean said that the Honorable M. Brooke Murdock, of the Circuit Court for Baltimore City, was present today to discuss the changes to Rule 4-263, which she and the Honorable Albert J. Matricciani, also of the Circuit Court for Baltimore City, had drafted. See Appendix 2. Judge Murdock told the Committee that she represented the Conference of Circuit Court Judges. She explained that the Conference was concerned that young prosecutors do not fully understand the *Brady* requirements. This may result in the discovery of *Brady* information during the middle of a trial, which can cause significant problems. The Criminal Subcommittee somewhat modified the language of Rule 4-263 that had been drafted by Judges Matricciani and Murdock. Judge Murdock stated that she and Judge Matricciani agree with the amended language, and she urged the Rules Committee to approve the amended language.

Mr. Dean commented that in Rule 4-263, everyone had agreed to the addition of the words "in writing" at the beginning of subsection (a)(1). This was a substantive amendment that

requires a hard document to be generated. Although the meeting materials contain similar amendments to Rule 4-262, there is no need to have the same changes made to the District Court Rule. Such changes may not be workable in District Court. Judge Norton remarked that it may be burdensome for State's Attorneys in the District Court to provide written materials. They often do not know the witnesses ahead of time. The Reporter asked whether any of the changes should be made to Rule 4-262, or if all the changes should be made except for the requirement that the material be furnished in writing. The Chair said that if District Court discovery is working well, the Rule should be left alone. Any problems can be studied later.

The Chair asked if any of the guests would like to speak. Mr. Gioia told the Committee that he was an Assistant State's Attorney in Baltimore City. He said that Patricia C. Jessamy, State's Attorney for Baltimore City, had written a letter to Judge Missouri after the August 26th Subcommittee meeting (a copy of which was distributed to the Committee at today's meeting - see Appendix 3) in which Ms. Jessamy requested that a Committee note be added to Rule 4-263 providing that the State's disclosure obligation under subsection (a)(1) is coextensive with that established in the Brady case. He asked that the Rules Committee add this Committee note.

Ms. Forster, the Public Defender for the State of Maryland, was the next speaker. Her office is in favor of the proposed changes to the Rule. She suggested that subsection (a)(1)(C)

should read as follows: "mitigates the offense or punishment" to be consistent with the first sentence of subsection (a)(1) which has the language "mitigate the guilt or punishment of the defendant." The Chair responded that the suggested language can be worked in if the Committee approves. Mr. Mitchell said that he was the president of the Criminal Defense Attorneys' Association. He agreed with Ms. Forster that the changes to the Rule are beneficial.

The Chair noted that at the Subcommittee meeting, there had been a discussion about adding language to cover situations where there is an agreement between the prosecutor and the defense as to informal discovery. An example would be where the defendant agrees to the prosecutor's offer of open file discovery. This would prevent new counsel for the defendant at trial from stating that he or she did not know about the agreement involving previous defense counsel. Mr. Dean pointed out that historically, the criminal discovery rules were self-executing between counsel, and the court became involved only if problems arose. It is not necessary to micro-manage the process -- it is working well. In rare instances, there may be new counsel, but it is not necessary to address previous agreements. Nothing indicating that any problems exist was brought to the attention of the Subcommittee.

The Chair questioned whether language could be added to the Rule to indicate that counsel can engage in informal discovery.

Ms. Jessamy commented that at the August 26th Subcommittee

meeting, she had pointed out that the addition of the language "in writing" could cause problems.  A prosecutor may open the file which the defense attorney reviews, but nothing is actually in writing.  What is the meaning of the term "in writing?"  The conclusion was that it is an outline of what happened regarding discovery.  Mr. Bowen pointed out that the discovery may simply be that the prosecutor provides photographs to the defense. Judge Murdock explained that the writing would state that the photographs were turned over to the defense.  The writing is an affirmative duty to put something on paper showing what the prosecution has turned over to the defense.

The Chair remarked that a defense request to see photographs that will be used as evidence is covered by subsection (b)(5) of Rule 4-263.  What Mr. Bowen is suggesting for section (a) of the Rule is to include discovery even more than that which the State intends to use at trial if it is exculpatory material.  Ms. Jessamy stated that the writing would provide that a photograph had been disclosed or furnished.  Mr. Sykes noted that the writing would describe the photograph.  Judge Murdock observed that the Conference of Circuit Judges did not intend that the writing would be in detail -- it would simply state that a photograph was turned over.  Ms. Potter pointed out that a form confirming that there had been open file discovery will not help if the issue is later raised in trial.  Judge Murdock suggested that the State could affirm in writing a statement that the file contained no exculpatory information.  Mr. Dean commented that

the prosecutor may not know what is exculpatory. He or she cannot step into the mind of the defense attorney. Ms. Jessamy noted that an affirmative statement is not a certified statement.

Mr. Riddle told the Committee that he is the president of the Maryland State's Attorneys' Association. He suggested that the State's Attorney can send a letter to the defense attorney, stating that enclosed are copies of certain designated pages and notifying the defense attorney as to the existence of any physical evidence that cannot be transported. This should satisfy the writing requirement. Mr. Dean responded that this would satisfy the writing requirement.

Mr. Klein remarked that although he does not practice criminal law, on the civil side of practice, an attorney must "specify documents with reasonable particularity" when requesting documents, and when producing documents, an attorney must identify them "in sufficient detail" so as to permit the requesting party to identify them. The language "in writing" in Rule 4-263 does not accomplish this. The Rule needs further clarification. Judge Kaplan added that there should be a reasonable itemization of the discovery materials. Mr. Dean noted that the prosecutor usually designates numbered pages of discovery materials. Mr. Klein observed that the Style Subcommittee can draft the language based on the corresponding Title 2 Rules. The Chair agreed that the Style Subcommittee can do the drafting as long as the Rules Committee is satisfied with the concept. The writing would describe the information that is

being provided to the defense.

Mr. Sykes proposed that the language be: "identify with reasonable particularity." The Chair said that the prosecutor should tell the defense attorney what materials there are and follow up with a filing. This allows any dispute to be resolved. If defense counsel is not satisfied with the materials disclosed, then he or she can raise the matter with the judge. Mr. Sykes remarked that with open file discovery, the numbered pages can be identified as the relevant portion of the file.

Ms. Jessamy suggested that language should be added to Rule 4-263 that states that counsel can agree as to the necessary discovery materials. Mr. Dean reiterated that this would be micro-managing. The Chair responded that the addition of this language acknowledges the use of informal discovery agreements. Judge Heller pointed out that the prosecutor in a case may change, and this could affect the earlier discovery agreement. The Chair commented that there could be a later post conviction case because an argument arises after a conviction that the attorney did not make a discovery request. The Rule should provide for the situation where counsel agree to informal discovery. The Reporter commented that if there is open file discovery, the prosecutor could certify that certain designated pages were provided.

Mr. Dean pointed out that section (f) of Rule 4-263 provides that the burden is on the person seeking discovery to bring discovery deficiencies to the attention of the court. Mr.

Johnson remarked that there is a requirement in civil cases that the party requesting discovery make good faith attempts to discuss problems concerning discovery with the opposing party. Mr. Dean noted that there is a similar requirement in section (f). Judge Murdock pointed out that in civil cases, there is a specific period for discovery. During the course of a criminal trial, discovery materials may appear that surprise both the prosecution and the defense. The Chair added that the police may not have told the prosecutor about certain findings. He expressed the concern that there should be leeway in filing a motion to compel pursuant to section (f). The introductory language in that section "[i]f discovery is not furnished as requested" may be too limiting. Mr. Dean suggested that the language should be: "[i]f discovery is not furnished as required." Ms. Ogletree remarked that both may be appropriate. Mr. Dean then suggested that the section begin as follows: "[i]f discovery is not furnished as requested or required." This would include the discovery required by subsection (a)(1). The Committee agreed by consensus to this change.

Mr. Sykes remarked that with required discovery, if a party does not get the discovery, the party may not realize it is missing. The requirement of section (f) that a motion to compel discovery must be filed within 10 days after receipt of inadequate discovery or after the discovery should have been received may be unworkable if the realization about the missing discovery is not made until the middle of the trial. Mr. Dean

responded that the Rule is designed to require early disclosure of *Brady* materials to avoid mid-trial disclosures. The proposed amendments to section (f) will add further weight.

The Chair suggested that language should be added to the Rule that provides that the State's Attorney shall file with the court a statement that all of the information required pursuant to the Rule has been furnished to the defense. He asked if this is burdensome for prosecutors. Ms. Jessamy replied that the proposed changes to the Rule are a compromise. The changes do not take care of the situation where the prosecutor finds out that the police had not turned over evidence to the prosecutor previously. The Chair commented that police-prosecutor communication problems cannot be solved by rule.

The Chair said that the two issues, the obligation to disclose and the obligation of prosecutors to submit a writing, should be divided into two sentences within the Rule. Judge Murdock expressed her agreement with the Chair as to dividing the issues and with Ms. Jessamy that no rule can prevent all problems. Ms. Forster also agreed with Ms. Jessamy but said that the proposed changes to the Rule are a good first step. A second step would be to change the sanctions for discovery violations. The Chair responded that the Subcommittee can look at this issue when it reviews the Rule again. A Committee note will be developed addressing the concerns expressed today. This can be submitted to the consultants for their review. The Rules

Committee can try to find a consensus as to the language of the note, or alternative versions can be drafted.

Mr. Bowen suggested that language could be added to subsection (a)(1) that would read as follows: "A State's Attorney shall identify in writing the material or information furnished tending to mitigate ...". The Reporter suggested that the new language be: "identify in writing with reasonable particularity the material or information furnished...". Mr. Bowen said that the Style Subcommittee can fine-tune the language.

Mr. Dean pointed out that there is another amendment to Rule 4-263 in subsection (b)(1) -- a reference to Code, Criminal Procedure Article, §11-205 is added. There have been some complaints from witnesses about providing their addresses to the defense. The statute provides that the address and phone number of witnesses may be withheld unless a judge determines otherwise. The Chair said that the amendment is a good one, and the Committee agreed by consensus to the change.

By consensus, the Committee approved Rule 4-263 as amended, subject to stylistic changes and the addition of a Committee note. The Chair stated that the Committee will review the Rule again after the Subcommittee has drafted the Committee note.

Mr. Dean 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 Section IV of Rule 4-343 (h) to delete the language "Based upon the evidence" and to delete the phrase, "by a preponderance of the evidence," as follows:

Rule 4-343. SENTENCING – PROCEDURE IN CAPITAL CASES

. . .

(h) Form of Written Findings and Determinations

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

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

*Section I*

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

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

_______ proven      _______ not proven

2. The defendant engaged or employed another person to commit the murder and the murder was committed under an agreement or

contract for remuneration or the promise of remuneration.

______ proven    ______ not proven

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

______ proven    ______ not proven

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

*Section II*

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

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

______ proven    ______ not proven

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

*Section III*

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

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

| ______ | ______ |
|---|---|
| proven | not proven |

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

| ______ | ______ |
|---|---|
| proven | not proven |

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

| ______ | ______ |
|---|---|
| proven | not proven |

4. The victim was taken or attempted to be taken in the

course of a kidnapping or abduction or an attempt to kidnap or abduct.

_______ proven    _______ not proven

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

_______ proven    _______ not proven

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

_______ proven    _______ not proven

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

_______ proven    _______ not proven

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

_______ proven    _______ not proven

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

_______ proven    _______ not proven

10. The defendant committed the murder while committing or

attempting to commit a carjacking, armed carjacking, robbery, under Code, Criminal Law Article, §3-402 or §3-403, arson in the

first degree, rape in the first degree, or sexual offense in the first degree.

| ______ | ______ |
|---|---|
| proven | not proven |

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

*Section IV*

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

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

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

[ ] (a) We unanimously find ~~by a preponderance of the evidence~~ that the above circumstance exists.

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

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that the above circumstance exists.

8. (a) We unanimously find ~~by a preponderance of the evidence~~ that the following additional mitigating circumstances exist:

______________________________________________________________

______________________________________________________________

______________________________________________________________

______________________________________________________________

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find ~~by a preponderance of the evidence~~ that the following additional mitigating circumstances exist:

______________________________________________________________

______________________________________________________________

______________________________________________________________

______________________________________________________________

(Use reverse side if necessary)

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

*Section V*

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

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

_______ yes     _______ no

*Section VI*

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

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

2. If the answer in Section II is marked "proven," enter "Imprisonment for Life."

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

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

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

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

"Death."

We unanimously determine the sentence to be ____________________.

*Section VII*

If "Imprisonment for Life" is entered in Section VI, answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of imprisonment for life previously entered shall be without the possibility of parole?

_______ yes     _______ no

| | |
|---|---|
| ______________________ Foreman | ______________________ Juror 7 |
| ______________________ Juror 2 | ______________________ Juror 8 |
| ______________________ Juror 3 | ______________________ Juror 9 |
| ______________________ Juror 4 | ______________________ Juror 10 |
| ______________________ Juror 5 | ______________________ Juror 11 |
| ______________________ Juror 6 | ______________________ Juror 12 |

or,

______________________
JUDGE

. . .

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

> A footnote in the case of *Conyers v. State*, 354 Md. 132 (1999) pointed out that the trial judge in the case at bar had observed that evidence is more than just the testimony and physical exhibits, particularly in reference to the determination of mitigating circumstances, and stated that the Rules Committee should consider whether a broader phrase, such as "facts or circumstances" might be more appropriate than the term "evidence." In light of this, and based on the recommendation of the Pattern Jury Instructions Committee, the Criminal Subcommittee recommends simply deleting the references in Section IV to the language "based upon the evidence" and "by a preponderance of the evidence."

Mr. Dean explained that the Pattern Jury Instructions Committee recommended the change to the Rule which came about because of a footnote in the case of *Conyers v. State*, 354 Md. 132 (1999) pointing out that evidence in a case is more than just the testimony and physical exhibits, particularly in reference to the determination of mitigating circumstances. In the footnote, the Court of Appeals asked the Rules Committee to consider whether language broader than the term "evidence" could be used in the Rule. The Pattern Jury Instructions Committee proposes deleting the references in Section IV to the language "based upon the evidence" and "by a preponderance of the evidence." Ms. Forster, who is a member of the Pattern Jury Instructions Committee, commented that the proposed changes are consistent

with the *Conyers* case. By consensus, the Committee approved the Rule as presented.

Mr. Dean presented Rule 4-329, Advice of Expungement, Rule 4-247, Nolle Prosequi, and Rule 4-248, Stet, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

ADD new Rule 4-329, as follows:

Rule 4-329. ADVICE OF EXPUNGEMENT

When all of the charges in a criminal case against a defendant are disposed of by acquittal, dismissal, probation before judgment, nolle prosequi, or stet, the court shall advise the defendant that the defendant may be entitled to expunge the records relating to the charge or charges against the defendant in accordance with Code, Criminal Procedure Article, Title 10, Subtitle 1 and Title 4, Chapter 500 of these Rules. If the defendant is not present, and the case has been disposed of by dismissal, nolle prosequi, or stet, the notice to the defendant required by Rules 4-247 and 4-248 shall contain the advice of expungement pursuant to this Rule.

Cross reference: For expungement of charges in cases that include a minor traffic violation, see Code, Criminal Procedure Article, §10-107.

Source: This Rule is new.

Rule 4-329 was accompanied by the following Reporter's Note.

Chapter 362 (HB 624), Acts of 2004 added a provision requiring a court to advise a defendant that he or she may be entitled to expungement of records relating to charges against the defendant if the charges have been disposed of by acquittal, dismissal, probation before judgment, nolle prosequi, or stet. The Criminal Subcommittee recommends adding Rule 4-329 to conform to the statute and adding a cross reference to the new Rule to Rule 4-247, Nolle Prosequi and Rule 4-248, Stet. The Criminal Subcommittee has also suggested a cross reference to Code, Criminal Procedure Article, §10-107 because it pertains to expungement when charges include a lesser traffic violation, a concept related to Rule 4-329.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-247 by adding a cross reference to proposed new Rule 4-329 and to Code, Criminal Procedure Article, §6-229, as follows:

Rule 4-247. NOLLE PROSEQUI

(a) Disposition by Nolle Prosequi

The State's Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court. The defendant need not be present in court when the nolle prosequi is entered, but in that event the clerk shall send notice to the defendant, if the defendant’s whereabouts are known, and to the

defendant’s attorney of record.

(b) Effect of Nolle Prosequi

When a nolle prosequi has been entered on a charge, any conditions of pretrial release on that charge are terminated, and any bail bond posted for the defendant on that charge shall be released. The clerk shall take the action necessary to recall or revoke any outstanding warrant or detainer that could lead to the arrest or detention of the defendant because of that charge.

Cross reference: For provisions relating to expungement of the records after a case has been dismissed by entering a nolle prosequi, see Rule 4-329. For provisions relating to a nolle prosequi with the requirement of drug or alcohol treatment in non-violent crimes, see Code, Criminal Procedure Article, §6-229.

Source: This Rule is derived from former Rule 782 a and b and M.D.R. 782 a and b.

Rule 4-247 was accompanied by the following Reporter’s Note.

See the Reporter’s note to Rule 4-329 for an explanation of the first sentence of the proposed new cross reference.

The second sentence of the proposed new cross reference refers to Code, Criminal Procedure Article, §6-229, which was added by Chapter 238 (HB 295), Acts of 2004 and provides for the availability of a nolle prosequi or a stet with the requirement of drug or alcohol abuse treatment for defendants who are charged with non-violent crimes or have not been convicted of crimes of violence for the past five years.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-248 by adding a cross reference to new Rule 4-329 and to Code, Criminal Procedure Article, §6-229, as follows:

Rule 4-248. STET

(a) Disposition by Stet

On motion of the State's Attorney, the court may indefinitely postpone trial of a charge by marking the charge "stet" on the docket. The defendant need not be present when a charge is stetted but in that event the clerk shall send notice of the stet to the defendant, if the defendant's whereabouts are known, and to the defendant's attorney of record. A charge may not be stetted over the objection of the defendant. A stetted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of court for good cause shown.

(b) Effect of Stet

When a charge is stetted, the clerk shall take the action necessary to recall or revoke any outstanding warrant or detainer that could lead to the arrest or detention of the defendant because of the charge, unless the court orders that any warrant or detainer shall remain outstanding.

Committee note: For provisions relating to bail or recognizance when criminal charges are stetted see Code, Criminal Procedure Article, §5-208.

Cross reference: For provisions relating to expungement of the records after a case has been dismissed by entering a stet, see Rule

4-329. For provisions relating to a stet with the requirement of drug or alcohol treatment in non-violent crimes, see Code, Criminal Procedure Article, §6-229.

Source: This Rule is derived from former Rule 782 c and d and M.D.R. 782 c and d.

Rule 4-248 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-247.

Mr. Dean explained that Chapter 362 (HB 624), Acts of 2004 required a court to advise a defendant that he or she may be entitled to expungement of records relating to charges against the defendant if the charges have been disposed of by acquittal, dismissal, probation before judgment, nolle prosequi, or stet. The Subcommittee recommends adding a new Rule and adding cross references to the new Rule to Rules 4-247, Nolle Prosequi, and 4-248, Stet. The Subcommittee has also recommends that a cross reference to Code, Criminal Procedure Article, §10-107 be added at the end of Rule 4-329. The Code provision pertains to expungement when charges include a lesser traffic violation. The Committee approved the new Rule and the addition of cross references to Rules 4-247 and 4-248, by consensus.

Mr. Dean presented Rules 4-252, Motions in Circuit Court, and 8-204, Application for Leave to Appeal to Court of Special Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-252 by adding a new subsection (h)(2)(B), 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, 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

(1) Generally

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.

(2) (A) Motions Concerning Transfer of Jurisdiction to the Juvenile Court

A motion requesting that a child be held in a juvenile facility pending a transfer determination shall be heard and determined not later than the next court day after it is filed unless the court sets a later date for good cause shown.

(B) A motion to transfer jurisdiction of an action to the juvenile court shall be determined within 10 days after the hearing on the motion.

(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 and file or dictate into the record a statement of the reasons for the action taken.

(B) If the state appeals a decision of the trial court granting a motion to suppress evidence in a case in which the defendant is charged with a crime of violence, as defined in Code, Criminal Law Article, §14-101, the court may release the defendant on any terms and conditions that the court considers appropriate or may order the defendant remanded to custody pending the outcome of the appeal.

~~(B)~~ (C) 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 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 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, 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.

Chapter 462, (HB 80) Acts of 2004 added a provision to Code, Courts and Judicial Proceedings Article, §12-302 that states that when the State appeals a decision of the trial court granting a motion to suppress evidence in a case in which the defendant has been charged with a crime of violence, the court may release the defendant on appropriate terms and conditions or may order the defendant remanded to custody pending the outcome of the appeal. The Criminal Subcommittee recommends adding this language to subsection (h)(2) of Rule 4-252 and adding a cross reference to this new provision in Rule 8-204.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN COURT OF APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 200 - OBTAINING REVIEW IN COURT OF SPECIAL APPEALS

AMEND Rule 8-204 by adding a cross reference at the end of the Rule, as follows:

Rule 8-204. APPLICATION FOR LEAVE TO APPEAL TO COURT OF SPECIAL APPEALS

. . .

Cross reference: See Rule 4-252 (h)(2)(B) for cases involving appeals taken by the State from a decision of a trial court granting a motion to suppress evidence in crimes of violence.

. . .

Rule 8-204 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-252.

Mr. Dean explained that subsection (h)(2)(B) of Rule 4-252 is added to conform to Chapter 462 (HB80), Acts of 2004, which provides that when the State appeals a ruling suppressing evidence in a case in which the defendant has been charged with a crime of violence, the court may release the defendant on appropriate terms and conditions or may order the defendant remanded to custody pending the outcome of the appeal. The Subcommittee also proposes that a cross reference to subsection (h)(2)(B) be added to Rule 8-204. By consensus, the Committee approved the changes to the Rules.

Mr. Dean 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 by adding new language to the cross reference at the end of the Rule, 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~~ <u>recommending that</u> 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~~ <u>Interstate Compact for Adult Offender Supervision</u>, Code, Correctional Services Article, §6-201 et seq. <u>For evaluation as to the need for drug or alcohol treatment before probation is ordered in cases involving operating a motor vehicle or vessel while under the influence of or</u>

impaired by drugs or alcohol, see Code, Criminal Procedure Article, §6-220.

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.

The General Assembly repealed the Uniform Act for Out-of-State Parolee Supervision and replaced it with the Interstate Compact for Adult Offender Supervision. The latter no longer has a provision allowing judges to require or permit a defendant to reside in or travel to another state as a condition of parole or probation. The Rules Committee recommends conforming the first sentence of the cross reference to the new statute.

Chapter 335 (HB 376), Acts of 2004 added a provision to Code, Criminal Procedure Article, §6-220, which states that before imposing a period of probation, a court may order the Department of Health and Mental Hygiene to evaluate a defendant convicted of a charge involving operating a motor vehicle or vessel while under the influence of or impaired by drugs or alcohol. The Rules Committee recommends that a cross reference to the statute be added to Rule 4-346.

Mr. Dean told the Committee that the legislature repealed the Uniform Act for Out-of-State Parolee Supervision and replaced it with the Interstate Compact for Adult Offender Supervision, which no longer allows judges to require or permit a defendant to reside in or travel to another state as a condition of parole or probation. The Subcommittee suggests modifying the language of the cross reference at the end of Rule 4-346 to be consistent with the Interstate Compact. The amendment to the Rule also draws attention to Code, Criminal Procedure Article, §6-220, which was modified by Chapter 335 (HB 376), Acts of 2004, to

provide that before imposing a period of probation, a court may order the Department of Health and Mental Hygiene to evaluate a defendant convicted of a charge involving operating a motor vehicle or vessel while under the influence of or impaired by drugs or alcohol. The Committee approved the changes to the Rule by consensus.

Mr. Dean presented Rule 4-347, Proceedings for Revocation of Probation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-347 by adding language to the cross reference at the end of the Rule, as follows:

Rule 4-347. PROCEEDINGS FOR REVOCATION OF PROBATION

(a) How Initiated

Proceedings for revocation of probation shall be initiated by an order directing the issuance of a summons or warrant. The order may be issued by the court on its own initiative or on a verified petition of the State's Attorney or the Division of Parole and Probation. The petition, or order if issued on the court's initiative, shall state each condition of probation that the defendant is charged with having violated and the nature of the violation.

(b) Notice

A copy of the petition, if any, and

the order shall be served on the defendant with the summons or warrant.

(c) Release Pending Revocation Hearing

Unless the judge who issues the warrant sets conditions of release or expressly denies bail, a defendant arrested upon a warrant shall be taken before a judicial officer of the District Court without unnecessary delay or, if the warrant so specifies, before a judge of the District Court or circuit court for the purpose of determining the defendant's eligibility for release.

(d) Waiver of Counsel

The provisions of Rule 4-215 apply to proceedings for revocation of probation.

(e) Hearing

(1) Generally

The court shall hold a hearing to determine whether a violation has occurred and, if so, whether the probation should be revoked. The hearing shall be scheduled so as to afford the defendant a reasonable opportunity to prepare a defense to the charges. Whenever practicable, the hearing shall be held before the sentencing judge or, if the sentence was imposed by a Review Panel pursuant to Rule 4-344, before one of the judges who was on the panel. With the consent of the parties and the sentencing judge, the hearing may be held before any other judge. The provisions of Rule 4-242 do not apply to an admission of violation of conditions of probation.

Cross reference: See *State v. Peterson*, 315 Md. 73 (1989), construing the third sentence of this subsection.

(2) Conduct of Hearing

The court may conduct the revocation hearing in an informal manner and, in the

interest of justice, may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses. The defendant shall be given the opportunity to admit or deny the alleged violations, to testify, to present witnesses, and to cross-examine the witnesses testifying against the defendant. If the defendant is found to be in violation of any condition of probation, the court shall (A) specify the condition violated and (B) afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

Cross reference: See *Hersch and Cleary v. State*, 317 Md. 200 (1989), setting forth certain requirements with respect to admissions of probation violations, and *State v. Fuller*, 308 Md. 547 (1987), regarding the application of the right to confrontation in probation revocation proceedings. <u>For factors related to drug and alcohol abuse treatment to be considered by the court in determining an appropriate sentence, see Code, Criminal Procedure Article, §6-231.</u>

Source: This Rule is new.

Rule 4-347 was accompanied by the following Reporter's Note.

Chapter 238 (HB 295), Acts of 2004 added §6-231 to the Criminal Procedure Article. The new provision lists factors related to drug and alcohol abuse treatment that the court must consider in connection with the determination of an appropriate sentence. The Criminal Subcommittee recommends adding a cross reference to the new provision in Rule 4-347.

Mr. Dean explained that Chapter 238 (HB 295), Acts of 2004, added Code, Criminal Procedure Article, §6-231 which lists factors related to drug and alcohol abuse treatment that the

court must consider in connection with the determination of an appropriate sentence. The Subcommittee debated whether it was necessary to add a cross reference to the new statute, but it decided that there is no harm in adding the cross reference to what is a relatively new and progressive look at probation conditions. The Chair inquired if this applies to sentencing in non-capital cases. He commented that it is equally applicable to when the initial sentence is being imposed. Mr. Dean suggested that the cross reference also be added to Rule 4-342, Sentencing -- Procedure in Non-Capital Cases. The Chair said that the issue is most likely to arise in that situation. The Committee agreed by consensus to Mr. Dean's suggestion. The Committee agreed by consensus to approve Rule 4-347 as presented.

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-504.1 by changing the term "compromised" to "dismissed" in section 3, 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*, Criminal Law Article, §§2-503, 2-504, 2-505, or 2-506, or former 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~~ dismissed pursuant to Code*, Criminal Law Article, §3-207, former 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*, Criminal Law Article, §14-101 (a), of which I was convicted. 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, 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.

> The Criminal Subcommittee recommends deletion of the word "compromised" in the sixth statement in section 3 of Form 4-501.1. The underlying statute, Code, Criminal Law Article, §3-207 uses the term "dismissal of assault charge" in place of the former term "compromise of the case." Therefore, it is more appropriate to substitute the word "dismissed" in place of the word "compromised."

Mr. Dean said that on the third page of the form, the Subcommittee suggests that the word "compromised" be changed to the word "dismissed," because the underlying statute, Code, Criminal Law Article, §3-207, uses the language "dismissal of assault charge" rather than "compromise of the case," the archaic

language previously used. By consensus, the Committee agreed to this change.

Agenda Item 1. Consideration of proposed amendments to certain rules recommended by the General Court Administration Subcommittee: Rule 16-109 (Photographing, Recording, Broadcasting or Televising in Courthouses), Rule 16-404 (Administration of Court Reporters), Rule 16-405 (Electronic Recording of Circuit Court Proceedings), Rule 16-406 (Access to Videotape and Audiotape Recordings of Proceedings in the Circuit Court), Rule 16-504 (Recording of Proceedings), and Rule 16-1006 (Required Denial of Inspection – Certain Categories of Case Records)

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Judge Norton told the Committee that the changes to the Rules in Title 16 had been drafted by Una Perez, Esq., Special Reporter to the Rules Committee, who could not attend the meeting today. The changes to the Rules were considered by the General Court Administration Subcommittee.

Judge Norton presented Rule 16-109, Photographing, Recording, Broadcasting or Televising in Courthouses, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE,

JUDICIAL DUTIES, ETC.

AMEND Rule 16-109 to add a Committee note after subsection b 1, to add language to subsection b 3 to refer to camera-equipped cellular phones and other similar devices, to add a new subsection b 1 (iii) pertaining to the testimony of child victims, to add a new section d pertaining to actions by the presiding judge and the local administrative judge, to delete subsection f 1, to delete language in subsection f 2, to add a

Committee note at the end of subsection f 2, and to renumber the provisions in section g, as follows:

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

a. Definitions.

1. "Extended coverage" means any recording or broadcasting of proceedings by the use of television, radio, photographic, or recording equipment by:

(i) the news media, or

(ii) ~~by~~ persons engaged in the preparation of educational films or recordings with the written approval of the presiding judge.

2. "Local administrative judge" means the county administrative judge in the Circuit Court and the district administrative judge in the District Court.

3. "Party" means a named litigant of record who has appeared in the proceeding.

4. "Proceeding" means any trial, hearing, motion, argument on appeal or other matter held in open court which the public is entitled to attend.

5. "Presiding judge" means a trial judge designated to preside over a proceeding which is, or is intended to be, the subject of extended coverage. Where action of a presiding judge is required by this rule, and no trial judge has been designated to preside over the proceeding, "presiding judge" means the local administrative judge. "Presiding judge" in an appellate court means the Chief Judge of that Court, or the senior judge of a panel of which the Chief Judge is not a member.

b. General Provisions.

1. Extended coverage of proceedings in the trial and appellate courts of this State is permitted unless prohibited or limited 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 and transmitting 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.

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; or

(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.

c. Request for Extended Coverage.

1. All requests for extended coverage shall be made in writing to the clerk of the court at which the proceeding is to be held at least five days before the proceeding is scheduled to begin and shall specifically identify the proceeding to be covered. For good cause a court may honor a request which does not comply with the requirements of this subsection. The clerk shall promptly give notice of a request to all parties to the proceeding.

2. Where proceedings are continued other than for normal or routine recesses, weekends, or holidays, it is the responsibility of the media to make a separate request for later extended coverage.

Cross reference: For the definition of "holiday," see Rule 1-202.

d. Action on Request.

The presiding judge shall grant or deny a request for extended coverage before the commencement of the proceeding. Upon granting a request for extended coverage, the presiding judge shall promptly notify the local administrative judge who shall make whatever arrangements are necessary to accommodate the entry into and presence in the courthouse of the persons conducting the extended coverage and their equipment.

~~d.~~ e. Consent to Extended Coverage.

1. Extended coverage shall not be permitted in any proceeding in a trial court unless all parties to the proceeding have filed their written consent in the record, except that consent need not be obtained from a party which is a federal, state, or local government, or an agency or subdivision thereof or an individual sued or suing in his official governmental capacity.

2. Consent once given may not be withdrawn, but any party may at any time move for termination or limitation of extended coverage in accordance with this rule.

3. Consent of the parties is not required for extended coverage in appellate courts, but any party may at any time move for termination or limitation of extended coverage in accordance with this rule.

~~e.~~ <u>f.</u> Restrictions on Extended Coverage.

~~1. Extended coverage of the testimony of a witness who is a victim in a criminal case shall be terminated or limited in accordance with the request or objection of the witness.~~

~~2.~~ <u>1.</u> Extended coverage of all or any portion of a proceeding may be prohibited, terminated or limited, on the presiding judge's own ~~motion~~ <u>initiative</u> or on the request of a party, witness, or juror in the proceedings, where the judge finds ~~a reasonable probability of unfairness, danger to a person, undue embarrassment, or hindrance of proper law enforcement would result if such action were not taken. In cases involving police informants, undercover agents, relocated witnesses, and minors, and in evidentiary suppression hearings, divorce and custody proceedings, and cases involving trade secrets, a presumption of validity attends the request. This list of requests which enjoy the presumption is not exclusive, and the judge may in the exercise of his discretion find cause in comparable situations. Within the guidelines set forth in this subsection, the judge is granted broad discretion in determining whether~~ <u>that</u> there is <u>good</u> cause for termination, prohibition<u>,</u> or limitation <u>of extended coverage</u>. <u>There is a presumption that good cause exists in cases involving minors, divorce, and trade secrets.</u>

<u>Committee note: Examples of good cause include unfairness, danger to a person, undue embarrassment, or hindrance of proper law enforcement.</u>

~~3.~~ <u>2.</u> Extended coverage is not permitted of any proceeding which is by law closed to the public, or which may be closed to the

public and has been closed by the judge.

~~4.~~ 3. Extended coverage in the judicial area of a courthouse or other facility is limited to proceedings in the courtroom in the presence of the presiding judge.

~~5.~~ 4. There shall be no audio coverage of private conferences, bench conferences, and conferences at counsel tables.

~~f.~~ g. Standards of Conduct and Technology.

~~8.~~ 1. Television or movie camera equipment shall be positioned outside the rail of the courtroom, or if there is no rail, in the area reserved for spectators, at a location approved in advance by the presiding judge. Wherever possible, recording and broadcasting equipment which is not a component part of a television camera shall be located outside the courtroom in an area approved in advance by the presiding judge.

~~9.~~ 2. A still camera photographer shall be positioned outside the rail of the courtroom or if there is no rail, in the area reserved for spectators, at a location approved in advance by the presiding judge. The still camera photographer shall not photograph from any other place, and shall not engage in any movement or assume any body position that would be likely to attract attention or be distracting. Unless positioned in or beyond the last row of spectators' seats, or in an aisle to the outside of the spectators' seating area, the still photographer shall remain seated while photographing.

~~10.~~ 3. Broadcast media representatives shall not move about the courtroom while proceedings are in session, and microphones and recording equipment once positioned shall not be moved during the pendency of the proceeding.

~~1.~~ 4. Not more than one ~~portable~~ television camera, operated by not more than one person, shall be permitted in any trial court proceeding. Not more than two stationary television cameras, operated by not more than one person each, shall be

permitted in any appellate court proceeding.

~~2.~~ 5. Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment approved by the presiding judge shall be permitted in any proceeding in a trial or appellate court.

~~3.~~ 6. Not more than one audio system for broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup shall be accomplished from existing audio systems, except that if no technically suitable audio system exists, unobtrusive microphones and related wiring shall be located in places designated in advance by the presiding judge. Microphones located at the judge's bench and at counsel tables shall be equipped with temporary cutoff switches. A directional microphone may be mounted on the television or film camera, but no parabolic or similar microphones shall be used.

~~4.~~ 7. Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from extended coverage.

~~5.~~ 8. Only television, movie, and audio equipment that does not produce light or distracting sound shall be employed. No artificial lighting device of any kind shall be employed in connection with the television and movie cameras.

~~6.~~ 9. Only still camera equipment that does not produce distracting sound shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

~~7.~~ 10. It shall be the affirmative duty

of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceedings.

11. Photographic or audio equipment shall not be placed in or removed from the courtroom except prior to commencement or after adjournment of proceedings each day, or during a recess. Neither film magazines nor still camera film or lenses shall be changed within a courtroom except during a recess in the proceeding.

12. With the concurrence of the presiding judge, and before the commencement of a proceeding or during a recess, modifications and additions may be made in light sources existing in the courtroom provided such modifications or additions are installed and maintained without public expense.

Source: This Rule is former Rule 1209.

Rule 16-109 was accompanied by the following Reporter's Note.

This Rule is modified to reflect several policy decisions by the General Court Administration Subcommittee. First, a cross reference is added following subsection b 1 to highlight the statutory provision forbidding extended coverage of criminal trials and grand jury proceedings. A reference to an exception in that statute for the videotaping of certain child witnesses is added for completeness in subsection b 7.

New language is added to subsection b 3 to take account of camera-equipped cell phones and similar technology. As a practical matter, this may impose additional burdens on courthouse security and bailiffs; but it is important to make clear that these devices are prohibited in courtrooms.

A new provision, section d, has been added to make clear that, although the presiding judge controls what happens in the

> courtroom during a covered proceeding, the local administrative judge makes whatever decisions and arrangements are necessary to get the media personnel and their equipment from the door of the courthouse to the door of the courtroom involved.
>
> Finally, certain references in the "Restrictions" section are proposed for deletion because they appear to refer to criminal proceedings, extended coverage of which is prohibited by law.

Judge Norton explained that several changes were proposed for Rule 16-109. A Committee note has been added at the end of subsection b. 1 referencing Code, Criminal Procedure Article, §1-201, which prohibits extended coverage of criminal proceedings in a trial court or before a grand jury. Ms. Perez had suggested a change to subsection b. 3 to include a reference to camera-equipped cell phones and similar devices and to add jury rooms as one of the places cameras are not permitted. The addition of a reference to camera-equipped cell phones captures additional related technology. In subsection b. 7 (iii), a reference to a statutory exception for child victims, Code, Criminal Procedure Article, §11-303, has been added. Section d. is new. It provides that the presiding judge shall grant or deny a request for extended coverage before the commencement of the proceeding, and if the request is granted, the presiding judge is to notify the administrative judge, who will then make the necessary arrangements.

Judge Norton noted that section f. has been modified. The word "motion" has been changed to the word "initiative," and

language referring to certain standards for the judicial decision and to specific types of actions presumed to be valid ones where extended coverage is to be prohibited has been deleted. Ms. Perez had added a Committee note listing examples of good cause. The Subcommittee had reorganized the order of the items in subsection g. Ron White, an employee of the Judiciary's Court Information Office who is knowledgeable about technology, wrote a memorandum that was distributed at the meeting today in which he suggested changes to Rule 16-109. See Appendix 4.

Mr. Bowen suggested that the language in section b. which reads "unless prohibited or limited in accordance with this Rule" should be changed to "unless prohibited by law." The Chair suggested that section b. begin as follows: "[u]nless prohibited by law or this Rule...". Mr. Bowen added that the Style Subcommittee can draft the exact language. By consensus, the Committee approved the suggested changes to the Rule subject to redrafting by the Style Subcommittee.

Judge Norton pointed out that Mr. White had suggested that in subsection c. 1, the language "five days" should be changed to "five business days." The Chair noted that Rule 1-203, Time, calculates a five-day period to exclude intervening Saturdays, Sundays, and holidays. However, people who request the extended coverage may not be familiar with Rule 1-203, so there is no harm in listing "five business days" in the Rule. Mr. Bowen suggested that a note be added to Rule 16-109 referring to Rule 1-203.

The Committee agreed by consensus to this suggestion.

Judge Norton said that Mr. White's next suggestion was to consider adding a sentence to the end of subsection c. 1 which reads, "No emergency approvals will be granted." Judge Norton did not agree with this suggestion, because a judge should be able to grant an emergency approval if the judge feels that it is necessary. Ms. Potter asked about the meaning of section d. The Chair responded that the Subcommittee's thinking was that the judge who presides over the case will decide whether there will be extended coverage. However, there may be a request for extended coverage before a presiding judge has been assigned to the case. Judge Heller pointed out that the definition in subsection a. 5 covers this situation, stating that if no trial judge has been designated to preside over a proceeding, the "presiding judge" means the local administrative judge.

Ms. Shipley inquired as to why the reference to custody proceedings and relocated witnesses was deleted from subsection f. 1. She expressed the opinion that this should be retained. The Chair suggested that the last sentence of subsection f. 1 should read as follows: "There is a presumption that good cause exists in cases involving minors, divorce, custody, relocated witnesses, and trade secrets." The Committee agreed by consensus to this change. Ms. Lucan questioned as to whether the presumption is rebuttable, and the Chair replied in the affirmative.

Mr. Shipley commented that Mr. White's suggestion to reorder

the provisions in subsection g. 4 can be considered by the Style Subcommittee. Mr. Klein noted that Mr. White's fourth suggestion to add the word "lavalier" to the last line in subsection g. 3 is actually a suggested change to subsection g. 6. The Reporter asked why a lavalier should not be used. Judge Norton answered that he was not familiar with the technology. Ms. Lucan pointed out that there is an enormous amount of technological information available from Courtroom 21, a program at the College of William and Mary School of Law. The Chair remarked that at a recent Judicial Conference, Professor Frederic Lederer addressed the judges. The Chair suggested that Professor Lederer should be sent a copy of the most recent draft of Rule 16-109, which can then be resubmitted to the Rules Committee after the professor comments. The Chair commented that Mr. White's suggestion to add a prohibition against ladders or stepping stools is not necessary.

Judge Norton asked if the Rule would go back to the Subcommittee, and the Chair replied that it would go back to the Subcommittee.

Judge Norton presented Rule 16-404, Administration of Court Reporters, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT AND OTHER PERSONS

AMEND Rule 16-404 to add a cross reference after section e, as follows:

Rule 16-404. ADMINISTRATION OF COURT REPORTERS

. . .

e. Methods of Reporting - Proceedings to be Recorded.

Each court reporter assigned to record a proceeding shall record verbatim by shorthand, stenotype, mechanical, or electronic sound recording methods, electronic word or text processing methods, or any combination of these methods, and shall maintain that record subject to regulations and standards prescribed by the Chief Judge of the Court of Appeals. Unless the court and the parties agree otherwise, all proceedings held in open court, including opening statements, closing arguments, and hearings on motions, shall be recorded in their entirety.

<u>Cross reference: Rule 16-1006 (g) provides that notes, backup audio tapes or compact discs, or computer disks of a court reporter that have not been filed with the clerk or are not part of the official court record are not ordinarily subject to public inspection.</u>

Source: This Rule is derived from former Rule 1224.

Rule 16-404 was accompanied by the following Reporter's Note.

New Rule 16-1006 provides that a court reporter's backup materials are not subject to inspection unless otherwise provided by law. The Rules Committee recommends an amendment to that Rule to expressly include a court reporter's backup audio tapes or CD's and a cross reference to that Rule in Rule 16-404.

Judge Norton explained that Ms. Perez had added a Committee note referencing Rule 16-1006, Required Denial of Inspection -- Certain Categories of Case Records. He noted that when Rule 16-1006 is discussed later, the discussion may affect Rule 16-404.

Judge Norton presented Rule 16-405, Electronic Recording of Circuit Court Proceedings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT

AND OTHER PERSONS

AMEND Rule 16-405 to delete the word "videotape" from the title, to add references to audiotapes throughout the Rule, to add the language "or other designee" in section b, to add language referring to safeguarding portions of audiotapes and videotapes in section c, and to add a new section d pertaining to safeguarding portions of recorded proceedings, as follows:

Rule 16-405. ~~VIDEOTAPE~~ <u>ELECTRONIC</u> RECORDING OF CIRCUIT COURT PROCEEDINGS

a. Authorization.

The Circuit Administrative Judge for a judicial circuit, after consultation with the County Administrative Judge for a county, may authorize the recording by <u>audiotape or</u> videotape of proceedings required or permitted to be recorded by Rule 16-404 e in courtrooms or hearing rooms in that county.

b. Identification.

The clerk <u>or other designee of the court</u> shall affix to the <u>audiotape or</u> videotape a label containing the following information:

1. the name of the court;

2. the date on which the <u>audiotape or</u> videotape was recorded;

3. the docket reference of each proceeding included on the tape; and

4. any other identifying letters, marks, or numbers.

c. Trial Log; Exhibit List.

The clerk or other designee of the court shall keep a written log identifying each proceeding recorded on ~~a~~ an audiotape or videotape and, for each proceeding recorded on the tape, a log listing the tape references for the beginning and end of each witness's testimony, ~~and~~ an exhibit list, and any portion of the audiotape or videotape that has been safeguarded pursuant to section d of this Rule. The original logs and exhibit list shall remain with the original papers in the circuit court. A copy of the logs and the exhibit list shall be kept with the audiotape or videotape.

d. Safeguarding Confidential or Non-Public Portions of Proceeding

If a portion of a proceeding that is being audiotaped or videotaped involves placing on the record matters that would not be stated in open court or open to public inspection, the court shall direct that appropriate safeguards be placed on that portion of the proceeding.

~~d.~~ e. Presence of Court Reporter Not Necessary; Conflicts With Other Rules.

1. If circuit court proceedings are recorded by audiotape or videotape, it is not necessary for a court reporter to be present in the courtroom.

2. In the event of a conflict between this Rule and another Rule, this Rule shall prevail.

Source: This Rule is former Rule 1224A.

Rule 16-405 was accompanied by the following Reporter’s Note.

The amendments to this Rule are proposed because the Rules Committee has indicated a desire that audiotapes and videotapes be

treated the same for some purposes, and differently for purposes of public access.

Proposed new section d implements the Rules Committee's decision that care should be taken to protect recorded matters that would not be heard live in open court, such as bench conferences, attorney-client conversations, or material the parties agreed or the court ordered to be kept confidential, such as trade secrets or sensitive personal financial or medical information.

Judge Norton told the Committee that the word "videotape" has been deleted from the title of Rule 16-405, and each time the word "videotape" appears, the words "audiotape or" have been placed before it. In section b., the language "or other designee of the court" has been placed after the word "clerk." Section d. is new and pertains to safeguarding portions of proceedings that are not to be stated in open court or open to public inspection. Mr. Michael inquired as to why the word "electronic" is used in the title of Rule 16-405, but not in the text of the Rule. The Vice Chair suggested that the word "electronic" should be removed from the title of the Rule, so that the title is "Recording of Circuit Court Proceedings." Mr. Klein pointed out that the Rule seems to be limiting recording technology to tapes. Other means of recording are available, such as discs. Ms. Lucan commented that in most of the places where the Rule uses the language "audiotape or videotape," substituting the words "electronic recording" would cover compact discs and DVD's. Mr. Michael suggested that the Rule should cover recording of any type, such as digital recording. The Reporter noted that other types of

recording exist, such as stenographic recording. Judge Heller suggested that Courtroom 21 could be consulted as to what the most appropriate phrase is to describe recordings. The Chair stated that the definition of "electronic recording" includes specific devices. By the principle of *ejusdem generis,* one can determine whether certain devices are within the scope of the Rule.

The Vice Chair suggested that the words "electronic recording" be added to sections a. and b. of Rule 16-405 in place of the language "audiotape or videotape." The Chair suggested that other jurisdictions should be looked at to see how they handle this issue.

The Committee approved Rule 16-405 as presented, subject to modifications in the terminology that is used in the Rule.

Judge Norton presented Rule 16-406, Access to Videotape and Audiotape Recordings of Proceedings in the Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT AND OTHER PERSONS

AMEND Rule 16-406 to add references to audiotapes in the title and throughout the Rule, to expand the access provision in section b, to add a new section c pertaining to obtaining a copy of audiotape recordings or the audio portion of videotape recordings,

to make section d only applicable to videotape recordings, and to change internal references, as follows:

Rule 16-406. ACCESS TO VIDEOTAPE AND AUDIOTAPE RECORDINGS OF PROCEEDINGS IN THE CIRCUIT COURT

a. Control - In General.

Videotape or audiotape recordings made pursuant to Rules 16-404 and 16-405 are under the control of the court having custody of them. Access to and copying of those recordings are subject to the provisions of this Rule.

Cross reference: Code, State Government Article, §10-615.

b. ~~Direct~~ Access - In General.

No person other than a duly authorized court official or employee shall have direct access to or possession of an official videotape or audiotape recording. Unless otherwise ordered by the court, any interested person may view an official videotape recording at the times and places determined by the court having custody of the recording. Audiotape recordings and, where practicable, the audio portion of videotape recordings, may be purchased as provided in this Rule.

c. Right to Obtain Copy of Audiotape Recording or Audio Portion of Videotape Recording

Subject to Rule 16-405 d and unless otherwise ordered by the court, the authorized custodian of an official audiotape recording or the audio portion of a videotape recording shall make a copy of the audiotape recording or audio portion of a videotape recording, or any portion thereof, available to any person upon written request and the payment of reasonable costs.

~~c.~~ d. Right to Copy of Videotape Recording; Restrictions.

1. Upon written request and the payment of reasonable costs, the authorized custodian of an official videotape recording shall make a copy of the recording, or any part requested, available to:

(A) a party to the action or the party's attorney;

(B) a stenographer or transcription service designated by the court for the purpose of preparing an official transcript from the recording; and

(C) the Commission on Judicial Disabilities or its designee.

2. Unless authorized by an order of court, a person who receives a copy of a videotape recording pursuant to this section shall not (A) make or cause to be made any additional copy of the recording or (B) except for a non-sequestered witness or an agent, employee, or consultant of the attorney, make the recording available to any person not entitled to it pursuant to this section.

~~d.~~ e. Other Persons.

1. This section does not apply to the videotape of (A) a criminal proceeding, (B) a revocation of probation proceeding, or (C) any proceeding that is confidential by law. The right to obtain a copy of a videotape in those proceedings is governed solely by section ~~c~~ d of this Rule.

2. A person not entitled to a copy of a videotape recording pursuant to section ~~c~~ d of this Rule may file a request to obtain a copy pursuant to this section. The person shall file the request with the clerk of the circuit court in which the proceeding was conducted and shall serve a copy of the request pursuant to Rule 1-321 on each party to the action.

3. A party may file a written response to the request within five days after being served with the request. Any other interested person may file a response within 5 days after service of the request on the last party to be served.

4. The clerk shall refer the request and all responses to the judge who conducted the proceeding.

5. If the action is still pending in the court, the court shall deny the request unless (A) all parties have affirmatively consented and no interested person has filed a timely objection or (B) the court finds good cause to grant the request. If the action has been transferred to another circuit court, the court shall transfer the matter to that court. If judgment has been entered in the action, the court shall grant the request unless it finds good cause to the contrary, but the court may delay permission to obtain the copy until either all appellate proceedings are completed or the right to further appellate review has lapsed.

Source: This Rule is former Rule 1224B.

Rule 16-406 was accompanied by the following Reporter's Note.

The amendments to this Rule are proposed to effectuate several policy decisions by the Rules Committee. First, the "access" rule governs both audiotape and videotape recordings. The two types of official recordings are treated differently because of the dangers inherent in the broadcast of videotaped court proceedings, and countervailing First Amendment concerns. The Committee believes that any person should be entitled to view a videotape recording, but that copies should only be available as provided in the current rule.

The Committee believes also that copies of audiotapes, and, if practicable, the audio portion of videotapes, should be available

for purchase.  The Committee does not intend to require that an audio portion be extracted from a video recording if it is not otherwise available, but only to say that if the audio portion can be made available without any additional effort, it should be treated the same way as an audiotape recording.

Judge Norton explained that the word "audiotape" was added throughout the Rule and that section b. expanded the access to audiotape and videotape recordings.  It is difficult to use one general label to describe the recordings.  Ms. Lucan suggested that the word "tape" be deleted, so that the recordings are described as "video and audio."  The Committee agreed by consensus to this change.

Judge Norton commented that section b. provides that interested persons may view an official video recording at times and places determined by the court.  The Chair noted that the word "interested" in section b. does not add anything to the section, and he suggested that the word be deleted.  The Committee agreed by consensus to the deletion.

Judge Norton observed that section c. refers to Rule 16-405 d., the new provision pertaining to safeguarding portions of the recordings of proceedings.  The Committee approved the Rule as amended.

Judge Norton presented Rule 16-504, Recording of Proceedings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 500 - COURT ADMINISTRATION –

DISTRICT COURT

AMEND Rule 16-504 to add a new section b pertaining to access to recordings, a new section c pertaining to de novo appeals, and a new section d pertaining to safeguarding portions of proceedings, as follows:

Rule 16-504. RECORDING OF PROCEEDINGS

a. Generally.

All trials, hearings, and other proceedings before a judge in open court shall be recorded verbatim by an audio recording device provided by the court. The Chief Judge of the District Court may authorize recording by additional means. The recording shall be filed among the court records.

b. Access to Recordings.

A party, or the party's attorney, may be permitted to listen to the recording of the trial of the party's case, at times and places determined by a judge. A judge may, in the interests of justice, waive the payment of costs and permit a non-party to listen to a recording of a case. Any person may, upon written request and payment of the cost, obtain a recording of any proceeding.

c. De Novo Appeals.

In any proceeding from which, by law, an appeal will be de novo, the Court will not provide a transcript. Access to the recording of the proceeding shall be governed by section b of this Rule.

d. Safeguarding Confidential or Non-Public Portions of Proceeding.

To the extent that any portion of a proceeding that is being audiotaped or videotaped involves placing on the record matters that would not be stated in open court or open to public inspection, the Court shall direct that appropriate safeguards be placed on that portion of the proceeding. The clerk shall create a written log listing the tape references for the beginning and end of the safeguarded portions of the proceeding.

Cross reference: See Rule 16-404 b concerning regulations and standards applicable to court reporting in all courts of the State.

Source: This Rule is former M.D.R. 1224.

Rule 16-504 was accompanied by the following Reporter's Note.

The amendments to this Rule are proposed to make clear the actual practice in the District Court. New sections (b) and (c) are derived from District Court Administrative Regulations VI and VII with style changes. Section d is new and was added to conform to section d of Rule 16-405, the parallel provision for the circuit court.

Note to Subcommittee: Although the full Committee wanted the rules to be "the same" for the circuit and District Court, it seems that the two cannot really be harmonized.

Judge Norton explained that the new language is based on the administrative regulations of the District Court. Section d. contains a provision concerning safeguarding similar to the ones in Rule 16-405 d. He suggested that the second sentence of section b. could be separated into two sentences. The Vice Chair pointed out that a non-party cannot be told that he or she is not

permitted to listen to a public proceeding. Ms. Potter added that any member of the public can pay for a compact disc recording of proceedings. The Vice Chair said that since anyone can listen to the tapes, whether the person is a party or not, the second sentence of section b. is incorrect. The Chair suggested that section b. borrow from the language of sections b. and c. of Rule 16-406. The word "videotape" can be deleted, because District Court proceedings are not videotaped. The concept is that anyone can listen to the audiotapes, anyone can purchase them, and the tapes are subject to safeguarding provisions.

The Vice Chair commented that the language providing for the ability to waive costs should not appear only in some of the Rules and yet not appear in others. Rule 1-325, Filing Fees and Costs -- Indigency, applies to the Title 16 Rules being discussed today. Ms. Lucan remarked that some individuals may receive the recording of the case without charge, and she inquired as to how to word this. The Vice Chair pointed out that there may be other grounds for waiver besides indigency. The Chair suggested that the present language of section b. should be deleted and in its place, language should be added that states that there should be payment of reasonable costs unless costs are waived by the court. This makes it clear that someone can ask for a waiver, but does not lock in the court into the standard "in the interests of justice." The Committee agreed by consensus to this suggestion.

Mr. Klein noted that section d. is not consistent with section a., which refers only to audio recording, not video recording and not just recording on tapes. He suggested that the references to the word "tape" be deleted from section d. The Vice Chair suggested that the term "electronic recording" be used throughout the Rules. Judge Norton added that the terminology of the Rule should be parallel to the terminology of Rules 16-405 and 16-406 pertaining to the circuit court. The Chair remarked that Rule 16-504 should be made identical to the circuit court rules to the extent that they can be made identical. By consensus, the Committee approved the Rule as amended.

Judge Norton presented Rule 16-1006, Required Denial of Inspection –- Certain Categories of Case Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1006 to add a reference to backup audiotapes or compact disks, as follows:

Rule 16-1006. REQUIRED DENIAL OF INSPECTION - CERTAIN CATEGORIES OF CASE RECORDS

Except as otherwise provided by law, the Rules in this Chapter, or court order, the custodian shall deny inspection of:

. . .

(g) Notes<u>, backup audiotapes or compact discs,</u> or a computer disk of a court reporter

> that are in the possession of the court reporter and have not been filed with the clerk <u>or are not part of the official court record</u>.
>
> . . .

Rule 16-1006 was accompanied by the following Reporter's Note.

> See the Reporter's note to the proposed amendment to Rule 16-404.

Judge Norton explained that in the circuit court, the court reporter may purchase at his or her own expense equipment and supplies necessary to make recordings of proceedings. The reporters keep the disk or notes that they create. The issue is whether there should be access to those disks or notes. Ms. Lucan remarked that the material used by the court reporter to create a transcript should be accessible because of the rules pertaining to access to court records. Ms. Ogletree noted that there are differences among the circuits. Ms. Lucan observed that if the court reporter brings a machine to audiotape the proceedings, the tape serves as the court record. Judge Heller commented that if the court reporter brings his or her own personal tape recorder that the reporter uses to prepare the transcript, the public is not entitled to the personal tape recording that is used to make the transcript. The Reporter observed that there may be a distinction between a recording that is made as the official recording of the proceedings and a recording that is made only as a secondary backup to assist the

court reporter in transcribing stenographic notes. Mr. Shipley said that when he first became the Clerk for Carroll County, all circuit court proceedings were recorded by mask recording. He remarked that what the court reporter says into the mask that is used for recording is not a matter of public record. Ms. Lucan referred to "proprietary" material or "proprietary" work. The court reporter's mask recording is proprietary.

Mr. Klein pointed out that the issue is not whether the tapes are "in the possession of the court reporter" as section g. provides, but whether they have been filed as part of the court record. A better way of stating this in the Rule would be: "that have not been filed with the clerk." Mr. Shipley remarked that in Carroll County, tape recordings are made, but the tapes are not filed with the clerk's office. The tapes are maintained by the court reporters. Mr. Klein reiterated that it is a question of the official record. Ms. Lucan noted that one could ask for the tapes, but Mr. Shipley responded that in his county, the request would be denied. He commented that there have been disagreements with the court reporters over obtaining the transcript. If it is obtained in the clerk's office, the copying cost is $.25 per page; if it is obtained from the court reporter, the copying cost is $4.00 per page. Ms. Lucan pointed out that the way the Rule is worded could change this.

The Chair said that if someone wants to listen to a tape of the case, the court reporter cannot deny the request on the basis of ownership. He asked whether the Rules as they are drafted

make this clear. Judge Heller replied that Rule 16-406 makes this clear. The Chair agreed with Mr. Klein's suggestion to modify the language of section g. It should state that a recorded disk or tape prepared for the court is available to the public. He expressed the concern that although the reporters are obligated to provide an official transcript for appellate review, they will not do so until they are paid.

Ms. Potter asked whether some recording in courts relies only on the court reporter without electronic backup, and the answer from several members was affirmative. Mr. Klein remarked that if the sole recording of the proceedings is what the reporter has, then it is the official record. Ms. Lucan noted that if there is no audiotape and what is being relied upon is a shorthand or dictator machine, then there is no record. The Chair observed that if the equipment belongs to the court, then the public has a right to the recordings, but if the tape is for the convenience of the court reporter, and the tape recorder belongs to the reporter, the public has no right to it. Mr. Michael observed that in Frederick County, the court reporters take shorthand notes of the proceeding in a notebook.

Ms. Lucan commented that if there is a verbatim recording made by a machine, and it is accomplished pursuant to Rule 16-404, then it is a court record. Even if the recording equipment is owned by the court reporter, if the tape of the proceeding is the sole recording of the proceeding, then there should be public

access.  If the procedures are not organized this way, then there will be different levels of access in different circuit courts.

Ms. Lucan pointed out that Rule 16-404 provides that the Court of Appeals has the power to require how the recording is to be set up.  The Rules should not allow the court stenographer to create proprietary material out of the records of open court proceedings.  Ms. Lucan stated that the Delaware-Maryland-D.C. Press Association feels that there are problems with two aspects of section (g) of Rule 16-1006 -- if the court reporter's audiotape recording is the only recording and if there is no recording.

The Chair said that in Baltimore County, one or two conscientious court reporters bring their own tape recorders into court and use the tapes to double-check their notes while the other four court reporters do not.  There should not be a separate rule with respect to the court reporters who bring their own tape recorders to court and those who do not.  In Howard County, there is no stenographer.  A court employee checks the disks to make sure that the proceedings are being recorded.  The equipment used belongs to the court.  The Court of Appeals did not intend for the public to be entitled to backup tapes, such as those used in Baltimore County.  Ms. Lucan inquired as to what happens if the backup tape is the only tape made of the proceeding.  Mr. Klein suggested that Rule 16-404 be changed to require that created audiotapes are subject to public inspection. Ms. Ogletree observed that it is not a question of what the

official record is; all counties should be treated the same, despite the differences in their procedures.

The Reporter pointed out that Mr. Shipley had said that the tapes in Carroll County are owned by that County. This can be distinguished from the situation in which a court reporter brings in his or her own tape recorder to back up the stenographic recording of the proceeding.

The Chair asked Ms. Veronis what the Court Reporters Manual states as the policy on this issue. Ms. Veronis replied that Rule 16-1006 was not in effect at the time the Manual was written. The Chair commented that in Anne Arundel and Howard Counties, the public paid for machines for recording. Ms. Veronis remarked that when the Court Reporters' Committee was formed, court reporting was only effected by stenotype. The counties referred to by the Chair switched modes of recording and may need some guidance. Backup tapes are necessary. Ms. Ogletree said that the issue is what constitutes the record.

The Vice Chair expressed the view that the best that can be done at this point is to determine what is a court record and to determine whether the proceedings are memorialized on court-purchased equipment. She suggested that the language "and backup sound recordings made by any means" be added to Rule 16-1006 after the word "disk" and before the word "of." The same change should be made to the language in the new cross reference proposed for addition to Rule 16-404. The Committee agreed by

consensus to this change. The Committee approved Rule 16-1006 and Rule 16-404 as amended.

Agenda Item 4. Consideration of proposed amendments to certain rules in Title 6: Rule 6-208 (Form of Register's Order), Rule 6-412 (Disclaimer), Rule 6-455 (Modified Administration), and Rule 6-456 (Modified Administration - Extension of Time to File a Final Report and to Make Distribution

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Mr. Sykes presented Rule 6-208, Form of Register's Order, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 200 - SMALL ESTATE

AMEND Rule 6-208 to delete subsection 6. (d), as follows:

Rule 6-208. FORM OF REGISTER'S ORDER

The order entered by the register shall be in the following form:

[CAPTION]

ORDER FOR SMALL ESTATE

Upon the foregoing Petition, it is this _____ day of

______________________,______, by the Register of Wills ordered
(month) (year)

that:

1. The estate of ____________________________________ shall be administered as a small estate.

2. ____________________________________ shall serve as

personal representative.

3. The personal representative shall pay fees due the register, expenses of administration, allowable funeral expenses, and statutory family allowances, and, if necessary, sell property of the decedent in order to pay them.

4. The will dated ________________________ (including codicils, if any, dated ___________________________) accompanying the petition is:

[ ] admitted to probate; or

[ ] retained on file only.

5. Publication is:

[ ] not required; or

[ ] required and Notice of Appointment shall be published once in a newspaper of general circulation in the county.

6. When publication is required, the personal representative shall, subject to the statutory order of priorities and the resolution of disputed claims by the parties or by the court: (a) pay all proper claims, expenses, and allowances not previously paid; (b) if necessary, sell property of the estate in order to do so; and (c) distribute the remaining property of the estate in accordance with the will or, if none, with the intestacy laws of this State~~; and (d) file a certificate of compliance with the register pursuant to Rule 6-211 within 60 days after the expiration of the time for filing claims~~.

_________________________________
Register of Wills

THIS ORDER DOES NOT CONSTITUTE LETTERS OF ADMINISTRATION AND DOES NOT AUTHORIZE THE TRANSFER OF ASSETS.

Certificate of Service

I hereby certify that on this ______ day of _________________, (month)

______, I delivered or mailed, postage prepaid, a copy of the (year)

foregoing Order to _____________________________________________, (name and address)

Personal Representative.

_________________________________
Register of Wills

Rule 6-208 was accompanied by the following Reporter's Note.

> Recent amendments to Rule 6-211 eliminated the certificate of compliance. This had been requested by the Association of Register of Wills because in a majority of small estate proceedings, the certificate was not filed, and consequently the estate could not be closed without a show cause proceeding. Accordingly, the Rules Committee recommends that the reference to the certificate of compliance in Rule 6-208 be deleted.

Mr. Sykes explained that at the request of the Association of Registers of Wills, the requirement of filing a certificate of compliance was eliminated from Rule 6-211, Proceedings after Publication, because in most small estate proceedings, the certificate was never filed, and the estate could not be closed

without a show cause proceeding. The reference to the certificate of compliance was inadvertently left in Rule 6-208 and must be deleted. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 6-412, Disclaimer, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS’ ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-412 by deleting sections (a) and (c), modifying section (b) and changing it to section (a) and adding a new section (b), as follows:

Rule 6-412. DISCLAIMER

~~(a) Time for Filing with Register~~

~~A disclaimer of a legacy, intestate share, survivorship interest, or other interest in a decedent's property required to be filed with the register pursuant to Code, Estates and Trusts Article, §9-202 shall be filed within nine months after the decedent's death or in the case of a future interest, within nine months after the date specified in that section.~~

~~Committee note: For disclaimers not required to be filed with the register, see Code, Estates and Trusts Article, §9-202 (b) and (c). Disclaimers that are timely under this Rule are not necessarily effective for federal gift tax purposes.~~

~~(b)~~ (a) Content of Disclaimer

~~The~~ A disclaimer of a legacy, intestate share, survivorship interest, or other interest in a decedent’s property shall

be in writing or other record and shall (1) describe the ~~property or~~ interest or power disclaimed, (2) declare the disclaimer ~~and its extent~~, (3) be signed by the ~~disclaimant~~ person making the disclaimer, and (4) be acknowledged if an interest in real property is disclaimed.

Cross reference: For form of acknowledgment, see Code, Real Property Article, §4-204.

~~(c) Notice~~

~~In addition to filing the disclaimer with the register pursuant to section (a) of this Rule, the disclaimant shall deliver or mail by certified mail a copy of the disclaimer to any personal representative or other fiduciary of the deceased owner or deceased donee of a power of appointment and to the trustee or other person who has legal title to the property or interest disclaimed. The disclaimant shall cause an executed copy to be recorded among the land records of the county in which any real property or interest in real property that is disclaimed is located.~~

(b) Delivery or Filing of Disclaimer

The delivery or filing of a disclaimer shall be as provided by Code, Estates and Trusts Article, §9-209.

Rule 6-412 was accompanied by the following Reporter's Note.

In Chapter 465, Acts of 2004 (SB 541), the General Assembly completely revised the Maryland Uniform Disclaimer of Property Interests Act. Changes to Rule 6-412 are required to be in conformance with the new law. The requirement of filing disclaimers with the register has been eliminated, so section (a) is no longer necessary. The content of disclaimers has been modified, so the Probate/Fiduciary Subcommittee proposes amendments to section (b) which is now section (a). The notice provisions in the statute have been reorganized into a new section involving delivery or filing of disclaimers in various cases, and the Subcommittee recommends a reference to the statute in new section (b).

Mr. Sykes told the Committee that the legislature revised the Maryland Uniform Disclaimer of Property Interests Act in Chapter 465, (SB 541) Acts of 2004. The new law covers most of what was previously in Rule 6-412. The disclaimers no longer need be filed with the registers. The disclaimer extends to legacies, intestate shares, survivorship, and other interests. Mr. Bowen asked about the addition of the language "or other record" in section (a), and Mr. Sykes replied that this is taken directly from the statute. Mr. Bowen commented that if the interest is in real property, it has to be in writing and acknowledged. Mr. Sykes suggested that the language of the Rule could be: "or other record, if not land." The Vice Chair remarked that a person could state on a videotape that he or she disclaims rights. Mr. Sykes responded that he did not think that it is a good idea to interfere with the statutory language. The Vice Chair expressed the opinion that the language "in writing or other record" is not worded well. Mr. Sykes agreed.

The Vice Chair commented that the language in section (a) that reads "or power" is not necessary, because the word "interest" covers everything. Mr. Sykes responded that this also includes a "power of appointment," which is a technical term. Mr. Sykes suggested that the words "or a power over" be added to the introductory clause of section (a). The Committee agreed by consensus, so that the language would read "... or other interest in or a power over a decedent's property...". New section (b)

refers to the statute. The Committee approved the Rule as amended.

Mr. Sykes presented Rule 6-455, Modified Administration, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-455 by changing the language pertaining to trustees in paragraph 1 of the form of election in section (b), by adding the category of "trustee of a trust that is a residuary legatee" to the consent to Election for Modified Administration form, and by adding signature lines for the trustees at the end of the form in section (c), as follows:

Rule 6-455. MODIFIED ADMINISTRATION

(a) Generally

When authorized by law, an election for modified administration may be filed by a personal representative within three (3) months after the appointment of the personal representative.

(b) Form of Election

An election for modified administration shall be in the following form:

BEFORE THE REGISTER OF WILLS FOR ____________________, MARYLAND

ESTATE OF __________________________________ Estate No. _________

ELECTION OF PERSONAL REPRESENTATIVE FOR

MODIFIED ADMINISTRATION

1. I elect Modified Administration. This estate qualifies for Modified Administration for the following reasons:

(a) The decedent died on _____________ [ ] with a will or [ ] without a will.

(b) This Election is filed within 3 months from the date of my appointment which was on ____________________________________.

(c) [ ] Each of the residuary legatees named in the will or [ ] each of the heirs of the intestate decedent is either:

[ ] The decedent's personal representative or [ ] an individual or an entity exempt from inheritance tax in the decedent's estate under §7-203 (b), (e), and (f) of the Tax-General Article.

(d) Each trustee of every trust ~~created in the decedent's will~~ that is a residuary legatee is one or more of the following: the decedent's [ ] personal representative, [ ] surviving spouse, [ ] child.

(e) Consents of the persons referenced in 1 (c) [ ] are filed herewith or [ ] were filed previously.

(f) The estate is solvent and the assets are sufficient to satisfy all specific legacies.

(g) Final distribution of the estate can be made within 12 months after the date of my appointment.

2. Property of the estate is briefly described as follows:

Description Estimated Value

3. I acknowledge that I must file a Final Report Under Modified Administration no later than 10 months after the date of appointment and that, upon request of any interested person, I must provide a full and accurate Inventory and Account to all interested persons.

4. I acknowledge the requirement under Modified Administration to make full distribution within 12 months after the date of appointment and I understand that the Register of Wills and Orphans' Court are prohibited from granting extensions under Modified Administration.

5. I acknowledge and understand that Modified Administration shall continue as long as all the requirements are met.

I solemnly affirm under the penalties of perjury that the contents of the foregoing are true to the best of my knowledge, information and belief.

| | |
|---|---|
| Attorney | Personal Representative |
| Address | Personal Representative |

____________________________
Address

____________________________
Telephone

(c) Consent

An election for modified administration may be filed if all the residuary legatees of a testate decedent and the heirs at law of an intestate decedent consent in the following form:

BEFORE THE REGISTER OF WILLS FOR ____________________, MARYLAND

ESTATE OF ______________________________ Estate No. __________

CONSENT TO ELECTION FOR
MODIFIED ADMINISTRATION

I am a [ ] residuary legatee<u>, [ ] trustee of a trust that is a residuary legatee,</u> or [ ] heir of the decedent who died intestate. I consent to Modified Administration and acknowledge that under Modified Administration:

1. Instead of filing a formal Inventory and Account, the personal representative will file a verified Final Report Under Modified Administration no later than 10 months after the date of appointment.

2. Upon written request to the personal representative by any legatee not paid in full or any heir-at-law of a decedent who died without a will, a formal Inventory and Account shall be provided by the personal representative to the legatees or heirs of the estate.

3. At any time during administration of the estate, I may revoke Modified Administration by filing a written objection with the Register of Wills. Once filed, the objection is binding on the estate and cannot be withdrawn.

4. If Modified Administration is revoked, the estate will proceed under Administrative Probate and the personal representative shall file a formal Inventory and Account, as required, until the estate is closed.

5. Unless I waive notice of the verified Final Report Under Modified Administration, the personal representative will provide a copy of the Final Report to me upon its filing, which shall be no later than 10 months after the date of appointment.

6. Final Distribution of the estate will occur not later than 12 months after the date of appointment of the personal representative.

_____________________________
Signature of Residuary Legatee or Heir

_____________________________
Type or Print Name

_____________________________
[ ] Surviving Spouse [ ] Child
[ ] Residuary Legatee or Heir
serving as Personal Representative

_____________________________
Signature of Residuary Legatee or Heir

_____________________________
Type or Print Name

_____________________________
[ ] Surviving Spouse [ ] Child
[ ] Residuary Legatee or Heir
serving as Personal Representative

_____________________________
Signature of Trustee

_____________________________
Signature of Trustee

____________________________ _______________________________

Type or Print Name Type or Print Name

. . .

Rule 6-455 was accompanied by the following Reporter's Note.

> In Code, Estates and Trusts Article, §5-702, the term "trustee of each trust created in the decedent's will" has been changed by the General Assembly in Chapter 477, Acts of 2004 (SB 686) to "trustee of each trust that is a residuary estate." To conform Rule 6-455 to the new law, changes must be made to the form of election in section (b) and the consent form in section (c).

Mr. Sykes explained that previously, modified administration had to be consented to by each trustee of every trust created in the decedent's will. Chapter 477 (SB 686), Acts of 2004 changed this to the "trustee of each trust that is a residuary estate." This change is reflected in form of election, in the consent to election, and in the signature list at the end of the Rule. The Committee agreed by consensus to these changes.

Mr. Sykes presented Rule 6-456, Modified Administration – Extension of Time to File a Final Report and to Make Distribution, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-456 to remove signature lines of interested persons from the consent form, as follows:

Rule 6-456. MODIFIED ADMINISTRATION – EXTENSION OF TIME TO FILE A FINAL REPORT AND TO MAKE DISTRIBUTION

(a) Generally

The initial time periods for filing a final report and for making distribution to each legatee and heir may be extended for 90 days if the personal representative and each interested person sign the form set out in section (b) of this Rule and file the form within 10 months of the date of appointment of the personal representative.

(b) Form

A consent to an extension of time to file a final report and to make distribution in a modified administration shall be in substantially the following form:

BEFORE THE REGISTER OF WILLS FOR ____________________, MARYLAND

IN THE ESTATE OF _____________________________ Estate No. ______

Date of Death _______________________________ Date of Appointment Of Personal Representative _________

CONSENT TO EXTEND TIME TO FILE FINAL REPORT

AND TO MAKE DISTRIBUTION IN A MODIFIED ADMINISTRATION

We, the Personal Representative and Interested Persons in the above-captioned estate, consent to extend for 90 days the time to file a final report and to make distribution in the modified administration of the estate. We acknowledge that this consent must be filed within 10 months of the date of appointment of the personal representative.

Personal Representatives
(Type or Print Names)

| Name | Signature |
| --- | --- |
| Name | Signature |
| Name | Signature |

Interested Persons
(Type or Print Names)

| Name | Signature |
| --- | --- |
| Name | Signature |
| Name | Signature |
| ~~Name~~ | ~~Signature~~ |
| ~~Name~~ | ~~Signature~~ |
| ~~Name~~ | ~~Signature~~ |

~~Name Signature~~

________________________________ ______________________________

~~Name Signature~~

________________________________ ______________________________

~~Name Signature~~

_______________________________ _______________________________

~~Name Signature~~

Source: The Rule is new.

Rule 6-456 was accompanied by the following Reporter's Note.

> The Probate/Fiduciary Subcommittee recommends deletion of seven of the signature lines for interested persons in Rule 6-456. Most other rules contain at most three signature lines, so the 10 lines in this Rule are unnecessary.

Mr. Sykes explained that the only change to the Rule was to eliminate seven of the signature lines, because they are unnecessary. By consensus, the Committee agreed to this change.

Agenda Item 5. Consideration of proposed amendments to Rule 16-821 (Performance of Marriage Ceremonies by Judges – Applicability of Rules)

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The Chair presented Rule 16-821, Performance of Marriage Ceremonies by Judges - Applicability of Rules, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-821 to add language pertaining to judges eligible for recall, as follows:

Rule 16-821. PERFORMANCE OF MARRIAGE CEREMONIES BY JUDGES – APPLICABILITY OF RULES

Rules 16-821 through 16-824 apply to all Maryland judges of the District Court, a circuit court, the Court of Special Appeals, and the Court of Appeals, including retired judges eligible for recall pursuant to Article IV, §3A of the Maryland Constitution and Code, Courts Article, §1-302, who wish to perform marriage ceremonies.

Cross reference: Code, Family Law Article, §2-406.

Source: This Rule is new.

Rule 16-821 was accompanied by the following Reporter's Note.

Chapter 199 (HB 746), Acts of 2004 was enacted by the Maryland General Assembly. It provides that judges eligible for recall under Article IV, §3A of the Maryland Constitution and Code, Courts Article, §1-302 are included as judges able to perform marriages. It also provides that a Maryland judge's fee for performing a marriage ceremony is a non-refundable fee payable to the clerk before a marriage license is issued. The General Court Administration Subcommittee recommends adding language to Rule 16-821 to conform to the legislation.

The Subcommittee considered but rejected a change to Rule 16-823 that would have added the requirement set out in House Bill 746 that the fee for performing the ceremony has to have been paid to the clerk before the judge could perform the ceremony. The reasons for the rejection include (1) a judge should be able to perform a ceremony without

> charge if the judge chooses to do so, such as in a last-minute situation, (2) the judge may not be able to find out whether the fee has been paid, and (3) section (c) provides that the judge can refuse to perform the ceremony, which is sufficient to cover any problem with the fee arrangement.

The Chair said that in Chapter 199 (HB 746), Acts of 2004, the legislature attempted to resolve the issue of retired judges performing marriages. Judge Kaplan asked about the word "eligible." The Chair responded that a judge who resigns just before his or her judicial disabilities hearing would be ineligible for recall. The statute did not solve this issue, but the Rule contains a reference to it. The idea is that a judge is eligible for recall if the Court of Appeals has determined that the judge can serve. The Reporter noted that a retired judge who has returned to the private practice of law may be ineligible for recall.

Ms. Veronis pointed out that lines 1 through 4 of House Bill 746, a copy of which was included in the meeting materials, contain the language "approved for recall," while line 10 states "eligible for recall." The Chair suggested that the language in the Rule should be "approved for recall." The Committee agreed by consensus to this change. By consensus, the Committee approved the Rule as amended.

The Chair told the Committee that the Subcommittee had considered but rejected a change to Rule 16-823, Judicial Action, that would have added the phrase, "and the fee for performing the

ceremony has been paid to the clerk of the circuit court," to the end of the first sentence of section (b). The Vice Chair remarked that the law changed, but the Rule has not been changed. The Chair commented that the problem that the statute addresses is who should collect the fee for performing the marriage. Mr. Shipley pointed out that when the parties take out the license, they may not know whether a judge will be performing the ceremony. The Chair stated that the validity of the marriage is not affected by whether or not the fee was paid to the person who performed the ceremony. When the judge see a valid license, he or she will not know if the fee was paid unless there is a receipt. Judge Heller observed that the clerk will not issue the license until the fee is received. It is not up to the judge to police whether the fee was properly paid. The Vice Chair said that it seems unseemly for a judge to have ask for the receipt on a couple's wedding day.

The Chair pointed out that the legislation requires the fee to be collected, and the clerks around the State were in agreement. Judge Heller suggested that the Rule should not be modified. A judge may or may not know whether the fee has been paid. If the clerk issues a marriage license, the judge will presume that it is valid. Mr. Shipley commented that the applicant for the license may not know who will be performing the marriage when he or she completes the application. The Chair remarked that it might be preferable to conform the Rule to the statute. The Vice Chair agreed with Judge Heller that no change

should be made. The statute is in effect if there are questions. The Committee agreed by consensus that no change should be made to Rule 16-823.

Agenda Item 6. Consideration of a proposed amendment to Rule 5-902 (Self-Authentication)

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The Chair presented Rule 5-902, Self-Authentication, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 900 - AUTHENTICATION AND IDENTIFICATION

AMEND Rule 5-902 to add language to subsection (a)(11) providing that the proponent must give notice to the adverse party of the proponent's intention to authenticate business records and that the adverse party must file an objection to the authentication no later than five days prior to the commencement of the proceeding, as follows:

Rule 5-902. SELF-AUTHENTICATION

(a) Generally

Except as otherwise provided by statute, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic Public Documents Under Seal

A document bearing a seal purporting to be that of the United States, or of any

state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the trust territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal

A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in subsection (a)(1) of this Rule, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents

A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation and accompanied by a final certification. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records

A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with this Rule or complying with any applicable statute or these rules.

(5) Official Publications

Books, pamphlets, or other publications purporting to be issued or authorized by a public agency.

(6) Newspapers and Periodicals

Printed materials purporting to be newspapers or periodicals.

(7) Trade Inscriptions and the Like

Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged Documents

Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents

To the extent provided by applicable commercial law, commercial paper, signatures thereon, and related documents.

Cross reference: See, e.g., Code, Commercial Law Article, §§1-202, 3-307, and 3-510.

(10) Presumptions under Statutes or Treaties

Any signature, document, or other matter declared by applicable statute or treaty to be presumptively genuine or authentic.

(11) Certified Records of Regularly Conducted Business Activity

The original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803 (b) (6), which the custodian or another qualified individual certifies (A) was made, at or near

the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (B) is made and kept in the course of the regularly conducted business activity, and (C) was made and kept by the regularly conducted business activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness; ~~but a record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it~~ <u>provided that, at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, the proponent (1) notifies the adverse party of the proponent's intention to authenticate the record pursuant to this subsection, and (2) makes a copy of the certificate and the record available to the adverse party. If the adverse party objects to the authenticity of the record, the adverse party must file a written objection on that ground no later than five days prior to the commencement of the proceeding</u>.

(12) Items as to Which Required Objections Not Made

Unless justice otherwise requires, any item as to which, by statute, rule, or court order, a written objection as to authenticity is required to be made before trial, and an objection was not made in conformance with the statute, rule, or order.

Committee note: As used in this Rule "document" is a generic term. It includes public records encompassed by Code, Courts Article, §10-204.

(b) Definition

As used in this Rule, "certifies", "certificate", or "certification" means, with respect to a domestic record or public

document, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record or public document, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record or public document must be accompanied by a final certification as to the genuineness of the signature and official position (1) of the individual executing the certificate or (2) of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual. A final certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country who is assigned or accredited to the United States.

Source: This Rule is in part derived from F.R.Ev. 902 and in part new.

Rule 5-902 was accompanied by the following Reporter’s Note.

The Evidence Subcommittee recommends the addition of language to subsection (a)(11) that would require the proponent of business record evidence to notify the adverse party of the proponent’s intention to authenticate the records and to make a copy of the certificate and the record available to the adverse party. It would also require the adverse party to file a written objection to the authenticity of the record no later than five days prior to the proceeding.

The Chair explained that he had learned about a problem with Rule 5-902 from a prosecutor in Howard County. The prosecutor had wanted to introduce business records into evidence in a trial

while saving the custodian of the records a trip to court to authenticate the records. The prosecutor thought that he had complied with the Rule, but at the trial, an objection was made based on the lack of authentication. The new language proposed for addition to the Rule complies with the case of *Crawford v. Washington*, 124 S.Ct. 1354 (2004), which held that out-of-court statements by witnesses that are testimonial are barred, unless witnesses are unavailable and defendants had a prior opportunity to cross examine the witnesses. The language is designed to save the witness a trip by stating that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, the proponent notifies the adverse party of the proponent's intention to authenticate the record by self-authentication pursuant to Rule 5-902 (a)(11). If the adverse party objects, he or she must file a written objection five days prior to the trial. Mr. Dean commented that the amended language clarifies what the general practice should be.

The Vice Chair noted that the beginning of the Rule states that extrinsic evidence of authenticity is not required with respect to the items listed. The Chair said that Professor Lynn McLain, of the University of Baltimore Law School, had suggested the change to the Rule. The federal rules have a similar provision. The new language helps to avoid sandbagging. Mr. Leahy remarked that a party could notify the other side 50 days before the trial, and then five days before the trial, the

objection comes in. The Chair suggested that the adverse party should be allowed to object no later than five days after the certification. Mr. Dean inquired as to what the objection by the other party will generate, and the Chair answered that the party will have to produce the witness. Mr. Dean commented that he would not like to see harassing objections being generated. He expressed the concern that the witness should not be brought in just because the party objects.

The Vice Chair suggested that business records should be like the other categories in the Rule. The burden should be on the other side to argue that the records have not been authenticated. The Reporter observed that business records, particularly those of a party, may be less inherently trustworthy as to their authenticity than the other categories of documents listed in the Rule. The Chair responded that the proposed amendment may not be necessary. A motion in limine could be a substitute. The Evidence Subcommittee can discuss whether there is a better way to solve the authentication problem. It may be helpful to review how other states have handled this issue. The Chair expressed his agreement with Mr. Leahy that the objection to the self-authentication should be related to the date of notification of the proposed self-authentication. Mr. Dean remarked that he has not heard of any problems with this. It would be a good idea to facilitate the process to avoid bringing in unnecessary witnesses by designing a mechanism to allow a

legitimate pretrial challenge to the records. The Chair stated that the Rule would go back to the Evidence Subcommittee.

The Chair told the Committee that a Draft Maryland Code of Civility had been handed out at the meeting. See Appendix 5. He had discussed this with Ms. Potter, who is the Rules Committee representative on the Professionalism Commission chaired by the Honorable Lynn Battaglia, Judge of the Court of Appeals. Ms. Potter said that the some of the ideas suggested at the Commission meetings were a remedial course and a new admittee course on professionalism. This proposed Code of Civility was drafted by Professor Abraham Dash of the University of Maryland School of Law. Judge Heller commented that the Maryland State Bar Association had adopted a code of civility, which includes provisions applicable to judges in addition to provisions applicable to lawyers. The portion of the MSBA Code of Civility that is applicable to judges is based on the American Bar Association Model Code of Judicial Conduct and the Code used in the federal Seventh Circuit that applies to judges. The Draft Code handed out today does not apply to judges. Judge Heller added that she had co-chaired a Committee in Baltimore City on the same subject. Some law firms and courts have adopted similar codes. The Chair noted that Baltimore County, Baltimore City, and Montgomery County have similar codes. Ms. Potter commented that many states have these codes, but the problem is that they are not working. She remarked that any code on civility would need some teeth added to it to make it work.

Judge Heller expressed the opinion that the Draft Code handed out today has many deficiencies. Mr. Johnson pointed out that the Professionalism Commission will work on this matter, and there will be an opportunity for the Rules Committee and the public to comment. The Chair observed that an attorney who agrees to help a client in a case where the attorney needs a postponement may run afoul of Number 6 under the heading "Common Courtesy" in the Draft Code of Civility which provides that "Lawyers shall not accept professional commitments they know they will be unable to honor." This is a very unsettling provision.

The Chair adjourned the meeting.