

February 17, 2021

The Honorable Mary Ellen Barbera,
Chief Judge

The Honorable Robert N. McDonald

The Honorable Shirley M. Watts

The Honorable Michele D. Hotten

The Honorable Joseph M. Getty

The Honorable Brynja M. Booth

The Honorable Jonathan Biran,
Judges

The Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Annapolis, Maryland 21401

Your Honors:

The Rules Committee submits this Supplement to its Two Hundred and Sixth Report in light of the discussion at the hearing on that Report on February 11, 2021 regarding the addition of a Committee note to Rule 4-325 (e) on page 151 of the Report binder. We also call attention to a matter involving the amendments proposed to Rule 19-217 on page 100 of the binder.

With respect to the latter, the Court will note there are brackets around the proposed additions to subsections (a) (3) (C) and (b) (2). The intent of the Rules Committee was that a motion for *pro hac vice* special admission and the certificate of the out-of-State attorney be substantially in the form of Form 19-A.1 included in the Appendix of Forms. The question was whether that Form should remain in the Rules. It has been there at least since 1980.

With respect to Rule 4-325, the Court approved the deletion of the words "evidence of" in subsection (e) (1) and asked the Committee to draft and propose a Committee note to section (e) to implement Judge Watts's motion to make clear that Subsection (e) (2) of the Rule permits but does not require a trial judge to give a jury instruction on any particular factor that may bear on the reliability of a pretrial eyewitness identification. We propose the following:

"Subsection (e) (1) of this Rule directs a trial court, upon request, to instruct the jury that, in determining whether a challenged pretrial eyewitness identification obtained with the participation of law enforcement personnel is reliable, it shall consider whether there was compliance with the requirements of Code, Public Safety Article, §§ 3-506 and 3-506.1. Subsection (e) (2) is a catchall provision that directs the court to instruct the jury that it may consider any other factors that reasonably may affect the reliability of a pretrial eyewitness identification but does not require an instruction on whether any particular factor may have that effect."

To be consistent with that Committee note, the Committee recommends rewriting the cross reference that follows to read: "For jury instructions pertaining to eyewitness identifications recommended by the Maryland Pattern Jury Instruction Committee of the Maryland State Bar Association, Inc., see Maryland Pattern Jury Instruction MPJI-CR 3:30."

Respectfully submitted,

Alan M. Wilner
Chair

AMW:wp

cc: Suzanne C. Johnson, Clerk

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-325 to add new section (e) requiring the court, upon request, to instruct a jury as to consideration of certain evidence if pretrial eyewitness identification evidence is admitted, to add a Committee note and cross reference after section (e), and to make conforming amendments to subsequent sections, as follows:

Rule 4-325. INSTRUCTIONS TO THE JURY

(a) When Given

The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. In its discretion the court may also give opening and interim instructions.

(b) Written Requests

The parties may file written requests for instructions at or before the close of the evidence and shall do so at any time fixed by the court.

(c) How Given

The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

(d) Reference to Evidence

In instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided. In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses.

(e) Eyewitness Identification

If pretrial eyewitness identification evidence obtained with the participation of personnel from a law enforcement agency has been admitted, the court, upon request, shall instruct the jury, as relevant, that, in considering the reliability of the identification, the jury shall consider evidence of:

(1) whether there was compliance with the requirements of Code, Public Safety Article, §§ 3-506 and 3-506.1; and

(2) any other factor that reasonably may bear on the reliability of the identification.

Committee note: Subsection (e)(1) of this Rule directs a trial court, upon request, to instruct the jury that, in determining whether a challenged pretrial eyewitness identification obtained with the participation of law enforcement personnel is reliable, it shall consider whether there was compliance with the requirements of Code, Public Safety Article, §§ 3-506 and 3-506.1. Subsection (e)(2) is a catchall provision that directs the court to instruct the jury that it may consider any other factors that reasonably may affect the reliability of a pretrial eyewitness identification but does not require an instruction on whether any particular factor may have that effect.

Cross reference: For jury instructions pertaining to eyewitness identifications recommended by the Maryland Pattern Jury Instruction Committee of the Maryland State Bar Association, Inc., see Maryland Pattern Jury Instruction MPJI-CR 3:30.

~~(e)~~ (f) Objection

No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

~~(f)~~ (g) Argument

Nothing in this Rule precludes any party from arguing that the law applicable to the case is different from the law

described in the instructions of the court stated not to be binding.

Source: This Rule is derived as follows:

Section (a) is derived from former Rule 757 d.

Section (b) is derived from former Rule 757 a.

Section (c) is derived from former Rule 757 b.

Section (d) is derived from former Rule 757 c.

Section (e) is new.

Section ~~(e)~~ (f) is derived from former Rule 757 f and h.

Section ~~(f)~~ (g) is derived from former Rule 757 g.

MARYLAND RULES OF PROCEDURE

TITLE 19 - ATTORNEYS

CHAPTER 200 - ADMISSION TO THE BAR

AMEND Rule 19-217 by requiring certain information be included in a motion for special admission, by requiring the attorney to be admitted to disclose certain previous special admissions and unique identifying numbers provided by Judiciary units, and by requiring a record of attorneys granted or denied special admission be maintained in the Attorney Information System, as follows:

RULE 19-217. SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEYS PRO HAC VICE

(a) Motion for Special Admission

(1) Generally

A member of the Bar of this State who (A) is an attorney of record in an action pending (i) in any court of this State, or (ii) before an administrative agency of this State or any of its political subdivisions, or (B) is representing a client in an arbitration taking place in this State that involves the application of Maryland law, may move that an attorney who is a member in good standing of the Bar of another state be admitted

to practice in this State for the limited purpose of appearing and participating in the action as co-counsel with the movant.

Committee note: "Special admission" is a term equivalent to "admission pro hac vice." It should not be confused with "special authorization" permitted by Rules 19-218 and 19-219.

(2) Where Filed

(A) If the action is pending in a court, the motion shall be filed in that court.

(B) If the action is pending before an administrative agency, the motion shall be filed in the circuit court for the county in which the principal office of the agency is located or in any other circuit court in which an action for judicial review of the decision of the agency may be filed.

(C) If the matter is pending before an arbitrator or arbitration panel, the motion shall be filed in the circuit court for the county in which the arbitration hearing is to be held or in any other circuit court in which an action to review an arbitral award entered by the arbitrator or panel may be filed.

(3) Other Requirements

The motion shall be in writing and shall include the following:

(A) the full name, address, telephone number, and email address of the attorney to be specially admitted; and

(B) the movant's certification that copies of the motion have been served on the agency or the arbitrator or arbitration panel, and all parties of record.

[(C) The motion shall be substantially in the form provided in Appendix 19-A, Form A.1.]

Cross reference: See Appendix 19-A following Title 19, Chapter 200 of these Rules for Forms 19-A.1 and 19-A.2, providing the form of a motion and order for the Special Admission of an out-of-state attorney.

(b) Certification by Out-of-State Attorney

The attorney whose special admission is moved shall certify in writing:

(1) the number of times the attorney has been specially admitted during the ~~twelve months~~ five years immediately preceding the filing of the motion and the courts that granted admission, and

(2) each unique identifying number previously issued to the attorney by the Attorney Information System, Client Protection Fund, or Maryland Judicial Information Systems (JIS) for use with Maryland Electronic Courts (MDEC).

The certification [shall be substantially in the form provided in Appendix 19-A, Form A.1 and] may be filed as a separate paper or may be included in the motion under an appropriate heading.

(c) Order

The court by order may admit specially or deny the special admission of an attorney. In either case, the clerk shall forward a copy of the order to the State Court Administrator, who shall maintain a ~~docket~~ record of all attorneys granted or denied special admission in the Attorney Information System. When the order grants or denies the special admission of an attorney in an action pending before an administrative agency, the clerk also shall forward a copy of the order to the agency.

(d) Limitations on Out-of-State Attorney's Practice

An attorney specially admitted pursuant to this Rule may act only as co-counsel for a party represented by an attorney of record in the action who is admitted to practice in this State. The specially admitted attorney may participate in the court or administrative proceedings only when accompanied by the Maryland attorney, unless the latter's presence is waived by the judge or administrative hearing officer presiding over the action. An attorney specially admitted is subject to the Maryland Attorneys' Rules of Professional Conduct during the pendency of the action or arbitration.

Cross reference: See Code, Business Occupations and Professions Article, § 10-215.

Committee note: This Rule is not intended to permit extensive or systematic practice by attorneys not admitted in Maryland. Because specialized expertise or other special circumstances may be important in a particular case, however, the Committee has

not recommended a numerical limitation on the number of special admissions to be allowed any out-of-state attorney.

Source: This Rule is derived from former Rule 19-214 (2018).