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 January 7, 2005.

Members present:

Hon. Joseph F. Murphy, Jr., Chair

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

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Una M. Perez, Esq., Special Reporter to the Rules Committee
Paul DeWolfe, Esq., Office of the Public Defender
Timothy S. Mitchell, Esq., Maryland Criminal Defense Attorneys Association
Chrys Kefelas, Esq., Deputy Counsel to Governor Ehrlich
Ms. April R. Randall
Antonio Gioia, Esq., Office of the State's Attorney, Baltimore City
Lawrence Doan, Esq., Office of the State Attorney, Baltimore City
Michele Nethercott, Esq., Office of the Public Defender
Professor Lynn McLain, University of Baltimore School of Law
Elizabeth Veronis, Esq., Special Assistant to the Chief Judge of the Court of Appeals
Dennis C. McCoy, Esq.

The Chair convened the meeting.

Agenda Item 1. Consideration and reconsideration of proposed amendments to certain Rules in Title 5: Rule 5-804 (Hearsay Exceptions; Declarant Unavailable) and Rule 5-902 (Self-Authentication)

Mr. Karceski presented Rule 5-804, Hearsay Exceptions; Declarant Unavailable, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-804 to delete the current language of subsection (b)(5) and add new language, as follows:

Rule 5-804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability

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

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

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

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

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

(5) is absent from the hearing and the proponent of the statement has been unable to

procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.

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

(b) Hearsay Exceptions

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

(1) Former Testimony

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

(2) Statement Under Belief of Impending Death

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

(3) Statement Against Interest

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

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

(4) Statement of Personal or Family History

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

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

(5) ~~Other Exceptions~~ Forfeiture by Wrongdoing

~~Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is unavailable as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be~~

~~admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.~~ A statement, which (A) was (i) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (ii) reduced to writing and has been signed by the declarant; or (iii) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (B) which is offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. A statement may not be admitted under this exception **unless, as soon as is practicable after the proponent of the statement learns that the declarant will be unavailable**, the proponent ~~[of it]~~ makes known to the adverse party~~[, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it,]~~ the intention to offer the statement and the particulars of it.

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

Cross reference: See Committee note to Rule 5-803 (b)(24).

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

Rule 5-804 was accompanied by the following Reporter's Note.

In response to problems of witness intimidation, and at the suggestion of Professor Lynn McLain of the University of Baltimore School of Law and the Honorable Paul Grimm, Magistrate Judge of the United States District Court, the Evidence Subcommittee recommends the addition of a new hearsay exception based on Federal Rule 804 b 6, Forfeiture [of an accused's confrontation

> right] by Wrongdoing. The Subcommittee added language derived from Rule 5-802.1 circumscribing the types of statements that would qualify. The Subcommittee also recommends adding a Committee note that clarifies that the government is also included when the Rule refers to a "party" in subsection (b)(5).
>
> The Subcommittee recommends deleting the catchall exception in subsection (b)(5) because it is duplicative of subsection (b)(24) of Rule 5-803.

Mr. Karceski explained that the proposed changes to Rule 5-804 are an attempt to parallel the Rule with its federal counterpart, Federal Rule 804 b 6, Forfeiture by Wrongdoing. The new provision allows statements by an unavailable witness to be admitted when the statements have some trustworthiness, such as those given under oath subject to the penalty of perjury at trial, in a deposition or other proceeding, or reduced to writing and signed by the declarant, or recorded by stenographic or electronic means, if the unavailability of the witness was procured by a party who engaged in or acquiesced in wrongdoing intended to cause the witness's unavailability. To add balance to the proposed amendment, the suggested Committee note indicates that the government is also included when the subsection refers to a "party." This levels the playing field for both sides by including the government, the defendant, or a friend or family member of the defendant who attempts to exclude the testimony of a witness. One issue to be discussed is the timing of when the information is brought forward. The proposed language states:

"A statement may not be admitted under this exception unless, as soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it." The matter could arise on the day of the trial. The Chair observed that, because of this possibility, instead of using the exact language of the current "catchall" exceptions in subsection (b)(24) of Rule 5-803 and subsection (b)(5) of Rule 5-804, the proposed amendment substitutes the phrase, "as soon as is practicable" for the "catchall" phrase, "sufficiently in advance of trial." The trial court can take steps to allow counsel to prepare if the matter is raised on the day of trial.

The Chair stated that the Office of the Governor is very interested in the proposed change to Rule 5-804. Last year, a bill submitted on witness intimidation did not get out of the House Judiciary Committee. Witness intimidation arises frequently in Baltimore City as well as in other jurisdictions around the State. The Chair had spoken with Jervis Finney, Esq., Chief Legal Counsel and Chrys Kefalas, Esq., Deputy Counsel, from the Office of the Governor. The Chair commented that the language in bold letters recognizes that the proponent of the statement may not be aware of the witness's unavailability until the last minute before trial. It requires the proponent to give as much prior notice as is practicable. The "catchall" language that was used in an earlier draft of the proposed amendment is

problematic and therefore has been deleted. Fed.R.Ev. 804 (b)(6) is much broader, because it allows any statement to be admitted that was offered against a party who has engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness. When the Evidence Subcommittee discussed the Rule, Delegate Vallario was concerned that a witness's statement that is found in a police report but has not been reduced to writing could be admitted. To avoid this scenario, the language from Rule 5-802.1, Hearsay Exceptions – Prior Statements by Witnesses, was put into the proposed language in Rule 5-804 so that only statements that are trustworthy because they are under oath, reduced to writing and signed by the declarant, or recorded by stenographic or electronic means, may be admitted under the Rule. This solves some of the problems raised at the Subcommittee meeting. The Chair said that the Honorable Paul Grimm, Magistrate Judge of the United States District Court, and Professor Lynn McLain of the University of Baltimore Law School were present at the Subcommittee meeting.

The Chair said that another issue discussed at the meeting was where the Rule should be placed. One possibility is to put it into Rule 5-803, Hearsay Exceptions: Unavailability of Declarant Not Required, because it is an admission by conduct. However, it is better suited to Rule 5-804, because the declarant is unavailable. This is not like an admission by silence, which is a real, relevant silence in the face of an accusation.

Professor McLain explained that the proposed change to Rule

5-804 is based on the common law and the federal rule that may not be familiar to some Maryland practitioners. She cited footnote 7 in *Cooley v. State*, 157 Md. App. 101 (2004), authored by the Chair: "If the means of justice are to be preserved and the ends of justice protected, courts must exercise their discretion so as to dispel any belief that intimidation of victims or witnesses will serve the ends to which the intimidation is directed." Professor McLain told the Committee that this Rule is different from guilty knowledge or prosecuting someone for intimidating a witness. It facilitates the possibility of admitting a witness' statement without the witness being available. It takes away the payoff of intimidating the witness.

Professor McLain continued that in some sections of Baltimore City, the selling of drugs on the streets is common, and there is an atmosphere of intimidation by threats, vandalism, harassment, and even murder. Editorials in the Sunpapers have indicated that this is a big problem. In a recent case, the father of a 10-year-old child who was innocently struck by a bullet, would not talk to the police, because he was afraid for the safety of his family. Currently, if a witness cannot or will not testify, the prosecution of the case is often dropped. Although the proposed change to Rule 5-804 is not a cure for these problems, it may provide some help. It is a logical consequence that if one commits wrongdoing, one cannot complain

about the situation that was created. The defendant cannot object to the admission of the witness's out-of-court statement on the grounds that the defendant is not able to cross-examine the witness, if the defendant is responsible for the unavailability of the witness. Professor McLain quoted from *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879): "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege." At the request of Professor McLain, excerpts from *Reynolds*, *Crawford v. Washington*, 124 S. Ct. 1354, 1370 (2004), and the Advisory Committee Notes to the 1997 Amendments to Fed.R.Ev. 804 and correspondence from Professor Richard D. Friedman of the University of Michigan Law School were distributed to the Committee. See Appendix 1.

The Chair asked the guests if anyone wished to speak on this issue. Mr. Gioia, an Assistant State's Attorney for Baltimore City said that he was the training director for his office, and he introduced Mr. Doan, who is the Chief Attorney for the Trial Division of the Baltimore City State's Attorney's Office. Mr. Gioia thanked the Committee for the opportunity to speak. He said that although the changes to Rule 5-804 are well-intentioned, they are inadequate to solve the problems they are trying to cure. There is an unintended benefit to a defendant

who murders a witness, since the dead witness's statement cannot be admitted if it had not been given under oath, reduced to writing, or recorded by stenographic or electronic means. If a defendant murders or arranges for the murder of a witness who was to testify for the United States Attorney's office, the witness's statement is admissible under the federal system. Mr. Gioia asked the Committee not to adopt a watered-down version of the federal rule.

Mr. Gioia cited the case of *Nance v. State*, 331 Md. 549 (1993) concerning this issue, and he said that there is fear in Baltimore City. Often a defendant's girlfriend is willing to testify at first, and then she refuses to come to court. If the defendant authorized the killing of a witness or killed the witness himself, the witness's statement cannot be admitted. Mr. Doan added that the witness may have made an oral statement to the detective, but the statement was not on tape nor was it signed. This would not be covered under the Rule. Mr. Gioia said that even if the statement were admitted, the defense attorney can attack the credibility of the declarant under Rule 5-806, Attacking and Supporting Credibility of Declarant. He asked that Rule 5-804 be the same as the federal rule.

Mr. Johnson commented that there has to be some indicia of credibility on the part of the witness. If the witness tells the detective something that is not under oath, credibility is out of the equation.

Judge Missouri said that he is a former prosecutor, and he did not like the direction in which Mr. Gioia was going. Police officers may lie about what the witness had told them. If the witness will not sign a statement or be recorded, the purported testimony of the witness should not be admitted. Mr. Doan remarked that the officer could be cross-examined. Mr. Gioia added that mendacity among law enforcement is always possible and may be a problem. The Chair commented that he had been an Assistant's State's Attorney, also. This Rule runs the risk of violating constitutional rights. If the defendant's girlfriend will not put her statement in writing, it should not be admitted. There are other reasons that she may not want her statement to be admitted besides being frightened. There are other arrows in the prosecutor's quiver to get her testimony admitted, such as taking her deposition under Rule 4-261, Depositions. A basic degree of accuracy is necessary. The Chair said that he shared the concern of Mr. Johnson and Judge Missouri about the reliability of the testimony of a witness who will not sign a written statement. The Chair added that another troubling aspect of the proposed Rule change is the question of how the prosecutor proves participation by the defendant in the intimidation. Without this proof, the defendant has a constitutional right to confront the witness.

Mr. Karceski observed that when a witness will not sign a statement or allow one to be recorded or stated under oath, there is almost no chance that the witness will appear to testify at

the trial. He said that he shared the concern of the Chair and Judge Missouri about allowing in the witness's oral statement to the police. The police will have to learn better how to deal with such a witness.

Mr. Gioia remarked that subsection (b)(6), Forfeiture by Wrongdoing, was added to Fed.R.Ev. 804 in 1997. Since 1997, in federal appellate decisions, there are rare instances where the statement of a missing or dead witness has not been recorded or memorialized in writing. This is not a confrontation clause violation either pre- or post-*Crawford v. Washington*, 124 S. Ct. 1354 (2004). He reiterated that he advocated a rule that is co-extensive with Fed.R.Ev. 804 (b)(6).

Mr. Mitchell told the Committee that he is the President of the Criminal Defense Attorney's Association. He echoed the comments of the Chair and Judge Missouri. In Prince George's County, a few officers seem willing to violate their own code of ethics. He said that he objects to opening the door to statements that have not been recorded under oath. Another concern is that no decisions exist as to the definition of the term "wrongdoing" or what intimidation of a witness is. Some of the comments he has heard indicate that intimidation means physically harming a witness. If the defendant says to the witness "If you testify, I will kill you," that is wrongdoing intended to keep the witness from testifying, but what about something more subtle? There are statutes addressing witness

intimidation, and these must be reconciled with the proposed change to Rule 5-804. Another problem is the witness who has perceived intimidation, but there is no reasonable basis for the witness's fear. Also, what will the standard be to determine if the defendant had anything to do with the witness's perception? Mr. Mitchell thanked the members of the Committee for their attention.

Mr. Brault pointed out that if an intimidated witness, who is available and is called at the trial by the State, directly contradicts a statement that the witness gave to a police officer, section (a) of Rule 5-802.1, Hearsay Exceptions – Prior Statements by Witnesses, is available to allow the prior statement to be admitted. He observed that the State's Attorney's position is that the safeguards in Rule 5-802.1 (a) should be omitted from Rule 5-804 (b)(5). Mr. Dean clarified that this is the position of the Office of the State's Attorney for Baltimore City, not all State's Attorneys in Maryland. Mr. Brault commented that this would create different rules of admissibility for statements of a live witness who can be cross-examined than for one who has been murdered. For the latter, all of the witness's oral statements to the police would have to be admitted. He said that years ago, he had done criminal defense work, and it was known that certain police officers do not always tell the truth. An experienced defense attorney must proceed knowing that this might be a possibility.

Mr. Dean explained that the Evidence Subcommittee started

using the federal Rule as a base. To provide some guarantees of reliability, language was borrowed from Rule 5-802.1 (a) and added to the proposed new provision in Rule 5-804. He expressed the opinion that Mr. Gioia's objection to adding this language is not a reason to reject the proposed Rule change that is before the Committee today. The new language will address the serious problem of witness intimidation, and the addition of the language from Rule 5-802.1 will make it a fair Rule. If the new Rule does not address the problem, further changes can be made. He added that based on his experience as a prosecutor, it is not a good idea to vouch for a witness who will not record a statement or sign that it is true.

Mr. DeWolfe asked if there had been any discussions as to the standard of proof for establishing the wrongdoing. If it is by preponderance of the evidence, the Office of the Public Defender would have a problem with it. The standard of proof for "other crimes" evidence is clear and convincing. His office also would object to a Rule that allows admissibility of the witness's statement to be triggered not only by the defendant's own conduct, but also by the defendant's acquiescence in the conduct of others.

The Chair said that the Subcommittee had looked at establishing wrongdoing or acquiescence in wrongdoing with evidence that is itself hearsay evidence. Federal cases have held that this is allowable. This is decided preliminarily pursuant to Fed.R.Ev. 104, Preliminary Questions. Maryland Rule

5-104 provides that the court may admit evidence whose relevance depends upon the fulfillment of a condition or fact if the court finds that evidence has been introduced that is sufficient to support a finding by the trier of fact that the condition has been fulfilled. Although federal cases use the preponderance of the evidence standard, the Chair conjectured that consistent with the ruling of the Court of Appeals with respect to evidence of other crimes, the standard would be clear and convincing evidence that the defendant acquiesced in or initiated wrongdoing. The fact proven by the evidence is itself hearsay under the definition of hearsay. This should be left to case development.

Professor McLain pointed out that Rule 5-804 applies to both civil and criminal cases. In the case of *Sessoms v. State*, 357 Md. 274 (2000), the Court of Appeals held that the standard of clear and convincing evidence is only to protect defendants in criminal actions. Should Rule 5-804 contain a specific burden of proof applicable in criminal actions? In medical malpractice cases, experts who testify on behalf of plaintiffs face a fraternity of silence. This is not an overt threat, but it makes one tread carefully. Mr. Brault referred to *Meyer v. McDonnell*, 40 Md. App. 524 (1978), in which Dr. McDonnell tried to intimidate the plaintiff's expert witnesses in his medical malpractice case by telling them of his intention to have transcripts of their depositions disseminated to their local and national medical societies. The holding of the Court of Special

Appeals was that the evidence of the intended intimidation "has probative value insofar as it related to the [the defendant's] consciousness of the weakness of his case and it could have been considered by the jury for that purpose." *Meyer*, at 534. The Chair added that because the witnesses came to trial and took the stand, there was no issue as to the admissibility of their prior statements. He opined that had the intimidation been successful, the witnesses' prior statements should have been admissible as substantive evidence.

Professor McLain noted that Fed.R.Ev. 804(b)(6) applies to civil and criminal cases. Except for the Fifth Circuit, the burden of proof as to forfeiture by wrongdoing in federal criminal cases is the preponderance of the evidence standard. The Advisory Committee note to the 1997 amendments to Fed.R.Ev. 804 states that "[t]he usual Rule 104 (a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804 (b)(6) seeks to discourage." The use of Fed.R.Ev. 104 (a), rather than Fed.R.Ev. 104 (b), provides a safeguard in that a judge, rather than a jury, makes the determination as to admissibility of a statement under Fed.R.Ev. 804 (b)(6). The Hon. Paul W. Grimm, who was present at the Subcommittee meeting at which this Rule was discussed, had commented that if the State can prove wrongdoing, whether criminal or not, such as procuring the unavailability of a witness, it does not necessarily mean that the witness's out-of-court statement is admitted. The

statement may be admitted, but the trial court has to review the statement to see if the declarant has first-hand knowledge. After *Crawford*, the issue is more one of whether the statement is hearsay and a question of due process, as well as State or federal evidence rules. The hearsay must be reliable, or it violates due process. Fed.R.Ev. 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The kinds of statements that are admitted include dying declarations, excited utterances, and statements made to the defendant's girlfriend. Some testimonial statements may be admitted. The Court of Appeals is currently considering a case involving a definition of the term "testimonial." In some jurisdictions, some excited utterances are considered to be testimonial.

Mr. Karceski asked Professor McLain what the jury is told about the defendant procuring the unavailability of the witness. Professor McLain answered that the jury is not told about this. Mr. Karceski noted that the client may have procured the witness's absence, yet it is not stated as to why the witness is not there. The Chair said that this is resolved outside of the presence of the jury, similar to an instruction as to credibility.

Mr. Gioia thanked the Chair for the revision of the notice provision. He remarked that the identity of the absent declarer

and the particulars of the statement would have been previously disclosed to the defense pursuant to Rule 4-263. The Chair inquired as to whether the federal rule requires prior notification, and Professor McLain responded that this is not required. The Chair expressed the opinion that prior notification should be required. The notice does not necessarily have to be in writing.

The Chair said that with respect to the request made by the State to conform the Rule to the federal rule, if the Rule is approved by the Rules Committee, the guests can come to the Court of Appeals and ask for the added language to be taken out. Mr. Sykes pointed out that there is an alternative version of the new language in the meeting materials, and he questioned as to what the Subcommittee's opinion is. The Chair explained that the version of Rule 5-804 handed out and considered by the Committee today clarifies that the duty is on the disclosing party to notify the opponent as soon as the opponent is aware that the declarant is unavailable. The language which is indicated as stricken at the beginning of subsection (b)(5) was the "catchall" language at the end of the Rule. Originally, the proposed language read "makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it," but this did not account for the situation where the unavailability is not discovered until after the trial has started and is not known in advance of the trial.

Mr. Bowen moved to adopt the version of Rule 5-804 that was handed out at today's meeting, taking into account that stylistic changes will be necessary. The motion was seconded, and it passed unanimously.

Agenda Item 3. Consideration of a policy question concerning adding to Rule 8-423 (Supersedeas Bond) a cap on the dollar amount of a supersedeas bond (See Appendix 2)

The Chair announced that because Mr. McCoy was present, Agenda Item 3 would be discussed next.

Mr. McCoy said that he appreciated the opportunity to address the Rules Committee. He represents the Philip Morris Company. In May of 2004, he submitted a letter with background material to the Rules Committee requesting that a change be made to Rule 8-423, Supersedeas Bond, to put in a $25 million bond limit. See Appendix 3. Currently, Rule 8-423 provides that when judgment is for the recovery of money not otherwise secured, the amount of the bond shall be the sum that will cover the whole amount of the judgment remaining unsatisfied plus interest and costs. Mr. McCoy is proposing that language be added to state that if the appellee proves by a preponderance of the evidence that an appellant whose bond has been so limited has been dissipating assets outside the ordinary course of business to avoid payment of a judgment, the court may require the appellant to execute a bond in an amount up to the full amount of the judgment. This follows the changes made by at least 30 other states that have limited the amount of supersedeas bonds. In 2003, there were 21 jury verdicts of over $100 million, including one for $11.8 billion. In Maryland, in *First Union National Bank v. Steele Software*, 154 Md. App. 97 (2003), the plaintiff was awarded $76 million in compensatory damages and an additional

$200 million in punitive damages.

Mr. McCoy noted that although ordinarily a bond must be posted in an amount equal to the amount of the judgment, *O'Donnell v. McGann*, 310 Md. 342 (1987) held that the general provisions of Rule 1-402 (d) give a trial judge latitude in setting the amount of a supersedeas bond "in an extraordinary case." In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), there was an $11.12 billion verdict against Texaco for tortious interference of a contract. At that time, the entire world bond market totaled $1.5 billion, so Texaco could not post the bond and had to file for bankruptcy to prevent Pennzoil from perfecting judgment liens on its property. In *Liggett Group v. Engel*, 853 So. 2d 434 (2003), Mr. McCoy's client was the defendant. A class of smokers was awarded $145 billion in punitive damages. Pre-existing Florida law required a defendant to post a bond equal to 125% of the verdict, which would have resulted in a bond of $182 billion in the *Engel* case. While the case was pending, the Florida legislature enacted an appeal bond cap of $100 million, allowing the defendant to post a bond. The case was reversed on appeal. In *Price v. Philip Morris*, 793 N.E. 2d 942 (2003), there was a $10 billion judgment against a client, and the court required a supersedeas bond of $12 billion. It was estimated that the total bond capacity in the world at that time was $5 billion. The court ultimately reduced the bond requirements, and an appeal is pending.

Mr. McCoy said that there have been other events outside of the judicial environment. Several tobacco companies and states effected a master settlement agreement in which the tobacco companies pay money to the states annually. It is a private settlement agreement that is a result of suits brought by various attorneys general of the states involved. The net receipts to Maryland are $120 million a year, after $30 million in counsel fees are subtracted. Some of the money goes into smoking prevention and general health programs. The inability of Mr. McCoy's client to post bond in the *Price* case resulted in some attorneys general filing *amicus curiae* briefs requesting that the court to adopt a bond level other than $12 billion. It was obvious that the company could not make payments under the master settlement agreement and post bond. If the tobacco companies filed for bankruptcy, this would cut off the payments to Maryland and other states. The attorneys general solicited the court to exercise its prerogative under the Illinois rule, which is the same as the Maryland rule, to change the amount of the supersedeas bond. Setting bond is discretionary. When or whether the discretion is exercised has a huge impact on publicly traded stocks, whose owners include widows, orphans, trust funds, and endowments. Mr. McCoy's client lost two-thirds of its capitalization value in two months. The loss flowed to the owners and affected pension funds for Maryland. The court does have discretion, but there is no indication as to when a court

will exercise its discretion to bring relief. Thirty states have instituted a finite bond cap. Two effected this by rule, the others legislatively. In five states, the filing of an appeal automatically stays a judgment without a supersedeas bond.

The Chair asked about the two states that instituted a supersedeas bond cap by rule. Was this was done only for punitive damages? Mr. McCoy replied that one of the states instituted the cap only for punitive damages. He said that he had given the Reporter to the Rules Committee a synopsis of the states instituting a cap. The 30 states with the bond cap vary as to the amount. The $25 million cap that is being requested is at the low end. In some of the states, the court sets the bond cap by rule. Mr. McCoy's client encourages the Court of Appeals to make the requested change.

Judge McAuliffe noted that at the Subcommittee meeting at which this issue had been discussed, the consultants had indicated that most states impose the cap legislatively. A bill had been before the Maryland General Assembly, but the House of Delegates did not pass it. Mr. Brault commented that notwithstanding the *O'Donnell* case, most judges require the bond in the amount of the judgment plus a year's interest, and this is an outrage.

The Chair noted that some judges are exercising discretion. Mr. Michael added that it is not uncommon in Maryland for judges to limit the amount of the bond in medical malpractice cases to

the amount of insurance coverage. He questioned as to why *O'Donnell* is not adequate to protect companies. Mr. McCoy answered that sometimes the tobacco companies are unpopular and are not favored litigants. The unpopular litigant nevertheless is entitled to constitutional guarantees. He and his client believe that the courts, for various reasons, are reluctant to make changes. This injects uncertainty into the financial market, causing problems for pension funds and others. Mr. Michael pointed out that *O'Donnell* allows a party to put on testimony on the issue of the effect of the amount of the supersedeas bond on a company and its shareholders.

Judge Missouri expressed the view that the proposed rule change would diminish judicial discretion, and he stated that he is not in favor of it. If a cap is instituted, it should be by the legislature. Mr. McCoy remarked that the matter went before the legislature, which sent it to the Court of Appeals. He prefers that it go before the Court of Appeals rather than back to the legislature, so that there can be closure.

The Chair said that the Committee could vote on Mr. McCoy's proposal or could defer the matter to see if the legislature takes action. There is an historical reluctance on the part of the Committee to get involved in matters that have been submitted to the legislature. Judge Dryden suggested that in lieu of putting in a monetary limit, the Rule could be amended to emphasize that the court has discretion to change the amount of

the bond. The meaning of the word "ordinarily" in Rule 8-423 (b)(2) could be expanded.

Mr. McCoy told the Committee that his client favors a limit such as the one imposed by 30 other states. Mr. Sykes expressed the opinion that he was reluctant to get into assigning dollar limits. The legislature is more equipped to handle this type of issue, because it is a broader-based representative body. However, for the Rules Committee to vote down the request could send the wrong message. The most competent body to handle this matter is the legislature.

Mr. Brault commented that it would be helpful to expand the discretionary aspect of the Rule with the immediate right of appeal and a stay pending the resolution as to the amount of the bond. Mr. Klein remarked that he was troubled at the idea of putting a specific dollar amount for the bond in a Rule. He agreed with Mr. Brault that the Rule should be expanded to emphasize the court's discretion in setting the bond by adding a litany of factors that the trial judge should go through in setting the bond if the judge is approached to change the amount of the bond to an amount different than the amount of the judgment. Ms. Potter pointed out that Rule 8-422, Stay of Enforcement of Judgment, provides in section (c) that the Court of Special Appeals may "increase, decrease, or fix the amount of the supersedeas...bond...". It is clear that the court has discretion.

The Chair suggested that the Appellate Subcommittee could

redraft the Rule to highlight the judge's discretion and consider whether specific language could be added with respect to a hearing that would include evidence of hardship factors for the judge to consider. A specific amount for the bond would not be put into the Rule. Mr. McCoy could assist the Subcommittee. Even if his request passes the legislature, it would not hurt for the Rule to clarify that the court has discretion in setting the bond. Appellate review would be more accurate if the appellate court could see how the trial judge analyzed the case to set the bond. Mr. McCoy said that he will again try to obtain a cap from the legislature. He will apprise the legislature of the Rules Committee's opinion that a finite cap on the amount of the bond should not be put into Rule 8-423. He thanked the Committee members for their consideration.

Agenda Item 1. Consideration and reconsideration of proposed amendments to certain Rules in Title 5: Rule 5-804 (Hearsay Exceptions; Declarant Unavailable) and Rule 5-902 (Self-Authentication). (Continued)

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 after service of the notice and to add a certification form, 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~~ that has been certified pursuant to this subsection, if at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, the proponent (A) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (B) makes a copy of the certificate and record available to the adverse party. If the adverse party objects to the admission of the record on the ground that 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.~~ , the party must file a written objection on that ground

no later than five days after service of the proponent's notice. The original or duplicate of the business record must be certified in substantially the following form:

Certification of Custodian of Records or Other Qualified Individual

I, _____, do hereby certify that:

(1) I am the Custodian of Records of or am otherwise qualified to administer the records for _____ (identify the organization that maintains the records), and

(2) The attached records

(a) are true and correct copies that were made at or near the time of the occurrence of the matters set forth, by or from the information transmitted by, a person with knowledge of these matters; and

(b) were kept in the course of the regulated conducted activity; and

(c) were made and kept by the regularly conducted business activity as a regular practice.

I declare under penalty of perjury that the foregoing is true and correct.

_____
Signature and Title

_____
Date

Committee note: Any objection made pursuant to this subsection does not constitute a waiver of any other ground raised at trial.

(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 under that subsection 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 after service of the proponent's notice.

The Chair explained that a prosecutor in Howard County had attempted to get an exhibit admitted under the self-authentication rule but was prevented from doing so. Nothing in the Rule requires the adverse party to file a timely written objection. The suggested new language is based on the principles of Code, Courts Article, §10-1003, Presence of Chemist or Analyst at Criminal Proceeding; Availability of Chemical Report to Defense Counsel, and Code, Courts Article, §10-1004, Statement Establishing Chain of Custody. It provides that the proponent of the business record must notify the adverse party at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence of the proponent's intention to authenticate the record by self-authentication. If the adverse party objects on the ground that the sources of information or the method or circumstances of preparation indicate a lack of trustworthiness, the objection must be filed no later than five days after service of the proponent's notice. The Subcommittee decided to include a certification form, so that practitioners have some idea of what to file. There have been

problems concerning the adequacy of the documents supplying the notification. The proposed amendment to the Rule is intended to prevent objection by ambush.

Mr. Dean expressed his support of the anti-"sandbag" language and the addition of the form in the Rule. Mr. Michael also stated that he was in favor of the form, but he suggested that the language "are true and correct copies" should be added to part (2)(a) of the form. The Committee agreed by consensus to this change.

Mr. Johnson questioned the ten-day time period. The Chair replied that nothing is magic about this time period. In §10-1004 of the Courts Article, the State has twenty-five days before trial to give notice that it intends to offer the statement establishing the chain of custody. Mr. Maloney commented that this works well in criminal trials. The Chair stated that if the Rules Committee prefers another time period, that would be acceptable.

Mr. Brault noted that this procedure applies to authentication only and not to an objection on the merits. The Chair suggested that a Committee note should be added which would state that an objection to self-authentication made in advance of the trial does not constitute a waiver of any other ground that may be asserted as to admissibility at the trial. By consensus, the Committee agreed to this addition.

The Committee approved the Rule as amended.

Agenda Item 4. Reconsideration of certain proposed amendments to Rule 4-262 (Discovery in District Court)

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-262 to add language to section (a) referring to a certain statute and to Rule 4-263 (b)(1), 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, except as provided under Code, Criminal Procedure Article, §11-205, shall be as follows:

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

(2) Upon request of the defendant the State's Attorney shall permit the defendant to inspect and copy (A) any portion of a document containing a statement or containing the substance of a statement made by the defendant to a State agent that the State intends to use at trial or at any hearing other than a preliminary hearing and (B) each

written report or statement made by an expert whom the State expects to call as a witness at a hearing, other than a preliminary hearing, or trial.

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

The Rules Committee recommended that Rule 4-263 (a)(1) be amended to clarify for prosecutors what their obligations are under

> *Brady v. Maryland*, 373 U.S. 83 (1963), after some problems with this issue had been reported by the American College of Trial Lawyers. The Committee suggested that there should be a corresponding amendment to Rule 4-262 to refer to the *Brady* requirements. The Criminal Subcommittee recommends a cross reference to Rule 4-263 (b)(1) with some limiting language applicable to District Court practice.

Mr. Dean explained that at the November Rules Committee meeting, the Vice Chair noted that the provision in Rule 4-262 defining the discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) is not the same as the parallel provision in the proposed amendments to Rule 4-263, Discovery in Circuit Court, which have been approved by the Rules Committee. Rule 4-262 was remanded to the Criminal Subcommittee to make it as consistent with Rule 4-263 as is feasible. The Subcommittee decided that the easiest way to accomplish its task was to add to Rule 4-262 a reference to the subsection of Rule 4-263 that relates to the type of materials to which the defendant is entitled. Additionally, the proposed amendment to Rule 4-262 makes it clear that the State does not have the obligation to file a written statement in District Court, as it must do in circuit court. Judge Norton said that he had e-mailed the proposed change to the Rule to the District Court Administrative Judges Committee members and to outgoing Chief Judge Vaughan and incoming Chief Judge Clyburn. No one had expressed any major objections to the change.

Ms. Nethercott pointed out that Rule 4-263 (a) has a requirement of due diligence on the part of the parties who are obligated to provide materials, but this does not appear in Rule 4-262. Mr. Dean responded that the realities of District Court practice are that the State's Attorneys are not involved in the charging and often do not see cases until the day of the trial. Additional burdens should not be imposed on the Assistant State's Attorneys who prosecute cases in the District Court. Ms. Nethercott said that *Brady* requirements are not different in District Court, and this includes due diligence.

The Chair noted a typographical error in subsection (a)(2) of Rule 4-262: in the last line the reference to "subsection (d)(1) of Rule 4-263" should be "subsection(e)(1) of Rule 4-263." He commented that rarely is there a State's request for discovery in the District Court. He suggested that section (c) be should be revised to apply to the obligations of the parties and that language referring to the obligations of the parties provided in Rule 4-263 (a) should be put into section (c). The Reporter suggested that section (c) be moved to the front of the Rule, its location in the proposed amendments to Rule 4-263. The Committee agreed by consensus to these changes.

Mr. Karceski expressed the view that there should be a certification requirement in the Rules, and he said that he will bring this to the attention of the Court of Appeals when the proposed Rules changes are transmitted to the Court.

The Committee approved the Rule as amended.

Agenda Item 2. Consideration of certain proposed Rules changes pertaining to Judicial Review of Decisions of the Workers' Compensation Commission: Proposed New Rule 7-211 (Request for Impleader of the Subsequent Injury Fund) and Proposed Amendments to Rule 8-604 (Disposition)

Judge McAuliffe presented Rules 7-211, Request for Impleader of the Subsequent Injury Fund, and 8-604, Disposition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF

ADMINISTRATIVE AGENCY DECISIONS

ADD new Rule 7-211, as follows:

Rule 7-211. REQUEST FOR IMPLEADER OF THE SUBSEQUENT INJURY FUND

(a) Generally

If a party files a request for impleader of the Subsequent Injury Fund more than 60 days before trial, the court shall grant the request. If a party files a request for impleader within the 60-day period before trial, the court shall determine whether there is good cause to grant the request.

(b) Order Granting Request for Impleader

If the court grants a request for impleader, the court shall suspend further proceedings and remand the case to the Workers' Compensation Commission for further

proceedings.

(c) Information To Be Provided to the Subsequent Injury Fund

Within 10 days after the date of an order granting a request for impleader, the impleading party shall provide to the Subsequent Injury Fund and all other parties:

(1) a copy of the original claim and any amendments;

(2) each issue previously filed in the claim;

(3) any award or order entered by the Commission on the claim;

(4) identification, by claim number if available, of prior awards or settlements to the claimant for permanent disability made or approved by the Commission, by a comparable commission of another state, or by the District of Columbia;

(5) all relevant medical evidence relied on to implead the Subsequent Injury Fund; and

(6) a certification that a copy of the request for impleader and all required information and documents have been mailed to the Subsequent Injury Fund and all other parties.

Cross reference: COMAR 14.09.01.13.

Source: This Rule is new.

Rule 7-211 was accompanied by the following Reporter's Note.

In *Carey v. Chessie Computer Services, Inc.,* 369 Md. 741, the Court of Appeals noted that there is no express procedure in Title 7, Chapter 200 or elsewhere in the Rules that provides for impleading the Subsequent Injury Fund (SIF) in a Workers' Compensation action pending in a circuit court. Chapter 276 (HB 122), Acts of 2003 modified Code, Labor

and Employment Article, §9-807 by adding a good cause showing before proceedings are suspended and remanded to the Workers' Compensation Commission when the SIF is impleaded less than 60 days before a trial in the circuit court or hearing in the Court of Special Appeals. The addition of Rule 7-211 and subsection (d)(3) of Rule 8-604 will provide a procedure for impleading the SIF that conforms to the statutory changes and uses the language of the corresponding COMAR statute in subsection (a)(2) of Rule 7-211 and subsection (d)(3)(B) of Rule 8-604 to describe the impleading requirements.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 600 - DISPOSITION

AMEND Rule 8-604 by adding a new subsection (d)(3) pertaining to requests for impleading the Subsequent Injury Fund in an appeal from a Workers' Compensation Commission, as follows:

Rule 8-604. DISPOSITION

(a) Generally

As to each party to an appeal, the Court shall dispose of an appeal in one of the following ways:

(1) dismiss the appeal pursuant to Rule 8-602;

(2) affirm the judgment;

(3) vacate or reverse the judgment;

(4) modify the judgment;

(5) remand the action to a lower court in accordance with section (d) of this Rule; or

(6) an appropriate combination of the above.

(b) Affirmance in Part and Reversal, Modification, or Remand in Part

If the Court concludes that error affects a severable part of the action, the Court, as to that severable part, may reverse or modify the judgment or remand the action to a lower court for further proceedings and, as to the other parts, affirm the judgment.

(c) Correctible Error

(1) Matters of Form

A judgment will not be reversed on grounds of form if the Court concludes that there is sufficient substance to enable the Court to proceed. For that purpose, the appellate court shall permit any entry to be made by either party during the pendency of the appeal that might have been made by that party in the lower court after verdict by the jury or decision by the court.

(2) Excessive Amount of Judgment

A judgment will not be reversed because it is for a larger amount than claimed in the complaint if the plaintiff files in the appellate court a release of the excess.

(3) Modified Judgment

For purposes of implementing subsections (1) and (2), the Court may modify the judgment.

(d) Remand

(1) Generally

If the Court concludes that the substantial merits of a case will not be

determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

Committee note: This Rule is not intended to change existing case law regarding limited remands in criminal cases; see *Gill v. State*, 265 Md. 350 (1972); *Weiner v. State*, 290 Md. 425 (1981); *Reid v. State*, 305 Md. 9 (1985).

(2) Criminal Case

In a criminal case, if the appellate court reverses the judgment for error in the sentence or sentencing proceeding, the Court shall remand the case for resentencing.

(3) Request for Impleader of the Subsequent Injury Fund in an Appeal from a Workers' Compensation Commission Decision

(A) Generally

If a party files a request for impleader of the Subsequent Injury Fund more than 60 days before trial, the court shall grant the request. If a party files a request for impleader within the 60-day period before trial, the court shall determine whether there is good cause to grant the request.

(B) Order Granting Request for Impleader

If the court grants a request for impleader, the court shall suspend further proceedings and remand the case to the Workers' Compensation Commission for further proceedings.

(C) Information To Be Provided to the Subsequent Injury Fund

Within 10 days after the date of an order granting a request for impleader, the impleading party shall provide to the Subsequent Injury Fund and all other parties:

(i) a copy of the original claim and any amendments;

(ii) each issue previously filed in the claim;

(iii) any award or order entered by the Commission on the claim;

(iv) identification, by claim number if available, of prior awards or settlements to the claimant for permanent disability made or approved by the Commission, by a comparable commission of another state, or by the District of Columbia;

(v) all relevant medical evidence relied on to implead the Subsequent Injury Fund; and

(vi) a certification that a copy of the request for impleader and all required information and documents have been mailed to the Subsequent Injury Fund and all other parties.

Cross reference: COMAR 14.09.01.13.

(e) Entry of Judgment

In reversing or modifying a judgment in whole or in part, the Court may enter an appropriate judgment directly or may order the lower court to do so.

Source: This Rule is derived as follows:
Section (a) is derived from former Rules 1070 and 870.
Section (b) is derived from former Rules 1072 and 872.
Section (c) is derived from former Rules 1073 and 873.
Section (d) is in part derived from former Rules 1071 and 871 and in part new.
Section (e) is derived from former Rules 1075 and 875.

Rule 8-604 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-211.

Judge McAuliffe explained that the Rules are proposed to be changed to provide a procedure for impleading the Subsequent Injury Fund (the "SIF") after a case has been decided by the Workers' Compensation Commission (the "Commission") and is on appeal to a circuit court or to the Court of Special Appeals. Proposed new Rule 7-211 applies to the circuit court, and Rule 8-604 applies to the Court of Special Appeals. Chapter 276 (HB 122), Acts of 2003 modified Code, Labor and Employment Article, §9-807 by adding a good cause showing before proceedings are suspended and remanded to the Commission when the SIF is impleaded less than 60 days before a trial in the circuit court or a hearing in the Court of Special Appeals. Within the 60-day period, the court determines whether there is good cause to grant the request for impleader of the SIF. Up to that time period, the request is automatically granted. The Court of Appeals in *Carey v. Chessie Computer Services, Inc.*, 369 Md. 741 (2002), pointed out that there should be an express procedure in the Rules of Procedure for impleading the SIF in a Workers' Compensation action pending in a circuit court. The two Rules address the timing of and the procedure for impleader of the SIF. The Vice Chair assisted with the redrafting of the Rules.

The Committee approved the Rules as presented.

The Chair announced that on January 10, 2005, at 2:00 p.m.,

the Court of Appeals will be considering the Report of the Ethics 2000 Committee, chaired by the Hon. Lawrence F. Rodowsky, retired Judge of the Court of Appeals, recommending changes to the Maryland [Lawyers'] Rules of Professional Conduct.

The Chair also announced that on January 27, 2005, the Appellate Subcommittee of the Litigation Section of the Maryland State Bar Association will present a program at the University of Maryland School of Law on unpublished opinions. The speakers will be the Honorable Alan M. Wilner, of the Court of Appeals, and Professor William Reynolds of the University of Maryland School of Law. They will discuss the use of unpublished opinions in the federal courts and the mechanism by which someone can cite an unpublished opinion. This may be a potential topic for the Appellate Subcommittee of the Rules Committee in the future.

The Chair said that Judge Missouri has tendered his resignation to the Committee, because he was elected Chair of the Conference of Circuit Judges. The Honorable William B. Spellbring, Jr. of the Circuit Court for Prince George's County, has been appointed to fill the unexpired term of Judge Missouri.

The Chair adjourned the meeting.