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 October 14, 2005.

Members present:

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

F. Vernon Boozer, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. John L. Norton, III
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
James M. Brault, Esq.
Brian L. Zavin, Esq.
Dennis C. McCoy, Esq.
Keith Teel, Esq.
L. A. Richardson, Jr., Esq., State Farm Insurance
Antonio Gioia, Esq., State's Attorney Office, Baltimore City
David R. Durfee, Jr., Esq., Executive Director, Legal Affairs, Administrative Office of the Courts
Deborah A. Unitus, Manager, Program Services, Administrative Office of the Courts

The Chair convened the meeting. He said that at the Court of Appeals hearing on October 11, 2005 concerning subsection (d)(2) of Rule 16-760, Order Imposing Discipline or Inactive Status,

there were oral presentations from two diverse groups. The first consisted of several paralegals who testified that they do not want disbarred or suspended attorneys working as paralegals. The second group consisted of several disbarred and suspended attorneys who expressed the view that they ought to be able to serve as paralegals until they are reinstated. The Court decided to keep Rule 16-760 (d)(2), which prohibits disbarred or suspended attorneys from acting as paralegals, in suspension and send the issue to the Rules Committee with a request that the Committee draft a Maryland Rule similar to Rule 217 (j) of the Pennsylvania Rules of Disciplinary Enforcement, which has a reporting requirement imposed on a disbarred or suspended attorney serving as a paralegal to report his or her activities. The Chair suggested that the Committee consider imposing the reporting requirement on the attorney supervising the disbarred or suspended attorney, so that the supervising attorney certifies that the disbarred or suspended attorney is not performing any duties that a paralegal is not allowed to perform.

Agenda Item 2. Consideration of proposed amendments to Rule 8-423 (Supersedeas Bond)

The Vice Chair presented Rule 8-423, Supersedeas Bond, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-423 by adding language to subsection (b)(1) that provides factors for the court to use in determining the amount of the supersedeas bond, as follows:

Rule 8-423. SUPERSEDEAS BOND

(a) Condition of Bond

A supersedeas bond shall be conditioned upon the satisfaction in full of (1) the judgment from which the appeal is taken, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or (2) any modified judgment and costs, interest, and damages entered or awarded on appeal.

(b) Amount of Bond

Unless the parties otherwise agree, the amount of the bond shall be as follows:

(1) Money Judgment Not Otherwise Secured

When the judgment is for the recovery of money not otherwise secured, the amount of the bond ordinarily shall be the sum that will cover the whole amount of the judgment remaining unsatisfied plus interest and costs. <u>However, the court may set the bond in another amount upon making specific findings justifying the amount. The court shall take into consideration any relevant factor, including</u>

<u>(A) the judgment debtor's ability to pay the judgment;</u>

(B) the existence and value of security;

(C) the judgment debtor's opportunity to dissipate assets;

(D) the judgment debtor's likelihood of success on appeal;

(E) the potential adverse effects of the bond on the judgment debtor, including, but not limited to, the potential adverse effects on the judgment debtor's employees, financial stability, and business operations;

(F) the potential adverse effects of the bond on the judgment creditor and third parties, including public entities; and

(G) in a class action suit, the adequacy of the bond to compensate all members of the class.

Cross reference: Rule 1-402 (d); *O'Donnell v. McGann*, 310 Md. 342, 529 A.2d 372 (1987).

(2) Disposition of Property

When the judgment determines the disposition of the property in controversy (as in real actions, replevin, and actions to foreclose mortgages,) or when the property, or the proceeds of its sale, is in the custody of the lower court or the sheriff, the amount of the bond shall be the sum that will secure the amount recovered for the use and detention of the property, interest, costs, and damages for delay.

(3) Other Cases

In any other case, the amount of the bond shall be fixed by the lower court.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 1018 a.
Section (b) is derived from former Rule 1018 b and 1020 a.

Rule 8-423 was accompanied by the following Reporter's Note.

> Dennis McCoy, Esq., requested that the Rules Committee consider adding a supersedeas bond limit of $25 million to ensure that a defendant's right to appeal is fully protected. The Committee discussed this issue and decided that a supersedeas bond limit is a matter for the legislature to determine. However, the Committee suggested that language could be added to Rule 8-423 emphasizing that the court can set a bond that is different from the one delineated in subsection (b)(1) of the Rule and providing factors that the court can use in determining the bond amount. The factors suggested for addition to the Rule are derived from Iowa Code, §625A.9 and Rule 62 of the Utah Rules of Civil Procedure.

The Vice Chair said that this Rule had been before the Committee previously. Dennis McCoy, Esq., had requested that a flat dollar limit on the amount of a supersedeas bond be added to the Rule. He had requested that the legislature change the law to add a limit to a supersedeas bond, but the legislature sent the matter to the Rules Committee. Previously, the Rule had been revised to add the word "ordinarily" in subsection (b)(1). The Appellate Subcommittee reconsidered the Rule and recommended adding language to subsection (b)(1) stating that the court, upon making specific findings, may set the bond in an amount other than the amount that would cover the whole amount of the judgment remaining unsatisfied plus interest and costs. The Subcommittee added into the Rule factors to be considered. The factors were taken from statutory provisions in other states.

Mr. McCoy told the Committee that he appreciated the Rules

Committee discussing this issue. The issue is procedural, but it also involves the right of a defendant to take an appeal. When the amount of a supersedeas bond is set so high that the defendant cannot post it, the right of appeal effectively has been denied. Mr. McCoy introduced Keith Teel, Esq., who is familiar with the law pertaining to this issue in every state and has worked with many states that had made changes to their laws or rules.

Mr. Teel told the Committee that he is an attorney with Covington and Burling in Washington, D.C., but he is not a member of the Maryland bar. Thirty-three states have limitations on the amounts of supersedeas bonds, and other than in Idaho, he was involved with the other 32 states in formulating the limitations. All 33 states adopted a cap on the amounts of the bonds. The caps range in amounts from $1,000,000 to $150,000,000. The version of the Rule before the Committee today is taken from the statutes in Iowa and Utah. A better approach to the language of the Rule may be to end subsection (b)(1) after the word "factor." The first four factors listed in subsection (b)(1) are taken from the Utah statute, and the next three come from the Iowa statute. In Iowa, there is a $100,000,000 limit on the amount of a supersedeas bond. The bond cannot be set any higher, regardless of the amount of the judgment. The factors are not used to lower the amount of the bond. Rather, they are factors to be used in determining whether the bond should be set in an amount greater than one hundred ten percent of the judgment.

Mr. Teel inquired as to whether the seven factors in Rule 8-423 could be used either to lower or to raise the amount of the bond. The factors are difficult to figure out. The final one, the adequacy of the bond to compensate all members of a class in a class action suit, is unclear. Does it mean that the bond must be sufficient to compensate all of the members of the class? If so, how does one lower the amount of the bond? Many judges are not comfortable setting a lower bond. Utah has a $25 million cap in class actions, so that the factor listed in subsection (G) is not needed. As to the first factor listed, the judgment debtor's ability to pay, the judge will not have access to this information. The second factor, the existence and value of security, is not meaningful, because a large corporation may have plants and equipment worth $10 billion, but that does not mean that the company is in good financial shape. The third factor, the judgment debtor's opportunity to dissipate assets, is a relevant consideration, but a bad actor in a corporation can easily do this, so this is not that helpful. The fourth factor, the potential adverse effects of the bond on the judgment debtor is a worthwhile consideration. The potential adverse effects of the bond on the judgment creditor and third parties can be debated, and this factor is not necessarily clear.

Mr. Teel noted that the Rules Committee previously discussed including a hard cap on the amount of supersedeas bonds. If the Committee does not favor a cap, then the next best idea would be to end subsection (b)(1) after the word "factor" in the second

sentence. The Chair commented that an alternative approach would be for a party can ask the judge to stay enforcement proceedings and give the plaintiff a lien on the defendant's property. The Rules permit this now.

Mr. Michael stated that where there is liability insurance that covers part of the judgment, there should be a requirement that the amount of the bond be at least the amount of the liability insurance.

Mr. Klein said that he was not in favor of putting a hard cap in the Rule, because that is a legislative function. Subsection (b)(1)(G) is based on a statute in Iowa, where there is a hard cap. The subsection cannot be squared with subsection (b)(1)(E). The American Law Institute is working on a claims aggregation project. Mr. Klein expressed his concern that with increased claims aggregation, companies will be unable to take an appeal from the decision of a single jurist.

The Chair suggested that the Rule could be broken down to cover two situations. One situation would be class action suits, where there could be a cap. In all other cases, there would be no cap. The defendant would be able to argue for a lesser amount and the plaintiff for a higher amount consistent with the Rule. Mr. Teel pointed out that in Utah, the law does not allow for the plaintiff to argue for a cap larger than the $25 million one the law provides for. The Chair said that there would be no cap in non-class action cases.

Mr. Klein responded to Mr. Michael's comment about liability

insurance coverage by noting that the coverage amount may be illusory. In mass tort cases, there is almost always coverage litigation as to whether the insurance company has the contractual obligation to pay the damages. The Chair suggested that language could be placed in the Rule indicating that the court will give consideration to the judgment debtor's insurance coverage. Judge Kaplan suggested that the first new sentence of subsection (b)(1) be approved with subsection (b)(1)(G) deleted, and that a separate section be added for class action suits.

The Vice Chair commented that previously the Rules Committee had decided that Rule 8-423 should not have a cap on the amount of the bond. The word "ordinarily" was added to subsection (b)(1) to indicate that there are circumstances when the amount of the bond can be changed from the sum covering the whole amount of the judgment remaining unsatisfied plus interest and costs. The case of *Pennzoil v. Texas,* 481 U.S. 1 (1987), was an example of a situation where the bond amount was outrageous, denying the right of appeal. The court should be allowed discretion to set the appropriate amount. The Rules Committee had decided to consider the factors a judge should use in setting the amount of the bond. Rule 8-423 should provide that a judge may not set an amount greater than the amount of the judgment plus costs, but may set less than that amount. The Vice Chair suggested that the word "ordinarily" be removed, and the following language should be added to subsection (b)(1) after the word "costs:" "except that the court may reduce the amount of the bond, upon making

specific findings that justify the amount. The court shall take into consideration all relevant factors." The Committee agreed to this suggestion by consensus.

Mr. Teel remarked that this modification is far preferable to the way the Rule appears in the meeting materials. Mr. Klein commented that the minutes should reflect that his personal view, which may be shared by others, is that the action taken today is not to be interpreted as against the idea of a hard cap on supersedeas bonds generally or on bonds in class actions. Whether or not there should be a hard cap is a matter for the legislature to determine. The Rules Committee is institutionally uncomfortable getting into the jurisdiction of the legislature. The Chair noted that the change to the Rule is consistent with the position of the Committee the last time this issue was on the agenda. He suggested that section (c) of Rule 2-632, Stay of Enforcement, be changed to include a provision for a stay of enforcement of the judgment pending appellate review of a circuit court order setting the amount of a supersedeas bond. The Vice Chair expressed the concern that there would be no bond associated with this. Mr. Teel responded that five of six New England states have no bond.

Mr. Sykes suggested that the wording of Rule 2-632 (c) could be: "... the court may stay enforcement of a judgment ... pending any consideration and decision on a motion to modify the amount of a supersedeas bond pursuant to Rule 8-423." The filing of a motion to lower the amount of the bond will stay enforcement of

the judgment until the court rules on it. The Vice Chair pointed out that this may be problematic, because Rule 1-402, Filing and Approval [of a bond], provides in section (b): "Except as otherwise provided in this section, a bond is subject to approval by the clerk as to form, amount, and surety. If the clerk refuses to approve the bond, if an adverse party objects in writing to the bond, or if a rule requires that the court approve the bond, the bond is subject to approval by the court, after notice and an opportunity for any hearing the court may direct." This provision contemplates hearing and notice, and it requires a motion process with 15 or 18 days to respond. If this procedure takes months, the debtor will get rid of his or her assets before the appeal is heard. The Chair responded that the circuit court judge can stay enforcement of the judgment. The judgment lien protects the plaintiff. Mr. Maloney remarked that everyone will ask to reduce the amount of the bond, in order to have the stay.

Mr. Sykes reiterated the Vice Chair's point that the motion procedure is cumbersome. There is a difference between a motion and an application. The Vice Chair observed that section (b) of Rule 8-423 does not specify whether one files a motion or an application to get to court. Judge McAuliffe pointed out that section (c) of Rule 8-422, Stay of Enforcement of Judgment, provides that a party may file a motion to increase, decrease, or fix the amount of the supersedeas bond. The court can act with or without a hearing.

The Vice Chair commented that section (a) of Rule 8-423

states that the bond shall be conditioned upon the satisfaction in full of the judgment. If the bond is reduced, it will not satisfy the judgment. The Chair responded that subsection (b)(1) provides that the amount of the bond "ordinarily" shall be the sum that will cover the whole amount of the judgment remaining unsatisfied plus interest and costs. Mr. Teel added that section (a) is subject to section (b) in the Rule.

The Chair questioned as to why the condition of the bond has to be expressed the way it is in section (a). He suggested that the word "ordinarily" be added to section (a). The Vice Chair said that regardless of the amount of the bond, the defendant remains liable for the full amount of the judgment. The Reporter remarked that unless the judgment debtor has assets that are sufficient to cover the amount of the bond, no surety company will write the bond. Mr. Sykes suggested that the Rule make clear that the defendant is liable for the full amount of the judgment.

Mr. Sykes suggested that the following language be added to the beginning of section (a): "[e]xcept as otherwise provided in section (b)...". The Vice Chair said that the Style Subcommittee can draft the language if the Committee can agree on the concept.

The bond may be reduced, but the entire amount is to be used to satisfy all or part of the judgment. The Chair commented that the circuit court can require that the bond be conditioned upon full satisfaction of the judgment and interest. The court can set the bond in the amount of a lesser sum if the court thinks

that this would be equitable. This is somewhat inconsistent and should be reconciled. Mr. Sykes pointed out that this same inconsistency exists in the present rule.

Delegate Vallario said that the legislature determined that judges have the authority to set a supersedeas bond. A huge judgment such as the one in *Liggett Group v. Engel*, 853 So. 2d. 434 (2003) that resulted in a bond of $182 billion is unreasonable. No surety company can issue a bond in a case like this. The bill to limit the amount of supersedeas bonds in Maryland failed, because the legislature decided that the amount of a supersedeas bond is a matter within the discretion of the judiciary.

Mr. Sykes noted that the issuance of a bond and the amount of a bond are separate matters. The bond is conditioned upon the payment of the amount set if the appeal is dismissed or lost. The amount is governed separately. Ordinarily, the bond is for the full amount of the judgment, subject to the right of the court to modify this. The Chair remarked that this is a drafting matter. Section (a) can begin with the following language: "Except as otherwise provided in section (b), a supersedeas bond shall be conditioned upon...". The tagline of section (b) could be changed to indicate that the amount of the bond can be reduced. Judge Dryden inquired whether section (a) is necessary, and the Chair answered that it is as long as it is reconciled with section (b). The Style Subcommittee can draft the language. By consensus, the Committee approved the suggestion to reconcile

sections (a) and (b) subject to drafting by the Style Subcommittee. By consensus, the Committee approved the Rule as amended.

Agenda Item 1. Consideration of proposed amendments to Rule 4-212 (Issuance, Service, and Execution of Summons or Warrants)

Mr. Karceski presented Rule 4-212, Issuance, Service, and Execution of Summons or Warrant, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-212 **[Alternative 1: to add language to subsection (f)(1) to allow certain persons to serve a copy of the charging document on the defendant] [Alternative 2: to add a new subsection (f)(3) to provide for a certain designation by the Administrative Judge]** and to change the language of section (g), as follows:

Rule 4-212. ISSUANCE, SERVICE, AND EXECUTION OF SUMMONS OR WARRANT

(a) General

When a charging document is filed or a stetted case is rescheduled pursuant to Rule 4-248, a summons or warrant shall be issued in accordance with this Rule. Title 5 of these rules does not apply to the issuance of a summons or warrant.

(b) Summons - Issuance

Unless a warrant has been issued, or the defendant is in custody, or the charging document is a citation, a summons shall be issued to the defendant (1) in the District Court, by a judicial officer or the clerk, and (2) in the circuit court, by the clerk. The summons shall advise the defendant to appear in person at the time and place specified or, in the circuit court, to appear or have counsel enter an appearance in writing at or before that time. A copy of the charging document shall be attached to the summons. A court may order the reissuance of a summons.

(c) Summons - Service

The summons and charging document shall be served on the defendant by mail or by personal service by a sheriff or other peace officer, as directed (1) by a judicial officer in the District Court, or (2) by the State's Attorney in the circuit court.

(d) Warrant - Issuance; Inspection

(1) In the District Court

A judicial officer may, and upon request of the State's Attorney shall, issue a warrant for the arrest of the defendant, other than a corporation, upon a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document and that (A) the defendant has previously failed to respond to a summons that has been personally served or a citation, or (B) there is a substantial likelihood that the defendant will not respond to a summons, or (C) the whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court, or (D) the defendant is in custody for another offense, or (E) there is probable cause to believe that the defendant poses a danger to another person or to the community. A copy of the charging document shall be attached to the warrant.

(2) In the Circuit Court

Upon the request of the State's Attorney, the court may order issuance of a warrant for the arrest of a defendant, other than a corporation, if an information has been filed against the defendant and the circuit court or the District Court has made a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document or if an indictment has been filed against the defendant; and (A) the defendant has not been processed and released pursuant to Rule 4-216, or (B) the court finds there is a substantial likelihood that the defendant will not respond to a summons. A copy of the charging document shall be attached to the warrant. Unless the court finds that there is a substantial likelihood that the defendant will not respond to a criminal summons, the court shall not order issuance of a warrant for a defendant who has been processed and released pursuant to Rule 4-216 if the circuit court charging document is based on the same alleged acts or transactions. When the defendant has been processed and released pursuant to Rule 4-216, the issuance of a warrant for violation of conditions of release is governed by Rule 4-217.

(3) Inspection of the Warrant and Charging Document

Unless otherwise ordered by the court, files and records of the court pertaining to a warrant issued pursuant to subsection (d)(1) or (d)(2) of this Rule and the charging document upon which the warrant was issued shall not be open to inspection until either (A) the warrant has been served and a return of service has been filed in compliance with section (g) of this Rule or (B) 90 days have elapsed since the warrant was issued. Thereafter, unless sealed pursuant to Rule 4-201 (d), the files and records shall be open to inspection.

Committee note: This subsection does not preclude the release of otherwise available statistical information concerning unserved arrest warrants nor does it prohibit a

State's Attorney or peace officer from releasing information pertaining to an unserved arrest warrant and charging document.

Cross reference: See Rule 4-201 concerning charging documents. See Code, State Government Article, §10-616 (q), which governs inspection of court records pertaining to an arrest warrant.

(e) Execution of Warrant - Defendant Not in Custody

Unless the defendant is in custody, a warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest. The defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest or, if the warrant so specifies, before a judicial officer of the circuit court without unnecessary delay and in no event later than the next session of court after the date of arrest. The court shall process the defendant pursuant to Rule 4-216 and may make provision for the appearance or waiver of counsel pursuant to Rule 4-215.

Committee note: The amendments made in this section are not intended to supersede Code, Courts Article §10-912.

(f) Procedure - When Defendant in Custody

(1) Same Offense

When a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest. When a charging document is filed in the District

Court for the offense for which the defendant is already in custody a warrant or summons need not issue. A copy of the charging document shall be served on the defendant promptly after it is filed, and a return shall be made as for a warrant. **[Alternative 1:] Service may be effected by any person, 18 years of age or older, but not by a District Court commissioner.** When a charging document is filed in the circuit court for an offense for which the defendant is already in custody, a warrant issued pursuant to subsection (d)(2) of this Rule may be lodged as a detainer for the continued detention of the defendant under the jurisdiction of the court in which the charging document is filed. Unless otherwise ordered pursuant to Rule 4-216, the defendant remains subject to conditions of pretrial release imposed by the District Court.

(2) Other Offense

A warrant issued pursuant to section (d) of this Rule for the arrest of a defendant in custody for another offense may be lodged as a detainer for the continued detention of the defendant for the offense charged in the charging document. When the defendant is served with a copy of the charging document and warrant, the defendant shall be taken before a judicial officer of the District Court, or of the circuit court if the warrant so specifies, without unnecessary delay. In the District Court the defendant's appearance shall be no later than 24 hours after service of the warrant, and in the circuit court it shall be no later than the next session of court after the date of service of the warrant.

[Alternative 2]

(3) Service

The Administrative Judge shall designate a constable, sheriff, or a State or local police officer to serve a copy of the summons or warrant and the charging document upon the defendant pursuant to sections (c)

and (f) of this Rule.

(g) Return of Service

The ~~officer~~ person who served the defendant with a copy of the summons or warrant and the charging document shall make a prompt return of service to the court that shows the date, time, and place of service.

(h) Citation - Service

The person issuing a citation, other than for a parking violation, shall serve it upon the defendant at the time of its issuance.

Source: This Rule is derived as follows:
Section (a) is in part derived from former Rule 720 a and M.D.R. 720 c and in part new.
Section (b) is derived from former Rule 720 a and M.D.R. 720 c.
Section (c) is derived from former Rule 720 b and M.D.R. 720 d.
Section (d) is in part derived from former Rule 720 c and M.D.R. 720 e and is in part new.
Section (e) is derived from former Rule 720 d and e, M.D.R. 720 f, and M.D.R. 723 a.
Section (f) is derived from former Rule 720 f and M.D.R. 720 h.
Section (g) is derived from former M.D.R. 720 g.
Section (h) is derived from former M.D.R. 720 i.

Rule 4-212 was accompanied by the following Reporter's Note.

Antonio Gioia, Esq., Chief Attorney, Training Division, of the Baltimore City State's Attorney's Office, suggested amendments to Rule 4-212 to ameliorate the delays in the processing of arrestees at the Central Booking and Intake Facility in Baltimore City. Mr. Gioia suggested that the Rule be amended to include service of the summons or warrant and charging document upon the defendant by the District Court Commissioner. However, the Criminal

> Subcommittee's opinion was that this was not authorized by the legislature. The Subcommittee's recommendation is that Rule 4-212 be amended to permit service by a person other than a District Court commissioner. This would increase the number of potential people available to serve the defendant. Although the amendments are aimed at easing the situation in Baltimore City only, several other jurisdictions have a similar central booking body, and other jurisdictions may change to this system in the future.

Mr. Karceski told the Committee that the proposed changes to the Rule were suggested by Antonio Gioia, Esq, an Assistant State's Attorney for Baltimore City. Mr. Gioia participated in the conference call of the Criminal Subcommittee at which the Rule was discussed. The problem is a parochial one, since it stems from Baltimore City's Central Booking facility, but other jurisdictions may soon have similar systems, so it is worthwhile to consider amending Rule 4-212 to help with the problem. In Baltimore City, after someone is arrested, the person is taken to Central Booking rather than to the police station. A police officer or an Assistant State's Attorney prepares a charging document that is served on the defendant in Central Booking. If the defendant were in a police station, it would be easier to serve him or her with the charging document. Mr. Gioia noted that there are 200 or more arrests in Baltimore City each day, and Judge Kaplan remarked that sometimes the number is closer to 250. Mr. Karceski pointed out that the Rule does not require the arresting officer to serve the defendant, but the person who serves it must be a police officer. There are no police officers

at Central Booking. It is a waste of manpower to require that a police officer go to Central Booking to perform the ministerial act of serving a charging document. Code, Courts Article, §2-605 provides that all criminal process shall be served by constables, sheriffs, State police, or local police as the administrative judge of the district shall direct. To comply with the law, either police officers will have to man Central Booking, or the Rule will have to be changed to devise a way to effect service. *Darrikhuma v. State*, 81 Md. App. 560 (1990) holds that generally, a District Court commissioner has no authority to effect service of traffic citations upon a defendant. In *State v. Preissman*, 22 Md. App. 454 (1974), the court held that a District Court Commissioner is not authorized to serve process.

Mr. Karceski explained that there are two alternatives before the Committee. The members of the Subcommittee believe that Code, Courts Article, §2-605 controls. However, a commissioner is not permitted to serve process for the reasons spelled out in *Darrikhuma*. Mr. Karceski said that he had spoken with Mr. Gioia several times about this issue, and he asked Mr. Gioia to present his views.

Mr. Gioia told the Committee that he is the Chief Attorney in the Training Division of the Baltimore City State's Attorney's Office. Serving process on someone who is lawfully detained is a ministerial job. The idea to broaden the scope of persons permitted to serve defendants in Central Booking is a good one, because it will get police officers back on the streets to do

their job. He said that his proposal is to expand upon of Code, Courts Article, §2-605. The General Assembly has historically been reluctant to get involved in the daily affairs of law enforcement. One point of view is that Code, Courts Article, §2-605 regulates service of criminal process everywhere, but Mr. Gioia stated that he did not agree with this. His view is that the statute regulates service of process only in free society. It does not apply when the defendant is in custody. Some of the problems in Central Booking result from the bottleneck caused by the lack of available bodies to serve charging documents on people who have been arrested. The proposed changes to the Rule are not in conflict with a reasonable interpretation of Code, Courts Article, §2-605, which has no relevance to the ministerial service on someone in a detention center.

Mr. Maloney pointed out that Code, Courts Article, §2-605 provides for all criminal and traffic process. No distinction between free society and detention centers is spelled out in that provision, even though the policy reasons noted by Mr. Gioia are compelling. The Vice Chair commented that the statute was last changed in 1978. Section (a) provides that civil process shall be served by constables, and this is outdated. Mr. Gioia remarked that institutionally, the Rules Committee has a history of addressing matters that exist statewide. The problem being discussed today is parochial, but it will not be for too much longer. The Chair said that the Committee could approve the Rule contingent on a change in the statute, and then the Rule could be

presented to the Court of Appeals as soon as the statute is changed. The Vice Chair observed that the Committee can recommend and the Court can adopt a rule that is in conflict with a statute, but the Committee does not like to do this. Delegate Vallario said that the legislature will look at changing the statute.

The Chair commented that the *Preissman* case is 31 years old and involved a unique situation where the defendant being served was not in custody. Mr. Gioia added that the method of service in that case was harmless error. The change to the Rule will allow the booking process to proceed a little more smoothly. Currently, Rule 4-212 does not reflect the actual practice in Baltimore City. The Chair suggested that the change to the Rule could be presented to the Court of Appeals, even though it is not entirely consistent with the statute. The Rule could be changed to allow any person 18 years of age or older, including a commissioner, to serve process. Judge Norton said that David Weissert, Coordinator of Commissioner Activity, had expressed his concern as to the separation of powers if a representative of the judiciary serves the defendant. The statute has some flexibility as to the type of police officer who can effect service.

The Vice Chair inquired as to whether a police officer would be present when the commissioner serves the charging document. Mr. Gioia replied in the negative. A correctional officer escorts the defendant when he or she appears before the commissioner. Brian Zavin, Esq. from the Office of the Public

Defender stated that his office opposes commissioners being given the authority to serve charging documents on the defendants. Mr. Karceski expressed the view that the defendant should have the charging document before he or she appears before the Commissioner. The problem with the proposed Rule change is not that the commissioner serves the charging document, it is the fact that it is too late when the defendant appears before the commissioner for the defendant to receive the document. Mr. Maloney noted that the Rule is silent as to who may serve the charging document – it is the statute that determines this. The Chair remarked that this issue could be revisited after the legislative session is completed.

The Vice Chair pointed out that section (g) of Rule 4-212 currently refers to the "officer" who served the defendant. The word "officer" is not a defined term. However, the word "peace officer" is a defined term. The existing Rule is ambiguous. Delegate Vallario told the Committee that the other members of the House Judiciary Committee and he had visited Central Booking. The problem is that at least 100 people are locked up in the cells on each side of the building. By the time the papers get to the State's Attorney for processing in a particular case, it is difficult to find the defendant so that he or she can be served. If the commissioner later serves the defendant, the problem is that the defendant is finding out for the first time what the charges against him or her are. If a policeman serves the defendant, the defendant will have time to review the

charging document prior to appearing before the Commissioner.

The Chair stated that the Committee will work with the legislature on this matter.

Agenda Item 3. Consideration of proposed new Rule 1-333 (Continuance) and the deletion of Rules 2-508 (Continuance) and 3-508 (Continuance)

The Vice Chair said that she was representing Mr. Zarnoch, Chair of the General Provisions Subcommittee, who was not at today's meeting. She presented Rule 1-333, Continuance, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

ADD new Rule 1-333, as follows:

Rule 1-333. CONTINUANCE

(a) Applicability

This Rule applies to continuances in all courts in this State, except when in conflict with Rule 4-271.

(b) Generally

As justice may require and notwithstanding any other provision in this Rule, the court, on motion of any party or on its own initiative, may continue a hearing or other proceeding.

(c) Scheduling Order

Continuances of dates contained in a scheduling order are governed by the provisions pertaining to continuances, if any, set forth in the scheduling order.

(d) Absent Witness

Except in criminal cases, a motion for a continuance on the ground that a necessary witness is absent shall state: (1) the intention of the moving party to call the witness at the proceeding, (2) the specific facts to which the witness is expected to testify, (3) the reasons why the matter cannot be determined with justice to the party without the evidence, (4) the facts that show that reasonable diligence has been employed to obtain the attendance of the witness, and (5) the facts that lead the moving party to conclude that the attendance or testimony of the witness can be obtained within a reasonable time.

(e) Conflicting Case Assignments

A continuance based on conflicting case assignments is governed by administrative order of the Chief Judge of the Court of Appeals. The clerk of each court shall make available for public inspection a copy of the current administrative order. A party who files a motion for a continuance based on conflicting case assignments shall attach a copy of the trial notice that causes the conflict in the party's schedule.

Committee note: The current administrative order for continuances for conflicting case assignments is also available on the Maryland Judiciary's website, www.courts.state.md.us.

(f) Legislative Privilege

A continuance based on legislative privilege is governed by Code, Courts Article, §6-402.

(g) Costs

When granting a continuance for a

reason other than one pertaining to legislative privilege, the court may assess costs and expenses occasioned by the continuance.

Source: This Rule is new.

Rule 1-333 was accompanied by the following Reporter's Note.

The General Provisions Subcommittee recommends deleting Rules 2-508 and 3-508 and adding a new rule to Title 1 pertaining to continuances in all proceedings in all courts, except for criminal matters in the circuit courts and the District Court. Although the form and content of Rules 2-508 and 3-508 were used as a basis for the new rule, there are some differences between those Rules and the proposed new Rule.

Section (a), Applicability, is new.

Section (b) is derived from current Rule 2-508 (a). It sets forth the overarching principle that whenever justice requires the granting of a continuance, the court may do so.

The provisions of section (b) of current Rule 2-508 are omitted. The Subcommittee believes that there is no need to highlight lack of completion of discovery as a ground for a continuance over other grounds.

Section (c) is new. The Subcommittee was advised that some circuit courts include in their scheduling orders specific provisions pertaining to continuances. In the Circuit Court for Baltimore City, for example, requests for modifications made within 15 days after the scheduling order is entered usually are accommodated, while requests for modifications within 30 days of a pretrial conference or trial date require a showing of "exigent circumstances."

Section (d) is derived from current Rule 2-508 (c), Absent Witness, with the elimination of the affidavit requirement.

> The Subcommittee believes this to be unnecessary, at least in the circuit courts, because of the affidavit requirement of Rule 2-311 (d).
>
> Section (e) is new. Rather than incorporating in the Rule the rather lengthy provisions of the current administrative order for conflicting case assignments, section (e) requires the clerk of each court to make a copy of the administrative order available for public inspection. A Committee note following the section states that the administrative order is also available on the Maryland Judiciary's website. Section (e) also requires that a copy of the trial notice that causes a conflict in case assignments be attached to a motion for a continuance that is based on the conflict.
>
> In section (f), the Subcommittee recommends that a reference to Code, Courts Article, §6-402 pertaining to legislative privilege be included in the Rule, rather than a repetition of the procedures described in the statute. The Subcommittee notes that by Chapter 606 (HB 1476), Acts of 2005, the legislature
> expanded legislative privilege to apply to appellate proceedings.
>
> Section (g), Costs, is derived from current Rule 2-508 (e).

The Vice Chair explained that in place of Rules 2-508 and 3-508, both entitled "Continuance," the Subcommittee is recommending the new Title 1 Rule that applies to proceedings in all courts, except for criminal matters in the District Court and the circuit courts. The standard for the court to use in deciding the motion to continue the case is "as justice may require." Mr. Karceski pointed out that in criminal cases, there is always a requirement that the case must be tried within 180

days. The Chair commented that whether a case should or should not be postponed is a unique problem that should be addressed by the administrative judge or the District Court judge in the jurisdiction where the case is pending or where the motion for a continuance is filed. A copy of the "Revised Administrative Order for Continuances for Conflicting Case Assignments or Legislative Duties" dated April 26, 1995 and signed by the Honorable Robert C. Murphy, then-Chief Judge of the Court of Appeals, is included in today's meeting materials. See Appendix 1. Judge Kaplan inquired as to whether this is honored in the federal courts. The Chair replied that the federal courts generally do not follow this procedure.

Mr. Karceski commented that conflicts in scheduling of cases are more of a problem for solo practitioners than for lawyers who are part of a large law firm. Some jurisdictions adhere strictly to the Administrative Order. Mr. Karceski has spoken with Chief Judge Robert M. Bell regarding the Order. Chief Judge Bell said that the Administrative Order is discretionary. The Order is not followed consistently throughout the State. A defendant in a criminal action may not be able to hire counsel of his or her choice because of a conflict in scheduling involving a jurisdiction that follows the Administrative Order to the letter. The Chair remarked that two or three times a month in the Court of Special Appeals, there is a request by an attorney who has a scheduling conflict. The Court of Special Appeals does not adhere to the Administrative Order strictly. The judges try to

be flexible. The opposing party usually cites the Administrative Order. Judge Norton pointed out that most judges use common sense in determining conflicts in attorney's schedules, trying to avoid stranding out-of-state witnesses. Most judges do not view the Administrative Order as etched in stone. Working out conflicts in the schedule in most civil cases in District Court is not a problem. A stricter application of the Order in the criminal context may be appropriate, but the court should not be deprived of flexibility in working out conflicts in case assignments. Judge Heller inquired as to whether the salient points of the Administrative Order should be set forth in the Rule. The Chair responded that the Rule could provide that continuances ordinarily shall be governed by the Administrative Order. In lieu of the standard provided for in the Rule which is "as justice requires," the standard for changing the trial date could be "for good cause shown," the standard set out in Rule 4-271. The court has discretion to award costs and expenses to the other side.

The Vice Chair said that the Subcommittee could not agree on whether the Administrative Order or parts of it should be incorporated into the Rule. The Court of Appeals should be consulted to make this determination. Judge Heller reiterated that the Rule must be clear that the judge has discretion. The Vice Chair noted that the most recent revision of the Administrative Order occurred in 1995, and it should be evaluated as to which parts are still relevant. Mr. Klein expressed the

opinion that the Administrative Order should be included as part of the Rule, so people will not have to search for it.

The Chair pointed out that section 6 of the Administrative Order provides: "[w]ith respect to conflicting hearings or trial dates between a circuit court for a county or Baltimore City, either division of the United States District Court for the District of Maryland, the United States Bankruptcy Court for the District of Maryland, or the Maryland District Court, priority shall be given to the case in accordance with the earliest date on which assignment for hearing or trial was made...". The likelihood is that a federal judge will not grant a continuance in a federal case in accordance with this provision. The Chair continued that in his experience, when there is a conflict between a federal case and a case in State court, it is always the conflicting State case that must be postponed. As to the situation already discussed by Mr. Karceski where the criminal defendant cannot get his or her counsel of choice due to a conflict, this is an unconstitutional denial of a defendant's right to counsel if a reasonable accommodation will allow the defendant to have the attorney he or she chooses. The reasonable accommodation is constitutionally mandated.

Ms. Potter commented that if the Administrative Order is placed in the Rule, judges will give the Order increased emphasis and will more strictly adhere to it. The Vice Chair said that some of the provisions in the Order should be revisited. The Chair suggested that the Rule could be on the agenda of the

Judicial Council to get the Council's input. Judge Heller suggested that the Council focus on the conflict provision, not the entire Rule. Mr. Michael inquired as to whether there is a distinction between the word "continuance" and the word "postponement." Judge Kaplan observed that if a trial has already begun, stops for a while, and resumes a few days later, ordinarily that would be considered a "continuance," rather than a "postponement."

Mr. Brault expressed the view that managing the calendar is the worst part of a trial attorney's practice. The number of trial attorneys is diminishing because of the difficulties in managing their calendars. Section (c) of the proposed new Rule provides that continuance of dates in a scheduling order is governed by the provisions pertaining to continuances in the scheduling order, but this is not always applicable. The Vice Chair noted that the standard of "as justice may require" may be too broad. Mr. Brault questioned whether section (c) is consistent with section (b). The Vice Chair responded section (b) includes the language: "notwithstanding any other provision in this Rule...".

Mr. Brault told the Committee that there is a judge in Prince George's County who will schedule no case later than 180 days after it is filed. Even if the attorney tells the judge that the attorney is not available within that time period, the judge advises the attorney to give the case to someone else. This also happens in Anne Arundel and Montgomery Counties. This

is a major problem for busy civil trial attorneys and defense attorneys. The Chair remarked that not too long ago, the administrative judge would ask the parties to agree on a trial date.

Delegate Vallario remarked that this Rule was discussed at a recent meeting of the Criminal Defense Attorneys' Association. The Chair said that Harold Glaser, Esq. testified before the Senate Judiciary Committee in opposition to a bill that would have codified what is in the Administrative Order. Because of case management time standards, cases being squeezed into unrealistic trial dates. Mr. Brault observed that the problem with the Rule is that good attorneys are being penalized because of bad attorneys who abuse the system. Judge Dryden noted that sometimes criminal defendants appear on the day of trial with an attorney just hired that day so that the case will be postponed. Case management is a difficult problem. Judge McAuliffe noted that Chief Judge Bell had expressed reservations about the continued efficacy of the Administrative Order. Mr. Karceski reiterated that varying jurisdictions handle this issue differently. In the District Court in Baltimore City, the trial is scheduled for 30 days after the case is filed. This is almost impossible even if the criminal defendant has the Public Defender as counsel.

The Vice Chair pointed out that section (c) is a new provision. Many of the jurisdictions do not address postponements in their scheduling orders. Judge Heller said that

in the Circuit Court for Baltimore City, the judges have chosen to allow a postponement if the request is made within the first 15 days of the initial order setting a date for the pretrial conference and trial. A postponement request beyond 15 days may be granted if the party shows good cause, but the request is subject to detailed scrutiny. A postponement request that is made within 30 days of the pretrial conference or trial date may be granted only for exigent circumstances. The party is required to come to court and explain the exigent circumstances. In civil cases, the timing of the dates that go in the scheduling order in each type of case has been arranged with the assistance of the civil bar. Because of this, the dates generally are acceptable to counsel. The Vice Chair commented that she is troubled by the fact that Rule 2-504, Scheduling Order, does not address postponements. Rule 1-333 may not be the place to address problems with continuances of dates contained in the scheduling order.

The Reporter cautioned that the Rule has to be drafted carefully, so that an attorney is not able to argue that a continuance cannot be granted if it is not specifically provided for in Rule 1-333 or the Administrative Order. The Vice Chair suggested that section (b) could provide that the court can continue a hearing or other proceeding as justice may require, and section (c) could be deleted. Mr. Brault remarked that in Anne Arundel County, no continuances are allowed even in exigent circumstances. Mr. Klein suggested that section (b) could begin

with, "Notwithstanding any other provision in this Rule or in any scheduling order...". The Vice Chair expressed the opinion that this change would be too radical. The Chair asked why section (c) should be eliminated. The Vice Chair replied that since the scheduling order Rule currently does not address continuances, the contents of section (c) should go into Rule 2-504. Judge Heller said that the scheduling orders in Baltimore City address the issue of continuances, providing for the 15-day and 30-day time frames that she previously explained. The Chair stated that Rule 1-333 needs to refer to scheduling orders.

Judge McAuliffe proposed that section (c) could be deleted, and the Rule could provide that the scheduling order is subject to section (b). An individual judge can grant a continuance pursuant to section (b). Mr. Klein suggested that the Rule clarify that a scheduling order cannot supersede section (b). Mr. Brault pointed out that only the administrative judges can grant continuances. Judge Heller observed that in Baltimore City, the judge in charge of the civil docket or that judge's designee can grant continuances. This is done on a rotational basis. Someone cannot obtain a continuance by asking a judge other than the one in charge of the civil docket or that judge's designee.

The Chair stated that he will bring this matter to the Judicial Council and request the Council's recommendations.

Agenda Item 4. Consideration of proposed amendments to: Rule 2-341 (Amendment of Pleadings) and Rule 2-504 (Scheduling Order)

The Vice Chair presented Rule 2-341, Amendment of Pleadings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-341 to change the tagline to section (a), to add language to section (a), to change a time period in section (a), to change the tagline to section (b), and to delete language from and add language to section (b), as follows:

Rule 2-341. AMENDMENT OF PLEADINGS

(a) ~~Prior to 15 Days of Trial Date~~ Without Leave of Court

A party may file an amendment to a pleading ~~at any time prior to~~ without leave of court by the date set forth in a scheduling order or, if there is no scheduling order, ~~60~~ up to 30 days ~~of~~ before a scheduled trial date. Within 15 days after service of an amendment, any other party to the action may file a motion to strike setting forth reasons why the court should not allow the amendment. If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading or within 15 days after service of the amendment, whichever is later. If no new or additional answer is filed within the time allowed, the answer previously filed shall be treated as the

answer to the amendment.

(b) ~~Within 15 days of Trial Date and Thereafter~~ With Leave of Court

~~Within 15 days of a scheduled trial date or after trial has commenced, a~~ A party may file an amendment to a pleading after the dates set forth in section (a) of this Rule only ~~by written consent of the adverse party or~~ by leave of court. If the amendment introduces new facts or varies the case in a material respect, the new facts or allegations shall be treated as having been denied by the adverse party. The court shall not grant a continuance or mistrial unless the ends of justice so require.

Committee note: By leave of court, the court may grant leave to amend the amount sought in a demand for a money judgment after a jury verdict is returned. See *Falcinelli v. Cardascia*, 339 Md. 414, 663 A.2d 1256 (1995).

(c) Scope

An amendment may seek to (1) change the nature of the action or defense, (2) set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended, (4) correct misnomer of a party, (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, (6) add a party or parties, (7) make any other appropriate change. Amendments shall be freely allowed when justice so permits. Errors or defects in a pleading not corrected by an amendment shall be disregarded unless they affect the substantial rights of the parties.

(d) If New Party Added

If a new party is added by amendment, the amending party shall cause a summons and complaint, together with a copy of all pleadings, scheduling notices, court orders,

and other papers previously filed in the action, to be served upon the new party. *Currently pending before the Court of Appeals as part of the 155th Report is proposed new section (e), which reads as follows:*

(e) Highlighting of Amendments

Unless the court orders otherwise, a party filing an amended pleading shall also file a comparison copy of the amended pleading showing by lining through or enclosing in brackets material that has been stricken and by underlining or setting forth in bold-faced type new material.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 320.
Section (b) is new and is derived in part from former Rule 320 e.
Section (c) is derived from sections a 2, 3, 4, b 1 and d 5 of former Rule 320 and former Rule 379.
Section (d) is new.
Section (e) is derived from the 2001 version of L.R. 103 (6)(c) of the Rules of the United States District Court for the District of Maryland.

Rule 2-341 was accompanied by the following Reporter's Note.

The Honorable Thomas P. Smith, of the Circuit Court for Prince George's County, wrote a letter expressing his concern that there is an inconsistency between Rules 2-341 and the scheduling orders issued pursuant to Rule 2-504 because the scheduling order provides that amendments to pleadings and the addition of parties must be completed by a date certain, while Rule 2-341 (a) provides that a party may file an amendment to a pleading any time prior to 15 days before the trial date without leave of court. In response to Judge Smith's letter, the Committee proposes a change to Rule 2-341 that ties the filing of amendments without leave of court to the date set forth in the scheduling order. Where there is no

> scheduling order, an amendment may be filed without leave of court up to 30 days before a scheduled trial date. The Committee recommends changing the 60-day period to 30 days to conform to other time periods in the Rules.
>
> Additional proposed changes to Rule 2-504 include the transfer of certain time periods that were originally in Rule 2-341 and the addition of items to the contents of the scheduling order. Rule 2-504 also has proposed new language providing that the court may modify the scheduling order to prevent injustice.

The Vice Chair explained that the Honorable Thomas P. Smith, of the Circuit Court for Prince George's County, had pointed out an inconsistency between Rule 2-341 and scheduling orders issued pursuant to Rule 2-504, Scheduling Order. The scheduling orders provide that amendments to pleadings must be completed by a date certain, but Rule 2-341 provides that amendments to pleadings may be filed at any time. Sections (a) and (b) of Rule 2-341 are now being structured as to amendments without leave of court and amendments with leave of court. Section (a) provides that amendments without leave of court must be filed by the date set forth in the scheduling order or, if there is no scheduling order, no later than 30 days before a scheduled trial date; amendments filed with leave of court may be filed after the dates set forth in section (a).

The Vice Chair stated that the Subcommittee discussed the question of the number of days before a scheduled trial date that an amendment without leave of court should be allowed in a case

in which there is no scheduling order. A case without a scheduling order generally is not as complex as a case in which there is a scheduling order. The 60-day period currently in the Rule is unnecessarily long. The Subcommittee decided that it is too close to the trial date to allow amendments without leave of court to be filed within 15 days of the trial date, and recommends that the time period be set at "up to 30 days before a scheduled trial date."

Mr. Maloney questioned the Committee note after section (b). The Vice Chair observed that the note was already in the Rule. Mr. Maloney asked whether the *ad damnum* clause may be amended in the middle of the trial. Mr. Brault responded that at the discretion of the judge, it can be amended after the trial is over. Judge McAuliffe added that this is implicit in the applicable case law of *Falcinelli v. Cardascia*, 339 Md. 414 (1995). Mr. Maloney suggested that the Committee note could be broader. The Reporter pointed out that the Court of Appeals wrote the Committee note, reversing the recommendation of the Rules Committee. Mr. Sykes expressed the view that the note is sufficiently explicit. By consensus, the Committee approved the Rule as presented.

The Vice Chair presented Rule 2-504, Scheduling Order, for the Committee's consideration.

AMEND Rule 2-504 to add language to subsection (b)(1)(E), to add subsections (b)(1)(F) and (G), to reletter subsection (b)(1), to delete subsection (b)(2)(C), to reletter subsection (b)(2), and to add a new section (c), as follows:

Rule 2-504. SCHEDULING ORDER

(a) Order Required

(1) Unless otherwise ordered by the County Administrative Judge for one or more specified categories of actions, the court shall enter a scheduling order in every civil action, whether or not the court orders a scheduling conference pursuant to Rule 2-504.1.

(2) The County Administrative Judge shall prescribe the general format of scheduling orders to be entered pursuant to this Rule. A copy of the prescribed format shall be furnished to the Chief Judge of the Court of Appeals.

(3) Unless the court orders a scheduling conference pursuant to Rule 2-504.1, the scheduling order shall be entered as soon as practicable, but no later than 30 days after an answer is filed by any defendant. If the court orders a scheduling conference, the scheduling order shall be entered promptly after conclusion of the conference.

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an

appropriate scheduling category of a differentiated case management system established pursuant to Rule 16-202;

(B) one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402 (f) (1);

(C) one or more dates by which each party shall file the notice required by Rule 2-504.3 (b) concerning computer-generated evidence;

(D) a date by which all discovery must be completed;

(E) a date by which all dispositive motions must be filed, which shall be no earlier than 15 days after the date by which all discovery must be completed;

(F) a date by which any additional parties must be joined;

(G) a date by which amendments to the pleadings are allowed as of right; and

~~(F)~~ (H) any other matter resolved at a scheduling conference held pursuant to Rule 2-504.1.

(2) Permitted

A scheduling order may also contain:

(A) any limitations on discovery otherwise permitted under these rules, including reasonable limitations on the number of interrogatories, depositions, and other forms of discovery;

(B) the resolution of any disputes existing between the parties relating to discovery;

~~(C) a date by which any additional parties must be joined;~~

~~(D)~~ (C) a specific referral to or

direction to pursue an available and appropriate form of alternative dispute resolution, including a requirement that individuals with authority to settle be present or readily available for consultation during the alternative dispute resolution proceeding, provided that the referral or direction conforms to the limitations of Rule 2-504.1 (e);

~~(E)~~ (D) an order designating or providing for the designation of a neutral expert to be called as the court's witness;

~~(F)~~ (E) a further scheduling conference or pretrial conference date; and

~~(G)~~ (F) any other matter pertinent to the management of the action.

(c) Modification of Order

The scheduling order controls the subsequent course of the action but may be modified by the court to prevent injustice.

Cross reference: See Rule 5-706 for authority of the court to appoint expert witnesses.

Source: This Rule is new.

Rule 2-504 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 2-341.

The Vice Chair told the Committee that there have been some suggested additions to the contents of the scheduling order. Originally, it was assumed that no court would require that all dispositive motions be filed before discovery was completed, but because at least one jurisdiction has incorporated such a requirement in its scheduling order, the Subcommittee added subsection (b)(1)(E) to make clear that courts may not require

that dispositive motions be filed any earlier than 15 days after the date by which discovery is completed. Subsection (b)(1)(F) adds to the mandatory contents of the scheduling order a date by which any additional parties must be joined. This provision is moved from subsection (b)(2), pertaining to contents of the scheduling order that are permitted, but not required. Subsection (b)(1)(G) adds a date by which amendments to the pleadings are allowed as of right to coordinate with the proposed amendments to Rule 2-341. Judge Heller noted that the scheduling orders in lead paint cases already contain these provisions, and she stated that this is a good addition to Rule 2-504.

The Vice Chair state that section (c) is new. It provides that the scheduling order controls the subsequent course of the trial, but may be modified to prevent injustice. Mr. Klein suggested that the word "may" should be changed to the word "shall," so that section (c) is no longer stated permissively. By consensus, the Committee agreed with Mr. Klein's suggestion. By consensus, the Committee approved the Rule as amended.

Agenda Item 5. Consideration of proposed amendments to Rule 16-819 (Court Interpreters) and Canon 11, Appendix: Maryland Code of Conduct for Court Interpreters

---

Judge Norton presented Rule 16-819, Court Interpreters, and Canon 11 of the Maryland Code of Conduct for Court Interpreters, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-819 (e) to delete language pertaining to good cause and to add a statement pertaining to removal of interpreters from a proceeding, as follows:

Rule 16-819. COURT INTERPRETERS

. . .

(e) Removal from Proceeding

A court interpreter may be removed from a proceeding ~~for good cause. Good cause for removal includes:~~

~~(1) failing to interpret adequately;~~

~~(2) knowingly interpreting falsely;~~

~~(3) knowingly disclosing confidential or privileged information obtained while serving in a proceeding; or~~

~~(4) failing to follow applicable laws, rules of court, or the Maryland Code of Conduct for Court Interpreters in the Appendix to these Rules.~~ by a judge or judicial appointee within the meaning of Rule 16-814 (e)(1), who shall then notify the Administrative Office of the Courts that the action was taken.

. . .

Rule 16-819 was accompanied by the following Reporter's Note.

The Administrative Office of the Courts (AOC) has been having problems with the

conduct of court interpreters. To clarify that it is permissible to discipline interpreters, including removing them from the court list of interpreters, the General Court Administrative Subcommittee, at the request of the AOC, recommends deleting the "good cause" standard from section (e) of Rule 16-819 and replacing it with language stating that a judicial officer or master may remove an interpreter from a proceeding and then must report the removal to the AOC. The AOC also proposes that the standard for removal in Canon 11 of the Maryland Code of Conduct for Court Interpretors be changed from "for good cause" to "for reasons satisfactory to the Administrative Office of the Courts" and that in place of a hearing, an interpreter simply have an opportunity to respond before the interpreter is disciplined. The AOC also suggests removing the language pertaining to good cause for removal because it is inconsistent with the idea that someone can be removed for any reasons other than a reason that is unconstitutional or illegal. The Subcommittee agrees with these suggested changes to Canon 11.

Two judges on the Judiciary's Interpreter Committee, the Honorable Audrey J. S. Carrion of the Circuit Court for Baltimore City, and the Honorable Paul A. Hackner of the Circuit Court for Anne Arundel County, have requested that in Rule 16-819 (e), the term "judicial officer" be change to "judge" and that the definition of the term "judge" be the one used in Rule 1-202 (m). They have also requested that a definition of the term "master" be included. The Subcommittee agrees that the term "judge" is preferable to the term "judicial Officer," but believes that no definition of the word "judge" needs to be placed in the Rule. In lieu of the term "master," the Subcommittee suggests using the term "judicial appointee" as defined in Rule 16-814 (e)(1).

MARYLAND RULES OF PROCEDURE

APPENDIX: MARYLAND CODE OF CONDUCT

FOR COURT INTERPRETERS

AMEND Canon 11 by deleting language providing for a hearing and language referring to certain types of discipline of interpreters for good cause, and by adding language that allows discipline for any reason satisfactory to the Administrative Office of the Courts, as follows:

APPENDIX: MARYLAND CODE OF CONDUCT FOR COURT INTERPRETERS

Preamble

In the absence of a court interpreter, many persons who come before the courts are partially or completely excluded from full participation in the proceedings because they have limited proficiency in the English language, have a speech impairment, or are deaf or hard of hearing. It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position and enjoy equal access to justice as similarly situated persons for whom there is no such barrier. As officers of the court, interpreters help to ensure that these persons enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively.

Applicability

This Code shall guide and be binding upon all certified interpreters and interpreters eligible for certification, as those terms are defined in Rule 16-819, and all agencies and organizations that administer, supervise the use of, or deliver interpreting services in the courts of this State.

. . .

Canon 11

Compliance

After notice and ~~an~~ a reasonable opportunity ~~for a hearing~~ to respond, the Administrative Office of the Courts may discipline an interpreter, ~~by actions such as public or private reprimand or suspension or removal from a list of court interpreters, for inadequate performance or other good cause~~ including removing the interpreter from the list of court interpreters, for any reasons satisfactory to the Administrative Office of the Courts, other than a reason that is unconsti-tutional or otherwise illegal.

~~Commentary~~

~~The following are examples of good cause for disciplining an interpreter:~~

~~Knowingly making false interpretation while serving in an official capacity;~~

~~Knowingly disclosing confidential or privileged information obtained while serving in an official capacity;~~

~~Failing to follow the standards prescribed by law and the ethics of the interpreter profession.~~

Canon 11 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 16-819.

Judge Norton explained that the Administrative Office of the Courts ("the AOC") had requested that the Committee propose amendments to the Rules pertaining to court interpreters so that a judge or judicial appointee may remove a court interpreter at the moment the problem with the interpreter occurs in the

courtroom. A judicial appointee is defined in subsection (e)(1) of Rule 16-814, Maryland Code of Conduct for Judicial Appointees, as an auditor, examiner, master, or referee appointed by the Court of Appeals, the Court of Special Appeals, a circuit court, or an orphans' court. The change to the Rules would allow judges and judicial appointees to remove court interpreters at the moment the problem occurs, without the necessity of having to find good cause to remove the interpreter. The Chair added that the changes to the Rules would eliminate the requirement of holding a hearing before an interpreter, who is on the AOC approved list, can be removed.

The Vice Chair inquired as to why the court interpreters must be removed. The Chair responded that David R. Durfee, Jr., Esq., Executive Director of Legal Affairs, and Deborah A. Unitus, Manager of Program Services for the AOC, were present to speak on this topic. Mr. Durfee told the Committee that he had sent a letter to the Chair explaining that there had been a number of problems with court interpreters who were supplying information to witnesses and giving answers for witnesses. Ms. Unitus had asked what could be done to alleviate this problem. The Rules pertaining to court interpreters do not address this currently. Mr. Durfee said that a "for cause" standard is burdensome. A hearing with cross-examination of witnesses is too formal and inefficient a process. The Chair commented that a judge may want to remove an interpreter because a party distrusts the interpreter or because a judge wants the proceeding to move more

quickly.

Mr. Durfee questioned the use of "good cause" in the current Rule. Does that mean that someone can cross-examine a judge? How formal is the removal proceeding? It is important to move away from the formal process that makes it difficult to remove an interpreter, when removal of the interpreter becomes necessary in the middle of a trial. The interpreter can be given the opportunity to respond without holding a hearing. The Chair asked whether the Rule should include allowing the interpreter to file a written response. Mr. Durfee answered that the Rule should be left in the form that appears in the meeting materials. Judge Norton pointed out that Rule 16-819 (e) allows an interpreter to be removed at the trial by a judge or judicial appointee, who then notifies the AOC about the removal. Mr. Durfee noted that the requirement in Canon 11 that the removal be for reasons satisfactory to the AOC implies that a statement in writing is filed. Mr. Karceski remarked that there are forms of discipline other than removal that are in the Rule already. The Vice Chair observed that the reference to "discipline" in the Rule sound as if the AOC is a disciplinary body like the Attorney Grievance Commission. Mr. Durfee commented that an interpreter could be disciplined by being suspended or reprimanded.

The Vice Chair suggested that Canon 11 read as follows: "After notice and reasonable opportunity to respond, the Administrative Office of the Courts may remove an interpreter from the list of court interpreters." Mr. Durfee said that the

proposed language had been taken from the State Merit System Law applying to the removal of employees. By consensus, the Committee agreed with the Vice Chair's suggestion. The Committee approved Rule 16-819 as presented and Canon 11 as amended. The Chair thanked Mr. Durfee and Ms. Unitus for their help in implementing the Court Interpreter Rules.

The Chair adjourned the meeting.