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 November 15, 2002.

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. Ellen M. Heller
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Timothy F. Maloney, Esq.
Hon. William D. Missouri
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Hon. Dennis M. Sweeney
Una M. Perez, Esq.
Barbara Hergenroeder, Esq., Director of Character and Fitness, State Board of Law Examiners
Glenn Grossman, Esq., Assistant Bar Counsel, Attorney Grievance Commission
Albert "Buz" Winchester, M.S.B.A., Office of Legislative Relations

The Chair convened the meeting. He stated that the first item for discussion would be Agenda Item 2, because Ms. Hergenroeder, Director of Character and Fitness for the Board of Law Examiners, was present to discuss this item.

Agenda Item 2. Consideration of proposed amendments to two Rules Governing Admission to the Bar of Maryland: Rule 6 (Petition to Take a Scheduled Examination) and Rule 9 (Re-examination After Failure)

Mr. Brault presented Rule 6, Petition to Take a Scheduled Examination, and Rule 9, Re-examination After Failure, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE

BAR OF MARYLAND

AMEND Bar Admission Rule 6 to delete a certain certification requirement, to change the time for filing the petition, to add a certain provision concerning affirmation and certification of the petitioner's eligibility, and to add a certain provision concerning the voiding of examination results, as follows:

Rule 6. PETITION TO TAKE A SCHEDULED EXAMINATION

(a) Filing

An applicant may file a petition to take a scheduled bar examination if the applicant (1) is eligible under Rule 4 to take the bar examination and (2) has applied for admission pursuant to Rule 2 and the application has not been withdrawn or rejected pursuant to Rule 5. The petition shall be under oath and shall be filed on the form prescribed by the Board.

~~(b) Certification by Law School~~

~~The petition shall include a certification, on a form prescribed by the Board, signed by the dean or other authorized official of the law school attended by the petitioner, showing (1) that the law school meets the requirements of Rule 4 (a) unless the requirements have been waived by the Board pursuant to Rule 4 (b); (2) that the petitioner either graduated on a stated date or is unqualifiedly eligible for graduation at the next commencement exercise, naming the date; and (3) that the petitioner, so far as is known to that official, has not been guilty of any criminal or dishonest conduct other than minor traffic offenses, except as noted on the certification, and is of good moral character.~~

~~(c)~~ (b) Time for Filing

~~The petition shall be filed at least 20 days before the scheduled examination.~~ A petitioner who intends to take the examination in July shall file the petition no later than the preceding May 20. A petitioner who intends to take the examination in February shall file the petition no later than the preceding December 20. Upon written request of a petitioner and for good cause shown, the Board may accept a petition filed after that deadline. If the Board rejects the petition, the petitioner may file an exception with the Court within five days after notice of the rejection.

(c) Affirmation and Verification of Eligibility

The petition to take an examination shall contain a signed, notarized affirmation which states that the petitioner is eligible to take the examination. No later than the first day of September following an examination in July or the fifteenth day of March following an examination in February, the

petitioner shall cause to be sent to the Office of the State Board of Law Examiners a transcript that reflects the date of the award of a Juris Doctor degree to the petitioner.

(d) Voiding of Examination Results for Ineligibility

If an applicant who is not eligible under Rule 4 takes an examination, the applicant's petition will be deemed invalid, and the applicant's examination results will be voided. No fees will be refunded.

~~(d)~~ (e) Refunds

If a petitioner withdraws the petition or fails to attend and take the examination, the examination fee will not be refunded except for good cause shown. The examination fee may not be applied to a subsequent examination unless the petitioner is permitted by the Board to defer taking the examination.

Source: This Rule is ~~derived from former Rule 5 a with the exception of section (d), which is~~ new, except that section (a) is derived from former Rule 5 (a).

Bar Admission Rule 6 was accompanied by the following Reporter's Note.

Amendments to Rules 6 and 9 of the Rules Governing Admission to the Bar of Maryland are proposed at the request of the State Board of Law Examiners.

To allow the Board sufficient time to process a petition to take an examination, in light of increases in the number of candidates and the number of requests for accommodation under the Americans With Disabilities Act, the time for filing the

petition is proposed to be changed from 20 days before the scheduled examination to no later than the preceding May 20th for the July examination or the preceding December 20th for a February examination.

The existing requirement set forth in Rule 6 (b) that a certain certification by the petitioner's law school be included in the petition is proposed to be deleted. In its place are proposed new sections (c) and (d). New section (c) requires the petitioner to affirm the petitioner's eligibility to take the examination and provide a law school transcript to the Board within a certain time after the examination. New section (d) voids the examination results of any applicant who is found to have been ineligible to take the examination.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE

BAR OF MARYLAND

AMEND Bar Admission Rule 9 to change the time for filing the petition, as follows:

Rule 9. RE-EXAMINATION AFTER FAILURE

(a) Petition for Re-examination

An unsuccessful examinee may file a petition to take another scheduled examination. The petition shall be on the form prescribed by the Board and shall be accompanied by the required examination fee.

(b) Time for Filing

~~The petition shall be filed at least 20 days before the scheduled examination.~~ A petitioner who intends to take the July examination shall file the petition, together with the prescribed fee, no later than the preceding May 20. A petitioner who intends to take the examination in February shall file the petition, together with the prescribed fee, no later than the preceding December 20. Upon written request of a petitioner and for good cause shown, the Board may accept a petition filed after that deadline. If the Board rejects the petition, the petitioner may file an exception with the Court within five days after notice of the rejection.

(c) Deferment of Re-examination

To meet scheduling needs at either the July or the February examination, the Board may require a petitioner to defer re-examination for one setting.

(d) Three or More Failures - Re-examination Conditional

If a person fails three or more examinations, the Board may condition retaking of the examination on the successful completion of specified additional study.

(e) No Refunds

If a petitioner withdraws the petition or fails to attend and take the examination, the examination fee will not be refunded and may not be applied to a subsequent examination unless the petitioner is required by the Board to defer retaking the examination or establishes good cause for the withdrawal or failure to attend.

Source: This Rule is derived as follows:

Section~~s~~ (a) ~~and (b) are~~ is derived from former Rule 8 a.

Section (b) is new.

Sections (c) and (d) are derived from former Rule 8 c.

Bar Admission Rule 9 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 6 of the Rules Governing Admission to the Bar of Maryland.

Mr. Brault explained that the State Board of Law Examiners ("the Board") is proposing to delete section (b) of Rule 6. This provision requires a certification signed by the dean or other authorized official of the law school attended by the petitioner which shows that the petitioner graduated and has not been convicted of a crime. The change to the Rule would mean that the petitioner would certify to the Board directly that he or she graduated and has not been convicted of any crime. If the petitioner did not graduate, the results of the bar exam would be voided. The Board is also requesting a change in the time for filing in what was originally section (c), now section (b). Instead of the petition being filed at least 20 days before the scheduled examination, the Board is asking that petitioners be required to file the petition no later than May 20 for the July examination and December 20 for the February examination. This will give the Board extra time

to prepare for administering the examination.

Ms. Hergenroeder told the Committee that since the inception of the Bar Admission Rules, the number of people taking the bar exam has doubled, and so has the amount of administrative work. Petitioners may not sit for the exam if they have not graduated from law school. After the exam is taken, the fact that the petitioner graduated and his or her character and fitness will be confirmed. No certification prior to the exam is necessary. The Board can rely on the word of the petitioner that he or she has graduated or is about to graduate. Code, Business Occupations and Professions Article, §10-207 requires that someone taking the bar examination must have graduated from law school.

Ms. Hergenroeder said that the short time period between the filing of the petition and the examination is causing problems for the Board. There are many more applications and also many more requests for accommodations for petitioners' disabilities, and these require time to process. The requests for accommodation due to a disability must be assessed by an expert. Mr. Maloney inquired as to what type of accommodations people are requesting. Ms. Hergenroeder answered that these include requests for extended time, examination in a private room, and extra lighting.

Mr. Brault explained that the Board is requesting that

Rule 9 be amended to change the time for filing a petition for re-examination to the same time period as section (b) of Rule 6.

The Committee approved Bar Admission Rules 6 and 9 as presented.

Agenda Item 1. Consideration and reconsideration of certain proposed rules changes concerning jury trails: Amendments to:
Rule 2-511 (Trial by Jury), Rule 2-512 (Jury Selection), Rule 4-312 (Jury Selection), Rule 4-314 (Defense of Not Criminally Responsible), Rule 2-521 (Jury – Review of Evidence – Communications), Rule 4-326 (Jury – Review of Evidence – Communications), and Rule 5-606 (Competency of Juror as Witness)

Mr. Johnson presented Rule 2-511, Trial by Jury; Rule 2-512, Jury Selection; Rule 4-312, Jury Selection; and Rule 4-314, Defense of Not Criminally Responsible, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-511 (b) to add a certain provision concerning alternate jurors and to allow the parties to enter into certain agreements concerning the deliberations and verdict of the jury, as follows:

Rule 2-511. TRIAL BY JURY

(a) Right Preserved

The right of trial by jury as guaranteed by the Maryland Constitution and the Maryland Declaration of Rights or as provided by law shall be preserved to the parties inviolate.

(b) Number of Jurors

The jury shall consist of six ~~persons~~ jurors and the number of alternate jurors selected in accordance with Rule 2-512 (b) that the court in its discretion determines may be necessary reasonably to assure that a total of not less than six jurors remain to return a verdict at the conclusion of the jury's deliberations. ~~With the approval of the court, the parties may agree to accept a verdict from fewer than six jurors if during the trial one or more of the six jurors becomes or is found to be unable or disqualified to perform a juror's duty.~~ Unless the parties otherwise agree in writing or on the record, (1) an alternate juror who does not replace a juror shall not deliberate or participate in the verdict, (2) the verdict shall be unanimous, and (3) no verdict shall be taken from a jury reduced in size to fewer than six jurors.

(c) Separation of Jury

The court, either before or after submission of the case to the jury, may permit the jurors to separate or require that they be sequestered.

(d) Advisory Verdicts Disallowed

Issues of fact not triable of right by a jury shall be decided by the court and may not be submitted to a jury for an advisory verdict.

Cross reference: Rule 2-325.

Source: This Rule is derived as follows:
Section (a) is new and is derived in part from FRCP 38 (a).
Section (b) is derived from former Rule 544 and FRCP 48.
Section (c) is derived from former Rule 543 a 8.
Section (d) is derived from former Rule 517.

Rule 2-511 was accompanied by the following Reporter's Note.

The first sentence of section (b) is proposed to be amended to make clear that determining the number of alternate jurors in a particular case is a matter within the discretion of the court, with the goal of the court to reasonably assure that a total of not less than six jurors remain to return a verdict at the conclusion of deliberations. The proposed new second sentence states that (1) alternate jurors do not deliberate or participate in the verdict, (2) the verdict must be unanimous, and (3) no verdict shall be taken from a jury reduced in size to fewer than six persons; however, the parties may agree in writing or on the record to vary one or more of these requirements.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-512 to change a certain provision concerning the discharge of alternate jurors, to add a new section (d) that provides for an advance questionnaire to be completed by prospective jurors, to delete a certain phrase concerning the identification of jurors, and to clarify that the jury foreperson may either be selected by the court or elected by the jury, as follows:

Rule 2-512. JURY SELECTION

(a) Challenge to the Array

A party may challenge the array of jurors on the ground that its members were not selected, drawn, or summoned according to law or on any other ground that would disqualify the panel as a whole. A challenge to the array shall be made and determined before any individual juror from that array is examined, except that the court for good cause may permit it to be made after the jury is sworn but before any evidence is received.

(b) Alternate Jurors

(1) Generally

The court may direct that one or more jurors be called and impanelled to sit as alternate jurors. Any juror who, before the time the ~~jury retires to consider its verdict,~~ juror's service is completed, becomes or is found to be unable or disqualified to perform a juror's duty shall be replaced by an alternate juror in the order of selection. An alternate juror

shall be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as a juror. An alternate juror who does not replace a juror shall be discharged ~~when the jury retires to consider its verdict~~ at such time as the court concludes that the juror's service is completed.

Cross reference: See Rule 2-511 (b).

The Council on Jury Use and Management recommends that the court have the option of retaining alternate jurors after the jury retires to deliberate and allowing an alternate to replace a juror after deliberations have begun. Draft subsection (b)(2), based on Fed. R. Crim. P. 24 (c)(3), is set forth below:

(2) Retaining Alternate Jurors

The court may retain alternate jurors after the jury retires to deliberate. The court shall ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

(c) Jury List

Before the examination of jurors, each party shall be provided with a list of jurors that includes the name, age, sex, education, occupation, and occupation of spouse of each juror and any other information required by the county jury plan. When the county jury plan requires the address of a juror, the address need not include the house or box number.

(d) Advance Questionnaire

Before the jury selection process takes place, the court may direct that prospective jurors answer questions in writing under oath. Before the questionnaire is submitted to the prospective jurors, the court shall give the parties a reasonable opportunity to propose questions to be included in the questionnaire and to object to questions proposed by another party or the court. Except as otherwise provided in this section or ordered by the court, the responses are confidential and not available for public inspection. The court may require appropriate safeguards to protect against the disclosure of the identities of the prospective jurors, including identification of responses to the questionnaires only by juror numbers. The court shall provide the responses to each party before beginning the jury selection process. The court shall give the parties an opportunity to be heard before it excuses a prospective juror on the basis of a fact-specific, case-related response. The Clerk of the Court shall pay the cost of the questionnaires.

Committee note: The use of advance questionnaires is recommended in complex or multi-defendant cases. The questionnaire is intended to reduce the time required for the examination of jurors under section (e) of this Rule and respect the privacy of jurors who may be reluctant to response to certain questions in open court.

~~(d)~~ (e) Examination of Jurors

The court may permit the parties to conduct an examination of jurors or may itself conduct the examination after considering questions proposed by the parties. If the court conducts the examination, it may permit the parties to supplement the examination by further inquiry or may itself submit to the jurors additional questions proposed by the

parties. The jurors' responses to any examination shall be under oath. Upon request of any party the court shall direct the clerk to call the roll of the panel and to request each juror to stand and be identified ~~when called by name~~.

~~(e)~~ (f) Challenges for Cause

A party may challenge an individual juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown.

~~(f)~~ (g) Additional Jurors

When the number of jurors of the regular panel may be insufficient to allow for selection of a jury, the court may direct that additional jurors be summoned at random from the qualified jury wheel and thereafter at random in a manner provided by statute.

~~(g)~~ (h) Designation of List of Qualified Jurors

Before the exercise of peremptory challenges, the court shall designate from the jury list those jurors who have qualified after examination. The number designated shall be sufficient to provide the number of jurors and alternates to be sworn after allowing for the exercise of peremptory challenges. The court shall at the same time prescribe the order to be followed in selecting the jurors and alternate jurors from the list.

~~(h)~~ (i) Peremptory Challenges

Each party is permitted four peremptory challenges plus one peremptory challenge for each group of three or less alternate jurors to be impanelled. For purposes of this section, several plaintiffs or several defendants shall be

considered as a single party unless the court determines that adverse or hostile interests between plaintiffs or between defendants justify allowing to each of them separate peremptory challenges not exceeding the number available to a single party. The parties shall simultaneously exercise their peremptory challenges by striking from the list.

~~(i)~~ (j) Impanelling the Jury

The jurors and any alternates to be impanelled shall be called from the qualified jurors remaining on the list in the order previously designated by the court and shall be sworn. The court shall either designate a juror as ~~foreman~~ foreperson or direct that the jurors elect a foreperson.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 754 a and is consistent with former Rule 543 c.
Section (b) is derived from former Rule 751 b and is consistent with former Rule 543 b 3.
Section (c) is new.
Section (d) is new.
Section ~~(d)~~ (e) is derived from former Rules 752 and 543 d.
Section ~~(e)~~ (f) is derived from former Rule 754 b.
Section ~~(f)~~ (g) is consistent with former Rule 543 a 5 and 6.
Section ~~(g)~~ (h) is new with exception of the last sentence which is derived from former Rule 753 b 1.
Section ~~(h)~~ (i) is derived from former Rule 543 a 3 and 4.
Section ~~(i)~~ (j) is derived from the last sentence of former Rule 753 b 3 and former Rule 751 d.

Rule 2-512 was accompanied by the following Reporter's Note.

Amendments to Rules 2-512 and 4-312 are proposed by the Trial Subcommittee.

The Subcommittee proposes a change as to when an alternate juror is discharged, allowing the judge to keep the alternates as such until all of the jurors have been discharged. If, for example, in a case in which punitive damages may be awarded, one of the original jurors becomes ill and is unable to serve during the punitive damage phase of the case, the alternate would be available to serve in place of that juror.

The Council on Jury Use and Management recommends the addition of a new subparagraph that goes one step further and expressly allows an alternate juror to replace a juror who, during deliberations, becomes unable or disqualified to serve. The Subcommittee makes no recommendation as to the additional paragraph and notes that the addition reflects a change in the policy underlying the current rule as enunciated in Hayes v. State, 355 Md. 615 (1999), a change that would be coming "through the normal rule-making process." Id. at 635. A draft subsection that would implement the Council's recommendation and is based on Fed. R. Crim. P. 24 (c)(2) is included in each Rule for consideration by the Rules Committee.

The Trial Subcommittee is recommending that Rules 2-512 and 4-312 be amended to add to each Rule a provision for an advance juror questionnaire based on the recommendation of the Council on Jury Use and Management. One of the benefits of the questionnaire is the protection of privacy for potential jurors who will be able to answer questions, which may be of a personal nature, in writing instead of orally in front of an entire array of jurors. Another benefit is a reduction in the amount of time needed for the examination of jurors under Rules 2-512 (e) and 4-312 (e).

Additional proposed amendments to the two Rules allow jurors to be identified by a method other than by the juror's name during a roll call, and the amendments make clear that the jury foreperson may be either selected by the court or elected by the jury.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-312 to change a certain provision concerning the discharge of alternate jurors, to add a new section (d) that provides for an advance questionnaire to be completed by prospective jurors, to delete a certain phrase concerning the identification of jurors, and to clarify that the jury foreperson may either be selected by the court or elected by the jury, as follows:

Rule 4-312. JURY SELECTION

(a) Challenge to the Array

A party may challenge the array of jurors on the ground that its members were not selected, drawn, or summoned according to law or on any other ground that would disqualify the panel as a whole. A challenge to the array shall be made and determined before any individual juror from that array is examined, except that the court for good cause may permit it to be made after the jury is sworn but before any evidence is received.

(b) Alternate Jurors

(1) Generally

An alternate juror shall be drawn in the same manner, have the same qualifications, be subject to the same examination, take the same oath, and have the same functions, powers, facilities, and privileges as a juror.

(2) Capital Cases

In cases in which the death penalty may be imposed, the court shall appoint and retain alternate jurors as required by Code, Criminal Law Article, §2-303 (d).

(3) Non-Capital Cases

(A) Applicability

Subsection (b)(3) of this Rule applies in cases other than cases in which the death penalty may be imposed.

(B) Generally

~~In all other cases, the~~ The court may direct that one or more jurors be called and impanelled to sit as alternate jurors. Any juror who, before the time the ~~jury retires to consider its verdict~~ juror's service is completed, becomes or is found to be unable or disqualified to perform a juror's duty, shall be replaced by an alternate juror in the order of selection. An alternate juror who does not replace a juror shall be discharged ~~when the jury retires to consider its verdict~~ at such time as the court concludes that the juror's service is completed.

The Council on Jury Use and Management recommends that the court have the option of retaining alternate jurors after the jury retires to deliberate and allowing an alternate to replace a juror after deliberations have begun. Draft subsection

(b)(3)(C), based on Fed. R. Crim. P. 24 (c)(3), is set forth below:

(C) Retaining Alternate Jurors

The court may retain alternate jurors after the jury retires to deliberate. The court shall ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew.

(c) Jury List

Before the examination of jurors, each party shall be provided with a list of jurors that includes the name, age, sex, education, and occupation of each juror, the occupation of each juror's spouse, and any other information required by the county jury plan. When the county jury plan requires the address of a juror, the address shall be limited to the city or town and zip code and shall not include the juror's street address or box number, unless otherwise ordered by the court.

(d) Advance Questionnaire

Before the jury selection process takes place, the court may, and in cases in which the death penalty may be imposed shall, direct that prospective jurors answer questions in writing under oath. Before the questionnaire is submitted to the prospective jurors, the court shall give the parties a reasonable opportunity to propose questions to be included in the questionnaire and to object to questions proposed by another party or the court. Except as otherwise provided in this section or ordered by the court, the responses are confidential and not available for public inspection. The court may require appropriate safeguards to

protect against the disclosure of the identities of the prospective jurors, including identification of responses to the questionnaires only by juror numbers. The court shall provide the responses to each party before beginning the jury selection process. The court shall give the parties an opportunity to be heard before it excuses a prospective juror on the basis of a fact-specific, case-related response. The Clerk of the Court shall pay the cost of the questionnaires.

Committee note: The use of advance questionnaires is recommended in complex or multi-defendant cases. The questionnaire is intended to reduce the time required for the examination of jurors under section (e) of this Rule and respect the privacy of jurors who may be reluctant to respond to certain questions in open court.

~~(d)~~ (e) Examination of Jurors

The court may permit the parties to conduct an examination of prospective jurors or may itself conduct the examination after considering questions proposed by the parties. If the court conducts the examination, it may permit the parties to supplement the examination by further inquiry or may itself submit to the jurors additional questions proposed by the parties. The jurors' responses to any examination shall be under oath. Upon request of any party the court shall direct the clerk to call the roll of the panel and to request each juror to stand and be identified ~~when called by name~~.

~~(e)~~ (f) Challenges for Cause

A party may challenge an individual juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown.

~~(f)~~ (g) Additional Jurors

When the number of jurors of the regular panel may be insufficient to allow for selection of a jury, the court may direct that additional jurors be summoned at random from the qualified jury wheel and thereafter at random in a manner provided by statute.

~~(g)~~ (h) Designation of List of Qualified Jurors

Before the exercise of peremptory challenges, the court shall designate from the jury list those jurors who have qualified after examination. The number designated shall be sufficient to provide the number of jurors and alternates to be sworn after allowing for the exercise of peremptory challenges pursuant to Rule 4-313. The court shall at the same time prescribe the order to be followed in selecting the jurors and alternate jurors from the list.

~~(h)~~ (i) Impanelling the Jury

The jurors and any alternates to be impanelled shall be called from the qualified jurors remaining on the list in the order previously designated by the court and shall be sworn. The court shall either designate a juror as ~~foreman~~ foreperson or direct that the jurors elect a foreperson.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 754 a.
Section (b) is derived from former Rule 754 b.
Section (c) is new.
Section (d) is new.
Section ~~(d)~~ (e) is derived from former Rule 752.
Section ~~(e)~~ (f) is derived from former Rule 754 b.

Section ~~(f)~~ (g) is new.

Section ~~(g)~~ (h) is derived from former Rule 753 b 1.

Section ~~(h)~~ (i) is derived from former Rule 751 c and d.

Rule 4-312 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendments to Rule 2-512.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-314 to conform it to the relettering of Rule 4-312, as follows:

Rule 4-314. DEFENSE OF NOT CRIMINALLY RESPONSIBLE

. . .

(b) Procedure for Bifurcated Trial

(1) Generally

For purposes of this Rule, a bifurcated trial is a single continuous trial in two stages.

(2) Sequence

The issue of guilt shall be tried first. The issue of criminal responsibility shall be tried as soon as practicable after the jury returns a verdict of guilty on any

charge. The trial shall not be recessed except for good cause shown.

(3) Examination of Jurors

The court shall inform prospective jurors before examining them pursuant to Rule 4-312 ~~(d)~~ (e) that the issues of guilt or innocence and whether, if guilty, the defendant is criminally responsible will be tried in two stages. The examination of prospective jurors shall encompass all issues raised.

(4) Appointment of Alternate Jurors

The court shall appoint at least two alternate jurors, who shall be retained throughout the trial.

(5) Trial of Issue of Criminal Responsibility

(A) Except as otherwise provided in paragraph (B) or (C) of this subsection, the issue of criminal responsibility shall be tried before the same jury that tried the issue of guilt. Any juror who dies, becomes incapacitated or disqualified, or is otherwise discharged before the jury begins to deliberate in the criminal responsibility stage shall be replaced by an alternate juror in the order of selection.

(B) The defendant may move to have the issue of criminal responsibility tried without a jury by the judge who presided over the first stage of the trial. The court shall grant a motion made by the defendant unless it finds and states on the record a compelling reason to deny the motion.

(C) If an appellate court affirms the judgment of guilt but remands for a new trial on the issue of criminal responsibility, that issue shall be

re-tried by a jury impaneled for the purpose or by the court pursuant to paragraph (B) of this subsection.

(6) Order of Proof

(A) Evidence of mental disorder or mental retardation as defined in Code, Health General Article, §12-108 shall not be admissible in the guilt stage of the trial for the purpose of establishing the defense of lack of criminal responsibility. This evidence shall be admissible for that purpose only in the second stage following a verdict of guilty.

(B) In the criminal responsibility stage of the trial, the order of proof and argument shall reflect that the defendant has the burden of establishing the lack of criminal responsibility. The defendant and the State may rely upon evidence admitted during the first stage and may recall witnesses.

(7) Motion by State

The State may move for judgment on the issue of criminal responsibility at the close of the evidence offered by the defendant. In ruling on the motion, the court shall consider all evidence and inferences in the light most favorable to the defendant. The court may grant the motion if it finds no legally sufficient evidence from which a rational trier of fact could find that the defendant was not criminally responsible.

. . .

Rule 4-314 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-314 conforms the Rule to the proposed relettering of Rule 4-312.

Mr. Johnson told the Committee that the Trial Subcommittee has tried again to draft these Rules which pertain to the issue of alternate jurors. The Subcommittee focused on judicial economy, instead of juror dissatisfaction. Under the proposed Rules, the court has the flexibility to assure that not less than six jurors will be available to deliberate the verdict in a case by determining the number of alternate jurors as provided for in section (b) of Rule 2-511.

Ms. Potter noted that the language in the first sentence of section (b) which reads: " ...may be necessary reasonably to assure..." is awkward. The Chair responded that the Style Subcommittee can amend this language, but he expressed the concern that when there is a mass tort case, such as an asbestos trial, the Rule as proposed to be amended may not solve the problem of the jury falling below the number of six, because the Rule provides that the alternates are discharged and do not deliberate. Judge Missouri pointed out that the Rule provides that the parties can agree otherwise to another arrangement. Mr. Johnson added that the judge can decide not to discharge an alternate juror.

The Chair commented that the problem still exists where an alternate juror is upset because he or she sat for several weeks on a jury and then is discharged before deliberation. This was the reason that the federal rules were changed. Mr.

Johnson said that some people are against the idea that the six-person jury should be expanded, and the statute currently requires six jurors. The concept that the parties may agree otherwise should remain in the Rule, so parties do not have additional jurors imposed on them.

Mr. Brault questioned as to whether any other jurisdiction has rules similar to the ones presented today. The Reporter replied that she was not aware of any. Mr. Brault disagreed with the Rules as presented.

Mr. Klein commented that at the Subcommittee meeting, he had stated his opposition to the proposal. The Council on Jury Use and Management issued a comprehensive and extensive report which, among other things, examined the issue of dissatisfaction among alternate jurors. Often these jurors feel that they are second-class citizens and are upset when they find out that they are alternates. If they are told this at the beginning of the case, they may not pay attention to the testimony. The purpose of the changes to the Rules should be to address this issue, but the proposed Rules do not address it. They perpetuate the existing rule with a slight twist as to when alternate jurors are discharged. Nothing in the Constitution bars a jury of greater than six people. The Rules could supersede the statute, which provides for a jury of six persons in civil cases. Mr. Klein expressed his

preference for another look at this by the legislature. The federal approach addresses the issue of alternate juror satisfaction. Studies on the size of juries have indicated that the larger the jury, the fewer outlier verdicts there are. This would be a collateral benefit to having a larger jury, and it would address the issue of juror satisfaction.

Judge Missouri said that he and the Chair had testified before the legislature last session, and their testimony was not favorably received. At the recent Subcommittee meeting, Delegate Vallario had suggested that the legislature should be asked to take another look at this issue. Judge Sweeney, the current Chair of the Council on Jury Use and Management, expressed his agreement with Mr. Klein. The preferable way to handle the issue of juror satisfaction is to follow the federal approach. He said that he was not aware of any problems resulting from the federal rule.

Mr. Brault remarked that he had spoken with Delegate Vallario who had indicated that the House Judiciary Committee did not think that a change to the law was necessary. The Rule could be rewritten without changing the statute. In 1975 when the revision of the Maryland Rules was undertaken, the Honorable Paul Niemeyer, a judge of the U.S. Court of Appeals for the Fourth Circuit, who was then a practicing attorney and a member of the Rules Committee, was interested, along with

Mr. Sykes and Mr. Bowen, in conforming the Maryland rules to the federal rules. During the next 10 years as the Maryland rules were being redrafted, the Rules Committee did not totally follow the federal approach, but they came close to it. The idea was that a practitioner in Maryland could go across the street from the Baltimore City Courthouse to the federal courthouse (the only location at that time) and be able to practice in federal court, also. So that Maryland could follow the federal approach of six-person juries, a Constitutional amendment was passed. The Honorable Robert C. Murphy, then Chief Judge of the Court of Appeals, was in favor of the smaller jury, because it would help the judicial budget. Mr. Brault stated that he is involved in many national organizations, and the six-person jury is regarded among many members of the bar as a failure. Some plaintiff attorneys feel that the monetary verdicts are higher when the jury is smaller, but this has never been proven by any organization that collects this type of data.

The Chair asked if the verdicts in federal court are a failure. Mr. Brault replied that the larger juries reflect a better quality of justice. Mr. Maloney commented that this issue was discussed at the May 2001 Rules Committee meeting, at which time the Committee decided to present the issue of jury size to the legislature. The legislature declined to

change the statute. The proposed Rule is not inconsistent with the desire of the Committee to go to the legislature again. It tells the trial judges that the parties can agree that the alternates can deliberate. To go beyond this and override the statute would be a big mistake.

Mr. Klein told the Committee that the federal rules were amended in 1991. He quoted from the comment to Fed. R. Civ. P. 47, Selection of Jurors, as follows:

> The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.

The comment to the companion rule, Fed. R. Civ. P. 48, Number of Jurors–Participation in Verdict, reads in part:

> Because the institution of the alternate juror has been abolished by the proposed revision of Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in excess of six increases the representativeness of the jury and harms no interest of a party.

Mr. Brault commented that the idea that a plaintiff's attorney would prefer a smaller jury is belied by practice in the District of Columbia and the Maryland suburbs of the District. No plaintiff's injury attorney seems to go out of his or her way to practice in Maryland where there are six-person juries. He has litigated the issue of *forum non*

conveniens many times, and the plaintiffs' attorneys are satisfied to remain in D.C. where the juries are larger. The plaintiffs' attorneys seem to prefer the urban nine-member jury as opposed to the suburban six-member jury.

The Chair remarked that most plaintiffs' attorneys in Maryland prefer the jury cases to be in Baltimore City where the verdicts tend to be larger than in smaller counties such as Cecil County. In his nine years as a circuit court judge, he did not find the verdicts to be that different as between six- and 12-person juries. Some plaintiffs' attorneys feel that it is easier to prove a case to six rather than to 12 people. In assessing damages, a 12-person jury will treat a party no differently than a six-person jury. Delegate Vallario had told the Chair and Judge Missouri previously that this was a matter for the legislature and not the Rules Committee. This may be a reflection of the majority of the House Judiciary Committee. If the issue is presented to the legislature, Judge Sweeney will appear before it. It seems that the Maryland State Bar Association (MSBA) may be taking a different position this year than it took last year.

Mr. Johnson expressed his concern about the Rule superseding the statute. Last year the MSBA opposed the legislation to increase the jury size, but the members may not have been sufficiently well informed. Now that a liaison

committee between the MSBA and the Rules Committee has been created, Ms. Perez, one of the liaison committee's members and a former Reporter to the Rules Committee, who is present at today's meeting, can update the MSBA. There is a problem if the legislature believes the matter of jury size is in its bailiwick, and a rule change adopting the federal approach is made without the corresponding statutory change. Because of the recent election, there is a new political landscape, including several new committee chairs in the legislature. It is important to get along with the legislature. Mr. Klein commented that he did not disagree with Mr. Johnson. The federal rule should not be adopted without a fair consideration by the legislature.

Judge Missouri suggested that Rule 2-511 be remanded to the Subcommittee, so it can monitor the attempt to change the size of the jury through the legislation. Judge Heller agreed with Judge Missouri's suggestion. In the meantime, the provisions of the proposed amended rule can be effected under the current Rule by agreement of the parties. Mr. Johnson disagreed, explaining that some judges believe that judges do not have the authority to seat alternates. For example, that is the view of the Honorable Nancy Davis-Loomis, a judge of the Circuit Court for Anne Arundel County. Mr. Dean inquired as to why an alternate juror cannot be available if a regular

juror cannot deliberate. The Chair answered that this will be discussed when Rule 2-512, Trial by Jury, is discussed. The Chair stated that Rule 2-511 will be remanded to the Subcommittee, pending legislative action in the 2003 session.

Turning to Rule 2-512, Mr. Johnson explained that subsection (b)(2) is proposed to be amended to provide that an alternate juror shall be discharged when the court concludes that the juror's service has been completed, instead of when the jury retires to consider its verdict. The Chair said that he believes that this Rule change is independent of the six-juror v. 12-juror issue. An asbestos case could involve seven or eight plaintiffs and may require six jurors and six alternates. The idea is to retain enough jurors to finish the case.

Judge Sweeney commented that the case of Hayes v. State, 355 Md. 615 (1999) provides that once the jury room door closes for the jurors to begin their deliberation, no more alternates can join the jury. The Rules Committee may draft a rule to change this. The Council on Jury Use and Management recommends allowing an alternate juror to replace a juror who, during the deliberations, becomes unable to serve. The Trial Subcommittee is setting forth the Council's recommendation, without a Subcommittee vote. The changes to Rule 2-512 are modeled upon Fed. R. Crim. P. 24 (c)(3). Once the alternate

juror becomes part of the jury, the jury would be instructed to begin its deliberations anew. None of its prior decisions would be imposed on the alternate. This is a good way to save a case.

Mr. Klein expressed the opinion that this Rule should be tabled pending the decision of the legislature as to the number of jurors. There is some concern that an alternate juror will go home upon being dismissed and watch television concerning the case. Then the alternate is called back after another juror becomes too ill to serve. This situation is fraught with potential problems. It may be preferable to have no alternate jurors at all.

Judge Heller commented that regardless of the legislature's actions, she is in favor of the changes to the civil and the criminal rules. In a protracted civil or criminal case, it is a problem if during deliberations a juror becomes unavailable. The revised procedures would assist in preventing mistrials. As far as the problem of an alternate juror watching television, the same problem exists when juries are not sequestered, and the jurors go home at night. Mr. Dean remarked that he tried a criminal case recently which took a week before the jury began deliberations. Once the jury began deliberating, a juror refused to come back. Although there had been three alternates, none of them could

take the place of the missing juror, so there was a mistrial.

Mr. Klein moved to table discussion of the Rule pending consideration by the legislature. The motion was seconded. The motion failed on a vote of six in favor. Mr. Brault commented that the Rules Committee has taken a position as to its preference for the federal approach. The Chair stated that the statute, Code, Courts and Judicial Proceedings Article, §3-806, provides that a jury consists of six persons. Then the proposed Rule that provides that the alternates may deliberate was drafted.

Mr. Brault moved that the policy of the Rules Committee should be stated as a preference for the federal approach, which is that the jury shall consist of not fewer than six and not more than 12 jurors, and all jurors shall participate in the verdict unless excused by the court. The Chair of the Rules Committee or his designee would be asked to present this to the legislature, requesting that the legislature give authority for this so that a Rule can be drafted. The motion was seconded. The Chair said that he had presented this issue to the legislature last year. He and Judge Missouri had appeared before the House Judiciary Committee explaining the Rules Committee's preference for the federal approach. Judge Missouri added that the Conference of Circuit Judges will be meeting the following Monday, and he and Judge Heller will

make sure that the Conference shares the same view. The Chair called for a vote on Mr. Brault's motion to approve the federal rule and present this to the legislature. The motion passed unanimously.

The Chair said that in a protracted case lasting seven or eight weeks, proposed new subsection (b)(2) of Rule 2-512 may afford some protection from the possibility of a mistrial. When deliberations are lengthy, jurors may drop out. Mr. Johnson commented that if the policy suggested by Mr. Brault is adopted, there will not be any alternates.

Mr. Johnson told the Committee that another amendment to Rule 2-512 provides for an advance questionnaire to be administered to prospective jurors. This would be helpful to the court, particularly in protracted cases. One of its purposes is to reduce the time required for the examination of jurors pursuant to section (e) of the Rule. There is also a proposed change to section (j) substituting the word "foreperson" for "foreman" and adding an option for the jurors to elect a foreperson.

Judge Missouri inquired as to when the Rule contemplates that the court would direct the jury to elect a foreperson. Judge Heller answered that it would be before the jury deliberates. Judge Missouri noted that in some cases, the jury elects a foreperson earlier than that. Judge Sweeney

remarked that there are a variety of practices within the State. Some judges select the foreperson as soon as the jury is impanelled, and others wait until the end of the trial. Why should the Rule specify a time? He suggested that the word "elect" be changed to the word "select." A juror may volunteer for the job, rather than be elected by the other jurors.

The Chair asked what the view of the Council on Jury Use and Management was regarding this issue. Judge Sweeney answered that their view is that if the judge selects the foreperson, there will likely be criticism that the forepersons tend to be white, middle-aged men. Jurors can be trusted to select their own forepersons. Some people do not like speaking in public and would be unhappy if the judge selected them as foreperson.

Judge Kaplan moved that the word "elect" should be replaced with the word "select" in section (j). The motion was seconded, and it passed unanimously.

Judge Heller observed that the questionnaire which is proposed to be added to the Rule in section (d) is a very good idea. She commented that a reporter from The Daily Record was looking into why a reporter cannot come up to the bench during a bench conference at a jury trial. She asked what protects a potential juror's response when jurors are at the bench during

voir dire. Some of the responses from jurors involve very personal information which would not ordinarily be available to the public. It would be a problem if the newspapers were able to obtain a transcript of the trial. The Chair said that individual voir dire may be protected from the public. Judge Heller remarked that in Baltimore City, a potential juror stated that she had been a victim of rape. Judge Johnson observed that he would excuse such a juror before she made the statement. Judge Heller responded that if the juror looked or acted upset, that would be possible, but in the case to which she was referring, the juror did not look or act upset. Mr. Brault asked if the court could seal such testimony. Judge Heller said that she had been asked to seal this particular testimony.

By consensus, the Committee approved the Rule as presented.

Turning to Rule 4-312, Mr. Johnson explained that the Rule generally tracks the changes in Rule 2-512. The Chair noted that the proposed changes regarding retaining all of the jurors will solve the problem presented in the Hayes case. Judge Sweeney expressed his concern about the advance questionnaires being mandatorily used in death penalty cases. In some cases, the questionnaire may not be necessary and should not be mandatory in death penalty cases. The Chair

described the situation where the defendant waives the right to a jury sentence in advance. The Rule provides that the judge has to send the questionnaire to the jurors. The following language could be added to section (d): “unless the defendant has waived in advance the right to a sentence being imposed by the jury.”

Mr. Brault commented that filling out the questionnaires may be a potential cause of error. The Chair added that there could be arguments concerning what should be included in the questionnaire. Judge Sweeney noted that in a death penalty case, something important could be overlooked. He suggested that questionnaires in death penalty cases should not be mandatory, questioning why one category of cases is being singled out.

Mr. Maloney moved that the requirement that questionnaires be administered in all capital cases be deleted. The motion was seconded. The Chair said that this could be accomplished by eliminating the following language in the first sentence of section (d): “... and in cases in which the death penalty may be imposed shall... .” Mr. Klein suggested that a Committee note could be added after section (d) which would provide that a juror questionnaire is a good idea in complex or death penalty cases. The motion was passed unanimously, and the Committee agreed by consensus to

the changes suggested by the Chair and Mr. Klein. By consensus, the Committee approved the Rule as amended.

Turning to Rule 4-314, Mr. Johnson explained that the change to the Rule is stylistic only, changing the reference in the Rule to "Rule 4-312 (e)" from "Rule 4-312 (d), since the latter Rule has been renumbered. The Committee approved the change to Rule 4-314 by consensus.

Mr. Johnson presented Rule 2-521, Jury–Review of Evidence–Communications, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-521 to add certain provisions concerning juror notes and notepads, as follows:

Rule 2-521. JURY - REVIEW OF EVIDENCE - COMMUNICATIONS

(a) Jurors' Notes

The court may, and upon request of any party shall, provide paper notepads for use by jurors during trial and deliberations. The notepads shall be collected ~~during recesses in the trial~~ ***when the court adjourns for the day*** and at the end of the trial. A juror's notes may not be reviewed or relied upon by any person for any purpose other than by the juror while taking them and during deliberations. The court shall instruct the jurors that any notes made by a juror outside the

courtroom ***or other location where the court is convened*** may not be brought into the courtroom. If a juror is unable to use a notepad due to a disability, the court shall provide a reasonable accommodation. After the trial, all notes shall be destroyed promptly.

~~(a)~~ (b) Items Taken to Jury Room

Jurors may take their notes ~~regarding the evidence and may keep the notes~~ with them when they retire for ~~their~~ deliberation. Unless the court for good cause orders otherwise, the jury may also take exhibits that have been admitted in evidence, except that a deposition may not be taken into the jury room without the agreement of all parties and consent of the court. Written or electronically recorded instructions may be taken into the jury room only with the permission of the court.

Cross reference: See Rule 5-802.1 (e).

~~(b)~~ (c) Jury Request to Review Evidence

The court, after notice to the parties, may make available to the jury testimony or other evidence requested by it. In order that undue prominence not be given to the evidence requested, the court may also make available additional evidence relating to the same factual issue.

~~(c)~~ (d) Communications With Jury

The court shall notify the parties of the receipt of any communication from the jury pertaining to the action before responding to the communication. All such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action.

Source: This Rule is derived as follows:

Section (a) is new.

Section ~~(a)~~ (b) is derived from former Rules 558 a, b and d and 758 b.

Section ~~(b)~~ (c) is derived from former Rule 758 c.

Section ~~(c)~~ (d) is derived from former Rule 758 d.

Rule 2-521 was accompanied by the following Reporter's Note.

At the request of Chief Judge Bell, the Rules Committee considered the matter of control of jurors' notes, in light of Aron v. Brock, 118 Md. App. 475 (1997), cert. denied, 346 Md. 629 (1997).

Proposed amendments to Rules 2-521 and 4-326 provide for notepads to be distributed by the court to jurors for notetaking during the trial and use during deliberation, upon the request of any party or sua sponte by the court. The court maintains control of the notepads by collecting them during recesses in the trial and promptly destroying them after the trial. As to notes made by a juror outside the courtroom, the proposed amendments require the court to instruct the jury that notes made outside the courtroom may not be brought into the courtroom. The amendments also require the court to provide a reasonable accommodation under the Americans with Disabilities Act, 42 U.S.C. §12101, et. seq., for any juror who is unable to use a notepad due to disability.

The Trial Subcommittee recommends two additional changes to Rules 2-521 (a) and 4-326 (a), suggested by the Council on Jury Trial Use and Management. The changes are: (1) substituting ***"when court adjourns for the day"*** *for "during recesses in the trial" and (2) adding the phrase* ***"or other location where court is convened."*** *The Council believes that collecting notepads*

each time there is a brief recess is burdensome and time-consuming. Also, the Council notes that court may be convened at a location outside the courtroom, for example, at the location of the property during a view in a condemnation action.

Mr. Johnson told the Committee that he was not present at the Trial Subcommittee meeting when Rule 2-521 had been discussed, and he asked Judge Missouri to explain the changes to the Rule. Judge Missouri said that the changes involve jurors' notes. The bold print indicates where the Subcommittee took out the references to the jurors' notepads being collected during every recess of the trial, because the Subcommittee felt that this collection was too frequent. It is sufficient to collect the notepads at the end of the day. The changes also clarify that the court must instruct the jury that any notes made outside of the courtroom or other location where the court is convened may not be brought into the courtroom. The Chair referred to the case of Aron v. Brock, 118 Md. App. 475 (1997) in which a juror hearing the case had created a book with information about the case which he entered into a computer each night after the trial day ended, and he had shown the book to the parties' attorneys. The trial judge lost the book, so it was never before the appellate court. Mr. Brault remarked that the case was remanded, so that the information from the lost book could be

retrieved from the juror's computer.

Judge Heller asked the meaning of the language "reasonable accommodation" at the end of section (a). Judge Missouri replied that under the Americans with Disabilities Act, an example of a reasonable accommodation would be a tape recorder. Mr. Brault commented that jurors may have a long break for lunch, and during the break, they work on the notes. In the Aron case, the juror worked on his notes at home. Judge Missouri responded that the view of the Subcommittee is that the trial judge should be able to manage the juror notes. Judge Missouri said that he instructs jurors who are about to take an extended break that they must leave their notepads in the courtroom. The Subcommittee is trying to ensure that the jurors do not take their notes home at night, and Mr. Brault added they should not take their notes to lunch.

The Chair suggested that the following language could be added to section (a): "The court shall ensure that the notepads are collected when the court adjourns for the day and that the jurors' notes are not reviewed or relied upon by any person and that any notes a juror makes outside are not brought into the courtroom." Judge Sweeney commented that in a medical malpractice case, the jurors often have a notebook with medical records and exhibits. He gives the jurors a yellow marker to underline whatever passages in the notebook

they feel are important. Whenever the court recesses, the jurors often want to review the notebooks. It is micro-managing if the Rule provides that the judge must instruct the jurors that they have to leave the notebooks in their seats during a recess. In Judge Sweeney's 11 years on the bench, no juror ever did anything untoward. The Aron case is very unusual.

Mr. Johnson expressed the concern that some people believe that jurors do not always follow the judge's admonition not to discuss the case. It might be beneficial to add to section (a) a statement that is based upon the second sentence of the second paragraph of the Reporter's note, which would provide that the court maintains control over the notepads by collecting them during the trial when the court adjourns for the day and by promptly destroying them after the trial. Judge Heller remarked that in her courtroom, the jurors take the notepads to the jury room, and the notepads are collected at the end of the day. During long recesses or lunch, the notepads are taken to the jury room, where they are always secured. There is an opportunity for the jurors to review the notes. The Committee agreed by consensus to Mr. Johnson's suggestion.

Mr. Klein referred to the sentence which prohibits a juror from bringing in notes made outside of the courtroom,

except for notes when court is convened at another location, such as for a demonstration of the operation of machinery that is too large to bring into the courtroom. The Chair expressed the view that this does not have to be expressly stated in the Rule. The Committee agreed by consensus to take out the fourth sentence of section (a). Mr. Johnson suggested that the second sentence be changed to the language in his previously suggested Committee note. The Committee agreed to this change by consensus. The Reporter asked if a sentence is needed pertaining to outside influences. The Chair responded that this would be covered by a separate instruction by the judge. The Rule should not lock the judge in. Mr. Maloney moved that Rule 2-521 be adopted as amended. The motion was seconded, and it passed unanimously.

Mr. Johnson presented Rule 4-326, Jury–Review of Evidence–Communications, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-326 to add certain provisions concerning the use of juror notes and notepads, as follows:

Rule 4-326. JURY - REVIEW OF EVIDENCE - COMMUNICATIONS

(a) Jurors' Notes

The court may, and upon request of any party shall, provide paper notepads for use by jurors during trial and deliberations. The notepads shall be collected ~~during recesses in the trial~~ ***when the court adjourns for the day*** and at the end of the trial. A juror's notes may not be reviewed or relied upon by any person for any purpose other than by the juror while taking them and during deliberations. The court shall instruct the jurors that any notes made by a juror outside the courtroom ***or other location where the court is convened*** may not be brought into the courtroom. If a juror is unable to use a notepad due to a disability, the court shall provide a reasonable accommodation. After the trial, all notes shall be destroyed promptly.

~~(a)~~ (b) Items Taken to Jury Room

Jurors may take their notes ~~regarding the evidence and they may keep the notes~~ with them when they retire for ~~their~~ deliberation~~s~~. Unless the court for good cause orders otherwise, the jury may also take the charging document and exhibits which have been admitted in evidence, except that a deposition may not be taken into the jury room without the agreement of all parties and the consent of the court. Electronically recorded instructions or oral instructions reduced to writing may be taken into the jury room only with the permission of the court. On request of a party or on the court's own initiative, the charging documents shall reflect only those charges on which the jury is to deliberate. The court may impose safeguards for the preservation of the exhibits and the safety of the jurors.

Cross reference: See Rule 5-802.1 (e).

~~(b)~~ (c) Jury Request to Review Evidence

The court, after notice to the parties, may make available to the jury testimony or other evidence requested by it. In order that undue prominence not be given to the evidence requested, the court may also make available additional evidence relating to the same factual issue.

~~(c)~~ (d) Communications With Jury

The court shall notify the defendant and the State's Attorney of the receipt of any communication from the jury pertaining to the action before responding to the communication. All such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action.

Source: This Rule is derived as follows:
Section (a) is new.
Section ~~(a)~~ (b) is derived from former Rules 758 a and b and 757 e.
Section ~~(b)~~ (c) is derived from former Rule 758 c.
Section ~~(c)~~ (d) is derived from former Rule 758 d.

Rule 4-326 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 2-521.

Mr. Dean inquired as to whether the same changes will be made to Rule 4-326 as were made to Rule 2-521, and the Chair answered that the same changes would be made to the Title 4 rule. The Committee approved the Rule as amended.

Mr. Johnson presented Rule 5-606, Competency of Juror as Witness, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-606 to prohibit impeachment of a verdict by a juror's notes, as follows:

Rule 5-606. COMPETENCY OF JUROR AS WITNESS

(a) At the Trial

A member of a jury may not testify as a witness before the jury in the trial of the case in which the juror is sitting. If the juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict

(1) In any inquiry into the validity of a verdict, a juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict, or (C) the juror's mental processes in connection with the verdict.

(2) A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

(3) A juror's notes made in accordance with Rule 2-521 (a) or Rule 4-326 (a) may not be used to impeach a verdict.

(c) "Verdict" Defined

For purposes of this Rule, "verdict" means (1) a verdict returned by a petit jury or (2) a sentence returned by a jury in a sentencing proceeding conducted pursuant to Code, Article 27, §413.

Committee note: This Rule does not address or affect the secrecy of grand jury proceedings.

Source: This Rule is derived in part from F.R.Ev. 606.

Rule 5-606 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 5-606 prohibits impeachment of a verdict by the use of a juror's notes made in accordance with Rule 2-521 (a) or Rule 4-326 (a).

Mr. Johnson explained that a new subsection (b)(3) was added which provides that a juror's notes may not be used to impeach a verdict. The Chair commented that this is consistent with the case of Wernsing v. General Motors, 298 Md. 406 (1984). The Committee approved the change to the Rule by consensus.

Agenda Item 3. Consideration of proposed amendments to certain rules in Title 16, Chapter 700: Rule 16-723 (Confidentiality), Rule 16-771 (Disciplinary or Remedial Action Upon Conviction of Crime), Rule 16-773 (Reciprocal Discipline or Inactive Status), Rule 16-774 (Summary Placement on Inactive Status), Rule 16-775 (Resignation of Attorney), and Rule 16-781 (Reinstatement)

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Mr. Brault explained that the Attorneys Subcommittee received a request from the Attorney Grievance Commission and the Office of Bar Counsel to change some of the Rules in Chapter 16 based on their experience with the revised Attorney Discipline Rules.

Mr. Brault presented Rule 16-723, Confidentiality, Rule 16-775 (f) (Resignation of Attorney), and Rule 16-781 (Reinstatement), for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS

OF ATTORNEYS

AMEND Rule 16-723 (b)(1) to add language clarifying that a complaint is confidential and to add a new subsection (d)(1), as follows:

Rule 16-723. CONFIDENTIALITY

. . .

(b) Other Confidential Proceedings and Records

Except as otherwise provided in these Rules, the following records and proceedings are confidential and not open to inspection:

(1) the records of an investigation by Bar Counsel, including any complaint;

(2) the records and proceedings of a Peer Review Panel;

(3) information that is the subject of a protective order;

(4) the contents of a warning issued by Bar Counsel pursuant to Rule 16-735 (b), but the fact that a warning was issued shall be disclosed to the complainant;

(5) the contents of a prior private reprimand or Bar Counsel reprimand pursuant to the Attorney Disciplinary Rules in effect prior to July 1, 2001, but the fact that a private or Bar Counsel reprimand was issued and the facts underlying the reprimand may be disclosed to a peer review panel in a proceeding against the attorney alleging similar misconduct;

Committee note: The peer review panel is not required to find that information disclosed under subsection (b)(5) is relevant under Rule 16-743 (c)(1).

(6) the contents of a Conditional Diversion Agreement entered into pursuant to Rule 16-736, but the fact that an attorney has signed such an agreement shall be public; (7) the records and proceedings of the Commission on matters that are confidential under this Rule;

(8) a Petition for Disciplinary or Remedial Action based solely on the alleged incapacity of an attorney and records and proceedings other than proceedings in the Court of Appeals on that petition; and

(9) a petition for an audit of an attorney's accounts filed pursuant to Rule 16-722 and records and proceedings other than proceedings in the Court of Appeals on that petition.

. . .

(d) Required Disclosure ~~to Disciplinary Authorities~~

(1) To Clerk of the Court of Appeals

If an attorney is reprimanded by the Commission, Bar Counsel shall notify the Clerk of the Court of Appeals.

(2) To Disciplinary Authorities

If an attorney resigns or is reprimanded, convicted of a serious crime, or, by order of the Court of Appeals, disbarred, suspended, reinstated, or transferred to inactive status, the Clerk of the Court of Appeals of Maryland shall notify the National Lawyer Regulatory Data Bank of the American Bar Association and the disciplinary authority of every other jurisdiction in which the attorney is admitted to practice.

. . .

Rule 16-723 was accompanied by the following Reporter's Note.

At the open meeting on the 151st Report of the Rules Committee, the Court of Appeals asked the Chair of the Attorney Grievance Commission to determine whether the mere fact that a complaint was filed against an attorney can be disclosed. The Commission Chair and the Attorneys Subcommittee are in agreement that the fact that a complaint has been filed or the contents of the complaint should be confidential. They recommend that language referring to the complaint be added to subsection (b)(1) to make this clear.

The Court of Appeals amended Rule 16-723 (d) sua sponte to change "Bar Counsel"

to “the Clerk of the Court of Appeals.” This amendment requires the latter to notify the National Lawyer Regulatory Data Bank of the American Bar Association and the disciplinary authority of every other jurisdiction. This change in procedure requires parallel changes to Rules 16-775 and 16-781, as well as a further change to Rule 16-723 (d) to provide a method for the Clerk of the Court of Appeals to find out that an attorney has been reprimanded by the Commission.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-775 (f) to change the language “Bar Counsel” to “the Clerk of the Court of Appeals,” as follows:

Rule 16-775. RESIGNATION OF ATTORNEY

. . .

(f) Effect of Resignation

An attorney may not practice law in this State after entry of an order accepting the attorney's resignation. ~~Bar Counsel~~ The Clerk of the Court of Appeals of Maryland shall give any notice required by Rule 16-723 (d).

. . .

Rule 16-775 (f) was accompanied by the following Reporter's

Note.

See the Reporter's Note to Rule 16-723 (d).

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-781 by adding a new subsection (l)(1) and by deleting section (m), as follows:

Rule 16-781. REINSTATEMENT

. . .

(l) Duties of Clerk

(1) Generally

Promptly after the effective date of an order that reinstates a petitioner, the Clerk of the Court of Appeals shall give any notice required by Rule 16-723 (d).

~~(1)~~ (2) Attorney Admitted to Practice

Upon receiving a reinstatement notice authorized by section (e) of this Rule, or on the effective date of an order or notice that reinstates a petitioner

admitted by the Court of Appeals to the practice of law, the Clerk of the Court of Appeals shall place the name of the petitioner on the register of attorneys in that Court and shall certify that fact to the Trustees of the Client Protection Fund of the Bar of Maryland and to the clerks of all courts in the State.

~~(2)~~ (3) Attorney Not Admitted to Practice

Upon receiving a reinstatement notice authorized by section (e) of this Rule, or on the effective date of an order or notice that reinstates a petitioner not admitted by the Court of Appeals to practice law, the Clerk of the Court of Appeals shall remove the petitioner's name from the list maintained in that Court of non-admitted attorneys who are ineligible to practice law in this State, and shall certify that fact to the Board of Law Examiners and the clerks of all courts in the State.

~~(m) Duty of Bar Counsel~~

~~Promptly after the effective date of an order that reinstates a petitioner, Bar Counsel shall give any notice required by Rule 16-723 (d) and shall request the Clerk of the Court of Appeals to notify the disciplinary authority of any other jurisdiction in which the petitioner may be admitted to practice.~~

~~(n)~~ (m) Motion to Vacate Reinstatement

Bar Counsel may file a motion to vacate an order that reinstates the petitioner if (1) the petitioner has failed to demonstrate substantial compliance with the order, including any condition of reinstatement imposed under Rule 16-760 (h) or section (j) of this Rule or (2) the petition filed under section (a) of this Rule contains a false statement or omits a material fact, the petitioner knew the

statement was false or the fact was omitted, and the true facts were not disclosed to Bar Counsel prior to entry of the order. The petitioner may file a verified response within 15 days after service of the motion, unless a different time is ordered. If there is a factual dispute to be resolved, the court may enter an order designating a judge in accordance with Rule 16-752 to hold a hearing. The judge shall allow reasonable time for the parties to prepare for the hearing and may authorize discovery pursuant to Rule 16-756. The applicable provisions of Rule 16-757 shall govern the hearing. The applicable provisions of Rules 16-758 and 16-759, except section (c) of Rule 16-759, shall govern any subsequent proceedings in the Court of Appeals. The Court may reimpose the discipline that was in effect when the order was entered or may impose additional or different discipline.

~~(o)~~ (n) Costs

In proceedings for reinstatement, unless the Court of Appeals orders otherwise, the petitioner shall pay all court costs and costs of investigation and other proceedings on the petition, including the costs of physical and mental examinations, transcripts, and other expenditures incurred by Bar Counsel that were reasonably necessary to evaluate the petition.

. . .

Rule 16-781 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-723 (d).

Explaining the proposed changes to Rule 16-723, Mr.

Brault stated that the media has contended that complaints filed with the Attorney Grievance Commission are not subject to confidentiality. The Attorneys Subcommittee feels that the complaint and any investigation following it should all be confidential. The Chair said that the Honorable John C. Eldridge, Judge of the Court of Appeals, had raised the question as to whether or not Bar Counsel can confirm the existence of a complaint being filed and the ensuing investigation. Mr. Grossman, Deputy Bar Counsel, noted that the former Rule specifically referred to the complaint as being confidential. The Chair pointed out that the proposed amendments do not address the question of whether the fact that a complaint has been filed can be acknowledged by Bar Counsel. Mr. Brault responded that Bar Counsel often acknowledges the existence of a matter. It is better to be consistent with the practice of the Office of Bar Counsel, because if a filing of a complaint is not confirmed, the imaginations of the public run wild.

The Chair expressed the view that the Rule should provide that Bar Counsel does not have to confirm the existence of a complaint. Mr. Grossman remarked that this is consistent with the practice of the Office of Bar Counsel. The Chair suggested that section (b) could begin as follows: "Except as otherwise provided in these Rules, the following records and

proceedings are confidential and open to public inspection or disclosure:

... ," and the new language to subsection (b)(1) could read, "including the existence and content of any complaint." The Committee agreed by consensus with the Chair's suggested language.

Ms. Potter inquired as to why the confidential items have to be itemized. The Chair expressed the opinion that the tagline to section (b) should be changed –- a possible new tagline is "Other Confidential Matters." The Reporter commented that the Style Subcommittee can change this, and the Committee agreed by consensus.

Mr. Brault drew the Committee's attention to section (d) of Rule 16-723.

Mr. Brault explained that when the Court of Appeals amended section (d) to change the language "Bar Counsel" to the "Clerk of the Court of Appeals," no procedure was added for the Clerk of the Court of Appeals to be notified that the Commission had issued a reprimand to an attorney. Mr. Grossman remarked that the Rule was changed so that the Clerk of the Court of Appeals, rather than Bar Counsel, is to notify the National Lawyer Regulatory Data Bank of the American Bar Association and the disciplinary authority of every other jurisdiction that an attorney has resigned, has been

reprimanded, has been convicted of a serious crime or has been disbarred, suspended, reinstated, or transferred to inactive status. By consensus, the Committee approved the change to section (d) of Rule 16-723 and the parallel conforming amendments to Rules 16-775 (f) and 16-781.

Mr. Brault presented Rules 16-771 (Discipline or Remedial Action Upon Conviction of Crime), 16-773 (Reciprocal Discipline or Inactive Status), 16-774 (Summary Placement on Inactive Status), and 16-775 (Resignation of Attorney), for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-771 (b) to change the word "shall" to "may" and delete the references to Rule 16-751, as follows:

Rule 16-771. DISCIPLINARY OR REMEDIAL ACTION UPON CONVICTION OF CRIME

. . .

(b) Petition in Court of Appeals

Upon receiving and verifying information from any source that an attorney has been convicted of a serious crime, Bar Counsel ~~shall~~ may file a Petition for Disciplinary or Remedial

> Action in the Court of Appeals ~~pursuant to Rule 16-751~~ and serve the attorney in accordance with Rule 16-753. The petition shall be filed whether the conviction resulted from a plea of guilty, nolo contendere, or a verdict after trial and whether an appeal or any other post-conviction proceeding is pending. The petition shall allege the fact of the conviction and include a request that the attorney be suspended immediately from the practice of law. A certified copy of the judgment of conviction shall be attached to the petition and shall be prima facie evidence of the fact that the attorney was convicted of the crime charged.
>
> . . .

Rule 16-771 was accompanied by the following Reporter's Note.

> David D. Downes, Esq., Chair of the Attorney Grievance Commission, requested by letter changes to Rules 16-771 and 16-773 to delete the requirement that Bar Counsel must seek the approval of the Commission before filing a Petition for Disciplinary or Remedial Action. Rule 16-771 allows Bar Counsel to file the Petition upon receiving and verifying information from any source that an attorney has been convicted of a serious crime. Rule 16-773 allows Bar Counsel to file the Petition upon receiving information that an attorney has been disciplined or placed on inactive status based on incapacity. Currently both Rules provide that Bar Counsel must act pursuant to Rule 16-751 which requires the approval of the Commission. The Chair of the Commission, Deputy Bar Counsel, and the majority of the Attorneys Subcommittee recommend modifying Rules 16-771 and 16-773 as well as Rule 16-774, which involves a petition to place an attorney on inactive status, to eliminate the requirement that

the Commission must give its approval in order for Bar Counsel to take action. The Honorable John F. McAuliffe, a member of the Attorneys Subcommittee, expressed the opinion that the Rules should remain unchanged, retaining the current procedure.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-773 (b) by relettering it as subsection (b)(1) and by changing the word "shall" to "may," deleting the reference to Rule 16-751, and adding other language; and by adding a new subsection (b)(2), as follows:

Rule 16-773. RECIPROCAL DISCIPLINE OR INACTIVE STATUS

. . .

(b) ~~Duty~~ Action of Bar Counsel

(1) When an Attorney Has Been Disciplined or Placed on Inactive Status in Another Jurisdiction

Upon receiving information from any source that in another jurisdiction an attorney has been disciplined or placed on inactive status based on incapacity, Bar Counsel ~~shall~~ may obtain a certified copy of the disciplinary or remedial order and file it with a Petition for Disciplinary or Remedial Action in the Court of Appeals

~~pursuant to Rule 16-751~~, and if Bar Counsel so files, shall serve copies of the petition and order upon the attorney in accordance with Rule 16-753.

(2) When an Attorney Has Resigned From the Bar of Another Jurisdiction

Upon receiving information from any source that in another jurisdiction an attorney has resigned from the bar while disciplinary or remedial action is threatened or pending in that jurisdiction, Bar Counsel shall notify the attorney that the resignation in the other state shall be deemed an irrevocable request for resignation from the Maryland bar, unless the attorney shows good cause in writing within 30 days from the receipt of Bar Counsel's notice as to why he or she should remain as a member in good standing of the Maryland bar.

. . .

Rule 16-773 was accompanied by the following Reporter's Note.

As to subsection (b)(1) see the Reporter's Note to Rule 16-771.

The Chair of the Attorney Grievance Commission pointed out that Rule 16-773 does not address any action to be taken by the Commission, Bar Counsel, or the Court of Appeals when an attorney licensed in Maryland resigns from the bar of another state while disciplinary or remedial action is threatened or pending. In response, the Attorneys Subcommittee recommends that a new subsection (b)(2) be added to Rule 16-773 providing that a resignation from the bar of another state shall be deemed an irrevocable request for resignation from the bar of Maryland unless the attorney shows good cause as to why he or she should

remain a member of the Maryland bar.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-774 to delete language referring to approval by the Commission and to Rule 16-751, as follows:

Rule 16-774. SUMMARY PLACEMENT ON INACTIVE STATUS

. . .

(b) Procedure

(1) Petition for Summary Placement; Confidentiality

Bar Counsel~~, with the approval of the Commission,~~ may file ~~in accordance with Rule 16-751~~ a petition to summarily place an attorney on inactive status. The petition shall be supported by a certified copy of the judicial determination or involuntary admission. The petition and all other papers filed in the Court of Appeals shall be sealed and stamped "confidential" in accordance with Rule 16-723 (b)(8).

. . .

Rule 16-774 was accompanied by the following Reporter's

Note.

See the Reporter's Note to Rule 16-771.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-775 to add a new section (a) and a new subsection (d)(2), to change the language "Bar Counsel" to "the Clerk of the Court of Appeals" in section (g), and to make other stylistic changes, as follows:

Rule 16-775. RESIGNATION OF ATTORNEY

(a) Out-of-State

An attorney who resigns from the practice of law in any other jurisdiction while disciplinary or remedial action is threatened or pending in that jurisdiction shall be deemed to have filed an application to resign from the practice of law in this State.

~~(a)~~ (b) In State – Application

An application to resign from the practice of law in this State shall be submitted in writing under oath to the

Court of Appeals, with a copy to Bar Counsel. The application shall state that the resignation is not being offered to avoid disciplinary action and that the attorney has no knowledge of any pending investigation, action, or proceedings in any jurisdiction involving allegations of professional misconduct by the attorney.

~~(b)~~ (c) When Attorney May Not Resign

Except as provided in section (a) of this Rule, ~~An~~ an attorney may not resign while the attorney is the subject of a disciplinary investigation, action, or proceeding involving allegations of professional misconduct. An application to resign does not prevent or stay any disciplinary action or proceeding against the attorney.

~~(c)~~ (d) Procedure

(1) When Attorney Resigns in Maryland

Upon receiving a copy of the application submitted in accordance with section ~~(a)~~ (b) of this Rule, Bar Counsel shall investigate the application and file a response with the Clerk of the Court.

(2) When Attorney Resigns in Other Jurisdiction

Upon receiving information that an attorney has resigned from the practice of law in another jurisdiction while disciplinary or remedial action was threatened or pending in that jurisdiction, Bar Counsel shall obtain a certified copy of the order granting resignation together with available information concerning the threatened or pending disciplinary or remedial action. Bar Counsel [shall] [may] file those documents with the Court of Appeals together with a petition to accept the attorney's resignation in this State and shall serve copies upon the attorney in

accordance with Rule 16-753. The Court of Appeals shall order Bar Counsel and the attorney, within 15 days from the date of the order, to show cause in writing why the resignation should not be accepted.

~~(d)~~ (e) Order of the Court of Appeals

The Court of Appeals shall enter an order accepting or denying the resignation. A resignation is effective only upon entry of an order accepting it.

~~(e)~~ (f) Duty of Clerk

When the Court enters an order accepting an attorney's resignation, the Clerk of the Court of Appeals shall strike the name of the attorney from the register of attorneys in that Court and shall certify that fact to the Trustees of the Clients' Security Trust Fund and the clerks of all courts in this State.

~~(f)~~ (g) Effect of Resignation

An attorney may not practice law in this State after entry of an order accepting the attorney's resignation. ~~Bar Counsel~~ The Clerk of the Court of Appeals of Maryland shall give any notice required by Rule 16-723 (d).

~~(g)~~ (h) Motion to Vacate

On motion of Bar Counsel, the Court may vacate or modify the order in case of intrinsic or extrinsic fraud.

Source: This Rule is in part derived from former Rules 16-712 (BV12) and 16-713 a (BV13 a) and in part new.

Rule 16-775 was accompanied by the following Reporter's Note.

The Chair of the Attorney Grievance Commission pointed out that the Attorney Discipline Rules do not address any action to be taken by the Commission, Bar Counsel, or the Court of Appeals when an attorney licensed in Maryland resigns from the bar of another state while disciplinary or remedial action is threatened or pending. In response, the Attorneys Subcommittee recommends that language be added to Rule 16-775 providing that an attorney who resigns from the bar of another state while disciplinary or remedial action is threatened or pending shall be deemed to have filed an application to resign from the bar of Maryland, unless the attorney shows good cause as to why he or she should remain a member of the Maryland bar.

As to section (g), see the Reporter's Note to Rule 16-723 (d).

Mr. Brault pointed out that the problem being addressed in Rule 16-775 (a) and (d) is when an attorney licensed in Maryland is practicing in another state, and the attorney resigns from the other state's bar because disciplinary or remedial action is threatened or pending in the other state, there is nothing to prevent the attorney from coming back to Maryland to practice. Mr. Grossman said that the Commission is withdrawing the request for the changes to sections (a) and (d) of Rule 16-775. The Reporter observed that resignation of the attorney in another jurisdiction also is addressed in the proposed amendment to Rule 16-773 and questioned whether that rule also was being withdrawn. The Chair suggested that the Rules be remanded to the Subcommittee and asked about the urgency of the other proposed changes. Mr. Grossman responded that some of the changes are noncontroversial and are intended to speed the disciplinary process. The Chair stated that Rules 16-771, 16-773, 16-774, and 16-775 would be remanded to the subcommittee and, after they have been redrafted, would be placed on the agenda of the next meeting of the Rules Committee.

Agenda Item 4. Consideration of proposed amendments to certain rules concerning transfers of actions to the juvenile court at sentencing: Rule 4-342 (Sentencing – procedure in Non-Capital Cases), Rule 4-251 (Motions in District Court), Rule 4-252

(Motions in Circuit Court), Rule 11-102A (Pretrial Transfer of Jurisdiction From Court Exercising Criminal Jurisdiction), and Rule 4-222 (Procedure Upon Waiver of Jurisdiction by Juvenile Court)

Judge Johnson presented Rule 4-342, Sentencing – Procedure in Non-Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 to add a new cross reference, as follows:

Rule 4-342. SENTENCING -- PROCEDURE IN NON-CAPITAL CASES

(a) Applicability

This Rule applies to all cases except those governed by Rule 4-343.

(b) Statutory Sentencing Procedure

When a defendant has been found guilty of murder in the first degree and the State has given timely notice of intention to seek a sentence of imprisonment for life without the possibility of parole, but has not given notice of intention to seek the death penalty, the court shall conduct a sentencing proceeding, separate from the

proceeding at which the defendant's guilt was adjudicated, as soon as practicable after the trial to determine whether to impose a sentence of imprisonment for life or imprisonment for life without parole.

Cross reference: Code, Criminal Law Article, §§2-101, 2-201, 2-202 (b)(3), 2-303, and 2-304.

(c) Judge

If the defendant's guilt is established after a trial has commenced, the judge who presided shall sentence the defendant. If a defendant enters a plea of guilty or nolo contendere before trial, any judge may sentence the defendant except that, the judge who directed entry of the plea shall sentence the defendant if that judge has received any matter, other than a statement of the mere facts of the offense, which would be relevant to determining the proper sentence. This section is subject to the provisions of Rule 4-361.

(d) Presentence Disclosures by the State's Attorney

Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing. If the court finds that the information was not timely provided, the court shall postpone sentencing.

(e) Notice and Right of Victim to Address the Court

(1) Notice and Determination

Notice to a victim or a victim’s representative of proceedings under this Rule is governed by Code, Criminal

Procedure Article, §11-104 (e). The court shall determine whether the requirements of that section have been satisfied.

(2) Right to Address the Court

The right of a victim or a victim's representative to address the court during a sentencing hearing under this Rule is governed by Code, Criminal Procedure Article, §11-403.

Cross reference: See Code, Criminal Procedure Article, §§11-103 (b) and 11-403 (e) concerning the right of a victim or victim's representative to file an application for leave to appeal under certain circumstances.

(f) Allocution and Information in Mitigation

Before imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

(g) Reasons

The court ordinarily shall state on the record its reasons for the sentence imposed.

(h) Credit for Time Spent in Custody

Time spent in custody shall be credited against a sentence pursuant to Code, Criminal Procedure Article, §6-218.

(i) Advice to the Defendant

At the time of imposing sentence, the court shall cause the defendant to be advised of any right of appeal, any right of review of the sentence under the Review of Criminal Sentences Act, any right to move for modification or reduction of the sentence, and the time allowed for the

exercise of these rights. At the time of imposing a sentence of incarceration for a violent crime as defined in Code, Correctional Services Article, §7-101 and for which a defendant will be eligible for parole as provided in §7-301 (c) or (d) of the Correctional Services Article, the court shall state in open court the minimum time the defendant must serve for the violent crime before becoming eligible for parole. The circuit court shall cause the defendant who was sentenced in circuit court to be advised that within ten days after filing an appeal, the defendant must order in writing a transcript from the court stenographer.

Cross reference: Code, Criminal Procedure Article, §§8-102 - 8-109.

Committee note: Code, Criminal Procedure Article, §6-217 provides that the court's statement of the minimum time the defendant must serve for the violent crime before becoming eligible for parole is for informational purposes only and may not be considered a part of the sentence, and the failure of a court to comply with this requirement does not affect the legality or efficacy of the sentence imposed.

(j) Terms for Release

On request of the defendant, the court shall determine the defendant's eligibility for release under Rule 4-349 and the terms for any release.

(k) Restitution from a Parent

If restitution from a parent of the defendant is sought pursuant to Code, Criminal Procedure Article, §11-604, the State shall serve the parent with notice of intention to seek restitution and file a copy of the notice with the court. The court may not enter a judgment of

restitution against the parent unless the parent has been afforded a reasonable opportunity to be heard and to present evidence. The hearing on parental restitution may be part of the defendant's sentencing hearing.

Cross reference: ~~Parent's liability, hearing, recording and effect, Rule 11-118.~~ See Code, Criminal Procedure Article, §4-402.2 which allows the court, in the case of a minor, under certain circumstances, to transfer jurisdiction to the juvenile court for sentencing.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 772 a.
Section (b) is new.
Section (c) is derived from former Rule 772 b and M.D.R. 772 a.
Section (d) is derived from former Rule 772 c and M.D.R. 772 b.
Section (e) is new.
Section (f) is derived from former Rule 772 d and M.D.R. 772 c.
Section (g) is derived from former Rule 772 e and M.D.R. 772 d.
Section (h) is derived from former Rule 772 f and M.D.R. 772 e.
Section (i) is in part derived from former Rule 772 h and M.D.R. 772 g and in part new.
Section (j) is new.
Section (k) is new.

Rule 4-342 was accompanied by the following Reporter's Note.

The legislature enacted Chapter 159, Acts of 2002 (SB 428), which allows a court exercising criminal jurisdiction to transfer an action involving a child to the juvenile court at sentencing under certain circumstances. The Criminal Subcommittee is proposing that a new cross reference be added to Rule 4-342 to refer to the new

transfer procedure.

Judge Johnson told the Committee that the Subcommittee is proposing to add a new cross reference after section (k). He noted an error in the cross reference -– the reference to "Code, Criminal Procedure Article, §4-402.2" should be "Code, Criminal Procedure Article, §4-202.2." The Committee approved the Rule as corrected.

Judge Johnson presented Rule 4-251, Motions in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-251 to correct a certain statutory reference and to clarify the applicability of subsection (c)(2), as follows:

Rule 4-251. MOTIONS IN DISTRICT COURT

. . .

(c) Effect of Determination Before Trial

(1) Generally

The court may grant the relief it deems appropriate including the dismissal of the charging document with or without prejudice.

(2) Transfer of Jurisdiction to Juvenile Court

If the court grants a motion to transfer jurisdiction of an action to the juvenile court before trial or the entry of a plea under Rule 4-242, or if the court determines that the action should be transferred to the juvenile court for sentencing, pursuant to Code, Criminal Procedure Article, §4-202.2, the court shall enter a written order waiving its jurisdiction and ordering that the defendant be subject to the jurisdiction and procedures of the juvenile court. In its order the court shall (A) release or continue the pretrial release of the defendant, subject to appropriate conditions reasonably necessary to ensure the appearance of the defendant in the juvenile court or (B) place the defendant in detention or shelter care pursuant to Code, Courts Article, §~~3-815~~ 3-8A-15. Until a juvenile petition is filed, the charging document shall be considered a juvenile petition for the purpose of imposition and enforcement of conditions of release or placement of the defendant in detention or shelter care.

Cross reference: Code, Criminal Procedure Article, §4-202.

Committee note: Subsections (a)(1) and (2)

> include, but are not limited to allegations of improper selection and organization of the grand jury, disqualification of an individual grand juror, unauthorized presence of persons in the grand jury room, and other irregularities in the grand jury proceedings. Section (a) does not include such matters as former jeopardy, former conviction, acquittal, statute of limitations, immunity, and the failure of the charging document to state an offense.
>
> Source: This Rule is derived from former M.D.R. 736.

Rule 4-251 was accompanied by the following Reporter's Note.

> The proposed amendments to Rules 4-251 and 4-252 correct a statutory reference by substituting "Code, Courts Article, §3-8A-15" for "Code, Courts Article, §3-815," and clarify that the "Transfer of Jurisdiction to Juvenile Court" provision is also applicable to transfers at sentencing made pursuant to Code, Criminal Procedure Article, §4-202.2.

Judge Johnson explained that a change has been proposed to subsection (c)(2). Judge Heller inquired as to why the change is necessary, and Judge Missouri answered that a new law was passed providing for transfers to the juvenile court for sentencing in certain cases. The Chair pointed out that the transfer may occur after a trial or after a guilty plea. He suggested that the new language be placed in a Committee note. Judge Missouri commented that the Subcommittee had discussed whether once the case is transferred, the District

Court judge or the circuit court judge would sentence the defendant. Judge Heller remarked that regardless of whether the case began in the District Court or a circuit court, the circuit court would sentence him or her.

Judge Missouri noted that the new law is ambiguous as to which court sentences. The Subcommittee feels that it should be the circuit court. Judge Norton, a member of the Subcommittee who is a District Court judge, had expressed the view that the circuit court judge should handle the sentencing, because the District Court judges are not as familiar with juvenile matters and the resources that are available for juvenile respondents. Mr. Bowen pointed out that the proposed language does not deal with the issue of which court is to handle the sentence, and he suggested that the language be moved to a cross reference or a Committee note. Mr. Dean suggested that the substance of the Reporter's note could be put into a Committee note.

The Reporter commented that a written order is appropriate in the transfer situation, but Rule 4-251 is a pretrial transfer rule. Not all of the procedures set forth in subsections (c)(2)(A) and (c)(2)(B) are appropriate when the transfer is at sentencing. Mr. Bowen moved that the underlined language and the last three lines of the Reporter's note should be put into a Committee note. This would cure the

problem of transfers before trial versus transfers pursuant to Code, Criminal Procedure Article, §4-202.2, which pertains to transfers after trial. The motion was seconded. The Chair pointed out that the tagline to section (c) should be changed. The Reporter suggested that the first few words of the proposed amendment ending with “Rule 4-242" be retained to make clear that the section does not pertain to post-trial transfers.

Mr. Sykes observed that Rule 4-251 pertains to motions in the District Court, and he expressed the opinion that the proposed changes do not fit into this Rule.

Mr. Bowen withdrew his motion so that the Rule can be sent back to the Criminal Subcommittee to revise the Rule. The second to the motion was also withdrawn.

The Committee remanded Rule 4-251 to the Subcommittee.

Judge Johnson presented Rule 4-252, Motions in Circuit Court, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-252 to correct a certain statutory reference

and to clarify the applicability of subsection (h)(3), as follows:

Rule 4-252. MOTIONS IN CIRCUIT COURT

. . .

(h) Effect of Determination of Certain Motions

(1) Defect in Prosecution or Charging Document

If the court granted a motion based on a defect in the institution of the prosecution or in the charging document, it may order that the defendant be held in custody or that the conditions of pretrial release continue for a specified time, not to exceed ten days, pending the filing of a new charging document.

(2) Suppression of Evidence

(A) If the court grants a motion to suppress evidence, the evidence shall not be offered by the State at trial, except that suppressed evidence may be used in accordance with law for impeachment purposes. The court may not reconsider its grant of a motion to suppress evidence unless before trial the State files a motion for reconsideration based on (i) newly discovered evidence that could not have been discovered by due diligence in time to present it to the court before the court's ruling on the motion to suppress evidence, (ii) an error of law made by the court in granting the motion to suppress evidence, or (iii) a change in law. The court may hold a hearing on the motion to reconsider. Hearings held before trial shall, whenever practicable, be held before the judge who granted the motion to suppress. If the court reverses or modifies its grant of a motion to suppress, the judge shall prepare and file or dictate into the record a statement of the reasons for the action taken.

(B) If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise. A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction.

(3) Transfer of Jurisdiction to Juvenile Court

If the court grants a motion to transfer jurisdiction of an action to the juvenile court before trial or the entry of a plea under Rule 4-242 or if the court determines that the action should be transferred to the juvenile court for sentencing pursuant to Code, Criminal Procedure Article, §4-202.2, the court shall enter a written order waiving its jurisdiction and ordering that the defendant be subject to the jurisdiction and procedures of the juvenile court. In its order the court shall (A) release or continue the pretrial release of the defendant, subject to appropriate conditions reasonably necessary to ensure the appearance of the defendant in the juvenile court or (B) place the defendant in detention or shelter care pursuant to Code, Courts Article, §~~3-815~~ 3-8A-15. Until a juvenile petition is filed, the charging document shall have the effect of a juvenile petition for the purpose of imposition and enforcement of conditions of release or placement of the defendant in detention or shelter care.

Cross reference: Code, Criminal Procedure Article, §4-202.

Committee note: Subsections (a)(1) and (2) include, but are not limited to allegations of improper selection and organization of the grand jury, disqualification of an

> individual grand juror, unauthorized presence of persons in the grand jury room, and other irregularities in the grand jury proceedings. Section (a) does not include such matters as former jeopardy, former conviction, acquittal, statute of limitations, immunity, and the failure of the charging document to state an offense.
>
> Source: This Rule is derived from former Rule 736.

Rule 4-252 was accompanied by the following Reporter's Note.

> See the Reporter's Note to the proposed amendment to Rule 4-251.

Judge Johnson told the Committee that new language has been proposed for subsection (h)(3). The Chair said that if a juvenile is convicted in circuit court, the disposition will be conducted by the juvenile court on the basis of the charging document. A juvenile petition will be filed. Mr. Dean responded that the legislation does not contemplate this. The Chair commented that the last sentence of the Rule is problematic. Ms. Perez noted that the current Rule deals with pretrial proceedings, while the proposed language refers to procedures after the defendant has been convicted.

The Chair asked if Mr. Bowen's proposed amendment to subsection (c)(2) of Rule 4-251 should be made here, or if the Rule should go back to the Subcommittee. Judge Missouri remarked that the statute contemplates that a criminal

defendant will become the respondent and be dealt with under the juvenile rules. A petition will be filed. Judge Heller noted that the statute presumes conviction, and at the sentencing, no petition is necessary. Judge Missouri remarked that the court will give the same litany as for pretrial proceedings. Once the court determines to transfer the case, the adult court documents will be sent.

Judge Kaplan said that a new petition is filed, and as a judge of the criminal court, he waives the individual back to juvenile court. There is no plea. The new petition may be pursuant to an arrangement in the criminal court that will admit the facts. Judge Heller noted that under the statute, there has to have been a conviction. Judge Missouri commented that this is a loophole. Mr. Dean expressed the view that this should be dealt with in Title 11. The Reporter said that Bruce Martin, Esq., counsel to the Department of Juvenile Justice, had explained that the legislative intent was for the court in which the defendant was tried to be the court that conducts the disposition hearing. The Subcommittee's view was that the case should be sent to a judge of the juvenile court.

The Chair questioned as to whether the statute calls for a juvenile petition to be filed. Ms. Perez answered that it does not. The Chair pointed out that if the defendant is

charged with possession of a handgun in a mandatory minimum sentence case, and the court does not want to impose the mandatory minimum sentence, the judge can send the case to juvenile court after a conviction. Does the court immediately transfer the defendant to juvenile court after the conviction on charging documents already filed, or does the court wait until a petition has been filed? The amendments to the Rule do not resolve these questions. Judge Johnson remarked that a petition is needed. Senator Stone observed that the petition can only be filed pretrial, and this transfer occurs after the defendant already has been found guilty. The Chair commented that the legislation has a downstream effect –- the prosecution wants the child tried as an adult, but the judge then transfers the case to juvenile court. The Reporter added that the original charges may have been precluded in juvenile court.

Judge Kaplan said that under the current system, the criminal court judge transfers the case to the juvenile court, and immediately a juvenile petition is filed. The respondent pleads guilty in juvenile court, and the case is set for disposition. A guilty finding in adult court would make the case too late to transfer. Mr. Brault noted that the new statute requires that there be a finding of guilt before the transfer. The Chair commented that the statute is silent as

to whether the case is sent on the criminal charging document or on a new juvenile petition. Mr. Brault responded that before a petition is filed, the charging document is treated as a petition. Mr. Dean pointed out that subsection (e)(2) of the statute requires that the record of the hearing and of the disposition be transferred to the juvenile court. The Chair said that this should be expressly provided for in the Rule.

Judge Johnson stated that the Subcommittee would reconsider the Rule.

Judge Johnson presented Rule 11-102A, Pretrial Transfer of Jurisdiction from Court Exercising Criminal Jurisdiction, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 11 - JUVENILE CAUSES

AMEND Rule 11-102A, as follows:

Rule 11-102A. <u>PRETRIAL</u> TRANSFER OF JURISDICTION FROM COURT EXERCISING CRIMINAL JURISDICTION

a. Applicability

This Rule applies to actions for which a court exercising criminal jurisdiction has entered an order transferring jurisdiction pursuant to Rule 4-251 (c)(2) or 4-252 (h)(3). <u>It does not apply to an action transferred pursuant to Code, Criminal Procedure Article, §4-202.2.</u>

. . .

Rule 11-102A was accompanied by the following Reporter's Note.

> The proposed amendment to Rule 11-102A clarifies that the Rule is inapplicable to transfers at sentencing made pursuant to Code, Criminal Procedure Article, §4-202.2.

Judge Johnson explained that the change was made to the Rule to clarify that it is not applicable to Code, Criminal Procedure Article, §4-202.2. The Chair expressed the opinion that this change is appropriate. The Reporter said that if the Committee approves the Rule, it can go forward with the other revised Juvenile Rules which will be going to the Court of Appeals soon. The Committee approved the Rule by consensus.

Judge Johnson presented Rule 4-222, Procedure Upon Waiver of Jurisdiction by Juvenile Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

> AMEND Rule 4-222 by adding a new cross reference, as follows:

Rule 4-222. PROCEDURE UPON WAIVER OF

(a) Pretrial Release Hearing

A minor or an adult defendant who is detained after entry of an order waiving jurisdiction by a juvenile court shall be taken before a judicial officer of the District Court for a pretrial release hearing pursuant to Rule 4-216 without unnecessary delay and in no event later than 24 hours after the waiver order is entered. The petition alleging delinquency shall serve as the charging document for the purpose of detaining the minor or adult defendant pending the filing of a charging document pursuant to section (d) of this Rule.
Cross reference: Code (1957, 1989 Repl. Vol.), Courts Art., §10-912.

(b) Probable Cause Determination

A minor or adult defendant shall be released on personal recognizance under terms and conditions that do not significantly restrain the defendant's liberty unless the judicial officer determines that there is probable cause to believe that the minor or adult defendant committed the offense described in the juvenile petition.

(c) Review by Court

A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule shall be presented immediately to the District Court if the court is then in session or, if not, at the next session of the court. The District Court shall review the commissioner's pretrial release determination and shall take appropriate action thereon. If the minor or adult

defendant will remain in custody after the review, the District Court shall set forth in writing or on the record the reasons for the continued detention.

(d) Filing of Charging Document

Within ten days after the entry of the waiver order, a charging document shall be filed in the District Court or in the circuit court charging the minor or adult defendant with the offense described in the juvenile petition. If not so filed, the minor or adult defendant shall be released without prejudice from all conditions of pretrial release.

Cross reference: See Code, Criminal Procedure Article, §4-202.2 which allows the court, in the case of a minor, under certain circumstances, to transfer jurisdiction to the juvenile court for sentencing.

Source: This Rule is derived from former M.D.R. 728.

Rule 4-222 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 4-342.

Judge Johnson pointed out that a cross reference to the new statute has been added after section (d). The Committee approved the Rule by consensus.

Judge Johnson stated that the Subcommittee will reconsider Rules 4-342, 4-251, and 4-252.

Agenda Item 5. Consideration of a proposed amendment to Rule 4-254 (Reassignment and Removal)

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Judge Johnson presented Rule 4-254, Reassignment and Removal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-254 (b)(1) to add language providing that the State's Attorney has to file a notice of intention to seek the death penalty as a condition for removal, as follows:

Rule 4-254. REASSIGNMENT AND REMOVAL

(a) Reassignment in District Court

The reassignment of a criminal action pending in the District Court shall be governed by the provisions of Rule 3-505.

(b) Removal in Circuit Courts

(1) Capital Cases

When a defendant is charged with an offense for which the maximum penalty is death and <u>(A)</u> either party files a suggestion under oath that the party cannot have a fair and impartial trial in the court in which the action is pending <u>and (B) the State's Attorney has filed a notice of intention to seek the death penalty</u>, the court shall order that the action be transferred for trial to another court having jurisdiction. The Circuit Administrative Judge of the court ordering removal shall designate the county to which the case is to be removed. A suggestion by

a defendant shall be under the defendant's personal oath. A suggestion filed by the State shall be under the oath of the State's Attorney.

(2) Non-capital Cases

When a defendant is charged with an offense for which the maximum penalty is not death and either party files a suggestion under oath that the party cannot have a fair and impartial trial in the court in which the action is pending, the court shall order that the action be transferred for trial to another court having jurisdiction only if it is satisfied that the suggestion is true or that there is reasonable ground for it. The Circuit Administrative Judge of the court ordering removal shall designate the county to which the case is to be removed. A party who has obtained one removal may obtain further removal pursuant to this section.

(3) Transfer of Case File - Trial

Upon the filing of an order for removal, the clerk shall transmit the case file and a certified copy of the docket entries to the clerk of the court to which the action is transferred and the action shall proceed as if originally filed there. After final disposition of the action, the clerk shall return a certified copy of the docket entries to the clerk of the court in which the action was originally instituted for entry on the docket as final disposition of the charges.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 744.
Section (b) is derived from former Rule 744.

Rule 4-254 was accompanied by the following Reporter’s Note.

> Judge Missouri pointed out a problem with the wording of subsection (b)(1) of Rule 4-254. A judge in St. Mary's county interpreted this provision to mean that he was required to transfer a case upon the defense attorney's request even though the State's Attorney had no intention of seeking the death penalty. The wording of subsection (b)(1) does not track the language in the Maryland Constitution, Article IV, Section 8, Removal of Cases. To make it clear that a case has to be removed only when the State's Attorney intends to seek the death penalty, the Criminal Subcommittee recommends the addition of language to subsection (b)(1) stating this requirement.

Judge Johnson explained that this change was requested by Judge Missouri. Judge Missouri stated that a judge in his circuit interpreted subsection (b)(1) of Rule 2-454 to mean that he was required to transfer a case upon the defense attorney's request. Mr. Dean pointed out that the State's Attorney did not intend to seek the death penalty in the case described by Judge Missouri. Judge Missouri added that the judge did not allow any argument but ruled that the case was automatically transferred. The ambiguity in the current wording of the Rule leads to different interpretations in different jurisdictions. The Chair expressed the view that the change is appropriate.

The Committee approved the Rule by consensus.

Agenda Item 6. Reconsideration of proposed amendments to: Rule

4-505 (Answer to Application or Petition) and Form 4-503.4 (Notice of Hearing)

Judge Johnson presented Rule 4-505, Answer to Application or Petition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-505 to add to section (a) new language requiring an agency which objects to an application for expungement to file an answer, as follows:

Rule 4-505. ANSWER TO APPLICATION OR PETITION

(a) Answer to Application

Within 30 days after service of an application for expungement, <u>if the law enforcement agency objects to the expungement,</u> the ~~law enforcement~~ agency shall file an answer~~, if it has not previously filed a timely notice of denial or if it wishes to assert additional reasons for denial at the hearing,~~ and serve a copy on the applicant or the attorney of record.

(b) Answer to Petition

Within 30 days after service of a petition for expungement, the State's Attorney shall file an answer, and serve a copy on the petitioner or the attorney of record.

Cross reference: Code, Criminal Procedure Article, §10-105 (d).

(c) Contents

An answer objecting to expungement of records shall state in detail the specific grounds for objection. A law enforcement agency or State's Attorney may by answer consent to the expungement of an applicant's or petitioner's record.

(d) Effect of Failure to Answer

The failure of a law enforcement agency or State's Attorney to file an answer within the 30 day period constitutes a consent to the expungement as requested.

Source: This Rule is derived from former Rule EX4.

Rule 4-505 was accompanied by the following Reporter's Note.

Julia M. Andrew, Esq., Assistant Attorney General, explained in a letter that a law enforcement agency is not required to file an answer to an application for expungement if the agency previously filed a timely notice of denial. The current language of section (d) of Rule 4-505 is misleading because it does not refer to a filing of a notice of denial, and Ms. Andrew requested that this language be added. The Rules Committee recommends, instead, that the agency always be required to file an answer if it objects to the expungement. This change makes the Rule in conformance with Form 4-503.4, Notice of Hearing, which requires an answer stating the agency's specific grounds for objection if it wishes to oppose an application for expungement of records. Ms. Andrew agreed to the recommendation of the Rules Committee.

Judge Johnson explained that this change was considered previously by the Committee and resulted after a request from Julia M. Andrew, Esq., an Assistant Attorney General, to add a reference to filing a notice of denial in section (d) to make it clear that a law enforcement agency is not required to file an answer to an application for expungement if the agency previously filed a timely notice of denial. The Rules Committee recommends that in place of this change, the agency always be required to file an answer if it objects to the expungement. The Committee approved the change to the Rule by consensus.

Judge Johnson presented Form 4.503.4, Notice of Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-503.4 to make a certain stylistic change, as follows:

Form 4.503.4. NOTICE OF HEARING

(Caption)

NOTICE OF HEARING

TO THE LAW ENFORCEMENT AGENCY SERVED HEREWITH:

A hearing on the foregoing Application for Expungement of Records has been set for . . . . . ., ~~19~~ . . ., (Date)

at . . . . M. in the District Court for . . . . . .

City/County at . . . . . ., Maryland, at which time an Order for Expungement of Records may be entered.

If you wish to oppose the application, within 30 days after the service of this Notice of Hearing you must file and serve upon the applicant or the applicant's attorney of record an answer stating in detail your specific grounds for objection.

Issued this . . . . . day of . . . . . ., ~~19.~~ . . . (Month) (Year)

. . . . . .

Clerk

Form 4-503.4 was accompanied by the following Reporter's Note.

The proposed amendments to Form 4-503.4 delete date references to the year

"19 ___."

Judge Johnson explained that the change to the form is stylistic, deleting references to the year "19__". The Committee approved the change by consensus.

Agenda Item 7. Consideration of proposed amendments to certain rules concerning restitution: Rule 4-342 (Sentencing – Procedure in Non-Capital Cases) and Rule 4-354 (Enforcement of Money Judgment)

Judge Johnson presented Rule 4-342, Sentencing–Procedure in Non-Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 by adding a new section (l) providing for recordation of restitution, as follows:

Rule 4-342. SENTENCING -- PROCEDURE IN NON-CAPITAL CASES

(a) Applicability

This Rule applies to all cases except those governed by Rule 4-343.

(b) Statutory Sentencing Procedure

When a defendant has been found guilty of murder in the first degree and the State has given timely notice of intention to seek a sentence of imprisonment for life without the possibility of parole, but has not given notice of intention to seek the death penalty, the court shall conduct a sentencing proceeding, separate from the proceeding at which the defendant's guilt was adjudicated, as soon as practicable after the trial to determine whether to impose a sentence of imprisonment for life or imprisonment for life without parole.

Cross reference: Code, Criminal Law Article, §§2-101, 2-201, 2-202 (b)(3), 2-303, and 2-304.

(c) Judge

If the defendant's guilt is established after a trial has commenced, the judge who presided shall sentence the defendant. If a defendant enters a plea of guilty or nolo contendere before trial, any judge may sentence the defendant except that, the judge who directed entry of the plea shall sentence the defendant if that judge has received any matter, other than a statement of the mere facts of the offense, which would be relevant to determining the proper sentence. This section is subject to the provisions of Rule 4-361.

(d) Presentence Disclosures by the State's Attorney

Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing. If the court finds that the information was not timely provided, the court shall postpone sentencing.

(e) Notice and Right of Victim to Address the Court

(1) Notice and Determination

Notice to a victim or a victim's representative of proceedings under this Rule is governed by Code, Criminal Procedure Article, §11-104 (e). The court shall determine whether the requirements of that section have been satisfied.

(2) Right to Address the Court

The right of a victim or a victim's representative to address the court during a sentencing hearing under this Rule is governed by Code, Criminal Procedure Article, §11-403.

Cross reference: See Code, Criminal Procedure Article, §§11-103 (b) and 11-403 (e) concerning the right of a victim or victim's representative to file an application for leave to appeal under certain circumstances.

(f) Allocution and Information in Mitigation

Before imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

(g) Reasons

The court ordinarily shall state on the record its reasons for the sentence imposed.

(h) Credit for Time Spent in Custody

Time spent in custody shall be credited against a sentence pursuant to Code, Criminal Procedure Article, §6-218.

(i) Advice to the Defendant

At the time of imposing sentence, the court shall cause the defendant to be advised of any right of appeal, any right of review of the sentence under the Review of Criminal Sentences Act, any right to move for modification or reduction of the sentence, and the time allowed for the exercise of these rights. At the time of imposing a sentence of incarceration for a violent crime as defined in Code, Correctional Services Article, §7-101 and for which a defendant will be eligible for parole as provided in §7-301 (c) or (d) of the Correctional Services Article, the court shall state in open court the minimum time the defendant must serve for the violent crime before becoming eligible for parole. The circuit court shall cause the defendant who was sentenced in circuit court to be advised that within ten days after filing an appeal, the defendant must order in writing a transcript from the court stenographer.

Cross reference: Code, Criminal Procedure Article, §§8-102 - 8-109.

Committee note: Code, Criminal Procedure Article, §6-217 provides that the court's statement of the minimum time the defendant must serve for the violent crime before becoming eligible for parole is for informational purposes only and may not be considered a part of the sentence, and the failure of a court to comply with this requirement does not affect the legality or efficacy of the sentence imposed.

(j) Terms for Release

On request of the defendant, the court shall determine the defendant's eligibility for release under Rule 4-349 and the terms for any release.

(k) Restitution from a Parent

If restitution from a parent of the

defendant is sought pursuant to Code, Criminal Procedure Article, §11-604, the State shall serve the parent with notice of intention to seek restitution and file a copy of the notice with the court. The court may not enter a judgment of restitution against the parent unless the parent has been afforded a reasonable opportunity to be heard and to present evidence. The hearing on parental restitution may be part of the defendant's sentencing hearing.

(l) Recordation of Restitution

(1) Circuit Court

Recordation of a judgment of restitution in the circuit court shall be governed by Code, Criminal Procedure Article, §11-608 and Rule 2-601.

(2) District Court

Upon the entry of a judgment of restitution in the District Court, the Clerk of the Court shall send the written notice required under Code, Criminal Procedure Article, §11-610 (e). Recordation of a judgment of restitution in the District Court shall be governed by Code, Criminal Procedure Article, §§11-610 and 11-612 and Rule 3-621.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 772 a.
Section (b) is new.
Section (c) is derived from former Rule 772 b and M.D.R. 772 a.
Section (d) is derived from former Rule 772 c and M.D.R. 772 b.
Section (e) is new.
Section (f) is derived from former Rule 772 d and M.D.R. 772 c.
Section (g) is derived from former Rule 772 e and M.D.R. 772 d.

Section (h) is derived from former Rule 772 f and M.D.R. 772 e.
Section (i) is in part derived from former Rule 772 h and M.D.R. 772 g and in part new.
Section (j) is new.
Section (k) is new.
Section (l) is new.

Rule 4-342 was accompanied by the following Reporter's Note.

> The Criminal Subcommittee recommends amendments to Rules 4-342 and 4-354 requested by Russell Butler, Esq. because of problems with recording and enforcing judgments of restitution. The amendments would clarify that judgments of restitution may be enforced in the same manner as money judgments in civil actions and would add cross references to those sections of the Criminal Procedure Article that govern recording and indexing judgments of restitution. These amendments would provide more specific guidance for the clerks.

Judge Johnson explained that the amendment to the Rule was requested by Russell Butler, Esq., to address problems with recording and enforcing judgments of restitution. The Chair commented that it is helpful to refer to the statute in the Rule. The Committee approved the Rule by consensus.

Judge Johnson presented Rule 4-354, Enforcement of Money Judgment, for the Committee's consideration.

AMEND Rule 4-354 by adding a new section (b) and a cross reference, as follows:

Rule 4-354. ENFORCEMENT OF MONEY JUDGMENT

(a) Generally

A money judgment or other order for payment of a sum certain entered in a criminal action in favor of the State, including imposition of a fine, forfeiture of an appearance bond, and adjudication of a lien pursuant to Code, Article 27A, §7, may be enforced in the same manner as a money judgment entered in a civil action.

(b) Judgment of Restitution

A judgment of restitution may be enforced in the same manner as a monetary judgment entered in a civil action.

Cross reference: Code, Criminal Procedure Article, §11-613 (d).

Source: This Rule is derived in part from former M.D.R. 620 a and in part new.

Rule 4-354 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendments to Rule 4-342.

Judge Johnson explained that the amendment to the Rule adding a new section (l) was requested by Russell Butler, Esq., for the same reasons that he had requested the amendment

to Rule 4-342. The Chair asked Mr. Shipley if there should be any other changes to help the clerks in working with judgments of restitution. Mr. Shipley replied that no other changes are necessary. The Committee approved the Rule by consensus.

The Chair said that two Rules had been handed out at the meeting, Rule 8-301, Method of Securing Review in Court of Appeals, and Rule 16-401, Proscribed Activities–Gratuities, Etc.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 300 - OBTAINING APPELLATE REVIEW IN COURT OF APPEALS

AMEND Rule 8-301 to correct an obsolete cross reference, as follows:

Rule 8-301. METHOD OF SECURING REVIEW IN COURT OF APPEALS

(a) Generally

Appellate review by the Court of Appeals may be obtained only:

(1) by direct appeal or application for leave to appeal, where allowed by law;

(2) pursuant to the Maryland Uniform Certification of Questions of Law Act; or

(3) by writ of certiorari in all other cases.

Cross reference: For Code provisions governing direct appeals to the Court of Appeals, see Criminal Law Article, §2-401 concerning automatic review in death penalty cases; ~~Article 33, §19-4~~ Election Law Article, §12-203 concerning appeals from circuit court decisions regarding contested elections; and Financial Institutions Article, §9-712 concerning appeals from circuit court decisions approving transfers of assets of savings and loan associations. For Maryland Uniform Certification of Questions of Law Act, see Code, Courts Article, §§12-601 through 12-609.

(b) Direct Appeals or Applications to Court of Appeals

(1) An appeal or application for leave to appeal to the Court of Appeals in a case in which a sentence of death was imposed is governed by Rule 8-306.

(2) Any other appeal to the Court of Appeals allowed by law is governed by the other rules of this Title applicable to appeals, or by the law authorizing the direct appeal. In the event of a conflict, the law authorizing the direct appeal shall prevail. Except as otherwise required by necessary implication, references in those rules to the Court of Special Appeals shall be regarded as references to the Court of Appeals.

(c) Certification of Questions of Law

Certification of questions of law to the Court of Appeals pursuant to the Maryland Uniform Certification of Questions of Law Act is governed by Rule 8-305.

Source: This Rule is in part derived from Rule 810 and in part new.

Rule 8-301 was accompanied by the following Reporter's Note.

Article 33 was revised in 1998, and Article 33, §19-4 was renumbered at that time. Further revisions will take effect January 1, 2003 because of Chapter 291 (SB 1), Acts of 2002, changing this provision to Code, Election Law Article, §12-203. Article 33 has been replaced by the Election Law Article.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 400 - ATTORNEYS, OFFICERS OF COURT AND OTHER PERSONS

AMEND Rule 16-401 to correct a cross reference and to delete obsolete language and correct a Code reference in the Committee
note, as follows:

Rule 16-401. PROSCRIBED ACTIVITIES – GRATUITIES, ETC.

a. Giving Prohibited

No attorney shall give, either directly or indirectly, to an officer or employee of a court, or of an office serving a court, a gratuity, gift or any compensation related to his official duties and not expressly authorized by rule or law.

b. Receiving Prohibited

No officer or employee of any court, or of any office serving a court, shall accept a gratuity or gift, either directly or indirectly, from a litigant, an attorney

or any person regularly doing business with the court, or any compensation related to such officer's or employee's official duties and not expressly authorized by rule or law.

Cross reference: For definition of "person," see Rule 1-202 ~~(q)~~ (r).

Committee note: This Rule is based in part on New Jersey Rule 1:34. It is intended as a broad prohibition against the exchange of gratuities, gifts or any compensation not expressly authorized by rule or law as between attorneys and court officials and employees, in connection with the official functions of such persons. The Rule covers sheriffs and deputy sheriffs, as well as regular court officers, employees and other persons. ~~Among other things, it will prevent the practice, now existing in the courts of the Supreme Bench of Baltimore City, whereby certain portions of appearance fees are retained by the clerks by way of extra compensation or gratuities for the performance of their official duties.~~ This Rule is not intended to preclude contributions to or for elected public officials as authorized by and in conformance with the provisions of ~~Article 33, §§26-1 through 26-20, Annotated Code of Maryland (1968 Cum. Supp.)~~ Code, Election Law Article, Title 13.

Source: This Rule is derived from former Rule 1220.

Rule 16-401 was accompanied by the following Reporter's Note.

The reference to Rule 1-202 (q) in the cross reference has been modified to reflect its new designation as Rule 1-202 (r). Obsolete references to the Supreme Bench of Baltimore City have been deleted,

and the references to Article 33 have been deleted because it has been replaced by the Election Law Article pursuant to Chapter 291 (SB 1), Acts of 2002.

The amendment to the first Rule corrects an obsolete reference to the predecessor statute of the Election Law Article. The second Rule corrects a cross reference and deletes obsolete references to "the Supreme Bench of Baltimore City" and to the predecessor statute of the Election Law Article. The Committee approved the Rules by consensus.

The Chair presented Rule 4-313, Peremptory Challenges, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-313 to delete subsection (a)(4) and make stylistic changes, as follows:

Rule 4-313. PEREMPTORY CHALLENGES

(a) Number

(1) Generally

Except as otherwise provided by this section, each party is permitted four peremptory challenges.

(2) Cases Involving Death or Life Imprisonment

Each defendant who is subject on any single count to a sentence of death or life imprisonment, except when charged with a common law offense for which no specific penalty is provided by statute, is permitted 20 peremptory challenges and the State is permitted ten peremptory challenges for each defendant.

(3) Cases Involving Imprisonment for 20 Years or More, but Less Than Life

Each defendant who is subject on any single count to a sentence of imprisonment for 20 years or more, but less than life, except when charged with a common law offense for which no specific penalty is provided by statute, is permitted ten peremptory challenges and the State is permitted five peremptory challenges for each defendant.

~~(4) Cases Involving Election Law Offenses Punishable by Imprisonment in Penitentiary~~

~~In trials for offenses against the provisions of Code, Article 33, or any other law relating to elections or voter registration, each party shall be entitled to twenty peremptory challenges if the offense is punishable by imprisonment in the penitentiary.~~
~~Cross reference: Code, Article 33, §24-31.~~

~~(5)~~ (4) Alternate Jurors

For each alternate juror to be selected, the State is permitted one additional peremptory challenge for each defendant and each defendant is permitted two additional peremptory challenges. The additional peremptory challenges may be used only against alternate jurors, and other peremptory challenges allowed by this section may not be used against alternate jurors.

. . .

Rule 4-313 was accompanied by the following Reporter's Note.

> Chapter 585 (SB 118), Acts of 1998, deleted Code, Article 33, §24-31 because the Election Law Article Review Committee was of the opinion that peremptory challenges in election law offense cases are covered by Code, Courts Article, §8-301, and these cases do not need to be singled out in the Election Law Article. Subsection (a)(4) is now obsolete and should be deleted.

The Chair explained that subsection (a)(4) is proposed to be deleted because the legislature deleted Code, Article 33, §24-31, reasoning that peremptory challenges in election law offenses are covered by Code, Courts Article, §8-301, and there is no need for a separate provision in the Election Law Article. The Committee approved the change to Rule 4-313 by consensus.

The Chair stated that in the meeting materials, there is an information item concerning Rule 4-212, Issuance, Service, and Execution of Summons or Warrant. (See Appendix 1). The Reporter said that the Criminal Subcommittee felt that no change was needed to the Rule. The Committee agreed with the Subcommittee.

The Chair congratulated Judges Missouri and Heller for being recognized for leadership in law by The Daily Record.

The meeting was adjourned.