COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011 C-D Commerce Park Drive, Annapolis, Maryland, on February 9, 2007.

Members present:

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

Hon. Michele D. Hotten
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Frank M. Kratovil, Jr., Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Hon. Albert J. Matricciani
Robert R. Michael, Esq.
Hon. John L. Norton, III
Debbie L. Potter, Esq.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
J. Teigen Hall, Rules Committee Intern
Ahmet Hisim, Esq., Office of the State's Attorney for Baltimore City
Jennifer Brady, Esq., Office of the State's Attorney for Baltimore City
Frank Weathersbee, Esq., State's Attorney for Anne Arundel County
Allyn Nickle, Register of Wills for Cecil County
Allan J. Gibber, Esq.
Jordan Gilmore, University of Baltimore School of Law
Laura Gwinn, Esq., Office of the State's Attorney for Prince George's County
Mike McDonough, Esq., Office of the State's Attorney for Baltimore County
Joesph I. Cassilly, Esq., State's Attorney for Harford County
Russell P. Butler, Esq., Executive Director, Maryland Crime Victims Resource Center
Gerard B. Volatile, Esq., Office of the State's Attorney for Baltimore City

Leo Ryan, Esq., Office of the State's Attorney for Baltimore County
Charlotte K. Cathell, Register of Wills for Worcester County
Antonio Gioia, Esq., Office of the State's Attorney for Baltimore City
David Hayes, Esq., Assistant Attorney General
David Weinstein, Esq., Office of the State's Attorney for Prince George's County
Michele M. Nethercott, Esq., Public Defender
Nancy Forster, Esq., Public Defender's Office
Larry W. Shipley, Clerk, Circuit Court for Carroll County (retired)

The Chair convened the meeting. He introduced the most recently appointed member of the Rules Committee, the Honorable Michele D. Hotten, of the Circuit Court for Prince George's County, who took the place of the Honorable William B. Spellbring, Jr. The Chair also introduced Teigen Hall, an intern for the Rules Committee who is a student at the University of Baltimore School of Law. On March 12, 2007, at 2:00 p.m., the Court of Appeals will consider the proposed changes to Rule 1.15, Safekeeping Property, which pertains to attorney trust accounts. The changes were proposed by the Honorable Glenn T. Harrell, Jr., a member of the Court of Appeals and were sent to the Court on an emergency basis.

Agenda Item 1. Reconsideration of proposed amendments to: Rule 4-263 (Discovery in Circuit Court) and Rule 4-262 (Discovery in District Court)

Mr. Karceski presented Rule 4-263, Discovery in Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to require each party to exercise due diligence in identifying material and information to be disclosed, **to extend the obligations of the parties under the Rule to staff members of the defendant and certain others,** to reletter the sections, to add a cross reference following section (a), to add to section (b) a required disclosure of witness statements, to add language to subsection (b)(1) referring to a certain statute and Rule, to clarify the disclosure obligation of the State's Attorney under subsections (b)(2) and (3), to add a Committee note and cross reference following section (b), to add to subsection (c)(3) requirements concerning the State's consultation with an expert, **to add a new subsection (e)(2) containing requirements concerning witnesses and statements by witnesses,** to add to subsection (e)(**3**) requirements concerning an expert that the defendant expects to call as a witness at a hearing or trial, to change the time allowed in section (f) for the State's initial disclosure pursuant to section (b), to add the phrase "or required" to section (g), to provide generally that there is no requirement to file discovery material with the court, to require the filing of a notice by the party generating discovery material and retention of the material for a period of time if the material it is not filed with the court, and to require the filing of a statement if the parties agree to provide discovery or disclosures in a manner different than set forth in the Rule, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit

court shall be as follows:

~~(g)~~ (a) Obligations of ~~State's Attorney~~ the Parties

(1) Generally

Each party obligated to provide material or information under this Rule shall exercise due diligence to identify all of the material and information that must be disclosed.

(2) **Obligations of the Parties Extend to Staff and Others**

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

Cross reference: For the obligations of the State, see *State v. Williams*, 392 Md. 194 (2006).

~~(a)~~ (b) Disclosure Without Request

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

(1) The name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each person whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony and, as to all statements about the action made by the witness to a State agent: (A) a copy of each written or recorded statement and

[The Criminal Subcommittee presents three alternative versions of subsection (b)(1)(B)

for consideration by the Rules Committee:]

Alternative 1

(B) a copy of all reports of each oral statement or, if not available, the substance of each oral statement;

Alternative 2

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

Alternative 3

(B) a copy of all reports of each oral statement;

~~(1)~~ (2) Any material or information ~~tending to~~ in any form, whether or not admissible, in the possession or control of the State, as described in subsection (a)(2) of this Rule, that tends to exculpate the defendant or negate or mitigate the guilt or punishment of the defendant as to the offense charged;

(3) Any material or information in any form, whether or not admissible, in the possession or control of the State, as described in subsection (a)(2) of this Rule, that tends to impeach a witness by proving:

(A) the character of the witness for untruthfulness by establishing prior conduct as permitted under Rule 5-608 (b) or a prior conviction as permitted under Rule 5-609,

(B) that the witness is biased, prejudiced, or interested in the outcome of the proceeding or has a motive to testify falsely, or

(C) that the facts differ from the witness's expected testimony; and

~~(2)~~ (4) Any relevant material or information regarding: (A) specific searches and seizures, wire taps, or eavesdropping~~,~~; (B) the acquisition of statements made by the

defendant to a State agent that the State intends to use at a hearing or trial~~,~~; and (C) pretrial identification of the defendant by a witness for the State.

Committee note: Examples of material and information that must be disclosed pursuant to subsections (b)(2) and (3) of this Rule if within the possession or control of the State, as described in subsection (a)(2) of this Rule, include: each statement made by a witness that is inconsistent with another statement made by the witness or with a statement made by another witness; the mental health of a witness that may impair his or her ability to testify truthfully or accurately; pending charges against a witness for whom no deal is being offered at the time of trial; the fact that a witness has taken but did not pass a polygraph exam; the failure of a witness to make an identification; and evidence that might adversely impact the credibility of the State's evidence. The due diligence required by subsection (a)(1) does not require affirmative inquiry by the State with regard to the listed examples in all cases, but would require such inquiry into a particular area if information possessed by the State, as described in subsection (a)(2), would reasonably lead the State to believe that affirmative inquiry would result in discoverable information. **Due diligence does not require the State to obtain a copy of the criminal record of a State's witness unless the State is aware of the criminal record. If, upon inquiry by the State, a witness denies having a criminal record, the inquiry and denial generally satisfy due diligence unless the State has reason to question the denial. The failure of the State to ask a witness whether the witness has a prior conviction that could be used to disqualify or impeach the witness does not disqualify the witness from testifying.**

[In lieu of the language in boldface type in the Committee note above, a minority of the Criminal Subcommittee members prefers the following language:]

Due diligence, for example, does not require affirmative inquiry by the State with regard to convictions subject to discovery under subsection (b)(3)(A) of this Rule unless the State has reason to believe such convictions exist. If upon inquiry by the State, a witness denies having such convictions, the inquiry and denial generally satisfy due diligence unless the State has reason to question the denial. The failure of the State to ask a witness whether the witness has a prior conviction that would be discoverable under subsection (b)(3)(A) does not disqualify the witness from testifying.

Cross reference: See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. U.S.*, 405 U.S. 150 (1972); and *U.S. v. Agurs*, 427 U.S. 97 (1976).

~~(b)~~ (c) Disclosure Upon Request

Upon request of the defendant, the State's Attorney shall provide to the defendant the information set forth in this section:

~~(1) Witnesses~~

~~Disclose to the defendant the name and address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony;~~

~~(2)~~ (1) Statements of the Defendant

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

~~(3)~~ (2) Statements of Codefendants

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

~~(4)~~ (3) Reports or Statements of Experts

As to each expert consulted by the State in connection with the action the State shall: (A) provide to the defendant the name and address of the expert, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion, and (B) ~~Produce~~ produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by ~~each~~ the expert~~, consulted by the State,~~ including the results of any physical or mental examination, scientific test, experiment, or comparison, and ~~furnish~~ provide the defendant with the substance of any such oral report and conclusion;

~~(5)~~ (4) Evidence for Use at Trial

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

~~(6)~~ (5) Property of the Defendant

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

~~(c)~~ (d) Matters Not Subject to Discovery by the Defendant

This Rule does not require the State to disclose:

(1) Any documents to the extent that they contain the opinions, theories, conclusions, or other work product of the State's Attorney, or

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

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

~~(d)~~ (e) Discovery by the State

Upon the request of the State, the defendant shall:

(1) As to the Person of the Defendant

Appear in a lineup for identification; speak for identification; be fingerprinted; pose for photographs not involving reenactment of a scene; try on articles of clothing; permit the taking of specimens of material under fingernails; permit the taking of samples of blood, hair, and other material involving no unreasonable intrusion upon the defendant's person; provide handwriting specimens; and submit to reasonable physical or mental examination; **[The addition of subsection (e)(2), below, is a recommendation of a minority of the Criminal Subcommittee members.]**

(2) Witnesses

Provide the name and address of each person whom the defendant intends to call as a witness at the hearing or trial and, as to all statements about the action made by the witness to the defendant or agent, provide (A) a copy of each written or recorded statement, and (B) a copy of all reports of each oral statement, or, if not available, the substance of each oral statement;

~~(2)~~ **(3)** Reports of Experts

As to each expert whom the defendant expects to call as a witness at a hearing or trial: (A) provide to the State the name and address of the expert, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, and (B) ~~Produce~~ produce and permit the State to inspect and copy all written reports made in connection with the action by ~~each~~ the expert~~, whom the defendant expects to call as a witness at the hearing or trial,~~ including the results of any physical or mental examination, scientific test, experiment, or comparison, and ~~furnish~~ provide the State with the substance of any such oral report and conclusion;

(3) Alibi Witnesses

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

(4) Computer-generated Evidence

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

~~(e)~~ (f) Time for Discovery

Unless the court orders otherwise, the time for discovery under this Rule shall be as set forth in this section. The State's Attorney shall make disclosure pursuant to section ~~(a)~~ (b) of this Rule within ~~25~~ 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule

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

~~(f)~~ (g) Motion to Compel Discovery

If discovery is not ~~furnished~~ provided as requested or required, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters that have not been ~~furnished~~ provided. A response to the motion may be filed within five days after service of the motion. The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

(h) Continuing Duty to Disclose

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

(i) No Requirement to File with Court; Exceptions

Except as otherwise provided in these Rules or by order of court, discovery material need not be filed with the court. If the party generating the discovery material does not file the material with the Court, that party shall (1) serve the discovery material on the other party and (2) promptly file with the court a notice that

(A) reasonably identifies the information provided and (B) states the date and manner of service. The party generating the discovery material shall make the original available for inspection and copying by the other party, and shall retain the original until the earlier of the expiration of (i) any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court. This section does not preclude the use of discovery material at trial or as an exhibit to support or oppose a motion. If the parties agree to provide discovery or disclosures in a manner different from the manner set forth in this Rule, the parties shall file with the court a statement of their agreement.

~~(i)~~ (j) Protective Orders

On motion and for good cause shown, the court may order that specified disclosures be restricted.

(k) Sanctions

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

Source: ~~This Rule is derived as follows:~~

~~Section (g) is derived from former Rule 741 a 3.~~

~~Section (a) is derived from former Rule 741 a 1 and 2.~~

~~Section (b) is derived from former Rule 741 b.~~

~~Section (c) is derived from former Rule 741 c.~~

~~Section (d) is derived in part from former Rule 741 d and is in part new.~~

~~Section (e) is derived from former Rule 741 e 1.~~

~~Section (f) is derived from former Rule 741 e 2.~~

~~Section (h) is derived from former Rule 741 f.~~

~~Section (i) is derived from former Rule 741 g.~~

This Rule is derived in part from former Rule 741 and is in part new.

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

Albert D. Brault, Esq. brought to the attention of the Rules Committee a 2003 Report of the American College of Trial Lawyers, describing the problem that some federal prosecutors fail to provide information required to be furnished to a criminal defendant pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Brault spoke with local criminal defense lawyers in Montgomery County, who noted similar problems with some State prosecutors. To address this, the Honorable Albert J. Matricciani and the Honorable M. Brooke Murdock, Judges of the Circuit Court for Baltimore City, drafted proposed changes to Rule 4-263, the concept of which has been approved by the Rules Committee. The proposed amendments to Rule 4-263 blend language suggested by Judges Matricciani and Murdock with additional changes developed by the Committee.

Current section (g), Obligations of State's Attorney, is proposed to be amended to require that each party who is obligated to provide material or information under the Rule exercise due diligence in identifying the material and information to be disclosed and **to make subsection (2) applicable to all parties and not only to the State's Attorney**. Because of the importance of this obligation, section (g) is proposed to be moved to the beginning of the Rule and relettered (a). A cross reference to *State v. Williams*, 392 Md. 194 (2006) is proposed to be added following

the section to highlight that the State's obligations under the Rule extend beyond the knowledge of the individual Assistant State's Attorney prosecuting the case.

Disclosure of the identity of the State's witnesses, which currently is in the "Disclosure Upon Request" section of the Rule, is proposed to be moved to the "Disclosure Without Request" section, as new subsection (b)(1). References to Code, Criminal Procedure Article, §11-205 and Rule 16-1009 (b), concerning withholding of a witness's address under certain circumstances, are added to the section. Also, given the difficulty of analyzing each statement made by a State's witness as to anything that conceivably would be considered "*Brady*" material, coupled with the requirement of disclosure of prior written statements by witnesses as set forth in *Jencks v. U.S.*, 353 U.S. 657 (1957), the Committee recommends that *all* written and oral statements about the action by a witness whom the State intends to call to prove its case-in-chief or to rebut alibi testimony be disclosed without the necessity of a request by the defendant.

Amendments to subsections (b)(2) and (3) are proposed to clarify the State's disclosure requirements under *Brady* and its progeny. Subsections (b)(3)(A), (B), and (C) are derived from the "impeachment by inquiry of witness" provisions of Rule 5-616 (a)(6)(i) and (ii), (4), and (2), respectively. A Committee note containing examples of *"Brady"* materials that must be disclosed follows subsection (b)(3). The first sentence of the Committee note uses examples contained in correspondence dated October 25, 2005 from Nancy S. Forster, Public Defender, to Chief Judge Robert M. Bell. At the request of prosecutors, commentary concerning ascertainment of the criminal records of State's witnesses and when due diligence requires an affirmative inquiry into a particular area is included in the Committee note. After the Committee note

is a cross reference to *Brady* and to three additional opinions of the U.S. Supreme Court.

Using language borrowed from Rule 2-402 (f)(1)(A), subsection (c)(3) is proposed to be amended to require the State (upon request by the defendant) to disclose, as to each expert consulted by the State in connection with the action, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion. This requirement is intended to address the situation in which little or no information is received by the defendant because of the absence of a meaningful written report. A comparable amendment is proposed to be made to subsection (e)(**3**), pertaining to disclosure of the defendant's expert's information upon request by the State, except that in subsection (e)(**3**), the requirement to disclose extends only to information from an expert whom the defendant expects to call as a witness. **A new subsection (e)(2) is proposed to be added requiring the defendant to provide to the State the name and address of each witness the defendant intends to call and a copy of each statement made by the witness about the action, as well as a copy of all reports of each oral statement or the substance of each oral statement made by the witness about the action.**

In section (f), the time requirements for discovery under the Rule are proposed to be made subject to the phrase "unless the court orders otherwise." Also, the time for the initial disclosure by the State is changed from 25 to 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213, for consistency with other time provisions used throughout the Rules.

The words "or required" are proposed to be added to section (g) to clarify that a motion to compel discovery may be based on a failure to provide required discovery as well

as a failure to provide requested discovery.

Proposed new section (i) provides that, with certain exceptions, discovery material is not required to be filed with the court. In light of the adoption of Title 16, Chapter 1000, Access to Court Records, proposed new section (i) is intended to eliminate the inclusion of unnecessary materials in court files and reduce the amount of material in the files for which redaction, sealing, or other denial of inspection would be required. The non-filing of discovery information conforms the Rule to current practice in many jurisdictions. Much of the language of the section is borrowed from the first, third, and fourth sentences of Rule 2-401 (d)(2); however, the required contents of the notice that the party generating discovery material must file with the court, if the discovery materials are not filed with the court, have been modified by adding the requirement that the notice must "reasonably identif[y] the information provided" and by deleting the references to the "type of discovery material served" and "the party or person served." Additionally, the retention requirement as to original materials extends until the earlier of (i) the expiration of any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court. The last sentence of the section requires the parties to file with the court a statement of any agreement that they make as to providing discovery or disclosures different than set forth in the Rule.

The Committee recommends that the existing provisions in the Rule concerning sanctions be set out in a separate section (k).

Mr. Karceski explained that the changes to the Rule were initially proposed by Mr. Brault, who was unable to attend the meeting today. There are several issues associated with the Rule

to be discussed. One issue was raised by Russell Butler, Esq., who suggests adding the word “material” to section (b) after the word “all” and before the word “statements.” On page 3 of the meeting materials, there are three alternative versions proposed for the last phrase of section (b). The Office of the Public Defender submitted a letter written by Nancy Forster, Esq., Public Defender, dated February 6, 2007, a copy of which was handed out at the meeting today. (See Appendix 1). Michele Nethercott, Esq., an Assistant Public Defender, is present today to speak for choosing the first alternative. In the letter, Ms. Forster cited the case of *Johnson v. State*, 360 Md. 250 (2000) and explained that Alternative 1 is the only choice consistent with the holding of the case, which is that the State has to provide to the defendant his or her recorded statement and may not simply provide the substance of the statement.

Mr. Karceski said that his response to Mr. Butler’s suggestion, which was to add the word “material” to section (b), so that the third line of the underlined language would read “...as to all material statements about the action...,” is that the addition of the language “about the action” in section (b) would rule out the situation where someone provides an oral statement that is immaterial and not memorialized. An immaterial statement is not “about the action.” Using the word “material” gets into a subjective decision as to what is material. Judge Matricciani commented that the first alternative is consistent

with the federal rule, Fed. R. Crim. P. 16, which requires that the substance of an oral statement be produced.

Mr. Kratovil told the Committee that his office routinely turns over recorded statements to the defense. He expressed the concern that Alternative 1 will require turning over the substance of a statement that would otherwise not have to be recorded at all. If the prosecutor meets with the victim, and if the statement is not work product, the proposed changes to the Rule require that the substance of the conversation has to be recorded, reduced to a summary of the conversation, and turned over. This is not required currently. This is not a prior written statement under *Jencks v. U.S.*, 353 U.S. 657 (1957), and it is not exculpatory. The witness may be describing the crime consistently with the statement that was already given. The State would be required to document a totally consistent statement. Unless the parties agree that the statement is work product, it would have to be turned over. Mr. Kratovil remarked that he prefers Alternative 3. Requiring the recordation of every oral statement, even if it is consistent, is a dramatic change. The Chair stated that what everybody understands to be work product is not subject to discovery.

The Vice Chair asked how this is handled in the corresponding federal rule. The Chair said that this Rule is a little different, because it is advancing to the discovery phase what the federal rule and practice leave to the request by the

defense attorney immediately before the defense attorney begins the cross examination of the witness. The *Jencks* material is being moved up into discovery, which is proper as long as everyone is in agreement. It is important to make sure that when the prosecutor interviews a witness and makes notes, the Rule is not referring to that. Mr. Kratovil quoted from the language of Fed. R. Crim. P. 16 (a)(2):

> Except as Rule 16 (a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this Rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

He noted that 18 U.S.C. §3500 defines a statement as:

> (1) a written statement made by a witness and signed or otherwise adopted or approved by the witness, (2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by a witness and recorded contemporaneously with the making of the oral statement, or (3) a statement, however taken or recorded or a transcription thereof, if any, made by the witness to a grand jury.

The federal definition does not include the type of statements being discussed today. The letter from the Office of the Public Defender states that Fed. R. Crim. P. 16 (b)(2) does not require the disclosures that the proposed changes to subsection (e)(2) would require. However, the federal Rule does

not apply to the statements at issue.

The Vice Chair suggested that Rule 4-263 conform to the federal rules. Mr. Kratovil responded that the State's Attorneys in Maryland would agree with this. The Chair commented that during the late 1970's and early 1980's, there was a practice where at arraignments before federal magistrates, the magistrates would order the government to give to the defense the forms containing the reports of what an FBI witness said (Form 302). Mr. Kratovil clarified that what is being discussed today is all situations where statements have been given to state agents by witnesses. The proposed changes to the Rule require the State to turn over all of these statements without a request for them. This may get into the work product of counsel. This would mean that the State would have to turn over consistent statements and *Jencks* statements, and this is not required by *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Karceski said that when the proposed changes to Rule 4-263 previously were discussed by the Rules Committee, Robert L. Dean, Esq., the previous State's Attorneys' representative, and Antonio Gioia, Esq., another Assistant State's Attorney, had agreed with the changes, including the language of Alternative 1. What is being required by the Rule is disclosure of the statement of someone who will be called as a witness to prove the case; it is not the statement of any person that counsel ever talked to. The Rule refers to those persons intended to be called as witnesses. Mr. Butler's issue regarding

materiality is related to this.

Mr. Karceski stated that in his 38 years of practice, 30 of which have been criminal defense work, he has never received from the State a witness statement given to a victim-witness coordinator, or someone in a similar position, that says anything pertaining to the case, such as something that could have related to the mitigation of the crime or the innocence of the defendant. Mr. Kratovil agreed that victim-witness coordinator materials generally are not provided to the defense. Mr. Karceski commented that in all of his years of practice, someone must have said something to a victim-witness coordinator that touched on mitigation of the crime or innocence of the defendant. He expressed the view that the proposed language will not open up any floodgates of material that will have to be turned over to the defense. If, however, something is exculpatory or mitigating, then *Brady* requires that it be provided to the defense. Also, what the State has to do is really a direct product of how the State handles each of its witnesses. The State may speak to the witness once, twice, or even 15 times. If it is 15 times, then it is likely that something is wrong, and everything should be turned over to the defense. If Alternative 3 is chosen, there may never be a report.

Mr. Kratovil told the Committee that he was not present when the language of the Rule was agreed to. No rule has ever required the substance of a witness's oral statement to be

documented and turned over even if it is consistent. Under Alternative 1, every time a defense attorney finds out that a victim-witness coordinator had a conversation with a witness prior to trial, the attorney may argue that the witness's statement should have been documented and turned over. In response to the comment about how many times the State's Attorney met with the victim or witness, it depends on the trial and on the victim or witness. The victim may be very young. The prosecutor should not have to turn over every statement made by the witness unless it is exculpatory. Mr. Karceski asked Mr. Kratovil if he takes notes at witness interviews, and Mr. Kratovil replied that he often does take notes, depending on the nature of the case. The Office of the Public Defender had stated that attorneys' notes are attorney work product. The prosecutorial view is the same.

The Chair pointed out that the criminal rules do not address the work product concept as thoroughly as the civil rules do, where attorney work product is expressly addressed. It is divided up into materials acquired in preparation for trial and the thought processes of the lawyer. *Goldberg v. U.S.*, 425 U.S. 94 (1976) held that under certain circumstances, the defendant is entitled to the prosecutor's notes. The witness in the case testified that he met with the prosecutor at a pretrial hearing at which the prosecutor took notes. The prosecutor read back the notes to the witness to make sure that they were correct but did

not give the notes to the defendant. The Supreme Court said that the general work product rule is not applicable to this situation, and the notes are *Jencks* material. The Chair added that the Rule must distinguish what is protected as work product, both the prosecutor's and the defense attorney's work product. Language from section (d) of Rule 2-402, Scope of Discovery, could be added to Rule 4-263.

Mr. Kratovil expressed the concern that if a victim or witness is interviewed and gives an inconsistent statement that is not documented, this would not be turned over if it were not recorded. The Rule must make clear that an inconsistent statement would have to be documented and turned over. The Chair responded that this does not have to be in the Rule, because it is part of the holding in *Brady.*

The Vice Chair remarked that she does not practice criminal law. She noted that in civil cases, she views all notes taken from interviews with witnesses as work product and that she finds it unusual that the attorney's notes would be required to be turned over to the other party. Judge Matricciani cautioned that in civil practice, the parties have an even playing field, but in criminal law, the State's Attorney has an investigatory arm, while the defendant does not have this. The Chair cautioned that the Rule should not imply that information acquired by investigating officers constitutes work product. The prosecutor, in preparation for trial, after the charges have been filed and

after the investigation has substantially been completed, may speak with a witness, and the only material resulting from this interview that would have to be disclosed is *Brady* material. Rule 4-263 should distinguish material discovered by the investigating officer as opposed to material that legitimately is work product of the prosecutor, and provide protection for the latter. Work product should not be extended back into the investigatory phase. Mr. Kratovil had commented that on its face, the Rule requires the prosecutor to turn over his or her notes of interviews with victims three months after the indictment and a week before the trial. The Vice Chair observed that the Rule requires that if the notes are not turned over, then the prosecutor or someone else would have to summarize all of his or her conversations and turn this over to the defendant. The prosecutor may have spoken with a victim three times, and summaries of all three of these interviews would have to be turned over. Mr. Karceski remarked that if it is necessary to speak with the witness three times, it may be necessary for the prosecutor to turn over the notes or at least memorialize them so that if something comes up later, there is way to get to that information. Mr. Kratovil pointed out that it may be necessary to meet with a nine-year old victim several times before a trial.

The Chair suggested that section (b)(1) of the Rule, which essentially advances *Jencks*, should be made applicable to all statements about the action that a witness made to a State agent

prior to the filing of the charges. Any additional statements that must be disclosed would come under *Brady* material or other categories of information required to be disclosed. The time limitation places the statements within the investigatory phrase, rather than the trial preparation phrase. The continuing disclosure obligation requires disclosure of *Brady* material up to the moment of trial.

Judge Norton noted that in the District Court, any requirement that the material must be requested is meaningless. Once counsel enters an appearance, all material is demanded. He inquired as to why the language that had been agreed to by the Rules Committee two or three years ago is not satisfactory. The Vice Chair again asked why the federal rule with its nationwide interpretation is not followed. Ms. Nethercott remarked that although the process to change Rule 4-263 began years ago, the problem of the failure of the State to disclose exculpatory evidence in death penalty cases still exists. There have been many discussions as to how to solve the problem of the failure of law enforcement to recognize its disclosure obligations. The system that has the State's Attorneys determining what is exculpatory evidence is not working.

The Vice Chair commented that she did not feel that oral interviews always have to be reduced to writing. The failure to understand what exculpatory evidence is will not be fixed by changes to Rule 4-263. Ms. Nethercott pointed out that when post

conviction cases are reviewed, often there are items in the files of law enforcement investigators that should have been disclosed, but were not. The Chair asked Ms. Nethercott if she is suggesting that no work product defense should be available to the State's Attorney. She answered in the negative. The Chair reiterated his suggestion that statements made or the substance of oral statements made before the filing of charges should be turned over. Ms. Nethercott expressed the concern that using the filing of charges as a cutoff could mean that in serious cases, investigations could be conducted after the indictment, and this information would not be available to the defense. This does not solve the problem. The Chair countered that *Brady* applies throughout the case. The cutoff would protect work product. One way to draft the Rule is to use the filing of charges as a time limitation; the other way is to exclude work product. The Vice Chair questioned as to what work product would be. Unless it is exculpatory or included in Alternative 3, is there anything else? Mr. Kratovil answered that statements that are not inconsistent, not *Jencks* material, and not *Brady* material would be work product. The Chair commented that it would be a burden for the State's Attorney to turn over every witness's statement that is consistent with the investigation, but if the witness changes his or her story, then it would be *Brady* material.

Mr. Kratovil expressed the opinion that the language suggested by the Chair is a reasonable compromise. He disagreed

with the premise that State's Attorneys and police officers are not turning over exculpatory material. Most State's Attorneys do turn over statements that are written and recorded. The issue is requiring the substance of an oral statement that is not *Brady* material and that would not otherwise have to be turned over. Mr. Karceski noted that part (A) of subsection (b)(1) reads: "a copy of each written or recorded statement...". This will be what will continue to be turned over even after charges are filed. If there is a recorded statement or a written statement subsequent to the filing of charges, that should be turned over. If it is written, transcribed, or recorded, then the duty to disclose applies from the point of the initiation of the investigation until trial, but if it is oral, it applies up to the filing of the initial charging document, including an indictment or a District Court charging document. Charges should be referred to as the "initial charging document." The Chair added that a provision can be added to the Rule where the defense attorney can request that the court order the State to turn over other statements, so that if there is a situation where an indictment is returned, the investigation continues, and people are being interviewed, those statements would have to be turned over as well.

Mr. Sykes commented that there has been discussion about written and recorded statements. He asked about the situation where the law enforcement officer, who is investigating, takes

notes for his or her own edification or to remember what was said, but this is not reported. What does the language "about the action" in subsection (b)(1) include? The Chair replied that it includes statements about the anticipated testimony. Mr. Sykes suggested that the language could be "all statements relevant to the guilt or innocence or possible inconsistency of anticipated testimony." The sentence should contain terms that are objective, such as "a statement about the action or events that are the basis of the charge." The Style Subcommittee can draft the language.

Mr. Kratovil reiterated that the federal language of 18 U.S.C. §3500 specifically defines the term "statement" as "a stenographic, mechanical, electrical, or other recording" as opposed to "a recorded statement." The federal language could be incorporated into subsection (b)(1). Mr. Sykes noted that if the investigator uses a tape recorder while interviewing the witness, this may not be a statement as such, but if it is recorded and relevant to the charge, it should be turned over. Mr. Karceski suggested that the language could be "...as to all statements about the matter under investigation." Ms. Forster commented that the problem of what is attorney work product may be solved by including in Alternative 1 the option of stating that each oral statement to the prosecutor is consistent with the earlier statements. Then there is no problem about the prosecutor's notes.

The Chair stated that the best way to handle this is to put

into Rule 4-263 a specific provision that says in effect that anything that is disclosed by a witness to a prosecutor when the prosecutor is interviewing the witness in preparation for trial needs to be disclosed if required by *Brady*, but is not automatically disclosed under the clause referring to prior statements by witnesses. This has to be expressly stated. If the prosecutor interviews a witness who provides exculpatory information, the prosecutor is under a duty to disclose that. Otherwise, what the witness tells the prosecutor is not required to be disclosed in discovery; it is work product. Mr. Kratovil pointed out that Alternative 3 could be revised to read: "a copy of all reports of any inconsistent oral statement."

Mr. Cassilly, the State's Attorney for Harford County, told the Committee that victims often recant to the victim-witness coordinator. When that happens, the investigator does a *Brady* notification even if the investigator does not believe the recantation. The State's Attorney's Office in Harford County is presently sharing space with other agencies, including the Family Justice Center and the Spousal Abuse Center. A civil attorney assists with *ex parte* and permanency petitions in domestic violence cases. Information given to the agencies prior to charges often becomes within the knowledge of the prosecutor. *Ex parte* petitions are heard in open court, and the defendant may be present at an ex parte or permanency hearing. The defendant is aware of the petition by the victim and the testimony of the

victim. He added that he would like to see language in the Rule that provides that consistent statements are work product. He would not like to be required to go through all of the files of the civil attorney next door.

The Chair stated that this problem can be taken care of by adding a Committee note to Rule 4-263 (a)(2) clarifying the situation with respect to hybrid representation. The Vice Chair inquired as to whether the defense bar is trying to obtain through discovery material that is in addition to an oral statement that is exculpatory or impeaches. The Chair responded that the concern is that the prosecutor is not in a position to determine what is exculpatory. If the statement is disclosed, the prosecutor does not have to worry about whether or not it is exculpatory. The defendant uses the statement if he or she can. The problem arises when the prosecutor withholds the statement because he or she did not think that it was exculpatory.

Mr. Klein remarked that, although he does not practice criminal law, he recognizes that a prosecutor has legitimate work product claims. A temporal limit on when the statement was made is the best solution; otherwise, the prosecutor has to make a judgment as to what is work product and what is exculpatory. Mr. McDonough noted that in larger jurisdictions, there are many investigators for the State's Attorney's Office, and the time limitation could be problematic. It might be helpful to define work product. The Chair suggested that language could be added that would differentiate the materials requiring production, as

opposed to the thought processes of the prosecutor. It has been in the civil rule for years, but it has never found it way into the criminal rules.

Mr. McDonough reiterated the Vice Chair's question as to why the Maryland Rule should not follow the federal rule. He noted that the *Jencks* decision was a compromise designed to deal with these problems. Reports from interviews of witnesses by several different police officers can lead to a third party hearsay problem. *Jencks* held that defense counsel is entitled to prior written statements of witnesses. A statement that is recorded verbatim and signed and adopted by the witness can be used to impeach a witness with his or her own words, not with someone else's version of what was said. Someone else's version of the statement is hearsay. Consistent with *Brady*, the Court of Appeals has held that the defense cannot rummage through the prosecutor's files looking for anything that might conceivably be used in the defense case. Some of the proposed changes to the Rule are moving toward rummaging through the prosecutor's files. If there is a material inconsistency between what witnesses say, there is already an obligation on prosecutors to turn it over.

The Chair said that if ten prosecutors are asked to define "materiality," there probably would be ten different answers. He commented that when he was in practice, the defense attorney in federal court received statements signed by the government witnesses, or summaries of what the witnesses said to an

investigating officer, in a form entitled "Form 302." *Jencks* and the Maryland cases provide that if, before cross-examination, the defense attorney asks for a statement signed by the witness or a summary of what the witness said to an investigating officer, the prosecutor must turn it over if it exists. There is no *Brady* component to *Jencks*. If it is *Jencks* material, the defense is entitled to it, but not until it is requested and the direct examination has been completed. The Rule moves up in time *Jencks* material. The concern is that providing *Jencks* material does not include providing work product. The Rule must make the distinction. Mr. McDonough remarked that the proposed Rule change is broader than disclosure of *Jencks* material. The "verbatim, recorded, adopted by the witness" language in *Jencks* is not in Rule 4-263.

Mr. Butler remarked that the Chair had stated that when he received the federal Form 302 as a practicing attorney, he had received summaries from the prosecutor of what the witness said, not all the statements made by the witness. The victim-witness coordinators with whom Mr. Butler had spoken are concerned that the language of subsection (b)(1) that reads "... as to all statements about the action made by the witness to a State agent..." is very broad, and that not all of these statements are protected by being the work product of the prosecutor. The alternative is to more narrowly describe the statements that must be provided.

Mr. Kratovil expressed his preference for Alternative 3. Work product will have to be determined on a case-by-case basis. If it is not exculpatory, it does not have to be turned over. He remarked that the Chair's suggested time limit of prior to the filing of the charging document for providing the copy of the reports addresses the concerns of the prosecutors who meet with their witnesses and get consistent statements.

The Chair reiterated that a self-standing clause should be added that would provide that the Rule does not require the disclosure of work product, which can be defined consistent with the definition in Rule 2-402 (d). The issue is whether there should be a time limit that can be built into the Rule, along with the express requirement that *Brady* material must be turned over at any time. Mr. Karceski commented that all written and recorded statements are required to be turned over regardless of any time limit. Mr. Kratovil suggested that a clause should be added that would provide that any statement that is work product would not have to be turned over even if made prior to the filing of the charging document.

The Chair stated that subject to styling, a clause will be added to Alternative 1 that spells out the idea that work product is protected for both the prosecution as well as the defense. This Rule should be divided into two parts. One part should provide that a statement made before the charges were filed must be turned over, unless the statement is attorney work product as

defined in Rule 2-402 (d). The second part should provide that the defendant has the right to request that the court require disclosure of statements made after charges have been filed if the trial judge finds that this is necessary for a fair trial. Mr. Karceski remarked that he was not sure of the meaning of work product prior to the filing of charges. Judge Matricciani noted that work product is different in the criminal arena than in the civil arena. It could be argued that every statement obtained by the State would be work product, and the proposed changes to the Rule may result in the defendant getting less than he or she is getting under the existing Rule. The Chair said that work product could be defined.

The Vice Chair suggested that subsection (b)(1) should provide that a copy of all reports of each oral statement should be turned over. Subsection (b)(2) should clarify that material or information that is exculpatory, even oral statements, must be reduced to a writing and provided to the defendant. Subsection (b)(3) should clarify that oral interviews with witnesses that tend to impeach the witness must be reduced to a writing and turned over. The Chair commented that it is important to avoid a battle over whether evidence is exculpatory or not. Mr. Kratovil reiterated that Alternative 1, with a timeline and a definition of work product, as suggested by the Chair, would be acceptable. The Chair added that *Goldberg* may have a workable definition of work product in the criminal context that can be added to the

Rule. Ms. Nethercott inquired as to why a time limit is needed if the definition of work product is added to the Rule. The Chair answered that without it, the Rule would be burdensome if it requires memorialization of every consistent pretrial interview that occurs the weeks before trial. Inconsistent pretrial interview statements must be provided, but the prosecutor should not have to memorialize and provide every consistent interview statement.

Mr. Klein observed that by including a timeline, all statements made up to the filing of charges are presumptively not work product, but after the charges are filed, the State's Attorney decides what is work product. The Chair pointed out that it is hard to fashion the Rule to fit all cases. This is not like a civil case where everything may be presumptively work product. There are situations in which a prosecutor interviews someone who then goes before the grand jury. The prosecutor engages to some extent in an analysis, thought process, and strategy that should be protected. Mr. Klein asked whether the Rule will include the timeline, and the Chair replied affirmatively. Without request, everything up to the time that charges are filed will be turned over.

The Vice Chair asked for an example of an oral statement that may have been made to a State agent prior to the filing of charges that needs to be reduced to writing and turned over but is not exculpatory. Oral statements that are exculpatory must be turned over, but otherwise, what else would be discoverable? Mr.

Karceski answered that a police report of an interview with a witness that is not necessarily exculpatory but does report the events that occurred is an example. The Chair said that the Rule will be redrafted to try to address the concerns expressed.

Mr. Karceski pointed out that in section (a), the word "parties" has been substituted for the term "State's Attorney." By consensus, the Committee approved this change.

Mr. Cassilly expressed a concern about the proposed change that would require the State to provide to the defendant all statements made before the filing of the charging document. Many cases are in the circuit court only because a jury trial is prayed. Once the case is in the circuit court, often there is a guilty plea. If it is a same day/next day circuit court trial, or guilty plea after the jury trial prayer in the District Court, there is insufficient time to provide the additional discovery that the proposed amendments to Rule 4-263 would require. There is a large volume of these cases. The Chair responded that there is a proposed Rule change approved by the Rules Committee that will be included in the next Report to the Court of Appeals. The proposed change provides that if a jury trial is prayed in the District Court in advance of trial, then the circuit court rules apply. If a jury trial is prayed in the District Court on the day of trial, or within a certain window of time, the defendant would be entitled only to the discovery that is allowed under the District Court Rule.

Mr. Cassilly expressed an additional concern that if

discovery to unrepresented defendants, without a request, is mandated, the materials would be mailed to the defendant. Later, if an attorney is appointed, he or she may need to be given the same materials, because the defendant did not retain the materials. Mr. Cassilly suggested that the Rule could provide that once an attorney enters an appearance, it would be assumed that this includes a request for discovery. This avoids providing large amounts of discovery twice. The Chair commented that the Court of Appeals has already decided that certain discovery should be provided without a request.

Ms. Gwinn told the Committee that she has handled many murder cases in which there was witness intimidation. Discovery without request opens the door to this. She recently had sent out discovery to a defendant in a gang case, because no appearance by an attorney had been entered. The Chair questioned as to how many of the defendants in the gang cases are unrepresented. Ms. Gwinn responded that many may go for a month or two being unrepresented, because there may be a backlog in the Office of the Public Defender, as to interviewing clients or appointing panel attorneys. If there is discovery upon request, it is not burdensome for a defense attorney to file a boilerplate request asking for all discovery. To be sensitive to witness intimidation issues, the Rule should provide that all discovery is "upon request." Judge Matricciani noted that the issue is discovery upon the entry of an attorney's appearance, not discovery with or without a request. Mr. Hisim observed that it

is appropriate for a defendant who wishes to represent himself or herself to file a boilerplate discovery request. The Chair commented that if it is not a problem for the Rule to provide that discovery is available upon request, it should be written that way. The Rule should be written so that the discovery process flows as smoothly as possible.

Mr. Hisim noted that prosecutors usually are not concerned about the disclosures that they have made to defense counsel. However, from a practical standpoint, once the discovery is disclosed to the defendant, and the defendant then gets a postponement, the witnesses become fearful. The Chair responded that a protective order may be appropriate. Mr. Hisim said that it is difficult to prove that a witness needs protection. The Chair remarked that Rule 4-263 cannot be written to solve every problem. He said that subsection (b)(1) would be written with two alternatives -- discovery without a request and discovery with a request. Mr. Kratovil suggested that if discovery is effected without a request, the Rule should state that the State's Attorney will provide discovery if the defendant is represented by counsel. The Chair disagreed, noting that many defendants represent themselves.

Mr. Kratovil asked whether the last bolded paragraph in subsection (b)(4) had been suggested at the Subcommittee conference call on December 22, 2006 as simply an alternative that was not chosen. The Assistant Reporter confirmed that this was correct. Mr. Kratovil referred to the language in the first

sentence of the Committee note after subsection (b)(4) that reads "...the mental health of a witness that may impair his or her ability to testify truthfully or accurately...". He questioned as to whether a prosecutor could know this without a psychological examination of the witness. Mr. Karceski responded that this is not meant to be a request for a psychological examination. The Chair added that this is related to a determination of due diligence. He cited the case of *Clark v. State*, 364 Md. 611 (2001) in which a key witness to a murder that took place in 1982 suffered an industrial accident in 1992 before he testified. The witness filed a worker's compensation claim, and the records indicated that his injuries included memory problems. The trial court limited the inquiry regarding the witness's ability to recall accurately the events of 1982. The Court of Appeals reversed the case because of the failure to allow the defendant to cross-examine the witness about his possible memory problems. The Chair remarked that this is a due diligence matter. If the witness's memory problem is known to the State, or with the exercise of reasonable diligence should be known to the State, then it is an issue of due diligence. He pointed out that the State cannot be expected to search all worker's compensation files to get information on the mental health of witnesses.

Mr. Kratovil asked if there were a better way to make the concept more tangible. The Chair suggested that the language

could be: ...“the medical or psychiatric condition of a witness that may affect his or her ability to testify truthfully or accurately...”. The Vice Chair commented that the note refers to “examples of material and information that must be disclosed.” This means material and information that the State’s Attorney has in his or her possession. Ms. Nethercott pointed out that this is a result of cases concerning when health records can be subpoenaed. It does not refer to anyone with a mental health issue, but to those individuals with problems that may impact on memory.

Mr. Weathersbee, the State’s Attorney for Anne Arundel County, commented that he has concerns about the State having an affirmative duty to do criminal background checks. He noted that pursuant to Code, Criminal Procedure Article, §10-219, State agents are not allowed to turn over certain records to non-criminal justice units. A defense attorney is not a criminal justice unit. Mr. Cassilly added that one could read the Criminal Justice Information Systems (CJIS) law to require that a prosecutor who introduces a CJIS record in court note who is in the courtroom at the time the criminal record is revealed. CJIS records are difficult to read, and it may be unclear if something is a conviction or an acquittal. Mr. Cassilly said that he would not like to be sued for slander if he revealed a conviction that was later expunged, but CJIS did not have a record of the expungement. The Chair said that changes in the CJIS law have been discussed. Defense counsel should be able to get

information from CJIS. A defense attorney who enters an appearance is an officer of the court and should be able to receive the same information as the State. Then the prosecutor would not have to be concerned as to how much of the information he or she should turn over and if the prosecutor is going to get sued. Mr. Weathersbee added that the prosecutors agree. The Chair stated that this is a legitimate concern, and it needs to be reviewed.

The Vice Chair referred to the last sentence of the Committee note after subsection (b)(4) that reads: "The failure of the State to ask a witness whether the witness has a prior conviction that could be used to disqualify or impeach the witness does not disqualify the witness from testifying." She inquired as to whether the witness is qualified to testify when there is good evidence to lead the prosecutor to believe that the witness had a prior conviction, and the prosecutor does not ask. She suggested that this sentence be removed. Mr. Karceski responded that this is to cover a mistake if the prosecutor fails, for whatever reason, to find out this information from the witness. The language offers protection.

The Chair proposed that language be placed in the body of the Rule that would provide that the failure of the prosecutor to comply with the discovery obligations in the Rule does not automatically disqualify the witness from testifying, and the decision as to the appropriate sanctions for the violation is committed to the sound discretion of the court. By consensus,

the Committee agreed to delete the last sentence from the Committee note and add appropriate language to the body of the Rule.

The Vice Chair suggested that a cross reference to section (a) of Rule 1-201, Rules of Construction, be added to indicate the meaning of the word "shall." The Chair said that the relevant language of Rule 1-201 should be added to Rule 4-263, so it is not necessary to search for Rule 1-201.

Mr. Karceski told the Committee that he had requested that the language of proposed new subsection (e)(2) be added to the Rule. Other states have a similar provision requiring the defendant to provide the name and address of witnesses during discovery. He distributed a handout at the meeting indicating that 28 states have a similar provision. (See Appendix 2). Forty states do not require the prosecution to disclose witness statements without request, and 22 of those still require the defense to disclose its witnesses. The February 6, 2007 letter from the Office of the Public Defender stated that the defense has no obligation to produce the names and addresses of witnesses. (See Appendix 1). However, this is a reasonable requirement. Allowing the prosecution advance notice of the defense witnesses allows the fact-finder to have the best available information to make a decision. Mr. Kratovil expressed his agreement with the letter from the Office of the Public Defender insofar as it states that rebuttal and impeachment witnesses should not be included. Language could be added that

would exclude these witnesses. When the State finds about witnesses at the last minute, it is very difficult. A character witness may have a prior criminal record, and the State would have trouble finding out about it. In its letter, the Public Defender avers that witnesses would be harassed, but the same argument could be made for alibi witnesses, whose names are still required by subsection (e)(3) of the Rule to be turned over to the State. Many of the states that require the names of defense witnesses to be turned over to the State specifically exclude the name of the defendant, which is appropriate. The Rule could specifically exclude the defendant from the list of witnesses, so that the defendant would not have to announce pretrial if he or she is going to testify. Mr. Kratovil observed that the case cited by the Public Defender, *Carter v. State*, 149 Md. App. 509 (2003) did not pertain to witnesses –- it related to a "to do" list found in a defendant's cell that was the defendant's response to his attorney's request. This was determined to be work product, and turning it over to the State violated attorney-client privilege.

The Chair asked if the federal rules require the defense to turn over the names of its witnesses, and Mr. Kratovil answered that this is not required. The Chair then questioned as to whether the names of alibi witnesses must be turned over in federal cases, and Mr. Kratovil answered affirmatively. He reiterated that a majority of states already require the defense

to give the prosecution a list of witnesses, and in Maryland, the defense has to give the State a list of alibi witnesses. The Vice Chair expressed the view that it is not unreasonable to require the defense to turn over the names of its witnesses.

The Chair suggested that subsection (e)(2) should read as follows: "Provide the name and address of each person, other than the defendant, whom the defendant intends to call as a witness at the hearing or trial." The defense attorney has a duty not to call a witnesses whom the defense attorney has reason to believe will lie.

Mr. Karceski inquired about giving out the addresses of witnesses. The Vice Chair noted that subsection (b)(1) cites Code, Criminal Procedure Article, §11-205, but Mr. Karceski responded that this requirement to supply the name of witnesses does not apply to the defense. Ms. Gwinn remarked that the defendant can file a protective order to request protection of witnesses. She said that in many years of practice, she had never seen a defense attorney allege that the prosecutor or police harassed witnesses nor had she seen a motion for a protective order filed by the defense, but it is available.

Judge Matricciani asked whether the proposed change to the Rule would mean that when the defendant appears for trial and produces a witness who was not disclosed, the court could exclude that witness. Mr. Kratovil observed that if a *pro se* defendant does not list a witness even under the current Rule, there is no

sanction. The Chair commented that the defendant has the right to rest at the conclusion of the State's case-in-chief and does not have to put on any witnesses. If something happens during the State's case to change the defense's strategy, a judge may decide that the defense witness cannot be called, because the judge did not *voir dire* the jury on the issue of whether they knew the witness.

Mr. Maloney asked the representatives of the Office of the Public Defender for their views. Ms. Forster referred to the issue of tainting witnesses when their identities have to be revealed in advance. She said that when a police officer who is investigating the case arrives at the door of the witness, it can have a devastating effect on the witness. She acknowledged that this may not be a purposeful intimidation of the witness, but it may amount to intimidation, nonetheless. She told the Committee that revealing the names and addresses of witnesses up front is a problem.

Ms. Forster said that turning over statements is a problem as well. Unless there is an exception specified for the defendant who testifies, the defense would have to elect up front if the defendant is to testify. Another problem involves determining who is the agent of the defendant. Would "agent" include all defense counsel, the investigators, the law clerks, etc.? There is the issue of work product, and there has to be an exception for impeachment witnesses. An additional difficulty is

that the defense may not know all of the witnesses in advance of the trial. A judge may exclude many potential defense witnesses, because the defense did not reveal their names up front. The names were not revealed because the defense did not know about them. The Chair suggested expanding the disclosure of defense witnesses beyond alibi witnesses to require disclosure of witnesses who may be called to testify as to the defendant's character for veracity or for a relevant character trait involving the crime.

The Vice Chair said that the suggestion has been made to take out the language after the word "and" in subsection (e)(2), so that the concept of disclosing the statements made about the action by the defense witnesses is taken out. Leaving aside the issue of the witness's address for now, the defense would give the name of each person whom the defendant intends to call as a witness at the hearing or trial other than the defendant and other than impeachment witnesses. The only objection that has been stated is the police showing up at the witness's door.

Mr. Maloney observed that once a police officer comes to the home of a defense witness, possibly threatening to prosecute the witness for prior bad acts, the witness may become unavailable. Many defense counsel have often encountered this witness unavailability. To require the defense to disclose the names and addresses of the witnesses is a paradigm shift that goes far beyond the scope of the federal rules and other state courts. It is not likely that the Court of Appeals will adopt this. The

Rule should require only that the names of the character witnesses be disclosed.

Mr. Kratovil reiterated his view that it is not unreasonable for the prosecutor to be provided with the names and addresses of the defense witnesses before the trial. The Chair responded that requiring the names and addresses of fact witnesses may go too far. The danger is that it will lead to more discovery disputes in the trial courts and more issues raised in the appellate courts. The Rule should be expanded only to cover providing the names of the defendant's character witnesses, including witnesses who will testify that the defendant has a good character for veracity and character witnesses who will testify that a State's witness has a bad character. This is a substantial expansion.

Master Mahasa asked whether the Subcommittee had considered the historical rationale for making the rule different for the State and the defense regarding disclosure of witnesses. Mr. Karceski noted that the defense may not know whether it will call any witnesses until the State has finished presenting its case. At that point, the defendant elects whether or not to present a defense. Sometimes a key witness for the State testifies poorly, and the defense does not need to go forward. Judge Matricciani agreed that the Rule should be changed to provide that the defense disclose the names of character witnesses. By consensus, the Committee agreed to this change. By consensus, the Committee approved the Rule as amended. The Reporter stated that Rule 4-262, Discovery in District Court, will be conformed as needed to

the changes to Rule 4-263.

Agenda Item 2. Consideration of proposed amendments to: Rule 4-265 (Subpoena for Hearing or Trial), Rule 4-264 (Subpoena for Tangible Evidence Before Trial in Circuit Court), and Rule 4-266 (Subpoenas - Generally)

Mr. Karceski presented Rules 4-265 (Subpoena for Hearing or Trial), 4-264 (Subpoena for Tangible Evidence before Trial in Circuit Court), and 4-266 (Subpoenas – Generally) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-265 to delete language from section (a), to add a new section (c) providing that the request for a subpoena contain a designation of the materials, not privileged, which constitute or contain evidence to be produced, and to add a cross reference after section (c), as follows:

Rule 4-265. SUBPOENA FOR HEARING OR TRIAL

(a) Preparation by Clerk

On request of a party, the clerk shall prepare and issue a subpoena commanding a witness to appear to testify at a hearing or trial. Unless the court waives the time requirements of this section, the request shall be filed at least nine days before trial in circuit court, or seven days before trial in District Court, not including the day of trial and intervening Saturdays, Sundays, and holidays. The request for subpoena shall state the name, address, and county of the witness to be served, the date

and hour when the attendance of the witness is required, and the party requesting the subpoena. ~~If the request is for a subpoena duces tecum, the request also shall contain a designation of the documents, recordings, photographs, or other tangible things, not privileged, which constitute or contain evidence relevant to the action, that are to be produced by the witness.~~ At least five days before trial, not including the day of trial and intervening Saturdays, Sundays, or holidays, the clerk shall deliver the subpoena for service pursuant to Rule 4-266 (b).

(b) Preparation by Party

On request of a party entitled to the issuance of a subpoena, the clerk shall provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service. Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served at least five days before the trial or hearing.

(c) Subpoena Duces Tecum

If the subpoena is a subpoena duces tecum, the request also shall contain a designation of the documents, recordings, photographs, or other tangible things, not privileged, which constitute or contain evidence relevant to the action, that are to be produced by the witness.

Cross reference: Rule 4.4 of the Maryland Lawyers' Rules of Professional Conduct provides that a lawyer should not seek information in violation of the privacy rights of a third person.

Source: This Rule is derived from former Rule 742 b and M.D.R. 742 a.

Rule 4-265 was accompanied by the following Reporter's Note.

Russell Butler, Esq. pointed out an inadvertent omission in Rule 4-265. Section (a), pertaining to subpoenas prepared by the clerk, provides that privileged material should not be subpoenaed, but section (b), pertaining to subpoenas prepared by a party, does not contain that prohibition. Mr. Butler suggests adding a section (c) to Rule 4-265 that would contain language similar to that currently in section (a) providing that the request for a subpoena contain a designation of the materials, not privileged, which constitute or contain evidence, relevant to the action, that are to be produced by the witness. This would apply to both sections (a) and (b). Mr. Butler also suggests adding a cross reference at the end of Rules 4-264 and 4-265 that states that Rule 4.4 of the Maryland Lawyers' Rules of Professional Conduct provides that a lawyer should not seek information in violation of the privacy rights of a third person. He proposed that there be an addition to the contents of subpoenas as provided for in Rule 4-266 – a statement that material made private by law should not be produced in response to the subpoena. The cross references and proposed change to Rule 4-266 would help lawyers avoid possible ethics violations. The Criminal Subcommittee is in agreement with Mr. Butler's suggested modifications.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-264 to add a cross reference at the end of the Rule, as follows:

Rule 4-264. SUBPOENA FOR TANGIBLE EVIDENCE BEFORE TRIAL IN CIRCUIT COURT

On motion of a party, the circuit court may order the issuance of a subpoena commanding a person to produce for inspection and copying at a specified time and place before trial designated documents, recordings, photographs, or other tangible things, not privileged, which may constitute or contain evidence relevant to the action. Any response to the motion shall be filed within five days.

Cross reference: Rule 4.4 of the Maryland Lawyers' Rules of Professional Conduct provides that a lawyer should not seek information in violation of the privacy rights of a third person.

Source: This Rule is derived from former Rule 742 a.

Rule 4-264 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 4-265.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-266 (a) to add to the contents of a subpoena a notice stating that material made private by law should not be produced, as follows:

Rule 4-266. SUBPOENAS – GENERALLY

(a) Form

Every subpoena shall contain: (1) the caption of the action, (2) the name and address of the person to whom it is directed, (3) the name of the person at whose request it is issued, (4) the date, time, and place where attendance is required, and (5) a description of any documents, recordings, photographs, or other tangible things to be produced, and (6) a statement that material made private by law should not be produced in response to the subpoena.

. . .

Rule 4-266 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 4-265.

Mr. Karceski explained that Mr. Butler had pointed out that section (a) of Rule 4-265 provides that subpoenas prepared by the clerk should not contain privileged material, but section (b) pertaining to subpoenas prepared by a party does not have this restriction. To make the two sections consistent, the language pertaining to privileged material was redacted from section (a), and a new section (c) was created that applies to both sections

(a) and (b) and requires requests for subpoenas duces tecum to contain a designation of materials not privileged, which constitute or contain evidence relevant to the action, that are to be produced by the witness. Mr. Butler also suggested that a cross reference be added at the end of Rules 4-264 and 4-265 to Rule 4.4, Respect for Rights of Third Persons, which provides that a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege.

The Vice Chair expressed the opinion that this is a good change. She stated that she had a comment on another aspect of the Rule. If the clerk prepares the subpoena, the clerk delivers it for service at least five days before trial. It is likely that the subpoena is not going to be served within five days of trial if it is delivered on the fifth day. Section (b) of Rule 4-266 provides the option of a private process-server delivering the subpoena. The language of that provision states that unless impracticable, a party shall make a good faith effort to cause the subpoena to be served at least five days before trial. Whether the clerk or the lawyer prepares the subpoena, the lawyer who is asking for the subpoena ought to be making a good faith effort to see that it is served at least five days before the trial. It is not clear why there is a differentiation between the clerk and a lawyer preparing the subpoena.

Mr. Karceski observed that a party who requests that a

subpoena be prepared by the clerk needs the permission of the court if the subpoena is not requested at least nine days before trial. There could be a situation where the lawyer finds out about a certain witness four days before trial. Does a lawyer who prepares a subpoena, on a blank form pursuant to section (b) of the Rule have to go ask the court to authorize the subpoena because it is within the nine days? The Vice Chair pointed out that the Rule uses the language "unless impracticable" for subpoenas prepared by a party. It is a somewhat meaningless provision. The Chair questioned whether the time period should be 10 days for the clerk to prepare the subpoena and give it to the sheriff for service. The Vice Chair expressed the opinion that both provisions should be the same.

The Chair commented that this leads to another issue related to the Health Insurance Portability and Accounting Act (HIPAA), PL 104-191 (1996). Rules 4-264, 4-265, and 4-266 pertaining to subpoenas in criminal causes, need to be conformed to the law. The Criminal Subcommittee can look at these Rules and conform them to the civil rules in terms of HIPAA. Institutions will not honor subpoenas if the subpoena does not comply with HIPAA.

Mr. Michael asked about the time requirements in the Rule. Although a subpoena *duces tecum* in the civil arena is served 30 days before documents or other materials must be produced, Rule 4-265 has the potential for a subpoena to be served five days before production is required. Mr. Karceski remarked that in

District Court criminal cases, the trial often takes place 30 days after the defendant is charged. The Chair noted that this must have been worked out between the sheriffs and the clerks. Section (a) of Rule 4-265 provides for the request to be filed at least nine days before trial in circuit court, and seven days before trial in District Court. The clerk's office has two days to process the request for a subpoena, and the delivery is five days before the trial, but it is only being delivered for service. The service could take place the night before trial. The Criminal Subcommittee will look at these Rules in terms of time requirements and HIPAA requirements.

Mr. Shipley pointed out that the title of Rule 4-265 is "Subpoena for Hearing or Trial." However, in some places, the Rule refers to "hearing or trial" while in other places, the Rule refers only "trial." He suggested that the terminology in the Rule be reviewed so that it is consistent. The Chair said that the Rules will be remanded to the Criminal Subcommittee to consider time frames, HIPPA requirements, and terminology. The Chair thanked the guests for attending the meeting.

Agenda Item 3. Consideration of proposed new Title 7, Chapter 500 (Appeals from the Orphans' Court to the Circuit Court)

Mr. Sykes told the Committee that the Probate Subcommittee is recommending a new set of Rules pertaining to appeals from the Orphans' Court to the circuit court. The Rules are a result of the problems circuit court clerks were having when these appeals

came to the circuit court. Since there was no uniform practice among the counties, a new set of Rules was drafted. Code, Courts Article, §12-502 provides that an appeal from the Orphans' Court to the circuit court shall be heard *de novo* by the circuit court and shall be treated as if it were a new proceeding and as if there had never been a prior hearing or judgment by the Orphans' Court. The Subcommittee's goal was to regularize the proceedings. Consultants to the Subcommittee included Mr. Shipley, the former (now retired) Clerk of the Circuit Court for Carroll County and a former Rules Committee member, some Registers of Wills around the State, and other probate practitioners.

Mr. Sykes presented Rule 7-501, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-501, as follows:

Rule 7-501. APPLICABILITY

The rules in this Chapter govern appeals to a circuit court from a judgment of an orphans' court.

Committee note: In Harford County and Montgomery County, direct appeal to the Court of Special Appeals is the only method of appellate review of a judgment of the Orphans' Court. See Code, Courts Article, §12-502.

Source: This Rule is new.

Rule 7-501 was accompanied by the following Reporter's Note.

Larry W. Shipley, recently retired Clerk of Court for Carroll County, pointed out that appeals to the circuit court from the Orphans' Court have been causing some problems for the circuit court clerks, because there is no specific set of rules applying to these appeals. The captions in these cases are varied making it difficult for the clerk to docket the case appropriately. To address these problems, the Probate/Fiduciary Subcommittee with the help of the Vice Chair and Reporter has drafted a set of rules loosely based on the rules in Title 7, Chapter 100 (Appeals from the District Court to the Circuit Court), so that Orphans' Court appeals will be handled uniformly throughout the State.

Mr. Sykes explained that this is the starting point for the new Rules. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 7-502, Securing Appellate Review, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL

REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT

TO THE CIRCUIT COURT

ADD new Rule 7-502, as follows:

Rule 7-502. SECURING APPELLATE REVIEW

(a) By Notice of Appeal

Appellate review in the circuit court may be obtained only if a notice of appeal is filed with the Register of Wills within the time prescribed in Rule 7-503.

(b) Caption of Notice of Appeal

A notice of appeal shall be captioned in the following form:

IN THE ORPHANS' COURT FOR _____

IN RE ESTATE OF _____
(Name of decedent, Orphans' Court case number

APPEAL OF _____
(Name and Address)

(c) Joinder Not Required

An appeal may be filed with or without the assent or joinder of other persons.

(d) Substitution

The proper person may be substituted for a party on appeal in accordance with Rule 2-241.

(e) Stay of Proceedings

Stay of Orphans' Court proceedings in the event of appeal is governed by Code, Courts Article, §12-701 (a).

Source: This Rule is new.

Rule 7-502 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Sykes pointed out that the notice of appeal is filed with the Register of Wills. The caption provides a place for the county in which the case originated, and the name of the decedent as well as the Orphans' Court case number. Many of these cases do not have a plaintiff against a defendant. The appeal is often an appeal from the action of the Register of Wills or from an inheritance tax matter. It is sufficient to supply the name of the appellant. Section (d) pertains to substitution of a party in the appeal. Section (e) references Code, Courts Article, §12-701, which covers stays of Orphans' Court proceedings. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 7-503, Notice of Appeal – Times for Filing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-503, as follows:

Rule 7-503. NOTICE OF APPEAL – TIMES FOR FILING

(a) Generally

Except as otherwise provided in this

Rule or by law, the notice of appeal shall be filed within 30 days after entry pursuant to Rule 6-171 of the judgment or order from which the appeal is taken.

(b) Appeals by Other Party -- Within 10 Days

If one party files a timely notice of appeal, any other party may file a notice of appeal within 10 days after the date on which the first notice of appeal was served.

Source: This Rule is new.

Rule 7-503 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Sykes explained that the notice of appeal is to be filed within 30 days after entry of the judgment or order from which the appeal is taken. Section (b) is analogous to the provisions for multiple appeals in section (d) of Rule 7-104, Notice of Appeal – Times for Filing and section (e) of Rule 8-202, Notice of Appeal – Times for Filing. Mr. Leahy suggested that section (b) of the Rule should be amended to read, "...within 10 days after the date on which the first notice of appeal was served or within 30 days after entry of the judgment or order from which the appeal is taken, whichever is later." Mr. Sykes agreed. By consensus, the Committee agreed to the suggested amendment and approved the Rule as amended.

Mr. Sykes presented Rule 7-504, Notice of Appeal – Striking by Orphans' Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-504, as follows:

Rule 7-504. NOTICE OF APPEAL – STRIKING BY ORPHANS' COURT

(a) Generally

On motion or on its own initiative, the Orphans' Court may strike a notice of appeal (1) that has not been filed within the time prescribed by Rule 7-503, (2) if the Register of Wills has prepared the record pursuant to Rule 7-506 and the appellant has failed to pay the costs of preparing the record, (3) if the appellant has failed to deposit with the Register the costs of the transcript provided for in Rule 7-506 (c) or filing fee required by Rule 7-506 (d), or (4) if by reason of any other neglect on the part of the appellant the record has not been transmitted to the circuit court within the time prescribed in Rule 7-506.

(b) Notice

Before the Orphans' Court strikes a notice of appeal on its own initiative, the Register shall serve on all parties pursuant to Rule 6-125 a notice that an order striking the notice of appeal will be entered unless a response is filed within 15 days after service showing good cause why the notice of appeal should not be stricken.

Source: This Rule is derived from Rule 6-464.

Rule 7-504 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Sykes told the Committee that this Rule is analogous to Rule 7-105, Striking of Notice of Appeal by District Court and Rule 8-203, Striking of Notice of Appeal or Application for Leave to Appeal by Lower Court. The Rule requires the parties to show good cause for not striking an appeal after a motion is filed to strike the appeal or the Orphans' Court strikes the appeal.

Mr. Sykes presented Rule 7-505, Mode of Appeal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-505, as follows:

Rule 7-505. MODE OF APPEAL

An appeal from an orphans' court to a circuit court shall proceed in accordance with the Rules governing cases instituted in the circuit court. The form and sufficiency of pleadings in the record on appeal are governed by the rules applicable in the Orphans' Court.

Cross reference: Code, Courts Article, §12-502.

Source: This Rule is new.

Rule 7-505 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 7-501.

Mr. Sykes explained that although the appeal from the Orphans' Court proceeds in accordance with circuit court rules, the form and sufficiency of the pleadings in the record on appeal are governed by the Rules in the Orphans' Court. Judge Matricciani inquired as to whether discovery is available. Mr. Sykes replied affirmatively. Judge Matricciani asked if discovery is available in the Orphans' Court, and Mr. Sykes answered that it is available. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 7-506, Record, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-506, as follows:

Rule 7-506. RECORD

(a) Contents of Record

The record on appeal shall include (1) a certified copy of the docket entries in the estate proceeding, (2) a transcript, if requested, paid for, and filed by a party

together with any documentation of costs provided therewith, and (3) all original papers filed in the action in the Orphans' Court except those other items that the parties stipulate may be omitted. The Register of Wills shall append a certificate clearly identifying the papers included in the record. The Orphans' Court may order that the original papers in the action be kept in the Orphans' Court pending the appeal, in which case the Register of Wills shall transmit a certified copy of the original papers.

(b) Statement of Case in Lieu of Entire Record

If the parties agree that the questions presented by an appeal can be determined without a trial, they may sign and, upon approval by the Orphans' Court, file with the Register of Wills a statement showing how the questions arose and were decided, and setting forth only those facts or allegations that are essential to a decision of the questions. The parties are strongly encouraged to agree to such a statement. The statement of the case, the judgment or order from which the appeal is taken, and any opinion of the Orphans' Court shall constitute the record on appeal. The circuit court, however, may direct the Register to transmit all or part of the balance of the record in the Orphans' Court as a supplement to the record on appeal.

(c) Cost of Preparation

The appellant shall pay to the Register the cost of preparation of the record.

(d) Filing Fee

The appellant shall deposit with the Register of Wills the fee prescribed by Code, Courts Article, §7-202 unless the fee has been waived by an order of court or unless the appellant is represented by (1) an attorney assigned by Legal Aid Bureau, Inc. or (2) an attorney assigned by any other

legal services organization that accepts as clients only those persons meeting the financial eligibility criteria established by the Federal Legal Services Corporation or other appropriate governmental agency. The filing fee shall be in the form of cash or check or money order payable to the clerk of the circuit court.

(e) Transmittal of Record

After the receipt of all required fees, the Register of Wills shall transmit the record to the circuit court within 60 days after the date the first notice of appeal is filed. The filing fee shall be forwarded with the record to the clerk of the circuit court. For purposes of this Rule, the record is transmitted when it is delivered to the clerk of the circuit court or when it is sent by certified mail by the Register of Wills, addressed to the clerk of the circuit court. On motion or on its own initiative, the Orphans' Court or the circuit court for good cause show may shorten or extend the time for transmittal of the record.

(f) Duties of Register of Wills

(1) Preparation and Service of Docket Entries

The Register of Wills shall prepare and attach to the beginning of the record a certified copy of the docket entries in the estate proceeding. The original papers shall be fastened together in one or more file jackets and numbered consecutively, except that the pages of a transcript of testimony need not be renumbered. The Register shall serve a copy of the docket entries on each party to the appeal.

(2) Statement of Costs

The Register shall prepare and transmit with the record a statement of the costs of transcripts filed in the proceeding, if any, reported and documented, and the costs taxed against each party prior to the

transmission of the record, including the costs of all transcripts and copies, if any, of the transcripts for each of the parties.

(g) Correction or Supplementation of Record

On motion or on its own initiative, the circuit court may order that an error or omission in the record be corrected.

(h) Return of Record to Orphans' Court Pending Appeal

Upon a determination that the record should be returned to the Orphans' Court because of a matter pending in that court, the circuit court may order that the record be returned, subject to the conditions stated in the order.

Source: This Rule is new.

Rule 7-506 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Maloney questioned as to why there is a transcript when the proceedings in the circuit court are *de novo*. Mr. Michael observed that the transcript is not an integral part of the record. Mr. Sykes responded that the transcript is optional. He explained that the transcript can be used for impeachment purposes, or the parties may agree to substitute the transcript for live testimony. Mr. Maloney noted that the appeal may be delayed because of delay by the court reporter in preparing it. The transcript should not be considered part of the record, so the record can go forward without it. Mr. Sykes remarked that no transcript will be prepared unless a party requests one.

The Chair observed that even though it is not part of the record, preparation of the transcript could cause delay. He suggested that in the first sentence of section (a), the record on appeal "shall include" items (1) and (3) and "may include" item (2). Mr. Sykes said that the Registers of Wills who attended the Subcommittee meetings, as well as Mr. Shipley, felt that this was appropriate, so that the circuit court would have a full record of what occurred in the Orphans' Court. Judge Norton commented that he agreed with Mr. Maloney and Mr. Michael. A transcript may be used as an evidence tool at trial, but there are time limitations for the clerk to get the record to the circuit court. Inclusion of the transcript should be discretionary and not part of the record. Mr. Michael pointed out that under Rule 7-504 (a)(3), if the money is not paid for the transcript, the appeal is stricken. He remarked that the sanction of dismissal of the appeal for failure to pay for a transcript that the appellant did not request is inappropriate.

The Chair questioned as to whether the transcript is required in circuit court in appeals from Worker's Compensation cases. The procedure for Orphans' Court appeals should parallel this. Mr. Sykes agreed and noted that subsection (a)(3) of Rule 7-504 should be eliminated. The Chair said that nothing prohibits a party from ordering a transcript. Ms. Cathell, Register of Wills for Worcester County, observed that Rule 7-506 (a) states that a transcript is part of the record if requested. In her county, a transcript is prepared. Mr. Sykes commented

that the same delay problem exists if a party requests a transcript for evidentiary purposes.

The Vice Chair inquired as to other costs in addition to the cost of the transcript. Mr. Sykes responded that Rule 7-506 (c) and (d) require that the appellant pay the cost of preparation of the record and the filing fee. He observed that if the transcript is part of the record, ordinarily the appellant would be require to pay for it. These Rules could provide that the appellant should not be required to pay for the transcript unless the appellant is the party who wishes to have the transcript prepared. He suggested adding to Rule 7-506 (a) a sentence that states, "A party may supplement the record by paying for and filing a transcript." The Committee agreed by consensus.

Mr. Sykes said that Rule 7-506 (e) provides that the Register of Wills transmits the record to the circuit court within 60 days. The record is transmitted when it is delivered to the clerk of the circuit court or when it is sent by certified mail by the Register to the clerk. The time period can be extended by the Orphans' Court or by the circuit court.

The Vice Chair pointed out that section (e) provides that after the receipt of all the required fees, the Register shall transmit the record to the circuit court within 60 days. It would be possible that the Register would get the fees on the sixty-first day after the notice of appeal was filed. This may be inconsistent. Mr. Sykes inquired as to how to fix the inconsistency. The Chair suggested that the Rule could provide

that unless all required fees have not been paid, the Register shall transmit the record within 60 days. Mr. Sykes responded that this would mean that if the fees had been paid, the record would be transmitted. The Vice Chair said that the court reporter may say that the transcript will not be prepared until the costs are paid. Mr. Shipley remarked the clerk of a circuit court cannot delay sending a case to the Court of Special Appeals if the transcript costs have not been paid. The Chair said that the addition of the transcript to the record is conditional on someone requesting it, paying for it, and filing it.

Mr. Shipley remarked that the Clerk's office in the Circuit Court for Carroll County will not transmit the case to the Court of Special Appeals without the costs having been paid. The Chair withdrew his prior suggested language. The Chair suggested that section (e) could provide that unless the Orphans' Court has stricken the notice of appeal, the Register of Wills shall transmit the record to the circuit court within 60 days after the first notice of appeal is filed. Mr. Sykes asked about payment of fees. Mr. Gibber, a consultant to the Subcommittee, remarked that the Register certifies the record, and will not do so unless the fees are paid. He added that the fees are statutory. The Rule could be written so that the record is to be transmitted the later of 60 days after the date the first notice of appeal is filed or 10 days after the fees are received.

The Chair suggested that section (e) could read as follows: "Unless the appeal is stricken, pursuant to Rule 7-504 (a), the

Register of Wills shall transmit...". Mr. Gibber pointed out that the deadline in Rule 7-506 for transmitting the record would occur before the time requirements of Rule 7-504 pertaining to striking the appeal will have been satisfied. The Chair noted that there must be compliance with Rule 7-504 (a) and (b). He agreed with the Vice Chair that the time limit should be changed. Ms. Cathell observed that the Orphans' Court only meets once a week in some jurisdictions. Mr. Sykes noted that the last sentence of section (e) allows for shortening or extending the time for transmittal of the record. The Vice Chair suggested that section (e) could begin: "Unless shortened or extended...". The Chair pointed out that section (b) of Rule 8-412, Record – Time for Transmitting, begins as follows: "Unless a different time is fixed by order entered pursuant to section (d) of this Rule, the clerk of the court....shall transmit...". Mr. Sykes commented that the last sentence of section (e) of Rule 7-506 is the basis for shortening or extending the time, and this would substitute in the new language for the reference to "section (d) of this Rule." By consensus, the Committee agreed to conform section (e) to Rule
8-412 (b).

Mr. Sykes said that subsection (f)(1) states that the Register has to prepare a certified copy of the docket entries. Subsection (f)(2) provides that the Register prepares and transmits a statement of the costs of any transcripts and the costs taxed against each party prior to transmission of the

record.

Mr. Sykes stated that if there is a matter pending in the Orphans' Court requiring the record back, section (h) allows the circuit court to order the return of the record.

By consensus, the Committee approved the Rule as amended, approved deleting from Rule 7-504 (a)(3) the reference to the cost of the transcript, and approved Rule 7-504 as amended.

Mr. Sykes presented Rule 7-507, Docketing and Caption of Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-507, as follows:

Rule 7-507. DOCKETING AND CAPTION OF APPEALS

Each circuit court shall maintain a docket for appeals from the Orphans' Court. The appeals shall be docketed in the following form:

IN THE CIRCUIT COURT FOR _____	*	Civil
APPEAL OF _____ (Name and Address)	*	Action No._____
IN RE ESTATE OF _____ (Name of decedent, Orphans' Court case number	*	

Source: This Rule is new.

Rule 7-507 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Sykes explained that the docketing of Orphans' Court appeals is different in the circuit court than docketing of cases in the Orphans' Court. The docketing includes a civil action number. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 7-508, Dismissal of Appeal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-508, as follows:

Rule 7-508. DISMISSAL OF APPEAL

(a) On motion or on its own initiative, the circuit court may dismiss an appeal for any of the following reasons:

(1) the appeal is not allowed by law;

(2) the appeal was not properly taken pursuant to Rule 7-502;

(3) the notice of appeal was not filed with the Register of Wills within the time

prescribed by Rule 7-503;

(4) the record was not transmitted within the time prescribed by Rule 7-506, unless the court finds that the failure to transmit the record was caused by the act or omission of a judge, a Register of Wills, a clerk of court, a stenographer, or the appellee;

(5) the appeal has been withdrawn because the appellant filed a notice withdrawing the appeal or failed to appear as required for trial or any other proceeding on the appeal; or

(6) the case has become moot.

(b) Return of Record to Orphans' Court

Upon entry of the circuit court's order dismissing the appeal, the Clerk shall transmit a copy of the order to the Register of Wills. Any order of satisfaction shall be docketed in the estate proceeding. Unless the circuit court orders otherwise, the original papers included in the record shall be transmitted with the copy of the order.

(c) Reinstatement

If the appeal is reinstated, the circuit court shall notify the Register of Wills of the reinstatement and the Register shall return the record.

Source: This Rule is new.

Rule 7-508 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Sykes told the Committee that the circuit court may dismiss appeals from the Orphans' Court just as they can in ordinary civil cases. The appeal may be reinstated. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 7-509, Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-509, as follows:

Rule 7-509. HEARING

An appeal from an orphans' court to a circuit court shall be heard de novo.

Source: This Rule is new.

Rule 7-509 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Sykes noted that this is the Rule providing for the *de novo* hearing. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 7-510, Notice of Circuit Court Judgment, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-510, as follows:

Rule 7-510. NOTICE OF CIRCUIT COURT JUDGMENT

The clerk of the circuit court shall promptly send notice of the circuit court judgment to the Register of Wills, who shall enter the notice on the docket.

Source: This Rule is new.

Rule 7-510 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Sykes stated that the Rule provides for the circuit court clerk to send notice of the circuit court judgment to the Register of Wills. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 7-511, Assessment of Costs, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 500 - APPEALS FROM THE ORPHANS' COURT TO THE CIRCUIT COURT

ADD new Rule 7-511, as follows:

Rule 7-511. ASSESSMENT OF COSTS

(a) Allowance and Allocation

The circuit court, by order, may allocate costs among the parties. The prevailing party is entitled to costs unless the circuit court orders otherwise.

(b) State

Costs shall be allowed to or assessed against the State or any official, agency, or political subdivision of the State that is a party in the same manner as costs are allowed to or assessed against a private litigant.

Source: This Rule is new.

Rule 7-511 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 7-501.

Mr. Sykes told the Committee that the Rule provides that the circuit court allocates costs. Costs may be allowed to or assessed against the State. This is similar to ordinary appeal procedures. By consensus, the Committee approved the Rule as presented.

Agenda Item 4. Consideration of proposed amendments to: Rule 6-122 (Petitions), Rule 6-451 (Resignation of Personal Representative), and Rule 6-455 (Modified Administration)

Mr. Sykes presented Rule 6-122, Petitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 6-122 to eliminate duplicate language in the caption of the initial petition, to conform statement 1. to the language of Code, Estates and Trusts Article, §5-105 (b)(4), to change the word "attorney" to the word "address" in the affirmation paragraph at the end of Schedule C, to change the word "QUALIFIED" to the word "LIMITED" in the caption in section (c), to capitalize the word "ordered" in the caption in section (c), to change the word "of" to the word "for" in the Limited Order to Locate Assets in section (c), and to change the word "for" and to capitalize the word "ordered" in the Limited Order to Locate Will in section (d), as follows:

Rule 6-122. PETITIONS

(a) Initial Petition

The Initial Petition shall be in the following form:

IN THE ORPHANS' COURT FOR

(OR) _____, MARYLAND

BEFORE THE REGISTER OF WILLS FOR

IN THE ESTATE OF:

_____ ESTATE NO: _____

FOR:

[ ]	REGULAR ESTATE PETITION FOR ADMINISTRATION Estate value in excess of $30,000. (If spouse is sole heir or legatee, $50,000.) Complete and attach Schedule A.	[ ]	SMALL ESTATE PETITION FOR ADMINISTRATION Estate value of $30,000 or less. ~~(If spouse is sole~~ (If spouse is sole heir or legatee, $50,000.) Complete and attach Schedule B.	[ ]	WILL OF NO ESTATE Complete items 2 and 5	[ ]	LIMITED ORDERS Complete item 2 and attach Schedule C

The petition of:

_____ _____

Name

_____

Address

_____ _____

Name

_____

Address

_____ _____

Name

_____

Address

Each of us states:

1. I am (a) at least 18 years of age and either a citizen of the United States or a permanent resident ~~alien spouse of the decedent~~ of the United States who is the spouse of the decedent, an ancestor of the decedent, a descendant of the decedent, or a sibling of the decedent or (b) a trust company or any other corporation authorized by law to act as a personal

representative.

2. The Decedent, _____,
was domiciled in _____,
(County)
State of _____ and died on the _____
day of _____, _____, at

_____.
(place of death)

3. If the decedent was not domiciled in this county at the time of death, this is the proper office in which to file this petition because: _____

_____.

4. I am entitled to priority of appointment as personal representative of the decedent's estate pursuant to §5-104 of the Estates and Trusts Article, Annotated Code of Maryland because:

_____

_____

and I am not excluded by §5-105 (b) of the Estates and Trusts Article, Annotated Code of Maryland from serving as personal representative.

5. I have made a diligent search for the decedent's will and to the best of my knowledge:

[ ] none exists; or

[ ] the will dated _____ (including codicils, if any, dated _____) accompanying this petition is the last will and it came

into my hands in the following manner: _____

_____

_____

and the names and last known addresses of the witnesses are:

_____ _____

_____ _____

_____ _____

6. Other proceedings, if any, regarding the decedent or the estate are as follows: _____

_____

7. If any information required by paragraphs 2 through 6 has not been furnished, the reason is: _____

_____

_____

8. If appointed, I accept the duties of the office of personal representative and consent to personal jurisdiction in any action brought in this State against me as personal representative or arising out of the duties of the office of personal representative.

WHEREFORE, I request appointment as personal representative of the decedent's estate and the following relief as indicated:

[ ] that the will and codicils, if any, be admitted to administrative probate;

[ ] that the will and codicils, if any, be admitted to judicial probate;

[ ] that the will and codicils, if any, be filed only;

[ ] that only a limited order be issued;

[ ] that the following additional relief be granted: _____

_____

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

_____	_____
Attorney	Petitioner Date
_____	_____
Address	Petitioner Date
_____	_____
	Petitioner Date
_____	_____
Telephone Number	Telephone Number (optional)

IN THE ORPHANS' COURT FOR

(OR) _____, MARYLAND

BEFORE THE REGISTER OF WILLS FOR

IN THE ESTATE OF:

_____ ESTATE NO. _____

SCHEDULE - A

Regular Estate

Estimated Value of Estate and Unsecured Debts

Personal property (approximate value)..... $_____

Real property (approximate value)..... $_____

Value of property subject to:

(a) Direct Inheritance Tax of ____% ..... $_____

(b) Collateral Inheritance Tax of ____% ..... $_____

Unsecured Debts (approximate amount)..... $_____

$_____

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

_____	_____
Attorney	Petitioner Date
_____	_____
Address	Petitioner Date
_____	_____
	Petitioner Date
_____	_____
Telephone Number	Telephone Number (optional)

.....

(FOR REGISTER'S USE)

Safekeeping Wills _____ Custody Wills _____

Bond Set $_____ Deputy _____

IN THE ORPHANS' COURT FOR
(OR) _____, MARYLAND
BEFORE THE REGISTER OF WILLS FOR
IN THE ESTATE OF:
_____ ESTATE NO. _____

SCHEDULE - B

Small Estate - Assets and Debts of the Decedent

1. I have made a diligent search to discover all property and debts of the decedent and set forth below are:

(a) A listing of all real and personal property owned by the decedent, individually or as tenant in common, and of any other property to which the decedent or estate would be entitled, including descriptions, values, and how the values were determined:

_____

_____

_____

(b) A listing of all creditors and claimants and the amounts claimed, including secured*, contingent and disputed claims:

_____

_____

2. Allowable funeral expenses are $ _____; statutory family allowances are $_____; and expenses of administration claimed are $_____.

3. Attached is a List of Interested Persons.

4. After the time for filing claims has expired, subject to the statutory order of priorities, and subject to the resolution of disputed claims by the parties or the court, I shall (1) pay all proper claims**, expenses, and allowances not previously paid; (2) if necessary, sell property of the estate in order to do so; and (3) distribute the remaining assets of the estate in accordance with the will or, if none, with the intestacy laws of this State.

_____ _____

Date Personal Representative

*NOTE: §5-601 (d) of the Estates and Trusts Article, Annotated Code of Maryland "For the purpose of this subtitle - value is determined by the fair market value of property less debts of record secured by the property as of the date of death, to the extent that insurance benefits are not payable to the lien holder or secured party for the secured debt."

**NOTE: Proper claims shall be paid pursuant to the provisions of Code, Estates and Trusts Article, §§8-104 and 8-105.

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

_____ _____

Attorney Petitioner Date

_____ _____

Address Petitioner Date

_____ _____

Petitioner Date

_____ _____

Telephone Number Telephone Number (optional)

IN THE ORPHANS' COURT FOR

(OR) _____, MARYLAND

BEFORE THE REGISTER OF WILLS FOR

IN THE ESTATE OF:

_____ ESTATE NO. _____

SCHEDULE - C

Request for Limited Order

[ ] To Locate Assets

[ ] To Locate Will

1. I am entitled to the issuance of a limited order because I am:

[ ] a nominated personal representative or

[ ] a person interested in the proceedings by reason of

_____

_____

_____

_____

_____

2. The reasons(s) a limited order should be granted are:

_____

_____

_____

I solemnly affirm under the penalties of perjury that the contents of the foregoing schedule are true to the best of my knowledge, information, and belief. I further acknowledge that this order may not be used to transfer assets.

_____	_____
Attorney	Petitioner Date
_____	_____
~~Attorney~~ Address	Petitioner Date
_____	_____
	Petitioner Date
_____	_____
Telephone Number	Telephone Number (optional)

(b) Other Petitions

(1) Generally

Except as otherwise provided by the rules in this Title or permitted by the court, and unless made during a hearing or trial, a petition shall be in writing, shall set forth the relief or order sought, shall state the legal or factual basis for the relief requested, and shall be filed with the Register of Wills. The petitioner may serve on any interested person and shall serve on the personal representative and such persons as the court may direct a copy of the petition, together with a notice informing the person served of the right to file a response and the time for filing it.

(2) Response

Any response to the petition shall be filed within 20 days after service or within such shorter time as may be fixed by the court for good cause shown. A copy of the response shall be served on the petitioner and the personal representative.

(3) Order of Court

The court shall rule on the petition and enter an appropriate order.

(c) Limited Order to Locate Assets

Upon the filing of a verified petition pursuant to Rule 6-122 (a), the orphans' court may issue a limited order to search for assets titled in the sole name of a decedent. The petition shall contain the name, address, and date of death of the decedent and a statement as to why the limited order is necessary. The limited order to locate assets shall be in the following form:

IN THE ORPHANS' COURT FOR

(OR) _____, MARYLAND

BEFORE THE REGISTER OF WILLS FOR

IN THE ESTATE OF:

_____ ~~QUALIFIED~~ LIMITED ORDER NO. _____

LIMITED ORDER TO LOCATE ASSETS

Upon the foregoing petition by a person interested in the proceedings, it is this _____ day of _____, by the Orphans' Court ~~of~~ for _____(county), Maryland, ~~ordered~~ ORDERED that:

1. The following institutions shall disclose to _____ _____ the assets, and the values
(Name of petitioner)
thereof, titled in the sole name of the above decedent:

_____	_____
(Name of financial institution)	(Name of financial institution)
_____	_____
(Name of financial institution)	(Name of financial institution)
_____	_____
(Name of financial institution)	(Name of financial institution)

2. THIS ORDER MAY NOT BE USED TO TRANSFER ASSETS.

(d) Limited Order to Locate Will

Upon the filing of a verified petition pursuant to Rule 6-122 (a), the orphans' court may issue a limited order to a financial institution to enter the safe deposit box of a decedent

in the presence of the Register of Wills or the Register's authorized deputy for the sole purpose of locating the decedent's will and, if it is located, to deliver it to the Register of Wills or the authorized deputy. The limited order to locate a will shall be in the following form:

IN THE ORPHANS' COURT FOR

(OR) _____, MARYLAND

BEFORE THE REGISTER OF WILLS FOR

IN THE ESTATE OF:

_____ :~~2000~~ LIMITED ORDER NO. _____

LIMITED ORDER TO LOCATE WILL

Upon the foregoing Petition, it is this _____ day of _____, _____ by the Orphans' Court ~~of~~ for _____(County), Maryland, ~~ordered~~ ORDERED that:

_____, located at
(Name of financial institution)

_____ enter the
(Address)

safe deposit box titled in the sole name of _____

_____, in the presence of
(Name of decedent)

the Register of Wills or the Register's authorized deputy for the sole purpose of locating the decedent's will and, if the will is located, deliver it to the Register of Wills.

Committee note: This procedure is not exclusive. Banks may also rely on the procedure set forth in Code, Financial Institutions

Article, §12-603.

Cross reference: Code, Estates and Trusts Article, §§2-102 (c), 2-105, 5-201 through 5-206, and 7-402.

Rule 6-122 was accompanied by the following Reporter's Note.

> The Maryland Register of Wills Association has requested changes to Rule 6-122, most of which are "housekeeping" in nature. They include eliminating duplicate language, changing an incorrect word, capitalizing words, and changing the preposition in the caption of the petition. The Association has also asked that the language of statement 1 in the petition be changed to conform to changes to Code, Estates and Trusts Article, §5-105 (b)(4). The Probate Subcommittee agrees with these changes.

Mr. Sykes explained that in the initial petition, language has been deleted from and new language added to statement 1 to conform to changes to Code, Estates and Trusts Article, §5-105, which broadened the eligible classes of petitioners. There are some "housekeeping" changes to the Rule, including changing the word "qualified" to "limited" and capitalizing the word "ordered" in the Limited Order to Locate Assets. There is a typographical error in the Limited Order to Locate Will -- the number "2000" should be deleted. Also in the same order, the word "ordered" has been capitalized. By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented Rule 6-451, Resignation of Personal Representative, for the Committee's consideration.

AMEND Rule 6-451 by adding language to section (b) to conform to Code, Estates and Trusts Article, §6-305 (b), as follows:

Rule 6-451. RESIGNATION OF PERSONAL REPRESENTATIVE

(a) Notice

A personal representative who wishes to resign before the approval of the final account shall file with the register a statement of resignation and a certificate that a notice of intention to resign was served on all interested persons at least 20 days prior to the filing of the statement.

(b) Successor

If no one applies for appointment as successor personal representative or special administrator before the filing of the statement of resignation and an appointment is not made within the 20-day period, the resigning personal representative may apply to the court for appointment of a successor.

(c) Account of Resigning Personal Representative

Upon appointment of a successor personal representative or special administrator, the court shall order the resigning personal representative to (1) file an account with the court and deliver the property of the estate to the successor personal representative or special administrator or (2) comply with Rule 6-417 (c). The resignation is effective upon appointment of the successor or special administrator.

(d) Inventory of Successor Personal Representative

Within three months after appointment, a successor personal representative shall file either a new inventory to replace the one filed by the predecessor personal representative or a written consent to be answerable for the items as listed and valued in the inventory or retained in the most recent account filed by the predecessor.

(e) Resignation of Co-personal Representative

A co-personal representative may resign by filing with the register a statement of resignation and a certificate that a notice of intention to resign was served on all interested persons at least 20 days prior to the filing of the statement.

Cross reference: Code, Estates and Trusts Article, §§6-303, 6-305, 7-301, and 7-305.

Rule 6-451 was accompanied by the following Reporter's Note.

The Maryland Register of Wills Association has requested that language be added to section (b) of Rule 6-451 to conform to the language of Code, Estates and Trusts Article, §6-305 (b) by including a reference to the 20-day period for appointing a successor personal representative. The Probate Subcommittee is in agreement with this change.

Mr. Sykes explained that language has been added to section (b) to conform to Code, Estates and Trusts Article, §6-305, which includes the additional language in the section pertaining to appointment of the successor personal representative. By consensus, the Committee approved the Rule as presented.

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

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-455 to delete language from the Election of Personal Representative for Modified Administration form, the Consent to Election for Modified Administration form, and the Final Report form referring to the Register of Wills and Orphans' Court being prohibited from granting extensions, to conform the first paragraph of the Consent to Election for Modified Administration form to Code, Estates and Trusts Article, §5-702, and to delete the lists of persons eligible for Modified Administration and replace them with a space for stating the relationship to the decedent at the end of the Consent to Election for Modified Administration form, as follows:

Rule 6-455. MODIFIED ADMINISTRATION

(a) Generally

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

(b) Form of Election

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

BEFORE THE REGISTER OF WILLS FOR _____, MARYLAND
ESTATE OF _____ Estate No. _____

ELECTION OF PERSONAL REPRESENTATIVE FOR

MODIFIED ADMINISTRATION

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

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

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

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

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

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

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

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

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

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

Description	Estimated Value

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

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

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

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

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

_____ _____

Attorney Personal Representative

_____ _____

Address Personal Representative

_____

Address

_____
Telephone

(c) Consent

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

BEFORE THE REGISTER OF WILLS FOR _____, MARYLAND

ESTATE OF _____ Estate No. _____

CONSENT TO ELECTION FOR
MODIFIED ADMINISTRATION

I am a [ ] residuary legatee who is the decedent's personal representative or an individual or an entity exempt from inheritance tax under §7-203 (b), (e), and (f) of Code, Tax General Article, ~~[ ] trustee of a trust that is a residuary legatee, or~~ [ ] an heir of the decedent who died intestate, and I am the decedent's personal representative or an individual or an entity exempt from inheritance tax under §7-203 (b), (e), and (f), [ ] or a trustee of a trust that is a residuary legatee who is the decedent's personal representative, surviving spouse, or child. ~~I consent to Modified Administration and acknowledge that under Modified Administration:~~

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

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

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

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

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

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

_____	_____
Signature of Residuary Legatee or Heir	~~[ ] Surviving Spouse [ ] Child [ ] Residuary Legatee or Heir serving as Personal Representative~~ State Relationship to Decedent
_____	
Type or Print Name	

_____	_____
Signature of Residuary Legatee or Heir	~~[ ] Surviving Spouse [ ] Child [ ] Residuary Legatee or Heir serving as Personal Representative~~ State Relationship to Decedent
_____	
Type or Print Name	
_____	_____
Signature of Trustee	Signature of Trustee
_____	_____
Type or Print Name	Type or Print Name

(d) Final Report

(1) Filing

A verified final report shall be filed no later than 10 months after the date of the personal representative's appointment.

(2) Copies to Interested Persons

Unless an interested person waives notice of the verified final report under modified administration, the personal representative shall serve a copy of the final report on each interested person.

(3) Contents

A final report under modified administration shall be in the following form:

BEFORE THE REGISTER OF WILLS FOR _____, MARYLAND

ESTATE OF _____ Estate No. _____

Date of Death _____ Date of Appointment of Personal Representative _____

FINAL REPORT UNDER MODIFIED ADMINISTRATION
(Must be filed within 10 months after the date of appointment)

I, Personal Representative of the estate, report the following:

1. The estate continues to qualify for Modified Administration as set forth in the Election for Modified Administration on file with the Register of Wills.

2. Attached are the following Schedules and supporting attachments:

Total Schedule A: Reportable Property ..... $ _____

Total Schedule B: Payments and Disbursements ..... $(_____)

Total Schedule C: Distribution of Net Reportable Property ..... $ _____

3. I acknowledge that:

(a) Final distributions shall be made within 12 months after the date of my appointment as personal representative.

~~(b) The Register of Wills and Orphans' Court are prohibited from granting extensions of time.~~

~~(c)~~ (b) If Modified Administration is revoked, the estate shall proceed under Administrative Probate, and I will file a formal Inventory and Account, as required, until the estate is closed.

I solemnly affirm under the penalties of perjury that the contents of the foregoing are true to the best of my knowledge, information, and belief and that any property valued by me which

I have authority as personal representative to appraise has been valued completely and correctly in accordance with law.

_____	_____
Attorney Signature	Personal Representative Date
_____	_____
Address	Personal Representative Date
_____	_____
Address	Personal Representative Date
_____	
Telephone	

. . .

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

> The Maryland Register of Wills Association has suggested that language in the Election of Personal Representative for Modified Administration and the Consent to Election for Modified Administration forms referring to the Register of Wills and Orphans' Court being prohibited from granting extensions be deleted. The language proposed for deletion implies that no extensions are permitted, but Code, Estates and Trusts Article, §5-703 was amended to allow extensions of the time period for filing a final report and for making distribution with consent of the person representative and the interested persons. The Subcommittee is in agreement with the proposed deletion of the language to avoid this implication.
>
> The Association has also suggested that the Consent to Election for Modified Administration form be expanded to conform to Code, Estates and Trusts Article, §5-702, which had been changed to include individuals or entities exempt from inheritance tax under §7-203 (b), (e), and (f) of the Tax-General Article as residuary legatees or heirs at law

eligible for Modified Administration. The Subcommittee approves of this change.

Mr. Sykes told the Committee that changes to Rule 6-455 are suggested that would delete the language in the Election of Personal Representative for Modified Administration form and the Consent to Election for Modified Administration form that states that the Register of Wills and the Orphans' Court are prohibited from granting extensions. This does not conform to Code, Estates and Trusts Article §5-703, because of the implication that no extensions of time periods are permitted. However, the statute provides for consent by a personal representative and interested persons to extension of time periods for filing a final report and for making distribution to each legatee and heir. The same language in the Final Report under Modified Administration form is also proposed for deletion.

Mr. Sykes said that the Subcommittee proposes to amend the Consent to Election for Modified Administration form, because the classes of people who are the residuary legatees and the heirs at law that qualify the estate for modified administration have been changed in Code, Estates and Trusts Article, §5-702, and these classes are reflected in the form. The statute has added individuals or entities exempt from inheritance tax with respect to the decedent's estate and all trustees of each trust that is a residuary legatee to the list of classes, so these classes of people have been added to the form.

Mr. Sykes noted that the signature section at the end of the

Consent to Election for Modified Administration form has been changed, also. Instead of adding the new classes of people to the list in the signature section, the Subcommittee suggests deleting the classes of people currently listed in the form and replacing them with the language "State Relationship to Decedent." By consensus, the Committee approved the Rule as presented.

Mr. Sykes presented an additional agenda item, Rule 6-413, Claim Against Estate - Procedure, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-413 (c) by deleting certain language referring to recording of claims against a decedent's estate and by adding a certificate of service to the claim form, as follows:

Rule 6-413. CLAIM AGAINST ESTATE - PROCEDURE

. . .

(c) Form of Claim

A claim against a decedent's estate may be filed or made substantially in the following form:

In the Estate of: _____ Estate No. _____

Date _____

CLAIM AGAINST DECEDENT'S ESTATE

The claimant certifies that there is due and owing by the decedent in accordance with the attached statement of account or other basis for the claim the sum of $ _____.

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

_____	_____
Name of Claimant	Signature of claimant or person authorized to make verifications on behalf of claimant
_____	_____
Name and Title of Person Signing Claim	Address
	_____
	_____
	Telephone Number

~~FILED: _____~~

~~RECORDED:~~

~~Claims Docket Liber _____ Folio _____~~

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 200___, I [ ] delivered or [ ] mailed, first class, postage prepaid, a copy of the foregoing Claim to the following persons:

_____

(Names and addresses)

_____

_____
Signature of Claimant

Instructions:

1. This form may be filed with the Register of Wills upon payment of the filing fee provided by law. A copy must also be sent to the personal representative by the claimant.

2. If a claim is not yet due, indicate the date when it will become due. If a claim is contingent, indicate the nature of the contingency. If a claim is secured, describe the security.

. . .

Rule 6-413 was accompanied by the following Reporter's Note.

> The Honorable Charlotte K. Cathell, Register of Wills for Worcester County and President of the Maryland Register of Wills Association, pointed out that a certificate of service form should be submitted when a claim is filed against a decedent's estate. She suggests adding a Certificate of Service form to the claim form in section (c) of Rule 6-413.
>
> Ms. Cathell also suggests deleting the reference to filing and recording in the claim form in section (c) because the records are now scanned and no longer recorded.

Mr. Sykes told the Committee that the proposed changes to Rule 6-413 were distributed to the Committee at today's meeting. The changes were suggested by the Maryland Register of Wills Association. The Association recommends adding a certificate of service form at the end of the claim form. Code, Estates and Trusts Article §8-104 requires that the claimant deliver a

written statement of the claim to the personal representative. The Association proposes that the new language provide for a copy of the claim to be sent to “the following persons,” but Mr. Gibber suggests that the certificate of service provide that the a copy of the claim is to be sent to “the personal representative.” Ms. Cathell agreed to this change, and, by consensus, the Committee also agreed. By consensus, the Committee approved the Rule as amended.

The Chair said that the Committee owes a debt of gratitude to the Register of Wills Association and the consultants who were present today. He added that the Committee is grateful for the assistance they have provided over the years. He also thanked Mr. Sykes and the members of the Probate/Fiduciary Subcommittee.

The Chair stated that Agenda Item 5 would be continued until the March meeting, because Judge Dryden was not able to be present today.

The Chair adjourned the meeting.