COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held at the Sheraton International Hotel -- BWI Airport, 7032 Elm Road, Baltimore, Maryland, on April 12, 2002.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Hon. William D. Missouri
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter

The Chair convened the meeting.

Agenda Item 1. Reconsideration of proposed amendments to certain rules in Title 4, Criminal Causes: Rule 4-243 (Plea Agreements), Rule 4-342 (Sentencing – Procedure in Non-Capital Cases), and Rule 4-343 (Sentencing – Procedure in Capital Cases)

Judge Johnson presented Rule 4-243, Plea Agreements, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-243 to add certain provisions concerning notice to victims and victims' representatives, as follows:

Rule 4-243. PLEA AGREEMENTS

(a) Conditions for Agreement

(1) Terms

The defendant may enter into an agreement with the State's Attorney for a plea of guilty or nolo contendere on any proper condition, including one or more of the following:

~~(1)~~ (A) That the State's Attorney will amend the charging document to charge a specified offense or add a specified offense, or will file a new charging document;

~~(2)~~ (B) That the State's Attorney will enter a nolle prosequi pursuant to Rule 4-247 (a) or move to mark certain charges against the defendant stet on the docket pursuant to Rule 4-248 (a);

~~(3)~~ (C) That the State's Attorney will agree to the entry of a judgment of acquittal on certain charges pending against the defendant;

~~(4)~~ (D) That the State will not charge the defendant with the commission of certain other offenses;

~~(5)~~ (E) That the State's Attorney will recommend, not oppose, or make no comment to the court with respect to a particular sentence, disposition, or other judicial action;

~~(6)~~ (F) That the parties will submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration pursuant to section (c) of this Rule.

(2) Notice to Victims

The State's Attorney shall give prior notice, if practicable, of the terms of the plea agreement to each victim or victim's representative who has filed a Crime Victim Notification Request form or who has submitted a request to the State's Attorney pursuant to Code, Criminal Procedure Article, §11-104.

(b) Recommendations of State's Attorney on Sentencing

The recommendation of the State's Attorney with respect to a particular sentence, disposition, or other judicial action made pursuant to subsection ~~(a)(5)~~ (a)(1)(E) of this Rule is not binding on the court. The court shall advise the defendant at or before the time the State's Attorney makes a recommendation that the court is not bound by the recommendation, that it may impose the maximum penalties provided by law for the offense to which the defendant pleads guilty, and that imposition of a penalty more severe than the one recommended by the State's Attorney will not be grounds for withdrawal of the plea.

(c) Agreements of Sentence, Disposition, or Other Judicial Action

(1) Presentation to the Court

If a plea agreement has been reached pursuant to subsection ~~(a)(6)~~ (a)(1)(F) of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant pleads. The judge may then accept or reject the plea and, if accepted, may approve the agreement

or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.

(2) Not Binding on the Court

The agreement of the State's Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.

(3) Approval of Plea Agreement

If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement. The court shall determine whether the requirements of Code, Criminal Procedure Article, §11-104 (e) have been satisfied.

Committee note: As to whether sentence imposed pursuant to an approved plea agreement may be modified on post sentence review, see *Chertkov v. State*, 335 Md. 161 (1994).

(4) Rejection of Plea Agreement

If the plea agreement is rejected, the judge shall inform the parties of this fact and advise the defendant (A) that the court is not bound by the plea agreement; (B) that the defendant may withdraw the plea; and (C) that if the defendant persists in the plea of guilty or nolo contendere, the sentence or other disposition of the action may be less favorable than the plea agreement. If the defendant persists in the plea, the court may accept the plea of guilty only pursuant to Rule 4-242 (c) and the plea of nolo contendere only pursuant to Rule 4-242 (d).

(5) Withdrawal of Plea

If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.

(d) Record of Proceedings

All proceedings pursuant to this Rule, including the defendant's pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any of its terms would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.

Source: This Rule is derived from former Rule 733 and M.D.R. 733.

Rule 4-243 was accompanied by the following Reporter's Note.

In response to a request made by the Stephanie Roper Committee, Inc., the Rules Committee recommends the addition of new subsection (a)(2), Notice to Victims, to Rule 4-243.

The Committee also recommends that a new sentence be added to subsection (c)(3) of the Rule to require the judge who approves a plea agreement to make a determination as to whether the requirements of Code, Criminal Procedure Article, §11-104 (e) have been satisfied. The Committee rejected a proposal that would have required a postponement if the victim had not been notified of the plea agreement. The Committee was concerned that if, for example, a plea agreement is reached at a "motions hearing" which the victim did not attend, unnecessary delay would occur if a postponement is required. During the delay, the defendant could change his or her mind, the case would not have progressed

> beyond the "motions hearing" stage, and an appropriate plea agreement resolving the case may have become impossible to reach.
>
> The Committee believes that its proposed additions to the Rule will emphasize the importance of victim notification and encourage compliance with the notification requirements of Code, Criminal Procedure Article, §11-104 (e).

Judge Johnson explained that the Stephanie Roper Committee, Inc. had requested the addition of subsection (a)(2) to Rule 4-243. The new language provides for notice to victims or victims' representatives of the terms of any plea agreement involving the defendant. The Roper Committee also requested the change to subsection (c)(3), which requires the judge who approves a plea agreement to make a determination as to whether the requirements of Code, Criminal Procedure Article, §11-104 (e) have been satisfied.

The Vice Chair commented that she is not certain as to whether subsection (a)(2) necessitates a postponement for failure to comply with the requirements of Code, Criminal Procedure Article, §11-104 (e). No sanction is stated in the Rule for failure to comply. The possibility of a postponement is left open. The court can look to section (a) of Rule 1-201, Rules of Construction, the last sentence of which reads,

> If no consequences are prescribed, the court may compel compliance with the rule or may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule.

Should this Rule be cross referenced? The Chair suggested that the language of subsection (a)(2) could provide that the court may approve a plea agreement even if the requirements are not satisfied. It would be up to the judge to decide what to do. The Vice Chair pointed out that the notice requirement is conditioned upon notice being practicable. If a plea agreement is reached on the spot at a hearing, it may not be practicable to give advance notice.

Judge Heller remarked that victims would be given advance notice of the trial or hearing date, time, and place. At the proceeding, the judge could inquire if the victim or the victim's representative had been told of the plea. Mr. Sykes added that the defendant may change to a guilty plea at a motions hearing to avoid notice to the victim. The Chair commented that the victim or the victim's representative is always notified of the date of the motions hearing but may not know that at the hearing, there is the possibility that the defendant could plead guilty. The victim knows about the hearing, but the prosecutor has to go further and explain that at the motions hearing, there is the possibility of the defendant pleading guilty. Judges should be encouraged to make sure that victims receive notice, so the judges' hands are not tied.

The Chair said that his preference is for an express statement in the Rule to the effect that a judge may approve a plea agreement even if there has not been compliance with the notice requirements of the Code. Judge McAuliffe responded that

this is counter to the legislation. The Rule has a nice balance and leaves open the question of whether the judge could proceed without compliance with the Code provision. The Rule should not make a blanket statement that the judge can go forward without compliance. The Chair suggested that another way to handle this is to include language to the effect that if the requirements of the Code have not been satisfied, the court shall not approve of a plea agreement, unless the court finds that it is not practicable to comply with the requirements. The Vice Chair reiterated that the only language that needs to be added is a cross reference to Rule 1-201.

Mr. Sykes commented that a standard is needed for the judge to determine how to proceed. Judge Heller expressed the opinion that the Criminal Subcommittee was correct in not including language requiring a postponement. The burden is on the prosecutor's office to notify the victim, but this is not always easy. The victim may have moved or does not get the messages the prosecutor leaves. Mr. Sykes suggested that the judge should state on the record why he or she approves the plea agreement even though the victim is not present and may not have been notified. Mr. Brault asked if the victim can object. The Chair said that the victim may not object, but may want to be heard. Judge Norton observed that the judge will review the claim of the State's Attorney that notice to the victim was impracticable.

Mr. Hochberg commented that he reads subsection (b)(3) to mean that the judge does not have the discretion to go forward

with the proceeding. The Vice Chair said that she initially had read subsection (b)(3) that way, and she reiterated her suggestion that a cross reference to Rule 1-201 should be added at the end of the subsection. Sanctions, including postponement, for lack of compliance with the requirements of Code, Criminal Procedure Article, §11-104 (e) may be appropriate. The Chair suggested that the new language could be: "Before approving a plea agreement, the court shall determine whether the requirements of Code, Criminal Procedure Article, §11-104 (e) have been satisfied." The Vice Chair noted that an earlier draft amendment to this Rule provided that the court would have to postpone the proceeding if the Code requirements had not been satisfied.

The Reporter pointed out that language which was recently added to section (c) of Rule 4-345, Sentencing–Revisory Power of Court, is clear that the court cannot go forward under that Rule unless the notice requirements have been satisfied. That Rule is different, because the defendant is already serving a sentence, the defendant is requesting a modification of that sentence, and the notice is clear as to the purpose of the hearing. However, under Rule 4-243, a plea agreement could be reached at a hearing that began as a motions hearing. The victim may have decided that he or she did not wish to attend a motions hearing. The State's Attorney could attempt to give the best notice possible under the circumstances and call the victim to alert him or her that a plea may be worked out. Cross referencing Rule 1-201 is

the correct approach.

The Chair suggested that the new language in subsection (b)(3) be deleted. Mr. Sykes agreed with the Chair, pointing out that this language is unclear as to whether the judge has to make a finding before the proceeding can go forward. The Vice Chair inquired if this language is in the statute, and the Reporter replied that it is not.

Mr. Sykes moved to delete the new language in subsection (b)(3), the motion was seconded, and it passed unanimously. The Committee approved the Rule as amended.

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 to add a new section concerning notice to victims and victims' representatives and their right to address the court, as follows:

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

(a) Applicability

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

(b) Statutory Sentencing Procedure

When a defendant has been found guilty of murder in the first degree and the State

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

Cross reference: Code, Article 27, §§412 and 413.

(c) Judge

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

(d) Presentence Disclosures by the State's Attorney

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

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

(1) Notice and Determination

Notice of proceedings under this

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

(2) Right to Address the Court

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

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

~~(e)~~ (f) Allocution and Information in Mitigation

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

~~(f)~~ (g) Reasons

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

~~(g)~~ (h) Credit for Time Spent in Custody

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

~~(h)~~ (i) Advice to the Defendant

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

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

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

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

~~(i)~~ (j) Terms for Release

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

~~(j)~~ (k) Restitution from a Parent

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

Cross reference: Parent's liability, hearing, recording and effect, Rule 11-118.

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

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

The Stephanie Roper Committee, Inc. has requested that provisions be added to Rule 4-342 concerning notice to and the right of victims and victims' representatives to address the court at sentencing.

The Rules Committee recommends the addition to the Rule of proposed new section (e), which states that notice and the right to address the court are governed by Code, Criminal Procedure Article, §§11-104 (e) and 11-403, respectively. Additionally, the second sentence of proposed new subsection (e)(1) requires that the court determine whether the notice requirements of the statute have been satisfied.

The Rules Committee also recommends the addition of a cross reference following section (e), concerning the right of a victim or victim's representative to file an application for leave to appeal in accordance with Code, Criminal Procedure Article, §§11-103 (b) and 11-403 (e).

Mr. Sykes suggested that the second sentence of subsection (e)(1) should be deleted to be consistent with the change made to Rule 4-243. Judge McAuliffe responded that this Rule is different. The statute provides a sanction for non-compliance, which is filing an application for leave to appeal. The language of the Rule could be tightened to provide that the court may not proceed unless the requirements of the statute have been satisfied. Judge Heller expressed the view that the new language is appropriate. It reminds the prosecutor that the court will check on compliance. The Committee approved the Rule by consensus.

Judge Johnson presented Rule 4-343, Sentencing–Procedure in Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-343 to add a new section providing for the right of victims' representatives to address the jury and to conform the rule to a proposed amendment to Rule 4-342, as follows:

Rule 4-343. SENTENCING -- PROCEDURE IN CAPITAL CASES

(a) Applicability

This Rule applies whenever a sentence of death is sought under Code, Article 27, §413.

(b) Statutory Sentencing Procedure

When a defendant has been found guilty of murder in the first degree, the State has given the notice required under Code, Article 27, §412 (b)(1), and the defendant may be subject to a sentence of death, a sentencing proceeding, separate from the proceeding at which the defendant's guilt was adjudicated, shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, §413. A separate Findings and Sentencing Determination form that complies with sections ~~(g) and (h)~~ (h) and (i) of this Rule shall be completed with respect to each death for which the defendant is subject to a sentence of death.

(c) Presentence disclosures by the State's Attorney

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

(d) Reports of Defendant's Experts

Upon request by the State after the defendant has been found guilty of murder in the first degree, the defendant shall produce and permit the State to inspect and copy all written reports made in connection with the action by each expert the defendant expects to call as a witness at the sentencing proceeding, including the results of any physical or mental examination, scientific test, experiment, or comparison, and shall furnish to the State the substance of any such oral report or conclusion. The defendant shall provide this information to the State sufficiently in advance of sentencing to afford the State a reasonable opportunity to investigate the information. If the court finds that the information was

not timely provided, the court may postpone sentencing if requested by the State.

(e) Judge

Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(f) Notice and Right of Victim's Representative to Address the Court or Jury

(1) Notice and Determination

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

(2) Right to Address the Court or Jury

The right of a victim's representative to address the court during a sentencing hearing under this Rule is governed by Code, Criminal Procedure Article, §11-403. The right of a victim's representative to address the jury during a sentencing hearing under this Rule is governed by Code, Criminal Procedure Article, §11-404.

Cross reference: See Code, Criminal Procedure Article, §§11-103 (b), 11-403 (e), and 11-404 (c) concerning the right of a victim's representative to file an application for leave to appeal.

~~(f)~~ (g) Allocution

Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement, and shall afford the State the opportunity to respond.

Committee note: A defendant who elects to allocate may do so before or after the State's rebuttal closing argument. If allocution occurs after the State's rebuttal

closing argument, the State may respond to the allocution.

~~(g)~~ (h) Form of Written Findings and Determinations

Except as otherwise provided in section ~~(h)~~ (i) of this Rule, the findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proven" has been proven BEYOND A REASONABLE DOUBT and that each of those statements marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The defendant was a principal in the first degree to the murder.

_____ proven _____ not proven

2. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

_____ proven _____ not proven

3. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons, and the defendant was a principal in the second degree

who: (A) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (B) was a major participant in the murder; and (C) was actually present at the time and place of the murder.

_____ proven _____ not proven

(If one or more of the above are marked "proven," proceed to Section II. If all are marked "not proven," proceed to Section VI and enter "Life Imprisonment.")

Section II

Based upon the evidence, we unanimously find that the following statement, if marked "proven," has been proven BY A PREPONDERANCE OF THE EVIDENCE or that, if marked "not proven," it has not been proven BY A PREPONDERANCE OF THE EVIDENCE.

At the time the murder was committed, the defendant was mentally retarded.

_____ proven _____ not proven

(If the above statement is marked "proven," proceed to Section VI and enter "Life Imprisonment." If it is marked "not proven," complete Section III.)

Section III

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "proven" has

been proven BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons.

_____ proven _____ not proven

2. The defendant committed the murder at a time when confined in a correctional institution.

_____ proven _____ not proven

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

_____ proven _____ not proven

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

_____ proven _____ not proven

5. The victim was a child abducted in violation of Code, Article 27, §2.

_____ _____
proven not proven

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

_____ _____
proven not proven

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

_____ _____
proven not proven

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

_____ _____
proven not proven

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

_____ _____
proven not proven

10. The defendant committed the murder while committing or attempting to commit a carjacking, armed carjacking, robbery, arson in the first degree, rape in the first degree, or sexual offense in the first degree.

_____ _____
proven not proven

(If one or more of the above are marked "proven," complete Section IV. If all of the above are marked "not proven," do not complete Sections IV and V and proceed to Section VI and enter "Life Imprisonment.")

Section IV

Based upon the evidence, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson in the first degree, carjacking, armed carjacking, escape in the first degree, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was

substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

5. The defendant was of a youthful age at the time of the crime.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

6. The act of the defendant was not the sole proximate cause of the victim's death.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence

that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

[ ] (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

8. (a) We unanimously find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(If the jury unanimously determines in Section IV that no mitigating circumstances exist, do not complete Section V. Proceed to Section VI and enter "Death." If the jury or any juror determines that one or more mitigating circumstances exist, complete Section V.)

Section V

Each individual juror shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstance found by that individual juror to exist.

We unanimously find that the State has proven BY A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proven" in Section III outweigh the mitigating circumstances in Section IV.

_____ _____
yes no

Section VI

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "not proven," enter "Life Imprisonment."

2. If the answer in Section II is marked "proven," enter "Life Imprisonment."

3. If all of the answers in Section III are marked "not proven," enter "Life Imprisonment."

4. If Section IV was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death."

5. If Section V was completed and marked "no," enter "Life Imprisonment."

6. If Section V was completed and marked "yes," enter "Death."

We unanimously determine the sentence to be _____.

Section VII

If "Life Imprisonment" is entered in Section VI, answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of life imprisonment previously entered shall be without the possibility of parole?

_____ _____
yes no

_____ _____
Foreman Juror 7

_____ _____
Juror 2 Juror 8

_____ _____
Juror 3 Juror 9

_____ _____
Juror 4 Juror 10

_____ _____
Juror 5 Juror 11

_____ _____
Juror 6 Juror 12

or, _____
JUDGE

~~(h)~~ (i) Deletions from Form

Section II of the form set forth in section ~~(g)~~ (h) of this Rule shall not be submitted to the jury unless the issue of mental retardation is generated by the evidence. Unless the defendant requests otherwise, Section III of the form shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Article 27, §412 (b)(1) of its intention to seek a sentence of death. Section VII of the form shall not be submitted to the jury unless the State has given the notice required under Code, Article 27, §412 (b)(2) of its intention to seek a sentence of imprisonment for life without the possibility of parole.

Committee note: Omission of some aggravating circumstances from the form is not intended to preclude argument by the defendant concerning the absence of those circumstances.

~~(i)~~ (j) Advice of the Judge

At the time of imposing a sentence of death, the judge shall advise the defendant that the determination of guilt and the sentence will be reviewed automatically by the Court of Appeals, and that the sentence will be stayed pending that review. At the time of imposing a sentence of life imprisonment, the court shall cause the defendant to be advised in accordance with Rule 4-342 ~~(h)~~ (i).

Cross reference: Rule 8-306.

~~(j)~~ (k) Report of Judge

After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant
- A. Date of Birth
- B. Sex
- C. Race
- D. Address
- E. Length of Time in Community
- F. Reputation in Community
- G. Family Situation and Background
  1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
  2. Family history (describe family history including pertinent data about parents and siblings)
- H. Education
- I. Work Record
- J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
- K. Military History

L. Pertinent Physical or Mental Characteristics or History
M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)

B. Was there any evidence that the defendant was impaired by alcohol or drugs at the time of the offense?
If so describe.

C. Did the defendant know the victim prior to the offense?

Yes ..... No .....

1. If so, describe relationship.

2. Did the prior relationship in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim

1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time in community
6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty .....; guilty .....; not criminally responsible .....

B. Mode of Trial:
Court ..... Jury .....
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel

1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity - Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in the pretrial notice.

B. Was the proceeding conducted
before same judge as trial? .....
before same jury? .....
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel - If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life imprisonment
Death
Life imprisonment without the possibility of parole

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence) - began and ended
Post-trial Motions Disposed of
Sentencing Proceeding - began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of this report.

.....
Judge

CERTIFICATION

I certify that on the ..... day of ....., ... (month) year, I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

.....
Judge

Within five days after receipt of the report, the parties may

submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court and with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

Committee note: The report of the judge is filed whenever a sentence of death is sought, regardless of the sentence imposed.

Source: This Rule is derived from former Rule 772A, with the exception of sections (c) and (d), which are new, and section ~~(f)~~ (g), which is derived from former Rule 772 d and M.D.R. 772 c.

Rule 4-343 was accompanied by the following Reporter's Note.

> The Stephanie Roper Committee, Inc., has requested that provisions be added to Rule 4-343 concerning notice and the right of victims' representatives to address the court or jury at sentencing.
>
> The Rules Committee recommends proposed amendments to Rule 4-343 that track the proposed amendments to Rule 2-342, except for the inclusion of references to Code, Criminal Procedure Article, §11-404, which is applicable when the defendant has elected to be sentenced by a jury.
>
> Additionally, an internal reference in section (j) is amended to conform to the proposed addition of section (e) to Rule 4-342.

Judge Johnson explained that a change similar to the new language being proposed in Rule 4-342 is also being proposed for Rule 4-343. Judge McAuliffe suggested that a Committee note be added to the Rule concerning the right of the victim's representative to allocute. Victim impact testimony in capital cases used to be prohibited, but the restriction was reversed in

part by the U.S. Supreme Court. The concern is that the victim's representative may go too far in addressing the jury, and due process problems would result. The Committee note could be added after subsection (f)(2) and reads as follows:

> Pursuant to §11-404 of the Criminal Procedure Article, the court may hold a hearing outside the presence of the jury to determine whether a victim's representative may present an oral address to the jury and may limit any unduly prejudicial portion of the proposed oral statement. See *Payne v. Tennessee*, 501 U.S. 808 (1991) generally permitting victim's family members to provide information concerning the individuality of the victim and the impact of the crime on the victim's survivors to the extent that the presentation does not offend the Due process Clause of the Fourteenth Amendment, but leaving undisturbed a prohibition against information concerning a victim's family member's characterization of and opinions about the crime, the defendant, and the appropriate sentence.

Judge McAuliffe moved that the Committee note be added, the motion was seconded, and it passed unanimously. The Committee approved the Rule as amended.

Agenda Item 2. Consideration of certain rules changes proposed by the Discovery Subcommittee - Amendments to: Rule 2-402 (Scope of Discovery), Rule 2-411 (Deposition - Right to Take), Rule 2-412 (Deposition - Notice), Rule 2-415 (Deposition - Procedure), Rule 2-504 (Scheduling Order); Conforming amendments to: Rule 2-419 (Deposition - Use), Rule 2-432 (Motion Upon Failure to Provide Discovery), Rule 4-261 (Depositions), Rule 16-808 (Proceedings Before Commission), Form No. 3 (General Interrogatories), and Form No. 7 (Motor Vehicle Tort Interrogatories)

The Vice Chair said that a package of Rules pertaining to

discovery issues, some of which originally had been generated by the Trial Subcommittee when H. Thomas Howell, Esq. was chair or it, will be presented today. The Vice Chair presented Rules 2-402, Scope of Discovery, 2-432, Motions Upon Failure to Provide Discovery, and 16-808, Proceedings Before Commission, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-402 to add a new provision concerning time limitations on the length of depositions, to expand the scope of discovery by interrogatory concerning expert witnesses, to specify that any discovery beyond interrogatories concerning expert witnesses will consist of depositions, to add certain provisions concerning expert witness fees, and to add a Committee note, as follows:

Rule 2-402. SCOPE OF DISCOVERY

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) Generally

A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or

to the claim or defense of any other party. It is not ground for objection that the information sought is already known to or otherwise obtainable by th party seeking discovery or that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. An interrogatory or deposition question otherwise proper is not objectionable merely because the response involves an opinion or contention that relates to fact or the application of law to fact.

(b) Limitations

By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 2-411. By order, the court may also limit the number of requests for admissions under Rule 2-424. The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules if it determines that (1) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act on its own initiative after reasonable notice or pursuant to a motion under Rule 2-403.

~~(b)~~ (c) Insurance Agreement

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or

reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

~~(c)~~ (d) Trial Preparation – Materials

Subject to the provisions of sections ~~(d)~~ (e) and ~~(e)~~ (f) of this Rule, a party may obtain discovery of documents or other tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the materials are discoverable under section (a) of this Rule and that the party seeking discovery has substantial need for the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

~~(d)~~ (e) Trial Preparation – Party's or Witness' Own Statement

A party may obtain a statement concerning the action or its subject matter previously made by that party without the showing required under section ~~(c)~~ (d) of this Rule. A person who is not a party may obtain, or may authorize in writing a party to obtain, a statement concerning the action or its subject matter previously made by that person without the showing required under section ~~(c)~~ (d) of this Rule. For purposes of this section, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a

transcription thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

~~(e)~~ (f) Trial Preparation--Experts

(1) Expected to Be Called at Trial

Discovery of the findings and opinions of experts~~, otherwise discoverable under the provisions of section (a) of this Rule and acquired or developed in anticipation of litigation or for trial,~~ may be obtained ~~without the showing required under section (c) of this Rule only~~ as follows: (A) ~~A~~ a party by interrogatories may require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state 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 to produce any written report made by the expert concerning ~~those~~ the expert's findings and opinions; (B) with respect to an expert whose findings and opinions were acquired or obtain in anticipation of litigation for for trial, a party by interrogatories may also require the other party to summarize the qualifications of the expert, to produce any available list of publication written by the expert, and to state the terms of the expert's compensation; and (C) a party may ~~obtain further discovery, by deposition or otherwise, of the findings and opinions to which an expert is expected to testify~~ take the deposition of an expert expected to be called as a witness at trial~~, including any written reports made by the expert concerning those findings and opinions~~.

(2) Not Expected to Be Called at Trial

When an expert has been retained by a party in anticipation of litigation or preparation for trial but is not expected to be called as a witness at trial, discovery of the identity, findings, and opinions of the

expert may be obtained only if a showing of the kind required by section ~~(c)~~ (d) of this Rule is made.

(3) Fees and Expenses

Unless manifest injustice would result, ~~(A)~~ the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in ~~responding to discovery under subsections (e)(1)(B) and (e)(2) of this Rule; and (B) with respect to discovery obtained under subsection (e)(1)(B) of this Rule the court may require, and with respect to discovery obtained under subsection (e)(2) of this Rule the court shall require, the party seeking discovery to~~ (A) attending a deposition and for time and expenses reasonably incurred in travel to and from the deposition and (B) preparing for and responding to discovery with respect to discovery obtained under subsection (f)(2) of this Rule ~~pay the other party a fair portion of the fees and expenses reasonably incurred by he latter party in obtaining findings and opinions from experts~~. Unless manifest injustice would result, a party seeking discovery shall not be required to pay a fee to an expert witness for attending a deposition under subsection (f)(1)(B) of this Rule that exceeds the hourly rate charged by that expert for time spent preparing for the deposition, and an expert's fee for time spent preparing for a deposition under subsection (f)(1)(B) shall be charged to the party retaining the expert.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 400 c and FRCP 33 (b).
Section (b) is new and is derived from Federal Rule 26 (b)(2).
Section ~~(b)~~ (c) is new and is derived from FRCP 26 (b)(2).
Section ~~(c)~~ (d) is derived from former Rule 400 d.
Section ~~(d)~~ (e) is derived from former Rule 400 e.
Section ~~(e)~~ (f)
Subsection (1) is derived from FRCP 26 (b)(4) and former Rule 400 f.

Subsection (2) is derived from FRCP 26 (b)(4) and former Rule U12 b.

Subsection (3) is derived from FRCP 26 (b)(4).

Rule 2-402 was accompanied by the following Reporter's Note.

The Discovery Subcommittee recommends the addition of a limitations provision in section (b) allowing the court to alter the limits provided for in the Discovery Rules. This provision is derived from Federal Rule 26 (b)(2).

Rule 2-402 (f)(1) is amended in three respects. First, the language "acquired or developed in anticipation of litigation or for trial" has been deleted to eliminate the distinction between an expert who was automatically involved in the case and one specifically acquired to testify for the trial. This solves the problem in the case of *Dorsey v. Nold*, 362 Md. 241 (2001), in which the court made that distinction in terms of the medical examiner in a case who did not develop his opinion as to the cause of death in anticipation of litigation or for trial and thus did not have to be disclosed to the other side as a witness. Second, subsection (f)(1)(A) is expanded so as to enable a party to discover by interrogatory the expert's qualifications, any available list of publications written by the expert, and the terms of the expert's compensation, including hourly rates. This discovery is similar to the disclosures set forth in F.R.C.P. 26 (a)(2)(B). Third, subsection (f)(1)(B) is narrowed and clarified in order to specify that further discovery (beyond interrogatories) will consist of the deposition of the expert that another party expects to call at trial. See Fed. R. Civ. P. 26 (b)(4)(A), allowing a party to "depose any person who has been identified as an expert whose opinions may be presented at trial."

Rule 2-402 (f)(3) is amended with respect to the allocation of expert fees and

expenses. The fee and expense provisions set forth in the proposed amendment are applicable "unless manifest injustice would result." Subsection (f)(3)(A) is reorganized so as to apply only to depositions taken under subsection (f)(1)(B). Instead of the vague allowance of a fee for time spent "in responding to discovery," subsection (f)(1)(B) authorizes a fee only for time in attending the deposition and in travel to and from the deposition, plus travel expenses. Subsection (f)(3) further limits the rate that a party seeking discovery must pay to an expert for attending a deposition under subsection (f)(1)(B) to the hourly rate charged by the expert for time spent preparing for the deposition. The responsibility for the expert's fee for time spent preparing for the deposition is imposed upon the party retaining the expert. This conforms to the policy reflected in Local Rule 104.11. a. of the Rules of the United States District Court for the District of Maryland.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND 2-432 (c) for conformity with proposed amendments to Rule 2-402, as follows:

Rule 2-432. MOTIONS UPON FAILURE TO PROVIDE DISCOVERY

. . .

(c) By Nonparty to Compel Production of Statement

If a party fails to comply with a request of a nonparty made pursuant to Rule 2-402 ~~(d)~~ (e) for production of a statement, the nonparty may move for an order compelling its production.

. . .

Rule 2-432 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-432 conforms the Rule to proposed changes to Rule 2-402.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-808 (g)(1) for conformity with proposed amendments to Rule 2-402, as follows:

Rule 16-808. PROCEEDINGS BEFORE COMMISSION

. . .

(g) Exchange of Information

(1) Upon request of the judge at any time after service of charges upon the judge, Investigative Counsel shall promptly (A) allow the judge to inspect the Commission Record and to copy all evidence accumulated during the investigation and all statements as defined in Rule 2-402 ~~(d)~~ (e) and (B) provide to the judge summaries or reports of all oral statements for which contemporaneously recorded substantially

verbatim recitals do not exist, and

(2) Not later than 30 days before the date set for the hearing, Investigative Counsel and the judge shall each provide to the other a list of the names, addresses, and telephone numbers of the witnesses that each intends to call and copies of the documents that each intends to introduce in evidence at the hearing.

(3) Discovery is governed by Title 2, Chapter 400 of these Rules, except that the Chair of the Commission, rather than the court, may limit the scope of discovery, enter protective orders permitted by Rule 2-403, and resolve other discovery issues.

(4) When disability of the judge is an issue, on its own initiative or on motion for good cause, the Chair of the Commission may order the judge to submit to a mental or physical examination pursuant to Rule 2-423.

. . .

Rule 16-808 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 16-808 conforms the Rule to proposed changes to Rule 2-402.

The Vice Chair pointed out that new section (b) allows the court to impose limits on the number of depositions and interrogatories or the length of depositions. The new provision is Federal Rule of Civil Procedure (Fed. R. Civ. P.) 26 (b)(2) verbatim. The new language lists the criteria the court can use in making the decision to limit discovery. The court may act on its own initiative or pursuant to a motion under Rule 2-403.

Mr. Titus commented that an arbitrary judge can strip down

discovery routinely in scheduling orders. He expressed his disappointment that the initial conference is not more meaningful. It could provide an ideal time for the judge to find out why it is necessary to have so many depositions in the case. The Vice Chair inquired as to why the federal rule does not refer to requests for production of documents. Mr. Maloney responded that the local federal rules provide for an express limitation on production of documents. The Chair suggested that language be added to section (b) providing for limits on requests for production of documents.

Mr. Sykes questioned as to what gives parties the right to respond after reasonable notice. Does the last sentence of section (b) mean after reasonable notice and the opportunity to respond? He suggested that the language "in a particular case" be added after the words "[b]y order" and that the Rule provide that the court may act on its own initiative after reasonable notice and an opportunity for parties to be heard. The Vice Chair said that the Subcommittee was in agreement with these suggestions. She asked whether adding the phrase "an opportunity to be heard" requires that a hearing be held. Mr. Sykes answered that there will be a hearing if the parties so request or the matter could be settled in a conference. Judge McAuliffe inquired if a telephone conference would be sufficient. Due process requires notice and an opportunity to be heard.

Mr. Brault remarked that a problem exists because the number of depositions is not limited. The Rule should provide that the

court may limit the number of depositions or requests for production of documents or property and may alter the limits on interrogatories and the length of depositions. Mr. Hochberg pointed out that since Rule 2-311, Motions, does not require a hearing, it might be helpful to provide in section (b) of Rule 2-402 that no hearing is required. He inquired as to whether the interrogatories should be limited to one set. Mr. Titus replied that the 1994 amendments to Rule 2-124 allow a party to propound several sets of interrogatories to another party, provided that the total number of interrogatories to that party is not more than 30. The second set can be narrowly tailored in light of the responses to the first set.

The Vice Chair stated that the Honorable Paul V. Niemeyer, Circuit Judge of the U.S. Court of Appeals for the Fourth Circuit, who was formerly a member of the Rules Committee, spearheaded the change to the federal rules to provide that depositions should take less than seven hours. Most states are limiting the length of depositions. This Rule provides for limits in a particular case. She noted that the suggested changes to section (b) are (1) to add the language "in a particular case" near the beginning, (2) to alter the limits on the length of depositions, (3) to provide for limits on requests for production of documents, and (4) to provide in the last sentence for parties to have an opportunity to be heard. The Committee agreed by consensus to these changes.

Mr. Bowen asked about the language in subsection (3) of

section (b) which refers to: “the needs of the case,” and suggested that the word “needs” should be replaced by the word “complexity.” The Vice Chair responded that this language can be discussed by the Style Subcommittee.

Turning to subsection (f)(1), the Vice Chair told the Committee that the proposed changes were in response to the case of Dorsey v. Nold, 362 Md. 241 (2001), which held that there is no requirement for a party to identify someone as an expert witness if the witness was not obtained in anticipation of litigation or for trial. One of the changes is to subsection (f)(1)(A) providing that a party may request by interrogatory the identity of all experts that the party expects to call at trial. Subsection (f)(1)(B) provides that by interrogatory a party may require the other parties to summarize the qualifications of the expert, to produce any available list of publications written by the expert, and to state the terms of the expert’s compensation. This list applies only to experts whose findings and opinions were acquired or obtained in anticipation of litigation or for trial. It would not apply to the treating physician. Part B of subsection (f)(1) applies only to experts obtained in anticipation of litigation or for trial; parts (A) and (C) apply to all experts expected to be called at trial.

Mr. Brault commented that this flies in the face of case law. Maryland often cites the opinions of the District of Columbia. Essentially, the opinion is that the treating physician is not an expert witness, but he or she is a factual

witness who participated in the events and is being called for factual information, which may include an opinion formed at the time of the incident at issue. Changing Rule 2-402 to require parties to list any factual expert is a significant change. The Vice Chair remarked that the scope of the term "expert" is broad, and it would include a mechanic. The Subcommittee was torn about this issue. The members considered the case of Turgut v. Levine, 79 Md. App. 279 (1989), which held that a party whose alleged negligence is the subject of the complaint need not list himself or herself as an expert in response to an interrogatory in order to enable that party to express an expert opinion as to whether the conduct in question was in accordance with the recognized standard of care. Mr. Brault commented that it would be a mistake to change Rule 2-402.

The Chair said that the Subcommittee is proposing to change the Rule to try to avoid trial by ambush. The Dorsey case held that defense counsel did not have to be told that the plaintiff was calling the coroner as a witness. The coroner was not listed on voir dire lists, and this was unfair. The standard should be that an expert who is testifying to something that requires expertise should be disclosed. The Vice Chair noted that interrogatories ask for personal knowledge and for experts. It is not always clear what type of witness one is. Mr. Brault expressed some doubts about parties being ambushed.

The Chair commented that in circuit court, discovery may be a "needle in the haystack" approach. A huge list of names is

given to the other side. The criminal rule, Rule 4-263, Discovery in Circuit Court, provides that upon the defendant's request, the State's Attorney shall disclose the name and address of each person whom the State intends to call as a witness at the trial. In the Dorsey case at the pre-hearing conference, each side told the other side who the witnesses were, but the coroner was not on the plaintiff's list. The Court of Appeals held that the coroner did not have to be on the plaintiff's witness list, because he did not acquire the basis of his opinion by contact with counsel.

Judge Heller observed that identifying the treating physician or the mechanic who will be a witness in a case will help resolve problems with the case. She cautioned that because of discovery deadlines in the scheduling order, if a list of witnesses is not provided until the pretrial conference, discovery has already closed, and it would be difficult to explore witnesses for further information. Mr. Brault remarked that in the first set of interrogatories, a party could inquire as to who the fact witnesses are. Mr. Titus responded that it is difficult to ascertain the witnesses at trial from a long list of witnesses to the occurrence. Judge Missouri commented that the Dorsey case surprised people. In Prince George's County, for cases on the complex litigation track, the scheduling order includes a reminder to attorneys that the experts are not just those acquired in anticipation of litigation or trial, but anyone who is qualified as an expert. This is to avoid the Dorsey case

situation. The Chair said that some attorneys are sending their clients to the treating physician for an evaluation and opinion, and then the attorney makes the argument that the physician does not have to be listed as an expert witness because he or she is the treating physician. The goal is to eliminate this. Judge Heller remarked that there is a requirement to supplement discovery when a new expert opinion is formed. The Chair commented that judges have discretion to allow other expert testimony. The circuit court can ask a party if he or she was surprised when an unknown witness appeared. A treating physician may be in a better position than a retained expert to express an opinion.

The Vice Chair stated that the proposed language in subsection (f)(3) is not precisely the language of Fed. R. of Civ. P. 26 (a)(2), but it moves in the direction of disclosure of anyone expressing an expert opinion. Mr. Brault remarked that it is difficult to obtain an expert for a federal case and onerous to respond to discovery as to the expert. Mr. Maloney noted that the local federal rules exempted Maryland federal practice from Fed. R. Civ. P. 26 (a)(2). Rule 104.10 of the Local Rules of the U.S. District Court states that Fed. R. Civ. P. Rule 26 (a)(2) disclosures need not be provided as to hybrid fact/expert witnesses, such as treating physicians. Ms. Potter observed that in the Reporter's note, the letters identifying the sections are not correct. The Vice Chair agreed that the Reporter's note needs to be rewritten.

Mr. Maloney suggested designating treating physicians as "hybrid fact/expert witnesses," using the federal terminology. Judge Daniels remarked that trial attorneys may not understand this, so the Rule should be as explicit as possible. The Vice Chair agreed with Mr. Maloney, and she suggested that either the Rule use clarifying language or a Committee note be added. Mr. Hochberg added that a relevant case should be cited in the note defining the term "expert." Mr. Sykes observed that the federal rule does not use the word "expert." This term should be explained in the Committee note. The Vice Chair expressed her agreement, commenting that the Rule needs to be clearer. It should distinguish between anyone with an opinion and those persons retained in anticipation of litigation. The Subcommittee will rewrite the Rule, and then the Rules Committee can look at it again.

Mr. Brault cautioned that when the Rule is redrafted, the requirement that a party must be able to give an opinion should be included. The Chair reiterated that this comes from the Turgut case. Mr. Brault remarked that there is a Maryland case which allows the plaintiff to require the defendant to give an expert opinion. Mr. Sykes said that this case is State, Use of Miles v. Brainan, 224 Md. 156 (1961). Mr. Brault agreed with Mr. Maloney that parties should have to identify witnesses who participated in the events in question and who give expert opinions.

The Vice Chair inquired if the Committee's view is that a

person who is sued and who can testify as to the standard of care should be identified as a witness. The Chair said that the plaintiff should have the right to call the defendant to the stand and question him or her with respect to standard of care and treatment. The plaintiff can name the defendant as a witness. Mr. Brault noted that this would change discovery practice. The Chair disagreed, stating that this would only resolve the problem of the Dorsey case. The Court of Appeals held that the plaintiff's attorney violated the scheduling order by not naming the witness. The scheduling order is not a discovery order, so there is no sanction. Either the Rule should require that a witness who is called is to be listed, or it should provide a sanction for failure to name the witness. Mr. Brault expressed his preference for the Rule as it stands now, which is that the defendant should not be included as a witness.

The Vice Chair suggested that the federal rules should be researched on this point. Mr. Sykes pointed out that in advance of trial, the attorney may not know who has knowledge of the facts of the case and may not know who the witnesses will be until the defense has the view of the plaintiff's case. Mr. Titus commented that opinion testimony is different from fact testimony. The Rule should ask which witnesses will give opinions. The Chair inquired if this should include lay opinion evidence permitted by Rule 5-701. Judge Daniel remarked that the question of what is an opinion is a philosophical one. It is a problem to be asked to disclose every person with any opinion.

This is a slippery slope. The Chair suggested that this could be keyed to Rule 5-702, Testimony by Experts. Mr. Brault expressed the view that there should be some definition of a "hybrid" witness.

Mr. Hochberg questioned as to the justification for subsection (f)(2). Ms. Ogletree noted that this is common in condemnation proceedings. Mr. Klein cited a situation where he had learned of the existence of an expert used by the other side in a case involving an automobile fire. Although not expected to be called as a witness at trial, the expert had investigated the fire and taken photographs. This unique information enabled the experts on the other side of the case to form opinions. The disclosure of the file was required at a hearing on the matter, and the file was critical to Mr. Klein's case. Mr. Brault observed that this is an exception to the work product principle.

The Vice Chair drew the Committee's attention to subsection (f)(3). The proposed language is for the purpose of clarifying the prior language which had not been clear. The court can require that the party seeking discovery pay the expert a fee for attending the deposition, for time and expenses incurred in travel to and from the deposition, and for preparing for and responding to discovery obtained under subsection (f)(2). To obtain discovery of the identity, findings, and opinions of experts not expected to be called at trial, a party must make the showing described in section (d) of Rule 2-402. In subsection (f)(3), the references to "subsection (f)(1)(B)" are incorrect;

they should read "subsection (f)(1)(C)."

Mr. Sykes asked how the situation where an expert who has never testified and has not charged an hourly rate for time spent should be handled. The Vice Chair responded that this only applies to experts retained in anticipation of litigation or for trial. The party seeking discovery cannot be charged more than what the expert charges the party retaining the expert for time spent preparing for a deposition. Mr. Sykes expressed his disagreement with the word "hourly" before the word "rate" in the second sentence of subsection (f)(3). The Vice Chair suggested that the word "hourly" be deleted, and the Committee approved this change by consensus.

Mr. Titus suggested that the principles of the local federal rule, Rule 104.11 (b) of the Rules of the U.S. District Court for the District of Maryland, which provides that a treating physician shall not charge a fee higher than the hourly fee that he or she customarily charges for in-office patient consultation or $200 per hour (whichever is lower) for any work that he or she performs in connection with any discovery matter, should be applied to subsection (f)(3). The Vice Chair said that this relates to the treating physician, which comes up in the Subcommittee's proposed amendment to Rule 2-412, Deposition – Notice. This language is only for experts retained in anticipation of litigation or for trial, not the treating physician. Mr. Brault commented that language could be added which provides that each side pays the expenses and fees of his

or her own expert. This would eliminate game-playing.

Ms. Potter suggested that the provision pertaining to the hybrid fact/expert witness should be separated out from the language covering other expert witnesses. The Chair suggested that the part of the Rule pertaining to experts retained in anticipation of litigation or for trial should be placed in a separate section. The Rule will go back for further revision by the Discovery Subcommittee. The Vice Chair stated that Rules 2-432 and 16-808 will be amended to be consistent with Rule 2-402 after its reconsideration.

The Vice Chair presented Rule 2-411, Deposition–Right to Take, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-411 to provide for a seven-hour limitation on the length of depositions, as follows:

Rule 2-411. DEPOSITION – RIGHT TO TAKE

Any party to an action may cause the testimony of a person, whether or not a party, to be taken by deposition for the purpose of discovery or for use as evidence in the action or for both purposes. Leave of court must be obtained to take a deposition (a) before the earliest day on which any defendant's initial pleading or motion is required; ~~or~~ (b) of a duration that is longer than one day (seven hours), unless the

> parties stipulate otherwise under Rule 2-401 (g); ~~(b)~~ (c) of an individual who has previously been deposed in the same action; or ~~(c)~~ (d) of an individual confined in prison. Leave of court may be granted on such terms as the court prescribes.
>
> Source: This Rule is derived from former Rule 401 and Federal Rule 30 (d)(2).

Rule 2-411 was accompanied by the following Reporter's Note.

> The Discovery Subcommittee is proposing to add a new provision which would limit the time of a deposition to one day of seven hours with additional time allowed by the court under certain circumstances. This would make the Rule consistent with Federal Rule 30 (d)(2).

The Vice Chair commented that the average length of time for depositions across the country is three to four hours. Judge Niemeyer has opined that the maximum length of time for a deposition should be five hours in the absence of a stipulation by the parties or a court ordering otherwise. Mr. Brault suggested that the length of time for a deposition should be four hours, which is half a day. Depositions take longer when the attorneys are inexperienced. Mr. Titus remarked that sometimes it is necessary to spend more than seven hours on a deposition. Mr. Sykes added that sometimes the witnesses are slow-speaking and long-thinking. Mr. Hochberg observed that there may be three or four attorneys involved in a case.

The Chair suggested that the maximum number of hours should be eliminated from the Rule. If the party wants to be protected, he or she could seek appropriate relief from the court under Rule

2-402. The danger of having a seven-hour limitation in the Rule is that some lawyers may be inclined to expand a short deposition to the full seven hours. The Vice Chair noted that people who could finish within four or five hours may take two days if there is no limitation in the Rule. The burden should be on the person who wants to take two days for a deposition. Mr. Titus commented that seven hours strikes a fair balance. Mr. Bowen said that the parties can stipulate to more time if it is needed. The Style Subcommittee will look at this Rule. The Committee approved the Rule as presented.

The Vice Chair presented Rules 2-412, Deposition–Notice, 2-419, Deposition – Use, and 4-261, Depositions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-412 by adding a new section (e) and redesignating former section (e) as section (f), as follows:

Rule 2-412. DEPOSITION--NOTICE

. . .

(e) Treating Physician

Any party serving a notice to take the deposition of a treating physician shall confer with opposing counsel and advise the physician in the notice of the total number of hours that will be required for the

deposition, including travel time. The treating physician may not charge a fee higher than the hourly fee customarily charged for in-office patient consultation for any work performed in connection with any discovery matter or for the taking of a deposition; may not charge for any hours exceeding the time estimate set forth in the notice, provided that the deposition is completed within the estimate; and may terminate the deposition when the estimated time has elapsed.

Cross reference: Rule 2-402 (e).

[(e)**]** (f) Objection to Form

. . .

Source: This Rule is derived as follows:

. . .

Section (e) is new.
Section **[**(e)**]** (f) is derived from former Rule 412 a.

Rule 2-412 was accompanied by the following Reporter's Note.

A treating physician may be considered both a fact witness and an expert whose loss of time in deposition is recognized as deserving of compensation.

New section (e) is derived in part from section 11 (b) of Rule 104 of the Rules of the United States District Court for the District of Maryland. It is intended to require a discovering party to reimburse the physician for time spent attending and in travel to and from the deposition and to estimate the total number of hours that will be required.

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-419 (d) for conformity with proposed amendments to Rule 2-412, as follows:

Rule 2-419. DEPOSITION –- USE

. . .

(d) Objection to Admissibility

Subject to Rules 2-412 ~~(e)~~ (f), 2-415 (g) and (i), 2-416 (g), and 2-417 (c), an objection may be made at a hearing or trial to receiving in evidence all or part of a deposition for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

. . .

Rule 2-419 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-419 conforms the Rule to proposed changes to Rule 2-412.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-261 (h)(4) for conformity with proposed amendments to Rule 2-412, as follows:

Rule 4-261. DEPOSITIONS

. . .

(h) Use

(1) Substantive Evidence

At a hearing or trial, all or part of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the court finds that the witness: (A) is dead, or (B) is unable to attend or testify because of age, mental incapacity, sickness, or infirmity, or (C) is present but refuses to testify and cannot be compelled to testify, or (D) is absent from the hearing or trial and that the party offering the deposition has been unable to procure the witness' attendance by subpoena or other reasonable means, unless the absence was procured by the party offering the deposition.

(2) Impeachment

At a hearing or trial, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness to the extent permitted by the rules of evidence.

(3) Partial Use

If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce at that time any other part that in fairness ought to be considered with the part offered, so far as otherwise admissible under the rules of evidence, and any party may introduce any other part in accordance with this Rule.

(4) Objection to Admissibility

Subject to Rules 2-412 ~~(e)~~ (f), 2-415 (g) and (h), 2-416 (g), and 2-417 (c), an objection may be made at the hearing or trial to receiving in evidence all or part of a deposition for any reason that would require the exclusion of the evidence if the

witness were then present and testifying.

. . .

Rule 4-261 was accompanied by the following Reporter's Note.

> The proposed amendment to Rule 4-261 conforms the Rule to proposed changes to Rule 2-412.

The Vice Chair explained that the proposed amendment to Rule 2-412 is modeled after Local Rule 104.11 (b) of the Rules of the United States District Court for the District of Maryland. It is not exactly the same as the federal local rule, which states that a party requesting a deposition must confer with opposing counsel before advising the physician of the number of hours that will be required for the deposition. This provision is not in section (e) of Rule 2-412. Mr. Sykes observed that the language which provides that the treating physician may not charge a fee higher than the hourly fee customarily charged for in-office patient consultation puts no limit on the hourly charge. Mr. Maloney remarked that the $200 cap adopted by the federal rules solves the problem. The Vice Chair said that some attorneys charge more than $200 an hour, and setting a dollar limit on what physicians can charge to give testimony in a deposition offends her sense of fairness.

The Vice Chair stated that the physician should not be able to receive more for the deposition than he or she earns for providing patient care. Mr. Bowen commented that what the physician charges is not necessarily what the physician earns,

and he referred to physicians who work in managed care. The Vice Chair added that with managed care, the physician gets a certain amount from the insurance company, which is not related to the hourly rate the physician charges. Mr. Titus added that the fees are not based on the time the physician actually spends with a patient.

Ms. Potter suggested that in the second sentence, the language "any work performed in connection with any discovery matter or for" should be deleted. Judge Heller pointed out that the federal rule contains the language "unless ordered by the court" and the language "or $200 per hour, whichever is lower," but this language has not been used into section (e) of Rule 2-412. The Vice Chair noted that section (e) only deals with notices of deposition, and she agreed with Ms. Potter that the language "in connection with any discovery matter" should be deleted. Mr. Hochberg suggested expanding section (e) to any participation in matters connected with the case, particularly at trial.

Mr. Bowen suggested that section (e) should apply to the time the physician spends in connection with preparing for or attending a deposition. Mr. Brault cautioned that this may open the door to the physician charging any fee he or she wishes. Judge McAuliffe suggested that this could be combined with the concept of the customary charge either in the office or for discovery matters, whichever is less. Judge Daniels inquired as to whether most physicians charge an hourly fee. Mr. Titus

remarked that often physicians charge for different levels of consultation. Mr. Bowen added that physicians sometimes schedule in 15-minute increments of time, and the level of consultation often is based on the number of increments used.

Mr. Brault suggested that in place of the language in section (e) which reads "any work performed in connection with any discovery matter or for the taking of a deposition," the following language should be substituted: "for attending the deposition." The Committee agreed by consensus to this change.

Judge Missouri asked if the Subcommittee consulted any physicians about this Rule. The Vice Chair answered that, initially, representatives from the Medical and Chirurgical Faculty ("Med-Chi") were participating in Subcommittee discussions, but they stopped attending the meetings. Judge Missouri remarked that some physicians have refused to testify, because they are not being compensated enough. He suggested that Med-Chi could approve a fee schedule for the compensation of physicians. The Reporter said that the Subcommittee had previously asked Med-Chi about this.

The Chair suggested that section (e) should be tied to what the physician earns for a patient consultation in the office. Mr. Brault pointed out that this would avoid violating the Sherman Act (15 U.S.C.S. 1), which does not permit a published fee schedule. Mr. Hochberg observed that a physician is not bound by the Maryland Rules of Procedure and does not have to follow Rule 2-412. Mr. Sykes questioned as to whether it would

be unethical for an attorney to make up the difference if the physician is not willing to testify for the amount of money the Rule allows. The Vice Chair responded that the witness is the one with whom the attorney contracted. Judge Heller pointed out that section (e) pertains to the treating physician, and not the expert witness to whom Mr. Sykes referred. Ms. Potter noted that it is the "luck of the draw" as to who the treating physician is. Mr. Sykes inquired if it is fair to specify the number of hours required for the physician to testify. This includes travel time, and there may be traffic problems that cannot be foreseen. An attorney may specify seven hours for a deposition but only need three hours. Mr. Bowen said that the physician is being taken away from his or her practice, and may have cancelled seven hours of appointments. Mr. Brault remarked that if the physician had been told that the deposition would take two hours and it takes four hours, he or she could leave if necessary. The physician can ask for more money. The Committee approved Rule 2-412 as amended. The Vice Chair stated that the Rule will go to the Style Subcommittee. The Committee approved the changes to Rules 2-419 and 4-261 as presented.

The Vice Chair presented Rule 2-415, Deposition–Procedure, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-415 to allow for more liberal correction of deposition transcripts, as follows:

Rule 2-415. DEPOSITION -– PROCEDURE

. . .

(d) Correction and Signature

The officer shall submit the transcript to the deponent for correction and signing, unless waived by the deponent and the parties. Any ~~corrections~~ changes to form or substance desired by the deponent ~~to conform the transcript to the testimony~~ shall be made on a separate sheet and attached by the officer to the transcript. Corrections made by the deponent become part of the transcript unless the court orders otherwise on a motion to suppress under section (i) of this Rule. If the transcript is not signed by the deponent within 30 days after its submission, the officer shall sign it and state why the deponent has not signed. The transcript may then be used as if signed by the deponent, unless the court finds, on a motion to suppress under section (i) of this Rule, that the reason for refusal to sign requires rejection of all or part of the transcript.

. . .

Rule 2-415 was accompanied by the following Reporter's Note.

The Discovery Subcommittee recommends that section (d) of Rule 2-415 be amended to allow for more liberal correction of

deposition transcripts. The amendment conforms the Rule to Federal Rule of Civil Procedure 30 (e).

The Vice Chair explained that Rule 2-415 has been modified to conform to federal practice. Mr. Klein added that the Discovery Subcommittee was of the opinion that the proposed amendments to the Rule, which allow changes to deposition testimony, were a step in the direction of solving problems with summary judgments and sham affidavits. What is implicit in the current Rule, but is not clear, is that if someone fails to correct a deposition within 30 days, the person has waived his or her right to object later. Mr. Titus noted that this is a major departure from practice in Maryland. The question is how to prevent abuses from occurring under the proposed new procedure if one can make a statement at the deposition and change the testimony a few days later. Mr. Klein pointed out that in section (i) of the Rule, a party can object to the changes by filing a motion to suppress.

The Chair suggested that the second sentence of section (d) read as follows: "Within 30 days after its submission, the deponent shall make any changes to form or substance and attach on a separate sheet." The Vice Chair referred to the 30-day requirement, asking the outcome if the transcript is not signed within 30 days with or without the errata sheet. The Chair proposed that the fourth sentence of the Rule could begin as follows: "If the transcript is not corrected and signed within

30 days...". Mr. Brault responded that this language suggests too strongly that the transcript should be corrected. He inquired as to whether once the deposition transcript has been altered, the deponent can be impeached by reference to the original statement. There are federal cases on this issue. Mr. Klein observed that the Rule provides that someone can ask for another deposition pursuant to section (i) of the Rule, which provides this as a remedy if a motion to suppress is granted.

Ms. Potter suggested that the Rule could provide that one may file a motion pursuant to Rule 2-411. Mr. Klein expressed the view that someone should be able to correct an answer. The proposed language is a way of stating that the transcript has to be corrected immediately, which would avoid playing games later. Mr. Titus commented that the Rule needs more work. Language should be added which would state that the errata sheet will be provided to the other parties. Mr. Titus remarked that often he does not get a copy of the errata sheet when one has been filed.

Ms. Ogletree commented that an example of an error in the transcript would be a sentence which left out the word "not," entirely changing the meaning. Mr. Titus said that a statement which provides that the traffic light was green instead of red would be a major factual change. Ms. Ogletree added that in cases with complicated issues, the court reporter might not be familiar with the terms used by the parties. Judge Heller remarked that if changes to the substance of the transcript are permitted, an unscrupulous attorney may suggest that the witness

change a true response that otherwise could have lead to the granting of a motion for summary judgment against the attorney's client. The Vice Chair said that the Subcommittee was of the opinion that if transcripts can be changed, the change should be made within 30 days, and then the other parties can file a motion to suppress. Mr. Titus commented that the federal approach makes him uncomfortable. Currently in Maryland, the transcript cannot be changed to state that the traffic light was not red as stated at the deposition, but it was green. There could be a separate category for substantive corrections, which would be listed in a document that is separate from the errata sheet. There should be a set period of time in which the corrections can be made.

The Vice Chair commented that Rule 2-415 does not refer to an "errata sheet" and gives no details as to the form of the sheet containing the corrections.

Mr. Brault remarked that if someone has changed the substance of the testimony, there should be authority from the trial judge to use the original testimony for impeachment purposes. Mr. Titus suggested that there should be two separate categories of corrections -– those of substance and those of form. The Vice Chair responded that sometimes it is difficult to know whether the correction is of form or substance. The Vice Chair stated that the Rule could be expanded to clarify the type of correction. Judge Kaplan observed that the correction may be because a party misunderstood the question during the deposition. Mr. Titus added that a party may not have remembered a fact until

after the deposition.

The Chair pointed out that the danger of allowing corrections is that they will be made in every case. Mr. Titus reiterated that there should be two kinds of corrections –- typographical errors and substantive changes. The Vice Chair responded that the distinction may not be that clear. Judge McAuliffe asked if there is the opportunity for impeachment if a substantive change to the transcript is made. Ms. Potter commented that there could be an attorney-client privilege issue involved. Judge McAuliffe questioned as to what the federal procedure is. Mr. Titus noted that if one makes a substantive change, there should be an automatic right to redepose the party making the change. Mr. Brault remarked that the original testimony and any corrections made to the deposition are part of the transcript. If the transcript is corrected, which version is the actual transcript? The Chair suggested that the last sentence of section (d) could begin as follows: “The transcript, including any changes, may then be used...”. Judge Heller pointed out that Fed. R. Civ. P. 30 (e) states: “The officer ... shall append any changes made by the deponent during the period allowed.”

The Vice Chair said that the Rule should go back to the Discovery Subcommittee for two reasons: to make clear that any changes must be made within 30 days after receiving the transcript and to research whether or not someone can be impeached by the original testimony if a change in substance has

been made to the transcript. Mr. Bowen expressed the opinion that it is difficult to separate changes in form from changes in substance. He suggested that the third sentence of section (d) should begin as follows: "The sheet containing the changes made by the deponent becomes part of the transcript...". Judge Kaplan agreed that the Rule should go back to the Subcommittee, but it should contain the change suggested by Mr. Bowen. The Committee agreed by consensus with Judge Kaplan's suggestion.

Mr. Brault referred to service of the errata sheet, suggesting that copies of the sheet should be distributed to the other parties. Mr. Titus commented that he disliked the tagline of section (i), suggesting that the tagline should be "Objections to Corrections to Depositions." The standard should be that if the court concludes that the correction is substantive, the court should freely grant leave to reopen the deposition. The Vice Chair said that the Rule already provides this, and the minutes should make this clear. Rule 4-215 was remanded to the Discovery Subcommittee.

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

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 (b) to add more categories of information to the scheduling order, which information parties must

disclose and to conform the Rule to proposed amendments to Rule 2-402, as follows:

Rule 2-504. SCHEDULING ORDER

(a) Order Required

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

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

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

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule 16-202;

(B) one or more dates by which each party shall identify by name, address, and telephone number each non-expert whom the party expects to call as a witness at trial (other than solely for impeachment) separately identifying those whom the party may call only if the need arises;

(C) one or more dates by which each party shall (i) designate those witnesses whose testimony is expected to be presented by means of a deposition (other than solely for impeachment) and (ii) provide a transcript of the pertinent portions of any deposition testimony that was not taken stenographically;

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

(E) one or more dates by which each party shall identify each document or other exhibit that the party expects to offer at trial (other than solely for impeachment) separately identifying those which the party may offer only if the need arises;

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

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

~~(E)~~ (H) a date by which all dispositive motions must be filed; and

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

(2) Permitted

A scheduling order may also contain:

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

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

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

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

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

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

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

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

Source: This Rule is new.

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

The Discovery Subcommittee recommends that categories of information consistent with those of Federal Rule 26 (a)(3) be disclosed to parties, and that this be accomplished by amending the required contents of the scheduling order.

The proposed amendment to Rule 2-504 (b)(1)(B) conforms the Rule to proposed changes to Rule 2-402.

The Vice Chair explained that the amended language adds three items to the scheduling order. The first is the date by which the party identifies each non-expert witness, the second is the date by which the party must designate the witnesses whose

testimony is expected to be presented by means of a deposition, and the third is the date by which the party must identify each document or other exhibit that the party expects to offer at trial.

Ms. Potter suggested that this language should be moved to Rule 2-504.2, Pretrial Conference, because it is too difficult to provide this information as early as the time of the scheduling order. Mr. Brault pointed out that at the pretrial conference, discovery has already closed. Mr. Titus remarked that a party may not know which witnesses the party will use to support the party's position until just before the trial. The Vice Chair expressed her agreement with Ms. Potter and Mr. Titus. She said that the Rule should go back to the Subcommittee for further modification. Ms. Ogletree pointed out that in her county, there are no pretrial conferences, only settlement conferences.

The Chair stated that this new language should go into the scheduling order. Judge Heller commented that the information could be provided at the pretrial conference. If the information is not available at that time, the judge can put in the date when it will be available. Mr. Titus said that in a simple case, it is not necessary to mandate the witness and exhibit list. The Chair noted that if there is a failure to name a witness, the party gives up the right to call that witness. The other parties should not find out at voir dire who the witnesses are. Ms. Potter commented that if the new language remains in Rule 2-504, it should go into subsection (b)(2) as optional.

Ms. Ogletree pointed out that pro se litigants do not understand how this works. If there is an attorney on the other side, relevant testimony may be excluded. Mr. Klein commented that the court has to set a pretrial conference which can cover the additional information provided in the new language. Ms. Ogletree estimated that only about 1% of the cases in her county have a specific pretrial order. Putting this into Rule 2-504.2 will disadvantage the many pro se litigants. Mr. Brault asked if these litigants are excused from answering interrogatories. Ms. Ogletree answered that the domestic relations master usually allows non-complying information, because so many people do not have counsel. Her problem with the rule change concerns who the parties will call at trial. Mr. Titus expressed the opinion that the new language should be put into Rule 2-504.2. Judge Missouri added that the judge needs to know this information. Judge Heller agreed with moving the new language to Rule 2-504.2.

The Reporter questioned as to whether the language "one or more dates" should be deleted. The Vice Chair said that there seems to be a consensus as to moving the new language to Rule 2-504.2. She noted that it could be discretionary if it were in subsection (b)(2) of Rule 2-504. Ms. Ogletree expressed her agreement with moving the new language. Judge Missouri moved that the new language could be placed in subsection (b)(2) of Rule 2-504 which would make it permissive. The motion was seconded, and it failed on a vote of six to nine. The Committee agreed by consensus to place the new language in Rule 2-504.2.

After lunch, the Vice Chair presented Form No. 3, General Interrogatories, and Form No. 7, Motor Vehicle Tort Interrogatories, which have been proposed to be changed to conform to changes made today.

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

AMEND Form No. 3 -- General Interrogatories, to conform Standard General Interrogatory No. 2 to an amendment to Rule 2-402 which expands the scope of discovery by interrogatory concerning expert witnesses, as follows:

Form No. 3 - General Interrogatories

Interrogatories

1. **Identify** each **person**, other than a **person** intended to be called as an expert witness at trial, having discoverable information that tends to support a position that you have taken or intend to take in this action, including any claim for damages, and state the subject matter of the information possessed by that **person**. (Standard General Interrogatory No. 1.)

2. **Identify** each **person** whom you expect to call as an expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the findings and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and with respect to an expert whose findings and opinions were acquired in anticipation of litigation or for trial, summarize the qualifications of the expert, state the terms of the expert's compensation, and attach to your answers any available list of publications written by the expert and any written report made by the

expert concerning ~~those~~ the expert's findings and opinions. (Standard General Interrogatory No. 2.)

3. If you intend to rely upon any **documents** or other tangible things to support a position that you have taken or intend to take in the action, including any claim for damages, provide a brief description, by category and location, of all such **documents** and other tangible things, and **identify** all **persons** having possession, custody, or control of them. (Standard General Interrogatory No. 3.)

4. Itemize and show how you calculate any economic damages claimed by you in this action, and describe any non-economic damages claimed. (Standard General Interrogatory No. 4.)

5. If any **person** carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in this action or to indemnify or reimburse for payments made to satisfy the judgment, **identify** that **person**, state the applicable policy limits of any insurance agreement under which the **person** might be liable, and describe any question or challenge raised by the **person** relating to coverage for this action. (Standard General Interrogatory No. 5.)

Committee note: These interrogatories are general in nature and are designed to be used in a broad range of cases.

Form No. 3 was accompanied by the following Reporter's Note.

The proposed amendment to Standard General Interrogatory No. 2 conforms the language of that Interrogatory to the language of the proposed amendment to Rule 2-402 (f)(1)(B) which (1) allows a party by interrogatories to require the other party to summarize the qualifications of an expert, (2) to produce any available list of publications written by the expert, and (3) to state the terms of the expert's compensatory, all of which apply when the expert is one whose findings and opinions were acquired or obtained in anticipation of

litigation or for trial.

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

AMEND Form No. 7 - Motor Vehicle Tort Interrogatories, for conformity with proposed amendments to Rule 2-402, as follows:

Form 7. Motor Vehicle Tort Interrogatories.

Interrogatories

. . .

12. **Identify** all **persons** who have given you "statements," as that term is defined in Rule 2-402 ~~(d)~~ (e), concerning the action or its subject matter. For each statement, state the date on which it was given and **identify** the custodian. (Standard Motor Vehicle Tort Interrogatory No. 12.)

. . .

Form No. 7 was accompanied by the following Reporter's Note.

The proposed amendment to Form No. 7 conforms the Form to proposed changes to Rule 2-402.

The Committee agreed by consensus to the changes, which will be redrafted if Rule 2-402 is changed by the Subcommittee.

Agenda Item 3. Consideration of Source Note Updates

The Vice Chair told the Committee that while working on the third edition of her book, Maryland Rules Commentary, she noticed that in the Discovery Rules, the source notes that refer to the federal rules are no longer accurate. Should these be updated? The printed e-mail from the Reporter to the Vice Chair in the meeting materials points out that it depends on the philosophy of source notes. If the philosophy is that the Maryland Rule is based upon the federal rule as it existed on the date that the Maryland rule was adopted, then a parenthetical date that shows the year of the applicable historical version of the federal rule can be inserted. If, however, the philosophy of source notes is that they should function more like cross references to the comparable provisions in the federal rules, then all federal source notes should be updated to the current location of the comparable provision. The Chair commented that using the renumbered federal rules would not be helpful if the Maryland rule is derived from an earlier version that uses a different number.

The Reporter said that the rules' history files could be

checked to see which federal rule the Maryland Rule was taken from at the time it was drafted. Mr. Klein commented that there would be an obligation to keep the federal rule current beyond the origin. The Reporter remarked that there is no automatic source of flagging these changes. The Chair stated that the citation should be the appropriate federal rule and year, as of the adoption fo the Maryland Rule. Judge McAuliffe suggested that this could be worked into the text of the source note. The Vice Chair suggested the language, "Rule ___ is derived from the [year] version of Fed. R. Civ. P. _____. The Committee agreed by consensus with this suggestion, and the Reporter stated that source notes that contain references to the federal rules will be amended accordingly.

Agenda Item 4. Consideration of proposed amendments to Rule 9-105 (Show Cause Order; Disability of a party; Other Notice)

Ms. Ogletree presented Rule 9-105, Show Cause Order; Disability of a Party; Other Notice, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 100 - ADOPTION; GUARDIANSHIP TERMINATING PARENTAL RIGHTS

AMEND Rule 9-105 to conform to statutory changes pertaining to notice to parents of persons for whom a guardian is to be appointed, as follows:

Rule 9-105. SHOW CAUSE ORDER; DISABILITY OF A PARTY; OTHER NOTICE

. . .

(b) Persons to be Served

(1) In Adoption Proceeding

(A) Subject to paragraphs (1)(B), (1)(C), (1)(D), and (1)(E) of this section, if the petition seeks adoption, the show cause order shall be served on (i) the person to be adopted, if the person is 10 years old or older; (ii) the parents of the person to be adopted; and (iii) any other person the court directs to be served.

(B) If the parental rights of the parents of the person to be adopted have been terminated by a judgment of guardianship with the right to consent to adoption, service shall be on the guardian instead of the parents.

(C) If an attorney has been appointed to represent a parent or the person to be adopted, service shall be on the attorney instead of the parent or person to be adopted.

Cross reference: See Rule 9-106 (a) concerning appointment of attorney.

(D) If a person to be adopted has been adjudicated to be a child in need of assistance in a prior juvenile proceeding and the court is satisfied by affidavit or testimony that the petitioner has made reasonable good faith efforts to serve the show cause order on the person’s parent by both certified mail and private process at the addresses specified in Code, Family Law Article, §5-322 (b) and at any other address actually known to the petitioner as one where the parent may be found, the court shall order notice by publication as to that parent pursuant to section (c) of this Rule.

(E) The show cause order need not be

served on a person who has executed a written consent pursuant to Rule 9-102.

(2) In a Guardianship Proceeding

(A) Subject to paragraphs (2)(B), ~~and~~ (2)(C), and (2)(D) of this section, if the petition seeks guardianship, the show cause order shall be served on (i) the parents of the person for whom a guardian is to be appointed and (ii) any other person that the court directs to be served.

(B) If an attorney has been appointed to represent a parent or the person for whom a guardian is to be appointed, service shall be on the attorney instead of the parent or person for whom a guardian is to be appointed.

(C) ~~The show cause order need not be served on: (i) a parent of a person for whom a guardian is to be appointed if the~~ If a person for whom a guardian is to be appointed has been adjudicated to be a child in need of assistance in a prior juvenile proceeding and the court is satisfied by affidavit or testimony that the petitioner has made reasonable good faith efforts to serve the show cause order on the person's parent by both certified mail and private process at the addresses specified in Code, Family Law Article, §5-322 (b) and at any other address actually known to the petitioner as one where the parent may be found~~; or (ii) a person who has executed a written consent pursuant to Rule 9-102~~, the court shall order notice by publication as to that parent pursuant to section (c) of this Rule.

(D) The show cause order need not be served on a person who has executed a written consent pursuant to Rule 9-102.

(c) Method of Service

Except as otherwise provided in this Rule, the show cause order shall be served in the manner provided by Rule 2-121. If the court is satisfied by affidavit or testimony that the petitioner or a parent, after

reasonable efforts made in good faith, has been unable to ascertain the identity or whereabouts of a parent entitled to service under section (b) of this Rule, the court may order, as to that parent, that the show cause order be published at least one time in one or more newspapers of general circulation published in the county in which the petition is filed and, if different, in the county of that parent's last known address. When a show cause order is published, unless the court orders otherwise, the show cause order shall identify the individual who is the subject of the proceeding only as "a child born to" followed by the name of any known parent of the child and shall set forth the month, year, county, and state of the child's birth, to the extent known.

Cross reference: See Code, Family Law Article, §5-322 (e), setting forth the efforts necessary to support a finding that a reasonable, good faith effort has been made by a local department of social services to locate a parent.

. . .

Rule 9-105 was accompanied by the following Reporter's Note.

Chapter 496, Acts of 2001 (HB 705), modified notice to parents of persons to be adopted by providing that if the person to be adopted already has been adjudicated to be a child in need of assistance and the petitioner has made good faith efforts to serve a show cause order on the parent by certified mail and private process, the court shall order notice by publication, instead of waiving notice which the previous version of the statute allowed. Publication is to be in one or more newspapers of general circulation in the county in which the petition was filed. The same modifications also apply to notice to parents of persons for whom a guardian is to be appointed, and the appropriate parallel changes to subsection (b)(2) were inadvertently omitted when the Rule was initially revised.

Ms. Ogletree explained that Rule 9-105 was changed to conform to statutory changes made last year pertaining to notice to parents of persons to be adopted. The Rule needs to be further amended, because the statutory change also applied to notice to parents of persons for whom a guardian is to be appointed, and this part of the Rule was not amended at the time of the previous change. The amendments to subsection (b)(2) conform to the amendments already made to subsection (b)(1) of the Rule. The Committee agreed by consensus to the changes to subsection (b)(2).

The Reporter said that the format of showing changes to the Rules needs to be modified, because the shading showing new language is difficult to read, particularly when a rule is e-mailed or faxed. The amendments to Rule 9-105 are presented in a proposed revised format. Instead of shading, the new language is underlined. Deleted language is shown by "strike-throughs." For rules changes, the Maryland Register uses italics for new language and brackets for deleted language. The Chair does not like brackets around deleted language, because it is difficult to tell where the deletion begins and ends. The Reporter asked if the Committee agrees with using strike-throughs to show the deletion of language and underlining to show new language. The Chair said that anything easy to read would be appropriate, and the Committee agreed.

Agenda Item 5. Consideration of proposed amendments to Rule 8.2 (Judicial and Legal Officials) of the Maryland Lawyers' Rules of Professional Conduct

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Mr. Brault presented Rule 8.2, Judicial and Legal Officials, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - THE MARYLAND RULES OF

PROFESSIONAL CONDUCT

AMEND Rule 8.2 (b) and the accompanying Comment to conform them to the language of proposed revised Canon 5B of Rule 16-813, Code of Judicial Conduct, as follows:

Rule 8.2. JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A candidate for judicial ~~position~~ office shall not make ~~or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he shall not announce in advance his conclusions of law on disputed issues to secure class support, and he shall do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination~~ pledges or promises of conduct in office other than the faithful and impartial performance of the duties of that office, shall not announce the candidate's views on disputed legal or political issues, and shall not misrepresent the identity or qualifications of the candidate or an

opponent or other fact.

COMMENT

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Code Comparison.–- With regard to Rule 8.2 (a), DR 8-102 (A) provides that "A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102 (B) provides that "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

Rule 8.2 (b) is ~~identical~~ similar to Canon ~~XXIX of the Canons and Rules of Judicial Ethics~~ 5B of Rule 16-813 of the Maryland Code of Judicial Conduct, which is applicable to judges who are candidates for judicial office. ~~Although the Maryland Disciplinary Rules have no counterpart to Rule 8.2 (b), DR 8-103 of the Model Code, adopted by the ABA after the Code was adopted in Maryland, is the same as Rule 8.2 (b) in substance.~~

Rule 8.2 was accompanied by the following Reporter's Note.

During the consideration of the revision of the Code of Judicial Conduct (Rule 16-813), M. Peter Moser, Esq., a consultant who is an expert in legal and judicial ethics, suggested that Rule 8.2 (b) should be conformed to the standards in proposed

revised Canon 5B of Rule 16-813 of the Maryland Code of Judicial Conduct pertaining to candidates for judicial office.

Mr. Brault explained that the American Bar Association changed its ethical rules for attorneys running for judicial office. The idea is to equate the ethical constraints of an attorney seeking judicial office to those of a judge seeking judicial office. The proposed new language is derived from the language of proposed revised Canon 5B of Rule 16-813 of the Maryland Code of Judicial Conduct pertaining to candidates for judicial office. This would place a judge and an attorney running for judicial office on the same footing. Mr. Sykes questioned whether the U.S. Supreme Court is addressing this issue. Mr. Brault answered that the Supreme Court is currently considering this in Republican Party v. Kelly, 247 F. 3d 854 (8th Cir. 2001), cert. granted, 122 S. Ct. 643 (2001). In that case, the lower court held that Minnesota Code of Judicial Conduct, Canon 5, which restricts candidates for judicial office from attending and speaking at partisan political gatherings and announcing their views on disputed legal and political issues, was constitutional. Judge McAuliffe pointed out that the language in the Judicial Ethics Rule is "...shall not announce the candidate's views on disputed legal or political issues likely to come before the judge." He asked why the last six words had been deleted from the new language. The Assistant Reporter said that this language had been taken out because Rule

8.2 only applies to attorneys. Judge McAuliffe expressed the view that the language should be added to Rule 8.2.

Mr. Titus asked if an attorney who is running for judge can state in his or her campaign that if the attorney is chosen as a judge, he or she will be very strict with persons charged with driving while intoxicated. Judge McAuliffe responded that a judge cannot discuss his or her views on a subject such as this. M. Peter Moser, Esq., a consultant to the General Court Administration Subcommittee who is an expert on judicial ethics, had suggested that the judicial ethics rule add the language "likely to come before the judge," and the same language should be added in to Rule 8.2. The Vice Chair suggested that the added language could be: "likely to appear before the candidate, if the candidate were elected." Mr. Brault suggested that the could be language "likely to come before the court to which the lawyer seeks to be elected." The Chair commented that this would tie the language to the judicial ethics rule.

The Chair said that a candidate who is an attorney and who steps out of line but is not elected to be a judge may face attorney discipline proceedings before the Attorney Grievance Commission. If the attorney were elected, he or she could face proceedings before the Judicial Disabilities Commission. Mr. Titus questioned whether an attorney running for judicial office can state that he or she will be more strict as to crime than some judges and will put more people in jail. Mr. Brault remarked that statements of opinion, such as that the candidate

is opposed to abortion and divorce, would cross the line as to what is proper. The Vice Chair suggested that the language "likely to come before the court to which the lawyer seeks to be elected" should be added to section (b) of Rule 8.2 to conform it to the judicial ethics rule.

Mr. Titus expressed the view that the language "disputed ... political issues" is dangerous. Mr. Maloney suggested that the language "on disputed legal or political issues" should be deleted. Judge McAuliffe pointed out that this language has already been approved in the corresponding judicial ethics rule. Mr. Brault added that it should be the same rule for both. The Committee approved by consensus the addition of language similar to "likely to come before the court to which the lawyer seeks to be elected." The Reporter said that the Style Subcommittee will revise this language.

Agenda Item 6. Reconsideration of proposed amendments to: Rule 2-510 (Subpoenas), Rule 3-510 (Subpoenas), and Rule 4-266 (Subpoenas – Generally)

Mr. Hochberg presented Rules 2-510, Subpoenas, 3-510, Subpoenas, and Rule 4-266, Subpoenas – Generally, for the Committee's consideration.

AMEND Rule 2-510 to provide additional methods of service of a subpoena, to expand the procedure for obtaining hospital records to apply to the records of all health care providers, and to add a cross reference to Code, Health-General Article, §4-306, as follows:

Rule 2-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before a master, auditor, or examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition. A subpoena shall not be used for any other purpose. If the court, on motion of a party alleging a violation of this section or on its own initiative, after affording the alleged violator a hearing, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court may impose an appropriate sanction upon the party or attorney, including an award of a reasonable attorney's fee and costs, the exclusion of evidence obtained by the subpoena, and reimbursement of any person inconvenienced for time and expenses incurred.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled

in and returned to the clerk to be signed and sealed before service. On the 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.

(c) 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, (5) a description of any documents or other tangible things to be produced, and (6) when required by Rule 2-412 (d), a notice to designate the person to testify.

(d) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 2-121 (a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney as permitted by Rule 1-321 (a). A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. 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.

Cross reference: See Code, Courts Article, §6-410, concerning service upon certain persons other than the custodian of public records named in the subpoena if the custodian is not known and cannot be ascertained after a reasonable effort.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time

specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production.

(g) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

Cross reference: For the availability of sanctions for violations of this section, see Rules 1-201 (a) and 1-341.

(h) Hospital Records

(1) A ~~hospital~~ health care provider, as defined by Code, Courts Article, §3-2A-01 (e), served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The ~~hospital~~ health care provider may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the ~~hospital~~ health care provider. The certification shall be prima facie evidence of the authenticity of the records.

(2) Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the ~~hospital~~ health care provider but need not return copies.

(3) When the actual presence of the custodian of medical records is required, the subpoena shall so state.

Cross reference: Code, Courts Article, §10-104 includes an alternative method of authenticating medical records in certain cases transferred from the District Court upon a demand for a jury trial. Code, Health-General Article, §4-306 requires that a subpoena to produce medical records without the authorization of a person in interest must be accompanied by a certification that a copy of the subpoena has been served on the person whose records are being sought or a certification that service of the subpoena has been waived by the court for good cause shown.

(i) Attachment

A witness served with a subpoena under this Rule is liable to body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former Rules 114 a and b, 115 a and 405 a 2 (b).
Section (d) is derived from former Rules 104 a and b and 116 b. Section (e) is derived from former Rule 115 b.
Section (f) is derived from FRCP 45 (d) (1).
Section (g) is derived from FRCP 45 (c) (1).
Section (h) is new.
Section (i) is derived from former Rules 114 d and 742 e.

Rule 2-510 was accompanied by the following Reporter's Note.

Amendments to Rules 2-510 and 3-510 are

being proposed to provide additional methods of serving subpoenas and to expand the procedure for obtaining hospital records to include records of all health care providers.

Proposed amendments to Rules 2-510 (d) and 3-510 (d) provide in each Rule two additional methods of serving a subpoena.

The first additional method is "as permitted by" subsection (a)(3) of Rule 2-121 or 3-121. That subsection reads as follows:

> (a) Generally
>
> Service of process may be made within this State or, when authorized by the law of this State, outside of this State . . . (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: "Restricted Delivery — show to whom, date, address of delivery." Service by certified mail under this Rule is complete upon delivery. Service outside of the state may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.

The second additional method applies to service of a subpoena on a party represented by an attorney. The proposed amendment allows service to be made on the attorney "as permitted by Rule 1-321 (a)." Rule 1-321 (a) reads as follows:

> (a) Generally
>
> Except as otherwise provided in these rules or by order of court, every pleading and other paper filed after the original pleading shall be served upon each of the parties. If service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service

upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address. Delivery of a copy within this Rule means: handing it to the attorney or to the party; or leaving it at the office of the person to be served with an individual in charge; or, if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of that person with some individual of suitable age and discretion who is residing there. Service by mail is complete upon mailing.

The Vice Chair of the Rules Committee has requested that the procedure for obtaining hospital records by subpoena in section (h) be extended to other types of records. The Trial Subcommittee in considering this issue did not want to extend the procedure to obtaining all types of records, but they feel that it would be appropriate for obtaining the records of all health care providers as defined in Code, Courts Article, §3-2A-01 (e). The Subcommittee added a cross reference to Code, Health-General Article, §4-306 so that the bar will be aware that a certificate of service must be made on the person whose records are being sought without their authorization.

AMEND Rule 3-510 to provide additional methods of service of a subpoena, to expand the procedure for obtaining hospital records to apply to the records of all health care providers, and to add a cross reference to Code, Health-General Article, §4-306, as follows:

Rule 3-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before an examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition taken pursuant to Rule 3-401 or 3-431. A subpoena shall not be used for any other purpose. If the court, on motion of a party alleging a violation of this section or on its own initiative, after affording the alleged violator a hearing, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court may impose an appropriate sanction upon the party or attorney, including an award of a reasonable attorney's fee and costs, the exclusion of evidence obtained by the subpoena, and reimbursement of any person inconvenienced for time and expenses incurred.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On the 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.

(c) 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, (5) a description of any documents or other tangible things to be produced.

(d) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 3-121 (a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney as permitted by Rule 1-321 (a). A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. 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.

Cross reference: See Code, Courts Article, §6-410, concerning service upon certain persons other than the custodian of public records named in the subpoena if the custodian is not known and cannot be ascertained after a reasonable effort.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before an examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for an order to compel the production.

(g) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

Cross reference: For the availability of

sanctions for violations of this section, see Rules 1-201 (a) and 1-341.

(h) Hospital Records

(1) A ~~hospital~~ health care provider, as defined by Code, Courts Article, §3-2A-01 (e), served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The ~~hospital~~ health care provider may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the ~~hospital~~ health care provider. The certification shall be prima facie evidence of the authenticity of the records.

(2) Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the ~~hospital~~ health care provider but need not return copies.

(3) When the actual presence of the custodian of medical records is required, the subpoena shall so state.

Cross reference: Code, Courts Article, §10-104 includes an alternative method of authenticating medical records in certain cases. Code, Health-General Article, §4-306 requires that a subpoena to produce medical records without the authorization of a person in interest must be accompanied by a

certification that a copy of the subpoena has been served on the person whose records are being sought or a certification that service of the subpoena has been waived by the court for good cause shown.

(i) Attachment

A witness served with a subpoena under this Rule is liable to body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former M.D.R. 114 a and b and 115 a.
Section (d) is derived from former M.D.R. 104 a and b and 116 b.
Section (e) is derived from former M.D.R. 115 b.
Section (f) is derived from FRCP 45 (d) (1).
Section (g) is derived from FRCP 45 (c) (1).
Section (h) is new.
Section (i) is derived from former M.D.R. 114 d and 742 e.

Rule 3-510 was accompanied by the following Reporter’s Note.

See the Reporter’s note to the proposed amendment to Rule 2-510.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-266 to provide an additional method of service of a subpoena, 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.

(b) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 2-121 (a)(3). A subpoena may be served by a sheriff of any county or by a person who is not a party and who is not less than 18 years of age, and in the District Court, if the administrative judge of the district so directs, by mail.

Cross reference: See Code, Courts Article, §6-410, concerning service upon certain persons other than the custodian of public records named in the subpoena if the custodian is not known and cannot be ascertained after a reasonable effort.

(c) Protective Order

Upon motion of a party or of the witness named in the subpoena filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may, for good cause shown, enter an order which justice requires to protect the party or witness from annoyance, embarrassment, oppression, or undue burden or expense, including one of the following:

(1) that the subpoena be quashed;

(2) that the subpoena be complied with

only at some designated time or place other than that stated in the subpoena, or before a judge, or before some other designated officer;

(3) that certain matters not be inquired into or that the scope of examination or inspection be limited to certain matters;

(4) that the examination or inspection be held with no one present except parties to the action and their counsel;

(5) that the transcript of any examination or matters produced or copies, after being sealed, not be opened or the contents be made public only by order of court; or

(6) that a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way.

(d) Attachment

A witness personally served with a subpoena under this Rule is liable to a body attachment and fine for failure to obey the subpoena without sufficient excuse. The writ of attachment may be executed by the sheriff or peace officer of any county and shall be returned to the court issuing it. The witness attached shall be taken immediately before the court if then in session. If the court is not in session, the witness shall be taken before a judicial officer of the District Court for a determination of appropriate conditions of release to ensure the witness' appearance at the next session of the court that issued the attachment.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 742 c and M.D.R. 742 b.
Section (b) is derived from former Rule 737 b and M.D.R. 737 b.
Section (c) is derived from former Rule 742 d and M.D.R. 742 c.
Section (d) is derived from former Rule 742 e and M.D.R. 742 d.

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

> The Rules Committee approved changes to Rules 2-510 and 3-510, allowing for service of subpoenas by certified mail, restricted delivery, in civil actions. A similar change to Rule 4-266 is proposed for service of subpoenas in criminal causes.
>
> The sentence, "Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney as permitted by Rule 1-321 (a)," which is proposed to be added to Rules 2-510 and 3-510 had been proposed for addition to section (b) of this Rule, but was rejected by the Committee at its June 2001 meeting. See pages 25-32 of the minutes of that meeting.

Mr. Hochberg explained that Rules 2-510, Subpoenas, and 3-510, Subpoenas, had been discussed at the May 2001 and June 2001 meetings, along with Rule 4-266, Subpoena–Generally. Two changes had been made to Rules 2-510 and 3-510. The first was to broaden the method of service of subpoenas to include service pursuant to subsection (a)(3) of Rule 2-121, Process–Service–In Personam, which permits mailing to the person to be served a copy of the subpoena by certified mail, restricted delivery. This was approved at the May 2001 Rules Committee meeting, but the issue was raised again at the June meeting. The purpose of the change is to save money because mailing is less expensive than service by the sheriff or by a private process server, which can cost from $25 to $45. If eight or ten subpoenas are being served, this can be very expensive.

The second change is allowing service on a party's attorney. Many attorneys are already accepting service of subpoenas on

behalf of clients, and there have been no problems.

The Vice Chair expressed the concern that there is no problem with the informal practice of serving a subpoena on the attorney, as long as the client and the attorney have agreed to this method. However, if the person does not appear at the hearing or trial because the subpoena was never served on the person, the person may be subject to a body attachment or to a contempt proceeding. Mr. Hochberg pointed out that other types of court orders are served by mailing to counsel. The Vice Chair cautioned that a default judgment may be entered against the party who does not appear. Mr. Hochberg noted that orders to produce discovery are served by mail, but the Vice Chair expressed the opinion that this is not a good comparison.

Judge Heller remarked that the court does not have to issue a body attachment. The Chair added that the judge can ask the attorney if he or she had notified the client who does not appear. Judge Heller commented that if a person is not represented by counsel, then he or she is personally notified. The attorney is the spokesperson for and representative of the client. Judge Missouri stated that this new procedure will not be abused. The Chair pointed out that there are ways that a party can duck or evade service, forcing the other party to incur expenses. The problem is the client who is playing games.

Turning to section (h) of Rules 2-510 and 3-510, Mr. Hochberg said that the Discovery Subcommittee proposed amending this provision to allow all health care providers, and not simply

hospitals, to produce subpoenaed records by delivering them to the clerk of the court. The Subcommittee used the definition of "health care provider" in Code, Courts Article, §3-2A-01 (e). Judge Missouri read from the statute which includes in the list of health care providers: a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, a psychologist, a licensed certified social worker-clinical, and a physical therapist. Judge Heller asked if midwives are included, since they can be the subject of lawsuits, and Mr. Brault answered that they are usually registered nurses or nurse practitioners who would be included. Mr. Hochberg added that a certificate of service would also be required, which is prima facie evidence of service, but it can be challenged.

Ms. Potter pointed out that the tagline of section (h) needs to be changed from "hospital records." Mr. Brault suggested that the tagline be "medical records." The Chair suggested that the tagline of section (h) be "records of health care providers," and the Committee agreed by consensus with this suggestion.

Mr. Hochberg pointed out that the cross reference at the end of section (h) has been expanded to refer to Code, Health-General Article, §4-306, which states that a subpoena to produce medical records without the authorization of a person in interest must be accompanied by a certification that a copy of the subpoena has been served on the person whose records are being sought. Mr. Hochberg told the Committee that he had distributed to them an

example of such a certificate of service.

Mr. Hochberg noted that Rule 4-266 also allows service of a subpoena by registered mail. The Chair commented that the idea of issuing bench warrants for defendants who had been served by mail makes him uneasy, but there has been no outcry so far. Baltimore City is issuing bench warrants on the basis of service by mail. The Reporter inquired as to who is served. The Vice Chair replied that if the person has an attorney, the attorney is the person served. The Chair commented that a practical problem exists if the defendant does not appear for trial. It is better to serve the defendant directly.

The Vice Chair asked if the last sentence of section (b) is intended to allow service by ordinary mail. Judge McAuliffe questioned as to why a subpoena would be served by ordinary mail. Judge Norton replied that in the District Court, the volume of subpoenas served necessitates service by ordinary mail. Judge McAuliffe commented that the Court of Appeals had refused to honor a Virginia statute permitting service by regular mail on a non-resident, because it violates due process. The issuance of body attachments when a subpoena is mailed by ordinary mail is not before the Committee today. Judge Norton remarked that letters may be undelivered or it may be unknown as to who received a letter sent by certified mail. Different judges have different procedures to handle this. Some issue body attachments.

Mr. Titus said that the Rule could provide that a body

attachment does not issue if a subpoena is sent by ordinary mail, and the recipient does not appear for the hearing or trial. Mr. Brault commented that the issue of how judges handle the individuals who fail to appear can be addressed through judicial education. The Reporter pointed out that first class mail often is more likely than certified mail to reach the addressee, because many people will not sign for their certified mail. The Vice Chair suggested that the last sentence of section (b) be clarified by using the language, "by first class mail, postage prepaid." The Committee agreed by consensus to this suggestion. The Committee approved by consensus the changes to Rules 2-510, 3-510, and 4-266 as amended.

The Chair adjourned the meeting.