COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100B of the People's Resource Center, 100 Community Place, Crownsville, Maryland on June 21, 2002.

Members presents:

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

Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Mark Wolfson, Rules Committee Intern
Barry Wolf, Esq.
Brian Frank, Esq.
Chris Flohr, Esq.
Glenn Grossman, Esq., Attorney Grievance Commission
Professor Byron Warnken, University of Baltimore School of Law
Professor Doug Colbert, University of Maryland School of Law
Carey Deeley, Esq.
Elizabeth B. Veronis, Esq., Court Information Office

The Chair convened the meeting. He said that several guests were present for the discussion of Rules 4-216, Pretrial Release and 4-217, Bail Bonds. He announced that Mr.

Brault had been

awarded the H. Vernon Eney award by the Maryland Bar Foundation. The Chair also announced that this was the last meeting Mr. Hochberg would be attending, because he was retiring from the practice of law and moving to Charlottesville, Virginia. The Chair thanked Mr. Hochberg for his service on the Rules Committee and wished him well on his retirement.

The Reporter introduced Mark Wolfson, an intern in the Rules Committee office who had just finished his first year as a law student at the University of Baltimore. The Reporter said that he is working on some legal research for some of the Rules Committee subcommittees.

The Chair asked if there were any additions or corrections to the Minutes of the January 4, 2002, February 15, 2002, and April 12, 2002 Rules Committee meetings. There being none, Judge Kaplan moved to adopt the Minutes as presented, the motion was seconded, and it passed unanimously.

The Chair stated that the date of the May 2003 Rules Committee meeting had been changed from May 9 to May 16, because the original date was in conflict with the meeting of the Maryland Judicial Conference.

Agenda Item 1. Reconsideration of proposed amendments to Rules
4-216 (Pretrial Release) and 4-217 (Bail Bonds)

Judge Johnson presented Rules 4-216, Pretrial Release and 4-217, Bail Bonds, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 to change the word "assure" to the word "ensure" throughout the Rule, to delete current section (a), to add a new section (a) explaining the Rule's purpose, to add certain new Code references, to add language in section (b) clarifying that a judge may release a defendant on personal recognizance with conditions imposed, to eliminate a certain cross reference, to change the tagline of section (c), to add new language to section (c) pertaining to a judge determining that no condition of release will assure the appearance of the defendant and the safety of the victim and the community, to conform section (d) to section (c), to add a new reference to the Code and to add language requiring the judicial officer to place in writing or to state on the record the amount and conditions of bail in section (e), to conform subsection (f)(5)(C) to section (c), to conform statutory references to recent legislation, to add language to section (i) providing for the power of a judge to alter conditions set by another judge or commissioner, and to add cross references to Rules 1-361 and 4-347 at the end of section (k), as follows:

Rule 4-216. PRETRIAL RELEASE

~~(a) Interim Bail~~

~~Pending an initial appearance by the defendant before a judicial officer pursuant to Rule 4-213 (a), the defendant may be released upon execution of a bond in an amount and subject to conditions specified in a schedule that may be adopted by the Chief Judge of the District Court for certain offenses. The Chief Judge may authorize designated court personnel or peace officers to release a defendant by reference to the schedule.~~

(a) Construction of Rule

This Rule shall be construed liberally to carry out the purpose of relying on criminal sanctions instead of financial loss to ensure the appearance of a defendant in a criminal case before verdict or pending a new trial.

~~(c)~~ (b) Defendants Eligible for Release by Commissioner or Judge

~~Except~~ In accordance with this Rule and Code, Criminal Procedure Article, §§5-101 and 5-201 and except as otherwise provided in section (d) of this Rule or by ~~law~~ Code, Criminal Procedure Article, §§5-201 and 5-202, a defendant ~~is~~ may be entitled to be released before verdict in conformity with this Rule with one or more conditions imposed or on personal recognizance~~, or with~~ which may include one or more conditions imposed, unless the judicial officer determines that no condition of release will reasonably ~~assure~~ ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim and the community.

~~Cross reference: See Code, Criminal Procedure Article, §5-101 (c) concerning defendants who may not be released on personal recognizance.~~

~~(b)~~ (c) Arrest Without Warrant – Probable Cause Determination

A defendant arrested without a warrant shall be released on personal recognizance under terms that do not significantly restrain the defendant's liberty unless the judicial officer determines that there is probable cause to believe that the defendant committed an offense and that no condition of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim and the community.

(d) Defendants Eligible for Release Only by a Judge

A defendant charged with an offense for which the maximum penalty is death or life imprisonment or with an offense listed under Code, Criminal Procedure Article, §5-202 (a), (b), (c), (d), or (e) may not be released by a District Court Commissioner, but may be released before verdict or pending a new trial, if a new trial has been ordered, if a judge determines that all requirements imposed by law have been satisfied and that one or more conditions of release will reasonably ~~assure~~ ensure (1) the appearance of the defendant as required and (2) ~~if the defendant is charged with an offense listed under Code, Criminal Procedure Article, §5-202 (b), (c), (d), or (e), that the defendant will not pose a danger to another person or~~ the safety of the alleged victim and the community ~~while released~~.

(e) Duties of Judicial Officer

(1) Consideration of Factors

In determining whether a defendant should be released and the conditions of release, the judicial officer, on the basis of information available or developed in a

pretrial release inquiry, may take into account:

(A) ~~The~~ the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction, insofar as these factors are relevant to the risk of nonappearance;

(B) ~~The~~ the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) ~~The~~ the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

(D) ~~The~~ the recommendation of an agency which conducts pretrial release investigations;

(E) ~~The~~ the recommendation of the State's Attorney;

(F) ~~Information~~ information presented by defendant's counsel;

(G) ~~The~~ the danger of the defendant to another person or to the community;

(H) ~~The~~ the danger of the defendant to himself or herself; and

(I) ~~Any~~ any other factor bearing on the risk of a wilful failure to appear, including prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult and prior convictions.

(2) Statement of Reasons - When Required

Upon determining to release a defendant to whom section (d) of this Rule applies or to refuse to release a defendant to whom section (c) of this Rule applies, the judicial officer shall state the reasons in writing or on the record.

(3) Imposition of Conditions of Release

If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set out in section (f) of this Rule that will reasonably:

(A) ~~Assure~~ ensure the appearance of the defendant as required,

(B) ~~Protect~~ prompt the safety of the alleged victim by ordering the defendant to have no contact with the alleged victim or the alleged victim's premises or place of employment or by other appropriate order, and

(C) ~~Assure~~ ensure that the defendant will not pose a danger to ~~another person or to~~ the community ~~if the charge against the defendant is an offense listed under Code, Criminal Procedure Article, §5-202 (b), (c), (d), or (e)~~.

(4) Advice of Conditions and Consequences of Violation

The judicial officer shall advise the defendant in writing or on the record of the conditions of release imposed and of the consequences of a violation of any condition. When bail is required, the judicial officer shall place in writing or state on the record the amount and any conditions of the bail.

(f) Conditions of Release

The conditions of release imposed by a judicial officer under this Rule may include:

(1) ~~Committing~~ committing the defendant to the custody of a designated person or organization that agrees to supervise the defendant and assist in ~~assuring~~ ensuring the defendant's appearance in court;

(2) ~~Placing~~ placing the defendant under the supervision of a probation officer or other appropriate public official;

(3) ~~Subjecting~~ subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

(4) ~~Requiring~~ requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer including any of the following:

(A) without collateral security,

(B) with collateral security of the kind specified in Rule 4-217 (e)(1)(A) equal in value to the greater of $25.00 or 10% of the full penalty amount, or a larger percentage as may be fixed by the judicial officer,

(C) with collateral security of the kind specified in Rule 4-217 (e)(1) equal in value to the full penalty amount,

(D) with the obligation of a corporation that is an insurer or other surety in the full penalty amount;

(5) ~~Subjecting~~ subjecting the defendant to any other condition reasonably necessary to:

(A) ~~assure~~ ensure the appearance of

the defendant as required,

(B) protect the safety of the alleged victim, and

(C) ~~assure~~ ensure that the defendant will not pose a danger to ~~another person or to~~ the community ~~if the charge against the defendant is an offense listed under Code, Criminal Procedure Article, §5-202 (b), (c), (d), or (e);~~

(6) ~~Imposing~~ imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, ~~Article 27, §763~~ Criminal Law Article, §9-304 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation of Code, ~~Article 27, §26, §761, or §762~~ Criminal Law Article, §§9-302, 9-303, or 9-305.

Cross reference: See Code, Criminal Procedure Article, §5-201 (b), and Code, Business Occupations and Professions Article, Title 20, concerning private home detention monitoring as a condition of release.

(g) Review of Commissioner's Pretrial Release Order

(1) Generally

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

reasons for the continued detention.

Cross reference: See Rule 4-231 (d) concerning the presence of a defendant by video conferencing.

(2) Juvenile Defendant

If the defendant is a child whose case is eligible for transfer to the juvenile court pursuant to Code, Criminal Procedure Article, §4-202 (b), the District Court, regardless of whether it has jurisdiction over the offense charged, may order that a study be made of the child, the child's family, or other appropriate matters. The court also may order that the child be held in a secure juvenile facility.

(h) Continuance of Previous Conditions

When conditions of pretrial release have been previously imposed in the District Court, the conditions continue in the circuit court unless amended or revoked pursuant to section (i) of this Rule.

(i) Amendment of Pretrial Release Order

After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of pretrial release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record. <u>This section includes the power of a judge to alter conditions set by another judge, as well as by a commissioner.</u>

(j) Supervision of Detention Pending Trial

In order to eliminate unnecessary

detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.

(k) Violation of Condition of Release

A court may issue a bench warrant for the arrest of a defendant charged with a criminal offense who violates a condition of pretrial release. After the defendant is presented before a court, the court may (1) revoke the defendant's pretrial release or (2) continue the defendant's pretrial release with or without conditions.

Cross reference: See Rule 1-361, Execution of Warrants and Body Attachments. See also, Rule 4-347, Proceedings for Revocation of Probation, which preserves the authority of a judge issuing a warrant to set the conditions of release on a violation of probation.

(l) Title 5 Not Applicable

Title 5 of these rules does not apply to proceedings conducted under this Rule.

Source: This Rule is derived in part from former Rule 721, M.D.R. 723 b 4, and is in part new.

Rule 4-216 was accompanied by the following Reporter's Note.

The Pretrial Release Project Advisory Committee in its report issued October 11, 2001 recommended modification of the

pretrial release system. Several of its recommendations involved changes to Rules 4-216 and 4-217. The Advisory Committee recommended the deletion of section (a) because the District Court schedules were used only when the transition from the former People's Court to the District Court took place. The Rules Committee considered the Rules and suggested further changes to Rule 4-216. The Criminal Subcommittee reviewed Rule 4-216 and is recommending that the Advisory Committee's proposal to integrate the rules provisions pertaining to pretrial release determined either by a commissioner or by a judge should not be adopted. Section (d) pertaining to defendants eligible for release only by a judge should be added back into the Rule as should the specific references to the relevant sections of Code, Criminal Procedure Article, §5-202, which specifically exclude a commissioner from authorizing pretrial release. The Criminal Subcommittee is also recommending that the requirement proposed by the Advisory Committee that a judicial officer explain in writing when he or she sets a greater amount of bail than 10% of the full penalty amount be deleted.

Additionally, because Chapter 26, Acts of 2002 (HB 11), created a new Criminal Law Article which contains many of the provisions formerly in Article 27 of the Annotated Code of Maryland, the references to Article 27 in Rule 4-216 are being corrected to reflect their new placement.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-217 to update a Rule number in the cross reference after section (d), to change the word "insure" to the word "ensure" in subsection (e)(3), to correct a statutory reference in the cross reference after section (j), and to make certain stylistic changes, as follows:

Rule 4-217. BAIL BONDS

(a) Applicability of Rule

This Rule applies to all bail bonds taken pursuant to Rule 4-216, and to bonds taken pursuant to Rules 4-267, 4-348, and 4-349 to the extent consistent with those rules.

(b) Definitions

As used in this Rule, the following words have the following meanings:

(1) Bail Bond

"Bail bond" means a written obligation of a defendant, with or without a surety or collateral security, conditioned on the appearance of the defendant as required and providing for the payment of a penalty sum according to its terms.

(2) Bail Bondsman

"Bail bondsman" means an authorized agent of a surety insurer.

(3) Bail Bond Commissioner

"Bail bond commissioner" means any person appointed to administer rules adopted pursuant to Maryland Rule 16-817.

Cross reference: Code, Criminal Procedure Article, §5-203.

(4) Clerk

"Clerk" means the clerk of the court and any deputy or administrative clerk.

(5) Collateral Security

"Collateral security" means any property deposited, pledged, or encumbered to secure the performance of a bail bond.

(6) Surety

"Surety" means a person other than the defendant who, by executing a bail bond, guarantees the appearance of the defendant, and includes an uncompensated or accommodation surety.

(7) Surety Insurer

"Surety insurer" means any person in the business of becoming, either directly or through an authorized agent, a surety on a bail bond for compensation.

(c) Authorization to Take Bail Bond

Any clerk, District Court commissioner, or other person authorized by law may take a bail bond. The person who takes a bail bond shall deliver it to the court in which the charges are pending, together with all money or other collateral security deposited or pledged and all documents pertaining to the bail bond.

Cross reference: Code, Criminal Procedure Article, §§5-204 and 5-205 ~~and Code (1957,~~

~~1991 Repl. Vol.), Article 87, §6~~.

(d) Qualification of Surety

(1) In General

The Chief Clerk of the District Court shall maintain a list containing: (A) the names of all surety insurers who are in default, and have been for a period of 60 days or more, in the payment of any bail bond forfeited in any court in the State, (B) the names of all bail bondsmen authorized to write bail bonds in this State, and (C) the limit for any one bond specified in the bail bondsman's general power of attorney on file with the Chief Clerk of the District Court.

(2) Surety Insurer

No bail bond shall be accepted if the surety on the bond is on the current list maintained by the Chief Clerk of the District Court of those in default. No bail bond executed by a surety insurer directly may be accepted unless accompanied by an affidavit reciting that the surety insurer is authorized by the Insurance Commissioner of Maryland to write bail bonds in this State.

(3) Bail Bondsman

No bail bond executed by a bail bondsman may be accepted unless the bondsman's name appears on the most recent list maintained by the Chief Clerk of the District Court, the bail bond is within the limit specified in the bondsman's general power of attorney as shown on the list or in a special power of attorney filed with the bond, and the bail bond is accompanied by an affidavit reciting that the bail bondsman:

(A) is duly licensed in the jurisdiction in which the charges are

pending, if that jurisdiction licenses bail bondsmen;

(B) is authorized to engage the surety insurer as surety on the bail bond pursuant to a valid general or special power of attorney; and

(C) holds a valid license as an insurance broker or agent in this State, and that the surety insurer is authorized by the Insurance Commissioner of Maryland to write bail bonds in this State.

Cross reference: Code, Criminal Procedure Article, §5-203 and Rule ~~1285~~ **16-817** (Appointment of Bail Bond Commissioner - Licensing and Regulation of Bail Bondsmen).

(e) Collateral Security

(1) Authorized Collateral

A defendant or surety required to give collateral security may satisfy the requirement by:

(A) depositing with the person who takes the bond the required amount in cash or certified check, or pledging intangible property approved by the court; or

(B) encumbering one or more parcels of real estate situated in the State of Maryland, owned by the defendant or surety in fee simple absolute, or as chattel real subject to ground rent. No bail bond to be secured by real estate may be taken unless (1) a Declaration of Trust of a specified parcel of real estate, in the form set forth at the end of this Title as Form 4-217.1, is executed before the person who takes the bond and is filed with the bond, or (2) the bond is secured by a Deed of Trust to the State or its agent and the defendant or surety furnishes a verified list of all encumbrances on each parcel of real estate subject to the Deed of Trust in

the form required for listing encumbrances in a Declaration of Trust.

(2) Value

Collateral security shall be accepted only if the person who takes the bail bond is satisfied that it is worth the required amount.

(3) Additional or Different Collateral Security

Upon a finding that the collateral security originally deposited, pledged, or encumbered is insufficient to ~~insure~~ **ensure** collection of the penalty sum of the bond, the court, on motion by the State or on its own initiative and after notice and opportunity for hearing, may require additional or different collateral security.

(f) Condition of Bail Bond

The condition of any bail bond taken pursuant to this Rule shall be that the defendant personally appear as required in any court in which the charges are pending, or in which a charging document may be filed based on the same acts or transactions, or to which the action may be transferred, removed, or if from the District Court, appealed, and that the bail bond shall continue in effect until discharged pursuant to section (j) of this Rule.

(g) Form and Contents of Bond - Execution

Every pretrial bail bond taken shall be in the form of the bail bond set forth at the end of this Title as Form 4-217.2, and shall be executed and acknowledged by the defendant and any surety before the person who takes the bond.

(h) Voluntary Surrender of the Defendant

by Surety

A surety on a bail bond who has custody of a defendant may procure the discharge of the bail bond at any time before forfeiture by:

(1) delivery of a copy of the bond and the amount of any premium or fee received for the bond to the court in which the charges are pending or to a commissioner in the county in which the charges are pending who shall thereupon issue an order committing the defendant to the custodian of the jail or detention center; and

(2) delivery of the defendant and the commitment order to the custodian of the jail or detention center, who shall thereupon issue a receipt for the defendant to the surety.

Unless released on a new bond, the defendant shall be taken forthwith before a judge of the court in which the charges are pending.

On motion of the surety or any person who paid the premium or fee, and after notice and opportunity to be heard, the court may by order award to the surety an allowance for expenses in locating and surrendering the defendant, and refund the balance to the person who paid it.

(i) Forfeiture of Bond

(1) On Defendant's Failure to Appear - Issuance of Warrant

If a defendant fails to appear as required, the court shall order forfeiture of the bail bond and issuance of a warrant for the defendant's arrest. The clerk shall promptly notify any surety on the defendant's bond, and the State's Attorney, of the forfeiture of the bond and the issuance of the warrant.

Cross reference: Code, Criminal Procedure Article, §5-211.

(2) Striking Out Forfeiture for Cause

If the defendant or surety can show reasonable grounds for the defendant's failure to appear, notwithstanding Rule 2-535, the court shall (A) strike out the forfeiture in whole or in part; and (B) set aside any judgment entered thereon pursuant to subsection (4)(A) of this section, and (C) order the remission in whole or in part of the penalty sum paid pursuant to subsection (3) of this section.

Cross reference: Code, Criminal Procedure Article, §5-208 (b)(1) and (2) and *Allegany Mut. Cas. Co. v. State*, 234 Md. 278, 199 A.2d 201 (1964).

(3) Satisfaction of Forfeiture

Within 90 days from the date the defendant fails to appear, which time the court may extend to 180 days upon good cause shown, a surety shall satisfy any order of forfeiture, either by producing the defendant in court or by paying the penalty sum of the bond. If the defendant is produced within such time by the State, the court shall require the surety to pay the expenses of the State in producing the defendant and shall treat the order of forfeiture satisfied with respect to the remainder of the penalty sum.

(4) Enforcement of Forfeiture

If an order of forfeiture has not been stricken or satisfied within 90 days after the defendant's failure to appear, or within 180 days if the time has been extended, the clerk shall forthwith:

(A) enter the order of forfeiture as a judgment in favor of the governmental entity that is entitled by statute to

receive the forfeiture and against the defendant and surety, if any, for the amount of the penalty sum of the bail bond, with interest from the date of forfeiture and costs including any costs of recording, less any amount that may have been deposited as collateral security; and

(B) cause the judgment to be recorded and indexed among the civil judgment records of the circuit court of the county; and

(C) prepare, attest, and deliver or forward to any bail bond commissioner appointed pursuant to Rule 16-817, to the State's Attorney, to the Chief Clerk of the District Court, and to the surety, if any, a true copy of the docket entries in the cause, showing the entry and recording of the judgment against the defendant and surety, if any.

Enforcement of the judgment shall be by the State's Attorney in accordance with those provisions of the rules relating to the enforcement of judgments.

(5) Subsequent Appearance of Defendant

When the defendant is produced in court after the period allowed under subsection (3) of this section, the surety may apply for the refund of any penalty sum paid in satisfaction of the forfeiture less any expenses permitted by law. If the penalty sum has not been paid, the court, on application of the surety and payment of any expenses permitted by law, shall strike the judgment against the surety entered as a result of the forfeiture.

(6) Where Defendant Incarcerated Outside this State

(A) If, within the period allowed under subsection (3) of this section, the surety produces evidence and the court

finds that the defendant is incarcerated in a penal institution outside this State and that the State's Attorney is unwilling to issue a detainer and subsequently extradite the defendant, the court shall strike out the forfeiture and shall return the bond or collateral security to the surety.

(B) If, after the expiration of the period allowed under subsection (3) of this section, but within 10 years from the date the bond or collateral was posted, the surety produces evidence and the court finds that the defendant is incarcerated in a penal institution outside this State and that the State's Attorney is unwilling to issue a detainer and subsequently extradite the defendant, the court shall (i) strike out the forfeiture; (ii) set aside any judgment thereon; and (iii) order the return of the forfeited bond or collateral or the remission of any penalty sum paid pursuant to subsection (3) of this section.

(j) Discharge of Bond - Refund of Collateral Security

(1) Discharge

The bail bond shall be discharged when:

(A) all charges to which the bail bond applies have been stetted, unless the bond has been forfeited and 10 years have elapsed since the bond or other security was posted; or

(B) all charges to which the bail bond applies have been disposed of by a nolle prosequi, dismissal, acquittal, or probation before judgment; or

(C) the defendant has been sentenced in the District Court and no timely appeal has been taken, or in the circuit court exercising original jurisdiction, or on

appeal or transfer from the District Court; or

(D) the court has revoked the bail bond pursuant to Rule 4-216 or the defendant has been convicted and denied bail pending sentencing; or

(E) the defendant has been surrendered by the surety pursuant to section (h) of this Rule.

Cross reference: See Code, Criminal Procedure Article, §5-208 ~~(c)~~ **(d)** relating to discharge of a bail bond when the charges are stetted. See also Rule 4-349 pursuant to which the District Court judge may deny release on bond pending appeal or may impose different or greater conditions for release after conviction than were imposed for the pretrial release of the defendant pursuant to Rule 4-216.

(2) Refund of Collateral Security - Release of Lien

Upon the discharge of a bail bond and surrender of the receipt, the clerk shall return any collateral security to the person who deposited or pledged it and shall release any Declaration of Trust that was taken.

Source: This Rule is derived from former Rule 722 and M.D.R. 722.

Rule 4-217 was accompanied by the following Reporter's Note.

The Pretrial Release Project Advisory Committee reviewed Rule 4-217 and suggested a few stylistic changes to it, including updating Article 27 references to the new Criminal Procedure Article (which had already been taken care of by the Rules Committee), updating an obsolete reference to Rule 1285 in the cross reference after

section (d), and correcting a statutory reference to Criminal Procedure Article, §5-208 (d) in the cross reference after section (j).

The Vice Chair referred to the language in section (b) which reads: "... a defendant may be entitled to be released before verdict...". She noted that this is not correctly stated, because the law is that a defendant is entitled to release unless the judicial officer determines that no condition of release will reasonably ensure the appearance of the defendant and the safety of the alleged victim and the community. The Chair commented that the language "may be" implies that the defendant need not be released even if the defendant is otherwise eligible for release. The language "may be" should be changed back to the word "is." The sentence should be structured to read that a defendant is entitled to release unless the judicial officer determines that no condition of release will reasonably ensure the appearance of the defendant and the safety of the alleged victim and the community. Mr. Hochberg remarked that this still affords the judicial officer flexibility.

The Vice Chair noted that the language "with one or more conditions imposed" does not have to be repeated in section (b). The Chair commented that the language "on personal recognizance" can be deleted, so that the language of section

(b) would read: "... a defendant is entitled to be released before verdict in conformity with this Rule with one or more conditions imposed, unless the judicial officer determines...". The Reporter said that the wording of the amendment to section (b) is intended to clarify that if a defendant is released, regardless of whether bail is required or the defendant is released on personal recognizance, conditions may be imposed. Mr. Sykes pointed out that the amendment to section (b) is clear, even if it is redundant. It emphasizes the option of personal recognizance. Judge Missouri added that if there is no reference to "personal recognizance" in this section, a judge could take the view that personal recognizance is not an option. The Chair noted that there is language elsewhere in the Rule that makes clear that a defendant can be released on personal recognizance. Judge Johnson expressed the opinion that this language needs to be at the beginning of the Rule.

The Vice Chair referred to the language in section (b) which reads "personal recognizance, which may include one or more conditions imposed," commenting that she thought that the Rule should provide that a defendant is to be released on personal recognizance unless the judicial officer determines that no condition of release will ensure the appearance of the defendant as required and the safety of the alleged victim and

the community. Judge Heller suggested that the Rule could provide that the defendant shall be released on personal recognizance or on bail, and either may be with one or more conditions. The Chair agreed that the Rule should contain language providing for a determination that bail can be required. The Vice Chair said that this is a matter of style. The defendant can be released on personal recognizance or on bail with or without conditions. Mr. Sykes added that it is with or without conditions in either case. The Committee agreed by consensus to allow the Style Subcommittee to draft the language that makes this clear.

Mr. Titus inquired as to whether section (a) is necessary. The Chair responded that this is a good question; there is a question as to whether this provision is inconsistent with statutory language. Mr. Titus expressed the opinion that the language of section (a), if it is retained, could be put into a Committee note. Mr. Brault suggested that the word "construed" is not appropriate, and the word "applied" should be substituted in its place. Mr. Titus moved to delete section (a), the motion was seconded, and it passed unanimously.

The Vice Chair asked if the substance of section (a) should be put into a Committee note. Mr. Sykes proposed that the substance of Professor Warnken's version of language

suggested for section (a), which is located in a memorandum that was distributed at today's meeting (See Appendix 1), should be the language in the Committee note. The suggested language reads as follows:

> As to those defendants who are eligible for release under sections (b) and (d) of this Rule, and who are judicially determined not to need conditions of release, under section (e)(3) of this Rule, as a means of ensuring both their appearance and the safety of the victim and the community, this Rule should be construed liberally, relying on criminal sanctions, rather than financial loss, to ensure both the defendant's appearance and the requisite safety. "Criminal sanctions" include both the sanction for the offense for which released and the sanction for a separate charge of "failure to appear" if the defendant does not appear.

The Committee agreed by consensus to use this language in a Committee note.

Judge Johnson drew the Committee's attention to section (c) of Rule 4-216. The Chair commented that the two concepts set out in section (c) are in conflict when they are put into a single sentence. The defendant is arrested without a warrant. The law enforcement officer prepares a statement of charges which is presented to the commissioner. From this, the commissioner determines that there is no probable cause, and the defendant is released on personal recognizance. Later, the evidence may show the defendant is guilty. The defendant cannot be held unless the documents presented to the

judicial officer establish probable cause. The way the Rule is worded, the commissioner could decide that there is no probable cause, but could hold the defendant anyway if the commissioner is satisfied that the defendant is dangerous. Mr. Sykes remarked that the judicial officer has to determine that there is probable cause and that no condition of release will ensure the appearance of the defendant and the safety of the alleged victim and the community.

Judge Missouri noted that if the defendant is released on personal recognizance, the case is still in the system. The Vice Chair commented that if someone is arrested without a warrant, and the commissioner does not find probable cause, the defendant should simply be released, neither on personal recognizance nor on bail, because the defendant should be out of the system at this point. Judge Missouri responded that the commissioner has no authority to dismiss the case. Judge Dryden added that the charge against the defendant is still alive after the defendant is released on personal recognizance after an arrest without a warrant. Sometimes after the defendant appears for trial, the defendant is found to be guilty. Judge Norton remarked that the court could have heard different evidence than what the commissioner heard. Mr. Sykes stated that if the judicial officer finds no probable cause after an arrest without a warrant, the case

automatically reverts to release on personal recognizance. The Chair said that there are two extremes possible -- the commissioner does not find probable cause, and the defendant is released, or the commissioner finds probable cause, but no condition reasonably ensures the appearance of the defendant and the safety of the alleged victim and the community, and the defendant is not released.

Mr. Titus inquired as to what happens in the real world when the police arrest a defendant who is then brought before a commissioner. The Chair replied that the police officer reads a statement of charges that the police officer prepared. Mr. Brault commented that he has a conceptual problem because an arrest without probable cause is an illegal arrest. The defendant who is illegally arrested is then required to have a form of bail, release on personal recognizance, notwithstanding the illegal arrest. If the defendant does not appear for trial, he or she is subject to further punishment. The Chair said that release on personal recognizance is not a form of bail. Mr. Brault responded that release on personal recognizance is a promise to appear or face criminal sanctions. The defendant is posting a form of bond -- his or her personal bond. Judge Dryden said that the commissioner does not know that the arrest is without probable cause -- there may be probable cause even though there is a lack of

written proof of probable cause. The commissioner does not ultimately know what the outcome will be; the charge against the defendant stays alive until there is an adjudication by a judge.

The Chair gave the example of a defendant who is arrested by a police officer on the charge of a misdemeanor that had not been witnessed by the police officer directly. The officer obtained the information from someone else. The arrest is illegal, because the act for which the defendant was arrested was not committed in front of the officer. Any evidence derived from the arrest will be suppressed at trial. However, if a witness to the crime appears at trial, the defendant may be convicted. Mr. Brault asked if instead of arresting the defendant, the officer went to the commissioner and filed a written complaint -- could this be processed as a warrant? The Chair said that it could be a summons or a warrant.

Judge Missouri commented that although there may not be probable cause to arrest someone, that person may be arrested for failure to appear. Mr. Karceski observed that some commissioners may have difficulty identifying probable cause, because they are insufficiently trained. The Chair remarked that the problem is not always with commissioners; sometimes, a judge will release a defendant after concluding incorrectly

that there is no probable cause. Mr. Karceski expressed the view that usually the problem is with the commissioners. It is not an ideal situation to wrongfully arrest someone and then release the person on personal recognizance with conditions.

Ms. Potter said that she and Mr. Titus had been looking at language suggested for section (c) by Professor Warnken on page 4 of the memorandum he had distributed today. Professor Warnken told the Committee that in his capacity as a professor of law, his view is that the real problem is with Rule 4-213, Initial Appearance of Defendant. There are five tasks to be completed by the judicial officer. Rule 4-213 identifies four of the five tasks: advice of charges, advice of right to counsel, pretrial release determination, and advice of preliminary hearing. One of the four listed tasks, pretrial release determination, is detailed in Rule 4-216. The fifth task is the only one of the five that is constitutionally required, and it is omitted from Rule 4-213. The case of Gerstein v. Pugh, 420 U.S. 103 (1975), established a constitutional requirement for a prompt probable cause determination after a warrantless arrest. That determination is buried in Rule 4-216. It might be better to list this task in Rule 4-213. The Chair commented that one rule can refer to another rule. For example, subsection (a)(3) of Rule 4-213

refers to Rule 4-216.

Mr. Titus noted that the alternate language proposed by Professor Warnken on page 4 of his memorandum for section (c) reads better. It provides that the judicial officer shall determine whether the arrest was supported by probable cause and the remainder of the procedure designated flows from whether there was probable cause. The Vice Chair agreed with Mr. Titus that Professor Warnken's language is better than the language proposed for section (c) by the Subcommittee. Judge Missouri expressed the opinion that the dropping of charges should be the decision of the State's Attorney. Mr. Karceski noted that the language of section (c) as it is presented today in the meeting materials requires that the defendant be released on personal recognizance unless there is probable cause to believe that the defendant committed an offense and that no condition of release will ensure the appearance of the defendant and the safety of the alleged victim and the community. Professor Warnken commented that the Rule does not expressly state that there must be a determination of probable cause. The Chair noted that the language in section (c) which reads, "... unless the judicial officer determines that there is probable cause to believe that the defendant committed an offense ..." makes it clear that there must be a determination of probable cause.

Mr. Brault questioned as to why, after a warrantless arrest and a finding of no probable cause, the defendant has to be released on personal recognizance. The Chair answered that releasing the defendant on personal recognizance makes sense. The defendant does not have to be recharged. Even if the arrest is technically illegal, there may have been 20 witnesses, and the release on personal recognizance ensures that the defendant does not walk away completely. If the witnesses appear at the trial, the defendant could be convicted. Mr. Karceski inquired as to why, if personal recognizance is a form of bond, a defendant is released on personal recognizance. If there is a lack of probable cause, why is there any bond at all? The Chair responded that release on personal recognizance is a promise to appear at trial.

Judge Heller commented that section (c) should be modified because it is unclear. Mr. Titus questioned as to whether a defendant should be entirely released when the judicial officer finds no probable cause, even if there are 20 victims and 20 witnesses. Can a prosecutor revisit the matter later? The Chair replied that the prosecutor can ask the court to reconsider the terms of release. The prosecutor also can file an information. Mr. Titus stated that the Minutes should reflect that the prosecutor can do this.

Mr. Titus remarked that an illegal arrest is a predicate to proving the tort of false arrest. Mr. Brault added that if the special police stop someone in a department store, and without probable cause accuse the person of shoplifting, the store is held liable. Under Rule 4-216, the police officer can make an illegal arrest with no consequence. A form of bond is obtained from the person who was illegally arrested, compelling the defendant to come to trial. This is no different than if the person had been legally arrested because there was probable cause. The Chair said that the only requirement for the defendant is to appear at trial where any evidence seized pursuant to the arrest without probable cause is inadmissible. This system has worked well.

Mr. Titus suggested that section (c) be clarified by using the language from page 4 of Professor Warnken's memorandum, and the Committee agreed by consensus.

Judge Johnson drew the Committee's attention to section (d) of Rule 4-216. Judge Dryden noted that there is no substantive change to section (d). The Chair added that this is consistent with current practice.

Turning to section (e), Judge Johnson said that most of the changes were stylistic. The Chair commented that consideration of the factors listed in subsection (e)(1) may occur at three stages of the proceedings: (1) before trial,

(2) after the verdict and before the sentencing, and (3) after the sentencing pending appellate review. The Rule implies that the factors listed are not considered after the verdict, but only in a pretrial release inquiry. He suggested that in the introductory language of subsection (e)(1) the word "may" should be changed to the word "shall," and that other language should be moved around to read: "... shall take into account, on the basis of information available: ...".

Ms. Potter asked why the Rule delineates where the information comes from. The Chair said that this is covered in subsection (e)(1)(D). The Reporter suggested that the language in the beginning of subsection (e)(1) which reads "on the basis of information available" could be deleted. Mr. Titus pointed out that there may not be a recommendation made by an agency which conducts pretrial release investigations, and he suggested that subsection (e)(1)(D) should read as follows: "the recommendation, if any, of an agency which conducts pretrial release investigations." Judge Johnson suggested that subsection (e)(1)(D) could simply begin with the words "any recommendation of an agency ...".

Judge Heller expressed disagreement with the suggestion to change the word "may" to "shall" in the beginning language of subsection (e)(1). The judicial officer does not necessarily articulate consideration of the factors listed in

the Rule. Changing the language to be mandatory would oblige the judicial officer to go through each factor on the record, and this is not what happens in reality. Judge Norton agreed with Judge Heller. The commissioners and the judges go through as many of the factors as are available. A commissioner may not have the recommendation of the State's Attorney or information from the defense attorney. The Rule should include the language "whatever is available." Mr. Johnson commented that the word "may" allows flexibility.

Delegate Vallario remarked that if the defendant is charged with a minor offense, such as stealing cigarettes, there will not be an agency recommendation, and the "laundry list" in the Rule is not needed. Mr. Sykes suggested that a Committee note could be added, which would provide: "the relevant factors in determination of conditions of release would include the following factors ... ." This could be placed next to the provision about releasing on conditions. This would avoid the problem of whether to use "shall" or "may" and of whether the list of factors needs to be exhaustive. The Vice Chair commented that subsection (e)(1) has been in Rule 4-216 for a long time, and she asked why it should now be moved to a Committee note. Mr. Sykes answered that the Committee note would solve the problems discussed today.

Judge Dryden told the Committee that the commissioners know about the checklist and are used to applying the factors to each situation. The Chair expressed the view that the Rule should not be changed. Mr. Karceski observed that the commissioners do not always listen to defense attorneys. He has been told by commissioners that he cannot speak even though he is the defendant's attorney, because he can go before a District Court judge the next day. At 3 o'clock in the morning, the reality is that the commissioner does not have available much of the information listed in subsection (e)(1) of the Rule. Usually there is no defense attorney or State's Attorney appearing before the commissioner. If the information is available, the judicial officer should consider it.

Mr. Karceski suggested that subsection (e)(1)(F) should read as follows: "information presented by the defendant or the defendant's counsel." The Reporter suggested that subsection (e)(1)(F) should read: "if available, information presented by the defendant or the defendant's counsel." Judge Missouri agreed with the Reporter's suggestion. The Chair suggested that the added language could be "information presented by the defendant or the defendant's attorney to the extent available." Judge Missouri pointed out that this addition would increase the risk that the defendant might make

a statement that the attorney wishes the defendant had not made. Mr. Klein suggested that subsection (e)(1)(F) could read: "any information presented by defendant or defendant's counsel." Subsections (e)(1)(D) and (e)(1)(E) could also begin with the word "any." The Reporter said that the Style Subcommittee can look at this issue.

The Chair referred to the language at the end of subsection (e)(1)(A) which reads "insofar as these factors are relevant to the risk of nonappearance." He said that this refers to an old, historical issue spoken about by the late Robert Sweeney, the first Chief Judge of the District Court, after he fielded complaints about commissioners and judges releasing defendants on personal recognizance. The Chair remarked that the factors to which subsection (e)(1)(A) refers cover more than the risk of nonappearance. Someone may continue to commit robberies even though the person will appear for trial. The standard should be if the person is a danger to the victim or to the community. The language at the end of subsection (e)(1)(A) should be deleted. The Vice Chair suggested that the language pertaining to the safety of the victim and the community should be added in, but the Chair noted that this language is already in subsection (e)(1)(G).

The Vice Chair inquired as to whether a judicial officer is allowed to refuse to release a defendant solely because of

the nature of the evidence. Taking out altogether the reference to the factors relevant to the risk of nonappearance allows the denial of pretrial release. The Chair said that the argument can be made that one only considers the nature of the evidence insofar as it is relevant to the risk of nonappearance. Judge Heller commented that the phrase "insofar as these factors are relevant to the risk of nonappearance" is not necessary. The Chair stated that he agreed that the nature of the evidence against the defendant should be considered not only as to the risk of nonappearance, but also as to the danger to the victim and to the community. Mr. Klein suggested that the language of subsection (e)(1)(G) could be added to subsection (e)(1)(I). The Vice Chair noted that the general rule is that someone is released unless (1) the defendant poses a danger to the victim or to the community or (2) there is a risk that the defendant will not appear. All of the factors are relevant to those two things. The Chair suggested that subsection (e)(1)(A) end with the word "conviction," and the remainder of that subsection be placed in subsection (e)(1)(I) which would read as follows: "any other factor relevant to the risk of nonappearance, including ...".

The Vice Chair pointed out that section (b) of Rule 4-216, which has now been relettered as section (a), sets forth

that when the determination is made as to whether the defendant should be released, there are two factors for the judicial officer to determine: the appearance of the defendant as required and the safety of the alleged victim and the community. The Chair said that this statement should be there. Professor Warnken explained that the Rule used to refer to the risk of flight. Now the Rule refers to the appearance of the defendant, the risk to the victim, and the risk to society. It is important not to co-mingle these three items with the list of types of information that the judicial officer may consider. Nothing on the list in and of itself is determinative of release; all are relevant to the three risks with which the Rule is concerned -- the risk of nonappearance by the defendant, the risk to the victim, and the risk to society.

The Vice Chair suggested that the language in subsection (e)(1)(A), which reads "insofar as these factors are relevant to the risk of nonappearance," and subsections (e)(1)(G) and (H) in their entirety should be moved to subsection (e)(1)(I). Judge Heller disagreed with this suggestion, stating that it is important for the judicial officer to look at the "shopping list" of factors, and they are semantically correct where they are located now. The Vice Chair suggested that language should be added to subsection (e)(1) repeating the concept

that the judicial officer may determine that no condition of release will ensure the appearance of the defendant and the safety of the alleged victim and the community. The Chair suggested that the last three lines of section (b), which has now been relettered section (a), should be placed either at the beginning of subsection (e)(1) or in subsection (e)(1)(I). Mr. Johnson pointed out that subsection (e)(1)(H) should not be put into subsection (e)(1)(I) because it does not refer to the safety of the community. The Vice Chair agreed that subsection (e)(1)(H) should not be moved. Professor Warnken commented that since the three items listed in section (b), which is now section (a), are statutorily required, they should be termed as mandatory. The Chair said that to be consistent with the statute, the Rule should retain the "laundry list," so there is no question about a judicial officer's right or duty to examine the information available.

Judge Johnson drew the Committee's attention to subsection (e)(2) and noted that the language in subsection (e)(2) has not been changed.

Turning to subsection (e)(3), Judge Johnson pointed out a typographical error in part (B) -- the word "protect" should not have been changed to the word "prompt." The Chair had a question about subsection (e)(4) concerning the meaning of the language "conditions of the bail." Mr. Sykes answered that an

example of a condition would be that the defendant is not allowed to leave the State. The Chair commented that if the judicial officer sets a bail of 10% or 50% of the full penalty amount, this is not a condition. The Reporter remarked that the word "terms" might work better than the word "conditions." The Vice Chair observed that Title 1, Chapter 400 of the Maryland Rules of Procedure has language pertaining to bonds. The Vice Chair commented that the tagline of subsection (e)(4) does not cover the new language that has been added to it.

Professor Warnken pointed out there is some redundancy in the conditions of release in section (f). The Chair said that the "Conditions of Release" section pertains to the judicial officer telling the defendant how the defendant can post bail. Imposition of the conditions of release precedes the advice of those conditions in the Rule. Mr. Sykes noted that the conditions of release and the conditions of bail are two separate things. Judge Johnson told the Committee that Mr. Deeley's committee had recommended that subsection (f)(4)(B) read as follows: "with collateral security of the kind specified in Rule 4-217(e)(1)(A) equal in value to the greater of $25.00 or 10% of the full penalty amount [,] or, <u>for reasons stated in writing</u>, a larger percentage as may be fixed by the judicial officer ...". The Criminal Subcommittee voted three to two to eliminate the suggested language. The

Chair questioned as to whether the language in subsection (f)(6) which reads: "for good cause shown" is necessary. The Vice Chair replied that Code, Criminal Law Article, §9-304 may have a good cause requirement. The Chair responded that if this is in the Code, the language should stay in, but if it is not, it should be deleted.

Mr. Deeley referred to Mr. Karceski's comments concerning appearances by defendants in the middle of the night. Mr. Deeley said that he, too, has had the experience of representing someone before a commissioner who did not allow Mr. Deeley to speak on behalf of his client. He expressed the view that the commissioners rarely set a bail of 10% of the full penalty amount. As the Chair of the Pretrial Release Advisory Committee, he seeks reform to pretrial release practices. He would like to see two changes to Rule 4-216. If the commissioner is required to explain why a bail greater than 10% of the full penalty amount is being set, it will remind him or her that the 10% bail is an option. Although it is an administrative burden to the bench to fill in the blank, it is being balanced against reforming pretrial practice. The Subcommittee's vote to eliminate the proposed language was very close, three to two. Mr. Deeley said that he hoped the Rules Committee would reconsider the proposal to add the language "for reasons stated in writing" to subsection

(f)(4)(B).

Ms. Veronis observed that the commissioner has to explain the bail only if it is higher than the 10% option. The Chair remarked that the hope is that the commissioner will always consider the 10% option or less, but the proposed language may not accomplish this. Commissioners may choose to proceed under subsection (f)(4)(C), instead of subsection (f)(4)(B). Mr. Deeley noted that his committee lobbied to get judicial officers to embrace the 10% option as the first choice alternative whenever bail is required. Ms. Veronis stated that the Report of the Pretrial Release Advisory Committee was endorsed by the Judicial Council. At the Subcommittee meeting, Judge Norton had pointed out an ambiguity caused by an overlap between two subsections of the Rule. If the collateral security required is 100% of the full penalty amount, there is an overlap between subsections (f)(4)(B) and (f)(4)(C). These subsections can be redrafted to eliminate the ambiguity.

Professor Warnken commented that Mr. Deeley suggests that judicial officers are not doing what they are supposed to be doing. However, there is no evidence to support this. In the Rule, there are nine factors that a judicial officer needs to consider; assuming all are equally valuable, why should one of these be put into writing and not the other eight? In his

report, a copy of which had been mailed to each member of the Rules Committee, Professor Warnken looked at 280,000 cases between 1998 and 1999. The failure to appear rate is 34.3% higher for the defendants who were given the bail of 10% of the full penalty amount. The Chair commented that this is a policy issue.

Professor Colbert told the Committee that he is a professor at the University of Maryland Law School. For the past eight years, he has been concerned with changing the pretrial release and bail system. In this capacity, he has not been retained by anyone. The results of a study he conducted showed that less than 3% of defendants were offered the 10% cash alternative bail. Half of all defendants were not released on personal recognizance. When the 10% alternative is used, upon the conclusion of the case, it can be recovered. It is the least onerous alternative. To encourage judges and commissioners to consider the 10% alternative, they have to appreciate the economic hardship higher bails impose. The Rules proposed today are a modest step forward. Nine out of 10 arrests are for non-violent crimes and are District Court offenses. These cases are appropriate for the 10% bail. If defendants can recover the money from the bail, it can be used for rent, utilities, and food.

Mr. Titus commented that the Rule quotes Code, Criminal

Procedure Article, §5-101 and refers to the liberal construction of the statute. He expressed his concern about deleting section (a) entirely and suggested that in addition to the Committee note drafted by Professor Warnken, a Committee note or cross reference could be added which would state what §5-101 provides. Judge Heller and the Chair agreed with this suggestion.

The Chair remarked that he was surprised to learn that commissioners are giving short shrift to the 10% bail alternative, because commissioners and judges are trained to consider it as an alternative. One way to solve the problem is to provide in the Rule that if the commissioner sets bail at $2500 or less, the commissioner shall advise the defendant that he or she may post a bail bond through a corporate surety or post a bond of 10%. The defendant would have the choice. This would ensure that commissioners consider the 10% option. Judge Norton observed that there needs to be a cultural change among judges to consider alternative bail methods. He agreed that there has been a lack of use of the 10% option.

Professor Warnken commented that the Chair's suggested change would create a de jure or de facto right to get a 10% bail which would then create a large bureaucracy to administer this type of bail. There is a reason why the failure to

appear rate is 34.3% higher with the 10% bail option. His report explains that the 10% bail is paid to the court, and if the defendant does not appear, no one sees to it that the defendant is located. Due to economic necessity, bail bondsmen see to it that defendants appear for trial. The large numbers of those who fail to appear cannot be ignored. If the 10% bail is offered 5 or 6% of the time, and it is put into place 3% of the time, it will produce 3,000 to 4,000 such bails. The de facto impact of 10% bail is bureaucracy in the courts. The Chair stated that the issue is whether the 10% bail is being used where it is appropriate. Delegate Vallario remarked that counsel, as officers of the court, help in assisting the judicial officers in determining bail. In the 2002 legislative session, there were two pieces of legislation on this topic, both of which failed after full hearings. His feeling is that the proposed language that was rejected by the Subcommittee was a back door approach to the legislation that was killed. The commissioners need to be educated. In some cases, a reasonable bond will assure the appearance of the defendant at trial. A bondsman will try to bring a defendant back for trial. If a defendant puts up $1000 of a $10,000 bail, no one will see that the defendant appears for trial.

The Vice Chair asked if the judges feel that a 10% cash

bond is inappropriate. Judge Heller responded that speaking for herself and not on behalf of other judges, she had been educated as to the possible reasons for using the 10% bail. She had not previously used this, but now she does use it as an option. She said that she agrees with Delegate Vallario and Judge Norton that it is important to educate judges and commissioners. The written requirement added to the Rule will not promote the use of the 10% bail. She expressed some concern as to an enforcement mechanism for those bails, and she remarked that the enforcement mechanism may or may not be better when a bail bondsman is involved. The Chair referred to the Vice Chair's question about whether judges are reluctant to use the 10% bail, commenting that some judges are reluctant, because of criticism by the law enforcement community. Judge Heller said that she is not afraid to use the 10% bail.

Judge Missouri told the Committee that in Prince George's County, the judges are rarely using the 10% bail in felony cases. For District Court misdemeanors, the numbers are up. Sometimes the reason the 10% bail is not used is simply a lack of awareness of the options. Judge Missouri noted that he has no problem with adding a checkoff box for the judicial officer to explain why the 10% bail was not chosen, but he feels that doing this will not emphasize the option of the 10% bail. He

expressed the concern that since there has to be a mechanism to keep track of the money owed to the people with 10% bail bonds who appear for trial, this may create a bureaucracy in the clerks' offices. The clerk in Prince George's County is concerned about tracking the bail bond money coming in. The District Court has mechanisms to accept the bail bond money through the commissioner. Judge Missouri had spoken with Ms. Veronis about adding language to Rule 4-216 to assist the clerks of the circuit court in this matter.

Mr. Shipley stated that the bail money is put into escrow. Ms. Veronis observed that Prince George's County is unique in that the county receives 1% of the amount of bail bond money. Judge Missouri commented that Prince George's County has a bail bond commissioner who monitors all bail bonds within the circuit. The Vice Chair expressed the opinion that this may present a conflict for judges. Judge Johnson responded that the fact the county receives 1% of the bail bond money is not in the minds of most judges. The State's Attorney proceeds with forfeiture of property bonds if the defendant does not appear. The Chair pointed out that the legislature rejected the 10% bail bill. He said that his proposal is not inconsistent with what the legislature rejected. The bail is low enough, and as long as the defendant is not dangerous, it is an option. Even with a 10%

option, many people prefer to pay a bail bondsman on a payment plan to get out of jail more quickly. This unclogs the detention centers which sometimes hold defendants for 90 days, because they cannot make a $500 bail.

Delegate Vallario referred to the $25 amount in subsection (f)(4)(B), noting that when the Rule was written, a $250 bond was a large amount of money. The $25 amount could be changed to $100 for a $1000 bond. This would be equivalent to the suggestion made by the Chair -- the greater of $1000 or 10%. The Reporter observed that Code, Criminal Procedure Article, §5-205 refers to the $25 amount.

Mr. Karceski expressed his agreement with the Chair's suggestion. The bail amount of $2500 covers the overwhelming majority of situations that would clog jails, and 10% of that would not cause problems. No commissioner has ever put a client of Mr. Karceski's on a 10% bail. His clients have either been released on personal recognizance, a monetary amount, or on a property bond. Professor Colbert also agreed with the Chair's proposal. There is a lack of awareness of the various bail options. Except for two counties, indigent defendants have no attorney when they appear before a commissioner or a bail review judge. An attorney would educate a commissioner or a judge. With the lack of representation, however, it is important to increase awareness

by other means. The Advisory Committee has requested that the Rules Committee speak to the 10% bail option to encourage judges to consider it.

Professor Warnken commented that to the extent there is a need for reform, he recommends the mandatory checkoff by judges. The Chair's suggestion is the same net effect as a mandatory 10% bail and is against the spirit of what the legislature did not do. Mr. Flohr expressed the view that including a box for commissioners and judges to check off is a way of calling attention to the 10% option. He had attended the legislative hearings on bail, and he feels that adding the checkoff box is not against the views of the legislators. The Chair stated that his proposal goes farther. If the bail is $2500 or less, the judicial officer shall advise the defendant of the right to post a 10% bail. If the bail is greater than $2500, the judicial officer shall determine if the bail is 10%, full, etc.

Delegate Vallario asked about changing the amount in subsection (f)(4)(B) from $25 to $100. The Committee agreed by consensus to this change. The Chair said that the Committee can agree on an amount below which the judicial officer must advise the defendant that he or she can choose the 10% option or a corporate surety. The Vice Chair suggested that the three different options for subsection

(f)(4)(B) be presented to the Court of Appeals, including the change from $25 to $100. The Court would be apprised that the Criminal Subcommittee did not vote for a change to the subsection. Judge Johnson said that since not all of the Subcommittee members were present at the meeting where the vote was taken, the Court should not be told about the Subcommittee's vote. The Vice Chair said that the three options are (1) no change, (2) adding a statement of reasons as to why the judicial officer chose a bail higher than 10% of the full penalty amount, and (3) the proposal by the Chair. The Court can decide as to which of these it prefers. The Chair agreed with the Vice Chair's suggestion.

Judge Missouri noted that the Chair's proposal is a way to encourage judicial officers to concentrate on the 10% option. The Vice Chair remarked that there may be times when even though the judicial officer is imposing a $2500 bond, the judicial officer may want a surety bond. Judge Heller responded that this judicial discretion is not taken away, but the Vice Chair argued that the Chair's proposal eliminates the judge's discretion to mandate a surety. The Chair observed that for some amounts of bail, it does not make sense to mandate a corporate surety. There is no harm in clarifying that above some level, a judicial officer has discretion to designate bail. Judge Heller remarked that this could result

in higher bails being set. Judge Missouri noted that some defendants, if given the option of a $10,000 bail or personal recognizance with supervision by Pretrial Release, opt for the $10,000 so that they will not be under the supervision of Pretrial Release.

Judge Kaplan expressed his agreement with the Chair's proposal using the amount of $2500 or below when the judicial officer advises the defendant of his or her right to post a 10% bond. The Vice Chair asked if the concept precludes the idea of sending the three options to the Court of Appeals. The Chair asked the Committee how many of them were in favor of the idea of offering the Court the three options. Four members were opposed, the remainder were in favor. The Chair then inquired what the Rules Committee preference was. The Vice Chair remarked that some of the members may not have a preference. The Chair stated that a majority of the Committee is favor of informing the Court of Appeals about the three options. The Vice Chair noted that the Court may combine the options. Mr. Sykes observed that no inconsistency exists between the proposal of the Pretrial Advisory Committee regarding the judicial officer explaining why the bail is over 10% of the full amount and the Chair's proposal that when a bail is set at $2500 or below, the defendant is to be told of the options of a bail of 10% of the full amount or a corporate

surety bond. Judge Kaplan moved that the Chair's proposal be approved as the first choice option for recommendation to the Court of Appeals. The Committee was in favor of this on a vote of 16 for the motion and one abstention. The Vice Chair said that although she would like this proposal to be an option that is presented to the Court, it is not necessarily her first choice. She questioned as to whether the courts can handle this administratively. Judge Dryden answered that this would be applicable mostly to the District Court, which takes in the bail money every day. The money is kept if the defendants do not appear, and it is returned to the defendants who do appear.

The Chair inquired as to how many Committee members were in favor of the Advisory Committee recommendation, which is that the judicial officer explain why a bail is set at more than 10% of the full amount. Senator Stone asked if this means that the judicial officer checks off a box which reads "considered, but denied," or if this means the officer has to write an explanatory paragraph. The Chair replied that this means providing a statement of reasons and not just checking a box. The Vice Chair inquired if the reasons answer why the officer is requiring a higher amount of bail, and the Chair answered that the reasons explain why the officer is not allowing a 10% cash bail. Senator Stone remarked that as part

of the educational component, a box could be added providing that 10% cash was considered, but denied. The Chair added that this would be useful to be put into the District Court forms, but not into the Rules of Procedure as a requirement.

Judge Missouri remarked that it was his understanding that the Pretrial Release Advisory Committee is recommending that a judicial officer be required to affirmatively state a reason when the defendant receives a bail which is greater than 10% of the full amount. Professor Warnken said that the judges and District Court commissioners need to be educated, but the third option takes way their discretion as to how the defendants post bond. The Chair responded that discretion would be taken away only if the bail is $2500 or less. Mr. Sykes asked if the requirement that the judicial officer explain the bail decision if it is greater than 10% of the full amount would cause an administrative burden in the flow of cases. Judge Heller replied that sometimes many defendants are present at the same time for bail reviews, and it could be a burden to write down the explanations. However, the benefits may outweigh the burdens.

The Chair commented that stating the reasons may create some burden on the commissioners and the court. There would be two situations in which the explanation would be made. One is explaining the decision as to whether the bail is cash or a

corporate surety, and the other is if the bail is more than 10% of the full amount. Mr. Deeley added that another benefit of requiring an explanation is that the next judicial officer to review the prior decision will understand it better.

The Chair called for a vote as to whether to include the requirement that a bail which is more than 10% of the full amount has to be explained as an option for the Court of Appeals to consider. The Chair explained that this vote did not mean that this option was the first choice. Mr. Sykes inquired as to how this will operate in practice. He said that he cannot vote in favor of this option because to him it seemed to be the equivalent of using a cannon to shoot a tin can. This option can be submitted to the Court of Appeals as a recommendation of a distinguished Committee chaired by Mr. Deeley, but Mr. Sykes reiterated that he cannot say that he is in favor of it.

The Chair asked the Committee to vote on three things: whether to recommend to the Court of Appeals adoption of the Advisory Committee's language, to recommend against adoption, or to take no position. Five members of the Committee voted to recommend in favor, seven voted to recommend against, and six took no position. The Chair stated that the court will be advised of this vote.

After the lunch break, the Chair announced that Ms.

Potter had received from the Maryland State Bar Association the Ed Shea Award for Professionalism. Mr. Johnson announced that Judge Missouri had received an award from the Pro Bono Resource Center for his activities.

Ms. Potter asked if the Style Subcommittee could take a look at the three factors listed in subsection (f)(5) of Rule 4-216. The Vice Chair answered that the Style Subcommittee will review this provision.

Judge Johnson told the Committee that no changes had been made to sections (g) or (h). Section (i) has new language. Mr. Sykes pointed out that the language needs restyling, but the concept will be retained. Mr. Titus asked if a Committee note pertaining to Code, Criminal Procedure Article §5-101 will be added to Rule 4-216 , and the Chair replied affirmatively. The Committee approved Rule 4-216 as amended.

Judge Johnson said that the only changes made to Rule 4-217 were stylistic. The Committee approved Rule 4-217 as presented.

Mr. Deeley thanked the Committee for their time and thoughtful deliberation. Judge Johnson added that all of the consultants had done a tremendous job.

Agenda Item 2. Reconsideration of a proposed amendment to Rule 4-505 (Answer to Application or Petition)

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-505 to add to section (d) new language to include failure to file a notice of denial as constituting a consent to an expungement, as follows:

Rule 4-505. ANSWER TO APPLICATION OR PETITION

(a) Answer to Application

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

(b) Answer to Petition

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

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

(c) Contents

An answer objecting to expungement

> of records shall state in detail the specific grounds for objection. A law enforcement agency or State's Attorney may by answer consent to the expungement of an applicant's or petitioner's record.
>
> (d) Effect of Failure to Answer
>
> The failure of a law enforcement agency or State's Attorney to file either a notice of denial or an answer within the 30 day period constitutes a consent to the expungement as requested.
>
> Source: This Rule is derived from former Rule EX4.

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

> Julia M. Andrew, Esq., Assistant Attorney General, explained in a letter that a law enforcement agency is not required to file an answer to an application for expungement if the agency previously filed a timely notice of denial. The current language of section (d) of Rule 4-505 is misleading because it does not refer to a filing of a notice of denial, and Ms. Andrew is requesting that this language be added. The Criminal Subcommittee is in agreement with this request.

Judge Johnson explained that the Subcommittee is proposing a change to the Rule in response to a letter from Julia Andrew, Esq., Assistant Attorney General. She had pointed out that a law enforcement agency is not required to file an answer to an application for expungement if the agency previously filed a timely notice of denial. Section (d) of

Rule 4-505 does not refer to a filing of a notice of denial which may be misleading, and Ms. Andrew recommends adding language to section (d) referring to a notice of denial. The Chair said that the problem is that if the law enforcement agency has filed or sent to the petitioner a notice of denial, and then a petition is filed requesting judicial relief, how will the court know that the agency is contesting the expungement, unless the agency files an answer? Judge Heller noted that this is already in the Rule. Ms. Andrew is making sure that failure to file a notice of denial constitutes a consent to the expungement.

The Chair asked again how the court will know that the agency denied the application. The Vice Chair responded that in the response to the applicant, the agency refuses to expunge the record. She pointed out that section (a) is misnamed, because it refers also to a notice of denial. Ms. Potter inquired if it is a notice or an answer. The Vice Chair replied that the State's Attorney files an answer. She asked whether the law enforcement agency is a party to this proceeding, if the agency denied the application for expungement. The Chair answered that the agency is a party. The Vice Chair inquired if the law enforcement agency is represented by the Office of the State's Attorney. Judge Heller noted that Rule 4-504, Petition for Expungement When

Charges Filed, provides that the petition shall be served on the State's Attorney and each law enforcement agency named in the petition. The law enforcement agency could be the police department, which is not necessarily represented by the State's Attorney.

The Chair suggested that the Rule could provide that if the person who seeks expungement goes to court, the person who is opposed to the expungement should answer the petition. The idea of the Rule may be that the court will know that the agency denied the application, because a person would not come to court unless that happened, but under proper judicial administration, an answer is filed explaining why the person is not entitled to the expungement. The Vice Chair remarked that the application is similar to a complaint. The agency files an answer or a timely notice of denial. The Rule could provide that the agency shall file an answer if one was not previously filed. Delegate Vallario observed that a notice of denial is not really an answer.

The Chair suggested that the following language be removed from section (a): "if it has not previously filed a timely notice of denial." He also suggested deleting the new language from section (d). He inquired as to how the court can consider whether to grant relief if the notice of denial served on the defendant-petitioner is not before the court.

Mr. Klein pointed out that Form 4-503.3, Application for Expungement of Police Record, has a check-off box indicating that the notice of denial of request for expungement is attached to the application. The burden is on the applicant to show the existence of the notice of denial. The Vice Chair pointed out that the application is like an initiating complaint, and the petition is filed after charges have been filed. Mr. Shipley added that the application is filed with the law enforcement agency; once the agency denies the application, then the applicant files with the court. Judge Missouri noted that section (a) of Rule 4-505 only applies where the person has been arrested, but not charged.

The Reporter suggested that the word "filed" be changed to the word "issued," because there is no case in which the notice of denial could have been "filed." Mr. Sykes again asked the question previously posed by the Chair–how does the court know that the agency previously denied the application? The Reporter answered that there are two situations in which an application would be filed with the court: either the agency denied the application or the agency took no action. Section (a) addresses both. The applicant may be in legal limbo if the agency never notified the applicant of its decision. If the applicant goes to court, he or she would check the appropriate box in paragraph 4 of Form 4-503.3.

Judge Heller expressed the view that the burden should not be on the agency. It is a good idea for the applicant to file something to give the judge an understanding of what took place previously.

The Chair questioned as to why the law enforcement agency should not be required to file an answer. The Vice Chair, speaking on behalf of agencies, explained that an agency would be burdened and should only have to file an answer if the agency needs to say something else. The Vice Chair expressed her agreement with the Reporter's suggestion to substitute the word "issued" for the word "filed" in subsection (a). The Committee agreed by consensus to this suggestion.

Mr. Sykes suggested that section (d) should be changed to read: "The failure of a law enforcement agency or State's Attorney to issue a notice of denial or to file an answer within the 30 day period constitutes a consent to the expungement as requested." The Chair pointed out that the agency may issue a notice of denial, but the court may not know that it has been issued, and interprets the agency's lack of action as a consent to the expungement. To avoid the court expunging a serious criminal record, the agency should file an answer or a copy of the notice of denial. Judge Missouri remarked that the best information is from the law enforcement agency. It is a greater burden for the agency to have to file

with the court when it has already issued a denial. Mr. Sykes said that once a case is in court, within 30 days, the agency should have to file either a copy of the original notice of denial or an answer which would amplify the notice of denial.

The Chair commented that if the agency does not have to file an answer, the problem that is created is that the court may not know about the previous denial, and it may allow the expungement. Judge Norton observed that it is not a burden to require the agency to file an answer if the agency objects to the expungement. In the vast majority of the cases, no one objects, so the expungement is granted. From an agency point of view, very few cases are contested.

The Chair agreed with Ms. Andrew's point that sections (a) and (d) are inconsistent. He suggested that Ms. Andrew be asked about the suggestion that the agency should be required to file an answer if the agency wants to contest the expungement. Delegate Vallario added that the agency could also file a copy of the notice of denial. The Reporter pointed out that this problem should be self-correcting if the Notice of Denial is attached to the application for expungement, as required by Form 4-503.3. If no Notice of Denial was issued, sections (c) and (d) of Rule 4-503, Application for Expungement When No Charges Filed, provide for service of copies of the application on the State's Attorney

and the law enforcement agencies. If no Notice of Denial is attached, the Notice of Hearing form, Form 4-503.4 is served on the State's Attorney and on the agency, which will be ordered to give an answer if the State's Attorney or agency wishes to oppose the expungement. The Vice Chair commented that it does not hurt to ask for an answer. The Reporter noted that inaction counts as a consent.

Judge Norton pointed out that the form seems to require an answer, but the Rule does not. The Rule only requires an answer if the agency wishes to embellish the initial denial. A hearing is discretionary with the petition and required with the application. The Reporter asked how this works in practice. Judge Norton replied that the judge receives a stack of petitions and applications, and no one objects to them. The Chair asked if the Rules Committee was in agreement that Ms. Andrew should be asked whether it would be sufficient to conform Rule 4-505 to Form 4-503.4, which provides that if the agency wishes to object to the application for expungement, the agency must file an answer stating specific grounds for the objection. The Committee agreed by consensus to consult Ms. Andrew.

Agenda Item 3. Consideration of certain proposed rules changes recommended by the Criminal Subcommittee to conform the Rules to recent legislation. Amendments to: Rule 1-361 (Execution

of Warrants and Body Attachments), Rule 4-231 (Presence of Defendant), Rule 4-312 (Jury Selection), Rule 4-340 (Procedures Required After Sentencing in Controlled Dangerous Substance Cases), Rule 4-342 (Sentencing – Procedure in Non-capital Cases), Rule 4-402 (Petition), Rule 5-412 (Sex Offense Cases; Relevance of Victim's Past Behavior), Rule 5-606 (Competency of Juror as Witness), Rule 8-301 (Method of Securing Review – Court of Appeals), Rule 8-306 (Capital Cases – Review in Court of Appeals), Rule 11-118 (Parents' Liability – Hearing – Recording and Effect), Form 4-504.1 (Petition for Expungement of Records) NOTE: The substantive changes to Rule 4-343 that are shown were approved at the April 2002 meeting of the Rules Committee. The enactment of Chapter 26 (HB 11) has necessitated certain non-substantive changes to the Rule to conform terminology and statutory references to the legislation. Rule 4-343 (Sentencing – Procedure in Capital Cases)

The Reporter presented Rules 1-361, Execution of Warrants and Body Attachments; 4-231, Presence of Defendant; 4-312, Jury Selection; 4-340, Procedures Required After Sentencing in Controlled Dangerous Substance Cases; 4-342, Sentencing - Procedure in Non-capital Cases; 4-402, Petition; 5-412, Sex Offense Cases; Relevance of Victim's Past Behavior; 5-606, Competency of Juror as Witness; 8-301, Method of Securing Review - Court of Appeals; 8-306, Capital Cases - Review in Court of Appeals; and 11-118, Parents' Liability - Hearing - Recording and Effect; and Form 4-504.1, Petition for

Expungement of Records, for the Committee consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-361 to conform to recent legislation, as follows:

Rule 1-361. EXECUTION OF WARRANTS AND BODY ATTACHMENTS

(a) Generally

A person arrested on a warrant or taken into custody on a body attachment shall be brought before the judicial officer designated in the specific instructions in the warrant or body attachment.
Cross reference: See Rules 4-102, 4-212, and 4-347 concerning warrants. See Rules 1-202, 2-510, 3-510, 4-266, and 4-267 concerning body attachments.

(b) Warrants Without Specific Instructions

If a warrant for arrest issued by a judge does not contain specific instructions designating the judicial officer before whom the arrested person is directed to appear:

(1) The person arrested shall be brought without unnecessary delay, and in no event later than 24 hours after the arrest, before a judicial officer of the District Court sitting in the county where

the arrest was made, and

(2) The judicial officer shall determine the person's eligibility for release, establish any conditions of release, and direct how the person shall be brought before the judge who issued the warrant.

(c) Body Attachments Without Specific Instructions

If a body attachment does not specify what is to be done with the person taken into custody, the person shall be brought without unnecessary delay before the judge who issued the attachment. If the court is not in session when the person is taken into custody, the person shall be brought before the court at its next session. If the judge who issued the attachment is not then available, the person shall be brought before another judge of the court that issued the attachment. That judge shall determine the person's eligibility for release, establish any conditions of release, and direct how the person shall be brought before the judge who issued the attachment.

Committee note: Code, ~~Article 27, §594 D-1 (a)(2)~~ Courts Article, §2-107 (a)(3) requires that a warrant for arrest issued by a circuit court contain certain instructions to the sheriff or other law enforcement officer who will be executing the warrant. This Rule provides procedures for processing a person taken into custody on a warrant or body attachment that does not contain this information.

Source: This Rule is new.

Rule 1-361 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 1-361

conforms the Rule to the renumbering and recodification of Code, Article 27, §594 D-1 (a)(2) as Code, Courts Article, §2-107 (a)(3).

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-231 to conform to recent legislation, as follows:

Rule 4-231. PRESENCE OF DEFENDANT

(a) When Presence Required

A defendant shall be present at all times when required by the court. A corporation may be present by counsel.

(b) Right to be Present - Exceptions

A defendant is entitled to be present at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248; or (3) at a reduction of sentence pursuant to Rules 4-344 and 4-345.

Cross reference: Code, ~~Article 27, §774~~ Criminal Procedure Article, §11-303.

. . .

Rule 4-231 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-231

conforms the Rule to the renumbering and recodification of Code, Article 27, §774 as Code, Criminal Procedure Article, §11-303.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-312 to conform to recent legislation, as follows:

Rule 4-312. JURY SELECTION

. . .

(b) Alternate Jurors

(1) Generally

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

(2) Capital Cases

In cases in which the death penalty may be imposed, the court shall appoint and retain alternate jurors as required by Code, ~~Article 27, §413 (m)~~ Criminal Law Article, §2-303 (d).

(3) Non-capital Cases

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

. . .

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

Chapter 26, Acts of 2002 (HB 11), created a new Criminal Law Article which contains many of the provisions formerly in Article 27 of the Annotated Code of

Maryland. The references to Article 27 in the Rules are being corrected to reflect their new placement.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-340 to conform to recent legislation, as follows:

Rule 4-340. PROCEDURES REQUIRED AFTER SENTENCING IN ~~CONTROLLED DANGEROUS SUBSTANCE~~ DRUG CRIME CASES

(a) Applicability

This Rule applies to a defendant convicted of a ~~controlled dangerous substance offense~~ drug crime, as defined in Code, ~~Article 27, §298A~~ Criminal Law Article, §5-810, committed on or after January 1, 1991. Title 5 of these rules does not apply to the determinations required to be made by the court under this Rule.

(b) Definitions

As used in this Rule:

(1) "conviction" includes probation on stay of entry of judgment pursuant to Code, Criminal Procedure Article, §6-220; and

(2) "license" means a State-issued license as defined in Code, Article 41, §1-501.

(c) Preliminary Determinations by Court

Immediately after sentencing the

defendant, the court shall determine from evidence in the case or from evidence or information supplied by the State's Attorney, the Division of Parole and Probation, or the defendant:

(1) whether the defendant holds a license; and

(2) if so, whether the defendant has been previously convicted of a ~~controlled dangerous substance offense~~ drug crime committed on or after January 1, 1991.

(d) Automatic Reporting Where Prior Conviction Exists

If the defendant has a license and such a prior conviction, the court shall direct the clerk to certify and report the current conviction and licensing information required by Code, ~~Article 27, §298A~~ Criminal Law Article, §5-810 to the appropriate licensing authority.

(e) Determination by Court Where No Prior Conviction Exists

If the defendant holds a license but has no such prior conviction the court shall determine whether, prima facie, there is a relationship between the current conviction and the license, including:

(1) the defendant's ability to perform the tasks authorized by the license;

(2) whether the public will be protected if the defendant continues to perform the tasks authorized by the license;

(3) whether the nature and circumstances of the ~~controlled dangerous substance offense~~ drug crime warrant referral to the licensing authority; and

(4) any other facts that the court

deems relevant.

(f) Reporting

If the court determines that there is a relationship between the conviction and a license, the court shall direct the clerk to certify and report the current conviction and the licensing information required by Code, ~~Article 27, §298A~~ Criminal Law Article, §5-810 to the appropriate licensing authority. If the court determines that there is no relationship between the conviction and a license, no report shall be issued to the licensing authority.

Source: This Rule is new.

Rule 4-340 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 4-312.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 to conform to recent legislation, as follows:

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

. . .

(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~~ Criminal Law Article, §§2-101, 2-201, 2-202 (b)(3), 2-303, and 2-304.

. . .

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

See the Reporter's Note to Rule 4-312.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

AMEND Rule 4-402 to conform to recent legislation, as follows:

Rule 4-402. PETITION

(a) Content

The petition shall state whether or not petitioner is able to pay costs of the proceeding or to employ counsel and shall include:

(1) The petitioner's name, place of confinement, and inmate identification number.

(2) The place and date of trial, the offense for which the petitioner was convicted, and the sentence imposed.

(3) The allegations of error upon which the petition is based.

(4) A concise statement of facts supporting the allegations of error.

(5) The relief sought.

(6) A statement of all previous proceedings, including appeals, motions for new trial and previous post conviction petitions, and the determinations made thereon.

(7) A statement of the facts or special circumstances which show that the allegations of error have not been waived.

Committee note: See Code, ~~Article 27, §645A~~ Criminal Procedure Article, Title 7 and *Curtis v. State*, 284 Md. 132 (1978).

. . .

Rule 4-402 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 4-312.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 400 - RELEVANCY AND ITS LIMITS

AMEND Rule 5-412 to conform with recent legislation, as follows:

Rule 5-412. SEX OFFENSE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR

In prosecutions for rape, sexual offense in the first or second degree, attempted rape, or attempted sexual offense in the first or second degree, admissibility of evidence relating to the victim's sexual history is governed by Code, ~~Article 27, §461A~~ Criminal Law Article, §3-317 (b).

Committee note: Code, ~~Article 27, §461A~~ Criminal Law Article, §3-317 (b) governs the admissibility of sexual history evidence only in prosecutions for rape, sexual offense in the first or second degree, attempted rape, or attempted sexual offense in the first or second degree. The admissibility of such evidence in other sexual offense cases is governed by the rules of this Title.

Source: This Rule is new.

Rule 5-412 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 4-312.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-606 to conform to recent legislation, as follows:

Rule 5-606. COMPETENCY OF JUROR AS WITNESS

(a) At the Trial

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

(b) Inquiry into Validity of Verdict

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

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

(c) "Verdict" Defined

For purposes of this Rule, "verdict" means (1) a verdict returned by a petit jury or (2) a sentence returned by a jury

in a sentencing proceeding conducted pursuant to Code, ~~Article 27, §413~~ **Criminal Law Article, §2-303 or 2-304**.

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

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

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

See the Reporter's Note to Rule 4-312.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 300 - OBTAINING APPELLATE REVIEW IN COURT OF APPEALS

AMEND Rule 8-301 to conform to recent legislation, as follows:

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

(a) Generally

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

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

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

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

Cross reference: For Code provisions governing direct appeals to the Court of Appeals, see ~~Article 27, §414~~ Criminal Law Article, §2-401 concerning automatic review in death penalty cases; Article 33, §19-4 concerning appeals from circuit court decisions regarding contested elections; and Financial Institutions Article, §9-712 concerning appeals from circuit court decisions approving transfers of assets of savings and loan associations. For Maryland Uniform Certification of Questions of Law Act, see Code, Courts Article, §§12-601 through 12-609.

. . .

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

See the Reporter's Note to Rule 4-312.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 300 - OBTAINING APPELLATE REVIEW IN COURT OF APPEALS

AMEND Rule 8-306 to conform to recent legislation, as follows:

Rule 8-306. CAPITAL CASES - REVIEW IN COURT OF APPEALS

. . .

(c) Automatic Appeal From Judgment

(1) Whenever a sentence of death is imposed, there shall be an automatic appeal to the Court of Appeals of both the determination of guilt and the sentence, whether or not the determination of guilt was based on a plea of guilty.

(2) The clerk of the circuit court shall enter on the docket a notice of appeal on behalf of the defendant within 10 days after the later of (A) entry of the judgment, or (B) entry of a notice withdrawing a timely motion for new trial filed pursuant to Rule 4-331 (a) or an order denying the motion. The clerk shall promptly notify the Attorney General, the defendant, and counsel for the defendant of the entry of the notice of appeal.

(3) Unless the parties have elected to proceed in accordance with Rule 8-413 (b), the clerk, upon docketing the notice of appeal, shall direct the court stenographer to prepare a transcript of both the trial and sentencing proceedings in conformance with Rule 8-411 (a). Within 10 days after receipt of the transcript, the clerk shall transmit the record to the Clerk of the Court of Appeals. The statement of costs required by Rule 8-413 (c) shall separately state the cost applicable to the sentencing proceeding. The State shall pay those costs.

(4) The Court of Appeals shall consider (A) those issues concerning the sentence required by Code, ~~Article 27, §414 (e)~~ Criminal Law Article, §2-401 (d) and (B) all other issues properly before the Court on appeal and necessary to a decision

in the case.

. . .

Rule 8-306 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 4-312.

MARYLAND RULES OF PROCEDURE

TITLE 11 - JUVENILE CAUSES

AMEND Rule 11-118 to conform to recent legislation, as follows:

Rule 11-118. PARENTS' LIABILITY - HEARING - RECORDING AND EFFECT

a. Hearing.

If, at any stage of a proceeding, the court believes a respondent has committed acts for which the respondent's parent or parents may be liable under Code, ~~Article 27, §139D, 151A, or 151C~~ Criminal Law Article, §§4-503, 9-504, or 9-505 or Code, Criminal Procedure Article, §11-607 (b), the court shall summon the parent or parents in the manner provided by Chapter 100 of Title 2 for service of process to obtain personal jurisdiction over a person to appear at a hearing to determine liability. This hearing may be conducted contemporaneously with a disposition hearing, if appropriate.

b. Recording.

Recordation of a judgment of restitution shall be governed by Code, Criminal Procedure Article, §11-608.

Source: This Rule is former Rule 918 and is in part new.

Rule 11-118 was accompanied by the following Reporter's Note.

See the first paragraph of the Reporter's Note to Rule 4-312.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-504.1 to conform to recent legislation, as follows:

Form 4-504.1. PETITION FOR EXPUNGEMENT OF RECORDS

(Caption)

PETITION FOR EXPUNGEMENT OF RECORDS

1. (Check one of the following boxes) On or about

_____, I was [ ] arrested, [ ] served
(Date)

with a summons, or [ ] served with a citation by an officer of

the

_____

(Law Enforcement Agency)

at
_____,

Maryland, as a result of the following incident
_____

_____
__

_____
_

_____
_.

2. I was charged with the offense of
_____

_____
_.

3. On or about
_____ ,
(Date)

the charge was disposed of as follows (check one of the following boxes):

[ ] I was acquitted and either three years have passed since

disposition or a General Waiver and Release is attached.

[ ] The charge was dismissed or quashed and either three years

have passed since disposition or a General Waiver and

Release is attached.

[ ] A judgment of probation before judgment was entered on

a

charge that is not a violation of Code*, Transportation Article, § 21-902 or Code*, Criminal Law Article, §§2-503, 2-504, 2-505, or 2-506, or former Code*, Article 27, §388A or §388B, and either (a) at least three years have passed since the disposition, or (b) I have been discharged from probation, whichever is later. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] A Nolle Prosequi was entered and either three years have passed since disposition or a General Waiver and Release is attached. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not

carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] The proceeding was placed on the Stet docket and three years have passed since disposition. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] The case was compromised pursuant to Code*, Criminal Law Article, §3-207, ~~or~~ former Code*, Article 27, §12A-5, or former Code*, Article 10, § 37 and three years have passed since disposition.

[ ] On or about _____ , I

(Date)

was granted a full and unconditional pardon by the Governor for the one criminal act, not a crime of violence as defined in Code*, ~~Article 27, § 643B (a)~~ Criminal Law Article, §14-101 (a), of which I was convicted. More than five years, but not more than ten years, have passed since the Governor signed the pardon, and since the date the Governor signed the pardon I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

WHEREFORE, I request the Court to enter an Order for Expungement of all police and court records pertaining to the above arrest, detention, confinement, and charges.

I solemnly affirm under the penalties of perjury that the contents of this Petition are true to the best of my knowledge, information and belief, and that the charge to which this

Petition relates was not made for any nonincarcerable violation

of the Vehicle Laws of the State of Maryland, or any traffic law,

ordinance, or regulation, nor is it part of a unit the

expungement of which is precluded under Code*, Criminal

Procedure Article, §10-107.

_____

_____

(Date) Signature

_____

(Address)

_____

_____

_____

(Telephone No.)

* References to "Code" in this Petition are to the Annotated Code of Maryland.

REPORTER'S NOTE

See the Reporter's Note to Rule 4-312.

The Reporter explained that Rule 1-361 is being conformed to the renumbering and recodification of Code, Article 27,

§594 D-1 (a)(2) as Code, Courts Article, §2-107 (a)(3). The other Rules and Form 4-504.1 are being amended because of the new Criminal Law Article which contains many of the provisions formerly in Article 27 of the Annotated Code of Maryland. The Committee approved the changes to the Rules by consensus.

The Reporter 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 (f) providing for the right of victims' representatives to address the jury, to add a certain Committee note following new section (f), to conform the rule to a proposed amendment to Rule 4-342, to conform terminology and statutory references to recent legislation, 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~~ Criminal Law Article, §2-

303.

(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)~~ Criminal Law Article, §2-202 (a), 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~~ Criminal Law Article, §2-303. 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 to a victim's representative of proceedings under this Rule is governed by Code, Criminal Procedure Article, §11-104 (e). The Court shall determine whether the requirements of that section have been satisfied.

(2) Right to Address the Court 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.

Committee note: Code, Criminal Procedure Article, §11-404 permits the court (1) to hold a hearing outside the presence of the jury to determine whether a victim's representative may present an oral

statement to the jury and (2) to limit any unduly prejudicial portion of the proposed statement. See *Payne v. Tennessee*, 501 U.S. 808 (1991), generally permitting the family members of a victim 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 the family member's characterization of and opinions about the crime, the defendant, and the appropriate sentence.

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 under certain circumstances.

~~(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~~ under 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 <u>for Life</u>.")

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 <u>for Life</u>." 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~~ facility.

_____ _____
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~~ facility 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~~ Criminal Law Article, §3-503 (a)(1).

_____

_____ proven not proven

6. The defendant committed the murder ~~pursuant to~~ under 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~~ under 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 under Code, Criminal Law Article, §3-402 or §3-403, 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 for Life.")

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~~ before judgment for 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 under Code, Criminal Law Article, §3-402 or §3-403, 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~~ murder.

(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 for Life" or "Death" according to the following instructions:

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

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

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

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 for Life."

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

We unanimously determine the sentence to be _____.

Section VII

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

Based upon the evidence, does the jury unanimously

determine that the sentence of ~~life~~ imprisonment for life 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)~~ Criminal Law Article, §2-202 (a) 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)~~ Criminal Law Article, §2-203 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 for life, 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 for life

Death

~~Life~~ Imprisonment for life 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)

....., I sent copies of this report to counsel for the parties
year

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, and the addition of a Committee note concerning the authority of the court (1) to hold a hearing outside the presence of the jury to determine whether a victim's representative may present an oral statement to the jury and (2) to limit any unduly prejudicial portion of the proposed oral statement.
>
> Additionally, an internal reference in section (j) is amended to conform to the proposed addition of section (e) to Rule 4-342.
>
> Chapter 26, Acts of 2002 (HB 11), created a new Criminal Law Article which contains many of the provisions formerly in Article 27 of the Annotated Code of Maryland. Terminology and statutory references in Rule 4-343 are proposed to be amended to conform to the legislation.

The Reporter explained that the chart which is in the meeting materials pertaining to Rule 4-343 shows the differences in terminology between the current Rule and the new law, Chapter 26, Acts of 2002 (HB 11). (See Appendix 2). The Criminal Subcommittee is proposing to conform the Rule to the new statute.

The Committee approved the changes to the Rule by consensus.

Agenda Item 4. Reconsideration of proposed amendments to Rules 16-723 (Confidentiality) and 16-735 (Dismissal or Other Termination of Complaint)

Mr. Brault presented Rule 16-723, Confidentiality, and Rule 16-735, Dismissal or Other Termination of Complaint, for the Committee's reconsideration.

Revised Draft for Reconsideration of Proposed Amendments to Rule 16-723

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-723 by adding a new subsection (b)(5) pertaining to prior reprimands, as follows:

Rule 16-723. CONFIDENTIALITY

. . .

(b) Other Confidential Proceedings and Records

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

(1) the records of an investigation by Bar Counsel;

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

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

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

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

~~(5)~~ (6) the contents of a Conditional Diversion Agreement entered into pursuant to Rule 16-736, except the fact that an attorney has signed such an agreement shall be public;

~~(6)~~ (7) the records and proceedings of the Commission on matters that are confidential under this Rule;

~~(7)~~ (8) a Petition for Disciplinary or Remedial Action based solely on the alleged incapacity of an attorney and records and

proceedings other than proceedings in the Court of Appeals on that petition; and

~~(8)~~ (9) a petition for an audit of an attorney's accounts filed pursuant to Rule 16-722 and records and proceedings other than proceedings in the Court of Appeals on that petition.

. . .

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

The Office of Bar Counsel pointed out a gap in the revised Attorney Disciplinary Rules because the revised Rules do not refer to private reprimands or Bar Counsel reprimands issued under the prior set of Attorney Disciplinary Rules which have now been superseded. It is suggested that these reprimands may be disclosed to a peer review panel after the panel has made a determination that similar misconduct may have occurred. Disclosure at a judicial hearing on a Petition for Disciplinary or Remedial Action would remain governed by the first sentence of Rule 16-757 (a), which provides:

> The hearing of a disciplinary or remedial action is governed by the rules of evidence and procedure applicable to a court trial in a civil action tried in a circuit court.

Because of the addition of a new subsection to section (b) and renumbering of current subsections (b)(5) through (b)(8), conforming amendments to Rules 16-722, 16-751, and 16-774 also are proposed.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-735 to add language providing that the fact that a warning was issued and the facts underlying the warning may be disclosed in a subsequent proceeding against the attorney, as follows:

Rule 16-735. DISMISSAL OR OTHER TERMINATION OF COMPLAINT

. . .

(c) Effect of Dismissal or Termination

(1) Except as provided in subsection (c)(2) of this Rule, a dismissal or a termination under this Rule, with or without a warning, shall not be disclosed by Bar Counsel in response to any request for information as to whether an attorney has been the subject of a disciplinary or remedial proceeding. The nature and existence of a proceeding terminated under this Rule, including any investigation by Bar Counsel that led to the proceeding, need not be disclosed by an attorney in response to a request for information as to whether the attorney has been the subject of a disciplinary or remedial proceeding.

(2) The fact that a warning was issued in conjunction with the termination of a complaint shall be disclosed to the complainant, and the fact that a warning was issued and the facts underlying the warning may be disclosed in a subsequent proceeding against the attorney when

relevant to a ~~subsequent~~ complaint ~~based on~~ alleging similar misconduct.

Source: This Rule is new.

Rule 16-735 was accompanied by the following Reporter's Note.

See the Reporter's Note to proposed amendments to Rule 16-723.

Mr. Brault explained that the Style Subcommittee had asked for the Attorneys Subcommittee to reconsider the proposed amendments to Rule 16-723, which has been approved at the May 2002 meeting of the Rules Committee. The issue regarding the Rule is disclosure of the contents of a prior private or Bar Counsel reprimand to a Peer Review Panel. The Style Subcommittee was concerned that disclosure to a panel prior to a determination by the panel that misconduct may have occurred could be prejudicial to the respondent. Glenn Grossman, Deputy Bar Counsel, had drafted the change to Rule 16-723, which had been approved at the May meeting. The Attorneys Subcommittee tried for a balance with Rule 16-735, Dismissal or Other Termination of Complaint, which provides that the fact that a warning was issued and the facts underlying the warning may be disclosed in a subsequent proceeding against the attorney when relevant to a complaint alleging similar misconduct. Rule 16-723 was drafted so that a private reprimand under the former Rules would be treated

the same as a dismissal with a warning under the new Rules.

Mr. Brault said that he and the Reporter worked on the Rule considering the discussion of a prior draft of the Rule which never passed. The earlier draft had provided for a sealed envelope containing the attorney's prior reprimands which would only be opened under certain conditions. (See Appendix 3). He told the Committee that Rule 16-723 has been rewritten to compare it to the idea of keeping the information about the prior reprimand secret until the panel had determined the issue of misconduct.

Mr. Grossman represented the position of the Attorney Grievance Commission (the Commission), which is that the former private reprimands and the new dismissals with warnings are comparable. The Reporter inquired as to whether the new dismissals with warnings are approved by the Commission, and Mr. Grossman replied in the affirmative. The Reporter observed that under the former system, the prior private reprimand was not approved by the Commission. Mr. Brault remarked that the Commission now reviews everything, including all Bar Counsel actions. He said that he serves on a committee concerning attorney ethics, on which Linda Lamone, Esq., the Vice Chair of the Commission, also serves. Ms. Lamone has said that the data shows that the Peer Review Panels are being reversed about 15% of the time. Mr. Brault

was not sure how that compares to the former Review Board decisions. Mr. Grossman responded that this is comparable to the percentage of decisions that the Review Board used to reverse, although there may be a few less reversals under the new system.

Mr. Brault commented that there had been a case where a dismissal with a warning was recommended, and then the Commission reversed and ordered that the respondent be charged. Under the new system, the Commission knows everything about the respondent. A panel may not have known about the respondent's three prior reprimands, but the Commission has all of the files, and nothing is confidential.

The Chair said that the fact that a private or Bar Counsel reprimand was issued for similar misconduct and the facts underlying the reprimand should be disclosed to a Peer Review Panel in a proceeding against the attorney only after the panel has made a determination that professional misconduct has occurred. Mr. Brault added that this is the wording of the second draft of the Rule. Mr. Grossman suggested that the original version of the Rule is better. Mr. Brault stated that he now agrees with Mr. Grossman because the Peer Review Panel ought to know what the Commission knows. The Chair cautioned that the danger with the first version is

that the prior history should only be relevant after the panel has made its conclusions about possible misconduct and not before that. Rule 16-743, Peer Review Process, sets out two stages: (1) is there reason to believe the attorney has committed professional misconduct and (2) if there is, what should be done about it? The Reporter remarked that even if the prior disciplinary history is successfully kept out of peer review, the Commission has all of the records and it makes the final determination in each case.

Mr. Brault observed that if the Peer Review Panel knows everything and still recommends dismissal or dismissal with a warning, the panel can explain its decision. If the panel does not know everything, then the Commission does not benefit from the Peer Review Panel's analysis. The proposed changes approved by the Committee last month are operative in today's world. Mr. Grossman observed that, as the years go by, finding relevant Bar Counsel reprimands will be difficult. Mr. Brault inquired as to who determines relevancy. Mr. Grossman replied that this is extremely informal. The respondent has a copy of his or her file and can object and explain fully why something is not relevant or has been overlooked. Mr. Brault remarked that representing someone at a Peer Review Panel is very different from representing someone at an Inquiry Panel.

The Chair pointed out that subsection (c)(1) of Rule 16-743, Peer Review Process, provides that the Peer Review Panel shall allow Bar Counsel, the attorney, and each complainant to explain their positions and offer supporting information. The Panel decides the relevancy of the supporting information. The Chair stated that Mr. Brault's recommendation that the Rule should not be changed again should be followed. The Rule would provide that the fact that a private or Bar Counsel reprimand had been issued and the facts underlying the reprimand may be disclosed to the Peer Review Panel in a proceeding against the attorney alleging similar misconduct. A Committee note should be added which would provide that just because information concerning a private or Bar Counsel reprimand is presented to the Peer Review Panel does not mean that the Panel has to find it relevant. The Committee agreed by consensus to approve the earlier version of Rule 16-723, with the addition of the Committee note suggested by the Chair. No additional changes were made to Rule 16-735. The Chair thanked Mr. Grossman for his assistance in drafting the Rules.

Agenda Item 5. Consideration of certain proposed Rules changes recommended by the Discovery Subcommittee: Amendments to: Rule 2-402 (Scope of Discovery), Rule 2-415 (Deposition – Procedure), Rule 2-411 (Deposition – Right to Take), Rule 2-419 (Deposition – Use), Rule 2-504.2 (Pretrial Conference), Form

Interrogatory, Form No. 3 (General Interrogatory), Form Interrogatory, Form No. 7 (Motor Vehicle Tort Interrogatories),
and conforming amendments to: Rule 2-432 (Motions Upon Failure
to Provide Discovery), Rule 2-504 (Scheduling Order), and Rule
16-808 (Proceedings Before Commission)

The Vice Chair presented Rule 2-402, Scope of Discovery, 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 a new category of expert witness, 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 the 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 in a particular case, the court, on motion or on its own initiative, may limit or alter the limits in these rules on the length and number of depositions, the number of interrogatories, the number of requests for production of documents, and the number of requests for admissions. 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 complexity 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.

~~(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

(A) Generally

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,~~ a person expected to be called as an expert witness at trial may be obtained ~~without the showing required under section (c) of this Rule only~~ as follows: ~~(A) A~~ (i) a party by interrogatories may require ~~any~~ the other party to identify each such 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)~~ (ii) 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 the expert ~~at trial, including any written reports made by the expert concerning those findings and opinions~~.

Committee note: This subsection requires a party to disclose the name and address of any witness who may give an expert opinion at trial regardless of whether that person was retained in anticipation of litigation or for trial. *Cf.* Dorsey v. Nold, 362 Md. 241 (2001). *See* Rule 104.10 of the Rules of the U.S. District Court for the District of Maryland. The subsection does not require, however, that a party name himself or herself as an expert. *See Turgut v. Levine*, 79 Md. App. 279, 556 A 2d 720 (1989).

(B) Experts Retained in Anticipation of Litigation or For Trial

In addition to the discovery of the findings and opinions of experts permitted pursuant to subsection (1)(A) of this Rule, with respect to an expert whose findings and opinions were acquired or obtained in anticipation of litigation or for trial, a party by interrogatories may require the other party 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.

(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, the party seeking discovery is not required to pay a fee to an expert witness for attending a deposition that exceeds the rate charged by that expert for time spent preparing for the deposition.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 400 c and ~~FRCP~~ ~~Fed. R. Civ. P.~~ 33 (b).
Section (b) is new and is derived from Fed. R. Civ. P. 26 (b)(2).
Section ~~(b)~~ (c) is new and is derived from ~~FRCP~~ Fed. R. Civ. P. 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~~ Fed. R. Civ. P. 26 (b)(4) and former Rule 400 f.

Subsection (2) is derived from ~~FRCP~~ Fed. R. Civ. P. 26 (b)(4) and former Rule U12 b.

Subsection (3) is derived from ~~FRCP~~ Fed. R. Civ. P. 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 Fed. R. Civ. P. 26 (b)(2).

Rule 2-402 (f) has been modified and expanded. The language "acquired or developed in anticipation of litigation or for trial" has been deleted from subsection (f)(1)(A) 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. Subsection (f)(1)(A) clarifies that further discovery (beyond interrogatories) will consist of the deposition of the expert. 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."

A new subsection (f)(1)(B) has been added to separate out the procedures for discovery of experts acquired or obtained in anticipation of litigation or for trial. Initially, this was proposed to be added to the previous provision, but members of the Rules Committee pointed out that this

should be considered separately because some of the procedures for discovery of these experts is different from other types of experts.

The Rules Committee proposes the addition of a Committee note to subsection (f)(2) to cover the expert who may give an expert opinion at trial regardless of whether that person was retained in anticipation of litigation or for trial. The concept is borrowed from Rule 104.10 of the Rules of the U.S. District Court for the District of Maryland, which uses the term "hybrid fact/expert witness."

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) is reorganized so as to apply only to depositions taken under subsection (f)(2). Instead of the vague allowance of a fee for time spent "in responding to discovery," subsection (f)(3) 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 to the rate charged by the expert for time spent preparing for the deposition. This is similar to the policy reflected in Local Rule 104.11. a. of the Rules of the United States District Court for the District of Maryland.

The Vice Chair explained that this is a continuation of the discussion of Rule 2-402 from prior meetings. The Rule incorporates changes based on the federal rules. Section (b) adds some limitations that the federal rules do not have. The

first sentence allows the court to set forth a variety of limitations. Mr. Brault expressed the opinion that the changes to Rule 2-402 are very good. Circuit court judges may need some education as to the changes, and this could be handled by a Judicial Conference educational program. The Vice Chair added that the Honorable Paul V. Niemeyer, Circuit Judge of the United States Court of Appeals for the Fourth Circuit, who was formerly a member of the Rules Committee before he became a judge, might be willing to educate Maryland judges. Judge Niemeyer had chaired the education process for the federal bench.

Mr. Johnson questioned as to whether the Discovery Subcommittee is satisfied that the beginning language of section (b) which reads "By order in a particular case..." is adequate to prohibit the courts from issuing identical standard discovery orders in every case. Mr. Titus observed that under Differentiated Case Management, Rule 2-504.1 provides for an initial scheduling conference, which can either be perfunctory or meaningful. His hope is that the scheduling conferences will be meaningful. He is fearful that the scheduling orders will contain a generic limit on depositions, interrogatories, and other discovery. Each order should be designed for a particular case.

The Chair addressed Mr. Johnson's concern and asked if

the following language would be an improvement in place of the first six words: "For good cause shown in a particular case...". The court should order the limitations after consideration of the particular facts of the case. Judge Heller suggested the following language: "By order in a particular case and after a conference call with all counsel...". Mr. Titus expressed the view that this language is more meaningful. Mr. Johnson agreed, stating that by requiring consultation with the parties, the Rule gives the parties the chance to ask for what they want. Mr. Brault remarked that the State rules give more control to the parties than the federal rules do. The Chair pointed out that some litigants are not represented by counsel. The Vice Chair suggested that Judge Heller's language be changed to "By order in a particular case and after a conference call with all parties ...". Mr. Johnson suggested that the Rule begin as follows: "On motion or on its own initiative, the court, by order in a particular case and after a conference call with all parties may ...". Mr. Brault suggested that the language should be modified to read "after consultation with the parties." The Committee agreed by consensus to the new language suggested by Mr. Johnson, as modified by Mr. Brault.

Turning to section (f), the Vice Chair explained that there is not a meaningful difference between experts retained

in anticipation of litigation or for trial and other experts. The change in language in section (f) would cover the coroner in the case of Dorsey v. Nold, 362 Md. 241 (2001). In that case, the court held that under the current wording of Rule 2-402, the coroner did not have to be disclosed to the other side as a witness, because his opinion was not developed in anticipation of litigation or for trial. Proposed new subsection (f)(1)(B) allows a party by interrogatories to require the other party to summarize the qualifications of an expert who was retained in anticipation of litigation or for trial, to produce any available list of publications written by the expert and to state the terms of the expert's compensation. There is also language added in the Committee note to subsection (f)(1)(A) that includes a statement that a party need not name oneself as an expert.

The Chair asked if the Rule covers the situation in which the plaintiff in a malpractice case intends to call the defendant physician. The Vice Chair answered that the Rule technically requires the plaintiff to name the physician. She suggested that the language "other than a party" be added to subsection (f)(1)(A) after the word "person" and before the word "expected," so that the beginning language of that provision would read as follows: "Discovery of the findings and opinions of persons other than a party expected ...".

The Committee agreed by consensus to this change.

The Vice Chair explained that the Rules Committee had requested that subsection (f)(1)(B) be separated from subsection (f)(1)(A), but she noted that the Rule read better when the two subsections were together. Judge Heller expressed the opinion that when the two provisions are separated, it is easier to distinguish them. The Chair suggested that the caption of subsection (f)(1)(B) be changed to read: "Additional Disclosures With Respect to Experts Retained in Anticipation of Litigation or for Trial." The Committee agreed by consensus with this suggestion.

Judge Heller said that subsection (f)(3) makes no distinction as to the type of expert. Subsection (f)(2) refers to section (d), which requires a showing that documents or other tangible things prepared in anticipation of litigation or for trial are discoverable under section (a) 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. The Vice Chair pointed out that subsection (f)(3) provides that the party seeking discovery is not required to pay a fee to the expert witness for attending a deposition that exceeds the rate charged by that expert for time spent preparing for the deposition. Mr. Brault asked why

this provision is in the Rule. The Vice Chair replied that this was in earlier drafts which had been drawn up when Mr. Howell was Chair of the Trial Subcommittee. Mr. Brault commented that this provision will not reduce any fees. Either all of the experts will raise their rates to conform to what is charged to testify, or experts will refuse to testify.

The Vice Chair remarked that the person setting up the deposition will pay for the expert's time spent at the deposition. The rate will be whatever rate the expert charges his or her principal for preparation. If the expert charges $200 per hour for the preparation, and $500 per hour for the deposition, the difference could be paid by the party who retained the expert, but it does not have to be paid by the party who is seeking discovery. Mr. Brault expressed the view that the Rule should make clear that it is not designed to control what the expert charges. Mr. Brault suggested that language could be added to the second sentence of subsection (f)(3) which would state: "unless the parties agree otherwise." The Vice Chair noted that there is a general provision in Rule 2-401 which allows the parties to change provisions of the discovery rules if they are in agreement.

Mr. Johnson pointed out that subsection (f)(3) provides that the court shall require that the party seeking discovery

pay the expert a reasonable fee for time spent in attending a deposition and preparing for discovery. It would be better for the Rule to provide that the parties may agree otherwise. The burden should be put on counsel to work things out before the parties have to go to the court. Judge Missouri added that he does not want to see the parties unless there is a problem. Mr. Johnson remarked that it is important to avoid attorneys sandbagging each other or one attorney getting another into a bind with the experts.

The Chair observed that the Rule does not cover the problem of the expert who charges an exorbitant amount of money. Ms. Potter remarked that this is a significant problem. Mr. Klein noted that subsection (f)(3) provides: "[u]nless manifest injustice would result ...". Mr. Johnson said that the parties should discuss the payment of experts -- the burden should be on the attorneys to work things out.

Mr. Brault noted that in his practice, depositions are held at the office of the attorney of the party whose expert is being deposed. Each side agrees to pay for his or her own expert. If the procedure is to make the other side pay for the expert, the non-paying party may hire many experts from all over the country or the world. It is preferable to agree up front that each party pays his or her own experts. The Chair suggested that the Rule provide that unless the parties

otherwise agree, the court shall establish the expert's fee and require that the party seeking discovery pay the fee. Mr. Brault suggested that the court should not be included, unless the parties have not been able to agree.

The Vice Chair observed that the proposed language in the second sentence of subsection (f)(3) allows the court to change the payment provisions of the subsection if "manifest injustice would result." Mr. Brault suggested that the language "unless the parties agree otherwise" could be added in. The Vice Chair pointed out that Rule 2-401, General Provisions Governing Discovery, allows the parties to agree otherwise, and if this language is added to Rule 2-402, it would have to be added to other rules. The Chair expressed the view that the first sentence of subsection (f)(3) is appropriate, but he suggested deleting the second sentence. Mr. Johnson observed that the second sentence protects parties from paying large amounts of money. The Chair said that if the expert charges a high fee for preparation for the deposition, the party seeking discovery is hurt nevertheless. The second sentence is keyed to the amount the expert charges, whether or not that amount is reasonable. The first sentence has the word "reasonable" in it, implying the right to go to court. The Vice Chair noted that the word "reasonable" in the first sentence applies to the time spent attending a

deposition, which is the subject of the second sentence. The second sentence makes clear that a rate that exceeds the rate charged by the expert for time spent preparing for the deposition is not "reasonable."

Mr. Johnson observed that there are situations where the expert charges a certain amount of money to review records, a certain amount to prepare for a deposition, and a different amount for trial and deposition testimony, which is higher than the rates for either review or preparation. The Rule is attempting to keep the costs down for the party seeking discovery. Ms. Potter observed that the Rule does not deal with how much time the expert will take. Mr. Johnson responded that this should be discussed in advance. Mr. Brault added that some issues cannot be handled by rule. Judge Missouri pointed out that after the rules are changed, initially the circuit court judges will have to settle more discovery disputes.

The Chair suggested that the language in subsection (f)(3), which reads, "unless manifest injustice would result, the court shall require ..." should be changed to provide that "unless the court orders otherwise, the party seeking discovery shall pay
... ." The Vice Chair observed that the concept of "manifest injustice" is in both sentences of subsection (f)(3), and she

suggested that the concept not be eliminated. She suggested that a Committee note be drafted to state that fee arrangements set out in subsection (f)(3) may be modified by the court if manifest injustice would result. The Committee agreed by consensus to these suggestions.

The Committee approved Rule 4-202 as amended.

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 in section (d) for more liberal correction of deposition transcripts, and for service of the correction sheet on other parties within 30 days after receiving the transcript; and to add a new section (i) providing a procedure for objection to substantive corrections of 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 desired by~~ changes to form or substance that the

deponent ~~to conform the transcript to the testimony~~ wants to make to the transcript shall be made on a separate correction sheet within 30 days after the date the officer mails or otherwise submits the transcript to the deponent. The correction sheet shall contain the reasons why the deponent is making the corrections. ~~and attached by the~~ The officer shall ~~to the transcript. Corrections made by the deponent~~ serve a copy of the correction sheet on the parties within 30 days and attach the correction sheet to the transcript. The changes become part of the transcript ~~unless the court orders otherwise on a motion to suppress under section (i) of this Rule~~. If the deponent does not timely sign 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)~~ (j) of this Rule, that the reason for refusal to sign requires rejection of all or part of the transcript.

. . .

(i) Further Deposition Upon Substantive Corrections to Transcript

If a correction sheet contains substantive changes, any party may serve notice of a further deposition of the deponent limited to the subject matter of the substantive changes made by the deponent unless the court, on motion of a party pursuant to Rule 2-403, enters a protective order precluding the further deposition.

~~(i)~~ (j) Motions to Suppress

An objection to the manner in which testimony is transcribed, videotaped, or audiotaped~~,~~ or to the manner in which a

transcript is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer is waived unless a motion to suppress all or part of the deposition is made promptly after the defect is or with due diligence might have been ascertained. ~~An objection to corrections made to the transcript by the deponent is waived unless a motion to suppress all or part of the corrections is filed within sufficient time before trial to allow for a ruling by the court and, if appropriate, further deposition.~~ In ruling on a motion to suppress, the court may grant leave to any party to depose the deponent further on terms and conditions the court deems appropriate.

. . .

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

The Rules Committee recommends that section (d) of Rule 2-415 be amended to allow for more liberal correction of deposition transcripts. The amendment is derived from Federal Rule of Civil Procedure 30 (e).

The Trial, Management of Litigation, and Discovery Subcommittees met to discuss the issue of "sham affidavits." One of their recommendations is to modify section (d) of Rule 4-215 further to add a 30-day time limit for service of a correction sheet on the other parties. They also recommend separating the procedure for objecting to corrections of a deposition transcript into two sections. The section pertaining to substantive corrections, section (i), includes a mechanism for objection by means of filing a motion for a protective order pursuant to Rule 2-403.

Section (j) pertaining to objections as to the manner of recording and the

> manner of preparing transcripts retains the motion to suppress as the mechanism to file objections to these corrections.

The Vice Chair explained that the changes to Rule 2-415 are based on Fed. R. Civ. P. 30 (e). The amended language allows changes of substance. Any changes to the testimony have to be set out on a separate sheet, which is served on the other parties. The Subcommittee added a requirement that the party changing testimony has to give reasons for the change. Any corrections, whether of form or substance, are considered to be part of the transcript. Section (i) provides a right to a further deposition if substantive changes are made.

Mr. Brault asked if the changes to the Rule are meant to address the issue of "sham affidavits." Mr. Klein replied that this is one point of the changes, so that the problems are identified sooner. The Committee approved the Rule as presented.

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 generally for a seven-hour limitation on the length of depositions and to add language referring to section (i) of Rule 2-415, 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 seven-hour day; ~~(b)~~ (c) of an individual who has previously been deposed in the same action, except as provided in Rule 2-415 (i); 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 Fed. R. Civ. P. 30 (d)(2).

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

The proposed amendment to Rule 2-411 adds 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 Fed. R.

Civ. P. 30 (d)(2).

The Discovery Subcommittee is proposing to add new subsection (i) to Rule 2-415, which provides that a party may serve notice of a further deposition on a deponent who files a correction sheet with substantive changes. This procedure is an exception to part (c) of Rule 2-411, which requires leave of court before a party can take a deposition of an individual who has previously been deposed in the same action. The Discovery Subcommittee recommends that language be added to Rule 2-411 which points out the exception in Rule 2-415 (i).

The Vice Chair explained that new language has been added to Rule 2-411 providing that depositions are to take no longer than one seven-hour day unless leave of court is granted. The Committee by consensus approved Rule 2-411 as presented.

The Vice Chair presented Rule 2-419, Deposition–Use, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-419 (a) to add language clarifying that correction sheets may be used to contradict or impeach the testimony of a deponent and section (d) for conformity with proposed amendments to Rule 2-412, as follows:

Rule 2-419. DEPOSITION -- USE

(a) When May be Used

(1) Contradiction and Impeachment

Any party may use ~~A~~ a deposition, including any correction sheets, to ~~may be used by any party for the purpose of contradicting or impeaching~~ contradict or impeach the testimony of the deponent as a witness.

(2) By Adverse Party

The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, managing agent, or a person designated under Rule 2-412 (d) to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by an adverse party for any purpose.

(3) Witness Not Available or Exceptional Circumstances

The deposition of a witness, whether or not a party, may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had due notice thereof, if the court finds:

(A) that the witness is dead; or

(B) that the witness is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, mental incapacity, sickness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon motion and reasonable notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) Videotape Deposition of Expert

A videotape deposition of a treating or consulting physician or of any expert witness may be used for any purpose even though the witness is available to testify if the notice of that deposition specified that it was to be taken for use at trial.

. . .

(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 Discovery Subcommittee recommends the addition of language to section (a) of Rule 2-419 to clarify that correction sheets filed by a deponent pursuant to Rule 2-415 (d) may be used to impeach or contradict the deponent's testimony, a concept derived from federal law.

The proposed amendment to section (d) of Rule 2-419 conforms the Rule to proposed changes to Rule 2-412.

The Vice Chair told the Committee that the changes to Rule 2-419 were made in light of the changes to Rule 2-415. The amended language clarifies that correction sheets filed by a deponent pursuant to Rule 2-415 may be used to impeach or contradict the deponent as a witness. The Chair asked if Rule 2-419 permits impeachment of a person who had stated earlier that he or she could not remember the answer to a question. The Vice Chair responded affirmatively. Mr. Titus pointed out that the correction sheet will include the reasons why the person initially did not answer the question at the deposition. He suggested that a Committee note be added to make clear that both the original deposition and the correction sheet can be used for impeachment. The Committee agreed by consensus to this suggestion. The Committee by consensus approved the Rule as amended.

The Vice Chair presented Form No.3, General Interrogatories; Form No. 7, Motor Vehicle Tort Interrogatories; Rule 2-432, Motions Upon Failure to Provide Discovery; Rule 2-504, Scheduling Order; and Rule 16-808, Proceedings Before Commission.

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.

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 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 (b)(1)(B) for conformity with proposed amendments to Rule 2-402, as follows:

Rule 2-504. SCHEDULING ORDER

. . .

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

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

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

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

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

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

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

. . .

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

The proposed amendment to Rule 2-504 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 explained that the changes to these Rules conform to the changes to Rule 2-402. By consensus, the Committee approved the amendments to the Rules as presented.

The Chair adjourned the meeting.