COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1.514, People's Resource Center, Crownsville, Maryland on September 11, 1998.

Members present:

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

Lowell R. Bowen, Esq.
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Anne C. Ogletree, Esq.
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Howard B. Gersh, Legal Section Baltimore County Police Department
Ernie Crist, Baltimore County Police Department
Maria Hall, Law Clerk
Hon. Martha F. Rasin, Chief Judge, District Court
Elizabeth F. Veronis, Esq., Legal Officer, A.O.C.

The Chair convened the meeting. He asked if there were any additions or corrections to the minutes of the June 19, 1998 Rules Committee meeting. There being none, Mr. Klein moved that the minutes be adopted as presented. The motion was seconded and carried unanimously.

The Chair said that there was an information item which was

distributed by Cathy Cox, Rules Committee secretary, at the meeting today. It is a cover letter which accompanied the Final Report on the Maryland Lawyer Disciplinary System conducted by the American Bar Association (ABA). The report had been sent to the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, who had given the Chair a copy. The Chair told the Committee that he is hoping to get copies of the report for each Committee member. When the Style Subcommittee is finished looking at the proposed new Attorney Discipline Rules, the Rules will come back to the full Committee for a review made in conjunction with consideration of the ABA report.

Mr. Hochberg asked what the background was to conducting the study. The Chair replied that the ABA offered its services several years ago. They sent in a review team to make recom-mendations as to improving the attorney discipline system in Maryland. When the General Court Administration Subcommittee drafted the revised attorney discipline rules, the Subcommittee went over the substance of the ABA Model Rules, rejecting and accepting certain aspects of them. Mr. Klein inquired if the ABA had reviewed the new Rules. The Chair responded that the ABA had not reviewed the new package of Rules. The Subcommittee had not seen the ABA recommendations.

The Vice Chair commented that it was her understanding that the Court of Appeals was interested in streamlining the attorney discipline process, making the first step similar to a Grand Jury proceeding to determine probable cause, followed by a trial before a

circuit court judge. The Chair expressed the view that this may not be the best system, but he noted that the Committee will have a chance to review this.

Agenda Item 1. Consideration of certain proposed recommendations of the Criminal Subcommittee:

(a) Video Conferencing -- Amendments to

Rule 4-231 (Presence of Defendant)
Rule 4-213 (Initial Appearance of Defendant)
Rule 4-216 (Pretrial Release)

(b) Amendments to Rule 4-265 (Subpoena)

(c) Legislative -- Amendments to

Rule 4-343 (Sentencing -- Procedure In Capital Cases)
Rule 4-344 (Sentencing--Review)
Rule 4-351 (Commitment Record)

(d) Expungement Forms -- Amendments to

Form 4-504.1 (Petition for Expungement of Records)
Form 4-503.1 (Notice of Release From Detention or Confinement Without Charge -- Request for Expungement)
Form 4-503.3 (Application for Expungement of Police Record)
Rule 11-601 (Expungement of Criminal Charges Transferred to the Juvenile Court)

(e) Letter to the Judiciary Committee of the Maryland House of Delegates re: House Bill 936 - District Court - Time for Filing Appeal - Stay

(f) Letter to Chief Judge Bell re:
(1) Private Home Detention Monitoring and
(2) Sexually Violent Predators

Judge Johnson explained that the first issue for consideration

by the Committee was video conferencing. Judge Johnson presented Rule 4-231, Presence of Defendant, Rule 4-213, Initial Appearance of Defendant, and Rule 4-216, Pretrial Release, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-231 to allow the presence of the defendant to be by video conferencing under certain circumstances, 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, Courts Article, §9-102.

(c) Waiver of Right to be Present

The right to be present under section (b) of this Rule is waived by a defendant:

(1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or

(2) who engages in conduct that justifies exclusion from the courtroom, or

(3) who, personally or through counsel, agrees to or acquiesces in being absent.

(d) Presence by Video Conferencing

(1) Except as otherwise expressly allowed by subsection (d)(2) of this Rule, if the presence of a defendant at a proceeding under this Title is allowed or required by law, the proceeding shall be conducted with the judicial officer and the defendant physically present, face-to-face, at the same location.

(2) In the District Court, a judicial officer may conduct an initial appearance under Rule 4-213 (a) or a review of the commissioner's pretrial release determination under Rule 4-216 (g) with the defendant and the judicial officer at different locations, provided that:

(A) the proceeding is conducted using a fully interactive video conferencing technology approved by the Chief Judge of the District Court for use in the county;

(B) immediately after the proceeding, all documents that are not a part of the District Court file and that would be a part of the file if the proceeding had been conducted face-to-face shall be electronically transmitted or hand-delivered to the District Court; and

(C) if the initial appearance under Rule 4-213 is conducted by video conferencing, the review under Rule 4-216 (g) shall not be conducted by video conferencing.

Committee note: Except when specifically covered by this Rule, the matter of presence of the defendant during any stage of the proceedings is left to case law and the Rule is not intended to exhaust all situations.

Source: This Rule is derived from former Rule 724 and M.D.R. 724.

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

At the request of law enforcement officials, the Criminal Subcommittee has considered the issue of the use of video conferencing technology for initial appearances and bail reviews. The proposed amendment to Rule 4-231 allows the use of this technology, under certain circumstances, either for the defendant's initial appearance or bail review, but not both. The Subcommittee believes that a judicial officer and the defendant should be face-to-face at at least one of these proceedings that occur early in the criminal justice process.

Subsection (d)(1) sets out the general rule that proceedings under Title 4 of the Maryland Rules that allow or require the presence of the defendant shall be conducted with the defendant physically present at the same location as the judicial officer.

Subsection (d)(2) allows a judicial officer of the District Court to conduct an initial appearance under Rule 4-213 (a) or a review of the commissioner's pretrial release determination under Rule 4-216 (g) by a fully interactive video conferencing technology approved by the Chief Judge of the District Court for use in the county. If video conferencing is used, all documents that would have become a part of the District Court file if the proceeding had been conducted face-to-face must be immediately transmitted electronically or hand-delivered to the District Court.

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-213 to add a certain cross reference following section (a), as follows:

Rule 4-213. INITIAL APPEARANCE OF DEFENDANT

(a) In District Court Following Arrest

When a defendant appears before a judicial officer of the District Court pursuant to an arrest, the judicial officer shall proceed as follows:

. . .

Cross references: Code (1957, 1989 Repl. Vol.), Courts Art., §10-912. See Rule 4-231 (d) concerning the appearance of a defendant by video conferencing.

. . .

Rule 4-213 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-213 adds a cross reference to the proposed new video conferencing section of Rule 4-231.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 to add a certain cross reference following section (g), 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.

(b) 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.

(c) Defendants Eligible for Release by Commissioner or Judge

Except as otherwise provided in section (d) of this Rule, a defendant is entitled to be released before verdict in conformity with this Rule on personal recognizance or with one or more conditions imposed unless the judicial officer determines that no condition of release will reasonably assure (1) the appearance of the defendant as required and (2) if the defendant is charged with an offense listed under Code, Article 27, §616 1/2 (k), the safety of the alleged victim.

Cross reference: See Code, Article 27, §616 1/2 (d) concerning defendants who may not be released on personal recognizance.

(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, Article 27, §616 1/2 (c), (i), (j), or (l) 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 applicable presumptions imposed by law have been rebutted and that one or more conditions of release will reasonably assure (1) the appearance of the defendant as required and (2) if the defendant is charged with an offense listed under Code, Article 27, §616 1/2 (c), (j), or (l), that the defendant will not pose a danger to another person or 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 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 defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) 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 recommendation of an agency which conducts pretrial release investigations;

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

(F) Information presented by defendant's counsel;

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

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

(I) 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 the appearance of the defendant as required,

(B) Protect the safety of the alleged victim if the defendant is charged with an offense listed under Code, Article 27, §616 1/2 (k), and

(C) Assure 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, Article 27, §616 1/2 (c), (j), or (l).

(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.

(f) Conditions of Release

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

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

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

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

(4) 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 the defendant to any other condition reasonably necessary to:

(A) assure the appearance of the defendant as required,

(B) protect the safety of the alleged victim if the charge against the defendant is an offense listed under Code, Article 27, §616 1/2 (k), and

(C) assure 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, Article 27, §616 1/2 (c), (j), or (l);

(6) Imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, Article 27, §763 reasonably necessary to stop or prevent the intimidation of a victim or witness or a

violation of Code, Article 27, §26, §761, or §762.

(g) Review of Commissioner's Pretrial Release Order

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.

(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 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.

(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) 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. 721, and M.D.R. 723 b 4, and is in part new.

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

The proposed amendment to Rule 4-216 adds a cross reference to the proposed new video conferencing section of Rule 4-231.

Judge Johnson noted that in many of the jurisdictions in Maryland, bail reviews by video conferencing have been taking place for some time. Other jurisdictions in the State are interested in this, and some are interested in conducting initial appearances by video conferencing. The Rules Committee has received requests for guidance on this subject. The requests were given to the Criminal Subcommittee for discussion. The Subcommittee is recommending modifying Rule 4-231 by adding a new section (d) which would expressly authorize the District Court Commissioners and District Court judges to permit the use of video conferencing for either a defendant's initial appearance or bail review, but not for both. The Subcommittee felt that the defendant and a judicial officer should be

face-to-face at least once. The Rule provides that the technology is to be approved by the Chief Judge of the District Court. There is a requirement that all documents have to be placed in the District Court file either by electronic transmission or by hand-delivery to the District Court immediately after the video conference.

Mr. Sykes questioned as to who transmits the documents, since passive wording is used. The Chair answered that the procedure in Baltimore County is that the responsibility is that of the officer who brings the defendant before the District Court. The Chair said that the Honorable Martha F. Rasin, Chief Judge of the District Court, as well as Howard B. Gersh, Esq., and Major Ernie Crist from Baltimore County were present to discuss the issue of video conferencing. Mr. Gersh told the Committee that in Baltimore County, all defendants who have been arrested are physically transported to one of four police precincts. With video conferencing from the police station, documents would be transmitted electronically. If the system breaks down, the papers would be physically transmitted.

Mr. Sykes reiterated that the Rule does not assign the responsibility for transmittal of the documents to anyone. Mr. Gersh responded that his reading of the Rule is that the Chief Judge of the District Court has to authorize any of the procedures and would have to be satisfied that the procedures pass muster. Mr. Sykes inquired whether the Rule should have a specific statement as to who is responsible for the transmittal of the documents. Mr. Gersh replied

that on behalf of Baltimore County, it would be appropriate to provide that the person who has the necessary documents is responsible for delivery of those documents. The Chair stated that the law enforcement officer who brings the defendant before the judicial officer could be responsible for transmitting the documents. Mr. Gersh suggested that the word "agency" should be substituted for the word "officer." This would allow the officer who makes the arrest to get back to his job instead of waiting around to deliver the documents. The Chair suggested that the language could be that the law enforcement officer shall cause the documents to be delivered. Judge Rasin pointed out that it would be the fault of the judicial officer if the documents were not transmitted properly. The Chair added that the judicial officer directs that the papers be made part of the file.

Judge Vaughan remarked that he had a problem with the possible difficulty in getting the necessary signatures for the extradition process if there is video conferencing. The Chair said that this procedure works well in bond reviews and should work with initial appearances. Mr. Gersh noted that the signatures can be electronically transmitted. Baltimore County has over 25,000 arrests a year, and a commissioner is located in only four places in the county. Two police officers could be tied up for hours waiting with a defendant to see the commissioner. There are also safety aspects of this, where commissioners have been attacked by defendants who

were just arrested and are still drunk or under the influence of drugs. Mr. Gersh said that he had spoken with the Subcommittee, and he was in agreement with them that either the initial appearance or the bail review could be by video conferencing, but not both. Baltimore County would select the initial appearance as the proceeding for which video conferencing is used.

Mr. Hochberg inquired as to how many other jurisdictions have or would like to have video conferencing. Mr. Gersh answered that the meeting materials contain a letter dated August 28, 1997 to Chief Judge Bell from representatives of the police departments of Anne Arundel, Baltimore, Harford, Howard, Montgomery, and Prince George's Counties, and Baltimore City in support of a rule pertaining to video conferencing. He noted that Baltimore City does not need video conferencing as much as the other jurisdictions, because it has a central booking facility which the other areas do not have. Mr. Maloney commented that in Prince George's and Montgomery Counties, video bail reviews are conducted regularly. The Rule presupposes that the video bail review would be eliminated if there is a conflict between the convenience of the police and the convenience of the court. Mr. Gersh pointed out that the Rule does not allow both bail reviews and initial appearances to be by video conferencing. His preference is for video initial appearances because there are a small number of bail reviews compared to initial appearances and because bail reviews are conducted in the courthouse during normal working

hours. More hours of police officers' time would be saved by video initial appearances, than by video bail reviews. Mr. Maloney said that there are 50 to 100 bail reviews a day in Montgomery and Prince George's Counties. Major Crist noted that the Rule should not contain an inference that the issue is controlled by the police department. Each jurisdiction is different, and the procedures will have to be worked out.

Judge Vaughan expressed the view that when the commissioner can see the person who has been arrested, it helps in the determination of probable cause and conditions of release. The Chair remarked that when he was in practice he had observed some belligerent commissioners, and his preference would be to appear in person before a judge and have the initial appearance conducted by video conferencing. The option is up to each jurisdiction, as long as the Chief Judge of the District Court is satisfied with the way the system works in a particular jurisdiction. If a jurisdiction prefers one way, they will not be forced to choose the other.

Mr. Sykes commented that the Rule should provide for the approval of the technology by the Chief Judge of the District Court, but also provide that the Chief Judge approve the use of the procedures in the various counties. The Vice Chair cautioned about avoiding local rule-making. Mr. Sykes suggested that the procedures should be documented. The Vice Chair said that the Rule contemplates old-fashioned or electronic procedures. Major Crist remarked that

the procedures can include faxing and electronic signatures. The Vice Chair pointed out that if the technology does not exist at times, then the documents can be hand-delivered.

Chief Judge Rasin told the Committee that it is important to understand the history of this issue. There was a bill pertaining to video conferencing in the legislature a few years ago which did not pass. The Honorable Robert F. Sweeney, then-Chief Judge of the District Court, felt that even though there was no law on the subject, it would be appropriate to introduce it into the District Court. The matter was studied, and a technology was developed to handle bail reviews and initial appearances. Judge Sweeney and Judge Robert C. Murphy, who was then Chief Judge of the Court of Appeals, decided that as a matter of policy, bail reviews and initial appearances would not both be handled by video conferencing in the same case. A long-standing policy had been that video initial appearances are not undertaken, since video bail reviews are now used in several jurisdictions. A group of police officers questioned this, and Judge Rasin said that she would study whether there is any legal prohibition against video initial appearances. She was satisfied that it is legal and can be done. The policy of not having a video initial appearance and a video bail review in the same case should continue. She told the Committee that she did not think a Rule change was necessary, especially since video bail reviews have been conducted for years without a rule.

The Chair asked if there has ever been a challenge to the video conferencing procedures, and Judge Rasin replied that she did not know of any challenges. She had informally polled some District Court commissioners as to which procedure should be by video conferencing. She received a variety of responses. Some said that they would have trouble identifying whether the defendant was drunk without having the person in front of them. Many of the jurisdictions have video bail reviews. In the jurisdictions listed by Mr. Gersh, only Baltimore County does not do video bail reviews. If the policy is changed, there may be an effect on the detention centers. The Chair responded that nothing in the Rule implies that a jurisdiction has to change its procedure. It undercuts someone from saying that it is unconstitutional to conduct a bail review from the jail. The procedure has worked well with no challenges to it. The Rule provides options, none of which are mandatory. It implements the sound policy that only one of the proceedings is conducted by video conferencing, but not both.

Judge Rasin said that she read the Rule to mean that she can approve the technology, but she cannot approve whether to conduct a proceeding by video conferencing. Mr. Bowen responded that the Rule gives the authority to the judicial officer to make a decision in each case. He was opposed to the concept of the Rule providing for a blanket decision by the Chief Judge. The Vice Chair questioned why the Rule has to provide for each particular jurisdiction when it

already limits the jurisdictions to one proceeding or the other by video conferencing. Judge Rasin replied that this is a question of the number of police departments, the views of the commissioners, and the views of the judges in each jurisdiction. It is a policy decision for each jurisdiction to develop the technology and invest in the time and effort to keep the system going. After that decision is made, the Commissioner determines the proper procedure for each particular case.

The Chair stated that the Chief Judge of the District Court makes the decision as to the video conferencing procedures. The Rule can provide this. Judge Rasin remarked that she needs the ability to make the decision based on policy matters in each locality which include the needs of the judges, commissioners, police, and detention centers. Judge Vaughan asked how the Chief Judge can disapprove video conferencing. The Chair explained that the Chief Judge can disapprove video conferencing for initial appearances if the county already does them for bail reviews. Judge Rasin added that the Rule appears to limit her approval to consideration of only the procedure and the technology. Mr. Sykes suggested that the approval would also be of the use of video conferencing. The Reporter suggested that subsection (d)(2)(C) could be changed to provide that the decision concerning the use of video conferencing is to be made by the Chief Judge. The Vice Chair inquired if this would be on a county-by-county basis. Judge Rasin replied that it would.

Mr. Sykes suggested that the Rule could be redrafted at lunchtime to provide that the Chief Judge of the District Court has the right to determine whether interactive video conferencing is used, and if so, whether the procedure and technology is approved by the Chief Judge. Judge Rasin agreed with this, saying that she does not intend to withhold approval if the circumstances are right. Judge Johnson commented that he thought that the Chief Judge of the District Court had the authority to do this already. Judge Rasin responded that she thought that she did, also. Judge Kaplan observed that video conferencing is used in civil litigation in the Circuit Court of Baltimore City. Judge Johnson added that the circuit court uses video conferencing from the detention center in violation of probation cases. Arraignments and bond reviews are conducted by video conferencing.

Mr. Karceski commented that he understood the concept that both bail reviews and initial appearances would not be conducted through video conferencing. When a county chooses, the technology is for either one or the other procedure. Otherwise, the county would need two complete systems. Some proceedings happen quickly in criminal cases. It may be a matter of hours after someone's arrest that he or she appears in front of the commissioner. A defense attorney would need to know what system the county uses. He said that he had been in Harford County the day before, and the commissioner there was located in the detention center. This was a very workable and

pleasant arrangement. The commissioner was in a separate facility, yet it was attached to the jail. Most criminal defense attorneys in Maryland would not complain if all of the proceedings were conducted by video conferencing. The problem is the fact that many defendants are unrepresented. Public defenders are not present at bail hearings.

Judge Kaplan suggested that the Rule be adopted as amended to include the right of the Chief Judge of the District Court to approve the use, technology, and procedures of video conferencing. The Vice Chair pointed out that she read the Rule to mean that each jurisdiction has one or the other system. What the Rule is trying to say is that the presence of the defendant does not have to mean the physical presence and that the Chief Judge of the District Court must approve the video conferencing. These two ideas could go into a Committee note to clarify the meaning of the Rule, or a sentence could be added to subsections (d)(2)(A) or (B). She expressed the concern that a defendant should be present at a hearing on a violation of probation. Judge Kaplan stated that violation of probation hearings are conducted in person.

Judge Rasin questioned how far the Rules can go in providing video conferencing in the District Court when no bills have been passed in the legislature. To have a rule on this should not mean that it is not possible to have video conferencing in other areas. Mr. Bowen inquired why the Rule has to provide that only one or the

other proceeding can be by video conferencing, as long as the defendant does not object to both being by video. The Chair responded that the Subcommittee felt that it was unfair to a defendant to have both proceedings conducted by video conferencing. Judge Vaughan noted that many defendants would not know how to object to this. Judge Kaplan remarked that in Baltimore City, there are 300 arrests a day, and offering an election to each defendant would be unworkable.

Mr. Hochberg asked if one of the documents to which the Rule refers is the videotape of the proceedings. The Chair replied that it is not. Mr. Hochberg inquired where the videotape goes. The Chair answered that a videotape is not necessarily made or maintained. Mr. Sykes suggested that to take care of Judge Rasin's problem, a Committee note could be added which would provide that the Rule contains no implication one way or the other as to video conferencing in other contexts. The Chair agreed that a Committee note would be helpful. Mr. Karceski remarked that those who do criminal defense work must know ahead of time which proceedings will be conducted by video conferencing. The Chair said that this Rule protects counsel. It authorizes the Chief Judge of the District Court to put in this type of technology. The Subcommittee's concern was that a defendant would come to trial after never having left the detention center for 180 days, so the Rule requires that either the bail review or the initial appearance be conducted in person.

Judge Kaplan moved to approve the Rule as amended allowing for the Chief Judge to authorize the use, procedures, and technology for video conferencing. Mr. Sykes asked if this would include his suggested Committee note, and Judge Kaplan answered that the Committee note was included in his motion. The motion was seconded, and it carried with two opposed. The Vice Chair stated that she was opposed because the Rule should reflect that the Chief Judge may approve the video conferencing, and the defendant is deemed to be present when video conferencing is used. The rest of the Rule is misleading.

Mr. Johnson asked if the proposed changes to Rules 4-213 and 4-216 are also approved. Judge Johnson replied that the changes to those Rules are simply cross references to Rule 4-231, and they should be approved by the Committee. The Committee agreed by consensus to approve the changes to Rules 4-213 and 4-216.

Judge Johnson presented Rule 4-265, Subpoena For Hearing or Trial, for the Committee's consideration.

AMEND Rule 4-265 to reorganize section (a), to allow the time requirements of section (a) to be waived by the court, to require the issuance of a blank subpoena under certain circumstances, and to require a certain good faith effort concerning the time of service of a subpoena prepared by a party, as follows:

Rule 4-265. SUBPOENA FOR HEARING OR TRIAL

(a) Preparation by Clerk

On request of a party, ~~T~~the clerk shall prepare and issue a subpoena commanding a witness to appear to testify at a hearing or trial ~~on request of a party~~. Unless the time requirements of this section are waived by the court, the request shall be filed at least nine days before trial in circuit court, or seven days before trial in the District Court, not including the day of trial and intervening Saturdays, Sundays, and holidays. The request for subpoena shall state the name, address, and county of the witness to be served, the date and hour when the attendance of the witness is required, and the party requesting the subpoena. If the request is for a subpoena duces tecum, the request also shall contain a designation of the documents, recordings, photographs, or other tangible things, not privileged, which constitute or contain evidence relevant to the action, that are to be produced by the witness. At least five days before trial, not including the day of trial and intervening Saturdays, Sundays, or holidays, the clerk shall deliver the subpoena for service pursuant to Rule 4-266 (b).

(b) Preparation by Party

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

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

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

The proposed amendments to Rule 4-265 reorganize section (a) and expressly allow a court to waive the time requirements pertaining to a subpoena issued under that section.

In section (b), two features of the recently-amended rules pertaining to subpoenas in civil actions (Rules 2-510 and 3-510) are proposed to be made applicable to subpoenas issued under this section: (1) if an attorney or other officer of the court entitled to the issuance of a subpoena requests a blank subpoena, the clerk must issue one and (2) unless impracticable, a party must make a good faith effort to cause the subpoena to be served at least five days before the trial or hearing.

Judge Johnson explained that the amendments to the Rule reorganize section (a) and allow the court to waive the time requirements pertaining to a subpoena. These changes parallel the amendments made to Rule 2-510, Subpoenas, which is the civil rule

pertaining to subpoenas. The Vice Chair asked how the time requirements are waived by the court. Does one party go before the judge? The Chair replied in the affirmative. The Vice Chair pointed out that Rule 1-351 pertains to ex parte orders. Mr. Maloney inquired how many jurisdictions do this. The Chair remarked that he thought that all of them did, but Ms. Ogletree countered that not all jurisdictions do this. Mr. Maloney moved to approve the Rule, the motion was seconded, and it passed unanimously.

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-343 to conform section (g) to Chapter 538, Laws of 1998, as follows:

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

(a) Applicability

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

(b) Statutory Sentencing Procedure

When a defendant has been found guilty of murder in the first degree, the State has given the notice required under Code, Article 27, §412 (b)(1), and the defendant may be

subject to a sentence of death, a sentencing proceeding, separate from the proceeding at which the defendant's guilt was adjudicated, shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, §413. A separate Findings and Sentencing Determination form that complies with sections (g) and (h) 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) Allocution

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

NOTE TO COMMITTEE: The amendment to section (f) that was approved by the Committee has not yet been considered by the Court of Appeals.

(g) Form of Written Findings and Determinations

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

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

Section I

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

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

_____	_____
proven	not proven

2. The defendant engaged or employed another person to commit

the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

_____ proven _____ not proven

3. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons, and the defendant was a principal in the second degree who: (A) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (B) was a major participant in the murder; and (C) was actually present at the time and place of the murder.

_____ proven _____ not proven

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

Section II

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

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

_____ proven _____ not proven

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

Section III

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

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

_____ _____
proven not proven

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

_____ _____
proven not proven

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

_____ _____
proven not proven

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

_____ _____
proven not proven

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

_____ _____
proven not proven

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

_____ _____
proven not proven

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an

agreement or contract for remuneration or the promise of remuneration.

_____ proven _____ not proven

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

_____ proven _____ not proven

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

_____ proven _____ not proven

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

_____ proven _____ not proven

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

Section IV

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

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

on stay of entry of judgment pursuant to a charge of a crime of violence.

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

(Mark only one.)

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

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

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

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

(Mark only one.)

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

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

☐ (c) After a reasonable period of deliberation, one or more of

us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

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

(Mark only one.)

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

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

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

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

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

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

☐ (c) After a reasonable period of deliberation, one or more of

us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

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

(Mark only one.)

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

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

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

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

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

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

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

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

(Mark only one.)

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

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

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

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

_____

_____

_____

_____.

(Use reverse side if necessary)

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

_____

_____

_____

_____

(Use reverse side if necessary)

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

Section V

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

We unanimously find that the State has proven BY A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proven" in Section III outweigh the mitigating circumstances in Section IV. _____ _____
yes no

Section VI

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

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

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

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

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

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

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

We unanimously determine the sentence to be _____.

Section VII

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

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

_____ yes _____ no

_____ Foreman	_____ Juror 7
_____ Juror 2	_____ Juror 8
_____ Juror 3	_____ Juror 9
_____ Juror 4	_____ Juror 10
_____ Juror 5	_____ Juror 11

_____ _____
Juror 6 Juror 12

or, _____
JUDGE

(h) Deletions From Form

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

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

(i) Advice of the Judge

At the time of imposing sentence, 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.

Cross reference: Rule 8-306.

(j) 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 under the influence of alcohol or drugs at the time of the offense? If so, describe.

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

Yes _____ No _____

1. If so, describe relationship.

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

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

E. Data Concerning Victim

1. Name

2. Date of Birth

3. Sex

4. Race

5. Length of time in community

6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:

Not guilty _____; guilty _____; not criminally responsible _____

B. Mode of Trial:

Court _____ Jury _____

If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel

1. Name

2. Address

3. Appointed or retained

(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

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

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

IV. Data Concerning Sentencing Proceeding

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

B. Was the proceeding conducted

before same judge as trial? _____

before same jury? _____

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

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

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

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

F. Sentence imposed: Life imprisonment

Death

Life imprisonment without the possibility of parole

V. Chronology

Date of Offense

Arrest

Charge

Notification of intention to seek penalty of death

Trial (guilt/innocence) -- began and ended

Post-trial Motions Disposed of

Sentencing Proceeding -- began and ended

Sentence Imposed

VI. Recommendation of Trial Court as to Whether Imposition of Sentence of Death is Justified.

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

_____
Judge

CERTIFICATION

I certify that on the _____ day of _____, 19 ____ I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

_____
Judge

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

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

Source: This Rule is derived from former Rule 772A with the exception of sections (c) and (d), which are new, and section (f), 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 proposed amendments to Rule 4-343 conform section (g), Form of Written Findings and Determinations, to Chapter 538, Laws of 1998 (House Bill 1067), which makes a principal in the second decree convicted of the murder of a law enforcement officer eligible for the death penalty under certain circumstances.

Judge Johnson explained that during the 1998 legislative session, the law was changed so that a principal in the second degree convicted of the murder of a law enforcement officer is eligible for the death penalty under certain circumstances. Subsection (g)(3) has been changed to conform to the law. The rest of the changes have been styled to reflect this change. Judge Vaughan moved to approve the Rule as presented, the motion was seconded, and it carried unanimously.

Judge Johnson presented Rule 4-344, Sentencing--Review, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-344 to add a certain cross reference following section (f), as follows:

Rule 4-344. SENTENCING--REVIEW

. . .

(f) Review Panel -- Decision

Whether or not an appeal has been taken, the Review Panel shall file a written decision with the clerk within 30 days after the application is filed. If the sentence is to be increased, the defendant shall be brought before the panel and resentenced pursuant to Rule 4-342. If the sentence is reduced or not changed, the defendant need not be brought before the Review Panel. In either case, the Review Panel shall state the reasons for its decision and shall furnish a copy of the decision to the defendant, defendant's counsel, and the State's Attorney.

Cross reference: See Code, Article 27, §§645JC and 645JE concerning decisions to change a sentence.

. . .

Rule 4-344 was accompanied by the following Reporter's Note.

A cross reference to Code, Article 27, §§645JC and 645JE is proposed to be added following Rule 4-344 (f) in light of Chapter 367, Laws of 1998, that modified provisions in those sections pertaining to a court's decision to change a sentence.

Judge Johnson told the Committee that a cross reference was added to the Rule because Chapter 367, Laws of 1998 modified provisions in the named Code provisions pertaining to a court's decision to change a sentence. Judge McAuliffe suggested that the cross reference be expanded to indicate that it applies to required notification to victims. The current wording does not alert a judge or the parties to the requirements of victim notification. The Reporter noted that the Code provisions are very lengthy and includes matters other than victim notification, and it would be difficult to

summarize all of them in the cross reference. Judge McAuliffe said that an expanded cross reference which refers to notification of victims and other requirements would be sufficient. Judge Kaplan moved to approve the Rule as amended, the motion was seconded, and it passed unanimously.

Judge Johnson presented Rule 4-351, Commitment Record, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-351 to add a certain cross reference following section (a), as follows:

Rule 4-351. COMMITMENT RECORD

(a) Content

When a person is convicted of an offense and sentenced to imprisonment, the clerk shall deliver to the officer into whose custody the defendant has been placed a commitment record containing:

(1) The name and date of birth of the defendant;

(2) The docket reference of the action and the name of the sentencing judge;

(3) The offense and each count for which the defendant was sentenced;

(4) The sentence for each count, the date

the sentence was imposed, the date from which the sentence runs, and any credit allowed to the defendant by law;

(5) A statement whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of the preceding term or to any other outstanding or unserved sentence.

Cross reference: See Code, Article 27, §643C (c)(1) concerning Maryland Sentencing Guidelines Worksheets prepared by a court.

(b) Effect of Error

An omission or error in the commitment record or other failure to comply with this Rule does not invalidate imprisonment after conviction.

Source: This Rule is derived from former Rule 777 and M.D.R. 777.

Rule 4-351 was accompanied by the following Reporter's Note.

Rule 4-351 is proposed to be amended to add a cross reference to Code, Article 27, §643C (c)(1) that was added by Chapter 362, Laws of 1998 (Senate Bill 241). Under the new law, if a court prepares a Maryland Sentencing Guidelines Worksheet, the clerk must deliver a copy of it to the agency that has been ordered by the court to retain custody of the defendant.

Judge Johnson explained that the cross reference is being recommended for addition to the Rule because of a new law, Chapter 362, Laws of 1998, which provides that if a court prepares a Maryland Sentencing Guidelines Worksheet, the clerk must deliver a copy of it to the agency that has been ordered by the court to retain custody of

the defendant. Judge Kaplan moved to approve the Rule as presented, the motion was seconded, and it carried unanimously.

Judge Johnson commented that the next few items to be presented pertained to expungement. He presented Form 4-504.1, Petition for Expungement of Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-504.1 for conformity with Chapter 495, Laws of 1998, as follows:

Form 4-504.1

(Caption)

PETITION FOR EXPUNGEMENT OF RECORDS

1. On or about _____, I was
(Date)

arrested 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 _____, the charge was
(Date)

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.

☐ ***(Do <u>not</u> check this box if the offense for which you want to have records expunged is a violation of Code*, Transportation Article, §21-902.)*** A judgment of probation before judgment was entered and three years have passed since the later of disposition or my discharge from probation. 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*, Article 27, §12 A-5 or former Code*, Article 10, §37 and three years have passed since disposition.

☐ On or about _____, I was granted a
(Date)
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), 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, Article 27, §738.

_____ _____
(Date) Signature

_____

(Address)

_____

_____
(Telephone No.)

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

Form 4-504.1 was accompanied by the following Reporter's Note.

> The amendments to Form 4-504.1 are proposed to conform it to Chapter 495, Laws of 1998 (H.B. 645). The new law prohibits expungement of records pertaining to a charge of a violation of Code, Transportation Article, §21-902 on which a judgment of probation before judgment is entered and expressly allows expungement of certain records pertaining to incarcerable violations of the Vehicle Laws of Maryland.

Judge Johnson said that the proposed amendments conform to Chapter 495, Laws of 1998 (House Bill 645) which is a new law prohibiting the expungement of records pertaining to a charge of a violation of Code, Transportation Article, §21-902 on which a judgment of probation before judgment is entered. The new law also expressly allows expungement of certain records pertaining to incarcerable violations of the Vehicle Laws of Maryland. Judge Kaplan moved to approve the amended form as presented, the motion was seconded, and it passed unanimously.

Judge Johnson presented Form 4-503.1, Notice of Release from Detention or Confinement Without Charge Request for Expungement, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-503.1 to delete a certain "Note" and to make a certain stylistic change, as follows:

Form 4-503.1. NOTICE OF RELEASE FROM DETENTION OR CONFINEMENT WITHOUT CHARGE -- REQUEST FOR EXPUNGEMENT

NOTICE OF RELEASE FROM DETENTION OR

CONFINEMENT WITHOUT CHARGE

REQUEST FOR EXPUNGEMENT

To: _____
(law enforcement agency)

_____
(Address)

_____

1. On or about _____, ~~19~~ ____, I was arrested,
(Date)
detained, or confined by a law enforcement officer of your agency at _____, Maryland as a result of the following incident (Specify) _____

_____

_____

_____.

2. I was released from detention or confinement on or about _____, ~~19~~ _____, without being charged with a crime.
(Date)

3. (Check one of the following boxes):

☐ Three years or more have passed since the date of my arrest, detention, or confinement.

☐ Less than three years have passed since the date of my arrest, detention, or confinement, but I have attached hereto a General Waiver and Release.

4. I hereby request that the police record of my arrest, detention, or confinement be expunged.

_____
(date)

_____
(Signature)

_____
(Name -- Printed)

_____
(Address)

_____

_____
(Telephone No.)

~~NOTE: THIS IS NOT TO BE USED FOR VIOLATIONS OF VEHICLE OR TRAFFIC LAWS.~~

Form 4-503.1 was accompanied by the following Reporter's Note.

> This amendment is proposed in light of Chapter 495, Laws of 1998 (House Bill 645), which allows expungement of records pertaining to motor vehicle violations for which a term of incarceration may be imposed. Because the

"NOTE" at the end of Form 4-503.1 is no longer correct, it is proposed to be deleted. Also, with the approach of the year 2000, the number "19" is deleted from spaces where dates are to be stated.

Judge Johnson explained that this form is recommended to be changed to conform to the same new law as the form previously presented. This law is Chapter 495, Laws of 1998 (House Bill 645). The note at the end of the form is proposed to be deleted, because it is no longer correct. Also, due to the upcoming change to the year 2000, the date is proposed to be modified. Judge Kaplan moved to approve the changes to the form as presented, the motion was seconded, and it carried unanimously.

Judge Johnson presented Form 4-503.3, Application for Expungement of Police Record, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-503.3 to add the word "nonincarcerable" to the affirmation portion of the form and to make a certain stylistic change, as follows:

Form 4-503.3. APPLICATION FOR EXPUNGEMENT OF POLICE RECORD

(Caption)

APPLICATION FOR EXPUNGEMENT

OF POLICE RECORD

1. On or about _____, ~~19~~ ____, I was
(Date)

arrested, detained, or confined by an officer of the _____

_____
(law enforcement agency)

at _____, Maryland as a result

of the following incident _____

_____.

2. On or about _____, ~~19~~ ____, I was released
(Date)

without having been charged with a crime.

3. On or about _____, ~~19~~ ____, I requested the
(Date)

law enforcement agency to expunge my police record pertaining to the incident.

4. the above named law enforcement agency (check appropriate box):

☐ issued the attached Notice of Denial of Request for Expungement.

☐ failed to notify me of any action taken within 60 days after receipt of my Notice and Request for Expungement.

WHEREFORE, I request the Court to enter an Order of Expungement of all police records pertaining to my arrest, detention, or confinement, and all court records of these

proceedings.

I solemnly affirm under the penalties of perjury that the contents of this application are true to the best of my knowledge, information, and belief and that the arrest to which this application related was not made for any nonincarcerable violation of the Vehicle Laws of the State of Maryland or any traffic law, ordinance, or regulation.

_____
(Date)

_____
(Signature)

_____
(Name -- Printed)

_____
(Address)

_____

_____
(Telephone No.)

Form 4-503.3 was accompanied by the following Reporter's Note.

> The word "nonincarcerable" is proposed to be added to Form 4-503.3 for conformity with Chapter 495, Laws of 1998 (House Bill 645). Also, with the approach of the year 2000, the number "19" is deleted from spaces where dates are to be stated.

Judge Johnson noted that this form is proposed to be amended in conformity with Chapter 495, Laws of 1998 (House Bill 645) as the other expungement forms have been amended. Judge Kaplan moved to approve the form as presented, the motion was seconded, and it carried unanimously.

Judge Johnson presented Rule 11-601, Expungement of Criminal Charges Transferred to the Juvenile Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 11 - JUVENILE CAUSES

CHAPTER 600 - EXPUNGEMENT

> AMEND Rule 11-601 to add the word "nonincarcerable" to the affirmation portion of the form set out in section (b), as follows:

Rule 11-601. EXPUNGEMENT OF CRIMINAL CHARGES

TRANSFERRED TO THE JUVENILE COURT

(a) Procedure

A petition for expungement of records may be filed by a respondent who is eligible under Code, Article 27, §737 (b) to request expungement. Proceedings for expungement shall be in accordance with Title 4, Chapter 500 of these Rules, except that the petition shall be filed in the juvenile court and shall be substantially in the form set forth in section (b) of this Rule.

(b) Form of Petition

A petition for expungement of records under this Rule shall be substantially in the following form:

(Caption)

PETITION FOR EXPUNGEMENT OF RECORDS

(Code*, Article 27, §737 (b))

1. On or about _____, I was arrested 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. The charge was transferred to the juvenile court under Code*, Article 27, §594A and (check one of the following boxes):

☐ No petition under Code*, Courts Article, §3-810 was

filed;

☐ The decision on the juvenile petition was a finding of facts-not-sustained; or

☐ I was adjudicated delinquent and I am now at least 21 years of age.

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*, Article 27, §738.

_____ _____
(Date) Signature

_____
(Address)

_____

_____
(Telephone No.)

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

Source: This Rule is new.

Rule 11-601 was accompanied by the following Reporter's Note.

> The word "nonincarcerable" is proposed to be added to the affirmation portion of the form set out in section (b) of Rule 11-601 for conformity with Chapter 495, Laws of 1998 (House Bill 645).

Judge Johnson explained that the Rule is proposed to be amended to add the word "nonincarcerable" in the affirmation to conform to Chapter 495, Laws of 1998 (House Bill 645). Mr. Titus moved to approve the Rule as presented, the motion was seconded, and it carried unanimously.

Judge Johnson explained that there are several additional items in the meeting materials pertaining to Agenda Item 1.

The first of these items involves House Bill 936, which, if passed by the legislature, would have provided that a motion to modify or reduce a sentence filed in the District Court within 90 days after the imposition of sentence would stay the time for filing an appeal until there has been a ruling on the motion. (See Appendix 1). A letter from Delegate Vallario to the Chair explains that House Bill 936 was withdrawn by its sponsor because the Judiciary Committee was unable to resolve the issues raised by the Maryland Judicial Conference's Legislative Subcommittee and the Maryland State's Attorneys' Association. These issues concern the fact that if the bill passed, a defendant who failed to appeal a conviction within the 30-day period after judgment could obtain an appeal by first filing a

motion to modify or reduce within the 90-day time frame. Also, since there is no requirement that that a District Court judge rule on a motion to modify or reduce within any time frame, many years could go by after the judgment before the appeal is filed and heard. Delegate Vallario asked in his letter if there should be any legislative changes or change to the Rules of Procedure based on the ideas of House Bill 936. The meeting materials contain a draft of a letter to Delegate Vallario from the Chair and Vice Chair recommending no change.

The Chair pointed out that if a defendant files a motion for modification and then, on the 32nd day, the judge denies the motion, the defendant has lost the right to appeal the conviction to the circuit court. The concern is that defendants are not receiving meaningful consideration regarding modification of their sentences. Mr. Hochberg suggested that this could be designed like the civil system, which provides that the time for appeal runs from the entry of an order disposing of a motion pursuant to Rule 2-534, Motion to Alter or Amend a Judgment. The Chair responded that this would be an administrative nightmare in this situation, and it would not be an easy decision for the defense attorney. The current system works well. Mr. Maloney expressed the view that to extend the period to appeal beyond 30 days would be a disaster, and Ms. Ogletree agreed. The Chair remarked that the situation would not be as difficult if criminal appeals were on the record instead of de novo.

Judge Vaughan moved to send the letter from the Chair and Vice Chair to Delegate Vallario as drafted. The motion was seconded, and it carried unanimously.

Judge Johnson explained that the next item for discussion involves two different issues, private home detention monitoring and sexually violent predators. (See Appendix 2). The meeting materials contain two letters from Stuart O. Simms, Secretary of the Department of Public Safety and Correctional Services, to Robert M. Bell, Chief Judge of the Court of Appeals. One letter concerns the duty of the Department to administer the licensing of private home detention monitoring companies and the other refers to the legislative requirement of registration of offenders who have been convicted of certain crimes against children or sexually violent offenses. A copy of Senate Bill 633, pertaining to private home detention monitoring agencies, is included in the meeting materials. Chief Judge Bell wrote Mr. Simms two letters, copies of which are in the meeting materials. In the letter pertaining to private home detention monitoring companies, Judge Bell said that the Rules Committee will be asked to consider whether a Rule is necessary. In the letter concerning registration of sexual offenders, Judge Bell noted that the Rules Committee had proposed a Rule on the subject of sexually violent predators, and the Court of Appeals had rejected that Rule. The Subcommittee had discussed both issues and concluded that neither subject required a rule at this time.

The Vice Chair inquired what the reasons would be to have rules on these subjects. The Chair replied that there may be some concern with the lack of uniformity and differences in standards. Judge Johnson commented that the law clearly covers the issue of private home detention monitoring. It had been a big problem until the Governor's Task Force suggested the statute. No rule is necessary. Judge Vaughan moved that the draft letter to Judge Bell from the Chair and Vice Chair, which letter is located in the meeting materials, should be sent out as two separate letters, one concerning sexual offenders and one private home detention monitoring. The motion was seconded, and it passed unanimously.

Mr. Sykes pointed out that the first paragraph of the statute provides as follows: "In accordance with eligibility criteria, conditions, and procedures prescribed in the Maryland Rules....". If there are no rules pertaining to private home detention monitoring, perhaps this language should be repealed from the statute. Ms. Veronis observed that this language could be interpreted as referring to the usual rules on pretrial release. The Vice Chair noted that Rule 4-216 sets forth the conditions imposed. The Chair added that the Rule has a catchall in subsection (d)(5), which has been revised and relettered as subsection (f)(5), effective October 1, 1998. The Vice Chair suggested that a reference to home detention could be made in Rule 4-216. The Reporter remarked that it could be added to the "laundry list" of what the court can do.

Mr. Sykes suggested that the letter could say that Rule 4-216 permits a judge to impose any conditions that are appropriate. The Reporter asked if the Rule should have a cross reference to the statute, or if it should list home detention monitoring as a condition. Judge Johnson expressed the opinion that a cross reference to the statute should be added to Rule 4-216. Judge Kaplan moved that Rule 4-216 should be amended to include a cross reference to home detention monitoring in Code, Article 27, §616 1/2, following section (f) of the revised Rule. The motion was seconded, and it passed unanimously. The Chair stated that the letter to Chief Judge Bell about private home detention monitoring would explain that the Committee will recommend that a cross reference be added to Rule 4-216.

Agenda Item 2. Consideration of certain proposed recommendations of the Evidence Subcommittee:

Amendments to Rule 5-803 (Hearsay Exceptions: Unavailability of Declarant Not Required)

Amendments to Rule 5-702 (Testimony By Experts)

Letter to Judiciary Committee of the Maryland House of Delegates re: House Bill 458 - Evidence - Expert Witness Testimony

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Mr. Titus presented Rule 5-803, Hearsay Exceptions: Unavailability of Declarant Not Required, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-803 to add a certain cross reference following subsection (b)(22), as follows:

Rule 5-803. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(b) Other Exceptions

. . .

(22) ~~[Vacant]~~ Judgment of Previous Conviction

~~There is no subsection 22.~~ Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment. In criminal cases, the State may not offer evidence of a judgment against persons other than the accused, except for purposes of impeachment. The pendency of an appeal may be shown but does not preclude admissibility.

Committee note: This section is derived without substantive change from F.R.Ev. 803 (22). Any language differences are solely for purposes of style and clarification.

Cross reference: For the admissibility in a certain civil proceeding and conclusive effect of a judgment of conviction establishing criminal accountability for the felonious and intentional killing of a decedent after all right to appeal has been exhausted, see Code, Courts Article, §10-919. For the admissibility in a certain civil proceeding and effect of certain judgments in state criminal and civil antitrust proceedings, see Code, Commercial Law Article, §11-210.

. . .

Rule 5-803 was accompanied by the following Reporter's Note.

The proposed addition of subsection (b)(22) and the Committee note that follows it have been approved by the Rules Committee, but have not yet been transmitted to the Court of Appeals.

The Evidence Subcommittee recommends the addition of a cross reference to the recently-enacted §10-919 of Code, Courts Article (Chapter 335/336, Laws of 1998) and to Code, Commercial Law Article, §11-210.

Mr. Titus explained that at the February, 1998 Rules Committee meeting, the Committee approved an amendment to subsection (b)(22) which added back in the federal language deleted by the Court of Appeals initially. The Evidence Subcommittee now recommends the addition of a cross reference to recent legislation, Code, Courts Article, §10-919 (Chapter 335/336, Laws of 1998) and to Code, Commercial Law Article, §11-210. Mr. Johnson commented that the statute may be inconsistent with the language of the exception, because the statute provides that all right to appeal has to be exhausted. The Chair noted that, pursuant to Rule 5-101, when provisions in Title 5 are inconsistent with statutes, the statute takes precedence. Mr. Hochberg remarked that the cross reference serves a good purpose.

Mr. Titus moved to approve the recommendation of the Subcommittee to add the cross reference, the motion was seconded, and it passed with one opposed.

Mr. Titus presented Rule 5-702, Testimony by Experts, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 700 - OPINIONS AND EXPERT TESTIMONY

AMEND the Committee note to Rule 5-702, as follows:

Rule 5-702. TESTIMONY BY EXPERTS

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Committee note: ~~This Rule is not intended to overrule~~ The required foundation for the admission of scientific techniques or principles not controlled by statute is governed in Maryland by Reed v. State, 283 Md. 374 (1978) and other cases adopting the common law principles enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). This Rule does not overrule the Frye-Reed test. Contrast Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The ~~required scientific foundation for the admission of~~ application of the Frye-Reed test to novel scientific techniques or principles is left to development through case law. ~~Compare Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S., 113 S. Ct. 2786 (1993).~~

Source: This Rule is new.

Rule 5-702 was accompanied by the following Reporter's Note.

The Evidence Subcommittee recommends an amendment to the Committee note to Rule 5-702 to make clear that the common law principles of the "Frye-Reed" test remain the basis for establishing the required foundation for the admission of scientific techniques or principles not controlled by statute. For further clarity, the signal preceding the reference to Daubert v. Merrell Dow

Pharmaceuticals, Inc., 509 U.S. 579 (1993) is proposed to be changed from "compare" to "contrast."

Mr. Titus explained that many bills have come before the General Assembly on this issue. Delegate Vallario has asked the Rules Committee to consider the issue. The Evidence Subcommittee decided to recommend an amendment to the Committee note to clarify that the common law principles of the "Frye-Reed" test remain the basis for establishing the required foundation for the admission of scientific techniques or principles not controlled by statute. Judge McAuliffe noted that the original Committee note was intentionally left open as to whether the test is to be based on the case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) or the case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Mr. Titus said that the Court of Appeals has followed the "Frye-Reed" test since the Rule was written. The amended Committee note would clarify that this is the appropriate test, and the Court of Appeals can eliminate the note if it so wishes.

Mr. Sykes questioned whether a Committee note is necessary. The Rule is sufficiently vague that the court could stay on the common law track. Mr. Howell pointed out that the change in the note would preserve the concept that Frye is in effect. He questioned the purpose of the sentence in the note which reads: "Contrast Daubert v. Merrell Dow Pharmaceuticals, Inc.....". The Chair said that Rule 5-702 is not the same as the federal rule. The reason is that the

Rules Committee and the Court were not ready to back off from "Frye-Reed." The Maryland Rule is better than the federal rule. Admission of novel scientific techniques or principles is left to development through case law. This says that it is up to the courts to determine this issue and not up to the legislature.

Judge McAuliffe pointed out that the original Committee note was inserted at the request of the Court of Appeals. The Court was being careful that not all quasi-experts should qualify. Mr. Titus commented that since the Rule was put into effect, there has been no change in the test used. The Committee note would clarify for practitioners and lower courts that the "Frye-Reed" test is the one to use. Mr. Titus expressed the view that the "Frye-Reed" is the better test. Mr. Sykes remarked that this is not intended to overrule Reed v. State, 283 Md. 374 (1978) and other cases on point. He inquired as to what was wrong with the current Committee note. Mr. Titus replied that the current note provides a field day for arguments. The new note locks in a test for analyzing scientific techniques. Mr. Klein questioned as to why the note has to be changed, because the change may create more problems. Mr. Titus explained that there had been bills in the legislature on this which did not pass, and Delegate Vallario was looking for clarification from the Rules Committee. After Mr. Titus looked over the bills, he realized that he was uncomfortable with the Committee note, which is too general.

Mr. Sykes reiterated that the reference to the Daubert case should be deleted. The Reporter commented that the Honorable Alan M. Wilner, previous Chair of the Rules Committee, and Professor Lynn McLain of the University of Baltimore Law School, had drafted the original Committee note. Two versions were presented to the Court. One version would have expressly overruled Reed and followed Daubert. The other version, which the Court adopted, left the continuing vitality of the "Frye-Reed" test in Maryland to further case law development. The Vice Chair pointed out that the modified Committee note more clearly rejects Daubert. She asked how the "Frye-Reed" test could be applied to a novel scientific technique or principle. Mr. Sykes answered that the technique or principle would always be rejected under the "Frye-Reed" test. Mr. Titus added that the "Daubert" test is friendlier to new techniques and principles, but more "junk science" is likely to be admitted. Also, under Daubert, there is a greater likelihood of inconsistent rulings by trial judges, and the inconsistency is not likely to be resolved on appeal, because "abuse of discretion" would be the appropriate appellate test.

The Vice Chair remarked that the last sentence of the note means that the only choice is the "Frye-Reed" test. It would be preferable to let the trial court choose the appropriate test. The Chair suggested that the last sentence of the Committee note read as follows: "The admissibility of novel scientific techniques or

principles is left to development through case law." The letter to Delegate Vallario as it is written would reflect the opposition of the Rules Committee to the legislation affecting this issue. (See Appendix 3). Mr. Sykes suggested that the language in the Committee note which reads "This Rule is not intended to overrule Reed v. State....." should be retained. The Vice Chair observed that the Court of Appeals adopted Rule 5-702 and has not asked that it be changed. The first sentence of the draft the Subcommittee is recommending is more helpful than the existing sentence. Mr. Howell expressed the view that the proposed letter does not explain how the suggested change to the Committee note would solve the legislative problems or help the Court of Appeals. The Reporter responded that the Subcommittee concluded that the general rule should be left up to the Court of Appeals, but that admissibility of specific scientific evidence, such as DNA evidence, could be a matter for legislative determination.

Judge Kaplan moved to approve the proposed amendments to Rule 5-702, with the Chair's suggested change to the fourth sentence of the Committee note. The motion was seconded, and it passed unanimously. Mr. Bowen suggested that the last paragraph of the letter read as follows:

> The Rules Committee suggests that in the absence of a legislative determination concerning a particular scientific technique or principle (e.g., DNA testing, radar, etc.), admissibility should be left to case law and the general principles set out in the Maryland

Rules.

The Committee agreed by consensus with Mr. Bowen's suggestion.

Agenda Item 3. Consideration of certain proposed rules changes recommended by the Property Subcommittee:

Amendments to Rule 14-206 (Procedure Prior to Sale)
Amendments to Rule 14-305 (Procedure Following Sale)
Amendments to Rule 14-504 (Notice to Persons Not Named as Defendants)
New Rule 14-506 (Notice to Tenant Following Judgment)

Ms. Ogletree presented Rule 14-206, Procedure Prior to Sale, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALE OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-206 (a) to provide an exception to the bond requirement in foreclosure sales, as follows:

Rule 14-206. PROCEDURE PRIOR TO SALE

(a) Bond

(1) Generally

Except as provided in subsection (a)(2) of this Rule, ~~B~~before making a sale of property to foreclose a lien, the person

authorized to make the sale shall file a bond to the State of Maryland conditioned upon compliance with any court order that may be entered in relation to the sale of the property or distribution of the proceeds of the sale. Unless the court orders otherwise, the amount of the bond shall be the amount of the debt plus the estimated expenses of the proceeding. On application by a person having an interest in the property or by the person authorized to make the sale, the court may increase or decrease the amount of the bond pursuant to Rule 1-402 (d).

(2) Trustee Appointed Under Certain Instruments

Unless otherwise ordered by the court, the trustee need not file a bond if the sale is for the benefit of either the grantor of the trust instrument or a person who paid a valuable consideration for the deed of trust and who is entitled to the proceeds of sale.

(b) Notice

(1) By Publication

After commencement of an action to foreclose a lien and before making a sale of the property subject to the lien, the person authorized to make the sale shall publish notice of the time, place, and terms of sale in a newspaper of general circulation in the county in which the action is pending. "Newspaper of general circulation" means a newspaper satisfying the criteria set forth in Code, Article 1, Section 28. A newspaper circulating to a substantial number of subscribers in a county and customarily containing legal notices with respect to property in the county shall be regarded as a newspaper of general circulation in the county, notwithstanding that (1) its readership is not uniform throughout the county, or (2) its content is not directed at all segments of the population. For the sale of an interest in real property, the notice shall be given at

least once a week for three successive weeks, the first publication to be not less than 15 days prior to sale and the last publication to be not more than one week prior to sale. For the sale of personal property, the notice shall be given not less than five days nor more than 12 days before the sale.

(2) By Certified and First Class Mail

(A) Before making a sale of the property, the person authorized to make the sale shall send notice of the time, place, and terms of sale by certified mail and by first class mail to the last known address of (i) the debtor, (ii) the record owner of the property, and (iii) the holder of any subordinate interest in the property subject to the lien.

(B) The notice of the sale shall be sent not more than 30 days and not less than ten days before the date of the sale to all such persons whose identity and address are actually known to the person authorized to make the sale or are reasonably ascertainable from a document recorded, indexed, and available for public inspection 30 days before the date of the sale.

(3) Other Notice

If the person authorized to make the sale receives actual notice at any time before the sale is held that there is a person holding a subordinate interest in the property and if the interest holder's identity and address are reasonably ascertainable, the person authorized to make the sale shall give notice of the time, place, and terms of sale to the interest holder as promptly as reasonably practicable in any manner, including by telephone or electronic transmission, that is reasonably calculated to apprise the interest holder of the sale. This notice need not be given to anyone to whom notice was sent pursuant to subsection (b)(2) of this Rule.

(4) Return Receipt or Affidavit

The person giving notice pursuant to subsections (b)(2) and (b)(3) of this Rule shall file in the proceedings an affidavit (A) that the person has complied with the provisions of those subsections or (B) that the identity or address of the debtor, record owner, or holder of a subordinate interest is not reasonably ascertainable. If the affidavit states that an identity or address is not reasonably ascertainable, the affidavit shall state in detail the reasonable, good faith efforts that were made to ascertain the identity or address. If notice was given pursuant to subsection (b)(3), the affidavit shall state the date, manner, and content of the notice given.

(c) Postponement

If the sale is postponed, notice of the new date of sale shall be published in accordance with subsection (b)(1) of this Rule. No new or additional notice under subsection (b)(2) of this Rule need be given to any person to whom notice of the earlier date of sale was sent, but notice shall be sent to persons entitled to notice under subsections (b)(2)(B) and (3) of this Rule to whom notice of the earlier date of sale was not sent.

Source: This Rule is derived in part from former Rule W74 and is in part new.

Rule 14-206 was accompanied by the following Reporter's Note.

Comments have been received asking for either an exception to the bond requirement or a minimal bond requirement when the property in a foreclosure sale is sold to the note-holder. The Subcommittee recommends that no bond need be required in this situation and has added a provision parallel to Rule 14-303 (a)(2).

Ms. Ogletree told the Committee that the Property Subcommittee

is recommending an exception to the bond requirement in a foreclosure sale when the property is sold for the benefit of either the grantor of the trust instrument or a person who paid a valuable consideration for the deed of trust and who is entitled to the proceeds of sale. The language of the proposed change is taken from subsection (a)(2) of Rule 14-303, Procedure Prior to Sale, which applies to judicial sales.

The Vice Chair commented that the grantor is the mortgagor. Ms. Ogletree said that a deed of trust for the benefit of creditors would fit into this category. If the sale of the property is to a third party, the trustee would file a bond after the sale. If the person for whose benefit the property is sold is entitled to the funds, the trustee does not need to file a bond. This is the procedure in some of the jurisdictions, but not all. The Vice Chair noted that the initial mortgagee bank may transfer the mortgage to someone else who then transfers to another bank. Ms. Ogletree responded that in some situations, a bond is appropriate.

Judge Johnson said that he always requires a minimum bond when the trustee is foreclosing. Ms. Ogletree remarked that the Rule would not prohibit this, since it provides "unless otherwise ordered by the court." Judge Johnson said that he cannot always enter an order for a minimum bond, then when the property is sold sign another order for a supplemental bond. Ms. Ogletree noted that this is precisely the problem pointed out by the Honorable Richard J. Clark

of the Circuit Court of Charles County who had sent in an e-mail message to this effect. Judge Johnson expressed the view that it would be better to set a minimum bond. Mr. Sykes pointed out that the issue is not for whose benefit the sale is, but whether there is any money from the sale. This may not be known for a while. A nominal bond could be required, with the option of a substantial bond later. Judge Johnson reiterated that this generates paperwork.

Mr. Bowen expressed the opinion that a minimum bond is worthless, and it creates extra paperwork. The Chair suggested that the new language could be shortened by providing that if the sale is for a party who is entitled to the proceeds of sale, no bond is required. Mr. Bowen noted that the Rule covers more than this. The Vice Chair commented that it does not make sense that a trustee appointed by the court under a mortgage would give a bond while a trustee appointed under a deed of trust would not. Judge Johnson remarked that if there is a lien on a condominium, a trustee is appointed to sell the property to satisfy the lien. Ms. Ogletree said that a condominium lien is a statutory lien, not a lien created by lien instrument. The fact that there is a mortgagee or trustee appointed under an instrument is not limiting -- there would be no bond in almost every case.

Judge McAuliffe observed that there is a problem when a grantor is in default as another person is entitled to the proceeds. Mr. Bowen responded that this is not an ordinary deed of trust, but is a

deed of trust for the benefit of creditors, and the debtor/grantor is the ultimate beneficiary.

The Vice Chair inquired as to why the new language refers only to a "deed of trust." Mr. Sykes asked if the term "note" could be used. Ms. Ogletree answered that a note may be secured by a mortgage, and may be a separate document, as with a deed of trust, or the note may be contained within a mortgage document. As between a mortgage and a deed of trust, when a mortgage is released, it is the end of the debt. That is not necessarily true with a deed of trust.

The Chair suggested that the court could have the option. An application could be filed with the court. Ms. Ogletree responded that ordinarily an application is not filed with the court. What is done in her county is that the trustee guesses the value of the debt and the expenses and knows that the court will require a bond. There is no application. The Vice Chair said that in other counties, a statement of mortgage debt is filed. Ms. Ogletree said that when this is filed, a bond amount could be set by taking into account a general idea of the costs. The Chair added that a petition could be filed in court, and as a secondary step, the judge could decide that no bond would be required. The Rule could provide that the court need not require a bond.

Ms. Ogletree questioned as to what should be changed in Rule 14-206. The Chair commented that the circuit court does not know what the bond should be. Ms. Ogletree reiterated that Judge Clark

had suggested that there be a minimum bond which would only be raised if the sale proceeds are more than the amount of the debt. The Chair suggested that the attorney should have a chance to have the bond excused. Ms Ogletree remarked that a $5000 bond costs $100, and so does a $20,000 bond. Judge Vaughan suggested that a lending institution could simply post a letter of credit. Ms. Ogletree responded that this would discriminate against the holder who is an individual, as opposed to a holder who is a bank.

The Vice Chair noted that anyone can file for permission to post security other than a bond. Some jurisdictions use a petition to the clerk to set a bond; some jurisdictions will not accept a petition. Ms. Ogletree remarked that there is a benefit to uniformity among the jurisdictions in the State. Judge Johnson suggested that the bond be set at $5000 unless there is a third party purchaser. The Vice Chair expressed the view that a $5000 bond makes the Rule clear, but the bond is worthless. Mr. Sykes reiterated that one does not know for whose benefit the sale is, until the sale has occurred. The Chair suggested that there could be a statement of debt filed as well as an estimated amount of the sale. If no money will change hands, there need be no bond. If the amount of money is unknown, and it could be substantial, a bond could be required.

Mr. Bowen pointed out that current Rule 14-303 (a)(2) already provides for an exception to the bond requirement. If subsection (a)(2) of Rule 14-206 will be rewritten, then the parallel provision

in Rule 14-303 should be rewritten, also. Since there have been no problems with the bond exception in Rule 14-303, there is no reason that it would not work in Rule 14-206. The Chair commented that Judge Johnson had had some unpleasant experiences. Judge Johnson said that a minimum bond is always required in his county. Ms. Ogletree stated that this is not the case in her county. Judge Johnson suggested that the Rule require a minimum bond unless the purchaser is a third party. Mr. Bowen expressed the opinion that this is not logical for foreclosure sales.

The Vice Chair asked what the relationship is between Chapter 200 and Chapter 300 of Title 14. Ms. Ogletree replied that there are additional requirements when there is no instrument. The Vice Chair commented that this has caused confusion. Mr. Hochberg inquired as to what a nominal bond would cover. The Chair answered that it would cover some costs for transfers. Judge Kaplan added that it would be minimal coverage. The Chair remarked that if an attorney leaves the country, the bond would be of no help. Judge Kaplan observed that it is not worth the effort to collect a small bond. Mr. Sykes suggested that there should be no bond unless there is no lien involved or there is a sale to a third party. Mr. Bowen said that this should be the same for both the bond rules. Mr. Sykes suggested that both provisions could use the same language. At an ordinary judicial sale the property is always purchased by a third party.

The Chair asked if the Subcommittee should reconsider the Rule.

The Vice Chair moved that there be no bond requirement in foreclosures subject to the appropriate chapter until the sale of the property. If the sale produces proceeds in excess of the debt and expenses, then a bond is required. The motion was seconded, and it carried with three opposed.

Ms. Ogletree inquired if this language would go in both Rules 14-206 and 14-303. The Vice Chair said that the changed language is appropriate where a trustee is appointed by the court. Mr. Sykes clarified that it is where there is money from the sale to a third party. The Chair stated that there are enough variances between the two Rules that the language should not be parallel. The Vice Chair expressed the view that the amendment is sensible, because until one knows the amount of money from the sale, there is no basis for the court to determine a bond.

After lunch, Ms. Ogletree presented Rule 14-305, Procedure Following Sale, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 300 - JUDICIAL SALES

AMEND Rule 14-305 to add a new section (g), as follows:

Rule 14-305. PROCEDURE FOLLOWING SALE

(a) Report of Sale

As soon as practicable, but not more than 30 days after a sale, the person authorized to make the sale shall file with the court a complete report of the sale and an affidavit of the fairness of the sale and the truth of the report.

(b) Affidavit of Purchaser

Before a sale is ratified, unless otherwise ordered by the court for good cause, the purchaser shall file an affidavit setting forth:

(1) whether the purchaser is acting as an agent and, if so, the name of the principal;

(2) whether others are interested as principals and, if so, the names of the other principals; and

(3) that the purchaser has not directly or indirectly discouraged anyone from bidding for the property.

(c) Sale of Interest in Real Property; Notice

Upon the filing of a report of sale of real property or chattels real pursuant to section (a) of this Rule, the clerk shall issue a notice containing a brief description sufficient to identify the property and stating that the sale will be ratified unless cause to the contrary is shown within 30 days after the date of the notice. A copy of the notice shall be published at least once a week in each of three successive weeks before the expiration of the 30-day period in one or more newspapers of general circulation in the county in which the report of sale was filed.

(d) Exceptions to Sale

(1) How Taken

A party, and, in an action to foreclose a lien, the holder of a subordinate interest in the property subject to the lien, may file exceptions to the sale. Exceptions shall be in writing, shall set forth the alleged irregularity with particularity, and shall be filed within 30 days after the date of a notice issued pursuant to section (c) of this Rule or the filing of the report of sale if no notice is issued. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.

(2) Ruling on Exceptions; Hearing

The court shall determine whether to

hold a hearing on the exceptions but it may not set aside a sale without a hearing. The court shall hold a hearing if a hearing is requested and the exceptions or any response clearly show a need to take evidence. The clerk shall send a notice of the hearing to all parties and, in an action to foreclose a lien, to all persons to whom notice of the sale was given pursuant to Rule 14-206 (b).

(e) Ratification

The court shall ratify the sale if (1) the time for filing exceptions pursuant to section (d) of this Rule has expired and exceptions to the report either were not filed or were filed but overruled, and (2) the court is satisfied that the sale was fairly and properly made. If the court is not satisfied that the sale was fairly and properly made, it may enter any order that it deems appropriate.

(f) Referral to Auditor

Upon ratification of a sale, the court, pursuant to Rule 2-543, may refer the matter to an auditor to state an account.

(g) Execution and Recordation

Except as otherwise ordered by court, the deed of sale must be executed and recorded within 30 days after the final order of ratification of the sale.

~~(g)~~ (h) Resale

If the purchaser defaults, the court, on application and after notice to the purchaser, may order a resale at the risk and expense of the purchaser or may take any other appropriate action.

. . .

Rule 14-305 was accompanied by the following Reporter's

Note.

> At its March 16, 1996 meeting, the Rules Committee posed the question of when a deed following a judicial sale must be executed and recorded. There have been long delays in recording to avoid paying for two sets of transfer stamps. The Property Subcommittee suggests a 30-day time limit, except as otherwise ordered by court.

Ms. Ogletree explained that at times there is a delay in executing and recording deeds after a judicial sale to avoid two sets of transfer taxes. The Property Subcommittee is recommending requiring the execution and recordation within 30 days after the final order of ratification of the sale, except as otherwise ordered by the court. This will help end the abuse.

The Chair inquired as to what the consequence will be if the 30-day time limit is not met. Ms. Ogletree replied that the consequence may be found in contempt, even though this is not written into the Rule. In foreclosure cases, the lender waits for another sale of the property. Mr. Sykes asked who would execute the deed. Judge Johnson responded that the trustee should. Mr. Sykes questioned as to who would record the deed. Ms. Ogletree answered that the buyer records the deed. The advertisement of the sale provides the information as to who is to record. Mr. Sykes commented that the Rule should provide who executes the deed and who records it, or there can be no sanction. Judge Vaughan remarked that the property will be resold, and that is the sanction. The Chair

suggested that section (h) could read as follows: "If the purchaser defaults or if the deed of sale is not recorded within the time provided for in section (g)...".

The Chair said that section (g) should be changed to specify who is to execute and record the deed. Ms. Ogletree reiterated that the advertisement provides who is to record. The Chair suggested that section (g) could provide that the deed would be recorded as provided in the order of sale, but Ms. Ogletree explained that the order of sale does not contain that information. Mr. Sykes suggested that the Rule provide that the purchaser or a designee record the deed. Ms. Ogletree suggested that in section (h), the new language should be "or if the deed of sale is not executed and recorded within....". Judge Vaughan expressed the view that it is unfair to sanction the purchaser for the trustee's failure to execute the deed. Ms. Ogletree moved that section (g) read as follows: "Except as otherwise ordered by court, the deed of sale shall be executed by the trustee and recorded by the purchaser within 30 days after the final order of ratification of the sale" and that section (h) read as follows: "If the purchaser defaults, or if the deed of sale is not recorded within the 30-day time period provided for in section (g), the court...". The motion was seconded, and it carried unanimously. The Rule was approved as amended.

Ms. Ogletree presented Rules 14-504, Notice to Persons Not Named as Defendants and 14-506, Notice to Tenant Following Judgment,

for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALE OF PROPERTY

CHAPTER 500 - TAX SALES

AMEND Rule 14-504 to add a sentence which refers to a new provision in the Tax-Property Article, as follows:

Rule 14-504. NOTICE TO PERSONS NOT NAMED AS DEFENDANTS

The plaintiff shall send the notice prescribed by Rule 14-502 (b)(3) to each person having a recorded interest, claim or judgment, or other lien who has not been made a defendant in the proceeding. If all or part of the property is a common area owned by or legally dedicated to a homeowners' association, the plaintiff shall also send the notice to the homeowners' association governing the property. The notice shall be sent to the person's last reasonably ascertainable address by certified mail, postage prepaid, return receipt requested, bearing a postmark from the United States Postal Service, and shall be accompanied by a copy of the complaint. The plaintiff shall file the return receipt from the notice or an affidavit that the provisions of this section have been complied with or that the address of the holder of the subordinate interest is not reasonably ascertainable. If the filing is made before final ratification of the sale, failure of a holder of a subordinate interest to receive the notice does not invalidate the sale. In addition, the plaintiff shall give the notice required by Code, Tax-Property Article, §14-836 (b)(4)(iv).

Source: This Rule is new but is derived from

Code, Tax-Property Article, §14-836.

Rule 14-504 was accompanied by the following Reporter's Note.

> A bill passed in the 1998 legislature which provides for notice to tenants of property subject to a foreclosure action. The Subcommittee recommends a reference to the new statutory provision instead of providing the full procedure in the Rule. Further statutory changes may occur in the future and this will avoid frequent changes to the Rule.

ADD new Rule 14-506, as follows:

Rule 14-506. NOTICE TO TENANT FOLLOWING JUDGMENT

(a) Written Notice

After issuance of the judgment foreclosing the right of redemption and at least 30 days before taking possession of the property, the plaintiff shall give any tenant of the property written notice that the plaintiff intends to obtain possession of the property and that the tenant must vacate the property within 30 days after the notice.

(b) How Notice is Given

The notice shall be sent:

(1) By first-class mail, postage prepaid, bearing a postmark from the United States Postal Service addressed to the tenant by name if the identity of the tenant is known to the plaintiff, and addressed to "occupant" if the identity of the tenant is not known;

(2) To each separately leased area of the property that the plaintiff can reasonably ascertain is occupied; and

(3) In an envelope prominently marked on the outside with the following phrase "Notice of Taking Possession of Property".

(c) Right to Possession

During the 30-day period immediately

following issuance of the judgment foreclosing the right of redemption, the plaintiff may apply for, process, and obtain, but not execute upon, a writ for possession of the property.

Source: This Rule is new.

Rule 14-506 was accompanied by the following Reporter's Note.

> The Property Subcommittee recommends the addition of a new Rule which is consistent with a new procedure added in 1998 to Code, Tax-Property Article, §14-836 (b)(7) providing for notice to tenants of a property which has been foreclosed.

Ms. Ogletree explained that the legislature in 1998 decided to add several notice requirements -- notice prior to a tax sale, and notice prior to possession after a tax sale, both made to tenants of the property to be sold or already sold at the tax sale. The new law has specific requirements for the notice. The Subcommittee decided that including all the statutory requirements in Rule 14-504 was burdensome, especially since any later statutory change would require further rules changes. It would be preferable to incorporate the statute by reference rather than put the contents of the pertinent statutory section into the Rule. However, new Rule 14-506 tracks Code, Tax-Property Article, §14-836 (b)(7). This Rule provides that after the tax sale and after ratification of the sale, there is a stay of the writ of possession. The Chair asked why the Rule could not simply refer to the statute, similar to the way Rule 5-412 is

drafted. Ms. Ogletree responded that this could be done.

Judge Vaughan questioned how someone who does not yet have a deed and title to the property can evict tenants. Ms. Ogletree said that the statute provides that there is a 30-day waiting period after the final order foreclosing the right of redemption, but the statute does not address the issue of the necessity of a deed to complete the chain of title. Judge Vaughan remarked that appellate courts do not like tax sales. Often, tax sales are set aside on appeal. Judge Vaughan said that he would be more comfortable if the deed were recorded before the tenant is evicted. Ms. Ogletree responded that the Rule tracks the statute, which does not provide for a deed. Subsection (b)(7)(ii) provides that "during the 30-day period immediately following issuance of the judgment foreclosing the right of redemption, the plaintiff may apply for, process, and obtain, but not execute upon, a writ for possession of the property." This does not indicate that a deed is necessary. Mr. Sykes noted that the fact that the plaintiff cannot execute is some protection.

The Vice Chair pointed out that there is no right to possession until there is a deed. Ms. Ogletree commented that Rule 2-647, Enforcement of Judgment Awarding Possession, provides that "upon the written request of the holder of a judgment awarding possession of property, the clerk shall issue a writ directing the sheriff to place that party in possession of the property." Mr. Sykes said that under the statute, one may process and obtain a writ of possession. Ms.

Ogletree clarified that one may apply, but without a deed, may not get it. The Vice Chair commented that someone could get the writ, but not be able to serve it and take possession. She expressed the view that the statute was incorrect -- to apply for a writ of possession, one would need to have the deed to the property.

Mr. Sykes moved that there be a reference to the statute in Rule 14-506, as there is in Rule 14-504, and that the references clarify that they refer to notices to tenants required by the Code. The motion was seconded. The Chair suggested that Rule 14-506 be designed similar to Rule 5-412, as a separate rule using the language "Notice to tenants is governed by Code, Tax-Property Article, 14-836 (b)(7.)" The motion carried unanimously. Rule 14-504 was approved as presented and Rule

14-506 was approved as amended.

Agenda Item 4. Consideration of proposed amendments to certain rules, recommended by the Probate/Fiduciary Subcommittee: Rule 10-205 (Hearing) and Rule 13-503 (Distribution)

Mr. Sykes presented Rule 10-205, Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 10 - GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 200 - GUARDIAN OF PERSON

AMEND Rule 10-205 to move the second

sentence of subsection (a)(2) to section (b), as follows:

Rule 10-205. HEARING

(a) Guardianship of the Person of a Minor

(1) No Response to Show Cause Order

If no response to the show cause order is filed and the court is satisfied that the petitioner has complied with the provisions of Rule 10-203, the court may rule on the petition summarily.

(2) Response to Show Cause Order

If a response to the show cause order objects to the relief requested, the court shall set the matter for trial, and shall give notice of the time and place of trial to all persons who have responded. ~~Upon motion by the alleged disabled person asserting that, because of his or her disability, the alleged disabled person cannot attend a trial at the courthouse, the court may hold the trial at a place to which the alleged disabled person has reasonable access.~~

Cross reference: Code, Estates and Trusts Article, §13-702.

(b) Guardianship of Alleged Disabled Person

When the petition is for guardianship of the person of an alleged disabled person, the court shall set the matter for jury trial. The alleged disabled person or the attorney representing the person may waive a jury trial at any time before trial. If a jury trial is held, the jury shall return a special verdict pursuant to Rule 2-522 (c) as to any alleged disability. A physician's certificate is admissible as substantive evidence without the presence or testimony of the physician unless, not later than 10 days before trial, an interested person who is not an individual under a disability, or the attorney for the alleged disabled person, files a request that the physician appear. If the trial date is less that 10 days from the date the response is due, a request that the physician appear may be filed at any time before trial. Upon motion by the alleged disabled person asserting that, because of his or her disability, the alleged disabled person cannot attend a trial at the courthouse, the court may hold the trial at a place to which the alleged disabled person has reasonable access.

Source: This Rule is in part derived from former Rule R77 and is in part new.

Rule 10-205 was accompanied by the following Reporter's Note.

> Joan O'Sullivan, Esq., a professor in the Clinical Law Office at the University of Maryland, commented in a letter that the second sentence of subsection (a)(2) is misplaced because it refers to alleged disabled persons and not to minors. Her suggestion was to move that sentence to section (b) where it would be placed appropriately.

Mr. Sykes explained that subsection (a)(2) is misplaced, because it refers to alleged disabled persons, and not to minors. He moved that subsection (a)(2) be placed as the last sentence of section (b). The motion was seconded, and it passed unanimously.

Mr. Hochberg suggested that in place of the word "motion" the word "request" should be substituted. The Vice Chair pointed out that Rule 1-332, Notification of Need for Accommodation, does not require that a motion be filed. Mr. Sykes expressed his agreement with the change of term. Judge Kaplan remarked that the court responds to an Americans with Disabilities Act (ADA) request by telephone. Mr. Sykes asked if the allegation of disability should be made under oath, so that no unnecessary demands are made. Judge Kaplan suggested that the Rule could require a written request made at least five days in advance of trial.

Mr. Hochberg inquired if an attorney is appointed in this situation. The Chair replied that upon request an attorney is appointed. The Reporter noted that the duty under Rule 1-332,

Notification of Need for Accommodation, is on attorneys. Mr. Hochberg questioned what would happen if there were no attorney. Mr. Sykes answered that the court can change the place of trial on its own motion. Judge Johnson added that he does this. The Chair observed that there is a line of cases on what a person can request the court to do.

Mr. Sykes asked if the word "motion" should be changed to the word "request." The Committee agreed by consensus to make this change.

Mr. Sykes presented Rule 13-503, Distribution, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 13 - RECEIVERS AND ASSIGNEES

CHAPTER 500 - REPORTS AND DISTRIBUTIONS

AMEND Rule 13-503 to add a new section (c) providing for a minimum dividend for distribution, as follows:

Rule 13-503. DISTRIBUTION

(a) Final Ratification Required

Until the final account has been audited pursuant to Rule 13-502 and finally ratified by the court, a final distribution shall not be made to creditors, the estate shall not be closed, and any bond of the receiver or assignee shall not be released.

(b) Payment

Promptly after final ratification of an auditor's account in which a distribution to creditors has been stated, the receiver or assignee shall make distribution as stated in the account.

(c) Minimum Dividend

No dividend in an amount less that five dollars ($5.00) shall be distributed by the assignee or receiver to any creditor unless the court orders otherwise. Any dividend not distributed to a creditor shall be treated in the same manner as unclaimed funds in accordance with section (d) of this Rule.

~~(c)~~ (d) Disposition of Unclaimed Distributions

The receiver or assignee shall pay into court any distributions that remain unclaimed for ninety days after final ratification of the auditor's final distribution account. The receiver or assignee shall file a list of the names and last known addresses of persons who have not claimed distributions, showing the amount of each person's distribution. The clerk shall issue a receipt for the payment, and the receipt shall release and discharge the receiver or assignee making the payment. Thereafter, the unclaimed distributions shall be subject to escheat as provided by law.

Source: This Rule is derived from former Rules BP9 b 2 and BP10.

Rule 13-503 was accompanied by the following Reporter's Note.

Sanford Harris, Esq., a consultant to the Receiverships Subcommittee, suggested in a comment letter that a provision should be added to Rule 13-503 providing for a $5.00 minimum dividend for distribution. This is consistent

with the Federal Bankruptcy Rules.

Mr. Sykes explained that some receivership dividends are less than $5.00, and there is no reason for the receiver to spend money and time distributing them. He moved that the change to the Rule be adopted, the motion was seconded, and it carried unanimously.

Agenda Item 5. Consideration of "housekeeping" amendments to certain rules: Rule 2-131 (Appearance), Rule 3-131 (Appearance), Rule 2-433 (Sanctions), Rule 2-603 (Costs), Rule 5-615 (Exclusion of Witnesses), Rule 8-204 (Application for Leave to Appeal to Court of Special Appeals), Rule 14-302 (Sales--Generally), Rule 14-401 (Sale for Other Use), Rule 15-207 (Constructive Contempt; Further Proceedings), and Rule 16-301 (Personnel in Clerks' Offices)

The Reporter presented the following Rules for the Committee's consideration: Rules 2-131, 3-131, 2-433, 2-603, 5-615, 8-204, 14-302, 14-401, 15-207, and 16-301.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 2-131 to correct an obsolete reference in the cross reference, as follows:

Rule 2-131. APPEARANCE

. . .

Cross reference: Rules 1-311, 1-312, 1-313; Rules 14, 15, and 16 of the Rules Governing

Admission to the Bar. See also Rule 1-202 ~~(q)~~ (r) for the definition of "person".

. . .

Rule 2-131 was accompanied by the following Reporter's Note.

The proposed amendment corrects an obsolete reference in the cross reference that follows Rule 2-131. Section (q) of Rule 1-202 has been relettered section (r).

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE--DISTRICT COURT

CHAPTER 100 - COMMENCEMENT OF ACTION AND PROCESS

AMEND Rule 3-131 to correct an obsolete reference in the cross reference, as follows:

Rule 3-131. APPEARANCE

. . .

Cross reference: Rules 1-311, 1-312, 1-313; Rules 14 and 15 of the Rules Governing Admission to the Bar. See also Rule 1-202 ~~(q)~~ (r) for the definition of "person", and Code, Business Occupations and Professions Article, §10-206 (b)(1), (2), and (4) for certain exceptions applicable in the District Court.

. . .

Rule 3-131 was accompanied by the following Reporter's Note.

The proposed amendment corrects an obsolete reference in the cross reference that follows Rule 3-131. Section (q) of Rule 1-202 has been relettered section (r).

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-433 (b) to correct an obsolete internal reference, as follows:

Rule 2-433. SANCTIONS

. . .

(b) For Failure to Comply with Order Compelling Discovery

If a person fails to obey an order compelling discovery, the court, upon motion of a party and reasonable notice to other parties and all persons affected, may enter such orders in regard to the failure as are just, including one or more of the orders set forth in section (a) of this Rule. If justice cannot otherwise be achieved, the court may enter an order in compliance with Rule ~~P4~~ 15-206 treating the failure to obey the order as a contempt.

. . .

Rule 2-433 was accompanied by the following Reporter's Note.

The proposed amendment corrects an obsolete reference to former Rule P4. The provisions concerning an order to initiate constructive civil contempt proceedings are now in Rule 15-206.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-603 (e) to correct an obsolete reference, as follows:

Rule 2-603. COSTS

. . .

(e) Waiver of Costs in Domestic Relations Cases -- Indigency

In an action under ~~Chapter 1100, Subtitle S~~ Title 9, Chapter 200 of these Rules, the court shall waive final costs, including any compensation, fees, and costs of a master or examiner if the court finds that the party against whom the costs are assessed is unable to pay them by reason of poverty. The party may seek the waiver at the conclusion of the case in accordance with Rule 1-325 (a). If the party was granted a waiver pursuant to that Rule and remains unable to pay the costs, the affidavit required by Rule 1-325 (a) need only recite the existence of the prior waiver and the party's continued inability to pay.

. . .

Rule 2-603 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-603 (e) corrects an obsolete reference to Chapter 1100, Subtitle S of the rules. That Subtitle was renumbered Title 9, Chapter 200.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-615 to conform the cross reference following section (b) to the transfer of Code, Article 27, §620 to Code, Article 27, §773, as follows:

Rule 5-615. EXCLUSION OF WITNESSES

. . .

(b) Witnesses Not to be Excluded

A court shall not exclude pursuant to this Rule

(1) a party who is a natural person,

(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney,

(3) an expert who is to render an opinion based on testimony given at the trial,

(4) a person whose presence is shown by a party to be essential to the presentation of the party's cause, such as an expert necessary to advise and assist counsel, or

(5) a victim of a crime of violence or the representative of such a deceased or disabled victim to the extent required by statute.

Cross references: Code, Article 27, ~~§620~~ 773; Rule 4-231.

. . .

Rule 5-615 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 5-615 conforms the cross reference following section (b) to the transfer of Code, Article 27, §620 to Code, Article 27, §773.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 200 - OBTAINING REVIEW IN COURT OF SPECIAL APPEALS

AMEND Rule 8-204 to correct a certain Code reference, as follows:

Rule 8-204. APPLICATION FOR LEAVE TO APPEAL TO COURT OF SPECIAL APPEALS

(a) Scope

This Rule applies to applications for leave to appeal to the Court of Special Appeals.

Cross reference: For Code provisions governing applications for leave to appeal, see Courts Article, §3-707 concerning bail; Courts Article, §12-302 (e) concerning guilty plea cases; Courts Article, §12-302 (g) concerning revocation of probation cases; ~~Courts Article, §12-303A~~ Article 27, §776 concerning victims of violent crimes; Article 27, §645-I concerning post conviction cases; Article 41, §4-102.1 (m) concerning inmate grievances; and Health-General Article, §§12-117 (e)(2), 12-118 (d)(2), and 12-120 (k)(2) concerning continued commitment, conditional release, or discharge of an individual committed as not criminally responsible by reason of insanity or incompetent to stand trial.

. . .

Rule 8-204 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 8-204 corrects a Code reference in the cross reference that follows section (a). Statutory provisions concerning applications for leave to appeal by victims of violent crimes are now set out in Code, Article 27, §776.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 300 - JUDICIAL SALES

AMEND Rule 14-302 to correct a certain Code reference and to delete obsolete Code references, as follows:

Rule 14-302. SALES--GENERALLY

(a) When Court May Order

At any stage of an action, the court may order a sale if satisfied that the jurisdictional requisites have been met and that the sale is appropriate.

Cross references: See Code, Family Law Article, §11-104 and Keen v. Keen, 191 Md. 31 (1948) for sale of nonresidents' property to satisfy alimony decree; Code, Family Law Article, §8-202 for sale of real or personal property incident to a divorce decree; Code, Business Regulations Article, §5-501 5-505 for sale of burial grounds; Code, Real Property Article, §14-107 for sale is lieu of partition; Code, Article 16, §159 for sale of personal property jointly owned; Code, Real Property Article, §14-110 for sale of consecutive interests in land by agreement of parties; Code, Tax Property Article, §§14-808 through 14-854 for tax sales; and Code, Tax General Article, §13-810 for sale to enforce income tax lien.

(b) Appointment of Trustee

When the Court orders a sale it may appoint a trustee to make the sale. The trustee shall be a natural person.

Cross references: See Code, Article 16, §107 Courts Article, §11-111 for the appointment of a trustee to execute a deed; Code, Real Property Article, §4-202 (e) for a form of a trustee's deed under a decree; and Code, Estates and Trusts Article, §14-101, for general jurisdiction of equity concerning trusts; and Code, Article 16, §114 for the appointment of a trustee to complete the collections of a sheriff or tax collector. Regarding fiduciaries generally, see Code, Estates and Trusts Article, §15-101 et seq.

Source: This Rule is derived from former Rule BR2.

Rule 14-302 was accompanied by the following Reporter's Note.

> The proposed amendments to Rule 14-302 delete obsolete references to Code, Article 16, §§114 and 159, which were repealed as obsolete or duplicative of the Maryland Rules. The amendments also correct the misnomer of Code, Business Regulation Article and conform the cross references to the

transfer of statutory provisions concerning burial grounds and the appointment of a trustee to execute a deed.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALE OF PROPERTY

CHAPTER 400 - BURIAL GROUND

AMEND Rule 14-401 to correct certain Code references in cross references following sections (b) and (d), as follows:

Rule 14-401. SALE FOR OTHER USE

. . .

(b) Complaint

The action for sale of a burial ground shall be commenced by filing a complaint that, in addition to complying with Rules 2-303 through 2-305, shall contain:

(1) a description of the burial ground sufficient to enable it to be located,

(2) a statement that the ground has been dedicated and used for burial purposes,

(3) a statement that the burial ground has creased to be used for burial purposes,

(4) a list of names and last known addresses of all known lot owners, or their assignees, if any, and

(5) a statement of the reasons why it is

desirable to sell the burial ground for other uses.

Cross references: See Code, Business Regulations~~s~~ Article, ~~§5-501~~ 5-505, which authorizes a proceeding for the sale of a burial ground that has ceased to be used for such purposes.

For sale of cemeteries in Baltimore City where more than 75% of acreage has been abandoned or becomes a menace, see Code, Business Regulations~~s~~ Article, ~~§5-502~~ 5-506.

As to certain cemeteries in Carroll County, see Code, Real Property Article, §14-119.

As to exemption of lots held only for burial from attachment or execution and insolvency laws, see Code, ~~Article 23, §164~~ Business Regulation Article, §5-503.

As to condemnation of cemeteries, see Rule 12-204.

. . .

(d) Proceedings When No Response Filed

If no party in interest appears in response to the notice, the action shall proceed ex parte. The court may order testimony to be taken and enter judgment as it deems proper.

Cross references: For distribution of proceeds of sale among parties interested, see Code, Business Regulations~~s~~ Article, ~~§ 5-501~~ §§5-505 and 5-506.

For power of court before making distribution to order that part of proceeds may be set aside and applied to the removal and burial of any dead and the purchase of a lot in another cemetery, see Code, Business Regulations~~s~~ Article, ~~§5-501~~ §§5-505 and 5-506.

As to legal effect of judgment on title, see Code, Business Regulations~~s~~ Article, ~~§5-501~~ §§5-505 and 5-506.

. . .

Rule 14-401 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 14-401 correct the misnomer of Code, Business Regulation Article and conform the cross references to the transfer of statutory provisions pertaining to the sale of burial grounds.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 200 - CONTEMPT

AMEND Rule 15-207 to correct certain obsolete terminology and an obsolete Code reference, as follows:

Rule 15-207. CONSTRUCTIVE CONTEMPT; FURTHER PROCEEDINGS

. . .

(b) When Judge Disqualified

A judge who enters an order pursuant to Rule 15-204 or who institutes a constructive contempt proceeding on the court's own initiative pursuant to Rule 15-205 (b)(1) or Rule 15-206 (b)(1) and who reasonably expects to be called as a witness at any hearing on the

matter is disqualified from sitting at the hearing unless (1) the alleged contemnor consents, or (2) the alleged contempt consists of a failure to obey a prior order or judgment in civil action or ~~an "order of restitution"~~ a "judgment of restitution" as defined in Code, Article 27, ~~§640 (a)(9)~~ 805A (i).

. . .

Rule 15-207 was accompanied by the following Reporter's Note.

This amendment to Rule 15-207 is proposed to correct obsolete terminology and an obsolete Code reference. The provisions of Code, Article 27 pertaining to restitution are now set out as §§805A - 813. In the statute, the term "order of restitution" has been changed to "judgment of restitution," the definition of which is set out in §805A.

MARYLAND RULES OF PROCEDURE

TILE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 300 - CIRCUIT COURT CLERKS' OFFICES

AMEND Rule 16-301 c. to correct an obsolete Code reference, as follows:

Rule 16-301. Personnel in Clerks' Offices.

. . .

c. Certain Deputy Clerks.

Persons serving as deputy clerks on July 1, 1991 who qualify for pension rights under Code, ~~Article 73B, §117~~ State Personnel and Pensions Article, §23-404 shall hold over as deputy clerks but shall have no fixed term and shall in all respects be subject to the personnel system established pursuant to section (b) of this Rule.

. . .

Rule 16-301 was accompanied by the following Reporter's Note.

The amendment to Rule 16-301 c. is

proposed to correct an obsolete reference to Code, Article 73B, §117 the provisions of which are now set out in Code, State Personnel and Pensions Article, §23-404.

The Reporter explained that all of the Rules contain "housekeeping" amendments to correct erroneous references. The Vice Chair moved that all of the changes to these Rules be accepted as presented, the motion was seconded, and it carried unanimously.

The Chair explained that the information item sent to the Committee was the latest draft of the Alternate Dispute Resolution (ADR) Rules as rewritten by Judges Alan M. Wilner and Lawrence F. Rodowsky. (See Appendix 4). The Rules will be the subject of the Court of Appeals conference on October 5, 1998 at 2:00 p.m. The Chair said that Judge Kaplan had some concerns about Baltimore City. Judge Kaplan told the Committee that the ADR Rules are different than the Rules sent to the Court of Appeals by the Rules Committee. They now provide that parties cannot be referred to ADR where the fee is charged without the consent of all of the parties. This means that there could be no fee-for-service mediation in Baltimore City. The voluntary, free settlement program could still continue, but even there the parties have a chance to object to a settlement officer. If the new Rules take effect, there would be limited court-sponsored ADR in Baltimore City. With 400 civil cases filed each month, there cannot be a pretrial conference on every one and agreement on the judge assigned to the pretrial conference. This would mean that

there cannot be an automatic rotation of judges. It is not wrong for a party to object to mediation, but to have a hearing or conference in advance is difficult. Instead, there could be an automatic assignment followed by an objection procedure. The Vice Chair noted that Judge Wilner agrees with this.

The Chair said that Judge Rodowsky is against forcing a party to pay for ADR. He feels that it is unfair to force people to pay for mediation that they do not want. Judge Kaplan remarked that in Baltimore City, there is volunteer mediation. The Chair responded that that is permissible. Judge Kaplan reiterated that he is opposed to holding a conference to get permission to use ADR. The Vice Chair suggested that a remedy for this could be to take out the requirement of a scheduling conference and have a procedure where the ADR is referred and then the parties can object.

The Chair observed that under Rule 17-103 (c), settlement conferences can be required. Judge Kaplan pointed out that under that Rule, he would have to consult with the parties as to the choice of a settlement officer. The Chair said that the parties must go to a scheduling conference if they are not paying for ADR. The parties have 15 days to complain. The onus is on the parties. Judge Kaplan responded that the burden is on the court to shift people around. When the notice goes out, the parties do not know who the settlement officer is. The court may have to waste time suggesting various settlement officers. The settlement conference cannot automatically

be scheduled. The voluntary process is destroyed. One or two insurance companies are taking an arbitrary stand that there can only be one offer to settle made. The settlement conference may be useless. The Chair suggested that the administrative judge could tell the parties not to come in for the conference if the conference would be useless. Judge Kaplan explained that if that is done, all of the insurance companies will say the same thing, and that would be the end of settlement conferences.

The Vice Chair asked Judge Kaplan if he wants a mandatory settlement conference. He replied that the present system works well. The Chair suggested that no hearings could be required, and a party may object to the person conducting the ADR. It is wrong to require settlement conference attendance when nothing would be accomplished. Judge Kaplan reiterated that there should be automatic assignment and then objections. In Baltimore City, the settlement conferences are 30 days before trial. There is no problem with objecting 20 days after the case is at issue, and no problem appearing before the settlement officer or the parties having their own settlement officer. The Chair commented that the Court of Appeals may agree, but attorneys may complain that it is unfair to be forced into settlement conferences when the other side will not change his or her position. Judge Kaplan remarked that many cases which seem unable to be settled do settle.

The Vice Chair asked how soon before the date of the conference

the notice goes out. Judge Kaplan answered that the notice goes out as soon as the case is at issue. Ms. Ogletree questioned whether the Rule has to provide for an objection within 15 days. The Vice Chair responded that the Rule provides this so the parties know up front about it. Judge Kaplan noted that the current system is that once the parties get a trial date, they can object to the date or the track on which the case was placed. Under differentiated case management (DCM), different cases are placed on different tracks, and there is not enough information to make a valid objection. The problem with the new Rules is that they eliminate fee-for-service ADR in Baltimore City. The Chair added that this may be true all over the State.

The Chair pointed out that there is no authority to force people to pay for court-ordered ADR. Judge Kaplan said that in the large jurisdictions, even minimal fee-for-service mediation would be eliminated. It may be necessary to modify the settlement program to get around the Rule. The Chair commented that the last time the ADR Rules were before the Court of Appeals, there were many outraged people. How can a judge make someone pay more than court costs? Judge Kaplan restated his position that he would like the ADR scheduled and then objections can be allowed.

The Chair adjourned the meeting.