COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Room #3, Judicial Education and Conference Center, 2009 Commerce Park Drive, Annapolis, Maryland, on November 17, 2006.

Members present:

Hon. Joseph F. Murphy, Jr., Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Master Zakia Mahasa
Robert R. Michael, Esq.
Anne C. Ogletree, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Del. Joseph F. Vallario, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Brian L. Zavin, Esq., Office of the Public Defender
Barbara L. Hergenroeder, Esq., Director of Character & Fitness, State Board of Law Examiners
Bedford T. Bentley, Jr., Esq., Secretary, State Board of Law Examiners
Michele Nethercott, Esq., Office of the Public Defender
Paul H. Ethridge, Esq., Chair, Rules of Practice Committee, MSBA
Laura Martin, Esq., Maryland Crime Victims' Resource Center, Inc.
William M. Katcef, Esq., Office of the State's Attorney for Anne Arundel County

The Chair convened the meeting. He said that since Mr. Karceski, Chair of the Criminal Subcommittee, was attending a motions hearing and would arrive later, Agenda Item 3 would be considered first.

Agenda Item 3. Consideration of proposed changes to the Rules Governing Admission to the Bar of Maryland - Amendments to Rule 1 (Definitions), New Rule 6.1 (Appeal of Denial of ADA Test

Accommodation Request), Amendments to Rule 6 (Petition to Take a Scheduled Examination), Amendments to Rule 9 (Re-Examination After Failure), and Amendments to Rule 13 (Out-of-State Attorneys)

Mr. Brault presented Rules 1 (Definitions), 6.1 (Appeal of Denial of ADA Test Accommodation Request), 6 (Petition to Take a Scheduled Examination), 9 (Re-examination after Failure), 13 (Out-of-State Attorneys), and Board Rule 3 (Test Accommodations Pursuant to the Americans with Disabilities Act) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE

BAR OF MARYLAND

AMEND Rule 1 of the Rules Governing Admission to the Bar of Maryland by adding a new definition and relettering the Rule, as follows:

Rule 1. Definitions.

In these Rules, the following definitions apply, except as expressly otherwise provided or as necessary implication requires:

(a) ADA

"ADA" means the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*

~~(a)~~ (b) Board

"Board" means the Board of Law Examiners of the State of Maryland.

~~(b)~~ (c) Court

"Court" means the Court of Appeals of Maryland.

~~(c)~~ (d) Code, Reference to

Reference to an article and section of the Code means the article and section of the Annotated Code of Public General Laws of Maryland as from time to time amended.

~~(d)~~ (e) Filed

"Filed" means received in the office of the Secretary of the Board during normal business hours.

~~(e)~~ (f) MBE

"MBE" means the Multi-state Bar Examination published by the National Conference of Bar Examiners.

~~(f)~~ (g) MPT

"MPT" means the Multistate Performance Test published by the National Conference of Bar Examiners.

~~(g)~~ (h) Oath

"Oath" means a declaration or affirmation made under the penalties of perjury that a certain statement or fact is true.

~~(h)~~ (i) State

"State" means (1) a state, possession, territory, or commonwealth of the United States or (2) the District of Columbia.

Source: This Rule is derived from former Rule 1.

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

The proposed amendment to Rule 1 of the Rules Governing Admission to the Bar of Maryland adds a definition of "ADA," a term

that is used in proposed new Rule 6.1 and proposed amendments to Rules 6, 9, and 13.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE

BAR OF MARYLAND

ADD new Rule 6.1 to the Rules Governing Admission to the Bar of Maryland, as follows:

Rule 6.1. APPEAL OF DENIAL OF ADA TEST ACCOMMODATION REQUEST

(a) Terminology

In this Rule, "applicant" includes a petitioner under Rule 13 who seeks a test accommodation under the ADA for the attorney examination.

(b) Accommodations Review Committee

(1) Creation and Composition

There is an Accommodations Review Committee which shall consist of nine members appointed by the Court of Appeals. Six members shall be lawyers who are not members of the Board. Three members shall not be lawyers. Each non-lawyer member shall be a licensed psychologist or physician who during the member's term does not serve the Board as a consultant or in any other capacity. The Court shall designate one lawyer member as Chair of the Accommodations Review Committee and one lawyer member as the Vice Chair. In the absence or disability of the Chair or upon express delegation of authority by the Chair, the Vice Chair shall have the

authority and perform the duties of the Chair.

(2) Term

Subject to subsection (b)(4) of this Rule, the term of each member is five years. A member may serve more than one term.

(3) Reimbursement; Compensation

A member is entitled to reimbursement for expenses reasonably incurred in the performance of official duties in accordance with standard State travel regulations. In addition, the Court may provide for compensation to the members.

(4) Removal

The Court of Appeals may remove a member of the Accommodations Review Committee at any time.

(c) Appeal from Denial of Test Accommodation

(1) Notice of Appeal

An applicant whose request for a test accommodation pursuant to the ADA is denied in whole or in part by the Board may note an appeal to the Accommodations Review Committee by filing a Notice of Appeal with the Board.

Committee note: It is likely that an appeal may not be resolved before the date of the scheduled bar examination that the applicant has petitioned to take. No applicant "has the right to take a particular bar examination at a particular time, nor to be admitted to the bar at any particular time." *Application of Kimmer*, 392 Md. 251, 272 (2006). After an appeal has been resolved, the applicant may file a timely petition to take a later scheduled bar examination with the accommodation, if any, granted as a result of the appeal process.

(2) Transmittal of Record

Upon receiving a notice of appeal, the Board promptly shall (A) transmit to the Chair of the Accommodations Review Committee a copy of the applicant's request for a test accommodation, all documentation submitted in support of the request, the report of each expert retained by the Board to analyze the applicant's request, and the Board's letter denying the requested accommodation and (B) mail to the applicant notice of the transmittal and a copy of each report of an expert retained by the Board.

(3) Hearing

The Accommodations Review Committee shall hold a hearing that is recorded verbatim by shorthand, stenotype, mechanical, or electronic audio recording methods, electronic word or text processing methods, or any combination of these methods. The Chair of the Committee shall determine whether the hearing is conducted by the full Committee or by a panel of the Committee, consisting of two lawyers and one non-lawyer, designated by the Chair. The applicant and the Board have the right to present witnesses and documentary evidence and be represented by counsel. The Committee or panel, in the interest of justice, may decline to require strict application of the Rules in Title 5, other than those relating to the competency of witnesses. Lawful privileges shall be respected.

(4) Report of Accommodations Review Committee

The Accommodations Review Committee shall file with the Board a report containing the Committee's recommendation and findings of fact upon which the recommendation is based. The Committee shall mail a copy of its report to the applicant.

(d) Review in the Court of Appeals

Within 30 days after the report of the Accommodations Review Committee is filed with the Board, the applicant or the Board may file with the Chair of the Committee exceptions to the recommendation and shall

mail a copy of the exceptions to the other party. Upon receiving the exceptions, the Committee shall cause to be prepared a transcript of the proceedings and transmit to the Court of Appeals the record of the proceedings, which shall include the transcript. The Committee shall notify the applicant and the Board of the transmittal to the Court and provide to each party a copy of the transcript. Proceedings in the Court shall be on the record made before the Accommodations Review Committee.

(e) If No Exceptions

If no exceptions pursuant to section (d) of this Rule are timely filed, the Accommodations Review Committee shall transmit its record to the Board, and the Board shall provide the test accommodation, if any, recommended by the Committee.

Committee note: If no exceptions are filed, no transcript of the proceedings before the Accommodations Review Committee is prepared.

Source: This Rule is new.

Rule 6.1 was accompanied by the following Reporter's Note.

New Rule 6.1, proposed in light of *Application of Kimmer*, 392 Md. 251 (2006), adds to the Rules Governing Admission to the Bar ("RGAB") a procedure for an appeal from the Board's denial, in whole or in part, of an applicant's request for a test accommodation pursuant to the ADA.

Section (a) provides that the word "applicant," as used in this Rule, includes a petitioner under Rule 13 who seeks a test accommodation for the attorney examination.

Using language derived in part from sections (a), (b), (c), (d), and (f) of Rule 16-711 (Attorney Grievance Commission), section (b) of RGAB 6.1 creates a 9-member Accommodations Review Committee appointed by the Court of Appeals. Six members are lawyers. Because ADA accommodations can be required for both mental and physical disabilities, three non-lawyers who are either licensed psychologists or physicians

are included as members. Each member serves a five-year term, subject to removal by the Court at any time. The members are entitled to reimbursement for their expenses and, to ensure the availability of qualified professionals willing to serve, subsection (b)(3) allows the Court to provide for compensation.

Proposed amendments to RGAB 6, 9, and 13 state that an applicant who seeks a test accommodation for the bar examination, or a petitioner who seeks a test accommodation for the attorney examination, must file an "Accommodation Request" on a form prescribed by the Board and provide any supporting documentation that the Board requires. The deadline for filing the request and documentation is the same as the deadline for filing a petition to take the scheduled examination for which the test accommodation is requested. Board Rule 3 governs the internal process by which the Board determines whether a requested test accommodation is warranted pursuant to the ADA. If the Board denies, in whole or in part, the requested accommodation, the applicant may in accordance with subsection (c)(1) of RGAB 6.1 note an appeal of the denial by filing with the Board a Notice of Appeal.

Subsection (c)(2) requires the Board to transmit its record to the Accommodations Review Committee promptly upon receiving a Notice of Appeal and to send to the applicant a notice of the transmittal and a copy of each report of an expert retained by the Board.

Subsection (c)(3) requires an evidentiary hearing and, using language from Rule 16-404 (e), requires that the hearing be recorded verbatim. The hearing may be before the entire Accommodations Review Committee or a 3-member panel designated by the Chair of the Committee. Using language from Rule 5-101 (c), subsection (c)(3) of RGAB 6.1 allows discretionary application of the Rules in Title 5 (Evidence).

Pursuant to subsection (c)(4), the report and recommendation of the Accommodations Review Committee is filed with

the Board, and a copy is sent to the applicant.

The Board or the applicant may file exceptions to the recommendation, in accordance with section (d). If exceptions are filed, a transcript of the hearing is prepared, and the record of the proceedings, including the transcript, is transmitted to the Court of Appeals. Proceedings in the Court of Appeals are on the record made before the Accommodations Review Committee.

Under section (e), if no exceptions are filed, the Committee's record is transmitted to the Board, and the Board provides the test accommodation, if any, that is recommended by the Committee.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE

BAR OF MARYLAND

AMEND Rule 6 of the Rules Governing Admission to the Bar of Maryland, as follows:

Rule 6. PETITION TO TAKE A SCHEDULED EXAMINATION

(a) Filing

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

(b) Request for Test Accommodation

An applicant who seeks a test accommodation under the ADA for the bar examination shall file with the Board an "Accommodation Request" on a form prescribed by the Board, together with any supporting documentation that the Board requires. The form and documentation shall be filed no later than the deadline stated in section (c) of this Rule for filing a petition to take a scheduled bar examination.

Cross reference: See Rule 6.1 for the procedure to appeal a denial of a request for a test accommodation.

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

. . .

~~(c)~~ (d) Affirmation and Verification of Eligibility

. . .

~~(d)~~ (e) Voiding of Examination Results for Ineligibility

. . .

~~(e)~~ (f) Certification by Law School

. . .

~~(f)~~ (g) Refunds

. . .

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

See the Reporter's note to proposed new Rule 6.1.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE

BAR OF MARYLAND

AMEND Rule 9 of the Rules Governing Admission to the Bar of Maryland, as follows:

Rule 9. RE-EXAMINATION AFTER FAILURE

(a) Petition for Re-examination

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

(b) Request for Test Accommodation

An applicant who seeks a test accommodation under the ADA for the bar examination shall file with the Board an "Accommodation Request" on a form prescribed by the Board, together with any supporting documentation that the Board requires. The form and documentation shall be filed no later than the deadline stated in section (c) of this Rule for filing a petition to take a scheduled bar examination.

Cross reference: See Rule 6.1 for the procedure to appeal a denial of a request for a test accommodation.

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

. . .

~~(c)~~ (d) Deferment of Re-examination

. . .

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

. . .

~~(e)~~ (f) No Refunds

. . .

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

See the Reporter's note to proposed new Rule 6.1.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE

BAR OF MARYLAND

AMEND Rule 13 of the Rules Governing Admission to the Bar of Maryland, as follows:

Rule 13. OUT-OF-STATE ATTORNEYS

. . .

(g) Request for Test Accommodation

A petitioner who seeks a test accommodation under the ADA for the attorney examination shall file with the Board an "Accommodation Request" on a form prescribed by the Board, together with any supporting documentation that the Board requires. The form and documentation shall be filed no later than the deadline stated in section (i) of this Rule for filing a petition to take a scheduled attorney examination.

Cross reference: See Rule 6.1 for the procedure to appeal a denial of a request for a test accommodation.

~~(g)~~ (h) Refunds

. . .

~~(h)~~ (i) Time for Filing

. . .

~~(i)~~ (j) Standard for Admission and Burden of Proof

. . .

~~(j)~~ (k) Action by Board on Petition

. . .

~~(k)~~ (l) Exceptions

. . .

~~(l)~~ (m) Attorney Examination

. . .

~~(m)~~ (n) Re-examination

. . .

~~(n)~~ (o) Report to Court - Order

. . .

~~(o)~~ (p) Required Course on Professionalism

. . .

~~(p)~~ (q) Time Limitation for Admission to the Bar

. . .

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

See the Reporter's note to proposed new Rule 6.1.

MARYLAND RULES OF PROCEDURE

RULES OF THE BOARD

If proposed new Rule 6.1 of the Rules Governing Admission to the Bar of Maryland is adopted, a suggested amendment to Board Rule 3 is as follows:

Board Rule 3. TEST ACCOMMODATIONS PURSUANT TO THE AMERICANS WITH DISABILITIES ACT

. . .

d. Board Determination

If there is uncertainty about whether the requested test accommodations are warranted pursuant to the ADA, the applicant's request and all supporting documentation shall be referred to a qualified expert retained by the Board to review and analyze whether the applicant has documented a disability and requested reasonable accommodations. After receipt of the expert's report, the matter shall be referred to a designated member of the Board for review. The designated Board member shall then determine whether test accommodations should be granted after examining the applicant's request and the report of the Board's expert. The Board's staff will advise the applicant by letter whether the request for test accommodations is granted or denied in whole or in part. If a request for test accommodations is denied in whole or in part, the applicant may file an appeal in accordance with Rule 6.1 of the Rules Governing Admission to the Bar of Maryland.

~~e. Appeal~~

~~An applicant shall file any appeal with the Board within 10 days of the date of the Board's letter denying test accommodations. The appeal shall be in the form of a letter addressed to the Board at the Board's administrative office and shall contain any additional information or documentation the applicant wishes to have considered. The Chairman of the State Board of Law Examiners is delegated the authority to decide appeals on behalf of the Board. The Board's staff will advise the applicant by letter of the results of the appeal.~~

Mr. Brault told the Committee that the proposed changes are a result of *Application of Kimmer*, 392 Md. 251 (2006) involving a law school graduate who applied to take the Maryland bar

examination. Mr. Kimmer contended that he had learning disabilities that entitled him to specific accommodations when he took the bar examination. The State Board of Law Examiners ("the Board") referred the case to their expert psychologist who concluded that Mr. Kimmer had not demonstrated a disability covered by the Americans with Disabilities Act ("ADA"). The Board denied Mr. Kimmer's request for ADA accommodation. Mr. Kimmer then filed an appeal with the Board's Chair who denied the appeal, because Mr. Kimmer had submitted no further evidence. Four days before the bar examination, Mr. Kimmer filed a petition for an injunction in the circuit court, which entered a temporary restraining order requiring that Mr. Kimmer receive the accommodations he had asked for when taking the examination. The Board complied with the court's order, but informed Mr. Kimmer that it maintained its position that he was not entitled to the accommodation and that it would not recommend his admission to the bar, even if he passed the examination, until there had been an adjudication on the merits of his entitlement to accommodation.

Mr. Kimmer then filed a motion for declaratory relief asking the circuit court to make permanent the temporary restraining order it had issued and asking for a ruling that he be admitted to the Maryland Bar. The motion was opposed by the Board. Mr. Kimmer passed the bar examination, and the Board filed exceptions to Mr. Kimmer's admission. The case was then heard by the Court of Appeals, which held that the Court of Appeals has exclusive

jurisdiction to hear cases involving the entitlement of a bar examination applicant to an ADA accommodation. Since the case should have been adjudicated in that Court, and not the circuit court, the exceptions of the Board were sustained, and Mr. Kimmer was denied admission to the Bar of Maryland.

Mr. Brault said that the problem is that no detailed procedure exists pursuant to which an applicant like Mr. Kimmer can appeal. The Attorneys Subcommittee, aided by Bedford T. Bentley, Jr., Esq., Secretary to the Board, and Barbara Hergenroeder, Esq., Director of Character and Fitness, created a procedure that would apply to appeals related to denial of accommodations under the ADA. Mr. Bentley told the Committee that Ms. Hergenroeder is principally responsible for handling requests for accommodations when taking the bar examination. A few years ago, the requests were based on obvious physical disabilities such as blindness. Now, approximately 80% of the disabilities alleged by applicants are cognitive, such as Attention Deficit Hyperactivity Disorder, Attention Deficit Disorder, and learning disabilities. The most difficult cases are the applicants who had no prior history of accommodations until they started law school. Board Rule 3 is structured so that the applicant files a request for an accommodation supplemented by medical information and the rationale demonstrating the need for the accommodation. The Director of Character and Fitness reviews the request. If a disability clearly exists, or the applicant has a long history of an

accommodation, the request routinely will be granted. In cognitive cases, if there is a question of the genuineness of the disability, there may need to be an additional review.

Currently, the case is referred to a psychological or medical expert who evaluates the case for the Board as to whether a true disability exists. If the accommodation is granted, that is the end of the process. If the accommodation is not granted, or only a part of what is requested is granted, the applicant can appeal the decision to the Chairman of the Board. The problem in *Kimmer* was that the applicant was not satisfied with the outcome of his appeal to the Board and then went to the circuit court for relief, instead of to the Court of Appeals.

Mr. Bentley told the Committee that the issue to discuss is the process for appeals in these cases. The proposed changes to the Rules establish a separate entity that is appointed by the Court of Appeals to conduct the appeal process. The Board did not want the appeal process strictly within it. A second review is needed for due process. Requests for accommodations are to be made at least 60 days before the bar examination, so that there is time to evaluate and decide the request before the examination is given.

Mr. Michael expressed the concern that the proposed changes may result in an increase in requests for accommodations, inundating the Board. It also may increase the number of accommodations that are granted. *Kimmer* held that no candidate

has the right to take a specific bar examination. The proposed changes do not have timing requirements. Mr. Brault responded that the Subcommittee did not want a time factor imposed on the Board. Mr. Michael suggested that a Committee note be added that would encourage applicants to apply for accommodations early in the process. Mr. Brault remarked that the applicants know from their experience applying for accommodations in law school that the burden is on the one who requests the accommodation. Time limits would result in appeals on the issue of lack of due process. Applicants whose requests are rejected initially can postpone taking the examination until there is a final determination concerning the requested accommodation.

The Reporter suggested that language could be put into the Committee note providing that the applicant may take the examination with no accommodation without prejudice to the right to take the examination a later time with any accommodation that is granted as a result of the appeal process. This is difficult to put into the body of the Rule. Mr. Bentley said that an applicant is always entitled to take the examination under standard conditions. Mr. Brault commented that Mr. Kimmer had not had an accommodation when he attended Emory University and graduated with a 3.7 grade point average. He attended law school at both George Washington and the University of Baltimore Law Schools. Ms. Hergenroeder commented that Mr. Kimmer received an accommodation from George Washington only because the University of Baltimore had given it to him. He had previously been in the

Richard Montgomery High School International Baccalaureate program. Mr. Brault observed that Mr. Kimmer had done so well in school before law school that there arose a question as to the legitimacy of his request for an accommodation to take the bar exam, and the Court of Appeals took note of this. Mr. Bowen inquired as to how many applicants ask for accommodations. Mr. Bentley replied that in July of 2006, approximately 1500 to 1600 people took the examination, and there were 70 or more requests for accommodations. Ms. Hergenroeder added that 2/3 of these were for cognitive disorders. Mr. Bentley remarked that providing accommodations often involve providing certain resources, such as a separate test room, use of a computer, different time schedules, and additional proctors.

Master Mahasa questioned if there is a higher scrutiny for those applicants whose disabilities have appeared recently, as opposed to those whose disabilities appeared early on. Mr. Bentley noted that part of the ADA pertains to a recognition of the history of the disability. Cases involving cognitive conditions often show that the condition manifested itself early in the person's life. Mr. Brault explained that the idea of the proposed changes is to create a special committee consisting of attorneys, physicians, and mental health experts to review the requests for accommodations. Rule 1 defines the "ADA." Rule 6.1 defines the term "applicant" to include a petitioner under Rule 13 who seeks an accommodation for the attorney examination. Rule 6.1 creates the Accommodations Review Committee, made up of nine

members: six lawyers who are not members of the Board and three non-lawyers who are licensed psychologists or physicians. The fees of psychologists and physicians who serve as consultants to the Board to review requests for accommodations can be substantial. Compensation of the psychologists, physicians, and lawyers who serve on the Accommodations Review Committee will be up to the Court of Appeals. If the Board denies the request for an accommodation, whether or not a consultant was involved, the applicant has the right to appeal to the Accommodations Review Committee. The Board transmits the record to the Chair of the Committee, and then a hearing is held. The Committee files a report with the Board containing the Committee's recommendation and findings of fact. Either side can file exceptions, and the case would proceed to the Court of Appeals. The Board is satisfied with the proposed changes to the Rules.

The Chair asked if any thought was given to adding more details in section (d). Language could be added providing that the burden of proof is on the applicant and how the case is presented to the Court. Mr. Brault responded that the Subcommittee did not discuss this. The Chair pointed out that section (d) provides that the applicant or the Board can file exceptions. Mr. Bowen inquired as to whether the decision on the record is sufficient. Ms. Hergenroeder answered that this is the same procedure as for character matters. The Chair suggested that a cross reference or a Committee note be added stating that the procedure is similar to that of the Character Committee.

Judge Dryden inquired as to whether the standard for making decisions is "clearly erroneous." The Reporter responded that when the Court acts on bar admission matters, it is exercising original jurisdiction. This is not like appellate review of a circuit court decision. The Chair suggested that the following language could be added to section (d): "The Court shall require the party who files exceptions to show cause why the exceptions should not be denied." This is similar to the language of section (d) of Bar Admission Rule 5, Character Review, and gives some guidance. By consensus, the Committee approved the addition of this language.

Judge Spellbring questioned as to whether the Office of the Attorney General furnishes counsel to the Board. Mr. Bentley replied affirmatively. The Chair asked whether that representation would extend to proceedings before the Accommodations Review Committee, a self-standing decision-making body. Mr. Bentley answered that it would be so represented. The Chair inquired as to whether Rule 6.1 should parallel Rule 5. Mr. Bentley answered that it would be helpful to alert the applicant that he or she bears the burden of proof. Mr. Michael suggested that the ADA should be reviewed to find out if it has proof requirements. The Chair noted that the proposed changes to the Rules follow the directive in *Kimmer* to institute a mechanism for an appeal.

Judge Dryden inquired as to whether a quorum for the panel

to hear the appeal is two persons. Mr. Bentley replied that the practice of the Character Committee is a minimum of three persons for a panel. The same principle should apply to this situation. The quorum requirements for the full Committee should be included in the Rule. Mr. Brault pointed out that there are Board Rules as well as court rules. Judge Dryden remarked that it is possible that only two members of a panel show up for a hearing. The Chair commented that Rule 16-804 (e) of the Judicial Disabilities Rules could be used as an example. The Reporter suggested that the wording could be that the panel could consist of not less than two attorneys and one non-attorney designated by the chair. Mr. Brault said that in order for the Commission on Judicial Disabilities to conduct business, at least one judge, one lawyer, and one public member must be present. Mr. Bowen noted that the proposed changes to the Rules do not address quorum requirements. A quorum should not be less than three persons, at least one of whom is a psychologist or physician.

Mr. Leahy commented that the appeal process is designed for three-member panels. He asked why the Rule provides for nine members of the Committee. Judge Dryden expressed the opinion that he does not like panels. Mr. Brault responded that it would be difficult to arrange for the entire Committee to hear all of the cases, because there are a substantial number of cases and scheduling would be very difficult. Judge Spellbring remarked that the examination is only given twice a year. Judge Dryden observed that most of the cases will be resolved without going to

the Accommodations Review Committee. Ms. Hergenroeder added that there are about 10 to 12 appeals for each July bar examination. The Reporter noted that the proposed Rule provides for a full evidentiary hearing, which can be very time-consuming. Ms. Hergenroeder said that an appeal to the Chair of the Board is a simpler process.

Mr. Brault suggested that the Rule provide whether the appeal is to the full Accommodations Review Committee or to a panel. A quorum of three persons should also be provided for in the Rule. The Chair suggested that at least three persons on the Accommodations Review Committee should be in agreement with the decision. Ms. Ogletree cautioned about overburdening the Committee with too many cases. Mr. Brault proposed that the cases should be heard by a hearing panel which takes evidence, and the entire Committee could then decide the case. Mr. Bowen said that the decision does not have to be unanimous. He suggested that language be added to subsection (c)(4) stating that if the hearing is conducted by a panel, the panel can then present recommendations to the Accommodations Review Committee which files a report. By consensus, the Committee agreed to this suggestion.

Judge Dryden asked whether the number of members on one panel may differ from the number of members on another panel. Ms. Ogletree expressed the view that the panel should consist of three persons. Mr. Brault added that the panel should be composed of one medical professional and two lawyers. By

consensus, the Committee approved of a three-person panel with two lawyers and one medical professional.

Mr. Brault observed that the Board of Law Examiners has the authority to write its own rules. Mr. Bentley replied that Rule 20, The Board, gives the authority to the Board to adopt Rules of the Board. Mr. Brault suggested that similar language be added to Rule 6.1 providing that the Accommodations Review Committee has the authority to create its own rules. He referred to Mr. Michael's suggestion to add a note encouraging applicants to apply early for accommodations. Mr. Brault questioned as to how much time in advance of the exam the petition is filed. Mr. Bentley responded that it is filed 60 days before the exam. Mr. Brault expressed the opinion that adding the note suggested by Mr. Michael is a good idea.

The Chair inquired as to what the earliest time is to apply to take the examination. Mr. Bentley answered that Rule 2 (c)(1) allows a law school student to file an application at any time after completion of pre-legal studies. Rule 6 provides that after the examination is taken, the applicant's law school provides certification that the applicant graduated from law school. Ms. Hergenroeder pointed out that if someone waits until after he or she graduated from law school, the person's graduation date may be less than 60 days before the next bar examination, and the person would not be allowed to take that exam. The Chair commented that a student who received an accommodation while in law school should apply for a bar exam

accommodation prior to graduation.

Mr. Michael remarked that an applicant who asks for an accommodation early will alert the Bar Examiners' Office. If an applicant applies late, he or she may not be able to take the bar examination on time. The Chair said that a request for an accommodation is presumptively not frivolous if the person already is receiving an accommodation as a law student. Mr. Bowen expressed the view that requiring the request for accommodations early is sensible, and putting this into a Committee note is a good idea.

Master Mahasa suggested that there should be a date certain for requesting an accommodation. Stating that someone should ask for an accommodation as soon as possible may be too nebulous. Mr. Brault questioned whether the Rule could provide that the applicant request accommodations within three months of his or her scheduled law school graduation. Ms. Hergenroeder responded that the Rule cannot require the request for accommodations any earlier than the deadline for filing the petition to take a scheduled bar examination, which is 60 days before the exam, because the ADA does not allow it. Mr. Michael said that warning is a reasonable approach encouraging applicants to apply early. By consensus, the Committee approved the addition of a Committee note to this effect. By consensus, the Committee approved the Rules as amended.

Agenda Item 2. Reconsideration of proposed amendments to Rules 4-263 (Discovery in Circuit Court) and 4-262 (Discovery in

District Court)

Mr. Karceski presented Rules 4-263, Discovery in Circuit Court, and 4-262, Discovery in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to require each party to exercise due diligence in identifying material and information to be disclosed, to reletter the sections, to add a cross reference following section (a), to add to section (b) a required disclosure of witness statements, to add language to subsection (b)(1) referring to a certain statute and Rule, to clarify the disclosure obligation of the State's Attorney under subsections (b)(2) and (3), to add a Committee note and cross reference following section (b), to add to subsection (c)(3) requirements concerning the State's consultation with an expert, to add to subsection (e)(2) requirements concerning an expert that the defendant expects to call as a witness at a hearing or trial, to change the time allowed in section (f) for the State's initial disclosure pursuant to section (b), to add the phrase "or required" to section (g), to provide that ordinarily discovery material is not filed with the court, to require the filing of a notice by the party generating discovery material, to require retention of discovery material for a period of time, and to require the filing of a statement if the parties agree to provide discovery or disclosures in a manner different than set forth in the Rule, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

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

(1) Generally

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

(2) Obligations of the State's Attorney Extend to Staff and Others

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

Cross reference: See *State v. Williams*, 392 Md. 194 (2006).

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

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

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

~~(1)~~ (2) Any material or information

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

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

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

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

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

~~(2)~~ (4) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

Committee note: Examples of material and information that must be disclosed pursuant to subsections (b)(2) and (3) of this Rule if within the possession or control of the State, as described in subsection (a)(2) of this Rule, include: each statement made by a witness that is inconsistent with another statement made by the witness or with a statement made by another witness; the mental health of a witness that may impair his or her ability to testify truthfully or accurately; pending charges against a witness for whom no deal is being offered at the time of trial; the fact that a witness has taken but did not pass a polygraph exam; the

failure of a witness to make an identification; and evidence that might adversely impact the credibility of the State's evidence. The due diligence required by subsection (a)(1) does not require affirmative inquiry by the State with regard to the listed examples in all cases, but would require such inquiry into a particular area if information possessed by the State, as described in subsection (a)(2), would reasonably lead the State to believe that affirmative inquiry would result in discoverable information. Due diligence does not require the State to ascertain the criminal record of each witness whom the State intends to call.

Alternative language suggested by the Style Subcommittee in lieu of the last sentence of the foregoing Committee note:

Due diligence does not require the State to obtain a copy of the criminal record of a State's witness unless the State is aware of the criminal record. If upon inquiry by the State, a witness denies having a criminal record, the inquiry and denial generally satisfy due diligence unless the State has reason to disbelieve the denial.

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

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

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

~~(1) Witnesses~~

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

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

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

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

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

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

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

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

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

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

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

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

This Rule does not require the State to disclose:

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

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

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

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

Upon the request of the State, the defendant shall:

(1) As to the Person of the Defendant

Appear in a lineup for identification; speak for identification; be fingerprinted; pose for photographs not involving reenactment of a scene; try on articles of clothing; permit the taking of specimens of material under fingernails; permit the taking of samples of blood, hair, and other material involving no unreasonable intrusion upon the defendant's person; provide handwriting specimens; and submit to reasonable physical or mental examination;

(2) Reports of Experts

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

(3) Alibi Witnesses

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

(4) Computer-generated Evidence

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

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

Unless the court orders otherwise, the time for discovery under this Rule shall be as set forth in this section. The State's Attorney shall make disclosure pursuant to section ~~(a)~~ (b) of this Rule within ~~25~~ 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. Any request by the defendant for discovery pursuant to section ~~(b)~~ (c) of this Rule, and any request by the State for discovery pursuant to section ~~(d)~~ (e) of this

Rule shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. The party served with the request shall furnish the discovery within ten days after service.

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

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

(h) Continuing Duty to Disclose

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

(i) Not to be Filed with Court; Exceptions

Except as otherwise provided in these Rules or by order of court, discovery material shall not be filed with the court. Instead, the party generating the discovery material shall (1) serve the discovery material on the other party and (2) promptly file with the court a notice that (A) reasonably identifies the information provided and (B) states the date and manner of service. The party generating the discovery material shall make the original available for inspection and copying by the other party, and shall retain the original

Query to Rules Committee: Do Alternatives 2 and 3 work? See the attached Records Retention and Disposal Schedule.

ALTERNATIVE 1

until the expiration of any sentence imposed on the defendant.

ALTERNATIVE 2

for the same period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court.

ALTERNATIVE 3

until the earlier of the expiration of (i) any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court.

This section does not preclude the use of discovery material at trial or as an exhibit to support or oppose a motion. If the parties agree to provide discovery or disclosures in a manner different from the manner set forth in this Rule, the parties shall file with the court a statement of their agreement.

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

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

(k) Sanctions

If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter

relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Source: ~~This Rule is derived as follows:~~
~~Section (g) is derived from former Rule 741 a 3.~~
~~Section (a) is derived from former Rule 741 a 1 and 2.~~
~~Section (b) is derived from former Rule 741 b.~~
~~Section (c) is derived from former Rule 741 c.~~
~~Section (d) is derived in part from former Rule 741 d and is in part new.~~
~~Section (e) is derived from former Rule 741 e 1.~~
~~Section (f) is derived from former Rule 741 e 2.~~
~~Section (h) is derived from former Rule 741 f.~~
~~Section (i) is derived from former Rule 741 g.~~
This Rule is derived in part from former Rule 741 and is in part new.

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

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

changes developed by the Committee.

Current section (g), Obligations of State's Attorney, is proposed to be amended to require that each party who is obligated to provide material or information under the Rule exercise due diligence in identifying the material and information to be disclosed. Because of the importance of this obligation, section (g) is proposed to be moved to the beginning of the Rule and relettered (a). A proposed Committee note following subsection (a)(1) makes clear that due diligence does not require that the State obtain a copy of the criminal record of each witness whom the State intends to call. A cross reference to *State v. Williams*, 392 Md. 194 (2006) is proposed to be added following the section to highlight that the State's obligations under the Rule extend beyond the knowledge of the individual Assistant State's Attorney prosecuting the case.

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

Amendments to subsections (b)(2) and (3) are proposed to clarify the State's disclosure requirements under *Brady* and its progeny. Subsections (b)(3)(A), (B), and (C)

are derived from the "impeachment by inquiry of witness" provisions of Rule 5-616 (a)(6)(i) and (ii), (4), and (2), respectively. A Committee note containing examples of *"Brady"* materials that must be disclosed follows subsection (b)(3). The Committee note uses examples contained in correspondence dated October 25, 2005 from Nancy S. Forster, Public Defender, to Chief Judge Robert M. Bell. At the request of prosecutors, a statement concerning ascertainment of the criminal records of State's witnesses is included in the Committee note. Also following subsection (b)(3) is a cross reference to *Brady* and to three additional opinions of the U.S. Supreme Court.

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

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

Rules.

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

Proposed new section (i) provides that, with certain exceptions, discovery material is not filed with the court. In light of the adoption of Title 16, Chapter 1000, Access to Court Records, proposed new section (i) is intended to eliminate the inclusion of unnecessary materials in court files and reduce the amount of material in the files for which redaction, sealing, or other denial of inspection would be required. The non-filing of discovery information conforms the Rule to current practice in many jurisdictions. Much of the language of the section is borrowed from the first, third, and fourth sentences of Rule 2-401 (d)(2); however, the required contents of the notice that the party generating discovery material must file with the court have been modified by adding the requirement that the notice must “reasonably identif[y] the information provided” and by deleting the references to the “type of discovery material served” and “the party or person served.” Additionally, the retention requirement as to original materials extends **[Alternative 1: until the expiration of any sentence imposed on the defendant.] [Alternative 2: for the same period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court.] [Alternative 3: until the earlier of (i) the expiration of any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court.]** The last sentence of the section requires the parties to file with the court a statement of any agreement that they make as to providing discovery or disclosures different than set forth in the Rule.

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-262 to require each party to exercise due diligence in identifying material and information to be disclosed, to reletter the sections, to add a cross reference following section (a), to add language to section (b) referring to a certain statute, to clarify the disclosure obligation of the State's Attorney under subsection (b)(1), to add a Committee note following subsection (b)(1), to revise the Committee note following subsection (b)(3), to provide that ordinarily discovery material is not filed with the court, and to require retention of discovery material for a period of time, as follows:

Rule 4-262. DISCOVERY IN DISTRICT COURT

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

(1) Generally

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

(2) Obligations of the State's Attorney Extends to Staff and Others

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

Cross reference: See *State v. Williams*, 329 Md. 194 (2006).

~~(a)~~ (b) Scope

Discovery and inspection pursuant to this Rule is available in the District Court in actions for offenses that are punishable by imprisonment, and, except as provided under Code, Criminal Procedure Article, §11-205, shall be as follows:

(1) The State's Attorney shall furnish to the defendant ~~any~~ the material ~~or~~ and information ~~that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged~~ specified in Rule 4-263 (b)(2) and (3) **[Query: Should any other sections or subsections of Rule 4-263 be added here?]**

Committee note: Examples of material and information that must be disclosed pursuant to subsections (b)(2) and (3) of Rule 4-263 if within the possession or control of the State, as described in subsection (a)(2) of this Rule, include: each statement made by a witness that is inconsistent with another statement made by the witness or with a statement made by another witness; the mental health of a witness that may impair his or her ability to testify truthfully or accurately; pending charges against a witness for whom no deal is being offered at the time of trial; the fact that a witness has taken but did not pass a polygraph exam; the failure of a witness to make an identification; and evidence that might

adversely impact the credibility of the State's evidence. The due diligence required by subsection (a)(1) does not require affirmative inquiry by the State with regard to the listed examples in all cases, but would require such inquiry into a particular area if information possessed by the State, as described in subsection (a)(2), would reasonably lead the State to believe that affirmative inquiry would result in discoverable information. Due diligence does not require the State to ascertain the criminal record of each witness whom the State intends to call.

Alternative language suggested by the Style Subcommittee in lieu of the last sentence of the foregoing Committee note:

Due diligence does not require the State to obtain a copy of the criminal record of a State's witness unless the State is aware of the criminal record. If upon inquiry by the State, a witness denies having a criminal record, the inquiry and denial generally satisfy due diligence unless the State has reason to disbelieve the denial.

(2) Upon request of the defendant, the State's Attorney shall permit the defendant to inspect and copy (A) any portion of a document containing a statement or containing the substance of a statement made by the defendant to a State agent that the State intends to use at trial or at any hearing other than a preliminary hearing and (B) each written report or statement made by an expert whom the State expects to call as a witness at a hearing, other than a preliminary hearing, or trial.

Query: Should the substance of Rule 4-263 (c)(5), Property of the Defendant, be added here? Also, should the substance of Rule 4-263 (d), Matters Not Subject to Discovery by the Defendant, be added to this Rule?

(3) Upon request of the State, the defendant shall permit any discovery or inspection specified in subsection ~~(d)(1)~~

(e)(1) of Rule 4-263.

Committee note: This Rule is not intended to limit the constitutional requirement of disclosure by the State. ~~See *Brady v. State*, 226 Md. 422, 174 A.2d 167 (1961), aff'd, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).~~ See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. U.S.*, 405 U.S. 150 (1972); and *U.S. v. Agurs*, 427 U.S. 97 (1976).

~~(b)~~ (c) Procedure

The discovery and inspection required or permitted by this Rule shall be completed before the hearing or trial. A request for discovery and inspection and response need not be in writing and need not be filed with the court. If a request was made before the date of the hearing or trial and the request was refused or denied, the court may grant a delay or continuance in the hearing or trial to permit the inspection or discovery.

(d) Not to be Filed With Court

Except as otherwise provided in these Rules or by order of court, discovery material shall not be filed with the court. Instead, the party generating the discovery material shall (1) serve the discovery material on the other party, (2) make the original available for inspection and copying by the other party, and (3) retain the original until the expiration of any sentence imposed on the defendant. This section does not preclude the use of discovery material at trial or as exhibits to support or oppose motions.

Source: This Rule is new.

Rule 4-262 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 4-262 track the proposed amendments to Rule 4-263, to the extent the Committee believes desirable in the District Court.

Section (c) of Rule 4-262 is proposed to be moved to the beginning of the Rule and relettered (a). The amended language of the section tracks the language of the comparable amendments to Rule 4-263, verbatim. A cross reference to *State v. Williams*, 392 Md. 194 (2006) is added following the section.

In section (b), a reference to Code, Criminal Procedure Article, §11-205 is proposed to be added for the reason stated in the Reporter's note to Rule 4-263.

Subsection (b)(1) is proposed to be amended to clarify that the disclosure obligations of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny apply in the District Court, as well as in circuit court. The amendment requires the State's Attorney to furnish to the defendant the material and information specified in Rule 4-263 (b)(2) and (3). As in the proposed amendment to Rule 4-263, a Committee note containing examples of "*Brady*" materials that must be disclosed is added. References to three additional opinions of the U.S. Supreme Court are proposed to be added to the Committee note at the end of section (b).

Proposed new section (d) is added for the reasons stated in the Reporter's note to Rule 4-263 (i). Due to the volume of cases in the District Court, State's Attorneys believe that the requirement of filing a notice that "reasonably identifies the materials furnished and states the date and manner of service," which is included in proposed new section (i) of Rule 4-263, would be burdensome in Rule 4-262. The Committee agrees, and has excluded this requirement from the provisions of Rule 4-262 (d). Also omitted from section (d) of Rule 4-262 is the last sentence of Rule 4-263 (i), which requires the parties to file a statement of their agreement with the Court if they agree to provide discovery or disclosures in a manner different from the manner set forth in the Rule.

Mr. Karceski told the Committee that Russell Butler, Esq., of the Maryland Crime Victims' Resource Center, Inc. sent correspondence dated November 15, 2006, concerning changes to section (a) of Rules 4-262 and 4-263. Mr. Karceski had also spoken to Mr. Butler on the telephone about these suggested changes. Mr. Butler's correspondence containing his suggestions for change and a copy of Code, Criminal Procedure Article, §11-1002 were distributed at the meeting today. (See Appendix 1).

Mr. Karceski had asked Mr. Butler if his point was that the Rules do not apply in the context of assistance that a victim or victim's representative is receiving. Mr. Butler had responded that the current wording of section (a) could require all written statements and the substance of all oral statements relating to crisis intervention and medical services that the victim is receiving pursuant to Code, Criminal Procedure Article, §11-1002 to be given to the defense. His interest was to prevent the dissemination of written documents pertaining to the treatment a victim is receiving. To avoid a chilling effect on victims, Mr. Butler is suggesting that language be added to section (a) of both Rules to clarify that the language of that section only applies to investigative and prosecutorial functions as set out in the case of *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Michael asked whether the "Brady" rule applies to post conviction procedures. Mr. Karceski replied affirmatively, stating that there is a continuing duty to disclose by the State.

Mr. Karceski told the Committee that Laura Martin, Esq. from the Maryland Crime Victims' Association was present to discuss Mr. Butler's proposed language. Ms. Martin said that in or affiliated with a State's Attorney's Office there is a victim-witness coordinator who provides services to victims. The coordinator takes personal information from the victim that is not related to the prosecution. The language of Rules 4-262 and 4-263 requires that oral statements by the victim be given to the defense. This means that exculpatory information must be turned over. If other information given by victims must be turned over to the defense, there could be a chilling effect on victims. The wording of the Rule is too broad.

The Chair commented that this problem can be addressed. He noted the problem of relevancy in subsection (a)(2). The prosecutor is not obligated to turn over personal information not relevant to the case, but on the other hand, if the prosecutor learns from the victim-witness coordinator that the victim had first named her brother, then later her father as the perpetrator of the crime, that information has to be disclosed even if it is not admitted into evidence. The victim may state that he or she was injured to the point of not being able to remember. Ms. Martin responded that she had been a prosecutor for 16 years and was cognizant of the discovery obligations. Subsection (a)(1) explains the general obligations of the State's Attorney. The reference in subsection (b)(1) to each oral statement is too broad and should be limited to exculpatory and mitigating

statements. The language proposed by Mr. Butler can be moved or changed as long as the effect on the victim is appropriate.

Judge Spellbring suggested that the Rule refer to "relevant statements." Ms. Martin disagreed with that suggestion, and Master Mahasa inquired as to who would determine what is relevant. The Chair suggested that the language could be: "a statement related to the offense for which the defendant is on trial." Ms. Martin reiterated that the language should be "exculpatory and mitigating statements."

Ms. Nethercott pointed out the systemic problem of prosecutors not identifying materials. Ms. Martin reiterated that the proposed language may cause a chilling effect on victims. Mr. Karceski commented that Mr. Butler's concern is about communications by witnesses or victims when they are receiving support services, an the communications have nothing to do with exculpatory information. It is not necessary to memorialize any communication that does not pertain to the trial, the defense, or exculpatory information. Ms. Nethercott proposed that the language in question could be: "any oral statement that relates to criminal conduct." Mr. Brault suggested that the new language could be: "any oral statement that relates to the subject matter of the action." He noted that the origin of the proposed change was from the American College of Trial Lawyers, which had issued a report stating that across the United States prosecutors are not turning over "Brady" material. It would be preferable to err by requiring too much information, rather than

too little.

The Chair said that the Rules Committee should not usurp the function of the legislature in creating a privilege. The legislature may wish to create a privilege for communications between the victim and the person who provides victim-witness services, but is it appropriate for that privilege to be created in a rule of procedure? Ms. Martin responded that all that is necessary is for the person providing services to witnesses and victims to turn over mitigating or exculpatory information, but not information related to finances or counseling.

Mr. Bowen pointed out that subsection (b)(1) refers to "all statements made by the witness to a State agent." Ms. Martin asked whether the victim-witness coordinator is a State agent. Mr. Karceski replied affirmatively. A statement with regard to the criminal prosecution must be provided, but not a statement about where the victim is housed. Certain issues that victims and witnesses talk about are not useful to the defense. In the Committee note at the end of section (b), language could be added to clarify what is intended to be excluded. What is included is all statements about the crime. A statement to the Criminal Injury Compensation Fund could be relevant and qualify as exculpatory evidence.

The Chair suggested that in the first sentence of subsection (b)(1), the language "about the action" could be added after the word "statements" and before the word "made," so that the first sentence would begin: "The name and, except as provided under

Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each person whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony, and, as to all statements about the action made by the witness...". Ms. Martin responded that this would be an improvement. The Chair remarked that the victim could state that the defendant attacked her as she was going to meet her boyfriend about whom her husband knows nothing. This is not about the action, but about where she was going. Judge Dryden observed that one could argue that this is related to the action. Mr. Brault commented that a claim to the Criminal Injury Compensation Board may contain evidence as to why the complaint was made against the defendant and may relate to mitigation. Ms. Martin said that the defendant would need to subpoena records, but the Chair pointed out that the defendant may not know about or have access to the records and would need the "Brady" rule to get information.

Delegate Vallario hypothesized a victim impact statement that the victim lost his or her glasses when the defendant stepped on them. Ms. Martin remarked that this type of statement is routinely turned over. Delegate Vallario commented that the statement that the victim cannot see without the lost glasses for which the victim is seeking reimbursement could be used by the defense. However, narrowing the language in subsection (b)(1) may exclude the defendant from getting this type of statement. The Chair expressed his agreement with Delegate Vallario.

Mr. Katcef told the Committee that he is an Assistant State's Attorney in Anne Arundel County. He observed that much of the discussion so far has been about "non-Brady" material. The Chair observed that the focus of the language also is to comply with the rule set out in *Jencks v. U.S.*, 353 U.S. 657 (1957). One way to do this is to change the last part of subsection (b)(1) so that it reads: "(A) a copy of the relevant portion of each written or recorded statement and (B) the substance of the relevant portion of each oral statement...". The problem with this is that the prosecutor or investigator would decide the relevance. The benefit is that the defense attorney would receive the relevant portion of the information and can always ask the judge to require the prosecutor to provide additional portions of the statement.

Mr. Karceski remarked that Mr. Butler had expressed the view that the wording of the Rule would memorialize all extraneous parts of the conversations of victims and witnesses. Ms. Martin added that to require the substance of all of the ordinary statements given to victim-witness coordinators by the victims and witnesses would be an onerous task. In informal discovery, most prosecutors provide what is necessary for the defense. Compliance with a rule written as broadly as the one in front of the Committee today would be difficult.

Mr. Karceski expressed the opinion that the Chair's suggestion to add the language "about the action" in subsection

(b)(1) would solve the problem with the Rule. It would not be necessary to memorialize whatever is extraneous, only those statements that seem to relate to the facts of the case. Mr. Katcef pointed out that the prosecutor's analysis as to what is significant may change as the case proceeds. A relevant conversation may involve the incident even if it is not "Brady" material. Mr. Karceski said that what is important is the statement of the victim about the crime. Mr. Katcef questioned as to what happens if the statement is by someone else and is not "Brady" material. The Chair responded that only the statements of those persons the State intends to call are relevant, if no "Brady" material is contained in the statement. Mr. Karceski noted that the problem is if the decision as to what to turn over is incorrect. Ms. Nethercott stated that there are problems throughout the State.

Mr. Brault pointed out another problem with giving out statements -- the State may have to turn over work product. The Chair commented that there are two kinds of work product -- thought processes and trial strategies. Materials prepared for use at trial are presumptively protected. Judge Spellbring noted that there is a gray area where the State is trying to decide what must be turned over. The State can file a protective order. Mr. Brault said that the Rule should qualify what is work product. In civil litigation, all statements, both oral and written, to the attorney or attorney's agents, are part of work product and generally are protected by the courts. The Chair

observed that in a criminal case, the defendant is entitled to all written statements by the witnesses. Mr. Brault added that this is the *Jencks* rule.

The Chair suggested that language could be added to subsection (b)(1) stating that if the prosecutor is not turning over everything to the defendant, the prosecutor may seek a protective order with respect to the portion of the statement that is not turned over. Master Mahasa remarked that witness statements all have irrelevant portions, and the prosecutor would have to file a protective order in every case. The Chair pointed out that if the prosecutor tells the defendant that he or she redacted seven lines from the 5-page statement because of a sensitive matter personal to the witness, the defendant may not make an issue out it. As long as the prosecutor is not sneaky, the defense attorney may agree to the redaction, so there would not have to be a protective order in every case. The prosecutor can decide how much of the statement is relevant, as long as he or she gives notice to the defendant that some of the statement is being redacted. Master Mahasa observed that the trial judge decide what can be redacted.

Ms. Nethercott expressed the opinion that the Chair's suggested addition of the language "about the action" is a good idea, but she did not like the suggestion to add the words "relevant portion" in subsection (b)(1). The Committee agreed by consensus to add the language "about the action." The Chair said

that the Court of Appeals can be asked about the "relevant portion" language.

Mr. Karceski told the Committee that the next issue for discussion was the Committee note after subsection (b)(4) of Rule 4-263 and after subsection (b)(1) of Rule 4-262 proposed by Mr. Kratovil, who could not be present at today's meeting. The Office of the Public Defender wrote a letter responding to the note, and representatives from that office are present at the meeting today.

Mr. Brault asked whether any issues relating to the contents of the note were resolved at the last Rules Committee meeting. The Chair replied that the issues were resolved in concept. The basic question is if it is a hardship for the prosecutor to ask a witness or a potential witness if he or she has a criminal record. It is not necessary for the prosecutor to produce a record of all of the prior arrests of the witness, especially those that are very old or those that resulted in acquittal. The convictions that are relevant are those that can be used to impeach the witness. Prosecutors should be told that they do not have to double-check if a citizen informs them that he or she has no arrest record. At what point must the prosecutor make an inquiry of the witness? The defense's view is that every witness must be asked about his or her arrest record. The defense does not always have access to the criminal record of witnesses. However, especially in misdemeanor cases initiated by a citizen's complaint to the Commissioner, rather than initiated by the

prosecutor, it is burdensome for the state to have to investigate the criminal records of all witnesses.

Ms. Nethercott commented that Mr. Kratovil's specific objection was the necessity of the State to make an inquiry of every witness. His proposed language in the Committee note explaining the meaning of due diligence seems circular. The Style Subcommittee's redraft of the last sentence of the note addresses the problem of Mr. Kratovil's draft. Master Mahasa disagreed with the use of the word "disbelieve" in the Style Subcommittee's draft. She suggested the word "question" in its place. Mr. Karceski agreed with this suggestion. By consensus, the Committee approved the Style Subcommittee's version of the Committee note, with the change to the word "question."

Mr. Katcef inquired as to how the inquiry about the witness's arrest record should be posed in the interview. Mr. Karceski replied that it is up to the prosecutor and the police. The Chair commented that the information obtained may never even be admitted into evidence if the judge determines that the probative value of the information is not strong enough to be admitted. Mr. Katcef remarked that the prosecutor may not deem it necessary to ask the witness about his or her record. Could the witness be precluded from testifying on the ground that there was no inquiry? Mr. Leahy observed that the Committee note states that the prosecutor is not required to obtain the witness's criminal record. Mr. Michael said that he reads the Rule to require an oral inquiry. Judge Dryden observed that this

requirement would not be feasible in a District Court case where often the prosecutor does not speak to the witnesses prior to trial. Mr. Katcef agreed with Judge Dryden.

Mr. Karceski said that when someone is tried for an offense in the District Court that could result in imprisonment, the Rule should apply. Unfortunately, the nature of trials in the District Court makes this difficult. The Chair commented that language could be added to the Committee note that would state that the failure of the prosecutor to ask the witness whether he or she has a prior conviction that could be used for impeachment is not a basis for disqualifying the witness from testifying. There may be situations in which the prosecutor does not want to embarrass or appear disrespectful of the witness. Mr. Katcef pointed out that sometimes it is difficult to contact witnesses, and often witnesses are reluctant to testify. It is important that witnesses not be discouraged from testifying. The Chair commented that there should not be "sandbagging." By consensus, the Committee approved the addition of a Committee note as suggested by the Chair.

Mr. Karceski drew the Committee's attention to section (i) of Rule 4-263, which has three alternatives concerning retention of discovery materials. He expressed his preference for Alternative 2. Master Mahasa commented that she preferred Alternative 3. If someone is serving a 25-year sentence, evidence from 20 years ago may be relevant. The Chair remarked that there are situations in which it may be advisable for a

party to file discovery material with the court. He suggested that the beginning language of section (i) should be: "Except as otherwise provided in these Rules or by order of court, discovery material need not be filed with the court. If the party generating the discovery material does not file the material with the court, that party shall...".

Master Mahasa observed that some courts do not want the discovery materials in the court file. Mr. Shipley added that many court clerks have file cabinets full of materials that the State did not want to store. The Chair said that the court makes a post-trial decision as to the disposition of exhibits and can do the same as to the disposition of discovery materials. He expressed the view that prosecutors could make their own determination as to whether they keep materials longer than the time stated in the applicable records retention and disposal schedule had the materials been filed with the court. This is the premise of Alternative 2. Mr. Leahy noted that the bar has no control over the retention policy of the State, and the policy may change. He expressed his preference for Alternative 3 which provides a "safe harbor." By consensus, the Committee approved Alternative 3. The Chair thanked the consultants for their assistance with the Rules.

Mr. Karceski told the Committee that he had another issue to present pertaining to Rule 4-262. He had sent correspondence that is included in the meeting materials, noting a problem he had in District Court. (See Appendix 2). Despite the fact that

most jurisdictions are very fair regarding discovery, he had a case in Worcester County in which the prosecutor refused to allow him to review potential items of evidence seized from his client. The prosecutor responded to his request to review the items by stating that Rule 4-262 does not require the prosecutor to allow the defense to see the items until the day of trial. He proposed that language be added to Rule 4-262 that is derived from two subsections of Rule 4-263, which are relettered (c)(4) and (5) in the meeting material version of the Rule. Even though District Court criminal practice differs from that in the circuit courts, some District Court cases involve search warrants and wiretaps, and defense attorneys should be allowed this discovery. Judge Dryden expressed his agreement with Mr. Karceski, stating that he could see where a judge could read the Rule to deny the defense access to property. However, he questioned whether it is necessary to change the Rule for a problem that arises once a year. Mr. Karceski remarked that had he asked for a jury trial, he would have been given access to the property. Judge Dryden expressed the opinion that the Rules should encourage efficient operation of the courts and should not promote jury trial prayers for the purpose of obtaining discovery rather than for the purpose of actually having a trial by jury. The Chair said that the same language as in relettered Rule 4-263 (c)(4) and (5) will be added to Rule 4-262, and the Committee agreed by consensus to this addition.

By consensus, the Committee approved Rules 4-262 and 4-263

as amended.

Agenda Item 1. Reconsideration of proposed amendments to Rule 4-246 (Waiver of Jury Trial - Circuit Court) and consideration of proposed amendments to Rules 4-215 (Waiver of Counsel) and 4-242 (Pleas)

Mr. Karceski presented Rule 4-246 (Waiver of Jury Trial - Circuit Court), Rule 4-215 (Waiver of Counsel), and Rule 4-242 (Pleas) for the Committee's consideration.

Note to Rules Committee: Rule 4-246 is to be reconsidered by the Rules Committee: (1) to consider additional changes in light of *Powell v. State* and *Zylanz v. State* (2) to review the styled version of the Committee note, and (3) if possible, to reduce the number of alternative versions of the second paragraph of the Committee note.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-246 to require that a court announce on the record a determination that a waiver is made knowingly and voluntarily and to add a Committee note and a cross reference after section (b), as follows:

Rule 4-246. WAIVER OF JURY TRIAL – CIRCUIT COURT

(a) Generally

In the circuit court a defendant having a right to trial by jury shall be tried by a jury unless the right is waived pursuant to section (b) of this Rule. If the

waiver is accepted by the court, the State may not elect a trial by jury.

(b) Procedure for Acceptance of Waiver

A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, ~~it determines,~~ after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily.

Committee note: Although the law does not require the court to use a specific form of inquiry in determining whether a defendant's waiver of a jury trial is knowing and voluntary, the record must demonstrate an intentional relinquishment of a known right. What questions must be asked will depend upon the facts and circumstances of the particular case.

In determining whether a waiver is *knowing*, the court should seek to ensure that the defendant understands that: (1) the defendant has the right to a trial by jury; (2) unless the defendant waives a trial by jury, the case will be tried by a jury;

ALTERNATIVE 1

(3) a jury consists of 12 persons selected at random and picked by the defendant, the defendant's attorney, and the State;

ALTERNATIVE 2

(3) a jury consists of 12 persons, who reside in the county where the court is sitting and who are selected at random and picked by the defendant, the defendant's attorney, and the State;

ALTERNATIVE 3

(3) a jury consists of 12 persons, who reside in the county where the court is sitting, selected at random from a list that includes registered voters, licensed drivers, and holders of identification cards issued by the Motor Vehicle Administration and picked by the defendant, the defendant's attorney, and the State;

(4) all 12 jurors must agree on whether the defendant is guilty or innocent and may only convict upon proof beyond a reasonable doubt;

(5) if the jury is unable to reach a unanimous decision, a mistrial will be declared and the State will then have the option of retrying the defendant; and (6) if the defendant waives a jury trial, the defendant may not be permitted to change the election at a later time.

In determining whether a waiver is *voluntary*, the court should consider the defendant's responses to questions such as: (1) Are you making this decision of your own free will?; (2) Has anyone offered or promised you anything in exchange for giving up your right to a jury trial?; (3) Has anyone threatened or coerced you in any way regarding your decision?; and (4) Are you presently under the influence of any medications, drugs, or alcohol?.

Cross reference: See *Kang v. State*, 393 Md. 97 (2006) and *Abeokuto v. State*, 391 Md. 289 (2006).

(c) Withdrawal of a Waiver

After accepting a waiver of jury trial, the court may permit the defendant to withdraw the waiver only on motion made before trial and for good cause shown. In determining whether to allow a withdrawal of the waiver, the court may consider the extent, if any, to which trial would be delayed by the withdrawal.

Source: This Rule is derived from former Rule 735.

Rule 4-246 was accompanied by the following Reporter's Note.

In light of the consolidated opinion in *Powell v. State* and *Zylanz v. State*, (Nos. 129 and 130, September Term, 2005, filed September 15, 2006), a proposed addition to Rule 4-246 (b) requires a circuit court, when it accepts a waiver of a jury trial, to announce on the record its determination that the waiver is made knowingly and voluntarily. The phrase, "announce on the record" is borrowed from language used in Rule 15-203 (a). Comparable amendments to section (b) of Rule 4-215 (Waiver of Counsel) and sections (c) and (d) of Rule 4-242 (Pleas) also are proposed.

In the cases of *Kang v. State*, 393 Md. 97 (2006) and *Abeokuto v. State*, 391 Md. 289 (2006), the Court of Appeals declined to require the trial court to use a particular form of inquiry to determine the voluntariness of a jury trial waiver, but expressed its preference that judges make a specific inquiry into voluntariness. The proposed Committee note following the section (b) lists questions that may be useful in determining that a jury trial waiver is made both voluntarily and knowingly. A cross reference following the Committee note cites the two cases.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND 4-215 by adding to section (b) a requirement that the court announce on the record a certain determination by the court, as follows:

Rule 4-215. WAIVER OF COUNSEL

. . .

(b) Express Waiver of Counsel

If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until ~~it determines,~~ after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.

. . .

Rule 4-215 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendments to Rule 4-246.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-242 by adding to sections (c) and (d) a requirement that the court announce on the record a certain determination by the court, as follows:

Rule 4-242. PLEAS

. . .

(c) Plea of guilty

The court may not accept a plea of guilty ~~only after it determines, upon~~ until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

(d) Plea of Nolo Contendere

A defendant may plead nolo contendere only with the consent of court. The court may require the defendant or counsel to provide information it deems necessary to enable it to determine whether or not it will consent. The court may not accept the plea ~~only after it determines, upon~~ until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the defendant is pleading voluntarily with understanding of the nature of the charge and the consequences of the plea. In addition, before accepting the plea, the court shall comply with section (e) of this Rule. Following the acceptance of a plea of nolo contendere, the court shall proceed to disposition as on a plea of guilty, but without finding a verdict of guilty. If the court refuses to accept a plea of nolo contendere, it shall call upon the defendant to plead anew.

. . .

Rule 4-242 was accompanied by the following Reporter's Note.

> See the Reporter's note to the proposed amendments to Rule 4-246.

Mr. Karceski explained that *Powell v. State and Zylanz v. State*, 394 Md. 632 (2006) held that the circuit court, when it accepts a waiver of a jury trial, must announce on the record its determination that the waiver is made knowingly and voluntarily. The Criminal Subcommittee proposes a change to section (c) of Rule 4-242 and section (b) of Rule 4-246 to conform to this decision. The Subcommittee also suggests adding a Committee note following section (b) in light of *Kang v. State*, 393 Md. 97 (2006) and *Abeokuto v. State*, 391 Md. 289 (2006) in which cases the Court expressed its preference that judges make a specific inquiry into voluntariness of a jury trial waiver. There are three alternatives for the language of the Committee note.

Mr. Brault pointed out that the three alternatives use the language "picked by the defendant," but the reality is that while the defendant is allowed some strikes, the defendant cannot pick his or her own jury. The Chair suggested that the following language could be added to any of the alternatives after the words "12 persons": "who are seated as jurors at the conclusion of the selection process in which the defendant, the defendant's attorney, and the State participate;". Mr. Karceski noted that the jurors have to be qualified. Mr. Shipley inquired whether

the definition includes alternate jurors, and the Chair replied that it does not. Master Mahasa pointed out that Alternative 3 refers to the names of persons taken from Motor Vehicle Administration (MVA) records and records of registered voters. She pointed out that Code, Courts Article, §8-206 provides that the jury pool also may include names from any other list of residents of the county that the jury plan authorizes. The Chair commented that this would include a "talesman" jury. The Style Subcommittee can draft this language. Judge Dryden commented that in the District Court for Anne Arundel County, the judges advise defendants about the right to a jury trial, but do not explain what a jury is, as Alternative 3 provides. He expressed his preference for Alternative 1.

Master Mahasa noted that the information could be communicated to the defendant by video. Mr. Zavin commented that it is preferable that the defendant be informed directly. Judge Dryden remarked that defendants are shown a video and re-advised at the circuit court and asked if they have already seen the video. Mr. Karceski agreed that Alternative 1 is the best. Ms. Ogletree said that it depends on the defendant. Mr. Katcef pointed out that most judges refer to the holders of cards issued by the MVA. The Reporter added that Alternative 3 reflects the language of the statute. Mr. Bowen suggested that Alternative 2 is preferable, but it would read better as: "selected from a list of individuals who reside in the county where the court is sitting and who are selected at random."

The Chair questioned whether the statute requires more than Mr. Bowen's selected language. He suggested that Mr. Bowen's language be presented to the Court of Appeals as one alternative and Alternative 3 as the other. The Reporter asked if the Chair's suggested language would be included in Alternative 3. The Chair replied affirmatively, stating that Alternative 3 would read as follows: "a jury consists of 12 persons, who reside in the county where the court is sitting, selected at random from a list that includes registered voters, licensed drivers, and holders of identification cards issued by the Motor Vehicle Administration, seated as jurors at the conclusion of a selection process in which the defendant, the defendant's attorney, and the State participate." By consensus, the Committee agreed to the Chair's suggestion.

Master Mahasa asked if the word "may" in section (a) should be changed to the word "shall." The Chair suggested that the word "may" be changed to the word "can," so that the last phrase of the second sentence would read: "the State cannot elect a trial by jury." He stated that the Style Subcommittee would review the language.

By consensus, the Committee approved Rule 4-246 and Rules 4-215 and 4-242 as presented.

Agenda Item 4. Consideration of proposed amendments to Rule 14-206 (Procedure Prior to Sale)

Ms. Ogletree presented Rule 14-206, Procedure Prior to Sale,

for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-206 to expand the definition of the bond in a foreclosure sale, as follows:

Rule 14-206. PROCEDURE PRIOR TO SALE

(a) Bond

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~~ $25,000. If the property is sold to a person other than the holder of the indebtedness or a person designated by the holder in a writing filed in the proceeding to take title on the holder's behalf, the person authorized to make the sale shall increase the amount of the bond, before the sale is ratified, to the amount of the sale price as set forth in the report of sale. 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).

(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) To Counties or Municipal Corporations

In addition to any other required notice, not less than 15 days prior to the sale of the property, the person authorized to make the sale shall send written notice to the county or municipal corporation where the property subject to the lien is located as to:

(A) the name, address, and telephone number of the person authorized to make the sale; and

(B) the time, place, and terms of sale.

(4) 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.

(5) Return Receipt or Affidavit

The person giving notice pursuant to subsections (b)(2), (b)(3), and (b)(4) 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)(4), 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) or (b)(3) 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 (4) of this Rule to whom notice of the earlier date of sale was not sent.

Cross reference: Regarding foreclosure consulting contracts, see Code, Real Property Article, §§7-301 through 7-321.

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.

Jeffrey B. Fisher, Esq., a mortgage foreclosure practitioner and a member of the Foreclosure Practice Subsection of the Real Property Section of the Maryland State Bar Association, has requested that section (a) of Rule 14-206 be amended to reduce clerical work and judicial time by simplifying the bond requirement and eliminating the need to file a motion to substitute purchaser if the property is bought by the holder of the debt secured by the lien, but title will be held by a person acting on the holder's behalf. The amendment (1) fixes the initially required bond at $25,000 unless increased or decreased by the court on the application of the person making the sale or any person having an interest in the property, making such applications unnecessary in most cases, (2) provides that the bond shall be increased to the sale price if the property is sold to a buyer who is not the holder of the debt or a person designated by the holder in a writing filed in the proceeding to take title

> on the holder's behalf, and (3) by providing that the holder can designate a person to take title on its behalf, eliminates the need for motions to substitute purchasers in those cases.

Ms. Ogletree explained that the substance of Rule 14-206 has been in existence for some time. The amount of the bond in a sale of property to foreclose a lien has always been the amount of the debt plus the estimated expenses of the proceeding. This has often resulted in the filing of a motion to reduce the bond if the lender is the purchaser of the property. Jeffrey B. Fisher, Esq., a practitioner who concentrates in mortgage foreclosures, asked the Property Subcommittee to consider changing Rule 14-206 to fix the bond at $25,000 initially, unless the property is sold to a person other than the holder of the indebtedness, in which case the person authorized to make the sale would increase the amount of the bond before the sale is ratified to the amount of the sale price.

The proposed change also provides that the holder can designate a person to take title on its behalf, eliminating the need for motions to substitute purchasers. The Subcommittee met by conference call and decided to recommend that the Rule be changed so that the amount of the bond is set at $25,000, unless a third party other than the holder of the indebtedness, or a person designated by the holder in a writing filed in the proceeding to take title on the holder's behalf, buys the property, in which case the bond would be increased to the full

amount of the selling price. This simplifies the post-sale procedure.

The Chair questioned whether there is court involvement to order the increase the amount of the bond. Ms. Ogletree responded that the court is not involved. If the property is sold to a third party, it is automatic that the bond must be increased. There is no need for court action. The Chair inquired as to how quickly the reports of sale are filed. Ms. Ogletree replied that they are filed within 31 days, depending on who is foreclosing and where. Foreclosures in smaller counties take less time. The Reporter suggested that the word "promptly" be added to the new language after the word "sale" and before the word "shall." Ms. Ogletree said that this is not necessary, as long as the report of sale is filed before the ratification of the sale.

Delegate Vallario asked why the bond increase is necessary. Ms. Ogletree said that if the property is sold to a third party, the bond will be increased to protect creditors. She added that the trustee under the deed of trust receives the funds. The trustee files a report with the court, and the sale is ratified. A bond is required to ensure the fidelity of the trustee. Delegate Vallario asked about claims against the bond. Ms. Ogletree answered that there could be some claims. There had been a case in which the trustee submitted false documents claiming that money was paid, when it had not been. A claim of $900,000 was filed against the bond. Mr. Brault referred to a

case in which the attorney failed to notify a junior lienholder, and the attorney was sued for malpractice. There had been no bond, although there should have been one. By consensus, the Committee approved the Rule as presented.

Agenda Item 5. Consideration of proposed amendments to Rule 5-615 (Exclusion of Witnesses)

Mr. Michael presented Rule 5-615, Exclusion of Witnesses, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-615 to make subsection (b)(5) applicable to all crimes and delinquent acts to the extent required by statute and to add to the cross reference following subsection (b)(5), as follows:

Rule 5-615. EXCLUSION OF WITNESSES

(a) In General

Except as provided in sections (b) and (c) of this Rule, upon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. When necessary for proper protection of the defendant in a criminal action, an identification witness may be excluded before the defendant appears in open court. The court may order the exclusion of a witness on its own initiative or upon the request of a party at any time. The court may continue the exclusion of a witness following the testimony of that witness if a party represents that the witness is likely to be

recalled to give further testimony.

Cross reference: For circumstances when the exclusion of a witness may be inappropriate, see *Tharp v. State*, 362 Md. 77 (2000).

(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~~ or a delinquent act, including any representative of such a deceased or disabled victim, to the extent required by statute.

Cross reference: Code, Courts Article, §3-8A-13; Criminal Procedure Article, §11-102 and §11-302; Rule 4-231.

(c) Permissive Non-exclusion

The court may permit a child witness's parents or another person having a supportive relationship with the child to remain in court during the child's testimony.

(d) Nondisclosure

(1) A party or an attorney may not disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.

(2) The court may, and upon request of a party shall, order the witness and any other

persons present in the courtroom not to disclose to a witness excluded under this Rule the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness's absence.

(e) Exclusion of Testimony

The court may exclude all or part of the testimony of the witness who receives information in violation of this Rule. Cross reference: *McGill v. Gore Dump Trailer Leasing, Inc.*, 86 Md. App. 416 (1991).

Source: This Rule is derived from F.R.Ev. 615 and Rules 2-513, 3-513, and 4-321.

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

Russell Butler, Esq. pointed out that Code, Criminal Procedure Article, §11-102 provides that a victim or victim's representative who has filed a notification request form has the right to attend any proceeding in which the right to appear has been granted to a defendant and Code, Courts Article, §3-8A-13 provides that victims may attend proceedings in which a child is alleged to be in need of supervision or to have committed a delinquent act that would be a misdemeanor or felony (for good cause shown) if committed by an adult or in a peace order proceeding. To conform to these statutes, Mr. Butler recommends modifying subsection (b)(5) of Rule 5-615 and adding references to these statutes to the cross reference after subsection (b)(5) of the same Rule.

Mr. Michael explained that Code, Criminal Procedure Article, §11-102 provides that a victim or victim's representative who has filed a notification request form has the right to attend any proceeding that a defendant is entitled to attend, and Code, Courts Article, §3-8A-13 provides that victims may attend proceedings in which a child is alleged to have committed a

delinquent act. Russell Butler, Esq., who had commented on Rules 4-262 and 4-263, had pointed out that language should be added to subsection (b)(5) to include a reference to a delinquent act by a juvenile, and a cross reference to the two statutes should be added after subsection (b)(5). By consensus, the Committee approved the Rule as presented.

The Chair adjourned the meeting.