March 25, 2008

SUPPLEMENT TO THE
ONE HUNDRED FIFTY-EIGHTH REPORT
OF THE
STANDING COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE

The Honorable Robert M. Bell,
Chief Judge
The Honorable Irma S. Raker
The Honorable Glenn T. Harrell, Jr.
The Honorable Lynne A. Battaglia
The Honorable Clayton Greene, Jr.
The Honorable Joseph F. Murphy, Jr.,
Judges
The Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Annapolis, Maryland 21401

Your Honors:

On September 26, 2007, the Rules Committee submitted its One Hundred Fifty-Eighth Report in which, among other things, it recommended changes to Rules 4-262, 4-263, and 4-301, dealing with discovery in criminal cases. The changes to those Rules were found in Category 3 of the 158th Report.

At the hearing held on that Report, on December 3, 2007, concerns were expressed by a number of prosecutors and others with respect to certain aspects of the recommended changes to Rules 4-262 and 4-263, principally the latter. Members of the Court inquired whether, in formulating its recommendations, the Rules Committee had considered the Standards relating to discovery in criminal cases adopted by the American Bar Association in 1994, and the answer was that those Standards had not been considered. In light of the controversy with respect to some of the Committee's proposals, the Court deferred action on them.

In an attempt to provide the Court with more complete information and to address the concerns expressed at the December 3 hearing, the Rules Committee has undertaken a further review of the discovery process in criminal cases in light of the ABA Standards, what is ultimately required under both Federal and Maryland Constitutional law, and how the discovery process can be clarified, made more effective, and promote greater fairness and efficiency in overall criminal procedure.

To that end, the Committee obtained and considered both the ABA Standards and the ABA Commentary to them. It had available to it the discovery rules applicable in Federal criminal cases and the rules adopted in other States, along with relevant case law. All of the individuals and groups that had indicated an interest in the matter were invited to submit written comments regarding the ABA Standards and whether, or to what extent, there should be any departure from them.

The Criminal Rules Subcommittee met, gave initial consideration to the ABA Standards and the written comments that had been received, and made a number of recommendations for changes to Rule 4-263 as submitted in the 158th Report. There did not appear to be much controversy with respect to Rule 4-262 and none at all with respect to Rule 4-301. The Rules Committee then devoted an entire full-day meeting on March 7, 2008, to the Subcommittee's recommendations. The meeting was well attended by prosecutors, defense counsel, and victims' rights representatives, all of whom were afforded the opportunity to address the Committee with respect to every aspect of the two Rules. From those presentations and the Committee's own deliberations, additional changes to the proposals submitted in the 158th Report were made.

On behalf of the Rules Committee, I am pleased to submit to Your Honors this Supplement to the 158th Report, containing the Rules Committee's final recommendations with respect to Rules 4-262 and 4-263. Because those Rules have essentially been rewritten, the Committee's proposal is to repeal the existing Rules and adopt in their place the Rules proposed in this Supplement. As there appeared to be no objection to the proposed amendment to Rule 4-301 as submitted in the 158th Report, the Committee recommends adoption of the amendment already before the Court. Attached to this Supplement, for the Court's further information, are:

Appendix A: The ABA Standards;
Appendix B: The ABA Commentary to those Standards;
Appendix C: An analysis of the extent to which the Rules Committee's final recommendations conform to or depart from the ABA Standards and, where there is a significant departure, why the Rules Committee chose that approach;
Appendix D: A copy of all of the written submissions received by the Rules Committee regarding Rules

4-262 and 4-263, since the Court's hearing on December 3, 2007;

Appendix E: A list of the areas in which there may remain a substantial disagreement between prosecutors and defense counsel, or between them and others. As to each such area of dispute, the Committee has attempted to set forth the respective positions of the disputants and the Rules Committee's thinking with respect to the matter;

Appendix F: Draft of a provision that would require broader disclosure of lay witnesses by the defense. This is explained below; and

Appendix G: Marked copies of Rules 4-263 and 4-262, showing changes from the current Rules if the proposed revised versions of the Rules are adopted.

There are two additional points to be made. First, the ABA Standards were adopted in 1994 and are drafted as guidelines rather than Rules. It is clear that a great deal of thought went into the development of those Standards and that the final version, to a large extent, was the product of compromise between the views and desires of prosecutors and defense counsel. To the extent that the Standards embody Constitutional requirements, their basic content can be found in the discovery rules throughout the country. The disagreements arise from provisions that extend discovery, by either the State or the defense, beyond what is Constitutionally required, and, in some of those respects, the Standards have not been universally embraced at either the Federal or State level.

Although the Rules Committee has now given consideration to the ABA Standards and has crafted Rules 4-262 and 4-263 in closer harmony to them, its recommendations continue to depart from them in some respects. The two most important departures deal with the disclosure of witnesses and witness statements not Constitutionally required. The ABA Standards would require the State to disclose the names and written statements of all persons having information regarding the offense charged, not just of persons the State intends to call as witnesses, and would require the defense to disclose the names and written statements of all persons the defense intends to call as witnesses. The parallel there is not complete. For the reasons set forth in Appendices C and E, a majority of the Rules Committee continues to recommend that those provisions not be adopted. Those issues will have to be resolved by the Court. Because it is such an important issue, language that would impose the disclosure requirement on the defense has been drafted and submitted separately as Appendix F. If the Court wishes to adopt that provision, it easily can be added to the Rules as proposed in this Supplement.

Second, one of the principal objectives of the rewriting of Rules 4-262 and 4-263 is to bring greater clarity to what is

required, so that disputes can be avoided and the process can work more effectively. To that end, Rule 4-263 provides some common examples of information the Rules Committee believes, based on existing case law, would fall within the ambit of "*Brady* material" and would need to be disclosed. Those examples are not intended to *extend* the scope of discovery but better to *define* it.

Respectfully submitted,

Alan M. Wilner
Chair

Linda M. Schuett
Co-Chair

AMW:cdc

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

RESCIND current Rule 4-262 and ADD new Rule 4-262, as follows:

Rule 4-262. DISCOVERY IN DISTRICT COURT

(a) Applicability

This Rule governs discovery and inspection in the District Court. Discovery is available in the District Court in actions that are punishable by imprisonment.

(b) Definitions

In this Rule, the following definitions apply:

(1) Generally

The terms “defense,” “defense witness,” “oral statement,” and “State’s witness,” have the meanings stated in Rule 4-263 (b).

Cross reference: For the definition of “State’s Attorney,” see Rule 4-102 (k).

(2) Written Statement

“Written statement” of a person:

(A) includes a statement in writing that is made, signed, or adopted by that person;

(B) includes a statement contained in a police or investigative report; but

(C) does not include attorney work product.

Committee note: The language of Rule 4-263 (b)(5) is not included in the definition of "written statement" in Rule 4-262.

(c) Obligations of the Parties

(1) Due Diligence

The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.

(2) Scope of Obligations

The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

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

(d) Disclosure by the State's Attorney

(1) Without Request

Without the necessity of a request, the State's Attorney shall provide to the defense all material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged and all material or information in any form, whether or not admissible, that tends to impeach a State's witness.

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); *U.S. v. Agurs*, 427 U.S. 97 (1976); Thomas v. State, 372 Md. 342 (2002); *Goldsmith v. State*, 337 Md. 112 (1995); and *Lyba v. State*, 321 Md. 564 (1991).

(2) On Request

On request of the defense, the State's Attorney shall provide to the defense:

(A) Statements of Defendant and Co-defendant

All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(B) State's Witnesses

The name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, together with all written statements of the person that relate to the offense charged;

(C) Searches, Seizures, Surveillance, and Pretrial Identification

All relevant material or information regarding:

(i) specific searches and seizures, eavesdropping, or electronic surveillance including wiretaps; and

(ii) pretrial identification of the defendant by a State's witness;

(D) Reports or Statements of Experts

As to each State's witness the State's Attorney intends to call to testify as an expert witness other than at a preliminary hearing:

(i) the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(ii) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(iii) the substance of any oral report and conclusion by the expert;

(E) Evidence for Use at Trial

The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial; and

(F) Property of the Defendant

The opportunity to inspect, copy, and photograph all items obtained from or belonging to the defendant, whether or not the State's Attorney intends to use the item at a hearing or at trial.

(e) Disclosure by Defense

On request of the State's Attorney, the defense shall provide to the State's Attorney:

(1) Reports or Statements of Experts

As to each defense witness the defense intends to call to testify as an expert witness:

(A) the expert's name and address, 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;

(B) the opportunity to inspect and copy all written reports made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert; and

(2) Documents, Computer-generated Evidence, and Other Things

The opportunity 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 defense intends to use at a hearing or at trial.

(f) Person of the Defendant

(1) On Request

On request of the State's Attorney that includes reasonable notice of the time and place, the defendant shall appear for the purpose of:

(A) providing fingerprints, photographs, handwriting exemplars, or voice exemplars;

(B) appearing, moving, or speaking for identification in a lineup; or

(C) trying on clothing or other articles.

(2) On Motion

On motion filed by the State's Attorney, with reasonable notice to the defense, the court, for good cause shown, shall order the defendant to appear and (A) permit the taking of buccal samples, samples of other materials of the body, or specimens of blood, urine, saliva, breath, hair, nails, or material under the nails or (B) submit to a reasonable physical or mental examination.

(g) Matters Not Discoverable

(1) By any Party

Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product or (B) any other material or information if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

(2) By the Defense

The State's Attorney is not required to disclose the identity of a confidential informant unless the State's Attorney

intends to call the informant as a State’s witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant.

(h) Continuing Duty to Disclose

Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

(i) 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.

(j) Material Not to be Filed with the Court

Except as otherwise provided in these Rules or by order of court, discovery material shall not be 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.

(k) Retention; Inspection of Original

The party generating discovery material shall retain the original until the expiration of any sentence imposed on the defendant and, on request, shall make the original available for

inspection and copying by the other party.

(l) Protective Orders

On motion of a party or a person from whom discovery is sought, the court, for good cause shown, may order that specified disclosures be denied or restricted in any manner that justice requires.

(m) Failure to Comply with Discovery Obligation

The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

RESCIND current Rule 4-263 and ADD new Rule 4-263, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

(a) Applicability

This Rule governs discovery and inspection in a circuit court.

(b) Definitions

In this Rule, the following definitions apply:

(1) Defense

"Defense" means an attorney for the defendant or a defendant who is acting without an attorney.

(2) Defense Witness

"Defense witness" means a witness whom the defense intends to call at a hearing or at trial.

(3) Oral Statement

"Oral statement" of a person means the substance of a statement of any kind by that person, whether or not reflected in an existing writing or recording.

(4) State's Witness

"State's witness" means a witness whom the State's Attorney intends to call at a hearing or at trial.

Cross reference: For the definition of "State's Attorney," see Rule 4-102 (k).

(5) Written Statement

"Written statement" of a person:

(A) includes a statement in writing that is made, signed, or adopted by that person;

(B) includes the substance of a statement of any kind made by that person that is embodied or summarized in a writing or recording, whether or not signed or adopted by the person;

(C) includes a statement contained in a police or investigative report; but

(D) does not include attorney work product.

(c) Obligations of the Parties

(1) Due Diligence

The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.

(2) Scope of Obligations

The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

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

(d) Disclosure by the State's Attorney

Without the necessity of a request, the State's Attorney shall provide to the defense:

(1) Statements

All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(2) Criminal Record

Prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant;

(3) State's Witnesses

The name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, together with all written statements of the person that relate to the offense charged;

(4) Prior Conduct

All evidence of other crimes, wrongs, or acts committed by the defendant that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404 (b);

(5) Exculpatory Information

All material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or

mitigate the defendant’s guilt or punishment as to the offense charged;

(6) Impeachment Information

All material or information in any form, whether or not admissible, that tends to impeach a State’s witness, including:

(A) evidence of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608 (b);

(B) a relationship between the State’s Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness;

(C) prior criminal convictions, pending charges, or probationary status that may be used to impeach the witness, but the State’s Attorney is not required to investigate the criminal record of the witness unless the State’s Attorney knows or has reason to believe that the witness has a criminal record;

(D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another statement made by the witness or with a statement made by another witness;

(E) a medical or psychiatric condition or addiction of the witness that may impair the witness’s ability to testify truthfully or accurately, but the State’s Attorney is not required to inquire into a witness’s medical, psychiatric, or addiction history or status unless the State’s Attorney has information that reasonably would lead to a belief that an

inquiry would result in discovering a condition that may impair the witness's ability to testify truthfully or accurately;

(F) the fact that the witness has taken but did not pass a polygraph examination; and

(G) the failure of the witness to identify the defendant or a co-defendant;

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); *U.S. v. Agurs*, 427 U.S. 97 (1976); Thomas v. State, 372 Md. 342 (2002); *Goldsmith v. State*, 337 Md. 112 (1995); and *Lyba v. State*, 321 Md. 564 (1991).

(7) Searches, Seizures, Surveillance, and Pretrial Identification

All relevant material or information regarding:

(A) specific searches and seizures, eavesdropping, and electronic surveillance including wiretaps; and

(B) pretrial identification of the defendant by a State's witness;

(8) Reports or Statements of Experts

As to each expert consulted by the State's Attorney in connection with the action:

(A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination,

scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(9) Evidence for Use at Trial

The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial; and

(10) Property of the Defendant

The opportunity to inspect, copy, and photograph all items obtained from or belonging to the defendant, whether or not the State's Attorney intends to use the item at a hearing or at trial.

(e) Disclosure by Defense

Without the necessity of a request, the defense shall provide to the State's Attorney:

(1) Reports or Statements of Experts

As to each defense witness the defense intends to call to testify as an expert witness:

(A) the expert's name and address, 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;

(B) the opportunity to inspect and copy all written reports made in connection with the action by the expert, including the

results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(2) Character Witnesses

As to each defense witness the defense intends to call to testify as to the defendant's veracity or other relevant character trait, the name and, except when the witness declines permission, the address of that witness;

(3) Alibi Witnesses

If the State's Attorney has designated the time, place, and date of the alleged offense, the name and, except when the witness declines permission, the address of each person other than the defendant whom the defense intends to call as a witness to show that the defendant was not present at the time, place, or date designated by the State's Attorney;

(4) Insanity Defense

Notice of any intention to rely on a defense of not criminally responsible by reason of insanity, and the name and, except when the witness declines permission, the address of each defense witness other than the defendant in support of that defense; and

Committee note: The address of an expert witness must be provided. See subsection (e)(1)(A) of this Rule.

(5) Documents, Computer-generated Evidence, and Other Things

The opportunity 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 defense intends to use at a hearing or at trial.

(f) Person of the Defendant

(1) On Request

On request of the State's Attorney that includes reasonable notice of the time and place, the defendant shall appear for the purpose of:

(A) providing fingerprints, photographs, handwriting exemplars, or voice exemplars;

(B) appearing, moving, or speaking for identification in a lineup; or

(C) trying on clothing or other articles.

(2) On Motion

On motion filed by the State's Attorney, with reasonable notice to the defense, the court, for good cause shown, shall order the defendant to appear and (A) permit the taking of buccal samples, samples of other materials of the body, or specimens of blood, urine, saliva, breath, hair, nails, or material under the nails or (B) submit to a reasonable physical or mental examination.

(g) Matters Not Discoverable

(1) By any Party

Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal

beliefs, or other privileged attorney work product or (B) any other material or information if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

(2) By the Defense

The State’s Attorney is not required to disclose the identity of a confidential informant unless the State’s Attorney intends to call the informant as a State’s witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant.

(h) Time for Discovery

Unless the court orders otherwise:

(1) the State's Attorney shall make disclosure pursuant to section (d) of this Rule within 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, and

(2) the defense shall make disclosure pursuant to section (e) of this Rule no later than 30 days before the first scheduled trial date.

(i) Motion to Compel Discovery

(1) Time

A motion to compel discovery based on the failure to provide discovery within the time required by section (h) of this Rule shall be filed within ten days after the date the discovery was due. A motion to compel based on inadequate discovery shall

be filed within ten days after the date the discovery was received.

(2) Content

A motion shall specifically describe the information or material that has not been provided.

(3) Response

A response may be filed within five days after service of the motion.

(4) Certificate

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.

(j) Continuing Duty to Disclose

Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

(k) Manner of Providing Discovery; Material Not to be Filed with Court

(1) By Agreement

Discovery may be accomplished in any manner mutually

agreeable to the parties. The parties shall file with the court a statement of their agreement.

(2) If No Agreement

In the absence of an agreement, the party generating the discovery material shall (A) serve the discovery material on the other party and (B) promptly file with the court a notice that (i) reasonably identifies the information provided and (ii) states the date and manner of service. On request, the party generating the discovery material shall make the original available for inspection and copying by the other party.

(3) Not to be Filed with the Court

Except as otherwise provided in these Rules or by order of court, discovery material shall not be 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.

(l) Retention

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

(m) Protective Orders

(1) Generally

On motion of a party or a person from whom discovery is sought, the court, for good cause shown, may order that specified

disclosures be denied or restricted in any manner that justice requires.

(2) In Camera Proceedings

On request of a party or a person from whom discovery is sought, the court may permit any showing of cause for denial or restriction of disclosures to be made in camera. A record shall be made of both in court and in camera proceedings. Upon the entry of an order granting relief in an in camera proceeding, all confidential portions of the in camera portion of the proceeding shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

(n) 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. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Source: This Rule is new and is derived in part from former Rule 741 and the 1998 version of former Rule 4-263.

APPENDIX C

COMPARISON

PROPOSED RULE 4-263 AND ABA STANDARDS

Rule 4-263 (a): Applicability

Rule 4-263 (a) states the applicability of the Rule to discovery in the circuit courts. ABA Standard 11-1.2 recognizes that discovery procedures may be more limited in cases involving minor offenses than those recommended in the ABA Standards. That is why two separate Rules now exist and are recommended to continue to exist: Rule 4-262 dealing with discovery in the District Court and Rule 4-263, applicable to cases in the circuit courts.

Rule 4-263 (b): Definitions

Rule 4-263 (b) contains five definitions: defense, defense witness, oral statement, State's witness, and written statement. There is no ABA Standard defining defense, defense witness, or State's witness. Those terms are defined simply to avoid repeating the substance of the definition throughout the Rule. The definition of "oral statement" is consistent with ABA Standard 11-1.3(b). The definition of "written statement" is consistent with ABA Standard 11-1.3(a).

The definition of "written statement" constitutes an expansion over the previous ABA conception of a written statement and has significance in terms of witness statements that must be disclosed. The text of the definition of "written statement," in both proposed Rule 4-263 (b)(5) and ABA Standard 11-1.3(a), includes the "substance of a statement of any kind made by [a] person that is embodied or summarized in any writing or recording, whether or not signed or adopted by that person." Both provisions state that the term is intended to include statements contained in "police or investigative" reports but does not include "attorney work product." The ABA Commentary notes that the term includes "documents, such as transcripts, which memorialize the statements of a person, as well as any 'recording' of a statement, whether by videotape, audiotape, or other means" but includes as well writings which "embody the 'substance' of a statement." In that regard, the Commentary makes clear that "the standard goes beyond simply word-for-word records of the person's oral statements [and] would include, for example, an investigator's notes of an interview of a person not signed or adopted by that person."

Rule 4-263 (c): Obligations of the Parties

Rule 4-263 (c)(1) requires the parties – prosecution and defense – to exercise due diligence to identify all material and information that must be disclosed under the Rule.

Subsection (c)(2) makes clear that the obligation to disclose extends to material and information in the possession and control of the members of the attorney's staff and of others who regularly report to or, with reference to the particular case, have reported to the attorney's office. This is the current Maryland law.

Rule 4-263 (c)(2) mirrors the language of ABA Standard 11-4.3(a). Subsection (c)(1) is generally consistent with Standard 11-4.3(b) and (c) but is stated in somewhat broader terms. Standard 11-4.3(b) requires the *prosecutor* to make reasonable efforts to ensure that information relevant to the defendant and the offense is provided to the prosecutor by investigative personnel. Standard 11-4.3(c) provides that, if the prosecutor is aware of discoverable information possessed by a government agency that does not report to the prosecutor's office, the prosecutor must disclose the existence of that information.

ABA Standard 11-4.3(d) and (e) go beyond the traditional due diligence obligation. Standard 11-4.3(d) provides that, if a request is made for identified material that would be discoverable if in the possession or control of a party but which is in the possession or control of *others*, the party must use diligent good faith efforts to cause the material to be made available. The ABA Commentary assumes that such information, not in the possession and control of the party from whom it is sought, could be obtained through subpoena to the third party and

notes that section (d) was added to "encourage the parties to use voluntary discovery methods." Rule 4-264 permits a subpoena for the pretrial inspection and copying of non-privileged documents and things which may constitute relevant evidence. The Rules Committee does not believe that either prosecutors or defense counsel should be burdened with trying to persuade third parties over whom they have no control to turn over information which, for their own purposes, they refuse voluntarily to do. The dispute is then between the party seeking the information and the third party who has it, and Rule 4-264 already provides an avenue to resolve that dispute.

Standard 11-4.3(e) permits a court to order the disclosure of material or information, not otherwise covered under Standard 11-4.3, upon a showing that the items sought "are material to the preparation of the case." The ABA Commentary confirms that this provision deals with information "that is outside the scope of the standards" and is to ensure that "the courts will have the flexibility needed to make the discovery rules work in a wide range of criminal cases." The Rules Committee does not recommend the adoption of that provision.

The proposals submitted in the Supplement call for a much broader range of discovery than is Constitutionally required, than is provided for in the current version of Rules 4-262 and 4-263, and than is required under discovery rules applicable in Federal cases. Standard 11-4.3(e) is extremely

broad and could lead to a court ordering the disclosure of material, such as attorney work product, that the discovery Rules actually seek to shield. Neither Fed. R. Crim. Proc. 16 nor the comparable rules in most other States contain such a provision.

Rule 4-263 (d): Disclosure by the State's Attorney

Rule 4-263 (d) requires the State, without request, to disclose to the defense ten categories of material and information, as follows:

(1) **Rule 4-263 (d)(1)** requires the disclosure of all written and oral statements of the defendant or any co-defendant that relate to the offense charged, along with material and information relating to the acquisition of such statements. Subsection (d)(1) is consistent with ABA Standard 11-2.1(a)(i).

(2) **Rule 4-263 (d)(2)** requires the disclosure of prior convictions, pending charges, or the probationary status of the defendant and any co-defendant. This is consistent with ABA Standard 11-2.1(a)(vi).

(3) **Rule 4-263 (d)(3)** requires disclosure of the names and, with statutory exceptions, the addresses of all persons whom the State intends to call as witnesses, either in its case-in-chief or to rebut alibi testimony, together with all written statements of such persons that relate to the offense charged. The comparable ABA Standard is Standard 11-2.1(a)(ii).

Current Rule 4-263 (b)(1) requires the disclosure, on

request, of the names and addresses of persons the State intends to call as witnesses but does not require the disclosure of statements by those witnesses. If such statements constitute "*Brady* material," they would have to be disclosed without request under current Rule 4-263 (a)(1). Otherwise, oral statements do not have to be disclosed at all and written statements do not have to be turned over until after the witness has completed direct examination, and then only to the extent they may fall within Maryland's version of the *"Jencks* rule." Proposed Rule 4-263 (d)(3), especially when coupled with the expanded definition of "written statement," significantly broadens the current requirement by making written witness statements discovery material that must be disclosed much earlier in the process and without request.

Subsection (d)(3) departs in one important respect from ABA Standard 11-2.1(a)(ii), which requires the disclosure, without request, not only of persons whom the State intends to call as witnesses but of "all persons known to the prosecution to have information concerning the offense charged" and of the written statements of such persons "that relate to the subject matter of the offense charged." The ABA Commentary notes that this is intended "broadly to encompass all persons with any relevant knowledge, helpful or harmful to either side" and recognizes that even the pretrial disclosure of prospective witnesses, much less anyone having relevant knowledge, is neither Constitutionally

required nor required under Federal Rule Crim. Proc. 16.

Neither the Federal Rule nor the Rules in most States have adopted this expansion. Only a handful of States require the disclosure of persons, other than prospective witnesses or persons required to be disclosed under *Brady*, simply because they may have knowledge about the offense. The Rules Committee does not recommend expanding the Maryland Rule in this regard. As under current Rule 4-263 (a)(1), *any* material or information in the possession or control of the State that constitutes "*Brady* material" must be disclosed under subsections (d)(5) and (6) of the proposed Rule, whether or not from prospective witnesses. An expansion of subsection (d)(3) is not necessary to cover that material.

The Committee was concerned that the duty to disclose the names, addresses, and statements of persons who are not intended to be called as witnesses and who do not have information that could be regarded as "*Brady* material" not only goes beyond what is generally required throughout the country but may be too ambiguous and burdensome. Prosecutors noted that often, when the police interview bystanders, neighbors, or others following a criminal event, interviewees will advise that they did not see the event and have no knowledge about it but that some other person may have such knowledge, that the prosecutor would not regard such interviewees as having knowledge about the offense and, for that reason, would not be inclined to call them as

witnesses, but that defense counsel might complain later that those persons should have been disclosed. *See* Appendix E, Item 1.

(4) **Rule 4-263 (d)(4)** requires the disclosure of evidence that the State intends to offer under Rule 5-404 (b). Rule 5-404 generally precludes evidence of a person's character or trait of character for the purpose of proving action in conformity therewith. Section (b) of that Rule, however, permits evidence of other crimes, wrongs, or acts for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. That kind of evidence is admissible as substantive evidence and not merely for impeachment. It may be in a form that would fall within the disclosure provisions of other sections of the proposed amendments to Rule 4-263, but the Rules Committee felt that there should be an express requirement to disclose this kind of evidence, which is what subsection (d)(4) accomplishes. The comparable ABA Standard 11.2.1(b) provides that, "[i]f the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and the substance of the evidence to be used." The Rules Committee believes that, because this is substantive evidence, the State should disclose the evidence itself and not just the "substance" of it.

(5) **Rule 4-263 (d)(5)** codifies the *Brady* requirement of

disclosing, without request, exculpatory evidence – evidence that would negate or mitigate the defendant's guilt or mitigate punishment. It requires the disclosure of material and information, whether or not admissible, that tends to "exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged." ABA Standard 11-2.1(a)(viii) requires disclosure of material or information "that tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant." The ABA Standard omits any specific mention of evidence that tends to "mitigate" guilt, which the Rules Committee believes should continue to be explicit in the Rule. *See Ware v. State*, 348 Md. 19 (1997). Other than that addition, the Committee believes that subsection (d)(5) is consistent with the ABA Standard.

(6) **Rule 4-263 (d)(6)** codifies the *Brady* requirement of disclosing, without request, evidence in the possession or control of the State's Attorney that may be used to impeach State's witnesses. It requires the disclosure of material and information, whether or not admissible, "that tends to impeach a State's witness." That kind of evidence, whatever form it takes, is "*Brady* material." For guidance, subsection (d)(6) then lists some common examples of information falling within that category of impeachment evidence, including:

Rule 4-263 (d)(6)(A): Evidence of prior conduct that might be admissible under Rule 5-608 (b) to show the character of the witness for untruthfulness. Except to the extent that the substance of such evidence may be subject to disclosure under ABA Standard 11-2.1(a)(viii) **[see Rule 4-263 (d)(3) *ante*]**, there is no counterpart ABA Standard.

Rule 4-263 (d)(6)(B): Evidence of a relationship between the State's Attorney and a State's witness, including the nature and circumstances of any agreement, understanding, or representation between the State's Attorney and the witness that constitutes an inducement for the cooperation or testimony of the witness. That essentially mirrors ABA Standard 11-2.1(a)(iii).

Rule 4-263 (d)(6)(C): Any record of prior criminal convictions, pending charges, or probationary status that may be used to impeach any witness to be called by the State, with the caveat that the State's Attorney is not required to investigate the criminal record of a State's witness unless the State's Attorney knows or has reason to believe that the witness has a criminal record. The first clause of subsection (d)(6)(C), creating the duty of disclosure, mirrors ABA Standard 11.2.1(a)(vi). The second clause is inserted to make clear that the State's Attorney has no obligation under the due diligence requirement to check the criminal records of State's witnesses unless he or she knows or has reason to believe that such a

record exists. There is no counterpart ABA Standard to that provision. *See* Appendix E, Item 2.

Rule 4-263 (d)(6)(D): An oral statement not otherwise memorialized made by a witness that is materially inconsistent with another statement made by the witness or with a statement made by another witness. There is no specific counterpart ABA Standard, but because a witness clearly may be impeached through the use of a prior inconsistent statement (Rule 5-616 (a)(1)), information of this kind, at least with respect to a State's witness known to the State's Attorney, would constitute "*Brady* material." *See Bruce v. State*, 318 Md. 706, 725 (1990) ("[I]f the State is aware of prior inconsistent statements made by a witness to a police officer, it may have an obligation to produce this information under the duty to furnish exculpatory evidence."). *See* Appendix E, Item 3.

Rule 4-263 (d)(6)(E): A medical, psychiatric, or addiction condition of a witness that may impair the witness's ability to testify truthfully or accurately, except that the State's Attorney is not required to inquire into a witness's medical, psychiatric, or addiction history or status unless, from information already possessed, the State's Attorney knows or has reason to believe that an inquiry would result in discovering a condition that may impair the witness's ability to testify truthfully or accurately. There is no specific counterpart ABA Standard.

The first part of this requirement was included in a Committee note in the proposed Rule submitted with the 158th Report and attracted adverse comment by prosecutors and victims' rights advocates. Some context is required. Medical and psychiatric records and information are generally privileged. If they are in the hands of a third party and are not in the possession or control of the State's Attorney, they do not, for that reason, constitute "*Brady* material" and are therefore not required to be disclosed by the State's Attorney. *See Goldsmith v. State*, 337 Md. 112 (1995); *Thomas v. State*, 372 Md. 342 (2002). The *Brady* issue arises when such information, which may include statements by the witness describing the witness's medical or psychiatric condition or status, *are* in the possession or control of the State's Attorney.

Even then, it is not all such information that is subject to disclosure but only information tending to establish a condition which may impair the witness's ability to testify truthfully or accurately. If the condition is of that kind and severity, the Rules Committee believes it would constitute "*Brady* material" and would have to be disclosed, notwithstanding the personal interest of the witness in having it shielded. *See United States v. Gray*, 52 Fed. Appx. 945 (9th Cir. 2002) (records obtained by prosecutor indicating Government witness had "auditory hallucinations" and was "actively psychotic" required to be disclosed under *Brady*); *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (Government's

knowledge that witnesses were using drugs throughout the trial required to be disclosed); *also Lyba v. State*, 321 Md. 564 (1991) (error not to permit cross-examination of victim-witness as to whether she was on drugs at time of assault and had consumed alcohol at time she identified defendant).

Some of the concern expressed by prosecutors and victims' rights advocates was whether, under the due diligence requirement, prosecutors were required to interrogate witnesses about their medical, psychiatric, or addiction background and whether, if victims volunteered this information to victim counselors employed by the police or the State's Attorney and the counselor made written notes of the conversation, those notes would subject to discovery. With respect to the first concern, the Rules Committee is of the view that the State's Attorney is under no obligation to inquire into the medical, psychiatric, or addiction history or condition of its witnesses, unless the State's Attorney knows or has reason to believe that an inquiry would produce discoverable information, in which event the prosecutor may not remain wilfully ignorant. As to the second concern, the issue is whether the written notes fall within the definition of "written statement." *See* subsection (b)(5). If so, they must be disclosed. The Rules Committee does not perceive any requirement that a victim counselor make written notes of this kind of information. *See* Appendix E, Item 4.

Rule 4-263 (d)(6)(F): The fact that a State's witness

has taken but did not pass a polygraph test. There is no counterpart ABA Standard. Any oral or written statement made by the defendant or a co-defendant in the course of polygraph examination that is in the possession or control of the State's Attorney must be disclosed under proposed Rule 4-263 (d)(1). Any written statement made by a State's witness in the course of such an examination must be disclosed under Rule 4-263 (d)(3). The issue here concerns not the statement but the recorded belief by the polygraph examiner that the witness was not being truthful. The case law regarding this kind of information is not altogether clear. In *Wood v. Bartholomew*, 516 U.S. 1 (1995), the Supreme Court held that, where the examiner's opinion would have been inadmissible in evidence, even for impeachment purposes, non-disclosure by the State did not constitute a *Brady* violation and did not require reversal of a conviction because disclosure may have affected trial strategy of the defense. *Compare*, however, *Patrick v. State*, 329 Md. 24 (1992), decided before *Wood*, but holding that, notwithstanding that the opinion of the polygraph examiner was inadmissible, "the reports of State experts who have conducted polygraph examinations, whether the results are exculpatory of the accused's guilt or not, constitute discoverable 'scientific tests' within the contemplation of [Rule 4-263 (b)(4)] [reports of experts]."

The Rules Committee is of the view that, where the State is aware that a State's witness underwent a polygraph examination

and the examiner concluded that the witness was not being truthful, that information should be disclosed, even if inadmissible in evidence and whether or not required by *Brady*. On balance, there is no harm to the State in disclosing that information, but it may be useful to the defense in finding other evidence with which to impeach the witness, which was the rationale of *Patrick*. Rather than leave the matter uncertain, the Committee believes that an affirmative statement is desirable.

Rule 4-263 (d)(6)(G): The failure of a witness to make an identification of the defendant or a co-defendant. There is no specific comparable ABA Standard, although this information would appear to be discoverable under ABA Standard 11-2.1(a)(vii), which requires the disclosure of "[a]ny material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case." The Rules Committee notes that its proposal deals only with the failure to make an identification and does not appear to include a misidentification. That information would likely be discoverable under subsection (d)(4) as exculpatory information.

(7) **Rule 4-263 (d)(7)** requires disclosure of all relevant material or information relating to (i) specific searches, seizures, eavesdropping, and electronic surveillance, including wiretaps and (ii) pretrial identification of the

defendant by a State's witness. The comparable ABA Standards are Standards 11-2.1(a)(vii), 11-2.1(c), and 11-2.1(d). As noted, Standard 11-2.1(a)(vii) requires the disclosure of "material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case." Standard 11-2.1(c) provides that, if the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact." Standard 11-2.1(d) provides that, if any tangible object which the State intends to offer at trial was obtained through a search and seizure, the prosecution should disclose "any information, documents, or other material relating to the acquisition of such objects."

Rule 4-263 (d)(7), when coupled with subsection (d)(6)(G) is generally consistent with those Standards, but there are some differences. As to identification evidence, the ABA Standard would seem to apply to the identification (or not) of anyone; subsections (d)(6)(G) and (d)(7) cover only identifications of the defendant or co-defendant by a State's witness (or failure to make such an identification). Subsection (d)(7) follows the current Rule, and the Rules Committee saw no need to expand the Rule. The ABA Standard requires only that the State inform the defense of electronic surveillance and does not require disclosure of relevant material concerning it. To that extent,

subsection (d)(7) is broader than the ABA Standard. With respect to the disclosure of information regarding specific searches and seizures, subsection (d)(7) is comparable to ABA Standard 11-2.1(d).

(8) **Rule 4-263 (d)(8)** requires disclosure of the name and address of 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. The State's Attorney must also afford the defense the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert and provide the substance of any oral report or conclusion by the expert. This is generally consistent with ABA Standard 11-2.1(iv).

(9) **Rule 4-263 (d)(9)** requires the State's Attorney to afford the defense the opportunity to inspect, copy, and photograph documents, computer-generated evidence, recordings, photographs, or other tangible items that the State intends to use at a hearing or trial. ABA Standard 11-2.1(a)(v) requires the disclosure and right to inspect, copy, test, and photograph those kinds of tangible objects "which pertain to the case or which were obtained for or belong to the defendant" and directs that the State identify which of those objects it intends to offer as evidence at trial. Rule 4-263 (d)(9) does not mention

the right to test the material. Moreover, as noted, it applies only to items that the State intends to use as evidence, not those which may "pertain to the case" but which the State does not intend to use as evidence. This follows the Rules Committee's general view, also expressed in other sections, that, other than "*Brady* material," the requirement of disclosure should be limited to information or material the State intends to use as evidence. *See* however, the explanation of Rule 4-263(d)(10), immediately following.

(10) **Rule 4-263 (d)(10)** requires the State's Attorney to afford the defense the opportunity 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 a hearing or trial. That requirement is generally consistent with ABA Standard 11-2.1(a)(v), although, as noted, it does not mention the right to test the items.

Rule 4-263 (e): Disclosure by Defense

Rule 4-263 (e), as proposed, requires the defense (1) without request, to disclose five categories of material and information – experts, character witnesses, alibi witnesses, insanity defense witnesses, and documents and tangible items the defense intends to use at trial or a hearing, (2) upon request, to have the defendant appear for the purpose of providing certain identifying information, and (3) upon motion and court order, to

have the defendant appear for the purpose of providing certain additional kinds of identifying information and to submit to a physical or mental examination.

ABA Standard 11-2.2(a)(i) requires the defense to disclose the names and addresses of all witnesses, other than the defendant, whom the defense intends to call at trial, together with all written statements of those witnesses that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness. Standard 11-2.2(a)(i) does not require disclosure of witnesses who will be called for the sole purpose of impeaching a State's witness until after the State's witness has testified.

This Standard was a major innovation by the ABA and was intended to provide a balance to Standard 11-2.1(a)(ii), which requires the State to disclose not only the names, addresses, and statements of its witnesses but of all persons known to the State to have information concerning the offense. The ABA Commentary notes that those were "reciprocal requirements on the prosecution and defense," and that "[t]he two standards go hand-in-hand, and must be read together." The Commentary points out:

> "The defense attorneys, prosecutors, judges, and academics revisiting these discovery standards concluded that unless meaningful pretrial disclosures are required of both parties in a criminal case, pretrial discovery cannot serve its intended purpose to enhance the fairness and the efficiency of the criminal justice system. In these standards, while the defense gives up its ability to hold its hand essentially closed

> until trial, it receives disclosures by the prosecution that significantly enhance its ability to prepare an effective defense."

Federal Rule Crim. Proc. 16 does not require the disclosure of either Government or defense lay witnesses. Subsection (b)(2) of that Rule provides that, except for scientific and medical reports, the Rule "does not authorize discovery or inspection of ... a prospective government or defense witness." The States are split on this issue. The great majority of States require the disclosure of experts, alibi witnesses, and witnesses to be called in support of an insanity defense. The split is somewhat more pronounced with respect to other lay witnesses. It appears that 30 States either require or permit a court to require that the defense disclose the names of its lay witnesses. In some of those States, the disclosure is automatic; in others it is contingent upon reciprocal discovery by the State, or upon request, or on motion and order. Nineteen States and the District of Columbia do not appear to require such disclosure. Included as non-disclosure States are North Carolina and Georgia, which require disclosure but not until the eve of trial.

As noted in the Supplemental Report, the Rules Committee had not considered the ABA Standards when crafting the version of Rule 4-263 submitted with its 158th Report, which omitted an obligation on the defense to disclose lay witnesses other than character and alibi witnesses. Nonetheless, arguments for and against such an obligation had been considered by the Committee

at several meetings, and the decision not to include that obligation was a deliberate, though not a unanimous, one.

The Rules Committee revisited that issue at its March 7, 2008 meeting, at which both prosecutors and defense counsel made presentations. Notwithstanding the ABA Standard and the view of a majority of States on this issue, a majority of the Committee again voted not to include that provision. It was persuaded that, because the burden of proof was on the State, the defense should not be required to telegraph in advance the defenses it intends to raise, which a disclosure of lay witnesses may do. In that regard, the Rules Committee notes that, although most of the States require the disclosure of defense lay witnesses, only a handful require the defense to give specific notice of its defenses, beyond alibi and insanity. There was concern as well, from anecdotal evidence noted by defense counsel, that disclosure of lay witnesses in advance of trial may inhibit defense witnesses from coming forth and agreeing to testify.

The Rules Committee recognizes that this is an important issue that needs to be decided ultimately by the Court. To assist the Court, should it be inclined to impose this obligation on the defense, there is attached, as Appendix F, a draft of language that would achieve that result. If the Court decides to include that general obligation, subsections (e)(1)(B), (C), and (D), as proposed, may be superfluous, although, as noted below, they are provided for in separate ABA Standards and probably

should be retained for clarity. *See* also Appendix E, Item 1.

Rule 4-263 (e) requires the defense, except for privileged work product of defense counsel, to disclose, without request, five categories of material and information, as follows:

(1) **Rule 4-263(e)(1)** requires the disclosure of the name and address of each expert the defense expects to call as a witness, together with the subject matter on which the expert is expected to testify, the substance of the expert's findings, the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. The defense must also disclose and provide an opportunity for the State to inspect and copy all written reports made in connection with the action by the expert and the substance of any oral report or conclusion. This is generally consistent with ABA Standard 11-2.2(a)(ii), except that the Standard also requires the disclosure of the expert's curriculum vitae. The defense requirement under subsection (e)(1)(A) is narrower than the State's requirement under subsection (d)(7). As noted, the State must disclose information with respect to each expert "consulted by the State in connection with the action," not just experts it intends to call as witnesses.

(2) **Rule 4-263(e)(2)** requires the disclosure of each witness the defense intends to call to testify as to the defendant's veracity or other relevant character trait. Unless

the witness declines permission, the witness's address must also be disclosed. There is no specific ABA counterpart Standard, although it would appear that those witnesses would have to be disclosed under ABA Standard 11-2.2(a)(i). ABA Standard 11-2.2(b), however, provides that, if the defense intends to use character, reputation, or other act evidence *not relating to the defendant*, it should notify the prosecutor of that intention and of the substance of the evidence to be used. There is no counterpart to that Standard in Rule 4-263.

(3) **Rule 4-263(e)(3)** provides that, upon designation by the State of the time, place, and date of the alleged occurrence, the defense must disclose the name and, unless the witness declines permission, the address of each person, other than the defendant, whom the defense expects to call as a witness to show that the defendant was not present at the time or place designated by the State. This is consistent with ABA Standard 11-2.2(c).

(4) **Rule 4-263 (e)(4)** provides that, if the defendant intends to rely on the defense of not criminally responsible by reason of insanity, the defense must notify the State of that intent and disclose the name and, unless the witness denies permission, the address of each witness the defense expects to call to testify in support of that defense. This is generally consistent with ABA Standard 11-2.2(c).

(5) **Rule 4-263 (e)(5)** requires the defense to afford the State an opportunity to inspect, copy, and photograph documents, computer-generated evidence, recordings, photographs, and other tangible things that the defense expects to use at a hearing or trial. This is consistent with ABA Standard 11-2.2(a)(iii) (other than that the ABA Standard permits the State to test such material) and with the State's obligation under Rule 4-263 (d)(9).

Rule 4-263 (f): Person of the Defendant

Rule 4-263 (f) requires the defense to disclose certain personal or bodily information.

(1) **Rule 4-263 (f)(1)** provides that, on request, the defendant must appear for the purpose of (i) providing fingerprints, photographs, handwriting exemplars, or voice exemplars, (ii) appearing, moving, or speaking for identification in a lineup, or (iii) trying on clothes or other articles. This is consistent with ABA Standard 11-2.3(a).

(2) **Rule 4-263 (f)(2)** provides that, on motion, the court, on a showing of good cause, shall order the defendant to permit the taking of buccal samples (DNA swabs from the mouth) and samples of other material from the body, specimens of blood, urine, saliva, breath, hair, nails, and material under the nails, and to submit to a reasonable physical or mental examination. With two exceptions, this tracks the language of ABA Standard 11-

2.3(b). The Rules Committee has added a specific reference to the taking of buccal samples, which is implicit in the ABA Standard but not specifically mentioned. Legislation dealing with the acquisition and retention of DNA evidence is now pending in the General Assembly. If enacted, the Rules Committee and ultimately the Court will need to consider any effect it may have on proposed Rule 4-263 (f)(2) and (l).

The ABA Standard allows the court to order the defendant to "participate in other reasonable and appropriate procedures." It also provides that the court's order should specify the authorized procedure, the scope of the defendant's participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place, and other conditions under which the procedure is to be conducted. Standard 11-2.3(d) adds that the court "should" issue such an order if it finds that the appearance of the defendant may be material to the determination of the issues in the case, that the procedure is reasonable and will be conducted in a manner which does not involve an unreasonable intrusion of the body or affront to the defendant's dignity, and the request is reasonable. The Standard also provides that defense counsel may be present at the procedure unless, with respect to a psychiatric examination, the court orders otherwise. The Rules Committee did not find it necessary to include those provisions.

<u>Rule 4-263 (g): Matters Not Discoverable</u>

Rule 4-263 (g) sets forth three categories of information that are not subject to discovery: (1) the mental impressions, trial strategy, personal beliefs, or other privileged work product of counsel, (2) any other information or material if the court finds that its disclosure is not Constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest of disclosure, and (3) the identity of a confidential informant unless the State's Attorney intends to call the informant as a witness or failure to disclose the informant's identity would infringe a Constitutional right of the defendant. These provisions track the current version of Rule 4-263(c). ABA Standard 11-6.1 contains somewhat similar provisions but is worded differently. The Rules Committee prefers its recommended approach.

Rule 4-263 (h): Time for Discovery

Rule 4-263 (h) requires that, unless the court orders otherwise, the State shall make its discovery within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant pursuant to Rule 4-213, and the defense shall make its discovery no later than 30 days before the first scheduled trial date. The Rules Committee believes this approach is consistent with ABA Standards 11-2.1(a) and 11-2.2(a), which require that discovery be "within a specified and reasonable time prior to trial" and 11-4.1, which recommends that discovery be initiated "as early as practicable in the process,"

that disclosure should be made first by the State, and that discovery be completed so that "each party has sufficient time to use the disclosed information adequately to prepare for trial."

Rule 4-263 (i): Motion to Compel Discovery

Rule 4-263 (i) permits a party to file a motion to compel discovery when discovery either is not provided at all or when discovery is provided but, for some reason, is incomplete or inadequate. In the former case, the motion must be filed within ten days after discovery was due; in the latter case, the motion must be filed within ten days after the inadequate discovery is received. The Rule requires the motion to describe the information or material that was not received and provides that the court need not consider such a motion unless the moving part has filed a certificate describing good faith efforts to resolve the dispute and attesting that the parties were unable to reach agreement. This provision tracks the current Rule. There is no specific ABA Standard dealing with motions to compel.

Rule 4-263 (j): Continuing Duty to Disclose

Rule 4-263 (j) places each party under a continuing duty to produce discoverable material and information and to supplement earlier responses. This tracks the language of current Rule 4-263 (h) and is consistent with ABA Standard 11-4.1(c).

Rule 4-263 (k): Manner of Providing Discovery; Material Not to

be Filed with Court

Rule 4-263 (k) is new. Current Rule 4-263 does not specify how discovery material is to be produced. ABA Standard 11-4.2 provides that disclosure should be accomplished in any manner mutually agreeable to the parties, and, in default of an agreement, provides for notice to the other side when the material may be inspected. Rule 4-263 (k) is generally consistent with that approach. It permits the parties to agree on the manner of providing discovery but requires that the parties file with the court a statement of their agreement, so there is a record of it. The Rule also provides a method in default of an agreement, that being service of the discovery on the other party and the filing of a notice that reasonably identifies the information and material provided and states the date and manner of service.

It was not uncommon in Maryland, when there was no agreement or understanding to the contrary, for the parties, responding to a formal request, to file discovery material with the court. The Rules Committee believes that this should no longer be allowed, unless ordered by the court. For one thing, it is not necessary to clutter up court files with discovery material. It is a burden on the clerks to have to deal with and retain such material. Equally important, discovery material often contains personal and identifying information regarding victims and witnesses that need not be placed in public court records. The

Court had to face this issue when dealing with the Rules governing access to court records. Rule 2-401 (d)(2) precludes the filing of discovery in civil cases, and the Committee believes the same approach should be followed in criminal cases.

Rule 4-263 (l): Retention

Unlike in civil cases, however, there is a greater need in criminal cases for discovery material to be retained in the event of a retrial or for post-conviction proceedings. There is no ABA Standard in this regard. In **Rule 4-263 (l)**, the Rules Committee proposes that each party be required to retain the original of the discovery material it generated for the shorter of (i) the sentence imposed on the defendant, or (ii) the retention period under the retention and disposal schedule that would have been applicable had the material been filed with the court.

There are a number of issues that need to be addressed in this regard, but, in the Rules Committee's view, they require further study and do not need to be resolved at this time. Much of the discovery material to which Rules 4-262 and 4-263 apply will likely end up as exhibits in the case, and any retention requirement under the discovery Rules will have to take account of and be synchronized with the requirements for preserving evidence. Some prosecutors are scanning documents at the end of trial and destroying the paper. The originals are not being preserved because of space requirements. It is not clear what

happens in the 24 subdivisions with respect to physical items such as drugs, weapons, perishable items, bulky items – who keeps them and for how long. Maryland Code, §8-201 (i) of the Criminal Procedure Article requires the State to preserve scientific evidence containing DNA material for a period of three years after imposition of sentence, but permits a court to require a longer retention; §8-201 (j), however, permits the State to dispose of such evidence sooner under certain circumstances. Retention may be a problem as well for defense counsel, who are not subject to any State-authorized retention schedule.

The Rules Committee recommends this as a separate area to be further investigated but is comfortable with proposed Rule 4-263 (l) for the time being.

Rule 4-263 (m): Protective Orders

Rule 4-263 (m) permits a party or person from whom discovery is sought to seek a protective order and permits the court to restrict specified disclosures in any manner that justice requires. Section (m) also permits an in camera proceeding with respect to such a request, but requires that a record be made of both in court and in camera proceedings. Upon the entry of an order granting relief, all confidential portions of the in camera proceeding are to be sealed, preserved in the court records, and be made available to the appellate court in the event of an appeal. These provisions are generally consistent with ABA Standards 11-6.5 (protective orders) and 11-

6.7 (in camera proceedings). Standard 11-6.5 is somewhat more specific. It provides that, on a showing of cause, the court may order "that specified disclosures be restricted, conditioned on compliance with protective measures, or deferred, or make such other order as is appropriate."

Rule 4-263 (n): Sanctions

Rule 4-263 (n) provides a range of sanctions that a court may impose for a violation of the Rule. They are consistent with current Rule 4-263 (i) and ABA Standard 11-7.1.

ABA Standards Not Addressed in Proposed Rule 4-263

There are a number of ABA Standards that are not addressed at all in proposed Rule 4-263. They are as follows:

(1) **Standard 11-3.1** allows a court, on motion and for good cause, to issue compulsory process (i) to obtain documents and other tangible items in the possession of third parties, (ii) to allow the entry on property owned or controlled by third parties, (iii) to obtain from a third party fingerprints, photographs, handwriting exemplars, or voice exemplars, specimens of blood, urine, saliva, breath, hair, nails, or other bodily materials, or (iv) to require third parties to submit to a reasonable physical or medical inspection of the body or participate in other reasonable and appropriate procedures. The Standard sets forth procedures for the issuance of such an order.

As noted, Rule 4-264 permits the court, on motion of any party, to issue a subpoena commanding a person to produce for inspection and copying designated documents, recordings, photographs, or other tangible things, not privileged, which may constitute or contain evidence relevant to the action. The Maryland Rules have not gone beyond that provision; nor was the

Rules Committee asked to propose such an extension. This is a matter that extends beyond the reciprocal discovery obligations of the parties and can be separately investigated by the Rules Committee.

(2) **Standard 11-3.2** provides a procedure to be followed if either party intends to destroy or transfer out of its possession objects or information otherwise discoverable. The only example given in the ABA Commentary to that Standard is when the prosecution intends to conduct tests which will consume or destroy the evidence, thereby precluding the defense from conducting its own tests, in which event the ABA notes that appropriate arrangements must be made to protect the interests of both sides. There was no request that the Rules Committee consider this matter. As noted above, §§8-201(i) and (j) of the Criminal Procedure Article contain specific requirements for the preservation of scientific identification evidence containing DNA material.

(3) **Standard 11-5.1** provides for depositions to perpetuate testimony. Rule 4-261 does likewise.

(4) **Standard 11-5.2** requires a court, on motion, to order a discovery deposition of any person other than the defendant under certain conditions. The Rules Committee was not asked to propose a Rule permitting or controlling discovery depositions.

(5) **Standard 11-6.2** states that the fact that a party

has indicated during the discovery process an intent to offer specified evidence or to call a specified witness is not admissible in evidence. The Rules Committee views this as a rule of evidence, not a discovery rule. It was not asked to propose such a Rule and did not consider one.

(6) **Standard 11-6.3** prohibits the parties from advising persons who have relevant material or information to refrain from discussing the case with opposing counsel or otherwise impeding opposing counsel's investigation of the case. The Rules Committee was not asked to propose such a Rule and did not consider one.

(7) **Standard 11-6.4** provides that materials furnished to an attorney in discovery should be used only for purposes of preparation and trial of the case and should be subject to any conditions the court may provide. The Rules Committee was not asked to propose such a Rule but notes that limitations on the use of discovery material can be dealt with through a protective order under Rule 4-263 (m).

(8) **Standard 11-6.6** provides that, when some parts of material or information are discoverable and other parts are not, the discoverable parts should be disclosed and the other party notified that the non-discoverable parts have been withheld. The Rules Committee was not asked to propose such a Rule, but notes that the requirement of disclosing discoverable parts of material or information is implicit.

APPENDIX E

POTENTIAL AREAS OF DISPUTE FOR COURT TO RESOLVE

As noted in the Supplemental Report, in revisiting the proposed amendments to Rules 4-262 and 4-263 submitted with its 158th Report, the Rules Committee gave careful consideration to the comments presented to the Court at the hearing on December 3, 2007. In an effort to address some of those comments, a number of changes to the initial submissions are proposed, but it is clear that some basic policy issues will remain for the Court to resolve. Although it is difficult to predict all of the disputes that may yet be presented, based on the comments already received, the Committee perceives that at least the following will be presented.

1. Disclosure of Lay Witnesses and Witness Statements (Rule 4-263)

There are three issues clustered within this topic that the Court may wish to consider together. Under current Rule 4-263, the State is required to disclose, without request:

(1) "*Brady* material" – material or information tending to negate or mitigate the guilt or punishment of the defendant, and

(2) relevant information regarding (i) searches, seizures, wiretaps, or eavesdropping, (ii) acquisition of statements made by the defendant to a State agent that the State intends to use at trial or hearing, and (iii) pretrial identification of the defendant by a State witness.

Upon request, the State is obliged to disclose:

(1) the names and addresses of persons the State intends to call as witnesses;

(2) a copy of all written or oral statements made by the defendant or a co-defendant to a State agent that the State intends to use at trial or hearing;

(3) Written reports and statements of experts consulted by the State, including the results of tests;

(4) Documents, tangible items, and computer-generated evidence that the State intends to use at trial or hearing; and

(5) Property obtained from or belonging to the defendant, whether or not the State intends to use it at trial or hearing.

The State is not required to disclose in discovery any written or oral statements made by its proposed witnesses, except to the extent that such statements may constitute "*Brady* material." Written statements of such witnesses must be disclosed as "*Jencks* material" after the witness has testified on direct examination, to the extent they are relevant to that testimony.

The defendant is required to appear at a lineup, be fingerprinted, pose for photographs, try on articles of clothing, permit the taking of specimens, and submit to physical or mental examination. The defense must also disclose written reports by experts the defense expects to call as witnesses, persons the defense expects to call as alibi witnesses, and computer-generated evidence. The defense is not required to disclose the names or addresses of any other lay witnesses, nor any statements

from such witnesses.

As noted in Appendix C, pp. 5-8, ABA Standard 11-2.1(a)(ii) would require the State to disclose, in discovery, the names, addresses, and written statements of all persons known to the State to have information concerning the offense charged. This is broader than the current Maryland Rule in two respects: (i) it embraces all persons known to have information regarding the offense, not just persons the State intends to call as witnesses; and (ii) it requires the disclosure, in discovery, of the written statements of all such persons. As a counterbalance to that expanded scope of State disclosure, and as noted in Appendix C, pp. 18-21, ABA Standard 11-2.2(a)(i) would require the defense to disclose the names, addresses, and written statements of all persons the defense intends to call as witnesses. This, too, is a significant expansion of what is now required of the defense.

The Rules Committee proposes something less than what the ABA Standards would require. It recommends limiting the scope of State disclosure of lay witnesses and witness statements (other than "*Brady* material") to the persons and written statements of persons the State intends to call as witnesses, not of all persons having knowledge of the offense, and it recommends that the defense be required to disclose (in addition to experts and alibi witnesses) the names and addresses (but not the statements) of witnesses to be called as character witnesses or in support of an insanity defense, but not *all* of its lay witnesses.

Both aspects of the Rules Committee's proposed

compromise are likely to be challenged. Defense counsel would prefer to have the State disclose the names and written statements of all persons known to the State to have information concerning the offense, not just those intended to be called as witnesses, but object to any requirement that the defense disclose the names of its prospective lay witnesses, other than those to be called as character witnesses or to support an alibi or insanity defense. Prosecutors object to having to disclose the names or statements of any persons other than those to be called as State witnesses and to *any* witness statements if the defense is not required to disclose the names of its lay witnesses.

Victims' rights advocates have expressed concern about any requirement to disclose statements made by victims to victim counselors employed by police departments or State's Attorneys. In some instances, the victims may reveal mental or emotional effects of the crime, occasionally in the context of discussion concerning the prospect of a claim for benefits under the Criminal Injuries Compensation program. Most of those statements made to victim counselors are oral ones, but the counselors often make notes of them, and the question arises whether those notes may be regarded as written statements of the victims. The Maryland Crime Victims Resource Center proposed a provision that would specifically exclude from disclosure statements that "relate to victim/witness assistance."

The Rules Committee did not adopt that recommendation. Its view with respect to this concern is that there is no requirement

that the counselors make written notes of oral statements by the victim. If no written notes are made of the victim's oral statement, it will not constitute a written statement of the victim/witness and will not need to be disclosed under the Committee's proposal.

The Rules Committee does not see a need for any specific exception for statements that "relate to victim/witness assistance." That is a very broad exception. The Committee notes as well that, if the victim makes any statement, written or oral, that would constitute "*Brady* material," it would have to be disclosed in any event and that, to the extent the statement would constitute a written statement of the victim/witness and is relevant to testimony to be given by the victim, it would have to be disclosed as "*Jencks* material" after the witness testified. To a large extent, the issue in this regard is one of timing, and the overall emphasis is on disclosing disclosable material earlier in the process.

The more substantial issues are those raised by the prosecutors and defense counsel. As noted in Appendix C, pp. 19-20, approximately 30 States have adopted the ABA approach of requiring the defense to disclose, in discovery, the names of persons it intends to call as witnesses. The ABA Standard and some of the States require as well the disclosure of written statements given by those prospective witnesses, and a few States require the defense to disclose the actual defenses it intends to raise at trial, even beyond alibi and insanity. The ABA Commentary makes clear that the witness-disclosure requirement

was the *quid pro quo* for requiring the prosecution to disclose not only the written statements of *its* lay witnesses but also the names and written statements of all persons known to the prosecution to have information regarding the offense.

Appendix F contains language that would add the witness-disclosure requirement in conformance with the ABA Standard. If the Court chooses to add that requirement, it may wish to consider expanding the State's requirement under proposed Rule 4-263 (d)(3) to conform to the ABA Standard of disclosing the names and addresses of all persons known to the State "to have information concerning the offense charged" and to identify the persons it intends to call as witnesses.

2. <u>Prior Convictions, Bad Acts of Witnesses</u>

Rule 4-263 (d)(6)(C) requires the disclosure by the State of prior convictions, pending charges, and probationary status that may be used to impeach any State witness, with the caveat that the State's Attorney is not required to investigate the criminal record of State witnesses unless the State's Attorney knows or has reason to believe that a witness has a criminal record. Some prosecutors have complained that this requirement is too burdensome and that, to the extent they obtain this information under the Criminal Justice Information System (CJIS), they are not allowed to divulge it to defense counsel. Defense counsel urge that the State is in a far better position to obtain this information than are they, as they do not have access to CJIS, and that the State *is* authorized to divulge it to

defense counsel.

The Rules Committee believes that prosecutors are not precluded by CJIS from divulging criminal history information to defense counsel. *See* COMAR 12.15.01.12B(2). To the extent this information is within the possession and control of the State's Attorney, the Rules Committee regards it as "*Brady* material" that must be disclosed for its impeachment value. The Committee does not believe that the due diligence mandate of Rule 4-263 (c)(1) requires the prosecutors to run record checks on all of its possible witnesses, however, but only on those whom the proscutor knows or has reason to believe have a criminal record. If the prosecutor has that level of knowledge, the Rules Committee does not believe that *Brady* would permit the prosecutor to remain wilfully ignorant of what a record check would reveal, especially since defense counsel do not have an equivalent ability to obtain that information.

At one point, some defense counsel urged that the State be required to run record checks on defense witnesses who may be disclosed to the prosecutor. That requirement exists with respect to the defendant and any co-defendant, but the Rules Committee does not believe that the State should be obliged to investigate and turn over information that would merely impeach a defense witness. Such an obligation could be unduly burdensome and productive of mischief on the part of defense counsel.

3. <u>Inconsistency Between Witness Statements</u>

Included in the proposal submitted with the 158th

Report was a Committee note which gave as an example of impeachment material the State would have to disclose "each statement made by a witness that is inconsistent with another statement made by the witness or with a statement made by another witness." Some prosecutors objected to that provision, which defense counsel believed desirable. The Rules Committee now proposes three changes. First, to the extent this information is required to be disclosed, the requirement should be in the Rule itself, not in a Committee note, and it has included an amended version of the requirement as Rule 4-263 (d)(6)(D). Second, because all written statements of witnesses in the possession or control of the State's Attorney must be disclosed under Rule 4-263 (d)(3), this provision need only apply to oral statements not otherwise memorialized that are inconsistent with another statement. If defense counsel is given all written statements of State witnesses, counsel can determine for itself whether there are inconsistencies. Finally, some prosecutors have expressed concern that the requirement, as stated in the previously proposed Committee note, could conceivably apply even to the most subtle and insignificant inconsistencies that easily and understandably might be overlooked and that, because of their insignificance, would not likely constitute impeachment material in any event. To address that concern, the Rules Committee proposes applying the disclosure requirement only where the oral statement is *materially* inconsistent with another statement. Defense counsel may object to that limitation.

4. <u>Medical, Psychiatric, Addictive Condition of State Witness</u>

In the Committee note attached to the 158th Report, the Committee gave as an example of impeachment material that had to be disclosed by the State "the medical or psychiatric condition of a witness that may impair his or her ability to testify truthfully or accurately." Prosecutors and victim rights advocates objected to that proposal. This issue is discussed in Appendix C, pp. 11-13. The Rules Committee proposes four changes. First, as with the other matters included in the Committee note, the requirement has been moved to the text of the Rule, as subsection (d)(6)(E). Second, by virtue of the lead-in to subsection (d)(6), the Committee has clarified that the requirement applies only to State witnesses. Third, for the same reasons that justify disclosure of medical or psychiatric conditions that may impair the ability of a State witness to testify truthfully or accurately, the Committee proposes adding addiction to the list. Finally, and most important, the Rules Committee has added the caveat that the State is not obliged by the due diligence requirement to inquire into a witness's medical, psychiatric, or addictive condition unless the prosecutor has information that would reasonably lead to a belief that an inquiry would reveal a condition that may impair the witness's ability to testify truthfully or accurately. As with the case of inconsistent statements, if the condition reaches that level of severity, it would likely constitute "*Brady* material" and if prosecutors have that level of knowledge, they would not be permitted to remain wilfully ignorant of what an

inquiry would reveal.

APPENDIX F

Alternate Language
to be added to Rule 4-263 (e)

Without the necessity of a request, the defense shall provide to the State's Attorney:

(1) Defense Witnesses

The name and, except when the witness declines permission, the address of each defense witness other than the defendant, together with all written statements of each such witness that relate to the subject matter of the testimony of that witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial.

PROPOSED REVISED RULE 4-262, SHOWING CHANGES FROM CURRENT RULE 4-262

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

Rule 4-262. DISCOVERY IN DISTRICT COURT

(a) ~~Scope~~ Applicability

~~Discovery~~ This Rule governs discovery and inspection ~~pursuant to this Rule is available~~ in the District Court. Discovery is available in the District Court in actions ~~for offenses~~ that are punishable by imprisonment.~~, and shall be as follows:~~

(b) Definitions

In this Rule, the following definitions apply:

(1) Generally

The terms "defense," "defense witness," "oral statement," and "State's witness," have the meanings stated in Rule 4-263 (b).

Cross reference: For the definition of "State's Attorney," see Rule 4-102 (k).

(2) Written Statement

"Written statement" of a person:

(A) includes a statement in writing that is made, signed, or adopted by that person;

(B) includes a statement contained in a police or investigative report; but

(C) does not include attorney work product.

Committee note: The language of Rule 4-263 (b)(5) is not included in the definition of "written statement" in Rule 4-262.

~~(1) The State's Attorney shall furnish to the defendant any material or information that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged.~~

~~(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.~~

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

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

(1) Due Diligence

The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.

(2) Scope of Obligations

The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are 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~~ of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

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

(d) Disclosure by the State's Attorney

(1) Without Request

Without the necessity of a request, the State's Attorney shall provide to the defense all material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged and all material or information in any form, whether or not admissible, that tends to impeach a State's witness.

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); *U.S. v. Agurs*, 427 U.S. 97 (1976); Thomas v. State, 372 Md. 342 (2002); *Goldsmith v. State*, 337 Md. 112 (1995); and *Lyba v. State*, 321 Md. 564 (1991).

(2) On Request

On request of the defense, the State's Attorney shall provide to the defense:

(A) Statements of Defendant and Co-defendant

All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(B) State's Witnesses

The name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, together with all written statements of the person that relate to the offense charged;

(C) Searches, Seizures, Surveillance, and Pretrial Identification

All relevant material or information regarding:

(i) specific searches and seizures, eavesdropping, or electronic surveillance including wiretaps; and

(ii) pretrial identification of the defendant by a State's witness;

(D) Reports or Statements of Experts

As to each State's witness the State's Attorney intends to call to testify as an expert witness other than at a preliminary hearing:

(i) the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the expert's findings and opinions, and a summary of the grounds for

each opinion;

(ii) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(iii) the substance of any oral report and conclusion by the expert;

(E) Evidence for Use at Trial

The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial; and

(F) Property of the Defendant

The opportunity to inspect, copy, and photograph all items obtained from or belonging to the defendant, whether or not the State's Attorney intends to use the item at a hearing or at trial.

(e) Disclosure by Defense

On request of the State's Attorney, the defense shall provide to the State's Attorney:

(1) Reports or Statements of Experts

As to each defense witness the defense intends to call to testify as an expert witness:

(A) the expert's name and address, 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;

(B) the opportunity to inspect and copy all written reports made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert; and

(2) Documents, Computer-generated Evidence, and Other Things

The opportunity 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 defense intends to use at a hearing or at trial.

(f) Person of the Defendant

(1) On Request

On request of the State's Attorney that includes reasonable notice of the time and place, the defendant shall appear for the purpose of:

(A) providing fingerprints, photographs, handwriting exemplars, or voice exemplars;

(B) appearing, moving, or speaking for identification in a lineup; or

(C) trying on clothing or other articles.

(2) On Motion

On motion filed by the State's Attorney, with reasonable notice to the defense, the court, for good cause shown, shall

order the defendant to appear and (A) permit the taking of buccal samples, samples of other materials of the body, or specimens of blood, urine, saliva, breath, hair, nails, or material under the nails or (B) submit to a reasonable physical or mental examination.

(g) Matters Not Discoverable

(1) By any Party

Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product or (B) any other material or information if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

(2) By the Defense

The State's Attorney is not required to disclose the identity of a confidential informant unless the State's Attorney intends to call the informant as a State's witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant.

(h) Continuing Duty to Disclose

Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the

response promptly.

~~(b)~~ (i) 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.

(j) Material Not to be Filed with the Court

Except as otherwise provided in these Rules or by order of court, discovery material shall not be 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.

(k) Retention; Inspection of Original

The party generating discovery material shall retain the original until the expiration of any sentence imposed on the defendant and, on request, shall make the original available for inspection and copying by the other party.

(l) Protective Orders

On motion of a party or a person from whom discovery is sought, the court, for good cause shown, may order that specified disclosures be denied or restricted in any manner that justice requires.

(m) Failure to Comply with Discovery Obligation

The failure of a party to comply with a discovery

obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Source: This Rule is new.

PROPOSED REVISED RULE 4-263, SHOWING CHANGES FROM CURRENT RULE 4-263

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

Rule 4-263. DISCOVERY IN CIRCUIT COURT

(a) Applicability

This Rule governs ~~Discovery~~ discovery and inspection in a circuit court ~~shall be as follows:~~.

(b) Definitions

In this Rule, the following definitions apply:

(1) Defense

"Defense" means an attorney for the defendant or a defendant who is acting without an attorney.

(2) Defense Witness

"Defense witness" means a witness whom the defense intends to call at a hearing or at trial.

(3) Oral Statement

"Oral statement" of a person means the substance of a statement of any kind by that person, whether or not reflected in an existing writing or recording.

(4) State's Witness

"State's witness" means a witness whom the State's Attorney intends to call at a hearing or at trial.

Cross reference: For the definition of "State's Attorney," see Rule 4-102 (k).

(5) Written Statement

"Written statement" of a person:

(A) includes a statement in writing that is made, signed, or adopted by that person;

(B) includes the substance of a statement of any kind made by that person that is embodied or summarized in a writing or recording, whether or not signed or adopted by the person;

(C) includes a statement contained in a police or investigative report; but

(D) does not include attorney work product.

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

(1) Due Diligence

The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.

(2) Scope of Obligations

The obligations of the State's Attorney ~~under this Rule~~ and the defense extend to material and information that must be disclosed under this Rule and that are 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~~ the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the

particular case.

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

~~(a)~~ (d) Disclosure ~~Without Request~~ by the State's Attorney

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

(1) Statements

All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(2) Criminal Record

Prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant;

(3) State's Witnesses

The name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, together with all written statements of the person that relate to the offense charged;

(4) Prior Conduct

All evidence of other crimes, wrongs, or acts committed by the defendant that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404 (b);

~~(1)~~ (5) Exculpatory Information

~~Any~~ All material or information ~~tending to~~ in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment ~~of the defendant~~ as to the offense charged;

(6) Impeachment Information

All material or information in any form, whether or not admissible, that tends to impeach a State's witness, including:

(A) evidence of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608 (b);

(B) a relationship between the State's Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness;

(C) prior criminal convictions, pending charges, or probationary status that may be used to impeach the witness, but the State's Attorney is not required to investigate the criminal record of the witness unless the State's Attorney knows or has reason to believe that the witness has a criminal record;

(D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another statement made by the witness or with a statement made by another witness;

(E) a medical or psychiatric condition or addiction of the witness that may impair the witness's ability to testify truthfully or accurately, but the State's Attorney is not

required to inquire into a witness's medical, psychiatric, or addiction history or status unless the State's Attorney has information that reasonably would lead to a belief that an inquiry would result in discovering a condition that may impair the witness's ability to testify truthfully or accurately;

(F) the fact that the witness has taken but did not pass a polygraph examination; and

(G) the failure of the witness to identify the defendant or a co-defendant;

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); *U.S. v. Agurs*, 427 U.S. 97 (1976); Thomas v. State, 372 Md. 342 (2002); *Goldsmith v. State*, 337 Md. 112 (1995); and *Lyba v. State*, 321 Md. 564 (1991).

~~(2)~~ (7) Searches, Seizures, Surveillance, and Pretrial Identification

~~Any~~ All relevant material or information regarding:

(A) specific searches and seizures, ~~wire taps or~~ eavesdropping, and electronic surveillance including wiretaps; and

~~(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)~~ (B) pretrial identification of the defendant by a State's witness ~~for the State.~~;

~~(b) Disclosure Upon Request~~

~~Upon request of the defendant, the State's Attorney shall:~~

~~(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) 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, 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) Statements of Codefendants~~

~~As to all statements made by a codefendant to a State agent which the State intends to use at a joint hearing or trial, 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)~~ (8) Reports or Statements of Experts

~~Produce and permit the defendant to inspect and copy all written reports or statements made in~~ As to each expert consulted by the State's Attorney in connection with the action: ~~by each expert consulted by the State,~~

(A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports

or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison~~,~~; and

(C) ~~furnish the defendant with~~ the substance of any ~~such~~ oral report and conclusion by the expert;

~~(5)~~ (9) Evidence for Use at Trial

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

~~(6)~~ (10) Property of the Defendant

~~Produce and permit the defendant~~ The opportunity to inspect, copy, and photograph ~~any item~~ all items obtained from or belonging to the defendant, whether or not the ~~State~~ State's Attorney intends to use the item at ~~the~~ a hearing or at trial.

~~(c) 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) 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~~

~~Produce and permit the State to inspect and copy all written reports made in connection with the action by each 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) Disclosure by Defense

Without the necessity of a request, the defense shall provide to the State's Attorney:

(1) Reports or Statements of Experts

As to each defense witness the defense intends to call to testify as an expert witness:

(A) the expert's name and address, 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;

(B) the opportunity to inspect and copy all written reports made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(2) Character Witnesses

As to each defense witness the defense intends to call to testify as to the defendant's veracity or other relevant character trait, the name and, except when the witness declines permission, the address of that witness;

(3) Alibi Witnesses

If the State's Attorney has designated the time, place, and date of the alleged offense, the name and, except when the witness declines permission, the address of each person other than the defendant whom the defense intends to call as a witness to show that the defendant was not present at the time, place, or date designated by the State's Attorney;

(4) Insanity Defense

Notice of any intention to rely on a defense of not criminally responsible by reason of insanity, and the name and, except when the witness declines permission, the address of each defense witness other than the defendant in support of that defense; and

Committee note: The address of an expert witness must be provided. See subsection (e)(1)(A) of this Rule.

(5) Documents, Computer-generated Evidence, and Other Things

The opportunity 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 defense intends to use at a hearing or at trial.

(f) Person of the Defendant

(1) On Request

On request of the State's Attorney that includes reasonable notice of the time and place, the defendant shall appear for the purpose of:

(A) providing fingerprints, photographs, handwriting exemplars, or voice exemplars;

(B) appearing, moving, or speaking for identification in a lineup; or

(C) trying on clothing or other articles.

(2) On Motion

On motion filed by the State's Attorney, with reasonable notice to the defense, the court, for good cause shown, shall order the defendant to appear and (A) permit the taking of buccal samples, samples of other materials of the body, or specimens of blood, urine, saliva, breath, hair, nails, or material under the nails or (B) submit to a reasonable physical or mental examination.

(g) Matters Not Discoverable

(1) By any Party

Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product or (B) any other material or information if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

(2) By the Defense

The State's Attorney is not required to disclose the identity of a confidential informant unless the State's Attorney intends to call the informant as a State's witness or unless the failure to disclose the informant's identity would infringe a

constitutional right of the defendant.

~~(e)~~ (h) Time for Discovery

Unless the court orders otherwise:

(1) ~~The~~ the State's Attorney shall make disclosure pursuant to section ~~(a)~~ (d) 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, and~~.~~ ~~Any request by the defendant for discovery pursuant to section (b) of this Rule, and any request by the State for discovery pursuant to section (d) 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.~~

(2) the defense shall make disclosure pursuant to section (e) of this Rule no later than 30 days before the first scheduled trial date.

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

(1) Time

~~If discovery is not furnished as requested, a~~ A motion to compel discovery based on the failure to provide discovery within the time required by section (h) of this Rule ~~may~~ shall be filed within ten days after ~~receipt of inadequate discovery or after discovery should have been received, whichever is earlier~~ the date the discovery was due. A motion to compel based on inadequate discovery shall be filed within ten days after the date the discovery was received.

(2) Content

~~The~~ A motion shall specifically describe the ~~requested matters that have not been furnished~~ information or material that has not been provided.

(3) Response

A response ~~to the motion~~ may be filed within five days after service of the motion.

(4) Certificate

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)~~ (j) Continuing Duty to Disclose

Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

(k) Manner of Providing Discovery; Material Not to be Filed with Court

(1) By Agreement

Discovery may be accomplished in any manner mutually agreeable to the parties. The parties shall file with the court a statement of their agreement.

(2) If No Agreement

In the absence of an agreement, the party generating the discovery material shall (A) serve the discovery material on the other party and (B) promptly file with the court a notice that (i) reasonably identifies the information provided and (ii) states the date and manner of service. On request, the party generating the discovery material shall make the original available for inspection and copying by the other party.

(3) Not to be Filed with the Court

Except as otherwise provided in these Rules or by order of court, discovery material shall not be 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.

(l) Retention

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

~~(i)~~ (m) Protective Orders

(1) Generally

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

On motion of a party or a person from whom discovery is sought, the court, for good cause shown, may order that specified disclosures be denied or restricted in any manner that justice requires.

(2) In Camera Proceedings

On request of a party or a person from whom discovery is sought, the court may permit any showing of cause for denial or restriction of disclosures to be made in camera. A record shall be made of both in court and in camera proceedings. Upon the entry of an order granting relief in an in camera proceeding, all confidential portions of the in camera portion of the proceeding shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

(n) 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. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Source: ~~This Rule is derived as follows:~~
~~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 (g) is derived from former Rule 741 a 3.~~
~~Section (h) is derived from former Rule 741 f.~~
~~Section (i) is derived from former Rule 741 g.~~
This Rule is new and is derived in part from former Rule 741 and the 1998 version of former Rule 4-263.