COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on June 19, 2009.

Members present:

Hon. Alan M. Wilner, Chair
Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. Ellen L. Hollander
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Sen. Norman R. Stone, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Brittany L. King, Rules Committee Intern
Sharon R. Holback, Esq., Office of the State's Attorney for Baltimore City
Kenneth J. MacFadyen, Esq.
Jeffrey Nadel, Esq.
Jeffrey B. Fisher, Esq.
Brian L. Zavin, Esq., Office of the Public Defender
Mary Ann Burkhart, Esq., Office of the State's Attorney for Baltimore City
Michele M. Nethercott, Esq., Office of the Public Defender
Scott D. Shellenberger, Esq., Office of the State's Attorney for Baltimore County
Lauren Marini, Esq.
John Burson, Esq.
Laura O'Sullivan, Esq.
Bedford T. Bentley, Esq., State Board of Law Examiners

The Chair convened the meeting. He welcomed the Honorable

W. Michel Pierson of the Circuit Court of Baltimore City, the newest member of the Committee. The Chair announced that the past Tuesday, the Court of Appeals had held a hearing on the 161st Report, which pertained to conforming the Foreclosure Rules to the statutes enacted by the General Assembly in 2009. The Supplement to that Report was sent about a week later to conform the Rules to federal legislation that President Obama signed on May 20, 2009. The Foreclosure Rules are now in effect. The Chair added that he expects that there will be more legislation in 2010.

The Chair announced that Mr. Brault was included in the list of superlawyers in Washington, D.C. The Chair congratulated Mr. Brault as did the Committee.

Agenda Item 1. Reconsideration of a proposed Rule change pertaining to capital cases - Amendments to Rule 4-343 (Sentencing - Procedure in Capital Cases)

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Mr. Karceski presented two versions of Rule 4-343, Sentencing - Procedure in Capital Cases, for the Committee's consideration.

**ALTERNATIVE #1**
**[Amend current Rule 4-343, without bifurcation of sentencing proceeding]**

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-343 by adding to the form set forth in section (h) a new "Preliminary" section containing five issues for determination, by adding a new paragraph to Section VI of the form referring to the new "Preliminary" section, and by deleting

the last sentence of section (i), as follows:

Rule 4-343. SENTENCING - PROCEDURE IN CAPITAL CASES

. . .

(h) Form of Written Findings and Determinations

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

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

Preliminary

[Submit the following only to the extent these issues are presented and remain for determination by the sentencing jury.]

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

Statement 1. The State has produced biological evidence or DNA evidence that links the defendant to the act of murder.

_____ _____
proved not proved

Statement 2. The State has produced a videotaped, voluntary interrogation and confession of the defendant to the murder.

_____ _____
proved not proved

Statement 3. The State has produced a video recording that conclusively links the defendant to the murder.

_____ _____
proved not proved

(If one or more of the above Statements are marked “proved,” proceed to Statements 4 and 5. If Statements 1, 2, and 3 are all marked “not proved,” proceed to Section VI and enter “Imprisonment for Life.”)

Statement 4. At the time of the murder, the defendant was 18 years of age or older.

_____ _____
proved not proved

Statement 5. The State has not relied solely on evidence provided by eyewitnesses.

_____ _____
proved not proved

(If Statements 4 and 5 are BOTH marked “proved,” proceed to Section I. If one or both Statements are marked “not proved,” proceed to Section VI and enter “Imprisonment for Life.”)

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proved" has been proved BEYOND A

REASONABLE DOUBT and that each of those statements marked "not proved" has not been proved BEYOND A REASONABLE DOUBT.

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

_____ proved _____ not proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

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

Section II

Based upon the evidence, we unanimously find that the

following statement, if marked "proved," has been proved BY A PREPONDERANCE OF THE EVIDENCE or that, if marked "not proved," it has not been proved BY A PREPONDERANCE OF THE EVIDENCE.

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

_____ proved _____ not proved

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

Section III

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

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

_____ proved _____ not proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

5. The victim was a child abducted in violation of Code, Criminal Law Article, §3-503 (a)(1).

_____ proved _____ not proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

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

| _____ | _____ |
|---|---|
| proved | not proved |

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

| _____ | _____ |
|---|---|
| proved | not proved |

10. The defendant committed the murder while committing or attempting to commit a carjacking, armed carjacking, robbery, under Code, Criminal Law Article, §3-402 or §3-403, arson in the first degree, rape in the first degree, or sexual offense in the first degree.

| _____ | _____ |
|---|---|
| proved | not proved |

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

Section IV

From our consideration of the facts and circumstances of this case, we make the following determinations as to mitigating circumstances:

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

(As used in the preceding paragraph, "crime of violence" means abduction, arson in the first degree, carjacking, armed

carjacking, escape in the first degree, kidnapping, mayhem, murder, robbery under Code, Criminal Law Article, §3-402 or §3-403, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial

as to constitute a complete defense to the prosecution.

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not

that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

8. (a) We unanimously find that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

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

Section V

Each individual juror has weighed the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any

mitigating circumstance found by that individual juror to exist.

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

_____ yes _____ no

Section VI

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

a. If Statements 1, 2, and 3 in the “Preliminary” Section are all marked “not proved,” enter “Imprisonment for Life.”

b. If Statement 4 in the “Preliminary” Section is marked “not proved,” enter “Imprisonment for Life.”

c. If Statement 5 in the “Preliminary” Section is marked “not proved,” enter “Imprisonment for Life.”

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

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

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

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

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

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

We unanimously determine the sentence to be _____.

Section VII

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

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

| | yes | no |
|---|---|---|

| | |
|---|---|
| _____ Foreperson | _____ Juror 7 |
| _____ Juror 2 | _____ Juror 8 |
| _____ Juror 3 | _____ Juror 9 |
| _____ Juror 4 | _____ Juror 10 |
| _____ Juror 5 | _____ Juror 11 |
| _____ Juror 6 | _____ Juror 12 |

or, _____ JUDGE

(i) Deletions from Form

Section II of the form set forth in section (h) of this

Rule shall not be submitted to the jury unless the issue of mental retardation is generated by the evidence. Unless the defendant requests otherwise, Section III of the form shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Criminal Law Article, §2-202 (a) of its intention to seek a sentence of death. ~~Section VII of the form shall not be submitted to the jury unless the State has given the notice required under Code, Criminal Law Article, §2-203 of its intention to seek a sentence of imprisonment for life without the possibility of parole.~~

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

. . .

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

> Amendments to Rule 4-343 are proposed to conform the Rule to Chapter 186, Laws of 2009 (SB 279), which precludes a sentence of death unless the State did not rely solely on evidence provided by eyewitnesses and there is (1) biological evidence or DNA evidence that links the defendant to the act of murder, (2) a videotaped, voluntary interrogation and confession of the defendant to the murder, or (3) a video recording that conclusively links the defendant to the murder.
>
> Because the issues are threshold ones, a new section is added to the beginning of the Findings and Sentencing Determination form in section (h), requiring determination as to whether any of the conditions for eligibility for the death penalty have been proved. Imposition of the death penalty also is prohibited if the defendant was under 18 years of age at the time of the murder. A

determination as to that issue also is added to the new section. References to this new "Preliminary" section are added to Section VI.

The statute provides that if the State failed to present the requisite evidence and had filed a notice under Code, Criminal Law Article, §2-202 that it intended to seek the death penalty, that notice is considered to have been withdrawn, and it is deemed that the State filed the proper notice under Code, Criminal Law Article, §2-203 to seek a sentence of life imprisonment without the possibility of parole. Therefore, the last sentence of section (i), which requires the State to give §2-203 notice before Section VII can be submitted to the jury, is deleted.

**ALTERNATIVE #2**

**[Rule 4-343 - Bifurcated Sentencing Proceeding]**

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

DELETE current Rule 4-343 and ADD new Rule 4-343, as follows:

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

(a) Applicability

This Rule applies when:

(1) a sentence of death is sought under Code, Criminal Law Article, §2-303; and

(2) the defendant has been found guilty of murder in the first degree, the State has given the notice required under Code, Criminal Law Article, §2-202 (a), and the defendant may be subject to a sentence of death.

(b) Statutory Sentencing Procedure; Bifurcation of Proceeding

A sentencing proceeding, separate from the proceeding at which the defendant's guilt was adjudicated, shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Criminal Law Article, §2-303 and this Rule. Upon recordation of the verdicts returned by the jury or judge, the court shall bifurcate the sentencing proceeding into two phases. A Phase I Findings form required by section (h) of this Rule and, if necessary, a separate Phase II Findings and Sentencing Determination form required by section (i) of this Rule shall be completed with respect to each death for which the defendant is subject to a sentence of death.

(c) Presentence Disclosures by the State's Attorney

If not previously disclosed pursuant to Rule 4-263, the State’s Attorney shall disclose to the defendant or counsel, sufficiently in advance of Phase I of the sentencing proceeding to afford the defendant a reasonable opportunity to investigate, any information that the State expects to present to the court or jury for consideration in sentencing. Upon request by the defendant, the court may postpone the sentencing proceeding if the court finds that the defendant reasonably needs additional time to investigate the State’s disclosure.

(d) Reports of Defendant's Experts

Upon request by the State after the defendant has been found guilty of murder in the first degree, the defendant shall produce and permit the State to inspect and copy all written reports made in connection with the

action by each expert the defendant expects to call as a witness at the sentencing proceeding, including the results of any physical or mental examination, scientific test, experiment, or comparison, and shall furnish to the State the substance of any such oral report or conclusion. The defendant shall provide this information to the State sufficiently in advance of Phase I of the sentencing proceeding to afford the State a reasonable opportunity to investigate the information. Upon request by the State, if the court finds that the information was not timely provided, the court may postpone sentencing.

(e) Judge

Except as provided in Rule 4-361, the judge who presided at trial shall preside at both phases of the sentencing proceeding.

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

(1) Notice and Determination

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

(2) Right to Address the Court or Jury

The right of a victim's representative to address the court or jury during a sentencing proceeding under this Rule is governed by Code, Criminal Procedure Article, §§11-403 and 11-404. Any exercise of that right shall occur during Phase II of the sentencing proceeding.

Committee note: Code, Criminal Procedure Article, §11-404 permits the court (1) to hold a hearing outside the presence of the jury to determine whether a victim's representative may present an oral statement to the jury and (2) to limit any unduly prejudicial portion of the proposed

statement. See *Payne v. Tennessee*, 501 U.S. 808 (1991), generally permitting the family members of a victim to provide information concerning the individuality of the victim and the impact of the crime on the victim's survivors to the extent that the presentation does not offend the Due Process Clause of the Fourteenth Amendment, but leaving undisturbed a prohibition against information concerning the family member's characterization of and opinions about the crime, the defendant, and the appropriate sentence.

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

(g) Allocution

Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement, and shall afford the State the opportunity to respond. If the defendant elects to allocute during the sentencing proceeding, the statements and response shall be made during Phase II of that proceeding.

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

(h) Phase I of Sentencing Proceeding

(1) Issues

In Phase I of the Sentencing proceeding, only the following issues, to the extent that they are raised and remain for determination, shall be presented to the sentencing jury or judge for determination by special verdict:

(A) whether at the time of the murder

the defendant was 18 years of age or older;

(B) whether at the time of the murder the defendant was not mentally retarded, as defined in Code, Criminal Law Article, §2-202 (b);

(C) whether the State has presented to the jury or judge, sitting as the trier of fact at the trial on guilt or innocence or at the sentencing proceeding, biological evidence or DNA evidence that links the defendant to the act of murder;

(D) whether the State has presented to the jury or judge, sitting as the trier of fact at the trial on guilt or innocence or at the sentencing proceeding, a videotaped, voluntary interrogation and confession of the defendant to the murder;

(E) whether the State has presented to the jury or judge, sitting as the trier of fact at the trial on guilt or innocence or at the sentencing proceeding, a video recording that conclusively links the defendant to the murder;

(F) whether the State, at the trial on guilt or innocence or at the sentencing proceeding, has relied solely on evidence provided by eyewitnesses;

(G) whether the defendant was a principal in the first degree to the murder;

(H) whether the defendant engaged or employed another person to commit the murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration; and

(I) Whether the victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons, and the defendant was a principal in the second degree who: (i) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (ii) was a major participant in the murder; and (iii) was

actually present at the time and place of the murder.

(2) Evidence, Instructions, and Argument

The court shall limit evidence, instructions, and argument in the Phase I proceeding to the issues submitted under subsection (h)(1) of this Rule.

(3) Findings and Determinations

The findings and determinations of the jury or judge in the Phase I proceeding shall be made in the following form, except that the requirement of unanimity applies only if the issues are submitted to a jury:

(CAPTION)

PHASE I FINDINGS

VICTIM: [Name of murder victim]

Section I

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

1. At the time of the murder, the defendant was 18 years of age or older.

_____ proved _____ not proved

2. The State has produced biological evidence or DNA evidence that links the defendant to the act of murder.

_____ proved _____ not proved

3. The State has produced a videotaped, voluntary interrogation and confession of the defendant to the murder.

_____ proved _____ not proved

4. The State has produced a video recording that conclusively links the defendant to the murder.

_____ proved _____ not proved

5. The State has not relied solely on evidence provided by eyewitnesses.

_____ proved _____ not proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

8. The victim was a law enforcement officer who, while in the performance of the officer's duties, was murdered by one or more persons, and the defendant was a principal in the second degree who: (A) willfully, deliberately, and with premeditation intended the death of the law enforcement officer; (B) was a

major participant in the murder; and (C) was actually present at the time and place of the murder.

_____ proved _____ not proved

Section II

Based upon the evidence, we unanimously find that the following statement, if marked “proved, has been proved BY A PREPONDERANCE OF THE EVIDENCE or that, if marked “not proved,” it has not been proved BY A PREPONDERANCE OF THE EVIDENCE:

9. At the time of the murder, the defendant was mentally retarded as defined in Code, Criminal Law Article, §2-202 (b).

_____ proved _____ not proved

| | |
|---|---|
| _____ Foreperson | _____ Juror 7 |
| _____ Juror 2 | _____ Juror 8 |
| _____ Juror 3 | _____ Juror 9 |
| _____ Juror 4 | _____ Juror 10 |
| _____ Juror 5 | _____ Juror 11 |
| _____ Juror 6 | _____ Juror 12 |

or,

_____
JUDGE

(4) Entry of Findings

If the Phase I findings were made by a jury, the written findings shall be returned to the court and entered as special verdicts. If the findings were made by a judge, they shall be entered in the record.

(i) Phase II of Sentencing Proceeding

(1) Findings and Sentencing Determinations

(A) In Phase II, subject to the deletions permitted or required by section (j) of this Rule, the sentencing jury or judge shall complete the entire Phase II Findings and Sentencing Determination form set forth in this section if on the Phase I Findings form:

(i) the statement numbered 1, if submitted to the sentencing authority, was marked “proved;”

(ii) at least one of the statements numbered 2, 3, or 4 was marked “proved;”

(iii) the statement numbered 5 was marked “proved;”

(iv) at least one of the statements numbered 6, 7, or 8 was marked “proved;” and

(v) the statement numbered 9, if answered, was marked “not proved.”

(B) In all other cases, if the judge is the sentencing authority, the judge shall enter a sentence of “Imprisonment for Life” and determine whether the imprisonment shall be without the possibility of parole. If the jury is the sentencing authority, the judge shall instruct the jury to enter a sentence of

“Imprisonment for Life,” and to complete only Section V of the Findings and Sentencing Determination form.

(2) Form of Written Phase II Findings and Determinations

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

(CAPTION)

PHASE II

FINDINGS AND SENTENCING DETERMINATION

VICTIM: [Name of murder victim]

Section I
(Aggravating Circumstances)

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

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

_____ proved _____ not proved

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

_____ proved _____ not

proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

5. The victim was a child abducted in violation of Code, Criminal Law Article, §3-503 (a)(1).

_____ proved _____ not proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

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

_____ proved _____ not proved

10. The defendant committed the murder while committing or attempting to commit a carjacking, armed carjacking, robbery, under Code, Criminal Law Article, §3-402 or §3-403, arson in the first degree, rape in the first degree, or sexual offense in the first degree.

_____ proved _____ not proved

(If one or more of the above are marked "proved," complete Section II.)

(If all of the above are marked "not proved," do not complete Sections II and III but proceed to Section IV, enter "Imprisonment for Life," and complete Section V)

## Section II
## (Mitigating Circumstances)

From our consideration of the facts and circumstances of this case, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of

a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation before judgment for a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson in the first degree, carjacking, armed carjacking, escape in the first degree, kidnapping, mayhem, murder, robbery under Code, Criminal Law Article, §3-402 or §3-403, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more

likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more

likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

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

(Mark only one.)

[ ] (a) We unanimously find that it is more likely than not that the above circumstance exists.

[ ] (b) We unanimously find that it is more likely than not that the above circumstance does not exist.

[ ] (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find that it is more likely than not that the above circumstance exists.

8. (a) We unanimously find that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find that it is more likely than not that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary)

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

Section III
(Weighing of Aggravating and Mitigating Circumstances)

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

We unanimously find that the State has proved BY A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proved" in Section I outweigh the mitigating circumstances in Section II.

_____ yes _____ no

Section IV
(Determination of Sentence of Death or Imprisonment for Life)

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

1. If, based upon the special verdicts entered in Phase I, the court finds or instructs the jury to enter “Imprisonment for Life,” enter “Imprisonment for Life.”

2. If all of the answers in Section I are marked "not proved," enter "Imprisonment for Life."

3. If Section II was completed and the judge, if sitting as the sentencing body, or the jury unanimously determined that no mitigating circumstance exists, enter "Death."

4. If Section III was completed and marked "no," enter "Imprisonment for Life."

5. If Section III was completed and marked "yes," enter "Death."

We unanimously determine the sentence to be _____.

Section V
(Parole Eligibility)

If "Imprisonment for Life" is entered in Section IV or if the judge has instructed you that the defendant's sentence is determined to be "Imprisonment for Life," answer the following question:

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

_____ yes _____ no

| | |
|---|---|
| _____ | _____ |
| Foreperson | Juror 7 |
| _____ | _____ |
| Juror 2 | Juror 8 |
| _____ | _____ |
| Juror 3 | Juror 9 |
| _____ | _____ |
| Juror 4 | Juror 10 |
| _____ | _____ |
| Juror 5 | Juror 11 |

_____ _____

Juror 6 Juror 12

or, _____

JUDGE

(j) Deletions from Phase II Form

Unless the defendant requests otherwise, Section II of the Phase II form shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Criminal Law Article, §2-202 (a) of its intention to seek a sentence of death.

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

(k) Advice of the Judge

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

Cross reference: Rule 8-306.

(l) Report of Judge

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

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant

A. Date of Birth

B. Sex

C. Race

D. Address

E. Length of Time in Community

F. Reputation in Community

G. Family Situation and Background

1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)

2. Family history (describe family history including pertinent data about parents and siblings)

H. Education

I. Work Record

J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)

K. Military History

L. Pertinent Physical or Mental Characteristics or History

M. Other Significant Data About Defendant

II. Data Concerning Offense

A. Briefly describe facts of offense (include time, place,

and manner of death; weapon, if any; other participants and nature of participation)

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

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

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

1. If so, describe relationship.

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

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

E. Data Concerning Victim

1. Name

2. Date of Birth

3. Sex

4. Race

5. Length of time in community

6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:

Not guilty .....; guilty .....; not criminally responsible .....

B. Mode of Trial:

Court ..... Jury .....

If there was a jury trial, did defendant challenge the

jury selection or composition? If so, explain.

C. Counsel

1. Name

2. Address

3. Appointed or retained

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

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

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

IV. Data Concerning Sentencing Proceeding

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

B. Was the proceeding conducted

before same judge as trial? .....

before same jury? .....

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

C. Counsel - If counsel at sentencing was different from

trial counsel, give information requested in III C above.

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

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

F. Sentence imposed: Imprisonment for life

Death

Imprisonment for life without the possibility of parole

V. Chronology

Date of Offense

Arrest

Charge

Notification of intention to seek penalty of death

Trial (guilt/innocence) - began and ended

Post-trial Motions Disposed of

Sentencing Proceeding - began and ended

Sentence Imposed

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

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

.....
Judge

CERTIFICATION

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

.....
Judge

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

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

Source: This Rule is derived in part from the 2008 version of former Rule 4-343 and is in part new.

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

> The proposed revision of Rule 4-343 provides for a bifurcated sentencing procedure in capital cases.
>
> In Phase I, the sentencing jury or judge makes the findings necessary to determine whether the technical requirements of eligibility for the death penalty have been met.
>
> In Phase II, the sentencing jury or judge finds and weighs aggravating and mitigating circumstances and determines whether the sentence is for "imprisonment for life" or "death." Also in Phase II, if

> "imprisonment for life" is the sentence, whether as a result of the Phase I determinations or as a result of the Phase II process, the sentencing jury or judge then determines whether "imprisonment for life" is with or without the possibility of parole.

Mr. Karceski explained that the proposed changes to the two versions of Rule 4-343 are as a result of Chapter 186, Laws of 2009 (SB 279). The Rule was discussed at the May, 2009 Rules Committee meeting. The bill restricts the death penalty to situations where the State is able to present biological evidence or DNA evidence that links the defendant to the act of murder; a videotaped, voluntary interrogation and confession of the defendant to the murder; or a video recording that conclusively links the defendant to the murder. The bill also prohibits the State from seeking the death penalty in situations where the State relies solely on evidence provided by eyewitness testimony.

Mr. Karceski observed that there are two ways that the Subcommittee has approached conforming the Rule to the statute. One is Alternative #1, which amends current Rule 4-343. The second, Alternative #2, bifurcates the process. Alternative #1 adds a new section (h) to the current Rule. It also adds a new paragraph to Section VI of the Rule and deletes a portion of section (i). In a general sense, for the death penalty to apply, there has to be a first degree murder, and a principal in the first degree. Code, Criminal Law Article, §2-303 provides an exception to this. The State has to present one of the three forms of evidence listed in the statute. The death penalty is

not available if the State relies solely on eyewitness testimony.

Mr. Karceski said that the changes begin at section (h), because this is the point at which there will or will not be a death penalty case. Section (h) requires that one of the three elements listed in the statute must be proved beyond a reasonable doubt. If the jury finds that any of these elements has not been proved beyond a reasonable doubt, the jury is instructed to go to Section VI of the form. There is an entry of "imprisonment for life," because the death penalty is not available. The jury would then determine whether the sentence would be "imprisonment for life" or "imprisonment for life without parole." If one of the three elements is proved, then the jury goes to Statements 4. and 5., which are on page 2 of the Rule. Those issues are whether the defendant is 18 years of age or older and whether the State has relied solely on eyewitness identification. If Statements 4. and 5. are proved, then the jury is directed to Section I. If either Statements 4. or 5. are not proved, then the jury is directed to Section VI.

Mr. Karceski continued that in most of the statements that are to be considered, the proof must be beyond a reasonable doubt. In Section I, there are three issues for the jury to consider, and all must be proved beyond a reasonable doubt. These are: (1) the defendant was a principal in the first degree, (2) the defendant engaged or employed another person to commit the murder, which was committed under an agreement or contract for remuneration or the promise of remuneration, and (3) the

victim was a law enforcement officer. These issues have not changed from the original Rule that was in place prior to the passage of SB 279.

Mr. Karceski commented that if one or more of the issues in Section I are proved beyond a reasonable doubt, then the jury is directed to Section II. The jury is deliberating all of these issues at one time. There is no bifurcation. They are given all of the issues to determine at once, and they are given a list of how to proceed from step to step. If any of the issues in Section I are proved, the jury moves on to Section II; if the issues are not proved, the jury would be directed to go to Section VI and to enter a sentence of "imprisonment for life."

Mr. Karceski noted that Section II is the issue of whether it has been proved by a preponderance of the evidence that the defendant is mentally retarded. If that is proved, the jury goes to Section VI. If it is not proved, then the jury is directed to Section III. Sections III and VI are the aggravating circumstances and the mitigating circumstances that the jury will next consider if they have gotten this far. There is a list of 10 aggravating circumstances any of which must be proved beyond a reasonable doubt. Only one of those must be proved, and if so, then the jury goes to Section IV and considers the mitigating circumstances. If the jury finds that the evidence is insufficient to prove any one of the aggravators, then the jury goes to Section VI. If none of the mitigating circumstances are found, the jury goes to Section VI and enters a sentence of

death. If one or more mitigators are found, the jury moves to Section V. There is a weighing process, and the jury determines by a preponderance of the evidence whether the aggravating factors outweigh the mitigating factors. The jury answers "yes" or "no." If the aggravators do not outweigh the mitigators, then the jury goes to Section VI, and there is a determination as to whether there should be a sentence of imprisonment for life or death.

Mr. Karceski stated that Section VI has a listing of the statements previously discussed in section (a), which reads as follows: "If Statements 1., 2., and 3. in the 'Preliminary' Section are all marked 'not proved,' enter 'Imprisonment for Life.'" The first three Statements have been added to the Rule based on SB 279. The jury will consider each Statement depending on what they have or have not found in Section VI, and they will make a unanimous finding. If the sentence that was determined by the jury is life imprisonment rather than death, in Section VII, the jury then decides whether the period is life or life without the possibility of parole.

Mr. Karceski observed that Alternative #1 uses the existing Rule as a template, and additions to that Rule are made to incorporate the new legislation. At the end of Alternative #1, section (i) has language deleted at the end. Judge Norton pointed out that on page 2, it may be more logical to move Statements 4. and 5. to the beginning as Statements 1. and 2. If it is found that the State relied solely on eyewitness testimony,

why is it necessary to consider the other issues? If the defendant is not of the required age, why does the jury need to determine the other issues? If the jury finds that those criteria are met, then the issues in the second tier can be considered.

Mr. Karceski agreed that this was a good suggestion. On page 1, the Rule provides that only the issues that remain are submitted to the jury. They do not get all of the items listed in the Rule if the issues have not been raised. The issue of eyewitness testimony will take as much discussion as Statements 1., 2., or 3. If Statement 4. becomes an issue, it should be relatively easier to address. It may be better to number it Statement 1. and move Statement 1. to 2., etc. Judge Norton's comment indicates that it takes a long time to discuss Statements 1., 2., and 3. and come to a conclusion, whichever one may be before the jury. Judge Norton explained that his point was that if the jury determines Statement 5., that would answer Statements 1., 2., and 3.

The Chair said that the problem is that there may be an ambiguity in Statement 5. He was not sure whether the State's reliance solely on eyewitness testimony also applies to the sentencing proceeding. If the State has not relied solely on eyewitness testimony at a trial on guilt or innocence, but relies on it to show principalship or something else at a sentencing proceeding, does this erase the possibility of the death penalty?

Mr. Patterson noted that the ambiguity would exist whether

at the end or at the beginning of the trial. It still is an issue that has to be resolved by the jury. Judge Norton's point is that if the jury is going to resolve that ambiguity by holding that the only evidence relied on by the State was eyewitness identification, therefore under the statute that answers everything that follows, why not resolve the ambiguity up front as opposed to having to go through all of the other issues? It is a threshold question, and it must be decided at some point. The determination should be made early, and then the case can move on. Judge Norton acknowledged that Mr. Cassilly was saying that some of the other issues may be clearer or quicker to discern particularly if the issue is tangential.

The Vice Chair noted that one of the two alternatives addresses the issue regarding evidence in the sentencing proceeding. The Chair responded that both alternatives do this. The Vice Chair inquired whether the Committee should decide whether to choose Alternative #1 or #2. The Chair answered that the Committee is not being asked to decide which of the two alternatives are to be presented to the Court of Appeals. His understanding was that the bifurcated proceeding may be the better way to address conforming the Rule to the statute, but that decision is up to the Court. The Committee would send up the two versions of the Rule as alternatives. Alternative #1 is all that is necessary to satisfy the statute, but Alternative #2 is the more rational way to deal with the problem. The Committee will not recommend one or the other. Mr. Karceski pointed out

that the State's Attorneys favor Alternative #1, and the Office of the Public Defender favors Alternative #2.

Mr. Shellenberger, the State's Attorney for Baltimore County, said that at the Subcommittee meeting, he had noted that Alternative #1 was preferred by the State's Attorneys. If one adjustment is made to Alternative #2, he would be more comfortable with that version of the Rule. The case law, which is set out in *Hunt v. State*, 321 Md. 387 (1990), is that sentences cannot be bifurcated. By rule, the Court of Appeals could order bifurcation. The problem with Alternative #2 is that it streamlines the five issues that would save time in sentencing proceedings, but it adds a sixth issue, whether the defendant is mentally retarded, that does not streamline the proceedings. In Alternative #2, mental retardation could be moved to what used to be Section I but is now Section II.

Mr. Shellenberger noted that the issues of DNA evidence, age, and eyewitness testimony can be resolved very quickly. When a prosecutor is at a death penalty sentencing, his or her first statement to the judge is that the prosecutor incorporates the entire trial. The prosecutor can say anything at sentencing that was already stated at trial. The prosecutor probably would not put on any more evidence than he or she had previously put on in the actual trial. However, the issue of mental retardation would involve two experts for the defense and at least one expert for the State. If there is an issue of streamlining by adopting

bifurcation, it would be better to move the issue of mental retardation out from the other issues. This is a summary of a debate that took three or four days. He acknowledged the work of the Subcommittee on drafting the two alternatives.

Mr. Karceski told Mr. Shellenberger that he had been helpful when the two versions of the Rule were discussed. Mr. Karceski asked Mr. Shellenberger if the problem with the issue of mental retardation is that it would take a long time to present. Mr. Shellenberger replied affirmatively, adding that there is no point in having a two-week long sentencing hearing when there are five or six threshold issues that the State must prove. If it fails to do so, the defendant's background or history need not be addressed.

Mr. Shellenberger said that if the purpose of bifurcation is to streamline a death penalty sentencing hearing, the issue of mental retardation does not help in the streamlining process. It is a subject that could take days and days to decide. The defense will have a psychologist, school records will be considered, and there will probably be a social worker to discuss the defendant's background. The State would have a right to have the defendant examined, so the prosecutor would bring in his or her expert to talk about whether it is an issue of mental retardation or an issue of diminished capacity. If mental retardation is in the second phase, under mitigating circumstances, the defense would get a second bite of the apple to be able to include all of the same information to allege some

form of diminished capacity. No time is being saved if the issue of mental retardation remains where it is.

Mr. Karceski cited Mr. Shellenberger's comment that he would agree with Alternative #2 if the Rule were changed to move the reference to the issue of the mental retardation of the defendant. Mr. Karceski asked Mr. Shellenberger if he would prefer Alternative #2 if the suggested change were made. Mr. Shellenberger responded that he preferred Alternative #1, but if he were pressed as to his opinion of Alternative #2, he would say that as a prosecutor, the change in Alternative #2 is much preferred, and it would save time for the jury.

Mr. Karceski asked if Mr. Shellenberger's opinion was that with or without Alternative #1, the change should be made. Mr. Shellenberger answered affirmatively. Mr. Karceski said that this was very helpful. He asked Mr. Zavin if he had any opinions on this issue. Mr. Zavin replied that the Office of the Public Defender, would support Alternative #2, which would streamline the process. This would include keeping in the first phase of the Rule the issue of whether the defendant is mentally retarded. If the State does not meet its burden, at that point in the case, there is a very high likelihood of plea bargaining taking place. In order to get a sentence of life without parole, the State would have to go before a jury. If, at the end of Phase I, any of those five questions are not answered "yes," in addition to the issue of mental retardation, there may not be a need to go to the next phase of trial.

The Chair clarified that the defense has the burden of proving mental retardation. The defense would have to prove by a preponderance of the evidence that the defendant was mentally retarded. He asked Mr. Zavin if he objected to moving the issue of mental retardation out of Phase I and putting it into Phase II. Mr. Zavin answered that his office believes that all of these issues should be in Phase I of the trial. However, having this in Phase II is better than the first alternative. Mr. Karceski noted that the underlying purpose of the bifurcation is to try to end this process earlier rather than later when possible. The mental retardation issue is kept in the first section. Whenever it becomes an issue, it is going to delay the trial.

The Chair questioned whether anyone had an opinion about moving the issue of mental retardation to Phase II. Mr. Karceski suggested that this be discussed when this part of the Rule is reached by the Committee. Master Mahasa inquired whether the term "mental retardation" is a Diagnostic and Statistical Manual of Mental Disorders ("DSM") diagnosis. Mr. Karceski replied that it is based on the DSM definition and on expert testimony, including from psychiatrists, psychologists, and even lay persons. The experts may reference a disorder or disorders found in the DSM. Master Mahasa remarked that the law has adopted the term "mental retardation." The Assistant Reporter noted that the term has been changed by the legislature. Chapter 119, Laws of 2009 (HB 20) changed the term "mental retardation" to

"intellectual disability" in some statutes.

The Vice Chair asked the meaning of the instruction on page 1 of Alternative #1 which read: "Submit the following only to the extent these issues are presented and remain for determination by the sentencing jury." Her understanding was that Statement 1., for example, is always presented. The Chair explained that either Statements 1., 2., or 3. can be presented, but not all of the statements have to be presented. Mr. Karceski added that one of those three must exist, but the jury only considers those that have been satisfactorily presented. If DNA is not an issue in the case, then this is not a subject for the jury to consider.

The Vice Chair questioned whether any issue not in the case would be crossed off on the form. Mr. Karceski answered that any issue not in the case would not appear on the form that the jury is given. It is not a good idea to submit a form to the jury that contains items that they should not consider. Mr. Patterson commented that the statement referred to by the Vice Chair is a bracketed instruction to the court as to how the verdict sheet should appear. Mr. Karceski said that what the Vice Chair was asking was whether all three of the statutory issues will appear regardless of whether they are issues in the case. The Vice Chair observed that the form has been in the Rules for a long time, and it has always been a form that it is submitted. Part of her question was whether the Rule is saying that this is not a form and has to be altered for each case.

The Chair expressed the view that Statements 1., 2., and 3.

always have to be presented on the form, because unless one of them is proved, that is the end of the death penalty as a possible punishment. Mr. Karceski asked if this will be sent to the jury if there is no DNA evidence in the case. Mr. Patterson responded that it is stipulated that it would be "not proved," because there is no DNA analysis done.

The Chair noted that if the State stipulates, the judge would instruct the jury to mark this issue "not proved." Mr. Patterson inquired as to why it should even be on the form if it does not exist. If it was not even brought up or hinted at as any part of the case, it is not an issue. The Chair pointed out that if this is the case, then there is no sentencing proceeding at all. The case would never get to Phase I or Phase II, because the State is going to stipulate that it does not have Statements 1., 2., or 3.

Judge Hollander remarked that the State may be relying on a confession, and she asked why the other two statements would have to be on the form. Mr. Patterson noted that if there is evidence of Statements 2. and 3., or there is evidence of Statement 2. or of Statement 3., that is what the jury has to decide -- whether it is proved or not proved. But if DNA evidence is not an issue, the jury should not be confused by including it on the form. The Vice Chair questioned as to who decides what is or is not an issue.

Mr. Karceski said that a scenario that is easy to understand is if there is no confession in a case. If the State has

nothing, why should it be submitted? Some of the jurors may think that there is a confession when one does not exist. Mr. Shellenberger stated that under the death penalty law, what is on the form is whatever the defendant wants on it. The defense counsel will tell the judge that he or she does not want every possible aggravator to be on the form, only the aggravator that is an issue. Some defense counsel will ask for all 12 aggravators on the form, so that if only one is proved, counsel can make the point that his or her client is not so bad. It is totally up to defense counsel to decide. Mr. Shellenberger added that he has seen this done both ways. The judge would tell the jury that it is agreed that no confession exists, but there may be an issue as to the other two grounds. The judge would ask if the defendant wants it on the form, and it is up to the defense. It is purely trial strategy.

The Vice Chair commented that this issue exists throughout the entire case, not just as to what is on the form. Mr. Shellenberger agreed, noting that case law holds that if there is a statutory mitigator, defense counsel can ask that it be included or not included, because counsel may not want the jury to consider the long list of other mitigators where the jury is marking "no." The Vice Chair asked whether defense counsel would determine whether or not all five of the issues would go on the form. Mr. Shellenberger answered that it would be the first three issues from which the defense would pick.

The Chair commented that it is not clear how this will play

out, because the statute has not yet taken effect. Mr. Shellenberger remarked that sometimes the State pre-marks the form. For instance, if there is no crime of violence, the defense will ask that this be pre-marked, and the State will do so, conceding that there are no prior convictions that qualify. The Chair said that he would assume that with respect to Statements 1., 2., and 3., they would be on the form, because one of them has to be proved in order for the case to proceed. If counsel agree that the State has not produced Statements 1., 2., or 3., the judge would instruct the jury to mark those statements "not proved."

Mr. Shellenberger noted that one possibility is that the jury would mark the form. In death penalty law, if the defense counsel or his or her client states that the defendant did not want something that was on the form, the case would have to be retried. Mr. Karceski inquired whether the trial judge gives the jury the form and instructs them to mark "not proved." The Chair responded that this can be done if the parties agree.

Mr. Karceski remarked that it would not make sense to give the jury the form and tell them to mark it "not proved." What would be the function of the jury at that point? It makes better sense for the judge not to put it on the form or to give it to the jury to let them decide on their own whether the element that is before them exists. If they had heard nothing about DNA or biological evidence in the entire case, they would now have to decide whether the State has proved it. The language that reads:

"Submit only to the extent that the issues are presented and remain" would solve this problem. If there is nothing about a confession in the case, why would this issue be submitted to the jury?

Mr. Klein commented that from the perspective of a non-criminal law practitioner, Section VI of the document, which ties back to the "Preliminary" section, is extraordinarily complicated. If something is deleted from the "Preliminary" section, it would require editing of Section VI. Mr. Karceski responded that it is not that difficult to edit Section VI. He said that Mr. Klein's point is valid. The Committee has to decide whether this proposal goes to the jury to the full extent, or whether the trial judge is to redact or delete any of the statements or provisions. Is there a middle ground, so that the court can say to the jury that there has been a stipulation? If there is no stipulation, that is where the problem arises.

Mr. Klein suggested that instead of the language, "Submit the following only...," the Rule could provide that if they are not issues, the parties should stipulate that they should be pre-marked. The Vice Chair pointed out that this concept is true throughout the entire form. It does not apply only to this section. Would deleting the language that begins with "Submit the following" cause problems? Mr. Klein reiterated that as soon as something is taken out of the "Preliminary" section, Section VI must be edited. The Vice Chair noted that Section VI assumes that all of the statements are on the form. She explained that

she was not suggesting that any of the statements on the form be deleted. Her suggestion is to delete the instruction to the trial judge, which is in the brackets after the word "Preliminary."

Judge Hollander referred to Statement 5., which reads: "The State has not relied solely on evidence provided by eyewitnesses." She asked if this is duplicative, because depending on the answers to Statements 1., 2., and 3., the answer is already known. The Chair explained that this is one of the ambiguities in the statute. Statements 1., 2., and 3. came in at one time. Mr. Shellenberger added that Statement 5. came in first as amended, and then Statements 1., 2., and 3. came in as a second amendment. Judge Hollander questioned whether they are the same. Mr. Shellenberger replied that they are the same.

Judge Hollander expressed the view that this is confusing. Her concern was that a jury would answer "proved" to Statements 1., 2., and 3. and answer "not proved" to Statement 5. Mr. Shellenberger said that the Rule should not change what the legislature has done, or the case will have to be retried. Judge Hollander inquired whether Statement 5. is unnecessary. Mr. Shellenberger responded that it is unnecessary, but the legislature felt that it was important. Logistically, Statement 5. was the first amendment offered by one senator, and Statements 1., 2., and 3. came in on a second amendment offered by another senator. Judge Hollander said that she thought that they were the same issue. If Statements 1., or 2., or 3. have been proven,

Statement 5. has been answered.

The Chair said that if this is not put on the form, there will be an appellate issue. The Vice Chair hypothesized that the jury has just been told that they have to mark the form, and the burden of proof is beyond a reasonable doubt. How does the jury figure out that a video recording that conclusively links the defendant to the murder has been proven beyond a reasonable doubt?

Mr. Shellenberger responded that the arguments of counsel will be that the surveillance camera is not conclusive enough. He has a case now where the person videotaped looks like the defendant, but a jury could find that it is someone else. The arguments of counsel will go around those "weasel" words, such as "conclusively" and "solely." Does the victim's blood found on the defendant "link" the defendant to the crime? The Vice Chair pointed out that in Statement 1., the word "conclusively" was not put before the word "links" as in Statement 3. Mr. Shellenberger noted that the Rule tracks the statute. The Chair added that the statute was not well-drafted.

Mr. Patterson told the Committee that he had previously served on Judge Raker's Criminal Pattern Jury Instruction Committee for a long time. He asked about the juxtaposition between the rule that is ultimately adopted by the Court of Appeals and the jury instruction. When Judge Raker's committee forms the actual instruction, it goes into the book that the judges use. Often the instructions come with notes on their use.

It sounds as if the Rules Committee is arguing the same thing as far as instructions on the Rule as opposed to what comes from Judge Raker's committee. He explained that his question is a result of the fact that he is fairly new to the Rules Committee. Is the function of the Rules Committee to come up with a rule that tracks the statute, so that the statute is implemented by rule? As far as the nuances, is the fact that everything is in there a function of the Jury Instruction Committee?

The Chair said that he had spoken with Judge Raker about this, so that she can coordinate with what the Court of Appeals ultimately does. The sentencing form is in the Rule, but it is not a matter of pattern jury instructions. The Committee is recommending an amendment to the Rule, either Alternative #1 or Alternative #2. Judge Raker understands that whatever the Court does with the Rule, the Criminal Pattern Jury Instructions Committee will have to fashion a jury instruction to conform to the changes to the Rule.

Mr. Patterson questioned whether the bracketed instruction on page 1 of Alternative #1 is a form issue or a jury instructions issue. The bracketed instruction reads as follows: "Submit the following only to the extent these issues are presented and remain for determination by the sentencing jury." The Vice Chair moved to delete the language in the brackets. The motion was seconded. Mr. Karceski asked if the deletion of the language would mean that all of the issues would be submitted to the jury. The Vice Chair responded that it would be worked out

by counsel. Mr. Karceski inquired if there would be no judicial intervention. The Vice Chair responded that she was not certain how it would be effected. Whatever is done should be done to the entire form.

Mr. Michael questioned whether, if the judge concludes as a matter of law that an issue has not been proved, the form could be pre-marked as "not proved." The Vice Chair expressed the concern that the trial judge gets to determine whether or not there is an issue. Mr. Patterson said that some deference has to be given to the comments by Mr. Shellenberger, because of the experience that Baltimore County has in these types of cases which may equal the rest of the State combined. Based on experience, what Mr. Shellenberger is saying is that defense counsel can ask for the judge to not instruct on any of the issues that do not apply. The form can be changed, so that it only has what needs to be proved or not proved. It seems that the Rule allows the court to be given the form that can be expanded upon or limited as the need arises, by the parties agreeing. Is this the procedure in these cases?

Mr. Shellenberger answered that the form is modified by agreement, by the judge making a determination, or by pre-marking the form, which is done very often, particularly in the area of no crimes of violence. If the defense attorney tells the judge that everyone agrees that the defendant has no other criminal record, the form will be pre-marked upon the request of defense counsel. He agreed that the language being discussed does not

exist in any other part of the form, so by including it, it seems to signal something that does not exist. The Chair pointed out that it is not necessary to have this language.

The Chair called for a vote on the motion to delete the bracketed language. The motion passed unanimously.

The Vice Chair asked if the issue of the order of the Statements had been resolved. Earlier in the discussion, Judge Norton had suggested that Statements 4. and 5. should be moved to become Statements 1. and 2. The Vice Chair inquired as to the meaning of the language after Statement 3. that reads: "If one or more of the above statements are marked 'proved,' proceed to Statements 4. and 5." The Chair replied that the way the Rule is structured now, if at least one of the items listed in Statements 1., 2., and 3. is not available, that is the end of the applicability of the death penalty.

The Vice Chair questioned as to the result if the defendant had been 16 years old at the time of the murder. Judge Hollander remarked that it is not necessary to consider Statements 4. and 5., if all of the first three Statements are not proved. The Chair explained that the reason that Statements 4. and 5. are singular, is that if either one of them is marked "not proved," then there is no availability of the death penalty. Statements 1., 2., and 3 are together. There could be one not proved, two not proved, or three proved.

The Vice Chair expressed the view that it makes sense to put Statements 4. and 5. first, because they are much simpler issues.

Judge Hollander noted that Statement 4. is very simple, but she was not sure about moving Statement 5. to the beginning, because someone who is not familiar with eyewitness evidence may find it to be a daunting task. Answering Statements 1., 2., and 3. would help someone figure out the answer to Statement 5.

Mr. Karceski suggested that Statement 4. should be moved to the beginning as Statement 1. The Reporter expressed the concern that this may cause the addition of many more instructions in terms of where to go next. The Vice Chair said that if Statement 4. becomes Statement 1., then the instruction would be that if it is marked "not proved," what is now Statements 1., 2., and 3. would be considered. Judge Hollander expressed the view that logically it would make sense to keep Statements 1., 2.,3., and 5. together.

The Reporter pointed out that Statements 1., 2., and 3. have to stay together, because they are in the statutory list of requirements that have to be met to apply the death penalty. The Vice Chair explained that Judge Hollander is suggesting that Statement 5. would become Statement 4., and Statement 4. would become Statement 1. The Reporter said that Statements 1., 2., and 3. are in the same category. The Chair commented that another division would be needed if this change is made. Judge Norton remarked that he suggested that the Statements be moved to save time, but if it is going to cause confusion, he would withdraw his motion. The person who seconded the motion agreed to the withdrawal.

Mr. Patterson referred to the information in the parentheses after Statement 3., which reads: "(If one or more of the above Statements are marked 'proved,' proceed to Statements 4. and 5. If Statements 1., 2., and 3. are all marked 'not proved,' proceed to Section VI and enter 'Imprisonment for Life'." He noted that this sounds like a pattern jury instruction. He suggested that the language could be: "If the above Statements are not proved, then the death penalty is not appropriate." The Chair pointed out that the language in the parentheses is similar to the language currently in the form. Judge Raker will not have a problem with this.

Mr. Karceski reiterated that the motion to move the Statements has been withdrawn. The Vice Chair referred to the Reporter's note at the end of Rule 4-343, Alternative #1, which explained that the statute provides that if the State failed to present the requisite evidence and had filed a notice that it intended to seek the death penalty, the notice is considered to have been withdrawn, and it is deemed that the State filed the proper notice to seek a sentence of life imprisonment without the possibility of parole. She inquired as to what would the result be if no notice had been filed. The Chair answered that it would never get to this point, because there can be no death sentence hearing if no notice has been filed. If the State does not give the notice of its intent to seek the death penalty (which includes in that notice each aggravating factor that it intends to rely on), the case would never reach this point. The Vice

Chair remarked that this is what the sentence used to say.

The Reporter observed that previously the State would have to give a notice of intent to seek the death penalty and a notice of intent to seek life imprisonment without the possibility of parole. The State could notify about either or both. What the new statute is saying is that the notice about life imprisonment without the possibility of parole is included implicitly in the notice of the death penalty. If the death penalty is stricken due to the way the jury has answered the questions in the form, then the case proceeds to life imprisonment without parole even if the State did not give that notice. The Vice Chair said that she thought that the point of this sentence was to say notice must be given in the first place.

Mr. Shellenberger responded that there are two issues. No prosecutor is going to file the notice of intent to seek the death penalty without filing the second notice of intent to seek imprisonment for life without parole. The statute provides that in certain cases in which the State has filed a notice to seek a sentence of death, the notice shall be considered withdrawn and be considered to be a notice of intent to seek life imprisonment without parole. If the State does not prove one of the three items listed in the statute, the statute automatically converts the notice to imprisonment for life without the possibility of parole. The jury will always have to make a decision after they enter the option of life imprisonment if it is with or without the possibility of parole. The Chair clarified that this is true

provided that the prosecutor filed the death notice.

The Vice Chair asked why the sentence that specifically stated that if the State did not file the notice of intention to seek the death penalty, Section VII shall not be submitted to the jury was in the Rule before. The Chair said that there are two notices. This sentence refers to the situation where the State filed a notice of intention to seek the death penalty but did not file the notice of intention to seek a sentence of life without the possibility of parole. Mr. Shellenberger added that it used to be that if the jury could not decide whether the defendant should get the death penalty, the jury would have to decide if the defendant would be sentenced to life imprisonment. There were many cases before the sentence of life imprisonment without parole was created.

Mr. Karceski told the Committee that Alternative #2 was the bifurcated process of sentencing. The Rule is new. He referred to the language in section (b) that reads: "Upon recordation of the verdicts returned by the jury or judge, the court shall bifurcate the sentencing proceeding into two phases. A Phase I Findings form required by section (h) of this Rule and, if necessary, a separate Phase II Findings and Sentencing Determination Form...". The procedure is similar to the one set out in Alternative #1. Phase I requires certain decisions to be made by the jury or the judge, whichever is the trier of fact, as to whether or not, if proved, the issue of the applicability of the death penalty moves on to Phase II. Counsel will, to the

extent that these are issues for consideration in Phase I findings, be able to present evidence on and argue those issues, and it limits the presentation of evidence to the least common denominator. The theory is that when this is done, and the jury acts, it may end the process if certain issues are not proved as they were required to be proved in Alternative #1. Although the Rule is new, sections (c) and (d) track the language of the current Rule.

The Vice Chair inquired whether sections (c) and (d) are exactly the same language as the current Rule. Mr. Karceski answered that they are not verbatim the same as the current Rule, but the language is fairly close to the language of the current Rule. Except for the addition of the reference to "Phase I of the sentencing proceeding," sections (c) and (d) are the same as the current Rule.

Mr. Karceski said that the Committee had previously discussed the issues pertaining to the language of Phases I and II. To a large extent, what the Committee had discussed at the last meeting related more to the prosecutor's responsibility to come forward and state whether there was sufficient evidence for them to proceed. The Subcommittee, at its last meeting, discussed this and decided that this is a very complicated process that may not move the case forward. The State's Attorneys who were present at that meeting commented that if they do not have a case, they would not choose to go forward, considering all of the time, effort, and monies involved in

prosecuting it. There was not a great deal of discussion as to what is done in Phase I or in Phase II. Issues raised in Phase I in section (h) are similar to the issues discussed in Alternative #1. The issues are listed beginning with subsections (h)(1)(A) through (h)(1)(I).

The Vice Chair inquired as to why the issues are in a different order in Alternative #2. The order of the issues in Alternative #1 had been discussed at great length earlier in the meeting. The age of the defendant is listed first in this version of the Rule. The Reporter responded that at this point in the proceedings, the case goes back to the judge who looks at what the jury marked and decides what to do next. On the form in Alternative #1, the jury has to figure out what to do next; at this point in the proceedings pursuant to Alternative #2, the judge figures out what to do next. Mr. Karceski said that he was not sure why the sequence is different in Alternative #2. The Chair pointed out that in Alternative #1, all of the issues are together, including instructions as to where to go next on the form depending on what has been proved. In Phase 1 of Alternative #2, there are only specific issues to determine, and the jury does not have to be instructed to go to a different place on the form.

The Vice Chair commented that whether or not the proceedings are bifurcated, if the trier of fact is the jury, they should get the same form. Why should they get a different form depending on which version of the Rule applies? Mr. Shellenberger answered

that the jury is only going to get one form or the other. They will not have compared the forms, so they will not know any better. This is a matter of the triggering issues. It was difficult to try to move the issue of age to the beginning of the form in Alternative #1. An instruction was necessary to check off which of the three statutory items apply, if any. What will happen with Phase I of Alternative #2 is that the jury checks off whether the listed issues apply, and then the judge decides what the next step will be. The jury will not know whether the case is moving forward. This is why there is a difference. The order in Alternative #2 is more logical, but it is too hard to fix in Alternative #1.

Mr. Karceski remarked that the jury has to consider all of these issues in the first phase not knowing that one of them may generate a case where the death penalty is not applicable. The jury goes through all nine of these issues in Phase I. The Vice Chair asked if it would make sense to delete the phrase in subsection (h)(1) that reads: "to the extent that they are raised and remain for determination," since it was deleted in Alternative #1. Mr. Karceski replied that if the phrase was deleted in Alternative #1, it should be deleted in Alternative #2, and he moved that it be deleted. The motion was seconded, and it passed unanimously.

The Vice Chair commented that she was confused by the addition of the concept in subsection (h)(1)(C) that not only is the sentencing jury or the judge to determine at the trial on

guilt or innocence whether the State has presented biological evidence or DNA evidence linking the defendant to the murder, but also that this can be determined at the sentencing proceeding. She did not see this in Alternative #1. Why was it added to Alternative #2? It is also in subsections (h)(1)(D), (E), and (F), but it is not in the other subsections. The Chair responded that it does not affect the other subsections.

The Vice Chair noted that in Alternative #1, there is no reference to evidence at the sentencing hearing. The Chair responded that one answer with respect to the video recording linking the defendant to the murder is that this evidence may be presented during the guilt or innocence phase, but at that point, the jury does not have to determine whether it conclusively links the evidence to the murder. Mr. Shellenberger added that there could be a court trial for guilt or innocence and a jury for sentencing. This happens when the case is basically tried two times with a court trial for guilt or innocence, and a jury trial for sentencing.

The Vice Chair questioned whether the language follows the language of the form in Alternative #1. Mr. Karceski answered that it does not follow the language of the Alternative #1 form. The Vice Chair said that she had several questions about it. It is not in Alternative #1, and it is not in the forms in subsection (h)(3) on pages 6 and 7. It does not track the form that is going to be submitted to the jury.

Mr. Shellenberger noted that what is stated in the Rule is

that these are the issues that would be decided in this new bifurcated procedure. The problem is that there is case law from the past 30 years that explains the meaning of the items in the form in Alternative #1. Now the suggestion is to move this to a new stage -– what will the issues be in a bifurcated sentencing hearing? The Vice Chair inquired whether an issue in the bifurcated sentencing hearing would be if there were evidence of a confession. Mr. Shellenberger replied that this is the only place where it is an issue in the bifurcated hearing, because as a prosecutor, he would have to prove this to keep going forward to the death penalty. The issue is if the standards of the new statute were met. The Rule will state which issues the prosecutor has to prove. It may be proved in the guilt or innocence phase or in the sentencing phase that the prosecutor has a videotaped confession.

The Vice Chair inquired what the result would be if the videotaped confession were introduced at the sentencing phase. The Chair answered that it may depend on what else is there. There could be an inculpatory statement by the defendant that has been shown to be voluntary for the purpose of admitting it into evidence. The jury has this statement. At the sentencing, the State must show that not only is this a confession, as opposed to a mere inculpatory statement, and that it was voluntary, but that the entire interrogation was videotaped, not just the confession. Mr. Shellenberger added that the State could win the guilt or innocence case by simply having the police officer say that the

officer gave the *Miranda* (*Miranda v. Arizona*, 384 U.S. 436 (1966)) warnings, and the defendant then confessed to the crime. But at the sentencing, the State has to have a videotape, although it was not necessary at the guilt or innocence stage.

Mr. Shellenberger said that a better answer comes in the area of whether DNA evidence "conclusively links" the defendant to the murder. When the witness takes the stand, he or she may identify the defendant by saying it is one out of a billion that it is the defendant's DNA, or the witness may identify the defendant as one out of 4 million. This may be enough in the guilt or innocence stage to justify a guilty verdict, but the issue would become whether it conclusively links the defendant to the murder. The prosecutor may have to put in more evidence during the sentencing phase to prove the "conclusive" link. These "weasel" words would affect whether it would be an issue at sentencing. The Chair commented that it is the same issue with the video recording of the crime scene. This has to conclusively link the defendant to the murder. To put the video in at the guilt or innocence stage, it is not required that it conclusively link the defendant to the murder.

The Vice Chair inquired why this does not have to be addressed anywhere else if this is an important concept to address in the bifurcated Rule. Mr. Shellenberger replied that 30 years of litigation have been associated with the form as it is now. Mr. Karceski asked whether the Vice Chair was referring

to the language in subsection (h)(1)(D) that reads "... at the trial on guilt or innocence or at the sentencing proceeding...". The Vice Chair replied that she was referring to the language "...or at the sentencing proceeding..." that appears in subsections (h)(1)(C), (D), (E), and (F). The Chair said that if that phrase is stricken, the phrase "...to the jury or judge..." should be stricken.

The Vice Chair remarked that if the attorneys who practice this kind of law agree with the wording, then she would be willing to withdraw her question about it. The Chair commented that if anyone feels that this language causes a problem, the language that would have be deleted is: "...to the jury or judge sitting as the trier of fact at the trial on guilt or innocence or at the sentencing proceeding...". Mr. Karceski expressed the view that none of the language should be eliminated. He noted that the confusion arises, because the Vice Chair had noted that Alternative #1 does not use this language anywhere. Alternative #1 is a "dinosaur" that has been around for some time. Should the Rule be changed to incorporate the language that was discussed? Should the language referring to "guilt or innocence" or "the sentencing proceeding" be put into Alternative #1? The Vice Chair said that she thought that the only real issue between the two versions is whether time will be saved, or whether the proceeding should be bifurcated. She expressed the opinion that it did not make sense that the bifurcated proceeding is similar to the other one, except that it is done in two different phases.

Mr. Shellenberger explained that practitioners who handle death penalty cases know what the issues are and what needs to be addressed in a single sentencing proceeding. The question is what should be added to the form. What he has learned from reading reversals in Court of Appeals death penalty cases is not to make changes to the form. Alternative #1 only adds the references to what is required by the new statute, and it makes no other changes to anything that has already been approved by the Court of Appeals. A bifurcation in a death penalty sentencing is a new concept. The reason the language "whether or not" has been added is because the nine issues that have to be decided at Phase I of the sentencing must be identified.

The Chair pointed out that the form in Phase II is exactly the same as in Alternative #1. The jury sees the same questions in both forms. The Vice Chair asked what the purpose of subsection (h)(1) is. Mr. Shellenberger responded that it tells attorneys what the issues are.

Mr. Karceski drew the Committee's attention to the "Phase I Findings" in subsection (h)(3). Although the issues for the jury to determine are not in the same order as they were in Alternative #1, the Committee had discussed moving it into this order. The first issue is whether the defendant was 18 years of age or older. Then the jury goes through eight of the issues in Section I. Statements 2., 3., 4., and 5. are the issues listed in the new statute. Only one of these has to be proved beyond a reasonable doubt. There could be more than one, but only one is

needed for the death penalty to apply. Only one of Statements 6., 7., and 8. is necessary for the case to move forward. Statement 1., whether the defendant was 18 years of age or older, has to be proved before the case moves to Phase II. Section II applies only to the issue of whether the defendant was mentally retarded. The Committee seems to have separated the first eight issues from that one, because of the quantum of proof necessary. The defendant has to prove by a preponderance of the evidence that he or she is mentally retarded.

Mr. Shellenberger remarked that it is logical to take this out, because it requires a different burden of proof and a different person presenting the evidence. The first eight statements are proved by the State beyond a reasonable doubt. Suddenly, in Section II, the burden is on the defendant to prove by a preponderance of the evidence that he or she is mentally retarded. Mr. Patterson added that Statements 1. through 8. are fairly objective issues to be decided. The issue of mental retardation in Statement 9. is subjective. It is not a question of the burden of proof; it is a question of grappling with the issue. If the State cannot prove Statements 1. through 8., the amount of time involved in proving mental retardation, which is an entirely different angle, belies the idea of bifurcating the trial.

Mr. Klein noted that what he had heard about the length of time it takes to prove Statement 9. suggested to him that it should not be in Phase I. He referred to Mr. Zavin's comment

earlier about plea bargaining, and he asked Mr. Zavin what his prediction would be about being able to plea bargain at the end of Phase I if there would be a bifurcated trial. Presumably, the State knows that this will be raised as a defense, and each side knows what the other side's experts will say. Mr. Zavin inquired whether this means without a jury finding, and Mr. Klein replied affirmatively. Mr. Zavin said that if each side has full knowledge what the other side's experts are going to say, it is possible to do so without a jury finding, but it is better to have the jury determine the issue.

Mr. Klein remarked that his view was that not having the issue decided by the jury is better for the defendant, because if the jury finds against the defense position, then the defendant is in no position to plea bargain. Having some ambiguity where each side has something at risk means that there is more give and take in the bargaining process. Mr. Zavin referred to the burden of proof that switches as well as to the standard of proof that will apply regardless of whether it is Phase I or Phase II. Whether the case is bifurcated or not, the jury will be asked to switch between the State proving and the defense proving. The question becomes whether the State really wants to pursue a sentence of life imprisonment or whether the State wants to go through a separate death penalty sentencing phase to get the death sentence. At that point, the State has a jury finding, and they may offer a sentence of life imprisonment.

The Chair questioned whether the State would be more

inclined to plea bargain if they had a jury verdict not proving mental retardation. They would have much less to lose at this point. Mr. Shellenberger observed that typically, presenting the issue of mental retardation is where the State would have its best evidence. The questions are whether the I.Q. tests were administered properly, whether they were given at the appropriate age, and whether the defendant had an I.Q. of 70 or less. If the State loses on this issue, there is no point in going forward. Mr. Zavin said that if there is compelling evidence of diminished capacity not reaching the point of mental retardation that is presented in Phase I, it would provide an impetus for a plea bargain.

The Chair asked whether the Committee thought that the issue of mental retardation should be moved to Phase II. Mr. Zavin questioned whether both versions of the Rule will be presented to the Court of Appeals. The Chair responded that the Committee will give the Court Alternatives #1 and #2. The Court can modify any of the language. The Committee would not be recommending either one. It is a policy issue for the Court. Because of the complications, the Committee wanted to give the Court the option of picking whichever version they preferred. The Reporter added that the drafts of both versions will be published for comment.

Mr. Karceski moved to take the issue of mental retardation out of Phase I and move it to Phase II of the Rule. The motion was seconded, and it passed unanimously. The Chair pointed out that this will require some redrafting of both versions of the

Rule. This will have to be sent to the Court quickly. The Court has set a hearing for September 9, 2009 on the 162nd Report that will contain these two versions of the Rules along with the Rules pertaining to DNA testing. The Rules will have to be decided on that day or very soon thereafter, because the death penalty statute goes into effect on October 1, 2009, and there are currently death penalty cases pending. The Chair asked if the Committee would be satisfied with both versions of the Rule being redrafted to implement the decision to move the issue of mental retardation without the Rule being brought back in September for the Committee to reconsider it. By consensus, the Committee agreed to this.

Mr. Karceski drew the Committee's attention to section (i) of Alternative #2, Phase II of Sentencing Proceeding. Statement 9. will no longer be listed in subsection (i)(1)(A)(v) for consideration at that time by the jury. The jury will only have to consider (1) whether the defendant was 18 years of age or older; (2) one of the following: whether there was biological or DNA evidence that links the defendant to the act of murder; whether the State has produced a videotaped, voluntary interrogation and confession of the defendant to the murder, or whether the State has produced a video recording that conclusively links the defendant to the murder; whether the State was relying solely on evidence provided by eyewitnesses; and (3) one of the following: whether the defendant was a principal in the first degree to the murder, whether the defendant engaged or

employed another person to commit the murder and the murder was committed under an agreement or contract for remuneration or the promise of remuneration, whether the victim was a law enforcement officer.

Mr. Karceski said that the issue of whether the defendant was mentally retarded has been moved to Phase II. In all other cases, if the issues just enumerated have not been proved, then the judge will enter a sentence of imprisonment for life or imprisonment for life without parole if it is a judge's decision. If it is a jury decision, they would be instructed to enter one or the other of these punishments. Phase II begins in subsection (i)(2), Phase II Findings and Sentencing Determination. This virtually tracks what is in Alternative #1. Section I begins with the aggravating circumstances. A determination as to where the issue of mental retardation should be put has to be made. The Chair responded that it might be a good idea to put this issue first, because if the trier of fact finds that the defendant is mentally retarded, then the death penalty does not apply.

Mr. Patterson inquired whether the idea of putting this first would be for the jury to determine this before it gets to aggravating and mitigating factors. Mr. Shellenberger expressed the opinion that the issue of mental retardation should be placed in the Rule right after the aggravators and separated out as it was previously and before the mitigating factors. It would be placed right above Section II, Mitigating Circumstances, and it

would stand by itself.

The Chair inquired whether this would go before the aggravators. If the trier of fact finds in the defendant's favor, it will not be necessary to go through all of the aggravators and mitigators. Mr. Patterson noted that the jury will have to make the determination before they consider the aggravators and mitigators. Mr. Shellenberger said that he envisioned that Phase II would be the entire sentencing hearing, and both sides would have to prove each of their burdens. The Chair stated that if the issue of mental retardation is put first, then the Rule would state that if the jury finds this issue proved, they would next go to Section VI on the form. Mr. Patterson noted that all of the testimony will come in anyway. The Chair added that much of it may be relevant to the issue of mental retardation, and Mr. Shellenberger agreed.

Mr. Karceski remarked that if the issue of mental retardation becomes the first item in Phase II, then it will be followed by the aggravating circumstances for the jury's consideration. There has to be an aggravator as in Alternative #1 followed by the mitigating circumstances. Then there is the weighing process to see if the aggravating circumstances outweigh the mitigating circumstances by a preponderance of the evidence. Section IV is entitled "Determination of Sentence of Death or Imprisonment for Life," and if the sentence is "imprisonment for life," Section V will state whether the sentence is life imprisonment or life imprisonment without parole. These sections

generally follow the pattern of Alternative #1. The only difference in Phase II, other than that there is no bifurcation in Alternative #1, is that the issue of mental retardation has been moved into Phase II. Mr. Karceski questioned whether there were any comments on the rest of Alternative #2.

Master Mahasa inquired as to the difference between a unanimous finding of "more likely than not" versus "fewer but not all." The Chair replied that for mitigators, each juror can find something that is a mitigating circumstance that the others may not find. That juror has to then balance what he or she finds to be the mitigators against the aggravators. The mitigators are found individually, but the aggravators have to be decided unanimously by all of the jurors. The mitigators can be found unanimously, but each juror can find them individually.

Mr. Shellenberger noted that what often happens is that the defendant's upbringing will be an issue that is raised, and the defense will argue that this is one of the mitigators. Some may feel that the upbringing did contribute to the ultimate crime. Some jurors may reject this. The case law holds that when a juror gets to the last procedure of weighing mitigators, he or she is allowed to consider what that juror found individually plus the mitigators that were found unanimously.

The Vice Chair commented that in section (b), the word "recordation" is used. It has a very specific meaning. The Chair responded that he had suggested that word, and he proposed that the word be changed to the word "recording." The Vice Chair

said that in the civil arena, it means noted on the files, and the land records are recorded. She had looked at the criminal rules and did not find a reference to how the verdict is memorialized. The Chair said that the current Rule uses the word "recording." The Vice Chair asked if the word "death" in the language in section (b) that reads: "...completed with respect to each death..." should be "murder." The Chair responded that this language is in the current law and should not be changed.

The Vice Chair noted that section (c) has some internal inconsistencies that were created by adding in the words "or counsel." The last sentence begins "[u]pon request by the defendant...". The Chair noted that this is the wording of the current Rule. The Vice Chair expressed the view that there are mistakes in the way the words "or counsel" are added in. It should be either added in everywhere, or the assumption should be made that the references to the words "the defendant" include counsel. Master Mahasa remarked that the person is the "defendant" whether or not he or she has counsel. The Chair reiterated that this is the language that is in the current Rule. The reason for the difference may be that the information that the State expects to present to the court should be disclosed to the defendant or counsel, but the decision about postponement may be a personal one for the defendant to do and not for the attorney.

By consensus, the Committee approved both versions of Rule 4-343 as amended.

Agenda Item 2. Reconsideration of proposed new Title 4, Chapter 700, Post Conviction DNA Testing

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Mr. Karceski explained that the general scheme of the Post Conviction DNA Testing Rules is based on the Rules in Title 4, Chapter 400, Post Conviction Procedure.

Mr. Karceski presented Rule 4-701, Scope, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-701, as follows:

Rule 4-701. SCOPE

The Rules in this Chapter apply to proceedings filed under Code, Criminal Procedure Article, §8-201.

Source: This Rule is new.

Rule 4-701 was accompanied by the following Reporter's Note.

Rules 4-701 through 4-710 are new and implement the provisions of Chapter 337, Laws of 2008 (SB 211), which became effective on January 1, 2009 and amended Code, Criminal Procedure Article, §8-201. The general scheme of the Rules is based on the Chapter 400, Post Conviction Procedure, Rules 4-401 through 4-408.

Mr. Karceski explained that Rule 4-701 had been revised at the last meeting. There being no comment, by consensus, the

Committee approved Rule 4-701 as presented.

Mr. Karceski presented Rule 4-702, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-702, as follows:

Rule 4-702. DEFINITIONS

In this Chapter, the terms "biological evidence," "DNA," "law enforcement agency," and "scientific identification evidence" have the meanings set forth in Code, Criminal Procedure Article, §8-201 (a).

Source: This Rule is new.

Mr. Karceski said that Rule 4-702 had been changed at the last meeting. There being no discussion, by consensus, Rule 4-702 was approved as presented.

Mr. Karceski presented Rule 4-703, Commencement of Proceeding; Venue, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-703, as follows:

Rule 4-703. COMMENCEMENT OF PROCEEDING; VENUE

(a) Generally

A proceeding under this Chapter is commenced by the filing of a petition under Code, Criminal Procedure Article, §8-201 by a person who:

(1) was convicted of a violation of Code, Criminal Law Article, §§2-201, 2-204, 2-207, or 3-303 through 3-306; and

(2) seeks (A) DNA testing of scientific identification evidence that (i) the State either possesses or may acquire, with or without a court order, from a third party and (ii) is related to the judgment of conviction, or (B) a search by a law enforcement agency of a law enforcement database or log for the purpose of identifying the source of physical evidence used for DNA testing of a law enforcement database or log.

(b) Venue

The petition shall be filed in the criminal action in the circuit court where the charging document was filed.

Source: This Rule is new.

Mr. Karceski told the Committee that subsection (a)(2)(A) of Rule 4-703 has been changed. New language has been added to part (i) that reads, "...the State either possesses or may acquire, with or without a court order, from a third party...". This is to address those situations where the State does not have direct control and possession of the items in question.

Ms. Nethercott commented that in subsection (a)(2)(B), the

language at the end that reads, "...of a law enforcement database or log" is superfluous. Mr. Shellenberger remarked that he had spoken with the Chair about that sentence. Mr. Karceski pointed out that this language is taken directly from the statute. Mr. Shellenberger noted that the Subcommittee had spent some time arguing over this language.

Ms. Nethercott asked whether the statute has the language "used for DNA testing of a law enforcement database or log." This sounds like it refers to DNA testing of a log, which is inappropriate. Mr. Klein said that it is not in the statute. The Assistant Reporter recalled that there had been an issue discussed previously as to what the language "used for DNA testing" means. Ms. Nethercott observed that the statutory language in Code, Criminal Procedure Article, §8-201 (b)(2) is "...the source of physical evidence used for DNA testing." The Chair suggested that subsection (a)(2)(B) end after the word "testing," and the Committee agreed by consensus to this change.

By consensus, the Committee approved Rule 4-703 as amended.

Mr. Karceski presented Rule 4-704, Petition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-704, as follows:

Rule 4-704. PETITION

(a) Content

(1) In General

Each petition shall state:

(A) the petitioner's name and, if applicable, place of confinement and inmate identification number;

(B) the court in which the charging document was filed, the date and place of trial, each offense of which the petitioner was convicted, and the sentence imposed for each offense;

(C) a description of all previous proceedings in the case, including direct appeals, motions for new trial, habeas corpus proceedings, post-conviction proceedings, and all other collateral proceedings, including (i) the court in which each proceeding was filed, (ii) the case number of each proceeding, (iii) the determinations made in each proceeding, and (iv) the date of each determination; and

(D) a statement regarding whether the petitioner is able to pay the cost of testing and to employ counsel. If indigent, the petitioner may request that the court appoint counsel.

(2) Request for DNA Testing

If the request is for DNA testing of scientific identification evidence, the petition shall contain:

(A) a description of the specific scientific identification evidence that the petitioner seeks to have tested; and

(B) a statement of the factual basis for the claims that (i) the State possesses that evidence, (ii) the evidence is related to the conviction, including a concise description of how the evidence is related to the conviction, and (iii) a reasonable probability exists that the requested DNA

testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.

(C) to the extent known: (i) a description of the type of DNA testing the petitioner seeks to employ and (ii) a statement of the factual basis for a claim that DNA testing method has achieved general acceptance within the relevant scientific community.

(3) Request for Search of Law Enforcement Database or Log

If the request is for a search of a law enforcement agency database or log, the petition shall:

(A) identify with particularity the law enforcement agency whose database or logs are to be searched; and

(B) state the factual basis for any claim that there is a reasonable probability that a search of the database or log will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing or will identify the source of physical evidence used for DNA testing of a law enforcement database or log.

Committee note: A petition filed by an unrepresented petitioner may be lacking in some of the details required by subsections (a)(2) and (3) of this Rule. To justify an order requiring DNA testing or a search of law enforcement databases or logs, however, those details must be provided at some point. That may be achieved by the appointment of counsel under Rule 4-707 and an appropriate amendment to the petition.

(b) Amendment

Amendments to the petition shall be freely allowed in order to do substantial justice. If an amendment is made, the court shall allow the State a reasonable opportunity to respond to the amendment.

(c) Withdrawal

On motion of a petitioner, the court may grant leave for the petitioner to withdraw a petition. If the motion is filed before the court orders DNA testing or a search of a law enforcement agency database or log, the leave to withdraw shall be without prejudice. If such an order has been issued, the leave to withdraw shall be with prejudice unless the court, for good cause, orders otherwise.

Source: This Rule is new.

Mr. Karceski explained that subsection (a)(1)(D) of Rule 4-704 had been changed. At the last meeting, the issue of the petitioner alleging the inability to pay the cost of testing or to employ counsel because of poverty was thoroughly discussed. The Rule had provided that the petitioner shall proceed in conformance with Rule 1-325 (a). The wording, but not the concept, had been changed. It is less cumbersome. Subsection (a)(2) is the same as it was when considered by the Committee on May 15, 2009. There is a change in subsection (a)(2)(C) that is the addition of the language “to the extent known...” at the beginning. This was discussed at the May meeting and at the last Subcommittee meeting. The point had been made that the petitions may be filed *pro se* initially. A petitioner is hardly going to be in a position to be able to set forth the information about the type of testing. This is why the new language was added. There is a provision for the appointment of counsel in Rule 4-707, Denial of Petition; Appointment of Counsel.

The Chair added that the Committee note at the end of section (a) goes along with subsection (a)(2)(C). Master Mahasa referred to the language in the Committee note that reads, "...those details must be provided at some point." She inquired as to who determines when the details must be provided. The Chair responded that the court will not order the testing unless the details have been shown, because this is required by the statute.

Ms. Holback referred to subsection (a)(2)(C)(ii) and suggested that the word "said" should be added after the word "that" and before the words "DNA testing." The first phrase refers to "the type of DNA testing that the petitioner seeks to employ," and the second phrase refers back to this. It would be appropriate to add the word "said" or the word "the." The Chair suggested that the word "the" be added. By consensus, the Committee agreed to this change.

Ms. Holback said that another minor point is in subsection (a)(3)(A) where the word "logs" is plural, but elsewhere in the Rules, the word is singular. She suggested that the word should be singular throughout the Rules. By consensus, the Committee agreed to change the word "logs" to the word "log."

Mr. Karceski said that subsection (a)(3) has not been changed, since it was discussed at the last meeting. The Chair had pointed out the Committee note at the end of the subsection. Sections (b) and (c) have not been changed.

By consensus, the Committee approved Rule 4-704 as amended.

Mr. Karceski presented Rule 4-705, Notice of Petition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-705, as follows:

Rule 4-705. NOTICE OF PETITION

(a) To State's Attorney

Upon receipt of a petition, the clerk shall promptly forward a copy of it to the State's Attorney and the county administrative judge. If the petition seeks a search of the database or log of an identified law enforcement agency, the State's Attorney shall send a copy of the petition to that law enforcement agency.

(b) To Public Defender

If the petition alleges that the petitioner is unable to pay the costs of testing or to employ counsel, the clerk shall promptly forward a copy of the petition to the Public Defender's Inmate Services Division.

Source: This Rule is new.

Mr. Karceski explained that there were no changes the Rule 4-705, except that in section (b), the phrase "the costs of testing" had been "the costs of the proceeding." By consensus, the Committee approved Rule 4-705 as presented.

Mr. Karceski presented Rule 4-706, Answer; Motion to Transfer, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-706, as follows:

Rule 4-706. ANSWER; MOTION TO TRANSFER

(a) Duty to File

The State's Attorney shall file an answer to the petition or a motion to transfer.

(b) Motion to Transfer

(1) Time for Filing

The motion shall be filed no later than 30 days after the State's Attorney receives notice of the petition.

(2) Content

A statement of facts establishing proper venue, including the case number, shall be attached to the motion to transfer.

(3) Determination; Transfer

The court promptly shall grant or deny the motion to transfer. If the court grants the motion, the court shall transfer the action to the county where the petition should have been brought.

(4) Notice of Transfer

If an action is transferred pursuant to subsection (b)(3) of this Rule, the clerk of the receiving court promptly shall comply with the notice requirements of Rule 4-705.

(c) Answer

(1) Time for Filing

The answer shall be filed no later than the later of 60 days after the State's Attorney receives notice of the filing or transfer of the petition or 60 days after the court denies a motion to transfer. If an answer is not filed within the time required by this Rule or an extended time allowed by the court, the court shall take such action as it deems appropriate.

Cross reference: For extension of time requirements, see Rule 1-204.

(2) Content

The answer shall state or contain:

(A) whether the specific scientific identification evidence that the petitioner desires to have tested exists and, if so, the location of the evidence, the name and business address of the custodian of the evidence, whether the evidence is appropriate for DNA testing, and if not, the reasons why it is not appropriate for DNA testing;

(B) if the State asserts that it has been unable to locate the evidence, an affidavit containing a detailed description of all steps it took to locate the evidence, including (i) a description of all law enforcement records, databases, and logs that were searched, (ii) a description and documentation of when and how the searches were conducted, and (iii) the names and business addresses of the persons who conducted them;

(C) if the State asserts that the evidence has been destroyed, an affidavit (i) containing a description and documentation of all relevant protocols pertaining to the destruction of the evidence, and (ii) stating whether the evidence was destroyed in conformance with those protocols and, (a) if so, providing documentation of that fact, and, (b) if not, stating the reasons for non-compliance with the protocols; and

(D) a response to each allegation in the petition.

(d) Service

The State's Attorney shall serve a copy of the answer or objection to venue on the petitioner and, if the petitioner alleges an inability to pay the costs of testing or to employ counsel, on the Public Defender's Inmate Services Division.

Source: This Rule is new.

Mr. Karceski told the Committee that Rule 4-706 was previously entitled "Answer." The "motion to transfer" option has been added to the Rule. The Rule lays out what the State's Attorney has to do. Subsection (b)(1) has a time for filing, which is no later than 30 days after the State's Attorney receives notice of the petition. The content must establish proper venue through a statement of facts, including the case number. The Chair suggested adding the language "of the case in which the judgment of conviction was entered" after the phrase "case number" in subsection (b)(2). By consensus, the Committee agreed to add this language to subsection (b)(2).

Mr. Karceski said that subsection (b)(3) provides that the court promptly grants or denies the motion, and if the court grants it, the action shall be transferred to the county where the petition should have been brought. Subsection (b)(4) is the notice of transfer, which shall comply with Rule 4-705.

Mr. Karceski continued that subsection (c)(1) has been changed, because there is a motion to transfer that could have

been filed by the State's Attorney, so the answer is filed no later than 60 days after the State's Attorney receives the notice of the filing or transfer of the petition or 60 days after the court denies a motion to transfer. There had been some discussion as to the next sentence providing that if an answer is not filed within the time required by the Rule or an extended time allowed by the court, the court shall take such action as it deems appropriate. Subsections (c)(2)(A) and (B) have been changed to add the word "business" before the word "address." Otherwise, the content of the answer remains the same. The Assistant Reporter pointed out that the phrase "objection to venue" in section (d) has been changed to "motion to transfer," and by consensus, the Committee agreed to correct this.

Mr. Karceski noted that the reference to "Public Defender's Inmate Services Division" had previously been the phrase "Public Defender." This is consistent with the language in the prior Rule.

By consensus, the Committee approved Rule 4-706 as amended.

Mr. Karceski presented Rule 4-707, Denial of Petition; Appointment of Counsel, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-707, as follows:

Rule 4-707. DENIAL OF PETITION; APPOINTMENT OF COUNSEL

(a) Denial of Petition

Upon consideration of the State's answer, the court may deny the petition if it finds as a matter of law that (1) the petitioner has no standing or (2) the facts alleged in the petition do not entitle the petitioner to relief.

(b) Appointment of Counsel

Unless the court denies the petition as a matter of law, a petitioner who is indigent and who has requested counsel shall be appointed counsel by the court provided counsel has not already filed an appearance to represent the petitioner within 30 days after the State has filed its answer.

Source: This Rule is new.

Mr. Karceski explained that Rule 4-707 was formerly entitled "Response to Answer." Rule 4-707 has been placed in front of Rule 4-708, "Response to Answer," and it is new. Section (a) pertains to the denial of the petition. There can be a denial of the petition on its face. The Rule incorporates the appointment of counsel at this stage of the proceedings. Section (b) provides that unless the court denies the petition as a matter of law, an indigent petitioner who has requested counsel shall be appointed counsel by the court, provided counsel has not already filed an appearance to represent the petitioner within 30 days after the State has filed its answer.

Mr. Bowen commented that the second line of section (b) seems to indicate that the petitioner who requested counsel but

is not indigent will get counsel appointed. The Chair responded that the Rule needs to be restyled. The Reporter said that Mr. Bowen had already restyled section (b) to read as follows: "If the court finds that a petitioner who has requested the appointment of counsel is indigent, the court shall appoint counsel within 30 days after the State has filed its answer unless (1) the court denies the petition as a matter of law or (2) counsel has already filed an appearance to represent the petitioner." The Chair noted that this implements what the Committee wanted to do at the last meeting, which is to get counsel involved earlier in the process when the State files its answer even before a response is due. By consensus, the Committee approved the language suggested by Mr. Bowen.

Judge Pierson remarked that he was trying to figure out how this process would work. Section (a) provides: "...if it [the court] finds as a matter of law...". The more correct language would be if the court "concludes" or "determines" as a matter of law. Judge Pierson added that he did not think that the Rule should imply that the court is making a factual finding, but if the court is making a factual finding, it is not fair to do this unless the petitioner is able to file a response. The language in the Rule is somewhat ambiguous. Often it is the same issue in the Habeas Corpus Rules, Rules 15-301 et. seq., involving the right of the petitioner to file a response to the response before the case goes any further.

The Chair pointed out that the Committee and the Subcom-

mittee had discussed the problem that the petition may be lacking in a number of respects simply because the petitioner is unrepresented. Once the State files an answer, it may be clear as a matter of law that the petitioner does not have standing or may not have been convicted of the appropriate crime. The petition can be dismissed, and it is not a fact issue. Unless the petition can be dismissed, counsel should be appointed to represent the petitioner before the response is due. The response is going to have to address whatever the State is saying and straighten out the petition which may be lacking in detail. It would be difficult for the petitioner to do this without the help of an attorney. That is why section (b) was included.

Judge Pierson responded that in habeas corpus petitions, frequently the petitioner's reply will clarify what was in the original petition. He asked if the Public Defender will be able to represent the petitioners in the DNA petitions. The Chair answered that the Committee had been told that the Office of the Public Defender screens the petitions to some extent to decide which ones they want to get involved in. If the Public Defender is willing to take the case, the issue of who to appoint is moot. The Rules provide that the Public Defender gets copies of the petition and the State's answer, so that they can decide if they want to represent the petitioner. If the Public Defender opts out, and there is no pro bono attorney assigned, should counsel be appointed before the response is due? Mr. Karceski added that there is no requirement that the Public Defender take the case

and no funding.

The Chair asked Judge Pierson if he had a suggested amendment. Judge Pierson suggested that the word "finds" in section (a) be changed to the word "determines." Mr. Bowen noted that section (b) would have to be changed also to be consistent. Judge Hollander expressed the view that section (a) should not be changed. Judge Pierson inquired whether it is a factual determination or a determination as a matter of law. Judge Hollander remarked that a finding of no standing is a legal determination. Judge Pierson asked whether the judge finds facts. Judge Hollander commented that the petition may not have what is necessary to go forward. Judge Pierson said that this may be because the petitioner does not have sufficient facts for the case to go forward. The petitioner may allege that the State has DNA evidence that would establish the petitioner's innocence. There is nothing legally insufficient about the way the petitioner alleges this. This is not at the proof stage.

Mr. Shellenberger observed that if the State responds by saying that the DNA evidence was destroyed, and the petitioner was convicted 30 years ago when there was no protocol to keep the evidence, then the evidence does not exist. It would be better to get an attorney to say that there should have been protocols, and some did exist at that time. The Chair said that another argument would be that the State did not look for the evidence in the proper places. Judge Pierson questioned whether in his judicial capacity, he is going to be weighing these allegations,

or he is going to determine that it is a failure to state a claim upon which relief can be granted.

The Chair stated that there are two questions. One is whether the word "find" should be changed to the word "determine." The other is whether the court is able to deny the petition before the response is filed. Mr. Shellenberger noted that the statute uses the word "find." No change was recommended by the Committee.

By consensus, the Committee approved Rule 4-707 as amended.

Mr. Karceski presented Rule 4-708, Response to Answer, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-708, as follows:

Rule 4-708. RESPONSE TO ANSWER

Not later than 60 days after the later of service of the State's answer or entry of an order appointing counsel pursuant to Rule 4-707, the petitioner may file a response to the answer. The response may challenge the adequacy or the accuracy of the answer and request that a search of other law enforcement agency databases or logs be conducted and be accompanied by an amendment to the petition. The petitioner shall serve the response on the State's Attorney.

Source: This Rule is new.

Mr. Karceski explained that Rule 4-708 had formerly been Rule 4-707, but because the Rule providing for counsel was included, this Rule has been moved back. When there is an answer to be filed, an attorney will have been appointed to represent the petitioner, or the petitioner will have elected not to have an attorney. The court is going to appoint someone as counsel, but the language in the Rule provides that the appointment can be rejected. If the petitioner wants to continue without counsel, he or she is able to do so. If counsel is appointed, and the petitioner accepts counsel, there is a period of 60 days after the later of service of the State's answer or entry of an order appointing counsel for a response to the State's answer to be filed. The petitioner may file a response, challenging the adequacy or accuracy of the answer and requesting that a search of other law enforcement agency databases or logs be conducted. The provision in the Rule that pertained to the appointment of counsel has been deleted, because the issue of appointment of counsel has been moved to Rule 4-707.

Ms. Holback suggested that the acronym "DNA" be added before the word "databases" and after the word "agency," so that people do not think that they can ask to search other databases or logs. Mr. Karceski supported that. By consensus, the Committee agreed to Ms. Holback's suggested change.

Ms. Potter inquired whether it may be stylistically preferable to restructure the first sentence of the Rule as follows: "The petitioner may file a response to the answer no

later than 60 days after...". She also suggested that it may be better to state that the answer should be filed "within 60 days after...". The Vice Chair agreed that the Rule should be restyled. Mr. Karceski said that the Rule should be rewritten for style purposes only and not substantively.

By consensus, the Committee approved Rule 4-708 as amended.

Mr. Karceski presented Rule 4-709, Hearing; Procedure if No Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-709, as follows:

Rule 4-709. HEARING; PROCEDURE IF NO HEARING

(a) When Required

Except as otherwise provided in subsection (b)(2) of this Rule, the court shall hold a hearing if, from the petition, answer, and any response, the court finds that the petitioner has standing to file the petition, the petition is filed in the appropriate court, and one of the following:

(1) specific scientific identification evidence exists or may exist that is related to the judgment of conviction, a method of DNA testing of the evidence may exist that is generally accepted within the relevant scientific community, and there is or may be a reasonable probability that the testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing;

(2) if the State contends that it has been unable to locate the evidence, there is a genuine dispute as to whether the State's search was adequate;

(3) if the State contends that the evidence existed or may have existed but was destroyed, there is a genuine dispute whether the destruction was in conformance with any relevant governing protocols or was otherwise lawful;

(4) the State is unable to produce scientific evidence that the State was required to preserve pursuant to Code, Criminal Procedure Article, §8-201 (i)(l); or

(5) there is some other genuine dispute as to whether DNA testing or a database or log search by a law enforcement agency should be ordered.

(b) Not Required

(1) Denial of Petition Without a Hearing

The court shall deny the petition without a hearing if it finds that:

(A) the petitioner has no standing to request DNA testing or a search of a law enforcement agency database or logs; or

(B) as a matter of law, the facts alleged in the petition pursuant to subsections (a)(2) and (3) of Rule 4-704 do not entitle the petitioner to relief under Code, Criminal Procedure Article, §8-201.

(2) Grant of Petition Without a Hearing

The court may enter an order granting the petition without a hearing if the State and the petitioner enter into a written stipulation as to DNA testing or a database or log search and the court is satisfied with the contents of the stipulation. An order for DNA testing shall comply with the requirements of Rule 4-710 (a)(2)(B).

(c) Discretionary

In its discretion, the court may hold a hearing when one is not required.

(d) Time

Any hearing shall be held within (1) 90 days after service of any response to the State's answer or, (2) if no response is timely filed, 120 days after service of the State's answer.

(e) If No Hearing

If the court declines to hold a hearing, it shall enter a written order stating the reasons why no hearing is required. A copy of that order shall be served on the petitioner and the State's Attorney.

Cross reference: For victim notification, see Code, Criminal Procedure Article, §§11-104 and 11-503.

Source: This Rule is new.

Mr. Karceski told the Committee that Rule 4-709 was previously entitled "Hearing." Section (a) addresses when a hearing is required. Except as provided in subsection (b)(2), the Rule states that the court shall hold a hearing if the court finds that the petitioner has standing, that the petition was filed in the appropriate court, and that one of the following was present: (1) scientific identification evidence exists or may exist that is related to the judgment of conviction, there is a method of testing that is generally accepted within the relevant scientific community, and there is a reasonable probability that the testing will produce exculpatory or mitigating evidence

relevant to the claim of wrongful conviction or sentencing, (2) if the State contends that it has been unable to locate the evidence, there is a genuine dispute as to whether the State's search was adequate, and (3) if the State contends that the evidence did exist but was destroyed, there is a genuine dispute whether the destruction was in conformance with any relevant governing protocols or was otherwise lawful. For these reasons, a hearing would be appropriate as long as the petitioner has standing.

Mr. Karceski said that subsections (a)(4) and (a)(5) have been added. Subsection (a)(4) is if the State is unable to produce evidence that the State was required to preserve pursuant to the statute. Subsection (a)(5) is if there is some other genuine dispute as to whether DNA testing or a database or log search by a law enforcement agency should be ordered. For the five reasons listed, a hearing would be required.

Mr. Karceski said that section (b) addresses when a hearing is not required. This is a new addition to the Rule. Subsection (b)(1) addresses a denial without a hearing. The court can deny the petition if it finds that the petitioner has no standing to request DNA testing or a search of the law enforcement agency database or log, or as a matter of law, the facts in the petition that are alleged pursuant to Rule 4-704 do not entitle the petitioner to relief under the statute. These two situations are ones where there would be a denial of the petition without a hearing. Subsection (b)(2) pertains to the grant of the petition

without a hearing. This happens if the State and the petitioner enter into a written stipulation as to the DNA testing or the search of a database or log. This has also been added to the Rule.

Ms. Ogletree inquired whether the term "DNA" will be added before each reference to "database or log search" in the Rules. Ms. Holback replied that the term should be added. Ms. Nethercott noted that in the context of language addressing a search of databases or logs, the reference may not be to DNA databases or logs necessarily. They could be evidence-tracking databases. The search could be for a certain shirt. Mr. Shellenberger remarked that this section is not addressing this. It is addressing the issue of whether there is unknown DNA on the shirt, the petitioner is requesting that it be put through the database to find out to whom it belongs, because it may belong to the real murderer and not the petitioner. The question is whether the State has the shirt, and if so, there is a request to test it. This does refer to a DNA database or log search. The search Ms. Nethercott just spoke about is the other kind of testing which is when the State has the requested item. Ms. Holback pointed out there is a duty to search under *Arey v. State*, 400 Md. 491 (2007) and *Blake v. State*, 395 Md. 214 (2006), the Rules, and the statute.

Mr. Karceski asked Mr. Shellenberger which provision in the proposed Rules he was discussing. Mr. Shellenberger answered

that he was referring to subsection (b)(2) of Rule 4-709. The term "DNA" would be added before the word "database" in the first sentence of that provision. Ms. Ogletree said that the term "DNA" would have to be added throughout the Rules. Mr. Shellenberger agreed, noting that there are a few other places where it would need to be placed. Any time the Rule uses the language "database or log search," the term "DNA" would be added before it. This does not prevent the petitioner from asking the State to look for the evidence.

The Chair stated that he wanted to make sure that if the term "DNA" is added throughout the Rules, the scope of the statute is not being limited. Somehow the State may have the duty to make the search, anyway. Ms. Holback responded that the State has the duty to search under *Blake*, *Arey*, the Rules, and the statute. The only databases and logs that they are entitled to affirmatively ask a judge to search are DNA databases and logs. She added that this is how she reads the statute. Ms. Nethercott remarked that she did not have a problem with that in this context, because it would be referring to a search of DNA databases and logs. She expressed the concern that it may not apply in previous sections of the Rules. Logically, it makes sense in subsection (b)(2) of Rule 4-709.

The Chair pointed out that the statute provides in subsection (b)(2) for a search by a law enforcement agency of a law enforcement database or log for the purpose of identifying

the source of physical evidence used for DNA testing. This appears to mean that it is not just a DNA database. He cautioned that adding the term "DNA" throughout the Rules could limit the applicability of the statute unless the statute will be read by the Court of Appeals as implying that it only applies to DNA databases or logs. It is not known if the Court will read it that way.

Mr. Shellenberger said that the concept of the Rule is that there are two types of searches. One is that a shirt was involved in the petitioner's case. The petitioner was convicted, but DNA testing did not exist at that time. The petitioner asks the State if it has the shirt, and if it does, the petitioner requests that it be tested. The other concept is that the petitioner was convicted. A hat with DNA evidence on it had been at the scene, but it is not known whose DNA it is. The petitioner asks for the DNA to be run through the database to identify whose DNA it is. This request is to identify the source. Mr. Shellenberger expressed the concern that the statute should not be expanded by searching other databases that have nothing to do with DNA. The term "DNA" only needs to be added to the two places noted today.

Mr. Klein noted that the Rule does not contain the statutory language "for the purpose of identifying the source of physical evidence used for DNA testing." It may make sense to add this language to Rule 4-709 in the places where the Rule refers to "search of a database or log." This way it would not matter what

the database is called. It clarifies what is being searched for. The Chair noted that this would only modify the "database or log search," not the DNA testing. The Reporter asked where this language would go. The Chair answered that it would be added throughout the Rules wherever the language "database or log search" appears. By consensus, the Committee approved this change.

Mr. Karceski pointed out that sections (c), (d), and (e) have not been changed. There had been a former section (d) entitled "Appointment of Counsel" that has been stricken, because at this point in the proceedings, counsel has already been appointed in the newest version of the Rules.

By consensus, the Committee approved Rule 4-709 as amended.

Mr. Karceski presented Rule 4-710, Determination of Petition After a Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-710, as follows:

Rule 4-710. DETERMINATION OF PETITION AFTER A HEARING

(a) DNA Testing

(1) Denial of Petition

The court shall deny a petition for DNA testing if it finds that:

(A) the State has made an adequate search for scientific identification evidence that is related to the judgment of conviction, that no such evidence exists within its possession, and that no such evidence was intentionally and willfully destroyed; or

(B) scientific identification evidence exists but the method of testing requested by petitioner is not generally accepted in the relevant scientific community, or that there is no reasonable probability that DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.

(2) Grant of Petition

(A) Order for DNA Testing

The court shall order DNA testing if (i) the State agrees to the testing, or (ii) after considering the petition, the answer by the State's Attorney, any response by the petitioner, and any evidence adduced at a hearing on the petition, the court finds that specific scientific identification evidence exists that is related to the judgment of conviction and there is a reasonable probability that the requested testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.

(B) Contents of Order

(i) An order for DNA testing shall:

(a) designate the specific evidence to be tested;

(b) specify the method of testing to be used;

(c) specify the laboratory where the testing is to be performed, provided that, if the parties cannot agree on a laboratory, the court may approve testing at

any laboratory accredited by the American Society of Crime Laboratory Directors, the Laboratory Accreditation Board, or the National Forensic Science Technology Center;

(d) require that the laboratory send a report of the results of the testing as well as raw data and the laboratory notes to the petitioner and the State's Attorney; and

(e) contain a provision concerning the payment of the cost of the testing.

(ii) An order for DNA testing also may:

(a) provide for the release of biological evidence by a third party;

(b) require the preservation of some of the sample for replicate testing and analysis or, if that is not possible, the preservation of some of the DNA extraction for testing by the State; and

(c) contain any other appropriate provisions.

Cross reference: Code, Courts Article, §10-915.

(3) Inability of State to Produce Scientific Evidence

If the State is unable to produce scientific evidence that the State was required to preserve pursuant to Code, Criminal Procedure Article, §8-201 (i)(1), and the court after a hearing determines that the failure to produce evidence was the result of intentional and willful destruction, the court shall:

(i) if no post conviction proceeding was previously filed by the petitioner under Code, Criminal Procedure Article, §7-102, open such a proceeding;

(ii) if a post conviction proceeding is currently pending, permit the petitioner to

amend the petition in that proceeding in light of the court's finding; or

(iii) if a post conviction proceeding was previously filed by petitioner under Code, Criminal Procedure Article, §7-102, but is no longer pending, reopen the proceeding under Code, Criminal Procedure Article, §7-104.

At any such post conviction hearing, the court shall infer that the results of the post conviction DNA testing would have been favorable to the petitioner.

(b) Database or Log Search

The court shall order a database or log search by a law enforcement agency if (i) the State agrees to the search, or (ii) after considering the petition, the answer by the State's Attorney, any response by the petitioner, and any evidence adduced at a hearing on the petition, the court finds that a reasonable probability exists that the database or log search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing. In all other cases, the court shall deny the petition.

Source: This Rule is new.

Mr. Karceski explained that this version of Rule 4-710 has some changes. Section (a) pertains to DNA testing as distinguished from a database or log search. Subsection (a)(1) addresses the denial of the petition. The court shall deny a petition for DNA testing if it finds (1) that the State has made an adequate search for scientific identification evidence related to the judgment of conviction, that no such evidence exists within its possession, and that the evidence was not intentionally and willfully destroyed; or (2) that scientific

identification evidence exists but the method of testing requested is not generally accepted in the relevant scientific community, or that there is no reasonable probability that DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.

Senator Stone inquired if some other language is needed because all evidence that was destroyed was done so intentionally and willfully. The Chair questioned whether the statute uses the language "intentionally and willfully." Mr. Klein remarked that he had raised this issue at a prior meeting, and the answer was that this language is a term of art. Mr. Shellenberger observed that the problem is that more likely than not, the police had the shirt 30 years ago, and the protocol was that it could be destroyed after five years. It was intentionally and willfully but not wrongfully destroyed. Should the word "unlawfully" or the language "in violation of protocols" be added in to clarify the meaning?

Judge Norton noted that "intentionally and willfully" is the language in the statute. The Chair inquired whether the word "willfully" could be construed as meaning "unlawfully." Courts are inconsistent about this language. He asked the Committee if they wanted to add the word "unlawfully" under the theory that statutory construction is that it must mean that. Senator Stone responded that he did not believe that this would upset anyone in the legislature.

The Chair asked Ms. Nethercott if she agreed with adding this. Ms. Nethercott replied that she did not have a problem substantively, but stylistically, it would require the use of three adjectives together. Ms. Holback suggested that the new language could be "intentionally and willfully destroyed in an unlawful manner." Judge Love suggested that a Committee note could be added that would explain that the Committee was tracking the language of the statute, and the Committee thinks that the language means that the destruction was unlawful.

The Chair commented that it may not be a good idea to drop the concept of "intentional." It may have been unlawful to destroy the evidence, but it was not done intentionally or willfully. The statutory language has a specific meaning. Mr. Klein noted that the State may have destroyed the wrong item. The words "intentionally" and "willfully" are necessary. The question is whether the word "unlawfully" should be added.

Master Mahasa referred to the language in subsection (a)(3) of Rule 4-709 that reads, "... in conformance with any relevant governing protocols or was otherwise lawful...," and she asked if language similar to this should be added to subsection (a)(1)(A) of Rule 4-710. The Chair responded that he was not sure that the word "unlawful" would apply to this language. As of 2001, the statute requires the State to keep the evidence. Before that the State did not have to keep it, but there may have been protocols that the police had for destroying evidence. Since 2001, if the State destroyed evidence that the law requires the State to keep,

it is unlawful. Mr. Shellenberger noted that it was unlawful, but it might not have been willful or intentional.

The Chair said that before there was a duty to keep the evidence, the destruction of it may not have been unlawful, but protocols for destruction of the evidence existed that the State did not follow. Mr. Shellenberger added that if the protocols were not followed, it would be willful and intentional, and the judge would decide whether or not it was lawful under the protocol.

Mr. Karceski expressed the view that this is why the word "unlawful" should not be incorporated into the Rule. Otherwise, there would be a debate about whether destruction that took place before 2001 is unlawful or lawful. Ms. Holback commented that the protocols in Baltimore City at the time of *Arey* did not cover this. Mr. Klein remarked that if the evidence has been destroyed, regardless of how or why, there is nothing to test. Ms. Holback observed that the statute provides that if the court determines that the evidence was intentionally and willfully destroyed, the court shall infer that the results of the post conviction DNA would have been favorable to the petitioner.

Mr. Klein pointed out that the debate is whether a petition for DNA testing would be denied if there is nothing to test. Ms. Nethercott said that there could be a situation where a request is made as to whether the evidence is still in existence, and the answer is affirmative. A petition for DNA testing is filed. The

State answers that testing is not appropriate. At some point after this, the police detective requests that all of the evidence be destroyed, and it is. This is clearly a situation where the petitioner states that he or she is entitled to an inference, because the State willfully and intentionally destroyed the evidence knowing that the petitioner wanted it. The petitioner would state that he or she is entitled to an inference that if he or she would have been able to test the evidence, the petitioner would have gotten an exculpatory result. The idea was to provide some sanction for the State's conduct. The Chair said that the petition would not be denied; the issue is the remedy.

Judge Norton expressed the opinion that the language should be left alone. The legislature meant for the word "willful" to modify the word "intentional," and it is not necessary to add another layer of review. The words "and willfully" mean something more than intent. Master Mahasa asked about adding a Committee note referring to conformance with whatever protocols were in place at the time of the destruction of the evidence. The Chair reiterated that after 2001, it no longer matters what the protocols were, the evidence had to be kept. Master Mahasa remarked that it would be the protocols before 2001. She suggested that the language in subsection (a)(3) of Rule 4-709 to which she had referred earlier would be appropriate -- "...in conformance with any relevant governing protocols or was otherwise lawful...". The Chair pointed out that there may not

have been any protocols.

Master Mahasa explained that based on the discussion, she felt that a clarification could be helpful. She moved to add this language to a Committee note after subsection (a)(1)(A) of Rule 4-710. The motion was seconded, and it passed with only two opposed. The Reporter asked what the exact wording would be. Master Mahasa suggested that the language of Rule 4-709 (a)(3) be tracked to apply to the destruction of evidence before 2001.

Mr. Karceski told the Committee that subsection (a)(2) addresses the grant of a petition. Subsection (a)(2)(B) pertains to the contents of the order. This has no new material added, except for subsection (a)(2)(B)(ii)(a), which states that an order for DNA testing may provide for the release of biological evidence by a third party. In subsection (a)(2)(B)(ii)(b), the preservation of some of the sample for replicate testing is being required. Ms. Nethercott noted that in that subsection, the word "extraction" should be the word "extract." By consensus, the Committee approved this change.

Mr. Karceski drew the Committee's attention to subsection (a)(3), Inability of the State to Produce Scientific Evidence. If the State is unable to produce the evidence it was required to preserve, and after the court determines that the failure to produce the evidence was the result of intentional and willful destruction, the court shall act as follows: (1) if no post conviction proceeding was previously filed, one would be opened, (2) if one is currently pending, the petitioner would be

permitted to amend the petition in light of the court's finding, or (3) if the post conviction proceeding was previously filed by the petitioner, but is no longer pending, the petitioner could reopen the proceeding. The Chair said that this is hinged on the failure to preserve evidence since 2001. This does not apply on its face to the failure to preserve evidence in accordance with protocols that existed before that time. Ms. Nethercott had referred to the petitioner being entitled to the inference, but it is not in this Rule.

Ms. Nethercott explained that she was referring to a situation where the evidence was collected prior to 2001 and had been maintained and then destroyed some time after 2001. The Chair clarified that Ms. Nethercott was not arguing that a petitioner could be entitled to the inference if the evidence were destroyed prior to 2001, but simply if it were destroyed not in accordance with protocols. Ms. Nethercott agreed. She said that as a practical matter, there either was no protocol, or the protocol allowed for such discretion, that it may not have mattered.

Mr. Shellenberger remarked that before 2001, there was wide latitude among various agencies and even in the same department there were varying protocols. Ms. Nethercott noted that it would be very difficult for a petitioner to make a case that someone destroyed evidence in 1982, pursuant to either a non-existent written protocol or one that existed. The Chair responded that it would only come into play if the protocol required that the

evidence be kept for 10 years. Ms. Nethercott added that it would only come into play if the evidence had been preserved up through 2001 and then destroyed.

Mr. Karceski drew the Committee's attention to section (b) of Rule 4-710, Database or Log Search. It states that the court shall order a database or log search by a law enforcement agency if the State agrees to the search or after considering the petition, the answer, the response, and any evidence adduced at a hearing, the court finds that a reasonable probability exists that the database or log search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing. Mr. Karceski inquired whether the term "DNA" will be added before the word "database" in this provision. Mr. Shellenberger answered that the term "DNA" should be added in here. The Chair added that any other statutory language that applies should be included. Mr. Karceski asked if the term "DNA" should be added before the word "database" the second time it appears. The Chair noted that this is referring back to the same language earlier in this paragraph, so it is not necessary to repeat it.

By consensus, the Committee approved Rule 4-710 as amended.

Mr. Karceski presented Rule 4-711, Further Proceedings Following Testing, for the Committee's consideration.

CHAPTER 700 – POST CONVICTION DNA TESTING

ADD new Rule 4-711, as follows:

Rule 4-711. FURTHER PROCEEDINGS FOLLOWING TESTING

(a) If Test Results Unfavorable to Petitioner

If the test results fail to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing, the court shall dismiss the petition and assess the cost of DNA testing against the petitioner.

(b) If Test Results Favorable to Petitioner

(1) If the test results produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing, the court shall order the State to pay the costs of the testing and:

(A) if no post conviction proceeding was previously filed by the petitioner under Code, Criminal Law Article, §7-102, open such a proceeding;

(B) if a post conviction proceeding is currently pending, permit the petitioner to amend the petition in that proceeding; or

(C) if a post conviction proceeding was previously filed by the petitioner under Code, Criminal Law Article, §7-102, reopen the proceeding under Code, Criminal Law Article, §7-104; or

(D) if the court finds that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, order a new trial.

(2) If the test results produce exculpatory or mitigating evidence relevant

> to a claim of wrongful conviction or sentencing but the court finds that a substantial possibility does not exist that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, it may order a new trial if it finds that such action is in the interest of justice.
>
> (3) If the court grants a new trial under subsection (b)(1)(D) or (b)(2) of this Rule, the court may order the release of the petitioner on bond or on conditions that the court finds will reasonably assure the presence of the petitioner at trial.
>
> Cross reference: Code, Criminal Law Article, §8-201 (h).
>
> Source: This Rule is new.

Mr. Karceski told the Committee that Rule 4-711 had previously been numbered Rule 4-710. Section (a) pertains to unfavorable test results. If they fail to produce the exculpatory or mitigating evidence, the court shall dismiss the petition and assess the cost against the petitioner. Section (b) addresses test results favorable to the petitioner. If the results produced exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing, the court shall order the State to pay the costs of the testing, and the same situations as in subsection (a)(3) of Rule 4-710 are set out. Subsection (b)(1)(D) provides that if the court finds that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, the court may order a new trial. Subsection (b)(2) provides that if the test results produced exculpatory or

mitigating evidence relevant to a claim of wrongful conviction or sentencing, but the court finds that a substantial possibility does not exist that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, it may order a new trial if it finds that such action is in the interest of justice.

Mr. Bowen pointed out that in this section, the concept of sentencing is introduced; however, subsection (b)(2) uses the language "petitioner would not have been convicted." Should the reference to "sentencing" be in that provision? Mr. Shellenberger replied that the statute uses the word "mitigating," so it would apply to sentencing. The DNA may not have exculpated the petitioner, but it could mitigate the sentence in some way. Mr. Bowen said that he had rewritten subsection (b)(2). The Reporter read the rewritten passage: "If the court finds that (A) the test results produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing, but (B) a substantial possibility does not exist that the petitioner would have been so convicted or sentenced if the test results had been known or introduced at trial, the court may order a new trial if it also finds that such action is in the interest of justice." Mr. Michael inquired as to where the language "substantial possibility" came from. Mr. Karceski answered that it is in the statute. By consensus, the Committee approved Mr. Bowen's revision of subsection (b)(2).

Mr. Karceski said that subsection (b)(3) provides that if

the court grants a new trial, the court may order the release of the petitioner on bond or on conditions that the court finds will reasonably assure the presence of the petitioner at trial.

Master Mahasa questioned as to how the "substantial possibility" standard works. The Chair replied that this is the test under *Strickland v. Washington*, 466 U.S. 668 (1984), which addressed post conviction relief. Although the U.S. Supreme Court uses the term "substantial probability," the Court of Appeals has interpreted the Supreme Court's language to mean "substantial possibility." The U.S. Supreme Court announced a decision in a case yesterday, *DA's Office v. Osborne*, 129 S.Ct. 2308 (2009), which held that there was no federal constitutional right under substantive due process to DNA testing; it is up to the states to address this. There is a federal statute, 18 USCS 3600, which is substantially different from the State law in a number of respects.

By consensus, the Committee approved Rule 4-711 as amended.

Agenda Item 3. Reconsideration of proposed amendments to Rule 4-214 (Defense Counsel)

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After the lunch break, Mr. Karceski presented Rule 4-214, Defense Counsel, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-214 by adding a new section (c) pertaining to joint representation of defendants and a cross reference following section (c), as follows:

Rule 4-214. DEFENSE COUNSEL

(a) Appearance

Counsel retained or appointed to represent a defendant shall enter an appearance in writing within five days after accepting employment, after appointment, or after the filing of the charging document in court, whichever occurs later. An appearance entered in the District Court will automatically be entered in the circuit court when a case is transferred to the circuit court because of a demand for jury trial. In any other circumstance, counsel who intends to continue representation in the circuit court after appearing in the District Court must re-enter an appearance in the circuit court.

(b) Extent of Duty of Appointed Counsel

When counsel is appointed by the Public Defender or by the court, representation extends to all stages in the proceedings, including but not limited to custody, interrogations, preliminary hearing, pretrial motions and hearings, trial, motions for modification or review of sentence or new trial, and appeal. The Public Defender may relieve appointed counsel and substitute new counsel for the defendant without order of court by giving notice of the substitution to the clerk of the court. Representation by the Public Defender's office may not be withdrawn until the appearance of that office has been stricken pursuant to section ~~(c)~~ (d) of this Rule. The representation of appointed counsel does not extend to the filing of subsequent discretionary proceedings including petition for writ of certiorari, petition to expunge records, and petition for post conviction relief.

(c) Inquiry Into Joint Representation

(1) Joint Representation

Joint representation occurs when:

(A) an offense is charged that carries a potential sentence of incarceration;

(B) two or more defendants have been charged jointly or joined for trial under Rule 4-253 (a); and

(C) the defendants are represented by the same counsel or by counsel who are associated in the practice of law.

(2) Court's Responsibilities in Cases of Joint Representation

If joint representation occurs, the court, on the record, promptly shall personally advise (A) each defendant of the right to effective assistance of counsel, including separate representation and (B) counsel to consider carefully any potential areas of impermissible conflict of interest arising from the joint representation. Unless the court is presented with a consent signed by each defendant and a statement by counsel that no conflict exists, the court shall take appropriate measures to protect each defendant's right to counsel.
Cross reference: See Rule 1.7 of the Maryland Lawyers' Rules of Professional Conduct.

~~(c)~~ (d) Striking Appearance

A motion to withdraw the appearance of counsel shall be made in writing or in the presence of the defendant in open court. If the motion is in writing, moving counsel shall certify that a written notice of intention to withdraw appearance was sent to the defendant at least ten days before the filing of the motion. If the defendant is represented by other counsel or if other counsel enters an appearance on behalf of the defendant, and if no objection is made within ten days after the motion is filed, the clerk shall strike the appearance of moving counsel. If no other counsel has entered an

appearance for the defendant, leave to withdraw may be granted only by order of court. The court may refuse leave to withdraw an appearance if it would unduly delay the trial of the action, would be prejudicial to any of the parties, or otherwise would not be in the interest of justice. If leave is granted and the defendant is not represented, a subpoena or other writ shall be issued and served on the defendant for an appearance before the court for proceedings pursuant to Rule 4-215.

Cross reference: Code, Courts Article, §6-407 (Automatic Termination of Appearance of Attorney).

Source: This Rule is in part derived from former Rule 725 and M.D.R. 725 and in part from the 2009 version of Fed. R. Crim. P. 44.

Rule 4-214 was accompanied by the following Reporter's Note.

The Honorable Charles G. Bernstein, of the Circuit Court for Baltimore City, suggested that Maryland adopt a rule similar to Fed. R. Crim. P. 44 (c) that places a burden on the trial judge to inquire when two or more defendants are represented by the same lawyer. *Duvall v. State*, 399 Md. 210 (2007) addressed this issue, but there is no Maryland Rule on point. The matter was considered by the Rules Committee in May of 2008. The Committee agreed that this type of rule would be beneficial and directed the Criminal Subcommittee to draft the Rule.

The Subcommittee recommends adding a new section (c) that is derived in part from the federal rule, and that recognizes that whether a conflict exists depends upon the facts of the particular case. See *Pugh v. State*, 103 Md. App. 624 (1995).

The Rules Committee considered a draft of section (c) at its April 2009 meeting, and remanded the Rule to the Criminal Subcommittee for additional changes and research into the practices of other

jurisdictions.

Mr. Karceski told the Committee that section (c) of Rule 4-214 has been changed. In particular, the change to subsection (c)(2) had been debated at the May meeting. This provision has since been modified. It now reads: "If joint representation occurs, the court, on the record, promptly shall personally advise (A) each defendant of the right to effective assistance of counsel, including separate representation and (B) counsel to consider carefully any potential areas of impermissible conflict of interest arising from the joint representation. Unless the court is presented with a consent signed by each defendant and a statement by counsel that no conflict exists, the court shall take appropriate measures to protect each defendant's right to counsel." The Chair said that this implements the decisions made by the Committee at the May meeting.

Master Mahasa said that she had questioned the language in the third sentence of section (d) that read as follows: "If the defendant is represented by other counsel or if other counsel enters an appearance on behalf of the defendant, **and if no objection is made within ten days after the motion is filed** (emphasis added), the clerk shall strike the appearance of moving counsel." Her question was why there is a ten-day waiting period for an objection if the defendant hires counsel. The Assistant Reporter responded that she had researched this language and could not find an answer. The Rule has read this way for many

years. Master Mahasa moved to strike the language that read: "and if no objection is made within ten days after the motion is filed." She pointed out that if the defendant is represented by counsel, no objection is going to be filed. Ms. Ogletree suggested that the word "and" could be changed to the word "or." Mr. Michael commented that the tactic referred to by this language could be that someone may come in at the last minute and try to substitute counsel. The ten days could be so that the other side can respond to this if there is some objection to counsel being changed at the last minute. It may cost a trial date or a hearing. The Chair added that it may be that the denial of a continuance may not be avoided.

Master Mahasa said that she thought that this language addresses the right of the defendant. Mr. Karceski hypothesized a situation where two attorneys represent the same defendant. Each has entered an appearance, but one decides to strike his or her appearance. Can that attorney do this without the consent of the defendant? Can the attorney automatically get out of the case? This could happen if there was not a time to object.

The Chair remarked that one could lose a motion for a continuance, the attorney withdraws his or her appearance, and the attorney's partner or associate files an appearance but states that he or she is not ready. Master Mahasa responded that the other side could file an objection to an attorney withdrawing his or her appearance. Ms. Ogletree noted that a request for a continuance could be filed. Master Mahasa observed that a

request for a continuance is a different issue. The Chair cautioned that the judge may have to grant a continuance if the new attorney is not ready to handle the case. There being no second to Master Mahasa's motion, no vote was taken.

Judge Pierson expressed the concern that the language in subsection (c)(2) that reads: "[u]nless the court is presented with a consent signed by each defendant and a statement by counsel that no conflict exists..." implies incorrectly to judges that this is a "safe harbor." There may be situations in which it would be better to question the defendant on the record to make sure that the defendant is consenting knowingly and fully understands the consequences of the consent. Alternatively, there could be a statement by counsel that no conflict exists that could be the subject of latter collateral proceedings or post conviction proceedings as to whether counsel's statement was incorrected and constituted ineffective assistance of counsel. The language of subsection (c)(2) implies that there is a safe harbor. It would be better to state: [u]nless the court determines that the defendant consents to joint representation or that no conflict exists, the court shall take appropriate measures...".

Mr. Karceski pointed out that the word "determined" should be used, and this takes the Rule back to the way it was in May and previously. Judge Norton commented that this change was prophylactic in nature and represented a compromise by the court attempting to ward off those conflicts. One of the proposals

that was discussed at the Subcommittee contained this kind of factual determination or ascertainment by the court. Then the issues of confidentiality, attorneys, in camera proceedings, and other issues were raised by the Office of the Public Defender and others. To avoid this level of scrutiny, this language was put in.

The Chair told the Committee that the discussion of Rule 4-214 would have to be deferred, so that the issue of attorneys' fees can be discussed before Mr. Brault, Attorney Subcommittee Chair, has to leave. He said that Judge Hollander had one item to present which should take very little time.

Agenda Item 5. Consideration of proposed amendments to Rule 8-503 (Style and Form of Briefs)

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Judge Hollander presented Rule 8-503, Style and Form of Briefs, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 500 - RECORD EXTRACTS, BRIEFS, AND ARGUMENT

AMEND Rule 8-503 (c) to add the e-mail address as part of the information required for the cover page of a brief, and to make stylistic changes, as follows:

Rule 8-503. STYLE AND FORM OF BRIEFS

. . .

(c) Covers

A brief shall have a back and cover of the following color:

(1) In the Court of Special Appeals:

(A) appellant's brief - yellow;

(B) appellee's brief - green;

(C) reply brief - light red;

(D) amicus curiae brief - gray.

(2) In the Court of Appeals:

(A) appellant's brief - white;

(B) appellee's brief - blue;

(C) reply brief - tan;

(D) amicus curiae brief - gray.

The cover page shall contain the name, address, ~~and~~ telephone number, and e-mail address, if available, of at least one attorney for a party represented by an attorney or of the party if not represented by an attorney. If the appeal is from a decision of a trial court, the cover page shall also name the trial court and each judge of that court whose ruling is at issue in the appeal. The name typed or printed on the cover constitutes a signature for purposes of Rule 1-311.

. . .

Rule 8-503 was accompanied by the following Reporter's Note.

The Appellate Subcommittee had discussed the issue of dissemination of opinions of the Court of Special Appeals to the parties via e-mail. After a recent bench meeting of the Court, the Honorable Ellen Hollander, the Honorable Peter Krauser, and the Honorable Deborah Eyler have requested that Rule 8-503 (c) be amended to include the e-mail address, if available, as part of the information that

is required on the cover page of the brief. This addition will be helpful in the effort to run the Court of Special Appeals as efficiently as possible.

Judge Hollander explained that section (c) of Rule 8-503 is proposed for amendment, so that the cover page of a brief would contain an e-mail address if available. The Reporter's note explains the change. By consensus, the Committee approved the change to Rule 8-503.

Agenda Item 6. Reconsideration of proposed: New Rule 2-603.1 (Attorneys' Fees and Related Nontaxable Expenses), New Rule 3-603.1 (Attorneys' Fees and Related Nontaxable Expenses), New Appendix: Guidelines for Determining Attorneys' Fees and Related Nontaxable Expenses); Amendments to: Rule 1-341 (Bad Faith - Unjustified Proceeding), Rule 2-433 (Sanctions), and Rule 2-603 (Costs)

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Mr. Brault presented Rule 2-603.1, Attorneys' Fees and Related Nontaxable Expenses, for the Committee's consideration.

**Note to Rules Committee: Changes made by the Attorneys Subcommittee after the March 2009 meeting of the full Committee are shown in boldface type.**

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 2-603.1, as follows:

Rule 2-603.1. ATTORNEYS' FEES AND RELATED NONTAXABLE EXPENSES

(a) Scope

This Rule applies to actions in which a prevailing party may be entitled, by law or

contract, to reasonable attorneys' fees, ~~based on a set of criteria including hours and rates. This section~~ **except that the Rule** does not apply to:

(1) an action in which a statute or contract authorizes attorneys' fees based on a fixed percentage or other formula;

(2) an action in which attorneys' fees and expenses constitute an element of damages that must be proved at trial or otherwise in the underling action as part of the party's claim; or

(3) unless otherwise ordered by the court in a particular action, a claim for attorneys' fees and related expenses pursuant to Code, Family Law Article, §§5-309, 5-3A-09, 5-3B-08, 7-107,8-214, 11-110, and 12-103.

(b) Motion; Time for Filing

A claim for attorneys' fees and related nontaxable expenses under this Rule shall be made by written motion. Unless otherwise provided by statute or court order, the motion for attorneys' fees and related nontaxable expenses incurred through the date of judgment shall be filed within 15 days after the entry of judgment, unless a motion under Rule 2-532, 2-533, or 2-534 is filed, in which case, the motion for attorneys' fees and expenses may be filed or supplemented within 15 days after entry of an order disposing of the post-judgment proceeding. A motion for fees and expenses incurred in connection with an appeal, application for leave to appeal, or petition for certiorari shall be filed within 15 days after the mandate or order disposing of the appeal, application, or petition is filed. Unless the court, for good cause shown, excuses a failure to comply with the time requirement of this subsection, the court shall deny a motion that is not timely filed.

(c) Memorandum

(1) Time for Filing

A motion filed pursuant to section (b) of this Rule shall be supported by a memorandum. Unless otherwise provided by court order, the memorandum shall be filed within 30 days after the motion is filed or, if a motion for bifurcation is filed pursuant to section (d) of this Rule, no later than 30 days after that motion is decided. Unless the court, for good cause shown, excuses a failure to comply with the time requirement of this subsection, the court shall deny the motion if the memorandum is not timely filed.

(2) Contents

Except as provided in section (d) of this Rule, the memorandum shall set forth:

(A) the nature of the case;

(B) the legal basis for recovery of attorneys' fees and related nontaxable expenses;

(C) the claims permitting fee-shifting as to which the moving party prevailed;

(D) the claims permitting fee-shifting as to which the moving party did not prevail;

(E) the claims not permitting fee-shifting;

**Alternative 1**

**(F) ~~to the extent practicable,~~ a detailed description of the work performed, broken down by hours or fractions thereof expended on each task, and, to the extent practicable, allocated to (i) claims permitting fee-shifting as to which the moving party prevailed and (ii) all other claims;**

**Alternative 2**

**(F) a detailed description of the work performed, broken down by hours or factions thereof expended on each task, excluding work performed solely on (i) claims as to which**

**fee shifting is not permitted and (ii) claims as to which the moving party did not prevail.**

**Committee note: A party may recover attorneys' fees and related nontaxable expenses rendered in connection with all claims if they arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts. *Reisterstown Plaza Assocs. v. General Nutrition Ctr.*, 89 Md. Ap. 232 (1991). *See also Energy North Natural Gas, Inc. v. Century Indem. Co.*, 452 F.3d 44 (1st Cir. 2006); *Snook v. Popiel*, 168 Fed. Appx. 577, 580 (5th Cir. 2006); *Legacy Ptnrs., Inc. v. Travelers Indem. Co.*, 83 Fed. Appx. 183 (9th Cir. Cal. 2003).**

(G) the amount or rate charged or agreed to in the retainer;

(H) the attorney's customary fee for ~~**like work**~~ **similar legal services**;

**(I) the customary fee prevailing in the attorney's legal community for similar legal services;**

(J) the fee customarily charged for similar legal services in the ~~**locality**~~ **county where the action is pending**;

(K) a listing of any expenditures for which reimbursement is sought;

(L) any additional factors that are required by the case law; and

(M) any additional factors that the attorney wishes to bring to the court's attention.

**Query: Should a provision be added to the Rule that allows the court, for good cause, to excuse compliance with the requirements of subsection (c)(2) in cases where full compliance is unnecessary and the cost of requiring it would be unreasonable?**

(3) Guidelines

The memorandum shall be prepared in accordance with the Guidelines for Determining Attorneys' Fees and Related Nontaxable Expenses that are appended to these Rules.

(d) Bifurcation of Issues

On motion or on its own initiative, the court may bifurcate the issues of the entitlement to attorneys' fees and the amount of fees and expenses to be awarded and may direct that the initial memorandum address only the issue of entitlement, subject to being supplemented upon resolution of that issue in favor of the movant.

(e) Response to Motion

Any response to a motion for attorneys' fees shall be filed no later than 15 days after service of the memorandum required by section (c) of this Rule, unless extended by court order.

(f) Stay Pending Appeal

Upon the filing of an appeal of the underlying cause of action, the court may stay the issuance of a judgment as to the award of attorneys' fees until the appeal is concluded.

(g) Informal Resolution

Before the court decides a claim for attorneys' fees, the court may (1) require the parties to make a good faith effort to resolve any dispute, (2) refer the issue to ~~**mediation**~~ **an alternative dispute resolution process** pursuant to Rule 17-103, and (3) hold a conference with the parties to discuss the matter. The conference may be held by telephone.

Source: This Rule is new and is derived in part from the 2008 version of Fed. R. Civ. P.

54 and L.R. 109 of the U.S. District Court for the District of Maryland.

Rule 2-603.1 was accompanied by the following Reporter's Note.

The Honorable Michael D. Mason, of the Circuit Court for Montgomery County, suggested that there should be a rule providing guidance for judges on setting attorneys' fees. To address this, the Rules Committee recommends new Rule 2-603.1, which borrows concepts and language primarily from Fed. R. Civ. P. 54 and Local Rule 109 of the United States District Court for the District of Maryland.

Section (a) delineates the types of claims to which the section does and does not apply.

Section (b) is derived from Fed. R. Civ. P. 54 (d)(2)(B) and L. R. 109 2. a. For consistency with Maryland procedure, the time for filing the motion for attorneys' fees is changed from 14 to 15 days after the entry of a judgment, with a delayed filing or a supplement to the motion allowed within 15 days after entry of an order disposing of certain post-judgment proceedings. The procedure for requesting attorneys' fees in connection with an appeal, application for leave to appeal, or petition for certiorari also is modified for consistency with appellate procedure in Maryland. The "waiver" language of L. R. 109 2. a. is replaced by a provision allowing the court to deny a motion that was not timely filed unless the late filing is excused for good cause shown.

Subsection (c)(1) is derived from L. R. 109 2. b. The time for filing the memorandum is changed from 35 to 30 days to be consistent with Maryland procedure. Late filing may be excused for good cause shown.

In subsection (c)(2), the Committee recommends expansion of the contents of the

memorandum to include designating the legal basis for the recovery of attorneys' fees, the claims not permitting fee-shifting, the amount or rate charged or agreed to in the retainer, and the fee customarily charged for similar legal work in the county where the action is pending.

Subsection (c)(3) is derived from the last sentence of L. R. 109 2. b.

Section (d) is derived from Fed. R. Civ. P. 54 (d)(2)(C), which permits bifurcation of the issues of entitlement to attorneys' fees and the amount of fees and expenses to be awarded.

Section (e) is derived from L. R. 109 2. a., except that the time period to file the response to the motion for attorneys' fees is changed from 14 to 15 days to be consistent with Maryland procedure.

Section (f) is added to comply with Maryland procedure.

Section (g) is added to facilitate resolution of the claims for attorneys' fees in an efficient manner.

Mr. Brault told the Committee that Rule 2-603.1 had been discussed three or four times previously and addresses fee-shifting. All of the suggested changes have been completed and are in bold print. The exceptions to the Rule are in section (a) and are: (1) an action in which a statute or contract authorizes attorneys' fees based on a fixed percentage or other formula, (2) an action in which attorneys' fees and expenses constitute an element of damages that must be proved at trial or otherwise in the underlying action as part of the party's claim, and (3) unless otherwise ordered by the court in a particular action, a

claim for attorneys's fees and related expenses pursuant to specified Family Law statutes. Mr. Brault said that these exceptions have been agreed upon. The foreclosure bar has requested that foreclosures be exempted. They have requested a blanket exception for foreclosures. Another way to accomplish this would be to include some form of exception by monetary value.

Mr. Brault remarked that he and the Chair had discussed some ways of handling this. The monetary exception covers many items that possibly should have been covered. He suggested that a category be added to the exceptions of claims for attorneys' fees that do not exceed $5000 or $2500. All of the efforts that are required in the motion, memorandum, and the Guidelines for Determining Attorneys' Fees and Related Nontaxable Expenses seem to be inappropriate for a small fee case, including routine foreclosures, that are limited by law to a $950 fee. It would be unreasonable for an auditor to have to comply with the requirements of the Rule for a $950 fee.

The Chair agreed with Mr. Brault, adding that peculiar to the foreclosure situation is that the request for attorneys' fees normally go to the court auditor. The auditor decides what the fees are, rather than the court deciding after a motion is filed. Subject to exceptions, motions are not filed. Mr. Brault pointed out that there can be an appeal in a foreclosure but that involves a different procedure. Ms. Ogletree commented that there would have to be some kind of mechanism added to the Rule

in the event that it pertains to cases where there has been extended litigation on the right to possession and on other issues, and the attorneys need to be able to charge for this. Mr. Brault remarked that the Rule would not refer to foreclosure specifically, but it could provide a blanket exception for any small fees.

The Chair noted that one way to revise Rule 2-603.1 would be to add the blanket exception to subsection (a)(3). There is an issue pertaining to the meaning of the phrase "related expenses." Does it refer to photocopying costs, travel, etc., or is it also picking up the cost of the bond or of advertising? Ms. Ogletree said that all of these items are noted in the instrument.

Mr. Fisher, a foreclosure consultant, commented that the foreclosure bar had found that no matter how much the Committee refines the Rules, judges often do not read them the same way. It is important that a phrase such as "related expenses" should be excluded in some way to make it clear that it does not mean the expenses of the foreclosure. It should be more than interpreting the language, it should be actually saying it. He wanted to reiterate what Mr. Brault had said which was that apart from the foreclosure arena, it takes a great deal of work to effectuate this kind of motion, and it takes a relatively high threshold before this Rule, which is based on federal rules from litigated cases, applies across the board in Maryland. Mr. Brault had referred to cases over $5000, but this seems to be a small amount in relation to the work involved in filing that

motion. If that is the threshold, there would probably be no foreclosures cases in it.

Mr. Brault commented that part of the problem is that case law holds that the attorney is entitled to fees for preparing the motion. If the fee is small, preparing the motion is going to cost more than the fee. It seems inappropriate. Some of the language in other Rules to exclude minor cases is cases less than $2500 or $2000 or percentages of the claim. If the amount of $5000 is put into the Rule, that would cover anything that should not apply. The Chair noted that it could be either a dollar amount or an amount that is a certain percentage of the recovery that is included on claims allowing fee-shifting. There has to be some reference to the "related expenses" to make clear that in a foreclosure case, these expenses do not cover the cost of advertising and items that are not related to the legal work.

The Vice Chair pointed out that the title of the Rule refers to "related nontaxable expenses." She asked if "nontaxable" means those kinds of costs that would not be taxed as costs. Mr. Brault replied affirmatively. The Vice Chair inquired as to why the word "related" or the phrase "related nontaxable expenses" is not used in subsection (a)(2). The phrase is used in section (b). Because the word "costs" is in Rule 2-603, Costs, she thought that the meaning of the term was that the costs were not taxed by the IRS, because these are not the words that mean recoverable as costs. There should be a reference to Rule 2-603 in Rule 2-603.1.

Mr. Brault said that the only decision to make is whether the Rule should have a flat fee that does not exceed $5000 or 20% of the underlying claim. The Vice Chair noted that section (a) states that the Rule applies to actions in which a prevailing party may be entitled to reasonable attorneys' fees. Do all of the exceptions except out actions in which the prevailing party is entitled to fees? This is not the basis for fees in a foreclosure action. It is not that one is only entitled to fees if one prevails.

The Chair asked why one would be entitled to fees if the person does not prevail. The Vice Chair inquired whether there has ever been a foreclosure action in which the attorney does not get his or her fees. Does the document state that one only gets fees if one prevails? Mr. Fisher answered that the document states that the attorney is entitled to reasonable attorneys' fees for performing the duties under the trust agreement. If the attorney moves forward with the case, and some required action is missed, such as publishing two times instead of three and then someone took exceptions to the sale, generally the attorney would not get his or her fee.

The Vice Chair said that this falls within the definition of whether it is reasonable for the attorney to get his or her fee. She stated that her problem is that when she reviews the exceptions, foreclosure actions do not need to be referred to in the Rule at all, because the action is not an exception to the general rule that the prevailing party is entitled to the costs.

Mr. Fisher agreed with the Vice Chair, but he said that this would not be clear to the circuit court judges.

The Chair commented that under the new Title 14 foreclosure rules, if a motion to dismiss is filed alleging that the lien or the instrument is bad and that there is no right to foreclose, and the judge grants the motion, the attorney would not be entitled to any money. The Vice Chair remarked that she did not disagree, but she noted that the fee is not based on whether the attorney won or lost the case, it is based upon the words in the document that provide that the attorney is entitled to reasonable attorney's fees. Her understanding was that all of the exceptions were an exception to the requirement.

Mr. Brault observed that the intent of the Rule was to make clear that when a debt is collected, the one collecting is the prevailing party, and that party is entitled to a certain percentage in the debt paper itself. It is not necessary to follow the requirements in the Rule, because the contract states that the prevailing party gets a certain percentage. One of the exceptions is where a party is prevailing. The Chair asked if there would be a problem to drop the word "prevailing" from section (a). One would be entitled only if the person prevails.

Mr. Brault said that the entire Rule is intended to apply to prevailing parties. The Chair noted that the domestic cases have been excepted out. The Vice Chair added that leases often provide that the tenant has to pay attorney's fees. The words of the document are not dependent upon who wins. Mr. Brault

reiterated that the purpose of the Rule is to cover prevailing parties' situations.

Mr. Burson pointed out that if the foreclosure attorney handles the case poorly, he or she would not try to charge the party for fees and costs. If the case goes before the court, and the borrower comes forward saying that the parties can work out a settlement, and the borrower would like more time to work things out, then the attorney would agree. To allow the to prevail is not necessarily to foreclose. Foreclosure may be a necessity, but even if the parties have already tried three times to work things out, and the judge tells them to try a fourth time, Mr. Burson said that he does not regard this as a failure on the part of the attorney.

Mr. Brault responded that the case law would not consider this to be a failure. Case law treats a party who obtains a settlement as prevailing. In a federal civil rights or employment rights case, if someone recovers, and the employer concedes the party was right and pays the party the money, the attorney is entitled to the fees. It is not necessary to prevail by way of judgment; one has to prevail by way of recovery. Mr. Brault added that he would like to see some resolution of the problem concerning foreclosure actions. Either foreclosures should be exempted entirely, or the better way to handle this, which was suggested earlier, is that the Rule include a cap on the amount of the attorney's fee. The fee would have to exceed a certain amount before the attorney has to go through the

requirements of the Rule.

The Chair said that the reason that he had considered this as an alternative is that there can be foreclosure cases (this does not refer only to residential foreclosures but to commercial foreclosures as well) in which the fees can be enormous. He had seen a foreclosure case that had gone back and forth to the circuit court three times, and this would not be a case with a fee of $950. There can be situations in which an auditor or the court asks to see all of the attorney's time records. In most residential foreclosures cases, this would not be necessary, so if the Rule can include language referring to cases that do not exceed a certain amount of money or a certain percent of the recovery for which fee-shifting is allowed, the small cases of any type can be excluded.

Mr. Brault commented that if the Rule had a $5000 fee requirement, this would eliminate filing the motions in the smaller cases in District Court. This may be the best way to satisfy the problem of foreclosure cases without referring to foreclosures specifically. The Vice Chair agreed that this is a good idea, but she referred to subsection (a)(2) which reads: "an action in which attorneys' fees and expenses constitute an element of damages that must be proved at trial or otherwise in the underlying action as part of the party's claim...". She said that she could not think of a situation in which this provision applies, because one cannot bring forth evidence of attorneys' fees as damages when one does not even know if he or she has a

right to the fees. The Chair explained that this provision means that one would need to prove the fees in the main case. The person cannot wait until the court decides the case and then file a motion for fees.

Mr. Brault said that he had two examples of what is being covered in subsection (a)(2). One is the failure of an insurer to defend someone in a tort action. The Vice Chair observed that the exception in subsection (a)(2) is not one to which the Rule applies. Mr. Brault responded that the reason the Rule is clarifying the exceptions is because the federal cases get into the problem of what a final judgment is -- whether it is part of the main claim or part of the post-trial relief. A Fourth Circuit case, *Carolina Power & Light Co. v. Dynegy Marketing & Trade*, 415 F.3rd 354 (2005), had been protracted and sent back to the trial court many times on that issue. The language of subsection (a)(2) is to make clear what is post-trial relief and what is part of the main claim.

The Vice Chair remarked that it may be a matter of style, but this is not an exception to the beginning of the sentence. Section (a) reads as follows: “This Rule applies to actions in which a prevailing party may be entitled, by law or contract, to reasonable attorneys’ fees, except that...”. The “except that” language should be all examples of the times when one is a prevailing party and is entitled to attorneys’ fees. Mr. Brault pointed out that if subsection (a)(2) is left out, since the Rule

copies the federal rule, it could cause problems with interpretation. The Chair said that in federal and State practice, the only cases in which a non-prevailing party is entitled to attorneys' fees is in domestic cases, and these have been excepted out. Judge Pierson agreed, noting that the word "prevailing" is unnecessary. Many contracts do not refer to the "prevailing" party.

Judge Norton observed that someone could lose the case-in-chief but prevail on sanctions for discovery violations, and attorneys' fees could be awarded. The Chair stated that there is jurisprudence, particularly in the federal system, as to what the term "prevailing" means, especially in the 42 U.S.C. §1983 discrimination cases and in the environmental cases where the plaintiff who prevails may not get damages but may get an injunction or some other remedy. Judge Pierson noted that the federal local rule, Rule 109, uses the word "prevailed," but Fed. R. Civ. Pro. 54 does not -- it only refers to a claim for attorneys' fees.

The Vice Chair remarked that if this Rule was geared towards those kinds of statutory actions in which one is entitled to fees, it would be appropriate. However, it goes beyond this to included contract actions and encompasses much more. The Chair commented that the genesis of the Rule at the State level was that it would apply to the statutory actions that provide fee-shifting rather than to contract actions. The Vice Chair observed that if the contract actions were not part of the Rule,

she would be more comfortable with the Rule. The Chair pointed out that the same problem exists with the contract actions where one is entitled to "reasonable fees," but it does not apply when the fee is set. The court has been having a problem with how the fee is measured. So far, the courts have used a modified lodestar approach -- time multiplied by rate. Some claims permit fee-shifting, and some do not.

The Vice Chair said that if this Rule is to apply to those cases in which by contract one of the parties is entitled to "reasonable" attorneys' fees, it should be specified. It does not always follow that the prevailing party would get the fees, but the words are not used in the instrument that way. The Chair noted that the language in the instruments varies. He asked what the deeds of trust provide. Mr. Fisher answered that the language is "reasonable attorneys' fees." Ms. Ogletree explained that this is part of the costs of the sale. The attorney is allowed all expenses and reasonable attorneys' fees. The trustee's commission is not to exceed ___ percent. The Chair added that this is true if there is a sale. Ms. Ogletree responded that this is as an expense of sale.

Mr. Michael inquired whether any damage would ensue if the word "prevailing" is taken out. Mr. Brault replied that this would open the Rule to other things. The Chair said that the language of section (a) could be "... applies to actions in which a party may be entitled to reasonable attorneys' fees." One is entitled or not. Mr. Brault observed that the word "prevailing"

could be taken out, but there is still the question as to whether there should be a threshold. The Vice Chair expressed the view that there should be a threshold, so that small cases could be excluded.

Mr. Brault said that the threshold provision could be added as subsection (a)(3), and current subsection (a)(3) would become subsection (a)(4). The Chair suggested that the threshold could be added as part of subsection (a)(3), which could be divided up into subsection (A) and subsection (B). The new language could include both an amount and a percentage, or it could just be an amount. It could read as follows: "... that does not exceed the lesser of ___ dollars or ___ percent of the amount of recovery on all claims in which fee-shifting is allowed." The Reporter noted that this is in Alternative 3 of the version of the Rule handed out today. Mr. Brault asked if the amount should be $5000 instead of $2500. Ms. Ogletree said that $2500 would not eliminate all of the small-claims actions, and she agreed with Mr. Brault that the amount should be $5000.

The Chair commented that the amount should be reasonable, but there could be a relatively small claim in which $7500 or $10,000 is a huge amount compared to what is actually recovered. This is not including the §1983 or environmental actions in which one gets an injunction that factors into the value of the service. He said that he would not agree with including a $7500 amount that totals up to 62% of the claim. The Vice Chair remarked that this would not exempt the court from looking at

whether the amount of the attorneys' fee is reasonable, it exempts the attorney from having to follow of the detailed procedure required by the Rule.

Judge Love pointed out that the trial judge always has the obligation to make certain that the attorneys' fees are reasonable. He agreed with the suggestion to make the amount $5000. The Reporter stated that the language of Alternative 3 with the change to the amount of $5000 would be placed into the Rule. She asked if there would also be a percentage added to the Rule. Judge Kaplan suggested that it be $5000 or 20%, whichever is higher. The Chair suggested that it should be whichever is less. Judge Norton said that if the lesser amount is used, everything will go back to the District Court. The Chair inquired if there should only be a flat amount in the Rule. The Vice Chair moved that the amount be $5000, and the motion was seconded.

Judge Pierson expressed his opposition to the quarterly statements required by the Guidelines for Determining Attorneys' Fees and Related Nontaxable Expenses. If a flat amount is put into the Rule, one will not know the quarterly statements will have to be filed, if the fee obtained is the ultimate measure of whether or not the statements must be filed. If a fee is under $5000, does one have to submit the quarterly statements? One would have to guess as to whether the fee will be under or over the $5000 limit, and the guess could be wrong.

The Chair said that the quarterly statement issue can be

discussed after the Committee determines the appropriate amount to go into the Rule. The idea is that someone would not have to follow the requirements of the Rule for a relatively small amount of money claimed for fees. Mr. Brault reiterated that the amount should be $5000. Judge Love asked if this is relative to any petition. Mr. Brault responded that the Rule would not apply to any fee claimed that is less than $5000.

Mr. Fisher asked how the "related expenses" would be handled. The Chair replied that the Vice Chair had pointed out that the language "nontaxable expenses," which is in the title of the Rule may need to be added in to the text. Mr. Brault added that the Vice Chair's point was that the word "costs" means all of the costs that are taxed by the court, and the word "expenses" is used for anything else. The word "nontaxable" should be deleted. The Vice Chair suggested that either a cross reference to Rules 2-603 and 3-603, Costs, or a Committee note indicating that Rules 2-603.1 and 3-603.1 do not apply to costs be added.

The Vice Chair noted that this covers one-half of the Rule. The other half is how to make it clear what is meant by "related expenses," such as copying charges and other expenses attorneys have. Mr. Brault said that this in the Guidelines. The Chair pointed out that the Guidelines will not be applicable if the fee is under $5000. Ms. Ogletree suggested that Rules 2-603 and 3-603 should be cross referenced, so that it is clear that this does not refer to the expenses of the proceeding, which include advertising and those kinds of items. The Vice Chair said that

the word “related” would be added into subsection (a)(2), and the word “nontaxable” would be taken out from the title.

Ms. Ogletree commented that there are expenses related to the foreclosure that are in a separate category. There are also the expenses the attorney incurs for copying, etc. The foreclosure expenses are in a separate category, because they are part of the action. This is the expenses the attorney incurs. Mr. Fisher noted that a problem exists, because traditionally costs of the sale were not viewed as court costs. Ms. Ogletree said that expenses of the sale under the instrument are in a separate category. Mr. Fisher added that this could be in a Committee note. The Vice Chair suggested that language could be added that would provide that one could see the Guidelines for what is meant by “related expenses.”

The Chair asked where “related expenses” are noted in the Guidelines. Reimbursable expenses, out-of-pocket expenses, mileage, and copy work are listed in section (d). He told Mr. Fisher that a Committee note could be added. The term “related expenses” would remain in the Rule, but the note would make clear that these are expenses related to the provision of legal services, such as the items listed in the Guidelines and not expenses related to the action itself. Mr. Fisher said that he approved of the language “expenses of sale in a foreclosure action.” The Chair responded that this language could be added in as an example. Mr. Fisher expressed the opinion that this would be an excellent addition. He complimented the work of the

Committee over the last months as they worked on the Title 14, Foreclosure Rules.

The Vice Chair noted that in subsection (a)(3) of Rules 2-603.1 and 3-603.1 as it appears in the Rule, not the revised version in the handout, the language would be something like "unless otherwise ordered by the court in a particular action, (A) claims for fees of less than $5000 and (B) related expenses...". The Chair stated that this would be the general scheme.

Mr. Brault drew the Committee's attention to subsection (c)(2), Contents. In subsection (c)(2)(F), there are two alternatives. The Vice Chair commented that she had a problem with this provision. It states when the motion is supposed to be filed, but it does not refer to the Guidelines. She did not understand how section (b) of Rule 2-603.1 meshes with subsection (b)(2) of the Guidelines. The Rule provides when the motion is supposed to be filed, but must one refer to the Guidelines also? The Chair said that the motion is supposed to be filed in accordance with the Guidelines. The Vice Chair pointed out that subsection (b)(2) states: "A motion for fees, accompanied by time records, shall be submitted in the following format organized by litigation phase...".

Mr. Brault observed that the Guidelines are referred to in the content of the motion. Subsection (c)(3) of Rule 2-603.1 provides: "The memorandum shall be prepared in accordance with the Guidelines for Determining Attorneys' Fees and Related

Nontaxable Expenses that are appended to these Rules." The Vice Chair pointed out that this refers to the memorandum, not the motion. Section (b) of Rule 2-603.1 states: "...A motion ... shall be filed within 15 days after the mandate or order disposing of the appeal, application, or petition is filed." Mr. Brault noted that the motion is intended to be bare bones, and it is the memorandum that contains the information required. The memorandum is to be written in accordance with the Guidelines. The Chair said that on page 1 of the Guidelines, subsection (b)(2) should refer to the memorandum and not the motion for fees. The Vice Chair remarked that this would solve her problem. By consensus, the Committee approved this change.

The Vice Chair pointed out that the references to the word "prevail" in subsections (c)(2)(C) and (D) should be deleted. The Reporter expressed the opinion that this needs to remain in the Rule, because there may be multi-count actions. Some permit fee-shifting, and some do not permit it. The party may win on some and may lose on some. The Vice Chair hypothesized a lease that provides that the landlord is entitled to attorneys' fees for any action filed to enforce the lease. The landlord files an action to enforce the lease. Judge Pierson remarked that the motion would have to state whether or not the landlord won. The Vice Chair said that there may be three counts in the landlord's case, one of which relates to enforcement of the lease, and two are not related to this.

Mr. Brault told the Committee that this was the subject of

Mr. Maloney's memorandum. He had written that a party may recover attorneys' fees and related nontaxable expenses in connection with all claims that are interrelated. He had cited cases that hold that even though one did not prevail on a count, if the person can show that it was interrelated to such a degree, then the person can recover the fees. The Reporter added that there may be some counts that were not interrelated and to which fee-shifting is not allowed, and the attorney cannot get the fees for this. The determination of who prevailed is necessary. Mr. Brault noted that Mr. Maloney had cited federal cases on this. The Chair pointed out that there are relevant State cases, also. *Friolo v. Frankel*, 373 Md. 501 (1973) involved statutory claims in which fee-shifting was allowed and common law claims in which it was not allowed. The Vice Chair withdrew her comment about taking out the references to the word "prevail."

Mr. Brault expressed the opinion that Alternative 1 of Rule 2–603.1 (c)(2)(F) is appropriate. The Chair suggested that in the first sentence of subsection (c)(2), the phrase "or by order of the court" should be added after the word "Rule" and before the word "the," so that it would read "[e]xcept as provided in section (d) of this Rule, or by order of court, the...". By consensus, the Committee approved this change. Master Mahasa asked if a hearing would be held if part of the necessary information is excluded. The Chair said that there would be a hearing anyway.

The Vice Chair pointed out that in subsection (a)(2), the word “underling” should be the word “underlying,” and in Alternative 2 of subsection (c)(2)(F), the word “factions” should be the word “fractions.” Mr. Brault said that the difference between Alternative 1 and Alternative 2 is that Alternative 1 refers to breaking down the description of the work performed allocated to claims permitting fee-shifting at which the moving party prevailed and all other claims, while Alternative 2 provides for the work broken down into claims as to which fee-shifting is not permitted and claims as to which the moving party did not prevail. Alternative 1 is better. By consensus, the Committee approved Alternative 1.

Mr. Brault drew the Committee’s attention to subsection (c)(2)(H). There had been criticism of the phrase “like work,” so it was changed to “similar legal services.” Then the issue came up in subsection (c)(2)(J) concerning the county where the action is pending as compared to the big city where the attorney came from. This is particularly true in Montgomery County where big firm attorneys from large firms or cities such as Chicago and San Francisco have a Washington office, and they charge tremendous fees, whereas in Montgomery County, the attorneys may charge half of that amount. This issue was addressed by using the word “county where the action is pending” and not the word “locality.”

The Vice Chair inquired as to how one would have this kind of information. Mr. Michael answered that the attorney hires an

expert. Mr. Brault added that there are also affidavits and witnesses. Ms. Ogletree asked what problem is trying to be cured. The Chair responded that the issue was raised by the Honorable Michael Mason, of the Circuit Court for Montgomery County, and it was triggered by the same kinds of cases in the federal courts, huge multi-claim cases that are protracted. Some have fee-shifting claims, and some do not. How does the court figure out what is reasonable for the attorneys' fees? The Court of Appeals and federal courts have held that the court decides this based on the lodestar approach. It begins with the time spent and the rate the services cost, and then many adjustments are made. That is how this issue started. The Rule is meant for the major cases.

Mr. Brault told the Committee that in section (g) of the Rule, the word "mediation" was changed to the language "an alternative dispute resolution process." By consensus, the Committee approved this change. Mr. Michael pointed out that there is a query after subsection (c)(2)(M). The Chair said that this query is the reason that he suggested adding the language "or by order of the court" to subsection (c)(2).

By consensus, the Committee approved Rule 2-603.1 as amended.

Mr. Brault presented Rule 3-603.1, Attorneys' Fees and Related Nontaxable Expenses, for the Committee's consideration.

**Note to Rules Committee: Changes made by the**

**Attorneys Subcommittee after the March 2009 meeting of the full Committee are shown in boldface type.**

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 600 - JUDGMENT

ADD new Rule 3-603.1, as follows:

Rule 3-603.1. ATTORNEYS' FEES AND RELATED NONTAXABLE EXPENSES

(a) Scope

This Rule applies to actions in which a prevailing party may be entitled, by law or contract, to reasonable attorneys' fees ~~**based on a set of criteria including hours and rates. This section**~~, except that the Rule does not apply to:

(1) an action in which a statute or contract authorizes attorneys' fees based on a fixed percentage or other formula; or

(2) an action in which attorneys' fees and expenses constitute an element of damages that must be proved at trial or otherwise in the underlying action as part of the party's claim.

(b) Motion

A claim for attorneys' fees and related nontaxable expenses under this Rule shall be made by written motion. The motion and any response thereto shall be made in accordance with the provisions of Rule 2-603.1, except that the time for filing the motion is as provided in section (c) of this Rule.

(c) Time for Filing

> Unless otherwise provided by statute or court order, a motion for attorneys' fees and related nontaxable expenses incurred through the date of judgment shall be filed within 15 days after the entry of judgment, unless a motion under Rule 3-533 or 3-534 is filed, in which case, the motion may be filed or supplemented within 15 days after entry of an order disposing of the post-judgment proceeding.
>
> Source: This Rule is new.

Rule 3-603.1 was accompanied by the following Reporter's Note.

> New Rule 3-603.1 is proposed to provide a procedure for claiming attorneys' fees and related nontaxable expenses in certain types of actions in the District Court. The Rule is based on the procedures set forth in proposed new Rule 2-603.1.

Mr. Brault told the Committee that Rule 3-603.1 would have to be conformed to the changes made to Rule 2-603.1. Judge Norton remarked that with the addition of the $5000 limit, the Rule will not apply to 99.9% of District Court cases. Replevin cases are not limited by dollar amount. The Reporter observed that some leases may be included.

By consensus, the Committee approved Rule 3-603.1 as amended.

Mr. Brault presented Appendix: Guidelines for Determining Attorneys' Fees and Related Nontaxable Expenses, for the Committee's consideration.

APPENDIX: GUIDELINES FOR DETERMINING ATTORNEYS' FEES AND RELATED NONTAXABLE EXPENSES

ADD a new Appendix, as follows:

APPENDIX: GUIDELINES FOR DETERMINING ATTORNEYS' FEES AND RELATED NONTAXABLE EXPENSES

(a) Applicability

These Guidelines apply to actions in which recovery of attorneys' fees and related nontaxable expenses is sought in accordance with Rule **2-603.1 or 3-603.1 and, where applicable, Rules 2-433 and 1-341**.

(b) Guidelines Regarding Billing Format, Time Recordation, and Submission of Quarterly Statements

(1) Time

Time shall be recorded by specific task and attorney, other professional**, or paralegal** performing the task.

(2) **Motion for Fees**

**A motion for fees**, accompanied by time records, shall be submitted in the following format organized by litigation phase:

Committee note: In general, preparation time and travel time should be reported under the category to which they relate. For example, time spent preparing for and traveling to and from a court hearing should be recorded under the category "court hearings." Factual investigation should also be listed under the specific category to which it relates. For example, time spent with a witness to obtain an affidavit for a summary judgment motion or opposition should be included under the category "motions practice." Similarly, a

telephone conversation or a meeting with a client held for the purpose of preparing interrogatory answers should be included under the category "interrogatories, document production, and other written discovery." Of course, each of these tasks must be separately recorded in the back-up documentation in accordance with subsection (b)(1).

(A) case development, background investigation, and case administration (includes initial investigations, file setup, preparation of budgets, and routine communications with client, co-counsel, opposing counsel, and the court);

(B) preparing pleadings;

(C) preparing, implementing, and responding to interrogatories, document production, and other written discovery;

(D) preparing for and attending depositions (includes time spent preparing for deposition);

(E) preparing and responding to motions;

(F) attending court hearings;

**(G)** preparing for and participating in Alternative Dispute Resolution proceedings;

**(H)** preparing for trial;

**(I)** attending trial;

**(J) preparing and responding to post-trial motions; and**

**(K)** preparing and responding to a **motion for** fee**s.**

(3) Quarterly Statements

Counsel for a party intending to seek fees if the party prevails shall submit to opposing counsel quarterly statements

showing the amount of time spent on the case and the total value of that time. These statements need not be in the "litigation phase" format provided in subsection (b)(2) or otherwise reflect how time has been spent. The first statement is due at the end of the first quarter in which the action is filed. Failure to submit these statements may result in a denial or reduction of fees.

(4) Settlement Conference

Upon request by the judge **(or other individual agreed upon by the parties)** presiding over a settlement conference, counsel for all parties (other than public attorneys who do not ordinarily keep time records) shall provide to the judge **(or other individual)** statements of time and the value of that time in the "litigation phase" format provided in subsection (b)(2).

(5) Billing Records

If during the course of a fee award dispute, a judge orders that the billing records of counsel for the party opposing fees must be turned over to the party requesting fees, those billing records shall be submitted in the "litigation phase" format.

**Committee note: The requirement of subsections (b)(4) and (b)(5) are subject to attorney-client privilege and work product protection.**

(c) Guidelines Regarding Compensable and Non-compensable Time

(1) Lead Attorney

Where plaintiffs with both common and conflicting interests are represented by different attorneys, there shall be a lead attorney for each task (e.g., preparing for and speaking at depositions on issues of common interest and preparing pleadings, motions, and memoranda), and other attorneys shall be compensated only to the extent that

they provide input into the activity directly related to their own client's interests.

(2) Deposition Attendance

**Ordinarily,** only one attorney for each separately represented party shall be compensated for attending depositions.

Committee note: Departure from this subsection would be appropriate upon a showing of a valid reason for sending two attorneys to the deposition, e.g. that the less senior attorney's presence is necessary because that attorney organized numerous documents important to the deposition, but the deposition is of a critical witness whom the more senior attorney should properly depose. Departure from this subsection also may be appropriate upon a showing that more than one retained attorney representing the defendant attended the deposition and charged the time for the attorney's attendance.

(3) Hearings **Other Than Trial**

**Ordinarily,** only one attorney for each party shall be compensated for attending hearings **other than trial**.

Committee note: The same considerations discussed previously concerning attendance by more than one attorney at a deposition also apply to attendance by more than one attorney at a hearing. There is no guideline as to whether more than one attorney for each party is to be compensated for attending trial. This must depend upon the complexity of the case and the role that each attorney is playing. For example, if a junior attorney is present at trial primarily for the purpose of organizing documents but takes a minor witness for educational purposes, consideration should be given to billing that attorney's time at a paralegal's rate.

(4) Conferences

**Ordinarily**, only one attorney is to be compensated for client, third party, and

intra-office conferences, although if only one attorney is being compensated, the time may be charged at the rate of the more senior attorney. Compensation may be paid for the attendance of more than one attorney where justified for specific purposes, such as periodic conferences of defined duration held for the purpose of work organization, strategy, and delegation of tasks in cases where the conferences are reasonably necessary for the proper management of the litigation.

(5) Travel

(A) To Do Substantive Work

Whenever possible, time spent in traveling should be devoted to doing substantive work for a client and should be billed (at the usual rate) to that client. If the travel time is devoted to work for a client other than the matter for which fees are sought, then the travel time should not be included in any fee request. If the travel time is devoted to substantive work for the client whose representation is the subject of the fee request, then the time should be billed for the substantive work, not travel time.

(B) Travel Time

Up to **three** hours of travel time (each way and each day) to and from a court appearance, deposition, witness interview, or similar proceeding that cannot be devoted to substantive work may be charged at the attorney's hourly rate.

(C) Long Distance Travel

Time spent in long-distance travel above the **three**-hour limit each way that cannot be devoted to substantive work may be charged at one-half of the attorney's hourly rate.

(d) Reimbursable Expenses

(1) Out-of-Pocket Expenses

**Ordinarily**, reasonable out-of-pocket expenses (including long-distance telephone calls, express and overnight delivery services, computerized on-line research, and faxes) are compensable at actual cost.

(2) Mileage

Mileage is compensable at the rate of reimbursement for official **State** government travel in effect at the time the expense was incurred.

(3) Copy Work

Copy work is compensable at **a reasonable commercial rate**.

The new Appendix: Guidelines for Determining Attorneys' Fees and Related Nontaxable Expenses was accompanied by the following Reporter's Note.

The Rules Committee recommends adopting, with some modifications, the federal Rules and Guidelines for Determining Attorneys' Fees in Certain Cases to provide a set of guidelines for judges to determine appropriate attorneys' fees. Specific hourly rates have been omitted, because the policy in Maryland is not to include specific dollar amounts in similar rules provisions.

The Chair suggested that the following language should be added to the beginning of section (a): "[u]nless otherwise provided by court order." By consensus, the Committee agreed to this modification. The Vice Chair inquired whether the Guidelines are only for guidance or are mandates. They appear to be mandates, and if that is the case, they should be in the

Rules, not in an appendix that may be difficult to find. The Chair said that they should be located right after Rule 2-603.1. The Vice Chair pointed out the Guidelines are not written that way. The word "shall" is used frequently.

The Chair noted that there is precedent for this in the Discovery Guidelines. The Vice Chair commented that they are truly guidelines, and there is no sanction for violating them. The Chair observed that there are Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access. The Vice Chair noted that they are written in guideline words and format, also. The Chair said that the Guidelines should follow the Rules that they are connected to, but the Reporter said that different publishers place them in different places in the rule books. The Vice Chair expressed the view that these Guidelines for Attorneys' Fees should not be in an appendix but part of the Rule.

Mr. Brault told the Committee that the Guidelines do not have many changes from the last time that they were considered. The Vice Chair commented that the wording of subsection (b)(1) implies that a paralegal is not a professional. The word "paralegal" should be moved after the word "attorney" and before the words "other professional." By consensus, the Committee agreed to this change. The Vice Chair noted that if the word "shall" is changed to the word "should," it would make this appendix truly guidelines. The Chair remarked that in the Rule, the memorandum is required to be in accordance with these

Guidelines, so that in that way they are mandatory. The Vice Chair responded that if the word "shall" is changed to the word "should," then one can do his or her best to comply with all of the Guidelines. If a guideline is missed, the attorney would not be in violation. Mr. Brault agreed with the Vice Chair.

The Chair pointed out that the addition of paralegals to the Guidelines changes current law. The Court of Appeals held in *Friolo* that a statute that permits attorneys' fees does not include paralegal fees. The statute only refers to "attorneys' fees." The theory was that these are part of the attorneys' fees, the cost of running an office. The proposed addition to the Rule is asking the Court to change a decision it made previously. Mr. Brault noted that the fees for paralegals are allowed in the federal rule and should be included in the Guidelines. The Vice Chair commented that if it is left out, the alternative would be for attorneys to do the same work at a higher cost. The Chair stated that he did not disagree, but he was cautioning the Committee about the change. Mr. Brault said that this can be pointed out to the Court when they consider the Guidelines.

Mr. Brault told the Committee that subsection (b)(2)(J) was added, even though it is not in the federal guidelines. The provision was renumbered. The reason that subsection (b)(4) was changed was that so the person holding the settlement conference, who could be a judge or any other individual agreed upon by the

parties (the latter was added in), can look at the case in camera to try to get a settlement without the other side seeing it. A reference to "attorney work product" was added in the Committee note after subsection (b)(5). Judge Pierson expressed the opinion that if this is being done in camera, those words should be added to subsection (b)(4). Otherwise, the question will arise as to whether the information would have to be given to the other side.

Mr. Brault suggested that the wording be: "...provide to the judge or other individual for in camera review...". The Vice Chair remarked that this is not an in camera procedure. The Chair asked why the other side would not be entitled to the information. Mr. Brault answered that it is being done before trial in an effort to settle, and the one side does not want to show their case to the other side. There may be a huge amount of fees claimed, and the mediator wants to review the source of the fees. The Chair inquired as to what the implication would be if there is no settlement. Usually, it is the trial judge holding the settlement conference. Attorneys' fees are set by a judge, not by a jury.

Mr. Brault remarked that by the time it is post-trial, even if it is the same judge, the only difference is that the same material will be available for both sides to look at. The judge would not have something post-trial that is different than what another judge would have. Mr. Michael responded that there might be something different, because if an attorney decides in the

post-trial proceeding that there is something that the attorney has done that the other side should not know, the attorney may not disclose it but would have put it in at the settlement conference.

The Chair said this is all post-trial. Mr. Brault noted that the settlement conference is pre-trial. The Vice Chair commented that this could come anywhere in the proceedings. The Chair stated that if it is post-trial, the only issue is the amount of the attorneys' fees and not the entire case. If the attorney discloses an ex parte communication to the judge, can that judge decide the issue of attorneys' fees if there is no settlement? The judge has confidential information that the other side did not see. Mr. Brault remarked that by the time the judge decides the case, the other side will have seen the information. Mr. Michael added that post-verdict, the confidentiality and public policy issues surrounding the settlement are no longer present.

Mr. Brault suggested that the word "pretrial" should be added after the word "conference" and before the word "counsel" in subsection (b)(4), so that the language would be: "...presiding over a settlement conference pretrial, counsel...". The Chair asked if "pre-trial" means before the underlying case is resolved. There could be a trial on the attorneys' fees. Mr. Bowen suggested that a sentence could be added that would provide that if the settlement is pretrial, the statement shall be presented to the judge or presiding individual in camera. Mr.

Brault remarked that this is a matter of style. The Chair said that this is part of the communications in the underlying action that the other side does not have when the amount of attorneys' fees is the only issue. Canon 3 of the Maryland Code of Judicial Conduct addresses ex parte communications. Mr. Michael pointed out that there may need to be a separate rule for pretrial and post-trial proceedings.

The Vice Chair noted that Mr. Brault had suggested that subsection (b)(4) apply to settlement conferences prior to trial. The Chair commented that it could be set up that way, or if there is a settlement conference post-trial, then both sides would get what the judge gets. Mr. Brault remarked that there are pretrial settlement conferences in every case. This is addressing a pretrial conference in a fee-shifting case and the settlement conference when it is limited to what the mediator can see, because the other side should not see work product. The Chair said that he was not concerned about what a mediator would see but rather what a judge would see.

The Vice Chair inquired as to where the requirement is that the reports have to be made quarterly. Master Mahasa replied that the requirement is in subsection (b)(3). The Vice Chair asked how anything could be confidential when the information has to be turned over quarterly. Mr. Brault answered that they are truncated statements. A statement could be that the attorney spent five hours interviewing witnesses, but he or she does not have to disclose who the witnesses were. The idea of the advance

is to let the other side know what is at stake. It is the monetary amount that the attorney will be claiming. The Honorable Durke Thompson, judge of the Circuit Court for Montgomery County, had told Mr. Brault that the judge had awarded $6,000,000 of attorneys' fees in a case.

Mr. Michael said that Judge Mason's idea was to let the other parties know ahead of time about the possible amount of attorneys' fees. Knowing in advance about the costs of the entire case ought to promote settlement discussions. The Vice Chair questioned whether the litigation phase is the phase where the attorney is giving the generalities. Mr. Michael answered affirmatively. The Vice Chair commented that when a judge in a settlement conference asks for the value of the time the attorney spent on the case, it would have to be handed over in the litigation phase. Mr. Michael disputed this, saying that a mediator in this type of case may want much more detailed information than has been provided thus far to get a case settled. The Vice Chair said that the mediator may ask for it, but subsection (b)(4) states what the attorney has to give. Judge Pierson disagreed. Mr. Brault added that the litigation phase is the full disclosure.

Judge Love asked whether the language "if the party prevails" should be deleted from subsection (b)(3). Mr. Brault replied in the affirmative. Judge Love referred to the language "shall submit to opposing counsel," and he observed that in the District Court, sometimes one party is unrepresented by counsel.

This language may need to be modified to something like “opposing party.” It will not happen often, but it could happen. The Chair pointed out that Rule 1-331, Attorney May Act for Party, provides that a party’s attorney may perform any act required or permitted to be performed by that party. The Vice Chair said that the word “counsel” in the language referred to by Judge Love should be “party.” By consensus, the Committee agreed to this change.

The Vice Chair inquired as to what changes were to be made to subsection (b)(4). Mr. Brault responded that he had suggested that the word “pretrial” be added after the word “conference” and before the word “counsel” and the words “for in camera review” after the word “individual” and before the word “statements.” The Chair pointed out that this would exclude a settlement conference when only attorneys’ fees are at issue. There could be a settlement conference pretrial on the underlying case, but it will not pertain to attorneys’ fees. The Reporter noted that Mr. Bowen had suggested that the text of subsection (b)(4) remain, but a second sentence would be added that would read as follows: “If the conference is pretrial, either party may request that the review be in camera.” Mr. Bowen commented that his suggested language is: “If the settlement conference is pretrial, the statement shall be presented to the judge or other presiding individual in camera.” By consensus, the Committee approved the addition of this language.

The Vice Chair inquired why anyone trying to settle a case

needs to know the detailed information included in subsection (b)(2). Judge Pierson answered that when there is a claim for a huge amount of attorneys' fees, the judge needs to see what the amount is derived from. The Chair referred to the quarterly reports, noting that pretrial a party would not know what the amounts are going to be. Mr. Brault responded that this is for settlement purposes. The Chair said that it is unknown what the attorneys' fees that are at issue are going to be, or who is going to prevail, and who will be entitled to the fees. Mr. Brault remarked that they could be ripe before trial, and the whole issue could be settled.

Judge Pierson said that he had been involved in cases where a claim for attorneys' fees became a major part of the settlement negotiation. Mr. Brault added that he thought that this was common. Judge Pierson observed that as a technical matter, in Baltimore City, individuals who are not agreed to by the parties preside over settlement conferences. They are attorneys who are assigned by the court. The language of subsection (b)(4), which reads "or other individual agreed upon by the parties" would not cover this situation. The Chair noted that a party cannot be forced into a settlement conference that is fee-for-service. Judge Pierson responded that the situation he was describing is not fee-for-service. Mr. Brault suggested that the language of subsection (b)(4) should be "...or other individual appointed or agreed upon by the parties...". By consensus, the Committee agreed to this change.

Mr. Brault pointed out that the use of the word "ordinarily" in section (c) gives some flexibility, because in complicated cases, there has to be more than one attorney. The Vice Chair referred to subsection (c)(5)(C) and asked why the Rule only allows one-half of the attorney's hourly rate if an attorney has to travel more than three hours as part of the case. Mr. Brault responded that there have to be some guidelines.

By consensus, the Committee approved the Guidelines as amended.

Mr. Brault presented Rule 2-603, Costs, for the Committee's consideration.

**Note to Rules Committee: Changes made by the Attorneys Subcommittee after the March 2009 meeting of the full Committee are shown in boldface type.**

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-603 (b) to require that a request for the assessment of certain costs be filed within a specified time, as follows:

Rule 2-603. COSTS

. . .

(b) Assessment by the Clerk

The clerk shall assess as costs all fees of the clerk and sheriff, statutory fees actually paid to witnesses who testify, and, in proceedings under Title 7, Chapter 200 of

> these Rules, the costs specified by Rule 7-206 (a). On written request of a party filed within 15 days after **the latter of** the entry of judgment or **the entry of** an order denying a motion filed under Rules 2-532, 2-533, or 2-534, the clerk shall assess other costs prescribed by rule or law. The clerk shall notify each party of the assessment in writing. On motion of any party filed within five days after the party receives notice of the clerk's assessment, the court shall review the action of the clerk.
>
> . . .

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

> Rule 2-603 (b) allows a party to file a written request that the clerk assess costs, other than fees of the clerk and sheriff, statutory fees paid to witnesses who testify, and costs specified under Rule 7-206 (a) in judicial reviews of decisions of administrative agencies. The Committee recommends that a request for the assessment of such other costs be made within 15 days after the entry of judgment or of an order denying a post-judgment motion.

Mr. Brault explained that a time provision to file a written request for costs, which is 15 days after the latter of the entry of judgment or the entry of an order denying a motion filed under Rules 2-532, 2-533, and 2-534, has been added.

By consensus, the Committee approved Rule 2-603 as presented.

Mr. Brault presented Rules 1-341, Bad Faith - Unjustified Proceeding and 2-433, Sanctions, for the Committee's consideration.

**Note to Rules Committee: Changes made by the Attorneys Subcommittee after the March 2009 meeting of the full Committee are shown in boldface type.**

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-341 to add a sentence pertaining to a memorandum in support of a motion, as follows:

Rule 1-341. BAD FAITH - UNJUSTIFIED PROCEEDING

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it. A memorandum in support of a motion filed for an award of costs and expenses shall comply with Rule 2-433 (e), and, unless otherwise ordered by the court, the memorandum shall be prepared in accordance with **any applicable** Guideline **in the Guidelines for** Determining Attorneys' Fees and Related Nontaxable Expenses that are appended to these Rules.

Source: This Rule is derived in part from former Rule 604 b and is in part new.

Rule 1-341 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-433. The Committee recommends that a memorandum in support of a motion filed under Rule 1-341 be prepared in accordance with any applicable

Guideline in the Guidelines for Determining Attorneys' Fees and Related Nontaxable Expenses.

**Note to Rules Committee: Changes made by the Attorneys Subcommittee after the March 2009 meeting of the full Committee are shown in boldface type.**

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-433 to add to sections (a) and (d) the words "costs and" before the word "expenses," to add to section (d) a reference to Rule 2-434, and to add a new section (e) pertaining to a memorandum in support of a motion requesting an award of costs and expenses and an award of attorneys' fees, as follows:

Rule 2-433. SANCTIONS

(a) For Certain Failures of Discovery

Upon a motion filed under Rule 2-432 (a), the court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following:

(1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party

from introducing designated matters in evidence; or

(3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party. If, in order to enable the court to enter default judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury.

Instead of any order or in addition thereto, the court, after opportunity for hearing, shall require the failing party or the attorney advising the failure to act or both of them to pay the reasonable <u>costs and</u> expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of <u>costs and</u> expenses unjust.

(b) For Loss of Electronically Stored Information

Absent exceptional circumstances, a court may not impose sanctions under these Rules on a party for failing to provide electronically stored information that is no longer available as a result of the routine, good-faith operations of an electronic information system.

(c) For Failure to Comply with Order Compelling Discovery

If a person fails to obey an order compelling discovery, the court, upon motion of a party and reasonable notice to other

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

(d) Award of Costs and Expenses, Including Attorneys' Fees

If a motion filed under ~~Rule 2-432 or under Rule 2-403~~ Rule 2-403, 2-432, or 2-434 is granted, the court, after opportunity for hearing, shall require the party or deponent whose conduct necessitated the motion or the party or the attorney advising the conduct or both of them to pay to the moving party the reasonable costs and expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of costs and expenses unjust.

If the motion is denied, the court, after opportunity for hearing, shall require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable costs and expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of costs and expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable costs and expenses incurred in relation to the motion among the parties and persons in a just manner.

(e) Memorandum Regarding Costs and Expenses, Including Attorneys' Fees

A motion requesting an award of costs and expenses, including attorneys' fees, shall be supported by a memorandum that sets forth the information required in subsections (e)(1) and (e)(2) of this Rule, as

applicable; however, the moving party may defer the filing of the memorandum until 15 days after the court determines the party's entitlement to costs and expenses, including attorneys' fees.

(1) Costs and Expenses Other Than Attorneys' Fees

The memorandum in support of a motion for costs and expenses other than attorneys' fees shall itemize the type and amount of the costs and expenses requested and include any available documentation of either.

(2) Attorneys' Fees

The memorandum in support of a motion for attorneys' fees shall set forth:

(A) a detailed description of the work performed, broken down by hours or fractions thereof expended on each task;

(B) the amount or rate charged or agreed to in the retainer;

(C) the attorney's customary fee for **similar legal services**;

**(D) the customary fee prevailing in the attorney's legal community for similar legal services; and**

(E) the fee customarily charged for similar legal services in the **county where the action is pending**;

(F) any additional factors that the moving party wishes to bring to the court's attention**, including any applicable factor listed in the Guidelines for Determining Attorneys' Fees and Related Nontaxable Expenses that are appended to these Rules**.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 422 c 1 and 2.
Section (b) is new and is derived from the

2006 version of Fed. R. Civ. P. 37 (f).
Section (c) is derived from former Rule 422 b.
Section (d) is derived from the 1980 version of Fed. R. Civ. P. 37 (a) (4) and former Rule 422 a 5, 6 and 7.
Section (e) is new.

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

> In Rule 2-433, the Rules Committee recommends (1) the addition of the words "costs and" before the word "expenses" in sections (a) and (d); (2) the addition of a reference to "Rule 2-434" in section (d); and (3) a new section (e), which establishes a bifurcated procedure for determining whether costs, expenses, and attorneys' fees should be awarded as sanctions. The Committee believes that the issue of entitlement to the award should be decided first, so that the moving party does not have to prepare a full accounting or other documentation at the time the motion is filed. The memorandum containing an accounting and other materials pertaining to computation of an award need not be filed until 15 days after the court determines whether the party is entitled to the award.

The Reporter commented that the Committee had made sure that Rules 1-341 and 2-433 worked together.

Mr. Brault drew the Committee's attention to section (e) of Rule 2-433. This addresses the request for an award for discovery violations. The first paragraph provides that the memorandum that is required to be filed with the motion may be deferred until 15 days after the court determines the party's entitlement to costs and expenses, so that the trial judge can decide whether to award attorneys' fees before the attorney has to go to the trouble of preparing the memorandum. The Vice Chair

inquired as to why the memorandum procedure has to be different in this context. Mr. Michael responded that the reason for it is to eliminate the work when the judge has decided that the fees will not be awarded. The Vice Chair expressed her agreement with this, but she asked why the memorandum would not include the same information that was in Rule 2-603.1, once the judge has decided to award the fees. Judge Pierson remarked that Rule 2-433 pertains to discovery sanctions. Mr. Brault added that this Rule addresses the one discovery violation and not the entire case. Mr. Michael said that the scope of the request and the fees are much more limited than in the fee-shifting case.

Mr. Brault noted that subsection (e)(2)(F) includes any additional factors that the moving party would like to bring to the court's attention, including any applicable factor listed in the Guidelines. He observed that Rule 1-341 provides that a memorandum in support of a motion filed for an award of costs and expenses shall be in the same form as Rule 2-433 (e).

By consensus, the Committee approved Rules 1-341 and 2-433 as presented.

Agenda Item 4. Reconsideration of proposed amendments to Rule 19 (Confidentiality) of the Rules Governing Admission to the Bar

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The Chair presented Bar Admission Rule 19, Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

AMEND Rule 19 of the Rules Governing Admission to the Bar of Maryland to add to section (a) and subsection (b)(1) provisions concerning the Accommodations Review Committee and its panels, to add to section (c) provisions concerning disclosures to bar admission agencies of other jurisdictions and to judicial and attorney disciplinary authorities, to expand upon the disclosures to the National Conference of Bar Examiners allowed by subsection (c)(7), to allow disclosure of the report of any Character Committee or the Board to be disclosed to any member of a Character Committee, to allow disclosure of certain information to the Child Support Enforcement Administration upon its request, and to provide for access to and confidentiality of certain records and proceedings in the Court of Appeals, as follows:

Rule 19. CONFIDENTIALITY

(a) Proceedings Before Committee or Board; General Policy

Except as provided in sections (b), ~~and~~ (c), and (d) of this Rule, the proceedings before **the Accommodations Review Committee and its panels,** a Character Committee, ~~or~~ and the Board and the related papers, evidence, and information ~~relating to those proceedings~~ are confidential and shall not be open to public inspection or subject to court process or compulsory disclosure.

(b) Right of Applicant

(1) Except as provided in paragraph (2) of this section, an applicant has the right to attend all hearings before **a panel of the Accommodations Review Committee,** a Character Committee, ~~or~~ and the Board pertaining to his or her application and be informed of and inspect all papers, evidence, and information received or considered by the Committee or the Board pertaining to the applicant.

(2) This section does not apply to (A) papers or evidence received or considered by a Character Committee of the Board if the Committee or Board, without a hearing, recommends the applicant's admission; (B) personal memoranda, notes, and work papers of members or staff of a Character Committee or the Board; (C) correspondence between or among members or staff of a Character Committee or the Board; or (D) an applicant's bar examination grades and answers, except as authorized in Rule 8 and Rule 13.

(c) When Disclosure Authorized

The Board may disclose:

(1) statistical information that does not reveal the identity of any individual applicant;

(2) the fact that an applicant has passed the bar examination and the date of the examination;

(3) any material pertaining to an applicant that the applicant would be entitled to inspect under section (b) of this Rule, if the applicant has consented in writing to the disclosure;

(4) any material pertaining to an applicant requested by

(A) a court of this State, another state, or the United States,

(B) Bar Counsel, the Attorney Grievance Commission, or the attorney disciplinary authority in another state,

(C) the authority in another jurisdiction that is responsible for investigating the character and fitness of an applicant for admission to the bar of that jurisdiction, or

(D) Investigative Counsel, the Commission on Judicial Disabilities, or the judicial disciplinary authority in another jurisdiction for use in:

~~(A)~~ (i) a pending disciplinary proceeding ~~pending in that court~~ against the applicant as an attorney or judge;

~~(B)~~ (ii) a pending proceeding ~~pending in that court~~ for reinstatement of the applicant as an attorney after disbarment; or

~~(C)~~ (iii) a pending proceeding ~~pending in that court~~ for original admission of the applicant to the Bar;

(5) any material pertaining to an applicant requested by a judicial nominating commission or the Governor of this State, a committee of the Senate of Maryland, or a committee of the United States Senate in connection with an application by or nomination of the applicant for judicial office;

(6) to a law school, the names of persons who graduated from that law school who took a bar examination and whether they passed or failed the examination; ~~and~~

(7) to the National Conference of Bar Examiners, identifying information **and bar examination results** (including name **and aliases**, ~~Social Security Number, birthdate,~~ **applicant number,** date of application, ~~and~~ date of examination**, examination number, birth date, Law School Admission Council number, law school, date that juris doctor degree was conferred, bar examination pass/fail status, and number of bar examination attempts**) of persons who have filed applications for admission pursuant to Rule 2 or petitions to take the attorney's examination pursuant to Rule 13~~.~~;

(8) to any member of a Character Committee, the report of any Character Committee or the Board following a hearing on an application; and

(9) to the Child Support Enforcement Administration, upon its request, the name, Social Security number, and address of a person who has filed an application pursuant

to Rule 2 or a petition to take the attorney's examination pursuant to Rule 13.

Unless information disclosed pursuant to paragraphs (4) and (5) of this section is disclosed with the written consent of the applicant, an applicant shall receive a copy of the information and may rebut, in writing, any matter contained in it. Upon receipt of a written rebuttal, the Board shall forward a copy to the person or entity to whom the information was disclosed.

(d) Proceedings and Access to Records in the Court of Appeals

(1) Subject to reasonable regulation by the Court of Appeals, Bar Admission ceremonies shall be open.

(2) Unless the Court otherwise orders in a particular case~~,~~:

(A) ~~proceedings~~ hearings in the Court of Appeals shall be open~~.~~, and

(B) if the Court conducts a hearing regarding a bar applicant, any report by the **Accommodations Review Committee**, a Character Committee, or the Board filed with the Court, but no other part of the applicant's record, shall be subject to public inspection.

(3) The Court of Appeals may make any of the disclosures that the Board may make pursuant to section (c) of this Rule.

(4) Except as provided in paragraphs (1), (2), and (3) of this section or as otherwise required by law, proceedings before the Court of Appeals and the related papers, evidence, and information are confidential and shall not be open to public inspection or subject to court process or compulsory disclosure.

Source: This Rule is new.

Bar Admission Rule 19 was accompanied by the following

Reporter's Note.

Several amendments to Rule 19 of the Rules Governing Admission to the Bar are proposed.

Provisions concerning the Accommodations Review Committee and its panels are added to section (a) and subsections (b)(1) and (d)(2).

In section (c), the list of permissible disclosures is expanded to include disclosures to bar admission authorities in other states, authorities in other jurisdictions responsible for investigating the character and fitness of a bar applicant, Bar Counsel, the Attorney Grievance Commission, attorney disciplinary authorities in other states, and judicial disciplinary entities in Maryland and other jurisdictions.

Amendments to subsection (c)(7) are at the request of the State Board of Law Examiners. The Board wishes to participate in a data collection initiative of the National Conference of Bar Examiners ("NCBE") to make the collection of accurate bar passage data universal. The amendments to subsection (c)(7) authorize the Board to provide the necessary information to the NCBE.

New subsection (c)(8) allows a report of a Character Committee or the Board following a hearing to be disclosed to any member of a Character Committee.

Code, Family Law Article §10-119.3 (b) requires a "licensing authority," as defined in §10-119.3 (a)(3)(ii), to require each applicant for a license to disclose the applicant's Social Security number. Code, Family Law Article, §10-119.3 (d) requires the "licensing authority," upon request of the Child Support Enforcement Administration ("CSEA"), to provide certain information to the CSEA. Chapter 256, Laws of 2007 (HB 792) added the Court of Appeals to the list of licensing authorities to which the statute applies. New subsection (c)(9) allows the

> Board, upon request of the CSEA, to disclose to the CSEA the name, Social Security number, and address of a person who has filed an application to take the bar examination or petition to take the attorney's examination in Maryland.
>
> Subsection (d)(1) provides that Bar Admission Ceremonies are open, subject to reasonable regulation by the Court of Appeals –- for example, a limit on the number of tickets to the ceremony available to the family and friends of each new admittee.
>
> Subsection (d)(2) provides that hearings in the Court of Appeals regarding a bar applicant are open, unless the Court otherwise orders in a particular case. If a hearing is conducted, the report of the Accommodations Review Committee, Character Committee, or Board are open to public inspection, but other parts of the applicant's record -- which may contain medical, financial, and other personal information not related to the subject matter of the proceeding -- remain confidential.
>
> Subsection (d)(3) allows the Court to make any disclosure that the Board may make.
>
> Subsection (d)(4) maintains the confidentiality of Bar admission materials filed with the Court, except as provided by the Rule or otherwise required by law.

The Chair explained that the Court of Appeals had specifically asked that Bar Admission Rule 19 be considered on the issue of confidentiality. The other phase of Rule 19 to be discussed is a request from Bedford Bentley, Esq., Secretary of the State Board of Law Examiners ("SBLE") regarding the ability to disclose bar admission results of individuals to the National Conference of Bar Examiners for release to the American Bar Association ("ABA") in the context of their accreditation of law

schools.

Mr. Bentley told the Committee that the principal reason for the requested change is that, in the accreditation process, law schools are now required to report on the success rates of graduates on the bar examination. A local law school where all of the graduates take the bar examination in the state where the law school is located has no problem finding out how its graduates fared on the bar examination. However, a national law school where the graduates take the bar examination across the country in many different states may have difficulty getting statistics on the pass rates of their graduates. In cooperation with the ABA, which has accreditation responsibilities with law schools, the law school community, and the bar admissions community, the National Conference would like to be able to act as a clearinghouse. To do this, they would like the bar admission authorities to release the statistics to them, and they will, in turn, release the statistics to the ABA and the law schools themselves.

Mr. Bentley said that in Maryland, this procedure is essentially already in effect, because when the Bar Examiner's Office gets the results of the bar examination, they automatically distribute the pass/fail status by name to each one of the law schools whose graduates took the Maryland bar examination. In many other states, this is not the case. The law school deans have trouble representing how their graduates are doing. The proposed modification to Rule 19 will allow the

Maryland Board of Law Examiners to give statistics to the National Conference of Bar Examiners, which can then consolidate the statistics from across the country and give them to the ABA.

Mr. Bentley said that the Chair had asked him to check to see how other states are responding to this request from the National Conference. So far, it is too early for the National Conference to give any information. The Chair commented that he had spoken with Ms. Gavin, the Director of Character and Fitness for the SBLE, as to what information the National Conference actually needs. Subsection (c)(7) refers to more than just the name of the applicant. Mr. Bentley responded that the National Conference needs all of the information listed in the Rule to make sure that they are reporting the information correctly.

The Chair inquired as to what protections exist to prevent this information from falling into the wrong hands. Mr. Bentley replied that the National Conference exists to support the bar admission community. There is every reason to believe that they will be very careful with the data. None will go anywhere but to the National Conference unless it is authorized to go to the law schools. The Chair questioned whether the Bar Examiner's Office gives the National Conference only the names. Mr. Bentley answered that the Conference is given the names and the information as to whether the person passed or failed the examination. The Chair noted that the Conference has all of the other information already. Mr. Bentley agreed, saying that they have the birthdates and the Law School Admission Council ("LSAC")

number. They would not be getting anything else other than the bar examination results. At the point where the National Conference releases the data to the law schools, to get that data, the law school has to ask the National Conference and ask about specific individuals. The law school would have to give the name and the appropriate LSAC number to the National Conference.

The Chair inquired as to what happens if a law school graduate of the University of Maryland takes the bar examination in Maryland, Florida, and Pennsylvania, and the graduate passes one of the examinations but fails the other two. What is reported? The SBLE would report the Maryland results. Mr. Bentley replied that one would not take more than two exams at any time. The Chair asked whether the National Conference cares only if someone passes one exam and does not care if another exam is not passed. Mr. Bentley said that what is being looked at is how law school graduates perform on the bar examination. The ABA will have to give the law schools the rule for addressing the situation noted by the Chair, taking two examinations and passing only one of them. Mr. Bentley commented that he did not know how the ABA would handle this.

Master Mahasa asked what role the ABA plays in this process. Mr. Bentley responded that the ABA Section on Bar Admissions is the accrediting authority for all law schools. Master Mahasa inquired whether the ABA is getting the specific information about the applicants. Mr. Bentley answered negatively,

explaining that the ABA is interested only in the statistics. The National Conference gets the personal information.

The Chair stated that the Rule before the Committee contains the proposed amendments to Rule 19 that incorporate the changes in sections (a) and (b) as well as in subsections (c)(4), (c)(7), (c)(8), (c)(9), and section (d). The changes addressing proceedings in the Court of Appeals, and what can be given to the Character Committees were discussed previously. The new material dealing with the data is in subsection (c)(7) in bold language. The Reporter pointed out that the reference to the "Accommodations Review Committee" which had been unintentionally left out is also being added in.

By consensus, the Committee approved Bar Admission Rule 19 as presented.

Continuation of Agenda Item 3.

Mr. Karceski said that Judge Pierson had previously expressed the concern that the proposed language of section (c) in Rule 4-214 indicates to trial judges that the presentation of the consent signed by each defendant and a statement by counsel that no conflict exists is a "safe harbor." Judge Pierson expressed the view that this "safe harbor" is illusory. He envisioned that it could play out in post conviction proceedings when the issue arises as to whether the consent was executed after a full advisement of all relevant factors and under circumstances, such that it was knowing and voluntary, and the consent would not be worth the paper that it is printed on. The

Rule is not necessarily dispositive. A judge could go beyond this, even though the language of the Rule is:"...[u]nless the court is presented with...". The judge can still make inquiry on the record as to whether the defendant understands what he or she is doing or whether the consent is being entered into voluntarily, like any other advisement the judge would undertake when a defendant is purporting to waive a fundamental right. These specific measures in the Rule may not be dispositive after a conviction.

Mr. Michael suggested deleting the phrase that begins with the word "unless." The sentence would then read: "The court shall take appropriate measures to protect each defendant's right to counsel." Judge Love suggested that the language could be: "Notwithstanding that the court is presented with the consent, the court shall take appropriate measures...".

The Chair said that this proposed change was triggered by the fact that there is a federal rule on point, Fed. R. Crim. P. 44. Initially the approach of the Subcommittee was to use the language of the federal rule, which requires the court to inquire about the propriety of the joint representation and personally advise the defendant about the right to effective assistance of counsel, including separate representation. This part is the same in Rule 4-214. The federal rule then states: "Unless there is good cause to believe that no conflict of interest is likely to arise, the court shall take appropriate measures to protect each defendant's right to counsel." The issue was raised as to

how this would work. Fed. R. Crim. P. 44 has been in existence for about 40 years, and many states have adopted it. The Committee had expressed concern as to whether this would require the judge to inquire into whether there will be inconsistent defenses or transgression on the attorney-client privilege. This is why the Rule was sent back to the Subcommittee.

Judge Pierson observed that he has disqualified counsel, notwithstanding consent. He has had cases where the defendant told him that the defendant consented to joint representation. Judge Pierson actually inquired of the defendant on the record after getting counsel's view as to whether the joint representation was appropriate. Judge Pierson had warned the defendant of the potential consequences of the inquiry of the defendant on the record. After the inquiry, the defendant said that he consented and understood what was being said. Under *Wheat v. United States*, 486 U.S. 153 (1988), Judge Pierson found that there was a conflict notwithstanding the consent. *Wheat* holds that the judge can be concerned not only about the right to counsel, but about the possibility of a basis as to whether the conviction could be upset based on the conflict. Judge Pierson found that there was a basis because of the conflict. The case was not one where there was a joint representation, but a sequential representation where the attorney had represented the main government witness and then the defendant. This situation is not easy, and it is fraught with problems. He reiterated his

concern that the suggested language seems to imply a “safe harbor.”

The Chair commented that he did not think that the Committee ever looked at the language as a “safe harbor.” A conflict that is not anticipated could result in a post conviction. The view was more of what duty, if any, a judge has when he or she sees either two defendants in court with one attorney or two defendants with two attorneys who are partners, and the judge takes no action. The Committee’s view was that the judge has to do something. The next question is what the judge should do.

Judge Pierson agreed with the Chair, but he pointed out that once the judge is satisfied with the written consent, the judge may go no further. The Chair remarked that the judge may tell the defendants that since they have only one attorney, they have a right to effective assistance of counsel and the right to separate counsel. The judge could ask the attorney if he or she has considered the implications of the potential conflict. The attorney may answer affirmatively and state that he or she is satisfied that no conflict exists. This is on the record, and the judge gets the written consent of both defendants. This does not insulate the court. Judge Pierson noted that a circuit court judge looks at this Rule which provides that unless the court is presented with a consent, the court shall take appropriate measures. This could send a signal that once the judge has those consents, he or she need not go any further.

Mr. Michael suggested that the language of this provision

could be: “In addition to a consent signed by each defendant and a statement by counsel that no conflict exists, the court shall take appropriate measures...”. This takes the “safe harbor” aspect out of this and makes the judge have the consent to representation by counsel, and the right to make further inquiry if the judge so chooses. Once the judge gets the assurance, that is about as far as he or she can go. If later on a conflict exists in the case, it can be addressed.

Mr. Patterson expressed his agreement with Mr. Michael’s suggested language, but he noted that this language is the same language that is in the federal rule and that caused all the problems. The hue and cry came up from defense attorneys who felt that this approach could give away their strategy. The issue about in camera proceedings without the prosecution present came up, also. How does the judge accomplish what Mr. Michael is suggesting? The judge makes an inquiry which encroaches on what Mr. Patterson felt was a specious argument about revealing strategies. If this is the approach, then the language of the federal rule should be adopted. This language is tried and true.

Mr. Karceski expressed the opinion that the federal language is not tried and true. Unlike the situations that occur in the circuit court and the District Court, this does not really happen in the federal court. That court has 10 cases to every 1000 that occur in the State circuit court. The issues are taken up by a magistrate judge before they even come before the U.S. District judge. In Mr. Karceski’s many years of practice, he had never

seen one attorney represent two defendants in the federal court. The State practice is a different landscape. He told Judge Pierson that it seems that while this situation is not routine in Baltimore City, it happens more often than not in that jurisdiction.

Judge Pierson stated that this situation does not happen very often in Baltimore City. The Honorable Charles Bernstein, who is also a Baltimore City Circuit Court judge, and who wrote the letter requesting the change to the Rule, may have seen this situation more often. Judge Pierson added that he has heard cases where counsel have assured him that no conflict existed when one attorney represented two defendants. Based on the context of the case and what counsel has said, he has agreed and took no further action. This should be left to the judge without telling the judge what he or she should consider. This is what bothers him about the language pertaining to the signed consent.

The Chair stated that the issue from defense counsel's side that was expressed quite vehemently was that if the judge goes behind the attorney's assurance after an inquiry with the attorney, getting written consents from the defendants, and then makes his or her own judgment about whether there is a potential conflict, it is necessarily going to get the judge into making inquiries that according to defense counsel, naturally disclose defense strategy or other things that may be inappropriate for the prosecutor to hear. This was their sense. Mr. Michael remarked that the defense attorney should tell the judge that the

question from the judge cannot be answered. Judge Norton pointed out that court has to make a finding.

The Chair said that the Reporter had spoken with the Honorable Roger Titus, Judge of the U.S. District Court for Maryland, and a former member of the Rules Committee who had said that this situation does not happen in federal court. The Reporter added that Judge Titus had never seen this situation. If it happens at all, it happens at the magistrate judge's level. The federal court has a court employee who looks at the cases and sends them out under the Federal Criminal Justice Act, so there is money to panel out the cases to avoid one attorney for two defendants. The Chair remarked that 30 or 40 states have adopted the federal rule. It is not clear how those states are addressing this issue. The Vice Chair recalled that at the last meeting, the language of the Rule was significantly different. It raised concerns about the nature of the inquiry and the conflicts. Her preference is to use the federal language. This language is not rigid. It allows the court to look at the circumstances and to determine whether there is or is not good cause to believe that a conflict exists. The judge can proceed without getting into how, what, where, and why.

The Chair noted that the Subcommittee's initial decision was to adopt the language of the federal rule. It came before the Rules Committee with one small change. Mr. Karceski said that the change to the Rule started off with the addition of a reference to Rule 1.7. Mr. Michael asked why the Committee did

not adopt the federal rule. Mr. Karceski replied that the issue was that the judge would not be able to go too far. The defense attorneys were concerned that the judge could ask questions that would reveal the defense attorney's strategies or issues that they did not want to disclose. It affords too much opportunity.

Mr. Michael noted that the proposed Rule goes farther than the federal rule. Mr. Karceski disagreed, noting that the judge need go no further if the required actions are taken. He agreed with Judge Pierson. If there is a written consent, and the attorney says "no conflict," then the judge's job is done. The Chair commented that that is not what Judge Pierson had said. It is what he usually does.

Mr. Bowen moved that the last sentence of the Rule should be the federal language to avoid the "safe harbor" trap. The new language would be: "Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures...". The Chair pointed out that the first sentence of the federal rule is already in Rule 4-214, and that would remain. The motion was seconded, and it carried unanimously.

By consensus, the Committee approved Rule 4-214 as amended.

There being no further business before the Committee, the Chair adjourned the meeting.