COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland, on February 11, 2005.

Members present:

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

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. John L. Norton, III
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Brian L. Zavin, Esq., Public Defender's Office
Barry Udoff, Maryland Bail Bond Association
Mark Holtschneider, Esq.
Russell P. Butler, Esq., Maryland Crime Victims Resource Center
Leslie Gradet, Esq., Clerk, Court of Special Appeals
Stacy McCormack, Esq., Public Defender's Office
Elizabeth B. Veronis, Esq., Special Assistant to the Court of Appeals
John McCarthy, Esq., Deputy State's Attorney, Montgomery County
Byron Warnken, Esq., University of Baltimore School of Law
Mary Anne Ince, Esq., Assistant Attorney General

The Chair convened the meeting. He welcomed the Honorable William B. Spellbring, Jr., of the Circuit Court for Prince

George's County, the newest member of the Committee. The Chair told the Committee that Judge Spellbring had been a prosecutor in Prince George's County with extensive litigation experience. He is an outstanding attorney and a wonderful circuit court judge.

The Reporter said that the revised Maryland Lawyers' Rules of Professional Conduct and the Rules Order approving them are on the Judiciary's website. The new Rules are effective July 1, 2005. The 154th Report to the Court is on the Judiciary's website and has been published in the *Maryland Register*. The Court conference on the 154th Report will be held on Monday, April 4, 2005 at 2:00 p.m. The Fiscal Year 2006 schedule of the Rules Committee meetings has been set up. The May meeting will be held on the Friday before Memorial Day, May 26, because it was difficult to find another date in May. If anyone has a problem with that date, the Reporter asked the Committee to let her know, and other options, such as having two meetings in June, could be explored. The Vice Chair remarked that the Friday before Memorial Day may create attendance issues.

The Reporter said that one of the Rules Committee members had requested an e-mail address list for the members of the Committee. If anyone does not want to be included on the list, he or she should contact the Reporter or Cathy Cox. Mr. Klein explained that the list would facilitate Subcommittee work. The Chair expressed the view that this is a good idea.

The Chair said that since Leslie Gradet, Esq., Clerk of the

Court of Special Appeals, was present, Agenda Item 5 would be discussed first, followed by Agenda Item 4.

Agenda Item 5. Consideration of certain proposed amendments to: Rule 8-207 (Expedited Appeal), Rule 8-411 (Transcript), and Rule 8-412 (Record - Time for Transmitting)

The Vice Chair presented Rule 8-207, Expedited Appeal, for the Committee's consideration.

ALTERNATIVE A

MARYLAND RULES OF PROCEDURE

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

CHAPTER 200 - OBTAINING REVIEW IN COURT OF SPECIAL APPEALS

AMEND Rule 8-207 by adding language to section (a) and making certain stylistic changes, as follows:

Rule 8-207. EXPEDITED APPEAL

(a) Adoption, Guardianship, Child Access, Child in Need of Assistance Cases, Interlocutory Appeals in Civil Cases

(1) This section applies to every appeal to the Court of Special Appeals (A) from a judgment granting or denying a petition for adoption, guardianship terminating parental rights, or guardianship of the person of a minor or disabled person, (B) contesting a judgment granting, denying, or establishing custody of or visitation with a minor child, and (C) from an interlocutory order entered pursuant to Code, Courts Article, §12-303. Unless otherwise provided for good cause by order of the Court of Special Appeals or by order of the Court of Appeals if that Court

has assumed jurisdiction over the appeal, the provisions of this section shall prevail over any other rule to the extent of any inconsistency.

(2) In the information report filed pursuant to Rule 8-205, the appellant shall state whether the appeal is subject to this section.

(3) Within five days after entry of an order pursuant to Rule 8-206 (a)(1) or an order pursuant to Rule 8-206 (d) directing preparation of the record, the appellant shall order the transcript and make an agreement for payment to assure its preparation. The court reporter or other person responsible for preparation of the transcript shall give priority to transcripts required for appeals subject to this section and shall complete and file the transcripts with the clerk of the lower court within 20 days after receipt of an order of the party directing their preparation and an agreement for payment of the cost. An extension of time may be granted only for good cause.

(4) The clerk of the lower court shall transmit the record to the Court of Special Appeals within thirty days after the date of the order entered pursuant to Rule 8-206 (a)(1) or Rule 8-206 (d).

(5) The briefing schedule set forth in Rule 8-502 shall apply, except that (A) an appellant's reply brief shall be filed within 15 days after the filing of the appellee's brief, (B) a cross-appellee's brief shall be filed within 20 days after the filing of a cross-appellant's brief, and (C) a cross-appellant's reply brief shall be filed within 15 days after the filing of a cross-appellee's brief. Unless directed otherwise by the Court, any oral argument shall be held within 120 days after transmission of the record. The decision shall be rendered within 60 days after oral argument or submission of the appeal on the briefs filed.

(6) Any motion for reconsideration

pursuant to Rule 8-605 shall be filed within 15 days after the filing of the opinion of the Court or other order disposing of the appeal. Unless the mandate is delayed pursuant to Rule 8-605 (d) or unless otherwise directed by the Court, the Clerk of the Court of Special Appeals shall issue the mandate upon the expiration of 15 days after the filing of the court's opinion or order.

(b) By Election of Parties

(1) Election

Within 20 days after the first notice of appeal is filed or within the time specified in an order entered pursuant to Rule 8-206 (d), the parties may file with the Clerk of the Court of Special Appeals a joint election to proceed pursuant to this Rule.

(2) Statement of Case and Facts

Within 15 days after the filing of the joint election, the parties shall file with the Clerk four copies of an agreed statement of the case, including the essential facts, as prescribed by Rule 8-413 (b). By stipulation of counsel filed with the clerk, the time for filing the agreed statement of the case may be extended for no more than an additional 30 days.

Committee note: Rule 8-413 (b) requires that an agreed statement of the case be approved by the lower court.

(3) Withdrawal

The election is withdrawn if ~~(1)~~ (A) within 15 days after its filing the parties file a joint stipulation to that effect or ~~(2)~~ (B) the parties fail to file the agreed statement of the case within the time prescribed by subsection (a)(2) of this Rule. The case shall then proceed as if the first notice of appeal had been filed on the date of the withdrawal.

(4) Appellant's Brief

The appellant shall file a brief within 15 days after the filing of the agreed statement required by subsection (a)(2) of this Rule. The brief need not include statement of facts, shall be limited to two issues, and shall not exceed ten pages in length. Otherwise, the brief shall conform to the requirements of Rule 8-504. The appellant shall attach the agreed statement of the case as an appendix to the brief.

(5) Appellee's Brief

The appellee shall file a brief within 15 days after the filing of the appellant's brief. The brief shall not exceed ten pages in length and shall otherwise conform to the requirements of Rule 8-504.

(6) Reply Brief

A reply brief may be filed only with permission of the Court.

(7) Briefs in Cross-appeals

An appellee who is also a cross-appellant shall include in the brief filed under subsection (a)(5) of this Rule the issue and argument on the cross-appeal as well as the response to the brief of the appellant. The combined brief shall not exceed 15 pages in length. Within ten days after the filing of an appellee/cross-appellant's brief, the appellant/cross-appellee shall file a brief, not exceeding ten pages in length, in response to the issues and argument raised on the cross-appeal.

(8) Oral Argument

Except in extraordinary circumstances, any oral argument shall be held within 45 days after the filing of the appellee's brief or, if the Court is not in session at that time, within 45 days after commencement of the next term of the Court. The oral argument shall be limited to 15 minutes for each side.

(9) Decision

Except in extraordinary circumstances or when a panel of the Court recommends that the opinion be reported, the decision shall be rendered within 20 days after oral argument or, if all parties submitted on brief, within 30 days after the last submission.

(10) Applicability of Other Rules

The Rules of this Title governing appeals to the Court of Special Appeals shall be applicable to expedited appeals except to the extent inconsistent with this Rule.

Source: This Rule is derived from former Rule 1029.

Rule 8-207 was accompanied by the following Reporter's Note.

Recently added language in section (a) allows expedited appeals from interlocutory orders entered by a circuit court in a civil case pursuant to Code, Courts Article, §12-303. Since the statute covers more than child access issues, Leslie Gradet, Esq., Clerk of the Court of Special Appeals, recommends creating a new section in the Rule pertaining to the §12-303 interlocutory orders. See Alternative A.

The Appellate Subcommittee would like the Rules Committee to make a policy determination as to whether some appeals of interlocutory orders should be subject to the "election" process for an expedited appeal. The Subcommittee also prefers an expanded reference to §12-303 interlocutory orders in section (a) rather than creating a new section in the Rule to deal with them. See Alternative B.

ALTERNATIVE B

MARYLAND RULES OF PROCEDURE

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

CHAPTER 200 - OBTAINING REVIEW IN COURT OF SPECIAL APPEALS

AMEND Rule 8-207 by adding a new section (b), changing current section (b) to section (c), and making certain stylistic changes, as follows:

Rule 8-207. EXPEDITED APPEAL

(a) Adoption, Guardianship, Child Access, Child in Need of Assistance Cases

(1) This section applies to every appeal to the Court of Special Appeals (A) from a judgment granting or denying a petition for adoption, guardianship terminating parental rights, or guardianship of the person of a minor or disabled person, and (B) contesting a judgment granting, denying, or establishing custody of or visitation with a minor child~~, and (C) from an order entered pursuant to Code, Courts Article, §12-303~~. Unless otherwise provided for good cause by order of the Court of Special Appeals or by order of the Court of Appeals if that Court has assumed jurisdiction over the appeal, the provisions of this section shall prevail over any other rule to the extent of any inconsistency.

(2) In the information report filed pursuant to Rule 8-205, the appellant shall state whether the appeal is subject to this section.

(3) Within five days after entry of an order pursuant to Rule 8-206 (a)(1) or an

order pursuant to Rule 8-206 (d) directing preparation of the record, the appellant shall order the transcript and make an agreement for payment to assure its preparation. The court reporter or other person responsible for preparation of the transcript shall give priority to transcripts required for appeals subject to this section and shall complete and file the transcripts with the clerk of the lower court within 20 days after receipt of an order of the party directing their preparation and an agreement for payment of the cost. An extension of time may be granted only for good cause.

(4) The clerk of the lower court shall transmit the record to the Court of Special Appeals within thirty days after the date of the order entered pursuant to Rule 8-206 (a)(1) or Rule 8-206 (d).

(5) The briefing schedule set forth in Rule 8-502 shall apply, except that (A) an appellant's reply brief shall be filed within 15 days after the filing of the appellee's brief, (B) a cross-appellee's brief shall be filed within 20 days after the filing of a cross-appellant's brief, and (C) a cross-appellant's reply brief shall be filed within 15 days after the filing of a cross-appellee's brief. Unless directed otherwise by the Court, any oral argument shall be held within 120 days after transmission of the record. The decision shall be rendered within 60 days after oral argument or submission of the appeal on the briefs filed.

(6) Any motion for reconsideration pursuant to Rule 8-605 shall be filed within 15 days after the filing of the opinion of the Court or other order disposing of the appeal. Unless the mandate is delayed pursuant to Rule 8-605 (d) or unless otherwise directed by the Court, the Clerk of the Court of Special Appeals shall issue the mandate upon the expiration of 15 days after the filing of the court's opinion or order.

(b) Appeals from Interlocutory Orders

This section applies to every appeal to the Court of Special Appeals from an interlocutory order entered pursuant to Code, Courts Article, §12-303. The provisions of section (a) of this Rule also apply to these orders.

~~(b)~~ (c) By Election of Parties

(1) Election

Within 20 days after the first notice of appeal is filed or within the time specified in an order entered pursuant to Rule 8-206 (d), the parties may file with the Clerk of the Court of Special Appeals a joint election to proceed pursuant to this Rule.

(2) Statement of Case and Facts

Within 15 days after the filing of the joint election, the parties shall file with the Clerk four copies of an agreed statement of the case, including the essential facts, as prescribed by Rule 8-413 (b). By stipulation of counsel filed with the clerk, the time for filing the agreed statement of the case may be extended for no more than an additional 30 days.

Committee note: Rule 8-413 (b) requires that an agreed statement of the case be approved by the lower court.

(3) Withdrawal

The election is withdrawn if ~~(1)~~ (A) within 15 days after its filing the parties file a joint stipulation to that effect or ~~(2)~~ (B) the parties fail to file the agreed statement of the case within the time prescribed by subsection (a)(2) of this Rule. The case shall then proceed as if the first notice of appeal had been filed on the date of the withdrawal.

(4) Appellant's Brief

The appellant shall file a brief within 15 days after the filing of the agreed statement required by subsection (a)(2) of

this Rule. The brief need not include statement of facts, shall be limited to two issues, and shall not exceed ten pages in length. Otherwise, the brief shall conform to the requirements of Rule 8-504. The appellant shall attach the agreed statement of the case as an appendix to the brief.

(5) Appellee's Brief

The appellee shall file a brief within 15 days after the filing of the appellant's brief. The brief shall not exceed ten pages in length and shall otherwise conform to the requirements of Rule 8-504.

(6) Reply Brief

A reply brief may be filed only with permission of the Court.

(7) Briefs in Cross-appeals

An appellee who is also a cross-appellant shall include in the brief filed under subsection (a)(5) of this Rule the issue and argument on the cross-appeal as well as the response to the brief of the appellant. The combined brief shall not exceed 15 pages in length. Within ten days after the filing of an appellee/cross-appellant's brief, the appellant/cross-appellee shall file a brief, not exceeding ten pages in length, in response to the issues and argument raised on the cross-appeal.

(8) Oral Argument

Except in extraordinary circumstances, any oral argument shall be held within 45 days after the filing of the appellee's brief or, if the Court is not in session at that time, within 45 days after commencement of the next term of the Court. The oral argument shall be limited to 15 minutes for each side.

(9) Decision

Except in extraordinary circumstances or when a panel of the Court recommends that the opinion be reported, the decision shall be rendered within 20 days after oral argument or, if all parties submitted on brief, within 30 days after the last submission.

(10) Applicability of Other Rules

The Rules of this Title governing appeals to the Court of Special Appeals shall be applicable to expedited appeals except to the extent inconsistent with this Rule.

Source: This Rule is derived from former Rule 1029.

Rule 8-207 was accompanied by the following Reporter's Note.

See the Reporter's note to Alternative A.

The Vice Chair explained that the two alternatives presented are stylistically different. A policy question to be answered by the Committee is whether all appeals from interlocutory orders listed in Code, Courts Article, §12-303 should be expedited or whether only appeals from certain specified interlocutory orders should be expedited. For example, a petition to stay arbitration would be automatically required to be expedited if all interlocutory orders are expedited pursuant to the Rule.

Ms. Gradet asked the Committee to look at §12-303 of the Courts Article, a copy of which was in the meeting materials. She observed that subsection (3)(x) reads as follows: "[d]epriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an

order...". This seems to fit with the other categories of cases listed in section (a) of Rule 8-207. The other types of interlocutory orders listed in §12-303 do not seem to be appropriate for inclusion in section (a) of Rule 8-207. Judge McAuliffe recalled that when Rule 8-207 had previously been before the Court of Appeals, the Honorable John C. Eldridge, then a member of the Court, had suggested that the Rule be made applicable to all expedited appeals. However, as Ms. Gradet has pointed out, many of the statutory interlocutory orders do not fit into the Rule.

Mr. Sykes noted that some of the orders listed in the statute, such as subsection (3)(vi), determining a question of right between the parties and directing an account to be stated on the principle of such a determination, are not necessarily appropriate as matters to be expedited. The Chair stated that in the Court of Special Appeals, where the parties to a case have agreed to an expedited schedule, the Court accommodates them. He asked the Committee what the policy on this should be. Mr. Sykes suggested that the Appellate Subcommittee could look at each item in the list in §12-303 to see whether the appeals from those orders should be expedited. If, in all instances, the appeals are expedited, the system may be clogged. The Vice Chair pointed out that if all of the categories of subsection (3) of §12-303 are considered, the only one that would be appropriate for an expedited appeal is subsection (3)(x). She said that this subsection is clearly covered by subsection (a)(1)(B) of Rule 8-

207, so that the entire reference to interlocutory appeals in subsection (a)(1)(C) can be deleted and replaced by the phrase, "including an appeal from an interlocutory order taken pursuant to Code, Courts Article, §12-303 (3)(x). This would solve the style question of whether to use Alternative A or B. The Chair remarked that the Style Subcommittee can work out the language of Rule 8-207 (a) to include a reference to Code, Courts Article, §12-303 (3)(x). The Committee approved the Rule as amended, subject to style changes.

The Vice Chair presented Rules 8-411, Transcript, and 8-412, Record -- Time for Transmitting, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-411 by adding language to section (b) and adding a cross reference after section (b), as follows:

Rule 8-411. TRANSCRIPT

(a) Ordering of Transcript

Unless a copy of the transcript is already on file, the appellant shall order in writing from the court stenographer a transcript containing:

(1) a transcription of (A) all the testimony or (B) that part of the testimony

that the parties agree, by written stipulation filed with the clerk of the lower court, is necessary for the appeal or (C) that part of the testimony ordered by the Court pursuant to Rule 8-206 (d) or directed by the lower court in an order; and

(2) a transcription of any proceeding relevant to the appeal that was recorded pursuant to Rule 16-404 e.

(b) Time for Ordering

The appellant shall order the transcript within ten days or five days in child in need of assistance cases after:

(1) the date of an order entered pursuant to Rule 8-206 (a)(1) that the appeal proceed without a prehearing conference, or an order entered pursuant to Rule 8-206 (d) following a prehearing conference, unless a different time is fixed by that order, in all civil actions specified in Rule 8-205 (a), or

(2) the date the first notice of appeal is filed in all other actions.

Cross reference: Rule 8-207 (a).

(c) Filing and Service

The appellant shall (1) file a copy of the written order to the stenographer with the clerk of the lower court for inclusion in the record, (2) cause the original transcript to be filed promptly by the court reporter with the clerk of the lower court for inclusion in the record, and (3) promptly serve a copy on the appellee.

Source: This Rule is derived from former Rule 1026 a 2 and Rule 826 a 2 (b).

Rule 8-411 was accompanied by the following Reporter's Note.

Child in need of assistance cases have been included in Rule 8-207 (a) as appropriate for an expedited appeal. However, civil information reports are not

required in these cases pursuant to Rule 8-205 (a). While civil appeal information reports are required in adoption/guardianship cases and in cases involving issues of custody and visitation, they are not required in CINA cases. In cases controlled by Rule 8-207 and in which information reports are filed, the Court of Special Appeals issues orders directing that the cases proceed under Rule 8-207 (a) and setting out the shorter deadlines for ordering the transcript and for transmitting the record to the Court of Special Appeals. Absent such an order, circuit court clerks, attorneys, and pro se parties are likely to miss these deadlines. Leslie Gradet, Esq., Clerk of the Court of Special Appeals, suggests referring to shorter time periods for CINA cases in Rules 8-411 and 8-412 rather than requiring circuit court clerks to earmark CINA cases on the monthly reports filed under Maryland Rule 16-309. She points out that even if the reports were modified by adding CINA cases, by the time they reach the Court of Special Appeals and are docketed, the five day requirement for ordering the transcript and the 30-day record transmittal requirement would have passed. The Appellate Subcommittee recommends adding a reference to the time periods appropriate for CINA cases in Rule 8-411 and 8-412 and adding to those Rules a cross reference to Rule 8-207 (a).

MARYLAND RULES OF PROCEDURE

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

CHAPTER 400 - PRELIMINARY PROCEDURES

AMEND Rule 8-412 by adding language to section (a) and adding a cross reference after section (a), as follows:

Rule 8-412. RECORD - TIME FOR TRANSMITTING

(a) To the Court of Special Appeals

Unless a different time is fixed by order entered pursuant to section (d) of this Rule, the clerk of the lower court shall transmit the record to the Court of Special Appeals within sixty days or thirty days in child in need of assistance cases after: (1) the date of an order entered pursuant to Rule 8-206 (a)(1) that the appeal proceed without a prehearing conference, or an order entered pursuant to Rule 8-206 (d) following a prehearing conference, unless a different time is fixed by that order, in all civil actions specified in Rule 8-205 (a); or

(2) the date the first notice of appeal is filed, in all other actions.

Cross reference: Rule 8-207 (a).

(b) To the Court of Appeals

Unless a different time is fixed by order entered pursuant to section (d) of this Rule, the clerk of the court having possession of the record shall transmit it to the Court of Appeals within 15 days after entry of a writ of certiorari directed to the Court of Special Appeals, or within sixty days after entry of a writ of certiorari directed to a lower court other than the Court of Special Appeals.

(c) When Record is Transmitted

For purposes of this Rule the record is transmitted when it is delivered to the Clerk of the appellate court or when it is sent by certified mail by the clerk of the lower court, addressed to the Clerk of the appellate court.

(d) Shortening or Extending the Time

On motion or on its own initiative, the appellate court having jurisdiction of

> the appeal may shorten or extend the time for transmittal of the record. If the motion is filed after the prescribed time for transmitting the record has expired, the Court will not extend the time unless the Court finds that the failure to transmit the record was caused by the act or omission of a judge, a clerk of court, the court stenographer, or the appellee.
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> Source: This Rule is derived from former Rules 1025 and 825.

Rule 8-412 was accompanied by the following Reporter's Note.

> See the Reporter's note to Rule 8-411.

The Vice Chair explained that language is proposed to be added to the Rules because Child in Need of Assistance ("CINA") cases have different time requirements than other cases. Ms. Gradet told the Committee that when CINA cases were added to Rule 8-207 as another category of case for an expedited appeal, a problem arose because an information report is filed in cases other than CINA cases, and in those cases, the Court of Special Appeals issues orders directing that the cases proceed under Rule 8-207 (a) and setting out the shorter deadlines for ordering the transcript and for transmitting the record to the Court of Special Appeals. Without this order, the circuit court clerks, attorneys, and *pro se* parties are likely to miss these deadlines. To avoid missing the deadlines in CINA cases, it is a good idea to draw attention to them in Rules 8-411 and 8-412.

By consensus, the Committee approved the Rules as presented.

Agenda Item 4. Consideration of a policy issue concerning the length of appellate opinions

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The Chair said that he had spoken with the Honorable Dana M. Levitz, of the Circuit Court for Baltimore County, who had written a letter complaining about the length of many appellate opinions. A copy of the letter is located in the meeting materials. (See Appendix 1). Judge Levitz told the Chair that although he was not able to attend the meeting today, he had expressed his views fully in the letter. Judge Levitz believes that appellate opinions tend to be too long, and busy trial judges do not have the time to read them. Some trial lawyers comment about this problem, also. Judge Levitz has asked for a page limit and a requirement that the holding of the case must be in the first five pages of the opinion. The Chair opined, however, that these are not appropriate for placement in a Rule, because there is no sanction for violating these restrictions. If these are a problem, they would be solved more efficiently by judicial education.

Mr. Sykes suggested that a course on appellate opinion-writing for judges should be offered. There are good books on the subject. Too great a percentage of the appellate opinions are written by law clerks. The Vice Chair observed that this would be an excellent topic for the Judicial Institute. The Chair remarked that there used to be a Judicial Institute course on writing, and the course was open to all members of the Judiciary. He had taken the course taught by three professors

who were not attorneys. Unfortunately, the course was discontinued for financial reasons.

Mr. Brault referred to two opinions he had read that were 77 pages and 116 pages in length. In both, the holding was contained on two pages. There is a limit on the amount of pages in a brief under Rule 8-503, Style and Form of Briefs. Often, the law clerks scan the language of the prior opinion on the subject into the new opinion. The Chair pointed out that very often, the long opinions are not the product of the law clerks. The two Court of Special Appeals judges who write the longest opinions do not have their law clerks adding language to the opinions. The judges work hard and believe that the length of the opinions is necessary, especially when the cases are remanded for further proceedings, not affirmed. He had shown Judge Levitz' letter to the other judges of the Court of Special Appeals who conferenced about it. Some of the judges disagree with the comments, because they work so hard on the opinions.

Mr. Maloney remarked that there needs to be a happy medium. In some lengthy opinions, such as complex commercial cases, the analysis is very helpful to the bar both at the time the opinion was drafted and later on. The bar should be grateful for the good work accomplished. The Vice Chair expressed the view that some opinions are too long, but one judge, in particular, does her best to seriously evaluate every case. Judge Heller said that she prefers an in-depth analysis to a cursory glance. She agreed that this should not be the subject of a rule, but that

there should be a judicial writing course. She commented that the bar and bench are fortunate to have the scholarship of dedicated appellate judges. Judge McAuliffe noted that there is a national course on writing judicial opinions, and he recommended that the Judicial Institute offer a course on opinion-writing, not just for appellate judges, but for all judges. Mr. Brault remarked that the advance sheets for the new cases offer a one-page summary of opinions capturing the holding of cases that are as long as 50 or 60 pages.

The Chair commented that in some states and federal circuits, there are rules for citing unreported opinions. There was a recent program on this subject at the University of Maryland Law School, but the topic of long opinions was not discussed. Everything written by intermediate appellate courts cannot be published. He asked if the Committee was interested in looking at a rule to allow someone to require the appellate court to consider an unpublished opinion. Mr. Maloney answered affirmatively, commenting that in a recent case in which he was counsel, there was an unreported case on point dispositive of all the issues, and he was not allowed to cite the case. The Chair remarked that if someone wishes to cite an unreported opinion, a rule in the Fourth Circuit requires a motion to be filed. The idea is to present the court with a copy of the opinion and send it to the other parties. The court decides whether or not the opinion may be cited. Mr. Maloney expressed the view that this should not be limited to appellate practice. Mr. Sykes observed

that by the time the attorney gets an answer about citing the unreported opinion, the deadline for filing the brief may have passed. The Chair suggested that this issue be discussed to see if it is workable. Mr. Brault questioned as to whether Rule 1-104 is different than this. Mr. Klein answered that that Rule is limited in its applicability. The Chair said that the Appellate Subcommittee will consider this issue.

Agenda Item 1. Consideration of proposed amendments to Rule 4-216 (Pretrial Release)

Mr. Dean presented Rule 4-216, Pretrial Release, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 to change the language of subsection (e)(4)(B) to conform to some of its language as it read before the 2003 amendments to the Rule and to collapse subsections (e)(4)(B) and (C) into one provision, as follows:

Rule 4-216. PRETRIAL RELEASE

. . .

(e) Conditions of Release

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

(1) committing the defendant to the custody of a designated person or

organization that agrees to supervise the defendant and assist in ensuring the defendant's appearance in court;

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

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

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

(A) without collateral security;

(B) with collateral security of the kind specified in Rule 4-217 (e)(1)(A) that is equal in value to the greater of ~~$100.00~~ $25.00 or 10% of the full penalty amount~~, and if the judicial officer sets bail at $2500 or less, the judicial officer shall advise the defendant that the defendant may post a bail bond secured by either a corporate surety or a cash deposit of 10% of the~~ or that is equal in value to a percentage greater than 10% but less that the full penalty amount;

~~(C) with collateral security of the kind specified in Rule 4-217 (e)(1)(A) equal in value to a percentage greater than 10% but less than the full penalty amount;~~

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

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

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

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

> (B) protect the safety of the alleged victim, and
>
> (C) ensure that the defendant will not pose a danger to another person or to the community; and
>
> (6) imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, Criminal Law Article, §9-304 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation of Code, Criminal Law Article, §9-302, 9-303, or 9-305.
>
> . . .

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

> The amendment to Rule 4-216 is proposed to conform the Rule to Chapter 531, (HB 1053), Acts of 2004, by reinstating much of the language of subsection (e)(4) as it read before the 2003 amendments to the Rule. This includes collapsing subsections (e)(4)(B) and (C) into one provision.

Mr. Dean explained that the Rule was revised extensively several years ago. One year ago, as recommended by the Committee, the Court of Appeals adopted an amendment which provides that if a judicial officer sets bail at $2500 or less, the judicial officer shall advise the defendant that the defendant may post a bail bond secured by either a corporate surety or a cash deposit of 10% of the full penalty amount. This change was made as a result of a study instituted by the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, and the Administrative Office of the Courts. In response to the Rule, the legislature passed Chapter 531 (HB 1053), Acts of 2004.

The Criminal Subcommittee recommends changing the Rule in light of the new law by going back to the version of the Rule that was in effect before the recent change.

The Chair commented that he was certain that the bill was introduced with the intent to change the Rule as it was approved by the Court of Appeals. Ira Cooke, Esq., the lobbyist for the bail bondsmen, wanted the latest version of the Rule rescinded. Does the statute truly supersede the Rule enacted by the Court of Appeals? If it does not, what should the Rules Committee do?

The statute tells the judicial officer that he or she has the authority to require of the defendant bail of the full penalty amount or to require the defendant to post 10% of the penalty amount. The statute states that the judge may expressly authorize anything. The defendant may use a bondsman, or the defendant can post the entire amount or $25. The statute and the Rule are not in conflict. The statute states that the judge can do whatever he or she chooses, and the Rule provides what the judge does in certain situations. Mr. Maloney expressed his agreement with the Chair, noting that the bill did not accomplish what it set out to do. Nothing in the bill mandates a change to the Rule. When the Rule was changed last year, there was a spirited debate in the Rules Committee, and the Committee overwhelmingly supported the Rule as adopted by the Court of Appeals. There is no reason to change the Rule.

Mr. Bowen pointed out that a bond is a promise to pay the full amount of the penalty. The collateral for the bond is a

different issue. The conditions for release are (1) without collateral security, or (2) with collateral security of 10% of the penalty amount or $25. The judicial officer has complete discretion to do what he or she wants regarding the bail. The statute does not change anything. The Chair said that the Rule provides that if the judicial officer sets bail at $2500 or less, the officer shall advise the defendant that the defendant may post a bail bond secured by either a corporate surety or a cash deposit of 10% of the penalty amount.

Judge Norton commented that some District Court judges have perceived problems with the latest version of the Rule. They see the Rule as allowing them to provide advice but not allowing them to accept the bond. More judges and commissioners are setting 10% cash bonds. Rather than a rule change, an educational process may be more useful. The Chair said that it makes no sense to read the Rule as meaning that the judicial officer can tell the defendant to post a 10% bond but not be able to take it. Judge Dryden expressed the opinion that the analyses of the bill by the Chair and Mr. Maloney are correct. However, the legislature intended to change the procedure. Judge Dryden inquired as to whether it is worth a contest with the legislature to avoid the intent of the new law. Mr. Maloney remarked that the legislature can redo the bill.

Professor Warnken expressed the view that the analyses by the Chair and Mr. Maloney are incorrect. Farther back in time the recommenda-tion was to allow anyone charged with a crime and

given bail to post 10%. The Criminal Subcommittee defeated this. What was done to the Rule by the Rules Committee was a compromise suggested by the Chair. The Court of Appeals adopted the change to the Rule by a vote of four to three. The language suggested for deletion provides that if the judicial officer sets bail at $2500 or less, the officer shall advise the defendant that the defendant may post a bail bond secured by either a corporate surety or a cash deposit of 10% of the full penalty amount. Up until now whenever bail is set, the judicial officer determines the method, but if the amount set is less than $2500, the defendant may have a right to execute by posting 10% of the full penalty amount. The legislature intended to change this. Up until December 31, 2003, in all circumstances, not just when the bail was above $2500, the judicial officer determined the method of posting bail, not the defendant. Once the Rule was changed, when the bail amount is from $0 to $2500, the defendant owns the decision as to the method of posting bail. It is clear that the statute eliminates this. The Court of Appeals has the authority to supersede the statute if it passes another rule. Mr. Dean correctly stated how and why the Criminal Subcommittee changed the Rule. Professor Warnken said that he understood the rationales of the Chair and Mr. Maloney. If the Rules Committee agrees with the Subcommittee, the Rule should be changed to implement the legislation. The most recent change to the Rule undid thirty years of the same procedure whereby the judicial officer makes the final determination as to bail.

Professor Warnken commented that there are insufficient state resources to track down defendants who are not appearing for their trials. A bondsman would assist in ensuring that they appear. He pointed out that the current Rule provides that if the bail is $2500, the defendant can post $250, and then flee without stopping to pay. The commissioners and District Court judges were concerned about this, and the bails that were set went up to at least $2501. The Chair responded that he had no problem with the bails going up. He clarified that when he suggested the change to Rule 4-216, it was not a compromise proposal. There is a point at which a defendant cannot be released on his or her own recognizance. There is no point in feeding the defendant in jail for a low amount of bail that he or she cannot make. Whether the cutoff amount is $2500 or $1000 is inconsequential. He asked if any studies have been done to see if the change in the Rule accomplished the goal of fewer people awaiting trial in jail. If there has been such an improvement, then the Rule should not be amended. The legislature has said that the judge has total discretion. If the defendant is a low risk for fleeing, then the bail should be under $2500, and the defendant should be allowed to either use a bondsman or post a bail bond.

Professor Warnken said that the Chair's question as to whether the statistics of those awaiting trial in jail have improved is a good one. Professor Douglas Colbert of the University of Maryland Law School had found anecdotally that

there was overcrowding in the jail because many people were not able to make bail. There are no supporting statistics in Baltimore City even before the legislation, the Rule change, and the debates over this issue. Many judicial officers were utilizing the 10% option even before it was mandated. The statute clearly undid the last change to the Rule. This may have to be an educational issue. Different judicial officers are doing different things, and the legislature has gone back to total discretion for the judicial officer in setting bail. Professor Warnken told the Committee that he does not have statistics on bail after the Rule was changed. The Chair pointed out that the legislature has provided that judges have discretion to set bail, and the Rule provides how to exercise the discretion. There is no conflict between the Rule and the statute.

Professor Warnken remarked that case law in Maryland provides that in the Maryland Constitution, the Court of Appeals is given the power of rule-making, and the rules are given equal weight to the laws. If two statutes are in conflict, the later in time prevails. If a rule and statute are in conflict, the later in time prevails. The Chair and Mr. Maloney have expressed the view that there is no conflict between the statute and the Rule. Their interpretation is that the Rule states that the judicial officer has discretion, but it must be exercised a certain way. There is an argument that the Rule has taken away the judicial officer's discretion. The Chair questioned as to

whether there is a case where the legislature confers discretion, but the court is powerless to enact a rule as to how discretion is exercised. Professor Warnken answered in the negative. He said that when the legislature uses the word "may," it means that there is discretion. The Chair read the statute out loud, and he noted that the Rule simply states when there is the express authority to act. Professor Warnken reiterated that it is difficult to make the argument that the statute is not in conflict with the Rule.

Mr. Maloney asked whether any further legislation will be introduced in the 2005 General Assembly on this topic. Professor Warnken answered that he was not aware of any legislation. The Chair expressed the opinion that the Rule should be left in place. He inquired as to whether the change in the Rule has caused a problem in the Baltimore City Jail. Mr. Maloney noted that the bill was sponsored by many Baltimore City legislators. Professor Warnken remarked that the anecdotal argument about overcrowding in the Baltimore City Jail did not result in the push to change the bail procedures.

The Chair noted that the Honorable Alan M. Wilner, a judge of the Court of Appeals, had suggested an amendment to the effect that ordinarily when the bail is $2500 or under, the judicial officer will advise the defendant of the choices listed in the Rule, but the judicial officer can require a corporate surety if the judicial officer states his or her reasons on the record. The Chair suggested that the proposal should be sent back to the

Subcommittee to (1) study the issue of whether the revised Rule improved conditions in the jails, (2) review the tape recording of the Court of Appeals conference as to Judge Wilner's proposed amendment, (3) decide whether the limitation on bail should be $2500 or some other amount, such as $1000 or $1500, and (4) revisit the issue of whether a conflict between the Rule and the statute exists. When the legislature gives discretion, is there any reason why a Rule cannot say how to exercise that discretion in certain instances?. After the Subcommittee considers these issues, the Rule can be brought back to the Rules Committee without prejudice to the rights of the bondsmen to go to the legislature. Mr. Dean responded that the Subcommittee was willing to reconsider the matter. The Committee agreed by consensus to send the matter back to the Subcommittee.

Mr. Dean asked Professor Warnken if the proposed Committee note that was handed out at the meeting should be discussed. See Appendix 1. Professor Warnken answered that it is premature to discuss this. The question is if the proposed language, which sets forth the legislative history of the Rule, should be in a Reporter's note, in a Committee note, or not in the Rule at all. The Chair commented that when the Subcommittee meets, the consultants can attend. Professor Warnken added that the Rules Committee and the Subcommittee have been very generous with the time devoted to this subject.

Agenda Item 2. Consideration of proposed new Rules pertaining to coram nobis: Rule 4-409 (How Commenced - Venue), Rule 4-410 (Petition), Rule 4-411 (Notice of Petition), Rule 4-412 (Response), Rule 4-413 (Withdrawal), Rule 4-414 (Hearing), Rule 4-415 (Statement and Order of Court), and Rule 4-416 (Application for Leave to Appeal)

Mr. Dean told the Committee that writs of error coram nobis have been revived recently because of the case of *Skok v. State*, 361 Md. 52 (2000) that energized the procedure. Currently, no rules setting out the procedure for a coram nobis proceeding exist. The Criminal Subcommittee felt that rules would be helpful. Many of these petitions are filed in Montgomery and Prince George's Counties and in Baltimore City. The procedures vary greatly from county to county and judge to judge. Some uniformity in the procedures would be helpful to practitioners. The *Skok* case is the foundation for the suggested rules.

Mr. Dean explained that coram nobis relief is similar to a petition for post conviction. It asks for a collateral attack on a criminal conviction. It can also attack a civil judgment, but the Rules being considered today are for attacks against criminal convictions. The actions are instituted by a defendant who has no other recourse to challenge the prior conviction. The defendant is not incarcerated or subject to the jurisdiction of the Department of Parole and Probation. Deportation is a possibility for non-citizens, especially those with prior convictions. The Assistant Reporter drafted the Coram Nobis Rules using the Post Conviction Rules as a starting point. It

would be a good idea to consider the Rules one at a time.

Mr. Dean presented Rule 4-409, How Commenced - Venue, for the Committee's consideration.

Note to Rules Committee: Title 4, Chapter 400 pertains to proceedings under the Uniform Post Conviction Procedure Act. Therefore, the Style Subcommittee will renumber the proposed new *coram nobis* Rules, either placing them elsewhere in Title 4 or moving them to Title 15.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

ADD new Rule 4-409, as follows:

Rule 4-409. HOW COMMENCED – VENUE

A proceeding for a writ of error coram nobis as to a prior criminal judgment is commenced by the filing of a petition in the action in which the judgment complained of was entered.

Source: This Rule is new.

Rule 4-409 was accompanied by the following Reporter's Note.

Rule 4-409 is new, but its structure is based on Rule 4-401, How Commenced – Venue. Although petitions for a writ of error *coram nobis* are often filed in the circuit court, the Rule is structured so that the petition is filed in the action in which the judgment complained of was entered, since Code, Courts Article, §1-609 provides that a District Court judge may issue the writ.

Mr. Dean said that after a decision by the Subcommittee that writs of error coram nobis should not be filed in District Court,

the Honorable Neil Axel, District Court judge from Howard County, pointed out to Judge Norton that Code, Courts Article, §1-609, Warrants; Writs, which specifically authorizes District Court judges to issue writs of error coram nobis.

Mr. Sykes pointed out that coram nobis is a civil action and asked if the Rules are correctly placed. Mr. Dean responded that post conviction is also a civil action but is placed in the Criminal Rules, and the petitions are filed in the underlying criminal action. Mr. Sykes remarked that the convictions being complained about may have happened a long time before the petition is filed, and the files are gone or are difficult to locate. Mr. Dean noted that Rule 4-403, Notice of Petition, provides that when a post conviction petition relates to an action tried in that court, it shall be filed in the action. Judge McAuliffe commented that post conviction cases are more current, filed while the defendant is incarcerated or subject to the Department of Parole and Probation. Under *Skok*, coram nobis cases are civil actions initiated by a separate filing. Mr. Bowen added that the case states at page 65: "a writ of error coram nobis remains a civil action in Maryland, independent of the underlying action from which it arose."

The Chair suggested that the language in the Rule that reads: "... in the action in which the judgment complained of was entered" be changed to: "...in the court where the defendant was convicted." The Committee agreed by consensus to this change.

The Committee approved the Rule as amended.

Mr. Dean presented Rule 4-410, Petition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

ADD new Rule 4-410, as follows:

Rule 4-410. PETITION

(a) Content

A petition for a writ of error coram nobis shall allege:

(1) The identity of the petitioner as the person subject to the judgment and sentence;

(2) The identification of the prior proceeding, including the procedural details leading to the judgment and sentence;

(3) A statement of all previous proceedings, including appeals, motion for new trial and previous post conviction petitions, and the determinations made thereon;

(4) The identification of any petitions for a writ of error coram nobis pertaining to the same proceeding that had been filed previously;

(5) The existence at time of the trial of facts not before the court and not in the record, that would have resulted in the entry of a different judgment or the allegations of error upon which the petition is based;

(6) The lack of knowledge by the petitioner and by the court at the time of the trial of the facts constituting the grounds for the petition; or the discovery by the petitioner of the grounds that could not have been discovered by due diligence;

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

(8) The significant collateral consequences that resulted from the challenged conviction;

(9) An explanation of the delay, if any, in bringing the petition after the discovery of the facts;

(10) The unavailability of appeal, post conviction, or other remedies;

(11) Facts, if any, showing why the petitioner should not be present at the hearing;

(12) The prayer for relief; and

(13) All relevant portions of the transcript of the prior proceeding, if available.

(b) Argument or Citation

The petition shall include a concise argument or citation of authority.

(c) Amendment

Amendment of the petition shall be freely allowed in order to do substantial justice.

Source: This Rule is new.

Rule 4-410 was accompanied by the following Reporter's Note.

Rule 4-410 is new. Most of the content of the Rule is derived from 39 Am. Jur. 2d, *Habeas Corpus and Post Conviction Remedies* §256 (2003). Subsection (a)(3), part of subsection (a)(5), and subsection (a)(7) are derived from Rule 4-402, Petition. The latter part of subsection (a)(6) is derived from the language of section (c) of Rule 4-331, Motion for New Trial. The language of subsection (a)(8) is derived from *Skok v. State*, 361 Md. 52 (2000).

The Chair pointed out that this Rule contains the contents of the petition. Judge Heller questioned as to why the language of subsection (a)(2) of Rule 4-402, Petition, in the Post Conviction Rules, which reads: "[t]he place and date of trial, the offense for which the petitioner was convicted, and the sentence imposed" was not included in Rule 4-410. Mr. Dean replied that the Rule is a mixture of Rule 4-402 and 39 Am. Jur. 2d, Habeas Corpus and Post Conviction Remedies. Judge Heller expressed the view that subsection (a)(2) of Rule 4-402 is more specific than the language in section (a) of Rule 4-410. The Chair remarked that the Rule does not need to include the place and date of trial. Judge Heller disagreed, explaining that petitions can be filed in the wrong court. The Chair said that even if the defendant was convicted in the District Court in Glen Burnie, and the coram nobis petition is filed in Annapolis, the clerk's office is the same. Judge Dryden pointed out that the petition could be filed in a county other than the one where the defendant was convicted. The Reporter suggested that the petition contain the case number of the underlying conviction. The Chair suggested that subsection (a)(13) of Rule 4-410 be changed (subject to restyling) to read as follows: [a]ll relevant portions of the transcript of the prior proceeding, if available, are attached." The Committee agreed by consensus to this change.

Mr. Brault inquired as to whether the Subcommittee gave any thought to drafting Rules for coram nobis proceedings that attack judgments in civil actions. Mr. Dean answered in the negative,

noting that the Subcommittee was focusing on coram nobis proceedings that attack criminal convictions. Mr. Brault stated that coram nobis could have a substantial effect on civil practice. If a foreclosure proceeding has been ratified and title has been transferred, a grant of a writ of error *coram nobis* could undo the transfer. He expressed the view that a civil judgment should not be set aside years after the judgment was entered. The Chair pointed out that Rule 4-409 applies to a proceeding for a writ of error coram nobis as to a prior criminal judgment. He suggested that a Committee note could be added that would state that the Rules are promulgated to deal with criminal cases and are not intended to expand upon the availability of writs of coram nobis in any other case. The Committee agreed by consensus to this addition.

Mr. Dean said that sections (b) and (c) of Rule 4-410 are taken from the Post Conviction Rules. Mr. Sykes suggested that section (b) should not be couched in the disjunctive, but it should read as follows: "The petition shall include a concise argument with citation of authority." The Chair suggested that the word "with" be "including." The Committee agreed by consensus with Mr. Sykes' suggested change and the Chair's amendment to it.

Judge Dryden expressed concern with subsection (a)(6) of the proposed Rule. The standard of due diligence is a very high burden for someone to meet. The Chair remarked that the person

would assert that the grounds could not have been discovered by due diligence, and the court will determine at the hearing whether this is true. Judge Dryden remarked that a petitioner exercising due diligence would have an obligation to know that if he is found guilty of the underlying crime, the conviction would result in deportation. Mr. Dean noted that the writ may be for a crime that took place a long time ago and was not a deportable offense at the time the defendant was convicted or pled guilty. The Chair observed that some inquiry should have been made into the possibility of deportation.

Mr. Klein pointed out that subsection (a)(6) consists of two clauses that do not necessarily go together. The Chair said that the Style Subcommittee can divide the two clauses. Subsection (a)(6) refers to a lack of knowledge at the time of the trial, and subsection (a)(7) refers to a statement explaining why the petitioner lacked the knowledge at the time of trial. In some cases involving coram nobis relief, the petitioner states that he or she cooperated with the government, and many years later, the petitioner is going to be deported. The judge who originally sentenced the petitioner grants the relief, because the judge did not realize that by sentencing the petitioner, he or she would be deported.

Mr. Brault reiterated that the due diligence standard would defeat the purpose of a coram nobis petition. One would be on inquiry notice the minute the person is accused of committing a crime. Ms. Ince, a consultant to the Subcommittee, said that a

1996 law was applied retroactively and made Mr. Skok subject to deportation. At the time Mr. Skok found out about the law, he timely moved for a writ of error coram nobis. Mr. Brault asked if this only applies to the situation where there has been an intervening change in immigration law. The Chair observed that as a practical matter, if the defendant asks the attorney about the possibility of deportation, and the attorney answers negatively, then the defendant's inquiry is diligent. Mr. Sykes commented that the second clause of subsection (a)(6) is limited to the discovery of new grounds that did not exist before. The word "due" is not necessary. Mr. Brault noted that Mr. Klein had expressed some confusion about the meaning of the two clauses. The Chair said that there are two separate aspects: what is the fact unknown to the defendant and the court, and why is it unknown? If the defendant knew about it, the defendant cannot take advantage of it later. If the defendant did not know about it, why would the failure to know be excused?

Mr. Maloney pointed out that the standard of due diligence changes the substance of the common law and is not consistent with the *Skok* case. The Chair asked Mr. Maloney if the last word of subsection (a)(6) should be "petition," and Mr. Maloney replied in the affirmative. Judge Heller referred to the language in subsection (a)(6) that reads "and by the court," and she inquired as to how one could show a lack of knowledge by the court. The Chair responded that the petitioner would have to

introduce a record of the prior proceedings to demonstrate facts not known to the court that entitle the petitioner to relief. Mr. Karceski remarked that he had heard that some writs of error coram nobis are granted for failure of the court to provide the defendant with the required litany, such as the right to a jury trial or the maximum sentence for the crime. What does that have to do with the lack of knowledge? The Chair answered that when shortcuts are taken during the taking of a guilty plea, the court may not have asked the necessary questions, and the plea is considered involuntary. In the *Skok* case, there were facts unknown to the court.

Ms. Ince pointed out that the language "by the court" in subsection (a)(6) reflects that under the original common law writ, it is necessary for the petitioner to return to the court that entered the judgment in order to establish the facts unknown at the time the judgment was entered. The Chair said that the petition must state why the person is entitled to the writ. If the petition is based on facts or law unknown to the court, it must so state. If the procedures in the original trial were inadequate, the petition must so state.

Mr. Sykes commented that there is an overlap between subsections (a)(5) and (a)(6) and some alternatives. He suggested that either the Style or the Criminal Subcommittee redraft the Rule. Mr. Maloney remarked that the goal is to set out the procedural framework for filing a petition. A Rule

should not modify the common law. Subsection (a)(8) does not exist in the common law. The last sentence of Rule 4-414, Hearing, provides that a petitioner may request that the court reopen a coram nobis proceeding, and this is not part of the common law. The Chair said that the *Skok* case expanded the common law and requires that the petition set forth the significant collateral consequences that resulted from the challenged conviction. Mr. Dean observed that *Skok* is not the final word on writs of error coram nobis. More expansion will be left to case development. Mr. Maloney noted that the Rule is creating substantive standards that do not exist in the case law. Subsection (a)(7), requiring the petitioner to include a statement of the facts or special circumstances which show that the allegations of error have not been waived, puts a burden on the petitioner that is not required by case law.

The Chair suggested that the language in subsection (a)(5) that reads "existence at time of the trial of" and "not before the court and not in the record" be deleted. The provision would read: "The facts that would have resulted in the entry of a different judgment, or the allegations of error upon which the petition is based;". Subsection (a)(8) should remain in the Rule, but subsection (a)(7) can be deleted. Mr. Dean expressed his concern for eliminating subsection (a)(7). Mr. Maloney pointed out that subsection (a)(7) is a burden for the petitioner. The Chair said that the waiver language in

subsection (a)(7) is taken from Rule 4-402, Petition, the Post Conviction Rule. It does not change the legal principles of waiver, and it is consistent with the structure of post conviction law. Mr. Maloney observed that the State can raise this as an affirmative defense. Mr. Brault noted that *Skok* states that the same principles of waiver that apply to post conviction cases apply to coram nobis cases. The two sets of Rules should be in balance.

Mr. Sykes commented that a formal statement that the allegations of error have not been waived is appropriate. However, requiring evidence to prove the negative, such as the facts or special circumstances, is not appropriate. He suggested that subsection (a)(7) read: "A statement that the allegations of error have not been waived." Mr. Maloney remarked that the Rule should not create the burden of demonstrating non-waiver. The Chair pointed out that the facts required by subsections (a)(3) and (4) provide an opportunity for the State to allege that there has been a waiver. The judge decides the issue at the hearing. The Chair added that the State in its answer has the burden of alerting the court that there has been a waiver. Judge Dryden commented that the State has more access to information than the petitioner does. The Chair suggested that subsection (a)(9) be deleted, and the Committee agreed by consensus to this suggestion. Mr. Brault inquired as to whether subsection (a)(7) will be changed, and the Chair responded that the Style

Subcommittee will redraft it. He also pointed out that subsection (a)(13) will be changed to include language providing that the relevant portions of the prior transcript will be attached.

Mr. Klein questioned the meaning of subsection (a)(11). Judge Dryden answered that the petitioner may have been deported. Mr. Brault noted that there are constitutional implications. Mr. Michael added that there may be a second coram nobis proceeding based on the denial of the petitioner's right to be at the first one. Judge Dryden observed that a coram nobis proceeding is a civil matter, and the petitioner does not have to be present. Mr. Sykes suggested that in place of the word "should," the words "need not" or "cannot" should be substituted. The Chair suggested that subsection (a)(11) be deleted, and the Committee agreed by consensus to its deletion.

Mr. Leahy asked if the transcript must be ordered pursuant to subsection (a)(13). The Reporter answered that it must be ordered if it is available. Mr. Maloney commented that this is an expensive burden for the petitioner. The Reporter said that in the District Court, the proceedings are on tape. Judge Dryden noted that the tapes are destroyed three years after the proceedings. Mr. Maloney expressed the view that since both sides rely on the transcript, one side should not be burdened with obtaining it. The Chair remarked that if the petitioner is in possession of the transcript of the prior proceeding, the petitioner should attach to the petition the relevant portions of

the transcript. Mr. Brault suggested that in place of the language "if available" in subsection (a)(13), the language "if in the possession of the petitioner" should be substituted. The Committee agreed by consensus to this change. The Committee approved the Rule as amended.

Mr. Dean presented Rule 4-411, Notice of Petition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

ADD new Rule 4-411, as follows:

Rule 4-411. NOTICE OF PETITION

Upon receipt of a petition for a writ of error coram nobis, the clerk shall promptly notify the State's Attorney.

Source: This Rule is new.

Rule 4-411 was accompanied by the following Reporter's Note.

Rule 4-411 is new and is based on Rule 4-403, Notice of Petition.

Mr. Dean told the Committee that the Rule is based on Rule 4-403, Notice of Petition, in the Post Conviction Rules. Judge Dryden inquired as to whether the notice is in writing. Mr. Dean replied that the notice is in writing for post convictions. The Chair pointed out that there could be a provision added to Rule 4-410 that would require that the State's Attorney be given notice, and then Rule 4-411 could be deleted. Mr. Dean suggested

that the Rule remain, because it would be helpful when a *pro se* litigant has filed the petition. The Committee approved the Rule as presented.

Mr. Dean presented Rule 4-412, Response, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

ADD new Rule 4-412, as follows:

Rule 4-412. RESPONSE

The State's Attorney shall file a response to the petition within 30 days after notice of its filing, or within such further time as the court may order.
Source: This Rule is new.

Rule 4-412 was accompanied by the following Reporter's Note.

Rule 4-412 is new and is derived from Rule 4-404, Response. The Subcommittee recommends, however, that the State's Attorney have 30 days to file a response after being notified that a petition was filed, instead of the 15 days provided for in Rule 4-404.

There being no discussion, the Committee approved the Rule as presented.

Mr. Dean presented Rule 4-413, Withdrawal, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

ADD new Rule 4-413, as follows:

Rule 4-413. WITHDRAWAL

If a hearing is held, the court may grant permission to withdraw the petition without prejudice at any time before the date of the hearing and thereafter only for good cause. If no hearing is held, the court may grant permission to withdraw the petition without prejudice before the court decides the petition.

Source: This Rule is new.

Rule 4-413 was accompanied by the following Reporter's Note.

Rule 4-413 is new and is in part based on Rule 4-405, Withdrawal, and in part based on Am. Jur. 2d, *Habeas Corpus and Post Conviction Remedies* §267 (2003).

Mr. Maloney asked why the petitioner cannot withdraw without permission of the court. The second sentence provides that if no hearing is held, the court may grant permission to withdraw the petition without prejudice before the court makes a decision. Mr. Dean inquired as to whether this is consistent with civil practice. Mr. Brault replied that Rule 2-506, Voluntary Dismissal, provides that a plaintiff may dismiss an action without leave of court before the adverse party files an answer. After an answer is filed, the action can be dismissed only on the order of the court or on agreement of the parties. Mr. Dean noted that Rule 4-405, Withdrawal, provides that in a post conviction, the court may grant permission to withdraw the

petition without prejudice at any time before the date of the hearing, and thereafter only for good cause.

The Chair suggested that the second sentence of Rule 4-413 be deleted. The wording of the Rule could be: "At any time before the later of the date of the hearing or the date on which the court files its opinion, the court may grant permission to withdraw the petition...". Mr. Maloney inquired as to whether the petition can be withdrawn after the opinion has been issued, and the Chair replied that it cannot. Mr. Sykes asked whether the court can permit withdrawal without prejudice. If so, the second sentence can be stricken. The Committee, by consensus, approved the deletion of the second sentence. The Chair commented that Rule 8-601, Dismissal of Appeal by Appellant, provides that an appeal can be dismissed by the appellant without the court's permission before the court files it opinion. He suggested that this matter be governed by the civil rules. Mr. Brault suggested that the language of Rule 4-413 should be: "Withdrawal of the petition is governed by Rule 2-506." By consensus, the Committee approved of this change. The Committee approved the Rule as amended.

Mr. Dean presented Rule 4-414, Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

ADD new Rule 4-414, as follows:

Rule 4-414. HEARING

The court may, in its discretion, hold a hearing on the petition. Evidence may be presented by affidavit, deposition, oral testimony, or in any other form as the court finds convenient and just. In the interest of justice, the court may decline to require strict application of the rules in Title 5, except those relating to competency of witnesses. The victim or victim's representative shall be notified of the hearing as provided in Code, Criminal Procedure Article, §§11-104 and 11-503 and is entitled to attend the hearing. If a petitioner requests that the court reopen a coram nobis proceeding that was previously concluded, the court shall determine whether a hearing will be held, but it may not reopen the proceeding or grant the relief requested without a hearing unless the parties stipulate that the facts stated in the petition are true and that the facts and applicable law justify the granting of relief.

Source: This Rule is new.

Rule 4-414 was accompanied by the following Reporter's Note.

Rule 4-414 is new and is based on Rule 4-406, Hearing. The fourth sentence has been added to conform to victims' rights laws.

Mr. Sykes questioned as to whether the fourth sentence concerning the victim or victim's representative should be put into a separate subsection. Mr. Butler, a consultant to the Subcommittee and an advocate for victims' rights, pointed out

that the language in Rule 4-345, Sentencing–Revisory Power of Court, has appropriate language that could be used in Rule 4-414. The Chair suggested that the Subcommittee can review the Rule to include the appropriate language from Rule 4-345. By consensus, the Committee agreed to this suggestion.

Mr. McCarthy told the Committee that there are hundreds of coram nobis cases in Montgomery County due to the large Hispanic community there. He expressed his concern about coram nobis cases where the petitioner is not present. If the case is presented by affidavit, the petitioner would not be subject to cross-examination, and the court could not assess the credibility of the petitioner. The Chair suggested that language could be added to Rule 4-414 that would provide that the petitioner be required to attend the hearing unless the court orders otherwise. Mr. McCarthy noted that it is difficult to address the issues of the case if the petitioner is not present at the hearing. Federal penitentiaries have television hookups, and a petitioner who is in federal prison could appear via television and be cross-examined. A videotaped deposition would be another means by which the court could assess the petitioner's credibility. Mr. Maloney suggested that "live video hookup" be added as a method of conducting the hearing. The Rule should not provide that the petitioner has the burden of proof as to why his or her non-appearance is justified. The Chair said that these cases often come down to a demeanor-based credibility assessment made after seeing the witness. He reiterated that instead of the

language of the Rule leading to the drawing of an inference as to why the person is not present, it would be better to provide that the petitioner be required to attend the hearing unless the court orders otherwise. Mr. Maloney added that the petitioner could demonstrate why he or she is unavailable, so that people in prison or out of the country are protected. The Reporter suggested that a Committee note could be added providing that the petitioner should be present if possible. Mr. Karceski remarked that the court, in its exercise of discretion, can determine this.

The Chair commented that the State can argue that the court should not decline to require the strict application of the rules in Title 5. The court can request that the petitioner must be present. Mr. Brault remarked that a judge can probably tell a legitimate petition by reading it. Mr. Karceski pointed out that even if a judge reverses a conviction, the Immigration and Naturalization Service (INS) can look behind the reversal and deport the petitioner. Even if both sides agree that the conviction should be overturned, the INS is not bound by that agreement.

Mr. Klein expressed the view that the third sentence subsumes the second sentence. The Chair said that both sentences should be left in as a point of emphasis for the courts. Mr. Klein noted that the second sentence pertains to the right to present evidence, and the third sentence provides that the court may decide whether to apply the rules of evidence. Mr. Dean

pointed out that this language is taken from Rule 4-406, Hearing, in the Post Conviction Rules. The Chair suggested that the second sentence should be put into a Committee note, and video conferencing can be added to the list. The intent of the Rule is to give the court needed flexibility to acquire necessary information by the most clearly reliable methods. Mr. Bowen suggested that the sentences should be reordered, and the Chair said that this can be done by the Style Subcommittee. The Rule must be clear that the standard is the interest of justice. He stated that the Rule would be sent back to the Subcommittee.

Mr. Dean presented Rule 4-415, Statement and Order of Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

ADD new Rule 4-415, as follows:

Rule 4-415. STATEMENT AND ORDER OF COURT

(a) Statement

The judge shall prepare and file or dictate into the record a statement setting forth separately each ground upon which the petition is based, the federal and state rights involved, the court's ruling with respect to each ground, and the reasons for the action taken thereon. If dictated into the record, the statement shall be promptly transcribed.

(b) Order of Court

The statement shall include or be accompanied by an order either granting or

denying relief. If the order is in favor of the petitioner, the court may provide for rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.

(c) Copy to the Parties

A copy of the statement and the order shall be filed promptly with the clerk and sent to the petitioner, petitioner's counsel, and the State's Attorney.

(d) Finality

The statement and order constitute a final judgment when entered by the clerk. Cross reference: See *Skok v. State*, 361 Md. 52 (2000).

Source: This Rule is new.

Rule 4-415 was accompanied by the following Reporter's Note.

Rule 4-415 is new and is based on Rule 4-407, Statement and Order of Court.

The Chair asked if the Rule is based on Rule 4-407, Statement and Order of Court, in the Post Conviction Rules. Mr. Dean answered in the affirmative. There being no other discussion, the Committee, by consensus, approved the Rule as presented.

Mr. Dean presented Rule 4-416, Application for Leave to Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

ADD new Rule 4-416, as follows:

Rule 4-416. APPLICATION FOR LEAVE TO APPEAL

An application for leave to appeal to the Court of Special Appeals from a decision of the circuit court shall be governed by Rule 8-204.

Source: This Rule is new.

Rule 4-416 was accompanied by the following Reporter's Note.

Rule 4-416 is new and is based on Rule 4-408, Application for Leave to Appeal.

Mr. Dean explained that Rule 4-416 is being withdrawn, because petitions can be filed in District Court and because appeals are governed by the regular appeals rules. The Committee agreed by consensus that Rule 4-416 should not be included in the coram nobis Rules.

The Chair stated that the Rules would be remanded to the Subcommittee to modify them in accordance with today's discussion.

Agenda Item 3. Consideration of proposed new Rule 1-326 (Proceedings Regarding Victims and Victims' Representatives

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Mr. Zarnoch presented Rule 1-326, Proceedings Regarding Victims and Victims' Representatives, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

ADD new Rule 1-326, as follows:

Rule 1-326. PROCEEDINGS REGARDING VICTIMS AND VICTIMS' REPRESENTATIVES

(a) Entry of Appearance

An attorney may enter an appearance on behalf of a victim or a victim's representative in a proceeding under Title 4 or Title 11 of these Rules for the purpose of representing the **[**~~interests~~**]** **rights** of the victim or victim's representative.

(b) Service of Pleadings and Papers

A party shall serve pursuant to Rule 1-321 upon counsel for a victim or a victim's representative copies of all pleadings or papers that pertain to: (1) the right of the victim or victim's representative to be informed regarding the criminal or juvenile delinquency case, (2) the right of the victim or victim's representative to be present and heard at any hearing, and (3) restitution. Any additional pleadings and papers shall be served only if directed by the court.

(c) Duties of Clerk

The clerk shall (1) send to counsel for a victim or victim's representative a copy of any court order **[**~~or ruling~~**]** pertaining to the **[**~~interests~~**]** **rights** of the victim referred to in section (b) of this Rule and (2) notify counsel for a victim or a victim's representative of any hearing that may affect the victim or victim's representative's **[**~~interest~~**]** **rights**.

Cross reference: "Victim" means a victim as defined under Article 47 of the Maryland Declaration of Rights. Pursuant to §14, Ch. 10, Acts of 2001, a "victim's representative" is listed separately for stylistic purposes to include a person acting for a victim.

> Source: This Rule is derived in part from Article 47 of the Maryland Declaration of Rights and from Canon 3A (5) of Rules 16-813 and 16-814.

Rule 1-326 was accompanied by the following Reporter's Note.

> Russell P. Butler, Esq., who represents the rights of victims, requested a new Rule that establishes procedures allowing counsel to enter an appearance to represent a victim or victim's representative in proceedings under Title 4 or Title 11 of these Rules.

Mr. Zarnoch explained that the Rule, as drafted by the General Provisions Subcommittee, has been reviewed by the Conference of Circuit Judges. The Conference made two changes to the Rule. The word "interests" has been changed to the word "rights," and the phrase "or ruling" has been deleted. Mr. Butler has agreed to the changes. Mr. Butler noted that he had a correction to the Reporter's note -– the Rule was requested by the Honorable William D. Missouri, Administrative Judge for Prince George's County and the newly appointed Chair of the Conference of Circuit Judges.

Mr. Sykes inquired as to whether the Rule is intended to encompass notices of hearing dates. Mr. Butler said that there is a separate obligation on the part of the States's Attorney to notify the victim or victim's representative.

The Chair suggested that a Committee note should be added that would provide that this Rule is not a substitution for other notification obligations in other statutes and rules. By consensus, the Committee agreed to this suggestion. The

Committee approved the Rule as amended.

Agenda Item 6. Consideration of "housekeeping" amendments to: Rule 2-325 (Jury Trial) and Rule 16-814 (Maryland Code of Conduct for Judicial Appointees)

The Reporter presented Rule 2-235, Jury Trial, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-325 (d) to correct a reference to a certain agency, as follows:

Rule 2-325. JURY TRIAL

. . .

(d) Appeals from Administrative Agencies

In an appeal from the ~~Workmen's~~ Workers' Compensation Commission or other administrative body when there is a right to trial by jury, the failure of any party to file the demand within 15 days after the time for answering the petition of appeal constitutes a waiver of trial by jury.

. . .

Rule 2-325 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-325 (d) corrects a reference to the Workmen's Compensation Commission, which should be a reference to the Workers' Compensation Commission.

The Reporter explained that there was an incorrect reference

to the ”Workmen’s Compensation Commission” in section (d) of the Rule. The correct wording is “Workers’ Compensation Commission.” The Committee approved the change to the Rule by consensus.

The Reporter presented Rule 16-814, Maryland Code of Conduct for Judicial Appointees, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-814 to add to the Terminology section a sentence concerning boldface type, as follows:

Rule 16-814. MARYLAND CODE OF CONDUCT FOR JUDICIAL APPOINTEES

. . .

Terminology

Terms explained below are noted in boldface type in the Canons and Comments where they appear.

In this Code the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(a) Fiduciary

“**Fiduciary**” includes administrator, attorney-in-fact by power of attorney, executor, guardian, personal representative, and trustee.
Cross reference: See Canons 3D (1)(c) and (2) and 4E. For a definition of “guardian,” see Rule 1-202 (j).

. . .

Rule 16-814 was accompanied by the following Reporter's Note.

> The proposed amendment to Rule 16-814 adds to the Terminology section a sentence that explains the use of boldface type throughout the Rule. This sentence, which is included in Rule 16-813, Maryland Code of Judicial Conduct, was inadvertently omitted from Rule 16-814.

The Reporter told the Committee that a sentence explaining the use of boldface type throughout the Rule was inadvertently omitted from the terminology section of the Rule. The sentence appears in Rule 16-813, Maryland Code of Judicial Conduct, and it should be added to Rule 16-814, also. By consensus, the Committee approved the addition of the sentence.

The Chair adjourned the meeting.