COURT OF APPEALS STANDING COMMITTEE
ON RULES PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100B of the People's Resource Center, 100 Community Place, Crownsville, Maryland, on June 24, 2005.

Members present:

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

Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Timothy F. Maloney, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Andrew Smullian, Rules Committee Intern
Hennie Caplan, District Court Headquarters
Faye D. Gaskin, Manager, Management Analysis and Research, A.O.C.
Antonio Gioia, Esq., Baltimore City State's Attorney Office
Paul H. Kozloski, Maryland Department of Public Safety
Information Technology and Communications Divisions
Rishawn White, Maryland Department of Public Safety
Information Technology and Communications Divisions
Godfrey Phelps
Brian L. Zavin, Esq., Office of the Public Defender
Mark T. Holtschneider, Esq., Lexington National Insurance Corp.
Barry Udoff, Maryland Bail Bond Association
Professor Byron L. Warnken, University of Baltimore School of Law
C. Carey Deeley, Esq., Venable LLP
Professor Lynn McLain, University of Baltimore School of Law
April R. Randall, University of Baltimore School of Law
Hon. William D. Missouri
Richard Montgomery, Director, Legislative Relations,
Maryland State Bar Association

The Chair convened the meeting. He said that the minutes of the meetings of March 11, 2005 and May 20, 2005 needed to be approved by the Committee. The Reporter said that Mr. Klein had suggested a correction to the May minutes. On page 26, in the sixth line, the following sentence should be deleted: "There could be 20 depositions of defense experts first." In its place, the following sentence should be substituted: "In the absence of a scheduling order specifically directing otherwise, some plaintiff attorneys have been known to insist on taking depositions of defense experts before any plaintiff's expert has been deposed." Judge Dryden moved to approve the minutes of the March 11, 2005 meeting as presented, and the minutes of the May 20, 2005 meeting as amended. The motion was seconded, and it was passed unanimously.

The Chair introduced Andrew Smullian, a student at the University of Baltimore Law School, who is working as a summer intern in the Rules Committee Office. He had attended the June 14, 2005 hearing at the Court of Appeals on the subject of access to court records. The hearing dealt with the narrow issue of whether the block on victim witness information should be maintained by Judicial Information Systems ("JIS") or if it should be removed, so there is electronic access to the names and addresses of victims and witnesses. The Court of Appeals decided that there is no legal basis for JIS to maintain the block. The practical implications of this decision have not yet played out. Victims' rights advocates and prosecutors are not happy with the

decision. The Chair stated that one way to address their concerns is by modifying the criminal discovery rules to state what is now stated in the civil discovery rules –- that discovery materials are not filed in the court file. Prosecutors have to be careful about what goes into the file. Prosecutors should send subpoenas and notices to victims without putting the names and addresses in the court file.

The Chair announced that Robert L. Dean, Esq., a member of the Committee, had gone to Kosovo for six months to prosecute war crime cases. Twilah Shipley, Esq., has resigned from the Committee and has moved to York, Pennsylvania to take a position in the Pennsylvania criminal justice system as a victims' rights coordinator. The Reporter told the Committee that the State Board of Law Examiners has proposed amendments to Rules 1, 7, and 8 of the Rules Governing Admission to the Bar. The Chair added that the Court will consider those Rules on September 6, 2005. The proposed changes pertain to the mechanics and scoring of the bar examination. The Reporter noted that the Multistate Performance Test published by the National Conference of Bar Examiners is proposed to be added. The proposed Rules changes will be published in the July 22, 2005 issue of the Maryland Register.

Agenda Item 3. Reconsideration of proposed amendments to Rule 4-216 (Pretrial Release)

Judge Spellbring 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;

Alternative 1

(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 than the full penalty amount;

Alternative 2

(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~~ may 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;

~~(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.
>
> The changes to the Rule had previously been considered by the Rules Committee who had sent it back to the Criminal Subcommittee to determine the legislative intent of House Bill 1053, namely whether the previous changes to Rule 4-216 were inconsistent with the statute. By a vote of 3 to 1, the Subcommittee decided that the Rule should be changed to the version that was before the Rules Committee in February of 2005, because this is consistent with House Bill 1053. This is shown as Alternative 1. Mr. Dean was the lone dissenter, arguing that the legislature did not intend to eliminate the required 10% deposit to the court. Alternative 2 is Mr. Dean's suggested language.

The Chair said that Elizabeth B. Veronis, Esq, Legal Officer, Court of Appeals, was not able to attend the meeting today. She had been asked to gather statistics as to whether the recent change to Rule 4-216, Pretrial Release, had made any impact on the number of people being held in jail because of being unable to make bail. Ms. Veronis reported that due to

problems beyond her control, she has not been able to finish collecting the statistics. She is a very industrious worker and will be able to complete the task soon. The Honorable Ben Clyburn, Chief Judge of the District Court, is also interested in this topic. He asked if the issue could be taken off of today's agenda and brought back for consideration at the September 2005 meeting of the Rules Committee. The Chair recognized that this will be an inconvenience for those interested persons who attended today's meeting, but it will be more appropriate for consideration in September.

Agenda Item 1. Reconsideration of proposed amendments to Rule 5-804 (Hearsay Exceptions; Declarant Unavailable)

Mr. Karceski presented Rule 5-804, Hearsay Exceptions; Declarant Unavailable, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-804 to delete current subsection (b)(5), to provide that under certain circumstances certain statements of a declarant whose unavailability was procured through wrongdoing or acquiescence in wrongdoing by a party are not excluded by the hearsay rule, and to cross reference a certain statute, as follows:

Rule 5-804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability

"Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.

A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony

Testimony given as a witness in any action or proceeding or in a deposition taken

in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death

In a prosecution for an offense based upon an unlawful homicide, attempted homicide, or assault with intent to commit a homicide or in any civil action, a statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement Against Interest

A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History

(A) A statement concerning the declarant's own birth; adoption; marriage; divorce; legitimacy; ancestry; relationship by blood, adoption, or marriage; or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated.

(B) A statement concerning the death of, or any of the facts listed in subsection (4)(A) about another person, if the declarant was related to the other person by blood, adoption, or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

(5) ~~Other Exceptions~~ Witness Unavailable Because of Party's Wrongdoing

(A) Civil Cases

~~Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is unavailable as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.~~ In all civil cases, a statement that (i) was (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and has been signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is offered against a party

Alternative 1

who has engaged or acquiesced in wrongdoing

Alternative 2

who has engaged in, directed, or conspired to commit wrongdoing

that was intended to, and did, procure the unavailability of the declarant as a witness. However, a statement may not be admitted under this exception unless, as soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it.

Committee note: A "party" as referred to in subsection (b)(5)(A) also includes an agent of the government. The language "reduced to writing and has been signed by the declarant" is not intended to be a substantive change from the slightly different language of Rule 5-802.1 (a)(2), but it is intended to clarify that the statement must have been signed by, but need not have been written by, the declarant.

(B) Criminal Cases

In criminal cases, admission of statements under this exception is governed by Code, Courts Article, §10-901.

Cross reference: See Committee note to Rule 5-803 (b)(24).

Source: This Rule is derived from F.R.Ev. 804.

Rule 5-804 was accompanied by the following Reporter's Note.

Subsequent to the Rules Committee's approval of changes to Rule 5-804 as a response to problems of witness intimidation, the legislature enacted Chapter 446 (Senate Bill 188), Acts of 2005, to deal with the same problem. The Evidence Subcommittee

> reconsidered Rule 5-804 with the goal of conforming it to Code, Courts Article, §10-901, added by the recent legislation. Because Senate Bill 188 applies only to criminal cases, the Subcommittee recommends reorganizing subsection (b)(5) by dividing it into two parts, one pertaining to civil cases, one pertaining to criminal cases. The latter would simply cross reference the new statute.
>
> The Committee has already approved the language of subsection (b)(5)(A). However, the suggestion was made at the recent Evidence Subcommittee meeting to use the language of the new statute in part (i)(c) of the first sentence. Two alternatives are presented: Alternative 1 is the language taken from Fed. R. Evid. 804 (b)(6) that has already been approved by the Committee. Alternative 2 is the language taken from Senate Bill 188. The Subcommittee also recommends adding language to the Committee note after subsection (b)(5)(A) to explain the discrepancy between the language of part (i)(b) of Rule 5-804 (b)(5) and similar language in Rule 5-802.1 (a)(2). Part of the language of the first sentence of subsection (b)(5)(A) is derived from the language of subsection (a) of Rule 5-802.1.

Mr. Karceski explained that the Rule had been previously considered by the Committee in January. The Evidence Subcommittee has further modified it in response to Chapter 446 (Senate Bill 188), Acts of 2005, which pertains to witness intimidation. The new law allows into evidence the statement of an unavailable declarant, under certain conditions, when the unavailability of the declarant was procured by wrongdoing. The Subcommittee decided to organize proposed new subsection (b)(5) of Rule 5-804 into two parts, the first dealing with civil cases, the other with criminal cases. The Subcommittee suggests that

subsection (b)(5)(B) simply make reference to the new statute, while subsection (b)(5)(A) address civil cases. The new statute applies to criminal cases in which the defendant is charged with certain enumerated crimes, including felonies pertaining to violent crimes and certain drug-related charges. The two alternatives shown in the Rule describing the wrongdoing of the party who has procured the unavailability of the witness are the federal language, which reads: "who has engaged or acquiesced in wrongdoing," and the language of the Maryland statute, which reads: "who has engaged in, directed, or conspired to commit wrongdoing." The Committee note explains that the language "reduced to writing and has been signed by the declarant" clarifies that the statement must have been signed by, but need not have been written by, the declarant.

The Vice Chair inquired as to whether crimes that are not covered by the statute are intentionally omitted from the scope of the Rule. The Chair responded that traditional spoliation evidence is not excluded by the Rule. If the defendant chases away a witness in a misdemeanor case, the witness's statement would not be admitted under the Rule. Evidence of conduct, as in the case of *Grandison v. State*, 305 Md. 685 (1986), would be admitted as an admission by conduct as demonstrated in the case of *Meyer v. McDonnell*, 40 Md. App. 524 (1978). He added that the statement is admitted for the limited purpose of explaining why the defendant took the action he or she took. Mr. Brault

remarked that spoliation is an inference as to an admission of guilt. The Chair agreed, commenting that in a jury trial, if the prosecution can prove that an out-of-court declarant made a statement, the statement may be admitted if the prosecution also can prove that the defendant chased the witness away. The issue is whether the statement is admitted as substantive evidence or whether the statement is admitted as an explanation for the defendant's actions. Spoliation evidence is available to everyone in civil and criminal cases.

The Vice Chair reiterated that in the Rule, there is no mention of the criminal cases not covered by the Code provision. Delegate Vallario pointed out that the legislature intended that the new hearsay exception for procuring the witness's absence be limited to cases involving drugs and violent crimes. It was not meant to include every misdemeanor, such as a bad check case. The Chair asked if an additional statement should be added to subsection (b)(5)(B) to make clear that the exception is not available for crimes not listed in the statute. The Vice Chair noted that the current Rule provides that a statement not specifically covered by any of the other exceptions in the Rule but having equivalent circumstantial guarantees of trustworthiness may be admissible. The Chair said that this in the "catch-all" provision. The Vice Chair pointed out that the catch-all provision is being deleted from Rule 5-804. The Chair responded that Rule 5-803 already contains a catch-all provision, so the one in Rule 5-804 is being deleted. Rule 5-803 applies

whether or not the declarant is available. The Reporter stated that she will add this explanation to the Reporter's note to Rule 5-804.

Mr. Gioia told the Committee that he is an Assistant State's Attorney in Baltimore City. On behalf of Patricia Jessamy, State's Attorney for Baltimore City, he asked the Committee to consider adding a Committee note to Rule 5-804. The enactment of the new law is not meant to repeal current law pertaining to spoliation or an explanation of the State's failure to produce an important State's witness. Spoliation does apply in a criminal context. Mr. Brault remarked that under the concept of spoliation, evidence that should be available, whether records or statements, has been destroyed, and an inference is created that the evidence would have been unfavorable to the person who destroyed it. Spoliation does not put the evidence itself before the jury. Rather, it is the inference of unfavorability that is before the jury.

The Chair referred to the *McDonnell* case in which one of the witnesses who had been threatened by the appellee appeared at trial and testified about the threats by the appellee. If the witness testifies, there is no hearsay problem. If the State wants to explain why the victim did not show up to testify, the State has to prove that the witness was chased off the stand by using evidence that does not violate the rule against hearsay. To present evidence of classic spoliation, the State must prove

that the defendant knew what the witness's testimony would be, and the defendant conspired to or did intimidate the witness. Mr. Brault pointed out that in the *McDonnell* case, the defendant was an orthopedic surgeon. The plaintiff listed a young orthopedic surgical resident as a witness. The evidence showed that the defendant physician contacted the chairman of the orthopedic surgery department and asked him to talk the resident out of testifying against the defendant. In *McDonnell*, the issue was whether this is comparable to an admission by the defendant.

The Chair said that in *McDonnell*, the trial judge had allowed in the evidence solely for the impeachment of the defendant. The Court of Special Appeals held that this was an erroneous limitation. Assuming *arguendo* that the resident had not come to testify because of the intimidation by the defendant, a necessary element is whether the defendant chased the witness off the stand. In the *Grandison* case, the defendant arranged to have hotel clerks killed. It was necessary to prove that the murdered persons were going to testify against Grandison and he knew what they were going to say, so Grandison made them unavailable. The out-of-court statement is admitted for the limited purpose of evidence that the defendant chased the witness off the stand because the defendant knew that the witness's testimony would be unfavorable. Mr. Sykes expressed the view that it is appropriate to clarify in a Committee note that spoliation evidence has not been rendered ineffective by the new

law. By consensus, the Committee agreed to add this Committee note to Rule 5-804.

Delegate Vallario asked which alternative the Committee prefers. The Chair answered that previously, the Committee had approved the language in Alternative 1. However, the language in Alternative 2 is taken from the new statute and is clearer and more appropriate. The meaning of the word "acquiesced" is not clear. The Subcommittee prefers Alternative 2. Mr. Karceski agreed, explaining that Alternative 2 is more structured. The Chair asked Professor McLain about federal cases on the subject of spoliation after a comparable exception was added to the federal Rules. Professor McLain replied that she has not reviewed the federal cases on this issue, but she expressed the opinion that it is a good idea to have the Committee note to forestall confusion. She offered to provide citations to civil and criminal cases to be included in the Committee note, and the Chair agreed that the citations would be good additions to the Committee note.

Mr. Brault asked about the same rule applying to both criminal and civil cases. He inquired as to why it is necessary to have this rule applying to civil cases. He expressed his concern that in a criminal context, the police took the statement of the unavailable declarant, but in a civil case, statements to lawyers are privileged. The Chair said that the statements in civil cases may have been taken by insurance adjusters or the police, such as in an automobile accident. Mr. Brault asked if

the other side can introduce the fact that a party sent a witness to Hawaii because the witness's statement is against the party's interest. The Chair replied that this would be spoliation evidence. Mr. Brault expressed concern as to whether the attorney's work product would have to be produced. The Chair pointed out that Rule 5-802.1, Hearsay Exceptions–Prior Statements by Witnesses, as well as Fed. R. Ev. 801 (d)(1), provide that the statement of a witness who changes his or her story can be admitted under certain conditions. Both the Maryland Rule and the federal rule apply to both civil and criminal cases.

Judge Dryden inquired as to whether small claims cases would be excluded from the applicability of Rule 5-804 (b)(5)(A). This subsection states that the Rule applies "in all civil cases." It would be difficult if the Rule applied to minor cases. The Chair noted that Rule 5-101 (b)(4) states that the Rules in Title 5 do not apply to small claim actions. Judge Dryden commented that a creative attorney could argue that because Rule 5-804 (b)(5)(A) states that it applies "in all civil cases," it applies in small claim actions. The Chair said that even in small cases, witnesses should not be permitted to be intimidated. Mr. Karceski commented that there may be more intimidation in small claims cases. The Vice Chair suggested that the word "all" be deleted from the Rule, and by consensus the Committee approved the deletion.

Judge Kaplan moved to approve the Rule with the language of

Alternative 2, the deletion of the word “all,” and the addition of a Committee note concerning spoliation. The motion was seconded, and it carried unanimously.

Agenda Item 2. Consideration of a proposed amendment to Rule 5-101 (Scope)

Mr. Karceski presented Rule 5-101, Scope, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 5-101 to correct an obsolete statutory reference, to add language to subsection (c)(4) in light of the addition of rules pertaining to coram nobis proceedings, and to add language to subsection (c)(7) to conform to a recent appellate opinion, as follows:

Rule 5-101. SCOPE

(a) Generally

Except as otherwise provided by statute or rule, the rules in this Title apply to all actions and proceedings in the courts of this State.

(b) Rules Inapplicable

The rules in this Title other than those relating to the competency of witnesses do not apply to the following proceedings:

(1) Proceedings before grand juries;

(2) Proceedings for extradition or rendition;

(3) Direct contempt proceedings in which the court may act summarily;

(4) Small claim actions under Rule 3-701 and appeals under Rule 7-112 (d)(2);

(5) Issuance of a summons or warrant under Rule 4-212;

(6) Pretrial release under Rule 4-216 or release after conviction under Rule 4-349;

(7) Preliminary hearings under Rule 4-221;

(8) Post-sentencing procedures under Rule 4-340;

(9) Sentencing in non-capital cases under Rule 4-342;

(10) Issuance of a search warrant under Rule 4-601;

(11) Detention and shelter care hearings under Rule 11-112; and

(12) Any other proceeding in which, prior to the adoption of the rules in this Title, the court was traditionally not bound by the common-law rules of evidence.

Committee note: The Rules in this Chapter are not intended to limit the Court of Appeals in defining the application of the rules of evidence in sentencing proceedings in capital cases or to override specific statutory provisions regarding the admissibility of evidence in those proceedings. See, for example, *Tichnell v. State*, 290 Md. 43 (1981); Code, ~~Article 41, §4-609 (d)~~ Correctional Services Article, §6-112 (c).

(c) Discretionary Application

In the following proceedings, the court may, in the interest of justice, decline to require strict application of the rules in this Title other than those relating to the competency of witnesses:

(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 5-104 (a);

(2) Proceedings for revocation of probation under Rule 4-347;

(3) Hearings on petitions for post-conviction relief under Rule 4-406;

(4) Hearings on petitions for coram nobis under Rule 4-414;

~~(4)~~ (5) Plenary proceedings in the Orphans' Court under Rule 6-462;

~~(5)~~ (6) Waiver hearings under Rule 11-113;

~~(6)~~ (7) Disposition hearings under Rule 11-115, including permanency plan hearings under Code, Courts Article, §3-823;

~~(7)~~ (8) Modification hearings under Rule 11-116;

~~(8)~~ (9) Catastrophic health emergency proceedings under Title 15, Chapter 1100; and

~~(9)~~ (10) Any other proceeding in which, prior to the adoption of the rules in this Title, the court was authorized to decline to apply the common-law rules of evidence.

Source: This Rule is derived from Uniform Rule of Evidence 1101.

Rule 5-101 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 5-101 make two additions to section (c) and correct an obsolete statutory reference.

Proposed new subsection (c)(4) conforms the Rule to proposed new Rule 4-414, concerning hearings on a petition for a writ of *coram nobis* as to a prior judgment in a criminal action.

The proposed amendment to subsection (c)(7) conforms the Rule to the holding of *In Re: Ashley E.*, ___ Md. ___ (No. 90, September Term 2004, filed May 17, 2005).

Mr. Karceski explained that there is an obsolete statutory reference to "Code, Article 41, §4-609" that needs to be deleted. In February 2005, the Committee approved the proposed *coram nobis* rules, and these need to be referenced in Rule 5-101. The Court of Appeals decided in the case of *In Re Ashley E.*, 387 Md. 260 (2005) that the court may decline to require strict application of the evidence rules in permanency planning hearings under Code, Courts Article, §3-823, and these are now to be referenced in Rule 5-101. The Committee agreed by consensus to the changes to the Rule.

Agenda Item 4. Item 4. Consideration of certain proposed rules changes pertaining to expungements: Amendments to: Rule 4-507 (Dismissal Without Hearing; Hearing), Rule 4-508 (Court Order for Expungement of Records), Rule 4-509 (Appeal; Lifting of Stay), Rule 4-510 (Compliance with Court Order for Expungement), Form 4-508.1 (Order for Expungement of Records)

Judge Spellbring presented Rule 4-507, Dismissal Without Hearing; Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-507 to allow the court to dismiss an application or a petition under certain circumstances without holding a

hearing and to require a prompt hearing on a motion for reconsideration filed within 10 days after an order of dismissal without a hearing, as follows:

Rule 4-507. DISMISSAL WITHOUT HEARING; HEARING

(a) Dismissal Without a Hearing

Upon review of the docket entries and the application or petition, if the Court determines that as a matter of law the applicant or petitioner is not entitled to expungement, the Court, without holding a hearing, may dismiss the application or petition without prejudice. On motion for reconsideration filed within 10 days after entry of the order of dismissal, the court promptly shall hold a hearing on the motion.

~~(a)~~ (b) Hearing On Application

In the case of an application for expungement that has not been dismissed pursuant to section (a) of this Rule, a hearing shall be held not later than 45 days after the filing of the application.

Cross reference: Code, Criminal Procedure Article, §10-103 (f).

~~(b)~~ (c) Hearing On Petition

In the case of a petition for expungement that has not been dismissed pursuant to section (a) of this Rule, a hearing shall be held only if the State's Attorney or law enforcement agency objects to the petition by way of timely answer.

Cross reference: Code, Criminal Procedure Article, §10-105 (e).

Source: This Rule is in part derived from former Rule EX6 and in part new.

Rule 4-507 was accompanied by the following Reporter’s Note.

> The proposed amendment to Rule 4-507 allows the court, without holding a hearing, to dismiss an application or petition, without prejudice, when as a matter of law an expungement should not be granted.
>
> Because of the statutory entitlement to a hearing set forth in Code, Criminal Procedure Article, §§10-103 (f) and 10-105 (e), the proposed amendment also provides for a prompt hearing on a motion for reconsideration that is filed within 10 days after entry of an order of dismissal without a hearing.

Judge Spellbring explained that Rule 4-507 currently requires that a hearing be held on expungement petitions or applications regardless of whether the petition or application qualifies for an expungement. The addition of language to the Rule permits the court to dismiss the matter without a hearing when, on its face and upon review of the docket entries, the application or petition does not warrant the remedy requested. The Chair noted that the Rule states that if a motion for reconsideration is filed within 10 days after entry of the order for dismissal, the court shall hold a hearing. The Reporter noted that Code, Criminal Procedure Article, §§10-103 (f) and 10–105 (e) provide for an automatic hearing, and this is why the Rule is drafted to provide for an automatic hearing on motion for reconsideration. The Honorable Alexandra Williams, a District Court Judge in Baltimore County, is a proponent of the change to make the process more efficient. Mr. Maloney commented that the proposed change conforms the Rule to practice.

Judge Dryden commented that the matter does not have to be

dismissed, but the judge could notify the petitioner or applicant of a deficiency that can be corrected. The Chair said that the court may notify the petitioner or applicant, or dismiss the application or petition without prejudice. The Rule does not state that the court may not notify the petitioner or applicant. Mr. Sykes pointed out that in the second sentence, if notice is not given to the petitioner and the petitioner does not file a motion for reconsideration, the petitioner would have to file a new petition. The notice should be mandatory. The Vice Chair inquired as to whether this notice would be in addition to the notice that is required generally. Ms. Potter said that section (c) of Rule 4-508, Court Order for Expungement of Records, provides that an order denying an application or petition for expungement is a final judgment. The Chair observed that a final judgment is appealable. The Vice Chair remarked that she did not know of a rule in Title 4 that requires the clerk to give notice in addition to the notice required by Rule 1-324, Notice of Orders, which provides that the clerk shall send notice of any order or ruling not made in the course of a hearing or trial to all parties entitled to service.

Mr. Klein expressed the opinion that the 10-day time period in section (a) of Rule 4-507 may be too short. He suggested that 30 days might be more appropriate. Delegate Vallario and Judge Norton agreed with the suggestion of a 30-day period. The Reporter noted that the dismissal is without prejudice. Mr. Shipley questioned as to whether the time period in section (b)

would have to be changed if the change to a 30-day period is made in section (a). He remarked that it could take longer than 45 days if the application is dismissed, and the motion to reconsider is granted. Judge Norton answered that section (b) applies to an application that has not been dismissed. The Reporter noted that the legislature wants these procedures to be rapid. Mr. Klein suggested that the date of the hearing be tied to the number of days after the motion for reconsideration has been filed. The Chair said that if an application has been dismissed, and there is a motion for reconsideration filed, the Rule states that the court promptly shall hold a hearing, but there is no time specified. If the application is not dismissed, the hearing shall be no later than 45 days after the filing of the application. This is not inconsistent. By consensus, the Committee approved the change in section (a) from 10 to 30 days.

The Vice Chair asked about the distinction between an application and a petition. Mr. Shipley answered that an application is used if no charges have been filed, while a petition is used if charges have been filed. The Vice Chair inquired as to whether sections (b) and (c) could be combined. The Chair responded that the procedures are different, and it would be difficult to combine the sections.

The Vice Chair noted that the Rule does not address when the hearing on the application or petition is held if a motion for reconsideration is granted. Mr. Shipley remarked that if a motion for reconsideration is granted, the hearing would be held

at that time, immediately following the granting of the motion.

By consensus, the Committee approved the Rule as amended.

Judge Spellbring presented Rules 4-508 and 4-509 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-508 to provide under certain circumstances for an automatic stay of an order granting expungement, to eliminate the thirty day delay in serving custodians of records with orders granting expungements, and to make certain stylistic changes, as follows:

Rule 4-508. COURT ORDER FOR EXPUNGEMENT OF RECORDS

(a) Content

An order for expungement of records shall be substantially in the form set forth at the end of this Title as Form 4-508.1, as modified to suit the circumstances of the case. If the court determines that the procedures for expungement of court records set forth in Rule 4-511 are not practicable in the circumstances, the order shall specify the alternative procedures to be followed.

Cross reference: Code, Criminal Procedure Article, §§10-103 (f) and 10-105 (f).

(b) Stay

If the court, over the objection of a State's Attorney or law enforcement agency, enters an order granting expungement, the order is stayed for 30 days after entry and thereafter if a timely notice of appeal is

filed, pending the determination of the appeal and further order of the court.

~~(b)~~ (c) Finality

An order of court for expungement of records, whether or not stayed, or an order denying an application or petition for expungement, is a final judgment.

Cross reference: Code, ~~(1957, 1989 Repl. Vol.)~~ Courts Article, §12-301.

~~(c)~~ (d) Service of Order and Compliance Form

Upon entry of a court order granting or denying expungement, the clerk forthwith shall serve a true copy of the order on all parties to the proceeding. ~~Thirty days after the~~ Upon entry of an order granting expungement ~~or upon expiration of any stay~~, the clerk shall serve on each custodian of records designated in the order and on the Central Repository a true copy of the order together with a blank form of Certificate of Compliance set forth at the end of this Title as Form 4-508.3.

Source: This Rule is derived in part from former Rule EX7 and is in part new.

Rule 4-508 was accompanied by the following Reporter's Note.

Proposed amendments to Rules 4-508, 4-509, and 4-510 and Form 4-508.1, together with an Administrative Order on Expungement of Criminal Records dated December 27, 2004, are intended to (1) address timing issues that have arisen under the current Rules, (2) significantly reduce the need to unseal sealed records, (3) allow custodians of records and the Central Repository sufficient time to do any investigation necessary to identify the records to be expunged and then expunge them, and (4) provide additional notice to the parties and the custodians of records concerning the status of the expungement proceedings.

Proposed new section (b) adds to Rule 4-508 an automatic 30-day stay of an order granting expungement if the order was entered over the objection of a State's Attorney or law enforcement agency. This allows for the *status quo* to be maintained during the time allowed for the State to note an appeal. There is no automatic stay of an order for expungement on an uncontested application or petition. In conjunction with the amendments to Rule 4-508, a new "Order" paragraph is proposed to be added to Form 4-508.1, to provide in each order whether or not it is stayed.

An amendment to section (c) makes clear that a stay of an order for expungement does not affect the finality of the order for purposes of appeal.

The amendment to section (d) eliminates the thirty day delay in the clerk's distribution of copies of the order to custodians. Instead, the order is transmitted upon its entry. Prompt notification allows the custodian to begin any necessary investigation and identification of records, even while the order is stayed. If the order for expungement is not stayed (because it was entered on an uncontested application or petition), the Administrative Order requires prompt removal of the court record from public inspection but allows access to the record by designated personnel of the Central Repository for purposes of complying with the order for expungement. The Administrative Order provides that the court records are not sealed until after the Central Repository has carried out its responsibilities.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-509 to provide for the lifting of a stay of an order for expungement and to require the clerk to send certain notices, as follows:

Rule 4-509. APPEAL; LIFTING OF STAY

(a) How Taken

Any party may appeal within 30 days after entry of the order by filing a notice of appeal with the clerk of the court from which the appeal is taken and by serving a copy on the opposing party or attorney.

(b) Lifting of Stay

~~The filing of a notice of appeal stays the court order pending the determination of the appeal.~~ If an order for expungement has been stayed, the stay may be lifted at any time upon written consent of the law enforcement agency if the order is based on an application or upon written consent of the State's Attorney if the order is based on a petition. A stay shall be lifted upon determination of any appeal or, if no notice of appeal was timely filed, upon expiration of the time prescribed for filing a notice of appeal.

(c) Notice

Promptly upon the disposition of an appeal or the lifting of a stay, the clerk shall send notice to the parties and to each custodian of records, including the Central Repository, to which an order for expungement and a compliance form were sent pursuant to Rule 4-508 (d).

Cross reference: Code, Criminal Procedure

Article, §10-105(g).

Source: This Rule is derived in part from former Rule EX8 and is in part new.

Rule 4-509 was accompanied by the following Reporter's Note.

> Proposed new section (b) of Rule 4-509 provides for the lifting of a stay that was entered pursuant to Rule 4-508 (b). The stay is lifted upon the determination of an appeal or, if no appeal is filed, upon expiration of the time prescribed for filing a notice of appeal. The stay may be lifted before the appeal time runs if, in the case of an order for expungement based on an application, the law enforcement agency consents or, in the case of an order for expungement based on a petition, the State's Attorney consents.
>
> Proposed new section (c) requires the clerk promptly to send notice of the disposition of an appeal and lifting of a stay to all parties and all custodians of records.

Judge Spellbring told the Committee that the proposed new language provides for a stay of 30 days after an order granting expungement is entered over the objection of a State's Attorney or a law enforcement agency. This will avoid sealing records that will have to be unsealed if the appeal of the court's order is successful. The Reporter suggested that the word "the" be removed in the last phrase of Rule 4-508 (b), so that the last phrase reads "and further order of court." By consensus, the Committee agreed to this suggestion. The Vice Chair asked to which court this refers. If the Court of Special Appeals agrees with the State's Attorney or the law enforcement agency that the order should not have been entered, on that day or the day that

certiorari is denied, does the circuit court take action? Senator Stone responded that the stay would be lifted. The Vice Chair inquired if this is automatic. Judge Spellbring noted that Rule 4-509, Appeal; Lifting of Stay, provides that the stay will be lifted.

The Vice Chair said that the last phrase in section (b) of Rule 4-508 which reads "and further order of court" is not necessary. The Reporter responded that there may be a further order of court if the parties agree to lift the stay. The Vice Chair remarked that if the Court of Special Appeals affirms the judgment of the circuit court granting expungement, the phrase "and further order of court" could be interpreted to mean that the stay remains in effect despite the order of the Court of Special Appeals. The Reporter suggested that the language could be "or further order of court." The Chair disagreed with this suggestion. He said that when the appeal is disposed of, there always will be a further order of court. If a petition for certiorari is filed, the stay should continue pending a determination by the Court of Appeals. The language "and further order of court" may not be necessary. The Vice Chair observed that the Court of Special Appeals could decide that the trial court was correct in granting the expungement and issue the mandate. The language "and further order of court" is not necessary. Mr. Brault noted that if the judgment of the trial court is reversed, there would be no expungement, causing no problems. If the judgment is affirmed, there would be a wait for

the mandate, and then a court order, adding 60 days to the process.

Mr. Brault inquired as to what the determination of the appeal is – an opinion or a mandate? The Vice Chair questioned as to whether the stay remains in force during the period that certiorari is sought from the Court of Appeals. The language "determination of the appeal" is vague. Does this mean the mandate of the Court of Special Appeals or the expiration of the time for filing certiorari? Mr. Brault suggested that the word "final" be added before the word "determination" in section (b) of Rule 4-508 to take into account the time for issuance of the mandate and for filing a petition for a writ of certiorari.

Judge Spellbring pointed out that the time is different in Rules 4-508 and 4-509. The latter is "promptly upon disposition of the appeal." He suggested that the time frames in the two Rules should be consistent. Mr. Brault commented that the word "disposition" is better than the word "determination." By consensus, the Committee agreed to change the word "determination" to "disposition" in section (b) of Rule 4-508.

The Chair pointed out that some cases are appealed from the District Court to a circuit court, which exercises appellate jurisdiction. The Vice Chair remarked that the stay is entered only when the State or law enforcement agency had objected to the petition or application. The current Rule requires a stay across the board, upon the filing of a notice of appeal. The Reporter responded that the current Rule does not provide for a stay

during the time period between the order granting expungement and the filing of the notice of appeal -- there is a gap in the Rule. The Vice Chair noted that the current provision is that if a notice of appeal is filed, the order for expungement is stayed. The proposed amendment to the Rule provides that the action is stayed only if the State had objected to the petition for expungement. The Reporter remarked that if there is no objection at the trial level, an appeal probably will not be successful. The Chair added that the changes to the Rule are an attempt to save the clerks' offices and other custodians of records the aggravation of sealing something that has to be unsealed later – processing an expungement that ultimately has to be unprocessed. The law enforcement agency or prosecutor has 30 days to appeal the expungement. If the appeal is filed, the order for expungement remains stayed pending the outcome of the appeal. An additional wrinkle is if all parties agree, the stay may be lifted.

Mr. Sykes commented that if the expungement is granted, and there is an appeal which reverses the trial court, the Rule provides that the stay is lifted on determination of the appeal. The extra step does not make sense. It is moot if the appeals court disposes of the case by holding that the expungement should not have been granted.

The Vice Chair suggested that the changes to Rule 4-509 are appropriate, and there could be a new Rule pertaining to stays, instead of the provisions pertaining to stays being in two

different rules. The Chair said that this is a matter for the Style Subcommittee. The Vice Chair expressed the view that the language "and further order of court" as to lifting the stay is not necessary. This happens automatically by virtue of what the appellate court tells the trial court to do. The Chair pointed out that there also is language in the Rule that provides that the stay is lifted if the parties consent. This is not automatic. The Reporter commented that notice provisions with respect to the stay are built into the Rules. Section (c) of Rule 4-509 provides that everyone to whom notice of the order for expungement and stay were sent also is sent notice of the disposition of any appeal and the lifting of the stay. The Vice Chair reiterated that the Style Subcommittee will look at the Rules.

Mr. Kozloski told the Committee that he works for the Maryland Department of Public Safety and Correctional Services, managing expungements for the Criminal Judicial Information System (CJIS). Accompanying him to the meeting was his assistant, Rishawn White. Mr. Kozloski said that each year there are approximately 15,000 expungements. Without a procedure that stays the order for expungement or otherwise allows CJIS access to the court files, it is very difficult for CJIS to go through the records to process expungements. Ms. White commented that cases can go unresolved if the courts do not cooperate. CJIS needs access to information in the court files to be able to correctly expunge files and notify the FBI that files have been

expunged. This cannot be accomplished without the cooperation of the court. Often tracking numbers in cases are incorrect, or the names in the cases are wrong. The employees of CJIS often must investigate to ascertain the correct information to expunge, and access to court files is needed.

The Chair said that he can recall only two cases in the past few years appealed from a circuit court to the Court of Special Appeals in which the State objected to an expungement. He asked how many cases appealed from the District to the circuit court involve an objection by the State to an expungement. Mr. Shipley replied that there have not been very many. Judge Norton commented that the proposed changes to the expungement rules may not help with the problems. If cases are stayed, the implementation of the expungement will not start, but once the expungements are implemented, and the case is sealed, the same problems arise. Ms. White remarked that it is helpful to avoid sealing the court file if all of the certificates of compliance have not been received. Mr. Shipley responded that the files are not sealed unless the certificates of compliance have been received.

The Chair pointed out that the system may be unfair to someone who is entitled to an expungement. An investigator reporting to a potential employer may find a notation of a criminal proceeding on someone’s record, yet the case is awaiting an expungement. There is a period of time before a police department sends back the certificate of compliance, but the

court has ordered that the records be expunged. The Rule needs to address this situation. Ms. Potter inquired as to whether the Administrative Order dated December 27, 2004, issued by the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, is helpful. (See Appendix 1). Ms. White stated that some courts are not fully complying with the Administrative Order. Ms. Potter suggested incorporating the substance of the Administrative Order into the Rule. The Honorable William D. Missouri, Administrative Judge for the Circuit Court of Prince George's County, questioned whether the administrative judges around the State are being notified when there is a lack of compliance with the Administrative Order. Ms. White remarked that her office is willing to work with Judge Bell and the courts. It is not often that counties do not cooperate, but a few do not. Judge Missouri added that it is important to communicate with the right people to avoid problems.

The Chair said that if an appeal is filed and all the parties agree to expunge the case, the appeal would be dismissed, and an appropriate order entered. No rule expressly provides this, but it is standard practice. The trial court should not be lifting the stay while the case is pending on appeal. The appellate court has jurisdiction until the appeal has been determined. Cases in which an appeal is filed are rare. The Rules should provide that cases are stayed for 30 days, so the objecting party can file an appeal. If an appeal is filed, the order for expungement remains stayed pending the determination of

the appeal. He asked what else could be done to avoid the problems CJIS is having. Judge Norton remarked that if the clerk refuses to cooperate, the administrative judge should be notified.

The Reporter asked what the language of Rule 4-509 should be. The Chair replied that the first sentence of current section (b) is not needed. The phrase "at any time" should be removed from the new first sentence of the section. The Vice Chair suggested that language providing that there is an automatic stay when there is an objection should be retained, and then the Rule should provide that the stay remains in effect if the appeal is filed. The Reporter suggested that the new first sentence of section (b) begin as follows: "[i]f an order for expungement has been stayed, the stay may be lifted if no appeal is filed ...". By consensus, the Committee agreed to the Reporter's suggested language in the first sentence of section (b).

By consensus, the Committee approved Rules 4-508 and 4-509 as amended.

Judge Spellbring presented Rule 4-510, Compliance with Court Order for Expungement, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-510 to require compliance with an order for expungement no later than 60 days after the entry of an unstayed

order or thirty days after the lifting of a stay of the order and to add a certain Committee note, as follows:

Rule 4-510. COMPLIANCE WITH COURT ORDER FOR EXPUNGEMENT

~~Within 30~~ As soon as is practicable but in no event later than 60 days after ~~service~~ the entry of a court order for expungement, or if the order for expungement is stayed, 30 days after the stay is lifted, every custodian of police records and court records subject to the order shall comply with the order, file an executed Certificate of Compliance, and serve a copy of the certificate on the applicant or petitioner.

Committee note: Until any stay is lifted and the custodian complies with the order for expungement, the records in the custody of that custodian that are open to the public for inspection remain open to the public for inspection.

Source: This Rule is derived from former Rule EX9.

Rule 4-510 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 4-510 incorporate into the Rule the provision of Code, Criminal Procedure Article, §10-105 (f) that requires compliance with an unstayed order for expungement "within 60 days after the entry of the order." If the order for expungement is stayed, the amendment requires compliance within 30 days after the stay is lifted. The 30-day time period provides a specific time requirement for the prompt expungement of records following an unsuccessful appeal by the State.

A proposed new Committee note makes clear that records open to public inspection remain open until any stay is lifted and the custodian has complied with the order for expungement.

Judge Spellbring told the Committee that the current Rule requires the custodian of records to comply with the court order for expungement within 30 days after service of the order. Code, Criminal Procedure Article, §10-105 (f) requires compliance with an unstayed order for expungement within 60 days after the entry of the order. The proposed change to the Rule changes the time period for compliance so that the Rule is consistent with the Code. Language has also been added providing that if the order has been stayed, compliance with the order must occur within 30 days after the stay is lifted. The Reporter pointed out that very few orders are stayed. The Chair referred to the addition of the Committee note, and Mr. Sykes pointed out that a non-compliant custodian could defeat this procedure. The Reporter said that CJIS has 60 days to complete the expungement. The process is not instantaneous, even though many petitioners expect it to be so. The Committee note makes the petitioner aware that the records are public until the certificates of compliance are filed.

The Chair said that he did not like the Committee note. Once the court orders the expungement, the records should not be open to the public. If a custodian of records does not cooperate, the hapless petitioner may think that the expungement took place. Ms. White added that she had seen some cases that are two years behind in completing the expungement. Any revision of the system may help this problem. Mr. Maloney asked if any remedy exists. The Chair answered that mandamus may be a remedy.

Mr. Maloney expressed the view that the Committee note should be deleted, but if it remains, its language should be part of the body of the Rule. The Vice Chair remarked that the Rule states that every custodian shall comply. It is difficult to cure non-compliance. The Reporter questioned as to whether the Committee note should be deleted. The Chair replied that it may be necessary because it tells the petitioner that not every record will be expunged quickly. The Vice Chair suggested that the beginning phrase of the note which reads "[u]ntil any stay is lifted and the custodian complies with the order of expungement" should be deleted. Mr. Sykes commented that this may give a recalcitrant custodian incentive not to comply. Judge Dryden observed that if someone get an order for expungement, and then applies for a job the next day, he or she cannot be sure when the record will be expunged.

The Chair said that another way to handle this issue is to provide that when the custodian gets a copy of the order for expungement, the public should not be allowed to inspect the record even prior to expiration of the 60 days for compliance. Ms. White commented that when her office receives an order for expungement, the files are flagged as pending expungement. The Chair remarked that as soon as the order is received, the custodian cannot open the record to the public and has 60 days to file the certificate. Mr. Maloney questioned as to how difficult this would be to effectuate. Ms. White responded that it would not be difficult for CJIS. When someone in her office checks the

record, he or she would see the flag indicating that the record is not public. The Chair pointed out the problem of the gray area between when the order is issued and the 60 days to comply. Mr. Maloney commented that the Chair's suggested change would help with the problem of tardy compliance by custodians of police records.

Ms. Caplan, who works at District Court headquarters, pointed out that the Administrative Order on Expungement of Criminal Records issued by Chief Judge Bell provides that a clerk of court "[p]romptly shall remove the record from public inspection and give the court and person seeking expungement notice of compliance." The Vice Chair remarked that if the State objects to the expungement, the trial court grants the expungement, and the State notes an appeal, the record remains open to public inspection during the pendency of the appeal because of the automatic stay. The Chair said that this is statutory.

Delegate Vallario commented that the original charge may have been in District Court, but the defendant was indicted in circuit court, and there would be two different case numbers. Ms. White responded that the expungement order would go to circuit court and then would be disseminated to District Court to expunge the files. Ms. Caplan noted that when the District Court expunges its record, no one checks to see if the defendant was recharged in a circuit court. Delegate Vallario observed that the circuit court expungement would result in expungement of the

District Court case, but this does not appear to be true the other way around. Ms. White pointed out that if the case is appealed to circuit court, there would be the same tracking number for the expungement. The Chair commented that the clerk is to serve notice of the order for expungement on each custodian of police and court records.

Mr. Klein expressed his disagreement with the policy of allowing the public to access records that the court has ordered expunged just because someone objects to the expungement. The Chair reiterated that the stay is statutory. The Chair stated that when there is an unstayed court order for expungement, a custodian must remove the record from public inspection as soon as the custodian receives the order. A sentence requiring this should be added to the Rule. The Committee agreed by consensus to this addition.

Mr. Maloney suggested that the committee note be deleted. The Reporter observed that the Notice to Applicant/Petition/ Defendant that is proposed to be added to Form 4-508.1 gives notice to these individuals that expungements do not occur instantaneously. By consensus the Committee agreed with Mr. Maloney's suggestion.

By consensus, the Committee approved the Rule as presented.

Judge Spellbring presented Form 4-508.1, Order for Expungement of Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

EXPUNGEMENT FORMS

AMEND Form 4-508.1 to conform to certain proposed amendments to Rules 4-508 and 4-509, to add a new "Order" paragraph pertaining to stays, and to add a certain Notice, as follows:

Form 4-508.1. ORDER FOR EXPUNGEMENT OF RECORDS

(Caption)

ORDER FOR EXPUNGEMENT OF RECORDS

The applicant/petitioner/defendant _____
(Name)
of_____
(Address)
having been found to be entitled to expungement of the police records pertaining to the arrest, detention, or confinement of the applicant/petitioner/defendant on or about _____,
(Date)
at _____ ,
Maryland, by a law enforcement officer of the _____

_____
(Law Enforcement Agency)
and the court records in this action, it is by the _____

_____ Court for _____

_____ City/County, Maryland, this

_____ day of _____ , _____.
(Month) (Year)

ORDERED that the clerk forthwith shall serve a true copy of this Order on each of the parties to this proceeding; and it is further

ORDERED that ~~30 days after entry of this Order or upon expiration of any stay,~~ the clerk forthwith shall serve on each custodian of police and court records designated in this Order and on the Central Repository a copy of this Order together with a blank form of Certificate of Compliance; and it is further

ORDERED that within ~~30~~ 60 days after ~~service~~ the entry of this Order or, if this Order is stayed, 30 days after the stay is lifted, the clerk and the following custodians of court and police records and the Central Repository shall (1) expunge all court and police records pertaining to this action or proceeding in their custody, (2) file an executed Certificate of Compliance, and (3) serve a copy of the Certificate of Compliance on the applicant/petitioner/defendant; and it is further

ORDERED that this Order

☐ is stayed

☐ is not stayed

pending further order of the court.

_____

(Custodian) (Address)

_____

_____

_____

_____

_____

_____

Date Judge

Notice to Applicant/Petitioner/Defendant: Until a custodian of records has complied with this Order, as evidenced by the filing a Certificate of Compliance, any records in the custody of that custodian that are open to the public for inspection remain open to the public for inspection.

Form 4-508.1 was accompanied by the following Reporter's Note.

> Form 4-508.1 is proposed to be amended in conformity with the amendments to Rules 4-508, 4-509, and 4-510, described in the Reporter's notes to those Rules.

Judge Spellbring told the Committee that Form 4-508.1 has proposed changes to conform it to the changes to the other expungement rules. The Reporter commented that the Notice to Applicant/Petitioner/Defendant should be modified to reflect the changes to Rule 4-510. The Style Subcommittee can do this. By consensus, the Committee approved the form as presented, subject to revision of the Notice by the Style Subcommittee.

Agenda Item 5. Consideration and reconsideration of amendments to certain Rules in Title 4: Rule 4-231 (Presence of Defendant), Rule 4-343 (Sentencing – Procedure in Capital Cases), and Rule 4-342 (Sentencing – Procedure in Non-Capital Cases)

_____

Judge Spellbring presented Rule 4-231, Presence of Defendant, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-231 (b) to delete certain language, as follows:

Rule 4-231. PRESENCE OF DEFENDANT

. . .

(b) Right to be Present - Exceptions

A defendant is entitled to be present at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law~~,~~ and (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248~~; or (3) at a reduction of sentence pursuant to Rules 4-344 and 4-345~~.

. . .

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

A former Rules Committee intern pointed out a possible conflict between (1) Rule 4-231 (b) which provides that a defendant is entitled to be present at every stage of the trial, except a reduction of sentence hearing pursuant to Rules 4-344 and 4-345, and (2) Rule 4-345 (d) which provides that the court may reduce a sentence only on the record in open court after hearing from the defendant. Since research into the history of the two Rules revealed no explanation of the inconsistency, the Criminal Subcommittee recommends deleting subsection (3) of Rule 4-231, removing a reduction of sentence hearing as an exception to the requirement that the defendant must be present at every stage of the trial. This would solve any conflict

that may exist between the two Rules.

Judge Spellbring explained that changes are proposed for Rule 4-231 because of a possible conflict with Rule 4-345, Sentencing–Revisory Power of Court. Section (f) of Rule 4-345 provides that the court may "... reduce...a sentence only on the record in open court, after hearing from the defendant...". Section (b) of Rule 4-231 provides that a defendant is entitled to be present at every stage of the trial, except "... at a reduction of sentence pursuant to Rules 4-344 and 4-345." To make these two Rules consistent, the Criminal Subcommittee recommends deleting subsection (b)(3) of Rule 4-231.

The Vice Chair asked why it would not be preferable to change Rule 4-345 to allow the defendant to be present at a reduction of sentence hearing. Judge Dryden remarked that defendants rarely object to a reduction of their sentences. Judge Missouri said that there had been a case where the defendant did object to a reduction of his sentence. The Court of Special Appeals sent the case back to the trial court, stating that there could be no action taken unless the defendant was present in the courtroom. The Chair suggested that a separate sentence could be added to section (a) of Rule 4-231 providing that the defendant has the right to be present at the sentence review hearing as governed by Rule 4-344, Sentencing–Review. The judge should not go forward at a sentence modification hearing if the defendant is not present. The Style Subcommittee

can revise the wording of the Rule. There are three categories of proceedings at which a defendant may be present. One is the preliminary hearing, the second is the trial, and the third is post-trial proceedings.

Judge Norton pointed out that the phrase "who requests an opportunity to be heard" in section (f) of Rule 4-345 has been interpreted to be mandatory only for victims and victims' representatives and optional for the defendant and the State. The Vice Chair expressed the view that the first sentence of section (f) should be rewritten to make clear that the defendant must be able to request an opportunity to be heard. The Chair suggested that a waiver provision be built in so that the defendant can waive his or her right to be present. The Committee agreed by consensus to the addition of a waiver provision to Rule 4-345.

Mr. Sykes pointed out that Rule 4-231 is listed in the pretrial procedure part of Title 4, but the part of the Rule being discussed pertains to post-trial procedures. The Chair said that the Style Subcommittee will look into whether the Rule, or a part of it, should be renumbered.

Delegate Vallario inquired as to whether the defendant would be considered present if he or she were on closed-circuit television. The Chair responded that the intent of the Rule is that the defendant is entitled to be physically present, except for the limited exception pertaining to Rules 4-213 and 4-216 (f) that is provided for in section (f) of Rule 4-231. The Style

Subcommittee will redraft Rule 4-231 to clarify that presence of the defendant means that the defendant is entitled to be physically present in person. By consensus, the Committee approved the amendments to Rules 4-231 and 4-345, subject to redrafting by the Style Subcommittee.

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

NOTE TO RULES COMMITTEE: RECOMMENDATIONS OF THE PATTERN JURY INSTRUCTIONS COMMITTEE TO AMEND SECTION (h) OF RULE 4-343 WILL BE DISTRIBUTED AS "HAND-OUT" MATERIAL AT THE JUNE 24, 2005 MEETING.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Section IV of Rule 4-343 to add a certain cross reference following section (a), **to conform the Rule to the recommendations of the Pattern Jury Instructions Committee,** and to make a certain stylistic change, as follows:

Rule 4-343. SENTENCING – PROCEDURE IN CAPITAL CASES

(a) Applicability

This Rule applies whenever a sentence of death is sought under Code, Criminal Law Article, §2-303.

Cross reference: For procedures pertaining to collection of DNA samples from an individual convicted of a felony, see Code, Public Safety Article, §2-504.

. . .

(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]

Section I

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

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

_____	_____
~~proven~~ proved	not ~~proven~~ 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.

_____	_____
~~proven~~ proved	not ~~proven~~ 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.

_____	_____
~~proven~~ proved	not ~~proven~~ proved

(If one or more of the above are marked "~~proven~~ proved," proceed to Section II. If all are marked "not ~~proven~~ 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 "~~proven~~ proved," has been ~~proven~~ proved BY A PREPONDERANCE OF THE EVIDENCE or that, if marked "not ~~proven~~ proved," it has not been ~~proven~~ proved BY A PREPONDERANCE OF THE EVIDENCE.

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

_____ _____

~~proven~~ proved | not ~~proven~~ proved

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

Section III

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

_____ ~~proven~~ proved | _____ not ~~proven~~ proved

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

_____ ~~proven~~ proved | _____ not ~~proven~~ 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.

_____ ~~proven~~ proved

_____ not ~~proven~~ 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.

_____ ~~proven~~ proved

_____ not ~~proven~~ proved

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

_____ ~~proven~~ proved

_____ not ~~proven~~ proved

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

_____ ~~proven~~ proved

_____ not ~~proven~~ 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.

_____ ~~proven~~ proved

_____ not ~~proven~~ proved

8. At the time of the murder, the defendant was under the

sentence of death or imprisonment for life.

_____	_____
~~proven~~ proved	not ~~proven~~ proved

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

_____	_____
~~proven~~ proved	not ~~proven~~ 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.

_____	_____
~~proven~~ proved	not ~~proven~~ proved

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

Section IV

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

1. The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo

contendere to a charge of a crime of violence; or (iii) been granted probation 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 by a preponderance of the evidence that the above circumstance exists.

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

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

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

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence

that the above circumstance exists.

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

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

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

(Mark only one.)

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

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

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

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

(Mark only one.)

[ ] (a) We unanimously find by a preponderance of the evidence

that the above circumstance exists.

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

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

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

(Mark only one.)

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

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

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

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

(Mark only one.)

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

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

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

the evidence that the above circumstance exists.

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

(Mark only one.)

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

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

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

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

_____

_____

_____

_____

(Use reverse side if necessary)

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

_____

_____

_____

(Use reverse side if necessary)

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

Section V

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

We unanimously find that the State has ~~proven~~ proved BY A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "~~proven~~ 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:

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

2. If the answer in Section II is marked "~~proven~~ proved,"

enter “Imprisonment for Life."

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

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

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

6. 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

_____ Foreman

_____ Juror 7

_____ Juror 2

_____ Juror 8

_____ Juror 3

_____ Juror 9

_____	_____
Juror 4	Juror 10
_____	_____
Juror 5	Juror 11
_____	_____
Juror 6	Juror 12

or,

_____
JUDGE

. . .

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

> See the Reporter's Note to Rule 4-342 concerning the proposed cross reference following section (a).
>
> **[PROPOSED REVISIONS RECOMMENDED BY THE PATTERN JURY INSTRUCTIONS COMMITTEE WILL BE DISTRIBUTED AND CONSIDERED BY THE RULES COMMITTEE AT THE JUNE 24, 2005 MEETING OF THE COMMITTEE.]**
>
> The substitution of the word "proved" for "proven" is stylistic, only.

Judge Spellbring told the Committee that the Subcommittee recommends the addition of a cross reference after section (a) of Rule 4-343 to draw attention to Code, Public Safety Article, §2-504 pertaining to collection of DNA samples from someone convicted of a felony. The Subcommittee also recommends changing the word "proven" to "proved" for stylistic purposes. Another issue arising out of the Rule has been discussed by the Pattern

Jury Instructions Committee. In footnote 5 of the case of *Conyers v. State*, 354 Md. 132 (1999), the Court of Appeals pointed out that the language "facts or circumstances" might be more appropriate in the capital sentencing form than the word "evidence." The Pattern Jury Instructions Committee will look at this issue again in the fall. The Criminal Subcommittee will revisit this issue after it receives the recommendations of the Pattern Jury Instructions Committee.

By consensus, the Committee approved the Rule as presented.

Judge Spellbring presented Rule 4-342, Sentencing – Procedure in Non-Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 to add a cross reference after section (a), as follows:

Rule 4-342. SENTENCING - PROCEDURE IN NON-CAPITAL CASES

(a) Applicability

This Rule applies to all cases except those governed by Rule 4-343.

Cross reference: For procedures pertaining to collection of DNA samples from an individual convicted of a felony or a violation of Code, Criminal Law Article, §§6-205 or 6-206, see Code, Public Safety Article, §2-504.

. . .

Rule 4-342 was accompanied by the following Reporter's Note.

> In Chapter 449 (HB 240), Acts of 2005, the legislature added new language to Code, Public Safety Article, §2-504 providing for the collection of a DNA sample from an individual who has been convicted of a felony or a violation of Code, Criminal Law Article, §§6-205 or 6-206. The sample may be collected at a suitable location in a circuit court following the imposition of sentence. This is an alternative to the current language that provides for the DNA sample to be collected on intake to a correctional facility. The Criminal Subcommittee recommends adding a cross reference to the statute to Rules 4-342 and 4-343.

Judge Spellbring told the Committee that the Criminal Subcommittee recommends adding a cross reference to the Rule to draw attention to Code, Public Safety Article, §2-504, which provides for the collection of a DNA sample from an individual who has been convicted of a felony or a violation of Code, Criminal Law Article, §§6-205 or 6-206. By consensus, the Committee approved the addition of the Committee note, subject to being restyled.

Agenda Item 6. Consideration of a proposed amendment to Rule 6-415 (Petition and Order for Funeral Expenses)

Mr. Sykes presented Rule 6-415, Petition and Order for Funeral Expenses, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-415 by adding a cross reference, as follows:

Rule 6-415. PETITION AND ORDER FOR FUNERAL EXPENSES

When a petition for funeral expenses is required by law, it shall be filed in the following form:

[CAPTION]

PETITION AND ORDER FOR FUNERAL EXPENSES

I hereby request allowance of funeral expenses and I state that:

(1) The expenses are as follows (or as set forth in the attached statement or invoice):

_____

_____.

(2) The estate is (solvent) (insolvent).

I solemnly affirm under the penalties of perjury that the contents of this petition are true to the best of my knowledge, information, and belief.

Date: _____ _____

_____
Personal Representative(s)

_____
Attorney

_____
Address

_____

_____
Telephone Number

Certificate of Service

I hereby certify that on this _____ day of _____, (month)

_____, I delivered or mailed, postage prepaid, a copy of the (year)

foregoing Petition to the following persons: _____

_____.
(name and address)

_____
Signature

ORDER

Upon a finding that $_____ is a reasonable amount for funeral expenses, according to the condition and circumstances of the decedent, it is this _____ day of

_____, _____.
(month) (year)

ORDERED, by the Orphans' Court for _____ County, that this sum is allowed.

_____

_____

_____
JUDGES

Cross reference: Code, Estates and Trusts Article, §§7-401 (i) and 8-106. For limitations on the amount of allowable funeral expenses, see Code, Estates and Trusts Article, §8-106 (b).

Rule 6-415 was accompanied by the following Reporter's Note.

> In Chapter 107, (SB 51) Acts of 2005, the legislature eliminated the maximum allowance for funeral expenses except for cases in administrative probate, judicial probate, and small estates. The Probate Subcommittee recommends expanding the cross reference at the end of Rule 6-415 to draw attention to the amended statute, Code, Estates and Trusts Article, §8-106 (b).

Mr. Sykes explained that the legislature passed a new statute, Chapter 107, (SB 51), Acts of 2005 that raised the amount of the allowance for funeral expenses from $5000 to $10,000 for an estate administered under Code, Estates and Trusts Article, Title 5, Subtitle 3 or 4, and eliminated the maximum amount for all other cases, except that the allowance for small estates remains at $5000. The Probate Subcommittee recommends the addition of a cross reference to the new statute to be placed at the end of Rule 6-415. By consensus, the Committee approved this change.

Agenda Item 7. Consideration of a proposed amendment to Rule 14-206 (Procedure Prior to Sale)

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

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-206 to add language to subsection (b)(2) and to add a cross reference at the end of the Rule, to conform to statutory changes, as follows:

Rule 14-206. PROCEDURE PRIOR TO SALE

(a) Bond

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

(b) Notice

(1) By Publication

After commencement of an action to foreclose a lien and before making a sale of the property subject to the lien, the person authorized to make the sale shall publish notice of the time, place, and terms of sale in a newspaper of general circulation in the county in which the action is pending. "Newspaper of general circulation" means a newspaper satisfying the criteria set forth in Code, Article 1, Section 28. A newspaper circulating to a substantial number of subscribers in a county and customarily containing legal notices with respect to

property in the county shall be regarded as a newspaper of general circulation in the county, notwithstanding that (1) its readership is not uniform throughout the county, or (2) its content is not directed at all segments of the population. For the sale of an interest in real property, the notice shall be given at least once a week for three successive weeks, the first publication to be not less than 15 days prior to sale and the last publication to be not more than one week prior to sale. For the sale of personal property, the notice shall be given not less than five days nor more than 12 days before the sale.

(2) By Certified and First Class Mail

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

(B) The notice of the sale shall be sent <u>to the record owner of the property no later than two days after the action to foreclose is docketed and shall include the notice required by Code, Real Property Article, §7-105 (a).</u>

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

(3) To Counties or Municipal Corporations

In addition to any other required notice, not less than 15 days prior to the sale of the property, the person authorized

to make the sale shall send written notice to the county or municipal corporation where the property subject to the lien is located as to:

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

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

(4) Other Notice

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

(5) Return Receipt or Affidavit

The person giving notice pursuant to subsections (b)(2), (b)(3), and (b)(4) of this Rule shall file in the proceedings an affidavit (A) that the person has complied with the provisions of those subsections or (B) that the identity or address of the debtor, record owner, or holder of a subordinate interest is not reasonably ascertainable. If the affidavit states that an identity or address is not reasonably ascertainable, the affidavit shall state in detail the reasonable, good faith efforts that were made to ascertain the identity or address. If notice was given pursuant to subsection (b)(4), the affidavit shall state the date, manner, and content of the notice given.

(c) Postponement

If the sale is postponed, notice of the new date of sale shall be published in accordance with subsection (b)(1) of this Rule. No new or additional notice under subsection (b)(2) or (b)(3) of this Rule need be given to any person to whom notice of the earlier date of sale was sent, but notice shall be sent to persons entitled to notice under subsections (b)(2)(B) and (4) of this Rule to whom notice of the earlier date of sale was not sent.

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

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

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

The General Assembly passed Chapter 509, (SB 761), Acts of 2005, pertaining to protection of homeowners in foreclosure. The Property Subcommittee recommends the addition of language to subsection (b)(2) of Rule 14-206 to conform to the notice provision in Code, Real Property Article, §7-105 that was added by the legislation and the addition of a cross reference at the end of Rule 14-206, referring to foreclosure consulting contracts, also added by the legislation.

Ms. Ogletree told the Committee that the General Assembly enacted Chapter 509, (SB 761), Acts of 2005, which modified Code, Real Property Article, §7-105 (a) to require additional notice for record owners of real property. The time for giving the added notice is also different from the time of the notice already provided for in the statute. The Property Subcommittee

recommends amending (b)(2)(B) and (C) of Rule 14-206 to conform to the new legislation. The new law also provides guidelines for mortgage foreclosure consultants, a cottage industry that has sprung up recently. The Subcommittee recommends adding a cross reference after section (c) to draw attention to the new law regarding mortgage foreclosure consultants. By consensus, the Committee agreed with the changes proposed for Rule 14-206.

The Chair adjourned the meeting.