COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, Annapolis, Maryland, on September 8, 2006.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Frank M. Kratovil, Jr., Esq.
J. Brooks Leahy, Esq.
Master Zakia Mahasa
Hon. Albert J. Matricciani
Hon. John L. Norton, III
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Shea McSpaden, Esq.
Lisa Sparks, Family Mediation Clinic, University of Baltimore School of Law
Professor Jane Murphy, Family Mediation Clinic, University of Baltimore School of Law
Master Theresa Furnari, Circuit Court for Baltimore City
Louise Phipps Senft, Baltimore Mediation
Richard Montgomery, Legislative Relations, Maryland State Bar Association, Inc.
Brian L. Zavin, Esq., Office of the Public Defender
Michele Nethercott, Esq., Office of the Public Defender
Janet Moss, Client Protection Fund

The Chair convened the meeting. He welcomed the newest members of the Rules Committee, the Honorable Albert J. Matricciani; Frank M. Kratovil, Esq.; and Master Zakia Mahasa.

He also welcomed back Mr. Bowen who had been unable to attend several meetings.

The Chair asked the Committee if there were any corrections or additions to the minutes of the November 18, 2005 and April 21, 2006 meetings. Mr. Klein pointed out an error on page 18 of the November minutes -– the word “stuffed” in the first full paragraph should be “staffed.” The Reporter added that there were several typographical errors in the April minutes that will be corrected. By consensus, the Committee approved the minutes as amended.

Agenda Item 1. Reconsideration of a proposed amendment to Rule 4-246 (Waiver of Jury Trial - Circuit Court)

The Chair presented Rule 4-246, Waiver of Jury Trial - Circuit Court, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-246 by adding a certain Committee note after section (b), as follows:

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

(a) Generally

In the circuit court a defendant having a right to trial by jury shall be tried by a jury unless the right is waived

pursuant to section (b) of this Rule. If the waiver is accepted by the court, the State may not elect a trial by jury.

(b) Procedure for Acceptance of Waiver

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

Committee note: Although the law does not require the court to use a specific form of inquiry in determining whether a defendant's waiver of a jury trial is knowing and voluntary, the record must demonstrate an intentional relinquishment of a known right. What questions must be asked will depend upon the facts and circumstances of a particular case. In determining whether a waiver is knowing, the court should seek to ensure that the defendant understands that: (1) he or she has the right to trial by jury; (2) unless he or she waives a trial by jury, the case will automatically be tried by a jury; (3) a jury consists of 12 persons selected at random from the list of registered voters and/or licensed drivers in the defendant's county and picked by the defendant, his or her attorney, and the State; (4) all 12 jurors must agree on whether the defendant is guilty or innocent and may only convict upon proof beyond a reasonable doubt; (5) if the jury is unable to reach a unanimous decision, a mistrial may be declared and the State would have the option of retrying the defendant; and (7) the defendant may not be permitted to change his or her election at a later time. In determining whether a waiver is voluntary, it is preferable that the court ask questions including, but not limited to, the following: (1) Are you making this decision of your own free will?; (2) Has anyone offered or promised you anything in exchange for giving up your right to a jury trial?; (3) Has anyone threatened or coerced you in any way

regarding your decision?; and (4) Are you presently under the influence of any medications, drugs, or alcohol?. See *Kang v. State*, 393 Md. 97 (2006) and *Abeokuto v. State*, 391 Md. 289 (2006).

(c) Withdrawal of a Waiver

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

Source: This Rule is derived from former Rule 735.

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

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

The Chair said that the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, subsequent to the filing of *Kang v. State*, 393 Md. 97 (2006) recommended that Rule 4-246 be amended. The Rules Committee considered the Rule at its June 2006 meeting, and referred it to the Criminal Subcommittee. At the Subcommittee meeting, representatives of the Office of the

Public Defender were present to help draft the changes to the Rule. Assistant Public Defenders Brian L. Zavin, Esq. and Michele Nethercott, Esq. are present at the meeting today to answer any questions. The proposed change is the addition of a Committee note after section (b) to alert trial judges as to how to determine the voluntariness of a defendant's waiver of a jury trial.

Mr. Zavin said that he was satisfied with the wording of the current proposal. Unlike an earlier draft of the Committee note, the current one addresses both the required prongs -- that a waiver is made not only knowingly, but also voluntarily. The note clarifies that the questions asked by the trial judge could change depending on the facts of the case. The Chair expressed the view that the proposed added language is a good response to the concern of the Court of Appeals. Judge Norton commented that as originally drafted, the proposed Committee note had referred to the questions set out in the Benchbook, a guide book for judges. Shea McSpaden, Esq., who works on the Benchbook project with Elizabeth B. Veronis, Esq., who serves as Legal Counsel to the Chief Judge, attended the Subcommittee meeting and explained that the Benchbook committee meets only a few times per year and has not met recently to amend the Benchbook. The Subcommittee deleted the reference to the Benchbook questions. Because the Court of Appeals would like the Rule to be amended promptly, it is not a good idea to wait until the Benchbook is updated.

Mr. Bowen noted that the second sentence of the Committee

note refers to "registered voters and/or licensed drivers in the defendant's county." He asked if this language would be appropriate if the case were transferred to another county. He suggested that the language should be: "...drivers in the county where the court sits." The Vice Chair questioned as to whether there may be jurors chosen who are not on either list, and the Chair replied affirmatively. He remarked that the clerk may pull in jurors, known as a "talesman" jury. Judge Dryden observed that the jurors may come from the list of holders of identification cards issued by the Motor Vehicle Administration ("MVA"), as well as from the lists of registered voters and licensed drivers. The Chair said that in some counties, the jurors come from only the MVA lists, and in some from both lists. Judge Dryden pointed out that the MVA list is an expansion of people available. In Anne Arundel County, five to 10 years ago, only the list of registered voters provided jurors.

The Chair suggested that the language could read: "...12 persons who promise to decide the case fairly and impartially. The 12 persons would be picked in a selection process in which the defendant, the defendant's attorney, and the prosecutor would participate."

The Vice Chair moved to delete the following language in the third item in the list set out in the third sentence of the Committee note: "from the list of registered voters and/or licensed drivers in the defendant's county." The motion was seconded and passed unanimously.

Master Mahasa observed that the note provides that the court should seek to ensure that the waiver is knowing and voluntary. To determine the voluntariness of the waiver, the court could ask the questions. The court could let the attorney qualify the client to determine that the waiver is knowing. The Vice Chair remarked that it might be better for the court to ask the questions. Judge Dryden suggested that in place of the language "the court should seek to ensure that...," the following language could be substituted: "the court should ensure that ...". The Chair inquired as to whether the Subcommittee had discussed the issue of who should ask the questions. Judge Norton replied that this was not discussed. He questioned as to whether *Kang* addressed who should ask the questions. The Vice Chair responded that the case stated only that the questions should be asked. Judge Kaplan added that the questions are not necessarily asked by the court. Judge Dryden noted that if the court uses the exact language provided for in the Committee note, this will satisfy the determination of knowing and voluntary.

The Vice Chair suggested that the wording of the third sentence in the note could be: "...the court should seek to insure that the waiver is knowing and voluntary by asking questions such as...". The Chair inquired as to whether the court must ask the questions, and the Vice Chair answered that the court does not necessarily have to ask. The Chair said that it might be better if the court asks the questions. Mr. Kratovil

commented that as long as the waiver is knowing and voluntary, it does not make a difference as to who asks the questions. The Chair pointed out that the Court of Appeals may prefer that the court ask the questions. He added that as long as the substance of the note is appropriate, the Style Subcommittee can redraft it. The language can then be brought back to the Rules Committee for another review.

Mr. Kratovil asked whether item (5) in the list in the third sentence of the note is necessary. He noted that more often than not, judges do not refer to the possibility of a mistrial when speaking to the defendant. Judge Dryden remarked that he makes this statement when questioning a defendant. The Chair commented that this statement is in the Benchbook. Judge Dryden observed that the defendant needs to know what will happen if the verdict is not unanimous. The Vice Chair suggested that the language in item (5) should be: "... a mistrial will be declared...". By consensus, the Committee agreed with this suggestion. The Chair referred to the case of *Harris v. State*, 295 Md. 329 (1983) in which the judge failed to tell the defendant that if the jurors do not reach a verdict within a reasonable time, the sentence will be a life sentence, and not a death sentence. The Chair expressed his agreement with Mr. Kratovil that there is no uniformity as to judges following item (5). The Vice Chair observed that since the items in the list are not mandatory, this is not necessarily an approved practice. Judge Matricciani

expressed the view that the questions should be asked in every guilty plea and every jury trial waiver. Judge Kaplan said that he asks the questions every time.

Mr. Brault commented that often groups of defendants are questioned in the courtroom, so that the judge does not have to repeat the litany so many times. Judge Kaplan clarified that it is not always given to everyone at once, but the group may be divided up, and then the questions are asked once for the entire group. The Chair added that each person in the group concedes that he or she understands. The Vice Chair suggested that the wording in the note should be broadened to provide that the court or someone else can ask the questions. Mr. Kratovil inquired as to whether this is consistent with the first part of the third sentence ("the court shall seek to ensure"). The Vice Chair pointed out that the concept of the note is that the court should seek to ensure that the waiver is knowing and voluntary, but it is not mandatory that the court ask the questions. The Chair stated that subject to restyling, the language will provide that the defendant should be asked questions, and then the questions will be listed. This will indicate that the court is not obligated to ask the questions, but the court will make sure that the record shows that the waiver is knowing and voluntary. The Reporter asked whether the reference to the list of drivers and registered voters will be deleted, and the Chair replied that it will be deleted. By consensus, the Committee approved the Rule as amended and subject to restyling.

Agenda Item 2. Reconsideration of proposed amendments to: Rule 4-261 (Depositions), Rule 4-263 (Discovery is Circuit Court), Rule 4-262 (Discovery in District Court), and Rule 4-301 (Beginning of Trial in District Court)

The Chair presented Rule 4-261, Depositions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-261 to allow a deposition in an action in the District Court under the same circumstances under which a deposition in a circuit court may be taken, as follows:

Rule 4-261. DEPOSITIONS

(a) Availability ~~in District Court~~

~~In District Court a deposition may be taken only with the consent of the State and the defendant and upon order of court.~~

~~(b) Availability in Circuit Court~~

~~In a circuit court the~~ The parties may agree, without an order of court, to take a deposition of a witness, subject to the right of the witness to move for a protective order under section ~~(g)~~ (f) of this Rule. Without agreement, the court, on motion of a party, may order that the testimony of a witness be taken by deposition if satisfied that the witness may be unable to attend a trial or hearing, that the testimony may be material, and that the taking of the deposition is necessary to prevent a failure of justice.

~~(c)~~ (b) Contents of Order for Deposition

An order for a deposition shall state

the name and address of each witness to be examined and the time, date, and place of examination. It shall also designate any documents, recordings, photographs, or other tangible things, not privileged, that are to be produced at the time of the deposition. An order for a deposition shall include such other matters as the court may order, including any applicable provision of section ~~(g)~~ (f) of this Rule.

~~(d)~~ (c) Subpoena

Upon entry by the court of an order for a deposition or upon request pursuant to stipulation entered into under section ~~(b)~~ (a) of this Rule, the clerk of the court shall issue a subpoena commanding the witness to appear at the time, date, and place designated and to produce at the deposition any documents, recordings, photographs, or other tangible things designated in the order of court or in the stipulation.

~~(e)~~ (d) How Taken

The procedure for taking a deposition shall be as provided by Rules 2-401 (f), 2-414, 2-415, 2-416, and 2-417 (b) and (c).

~~(f)~~ (e) Presence of the Defendant

The defendant is entitled to be present at the taking of a deposition unless the right is waived. The county in which the action originated shall pay reasonable expenses of travel and subsistence of the defendant and defendant's counsel at a deposition taken at the instance of the State.

~~(g)~~ (f) Protective Order

On motion of a party or of the witness and for good cause shown, the court may enter any order that justice requires to protect the party or witness from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the deposition not be taken;

(2) That the deposition be taken only at some designated time or place, or before a judge or some other designated officer;

(3) That certain matters not be inquired into or that the scope of the examination be limited to certain matters;

(4) That the examination be held with no one present except parties to the action and their counsel;

(5) That the deposition, after being sealed, be opened only by order of the court; or

(6) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

~~(h)~~ (g) Use

(1) Substantive Evidence

At a hearing or trial, all or part of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the court finds that the witness: (A) is dead, or (B) is unable to attend or testify because of age, mental incapacity, sickness, or infirmity, or (C) is present but refuses to testify and cannot be compelled to testify, or (D) is absent from the hearing or trial and that the party offering the deposition has been unable to procure the witness' attendance by subpoena or other reasonable means, unless the absence was procured by the party offering the deposition.

(2) Impeachment

At a hearing or trial, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness to the extent permitted by the rules of evidence.

(3) Partial Use

If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce at that time any other part that in fairness ought to be considered with the part offered, so far as otherwise admissible under the rules of evidence, and any party may introduce any other part in accordance with this Rule.

(4) Objection to Admissibility

Subject to Rules 2-412 (e), 2-415 (g) and (j), 2-416 (g), and 2-417 (c), an objection may be made at the hearing or trial to receiving in evidence all or part of a deposition for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

(i) Joint Defendants

When persons are jointly tried, the court, for good cause shown, may refuse to permit the use at trial of a deposition taken at the instance of one defendant over the objection of any other defendant.

Source: This Rule is derived as follows:
~~Section (a) is new.~~
Section ~~(b)~~ (a) is derived from former Rule 740 a and j.
Section ~~(c)~~ (b) is derived from former Rule 740 c.
Section ~~(d)~~ (c) is derived from former Rule 740 d.
Section ~~(e)~~ (d) is derived from former Rule 740 e.
Section ~~(f)~~ (e) is derived from former Rule 740 f.
Section ~~(g)~~ (f) is derived from former Rule 740 g.
Section ~~(h)~~ (g) is derived from former Rule 740 h.
Section ~~(i)~~ (h) is derived from former Rule 740 i.

Rule 4-261 was accompanied by the following Reporter's Note.

> The proposed amendments to Rule 4-261 allow a deposition in the District Court under the same circumstances under which a deposition is allowed in a circuit court, i.e., either by agreement of the parties or by order of court if the court is satisfied that a witness whose testimony may be material may be unable to attend a trial or hearing and that the taking of a deposition is necessary to prevent a failure of justice. Depositions in circuit court criminal actions are rare, and the Criminal Subcommittee believes that they will occur with even less frequency in the District Court. However, in circumstances such as the impending military deployment overseas of a key witness, the ability to preserve the witness's testimony for trial should not depend upon the agreement of the opposing party.

The Chair explained that the proposed changes to Rule 4-261 will make depositions available in certain circumstances in District Court. Judge Norton added that Mr. Karceski, the Criminal Subcommittee Chair, who was not present at today's meeting, had been counsel in a case where the key witness was being deployed to Iraq, and the case could not be transferred to circuit court in time for the circuit rules to apply so that the witness could be deposed. In such extraordinary circumstances, the court should be able to order a deposition of a witness in a District Court case. The Rule provides in section (a) that the court is "satisfied that the witness may be unable to attend a trial or hearing, that the testimony may be material, and that the taking of the deposition is necessary to prevent a failure of justice." This is a sufficient test so that this privilege would not be abused. It would only be used in rare circumstances. The

Chair remarked that this is sensible.

Mr. Kratovil noted that the Subcommittee felt that in the vast majority of cases, the defendant could pray a jury trial, have the case transferred to the circuit court, and obtain a deposition under the circuit court rule. There is no harm in allowing a deposition and keeping the case in the District Court. The main issue is the time factor. This procedure is not used very often in circuit court -- only in extraordinary circumstances. Ms. Nethercott added that the people attending the Subcommittee meeting had many collective years of experience, and they only knew of one or two instances where this was used. Cost issues are involved. The Reporter said that in Mr. Karceski's case, even though he had waived the preliminary hearing, the case was not proceeding quickly enough for there to be a transfer to the circuit court, a motion, and an order of the circuit court. The State would not agree to the deposition, so no deposition could be taken in the District Court. The Subcommittee felt that the fact that the other side disagrees is not a good reason to prohibit the deposition.

The Chair stated that since the Rule will not be invoked very often, it should not cause any problems. The Committee approved the Rule as presented.

The Chair presented Rule 4-263, Discovery in Circuit Court, and Rule 4-262, Discovery in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

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

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

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

(1) Generally

Each party obligated to provide

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

(2) Obligations of the State's Attorney

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

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

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

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

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

~~(1)~~ (2) Any material or information ~~tending to~~ in any form, whether or not admissible, in the possession or control of a State agent described in subsection (a)(2) of this Rule that tends to: (A) exculpate the defendant; (B) negate or mitigate the guilt or punishment of the defendant as to the offense charged; or (C) allow the defendant to impeach a witness by proving (i) the character of the witness for untruthfulness by establishing prior bad acts as permitted under Rule 5-608 (b), (ii) that the witness

is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely, or (iii) that the facts differ from the witness's expected testimony.

Committee note: Examples of material and information that constitutionally must be disclosed if within the possession or control of a State agent described in section (a) of this Rule include: witness statements that are mutually inconsistent; the mental health status of a witness that may impair his or her ability to testify truthfully or accurately; pending charges against a witness for whom no deal was being offered at the time of trial; the fact that a witness may have failed a polygraph exam; the failure of a witness to make an identification; evidence that might adversely impact the credibility of the State's evidence; and the prior criminal record of a witness.

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

~~(2)~~ (3) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

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

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

~~(1) Witnesses~~

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

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

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

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

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

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

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

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

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

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

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

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

This Rule does not require the State to disclose:

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

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

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

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

Upon the request of the State, the defendant shall:

(1) As to the Person of the Defendant

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

(2) Reports of Experts

As to each expert whom the defendant

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

(3) Alibi Witnesses

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

(4) Computer-generated Evidence

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

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

Unless the court orders otherwise, the time for discovery under this Rule shall be as set forth in this section. The State's Attorney shall make disclosure pursuant to section ~~(a)~~ (b) of this Rule within ~~25~~ 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. Any request by the defendant for discovery pursuant to section ~~(b)~~ (c) of this Rule, and any request by the State for discovery pursuant to section ~~(d)~~ (e) of this Rule shall be made within 15 days after the

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

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

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

(h) Continuing Duty to Disclose

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

(i) Filing With Court

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

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

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

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

(k) Sanctions

If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

Source: ~~This Rule is derived as follows:~~

~~Section (g) is derived from former Rule 741 a 3.~~

~~Section (a) is derived from former Rule 741 a 1 and 2.~~

~~Section (b) is derived from former Rule 741 b.~~

~~Section (c) is derived from former Rule 741 c.~~

~~Section (d) is derived in part from former Rule 741 d and is in part new.~~

~~Section (e) is derived from former Rule 741 e 1.~~

~~Section (f) is derived from former Rule 741 e 2.~~

~~Section (h) is derived from former Rule 741 f.~~

~~Section (i) is derived from former Rule 741 g.~~

This Rule is derived in part from former Rule 741 and is in part new.

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

> Albert D. Brault, Esq. brought to the attention of the Rules Committee a 2003 Report of the American College of Trial Lawyers, describing the problem that some federal prosecutors fail to provide information required to be furnished to a criminal defendant pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Brault spoke with local criminal defense attorneys in Montgomery County, who noted similar problems with some State prosecutors. To address this, the Honorable Albert J. Matricciani and the Honorable M. Brooke Murdock, Judges of the Circuit Court for Baltimore City, drafted proposed changes to Rule 4-263, the concept of which has been approved by the Rules Committee. The proposed amendments to Rule 4-263 blend language suggested by Judges Matricciani and Murdock with additional changes developed by the Committee.
>
> Current section (g), Obligations of State's Attorney, is proposed to be amended to require that each party who is obligated to provide material or information under the Rule exercise due diligence in identifying the material and information to be disclosed. Because of the importance of this obligation, section (g) is proposed to be moved to the beginning of the Rule and relettered (a). A cross reference to *State v. Williams*, 392 Md. 194 (2006) is proposed to be added following the section to highlight that the State's obligations under the Rule extend beyond the knowledge of the individual Assistant State's Attorney prosecuting the case.
>
> Disclosure of the identity of the State's witnesses, which currently is in the "Disclosure Upon Request" section of the Rule, is proposed to be moved to the "Disclosure Without Request" section, as new subsection (b)(1). A reference to Code, Criminal Procedure Article, §11-205, concerning withholding of a witness's address under certain circumstances is added to the

section. Given the difficulty of analyzing each statement made by a State's witness as to anything that conceivably would be considered "*Brady*" material, coupled with the requirement of disclosure of prior written statements by witnesses as set forth in *Jenks v. U.S.*, 353 U.S. 657 (1957), the Committee recommends that *all* written and oral statements by a witness whom the State intends to call to prove its case-in-chief or to rebut alibi testimony be disclosed without the necessity of a request by the defendant.

Amendments to subsection (b)(2) are proposed to clarify the State's disclosure requirements under *Brady* and it progeny. Subsections (b)(2)(C)(i), (ii), and (iii) are derived from the "impeachment by inquiry of witness" provisions of Rule 5-616 (a)(6)(i), (4), and (2), respectively. A Committee note containing examples of *"Brady"* materials that must be disclosed follows subsection (b)(2). The Committee note uses examples contained in correspondence dated October 25, 2005 from Nancy S. Forster, Public Defender, to Chief Judge Robert M. Bell. Also following subsection (b)(2) is a cross reference to *Brady* and to three additional opinions of the U.S. Supreme Court.

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

a witness.

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

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

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

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

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

Rule 4-262. DISCOVERY IN DISTRICT COURT

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

(1) Generally

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

(2) Obligations of the State's Attorney

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

reference to the particular action have reported, to the office of the State's Attorney.

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

~~(a)~~ (b) Scope

Discovery and inspection pursuant to this Rule is available in the District Court in actions for offenses that are punishable by imprisonment, and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), shall be as follows:

(1) The State's Attorney shall furnish to the defendant any material or information ~~that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged~~ provided for in Rule 4-263 (b)(2).

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

(3) Upon request of the State the defendant shall permit any discovery or inspection specified in subsection ~~(d)(1)~~ (e)(1) of Rule 4-263.

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

~~(b)~~ (c) Procedure

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

(d) Not to be Filed With Court

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

Source: This Rule is new.

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

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

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

In section (b), a reference to Code, Criminal Procedure Article, §11-205 is proposed to be added for the reason stated in

the Reporter's note to Rule 4-263.

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

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

The Chair told the Committee that the Criminal Subcommittee and the consultants had reached a consensus as to the proposed changes to the Rule. The "due diligence" clause will be placed at the beginning of the Rule, since it is expressly applicable to both parites. A cross reference to *State v. Williams*, 392 Md. 194 (2006) has been added at the end of section (a).

Judge Matricciani asked whether there is a writing that memorializes the material that is disclosed, and the Reporter

answered that in circuit court cases, there must be a writing that "reasonably identifies" the information provided. There is no comparable provision for District Court cases. The Chair commented that this is still a potential problem. Discovery that is served on the defendant but is not in the file may be in question 10 years later if a post conviction issue is exactly what was provided. Under the old system, the court file contained everything. With electronic access to files, there is concern about who may be looking at certain information in the files; therefore, discovery materials are not placed in the court files. The problem downstream is that in a post conviction or *coram nobis* proceeding, how can the court determine what was served on the defendant? At the last Rules Committee meeting, prosecutors from Baltimore City, and Robert Dean, Esq., then the prosecutorial representative on the Committee, discussed the issue of case retention. One suggestion for the amount of time the parties should retain the original discovery materials was for the length of time that the defendant is incarcerated or is on probation. A problem is that the prosecutors often do not have space to retain the materials for long periods. Mr. Kratovil asked if the period to retain the materials could be 10 years, since that is the period within which one must file a post conviction proceeding.

The Chair said that the problem has been created because discovery material is no longer being filed. Judge Matricciani

referred to the notice required to be filed in section (i). As long as the list of information is explicit, the judge in a post conviction proceeding can determine what material had been provided to the defendant in the original proceeding. A boilerplate checklist is not going to be helpful.

Judge Dryden noted that Mr. Dean had said that he would ask other State's Attorneys how they handle the file retention issue. Mr. Kratovil commented that in his county, retention is not a problem, but it is in the larger jurisdictions. The Vice Chair pointed out that Code, State Government Article, §10-637 *et seq.* pertains to the retention of documents. Ms. Nethercott commented that in her office, the files are retained for 12 years. The Vice Chair inquired as to whether there is a file retention policy in the Offices of the State's Attorneys. The Chair said that there is no statutory obligation on the part of the prosecutor to hold onto a file. Mr. Kratovil remarked that a prosecutor destroys files at his or her own peril.

The Reporter said that section (i) is derived from subsection (d)(2) of Rule 2-401, General Provisions Governing Discovery. That Rule provides that in lieu of filing discovery materials with the court,

> the party generating the discovery material shall serve the discovery material on all other parties and promptly file with the court a notice stating (A) the type of discovery material served, (B) the date and manner of service, and (C) the party or person served. The party generating the discovery material shall retain the original

> and shall make it available for inspection by any other party.

In the civil context, discovery materials are retained until the litigation has ended. How long should the materials be retained in a criminal case? The Chair pointed out that proposed section (i) provides that the party generating the discovery material shall retain the original until the expiration of any sentence imposed on the defendant. Ms. Nethercott commented that further information may be needed before a decision as to how long to hold onto discovery materials criminal cases can be made.

The Chair commented that when the Rule is considered by the Court of Appeals, the Court likely will ask how post conviction disputes regarding the contents of the discovery provided to the defendant are to be resolved. The language concerning retention until the expiration of the defendant's sentence can be left in. Interested persons at the hearing can request that the Court of Appeals modify the proposed language.

Mr. Kratovil expressed the opinion that although he is not familiar with all of the retention policies of the Maryland State's Attorney's offices, the policy of retaining the files until the sentence has run is not a reasonable one. Judge Matricciani questioned as to whether the retention period should last until the time for filing an appeal or a post conviction petition has expired. Mr. Kratovil noted that the only way to know this is to check the file for each defendant. It would be preferable to put a specific time period in the Rule. Judge

Matricciani commented that appeals in capital cases are often protracted.

The Chair suggested that the Rule provide that the originals of the materials generated be retained until the court orders otherwise. The judge can review the file. If it is a capital case or a sentence of life without the possibility of parole, the period to retain would not be stated. Otherwise, a specific time period can be provided as Mr. Kratovil suggested. A period of 10 or 12 years covers most cases. Ms. Nethercott remarked that the length of time the court retains the files is 12 years. Mr. Shipley pointed out that this has been changed to 20 years in the Records Retention and Disposal Schedule for the circuit courts of Maryland -- Schedule No. 2330. (See Appendix 1). The retention schedule has been updated, and the files in some cases are retained even longer. The Vice Chair expressed the view that the Rule should provide for retention for as long as the court would have retained the files. Ms. Nethercott suggested that the Rule prohibit prior disposal of the files. The Vice Chair said that she prefers this; otherwise the burden would be on the judges to look at so many files to determine when discovery materials can be disposed of.

Judge Norton suggested that the Court of Appeals be presented with both versions, retention for the length of the sentence or retention for the length of time that the records would be retained under the statutory requirements for file retention. The Chair said that one option is to provide that the

files shall be retained until the court orders otherwise. This is the language in section (a) of Rule 4-322, Exhibits. Judge Norton commented that he is leery of this language, because of the volume of cases in District Court. Judge Dryden suggested that there be a retention schedule. Judge Norton expressed the opinion that there not be individual court orders. The Chair said that post conviction cases impose an enormous burden on the judiciary, especially in the circuit courts and the Court of Special Appeals. The courts do not need a flood of cases based on the fact that no one can determine what discovery had been furnished. A retention policy will help solve this problem. Mr. Kratovil noted that there may be a middle ground. He expressed his concern about capital cases. A 10-year retention policy would be appropriate, except for capital cases and cases where the sentence is life imprisonment without parole. A second option is a period of 10 years from the date of the sentence. The Chair suggested that the period of retention until the expiration of the sentence is fairer.

The Vice Chair proposed that the Rule include the two options for retention -- what is there now and the period of retention applicable to court files. Judge Matricciani commented that the Rule should also allow for a shorter time period. The Chair suggested that if the defendant has been acquitted, the file could be destroyed. The Reporter stated that the two options will be the length of any sentence imposed, or the length of time specified for retention of court records. By consensus,

the Committee approved this suggestion.

Mr. Brault told the Committee that Maryland Lawyers' Rule of Professional Conduct 1.15, Safekeeping Property, provides that lawyers must keep clients' records for five years after termination of the representation. The Chair commented that this is not an unfair obligation. If a post conviction petition has been filed, and the court has to resolve the matter, the court ought to have the documentary evidence that it needs. If a defendant receives a sentence of 20 years, and the defense attorney destroys the file after four years, there is the risk of a new trial. There is not that much generation of material by defense counsel, and the private defense bar can raise any opposition it may have when the proposed Rule change is considered by the Court of Appeals. Mr. Brault remarked that most criminal defense attorneys dispose of their case files quickly. Ms. Nethercott observed that not having discovery materials in the court file is a problem in a post conviction case. Judge Dryden noted that the State should preserve its file. Ms. Nethercott responded that this does not help the defendant.

The Vice Chair said that the retention schedule of the Department of General Services is long and complicated. Some records are held for five years; some for 20 years. She asked whether it would be helpful to know the retention policies of the State's Attorneys' offices. Ms. Nethercott commented that Mr. Dean had said that he was going to check with the State's

Attorney's Association and State's Attorney's Offices around the State to see how they retained their files. Ms. Nethercott stated that she would check with the Office of the Public Defender on the same issue. Mr. Kratovil remarked that he did not know the specific policy of the State's Attorney's Office in each county.

The Chair suggested that two choices could be offered to the Court by the Committee. The choices are, unless the trial court orders otherwise, that the party generating the discovery material shall retain the original (1) until the expiration of any sentence imposed on the defendant or (2) for the length of time that the court's records are retained under the statutory requirement for file retention. The State's Attorney's Offices and the defense bar can recommend different language to the Court of Appeals.

Mr. Bowen suggested that in subsection (b)(2), the language "bad acts" should be changed to the words "prior conduct." This is the language of section (b) of Rule 5-608, Evidence of Character of Witness for Truthfulness or Untruthfulness, the Rule cited in subsection (b)(2). By consensus, the Committee agreed with this change.

Mr. Kratovil pointed out that the Criminal Subcommittee had discussed this reference to prior bad acts, or, as rephrased, prior conduct. He had some concern about whether this requires the State to provide criminal record checks on witnesses. The redraft of the Rule added the language in subsection (b)(2) that

reads “in the possession or control of a State agent.” There is a distinction as to whether the State has the criminal record of a witness physically in its possession, or whether the State is required to check the records of all of the witnesses. The Committee note should clarify that physical possession is not the same as access.

The Vice Chair inquired as to whether the criminal record can be checked online. Mr. Kratovil answered that it could be checked in the Criminal Justice Information System (“CJIS”) or in the court’s system. The Vice Chair remarked that one could check the record, but not print a copy of it, so that it is not in one’s physical possession. Mr. Brault added that it is not a good idea to discourage prosecutors from getting the criminal record. Mr. Kratovil pointed out that if the prosecutor checks the record, he or she should turn over the information whether or not it is printed. The language of the Rule should clarify that the State does not have to check the record of each witness. Judge Dryden remarked that a judge could read the Rule to mean that a prosecutor is obligated to check the record of every witness as a showing of due diligence. It could be argued that the record is always within the State’s ability to obtain.

The Reporter suggested that a new sentence be added to the Committee note. Mr. Kratovil commented that it is not reasonable to require the prosecutor to check the criminal record of all witnesses. The Chair commented that the danger in not requiring the State to check is deliberate ignorance by the prosecutor.

Mr. Kratovil said that this has to be reasonable –- the State cannot investigate the background of every witness in District Court or circuit court.

Judge Matricciani noted that what must be given to the defendant is what is not otherwise available to him or her. The Chair asked the meaning of the word "available." Ms. Nethercott replied that sometimes the defendant cannot get access at all, including access to out-of-state criminal information and to CJIS. The Vice Chair pointed out that the language "in possession or control" does not address the issue of electronic access.

Mr. Brault remarked that the word "control" has a meaning set out in case law. "Exclusive control" means that one party has control alone. The Chair said that within the context of the Rule, the prior conduct that is relevant is any act that is admissible under Rule 5-609, Impeachment by Evidence of Conviction of Crime. If the State has access to that information by pushing a button and finding out if the witness has a prior valid conviction, and the defense cannot get this information, the State should provide it. Mr. Kratovil questioned as to whether this would mean providing every homeowner's criminal record after a burglary has taken place. The Chair responded that if a witness is being interviewed, the witness can be asked if he or she has ever committed certain crimes. The Vice Chair remarked that the victim-homeowner could lie about his or her record. The Chair commented that the prosecutor would have to

take the victim at his or her word, unless the prosecutor had reason to disbelieve the witness. The kind of conduct used to impeach a witness pursuant to Rule 5-608 (b) is more difficult to ferret out. Judge Norton noted that the issue is what due diligence is. Judge Matricciani observed that in Baltimore City, victims and witnesses often have lengthy criminal records. If the victim or witness denies having a record, can the State simply ignore this?

Mr. Kratovil told the Committee that in Queen Anne's County, it may be reasonable to check the records of the witnesses in circuit court, but this may not be the case in the District Court or in the Circuit Courts for Prince George's County or Baltimore City. In those jurisdictions, the prosecutor is fortunate if the victim is present on the day of trial. Ms. Nethercott pointed out that the witness's criminal record is not always available to a *pro se* defendant. Mr. Kratovil remarked that anyone can check a criminal record. Ms. Nethercott observed that if the only information one has is a common name such as "John Smith," it would be difficult to find the record. Mr. Kratovil commented that the Criminal Subcommittee did not want to require the State to check the criminal records of all witnesses. The purpose of the phrase "in the possession or control of a State agent" in subsection (b)(2) means "in the exclusive possession or control."

The Chair asked if the defendant must be told that the

prosecutor has interviewed a witness who said that he or she has had a conviction that is less than 15 years old. Mr. Kratovil replied that the prosecutor has to tell the defendant, because this is due diligence. However, it is not reasonable for the prosecutor automatically to assume that in every case, the witness has a criminal record. The Chair pointed out that the prosecutor simply has to ask the witness about his or her record. Mr. Kratovil suggested that language be put into the Rule indicating that the language of subsection (b)(2) does not necessarily mean that criminal records checks must be conducted on every witness.

The Chair questioned the changes being suggested for Rule 4-262. Judge Norton answered that *Brady v. Maryland*, 373 U.S. 83 (1963) is applicable in the District Court, as well as in the circuit courts. The Vice Chair noted that in District Court, the prosecutor often does not speak with the witness until the day of the trial. There is no prior interview process. Judge Norton observed that the common sense rule is that there must be due diligence. This is reflected in subsection (a)(1) of both Rules.

Mr. Kratovil asked whether the Committee note will be changed to state that it is not necessary to check the prior criminal record of every witness. The Chair commented that the Rule should have language referring to prior convictions of a witness that can be used for impeachment pursuant to Rule 5-609. The Vice Chair suggested that the phrase in subsection (b)(2)

that reads "whether or not admissible" should be rewritten. The Chair noted that a prior conviction that is eligible for use does not necessarily get admitted. There has to be a balance. If the witness has a conviction that is eligible to be used pursuant to Rule 5-609, the prosecutor must disclose it. A party may file a motion *in limine* to prohibit the use of the information, but the information must be disclosed.

The Vice Chair suggested that the last phrase of the Committee note that reads "and the prior criminal record of a witness" be deleted. By consensus, the Committee agreed with this deletion. Mr. Brault remarked that *Brady* material is a problem nationally. The Chair said that the best place to put the language that has been agreed upon is in the Committee note, which can go after section (a). If the prosecutor has no reason to believe the contrary, an inquiry of the potential status of the witness as to whether the person has a criminal record constitutes due diligence. This is consistent with the concern expressed by Judge Matricciani that a mere denial does not satisfy due diligence requirements. Judge Matricciani commented that he has consistently encountered the argument from the State that checking the criminal record of a witness is burdensome. He inquired as to why this is such an obstacle. The Chair responded that the practical difficulty is getting this information, not the cost. The prosecutor could be worried that taking the witness at his or her word regarding the witness's lack of a

criminal record may not be due diligence. Is it necessary for the prosecutor to check the criminal record, even though the witness denies having one? Judge Matricciani observed that a witness who is reluctant to testify may become even more reluctant when there is an inquiry into his or her criminal background.

The Chair said that Rule 4-263 will be remanded to the Subcommittee one more time, so that the Subcommittee can work on the language. The Chair noted that there was a murder case in which a witness was later injured and lost his memory. The issue was the admissibility of the hospital records. Judge Dryden remarked that every witness cannot be questioned about his or her mental health. Mr. Brault pointed out that a witness's mental health records may be protected under the federal Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-191.

Judge Matricciani observed that without a certification requirement in the Rule, there is no consequence for the failure of the prosecutor to act. Judge Dryden responded that the remedy for a failure to disclose is that the prosecutor may not win the case. Judge Matricciani expressed the view that if due diligence is restricted, the teeth will be taken out of the Rule. Mr. Brault pointed out that the proposed *Brady* amendments to the Rule in Maryland make it the most advanced rule in the country. Judge Dryden noted that the examples in the Committee note are

very helpful. Ms. Nethercott commented that there are many permutations of what must be provided. The Chair added that the Committee note will help provide clarity.

The Chair said that a reference to Rule 5-609 will be added to the Rule in subsection (b)(2). The Committee note will be added after subsection (a)(1), and the language in subsection (b)(2) that reads "bad acts" will be taken out. The Committee note will be modified to make clear that where the prosecutor has no reason to believe to the contrary, an inquiry of a potential State's witness as to whether the witness has a criminal record generally satisfies due diligence.

The Reporter noted that there are two options on the timing of retaining records. The Chair suggested that the American Bar Association (ABA) procedure on retention be checked. Rule 4-262 has the same issues, and the same Committee note will be added to it after subsection (a)(1). He asked if the retention period set out in proposed section (d) of Rule 4-262 works well in District Court. Judge Dryden replied in the affirmative, although he observed that in a *coram nobis* case, it may be difficult to anticipate the period of time. The Chair said that once a case shifts to circuit court, the circuit court obligations as to retention apply. The Reporter stated that section (d) would remain in Rule 4-262 as drafted. By consensus, the Committee approved Rule 4-262 and 4-263 as amended, subject to the drafting of a Committee note by the Criminal Subcommittee.

The Chair presented Rule 4-301, Beginning of Trial in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-301 to provide for discovery under Rule 4-263 under certain circumstances and for discovery under Rule 4-262 in all other actions transferred to a circuit court upon a jury trial demand under this Rule, as follows:

Rule 4-301. BEGINNING OF TRIAL IN DISTRICT COURT

(a) Initial Procedures

Immediately before beginning a trial in District Court, the court shall (1) make certain the defendant has been furnished a copy of the charging document; (2) inform the defendant of each offense charged; (3) inform the defendant, when applicable, of the right to trial by jury; (4) comply with Rule 4-215, if necessary; and (5) thereafter, call upon the defendant to plead to each charge.

(b) Demand for Jury Trial

(1) Form and Time of Demand

A demand in the District Court for a jury trial shall be made either

(A) in writing and, unless otherwise ordered by the court or agreed by the parties, filed no later than 15 days before the scheduled trial date, or

(B) in open court on the trial date by the defendant and the defendant's counsel, if any.

(2) Procedure Following Demand

Upon a demand by the defendant for jury trial that deprives the District Court of jurisdiction pursuant to law, the clerk may serve a circuit court summons on the defendant requiring an appearance in the circuit court at a specified date and time. The clerk shall promptly transmit the case file to the clerk of the circuit court, who shall then file the charging document and, if the defendant was not served a circuit court summons by the clerk of the District Court, notify the defendant to appear before the circuit court. The circuit court shall proceed in accordance with Rule 4-213 (c) as if the appearance were by reason of execution of a warrant. Thereafter, except for the requirements of Code, Criminal Procedure Article, §6-103 and Rule 4-271 (a), or unless the circuit court orders otherwise, pretrial procedures shall be governed by the rules in this Title applicable in the District Court.

(c) Discovery

Discovery in an action transferred to a circuit court pursuant to a jury trial demand made in accordance with subsection (b)(1)(A) of this Rule is governed by Rule 4-263. In all other actions transferred to a circuit court upon a jury trial demand, discovery is governed by Rule 4-262.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 751.
Section (b) is new.
Section (c) is new.

Rule 4-301 was accompanied by the following Reporter's Note.

Rule 4-301 is proposed to be amended to provide that discovery under Rule 4-263 (Discovery in Circuit Court) is available in cases transferred to a circuit court upon a jury trial demand only when the demand is made in accordance with subsection (b)(1)(A) of Rule 4-301, i.e., only when a written demand is filed no later than 15 days before

> a scheduled trial date. In all other cases transferred pursuant to Rule 4-301, discovery is governed by Rule 4-262 (Discovery in District Court).

The Chair explained that section (c) is applicable in a case where a jury trial has been demanded. The Reporter explained that if, pursuant to subsection (b)(1)(A), a demand for a jury trial is made in writing and filed no later than 15 days before the scheduled trial date, the circuit court discovery Rule will be applicable. If a jury trial demand is made at a later time, the defendant's entitlement to discovery is governed by the District Court Rule. This allows same day/next day jury trials to proceed without a claim by the defendant that the case should be postponed so that circuit court discovery can be had. Judge Dryden expressed his approval of section (c). By consensus, the Committee approved the change to the Rule. The Chair stated that the Criminal Subcommittee had done an excellent job in revising the Rules.

Agenda Item 3. Consideration of a certain policy issue concerning Rule 2.1 of the Maryland Lawyers' Rules of Professional Conduct (See Appendix 2).

Mr. Brault presented paragraph 5 of the Comment to Rule 2.1, Advisor, for the Committee's consideration. (See Appendix 2).

Mr. Brault told the Committee that Master Theresa A. Furnari, Domestic Relations Master of the Circuit Court for Baltimore City, had suggested a change in paragraph 5 of the Comment to Rule 2.1 of the Maryland Lawyers' Rules of

Professional Conduct ("MLRPC") in the sentence that reads: "Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." She proposed that the word "may" be changed to the word "shall." Rule 2.1 concerns the advice a lawyer offers to a client. Rule 1.4, Communication, concerns what a lawyer communicates to a client. Master Furnari has requested this change to the Comment to Rule 2.1, because often referral of a case to mediation takes the cases out of the courts. The Attorneys Subcommittee's view is that it would be a mistake to change the word "may" to the word "shall." A change to "shall" could subject a lawyer to discipline when the lawyer may have had good reasons not to give the information to the client.

The Chair said that several guests were present to discuss this issue. Master Furnari told the Committee that she had distributed some material to them, including her *curriculum vitae*. (See Appendix 3). Before she became a master in 2002, for the previous 15 years she had represented clients and mediated cases. She also has conducted mediator training. She introduced Louise Phipps Senft, Esq., who teaches at the University of Baltimore School of Law and is an advisor to the Honorable Robert M. Bell, Chief Judge of the Court of Appeals on Alternative Dispute Resolution ("ADR"); Professor Jane Murphy of the University of Baltimore School of Law; and Lisa Sparks, a

student at the University of Baltimore School of Law.

Master Furnari commented that mandatory ADR has worked in other states with no negative repercussions. Professor Murphy added that ADR is underutilized. The American Bar Association ("ABA") amended its Model Rule 2.1, and Maryland is one of 26 states that has adopted the ABA Model Rule almost verbatim. Seven other states use language that is more mandatory, replacing the word "may" with "should" or "shall." Vermont and Virginia use the word "shall," and Hawaii, Colorado, Tennessee, Alaska, and Massachusetts use the word "should."

Judge Matricciani inquired as to whether a lawyer could be disciplined for violating the Comments. Master Furnari answered negatively, drawing the Committee's attention to paragraph 20 of the "Scope" section of the Maryland Lawyers' Rules of Professional Conduct (MLRPC) which states:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation.

Since 2002, in the states that use the word "shall," there have been no disciplinary actions based upon that terminology. Mr. Klein pointed out that the language of Rule 2.1 in Vermont reads "**[w]hen appropriate**, a lawyer shall advise the client of alternative forms of dispute resolution... (emphasis added)."

Mr. Johnson observed that the statement that the Comments

have no bearing on discipline may not be true. He said that he did not understand why it is necessary to have provisions in the Comment that appear to be binding. If something is binding, it should be in the Rule itself. Professor Murphy responded that if this is in the Rule, it could cause the problem referred to by Mr. Brault that it could result in the discipline of lawyers. If the statement is located in the Comment, it is educational. Professor Murphy continued that when she taught Professional Responsibility, she found that the students read the Comments, also. The current culture of the legal profession does not sufficiently embrace ADR. Lawyers can be reached in their formative stage as law students. Putting this statement in the Comment encourages a change in the culture. Master Furnari pointed out that paragraph 14 of the Scope section of the MLRPC states: "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." She again cited paragraph 20 of the "Scope" section of the MLRPC which states that a violation of a Rule should not itself give rise to a cause of action against a lawyer. The Comment is strictly to give guidance. She said that she did not know of any lawyer who has ever been sued pursuant to the Comment to Rule 2.1.

The Chair noted that an attorney may have to determine what is in his or her client's best interest and tell the client, but if the attorney feels that something is not in the client's best interest, the attorney may be obligated to tell the client that the choice is either to arbitrate with the insurance company that

has a reputation for not making large payouts or go to court and see what a jury does with the case. The attorney can make a recommendation but might be obligated to mention ADR, regardless of whether the attorney feels it is in the client's best interest.

Ms. Senft expressed the opinion that it is preferable to use the word "shall" in the context of the representation of the client. It is up to the discretion of counsel to advise his or her client accordingly. The Chair raised the possibility of an attorney exposing himself or herself to a malpractice claim by failing to tell his or her client that the client can consider ADR. Using the word "shall" could strengthen a malpractice action. Ms. Senft asked why this is a problem. Attorneys should take care to give the correct advice. The Chair agreed, but he said that there may have been numerous previous cases with the same insurance company which has never paid, so it would be pointless to recommend ADR with that company.

Judge Matricciani remarked that it is good to have a reference in the Comment to ADR, because the courts waste time dealing with superfluous cases that can be resolved in other ways, such as through ADR. The Chair suggested that instead of "may " or "shall," the Comment to Rule 2.1 could read "...when a matter is likely to involve litigation, the lawyer should, when appropriate ...".

Mr. Brault expressed his respect for the University of Baltimore School of Law from which three of his children

graduated. However, he said that in his many years defending lawyers, it is clear that society does not always function as it should. The Court of Appeals in *Fox v. Wills*, 390 Md. 620 (2006) held that lawyers representing children in custody cases are not entitled to qualified immunity from prosecution. When an attorney is sued as to the standard of care, the standard is resolved by a jury of lay persons who are not attorneys. Although paragraph 20 of the Scope section of the MLRPC states that violation of a Rule should not itself give rise to a cause of action against a lawyer, two cases, *Post v. Bregman*, 349 Md. 142 (1998) and *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 349 Md. 441 (1998) have turned that statement around. The preamble to the MLRPC was rewritten to point out that these cases held that the MLRPC are binding rules, which if not followed, may be evidence of a breach of the applicable standard of conduct. In *Son*, an attorney split a fee with a non-attorney. In *Post*, an attorney had signed a letter of agreement to split a fee for legal work with another participating attorney, and the first attorney wanted a greater fee than what was originally agreed upon. Mr. Brault cautioned that if the word “shall” is put into the Comment to Rule 2.1 or into the Rule itself, a jury could find that an attorney violated the Rule if the attorney did not inform the client about ADR. Juries traditionally do not like attorneys, and this could lead to a finding of mailpractice and a judgment against an attorney. This is why in drafting ethics

rules, the Rules Committee uses the words “shall,” “must,” and “should” judiciously.

Master Mahasa remarked that the word “should” is usually advisory. Mr. Johnson observed that the Rules Committee spent a great amount of time when helping draft the Rules pertaining to *pro bono* legal service discussing the difference between the words “shall” and “should.” The Court of Appeals approved the language of Rule 6.1, Pro Bono Publico Service, which reads “A lawyer in the full-time practice of law **should** aspire to render at least 50 hours per year of *pro bono publico* legal service, and a lawyer in part-time practice **should** aspire to render at least a pro rata number of hours (emphasis added).” Mr. Johnson said that he supports ADR, but, in his view, it is not more important than *pro bono* service. The word “should” is more appropriate than “shall” in the Comment to Rule 2.1.

Mr. Brault pointed out that section (c) of Rule 6.1 reads as follows: “This Rule is aspirational, not mandatory. Noncompliance with this Rule shall not be grounds for disciplinary action or other sanctions.” A similar paragraph could be added to the Comment to Rule 2.1. Master Furnari expressed the opinion that using the word “shall” in the Comment would not be a basis for a violation of a standard of conduct. Modifying the Comment would lead to a change in climate in which ADR is used more frequently. Chief Judge Bell created the ADR Commission which has now evolved into the Maryland Mediation and

Conflict Resolution Office ("MACRO") to encourage the use of ADR.

The Chair suggested that the third sentence in the Comment could be changed to read: "When a matter is likely to involve litigation, and one or more forms of alternative dispute resolution are reasonable alternatives to litigation, a lawyer should advise a client about those reasonable alternatives." A lawyer may not have extensive knowledge about ADR. Professor Murphy commented that lawyers should be required to be familiar with ADR. Mr. Bowen suggested that the words "in the opinion of the lawyer" should be added to the language suggested by the Chair after the word "and" and before the phrase "one or more." The Chair agreed with this suggestion. Master Furnari recommended that the opinion be an educated one. The Chair responded that the educational component can be addressed later.

The Chair asked Mr. Brault for his view. Mr. Brault replied that the suggested change to the Comment may still bring about lawsuits. The Rule applies to other areas of the law besides family law. The change could lead to litigation against lawyers who represent plaintiffs in personal injury cases. An attorney could be sued if ADR is used when more money could have been obtained through litigation. It would be a big mistake to change the Comment.

Judge Spellbring remarked that the Committee seems to agree that the Comments are not the appropriate place to educate attorneys. He pointed out that section (b) of Rule 1.4, Communication, states: "A lawyer shall explain a matter to the

extent reasonably necessary to permit the client to make informed decisions regarding the representation." This covers the matter being discussed today.

Ms. Senft acknowledged that there has been resistance in some of the states to similar proposals. The states where "shall" or "should" is used are proactive in the use of ADR. Although Maryland has many years of experience with ADR, many attorneys do not really know enough about it. There needs to be a dialogue between clients and counsel. ADR is meant not only for family law cases. The Chair commented that in some situations, ADR is neither necessary nor advisable. Professor Murphy noted that the language suggested for the Comment is "a reasonable alternative." She cited a study conducted by the Women's Law Center, which found that in 1998 6.3% of custody cases were mediated, and in 2003, the statistics were similar. The Administrative Office of the Courts seeks to promote ADR in the family law area. The Chair pointed out attorneys may know about ADR but choose not to recommend it to their clients. Master Furnari responded that the Rule does not require an attorney to recommend ADR. The suggested language of the Comment is: "...a lawyer should advise the client...". In some divorce cases, there may be no parity between the parties, and ADR may not be appropriate. In cases involving abuse, mediation may not be appropriate. It should be up to the client to decide.

Judge Dryden proposed that the language suggested by the Chair with the amendment made by Mr. Bowen be approved. The

Chair said that subject to restyling, his suggested language is to substitute the following sentence for the third sentence of paragraph 5 of the Comment to Rule 2.1: "Similarly, when a matter is likely to involve litigation, and, in the opinion of the lawyer, one or more forms of alternative dispute resolution are reasonable alternatives to litigation, a lawyer should advise the client about those reasonable alternatives." It is important to avoid using the word "shall," which has malpractice suits lurking from its use. Ms. Senft suggested that the advantages and disadvantages of ADR should be included in the Comment. The Chair responded that this would be too much to put into the Comment. He told Ms. Senft that when the Court of Appeals considers the changes to the Comment, she could ask the Court to include her suggested language.

Mr. Brault commented that he had been on the Ethics 2000 "Rodowsky" Committee. When that body met, the issue being discussed today did not come up. When the ABA language is adopted, the benefit is uniformity with the other states that have adopted it. Maryland should not have a separate version of the Rule.

By consensus (with one opposed), the Committee approved the Chair's language as it was amended.

Agenda Item 4. Reconsideration of proposed amendments to Rule 16-811 (Client Protection Fund of the Bar of Maryland)

Mr. Brault presented Rule 16-811, Client Protection Fund of

the Bar of Maryland, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-811 to change certain terminology and add a certain Committee note following subsection f. 4 (ii), as follows:

Rule 16-811. CLIENT PROTECTION FUND OF THE BAR OF MARYLAND

. . .

f. Enforcement.

1. List by Trustees of Unpaid Assessments.

As soon as practical after January 1, but no later than February 15 of each calendar year, the trustees shall prepare, certify, and file with the Court of Appeals a list showing:

(i) the name and account number, as it appears on their records, of each lawyer who, to the best of their information, is engaged in the practice of law and without valid reason or justification has failed or refused to pay (a) one or more annual assessments, (b) penalties for late payment, (c) any charge for a dishonored check, or (d) reimbursement of publication charges; and

(ii) the amount due from that lawyer to the Fund.

2. Notice of Default by Trustees.

(i) The trustees shall give notice of delinquency promptly to each lawyer on the list by first class mail addressed to the lawyer at the lawyer's last address appearing on the records of the trustees. The notice shall state the amount of the obligation to the Fund, that payment is overdue, and that failure to pay the amount to the Fund within 30 days following the date of the notice will result in the entry of an order by the Court of Appeals prohibiting the lawyer from practicing law in the State.

(ii) The mailing by the trustees of the notice of default shall constitute service.

3. Additional Discretionary Notice.

In addition to the mailed notice, the trustees may give any additional notice to

the lawyers on the delinquency list as the trustees in their discretion deem desirable. Additional notice may include publication in one or more newspapers selected by the trustees; telephone, facsimile, or other transmission to the named lawyers; dissemination to local bar associations or other professional associations; posting in State court houses; or any other means deemed appropriate by the trustees. Additional notice may be statewide, regional, local, or personal to a named lawyer as the trustees may direct.

4. Certification of Default by Trustees; Order of ~~Decertification~~ Temporary Suspension by the Court of Appeals.

(i) Promptly after expiration of the deadline date stated in the mailed notice, the trustees shall submit to the Court of Appeals a proposed ~~Decertification~~ Temporary Suspension Order stating the names and account numbers of those lawyers whose accounts remain unpaid. The trustees also shall furnish additional information from their records or give further notice as the Court of Appeals may direct. The Court of Appeals, on being satisfied that the trustees have given the required notice to the lawyers remaining in default, shall enter a ~~Decertification~~ Temporary Suspension Order prohibiting each of them from practicing law in the State. The trustees shall mail by first class mail a copy of the ~~Decertification~~ Temporary Suspension Order to each lawyer named in the order at the lawyer's last address as it appears on the records of the trustees. The mailing of the copy shall constitute service of the order.

(ii) A lawyer who practices law after having been served with a copy of the ~~Decertification~~ Temporary Suspension Order may be proceeded against for contempt of court in accordance with the provisions of Title 15, Chapter 200 (Contempt) and any other applicable provision of law or as the Court of Appeals shall direct.

Committee note: A lawyer is no longer authorized to practice law after having been served with a copy of a Temporary Suspension Order.

(iii) Upon written request from any Maryland lawyer, judge, or litigant to confirm whether a Maryland lawyer named in the request has been ~~decertified~~ temporarily suspended and has not been reinstated, the trustees shall furnish confirmation promptly by informal means and, if requested, by written confirmation. On receiving confirmation by the trustees that a Maryland lawyer attempting to practice law has been and remains ~~decertified~~ temporarily suspended, a Maryland judge shall not permit the lawyer to practice law in the State until the lawyer's default has been cured.

5. Payment.

Upon payment in cash or by certified or bank official's check to the Fund by a lawyer of all amounts due by the lawyer, including all related costs that the Court of Appeals or the trustees may prescribe from time to time, the trustees shall remove the lawyer's name from their list of delinquent lawyers and, if a ~~Decertification~~ Temporary Suspension Order has been entered, request the Court of Appeals to ~~rescind its Decertification Order as to that lawyer~~ enter an order that terminates the Temporary Suspension Order and reinstates the lawyer to good standing. If requested by a lawyer affected by the action, the trustees shall furnish confirmation promptly.

6. Bad Check; Interim Decertification Order.

(i) If a check payable to the Fund is dishonored, the treasurer of the Fund shall notify the lawyer immediately by the quickest available means. Within 7 business days following the date of the notice, the lawyer shall pay to the treasurer of the Fund, in cash or by certified or bank official's check, the full amount of the dishonored check plus any additional charge that the

trustees in their discretion shall prescribe from time to time.

(ii) The treasurer of the Fund promptly (but not more often than once each calendar quarter) shall prepare and submit to the Court of Appeals a proposed interim ~~Decertification~~ Temporary Suspension Order stating the name and account number of each lawyer who remains in default of payment for a dishonored check and related charges. The Court of Appeals shall enter an interim ~~Decertification~~ Temporary Suspension Order prohibiting the practice of law in the State by each lawyer as to whom it is satisfied that the treasurer has made reasonable and good faith efforts to give notice concerning the dishonored check. The treasurer shall mail by first class mail a copy of the interim Decertification Order to each lawyer named in the order at the lawyer's last address as it appears on the records of the trustees, and the mailing of the copy shall constitute service of the order.

7. Notices to Clerks.

The Clerk of the Court of Appeals shall send a copy of ~~a~~ each ~~Decertification~~ Temporary Suspension Order and ~~rescission~~ order that terminates a Temporary Suspension Order and reinstates the lawyer to good standing entered pursuant to this Rule to the Clerk of the Court of Special Appeals, the clerk of each circuit court, the Chief Clerk of the District Court, and the Register of Wills for each county.

. . .

Rule 16-811 was accompanied by the following Reporter's Note.

At its April 2006 meeting, the Rules Committee considered amendments to Rules 16-811 and 16-903 drafted at the request of Chief Judge Bell with respect to the use of the word "rescind" in the two Rules. The draft amendments to both Rules would have replaced the phrase, "rescind its

Decertification Order as to that lawyer" with the phrase, "enter an order that terminates the Decertification Order and restores the lawyer to good standing."

The Committee referred this matter to the Attorneys Subcommittee to consider issues including (1) discipline or other remedies available when a lawyer practices law while decertified, (2) consequences to litigation and other matters handled by a lawyer while decertified, and (3) whether Committee notes should be added or other changes should be made to the draft amendments to Rules 16-811 and 16-903. The consensus of the Committee members present at the April 2006 meeting was that the Rules should be clear that the validity of any legal action taken by an attorney while decertified is not affected by the fact that the lawyer was acting while decertified. For example, a criminal defendant should not be given a new trial because the lawyer representing the defendant had been decertified at the time of the defendant's trial and conviction. Land records should not be affected by the fact that a decertified lawyer executed the deed certification required by Code, Real Property Article, §3-104 (f).

After considering this matter at its July 26, 2006 meeting, the Attorneys Subcommittee recommends amendments to Rule 16-811 that eliminate the "decertification" terminology in the Rule and replace it with a "temporary suspension" of the attorney's right to practice law. "Rescission" language in the Rule is replaced by the phrase, "order that terminates the Temporary Suspension Order and reinstates the lawyer to good standing." A Committee note stating that a lawyer served with a Temporary Suspension Order is no longer authorized to practice law is proposed to be added following subsection f. 4 (ii) of the Rule.

No comparable changes are proposed to be made to Rule 16-903.

Mr. Brault explained that the Court of Appeals through a

letter from Alexander L. Cummings, Esq., Clerk of that Court, had raised the issue of the meaning of the word "rescind" in Client Protection Fund ("CPF") reinstatement orders and in similar orders for lawyers who fail to file *pro bono* reports pursuant to Rule 16-903, Reporting Pro Bono Legal Service. Currently, the procedure is that if a lawyer fails to pay his or her assessment owed to the CPF, the lawyer is decertified from the practice of law. Thereafter, if the lawyer complies by filing a late payment, the Court of Appeals enters an order rescinding the decertification. Mr. Brault had written a letter dated March 14, 2006, a copy of which is located in the meeting materials, expressing the view of the Attorneys Subcommittee that when something is "rescinded," it is void *ab initio* as if it had never existed. (See Appendix 4). The question is what happens with respect to pleadings filed and other work performed by a lawyer while decertified. If he or she argued a criminal case, would the criminal judgment be null and void? If the order rescinding the decertification is void *ab initio*, then all actions of the lawyer before the order is rescinded are legitimized. This would be appropriate with no adverse consequences to clients. Mr. Brault said that his impression is that the Court of Appeals is anxious to put greater teeth into Rules 16-811 and 16-903. If the penalty for non-compliance is severe, then more lawyers would comply. In place of the word "decertification" in Rule 16-811, the Subcommittee suggests the words "temporary suspension." This

is somewhat draconian, because the suspended lawyer would have to notify clients, take his or her name off the door and letterhead, and perform all of the other duties listed in Rule 16-760 that are required of a lawyer who has been suspended. A temporary suspension could mean that any work done by the lawyer would be nullified. An intern working for the Rules Committee researched other states and Maryland as to how this issue is handled. (See Appendix 5). There is no consensus, and the courts in Maryland are split as to whether the lawyer's actions are nullified.

Mr. Brault continued that the Subcommittee's view of changing Rule 16-903 is that since the Rule is more technical and less substantive than Rule 16-811, Rule 16-903 should not be changed. *Pro bono* service is aspirational, not required. The Subcommittee suggests keeping the word "rescission" in Rule 16-903. In that Rule, there is much more inadvertent failure to file the form. A way to avoid nullification would be to provide in the Rule that the court enters an order recertifying the lawyer without referring to "temporary suspension."

Mr. Bowen noted that the Committee note after subsection f. 4. (ii) may not be necessary, because subsection f. 4 (ii) already has similar language. Subsection f. 4 (ii) could be changed to read: "After having been served with a copy of the Temporary Suspension Order and prior to reinstatement, a lawyer is not authorized to practice law, and may be proceeded against...".

Mr. Kratovil inquired as to how a lawyer is notified if the assessment has not been paid. Ms. Moss, Administrator of the Client Protection Fund, responded that the lawyer is given a 30-day notice that the bill must be paid. The bills are sent out on July 1; on September 1, there would be one late fee. On January 2, there is a second late fee. In February, the lawyer is told that he or she is not in compliance, and in March, the Fund sends out a notice stating that the lawyer will be decertified in April if the fee is not paid. The lawyer has nine months and numerous notices to comply. Out of 34,000 active lawyers, only 300 are decertified each year. When a lawyer moves, he or she must notify the CPF. Generally, the lawyers who fail to comply are the ones who cannot be located. Mr. Brault asked whether each lawyer who is decertified is sent a copy of the order. Ms. Moss replied that a copy is sent to the last known address of the lawyer. Only about 1% of lawyers refuse to comply. Mr. Brault commented that the problem being discussed is not related to notice, but to what the lawyer has done in the interim.

The Reporter asked whether Rule 16-903 is to be changed. Mr. Brault replied that it should not be modified, unless the rate of non-compliance increases. The Chair proposed that the same changes that are being suggested for Rule 16-811 also could be presented to the Court of Appeals in Rule 16-903. The Court will be informed as to why the Committee feels the changes are not appropriate in Rule 16-903. By consensus, the Committee agreed.

Mr. Brault commented that there is a third alternative -- the Rule could state that the Court would enter an order recertifying the attorney. The Chair said that there is a doctrine of law that saves the final judgment in cases in which an attorney or a judge is not authorized as a matter of law to be involved in the case. An example is the cases that were heard by the Honorable Cypert Whitfill, a circuit court judge in Harford County, during the time that a complaint against him based on an allegation that he did not reside in Harford County was pending. Mr. Johnson reiterated that there is a reason for addressing the two Rules differently. There is a qualitative difference between the payment of the CPF assessment, which provides the necessary funding to reimburse losses caused by defalcations of lawyers and is a condition precedent to the practice of law, and the filing of a form, which assists in measuring attainment of aspirational goals. The Chair stated that the Court will be informed as to why the recommendation for change applies only to Rule 16-811.

The Chair adjourned the meeting.