COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in the Judiciary Education and Conference Center, Training Rooms 5 & 6, 2011-D Commerce Park Drive, Annapolis, Maryland, on March 9, 2007.

Members present:

Hon. Joseph F. Murphy, Jr., Chair

F. Vernon Boozer, Esq.
Hon. James W. Dryden
Hon. Michele D. Hotten
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, Esq.
Hon. Albert J. Matricciani
Robert R. Michael, Esq.
Anne C. Ogletree, Esq.
Kathy P. Smith, Clerk
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Teigen Hall, Rules Committee Intern
Eric Lieberman, Esq., Associate Counsel, The Washington Post
Larry W. Shipley, Clerk, retired

The Chair convened the meeting.

The Chair introduced Kathy P. Smith, who is the Clerk of Circuit Court for Calvert County. Ms. Smith is the newest member of the Committee, and he welcomed her.

The Chair said that the minutes of the May 26, 2006 and June 23, 2006 Rules Committee meetings had been distributed to the members. Mr. Klein moved to adopt the minutes as presented, Judge Matricciani seconded the motion, and it passed unanimously.

Agenda Item 1. Reconsideration of certain proposed Rules changes pertaining to jury trial implementing Chapter 372, Acts of 2006 (HB 1024) - Amendments to: Rule 16-1004 (Access to Notice, Administrative, and Business License Records), Rule 2-512 (Jury Selection), and Rule 4-312 (Jury Selection)

The Chair presented Rules 16-1004, Access to Notice, Administrative, and Business License Records; 2-512, Jury Selection; and 4-312, Jury Selection, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1004 by expanding subsection (b)(2) to allow a judge to disclose information about jurors after the jurors have completed service and to allow a custodian to disclose the names and zip codes of sworn jurors after the jury has been impaneled, as follows:

Rule 16-1004. ACCESS TO NOTICE, ADMINISTRATIVE, AND BUSINESS LICENSE RECORDS

(a) Notice Records

A custodian may not deny inspection of a notice record that has been recorded and indexed by the clerk.

(b) Administrative and Business License Records

(1) Except as otherwise provided by the Rules in this Chapter, the right to inspect administrative and business license records is governed by Code, State Government Article, §§10-611 through 10-626.

(2) (A) ~~Except as provided by Code, Courts Article, §8-212 (b) or (c), a~~ A custodian shall deny inspection of an administrative record used by the jury commissioner ~~or clerk~~ in ~~connection with~~ the jury selection process~~. Except as otherwise provided by court order, a custodian may not deny inspection of a jury list sent to the court pursuant to Rules 2-512 or 4-312 after the jury has been empaneled and sworn.~~, except (i) as a trial judge orders in connection with a challenge under Code, Courts Article, §§8-408 and 8-409; and (ii) as provided in (B) and (C) of this subsection.

(B) After a **source pool/pool of qualified jurors** has been emptied and recreated in accordance with Code, Courts Article, §8-207, and after every person selected to serve as a juror from that pool has completed the person's service, a trial judge shall, upon request, disclose the name, zip code, age, sex, education, occupation, and occupation of spouse of each person whose name was selected from that pool and placed on a jury list, unless, in the interest of justice, the trial judge determines that this information remain confidential in whole or in part.

(C) A custodian shall, upon request, disclose the names and zip codes of the sworn jurors contained on a jury list after the jury has been impaneled and sworn, unless otherwise ordered by the trial judge.

(D) A jury commissioner may provide jury lists to the Health Care Alternative Dispute Resolution Office as required by that Office in carrying out its duties, subject to that Office's adoption of regulations to ensure against improper dissemination of juror data.

(E) At intervals to which a jury commissioner agrees, the jury commissioner shall provide the State Board of Elections and State Motor Vehicle Administration with data about prospective, qualified, or sworn

jurors needed to correct erroneous or obsolete information, such as that related to a death or change of address, subject to the Board's and Administration's adoption of regulations to ensure against improper dissemination of juror data.

. . .

Rule 16-1004 was accompanied by the following Reporter's Note.

To conform to recent statutory changes, several Rules pertaining to jury trials have been proposed for modification. Rules 2-512 and 4-312 have been proposed to be changed to require the jury list to include the addresses of qualified jurors and to state that any need for additional information regarding jurors is to be set by rule and not by individual jury plan. The proposed changes to Rule 16-1004 include language stating that the jury commissioner shall provide a jury list as required under Rules 2-512 and 4-312 and that a custodian may disclose only the names of sworn jurors. Eric Lieberman, Esq., counsel to The Washington Post was concerned that access to juror information would be too limited by the proposed changes to Rule 16-1004. He has requested that language be added to section (b) of Rule 16-1004 providing that a judge may order inspection of an administrative record used by the jury commissioner and that after the pool of qualified jurors has been emptied and all jurors have completed their service, upon request, a trial judge shall disclose information about the jurors unless, in the interest of justice, the judge determines that this information should remain confidential. The requested new language also provides that a custodian shall disclose the names and zip codes of the sworn jurors, unless otherwise ordered by the trial judge.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-512 by adding a new subsection (a)(1) and a new cross reference after subsection (a)(1), by adding to and deleting language from subsection (a)(2), by adding a new subsection (a)(3), by adding to and deleting language from section (b), by adding to and deleting language from subsection (c)(1), by adding a new subsection (c)(2), by adding to and deleting language from subsection (d)(1), by renumbering section (e) as subsection (d)(2) with an additional word added to it, by deleting section (f), by renumbering section (g) as section (e), by adding to and deleting language from subsection (e)(1), by adding to and deleting language from subsection (e)(2), by relettering section (i) as section (f), by adding to and deleting language from subsection (f)(1), by adding new subsections (f)(2)and (f)(3), and by making the second sentence of section (i) into section (g) with language changes, as follows:

Rule 2-512. JURY SELECTION

(a) ~~Challenge to the~~ Array and Jury Size

(1) Size

Before trial begins, the judge shall decide the required number of sworn jurors, including alternates, if any, and decide on the size of the array of qualified jurors needed for selecting the jury.
Cross reference: See Code, Courts Article, §8-420 (b).

(2) Challenge

A party may challenge the array ~~of jurors~~ on the ground that its members were

not selected~~, drawn,~~ or summoned according to law or on any other ground that would disqualify the ~~panel~~ array as a whole. A challenge to the array shall be made and determined before any individual qualified juror from that array is examined, except that the ~~court~~ trial judge for good cause may permit it to be made after the jury is sworn but before any evidence is received.

(3) Insufficient Array

If the array is insufficient for jury selection, the trial judge may direct that additional qualified jurors be summoned at random from the qualified juror pool as provided by statute.

(b) ~~Alternate Jurors~~ General Requirements

~~The court may direct that one or more jurors be called and impanelled to sit as alternate jurors. Any juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty shall be replaced by an alternate juror in the order of selection. An alternate juror~~ All individuals to be impanelled on the jury shall be ~~drawn~~ selected in the same manner, have the same qualifications, and be subject to the same examination~~, take the same oath, and have the same functions, powers, facilities, and privileges as a juror. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict~~.

(c) Jury List

(1) Contents

Before the examination of qualified jurors, each party shall be provided with a list ~~of jurors~~ that includes the name, address, age, sex, education, occupation of each qualified juror, ~~and~~ the occupation ~~of spouse~~ of each ~~juror~~ qualified juror's spouse, and ~~any~~ other information, if any, required by ~~the county jury plan~~ rule. ~~When the county jury plan requires the address of~~

~~a juror, the~~ Unless the trial judge orders otherwise, the address ~~of a juror, the address need~~ shall be limited to the city or town and zip code and shall not include the ~~house~~ street address or box number.

(2) Dissemination

(A) To Persons Assisting in Jury Selection

A party may provide the jury list to any person employed by the party to assist in jury selection.

(B) Prohibited

Unless the trial judge orders otherwise, a party and counsel may not disseminate the jury list or the information contained on the list to any other person.

Committee note: A jury commissioner shall provide a copy of the jury list to the trial judge and, with permission of the trial judge, to an other individual such as the courtroom clerk, or court reporter for use in carrying out official duties in connection with a trial. Copies of jury lists so provided are not to be included in the case record but shall be returned to the jury commissioner.

(d) Examination ~~of Jurors~~ and Challenges for Cause

(1) Examination

The ~~court~~ trial judge may permit the parties to conduct an examination of qualified jurors or may ~~itself~~ conduct the examination after considering questions proposed by the parties. If the ~~court~~ trial judge conducts the examination, ~~it~~ the judge may permit the parties to supplement the examination by further inquiry or may ~~itself~~ submit to the qualified jurors additional questions proposed by the parties. The qualified jurors' responses to any examination shall be under oath. ~~Upon~~ On request of any party, the ~~court~~ trial judge shall direct the clerk to call the roll of

the ~~panel~~ array and to request each qualified juror to stand and be identified when called by name.

~~(e) Challenge for Cause~~ (2) Challenge for Cause

A party may challenge an individual qualified juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown.

~~(f) Additional Jurors~~

~~When the number of jurors of the regular panel may be insufficient to allow for selection of a jury, the court may direct that additional jurors be summoned at random from the qualified jury wheel and thereafter at random in a manner provided by statute.~~

~~(g)~~ (e) ~~Designation of List of Qualified Jurors~~ Peremptory Challenges

(1) Designation of Qualified Jurors; Order of Selection

Before the exercise of peremptory challenges, the ~~court~~ trial judge shall designate from the jury list those ~~jurors~~ individuals who ~~have~~ remain qualified after examination. The number designated shall be sufficient to provide the required number of sworn jurors, ~~and~~ including alternates, if any, ~~to be sworn~~ after allowing for the exercise of peremptory challenges. The ~~court~~ trial judge shall at the same time prescribe the order to be followed in selecting ~~the jurors and alternate jurors~~ individuals from the list.

~~(h)~~ (2) ~~Peremptory Challenges~~ Number; Exercise of Peremptory Challenges

Each party is permitted four peremptory challenges plus one peremptory challenge for each group of three or less ~~alternate jurors~~ alternates to be impanelled. For purposes of this section, several plaintiffs or several defendants shall be considered as a single party unless the ~~court~~

trial judge determines that adverse or hostile interests between plaintiffs or between defendants justify allowing to each of them separate peremptory challenges not exceeding the number available to a single party. The parties shall simultaneously exercise their peremptory challenges by striking from the list.

~~(i)~~ (f) ~~Impanelling the~~ Impanelled Jury

(1) Impanelling

The ~~jurors and any alternates~~ individuals to be impanelled as sworn jurors, including alternates, if any, shall be called from the qualified jurors remaining on the jury list in the order previously designated by the ~~court~~ trial judge and shall be sworn.

(2) Oath; Functions, Powers, Facilities, and Privileges

All sworn jurors, including alternates, if any, shall take the same oath and, until discharged from jury service, have the same functions, powers, facilities, and privileges.

(3) Discharge of Jury Member

At any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate in the order of selection set under subsection (e)(1). When the jury retires to consider its verdict, the trial judge shall discharge any alternate not needed to replace another jury member.

(g) Foreperson

The ~~court~~ trial judge shall designate a sworn juror as ~~foreman~~ foreperson.

Source: This Rule is derived as follows:
Section (a) is in part derived from former Rules 754 a and ~~is consistent with former~~

Rule 543 c and in part new.

Section (b) is derived from former Rule 751 b and ~~is consistent with~~ former Rule 543 b 3.

Section (c) is new.

Section (d) is derived from former Rules 752, 754 b, and 543 d.

Section (e) is derived from former Rules ~~754 b~~ 753 and 543 a 3 and 4.

Section (f) is ~~consistent with former Rule 543 a 5 and 6~~ new.

Section (g) ~~is new with exception of the last sentence which is derived from former Rule 753 b 1~~ is derived from former Rule 751 d.

~~Section (h) is derived from former Rule 543 a 3 and 4.~~

~~Section (i) is derived from the last sentence of former Rule 753 b 3 and former Rule 751 d.~~

Rule 2-512 was accompanied by the following Reporter's Note.

Subsection (a)(1) is added to state expressly that a trial judge sets the size of the jury to be impanelled and, therefore, the size of the initial array, before jury selection begins. Accordingly, the former first sentence of section (b) is deleted.

Subsection (a)(2) is derived from former section (a), with deletion of the former word "drawn" for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection as opposed to the archaic drawing of numbers from a wheel, and substitution of the word "array" is substituted for the former word "panel", for internal consistency and consistency with revised Code, Courts Article, Title 8.

Subsection (a)(3) is derived from former section (f) with substitution of the term "trial judge" for the former word "court" to avoid the inference that a majority of the bench must concur; substitution of the word "array" for the former words "regular panel" for internal consistency and consistency with revised Code, Courts Article, Title 8; and substitution of the reference to a "qualified juror pool" for the former reference to a

"qualified jury wheel" for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection as opposed to the archaic drawing of numbers from a wheel.

The former second sentence of section (b) is restated as an affirmative statement applicable to all impanelled jurors, including alternates. The word "selected" is substituted for the former word "drawn," for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection, as opposed to the archaic drawing of numbers from a wheel.

Former section (c) is renumbered as subsection (c)(1), with addition of "qualified" to modify "juro[r]" to reflect the addition of a defined term "qualified juror" in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors. Subsection (c)(1) is revised to require the jury list to include an address for a qualified juror but limited to a city or town and zip code to afford qualified jurors in a civil trial with the same protection for identifying information as that afforded to qualified jurors in a criminal trial. *See* Rule 4-312. Additionally, the requirement for additional information is to be set by rule rather than individual jury plan, for consistency with Code, Courts Article, §8-105.

Subsection (c)(2) is added to set forth the manner in which jury lists are to be distributed and protected against dissemination of juror information unnecessarily. The Committee note reflects the practice in some jurisdictions, whereby a jury list is returned to the jury commissioner and, thereby, is subject to Rule 16-1001 *et seq.*

Subsections (d)(1) and (2) are derived from former sections (d) and (e) with addition of the term "qualified" to modify "juro[r]" to reflect the addition of a defined term "qualified juror" in Code,

Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors; and substitution of the word "array" for the former words "panel" for internal consistency and consistency with revised Code, Courts Article, Title 8.

Subsection (e)(1) is derived from former section (g), with substitution of references to "individuals" for the former references to "jurors" and "alternate jurors," as these individuals are winnowed from among the "qualified jurors" – as categorized in Code, Courts Article, Title 8 – but may not be sworn as jurors. Accordingly, in subsection (e)(1), reference to "remain[ing] qualified" after examination is substituted for the former reference to "hav[ing] qualified".

Subsection (e)(2) is derived from former section (h).

Subsection (f)(1) is derived from the former first sentence of section (i), with substitution of reference to "individuals" to be impanelled "as sworn jurors" for the former reference to "jurors and any alternates," as these individuals are winnowed from among the "qualified jurors" – as categorized in Code, Courts Article, Title 8 – but are not yet sworn as jurors; and with the addition of "jury" to modify the word "list" for internal consistency.

Subsection (f)(2) is derived from the former third sentence of section (b), as it related to being sworn and serving as a sworn juror.

Subsection (f)(3) is derived from the former second and fourth sentences of section (b), with substitution of the reference to "the trial judge ... find[ing]" for the former reference "becomes or is found," and the passive "shall be discharged," since the judge's ruling is determinative. The substitution also avoids the inference that a majority of the bench must concur.

Section (g) is derived from the former second sentence of section (i), with

substitution of the word “foreperson” for the

former word “foreman,” to reflect the Judiciary’s policy to use gender neutral words where practicable.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-312 by adding a new subsection (a)(1) and a new cross reference after subsection (a)(1), by adding to and deleting language from subsection (a)(2), by adding a new subsection (a)(3), by adding to and deleting language from section (b), by adding to and deleting language from subsection (c)(1), by adding a new subsection (c)(2), by adding to and deleting language from subsection (d)(1), by renumbering section (e) as subsection (d)(2) with an additional word added to it, by deleting section (f), by renumbering section (g) as section (e), by adding to and deleting language from section (e), by relettering section (h) as section (f), by adding to and deleting language from subsection (f)(1), by adding new subsections (f)(2)and (f)(3), and by making the second sentence of section (h) into section (g) with language changes, as follows:

Rule 4-312. JURY SELECTION

(a) ~~Challenge to the~~ Array and Jury Size

(1) Size

Before trial begins, the trial judge shall decide the required number of sworn jurors, including alternates, if any, and

decide on the size of the array of qualified jurors needed for selecting the jury. Cross reference: See Code, Courts Article, §8-420 (b) and Code, Criminal Law Article, §2-303 (d).

(2) Challenge

A party may challenge the array ~~of jurors~~ on the ground that its members were not selected~~, drawn,~~ or summoned according to law or on any other ground that would disqualify the ~~panel~~ array as a whole. A challenge to the array shall be made and determined before any individual qualified juror from that array is examined, except that the ~~court~~ trial judge for good cause may permit it to be made after the jury is sworn but before any evidence is received.

(3) Insufficient Array

If the array is insufficient for jury selection, the trial judge may direct that additional qualified jurors be summoned at random from the qualified juror pool as provided by statute.

(b) ~~Alternate Jurors~~ General Requirements

~~(1) Generally~~

~~An alternate juror~~ All individuals to be impanelled on the jury shall be ~~drawn~~ selected in the same manner, have the same qualifications, and be subject to the same examination~~, take the same oath, and have the same functions, powers, facilities, and privileges as a juror~~.

~~(2) Capital Cases~~

~~In cases in which the death penalty may be imposed, the court shall appoint and retain alternate jurors as required by Code, Criminal Law Article, §2-303 (d).~~

~~(3) Non-capital Cases~~

~~In all other cases, the court may direct that one or more jurors be called and~~

~~impanelled to sit as alternate jurors. Any juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty, shall be replaced by an alternate juror in the order of selection. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict.~~

(c) Jury List

(1) Contents

Before the examination of qualified jurors, each party shall be provided with a list ~~of jurors~~ that includes the name, address, age, sex, education, and occupation of each qualified juror, the occupation of each qualified juror's spouse, and ~~any~~ other information, if any, required by ~~the county jury plan~~ rule. ~~When the county jury plan requires the address of a juror,~~ Unless the trial judge orders otherwise, the address shall be limited to the city or town and zip code and shall not include the ~~juror's~~ street address or box number~~, unless otherwise ordered by the court~~.

(2) Dissemination

(A) To Persons Assisting in Jury Selection

A party may provide the jury list to any person employed by the party to assist in jury selection.

(B) Prohibited

Unless the trial judge orders otherwise, a party and counsel may not disseminate the jury list or the information contained on the list to any other person.

Committee note: A jury commissioner shall provide a copy of the jury list to the trial judge and, with permission of the trial judge, to any other individual such as the courtroom clerk or court reporter for use in carrying out official duties in connection

with a trial. Copies of jury lists so provided are not to be included in the case record but shall be returned to the jury commissioner.

(d) Examination ~~of Jurors~~ and Challenges for Cause

(1) Examination

The ~~court~~ trial judge may permit the parties to conduct an examination of ~~prospective~~ qualified jurors or may ~~itself~~ conduct the examination after considering questions proposed by the parties. If the ~~court~~ trial judge conducts the examination, ~~it~~ the judge may permit the parties to supplement the examination by further inquiry or may ~~itself~~ submit to the qualified jurors additional questions proposed by the parties. The qualified jurors' responses to any examination shall be under oath. ~~Upon~~ On request of any party, the ~~court~~ trial judge shall direct the clerk to call the roll of the ~~panel~~ array and to request each qualified juror to stand and be identified when called by name.

~~(e)~~ (2) Challenges for Cause

A party may challenge an individual qualified juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown.

~~(f) Additional Jurors~~

~~When the number of jurors of the regular panel may be insufficient to allow for selection of a jury, the court may direct that additional jurors be summoned at random from the qualified jury wheel and thereafter at random in a manner provided by statute.~~

~~(g)~~ (e) ~~Designation of List of Qualified Jurors~~ Peremptory Challenges

Before the exercise of peremptory challenges, the ~~court~~ trial judge shall designate from the jury list those ~~jurors~~

individuals who ~~have~~ remain qualified after examination. The number designated shall be sufficient to provide the required number of sworn jurors, including ~~and~~ alternates ~~to be sworn~~ if any, after allowing for the exercise of peremptory challenges pursuant to Rule 4-313. The ~~court~~ trial judge shall at the same time prescribe the order to be followed in selecting ~~the jurors and alternate jurors~~ individuals from the list.

~~(h)~~ (f) ~~Impanelling the~~ Impanelled Jury

(1) Impanelling

The ~~jurors and any alternates~~ individuals to be impanelled as sworn jurors, including alternates if any, shall be called from the qualified jurors remaining on the jury list in the order previously designated by the ~~court~~ trial judge and shall be sworn.

(2) Oath; Functions, Powers, Facilities, and Privileges

All sworn jurors, including alternates if any, shall take the same oath and, until discharged from jury service, have the same functions, powers, facilities, and privileges.

(3) Discharge of Jury Member

At any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate in the order of selection set under section (e). When the jury retires to consider its verdict, the trial judge shall discharge any alternate not needed to replace another jury member.

(g) Foreperson

The ~~court~~ trial judge shall designate a sworn juror as ~~foreman~~ foreperson.

Source: This Rule is derived as follows:
Section (a) is in part derived from former

Rule 754 a and in part new.

Section (b) is derived from former Rule 751 b.

Section (c) is new.

Section (d) is derived from former Rules 752 and 754 b.

Section (e) is derived from former Rule ~~754 b~~ 753.

Section (f) is new.

~~Section (g) is derived from former Rule 753 b 1.~~

~~Section (h) is derived from former Rule 751 c and d.~~

Section (g) is derived from former Rule 751 d.

Rule 4-312 was accompanied by the following Reporter's Note.

Subsection (a)(1) is added to state expressly that a trial judge sets the size of the jury to be impanelled and, therefore, the size of the initial array, before jury selection begins. Accordingly, former subsection (b)(2) and the first sentence of subsection (b)(3) is deleted, with the addition of the cross references.

Subsection (a)(2) is derived from former section (a), with deletion of the former word "drawn" for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection as opposed to the archaic drawing of numbers from a wheel; substitution of the word "array" for the former word "panel," for internal consistency and consistency with revised Code, Courts Article, Title 8; addition of the word "qualified" to modify "juror" to reflect the addition of a defined term "qualified juror" in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors; and substitution of the term "trial judge" for the former word "court" to avoid the inference that a majority of the bench must concur.

Subsection (a)(3) is derived from former section (f), with substitution of the word "array" for the former words "regular panel" for internal consistency and consistency with

revised Code, Courts Article, Title 8; substitution of the term “trial judge” for the former word “court” to avoid the inference that a majority of the bench must concur; and substitution of the reference to a “qualified juror pool” for the former reference to a “qualified jury wheel” for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection as opposed to the archaic drawing of numbers from a wheel.

Former subsection (b)(1), except as it related to the oath and powers, is renumbered as section (b) and is restated as an affirmative statement applicable to all impanelled jurors, including alternates. The word “selected” is substituted for the former word “drawn”, for consistency with revised Code, Courts Article, Title 8, which reflects the use of computers for selection, as opposed to the archaic drawing of numbers from a wheel.

Former section (c) is renumbered as subsection (c)(1), with addition of “qualified” to modify “juro[r]” to reflect the addition of a defined term “qualified juror” in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors. Subsection (c)(1) is revised to require the jury list to include an address for a qualified juror with the current limitation as to a city or town and zip code. Additionally, the requirement for additional information is to be set by rule rather than individual jury plan, for consistency with Code, Courts Article, §8-105.

Subsection (c)(2) is added to set forth the manner in which jury lists are to be distributed and protected against dissemination of juror information unnecessarily. The Committee note reflects the practice in some jurisdictions, whereby a jury list is returned to the jury commissioner and, thereby, is subject to Rule 16-1001 *et seq.*

Subsections (d)(1) and (2) are derived from former sections (d) and (e), with substitution of the terms “trial judge” and “judge” for the former words “court” and “it,” and deletion of “itself,” to avoid the inference that a majority of the bench must concur; addition of the term “qualified” to modify “juro[r]” to reflect the addition of a defined term “qualified juror” in Code, Courts Article, §8-101 and to distinguish amongst prospective, qualified, and sworn jurors; and substitution of the word “array” for the former word “panel” for internal consistency and consistency with revised Code, Courts Article, Title 8.

Section (e) is derived from former section (g), with substitution of the term “trial judge” for the former word “court” to avoid the inference that a majority of the bench must concur and substitution of references to “individuals” for the former references to “jurors” and “alternate jurors”, as these individuals are winnowed from among the “qualified jurors” – as categorized in Code, Courts Article, Title 8 – but are not yet sworn as jurors. Accordingly, in section (e), reference to “remain[ing] qualified” after examination is substituted for the former reference to “hav[ing] qualified.”

Subsection (f)(1) is derived from the former first sentence of section (h), with substitution of the reference to “individuals” to be impanelled “as sworn jurors” for the former reference to “jurors and any alternates”, as these individuals are winnowed from among the “qualified jurors” – as categorized in Code, Courts Article, Title 8 – but are not yet sworn as jurors; and with the addition of “jury” to modify the word “list” for internal consistency.

Subsection (f)(2) is derived from the former subsection (b)(1), as it related to being sworn and serving as a sworn juror.

Subsection (f)(3) is derived from the former second and third sentences of subsection (b)(3), with substitution of the

reference to “the trial judge ... find[ing]” for the former reference “becomes or is found,” and the passive “shall be discharged,” since the judge’s ruling is determinative. The substitution also avoids the inference that a majority of the bench must concur.

Section (g) is derived from the former second sentence of section (h), with substitution of the term “trial judge” for the former word “court” to avoid the inference that a majority of the bench must concur; addition of the word “sworn” to modify “juror” to distinguish amongst prospective, qualified, and sworn jurors in accordance with revised Code, Courts Article, Title 8; and substitution of the word “foreperson” for the former word “foreman,” to reflect the Judiciary’s policy to use gender neutral words where practicable.

The Chair said that the Honorable Dennis Sweeney, Judge of the Circuit Court for Howard County, was the chair of the Council on Jury Use and Management which had revised many of the rules pertaining to jury trials. The Chair told the Committee that although Judge Sweeney could not attend today’s meeting, Eric Lieberman, Esq., Counsel to The Washington Post was present to discuss his proposed changes to Rule 16-1004.

Mr. Lieberman explained that he had proposed that language should be added to section (b) stating that a judge may order inspection of an administrative record used by the jury commissioner and that after the pool of qualified jurors has been emptied and all jurors have completed their service, a trial judge, upon request, shall disclose information about the jurors, unless the judge determines, in the interest of justice, that

this information should remain confidential. He said that he had worked with Judge Sweeney and the General Court Administration Subcommittee on the Rules pertaining to jury trials. He expressed his appreciation of the Subcommittee's willingness to accommodate the concerns of the newspaper. The Chair thanked Mr. Lieberman for helping with the jury trial rules.

Judge Hotten inquired as to whether the information that will be disseminated to the public includes the addresses of jurors. Master Mahasa answered that only the zip code will be given out, not the address. Judge Hotten agreed that this is appropriate, noting that some jurors had expressed their concern about their address being publicized. The Chair pointed out that there is a reference to a change of address in subsection (b)(2)(E) of Rule 16-1004 pertaining to the jury commissioner providing the State Board of Elections and the State Motor Vehicle Administration with data about prospective, qualified, or sworn jurors, subject to administrative regulations to ensure against improper dissemination of juror data. He added that he reads this to mean that a criminal defendant is not entitled to the specific street address of the jurors. Situations compromising a juror's privacy may arise during *voir dire*. In one case, a juror told the judge that he lived at a specified address, next door to someone who recently had been tried for murder. A transcript would reveal this information. It is difficult to enact a rule that resolves all problems.

Master Mahasa repeated a prior comment made at an earlier meeting that the Rule authorizes the dissemination of enough information to allow anyone to use the telephone book or the Internet to find the specific address of a juror. The Chair remarked that this is a good point; the amateurs will not be able to research this information, but more sophisticated people may be able to. However, the Rule contains language in subsection (b)(2)(B) that provides that in the interest of justice, a judge can take action to keep information confidential. The media is in agreement with this safeguard.

Mr. Klein questioned as to why there is bolded language in subsection (b)(2)(B). The Assistant Reporter replied that the Committee should make a choice between the two terms, "source pool" or "pool" of qualified jurors. The Reporter asked why the two terms are suggested. The Assistant Reporter responded that one had been proposed, and the other is the term used in Code, Courts Article, §8-207. The Chair expressed the opinion that the language of the statute should be followed, since the Rule refers to it. He inquired as to whether the term "qualified juror" is confusing. What is being addressed is a source pool of eligible jurors as opposed to jurors who are qualified to sit in a case. The Style Subcommittee can decide the appropriate language. The Rule should use the term "source pool," because it is in the statute. The Reporter noted that the term "qualified juror" is defined in Code, Courts Article, §8-101 (e). The Chair recommended that the term be "source pool of qualified jurors."

He said that he would check with Judge Sweeney as to his preference. The Reporter said that this issue would be considered by the Style Subcommittee.

Judge Dryden noted that the address of jurors is provided to the parties. Subsection (c)(1) of Rule 2-512 provides that each party is given a list of jurors that includes the name and address of each qualified juror. Rule 16-1004 provides that only the zip code is given out if someone wants the information after the juror's service is completed. The Reporter commented that the last sentence of subsection (c)(1) defines the word "address" to mean only the city or town and zip code, but not the street address. It may be preferable to move this last sentence to a location earlier in the Rule. The Style Subcommittee can look at this.

Mr. Shipley told the Committee that he had a question pertaining to subsection (c)(2). The Committee note provides that copies of jury lists provided to the trial judge or other individuals shall be returned to the jury commissioner but not included in the case record. What happens if the case is appealed on the issue of the array of the jury panel? Judge Dryden pointed out that the Rule does not instruct the commissioner to destroy the list. Mr. Michael remarked that the judge will know at the time of the trial that there is going to be an issue regarding the jury array. A good attorney will make the jury list part of the record. The mechanics of that appeal would guarantee that the jury list is part of the record.

Judge Dryden suggested that the language of the Committee note could be: "The jury list shall be returned to and retained by the jury commissioner." The Reporter suggested that the last sentence of the Committee note could be: "Unless otherwise ordered by the court, copies of jury lists so provided are not to be included in the case record but shall be returned to the jury commissioner." She also suggested adding that if a jury list is included in the record because of a challenge, then the record would be sealed.

The Chair commented that subsection (c)(2)(B) of Rules 2-512 and 4-312 could be revised to read: "Unless the trial judge orders otherwise, a party and counsel may not disseminate the jury list or the information contained on the list to any other person, and after the jury selection process, it shall be returned to the jury commissioner." He asked if the intention was that the jury list would never become part of the case record. The Reporter replied that this was an issue related to access to court records on the Internet. Judge Dryden remarked that this is not as much of a concern in civil cases. The Chair added that in civil cases there is not as much of a safety concern as in criminal cases, but a juror who decides a famous case and is called by many reporters for an interview may not want to serve as a juror again.

The Chair suggested that there are two different ways to structure the language of subsection (c)(2)(B). One is "[u]pon request, the court may allow the list to be disseminated...".

The other is “[u]nless the court orders otherwise, a party and counsel may not disseminate...”. The Reporter questioned as to whether the concept of giving the list to the jury commissioner unless the court orders otherwise should be put into the body of the Rule. The Chair answered that this should be part of the Rule, not part of a Committee note. He suggested that the language could be: “Unless the trial judge orders otherwise, copies of jury lists are not to be included in the case record but shall be returned to the jury commissioner.” Judge Matricciani pointed out that this is a major change in procedure. No one currently collects jury lists and returns them to the jury commissioner. Ms. Smith added that the court’s copy of the jury list goes into the case record.

The Chair commented that the Rule could require the judge to do something with his or her copy of the jury list. It could require the clerk to preserve his or her copy of the list. Judge Hotten remarked that two different items are being discussed. She said that she keeps a copy of the jury list and writes notes on it. She would not want her copy to be disseminated or preserved as part of the case record. The courtroom clerk also has a copy of the jury list. Which copy is the one to be preserved? Judge Kaplan observed that someone may raise an issue about the jury list later on. The lawyers in the case, the judge, and the courtroom clerk have copies of the list. If the lawyer wants to make an issue regarding the jury array, the lawyer can place his or her own copy in the record. Judge Dryden

commented that the clerk's copy should be the official copy.

Mr. Klein said that the default should be that the jury list is not part of the record unless someone seeks to make it part of the record. It might be useful to add a subsection (c)(2)(C) to clarify this. Subsection (c)(2)(B) provides that the parties cannot disseminate the jury list. The issue being discussed is what happens to all of the copies of the list. The Chair agreed and suggested that subsection (c)(2)(C) should state: "Unless marked for identification and offered into evidence pursuant to Rule 2-516 or Rule 4-322, Exhibits, a copy of the jury list is not part of the case record." An example of a problem with the jury array that could arise is one that took place in Baltimore County where the panels sent to the courtroom were inadvertently clustered by zip code. This type of situation would be covered by Mr. Klein's suggested language. Mr. Shipley expressed his agreement with this language, and by consensus, the Committee approved the changes to section (c) of Rules 2-512 and 4-312.

Mr. Shipley pointed out that the last sentence of subsection (d)(1) of Rule 4-312 states: "...the trial judge shall direct the clerk to call the roll of the array and to request each qualified juror to stand and be identified when called by name." The actual practice is that the jurors are called by juror number. Judge Matricianni suggested that the words "by name" be deleted. By consensus, the Committee agreed to this suggestion.

By consensus, the Committee approved the Rules as amended.

Agenda Item 2. Consideration of proposed amendments to Rule 3-510 (Subpoenas)

Judge Dryden presented Rule 3-510, Subpoenas, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 500 - TRIAL

AMEND Rule 3-510 to add a new subsection (h)(2) providing that counsel may inspect and copy subpoenaed medical records at any time prior to trial as long as counsel files a written acknowledgment that counsel has inspected or copied the records, as follows:

Rule 3-510. SUBPOENAS

. . .

(h) Records of Health Care Providers

(1) A health care provider, as defined by Code, Courts Article, §3-2A-01 (e), served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the records to the clerk of the court that issued the subpoena at or before the time specified for production. The health care provider may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the health care

provider. The certification shall be prima facie evidence of the authenticity of the records.

Alternative 1

(2) At any time prior to trial, counsel of record is permitted to inspect and copy the subpoenaed medical records. If counsel inspects or copies the records, the file shall include a written acknowledgment by counsel that counsel has inspected or copied the records.

Alternative 2

(2) At any time prior to trial, counsel of record is permitted to inspect and copy the subpoenaed medical records as long as counsel puts a written acknowledgment in the file stating that counsel has inspected or copied the records.

~~(2)~~ (3) Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action, the clerk shall return the original records to the health care provider but need not return copies.

~~(3)~~ (4) When the actual presence of the custodian of medical records is required, the subpoena shall so state.

Cross reference: Code, Courts Article, §10-104 includes an alternative method of authenticating medical records in certain cases. Code, Health-General Article, §4-306 requires that a subpoena to produce medical records without the authorization of a person in interest be accompanied by a certification that a copy of the subpoena has been served on the person whose records are being sought

or that the court has waived service for good cause.

. . .

Rule 3-510 was accompanied by the following Reporter's Note.

Nichole M. Hatcher, Esq. pointed out that the wording of subsections (h)(1) and (2) of Rule 3-510 incorrectly implies that a defendant is not allowed to view the medical history of a plaintiff until the day of trial. Subsection (h)(1) provides: "...the records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued...". Subsection (h)(2) states: "Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them...". Ms. Hatcher cited a recent case in the District Court in Baltimore County in which the judge quashed a subpoena based, in part, on the allegation by the plaintiff that Rule 3-510 requires that records be sealed until the day of trial. Ms. Hatcher notes that Code, Courts Article, §10-104 provides that a party who intends to introduce the writing or record of a health care provider without the provider's testimony must serve a notice of intent, a list that identifies each writing or record, and a copy of the writing or record on the other parties at least 30 days before the beginning of the trial. A defendant who is not permitted access to the subpoenaed records until the day of trial would not be able to comply with Code, Courts Article, §10-104 and would not be able to have his or her own expert view the medical history of a plaintiff claiming personal injuries in advance of trial.

To correct this interpretation of the Rule, the District Court Subcommittee proposes to add a new subsection (h)(2) to Rule 3-510, which would clarify that medical records may be inspected and copied at any time prior to trial as long as counsel acknowledges in writing that the records have

been inspected or copied.

Judge Dryden explained that Nicole Hatcher, Esq. had written a memorandum to her then-colleague, Harry Johnson, Esq., a member of the Rules Committee who was not able to attend today's meeting. In the memorandum, Ms. Hatcher pointed out a problem with the language of subsections (h)(1) and (2) of Rule 3-510. In a civil case in District Court, if the plaintiff in a personal injury case would like the medical records of the client introduced at trial, and the client has no objection to the medical records being obtained by subpoena and no objection to plaintiff's counsel sending those records to opposing counsel, they can be presented at trial without the treating physician being present. If defense counsel wants to subpoena medical records, the Rule requires that the records not be opened until the day of trial when they are brought into the courtroom. This prevents defense counsel from looking at the records ahead of time, so that they can check to see if they may need to call an expert witness or to obtain more records. Ms. Hatcher notes that this is not a problem in circuit court, because records depositions are available.

Judge Dryden said that a suggested solution to the problem is to permit any counsel of record to inspect and copy the subpoenaed medical records as long as counsel puts a written acknowledgment in the file. The Subcommittee saw this as a minimal problem that required a minimal solution. The situation

does not arise very often, and when it does, many judges would grant a continuance to allow counsel to look at the records or find another way to solve the problem. However, in Ms. Hatcher's case, the judge would not allow a continuance and did not permit the introduction of the records. Judge Dryden had spoken with several lawyers who handle this type of case. They had explained that insurance companies maintain lists of people who have received medical treatment in conjunction with automobile accidents or other tort claims. If people have frequent accidents, sometimes the same injury and medical expenses are claimed in two or more cases. Two alternatives of proposed new subsection (h)(2) are being presented.

Mr. Klein commented that about a year ago, one of his colleagues complained to him that he was unable to look at the medical records in a case before the trial. Judge Dryden remarked that one of the ideas that had been suggested to address this problem was to change Rule 4-321, Interrogatories to Parties. The Chair inquired as to what would happen under the revised language if the defense attorney sees from the Mideast Index of prior accident records that the plaintiff has numerous prior accidents resulting in similar injuries. The defense attorney subpoenas all of the prior medical records. The plaintiff claims that the prior records have nothing to do with the accident that is the subject of the litigation. The defense, however, thinks that the records are pertinent because they show a pattern of conduct or a prior injury. Are the other rules and

statutes that are applicable sufficient to deal with issues relating to PL 104-191 (1996), the Health Insurance Portability and Accountability Act (HIPAA)? Judge Dryden responded that this is the reason only counsel is allowed access to the medical records, because counsel has an obligation under HIPAA to keep the records private.

The Chair commented that it is easy to provide that the defense attorney is entitled to look at exhibits that the plaintiff intends to introduce, and it makes no sense to prohibit the defense attorney from looking at the records until the file is in the courtroom. He also stated his concern that providing the appropriate relief does not turn the Rule into a sword to allow the acquisition of other material.

Judge Dryden pointed out that if one is able to see the records at the time of trial, this would impinge on HIPAA anyway. The proposed change allows the records to be seen at an earlier time, but under the same circumstances. Although Ms. Hatcher is no longer at Whiteford, Taylor, and Preston as she was when her memorandum was written, Judge Dryden had spoken with Mr. Whiteford, a partner in that firm, who was in agreement with this change to the Rule. Master Mahasa questioned as to why a *pro se* litigant should not be able to have access to the medical records, also. Judge Dryden replied that he was not certain that *pro se* litigants would maintain the requisite level of privacy. He said that he recognizes that this is somewhat inequitable, but

this situation is not going to happen very often in small claim cases. In a large claim case, most parties will have counsel, or the matter will be litigated in the circuit court where more discovery is available. Master Mahasa inquired as to whether something could be added to make the Rule more equitable. The Chair said that it might be preferable for this procedure to be handled by filing a motion. A *pro se* litigant as well as a lawyer could file a motion. Judge Dryden responded that this may make the procedure more complicated. Mr. Michael added that a motions procedure would provide a forum for any HIPAA challenges.

Judge Dryden said that the Subcommittee had noted that this situation is so infrequent that one possibility was to make no change to the Rules. However, the decision was that a minor change to the Rule might work. The Chair suggested that the following phrase could be added at the beginning of current subsection (h)(2): "Unless the court has ordered otherwise...". Judge Matricciani inquired whether a change could be made to the Rule to clarify that the procedure set forth in the Rule is not the same as the procedure in circuit court for records depositions. The Chair said that this would not solve the problem for the District Court. Judge Matricciani responded that he understood the problem to be that the judge viewed the request as a records deposition. Judge Dryden acknowledged that this was part of the problem, but another aspect is that on the day of trial, a judge may refuse to grant a continuance to allow counsel

to fully examine the records.

Mr. Michael questioned as to how quickly the District Court could respond to a motion if the motions procedure suggested by the Chair were added to the Rule. Judge Dryden replied that it could be handled instantaneously. Judge Matricciani remarked that motions in the District Court usually are not be considered until the day of trial. Judge Dryden suggested that this could be handled prior to the trial. Mr. Klein asked about whether there would be a hearing. Judge Dryden responded that the opposing party should have a chance to respond. Mr. Klein inquired as to how a party can obtain an order to view the records. Judge Dryden answered that what often happens in the District Court is that a motion is filed so close to the trial date that the trial is turned into a hearing on the motion. The motion is heard prior to the trial, then the matter is continued for 30 minutes.

The Chair pointed out that the current Rule is silent with respect to the timing of when the records are released to the courtroom clerk. Judge Dryden responded that current subsection (h)(2) provides that the records are released upon commencement of the trial. Mr. Klein said that he could not understand why the records would be a secret until the day of trial. A person who puts a medical condition at issue would expect the records to be reviewed. The Chair commented that it is no problem when the issue is the defendant’s right to inspect medical records subpoenaed by the plaintiff who intends to introduce those

records into evidence at trial. Judge Dryden added that if defense counsel subpoenas the records, defense counsel cannot see them until the day of trial. Mr. Klein noted that defense counsel would not be able to tell whether the record was complete. Mr. Leahy observed that defense counsel would have to subpoena the records, because the plaintiffs would offer only the records they choose. Judge Dryden responded that the plaintiff can select the records that he or she would like to introduce into evidence. The plaintiff notifies the defense, and the defense receives the records prior to trial. The plaintiff can introduce the records into evidence without the need for the physician to be present. Without the physician being present, it is difficult for defense counsel to introduce into evidence the plaintiff's medical records that the defense has subpoenaed if counsel can only see the records upon the commencement of the trial. Mr. Klein noted that the defense would not know whether to have their witnesses present.

Judge Dryden reiterated that this is not a big problem. Even though one judge would not continue the case so the defense could see the medical records, most judges are willing to do so. Mr. Klein said that his point was that defense counsel cannot take the risk of showing up at trial without the witnesses if the judge does not grant a continuance. Mr. Leahy expressed the opinion that a *pro se* party should have the same right to see the records before trial. A *pro se* defendant may not know how to

subpoena records, but if the defendant is sufficiently astute to know what to do, he or she should have the same right as a party represented by counsel. Judge Dryden acknowledged this position, but he again pointed out that this impacts the privacy of medical records. In the District Court, the clerks in Judge Dryden's county put the medical records in a separate envelope, so that anyone who does not have a right to see them cannot gain access to the records. He agreed that some procedure to include access for *pro se* litigants could be added to the Rule. One way would be for the clerk's office to supervise a *pro se* litigant. An attorney is an officer of the court and should have the integrity to protect the privacy of the records. A *pro se* litigant could use the records for reasons that are not legitimate. Medical records may include information about medications or treatment for mental illness that have no relation to the issues presented in the case.

Judge Matricciani suggested that the beginning phrase of the suggested language of subsection (h)(2) could read: "At any time prior to trial, the court may permit counsel of record to inspect...". The court could then supervise the inspection. Judge Dryden responded that the Subcommittee was trying to avoid setting up a motions procedure and avoid court intervention. Judge Matricciani asked about court supervision, and Judge Dryden replied that supervision would only be required for *pro se* litigants. Mr. Shipley noted that a clerk will not unseal the

record without a court order.

The Chair suggested that current subsection (h)(2) read as follows: “Unless the court has ordered that the record may be inspected and copied prior to trial, upon commencement of the trial...”. Judge Dryden remarked that if this language were adopted, the court would still have to be involved. The Chair commented that the involvement of the court would protect against a *pro se* litigant who may be fighting with a relative and wants to get the records to release them to the press. It also deals with the situation where the defense has subpoenaed records. Judge Dryden asked if the revised language will contain a reference to a written acknowledgment about the inspection. The Chair replied negatively, stating that the court order authorizes the terms and conditions of the inspection.

Mr. Klein observed that someone may object to a pretrial inspection of the medical records. The party who wants to inspect should give notice to the other party to allow an opportunity for objection. The court would only have to get involved if an objection is filed to the inspection. Judge Dryden responded that the Chair’s suggested revision assumes that the court would permit the inspection unless an objection is made. It should not be too much of a motions practice. The Chair pointed out that some of this may be gamesmanship. In a personal injury case in the District Court where the plaintiff is represented by a lawyer, the lawyer will send copies of the

medical records to the insurance adjuster before suit is even filed. When the defense attorney comes to court requesting a continuance to see the records, it is not appropriate because he or she has already seen the records that were provided by the insurance company. This may have been the reason why the judge to whom the memorandum refers refused to grant a continuance. The best approach is to allow the trial judge to handle the matter appropriately. By consensus, the Committee approved the language suggested by the Chair changing subsection (h)(2).

By consensus, the Committee approved the Rule as amended.

Agenda Item 3. Reconsideration of policy issues concerning rescheduling of trial and hearings (See Appendix 1)

The Chair explained that the issue before the Committee is drafting a rule to govern continuances whether the continuance is based on schedule conflicts, or something else, such as counsel getting into a case late. There is an administrative order of the Chief Judge of the Court of Appeals pertaining to continuances. Its genesis was problems associated with the federal Speedy Trial Act, 18 U.S.C.A.§3161 et. seq., that were impacting on attorneys as well as the many statutes providing for priorities in scheduling cases. The Committee can address today whether some of the problems can be sufficiently congealed, leaving to the administrative judge’s discretion what is in the interest of justice.

The Reporter noted that this issue has been around for many

years. The latest action was the Judicial Council's discussion of continuances in October, 2006. The latest Rules Committee version is also in the meeting materials. (See Appendix 1). She had listed 10 of the difficult issues associated with this matter in her memorandum. The Rules Committee seemed to have solved many of the problems with continuances in its latest draft. The judge can overrule any of the priorities listed if justice so requires. Research on how other states handle case conflicts was conducted and had been reviewed previously. The Committee is being asked to provide some guidance on this issue.

Mr. Klein expressed the opinion that the latest version of proposed new Rule 1-333 is well written. He noted that section (e) provides that "a continuance based on conflicting case assignments ordinarily is governed by administrative order of the Chief Judge of the Court of Appeals." This language generally means that this is not engraved in stone but can be changed if necessary. He said that he prefers the phrase "for good cause shown" as opposed to "as justice may require" in section (b). His reasoning stemmed from his experience as a new lawyer in front of the Honorable Frank Kaufman, a judge of the U.S. District Court at that time who was somewhat inflexible about granting continuances. Judge Kaufman decided that a valid reason for continuing a trial was the fact that Mr. Klein would be away on his honeymoon.

Judge Dryden commented that the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, had stated at a meeting of

the Judicial Council that he planned to revisit the contents of the administrative order pertaining to continuances. The Chair said that Judge Bell would like to see what the Rules Committee suggests on the issue of continuances. Should the Rule be placed in Title 1, so that it applies to all courts, or should it go in Titles 2, 3, 4, 8, and 11? He suggested that the better approach would be to put the proposed Rule in Title 1, so that it applies to all courts. The Rule should contain language providing that where there is a schedule conflict, the administrative judges shall confer with one another to solve the conflict. This would be similar to the language in Code, Family Law Article, §9.5-206, that pertains to determination of jurisdiction when more than one state is involved in a child custody dispute. Most of the time the conflicts can be worked out. If one arises in the Court of Special Appeals, the dates are moved around, or the hearings start at 9:00 a.m. Nothing requires the Court of Special Appeals to make these arrangements. Many attorneys say that other courts are not as cooperative. There is no way to require a federal judge to change the schedule. It is not appropriate to require that criminal cases always take precedence over civil cases, that appellate cases always take precedence over trial cases, or that federal cases always take precedence over state cases.

Judge Dryden noted that the administrative order provides that whichever case is on the calendar first takes priority in scheduling. The Chair responded that this is not always appropriate. It may mean that a speeding ticket case takes

precedence over a serious criminal case. The administrative order may work for the judge, but it is not necessarily fair. Judge Dryden said that hopefully, a judge would recognize the problem, but Ms. Ogletree pointed out that not all judges would do so. The Chair remarked that the Rule cannot be written to address unreasonable judges. Judge Dryden added that a busy single practitioner who asks for a postponement may not be able to find another date for a trial. The Chair observed that occurrences such as snow days interfere with court schedules, and the time standards also complicate the scheduling, causing the judges to feel that they cannot be as flexible as they otherwise would have been.

The Chair commented that scheduling orders in the differentiated case management system can provide more efficient scheduling. When lawyers are involved in a major case, a date is assigned to accommodate counsels' schedules as much as possible. Mr. Michael remarked that practitioners who are handling many major cases often have scheduling difficulties. Mr. Brault had pointed out in his memorandum that often judges tell these lawyers that they need to get someone else to handle a particular matter because the lawyer is overbooked. Judge Kaplan said that there is often room to modify the schedules pretrial. If all parties are in agreement, then another date can be set up.

The Chair told the Committee that he had asked for comments from circuit administrative judges and from the District judges. The Honorable Ben Clyburn, Chief Judge of the District Court, had

provided helpful material, but it was not adaptable to being in a rule. The Rule has to be right for the lawyer, the client, and for the system of justice. A series of illustrations could be built into the Rule, including what would ordinarily take precedence. This would also address the rule in *State v. Hicks*, 285 Md. 310 (1979). A case with a *Hicks* scheduling problem generally will not be continued. Language could be added that would provide that ordinarily where there is a conflict, the judges confer with one another to resolve the conflict. Judge Dryden inquired if this is more of a problem in criminal cases rather than civil cases. Civil cases are governed more by counsel. If counsel want to postpone a case, as long as they all agree, the matter can be postponed. In criminal cases, the court must push the cases ahead.

The Chair said that if the plaintiff and defendant agree on a date that is years ahead, the court should not force the case to be tried at an earlier time. In a serious criminal case, the court has a duty to see that the case is timely tried. The *Hicks* rule and the statute accomplish this on the circuit court level. He suggested that language should be added to the proposed Rule that provides that in civil cases, if the parties agree, the court will schedule a case in conformity with the agreement of the parties, unless justice requires a contrary schedule. This will take care of scheduling on the civil side. Judge Hotten cautioned that this does not take into account the timeliness

standards. The Chair proposed the following language could be used with respect to the timeliness standards: "Where the parties agree to a specified date, that case is not subject to the time standard analysis."

Judge Kaplan pointed out that the Chair's suggested change with respect to the time standards in the ordinary case that will be tried within a few months would be appropriate, but agreeing to postpone a case to 2012 would not work. There should be a limit on the amount of time that cases can be postponed. The Chair expressed his agreement with Judge Kaplan and suggested that the language of the Rule should require the judges to confer with one another and to consider other factors that impact scheduling such as time standards. Judge Matricciani suggested that the Rule should not require judges to confer, because in Baltimore City, there may be as many as 50 motions a week requesting that cases be continued. Judges should only have to confer where the court hearing the motion feels that it is necessary. The Chair said that the Rule can provide that consultation is not required if the motion is granted, but before denying a motion to continue, consultation among judges would be required. Judge Matricciani suggested that no consultation would be necessary if counsel agrees to a date within one year of the original trial date. The Chair responded that this is a good idea and proposed that the time standards can be considered for inclusion in the Rule.

The Chair suggested that the Rule be remanded to the

Criminal Subcommittee to consider the issues impacting criminal cases and to the appropriate Subcommittee to consider the issues impacting civil cases. He expressed the view that it need not go to the District Court Subcommittee and asked Judge Dryden for his opinion. Judge Dryden answered that the Subcommittees can ask him any questions pertaining to the District Court. Master Mahasa noted that continuances in juvenile cases are a big problem. The Chair responded that the Rule can also be considered by the Juvenile Subcommittee. After the various subcommittees discuss the Rule, it will be drafted to go into Title 1 with sections that are particularly applicable and sections that are generally applicable. Judge Dryden asked if the current standard in criminal cases is "for good cause shown" as provided in *Hicks*, and the Chair replied affirmatively. Judge Dryden inquired if this is modified by the 1995 administrative order. The Chair answered that to a certain extent it is modified. That order pertained to problems with scheduling when there were also federal court cases, including Fourth Circuit cases that take precedence over U.S. District Court cases. Judge Dryden remarked that the administrative order also provided that when counsel takes on a case where there is already a trial date set, counsel cannot expect the court to allow a continuance.

The Chair said that each of the Subcommittees that have expertise in their particular area can discuss the Rule and propose general and specific recommendations. A legislative

postponement exists. He asked Mr. Zarnoch how many statutes pertain to assigning priorities, and Mr. Zarnoch responded that there are many. The Chair suggested that the Rule should not list all of the statutes but should state that the priorities are set "except as otherwise provided by statute." Mr. Klein inquired if the Subcommittees will focus on case assignments in section (e), and the Chair answered that the focus will be on the entire issue of continuances, but in particular, scheduling conflicts which seem to be the biggest problem. Mr. Klein questioned as to whether the language in section (b) will be decided by the Subcommittees or chosen at today's meeting. The Chair replied that this discussion can wait, because this language may be best at the end of a rule with language such as "notwithstanding any other provision." Mr. Klein expressed his preference for the language of Alternative 2 because it is broader and accommodates personal issues. Judge Matricciani commented that both are appropriate. Both could be used, so that the initial clause would read, "For good cause shown or as justice may require."

The Chair stated that the discussion has moved in the direction of finding solutions for the problems. There are special problems in criminal, civil, and juvenile cases. Master Mahasa remarked that if the new Rule is put into Title 1, someone may argue that the provisions of the juvenile statute are superseded by the Rule. Judge Dryden referred to an issue that had been raised regarding the application of evidence rules in a

juvenile proceeding. The Chair responded that it depends on the kind of proceeding, such as placement or review hearings. The Reporter asked how schedule conflicts for lawyers are handled in juvenile court, since there are statutory time standards. Master Mahasa agreed that there are many time standards in juvenile court that are federally imposed. The Reporter commented that the fact that private counsel represent some parties in juvenile court further complicates matters. Master Mahasa added that delinquency cases also complicate the schedule. The Reporter observed that this is a difficult problem to solve, because of the inherent conflict of statutory requirements, the requirements of a lawyer who is involved in other cases, and the right of a person to be represented by counsel of his or her choice. Master Mahasa pointed out that there are timing issues and a consideration of the weight of the dockets.

The Chair stated that unless the Rule is incredibly lengthy, it cannot handle every possible situation. Judge Dryden remarked that the best way to handle this may be to use the language stated by Judge Matricciani, coupled with the administrative order. The Chair stated that the appropriate Subcommittees would consider these issues.

The Chair adjourned the meeting.