COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on May 11, 2007.

Members present:

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

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Michele D. Hotten
Harry S. Johnson, Esq.
Richard M. Karceski, Esq.
Frank M. Kratovil, Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Hon. Albert J. Matricciani
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
George Perry, Rules Committee Intern
Michael Morrissette, Esq., Office of the Public Defender
Carol Tuohey, Maryland State Bar Association
Paul H. Ethridge, Esq., Maryland State Bar Association
Melvin Hirshman, Esq., Bar Counsel, Attorney Grievance Commission
Nancy Forster, Esq., Public Defender
Michele Nethercott, Esq., Office of the Public Defender

The Chair convened the meeting. He introduced the summer intern for the Rules Committee, George Perry, who is a law student at the University of Baltimore. The Chair said that the minutes of the September 8, 2006 and November 17, 2006 meetings

were distributed to the Committee as well as the minutes of the October 13, 2006 meeting, which had been revised by Mr. Klein. The Vice Chair moved that the minutes be accepted as presented, the motion was seconded, and it passed unanimously.

Agenda Item 1. Consideration of proposed amendments to: Rule 16-743 (Peer Review Process), Rule 16-735 (Dismissal or Other Termination of Complaint), and Rule 16-737 (Reprimand by Commission)

Mr. Brault said that he would give some background information before explaining the changes to some of the Rules pertaining to attorney discipline. Before the Rules were revised, the disciplinary system had two hearings. The Court of Appeals was critical of the system because sometimes it would take years to complete the disciplinary process. The Court directed that the Rules be revised to speed up the attorney discipline process. Consideration was given to a system with something similar to a grand jury proceeding, as opposed to a full panel hearing. The Court did not like the system proposed by the Rules Committee, and it revised the system to include a peer review panel, which would handle the cases expeditiously. With time deadlines in mind, a disciplinary action under the new system begins with a complaint to Bar Counsel and an investigation by Bar Counsel. Bar Counsel has the authority to dismiss, to warn, and to create a diversionary program in which a lawyer could participate, and if successful, avoid discipline. If the matter is not resolved by Bar Counsel, it then goes to

peer review, with a deadline. Peer review panels are composed of lawyers and members of the public. The proceedings are informal and private, and the panel makes recommendations.

Mr. Brault told the Committee that he represented a lawyer client in a disciplinary case which is currently pending in the Court of Appeals and is a matter of public record. His client had been an estates and trusts lawyer who had been the beneficiary of the will of a client. The question was whether the steps the lawyer took in having another lawyer review the matter were adequate under the independent counsel provision of Rule 1.8 of the Maryland Lawyers' Rules of Professional Conduct. Mr. Brault and his client appeared before a peer review panel. They presented their case with much detail, although the peer review proceeding was informal, and there was no transcript. Witnesses and colleagues testified. The complaining witness, a collateral relative, was able to testify by telephone. The peer review proceeding took half a day, and the panel then retired to consider the matter. They announced to the waiting counsel that although there may have been a technical violation of the Rule, it did not warrant full disciplinary procedures. They recommended a reprimand or, in the alternative, a diversionary agreement. The respondent agreed to accept a reprimand, but the Assistant Bar Counsel said that he had no authority to agree to the reprimand; only Bar Counsel had the authority. Bar Counsel was then asked, and he did not agree to the reprimand.

Mr. Brault said that it was Bar Counsel's contention that

the panel has no authority to recommend a reprimand without the agreement of Bar Counsel, and therefore, the panel must recommend charges. Mr. Brault stated that this brought to his attention Guideline 6.5 of the Administrative and Procedural Guidelines of the Attorney Grievance Commission, which provides that Bar Counsel must approve any recommendation of a peer review panel other than dismissal or the filing of a Petition for Disciplinary or Remedial Action. The panel chairman sent a report that he had been instructed that he could not recommend a reprimand. Charges were brought, the case was tried, and the judge found in favor of the attorney. Bar Counsel objected, and the case will be argued in the Court of Appeals.

Mr. Brault noted that Bar Counsel's position on this matter is that if a panel decided that a reprimand would be in order, it cannot make that recommendation unless Bar Counsel agrees. Ordinarily, the Attorney Grievance Commission never learns that the peer review panel thinks that only a reprimand is needed unless Bar Counsel had agreed. Mr. Brault has spoken with Melvin Hirshman, Bar Counsel; Glenn Grossman, Deputy Bar Counsel; and others in the Office of Bar Counsel on this issue. Mr. Brault had questioned the usefulness of peer review if Bar Counsel has to agree with the panel's recommendation before the recommendation can be made. The issue before the Committee today revises Rule 16-743 to clarify that the panel can recommend a reprimand even if Bar Counsel objects. The Attorney Grievance Commission retains the authority to overrule the panel.

Mr. Brault presented Rule 16-743, Peer Review Process, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-743 to require a Peer Review Panel to transmit to the Commission a recommended disposition that has been agreed upon by Bar Counsel and the attorney, to add a Committee note following new subsection (e)(1), to clarify provisions concerning a recommended disposition absent agreement of Bar Counsel and the attorney, to add a Committee note following new subsection (e)(2), to allow the attorney to enter into evidence the Panel's recommendation under certain circumstances, and to make a stylistic change, as follows:

Rule 16-743. PEER REVIEW PROCESS

(a) Purpose of Peer Review Process

The purpose of the peer review process is for the Peer Review Panel to consider the Statement of Charges and all relevant information offered by Bar Counsel and the attorney concerning it and to determine (1) whether the Statement of Charges has a substantial basis and there is reason to believe that the attorney has committed professional misconduct or is incapacitated, and, (2) if so, whether a Petition for Disciplinary or Remedial Action should be filed or some other disposition is appropriate. The peer review process is not intended to be an adversarial one and it is not the function of Peer Review Panels to hold evidentiary hearings, adjudicate facts, or write full opinions or reports.

Committee note: If a Peer Review Panel concludes that the complaint has a substantial basis indicating the need for some remedy, some behavioral or operational changes on the part of the lawyer, or some discipline short of suspension or disbarment, part of the peer review process can be an attempt through both evaluative and facilitative dialogue, (A) to effectuate directly or suggest a mechanism for effecting an amicable resolution of the existing dispute between the lawyer and the complainant, and (B) to encourage the lawyer to recognize any deficiencies on his or her part that led to the problem and take appropriate remedial steps to address those deficiencies. The goal, in this setting, is not to punish or stigmatize the lawyer or to create a fear that any admission of deficiency will result in substantial harm, but rather to create an ambience for a constructive solution. The objective views of two fellow lawyers and a lay person, expressed in the form of advice and opinion rather than in the form of adjudication, may assist the lawyer (and the complainant) to retreat from confrontational positions and look at the problem more realistically.

(b) Scheduling of Meeting; Notice to Attorney

(1) The Chair of the Peer Review Committee, after consultation with the members of the Peer Review Panel, Bar Counsel, and the attorney, shall schedule a meeting of the Panel.

(2) If, without substantial justification, the attorney does not agree to schedule a meeting within the time provided in subsection (b)(5) of this Rule, the Chair may recommend to the Commission that the peer review process be terminated. If the Commission terminates the peer review process pursuant to this subsection, the Commission may take any action that could be recommended by the Peer Review Panel under section (e) of this Rule.

(3) The Chair shall notify Bar Counsel,

the attorney, and each complainant of the time, place, and purpose of the meeting and invite their attendance.

(4) The notice to the attorney shall inform the attorney of the attorney's right to respond in writing to the Statement of Charges by filing a written response with the Commission and sending a copy of it to Bar Counsel and each member of the Peer Review Panel at least ten days before the scheduled meeting.

(5) Unless the time is extended by the Commission, the meeting shall occur within 60 days after appointment of the Panel.

(c) Meeting

(1) The Peer Review Panel shall conduct the meeting in an informal manner. It shall allow Bar Counsel, the attorney, and each complainant to explain their positions and offer such supporting information as the Panel finds relevant. Upon request of Bar Counsel or the attorney, the Panel may, but need not, hear from any other person. The Panel is not bound by any rules of evidence, but shall respect lawful privileges. The Panel may exclude a complainant after listening to the complainant's statement and, as a mediative technique, may consult separately with Bar Counsel or the attorney. The Panel may meet in private to deliberate.

(2) If the Panel determines that the Statement of Charges has a substantial basis and that there is reason to believe that the attorney has committed professional misconduct or is incapacitated, the Panel may (A) conclude the meeting and make an appropriate recommendation to the Commission or (B) inform the parties of its determination and allow the attorney an opportunity to consider a reprimand or a Conditional Diversion Agreement.

(3) The Panel may schedule one or more further meetings, but, unless the time is extended by the Commission, it shall make a recommendation to the Commission within 90

days after appointment of the Panel. If a recommendation is not made within that time or any extension granted by the Commission, the peer review process shall be terminated and the Commission may take any action that could be recommended by the Peer Review Panel under section (e) of this Rule.

(d) Ex parte Communications

Except for administrative communications with the Chair of the Peer Review Committee and as allowed under subsection (c)(1) as part of the peer review meeting process, no member of the Panel shall participate in an ex parte communication concerning the substance of the Statement of Charges with Bar Counsel, the attorney, the complainant, or any other person.

(e) Recommendation of Peer Review Panel

(1) Agreed Upon Recommendation

If during the peer review process, Bar Counsel and the attorney agree upon a recommended disposition, the Peer Review Panel shall transmit that recommendation to the Commission.

Committee note: If a Peer Review Panel determines that the attorney committed professional misconduct, or is incapacitated, and that the parties should enter into a Conditional Diversion Agreement, the Panel shall orally advise the parties of that determination and afford them an opportunity to enter into a Conditional Diversion Agreement in accordance with Rule 16-736. If agreement is reached, the Conditional Diversion Agreement becomes the Panel's recommended disposition; if no agreement is reached, the Panel transmits to the Commission one of the recommendations listed in subsection (e)(2) of this Rule.

(2) If No Agreement

~~The Peer Review Panel may recommend to the Commission that a Petition for Disciplinary or Remedial Action be filed or~~

~~make any recommendation to the Commission that Bar Counsel may make under Rule 16-734 (a), (b), or (c). The Panel~~ If there is no agreed upon recommendation under subsection (e)(1) of this Rule, the Panel shall transmit to the Commission an independent recommendation, not subject to the approval of Bar Counsel, and shall accompany its recommendation with a brief explanatory statement. The Panel's recommendation shall be one of the following:

(A) the filing of a Petition for Disciplinary or Remedial Action;

(B) a reprimand in accordance with Rule 16-737;

(C) dismissal of the complaint or termination of the proceeding without discipline, but with a warning, in accordance with Rule 16-735; or

(D) dismissal of the complaint or termination of the proceeding without discipline, without a warning, in accordance with Rule 16-735.

Committee note: Under subsection (e)(1) of this Rule, a Peer Review Panel may recommend to the Commission a Conditional Diversion Agreement in accordance with Rule 16-736, but a Panel may not make that recommendation under subsection (e)(2) of this Rule.

(3) Use of Recommendation and Statement

If a Petition for Disciplinary or Remedial Action is filed and the Panel had recommended a disposition other than the filing of a Petition, the respondent attorney shall have the right to enter into evidence the Panel's recommendation and statement.

(f) Action by Commission

The Commission may (1) ~~approve the filing of~~ direct Bar Counsel to file a Petition for Disciplinary or Remedial Action, (2) take any action on the Panel's recommendation that the Commission may take

on a similar recommendation made by Bar Counsel under Rule 16-734, or (3) dismiss the Statement of Charges and terminate the proceeding.

Source: This Rule is new.

Rule 16-743 was accompanied by the following Reporter's Note.

Albert D. Brault, Esq. pointed out that Guideline 6.5 of the Administrative and Procedural Guidelines of the Attorney Grievance Commission requires Bar Counsel to approve any recommendation of the Peer Review Panel other than dismissal or the filing of a Petition for Disciplinary or Remedial Action. The Attorneys Subcommittee acknowledges that Bar Counsel's role in effecting a Conditional Diversionary Agreement may require Bar Counsel's approval of such an agreement, but requiring Bar Counsel's approval of a recommendation by a Panel that an attorney be reprimanded negates the opinion of the Peer Review Panel and diminishes the value of the Peer Review process.

The Subcommittee proposes amendments to several of the Rules pertaining to attorney discipline to clarify that, absent agreement of the parties, the Panel's responsibility is to make an independent recommendation to the Commission. The proposed amendments to Rules 16-743, 16-735, and 16-737 make clear that a Panel is not limited to recommending either dismissal or the filing of a Petition for Disciplinary or Remedial Action. A Panel also may recommend to the Commission that a complaint be dismissed with a warning or that an attorney be reprimanded.

Two additional changes are proposed to Rule 16-743. New subsection (e)(1) requires a Peer Review Panel to transmit to the Commission a recommended disposition that has been agreed upon by Bar Counsel and the attorney. New subsection (e)(3) allows an attorney to enter into evidence the recommendation and statement of the Peer

Review Panel if the Panel's recommendation was a disposition other than the filing of a Petition for Disciplinary or Remedial Action.

Mr. Brault pointed out that the language proposed for deletion in subsection (e)(2) is the language of the current Rule. Subsection (e)(1) provides that if Bar Counsel and the attorney agree upon a recommended disposition, the panel shall transmit the recommendation to the Attorney Grievance Commission. Subsection (e)(2) provides that if there is no agreed upon recommendation, the panel shall transmit to the Commission an independent recommendation, not subject to the approval of Bar Counsel. What the prior Rule said and what may have given rise to the confusion is the language providing that the panel may recommend to the Commission that a Petition for Disciplinary or Remedial Action be filed or make any recommendation that Bar Counsel may make under subsections (a),(b), or (c) of Rule 16-734, Procedure Upon Completion of Investigation. Mr. Brault said that he thought that the language of Rule 16-734 meant that the panel could recommend a reprimand, but Bar Counsel disagreed, reasoning that Rule 16-734 requires Bar Counsel to make the decision.

Mr. Brault told the Committee that he had suggested the addition of subsection (e)(3), and the Subcommittee approved it, but he has since investigated further and determined that this probably is not advisable. The Court of Appeals would not be in favor of it. The Court's view is that what happens in the peer

review process stays in the peer review process. He suggested that subsection (e)(3) read as follows: "If a Petition for Disciplinary or Remedial Action is filed and the Panel had recommended a disposition other than the filing of a Petition, the respondent attorney shall have the right to petition the Commission for reconsideration." He had previously spoken with Mr. Hirshman and others about this. There is nothing in the Rules pertaining to reconsideration by the Commission of the decision to charge a lawyer. Nothing in the Rules states that this cannot be done. The Office of Bar Counsel is considering allowing this in the Administrative Guidelines. Mr. Brault expressed the opinion that in lieu of putting in the Rule the right to enter the panel's recommendation into evidence, the language providing for a petition for reconsideration should be substituted.

The Chair said that a formal petition for reconsideration can be built into the Rule. If the Rules are interpreted to mean that everything that is not prohibited is permitted, it may not be necessary. To avoid any arguments that may arise, a provision can be added that would allow both sides to request reconsideration by the Attorney Grievance Commission. However, in terms of the admissibility of the peer review recommendation, why should a judge who has to decide what to recommend regarding a lawyer's discipline not be able to know what the panel had recommended? Mr. Brault remarked that initially he had thought it would be worthwhile, but there is strong opposition to including it. Mr.

Hirshman explained that there is no provision under the current procedure for a circuit court judge to make any recommendation. Occasionally, a judge will do so. The judge can make findings pertaining to the respondent attorney by a preponderance of the evidence or anything in mitigation without making a recommendation. The problem is that some circuit court judges have made recommendations and some have not, although there has been no provision for it. The Court of Appeals does not necessarily follow the recommendation if one is given. The Chair acknowledged that this is true, but he noted that if the Court of Appeals has a disciplinary case in front of it, in trying to decide the case, it may wish to know what the recommendation of a respected peer review panel was. Why should the Court of Appeals be denied this information?

The Vice Chair questioned as to what prohibits the accessibility to the recommendation of the panel. Mr. Brault responded that he was not aware of any prohibition. The Reporter noted that Rule 16-723, Confidentiality, may be a factor affecting accessibility. Mr. Brault commented that even if the panel recommendation is not part of the public record, it may be able to go under seal to the hearing judge. Mr. Sykes remarked that the hearing judge is the Court of Appeals. Mr. Bowen suggested that if the change proposed by Mr. Brault is made to subsection (e)(3), then section (f) would have to be changed to provide that one of the options listed is to grant the petition and reconsider the decision. The Vice Chair said that adding in

a reconsideration process is not easily accomplished. Section (f) may need to be changed further.

Mr. Brault explained that under the former disciplinary rules, the Inquiry Panel used to hold a full-blown hearing, with a transcript and evidence. The only debate was as to whether the "formal" rules of evidence applied. There was a regular trial, and the Inquiry Panel made findings and recommendations. Following the Panel hearing, the procedure included an administrative appeal to the Review Board, which was composed of appointed attorneys who had the power to overrule the Panel. The administrative appeal was eliminated when the peer review process was substituted. Many people believe that some form of administrative reconsideration ought to remain. The complaint was that it took two years to complete the disciplinary process in Maryland, and many felt that this should be shortened to one year. Mr. Hirshman pointed out that the Rules provide 90 days for Bar Counsel to finish an investigation, and 30 days to make the recommendation. Then Peer Review Committee has 30 days to appoint a panel, the hearing is held within 60 days, and there is another 30 days to make the recommendation. The case then goes to the Commission, which has 30 days to file public charges and 120 days to try it. This may take one-and-a-half years from start to finish. Mr. Brault commented that this time frame is better than that of the previous procedure.

Mr. Brault noted that as a comparison, it may take as much as five years to try a disciplinary case for a lawyer charged

with a violation in the District of Columbia. The bar has tried to persuade the D.C. Court of Appeals to authorize changes to the Rules to shorten this time period, but the Court is not willing to do so. The Chair suggested language that would provide that within 30 days after the panel has filed its recommendation, on motion of Bar Counsel or the respondent, or on its own motion, the panel may reconsider its recommendation and file a new recommendation. Mr. Hirshman commented that the change should refer to the recommendation of the Commission, and Mr. Brault agreed. The Chair said that the language would be changed to reconsideration of the recommendation by the Commission. The Vice Chair commented that this would become section (g).

Judge Dryden questioned as to what the timeline would be. Mr. Sykes added that the petition for reconsideration should not be filed after charges have been filed. Mr. Hirshman noted that the Rule should provide that while there is a petition for reconsideration pending, no charges would be filed. The Commission meets on the third Wednesday of every month, and no business is conducted at the October meeting, so there is no guideline built in as to when they make their decisions. Mr. Sykes remarked that the Commission has to recommend charges, and then there is a certain amount of time before the charges are filed. Mr. Hirshman responded that the time period is 30 days. Mr. Sykes observed that within that 30-day period, the petition for reconsideration is able to be filed, and the filing should be stayed until the petition is decided. Mr. Brault noted that the

Commission does not meet very often. The Vice Chair commented that if the Commission is only meeting monthly, and it takes a month or two to decide a motion for reconsideration, it would be adding a substantial amount of time to a procedure that had been instituted to make the process move more quickly. She suggested that the Rule provide that a motion for reconsideration should be filed within five or 10 days. It should be an expedited process.

The Reporter inquired as to whether the lawyer knows that the Commission has directed Bar Counsel to file charges before the charges are filed. Mr. Hirshman replied that when the Commission directs the filing of charges, the Executive Secretary of the Commission sends a letter to the respondent. Mr. Maloney asked how much time elapses between the time the letter is sent to the respondent and the filing of charges. Mr. Brault replied that Bar Counsel has 30 days to file the charges. Mr. Hirshman added that this is not in the Rule; it is at the direction of the Court of Appeals.

Mr. Hirshman stated that he had no objection to the Subcommittee's proposal that the peer review panel can also recommend a reprimand. The Vice Chair said that she did not see how the language proposed to be stricken in subsection (e)(2) could be construed to require the agreement of Bar Counsel when the panel decides that a reprimand is appropriate. Mr. Brault reiterated that Guideline 6.5 of the Administrative and Procedural Guidelines of the Attorney Grievance Commission interprets the Rule to the contrary. When a panel is

constituted, the panel members are given a copy of the Guidelines, informing them that they cannot recommend a reprimand without the approval of Bar Counsel. In Mr. Brault's case, the panel chair said that he was prohibited from recommending a reprimand and could only recommend dismissal or charges, so although the panel felt that a reprimand was appropriate, they had to recommend charging the lawyer. A lawyer's career may be on the line when this happens.

The Chair commented that he agreed with the Vice Chair's interpretation of the language of the current Rule in section (e). He suggested that the Rule should state that the panel can make any recommendation to the Commission that Bar Counsel is authorized to make under Rule 16-734. The Reporter noted that the problem arises in the details of Rule 16-735, Dismissal or Other Termination of Complaint, and Rule 16-737, Reprimand by Commission. It is really an agreement between Bar Counsel and the lawyer as to the details of the reprimand. The Chair responded that the issue is whether Bar Counsel can say that if he does not agree with the panel's recommendation, charges must be filed. Since the Court did not address this issue when it adopted the Rules, the Rules should be amended. The Vice Chair remarked that this is changing the Rule to restate what it already says. It is also requiring the panel to submit an agreed upon recommendation, which is something that the current Rule does not require. Mr. Brault responded that similar to a criminal case, many of these discipline cases are essentially

plea bargains. What is to be avoided is working out an agreement with the prosecuting official which is then undone by someone else. The Vice Chair inquired if there is a way to get out of the peer review process if an agreement is reached. Mr. Brault replied that there is if an agreement is reached before the case ever goes to peer review. What happens is that the respondent and the Assistant Bar Counsel agree that a reprimand is the appropriate sanction. If Bar Counsel then disagrees, the entire agreement is undone.

The Reporter drew the Committee's attention to the Committee note on page 2, which was written by the committee of the Court that redrafted the revised Rules. The note pertains to the goal of getting the parties together and working out a solution agreeable to everyone. One of the purposes of peer review is to function as a settlement conference. Mr. Sykes suggested that Guideline 6.5 should be repealed. Mr. Michael asked whether the language of the Rule could be left unchanged, and a Committee note added to clarify that a panel can recommend a reprimand. Mr. Johnson pointed out that if the Guideline exists, it does not matter what Rule 16-743 provides. He expressed the concern that there may be no way to challenge the Guideline. The Rule can be changed to clarify that what was initially written is what was meant.

The Chair stated that the Court of Appeals can decide whether Bar Counsel has the right to overcall what the panel decided. After the Court of Appeals considers this issue, there

will be some legislative history that will be adhered to by Bar Counsel. Mr. Hirshman noted that the Administrative Guidelines have to be submitted to the Court of Appeals before they are adopted, and the ones in use now have been approved by the Court.

Mr. Hirshman commented that language pertaining to reconsideration should be added to the Rules. The Reporter inquired as to whether it would be reconsideration of the Commission's decision or reconsideration of the panel's decision. Mr. Hirshman answered that it would be reconsideration of the Commission's decision. The Vice Chair questioned as to whether this is even needed, because the Commission has rarely changed its decision in the past. The Chair referred to a case involving Steven L. Miles, Esq. Under the former Rules, a panel had recommended that Mr. Miles be disbarred on the basis of a witness's testimony, which turned out to be fraudulent. One week after the decision to recommend disbarment, the witness was exposed in federal court as a perjurer, and the panel withdrew its recommendation. There are situations in which something can arise that should result in reconsideration. The Rule should allow both sides to ask for reconsideration.

Mr. Brault inquired as to how the Commission functions. Assuming they meet once a month, the docket could be from two to 100 cases. Mr. Hirshman responded that he does not attend the Commission meetings. Mr. Brault remarked that there could be 10 recommendations to charge, and the Commission may not have the time to debate each case. It may also be influenced, as the

grand jury is reputed to be, by what the prosecutor tells it. It may be helpful for the Commission to include a brief explanatory statement with its decision. The prior Review Board, which reviewed transcripts, sometimes would reverse, but the Review Board has now been eliminated. The Vice Chair observed that requiring the Commission to write a brief explanatory statement could be detrimental, because it would slow the process. Mr. Johnson said that he was one of the people who had opposed the elimination of the Review Board. He had been a member of the Review Board, and he felt that it served the very important purpose of providing State-wide consistency to the process. The Review Board at times reversed the decision of a panel. However, the Court of Appeals was concerned about the timelines in the former procedure. It is better to err on the side of not building in the extra process of reconsideration and keep the discussion to the one issue about the reprimand that was raised. The Vice Chair agreed with Mr. Johnson. The Reporter asked if the suggestion about reconsideration is being eliminated, and the Committee agreed by consensus that it would not be put into the Rule.

Mr. Sykes inquired about the issue of informing the hearing judge as to the recommendation of the peer review panel, and whether this could be accomplished without destroying the confidentiality of the process. Mr. Johnson responded that the confidentiality is supposed to protect the lawyer who is involved in the disciplinary process. If the lawyer wants the evidence to

be before the judge who is hearing the case, the lawyer can choose to waive confidentiality. Mr. Sykes remarked that there is a case before the Court of Appeals currently in which Bar Counsel has taken the position that what the peer review panel did cannot be revealed because of confidentiality. The issue is not that clear. The Vice Chair said that she looked at Rule 16-723, Confidentiality, which states that everything in the record of the proceedings is confidential, and it cannot be introduced by waiver of the lawyer. This protects the lawyer and the members of the panel. Mr. Brault added that it protects the complainant, also.

Mr. Sykes commented that the result of the peer review is given in a flat statement. The Reporter inquired as to how brief the statement is. Mr. Brault replied that it ranges from almost nothing up to a short paragraph, but the statements are not very detailed. Mr. Hirshman told the Committee that a checklist goes out to the peer review panel providing for the options of dismissal, warning, or charges with spaces to write something. Most panels do not write anything. The Vice Chair expressed the view that it is not a good idea to allow the recommendation of the panel to go to the trial judge. The Reporter noted that it is a conceptual issue –- is the recommendation more like an expert opinion or more like the product of a settlement conference? The Chair observed that a judge may have no experience with real estate transactions and yet is asked to decide the fate of a lawyer who may have mishandled a real estate

transaction. A circuit court judge may wish to know the opinion of a panel that had some familiarity with that type of practice. He acknowledged that the Vice Chair's point is a good one. The Court of Appeals, however, should be allowed to know the opinions of those who heard the case below. The Vice Chair asked whether the Court of Appeals has access to the entire record. Mr. Hirshman replied that the peer review panel's recommendation does not become part of the record.

The Vice Chair commented that the discussion had gone far beyond the reason for the requested change. Mr. Brault said that the ability to issue a reprimand is very important, and the decision to reprimand happens frequently. It is important that the Rule allow the panel to issue a reprimand. The Vice Chair remarked that she did not understand the meaning of the Committee note after subsection (e)(1) that relates to a Conditional Diversion Agreement. Rule 16-736, Conditional Diversion Agreement, already pertains to this subject. She expressed the view that neither Committee note in Rule 16-743 is necessary. Subsection (e)(2) lists the various recommendations that a panel may make. A Conditional Diversion Agreement is not one of the choices.

Mr. Brault told the Committee that the panel is given instructions from Bar Counsel and from administrative rules to make sure the panel members understand what they are supposed to be doing. The Committee notes add to this. The Vice Chair pointed out that what subsection (e)(2) does now, instead of

referring back to Rule 16-734 (a), (b), or (c), is to set forth the possible actions, and this is much clearer. The Committee note is not necessary.

The Chair stated that subsection (e)(3), Use of Recommendation and Statement, will be deleted. A reconsideration procedure will not be added to the Rule because of the time issues.

The Vice Chair suggested that the Committee notes after subsections (e)(1) and (e)(2) be deleted. The Reporter commented that the Committee note following subsection (e)(1) describes a feature of Guideline 6.5 that helps to encourage negotiation of Conditional Diversion Agreements. The Committee note following subsection (e)(2) reflects the Attorneys Subcommittee's attempt to find a way to make the Conditional Diversion Agreement fit into something that the panel could recommend. The Subcommittee determined that this was too complicated without the approval of Bar Counsel. The Chair said that the Style Subcommittee will look at the two Committee notes. By consensus, the Committee approved the Rule as amended.

Mr. Brault presented Rules 16-735, Dismissal or Other Termination of Complaint; and 16-737, Reprimand by Commission for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-735 to clarify the procedure for a Peer Review Panel to recommend dismissal with a warning and to conform the Rule to the addition of new subsection (e)(3) to Rule 16-743, as follows:

Rule 16-735. DISMISSAL OR OTHER TERMINATION OF COMPLAINT

(a) Dismissal or Termination

(1) Upon completion of an investigation, Bar Counsel, or after a Peer Review Panel meeting, the Peer Review Panel may recommend to the Commission that:

(A) the complaint be dismissed because Bar Counsel or the Panel has concluded that the evidence fails to show that the attorney has engaged in professional misconduct or is incapacitated; or

(B) the disciplinary or remedial proceeding be terminated, with or without a warning because Bar Counsel or the Panel has concluded that any professional misconduct on the part of the attorney (i) was not sufficiently serious to warrant discipline and (ii) is not likely to be repeated.

(2) If satisfied with ~~Bar Counsel's~~ the recommendation of Bar Counsel or the Panel, the Commission shall dismiss the complaint or otherwise terminate the disciplinary or remedial proceeding, as appropriate. If Bar Counsel or the Panel has recommended a warning, the matter shall proceed as provided in section (b) of this Rule.

(b) Termination Accompanied by Warning

(1) If Bar Counsel or the Panel concludes that the attorney may have engaged in some professional misconduct, that the conduct was not sufficiently serious to warrant discipline, but that a specific warning to the attorney would be helpful to ensure that the conduct is not repeated, Bar Counsel or the Panel may recommend that the termination be accompanied by a warning against repetition. If satisfied with the recommendation, the Commission shall proceed in accordance with subsection (b)(2) of this Rule and, if the warning is not rejected, accompany the termination of the disciplinary or remedial proceeding with a warning. A warning does not constitute discipline, but the complainant shall be notified that termination of the proceeding was accompanied by a warning against repetition of the conduct.

(2) At least 30 days before a warning is issued, the Commission shall mail to the attorney a notice that states the date on which it intends to issue the warning and the content of the warning. No later than five days before the intended date of issuance of the warning, the attorney may reject the warning by filing a written rejection with the Commission. If the warning is not rejected, the Commission shall issue it on or after the date stated in the initial notice to the attorney. If the warning is rejected, it shall not be issued, and Bar Counsel or the Commission may take any other action permitted under this Chapter. Neither the fact that a warning was proposed or rejected nor the contents of a warning that was not issued may be admitted into evidence, except as otherwise provided by Rule 16-743 (e)(3).

(c) Effect of Dismissal or Termination

(1) Except as provided in subsection (c)(2) of this Rule, a dismissal or a termination under this Rule, with or without a warning, shall not be disclosed by the Commission or Bar Counsel in response to any request for information as to whether an

attorney has been the subject of a disciplinary or remedial proceeding. The nature and existence of a proceeding terminated under this Rule, including any investigation by Bar Counsel that led to the proceeding, need not be disclosed by an attorney in response to a request for information as to whether the attorney has been the subject of a disciplinary or remedial proceeding.

(2) The fact that a warning was issued in conjunction with the termination of a complaint shall be disclosed to the complainant, and the fact that a warning was issued and the facts underlying the warning may be disclosed in a subsequent proceeding against the attorney when relevant to a complaint alleging similar misconduct.

Source: This Rule is new.

Rule 16-735 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-743.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-737 to clarify the procedure for a Peer Review Panel to recommend a reprimand and to conform the Rule to the addition of new subsection (e)(3) to Rule 16-743, as follows:

Rule 16-737. REPRIMAND BY COMMISSION

(a) Offer

If Bar Counsel determines after completion of an investigation, or the Peer Review Panel determines after a Panel meeting, that an attorney has engaged in professional misconduct and that the appropriate sanction for the misconduct is a reprimand, Bar Counsel or the Panel shall serve on the attorney a written offer ~~to administer~~ of a reprimand and ~~enter into a joint~~ a waiver of further disciplinary or remedial proceedings that is contingent upon acceptance of the reprimand by the attorney and approval of the reprimand by the Commission. The offer shall include the text of the proposed reprimand, the date when the offer will expire, a ~~stipulation for waiving~~ a contingent waiver of further disciplinary or remedial proceedings, and advice that the offer, if accepted, is subject to approval by the Commission. The text of the proposed reprimand shall summarize the misconduct for which the reprimand is to be imposed and include a reference to any rule, statute, or other law allegedly violated by the attorney.

(b) Response

The attorney may accept the offer by signing the stipulation, endorsing the proposed reprimand, and delivering both documents to Bar Counsel or the Panel within the time stated in the notice or otherwise agreed to by Bar Counsel or the Panel. The attorney may (1) reject the offer expressly or by declining to return the documents timely, or (2) propose amendments to the proposed reprimand, which Bar Counsel or the Panel may accept, reject, or negotiate.

(c) Action by Commission

If the ~~parties agree~~ attorney agrees to a reprimand, ~~they~~ Bar Counsel or the Panel shall submit the proposed reprimand to the Commission for approval. ~~The parties~~ Bar Counsel or the attorney may submit also any

explanatory material that ~~they believe~~ either believes relevant and shall submit any further material that the Commission requests. Upon the submission, the Commission may take any of the following actions:

(1) the Commission may approve the reprimand, if satisfied that it is appropriate under the circumstances, in which event Bar Counsel shall promptly administer the reprimand to the attorney and terminate the disciplinary or remedial proceeding.

(2) the Commission may recommend amendments to the reprimand as a condition of approval, which the parties may accept or reject. If the parties accept the amendments, they shall notify the Commission of the acceptance, and the Commission shall then approve the reprimand. If either party rejects a proposed amendment, the reprimand shall be deemed disapproved.

(3) the Commission may disapprove the reprimand, if not satisfied that it is appropriate under the circumstances and direct Bar Counsel to proceed in another manner.

(d) Effect of Rejection or Disapproval

If a reprimand is proposed and rejected or if a reprimand to which the parties have stipulated is not approved by the Commission, the proceeding shall resume as if no reprimand had been proposed, and neither the fact that a reprimand was proposed, rejected, or not approved nor the contents of the reprimand and any stipulation may be admitted into evidence, except as otherwise provided by Rule 16-743 (e)(3).

(e) Effect of Reprimand

A reprimand constitutes discipline.

Source: This Rule is new.

Rule 16-737 was accompanied by the following Reporter's

Note.

See the Reporter's note to Rule 16-743.

Mr. Brault explained that these Rules contain amendments that conform to the changes to Rule 16-743. The Reporter noted that the language in subsection (b)(2) of Rule 16-735 and section (d) of Rule 16-737 referring to subsection (e)(3) of Rule 16-743 needs to be deleted, because subsection (e)(3) was not added to Rule 16-743. By consensus, the Committee approved the changes to the Rules as amended.

Agenda Item 2. Reconsideration of proposed amendments to: Rule 4-263 (Discovery in Circuit Court) and Rule 4-262 (Discovery in District Court)

Mr. Karceski presented Rules 4-263, Discovery in Circuit Court, and 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 extend the obligations of the parties under the Rule to staff members of the defendant and certain others, to reletter the sections, to add a cross reference following section (a), to add to section (b) a required disclosure of witness statements, to add language to subsection (b)(1) referring to a certain statute and Rule, to clarify the disclosure obligation of the State's Attorney

under subsections (b)(2) and (3), to add a Committee note and cross reference following section (b), to add to subsection (c)(1) a provision pertaining to statements of witnesses made after charges have been filed and requirements concerning the State's consultation with an expert, to add to subsection (c)(2)(B) requirements concerning an expert that the defendant expects to call as a witness at a hearing or trial, to expand the definition of "work product" in subsection (d)(1), to change the time allowed in section (e) for the State's initial disclosure pursuant to section (b), to add the phrase "or required" to section (f), to provide generally that there is no requirement to file discovery material with the court, to require the filing of a notice by the party generating discovery material and retention of the material for a period of time if the material is not filed with the court, to require the filing of a statement if the parties agree to provide discovery or disclosures in a manner different than set forth in the Rule, and to add a provision pertaining to disqualification of witnesses, 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 Parties Extend to Staff and Others

The obligations of the ~~State's Attorney~~ parties under this Rule extend to

material and information in the possession or control of the ~~State's Attorney~~ parties 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~~ has a duty to report, to the ~~office of the State's Attorney~~ party.

Cross reference: For the obligations of the State, see *State v. Williams*, 392 Md. 194 (2006).

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

Except for the work product of the State's Attorney as defined in subsection (d)(1) of this Rule, ~~Without~~ without the necessity of a request, the State's Attorney shall ~~furnish~~ provide to the defendant:

(1) The name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each person 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 about the action made by the witness to a State agent: (A) a copy of each written or recorded statement and (B) a copy of all reports of each oral statement, or, if not available, the substance of each oral statement made before charges were filed in the circuit court;

~~(1)~~ (2) Any material or information ~~tending to~~ in any form, whether or not admissible, in the possession or control of the State, including staff and others as described in subsection (a)(2) of this Rule, that tends to exculpate the defendant or negate or mitigate the guilt or punishment of the defendant as to the offense charged;

(3) Any material or information in any form, whether or not admissible, in the possession or control of the State, as described in subsection (a)(2) of this Rule, that tends to impeach a witness by proving:

(A) the character of the witness for untruthfulness by establishing prior conduct as permitted under Rule 5-608 (b) or a prior conviction as permitted under Rule 5-609,

(B) that the witness is biased, prejudiced, or interested in the outcome of the proceeding or has a motive to testify falsely, or

(C) that the facts differ from the witness's expected testimony; and

~~(2)~~ (4) 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.

Committee note: Examples of material and information that must be disclosed pursuant to subsections (b)(2) and (3) of this Rule if within the possession or control of the State, as described in subsection (a)(2) of this Rule, include: each statement made by a witness that is inconsistent with another statement made by the witness or with a statement made by another witness; the medical or psychiatric condition of a witness that may impair his or her ability to testify truthfully or accurately; pending charges against a witness for whom no deal is being offered at the time of trial; the fact that a witness has taken but did not pass a polygraph exam; the failure of a witness to make an identification; and evidence that might adversely impact the credibility of the State's evidence. The due diligence required by subsection (a)(1) does not require affirmative inquiry by the State with regard to the listed examples in all cases, but would require such inquiry into a particular area if information possessed by the State, as described in subsection (a)(2), would reasonably lead the State to believe that affirmative inquiry would result in discoverable information. Due diligence does not require the State to obtain a copy of the

criminal record of a State's witness unless the State is aware of the criminal record. If, upon inquiry by the State, a witness denies having a criminal record, the inquiry and denial generally satisfy due diligence unless the State has reason to question the denial.

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).

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

(1) Disclosure By State

Upon request of the defendant, the State's Attorney shall provide to the defendant the information set forth in this section:

~~(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;~~

(A) Statements of Witnesses

As to all statements about the action made by a witness to a State agent after charges were filed in the circuit court, the State shall provide a copy of each written or recorded statement.

~~(2)~~ (B) 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, the State shall ~~furnish~~ provide 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)~~ (C) Statements of Codefendants

As to all statements made by a codefendant to a State agent ~~which~~ that the State intends to use at a joint hearing or trial, the State shall ~~furnish~~ provide 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)~~ (D) Reports or Statements of Experts

As to each expert consulted by the State in connection with the action the State shall: (A) provide to the defendant 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~~ provide the defendant with the substance of any such oral report and conclusion;

~~(5)~~ (E) 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)~~ (F) 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.

(2) Disclosure By Defendant

Upon the request of the State, the defendant shall:

(A) 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;

(B) Reports of Experts

As to each expert whom the defendant expects to call as a witness at a hearing or trial: (A) provide to the 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 and permit the State to inspect and copy all written reports made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison, and provide the State with the substance of any such oral report and conclusion.

(C) Alibi Witnesses

Upon designation by the State of the time, place, and date of the alleged occurrence, provide 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.

(D) Character Witnesses

As to each witness whom the defendant expects to call to testify as to

the defendant's veracity or relevant character trait, provide the name and address of that witness.

(E) 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.

~~(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~~

(1) Matters Not Subject to Discovery by any Party

This Rule does not require the State or the defendant to disclose (A) the mental impressions, trial strategy, personal beliefs, or other work product of counsel or (B) 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.

(2) By Defendant

This Rule does not require the State to disclose

~~(2) The~~ 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) 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~~

~~Produce and permit the State to inspect and copy all written reports made in connection with the action by each 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) 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~~ provide the discovery within ten days after service.

(f) Motion to Compel Discovery

If discovery is not ~~furnished~~ provided 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~~ provided. 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)~~ (g) 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.

(h) No Requirement to File with Court;

Exceptions

Except as otherwise provided in these Rules or by order of court, discovery material need not be filed with the court. If the party generating the discovery material does not file the material with the court, that party shall (1) serve the discovery material on the other party and (2) promptly file with the court a notice that (A) reasonably identifies the information provided and (B) 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 earlier of the expiration of (i) any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court. 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 from the manner set forth in this Rule, the parties shall file with the court a statement of their agreement.

(i) Protective Orders

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

(j) 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. The

failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. Upon the filing of a motion to disqualify the witness's testimony, disqualification is within the discretion of the court.

Committee note: On motion of a party or a person from whom discovery is sought, and for good cause shown, the court may enter any order that justice requires to protect a party or person from annoyance, embarrassment, or oppression.

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 lawyers 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 and to make subsection (2) applicable to all parties and not only to the State's Attorney. 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.

Language has been added to the beginning of section (b) to clarify that work product of the State's Attorney is excluded from the materials the State's Attorney must disclose without request. Disclosure of the identity of the State's witnesses which was in the "Disclosure Upon Request" section of the Rule has been moved to section (b), "Disclosure Without Request" with some changes. References to Code, Criminal Procedure Article, §11-205 and Rule 16-1009 (b), concerning withholding of a witness's address under certain circumstances, are added to the section. The State must disclose the address of each person 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. Given the difficulty of analyzing each statement made by a State's witness as to anything that conceivably would be "Brady" material, coupled with the requirement of

disclosure of prior written statements by witnesses as set forth in *Jencks v. U.S.*, 353 U.S. 657 (1957), the Committee recommends that a copy of each written or recorded statement and a copy of all reports of each oral statement, or, if not available, the substance of each oral statement made before charges were filed be disclosed without the necessity of a request by the defendant.

Amendments to subsections (b)(2) and (3) are proposed to clarify the State's disclosure requirements under *Brady* and its progeny. Subsections (b)(3)(A), (B), and (C) are derived from the "impeachment by inquiry of witness" provisions of Rule 5-616 (a)(6)(i) and (ii), (4), and (2), respectively. A Committee note containing examples of *"Brady"* materials that must be disclosed follows subsection (b)(3). The first sentence of the Committee note uses examples contained in correspondence dated October 25, 2005 from Nancy S. Forster, Public Defender, to Chief Judge Robert M. Bell. At the request of prosecutors, commentary concerning ascertainment of the criminal records of State's witnesses and when due diligence requires an affirmative inquiry into a particular area is included in the Committee note. After the Committee note is a cross reference to *Brady* and to three additional opinions of the U.S. Supreme Court.

Subsection (c)(1)(A) provides that a copy of each written or recorded statement about the matter under investigation made by a witness to a State agent after charges were filed shall be provided by the State's Attorney upon request of the defendant. The Committee's view was that using the filing of charges as a point in time beyond which witness statements have to be requested by the defendant instead of being automatically given to the defendant by the State is reasonable.

Using language borrowed from Rule 2-402 (f)(1)(A), subsection (c)(1)(D) 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 (c)(2)(B), pertaining to disclosure of the defendant's expert's information upon request by the State, except that in subsection (c)(2)(B), the requirement to disclose extends only to information from an expert whom the defendant expects to call as a witness.

Section (d) has expanded the explanation of what work product is in conformity with the language set out in *Goldberg v. U.S.*, 425 U.S. 94 (1976).

In section (e), 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 (f) 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 (h) provides that, with certain exceptions, discovery material is not required to be filed with the court. In light of the adoption of Title 16, Chapter 1000, Access to Court Records, proposed new section (h) 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, if the discovery materials are not filed 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 earlier of (i) the expiration of any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court. 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 (j), including new language pertaining to disqualification of witnesses.

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 extend the obligations of the parties under

the Rule to staff members of the defendant and certain others, to reletter the sections, to add a provision pertaining to disqualification of witnesses, to add a 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 add a Committee note following subsection (b)(1), to add new subsections (b)(2)(A), (D), and (E) concerning disclosure upon request of the defendant, to revise the Committee note following subsection (b)(3), to add new subsection (c)(1) concerning matters not subject to discovery by the defendant, to provide generally that there is no requirement to file discovery material with the court, and to require retention of discovery material for a period of time if it 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 Parties Extend to Staff and Others

The obligations of the ~~State's Attorney~~ parties under this Rule extend to material and information in the possession or control of the ~~State's Attorney~~ parties 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~~ has a duty to report, to the ~~office of the State's Attorney~~ party.

Cross reference: For the obligation of the State, see *State v. Williams*, 329 Md. 194 (2006).

(3) Failure to Comply with Discovery Obligation

The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. Upon the filing of a motion to disqualify the witness's testimony, disqualification is within the discretion of the court.

Committee note: On motion of a party or a person from whom discovery is sought, and for good cause shown, the court may enter any order that justice requires to protect a party or person from annoyance, embarrassment, or oppression.

~~(a)~~ (b) Scope

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

(1) The State's Attorney shall ~~furnish~~ provide 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~~ specified in Rule 4-263 (b)(2) and (3).

Committee note: Examples of material and information that must be disclosed pursuant to subsections (b)(2) and (3) of Rule 4-263 if within the possession or control of the State, as described in subsection (a)(2) of this Rule, include: each statement made by a witness that is inconsistent with another statement made by the witness or with a statement made by another witness; the medical or psychiatric condition of a witness that may impair his or her ability to testify

truthfully or accurately; pending charges against a witness for whom no deal is being offered at the time of trial; the fact that a witness has taken but did not pass a polygraph exam; the failure of a witness to make an identification; and evidence that might adversely impact the credibility of the State's evidence. The due diligence required by subsection (a)(1) does not require affirmative inquiry by the State with regard to the listed examples in all cases, but would require such inquiry into a particular area if information possessed by the State, as described in subsection (a)(2), would reasonably lead the State to believe that affirmative inquiry would result in discoverable information. Due diligence does not require the State to obtain a copy of the criminal record of a State's witness unless the State is aware of the criminal record. If, upon inquiry by the State, a witness denies having a criminal record, the inquiry and denial generally satisfy due diligence unless the State has reason to question the denial.

(2) Upon request of the defendant, the State's Attorney shall produce and permit the defendant to inspect, ~~and~~ copy, and photograph: (A) any relevant material or information regarding pretrial identification of the defendant by a witness for the State and specific searches and seizures, wiretaps, or eavesdropping, **(B)** ~~**any portion of a document containing**~~ **a copy of each written or recorded statement**, ~~**or containing**~~ **and the substance of** ~~**a**~~ **each oral statement made by the defendant or a co-defendant to a State agent that the State intends to use at trial or at any hearing other than a preliminary hearing;** ~~and~~ ~~(B)~~ (C) 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; (D) 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; and (E) any item obtained from or belonging to the defendant, whether

or not the State intends to use the item as the hearing or trial.

(3) Upon request of the State, the defendant shall permit any discovery or inspection specified in subsections ~~(d)(1)~~ (c)(2)(A), (B), and (E) 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).

(c) Matters Not Subject to Discovery

(1) Matters Not Subject to Discovery by any Party

This Rule does not require the State or the defendant to disclose (A) the mental impressions, trial strategy, personal beliefs, or other work product of counsel or (B) 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.

(2) By Defendant

This Rule does not require the State to disclose 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.

~~(b)~~ (d) 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.

(e) No Requirement to File With Court; Exceptions

Except as otherwise provided in these Rules or by order of court, discovery material need not be filed with the court. If the party generating the discovery material does not file the material with the court, that party 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 an exhibit to support or oppose a motion.

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. A cross reference to *State v. Williams*, 392 Md. 194 (2006) is added following the section.

In section (b), as stated in the Reporter's note to Rule 4-263, references to Code, Criminal Procedure Article, §11-205 and Rule 16-1009 are proposed to be added.

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 provide to the defendant the material and information specified in Rule 4-263 (b)(2) and (3). As in the proposed amendment to Rule 4-263, a Committee note containing examples of "*Brady*" materials that must be disclosed is added.

Subsection (b)(2), concerning disclosure by the State upon request of the defendant, is proposed to be amended by the addition of the substance of Rule 4-263 (c)(1)(E), Evidence for Use at Trial, and Rule 4-263 (c)(1)(F), Property of the Defendant. In addition, the proposed amendment adds to Rule 4-262 (b)(2) the substance of Rule 4-263 (b)(4)(A) and (C), concerning searches and seizures, wiretaps, eavesdropping, and pretrial identification of the defendant and also adds to subsection (b)(2) a requirement that the State's Attorney turn over documents and other tangible things that the State intends to use as well as any item obtained from or belonging to the defendant whether or not to be used in trial. The latter was requested by a member of the Committee who is a criminal defense attorney and had been refused these items in a criminal case.

In addition to the reference to *Brady*, references to three additional opinions of the U.S. Supreme Court are proposed to be added to the Committee note at the end of section (b).

Also proposed to be added to the Rule is a new subsection (c)(1), which is derived verbatim from Rule 4-263 (d)(1), Matters Not Subject to Discovery by the Defendant and a new subsection (c)(2) which is derived from Rule 4-263 (d)(2).

Proposed new section (e) is added for the reasons stated in the Reporter's note to Rule 4-263 (h). 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 information provided" and "states the date

> and manner of service," which is included in proposed new section (h) 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 (e). Also omitted from section (e) of Rule 4-262 is the last sentence of Rule 4-263 (h), 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 from the manner set forth in the Rule. Additionally, in Rule 4-262, the time that a party must retain original discovery materials that are not filed with the court is "until the expiration of any sentence imposed on the defendant," rather than the time period stated in Rule 4-263 (h).

Mr. Karceski explained that the derivation of the changes to the Rules was a suggestion by Mr. Brault regarding problems with discovery. Mr. Karceski said that he and Mr. Kratovil had discussed the Rules today and agreed that it would be best to consider only the most recent changes to these Rules, which have been discussed many times in the past.

Mr. Karceski noted that section (a) of Rule 4-263 and of Rule 4-262 make the discovery obligations applicable to the parties and not just the State's Attorney as the Rule originally provided. The only substantive change made to section (a) is in subsection (a)(2). The language "have reported" has been changed to the language "ha[ve] a duty to report." This covers the situation where a detective or agent from another law enforcement group, such as the Drug Enforcement Administration or other federal agency, who does not generally work in the State's Attorney's Office or generally report to the State's Attorney,

but has taken an active part in the particular case, would have a duty to report.

Mr. Karceski drew the Committee's attention to section (b), Disclosure Without Request. Subsection (b)(1)(A) now reads: "a copy of each written or recorded statement." He suggested adding after the word "statement" the language "regardless of when made" to cover a written or recorded statement that is obtained by the State or agents of the State at any time, as opposed to the oral statements referred to in subsection (b)(1)(B) that are only included up to the time charges are filed at the circuit court. To accommodate the State, which was concerned that every telephone conversation with every witness would have to be disclosed, it was agreed that oral statements up to the time charges are filed would be disclosed, but written or recorded statements regardless of when they were made would have to be disclosed.

Mr. Karceski pointed out that subsection (c)(1)(A) requires the State to provide all written or recorded statements made by a witness to a State agent after charges were filed in the circuit court. This can be stricken if the suggested language is added to subsection (b)(1)(A). Master Mahasa inquired if this would preclude a witness from testifying as to what was said to him or her even though it was not written or recorded. An example would be a police officer who takes an oral statement from a witness. Mr. Kratovil answered that this would be covered under subsection (b)(1)(B), the substance of each oral statement made before

charges were filed in the circuit court.

Mr. Karceski told the Committee that he would be willing to go over all of the changes to the Rule. However, the Subcommittee has no other changes to the Rule, and the Committee has gone over the Rule many times already. An agreement has been reached that no one is 100% happy with, indicating compromises, which is good, and there are no other changes to the Rule made since the last full Rules Committee meeting, except for those pointed out today. The Chair asked Mr. Kratovil for his viewpoint. Mr. Kratovil answered that what is before the Committee today is a reasonable compromise. Ms. Forster, who is the State Public Defender, said that she was satisfied with the Rules.

Mr. Karceski told the Committee that the Subcommittee did not spend as much time on Rule 4-262 as on Rule 4-263, but an agreement has been reached as to how to change the District Court Rule. The Reporter added that the most recent version of Rule 4-262 was distributed at today's meeting. Mr. Karceski pointed out that Rule 4-262 tracks Rule 4-263. Subsections (a)(1) and (2) are the same as in the circuit court rule. Subsection (a)(3) is included in Rule 4-263(j). Disqualification is not automatic; a motion to disqualify must be filed first, and then it is within the court's discretion to allow a continuance, or if there is an egregious violation, the court can do what it believes is appropriate under all the circumstances. Rule 4-262 varies from the circuit court rule, which goes into a detailed listing of

motions to compel and the sanctions that are available. The District Court has a time issue, with a 30-day turnaround between the time of arrest and the time of trial, in some cases. The Rule allows the court to exercise discretion if there is a failure to comply with the Rule.

Mr. Karceski drew the Committee's attention to Rule 4-262 (b), which states that it is subject to section (c). Section (c) pertains to matters not subject to discovery, such as work product and mental impressions. Section (b) also states that what is provided in Code, Criminal Procedure Article, §11-205 is excepted. The Subcommittee decided that because of the difficulty with Rule 4-262 when private citizens file a complaint making the mandatory list of witnesses impractical, this requirement would not be included in the Rule. Mr. Kratovil had said that providing other discovery, such as witness statements and impeachment evidence, continues to be a part of both Rules.

The Chair questioned as to which subsections of Rule 4-263 (b) should be included in Rule 4-262. Mr. Karceski replied that Rule 4-262 (b)(1) states that the State's Attorney shall provide to the defendant any material or information specified in Rule 4-263 (b)(2) and (b)(3), the *Brady* sections of Rule 4-263. The Chair commented that he thought that oral statements were not to be provided, but written statements were to be provided. The change to the Rule should include a reference in subsection (b)(1) of Rule 4-262 to "Rule 4-263 (b)(1)(A)." Mr. Karceski

agreed.

Mr. Karceski drew the Committee's attention to subsection (b)(2) of Rule 4-262. This is new language, although it has not been added for review today. Subsection (b)(2)(A) is new as compared to the previous Rule. None of this was permitted by the previous Rule, and it will hopefully be added to the Rule. Subsection (b)(2)(B) has been changed, and the current version appears in the draft of the Rule that was handed out today. The change is proposed because there are prosecutions that could involve co-defendants. The revised language expands the State's duty at the District Court as to statements of the defendant and co-defendants that are in the possession of the State or agents of the State. Subsection (b)(2)(D) tracks the language of Rule 4-263 (c)(1)(E), which has been renumbered as (c)(1)(D).

Mr. Karceski noted that subsection (b)(3) provides that the defendant shall permit any discovery or inspection specified in subsections (c)(2)(A), (B), and (E) of Rule 4-263, which are generally to appear in a lineup with all the actions associated with it, and to provide certain discovery pertaining to expert testimony and computer-generated evidence that may be in the possession of the defendant. Section (c) pertains to matters not subject to discovery. Subsection (c)(1) provides that no party must produce work product. Subsection (c)(2) provides that the State is not required to disclose the identity of a confidential informant, as long as the failure to disclose the identity does not infringe on a constitutional right of the defendant. At the

Subcommittee meeting, Delegate Vallario asked if this precludes the defendant from getting information pertaining to a confidential informant under certain circumstances. The answer is that there are still procedures available so that if the informant fits certain categories, a defendant can file the appropriate motion with the court stating why the identity should be revealed, and the court would rule on that issue. The Rule does not preclude the filing of that motion, but it states that obtaining the information is not a matter of automatic right.

Mr. Karceski said that section (d) of the Rule has not been changed from the original language. Section (e) tracks some of the language of Rule 4-263 (h), which provides that there is no requirement to file discovery with the court. Subsection (h)(2) and the last sentence of Rule 4-263 (h) have been omitted in Rule 4-262 (e), as impractical and unduly burdensome in the District Court. In Rule 4-262 (e), the retention period is simplified to read, "... until the expiration of any sentence imposed on the defendant."

The Chair expressed his approval of the Rules, and he complimented the Subcommittee and the consultants for their hard work in drafting the changes to the Rules. He also thanked Mr. Brault for bringing the issue of deficiencies in discovery, which had been noted by the American College of Trial Lawyers, to the attention of the Rules Committee. Mr. Kratovil said that the prosecutors around the State have been discussing these Rules. He stated that the points of view that he expressed are not

necessarily those of the 24 State's Attorneys from each county or those of the State's Attorneys Association. He supports the Rules as they have been revised and will do his best to talk to the State's Attorneys around the State, but he cannot guarantee that all of them will be entirely in favor of the Rules. Judge Norton asked Mr. Kratovil, who is President of the State's Attorneys Association, whether that entity will endorse the changes to the Rules. Mr. Kratovil replied that his term as President expires next month, and he probably will not be President when the Association determines its position on them. The Rules have been discussed at various board meetings.

Mr. Brault remarked that he had heard that the U.S. Attorneys were opposed to changing the federal rules on discovery. About five years ago, the Criminal Subcommittee of the American College of Trial Lawyers brought this issue up before the federal prosecutors. The State of Maryland has surpassed the federal courts in improving discovery. At the last meeting, the federal prosecutors reconsidered this issue, but the outcome of that meeting is unknown. He said that when the process of changing the Maryland Rules began five years ago, he never would have imagined that the defense bar and the prosecutors would arrive at a consensus as to the revisions. By consensus, the Committee approved the changes to the Rules as presented.

Agenda Item 3. Consideration of a policy question concerning advice of certain collateral consequences of a plea of guilty

or nolo contendere (See Appendix 1)

Mr. Karceski told the Committee that a policy question was before them. (See Appendix 1). It arose from *Dawson v. State*, 172 Md. App. 633 (2007). The opinion quotes *Yoswick v. State*, 347 Md. 228 (1997) as follows: "The imposition of a sentence may have a number of collateral consequences and a plea of guilty is not rendered involuntary in the constitutional sense if the defendant is not informed of the collateral consequences." The defendant, Dawson, entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). While waiting in his cell to be sentenced, he received the pre-sentence investigation report and found out that by entering an *Alford* plea in a sex offense case, he was required to register as a sexual offender. This type of registration is an invasive process that can continue from 10 years to life, depending on the circumstances. The defendant did not want to be required to register, so he requested that his plea be withdrawn. The matter was resolved by the Court of Special Appeals, which held that since no sentence had been imposed, the circuit court should have considered exercising its discretion to permit the defendant to withdraw the plea pursuant to section (g) of Rule 4-242, Pleas. The circuit court had decided the case on the issue of whether or not the plea was knowingly and voluntarily entered. The Court of Special Appeals, in the panel's majority opinion, said that the case was not related to that and remanded the case to the trial court.

Recently, the Committee discussed section (e) of Rule 4-242 pertaining to persons who are not U.S. citizens affected by a guilty plea by being deported or detained. The Rule provides that the non-citizens must be advised by the court or counsel that if the plea is entered, there is the possible collateral consequence of detention or deportation. The question is whether every collateral consequence must be referred to in the Rule. If not, then should the collateral consequence of registration as a sexual offender be part of the Rule, or should it be left to the court or counsel to advise the defendant of this collateral consequence?

The Chair said that he had dissented from the majority in *Dawson*, stating his view that the majority remanded the case for the circuit court to exercise discretion, but he felt that it would be an abuse of discretion not to let the defendant withdraw his plea. The defendant had stated that had he known about the collateral consequence of registration, he would not have pleaded, and the court found that this statement was true. Therefore, the Chair's opinion was that the defendant was absolutely entitled to withdraw his plea.

Mr. Bowen expressed the view that if a non-citizen is entitled to information about collateral consequences, then a citizen should be entitled. He suggested that the answer to the policy question of whether to amend Rule 4-242 (e) to include advice about the collateral consequences should be affirmative.

Judge Norton explained that the Criminal Subcommittee was hesitant to add this to the Rule, because there are many other collateral consequences, such as an effect on parole or the right to vote, and amending the Rule to cover pleading guilty to a sexual offense may require adding to the Rule notification as to many other collateral consequences. Mr. Maloney expressed the opinion that registration as a sexual offender has an immediate and profound consequence, and it is unthinkable to have registration exposure without being warned in the litany given at the time of a guilty plea. Mr. Bowen noted that the case indicates that everyone involved in the case was chagrined that the defendant had not been warned about the consequences of pleading guilty to a sexual offense.

The Chair asked if anyone disagreed with adding in language to the Rule referring to the consequences of pleading guilty to a sexual offense. The Vice Chair pointed out that if the defendant pleads guilty not knowing that he or she could be subject to a mandatory minimum sentence, that would be an important issue to consider in revising the Rule. Mr. Kratovil questioned whether in a case where the defendant was sentenced to life imprisonment with the possibility of parole, and the attorney did not advise the defendant that in order to be paroled, the approval of the Governor is needed, would that consequence have to be referenced in the Rule? There are many other possible collateral consequences of a guilty plea, such as the loss of a license to practice law or medicine. Where is the line drawn as to what

needs to be part of that litany? Judge Matricciani inquired as to whether there should be a requirement that the defendant be asked if he or she had consulted with an attorney as to the collateral consequences of entering a plea. The Chair noted that section (c) of Rule 4-242 provides that the judge is not supposed to take the plea until the judge is satisfied that the defendant understands the nature of the charge and the consequences of the plea.

Mr. Brault said that he thought that the potential for a non-citizen to be deported was subject to writs of *coram nobis* to set aside a guilty plea, and questioned whether this remedy would be available to a sex offender. The Chair responded that it is theoretically available, but the situation discussed today is dissimilar to the deportation cases, because the registration requirement exists at the time the plea is entered. *Coram nobis* was used successfully in the deportation cases because the federal government changed its policy and began to deport people who would not have been deported when the plea was entered. The registration issue is not likely to arise all that often, but to the extent it saves post conviction actions and ends collateral attacks on sentences, it can be added to the Rule.

Judge Dryden inquired as to where the provision is that a judge must tell the defendant of the collateral consequences of pleading guilty. He customarily warns defendants about this, but he was not sure where the requirement is written. Pleading

guilty to a new charge could serve as a basis for a violation of probation on an earlier charge. The Chair commented that this should be put into the Judges' Benchbook. The Reporter remarked that she would notify the person who is revising the benchbook about adding this in.

Mr. Kratovil asked what the proposal is for amending the Rule. Mr. Maloney replied that language would be added to section (e) of Rule 4-242 requiring advice to defendants about the collateral consequences of pleading guilty to a sexual offense. This promotes the finality of criminal convictions. Including this in the Rule takes care of those few members of the bench who do not alert defendants about the consequences of pleading guilty. Mr. Karceski commented that the sexual offender laws are going to become more stringent, not more lax. They will regulate where sexual offenders may live, such as not less than a certain distance from schools and parks.

Mr. Kratovil reiterated his concern that a line has to be drawn as to which collateral consequences are to be included in Rule 4-242. There are situations where clerks' offices must notify administrative bodies that the licenses possessed by defendants have to be revoked because the defendant had pleaded guilty to certain offenses. Pleading guilty has many consequences. Deportation has already been added to the list, but this is fairly limited. Once others are added, it may be necessary to move on to warnings about revocation of licenses. He expressed his opposition to amending section (e) to include

the collateral consequences of pleading guilty to a sexual offense.

The Vice Chair inquired as to what happens if mandatory actions are added to the Rules, and the action does not occur. The Committee spent hours discussing whether non-citizens should be warned about the consequences of deportation or detention if they pled guilty to certain crimes. That is why the last sentence of section (e) was added, providing that the omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid. What the Rule should say is that the judge should make every effort to inform the defendant of the relevant collateral consequences of the plea. Judge Norton noted that section (e) of the Rule provides that the defendant should consult with defense counsel for additional information concerning the potential consequences of the plea. This shifts the focus of a post conviction action to the defense attorney, as opposed to the court's failure to provide the information. The Vice Chair questioned as to whether this would encourage the filing of post conviction actions. Judge Dryden pointed out that the judge has to direct questions to the defendant regardless of whether counsel told the defendant about the collateral consequences.

The Chair commented that it would be difficult for a court to invalidate a guilty plea of a physician or lawyer who did not realize that pleading guilty to a crime could invalidate his or her professional license, but the consequences for an uneducated

person who pleads guilty to a sexual offense are very serious.

The Chair noted that there are several aspects to this. One is that the defendant, before being sentenced, would like to withdraw the plea because had he or she known what was required, he or she never would have entered the plea in the first place. Another is the individual who was sentenced 10 years ago and is now saying he or she never would have pleaded guilty if he or she would have known about being deported. A third aspect is decreasing post conviction cases for incarcerated defendants and *coram nobis* cases for the ones who are finished serving their sentence.

The Vice Chair remarked that section (c) provides that the court may accept a guilty plea only after it determines upon an examination of the defendant on the record in open court conducted by the court, the State's Attorney, defense counsel, or any combination thereof that the defendant is pleading voluntarily with understanding of the nature of the charge and the consequences of the plea. This means something different from the one particular collateral consequence. The Chair responded that one consequence of a plea may be a mandatory minimum sentence, and the defendant must be told of this consequence.

The Vice Chair questioned whether the issue discussed today means that if the defendant is not told about registration as a sex offender, it would fall under section (c), where post

conviction relief is available because the defendant was not informed, or whether it is within the purview of section (e) where post conviction relief is not available in Maryland because the fact that the advice was not given does not render the guilty plea invalid. The Chair clarified that post conviction relief may be available under section (e) on the ground of ineffective assistance of counsel. Relief is not available by review of the transcript of the guilty plea proceeding. Now, for example, a judge takes a plea and does not advise properly. A reading of the transcript indicates that the plea was involuntary. On the other hand, the defendant says that he or she answered everything and the court fully covered the questions, but the defendant's lawyer did not know or inform him or her that immediately after the plea, he or she would be deported or would have to register as a sex offender.

Mr. Kratovil inquired as to whether if the court, the State's Attorney, or counsel did not advise the defendant of the deportation, that would be a basis for withdrawal of the plea. The Vice Chair asked whether Mr. Kratovil was referring to withdrawal before sentencing, and he answered affirmatively. The Chair stated that this is a basis for withdrawal of the plea under *Dawson*. The last sentence of section (e) saves an otherwise correct guilty plea litany, but it does not prevent a post conviction action where there is ineffective assistance of counsel. The Chair said that this is not happening very often.

Mr. Kratovil reiterated that his concern is the “slippery slope” of opening up the Rule to references to many collateral consequences.

The Chair stated that the Criminal Subcommittee will prepare language to be added to section (e) of Rule 4-242 for the Committee to consider.

Agenda Item 4. Consideration of proposed amendments to: Rule 4-217 (Bail Bonds), Rule 4-341 (Sentencing - Presentence Investigation and Report), Rule 1-101 (Applicability), Rule 4-502 (Expungement Definitions), Rule 4-503 (Application for Expungement of Record for Arrests, Detention, or Confinements Occurring Before October 1, 2007 When No Charges Filed), Form 4-503.1 (Request for Expungement of Police Record for Arrests, Detentions, or Confinements Occurring Before October 1, 2007 Without Charge), and Form 4-503.2 (General Waiver and Release)

Mr. Karceski presented Rule 4-217, Bail Bonds, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-217 by adding a cross reference at the end of section (g), as follows:

Rule 4-217. BAIL BONDS

. . .

(g) Form and Contents of Bond - Execution

Every pretrial bail bond taken shall be in the form of the bail bond set forth at the end of this Title as Form 4-217.2, and

shall be executed and acknowledged by the defendant and any surety before the person who takes the bond.
Cross reference: See Code, Criminal Procedure Article, §5-214 which allows a defendant, who has previously appeared in person before a judge or commissioner, to post bond by means of electronic transmission or hand delivery of the relevant documentation without appearing before the commissioner or judge if authorized by the County Administrative Judge or the Chief Judge of the District Court.

. . .

Rule 4-217 was accompanied by the following Reporter's Note.

The 2007 legislation enacted Chapter ___, Acts of 2007 (HB 337), which allows a defendant who has already appeared before a commissioner or judge in a criminal case to post bond by means of electronic transmission or hand delivery of the relevant documentation without appearing before the commissioner or judge, if authorized by the County Administrative Judge in the circuit court or the Chief Judge of the District Court in a District Court case. The Criminal Subcommittee recommends adding a cross reference to the new statute after section (g) of Rule 4-217.

Mr. Karceski explained that recent legislation was passed dealing with the execution of bail bonds. The Rule provides that a defendant must appear in person before the individual who takes the bond to execute and acknowledge certain things pertaining to posting a bail bond. The new statute, Code, Criminal Procedure Article, §5-214 allows the bond to be posted by electronic transmission or hand delivery of the relevant documentation as long as the defendant has previously appeared before a judge or commissioner and the County Administrative Judge authorizes this.

The Criminal Subcommittee recommends adding a cross reference tracking the language of the new statute at the end of section (g) of the Rule. Without the cross reference, the Rule would only allow the defendant to appear in person. Judge Norton added that the purpose of the new statute is to accommodate jurisdictions where there are rural jails with no commissioners nearby. The paperwork can be faxed to the commissioner without the need to drive the prisoner a long distance to where the commissioner is located.

The Chair remarked that this could be part of the video bail hearing procedure. He noted that the defendant does not usually post the bond, anyway. Someone else does so, on behalf of the defendant. The Vice Chair questioned as to whether the amended language is in the wrong place, because she did not read section (g) as stating that the defendant posts the bond. She asked whether the defendant has to actually file it with the court. Judge Dryden replied that the court would like to see the defendant put his or her own signature on the bond. The Chair pointed out that the judge sets the amount of the bond, and the bondsman then posts the bond.

Mr. Karceski said that he was unsure as to how the procedure works. He reads Rule 4-217 as providing that the defendant has to be present. The Vice Chair commented that she read section (g) as meaning that the bond has to be executed and acknowledged by the defendant and any surety. The surety has to be before the court. Judge Dryden responded that this is not correct. The

Chair suggested that section (g) should end after the word "surety." The bond has to be executed by the defendant and executed by the surety. He asked if defendants are brought back to appear before a commissioner when the defendant executes the bond. Judge Norton answered that the defendant appears before either a commissioner or a judge when the defendant executes the bond, and 99% of the time it is a commissioner. The Chair remarked that he sat on the circuit court for nine years, and he never asked for a defendant to be brought back to sign the bail bond. Judge Dryden noted that the defendants the Chair saw in those nine years as a circuit court judge probably personally appeared before a commissioner. The Chair disagreed, stating that his recollection was that the defendant is given bail, the defense attorney calls the bondsman who posts the bail, but the defendant was not brought in.

Mr. Karceski told the Committee that it is necessary to determine the best way to communicate the new procedure provided for in the amended statute. He expressed the opinion that the defendant has to be brought before the person who takes the bond. Judge Dryden commented that the commissioners are concerned that if the defendant is not brought back before the commissioner, there is the opportunity for mistakes to be made. It is important to have the defendant there personally. Often, the defendant fills out papers, providing personal information. The Chair said that he did not believe that this is always done in the presence of the commissioner or in the presence of the

circuit court judge. Ms. Smith remarked that this often takes place in the clerk's office. Mr. Shipley added that the defendant has to fill out a large number of forms. Mr. Karceski observed that often someone from the clerk's office takes the bond. He noted that deleting the end of section (g) would be changing the method of setting the bond.

The Vice Chair inquired as to the purpose of requiring the defendant to personally post bond. This is not necessary in a civil case. Judge Dryden replied that the judicial officer has to make sure that the surety is present and that the defendant has employed that individual to post the bond. It may involve a desperate situation where people tend to act with desperation. As Judge Norton pointed out, in a jurisdiction such as Anne Arundel County, it is not a long trip from the detention center to the commissioner's office. The commissioner is available 24 hours a day, and in a large jurisdiction, it is not a burden to bring in the defendant. It makes the judges feel more comfortable that everything has been done properly.

The Chair commented that the statute has changed the Rule. The cross reference is not appropriate. Judge Norton explained that the Subcommittee did not look at the substance of the Rule but was trying to alert people about the new statute. The Vice Chair noted that if the language "by the defendant and any surety before the person who takes the bond" means the commissioner or the court, then the Rule needs to be changed. The Chair said that "the person who takes the bond" could be a desk sergeant.

Mr. Bowen pointed out that the substance of the cross reference should be in the body of the Rule. The new statutory language provides that the defendant can post the bond electronically if the defendant has already appeared, but not in every case. The Chair commented that the Style Subcommittee can redraft the Rule with the language of the cross reference included.

The Vice Chair noted that the law seems to require that the County Administrative Judge in the circuit court or the Chief Judge of the District Court has to authorize the new procedure. Judge Norton responded that there is a blanket authorization of this in place. The Chair inquired as to whether someone from the judiciary testified when the bill was discussed by the legislature. Judge Norton reiterated that the rationale for the change is that some jails are located where the commissioner is and some are miles away from the commissioner. The Vice Chair acknowledged this, but she commented that when Rules are drafted, the intention is to allow attorneys to be able to move from jurisdiction to jurisdiction with knowledge of the Rules. Judge Norton responded that reading between the lines indicates that the intention of the change is to make sure that the advice of rights occurs. A defendant who has been before the commissioner has already heard this, and any opportunity to do so should not be subverted. The Vice Chair commented that she did not disagree with Judge Norton, but she expressed the view that the language "if authorized by the County Administrative Judge or the Chief Judge of the District Court" should not be included. Mr. Brault

pointed out that this language is taken directly from the statute, but the Vice Chair observed that the statute can be superseded by the Rule.

The Chair said that the bill was introduced by a delegate from Cecil County, which may mean that some of his clients sat in jail for a while until the sheriff was able to bring them before the judicial officer. Ms. Ogletree observed that in Caroline County, there is one commissioner in Federalsburg. If someone is arrested in the northern part of the county, the individual may not see the commissioner for some time. When the individual is finally brought before the commissioner, he or she may have go back to Denton to get a bondsman. It is very difficult to move people around, and Cecil County is more metropolitan than Caroline County. Judge Hotten inquired if the Conference of Circuit Judges had seen the bill. The Chair asked Mr. Zarnoch who was not certain if the Conference had had a chance to review the bill. He did point out that the statute uses the language "notwithstanding Maryland Rule 4-217 (g)" indicating that the legislature meant to override the Rule.

The Chair stated that Form 4-217.2 may have to be changed to conform to the statute. He added that the Style Subcommittee will look at the Rule. The consensus of the Committee is that the Rule must be changed to conform to the statute, or the statute will have to be superseded by the Rule. Mr. Sykes remarked that the Style Subcommittee should not make the decision as to whether the statute should be superseded. The Chair

suggested that the Honorable Ben Clyburn, Chief Judge of the District Court, should be asked as to whether the procedure should be made applicable to all jurisdictions. Judge Dryden commented that he would speak with Judge Clyburn.

Mr. Karceski presented Rule 4-341, Sentencing - Presentence Investigation and Report, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-341 to add a cross reference to a certain Code provision, as follows:

Rule 4-341. SENTENCING - PRESENTENCE INVESTIGATION AND REPORT

Before imposing a sentence, if required by law the court shall, and in other cases may, order a presentence investigation and report. A copy of the report, including any recommendation to the court, shall be mailed or otherwise delivered to the defendant or counsel and to the State's Attorney in sufficient time before sentencing to afford a reasonable opportunity for the parties to investigate the information in the report. Except for any portion of a presentence report that is admitted into evidence, the presentence report, including any recommendation to the court, is not a public record and shall be kept confidential as provided in Code, Correctional Services Article, §6-112.

Cross reference: See, e.g., *Sucik v. State*, 344 Md. 611 (1997). As to the handling of a presentence report, see *Ware v. State*, 348 Md. 19 (1997), and *Haynes v. State*, 19 Md. App. 428 (1973). <u>See Code, Criminal Procedure Article, §11-727 for a required presentence investigation and mental health assessment for a defendant who has been convicted of the crime of sexual abuse of a minor and is obligated to register as a child sexual offender.</u>

Source: This Rule is derived from former Rule 771 and M.D.R. 771.

Rule 4-341 was accompanied by the following Reporter's Note.

> The 2007 General Assembly enacted Chapter ___, Acts of 2007 (HB 390) which requires a court to order a presentence investigation and a mental health assessment for a defendant who violated Code, Criminal Law Article, §3-602, Sexual Abuse of a Minor, and is obligated to register as a child sexual offender. The Criminal Subcommittee recommends adding a cross reference to the new statute to Rule 4-341.

Mr. Karceski explained that the legislature modified Code, Criminal Procedure Article, §11-727 to require a presentence investigation and mental health assessment for a defendant who has been convicted of the crime of sexual abuse of a minor pursuant to Code, Criminal Law Article, §3-602 and is obligated to register as a child sexual offender pursuant to Code, Criminal Procedure Article §11-704, unless waived by the State's Attorney and defense counsel. The court is to consider the presentence investigation and mental health evaluation when sentencing the defendant. The Chair commented that the statute provides that defense counsel can waive, but not the defendant. Mr. Karceski said that he was not sure whether the court can ask for a presentence investigation and mental health assessment even if waived. The Subcommittee has recommended a cross reference to the amended statute.

The Vice Chair expressed the opinion that a cross reference to the amended statute is appropriate. She suggested that it be moved up to the beginning of the cross reference. She inquired as to whether there are other examples of required presentence

investigations. Mr. Karceski replied that they are required in all death penalty cases. The case referred to in the cross reference, *Ware v. State,* 348 Md 19 (1997) pertains to this. The Vice Chair added that the language in the cross reference which reads "[a]s to the handling of a presentence report..." is not instructive. Mr. Karceski said that although the concept of adding the cross reference to the amended statute is appropriate, the Subcommittee can look at the cases cited in the cross reference to try to improve the explanation of the cases.

By consensus, the Committee remanded Rule 4-341 to the Criminal Subcommittee.

Mr. Karceski told the Committee that the next series of proposed changes to rules are a result of legislative enactments, one of which deals with the expungement of certain civil cases. Possession of an open container may be charged civilly, and it may be subject to expungement. The impetus for the second set of rules involves the Baltimore City Central Booking facility, where persons are arrested and released without being charged.

Mr. Karceski presented Rules 1-101, Applicability, and 4-502, Expungement Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 100 - APPLICABILITY AND CITATION

AMEND Rule 1-101 to add language to section (d) clarifying that rules pertaining

to expungement of certain civil records are included in Title 4, as follows:

Rule 1-101. APPLICABILITY

. . .

(d) Title 4

Title 4 applies to criminal matters, post conviction procedures, and expungement of records in the District Court and the circuit courts; including records of civil offenses or infractions, except juvenile offenses, enacted under State or local law as a substitute for a criminal charge.

. . .

Rule 1-101 was accompanied by the following Reporter's Note.

Chapter ___, Acts of 2007 (HB 278) amended Code, Criminal Procedure Article, §10-101 to include the expungement of court records that pertain to any proceeding, except a juvenile proceeding, concerning a civil offense or infraction enacted under State or local law as a substitute for a criminal charge or police records concerning the arrest and detention of or further proceeding against a person for a civil offense or infraction, except a juvenile offense, enacted under State or local law as a substitute for a criminal charge. The Criminal Subcommittee recommends modifying Rule 1-101 (d) and sections (d), (i), and (j) of Rule 4-502 to conform to the change to the statute.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-502 to expand the definition in section (d), to delete section (g), to expand the definition in sections (h) and (i), and to add a new definition in section (k), as follows:

Rule 4-502. EXPUNGEMENT DEFINITIONS

The following definitions apply in this Chapter and in Forms 4-503.1 through 4-508.3:

(a) Application

"Application" means the written request for expungement of police records filed pursuant to Code, Criminal Procedure Article, §10-103 and Rule 4-503.

(b) Central Repository

"Central Repository" means the Criminal Justice Information System Central Repository of the Department of Public Safety and Correctional Services.

(c) Court

"Court" means the Court of Appeals, Court of Special Appeals, any circuit court, and the District Court.

(d) Court Records

"Court records" means all official records maintained by the clerk or other personnel pertaining to (1) any criminal action, (2) any action, except a juvenile proceeding, concerning a civil offense or infraction enacted under State or local law as a substitute for a criminal charge, or (3) any proceeding for expungement. It includes indices, docket entries, charging documents, pleadings, memoranda, assignment schedules, disposition sheets, transcriptions of proceedings, electronic recordings, orders, judgments, and decrees. It does not include: records pertaining to violations of the vehicle laws of the State or of any other traffic law, ordinance, or regulation;

written opinions of a court; cash receipt and disbursement records necessary for audit purposes; or a court reporter's transcript of proceedings involving multiple defendants.

(e) Expungement

"Expungement" means the effective removal of police and court records from public inspection:

(1) by obliteration; or

(2) by removal to a separate secure area to which the public and other persons having no legitimate reason for being there are denied access; or

(3) if effective access to a record can be obtained only by reference to other records, by the expungement of the other records or the part of them providing the access.

(f) Law Enforcement Agency

"Law enforcement agency" means any State, county, and municipal police department or agency, any sheriff's office, any State's Attorney's office, the Office of the State Prosecutor, and the Attorney General's office.

~~(g) Notice~~

~~"Notice" means a written request for expungement of police records given by a person pursuant to the Code, Criminal Procedure Article, §10-103, unless the context clearly requires a contrary meaning.~~

~~(h)~~ (g) Petition

"Petition" means a written request for expungement of court and police records filed by a person pursuant to Code, Criminal Procedure Article, §10-105 (a) and Rule 4-504.

~~(i)~~ (h) Police Records

"Police records" means all official records maintained by a law enforcement agency, a booking facility, or the Central Repository pertaining to the arrest and detention of or further proceeding against an individual for a criminal charge; ~~for~~ a suspected violation of a criminal law~~, or~~; a violation of Code, Transportation Article for which a term of imprisonment may be imposed; or a civil offense or infraction, except a juvenile offense, enacted under State or local law as a substitute for a criminal charge. "Police records" does not include investigatory files, police work-product records used solely for police investigation purposes, or records pertaining to nonincarcerable violations of the vehicle laws of the State or of any other traffic law, ordinance, or regulation.

~~(j)~~ (i) Probation Before Judgment

"Probation before judgment" means disposition of a charge pursuant to Code, Criminal Procedure Article, §6-220 or a civil offense or infraction, except a juvenile offense, enacted under State or local law as a substitute for a criminal charge; it also means probation prior to judgment pursuant to former Code, Article 27, §641, a disposition pursuant to former Code, Article 27, §292 (b), probation without finding a verdict pursuant to former Code, Article 27, §641 prior to July 1, 1975, and a disposition pursuant to former Section 22-83 of the Code of Public Local Laws of Baltimore City (1969 Edition).

~~(k)~~ (j) Records

"Records" means "police records" and "court records."

(k) Request

"Request" means a written statement given by a person pursuant to Code, Criminal Procedure Article, §10-103, asking for expungement of police records, unless the context clearly requires a contrary meaning.

(l) Service

"Service" with respect to the application or petition means mailing a copy by certified mail or delivering it to any person admitting service, and with respect to any answer, notice, or order of court required by this Rule or court order to be served means mailing by first class mail.

(m) Transfer

"Transfer" means the act, done pursuant to an order of court, of removing an action or proceeding from the court or docket in which it was originally filed or docketed to such other proper court or docket as the nature of the case may require.

Source: This Rule is derived from former Rule EX1.

Rule 4-502 was accompanied by the following Reporter's Note.

Chapter ___, Acts of 2007 (HB 10) alters expungement procedures by eliminating the required notice to law enforcement units, leaving only a procedure to file a request for expungement, and by eliminating the written waiver and release of tort claims that accompanied the notice of expungement of records pertaining to arrests, detentions, or confinements occurring before October 1, 2007 where no charge was filed. The statute also creates an automatic expungement of police and court records for arrests or confinements occurring on or after October 1, 2007. The Criminal Subcommittee recommends amending Rule 4-502 by deleting the definition of the word "notice" and by adding a definition of the word "request." The Subcommittee also recommends changing: (1) Rule 4-503 to apply to arrests, detentions, or confinements occurring before October 1, 2007 that do not result in a criminal charge and to add a Committee note referring to the automatic expungement procedure for arrests and confinements occurring on or after October 1, 2007; (2) Form 4-503.1 to indicate that it applies only to arrests, detentions, or

> confinements occurring before October 1, 2007 that do not result in a charge and to delete the provision referring to a "General Waiver and Release," and (3) Form 4-503.2 to eliminate the reference to "Code, Criminal Procedure Article, §10-103 (c), since the requirements to file a general waiver and release for arrests, detentions, and confinements not resulting in a charge has been eliminated.
>
> The change to section (d) is explained in the Reporter's note to Rule 1-101.

Mr. Karceski explained that section (d) of Rule 1-101 has language added that includes as subjects of expungement records of civil offenses or infractions, except juvenile offenses.

Mr. Bowen commented that although the new language is taken directly from the statute, the proper wording is "including records of civil offenses or infractions, except juvenile offenses, under State or local law enacted as a substitute for a criminal charge." He suggested that this language be the wording of the Rule. By consensus, the Committee agreed with this change.

The Chair inquired if the changes to the Rules could be effected by a definition providing "criminal matters include ...". The Vice Chair questioned as to how one figures out what kind of civil offenses were enacted under State or local law as a substitute for a criminal charge. There are many civil offenses, such as zoning laws, that could qualify under the new language. She stated that she did not understand the meaning of the added language. Judge Dryden responded that the amended language gives

judges the authority to expunge what they feel should be expunged. He remarked that the law was meant to apply to cases punishable only by a fine.

The Chair pointed out that the problem that resulted in the change to the law was that people with civil offenses on their record were applying for jobs, but they could not expunge the civil citations from their record. Judge Dryden added that initially the attempt to solve the problem was to move this information out of the criminal data base, but now employers have access to the information regarding civil offenses. Judge Norton remarked that it was odd to be able to expunge a conviction for possession of marijuana, but not for possession of a beer. The Vice Chair said that she did not have a problem with the concept of being able to expunge a civil offense, but it is strange to have to prove that the civil offense was enacted as a substitute for a criminal offense. Judge Dryden observed that the language pertaining to the expungement of civil offenses is difficult to state.

The Chair suggested that language could be added to the definition of "criminal action" as follows: "For purposes of this title, criminal action includes any civil action charging an offense or infraction, except a juvenile action, under State or local law enacted as a substitute for a criminal charge." Judge Norton asked if this should go into Rule 4-102, Definitions. The Chair answered that it should go into Rule 4-502. Mr. Maloney said that there can be a civil citation or a municipal infraction

for loud noise or unseemly conduct in the municipal civil code carrying no criminal penalty. If the definition states up front that it is criminal, it would exclude this offense. Some municipal infractions that carry only fines and no incarceration are only civil. Mr. Sykes suggested that the definition could include the language "conduct for which a criminal action could be brought."

Mr. Maloney noted that the statute is trying to address a range of conduct, much of which falls under the category of municipal civil infractions. Judge Dryden expressed the opinion that there is no better way to state this. The Vice Chair expressed her agreement with the Chair's suggestion that the words of the statute be added to the definition of "criminal action." The Chair pointed out that this would avoid repeating the definition in several Rules. Mr. Karceski suggested that the language of the statute that reads "enacted as a substitute for a criminal charge" should be deleted. This is the part of the language that is so difficult to define. The Vice Chair observed that regarding municipal infractions, the Anne Arundel County Code is set up to allow for citations and other ways of pursuing code violations, such as building or zoning codes. All of those sections provide that it is also a criminal offense. The municipal infractions in Anne Arundel County are not a substitute, since they are also criminal offenses. Judge Dryden remarked that it is virtually impossible to devise a list of violations that should be moved out of the criminal database to

the civil database.

Mr. Maloney suggested that the wording could be: “any infraction that is punishable by a fine or a term of incarceration.” Judge Dryden responded that he had considered this type of definition but was concerned that it might be too broad. The Chair inquired as to who had drafted the statute. It had been put before the legislature by request of the Maryland Judicial Conference. Judge Dryden replied that some of the District Court judges had brought the problem of expungement of civil offenses to the attention of Judge Clyburn. At first, they were going to request that only the offense of underage drinking should be able to be expunged, but then they decided that the idea might be more attractive to the legislature if the legislation did not focus solely on underage drinking.

The Vice Chair expressed her agreement with the Chair’s suggestion to define this as a criminal action. The Chair commented that the only danger is that people will not pick up on this in the civil context. Mr. Karceski said that what is meant by this statute is especially an alcohol violation which, under the same factual scenario, a police officer could charge with either a civil citation or a criminal summons. Sometimes a police officer will do both; sometimes the officer will do one or the other. The Chair asked if the civil offenses are always charged by citation, and Mr. Karceski replied affirmatively. Ms. Ogletree pointed out that there is an enabling statute authorizing the issuance of civil citations and asked if this

should be keyed into this change to the Rule.

The Chair suggested that this could be keyed into section (b) of Rule 4-102 which defines "citation." It could mean a charging document issued to a defendant by a peace officer. Judge Dryden said that this could be a problem, because it is not always issued by a peace officer. The Chair inquired as to why any attention has to be paid to a citation for a zoning violation. Ms Ogletree remarked that it could be a misdemeanor that is chargeable as a civil infraction. The Chair responded that a misdemeanor is a crime. Mr. Karceski asked whether Ms. Ogletree referred to an act that is a misdemeanor or one that could have been charged as a misdemeanor. Ms. Ogletree answered that under local law, it could have been a misdemeanor. Mr. Karceski expressed his agreement with the Chair that if it is a misdemeanor, it can be expunged.

Mr. Maloney suggested that the wording of the Rule could be "any offense charged under Rule 4-102 (a) or (b)." The term "peace officer" in section (b) is defined in section (h) as any law enforcement officer, police officer, and any other person authorized by State or local law to issue citations. Mr. Karceski questioned as to whether it will be understood that the word "citation" means a civil as well as a criminal citation, because this Rule is applicable to criminal matters. Mr. Maloney suggested that the statute that authorizes the issuance of civil citations to which Ms. Ogletree had referred be researched. The Chair stated that this would refer to any charge issued under

that statute. Mr. Sykes noted that the statute only refers to municipal violations. Ms. Ogletree remarked that most of the unusual civil violations come under that statute.

Mr. Karceski commented that he liked Mr. Maloney's suggestion, but if the Rule refers to Rule 4-102 (a) and (b), it might be better to indicate that the word "citation" also refers to civil citations. Judge Dryden said that if that change is made, a citation for drunk driving, which currently cannot be expunged, would be able to be expunged. Mr. Karceski said that it is unlawful to expunge alcohol-related offenses. Judge Dryden noted that this is a labyrinth, and Mr. Karceski added that this is why the statute uses the language "enacted as a substitute for a criminal charge."

The Chair asked if this law was passed, because of short-comings on the part of Judicial Information Systems ("JIS"). Judge Dryden replied in the negative, adding that the problem is that potential employers have access to the information about civil offenses. JIS was willing to move the information out of the criminal database, but employers were able to access it regardless. Mr. Kratovil observed that there is an argument that it does not matter if employers are accessing it. Mr. Karceski noted that the amended statute seems to allow a conviction for driving under the influence to be expunged. The way the law is written causes many problems.

The Chair said that the purpose of the change to the Rule is clear. The Style Subcommittee can look at it, and if there is a

substantive change to be made, the Rule can go back to the Committee. Judge Dryden noted that what the judges want is the discretion to do what ought to be done. Mr. Bowen remarked that the statutory language has been stylistically revised, but the Rule should not be written to be broader than the statute.

Mr. Kratovil questioned whether there are certain citations, such as an alcohol citation, that can be stetted. Judge Dryden answered that judges believe that this is permissible. Mr. Maloney added that some judges feel that they can do it; others do not. The Reporter asked whether the civil offenses are recorded in the CJIS (Criminal Justice Information System) database, and Judge Dryden responded that some are and some are not. The Chair inquired as to what the Committee wanted to do with the Rule. The Vice Chair replied that it is approved subject to being styled, and the Committee agreed by consensus with this.

Mr. Karceski presented Rule 4-503, Application for Expungement of Record for Arrests, Detention, or Confinements Occurring before October 1, 2007 When No Charges Filed, and Forms 4-503.1, Request for Expungement of Police Record for Arrests, Detentions, or Confinements Occurring Before October 1, 2007 without Charge, and 4-503.2, General Waiver and Release, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-503 to add language to the title, to delete language from and add language to section (a) complying with statutory changes and to add a Committee note after section (d) referencing a new statute, as follows:

Rule 4-503. APPLICATION FOR EXPUNGEMENT OF RECORD FOR ARRESTS, DETENTION, OR CONFINEMENTS OCCURRING BEFORE OCTOBER 1, 2007 WHEN NO CHARGES FILED

(a) Scope and Venue

An application for expungement of police records may be filed by any person who has been arrested, detained, or confined by a law enforcement agency, and has subsequently been released without having been charged with a crime, if (1) the applicant has first served on the law enforcement agency that arrested, detained, or confined the applicant a ~~notice and~~ request for expungement in the form set forth at the end of this Title as Form 4-503.1, which~~, if~~ shall be served within ~~three~~ eight years after the ~~applicant's arrest, detention, or confinement, shall be accompanied by a duly executed General Waiver and Release in the form set forth as Form 4-503.2~~ date of the incident; and (2) the request for expungement has been denied or has not been acted upon within 60 days after its receipt. The application shall be filed in the District Court for the county in which the applicant was first arrested, detained, or confined. Cross reference: Code, Criminal Procedure Article, §10-103.

(b) Contents - Time for Filing

The application shall be in the form set forth at the end of this Title as Form 4-503.3 and shall be filed within 30 days after service of notice that the request for expungement is denied by the agency or, if no

action is taken by the agency, within 30 days after expiration of the time period provided in subsection (a)(2) of this Rule.

(c) Copies for Service

The applicant shall file with the clerk a sufficient number of copies of the application for service on the State's Attorney and each law enforcement agency named in the application.

(d) Procedure upon Filing

Upon filing of an application, the clerk shall docket the proceeding, issue a Notice of Hearing in the form set forth at the end of this Title as Form 4-503.4, and serve copies of the application and notice on the State's Attorney and each law enforcement agency named in the application.
Committee note: Law enforcement units will automatically expunge records pertaining to arrests and confinements occurring on or after October 1, 2007 that do not result in a criminal charge. If the person who has been arrested or confined does not receive a notice of expungement from the law enforcement unit within 60 days after the person's release or does not receive a writing from the law enforcement unit within 60 days of the notice advising the person of compliance with the order to expunge, the person may seek redress by means of any appropriate legal remedy and recover court costs. See Code, Criminal Procedure Article, §10-103.1.

Source: This Rule is derived from former Rule EX3 a and c 1 and 2.

Rule 4-503 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-502.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-503.1 by deleting language from and adding language to the title, and by deleting part 3., as follows:

Form 4-503.1. ~~NOTICE OF RELEASE FROM DETENTION OR CONFINEMENT WITHOUT CHARGE -~~ REQUEST FOR EXPUNGEMENT OF POLICE RECORD FOR ARRESTS, DETENTIONS, OR CONFINEMENTS OCCURRING BEFORE OCTOBER 1, 2007 WITHOUT CHARGE

~~NOTICE OF RELEASE FROM DETENTION OR CONFINEMENT WITHOUT CHARGE~~
REQUEST FOR EXPUNGEMENT OF POLICE RECORD FOR ARRESTS, DETENTIONS, OR CONFINEMENTS OCCURRING BEFORE OCTOBER 1, 2007 WITHOUT CHARGE

To: .....
(law enforcement agency)

.....
(Address)

.....

1. On or about ....., ..., I was arrested,
(Date)

detained, or confined by a law enforcement officer of your agency at ....., Maryland as a result of the following incident (Specify) .....

.....

.....

.....

2. I was released from detention or confinement on or about

....., ..., without being charged
(Date)

with a crime.

~~3. (Check one of the following boxes):~~

~~[ ] Three years or more have passed since the date of my arrest, detention, or confinement.~~

~~[ ] Less than three years have passed since the date of my arrest, detention, or confinement, but I have attached hereto a General Waiver and Release.~~

~~4.~~ 3. I hereby request that the police record of my arrest, detention, or confinement be expunged.

.....
(Date)

.....
(Signature)

.....
(Name - Printed)

.....
(Address)

.....

.....
(Telephone No.)

Form 4-503.1 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-502.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-503.2 to delete a reference to a certain statute, as follows:

Form 4-503.2. GENERAL WAIVER AND RELEASE

GENERAL WAIVER AND RELEASE

I, ..., hereby release and forever discharge ..... (complainant) and the ....., (law enforcement agency) all of its officers, agents and employees, and any and all other persons from any and all claims which I may have for wrongful conduct by reason of my arrest, detention, or confinement on or about .....

This General Waiver and Release is conditioned on the expungement of the record of my arrest, detention, or confinement and compliance with Code*, Criminal Procedure Article, ~~§10-103 (c) or~~ §10-105, as applicable, and shall be void if these conditions are not met.

WITNESS my hand and seal this ..... (Date)

TESTE:

.....
Witness

.....(Seal)
Signature

* The reference to "Code" in this General Waiver and Release is to the Annotated Code of Maryland.

Form 4-503.2 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-502.

Mr. Karceski explained that the above Rule and Forms as well as proposed new section (k) of Rule 4-502, which was just discussed on the issue of expungement of civil offenses, are recommended for change because of recent legislation, Chapter 63, Acts of 2007 (HB 10), which eliminates the required notice about expungement to law enforcement units, replacing it with a procedure to file a request for expungement, and eliminates the written waiver and release of tort claims that accompanied the notice of expungement of records before October 1, 2007 where no charge was filed. The statute also creates an automatic expungement of police and court records for arrests or confinements occurring on or after October 1, 2007, where no charge was filed. The forms have been changed to conform to the modified definition of the word "request." Requests for expungement of arrests, detentions, or confinements occurring before October 1, 2007 must be made within 8 years after the date

of the incident. The Rule provides a window of opportunity for a limited time period.

The Chair commented that the Rule applies to people who are booked. Mr. Karceski added that they are booked but not charged. The Chair asked if they are taken before a commissioner. Mr. Karceski replied that they are not; they may be processed, photographed, and fingerprinted, but not charged. This Rule pertains to Baltimore City, in particular, and will have no practical significance after October 1, 2015. He expressed the concern that it is unusual for a Rule to have a "shelf life." The Reporter commented that some do, noting, for example, that Bar Admission Rule 11, Required Course on Professionalism, expires on December 31, 2010. By consensus, the Committee approved the Rules as presented.

The Chair adjourned the meeting.