COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 9 and 10 of the Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on May 18, 2012.

Members present:

Hon. Alan M. Wilner, Chair
Hon. Robert A. Zarnoch, Vice-Chair

Robert R. Bowie, Jr., Esq.
James E. Carbine, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Steven M. Sullivan, Esq.
Melvin J. Sykes, Esq.
Hon. Julia B. Weatherly

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kara K. Lynch, Esq., Assistant Reporter
Ms. Valerie Dawson, Court Reporter, Wicomico County
Sherry L. Meredith, Court Reporter, Prince George's County
P. Tyson Bennett, Esq., Chair, Rules of Practice Committee, MSBA
Leslie Gradet, Esq., Clerk, Court of Special Appeals
Sally W. Rankin, Court Administrator, Circuit Court for Somerset County

The Chair convened the meeting. He announced that the Court of Appeals would be holding its open hearing on the Supplement to the 173rd Report, which includes the Rules necessary to conform with Chapter 505, Laws of 2012, (HB 261), which overturns part of the Court's holding in *DeWolfe v. Richmond*, ___ Md. ___ (2012).

The hearing will take place on Monday, June 11, 2012 at 3:00 p.m. Anyone is welcome to attend the hearing. The Chair also said that he was sorry to announce that Ms. Lynch, an Assistant Reporter, would be resigning to accept a position with the Baltimore City Solicitor's Office. The Chair and the Committee wished her well.

Additional Agenda Item

The Chair presented Rule 4-331, Motions for New Trial; Revisory Power, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-331 to add a new subsection (b)(2) concerning a motion filed pursuant to Code, Criminal Procedure Article, §8-302; to add language to clarify the time for filing a motion under section (c); and to make stylistic changes, as follows:

Rule 4-331. MOTIONS FOR NEW TRIAL; REVISORY POWER

(a) Within Ten Days of Verdict

On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

Cross reference: For the effect of a motion under this section on the time for appeal see Rules 7-104 (b) and 8-202 (b).

(b) Revisory Power

(1) Generally

The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:

~~(1)~~ (A) in the District Court, on motion filed within 90 days after its imposition of sentence if an appeal has not been perfected;

~~(2)~~ (B) in the circuit courts, on motion filed within 90 days after its imposition of sentence.

Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

(2) Act of Prostitution While under Duress

On motion filed pursuant to Code, Criminal Procedure Article, §8-302, the court has revisory power and control over a judgment of conviction of prostitution under Code, Criminal Law Article, §11-306 to vacate the judgment, modify the sentence, or grant a new trial.

(c) Newly Discovered Evidence

The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:

(1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date ~~it~~ the court received a mandate issued by the ~~Court of Appeals or the Court of Special Appeals~~ final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief; ~~whichever is later;~~

(2) on motion filed at any time if a sentence of death was imposed and the newly discovered evidence, if proved, would show that the defendant is innocent of the capital

crime of which the defendant was convicted or of an aggravating circumstance or other condition of eligibility for the death penalty actually found by the court or jury in imposing the death sentence; and

(3) on motion filed at any time if the motion is based on DNA identification testing not subject to the procedures of Code, Criminal Procedure Article, §8-201 or other generally accepted scientific techniques the results of which, if proved, would show that the defendant is innocent of the crime of which the defendant was convicted.

Committee note: Newly discovered evidence of mitigating circumstances does not entitle a defendant to claim actual innocence. See *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992).

(d) DNA Evidence

If the defendant seeks a new trial or other appropriate relief under Code, Criminal Procedure Article, §8-201, the defendant shall proceed in accordance with Rules 4-701 through 4-711. On motion by the State, the court may suspend proceedings on a motion for new trial or other relief under this Rule until the defendant has exhausted the remedies provided by Rules 4-701 through 4-711.

Cross reference: For retroactive applicability of Code, Criminal Procedure Article, §8-201, see *Thompson v. State*, 411 Md. 664 (2009).

(e) Form of Motion

A motion filed under this Rule shall (1) be in writing, (2) state in detail the grounds upon which it is based, (3) if filed under section (c) of this Rule, describe the newly discovered evidence, and (4) contain or be accompanied by a request for hearing if a hearing is sought.

(f) Disposition

The court may hold a hearing on any motion filed under this Rule. Subject to section (d) of this Rule, the court shall hold a hearing on a motion filed under section (c) if a hearing was requested and the court finds that: (1) if the motion was filed pursuant to subsection (c)(1) of this Rule, it was timely filed, (2) the motion satisfies the requirements of section (e) of this Rule, and (3) the movant has established a prima facie basis for granting a new trial. The court may revise a judgment or set aside a verdict prior to entry of a judgment only on the record in open court. The court shall state its reasons for setting aside a judgment or verdict and granting a new trial.

Cross reference: Code, Criminal Procedure Article, §§6-105, 6-106, 11-104, and §11-503.

Source: This Rule is derived in part from former Rule 770 and M.D.R. 770 and is in part new.

Rule 4-331 was accompanied by the following Reporter's note.

New subsection (b)(2) is proposed to be added to Rule 4-331 in light of Chapter 218, Laws of 2011 (SB 327), which allows a person convicted of prostitution under Code, Criminal Law Article, §11-306 to file a motion to vacate the judgment if, when the person committed the crime, the person was acting under duress caused by the act of another person committed in violation of Code, Criminal Law Article, §11-303, the prohibition against human trafficking. The new law allows the court to vacate the judgment of conviction, modify the sentence, or grant a new trial.

The amendment to Rule 4-331 (c)(1) is proposed in response to a referral from the Court of Appeals. In *State v. Matthews*, 415 Md. 286 (2010), the Court referred the clarification of the Rule to the Rules Committee. *Id*. at 298.

The Court of Appeals explained that, in

Matthews v. State, 187 Md. App. 496 (2009), the Court of Special Appeals determined

> ...that Rule 4-331 (c)(1) is ambiguous because it permits a motion filed within one year after imposition of sentence or "the date it received a mandate issued by the Court of Appeals or the Court of Special Appeals, whichever is later," and thus, it is unclear whether Subsection (c)(1) "applies to *any* mandate," or only to a mandate issued at the conclusion of a direct appeal. *Matthews*, 187 Md. App. at 504, 979 A.2d at 203. *Matthews*, 415 Md. at 298-99 (emphasis in original).
>
> The Court of Appeals analyzed former versions of the Rule and the accompanying legislative history. In so doing, the Court found support for the position that the term "mandate" should be construed as referring only to the mandate issued at the conclusion of a direct appeal. *Id*. at 299-306. The Rules Committee also recommends including belated appeals permitted as post conviction relief.
>
> The proposed amendment to subsection (c)(1) resolves the ambiguity highlighted by the Court of Special Appeals, and is consistent with the Court of Appeals' interpretation of the Rule.

The Chair explained that there are two proposed amendments to Rule 4-331. One is in subsection (b)(2) and another in subsection (c)(1). The Committee had already approved the amendment to subsection (c)(1). This will go into the 174th Report to the Court of Appeals. The Committee had discussed the amendment to subsection (b)(2) at the last meeting. It allows a

person who has been convicted of prostitution to move to vacate the judgment, modify the sentence, or get a new trial upon presentation of evidence that the prostitution was a result of duress by an act of another committed in violation of the prohibition against human trafficking. The Committee had decided to add a cross reference to this statute in a number of rules, which was done. However, the cross reference did not seem to fit into Rule 4-331. The Rule pertains to a motion for a new trial and for general revisory power over a judgment. Since the amendment to subsection (c)(1) had to be sent quickly to the Court of Appeals, because they had asked for it, the Chair and the Reporter suggested that both amendments be sent to the Court right away rather than waiting for some time later to suggest another amendment to Rule 4-331. What is being proposed is not a cross reference but an actual substantive provision calling attention to this statutory right. Subsection (b)(2) is what is before the Committee today.

Mr. Patterson inquired if the language in the tagline of subsection (b)(2), which read: "[w]hile under duress" should also be in the body of the Rule. Section (c) is titled "Newly Discovered Evidence," and the first sentence of section (c) refers to "newly discovered evidence." Subsection (b)(2) by itself does not require duress. Subsection (b)(2) as it appears now could be read to mean any conviction of prostitution. The statute itself, Code, Criminal Law Article, §11-306, could be read to mean any conviction of prostitution. It does not refer

to duress, but only to prostitution. The Chair pointed out that there is a reference to Code, Criminal Procedure Article, §8-302, which is only available where the allegation and the proof is that the act of prostitution was under duress during human trafficking. The statute is in the meeting materials.

The Reporter drew the Committee's attention to sections (a) through (e) of Code, Criminal Procedure Article, §8-302, which were on pages 5 and 6 of the statute. The language of subsection (b)(2) had been shortened to only reference "§8-302," because too much language would have been required to accurately describe the procedures in sections (a) through (e) of the statute. The Chair remarked that it would be possible to more fully describe what is in the statute, but it would require the addition of three or four lines to subsection (b)(2) of Rule 4-331. Mr. Patterson acknowledged that it might not be necessary, but he questioned whether it should be left open-ended. The Chair commented that a subcommittee had been appointed to take a look at all of the criminal post-trial motions. There may be as many as 20 possible motions. The idea was to try to consolidate all or most of these motions, at least for hearing purposes. The subcommittee had not yet met to discuss this. There are American Bar Association (ABA) standards that set up a template for consolidating these types of motions.

Mr. Patterson said that the Chair had answered the question as to whether it is necessary to elaborate on Code, Criminal Procedure Article, §8-302. The Chair reiterated that he did not

think that it was necessary, but if it would be helpful to put more language in, it could be done. Mr. Sykes remarked that there was a possible compromise. Instead of referring to Code, Criminal procedure Article, §8-302, Rule 4-331 could refer to §8-302 (a), because most of the full statute does not mention prostitution under duress, whereas section (a) sets out the right to file a motion in that situation. The Chair added that section (b) of the statute provides what has to be in that motion. Mr. Sykes commented that Mr. Patterson had made a valid point. The structure of subsection (b)(2) of the Rule puts a great amount of weight on the tagline. The Reporter responded that the tagline could be changed. It is a matter of style. She did not want to put the section number of the statute in the tagline. To describe everything in the statute would require writing a page or two.

Mr. Sykes noted that subsection (b)(2) of Rule 4-331 refers to "Code, Criminal Procedure Article, §8-302." It then refers to a "judgment of conviction of prostitution," and "Code, Criminal Law Article, §11-306." He expressed the view that it is enough to state that the motion should be filed pursuant to §8-302 from a judgment of conviction of prostitution. It is not necessary to cite "Code, Criminal Law Article, §11-306." This would make it easier for someone reading this part of the Rule. The Reporter said that she was not sure what other prostitution offenses there might be. The law was very specific that it applies to only this particular prostitution conviction. Mr. Sykes pointed out that

this is the only offense to which Code, Criminal Procedure Article, §8-302 applies. The Chair added that the offense is part of the human trafficking law. It could be argued that many prostitutes act under duress from someone. Mr. Sykes said that the language of subsection (b)(2) is unclear and confusing.

Mr. Karceski asked what part of subsection (b)(2) is unclear. He expressed the view that pairing the two statutes together was sufficient. Mr. Sykes responded that the motion under Code, Criminal Procedure Article, §8-302 is limited to acts of prostitution when a person is acting under duress caused by the act of another as a part of human trafficking. If the motion provided for in the statute is filed, the person filing it gets a chance for relief from a judgment of conviction of prostitution under Code, Criminal Law Article, §11-306. Since Code, Criminal Procedure Article, §8-302 covers the situation, Mr. Sykes did not see any reason why it would be necessary to refer to general provisions with regard to prostitution. It is clearer to refer only to Code, Criminal Procedure Article, §8-302.

The Chair asked Mr. Sykes which language he thought should be deleted. Mr. Sykes suggested that subsection (b)(2) could read as follows: "On motion filed pursuant to Code, Criminal Procedure Article, §8-302, the court has revisory power and control over a judgment of conviction of prostitution to vacate the judgment, modify the sentence, or grant a new trial." The Reporter reiterated her concern that there may be other prostitution offenses. Mr. Sykes noted that the only offense a

Code, Criminal Procedure Article, §8-302 motion would be applicable to is prostitution under duress as part of human trafficking. The Chair said that §8-302 is limited to a conviction of prostitution under Code, Criminal Law Article, §11-306. He asked if anyone objected to Mr. Sykes' suggested change. Mr. Sykes noted that making the change would mean that the person reading the Rule would not have to look at two different statutes. By consensus, the Committee approved the language suggested by Mr. Sykes.

By consensus, the Committee approved Rule 4-331 as amended.

Agenda Item 1. Consideration of proposed amendments to Rules 2-633 (Discovery in Aid of Enforcement) and 3-633 (Discovery in Aid of Enforcement)

Mr. Sullivan presented Rules 2-633 and 3-633, Discovery in Aid of Enforcement, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-633 to make section (b) subject to section (c), to replace the word "may" with the word "shall" in section (b), and to add new section (c) concerning subsequent examinations, as follows:

Rule 2-633. DISCOVERY IN AID OF ENFORCEMENT

(a) Methods

A judgment creditor may obtain

discovery to aid enforcement of a money judgment (1) by use of depositions, interrogatories, and requests for documents, and (2) by examination before a judge or an examiner as provided in section (b) of this Rule.

Committee note: The discovery permitted by this Rule is in addition to the discovery permitted before the entry of judgment, and the limitations set forth in Rules 2-411 (d) and 2-421 (a) apply separately to each. Thus, a second deposition of an individual previously deposed before the entry of judgment may be taken after the entry of judgment without leave of court. A second post-judgment deposition of that individual, however, would require leave of court. *Melnick v. New Plan Realty*, 89 Md. App. 435 (1991). Furthermore, leave of court is not required under Rule 2-421 to serve interrogatories on a judgment debtor solely because 30 interrogatories were served upon that party before the entry of judgment.

(b) Examination Before a Judge or an Examiner

Subject to section (c) of this Rule, on request of a judgment creditor, filed no earlier than 30 days after entry of a money judgment, the court where the judgment was entered or recorded ~~may~~ shall issue an order requiring the appearance for examination under oath before a judge or examiner of (1) the judgment debtor, or (2) any other person if the court is satisfied by affidavit or other proof that it is probable that the person has property of the judgment debtor, is indebted for a sum certain to the judgment debtor, or has knowledge of any concealment, fraudulent transfer, or withholding of any assets belonging to the judgment debtor.

The order shall specify when, where, and before whom the examination will be held and that failure to appear may result in the person served being held in contempt. The order shall be served upon the judgment debtor or other person in the manner

provided by Rule 2-121. The judge or examiner may sequester persons to be examined, with the exception of the judgment debtor.

Cross reference: Code, Courts Article, §9-119.

(c) Subsequent Examinations

After an examination of a person has been held pursuant to section (b) of this Rule, a judgment creditor may obtain additional examinations of the person in accordance with this section. On request of the judgment creditor, if more than one year has elapsed since the most recent examination of the person, the court shall order a subsequent appearance for examination of the person. If less than one year has elapsed since the most recent examination of the person, the court may require a showing of good cause.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 627.
Section (b) is in part new and in part derived from former Rule 628 b.
Section (c) is new.

Rule 2-633 was accompanied by the following Reporter's note.

The proposed amendments to Rules 2-633 and 3-633 stem from correspondence from several delegates regarding House Bill 483 (2011) entitled, "Courts – Discovery – Examination in Aid of Enforcement of Money Judgment," which failed in the House Judiciary Committee.

The lead sponsor of HB 483 advises that its intended purpose was to permit a judgment creditor to conduct one oral examination of the judgment debtor or other person each year without the judgment creditor having to show good cause. If the judgment creditor wishes to conduct an oral examination of the person before one year has elapsed, the court may require a showing of good cause.

In the 2012 session of the General Assembly, House Bill 337 passed by a vote of 133-0 in the House, but received an

unfavorable report from the Senate Judicial Proceedings Committee.

Currently, Rule 2-633 is silent regarding subsequent examinations by the judgment creditor. Rule 3-633 currently provides that, upon request of the judgment creditor, the court may order a subsequent appearance for examination only for good cause shown. The proposed amendments resolve this discrepancy by adding section (c) to Rule 2-633 and amending Rule 3-633 (c), thereby making the sections regarding subsequent examinations identical.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 3-633 to make section (b) subject to section (c), to replace the word "may" with the word "shall" in section (b), to delete language from section (c) concerning subsequent examinations, and to add language to section (c) concerning subsequent examinations, as follows:

Rule 3-633. DISCOVERY IN AID OF ENFORCEMENT

(a) Methods

A judgment creditor may obtain discovery to aid enforcement of a money judgment (1) by use of interrogatories pursuant to Rule 3-421, and (2) by examination before a judge or an examiner as provided in section (b) of this Rule.

Committee note: The discovery permitted by this Rule is in addition to the discovery permitted before the entry of judgment, and the limitations set forth in Rule 3-421 (b) apply separately to each. Thus, leave of court is not required under Rule 3-421 to serve one set of not more than 15 interrogatories on a judgment debtor solely because interrogatories were served upon that party before the entry of judgment.

(b) Examination Before a Judge or an Examiner

Subject to section (c) of this Rule, on request of a judgment creditor, filed no earlier than 30 days after entry of a money judgment, the court where the judgment was entered or recorded ~~may~~ shall issue an order requiring the appearance for examination under oath before a judge or person authorized by the Chief Judge of the Court to serve as an examiner of (1) the judgment debtor, or (2) any other person if the court is satisfied by affidavit or other proof that it is probable that the person has property of the judgment debtor, is indebted for a sum certain to the judgment debtor, or has knowledge of any concealment, fraudulent transfer, or withholding of any assets belonging to the judgment debtor. The order shall specify when, where, and before whom the examination will be held and that failure to appear may result in the person served being held in contempt. The order shall be served upon the judgment debtor or other person in the manner provided by Rule 3-121. The judge or examiner may sequester persons to be examined, with the exception of the judgment debtor.

Cross reference: Code, Courts Article, §9-119.

(c) Subsequent Examinations

After an examination of a ~~defendant or other~~ person has been held pursuant to section (b) of this Rule, ~~the court may order a subsequent appearance for examination of that defendant or other person on request of~~

~~the same judgment creditor only for good cause shown.~~ a judgment creditor may obtain additional examinations of the person in accordance with this section. On request of the judgment creditor, if more than one year has elapsed since the most recent examination of the person, the court shall order a subsequent appearance for examination of the person. If less than one year has elapsed since the most recent examination of the person, the court may require a showing of good cause.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 627.
Section (b) is in part new and in part derived from former M.D.R. 628 b.
Section (c) is new.

Rule 3-633 was accompanied by the following Reporter's note.

See the Reporter's note to the proposed amendments to Rule 2-633.

Mr. Sullivan told the Committee that the proposed amendments to Rules 2-633 and 3-633 were relatively simple, but they had an interesting history, which the Committee needed to take into account before voting on the proposal to change the Rules on discovery in aid of enforcement. The proposal initiated in the legislature. The initial piece of legislation that had been proposed by Delegate Vallario and others did not pass in the legislature. It had been referred to the Rules Committee to accomplish what had not been accomplished in the legislature. Some advocates for this change were at the Judgments Subcommittee meeting. The essence of the change was to make automatic the right of the creditor to have the debtor appear for examination

within 30 days of the judgment. In subsequent years, the proposed change to the Rule would give the creditor an automatic right to another examination, one per year, without the need for the creditor to show cause. Currently, a creditor would need to show cause to be entitled to a subsequent examination. At the Subcommittee meeting, the relationship between the Rules Committee and the legislature had been discussed. Issues that had been raised were to what extent this matter should be deferred, and whether the Subcommittee should try to ascertain the intent of the legislature, or whether it is a question of merely adopting procedural rules of the Court of Appeals. The Court has the power to adopt those without reference to the other branch of government.

Mr. Sullivan said that he had made inquiries with members of the legislature that he knew. He found out that one of the reasons that the bill did not pass was because the legislative hearing that was held had been inadequate. Not enough people from the various interest groups attended the hearing. This happened when the matter was considered in 2011. In the most recent session, it passed on a vote of 133 to 0 in the House of Delegates, but the bill could not make it out of the Judicial Proceedings Committee in the Senate for two reasons. The first was that they thought that the language of the bill had been too loose. This does not affect the proposed Rule, which had been drafted more tightly. The other reason was that the Committee's report to the House Judiciary Committee asked whether the

existing rules, Rules 2-633 and 3-633, are sufficient to protect both sides. The legislators have given a mixed message. The House was unanimous in favor of what was essentially a poorly drafted version of the Rules, while the Senate Judicial Proceedings Committee felt that the current Rules are sufficient.

Mr. Sullivan commented that this came to the Rules Committee from the legislature. It would be valuable, if it is sent to the Court of Appeals, that they be asked to make an extra effort to make sure that there is notice to various groups. He assumed that debtors would be interested, since they are going to be automatically compelled to appear for annual examinations. Most debtors have more than one creditor. They may have an interest in the proposed Rules or the current Rules which require a showing of cause before the creditor can request an annual examination.

Mr. Sykes noted that the memorandum to the House Judiciary Committee from the Legislative Committee of the Maryland Judicial Conference had a statement that in addition to the lack of clarity of some of the language, the bill raised the possibility that numerous subpoena requests might occur, and anyone could be required to appear in court, including bankers, relatives, and friends of the debtor. The memorandum also states that the Maryland Judiciary opposes House Bill 337. Mr. Sykes asked why this was so and whether it was an official action by the Judiciary.

The Chair responded that the liaison with the legislature in

terms of opposing or supporting legislation is the Legislative Committee of the Judicial Conference, chaired by the Honorable Daniel M. Long, of the Circuit Court for Somerset County. The Chair said that he did not know why the bill had been opposed. The Reporter pointed out that a letter from the Maryland Judicial Conference written by Suzanne Delaney had been included in the meeting materials. The original version of the House Bill probably could have been drafted more clearly. This was partly why the Judiciary had opposed the bill. The Chair added that Suzanne Delaney is the person from the Administrative Office of the Courts who staffs the Legislative Committee of the Judicial Conference.

The Chair asked if anyone had a comment on the proposed Rules. Mr. Klein expressed the concern that this could cause a fiscal impact on society. All of these examinations would be taking place instead of putting the onus on the party to make some kind of showing before an examination would be held. This showing would involve the court. He added that he did not have enough information to make the decision as to whether Rules 2-633 and 3-633 should be changed. Judge Pierson remarked that he did not think that there would be any great volume of these cases, which are usually granted on a routine basis. It is not typical that they are used by creditors for the sole purpose of harassing the debtors. Once the creditor finds out that the debtor has no assets, that is usually the end of the case. This is how it works in the circuit court.

Judge Norton noted that the District Court corollary is that they have an avalanche of this type of case. There are some cases where people request excessive examinations. He was not sure if the proposed Rule change would cause people to automatically request the examinations yearly. He termed it a "robo-computer" request. This was the evil that he was concerned with. The Reporter asked if the District Court has many cases with excessive examinations, noting that there are costs that must be paid in advance before an examination is ordered. Judge Norton replied that in the ordinary case, there are not excessive examinations, but occasionally this does occur. Judge Love expressed his agreement with Judge Norton.

Mr. Klein questioned what the reason was for having this procedure. Mr. Sullivan answered that it provided the creditors a procedure without having to jump through many hoops. Judge Norton remarked that many District Court judges do not consider discretionary good cause, and they probably grant these semi-routinely anyway. Often the judges will get a stack of approximately 50 of these requests to sign. They would not be interested in having 50 good cause hearings. The Chair asked if the creditors can ask for an examination whenever they choose to. Judge Norton answered that it would have to be for good cause. Mr. Michael said that the debtor may deserve to be forced to go to court on several occasions. However, there also are peripheral people who may be impacted, such as bankers, debtors, friends, and relatives who may have information about the debt

and would also be subject to periodic examination about it without any court review as to whether it is appropriate. He would be more comfortable if this "robo-provision" would be applicable only to the person who owed the money and not applicable to other people unless a judge had reviewed it to see if it was appropriate.

Mr. Klein commented that this matter arose in the legislature. One house has blocked it. No one else came directly to the Rules Committee requesting this procedure. It only happened when the legislature failed to act. It is an attempt to circumvent the legislative process. Because there are economic issues and issues of inconvenience, Mr. Klein expressed the opinion that the Rule should be left alone, and the proponents should go through the legislative process. The Chair asked if the Subcommittee had recommended the change, or if they had presented it without a recommendation. Mr. Sullivan replied that they had presented it without a recommendation.

Mr. Klein moved to reject the proposed changes to Rules 2-633 and 3-633, suggesting that the legislative process could address it. The motion was seconded, and it passed by a majority vote.

Agenda Item 2. Consideration of proposed amendments to Rule 5-803 (Hearsay Exceptions: Unavailability of Declarant Not Required)

The Chair said that Ms. Ogletree, who was supposed to present Agenda Item 2, was not present at the meeting.

Consideration of Rule 5-803 was deferred.

Agenda Item 3. Consideration of a proposed amendment to Rule 2-214 (Intervention)

The Chair said that Mr. Brault, who was supposed to present Agenda Item 3, was not present at the meeting. Consideration of Rule 2-214 was deferred.

Agenda Item 4. Consideration of a Memorandum from the Discovery Subcommittee regarding Rules 2-421 (Interrogatories to Parties), 2-422 (Discovery of Documents, Electronically Stored Information and Property), and 2-424 (Admission of Facts and Genuineness of Documents)

Mr. Klein presented a Memorandum from the Discovery Subcommittee and Rules 2-421, Interrogatories to Parties, 2-422, Discovery of Documents, Electronically Stored Information and Property, and 2-424, Admission of Facts and Genuineness of Documents, for the Committee's consideration.

MEMORANDUM

TO	:	Members of the Rules Committee
FROM	:	Discovery Subcommittee
DATE	:	May 8, 2012
SUBJECT	:	Clarification of Rules 2-421, 2-422, and 2-424

At its September 27, 2011 meeting, the Discovery Subcommittee discussed whether to recommend amendments to Rules 2-421, 2-422,

and 2-424, in order to clarify language that may be considered to be ambiguous. *See* Memoranda dated September 20, 2011 and April 19, 2011.

The Subcommittee decided not to recommend amendments, but to nevertheless refer the matter to the full Committee for its consideration.

If the Committee determines that amendments are necessary, the Subcommittee would recommend proposing the enclosed amendments to Rules 2-421, 2-422, and 2-424.

KKL:cdc
Enclosures

MEMORANDUM

TO	:	Members of the Discovery Subcommittee
FROM	:	Sandra F. Haines, Esq., Reporter
DATE	:	September 20, 2011
SUBJECT	:	Clarification of Rule 2-421

Several months ago, Linda Schuett sent to the Rules Committee Office the following inquiry concerning Rule 2-421:

Rule 2-421 (b) requires a person to respond to interrogatories within 30 days after service or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later. I read this to mean that if you're served with interrogatories along with the Complaint, you

have to answer the interrogatories on the 15th day after your Answer or Motion to Dismiss is required to be filed and that you can't delay responding until the Motion to Dismiss is decided.

Maryland Rules Commentary (page 325) says responses to interrogatories must be filed within 30 days "or within 15 days after the time for responding **under Rule 2-321**, whichever is later." As you know, Rule 2-321 is the time for filing the Answer, and it provides that the time for filing is extended to 15 days after the court's ruling on a Motion to Dismiss. This would mean that you don't need to respond to interrogatories until after the court rules on the Motion to Dismiss.

Am I missing something obvious?

Attached is research from Assistant Reporter Kara Lynch regarding the history and interpretation of Rule 2-421.

Consideration of a clarification of Rule 2-421 will be on the agenda of the September 27, 2011 meeting of the Discovery Subcommittee.

SFH:cdc
Enclosure

MEMORANDUM

TO	:	Sandra F. Haines, Esq., Reporter
FROM	:	Kara M. Kiminsky, Esq., Assistant Reporter
DATE	:	April 19, 2011
SUBJECT	:	Rule 2-421

You have asked me to research the history and interpretation of Rule 2-421 (b) to determine whether its language is ambiguous. Rule 2-421 (b) states, in part: "The party to whom the interrogatories are directed shall serve a response within 30 days after service of the interrogatories or within 15 days after the date on which that party's initial pleading or motion is required."

The Rules Committee minutes for the 82nd Report (1983) indicate that the Committee's main objective in adopting Rule 2-421 (b) was to ensure that when a complaint and interrogatories are served near or at the same time, the responding party will have an additional 15 days to respond to the interrogatories. Attorneys were concerned that, without the addition of section (b), a defendant might have to answer both the complaint and interrogatories within 30 days (or 60 or 90 days, depending on the status of the defendant). Mr. Niemeyer indicated that section (b) was designed to afford a defendant an additional 15 days to file responses to interrogatories that were served with the complaint, so that the answer and responses are not due at the same time.

Additionally, when Rule 2-421(b) was adopted, FRCP 33 (a) provided that answers to interrogatories must be served within 30 days after service "except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow for a longer or shorter time."

Rule 2-322 requires that certain defenses be made by motion to dismiss filed before the answer. If a party files a motion to dismiss under Rule 2-322, the answer is not due until 15 days after the court has ruled upon the motion to dismiss. *See* Rule 2-321 (c) ("Automatic extension. When a motion is filed pursuant to Rule 2-322, the time for filing an answer is extended without special order to 15 days after the court's order on the motion . . . ."). There is no

discussion in the Rules Committee minutes, 82nd Report file, or Comment Review Subcommittee materials regarding whether filing a preliminary motion to dismiss will affect the time in which a party is required to respond to interrogatories.

It seems that the Rules Committee did not intend for the automatic extension of time for filing an answer in 2-321 (c) to apply to the time in which a party must respond to interrogatories pursuant to Rule 2-421 (b). If the Committee had intended to treat preliminary motions differently, it likely would have limited Rule 2-421 (b) to the "initial pleadings" and would not have included the phrase "or motion." According to the Rule, when interrogatories are served near or at the same time as the complaint, the responses to interrogatories are due 15 days after the defendant files a response to the complaint (regardless of whether it takes the form of an answer or a motion to dismiss).

It may be problematic that a defendant could be required to answer interrogatories while a motion to dismiss is pending. This could be resolved by omitting the phrase "or motion" from Rule 2-421 (b), as follows: "The party to whom the interrogatories are directed shall serve a response within 30 days after service of the interrogatories or within 15 days after the date on which that party's initial pleading is required."

This omission would have the effect of changing the Rule to mean that the defendant is not required to respond to interrogatories until 15 days after the required time for filing the initial pleading/answer. For example, if the defendant is served with a complaint and interrogatories on Day 1, and the defendant decides to file an answer, the responses would be due on Day 45 (unless the defendant is a corporation or out of state, etc.)

If, however, the defendant decides to file a preliminary motion instead of an

answer, the defendant would refer to Rule 2-321 to determine when the answer is due. Rule 2-321 (c) directs that the answer is not due until 15 days after the court rules on the motion. For example, if the defendant files a motion to dismiss on Day 30, and the court denies the motion on Day 50, the defendant has until Day 65 to file an answer. The responses to interrogatories would be due 15 days after the filing of the answer –Day 80– pursuant to Rule 2-322 (c).

The Committee could include a note pointing out that, in situations where the benefit of some discovery is necessary in order for the court to rule on the motion, a party may file a motion to shorten time requirements pursuant to Rule 1-204.

In conclusion, the Rule may need some clarification to avoid confusion over whether the automatic extension in Rule 2-321 (c) applies to Rule 2-421 (b). This could be achieved by amending Rule 2-421 (b) as follows:

(b) Response

The party to whom the interrogatories are directed shall serve a response within the later of:

(1) 30 days after service of the interrogatories; or

(2) ~~or within~~ 15 days after the date on which that party's ~~initial pleading or~~ preliminary motion pursuant to Rule 2-322 or answer pursuant to Rule 2-321 (a) or (b) is required~~, whichever is later~~.

. . .

KMK:cdc

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-421 to clarify the time within which a party must serve a response to interrogatories, to add a Committee note following section (b), and to make stylistic changes, as follows:

Rule 2-421. INTERROGATORIES TO PARTIES

(a) Availability; Number

Any party may serve written interrogatories directed to any other party. Unless the court orders otherwise, a party may serve one or more sets having a cumulative total of not more than 30 interrogatories to be answered by the same party. Interrogatories, however grouped, combined, or arranged and even though subsidiary or incidental to or dependent upon other interrogatories, shall be counted separately. Each form interrogatory contained in the Appendix to these Rules shall count as a single interrogatory.

(b) Response

The party to whom the interrogatories are directed shall serve a response within the later of:

(1) 30 days after service of the interrogatories;

(2) ~~or within~~ if a motion pursuant to Rule 2-322 is timely filed, 15 days after the ~~date on which that party's initial pleading or motion is required, whichever is later~~ court rules on the motion, unless the ruling on the motion makes the interrogatories moot;

(3) if no such motion is filed, 15 days after the date on which that party's answer

is due.

The response shall answer each interrogatory separately and fully in writing under oath, or shall state fully the grounds for refusal to answer any interrogatory. The response shall set forth each interrogatory followed by its answer. An answer shall include all information available to the party directly or through agents, representatives, or attorneys. The response shall be signed by the party making it.

Committee note: The automatic time extension provided by Rule 2-321 (c) for filing an answer when a preliminary motion was filed pursuant to Rule 2-322 does not affect the time for serving a response under this Rule.

(c) Option to Produce Business Records

When (1) the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of those business records or a compilation, abstract, or summary of them, and (2) the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, and (3) the party upon whom the interrogatory has been served has not already derived or ascertained the information requested, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect the records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(d) Use

Answers to interrogatories may be used at the trial or a hearing to the extent permitted by the rules of evidence.

Source: This Rule is derived as follows:
Section (a) is derived in part from former Rule 417 a 1 and 2 and is in part new.
Section (b) is derived from former Rule 417 b 1 and 2.
Section (c) is derived from former Rule 417 f and the 1980 version of Fed. R. Civ. P. 33 (c).
Section (d) is derived from former Rule 417 d.

Rule 2-421 was accompanied by the following Reporter's note.

The proposed amendment to Rule 2-421 clarifies that the time within which answers to interrogatories must be served is not affected by the automatic time extension provided by Rule 2-321 (c).

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-422 to clarify the time within which a party must serve a response to a request, to add a Committee note following section (c), and to make stylistic changes, as follows:

Rule 2-422. DISCOVERY OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND PROPERTY

(a) Scope

Any party may serve one or more

requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect, copy, test or sample designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 2-402 (a); or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 2-402 (a).

(b) Request

A request shall set forth the items to be inspected, either by individual item or by category; describe each item and category with reasonable particularity; and specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced.

(c) Response

The party to whom a request is directed shall serve a written response within the later of:

(1) 30 days after service of the request;

(2) ~~or within~~ 15 days after the date on which that party's ~~initial pleading or~~ preliminary motion pursuant to Rule 2-322 or answer pursuant to Rule 2-321 (a) or (b) is

required~~, whichever is later~~.

The response shall state, with respect to each item or category, that (1) inspection and related activities will be permitted as requested, (2) the request is refused, or (3) the request for production in a particular form is refused. The grounds for each refusal shall be fully stated. If the refusal relates to part of an item or category, the part shall be specified. If a refusal relates to the form in which electronically stored information is requested to be produced (or if no form was specified in the request) the responding party shall state the form in which it would produce the information.

Cross reference: See Rule 2-402 (b)(1) for a list of factors used by the court to determine the reasonableness of discovery requests and (b)(2) concerning the assessment of the costs of discovery.

Committee note: The automatic time extension provided by Rule 2-321 (c) or filing an answer when a preliminary motion was filed pursuant to Rule 2-322 does not affect the time for serving a response under this Rule.

(d) Production

(1) A party who produces documents or electronically stored information for inspection shall (A) produce the documents or information as they are kept in the usual course of business or organize and label them to correspond with the categories in the request, and (B) produce electronically stored information in the form specified in the request or, if the request does not specify a form, in the form in which it is ordinarily maintained or in a form that is reasonably usable.

(2) A party need not produce the same electronically stored information in more than one form.

Committee note: Onsite inspection of

electronically stored information should be the exception, not the rule, because litigation usually relates to the informational content of the data held on a computer system, not to the operation of the system itself. In most cases, there is no justification for direct inspection of an opposing party's computer system. *See In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) (vacating order allowing plaintiff direct access to defendant's databases).

To justify onsite inspection of a computer system and the programs used, a party should demonstrate a substantial need to discover the information and the lack of a reasonable alternative. The inspection procedure should be documented by agreement or in a court order and should be narrowly restricted to protect confidential information and system integrity and to avoid giving the discovering party access to data unrelated to the litigation. The data subject to inspection should be dealt with in a way that preserves the producing party's rights, as, for example, through the use of neutral court-appointed consultants. *See, generally, The Sedona Conference, The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2d ed. 2007), Comment 6. c.

Source: This Rule is derived from former Rule 419 and the 1980 and 2006 versions of Fed. R. Civ. P. 34.

Rule 2-422 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 2-421.

AMEND Rule 2-424 to clarify the time within which a party must serve a response to requests for admission, to add a Committee note following section (b), and to make stylistic changes, as follows:

Rule 2-424. ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

(a) Request for Admission

A party may serve one or more written requests to any other party for the admission of (1) the genuineness of any relevant documents or electronically stored information described in or exhibited with the request, or (2) the truth of any relevant matters of fact set forth in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth.

(b) Response

Each matter of which an admission is requested shall be deemed admitted unless~~,~~ the party to whom the request is directed serves a response signed by the party or the party's attorney within the later of:

(1) 30 days after service of the request~~;~~

(2) ~~or within~~ 15 days after the date on which that party's ~~initial pleading or~~ preliminary motion pursuant to Rule 2-322 or answer pursuant to Rule 2-321 (a) or (b) is required~~, whichever is later, the party to whom the request is directed serves a response signed by the party or the party's~~

~~attorney~~. As to each matter of which an admission is requested, the response shall set forth each request for admission and shall specify an objection, or shall admit or deny the matter, or shall set forth in detail the reason why the respondent cannot truthfully admit or deny it. The reasons for any objection shall be stated. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and deny or qualify the remainder. A respondent may not give lack of information or knowledge as a reason for failure to admit or deny unless the respondent states that after reasonable inquiry the information known or readily obtainable by the respondent is insufficient to enable the respondent to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request but the party may, subject to the provisions of section (e) of this Rule, deny the matter or set forth reasons for not being able to admit or deny it.

Committee note: The automatic time extension provided by Rule 2-321 (c) for filing an answer when a preliminary motion was filed pursuant to Rule 2-322 does not affect the time for serving a response under this Rule.

(c) Determination of Sufficiency of Response

The party who has requested the admission may file a motion challenging the timeliness of the response or the sufficiency of any answer or objection. A motion challenging the sufficiency of an answer or objection shall set forth (1) the request, (2) the answer or objection, and (3) the reasons why the answer or objection is insufficient. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply

with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served. If the court determines that the response was served late, it may order the response stricken. The court may, in place of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial.

(d) Effect of Admission

Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment. The court may permit withdrawal or amendment if the court finds that it would assist the presentation of the merits of the action and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission for any other purpose, nor may it be used against that party in any other proceeding.

(e) Expenses of Failure to Admit

If a party fails to admit the genuineness of any document or the truth of any matter as requested under this Rule and if the party requesting the admissions later proves the genuineness of the document or the truth of the matter, the party may move for an order requiring the other party to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees. The court shall enter the order unless it finds that (1) an objection to the request was sustained pursuant to section (c) of this Rule, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to expect to prevail on the matter, or (4) there was other good reason for the failure to admit.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 421

a and the 1970 version of Fed. R. Civ. P. 36 (a).

Section (b) is derived from former Rule 421 b 1 and 2 and the 1970 version of Fed. R. Civ. P. 36 (a).

Section (c) is derived from former Rule 421 d.

Section (d) is derived from the 1970 version of Fed. R. Civ. P. 36 (b) and former Rule 421 c and f.

Section (e) is derived from former Rule 421 e.

Rule 2-424 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 2-421.

Mr. Klein told the Committee that a more recent version of Rule 2-421 had been handed out at the meeting. The policy in the later version was 180 degrees from the policy in the earlier version. The background on the proposed changes was that the Discovery Subcommittee had considered a request from Linda Schuett, Esq., former Vice Chair of the Rules Committee, that the Subcommittee take a look at whether the current Rule addressing the timing of answers to interrogatories served with a complaint is ambiguous with respect to the intent of when those answers are due. The interpretation of the current Rule by Ms. Schuett, Mr. Klein, and the Subcommittee was that the mere filing of a motion to dismiss under Rule 2-322, Preliminary Motions, does not operate to stay the obligation to answer interrogatories served with a complaint other than to get an extra 15 days beyond the date on which either the complaint is answered, or the motion to dismiss was then due. If there was a 30-day response time on the

summons, someone would have 45 days from service of the summons in which to answer the interrogatories unless the person moves for a protective order. This was the Subcommittee's understanding of the intent of the current Rule. Ms. Lynch, an Assistant Reporter, had done some research on the history of the current Rule. She found that the Subcommittee's interpretation is consistent with that history of the Rule as well as with federal practice.

Mr. Klein commented that some people may think that if they file a motion to dismiss, the answers to interrogatories served with the complaint are not due until 15 days after the court rules on the motion to dismiss, which could be many months later. The Subcommittee's impression was that the policy is that there is no extension or stay until after the court rules on the motion to dismiss. The question was whether the current Rule is ambiguous such that this policy is not clear to practitioners. The Subcommittee's view was that the Rule was not so ambiguous to warrant a change to the Rule. They also felt that if the Committee agreed with their assessment that this is the correct policy, it may be that the language of Rule 2-421 could be tightened up to remove any supposed ambiguity.

Mr. Klein noted that the proposed amendment to Rule 2-421 that was in the meeting materials would be one way of accomplishing a clarification of the Rule if one is needed. The recommendation of the Subcommittee is that a clarification is not needed, and they think that this is the policy. In deference to

Ms. Schuett, who had served on the Committee for a long time, the Subcommittee thought that they ought to take a look at her request. They decided to present the policy issue to the full Committee. If the policy is correct, does the language of the Rule have to be changed to better effectuate that policy? Alternatively, if the Committee thinks that this is the wrong policy, and the answer to interrogatories ought to be stayed until after the court rules on the motion to dismiss, the version of the Rule handed out today contains language that would effectuate this 180-degree opposing policy.

Mr. Klein told the Committee that the first issue they ought to consider is the policy. The Subcommittee's recommendation is that no change should be made to what they perceive the policy to be. It would take a motion to do this. Mr. Johnson noted that there were changes to subsection (b)(2) in the version of Rule 2-421 that was in the meeting materials. He inquired if this was the Subcommittee's proposal. Mr. Klein responded that there were three issues that the Committee had to consider. The first was the question of whether to change the current policy from there being no stay to a stay until a motion to dismiss is ruled upon. The Subcommittee's recommendation was not to change the Rule. However, if the Committee thought that there was sufficient ambiguity in the current Rule, so that some clarification was needed, language that would clarify this was included in the draft of the Rule that was in the meeting materials. The Subcommittee did not think that this matter was important enough

to require a change to the Rule. The recommendation was to do nothing, unless someone moved to adopt the language that was in the version of the Rule in the meeting materials.

Mr. Michael observed that the interrogatories serve a purpose. To oppose a motion to dismiss, the interrogatories provide some way to address the issue that was raised in the motion. How difficult is it to respond 30 times that the interrogatory is burdensome? Is there not a legitimate purpose to the interrogatories? Mr. Klein remarked that he had a recent case where the discovery served was all focused on a jurisdictional question. If someone raises a jurisdictional issue as one of the grounds for the discovery, it is only fair that the discovery should take place. Where should the burden lie -- on the party who would prefer not to answer the discovery or on the party who wants to take the discovery? The current policy seems to work well.

The Chair inquired if anyone had a motion to amend Rule 2-421 either to stay the time for an answer or make the changes proposed in the meeting materials. No motion was forthcoming, so the Chair stated that Rule 2-421 would not be changed. He added that this would apply to Rules 2-422 and 2-424 as well.

Agenda Item 5. Consideration of a proposed revised Title 16 (Court Administration) - Chapter 500 - (Recording of Proceedings) and Chapter 600 - (Extended Coverage of Court Proceedings)

The Chair explained that two of the Chapters in the Court

Administration Rules were before the Committee. At the previous meeting, Chapters 100 through 400 had been discussed. The Committee needed to consider some policy questions. The Chair had circulated to the Committee a memorandum he had written laying out the issues.

MEMORANDUM

TO : General Court Administration Subcommittee

FROM : Alan M. Wilner

DATE : November 2, 2009

RE : Policy issues in Rules dealing with access to recordings of court proceeding

From the discussions at the last subcommittee meeting and the responses received to a questionnaire sent to the county administrative judges in the 24 circuit courts and the district administrative judges of the District Court, a number of issues have surfaced with respect to what ought to be recorded in open court proceedings and, with respect to electronic audio and audio-video recordings, what access should be allowed to those recordings. I present these issues for consideration by the subcommittee. I don't know if we will be able to deal with them at our scheduled meeting on December 8, which will be devoted primarily to consideration of a new Code of Conduct for Judicial Appointees, but, if not, we will take them up at the meeting following.

I. WHAT SHOULD BE RECORDED?
BACKGROUND

District Court

Rule 16-504(a), dealing with the District Court, requires that "all trials, hearings, and other proceedings before a judge in open court shall be recorded verbatim by an audio recording device provided by the Court," although it permits the Chief Judge to authorize recording by additional means, including audio-video.

The District Court uses CourtSmart, an **electronic audio** method of recording proceedings in open court. It does not appear that the Chief Judge has authorized recording by other means, except for video conferencing of initial appearances and bail review proceedings under Rule 4-231(d). All of the responses to my questionnaire indicate that CourtSmart is the recording method. The recording device is turned on in the morning, either at a set time or when the judge comes on the bench and is turned off in the evening, either then the judge leaves the bench or at a set time. Some responses indicate that the recording device is turned off during recesses; others indicate that it remains on throughout the day.

Despite the requirement that **all** proceedings in open court be recorded verbatim, it appears that, by pressing a mute button, the judge can halt or interrupt the recording so that, during the time the mute button is engaged, the proceeding is **not** being recorded, although some of the responses are ambiguous in that regard. The responses suggest that judges are, in fact, interrupting the recording on occasion.

Circuit Court

The Rules governing what must be recorded in the circuit courts differ, in one significant respect, from that pertaining to the District Court. Rule 16-404e., which is part of the Rule dealing with the administration of **court reporters**, provides that each court reporter assigned to record a proceeding "shall record verbatim by shorthand, stenotype, mechanical, or electronic audio recording methods,

electronic or text proceeding methods, or any combination of these methods . . . ." It continues that "**[u]nless the court and the parties agree otherwise**, all proceedings held in open court, including opening statements, closing arguments, and hearings on motions, shall be recorded in their entirety." Rule 16-405a. authorizes the electronic audio **or audio-video** recording of proceedings "required **or permitted** to be recorded by Rule 16-404e."

It is evident that, whichever system of recording is used, the court, with the consent of the parties, may determine that some undefined part of a proceeding in open court **not** be recorded.

The Circuit Courts vary in their methods of recording. Many use CourtSmart or some other proprietary system of **electronic audio** recording. Others use **stenotype** court reporters, at least in some courtrooms. I am not aware that there are any shorthand stenographic reporters still in use. In some of the courtrooms where stenotype reporters are used, there is a CourtSmart or another court-owned electronic audio system used as a backup for the stenotype reporter. Baltimore City uses a CourtSmart electronic **audio-video** system in all of its courtrooms. An electronic **audio-video** system is also used in two courtrooms in Prince George's County.

It appears that where **stenotype** is the method of court reporting, judges, presumably with the consent of the parties, sometimes direct the reporter not to record bench conferences that the judge believes are of a trivial nature and not really germane to the case. In some civil cases, with the consent of the parties, the judge may permit opening statements or other parts of the proceeding not to be recorded.

In most, but not all, of the circuit courts that use an **electronic audio** recording system, the system consists of a **primary** recording and a remote **back-up** recording. Baltimore City reports that there is a backup

recording of its **audio-video** recordings as well.

It is not entirely clear from the various responses and the remarks of the court reporters at the last subcommittee meeting whether, in courts using an **electronic audio** system, the judge, a court reporter, or the clerk, can prevent the **primary** system from recording parts of proceedings. The response from Baltimore City, with respect to its **audio-video** system, indicates that there are **two** buttons that may be pressed: one simply creates a static or "white noise" that precludes persons not in the immediate vicinity of the microphone from hearing what transpires but does not interrupt the recording by the **primary** system; the other, which is called a "pause" button, actually interrupts the primary recording but not the backup recording. Although there is some ambiguity or inconsistency in the responses from the other courts, that seems to be the case in the **electronic audio** systems generally. It appears that, in **all** of the electronic systems that have a remote **backup** recording, the backup **will** continue to record, even if the **primary** recording is interrupted.[1] The backup recording is difficult to access, however, and is generally viewed as merely a backup, available in case of a failure of the primary recording, and not as an alternative source that may be used to prepare a transcript.

There is no indication that, in electronic audio or audio-video courtrooms, judges have interrupted the actual recording of proceedings other than for bench conferences or other discussions they regard as trivial and not germane to the case, although Rule 16-404e. is sufficiently broad to permit a wider range of unrecorded proceedings. One problem is that the Rules

[1] Whether that is so when counsel presses the mute button on the counsel table microphone, in order to have a private conversation with the client, is not clear.

contain no guidelines or standards for determining when, or on what basis, recording may be interrupted, or who is actually responsible for commencing, terminating, and identifying the interruption.

With respect to proceedings in both the District Court and the circuit courts, there appears to be some ambiguity in the commonly used phrase "off the record" – whether, in all contexts, that means that the matter is not to be recorded at all or merely that it should (and lawfully may) be shielded from public access.

The Issues

(A) As a matter of policy, should all proceedings in open court in the presence of a judge should be recorded, even if parts of them may lawfully be shielded from public access: should, in other words, (1) the District Court Rule, containing no exception to the requirement that all proceedings in open court be recorded verbatim, should apply to the circuit courts as well and be construed literally. If the answer is "yes," given the impracticality of using a backup recording for purposes of making copies or preparing transcripts, the Rule, either in its text or in a Committee Note, would have to make clear that a mute or pause button could not be used to interrupt the recording, but only to create a noise that would preclude persons not in the immediate vicinity from hearing the discussion.

(B) If interruptions are to be allowed, should the judge be required to state in the record (i) that a portion of the proceeding is not being recorded, and (ii) why?

II. PUBLIC ACCESS TO COURT-MADE RECORDINGS

BACKGROUND

The Official Record

In both the district and circuit courts, the only **official** record of proceedings is the transcript prepared either by a court reporter from his/her stenographic notes or by a transcription service under contract with the court from the electronic recording. Electronic recordings are **not** an official record and are not transmitted to an appellate court.. *See*, however, Rule 8-415(c) allowing an appellate court to obtain an **audio-video** recording in addition to the transcript.

Categorical Shielding of Recordings

The current Rules provide for the general exclusion from public access of four categories of recordings:

(1) There is no right of public access to the actual electronic recording made by the court, whether audio or audio-video. *See* Rules 16-406a. and 16-505c. No person other than a duly authorized court official or employee may have direct access to those recordings.

(2) A stenotype reporter's notes **and backup electronic recordings** are regarded as personal to the reporter, and there is no right of public access to them. *See* Rule 16-1006(g).

(3) A transcript, tape recording, audio, video, or digital recording of any proceeding that was closed to the public pursuant to rule or order of court is not subject to public access. *See* Rule 16-1006(f).

(4) In both the District Court and the circuit courts, the court is required to place "appropriate safeguards" on any portion of a proceeding that involves placing on the record matters "that would not be heard in open court or open to public inspection." *See* Rules 16-504 b. (District Court) and 16-405d. (circuit courts). As those Rules are construed and implemented, any such "safeguarded" portions, **though recorded**, are not included on **copies** of such recordings

available to the public. Procedures are in place to block those parts from being copied on to a disc available to the public.

Several problems have been noted with respect to the "safeguarding" procedure. As is the case with respect to the actual interruption of recording, there is no set procedure for placing on the record **why** particular material should be "safeguarded" or even the court's directive to do so. Nor is there any Rule defining whose responsibility it is to implement the "safeguarding" by "tagging" the portion of the proceeding to be "safeguarded.". The courts differ in their assignment of this responsibility – whether it is the court clerk, the court reporter, or some other person. The lack of any clear guidance in both of those areas raises the concern over whether the tagging is properly done so that material that the judge has ordered be "safeguarded" is not, in fact, made available to public access.

Access to Copies of Audio and Audio-Video Recordings

The public currently has no right to come to the courthouse and listen to an **electronic audio** recording. Unless otherwise ordered by the court, however, and subject to the shielding of "safeguarded" portions, the custodian of an electronic audio or audio-video recording is **required** to make a copy of the **audio** recording (and, if feasible, the audio part of an audio-video recording) of any proceeding not closed to the public available to any person, on request and on payment of the reasonable cost of making the copy. *See* Rules 16-406 c. and 14-504 c. There are no guidelines for when a court may deny the right to a copy; not are there any standards for when the copy must be produced. Some courts are able to make the copies faster than others.

The situation is different with respect to **audio-video** recordings. Unless otherwise ordered by the court, the only persons (or

entities) **entitled** to a copy of an electronic **audio-video** recording are: (1) a party to the action or the party's attorney; (2) a stenographer or transcription service for the purpose of preparing a transcript; or (3) the Commission on Judicial Disabilities or its designee. Those persons are expressly precluded from making any additional copy of the recording, and, except for a non-sequestered witness or an agent, employee, or consultant of the attorney, make the recording available to any other person not entitled to it. *See* Rule 16-406 d.

No other person may obtain a copy of an electronic **audio-video** recording of any criminal or revocation of probation proceeding or any other proceeding that is confidential by law. Those persons may file a request for a copy, to which any party or other interested person may file a response. The request and any response is referred to the judge who conducted the proceeding. If the action is still pending in the court, the judge **must deny** the request unless (1) all parties affirmatively consent and no interested party has filed a timely objection, or (2) the court finds good cause to grant the request. If judgment has been entered in the action, the court **must grant** the request unless it finds good cause to the contrary, but it may delay permission until all appellate proceedings are concluded. *See* Rule 16-406e.

Presumably because of the restrictions on obtaining **copies** of electronic audio-video recordings, Rule 16-405 b. permits any person, unless otherwise ordered by the court, to **view** an electronic audio-video recording at the times and places determined by the court. As noted, that privilege is **not** accorded with respect to electronic **audio** recordings.

The Issues

The issues presented with respect to public access to copies of electronic recordings emanate from the confluence of or

tension between several somewhat conflicting facts or public policies, namely:

(1) Although electronic audio and audio-video recordings have no **official** status and are sometimes plagued with inaudibles, they do normally constitute the most accurate (and usually the **only**) documentation of what occurred in court and provide the sole basis for the preparation of official transcripts.

(2) Because, subject to seating capacity, the public has the right to attend any proceeding not lawfully closed and, subject to the "safeguarding" of sensitive portions, transcripts of all proceedings not closed to the public are available to the public, access to **unofficial electronic** records is probably not **Constitutionally** required. It **has,** however, with limitations, long been permitted as a matter of Maryland judicial public policy.[2]

(3) Transcripts can be expensive and generally take more time to prepare than copying an audio disk. Media reporters, facing practical deadlines, may find it not only more useful, but necessary, to listen to a copy of an electronic recording in order to check facts and find out what occurred, in order to develop a timely report. With the dramatic shrinking of news staff in both the print and electronic media, there is less opportunity for the media to send reporters to sit all day in court, and the need for some access to electronic recordings becomes more important from their perspective.

(4) On the other hand, since the right to obtain copies of electronic recordings was first provided, in January, 1990, the ability of persons to post digital recordings on the Internet has created, or significantly exacerbated, concerns about personal privacy and security, leading some courts, without any apparent authority, to

[2] Rules 16-405 and 16-406 first took effect January 1, 1990.

attempt to place restrictions on the use that can be made of copies of electronic audio recordings. Concerns have been expressed about sound bytes of testimony regarding very personal matters, sometimes involving children, being broadcast selectively or generally over the Internet or on the radio or television. To some extent, this mirrors the points made in the 2008 Report of the Committee To Study Extended Media Coverage Of Criminal Trials :Proceedings in Maryland.[3]

Some of the issues (minor and major) that the Rules Committee, and ultimately the Court of Appeals, may wish to consider are as follows:

(A) As noted, Rule 16-406d. entitles a party, a party's attorney, a stenographic or transcription service, and the Commission on Judicial Disabilities to obtain a copy of an audio-video recording. Should there be added to that list (i) Bar Counsel, (ii) the Chief Judge of the Court of Appeals, (iii) the presiding judge, (iv) with respect to a circuit court proceeding the county administrative judge of the circuit court, and (v) with respect to the District Court, the Chief Judge of that court?

(B) Can a better balance between (i) the value of ready <u>access</u> to an electronic recording and (ii) ameliorating the problems stemming from the harmful use of <u>copies</u> of such recordings be created by freely allowing the public to <u>listen</u> to such recordings at a place designated and controlled by the court but not providing <u>copies</u> to (or permitting copies to be made by) anyone other than the persons noted in (A) above, and, if so, is it practicable for the courts to do that?

(C) If that approach is not practicable, or not desirable, is there some other approach that can better balance those

[3] That Committee was a subcommittee of the Legislative Committee of the Maryland Judicial Conference.

competing interests?

(D) With regard to "safeguarded" portions that are recorded but are not subject to public access, should the Rule (i) provide some standard or guidance as to what may properly be "safeguarded," (ii) require a motion to safeguard that identifies the reason for the safeguarding of particular material and a finding by the judge on the record that justifies an order to safeguard, (iii) permit some limited review of that decision and indicate the nature of that review, and (iv) indicate who is responsible for actually commencing, terminating, and "tagging" the safeguarded material, so that the lines of authority and responsibility are clear?

The Chair presented Rule 16-501, In District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 500 – RECORDING OF PROCEEDINGS

Rule 16-501. ~~RECORDING OF PROCEEDINGS~~ IN DISTRICT COURT

(a) ~~Audio Recording Required~~ Proceedings to be Recorded

In the District Court, all trials, hearings, and other judicial proceedings ~~before a judge in open court~~ held in a courtroom in the presence of a judge shall be recorded verbatim ~~by an audio recording device provided by the Court. The Chief Judge of the District Court may authorize recording by additional means, including audio-video recording. The recording shall be filed among the court records. Audio-video~~

~~recording of a proceeding and access to the audio-video recording shall be in accordance with Rules 16-405 and 16-406.~~ in their entirety. Conferences in chambers that involve only routine administrative matters or settlement discussions in civil actions need not be recorded.

Committee note: To the extent that chambers do not have recording equipment, the purpose of this section is to require that no proceedings that must be recorded are to be conducted in chambers.

~~b. Safeguarding Confidential or Non-Public Portions of Proceedings~~

~~If a portion of a proceeding involves placing on the record matters that would not be heard in open court or open to public inspection, the Court shall direct that appropriate safeguards be placed on that portion of the audio recording. The clerk shall create a written log listing the recording references for the beginning and end of the safeguarded portions of the recording. The log shall be kept with the original papers in the Court and a copy of the log shall be kept with the audio recording.~~

(b) Method of Recording

(1) Generally

Proceedings shall be recorded by an audio recording device provided by the court.

(2) As Authorized By Chief Judge

The Chief Judge of the District Court may authorize recording by additional means, including audio-video recording. Audio-video recording of a proceeding and access to an audio-video recording shall be in accordance with this Rule and Rules 16-502 and 16-503.

(c) ~~Access; Right to Obtain Copy of Audio recording~~ Control of and Direct Access to Electronic Recordings

(1) Under Control of District Court

Electronic recordings made pursuant to this Rule shall be under the control of the District Court.

(2) Restricted Access or Possession

No person other than a duly authorized Court official or employee of the District Court shall have direct access to or possession of an official ~~audio~~ electronic recording.

(d) Filing of Recordings

Subject to section ~~b~~ (c) of this Rule, ~~and unless otherwise ordered by the Court, the authorized custodian of an official audio recording shall make a copy of the audio recording, or any portion thereof, available to any person upon written request and the payment of reasonable costs, unless payment is waived by the Court.~~ audio recordings and any other recording authorized by the Chief Judge shall be maintained by the court in accordance with the standards specified in an administrative order of the Chief Judge of the Court of Appeals.

(e) Court Reporters and Persons Responsible for Recording Court Proceedings

Regulations and standards adopted by the Chief Judge of the Court of Appeals under Rule 16-504 (a) apply with respect to court reporters and persons responsible for recording court proceedings employed in or designated by the District Court.

~~(b)~~ (f) Safeguarding Confidential ~~or Non-Public~~ Portions of Proceedings

If a portion of a proceeding involves placing on the record matters that, ~~would not be heard in open court or open to public inspection, the Court shall direct that appropriate safeguards be placed on that portion of the audio recording. The clerk shall create a written log listing the~~

~~recording references for the beginning and end of the safeguarded portions of the recording. The log shall be kept with the original papers in the Court and a copy of the log shall be kept with the audio recording.~~ on motion of a party, the court finds should and lawfully may be shielded from public access and inspection, the court shall direct that appropriate safeguards be placed on that portion of the recording. The clerk shall create a log listing the recording references for the beginning and end of the safeguarded portions of the recording. The log shall be kept in the court file, and a copy of the log shall be kept with the recording.

ALTERNATIVE A

(g) Right to Copy of Audio Recording

(1) Generally

Except for proceedings that were closed pursuant to law or as otherwise provided in this Rule or ordered by the court, the authorized custodian of an official audio recording shall make a copy of the audio recording available to any person upon written request and, unless waived by the court, upon payment of the reasonable costs of making the copy.

(2) Redacted Portions of Recording

Unless otherwise ordered by the District Administrative Judge, the custodian of the recording shall assure that all portions of the recording that the court has directed be safeguarded pursuant to section (f) of this Rule have been redacted before making a copy of a recording for a person under subsection (g)(1) of this Rule. If necessary to accomplish that task, the copying may be delayed for a reasonable period.

(3) Exceptions

Upon written request and subject to the conditions in this section, the custodian shall make available to the following persons a copy of the audio recording of proceedings that were closed pursuant to law or from which safeguarded portions have not been redacted:

(A) The Chief Judge of the Court of Appeals;

(B) The Chief Judge of the District Court;

(C) The District Administrative Judge having supervisory authority over the court;

(D) The presiding judge in the case;

(E) The Commission on Judicial Disabilities or, at its direction, Investigative Counsel;

(F) Bar Counsel;

(G) Unless otherwise ordered by the court, a party to the proceeding or the attorney for a party;

(H) A stenographer or transcription service designated by the court for the purpose of preparing an official transcript of the proceeding, provided that (i) the transcript or unredacted safeguarded portions of a proceeding, when filed with the court, shall be placed under seal or otherwise shielded by order of court ~~(ii) one copy of a transcript of a proceeding closed pursuant to law shall be filed and marked as under seal, or unredacted, safeguarded portions of a proceeding shall be marked as under seal,~~ and ~~(iii)~~ (ii) no transcript of a proceeding closed pursuant to law or containing unredacted safeguarded portions shall be prepared for or delivered to any person not entitled to a copy of the recording itself under this section; and

(I) Any other person authorized by the District Administrative Judge.

ALTERNATIVE B

(g) Right to Listen to or View Copy of Recording

(1) Generally

Except for proceedings that were closed pursuant to law or as otherwise provided in this Rule or ordered by the court, the authorized custodian of an official audio or audio-video recording, upon written request from any person, shall make a copy of the recording and permit the person to listen to the copy if it is an audio recording or to listen to and view the copy if it is an audio-video recording at a time and place designated by the court.
Committee note: It is intended that the custodian need make only one copy of the electronic recording and have that copy available for any person who makes a request to listen to or listen to and view it. If space is limited and there are multiple requests, the custodian may require several persons to listen to or to listen to and view the recording at the same time or accommodate the requests in the order they were received.

(2) Redacted Portions of Recording

Unless otherwise ordered by the District Administrative Judge, the custodian of the recording shall assure that all portions of the recording that the court directed to be safeguarded pursuant to section (f) of this Rule have been redacted before making a copy of a recording available for listening or listening and viewing. If necessary to accomplish this purpose, the copy may be delayed for a reasonable period.

(3) Restrictions on Additional Copies

A person listening to or listening to and viewing a copy of an electronic recording may not make a copy of that copy or have in his or her possession any device that, by itself or in combination with any other device, is capable of making a copy. The

custodian or other designated court official or employee shall take reasonable steps to enforce this prohibition, and any willful violation of it may be punished as a contempt.

(h) Right to Copy of Recording

(1) Who May Obtain Copy

Upon written request and subject to the conditions in this section, the custodian shall make available to the following persons a copy of the audio or audio-video recording, including a recording of proceedings that were closed pursuant to law or from which safeguarded portions have not been redacted:

(A) The Chief Judge of the Court of Appeals;

(B) The Chief Judge of the District Court;

(C) The District Administrative Judge having supervisory authority over the court;

(D) The presiding judge in the case;

(E) The Commission on Judicial Disabilities or, at its direction, Investigative Counsel;

(F) Bar Counsel;

(G) Unless otherwise ordered by the court, a party to the proceeding or the attorney for a party;

(H) A stenographer or transcription service designated by the court for the purpose of preparing an official transcript of the proceeding, provided that, if the recording is of a proceeding that was closed pursuant to law or from which safeguarded portions have not been redacted, (i) the transcript or the portions of the transcript containing unredacted safeguarded portions of a proceeding, when filed with the court, shall be placed under seal or otherwise shielded by order of the court ~~(ii) one copy~~

~~of a transcript of a proceeding closed pursuant to law shall be filed and marked as under seal, or unredacted, safeguarded portions of a proceeding shall be marked as under seal,~~ and ~~(iii)~~ (ii) no transcript of a proceeding closed pursuant to law or containing unredacted safeguarded portions shall be prepared for or delivered to any person not entitled to a copy of the recording itself under this section; and

(I) Any other person authorized by the District Administrative Judge.

(2) Restrictions on Use

Unless authorized by an order of court, a person who receives a copy of an electronic recording under this section shall not:

(A) make or cause to be made any additional copy of the recording; or

(B) except for a non-sequestered witness or an agent, employee, or consultant of the party or attorney, give or electronically transmit the recording to any person not entitled to it under this section.

(3) Violation of Restriction on Use

A willful violation of subsection (h)(2) of this Rule may be punished by contempt.

Cross reference: See Rule 16-504 (a) [16-404 b - current Rule reference] concerning regulations and standards applicable to court reporting in all courts of the State.

Source: This Rule is derived from former Rule 16-504.

Rule 16-501 was accompanied by the following Reporter's note.

Rule 16-501 is derived from former Rules 16-404, 16-405, 16-406, and 16-504. Section

(a) is derived from Rule 16-404 e. In section (a), the Subcommittee added language to clarify that chambers conferences involving only routine administrative matters or civil settlement actions need not be recorded. A Committee note was added to indicate that no proceedings that must be recorded are to be conducted in chambers.

Section (b) is derived from former Rule 16-504 a.

Section (c) is derived from former Rule 16-406 a and b.

Section (d) is new and was added to make clear that recordings authorized by the Chief Judge of the District Court are to be maintained by the court in accordance with standards found in an administrative order of the Chief Judge of the Court of Appeals.

Section (e) is derived from former Rule 16-404 b.

Section (f) is derived from former Rule 16-405 c and d.

Alternative A

Subsection (g)(1) is derived from former Rule 16-406 (c).

Subsection (g)(2) is new and was added to reinforce that the redacting of confidential portions of the recording takes place before a copy is given to someone.

Subsection (g)(3) is derived from former Rule 16-406 d. The Subcommittee proposed to add some people to the list of those who have a right to a copy of the recording, including the Chief judge of the court of Appeals, the chief judge of the District court, the District Administrative Judge having supervisory authority over the court, the presiding judge, and Bar Counsel. The Subcommittee proposed to add some conditions for a stenographer or transcription service designated by the court to prepare an official transcript if the recording is of a

proceeding closed pursuant to law or from which safeguarded portions have not been redacted, including that the transcript be sealed or shielded and that the transcript may not be prepared for or delivered to any person not entitled to a copy of the recording.

Alternative B

Subsection (g)(1) is derived from former Rule 16-406 e. A Committee note has been added to provide a procedure for the custodian to make copies of recordings available to the public.

Subsection (g)(2) is new and was added to reinforce that the redacting of confidential portions of the recording takes place before a copy is given to someone to listen to or view.

Subsection (g)(3) is new and provides that someone listening to or viewing a recording may not have a device with him or her that is capable of copying the recording.

Subsection (h)(1) is derived from former Rule 16-406 d. See the note to subsection (g)(3) in Alternative A.

Subsection (h)(2) is new and was added to provide limitations on the use of a recording when someone views or listens to it.

Subsection (h)(3) is new and provides a penalty for misuse of a recording.

The Chair explained that most of the policy questions arose in Rule 16-501. Chapter 500 addresses the recording of proceedings in open court. As the memorandum pointed out, the District Court is on the Courtsmart system, which is all audio recording statewide. The circuit courts for the most part are also on Courtsmart or some other proprietary electronic audio

system. Baltimore City is on an audio-video system as well as two courtrooms in Prince George's County circuit court. Some counties, mostly on the Eastern Shore (Baltimore County still has one or two) have human court reporters in the traditional sense of court reporters.

The Chair noted that one of the issues that has arisen is what has to be recorded by whatever method it is. The current District Court Rule seems to be that everything said in open court is recorded. Some of what is recorded may not be accessible to the public, but it is recorded. The practice seems to be that the judges have mute buttons. It is not entirely clear when a judge presses that button, whether he or she is interrupting the recording or just creating noise, so people cannot hear the discussion taking place at the bench.

The Chair commented that it is different in the circuit courts where everything is recorded, except what the parties and the court agree does not have to be recorded. This can include bench conferences, or occasionally in civil cases, the parties will agree that no opening statements are to be recorded. The issue has been raised whether everything that is said in open court with the judge present should be recorded, even if parts of what is recorded are not accessible. If this is the case, how does one implement the interruption of the recording?

The Chair noted that one aspect of this is that under the Courtsmart system, in most instances, and maybe all, two recordings are made. One is the primary recording which is

recorded in court. The Chair had been told that most recordings have a backup somewhere in the courthouse that is running, even if the primary recording device had been turned off. The information supplied to the Subcommittee was that the backup recording is intended to be used only if the primary recording device malfunctions in some way. It is not intended to be used to produce transcripts. It is very difficult to find the proceeding on a recording to produce it as a transcript.

The Chair said that the first issue that was to be considered was what should get recorded. The Subcommittee's view was that everything that is said in open court when a judge is there should be recorded. One reason is that it memorializes what has happened in court, and an appellate court may need that record. Also, to the extent that the record is accessible, the public might want to know what happened in the case. The Subcommittee's position was that everything should be recorded, and then what can be properly shielded from public access should be determined. Something should be shielded that is sensitive and lawfully can be shielded. This is one issue that the Committee will have to resolve.

The Chair remarked that the second issue is who has access to the recordings. When proceedings are recorded by audio, it is easy and inexpensive to make a disk. It can be done fairly quickly, although the various courts have differing resources. Some may be able to produce the disk the day it is requested or the next day; some courts may take a week to produce it. The

circuit courts have varying policies with respect to providing disks of the court proceedings. Some have a policy that anyone who wants the disk just has to come in and make a request, complying with the necessary requirements, and a court employee will make a copy of the disk from the actual electronic recording for the person. Other courts will allow someone to listen to the audio recording, but they do not allow the person to have a disk of what was recorded in court.

The Chair said that what triggered some of this debate was an occurrence in Montgomery County, which has had an electronic recording system since their new courthouse was completed in 1980. They had been giving these disks mostly to the news media. It was understood that the news media would not play the disk on the radio or the television. The disk was only for informational purposes, but not for rebroadcasting or any broadcasting. Apparently for years, the news media honored this. However, recently, part of a disk was broadcast on the radio. The court criticized this action and told the newsperson that he or she had no right to broadcast this. The media responded that once someone has the disk, it can be used, citing the Pentagon Papers case, *New York Times v. U.S.* 403 U.S. 713 (1971). The court then decided that the disks would not be available. It is not the official court record, although it may be the most accurate; however, the party requesting it would be allowed to come in and listen to it. This is the second policy issue.

The Chair commented that the Subcommittee favored the approach of people being allowed to come to the courthouse to listen to the tape, but the Subcommittee decided to send both approaches up to the full Committee. It is an important policy issue for the Committee to consider.

The Chair said that Rule 16-501 addresses the recording of proceedings in District Court. Sections (a), (b), (c), (e), and (f) are taken from the current Rule with some style changes. The Rule retains the requirement that all proceedings in open court before a judge be recorded. Apparently, there is some variation as to how this is done in many of the courts. Some courts turn on the recording equipment at 7:30 a.m., and it stays on until 4 p.m or 5 p.m. Some courts shut the equipment off during recesses. Others will turn it on when the judge comes on the bench and turn it off when the judge leaves. The Subcommittee had been told that essentially everything is recorded subject to the judge pushing the buttons from time to time. It was not clear to the Subcommittee whether that would actually interrupt the recording or not. This procedure may differ from one court to another within the District Court.

Section (a) of Rule 16-501 adds a clarification as to what can be discussed in chambers and not recorded. The Subcommittee spent a great amount of time on this. The Subcommittee's view was that if the parties are going to go into the judge's chambers, it would be off the record, because usually there are no recording devices in the chambers. The Subcommittee was

opposed to the situation where the discussion takes place in chambers, so that it would not be recorded to be an escape from the requirement that proceedings in open court be recorded. Section (a) adds language clarifying that in the judge's chambers, only routine administrative matters or settlement discussions in civil proceedings can be discussed. When the Subcommittee drafted this change, it was before the Alternative Dispute Resolution (ADR) Subcommittee had worked on District Court ADR. A Committee note should be added to section (a) to make clear that everything that is to be recorded in the court does not apply to ADR proceedings conducted pursuant to Title 17.

The Chair noted that the last clause of section (d) is new. Section (f), which addresses safeguarding confidential portions of proceedings, is new. If some of the proceeding is going to be shielded, then there has to be some procedure whereby a participant in the case tells the judge that the upcoming testimony in the case should be shielded. If the judge agrees, he or she will make sure that the shielded testimony, though recorded, is tagged in a manner that will effectively shield it from public access. There is a procedure for tagging this, so that someone is responsible for locating the point in the proceedings where shielding begins and ends, so that the shielded material will be automatically redacted from any copy. The first two lines of section (f) provide for this. The main issue is in Alternatives A and B in section (g). This is the issue of whether the person asking for a recording of the proceeding is

allowed to obtain a copy of it or whether the person is only allowed to listen to it or view it.

The Chair told the Committee that section (a) is consistent with the current Rule, Rule 16-504. Mr. Sykes pointed out that the Committee note provides that the purpose of section (a) is to require that no proceedings that must be recorded are to be conducted in chambers. The problem is that the only proceedings that must be recorded are proceedings in open court. The Committee note cancels itself out. As Rule 16-501 is now worded, it is sufficient to say that the only proceedings in chambers that are permissible are those that involve only routine administrative matters or settlement discussions in civil actions. The Chair inquired if Mr. Sykes wanted to drop the Committee note. Mr. Sykes moved to drop the Committee note, the motion was seconded, and it passed on a majority vote.

Mr. Karceski asked whether section (a) precludes the use of the button to mute the recording of the proceedings. He added that these are used everyday. The Chair responded that the question is what the mute button is used for. If it interrupts the recording, the answer to Mr. Karceski's question is that it was intended not to allow that. The Subcommittee interpreted the current Rule as not allowing that. Mr. Karceski said that he did not mean that pushing the mute button would interrupt testimony, but often the case proceeds, and the judge gets to a point where he or she calls one or more parties up to the bench. The judge may feel that the case can be resolved more quickly than the time

that the trial will take. That conversation at the bench will be recorded according to Rule 16-501 (a). But if the judge takes the next step and asks to see counsel in chambers, what the judge is suggesting cannot be discussed unless it is recorded.

The Chair inquired if Judge Norton had used this static button. Judge Norton replied negatively. He added that in some places, they are used routinely. Mr. Karceski remarked that he could not recall any District Court having the static button. However, the static button, if used, still records what is being said in court. Mr. Karceski clarified that he did not mean the scheduling of lunch or some administrative matter, but he did mean discussion regarding the case. Many times, attorneys will ask the judge if they can approach the bench to discuss a possible guilty plea. Some judges will refuse to talk about it; others will invite counsel to the bench to move the docket along. Mr. Karceski noted that as he read the Rule, all of the proceeding has to be recorded, and none of it can be discussed in chambers. It is not often that this is discussed in the judge's chambers, but it has happened to him in the District Court.

Judge Pierson commented that this had been discussed in the Subcommittee. The Rule would permit this in civil cases. He thought that the Subcommittee had considered whether the Rule would apply to plea discussions in criminal cases. It may be a similar issue. There may be discussions that counsel believe would be more productive if they are off the record. He could not remember why plea negotiations were not referenced in the

Rule. The Chair responded that the reason was that the plea discussions can be shielded and tagged, so that they are not publicly accessible. However, those plea discussions can result in appeals. The defendant may allege that the State promised the defendant something, the State denies it, and there is no record of it.

Judge Norton said that a case that he sees frequently is where the defendant is an informant, and he or she wants the court to be aware of this but not have this information accessible to the public. The defendant would like to whisper this to the judge, or the discussion could be held in chambers. Mr. Patterson remarked that the bane of the prosecution's existence is post conviction. A recent case involved a defendant claiming that he had not been advised of all of the negotiations that had taken place. Mr. Patterson expressed the view that everything needs to be recorded, somewhere, somehow as to what happens in a criminal case. It is the only way to accurately address post conviction matters that come up later in time. It seems now that these cases are never over. He had been in situations where counsel had met with the judge in chambers and talked about substantive issues. The best practice is for the judge to make a record of those substantive issues to preserve it.

The Chair remarked that this was the reason that the Subcommittee felt that it would be appropriate to discuss settlement of civil cases in the judge's chambers. These kind of

settlement discussions are usually in chambers, but this would not be appropriate in criminal cases. In appellate cases, defendants have alleged that the prosecution promised certain things, or that the defendant had never been told that his or her co-defendant was going to plead guilty.

Mr. Karceski suggested that another sentence covering criminal matters should be added to section (a). It would provide that any discussion in chambers must be recorded, also. The Chair pointed out that the equipment to record in chambers is not available. Mr. Karceski acknowledged this, adding that this would mean that there would not be any discussions in chambers. The Chair responded that this was somewhat optimistic.

Mr. Maloney commented that some discussions in the circuit court involving sensitive facts should be discussed in chambers. This happens very frequently in the circuit court. Afterward, the judge will go on the bench, stating that he or she and the parties and counsel met in chambers. The judge will then name the actions taken. The conferences in chambers should not be recorded. There is never going to be a recording of what the defense attorney tells his or her client. This is privileged information. The post conviction problem is where the defendant says that he or she did not know about some decisions made in the underlying case.

The Chair noted that what the Subcommittee looked at was not whether this confidential information should be publicly accessible, but whether it should be on the record, because it is

part of the case. Should the appellate court be able to consider it?

Mr. Maloney remarked that appeals from the District Court are de novo. What the Rule pertains to is post conviction cases. The Chair observed that it also pertains to petitions for certiorari to the Court of Appeals from District Court cases. Mr. Maloney responded that there are not very many of those. The Chair noted that everything gets recorded in the cases in the District Court now. Mr. Maloney pointed out that in some jurisdictions, the judges suggest to the parties that everyone should talk privately. Judge Norton said that it is a function of the style of judges. Some judges prefer chambers conferences; others do not. The Chair commented that what the Subcommittee wrestled with was not the chambers conference; it was not permitting the judge and the parties to go into chambers to discuss issues that are really part of the case. Judge Norton responded that this is what is happening in the chambers conferences. The Chair acknowledged this and added that this is what the Subcommittee was trying to address.

Mr. Sullivan noted that Rule 16-501 does not state that the parties and the judge are forbidden from going into the judge's chambers. It provides that if the proceeding is taking place in court, it has to be recorded. If the intent of the Rule is that it is forbidden for the parties to go into the judge's chambers to discuss what should be conducted in open court, section (a) does not provide this. The Chair said that this was the intent

of the Rule. If it does not state this clearly, from the Subcommittee's point of view, it should. The idea was that there should not be Star Chamber proceedings. Any part of the proceeding that ought to be in open court is public. Some of it can be shielded, but there is a record of everything that happened. This was how the Subcommittee viewed the current District Court Rule. This is the policy issue for the full Committee and ultimately, the Court of Appeals. The Subcommittee viewed this as a matter of transparency of judicial proceedings. Secret trials cannot be conducted.

The Chair said that the Committee note had been deleted, and he asked if anyone had a further comment on section (a). Judge Pierson expressed the opinion that if section (a) is ambiguous, then the deleted Committee note ought to be put back in. The note could be redrafted. The intent of the Rule and the note was that secret proceedings held in chambers are not allowed, except in the two limited instances referred to in section (a). Mr. Sykes asked why the last sentence of Rule does not say that. Judge Pierson replied that he had thought it did, but Mr. Sullivan had questioned it.

Mr. Sullivan commented that the meaning of the Rule is determined by where the judge is at the time. If the judge is in the courtroom, then all of the proceeding must be recorded. This is stated in the first sentence of section (a). If the judge is in chambers, then the Rule provides that certain matters need not be recorded. In most chambers, this will not have any meaning,

because there are no recording devices. If the intent is what the Committee note provides, it ought to be in the body of the Rule. It would state: "All other matters conducted in chambers need to be placed on the record." Mr. Sykes remarked that there would be no problem about putting this into the Rule itself. The language could be: "No other conferences in chambers shall be permitted." Judge Norton expressed the view that it is unwieldy for a defense attorney whose client is an informant to have the discussion in a crowded courtroom. In his county, they do not have the recording capabilities to record the discussion in chambers. Mr. Maloney commented that the Rule has moved from addressing a public access issue to addressing what judges can and cannot say in chambers. The judges can be trusted to make the correct decisions. They know what their responsibilities are, and they know the case law. The Rule should not be used to govern what judges can and cannot say.

The Chair observed that it is a matter of judicial policy, but there is a constitutional underpinning to this. Under the First and Sixth Amendments, there is a right of public access to courts. If part of the case is going to be tried in chambers, it would run afoul of both of those amendments. Mr. Maloney pointed out that there is no right of public access to a plea discussion. The judges in Maryland are familiar with case law, and they can be trusted to follow it. It is not necessary to tell judges what can be said in chambers. Mr. Karceski remarked that the problem with the Rule is that it does not refer to what happens in a

criminal case. It seems to be written only for District Court proceedings that are civil. Is this the intent?

The Chair answered that this was not the intent. Mr. Karceski expressed the opinion that Rule 16-501 should refer to criminal cases. The Chair noted that the intent of the Subcommittee was that everything that is said and that needs to be said in open court should be recorded. This would prohibit mute buttons that would interrupt the recording. A collateral issue that arose was the idea that the parties could go into the judge's chambers to do what ought to be done and maybe lawfully has to be done in open court.

Mr. Karceski expressed his agreement with Judge Norton. It is a problem that comes up on a daily basis in the District Court. Informants who work for the police are involved in many cases. A log can be set up to redact the confidential testimony or keep it private, but the possibility exists that it will not be kept private. Some slippage could occur, which may result in someone being killed. The Chair pointed out that slippage could happen whether or not the testimony is on the record. Mr. Karceski commented that if the confidential testimony was given in the judge's chambers, it would be less likely that this information would be revealed. At that point, it would have to be one of the attorneys or the judge who would leak the information. In some aspects of the criminal process, it is necessary to trust what is being done and how it is being done for good reason.

Mr. Michael moved to strike the last sentence of section (a) to eliminate the problem with what can be heard in chambers. The motion was seconded. Mr. Sykes inquired if this would mean that the parties can simply go to the judge's chambers and avoid the necessity of any recording. Mr. Michael replied affirmatively. It would impose on both the judge and the attorneys a certain responsibility. For example, in Montgomery County, it is not uncommon to discuss jury instructions in chambers rather than in open court. When the plaintiff's attorney has a problem with the instructions, it is his or her obligation to put it on the record. This frequently happens.

Mr. Maloney remarked that in every case in federal court, a charging conference that is never recorded is held in chambers. This may take as long as three hours. Mr. Michael said that this imposes on attorneys the responsibility to make sure that the record is preserved. Judge Norton commented that the courts will increasingly require that plea offers be placed on the record, so courts may have some responsibility placing on the record a summary of what occurred in chambers. The parties would then sign off on this, and it would be more useful than trying to bar completely going into chambers or trying to capture what happens there. The Chair asked if the testimony of witnesses could be taken in chambers, and then the judge would go to the courtroom and announce what the witness had said. Mr. Michael responded that he would argue that the first sentence prohibits this.

Judge Norton suggested that the word “testimony” could be added to the first sentence of section (a), so that it would read “...all trials, hearings, testimony, and other judicial proceedings...”. This would eliminate testimony in the judge’s chambers. Mr. Klein pointed out that it would not eliminate it, because of the language in the same sentence that reads: “held in the courtroom.” Mr. Sykes noted that it would have to be held in the courtroom in the presence of a judge, and anything else does not have to be recorded unless the Rule requires that it does; however, this would not be the case if the last sentence were stricken. Mr. Johnson inquired why the proceedings have to be held in a courtroom. The Chair replied that there are two problems. One is that the Subcommittee was advised that in the District Court and probably in the circuit court, also, recording in chambers in most courthouses is unavailable. The second problem is the right of public access to trials. Every time proceedings are held in chambers, it affects that right.

Mr. Michael suggested that the beginning language of section (a) of Rule 16-501 could be: “In the District Court, all trials, hearings, testimony, and other judicial proceedings in the presence of a judge shall be recorded verbatim.” The Chair said that the word “proceedings” would include testimony. Mr. Michael responded that he assumed that this would be in a courtroom. The Chair remarked that it would also include the presentation of exhibits and arguments on motions. Mr. Michael commented that if the equivalent of testimony is given in a judge’s chamber, it

ought to be recorded. The Chair stated that a motion to strike the last sentence of section (a) was on the table. The motion carried by a majority vote.

Judge Pierson moved to adopt the language suggested by Mr. Michael. The language "in a courtroom" would be deleted, but the word "testimony" would not be added. Mr. Klein questioned whether this would mean that chambers conferences would be forbidden. Judge Pierson replied that these would not be proceedings. The Chair pointed out that someone will probably argue that chambers conferences are proceedings. Mr. Sullivan asked Judge Pierson if the Committee note at the end of section (a) that had been deleted should be reinserted. The Chair commented that the Committee note was somewhat circular.

Mr. Sullivan observed that this is the only place that the thought is captured that whatever is supposed to be recorded needs to be recorded. The Rule does not specify this. Mr. Johnson remarked that if the Rule requires that something needs to be recorded, and no recording equipment is available in the judges' chambers, then the proceeding cannot be held in the chambers. Judge Pierson said that with the language "in a courtroom" in the first sentence of the Rule, what takes place in chambers does not apply.

The Chair noted that if the language "held in a courtroom" is stricken, it would eliminate chambers conferences altogether. Mr. Sykes said that the exception would be the last sentence of section (a), but the Chair pointed out that the last sentence had

been stricken. Mr. Sykes suggested that one solution would be to take out the language "in the courtroom" in the first sentence. The Chair responded that this would mean a change from the current Rule, which only requires verbatim recording of everything that is held in a courtroom in the presence of a judge. Mr. Sykes said that this would expand this to include anything in the presence of a judge. Then, the last sentence would read that conferences in chambers may involve only routine administrative matters or settlement discussions in civil actions. The Chair noted that this had been the Subcommittee's position, but the full Committee had suggested that there should be the ability to have proceedings in chambers off the record. Mr. Sykes responded that this is the policy question.

The Chair inquired if anyone had another motion. At that point in the meeting, the last sentence and the Committee note had been deleted. Mr. Sykes moved that in place of the last sentence, the following language should be substituted: "Conferences in chambers may involve only routine administrative matters or settlement discussions in civil actions." Mr. Karceski noted that this would mean that in criminal cases, conferences in chambers can apply to anything. Mr. Sykes remarked that there ought to be a provision for criminal cases. Judge Norton observed that other than a postponement conference, a plea discussion could not take place in chambers.

Mr. Sykes noted that Rule 16-501 only applies to civil actions. The Chair disagreed. Mr. Karceski acknowledged that it

is not only for civil actions, but the last sentence of section (a) only refers to a civil trial. The Chair disagreed. Mr. Karceski asked why the last sentence does not refer to a criminal case. The Chair replied that it was not intended that plea discussions would be unrecorded in chambers. Mr. Karceski pointed out that this happens frequently. The Chair explained that the Subcommittee felt that this should not be allowed. It is appropriate in civil cases, but not criminal.

Mr. Michael moved that the word "testimony" be added to the first sentence of section (a) after the word "hearings" and before the word "and." The motion was seconded.

Mr. Karceski commented that the Court of Appeals does not want the Rules sent up piecemeal. If the criminal issue was not addressed in this Rule, did it make sense to send this Rule to the Court if the Committee approved it? The Chair disagreed with Mr. Karceski that the Rule does not apply to criminal cases. He noted that the first sentence has the language: "all trials." Mr. Karceski said that he had been concerned with the last sentence. The Chair responded that the last sentence had been deleted. It had been intended to permit discussions in certain civil cases to not be recorded.

The Reporter clarified that section (a) consists of one sentence that ends with the word "entirety." Mr. Klein noted that the words "in a courtroom" are still in the Rule. What it means is that anything that happens in a courtroom must be recorded; it says nothing about what happens outside of the

courtroom. This is a “free for all.” The question is if this needs to be addressed. Mr. Michael commented that the “free for all” is the current practice. Mr. Klein acknowledged this but added that the Subcommittee’s view is that it should not be so much of a “free for all.”

The Chair said that the Subcommittee had discussed this at great length. Some people had seen cases, particularly criminal cases, where pleas had been discussed off the record. It is a sensitive situation when someone does not want the public to know that he or she is an informant. On the other hand, is this addressed by keeping if off the record entirely, so that there is no record of the agreement, or should the judge come into the courtroom and somehow communicate what happened? That then makes it public. Mr. Michael agreed with Mr. Maloney that the judges and the attorneys make the judgment as to what goes on the record. The attorney has an obligation to properly represent his or her client and will have to craft what is necessary to preserve the record.

Mr. Bowie remarked that whether it takes place in the courtroom does not matter; the issue is the recording. The Chair reiterated that there is no ability to record in most of the judges’ chambers. Mr. Bowie observed that this forces people into the courtroom. The Chair acknowledged that certain discussions take place in chambers, but he noted that he had also seen some very sensitive circuit court cases, where the judge would call the parties up to the bench and turn on the noisemaker

to present the audience from hearing the discussion. The discussion is recorded, but the public cannot hear it, because of the noise. It can be tagged and redacted from the copy given to the public. The Subcommittee felt that this was the best way to address this. The privacy is protected, but the discussion is kept on the record.

Mr. Michael asked Mr. Karceski what he does with criminal clients when this type of discussion takes place in chambers. Will the judge let the defendant into the judge's chambers? Mr. Karceski answered that sometimes that does happen, although not routinely. About 95% of the time, the defendant is in the courtroom or the lockup. Mr. Michael noted that the attorneys and judge would be having a sensitive discussion about the defendant's rights. What goes on the record to make it clear what has taken place, so that the defendant does not file a post conviction petition later on? Mr. Karceski replied that it depends on the attorneys and how they would like to operate. It is important for the attorney to make a record to protect himself or herself as well as the client to the extent it is possible. The attorney may not want to put on the record some statements that the attorney made to the court in the privacy of the judge's chambers. The attorney communicates with his or her client, documents the communication in the file, and does what is necessary to preserve it.

The Chair asked about the typical plea where in turn for the State dropping certain charges, the defendant agrees to testify

against two co-defendants. Is this deal arranged in chambers? Judge Norton said that the more major problem is when the defendant has been buying undercover drugs for the State police. Mr. Karceski remarked that if there is going to be testimony, that is usually made known. It may not be known at the time of the pleas, but it will be made known at the time that the State must produce that information. There may be a plea from the defendant without having to tell him or her that testimony is going to be forthcoming. If the State's Attorney has to reveal that information in discovery, then he or she will. The Chair inquired what would happen if the defendant says that he or she never agreed to that. Mr. Karceski answered that the plea would be withdrawn. There will be some memorialization of what has happened.

Judge Norton commented that he could not imagine a judge not putting the plea agreement on the record. The Chair asked what the problem is with putting the entire testimony on the record, if the judge announces what is going to happen with the plea agreement. Judge Norton replied that this is not the problem; it is the person who is an informant and is doing undercover buys of drugs for the police. It is not a good idea to put this on the record. Mr. Karceski added that there may be sensitive information about what the defendant has done. This should not necessarily go on the record either. The Chair inquired if it should not go on the record at all, so that no one can ever see it, or if it should just not be publicly accessible. Mr.

Karceski answered that it is important to make sure that no one can access it. The Chair said that this was the Subcommittee's view. It should be put on the record, but it should be shielded. A record of everything that happened would exist.

Mr. Karceski observed that the Chair's point was that if there is a chambers conference involving a criminal case, whatever is said regarding the trial would be memorialized by someone on the record. It would state the various points agreed to in the plea negotiation. This can be protected from the public according to Rule 16-501. As the Rule is now being proposed, certain events can happen in chambers, but nothing has to happen regarding the plea negotiations in open court. Everything can be said in chambers, and whatever has to be said or what is going to be limited can occur in open court. Not all of it has to take place on the record. The Rule is silent as to discussions in chambers.

Mr. Patterson referred to discovery in criminal cases. The best practice is that the prosecutor sends in a letter saying this is how he or she proposed to deal with the case. If the case involves someone who is getting a lesser sentence because he or she is an undercover informant, obviously the informant would not want this disclosed in a public forum to ensure his or her own safety and to not affect other future or existing cases. If the situation is that the defendant is negotiating as an informant, and the prosecution agrees that the defendant does not have to go to prison, the judge has to agree to this. This is

when the plea is worked out, and it will take place out of the center of the courtroom. However, records are made, including documentation of what is discussed between counsel. The judge has the ability to take that documentation and make it part of the record without stating it. He or she can put it on the record and seal it. Many best practices are available to protect that record. The defense attorney does not want to be found to be incompetent, nor does the State's Attorney, who would not like to try the case over again in five years.

Mr. Patterson remarked that the Committee had been discussing the exceptions, the gaps that arise, all of which can never be resolved. No matter how the Rule is written, some people will skirt the Rule. The Rule should envision the best practices, which include documentation. All of the parties would like documentation. Judges do not want to be perceived as not being just. They want to make sure that everything is above board. The exceptions in the Rule are outside the best practices.

The Chair pointed out that the discussion had diverted into a tangent of discussing pleas in criminal cases. Rule 16-501 and the comparable one for the circuit court, which is the same, Rule 16-501, are broader, providing that in every case, everything ought to be in open court, except for the matters that do not need to be. He had thought that a plea in federal court has to be in writing. Mr. Karceski responded that it is always in writing. It is not required, but it is the usual procedure. The

procedure is that the parties sign off. If the last sentence of section (a) of Rule 16-501 is going to be left in, the language could be: "...routine administrative matters, settlement discussions, or plea negotiations in criminal cases need not be recorded." The Chair responded that he had a problem with the plea negotiations being listed in section (a). He was not concerned about plea negotiations between counsel. Mr. Karceski said that if plea negotiations are conducted on the record in open court, they will be recorded, according to Rule 16-501. If the negotiations take place in chambers, the Rule would cover the situation of avoiding that the defendant may be gunned down the following week by a gang. It allows for an out card.

Mr. Carbine remarked that without focusing on the language, two concepts are being balanced. During an era in the judicial history of Maryland that happened before Mr. Carbine started practicing, there were many courts in which mischief took place. This is why everything should be put on the record to eliminate that type of mischief. On the other hand, Mr. Carbine said that he practiced civil litigation exclusively. From his perspective, conferences in chambers are the grease that makes the wheels of justice turn. This is because the attorneys do not have to guard every word that is spoken. The judge and the attorneys in effect become three attorneys. Mr. Carbine expressed his concern about limiting this. It is important to balance the two interests - - preventing mischief but giving the professionals who are trying

to move these cases along the flexibility of having off-the-record conversations.

The Chair remarked that Rule 16-501 has to be worded carefully. Mr. Patterson suggested that instead of eliminating the last sentence of section (a), one more sentence could be added. The last sentence could be left in as it is written. An additional sentence could be added that would read: "Conferences in chambers involving criminal cases must be made part of the court's record either orally or in writing." This would mean that the judge would have to announce on the record the details of a discussion in chambers, or if the subject of the discussion is sensitive, it is reduced to writing, put into the court file, and sealed. This is the most transparent way of addressing this.

The Chair noted that if the court record is sealed, it means that the judge's statements are in writing. Mr. Patterson explained that if the subject of the discussion is not sensitive, the judge can announce the details of the chambers conference on the oral record that is recorded in the courtroom, or the judge announces that a discussion was held in chambers, which he or she has reduced to writing. This will be part of the record and will be sealed. The Chair remarked that to accept a guilty plea, the judge has to find on the record that it is knowing and voluntary. To do that, the judge has to ask the defendant many questions as to the defendant's competence and knowledge of the what the plea agreement is. The judge must address this, and it has to be on the record. How can this be protected?

Mr. Patterson responded that one requirement is that there has to be a statement on the record that the defendant has been advised of the elements of the offense. What Mr. Patterson had seen is that the judge asks the attorney to state on the record that he or she has advised the defendant of the elements of the offense. The attorney can answer affirmatively, and it is not necessary for the attorney to go through every element. What the Chair is suggesting could be similar to this. This is not only in reference to pleas; it could happen in the middle of a trial, also.

The Chair reiterated that for a guilty plea, a specific requirement exists that an inquiry be made. Mr. Patterson noted that the problem is what is put on the record. Why does the record have to be oral and not written? Some people who do not need to know should be kept from hearing the information. The Chair stated that this had never been the issue. The Subcommittee was in agreement that some parts of the record should be shielded from public access but not off the record. The Chair added that the only instance he knew in which a judge could hold a private conversation in chambers and then announce in the courtroom what happened is a child custody matter. The judge can talk to the child in chambers and then announce the result. This is to protect children, and it is a civil case. He did not know of any other situation which permits this.

Judge Norton inquired if Rule 16-501 should reference this situation as an exception. The Chair responded that there is

case law on this point. It could be cross-referenced. Judge Norton observed that the Rule seemed to conflict with that. The Chair pointed out that it would not be testimony taken in court.

The Chair said that the last sentence of section (a) of Rule 16-501 had been deleted, the Committee note had been deleted, and the word "testimony" had been added to the first sentence. He asked if anyone else had a proposal to change section (a). Mr. Bowie remarked that if the language "in the courtroom" is eliminated from the first sentence of section (a), it would mean that material constitutional issues would be forced to be recorded. Discussions in chambers have to be revealed. The word "courtroom" in some ways is not necessary. The Chair noted that if the language "held in a courtroom" is taken out, it appears that chambers conferences would be precluded altogether.

Judge Pierson asked if every interaction with a judge is a proceeding. Rule 1-202 defines the word "proceeding." He was not sure that a settlement conference is necessarily a "proceeding." Mr. Karceski suggested that the Rule state that chambers conferences are not included. The Chair commented that the Subcommittee did not like that approach; the question is how to limit it to avoid an escape hatch. Mr. Karceski predicted that this provision would cause problems.

The Reporter said that the last sentence had been deleted, so the language is that of the original Rule. The language "in the courtroom" remains in the Rule. The Chair pointed out that Rule 16-501 as the Committee had changed it was basically the

current Rule, which was appropriate, except that it is being violated, or at least the principle of transparency and everything being on the record is being violated with no guidance, each judge doing what he or she wants to do. In most cases, no one complains about it, but in those cases where there is a complaint, there is no record.

The Chair drew the Committee's attention to section (b), which is the current District Court rule. There may be some style changes. Section (c) is also the current District Court rule. Section (d) is the same except for the additional language at the end which reads: "in accordance with the standards specified in an administrative order of the Chief Judge of the Court of Appeals." Section (e) is taken from the current Rule.

The Chair said that section (f) is the same except for the language at the end that begins "on motion of a party...". The Subcommittee's view was that if part of the record is to be redacted from public access, there should be a motion to redact, which should explain why it is able to be redacted. Mr. Karceski asked if the motion was able to be redacted. The Chair responded that the judge can state that the trial is getting into confidential matters and is lawfully able to be shielded. Judge Pierson noted that the Rules pertaining to access provide that a record can be shielded not only on motion of a party, but on motion of someone else who has a potential interest. By restricting this provision to "on motion of a party," it means that no one else other than a party can request the shielding.

Subsection (a)(1) of Rule 16-1009, Court Order Denying or Permitting Inspection of Case Record, reads as follows: "A party to an action in which a case record is filed, including a person who has been permitted to intervene, and a person who is the subject of or is specifically identified in a case record may file a motion...". Judge Pierson said that he was not suggesting that this language be replicated, but a non-party may have an interest in having particular proceedings sealed. The Chair pointed out that Rule 16-1009 (a)(1) pertains to case records, which is a defined term.

Judge Pierson remarked that his point was to illustrate that there could be a witness or someone else who had an interest in requesting that case records be sealed. Rule 16-501 (f) would not allow that person to ask for the records to be sealed, because it provides that a request for shielding would be on motion of a party. Ms. Potter asked if a rape victim in a criminal case is able to move to shield the case records. The victim is not a party. Judge Norton observed that a case could involve a separated or divorced couple, and one of them may have filed the other one's tax returns. The Chair responded that this would be part of the case record.

Judge Norton said that the Rule would require the motion for shielding to be made by a party. The case may not be the divorce case itself, but it would be another part of the proceeding, such as a domestic violence action. He expressed his agreement with Judge Pierson. Judge Pierson added that a case could involve a

business entity where a subpoena was filed to access records involving a trade secret. Mr. Carbine noted that the material could be confidential, in writing, and there could be testimony that is just as confidential that comes out of those documents.

The Chair inquired if the language "of a party" should be eliminated from section (f). By consensus, the Committee agreed to do so.

The Chair said that section (g) contains the two alternatives he had referred to earlier. Should the public be able to get and keep the actual copy of the disk recording of the proceedings, or should the Rule require that on request, a copy be made and the person would have the right to listen to it and make any notes that he or she wants but not have the disk? Ms. Potter questioned whether under Alternative A, the disk goes to the attorney for a party. She had been in a case involving an automobile accident where the defendant got four traffic tickets. There was a trial in the District Court on the traffic charges where the witnesses testified. If this type of case then goes to the circuit court on the injuries, and the attorney requests a copy of the traffic court case transcript, the attorney could then listen to the disk. Under Alternative A of section (g), the attorney would not be able to get the copy of the disk; he or she would only be able to go to the courthouse and listen to the tape, because the attorney did not represent the party in the underlying traffic case.

The Chair noted that currently an attorney can get the disks. Ms. Potter agreed, but she pointed out that she would not be able to under Alternative A. The Chair observed that the disk is not the official record. It probably could not be admitted as evidence. Ms. Potter responded that she was not referring to admitting the disk into evidence. Under the current procedure, she can pay for the copy and get it. Under Alternative B, she would have to take time out to listen to the disk, because she was not the attorney for the party in the underlying traffic case. This would be very burdensome.

The Chair remarked that the news media tends to agree with Ms. Potter. They would like to have the disks, so that they can listen to the disk at their convenience. The problem that led to the two alternatives was not whether the media can have the disks rather than listen to them; their view, which is probably correct, is that if they do obtain the disks, they can rebroadcast them or do anything that they want with them. Ms. Potter inquired how this is handled currently. Have any recordings ever been rebroadcast? The Chair answered affirmatively.

Mr. Karceski asked what the problem was with rebroadcasting. The Chair answered that it is the privacy issue. Mr. Karceski noted that the portions of the recording that have been redacted are not accessible. The Chair said that the only portions of the disk that are redacted are those that legally can be redacted. There is testimony in any divorce or malpractice actions. The

entire proceeding will not be broadcast to use out of context, but what the media had done was to rebroadcast the thirty seconds or so of someone expressing emotions or some allegation in testimony but not broadcast the cross examination that destroyed it. This is the danger of rebroadcasting, and this is why the Subcommittee presented both views.

Mr. Klein noted that this could be an end run on the prohibition against cameras in the courtroom. Currently, the only camera in the courtroom that he knew of was the broadcasting of Court of Appeals arguments on the web. Otherwise, if the court reporter is speedy, the proceedings from any day in court may be watched on the evening news. The Chair clarified that the video is not available. Mr. Klein responded that the audio still could be heard on the news. Mr. Carbine pointed out that subsection (h)(1)(I) is the catchall allowing any other person authorized by the District Administrative Judge to get a copy of the disk. Mr. Carbine remarked that he gets transcripts. It is necessary to do a certain amount of paperwork to get the disk. To that paperwork, he would add a motion to the Administrative Judge requesting a transcript of a certain case to prepare for another case and stating that the transcript would not be used for any other purpose. The judge allows the person to get the disk.

The Chair pointed out that the difference between Alternatives A and B is that under Alternative A, everyone is entitled to a copy, except that certain people listed in

subsection (h)(1) are entitled to an unredacted copy. Mr. Carbine said that he was referring to Alternative B, which is a change from the current procedure. The person who wants the disk fills out a form and pays the cost; the disk then comes in the mail. If this is to be changed, and the disk is not accessible to an attorney who is not counsel of record in the case, then the Rule could provide for a motion to be filed by that attorney to obtain the disk. The Chair noted that this procedure could be changed by MDEC. One reason that the disks may not be available is because they are not the official record. A transcript is available. If under MDEC, the disk is going to be the official record (although this has not been resolved yet), then the problem of availability would be addressed. Ms. Potter commented that section (a) of Rule 16-501 had been discussed at great length, because of the need for transparency with everything on the record and a guarantee of First Amendment rights. Now the discussion of Alternatives A and B seems to be backing away from this.

The Chair disagreed, pointing out that anyone can listen to the disk but just cannot have it. Ms. Potter argued that if the goal is transparency, then anyone should be able to have it. The Chair answered that right now, the reason that everyone cannot have the disk is because it is not the official record. Ms. Potter asked if the Rule could provide that the disk is available, but it cannot be rebroadcast. The Chair reiterated that the media takes the position that if they obtain it, under

the First Amendment, they can use it, citing the *Pentagon Papers* case.

Mr. Carbine remarked that when electronic filing had been discussed, it had been noted that someone must go to court to get to the information. There is a built-in physical disincentive. What has been difficult to resolve is that if everything is accessible online, teenagers may be getting charged information out of their teachers' divorce proceeding and broadcasting it over their i-phones to everyone at school. Ways to make this information less easy to access had been discussed. Judge Weatherly commented that the media will certainly be highly motivated to go to the Court of Appeals and argue for accessibility of the disks. Mr. Carbine noted that in five years, one will not have to go to court to get this information, it will all be online.

The Chair told the Committee that this presents the conflict between privacy and transparency. In criminal cases, victims or children may be testifying, and the question is if this should be broadcast all over the world. The disk can be immediately sent anywhere. Mr. Sykes remarked that if someone cannot get a copy of the disk, the person would have the right to look at it and take notes. Would this not increase the possibility of harm because of distortion and other issues? It may be preferable to give the entire disk to the media or to whoever wants it in the interest of promoting accuracy. He could not see what would be

saved by seeing the disk and making one's own subjective interpretation by making notes.

Judge Norton expressed the opinion that this may be ultimately more of a circuit court problem than a District Court problem in terms of the type of cases that the media will be interested in. He inquired if the Committee should take a vote as to which alternative they prefer but send both options up to the Court of Appeals. The Chair acknowledged that this could be done, but he suggested that this may not be predominately a circuit court problem. There are many domestic violence cases in District Court the disks of which are accessible to the public.

The Chair asked if the Committee wanted to choose Alternative A or Alternative B, or send both to the Court of Appeals, and in either case, if there were any suggested changes to A or B. Judge Norton moved that both alternatives be sent. Mr. Karceski expressed his agreement with Ms. Potter as to the possibility that the Rule as drafted precludes an attorney who is not a party from requesting the audio recording. Judge Norton responded that under Alternative B, the audio recording can be requested, but the attorney would not be automatically entitled to it.

Mr. Karceski asked whether the attorney would get the disk under Alternative A. Judge Norton said that the attorney would automatically get it under Alternative A; however, under Alternative B, the attorney can request it, but does not automatically get it. The Chair pointed out that someone could

listen to the recording. Judge Norton remarked that Ms. Potter did not want to be able to listen to it, she wanted to be able to obtain the disk, and this would require a request.

Mr. Karceski suggested that attorneys be allowed to get the disks, which are important for a number of reasons. In many criminal cases, one co-defendant is tried before the other co-defendant, and it is very useful to have the disk of the earlier proceeding. For the attorney to not be able to get it or only be able to go listen to it is an unnecessary change. He recollected that Baltimore City Circuit Court has an audio-video recording system. The Chair pointed out that the video part is not available. Mr. Karceski added that this would not apply to someone who is a party. The Chair added that any of the persons listed in subsection (g)(1) of Alternative A or subsection (h)(1) of Alternative B of Rule 16-501 could get the audio portion of the recording. Mr. Karceski was not sure if Baltimore City Circuit Court has audio-video courtrooms. Do they separate the audio from the video? The Chair replied that the proposed Rule provides that if the audio can be separated from the video, one can listen to or have the audio portion, not the video part. If total transparency is the goal, then the video part should be available, also.

The Chair said that a motion was on the floor to send both alternatives to the Court of Appeals. He called for a vote on the motion, and it passed by a majority. Mr. Sykes suggested that the Court should be apprised of the sentiment of the

Committee. The Chair responded that a straw vote could be taken to see the Committee's view. Mr. Klein commented that it is probably not a good idea to hand out video recordings, because it circumvents cameras in the court. The Chair clarified that it would only be audio recordings available. Mr. Klein asked whether under Alternative A or B, there would be any circumstances where someone could get the video if he or she is not a party to the action. The Chair replied affirmatively, noting that the persons listed in subsection (g)(3) of Alternative A and subsection (h)(1) of Alternative B could also get the video. Mr. Klein inquired whether the media could get a video recording under Alternatives (A) or (B). The Chair replied affirmatively. He asked who was in favor of Alternative A, and eight members raised their hands. He asked who was in favor of Alternative B, and five members raised their hands. The Chair said that this vote would be presented to the Court. By consensus, the Committee approved section (g) of Rule 16-501 as amended with both Alternatives A and B.

By consensus, the Committee approved Rule 16-501 as amended.

The Chair presented Rule 16-502, In Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 500 – RECORDING OF PROCEEDINGS

Rule 16-502. IN CIRCUIT COURT

(a) Proceedings to be Recorded

(1) Proceedings in the Presence of Judge

In a circuit court, all trials, hearings, and other proceedings before a judge in a courtroom shall be recorded verbatim in their entirety, except that, unless otherwise ordered by the court, a court reporter need not report or separately record an audio or audio-video recording offered as evidence at a hearing or trial. Conferences in chambers that involve only routine administrative matters or settlement discussions in civil actions need not be recorded.

Committee note: To the extent that chambers do not have recording equipment, the purpose of this section is to require that no proceedings that must be recorded are to be conducted in chambers.

An audio or audio-video recording offered at a hearing or trial must be marked for identification and made part of the record, so that it is available for future transcription. See Rules 2-516 (b)(1)(A) and 4-322 (c)(1)(A).

(2) Proceedings Before Master, Examiner, or Auditor

Proceedings before a master, examiner, or auditor shall be recorded verbatim in their entirety, except that:

(A) the recording of proceedings before a master may be waived in accordance with Rules 2-541 (d)(3) or 9-208 (c)(3);

(B) the recording of proceedings before an examiner may be waived in accordance with Rule 2-542 (d)(4); and

(C) the recording of proceedings before an auditor may be waived in accordance with Rule 2-543 (d)(3).

(b) Method of Recording

> Proceedings may be recorded by any reliable method or a combination of those methods approved by the County Administrative Judge. If proceedings are recorded by a combination of methods, the County Administrative Judge shall determine which method shall be used to prepare a transcript.
>
> Source: This Rule is derived in part from former Rule 16-404.

Rule 16-502 was accompanied by the following Reporter's note.

> Rule 16-502 is derived from former Rule 16-404.
>
> Subsection (a)(1) is derived from former Rule 16-404 e. The Subcommittee added language to clarify that chambers conferences involving only routine administrative matter or civil settlement actions need not be recorded. A Committee note was added to indicate that, unless the chambers has recording capability, no proceedings that must be recorded are to be conducted in chambers and that a recording offered at a hearing or trial shall be marked for identification and made part of the record.
>
> Subsection (a)(2) is new and was added to draw attention to the fact that rules allowing for the recordings before a master, examiner, or auditor may be waived.
>
> Section (b) is derived from former Rule 16-404 (e), but it has been changed to eliminate the specific methods of recording and updated to provide that if proceedings are recorded by a combination of methods, the County Administrative Judge shall determine the method used to prepare the transcript.

The Chair said that Rule 16-502 had one change from Rule 16-404, the current Rule. It would now be parallel to Rule 16-501. Subsection (a)(1) requires that everything be recorded. The

current provision that the parties can agree as to what will not be recorded can be eliminated. He assumed that subsection (a)(1) would be conformed to the parallel provision in the District Court. The last sentence of subsection (a)(1) and the first sentence of the Committee note would be deleted. The word "testimony" would be added in after the word "hearings" and before the word "and." Subsection (a)(2) addresses masters, examiners, and auditors. Current rules provide that everything gets recorded except what is waived.

Mr. Klein commented that at the circuit court level, parties will sometimes bring in an outside court reporter to do realtime reporting. This reporter often gets designated ultimately as the official reporter. If this scenario takes place, the court reporters will often be audio-taping the proceedings, so that they can check it to make sure that they did not miss a word when they type it up later. Independent of what may be recorded in the courtroom, the court reporter has made a recording. Mr. Klein said that he was not sure that the Rule addresses what the reporter can choose to do with that recording.

The Chair agreed that Rule 16-502 does not address this, but he noted that current Rule 16-110 (proposed Rule 16-208), Cell Phones; Other Electronic Devices; Cameras, addresses it, because it applies to all electronic devices that are capable of recording. That Rule requires that the judge permit the recording. Mr. Klein remarked that the court is clearly permitting the recording to be made. The question is once the

reporter has the recording, if the media asks him or her to sell it, is the reporter free to sell the tape to the media? Should something be added to Rule 16-502 that provides that any such recording is also subject to Alternative A or Alternative B of Rule 16-501?

Ms. Dawson pointed out that Rule 16-1006, Required Denial of Inspection – Certain Categories of Case Records, provides that the custodian of records shall deny inspection of "[b]ackup audio recordings made by any means, computer disks, and notes of a court reporter that are in the possession of the court reporter and have not been filed with the clerk." Mr. Klein said that he wanted to make sure that no loophole existed. Implicit in the technology that the court reporter needs to do his or her job is implicit in whatever order the court issues giving the reporter permission to do the court reporting. The reporters are probably not thinking about cell phones in this context. The Chair noted that Rule 16-110 includes any device capable of broadcasting or recording. Mr. Carbine asked if Rule 16-502 will conform to the changes made to Rule 16-501. The Chair replied affirmatively.

By consensus, the Committee approved Rule 16-502 as it will be amended.

After lunch, the Chair presented Rule 16-503, Electronic Recording of Circuit Court Proceedings, for the Committee's consideration.

Rule 16-503. ELECTRONIC RECORDING OF CIRCUIT COURT PROCEEDINGS

(a) Control of and Direct Access to Electronic Recordings

(1) Under Control of Court

Electronic recordings made pursuant to Rule 16-502 and this Rule are under the control of the court.

(2) Restricted Access or Possession

No person other than a duly authorized official or employee of the circuit court shall have direct access to or possession of an official electronic recording.

(b) Filing of Recordings

Subject to section (a) of this Rule, audio and audio-video recordings shall be maintained by the court in accordance with standards specified in an administrative order of the Chief Judge of the Court of Appeals.

(c) Court Reporters

Regulations and standards adopted by the Chief Judge of the Court of Appeals under Rule 16-504 (a) apply with respect to court reporters employed in or designated by a circuit court.

(d) Presence of Court Reporters Not Necessary

If circuit court proceedings are recorded by audio or audio-video recording, which is otherwise effectively monitored, a

court reporter need not be present in the courtroom.

(e) Identification Label

Whenever proceedings are recorded by electronic audio or audio-video means, the clerk or other designee of the court shall affix to each electronic audio or audio-video recording a label containing the following information:

(1) the name of the court;

(2) the docket reference of each proceeding included on the recording;

(3) the date on which each proceeding was recorded; and

(4) any other identifying letters, marks, or numbers necessary to identify each proceeding recorded.

(f) Information Required to be Kept

(1) Duty to Keep

The clerk or other designee of the court shall keep the following items:

(A) a proceeding log identifying (i) each proceeding recorded on an audio or audio-video recording, (ii) the time the proceeding commenced, (iii) the time of each recess, and (iv) the time the proceeding concluded;

(B) an exhibit list;

(C) a testimonial log listing (i) the recording references for the beginning and end of each witness's testimony and (ii) each portion of the audio or audio-video recording that has been safeguarded pursuant to section (g) of this Rule.

Query: Should there be a cross reference to Rule 16-1009 (b)(2)?

(2) Location of Exhibit List and Logs

The exhibit list shall be kept in the court file. The proceeding and testimonial logs shall be kept with the audio or audio-video recording.

(g) Safeguarding Confidential Portions of Proceeding

If a portion of a proceeding involves placing on the record matters that, on motion of a party, the court finds should and lawfully may be shielded from public access and inspection, the court shall direct that appropriate safeguards be placed on that portion of the recording. For audio and audio-video recordings, the clerk or other designee shall create a log listing the recording references for the beginning and end of the safeguarded portions of the recording.

ALTERNATIVE A

(h) Right to Copy of Audio Recording

(1) Generally

Except for proceedings that were closed pursuant to law or as otherwise provided in this Rule or ordered by the court, the authorized custodian of an audio recording shall make a copy of the audio recording or, if practicable, the audio portion of an audio-video recording available to any person upon written request and, unless waived by the court, upon payment of the reasonable costs of making the copy.

(2) Redacted Portions of Recording

Unless otherwise ordered by the County Administrative Judge, the custodian of the recording shall assure that all portions of the recording that the court has directed be safeguarded pursuant to section (g) of this Rule have been redacted before making a copy of a recording for a person under subsection (h)(1) of this Rule. If necessary

to accomplish that task, the copying may be delayed for a reasonable period.

(3) Exceptions

Upon written request and subject to the conditions in this section, the custodian shall make available to the following persons a copy of the audio recording or audio-video recording of proceedings that were closed pursuant to law or from which safeguarded portions have not been redacted:

(A) The Chief Judge of the Court of Appeals;

(B) The County Administrative Judge;

(C) The Circuit Administrative Judge having supervisory authority over the court;

(D) The presiding judge in the case;

(E) The Commission on Judicial Disabilities or, at its direction, Investigative Counsel;

(F) Bar Counsel;

(G) Unless otherwise ordered by the court, a party to the proceeding or the attorney for a party;

(H) A stenographer or transcription service designated by the court for the purpose of preparing an official transcript of the proceeding, provided that (i) the transcript, when filed with the court, shall be placed under seal or otherwise shielded by order of court, and (ii) no transcript of a proceeding closed pursuant to law or containing unredacted safeguarded portions shall be prepared for or delivered to any person not entitled to a copy of the recording itself under this section;

(I) If the recording is an audio-video recording, the Court of Appeals or the Court of Special Appeals pursuant to Rule 8-415 (c); and

(J) Any other person authorized by the County Administrative Judge.

ALTERNATIVE B

(h) Right to Listen to or View Copy of Recording

(1) Generally

Except for proceedings that were closed pursuant to law or as otherwise provided in this Rule or ordered by the Court, the authorized custodian of an audio or audio-video recording, upon written request from any person, shall make a copy of the recording and permit the person to listen to the copy if it is an audio recording or to listen to and view the copy if it is an audio-video recording at a time and place designated by the court.

Committee note: It is intended that the custodian need make only one copy of the electronic recording and have that copy available for any person who makes a request to listen to or to listen to and view it. If space is limited and there are multiple requests, the custodian may require several persons to listen to or to listen to and view the recording at the same time or accommodate the requests in the order they were received.

(2) Redacted Portions of Recording

Unless otherwise ordered by the County Administrative Judge, the custodian of the recording shall assure that all portions of the recording that the court directed to be safeguarded pursuant to section (g) of this Rule have been redacted before making a copy of a recording available for listening or listening and viewing. If necessary to accomplish this purpose, the copy may be delayed for a reasonable period.

(3) Restrictions on Additional Copies

A person listening to or listening to and viewing a copy of an electronic recording may not make a copy of that copy or have in

his or her possession any device that, by itself or in combination with any other device, is capable of making a copy. The custodian or other designated court official or employee shall take reasonable steps to enforce this prohibition, and any willful violation of it may be punished as a contempt.

(i) Right to Copy of Recording

(1) Who May Obtain Copy

Upon written request and subject to the conditions in this section, the custodian shall make available to the following persons a copy of the audio or audio-video recording, including a recording of proceedings that were closed pursuant to law or from which safeguarded portions have not been redacted:

(A) The Chief Judge of the Court of Appeals;

(B) The County Administrative Judge;

(C) The Circuit Administrative Judge having supervisory authority over the court;

(D) The presiding judge in the case;

(E) The Commission on Judicial Disabilities or, at its direction, Investigative Counsel;

(F) Bar Counsel;

(G) Unless otherwise ordered by the court, a party to the proceeding or the attorney for a party;

(H) A stenographer or transcription service designated by the court for the purpose of preparing an official transcript of the proceeding, provided that, (i) if the recording is of a proceeding that was closed pursuant to law or from which safeguarded portions have not been redacted, the transcript, when filed with the court, shall be placed under seal or otherwise shielded by order of the court, and (ii) no transcript of

a proceeding closed pursuant to law or containing unredacted safeguarded portions shall be prepared for or delivered to any person not entitled to a copy of the recording itself under this section.

(I) Any other person authorized by the County Administrative Judge.

(2) Restrictions on Use

Unless authorized by an order of court, a person who receives a copy of an electronic recording under this section shall not:

(A) make or cause to be made any additional copy of the recording; or

(B) except for a non-sequestered witness or an agent, employee, or consultant of the party or attorney, give or electronically transmit the recording to any person not entitled to it under subsection (i)(1) of this Rule.

(3) Violation of Restriction on Use

A willful violation of subsection (i)(2) of this Rule may be punished by contempt.

Cross reference: See Rule 16-504 (a) [16-404 b - current Rule reference] concerning regulations and standards applicable to court reporting in all courts of the State.

Source: This Rule is derived form former Rules 16-404, 16-405, and 16-406.

Rule 16-503 was accompanied by the following Reporter's note.

Rule 16-503 is derived from former Rules 16-404, 16-405, and 16-406. Subsection (a)(1) is derived from former Rule 16-406 a. Subsection (a)(2) is derived from former Rule 16-406 b.

Section (b) is new and was added to clarify that recordings shall be maintained by the court in accordance with standards specified in an administrative order of the Chief Judge of the Court of Appeals.

Section (c) is derived from former Rule 16-404 b.

Section (d) is derived from former Rule 16-405 e.

Section (e) is derived from former Rule 16-405 b.

Section (f) is derived from former Rule 16-405 c.

Section (g) is derived from former Rule 16-405 d. The second sentence is new and was added to provide a means for locating the safeguarded portions of the recording. As with 16-501, the Subcommittee has presented the Rules Committee with two alternatives. Alternative A permits someone to have a copy of the recording. Alternative B permits only listening to or viewing a copy.

Alternative A

Subsection (h)(1) is derived from former Rule 16-406 c.

Subsection (h)(2) is new and was added to reinforce that the redacting of confidential portions of the recording takes place before a copy is given to someone.

Subsection (h)(3) is derived from former Rule 16-406 d. The Subcommittee has added some people to the list of those who have a right to a copy of the recording, including the Chief Judge of the Court of appeals, the County Administrative Judge, the Circuit Administrative Judge having supervisory authority over the court, the presiding judge, and Bar Counsel. As with Rule 16-501, the Subcommittee added some conditions for a stenographer or transcription service designated by the court or prepare an official transcript if the recording is of a

proceeding closed pursuant to law or from which safeguarded portions have not been redacted, including that the transcript be sealed or shielded and that the transcript may not be prepared for or delivered to any person not entitled to a copy of the recording.'

Alternative B

Subsection (h)(1) is derived from former Rule 16-406 c, except that the right to obtain a copy of a recording has been changed to the right to listen or view a copy. A Committee note has been added to provide a procedure for the custodian to make copies of recordings available to the public.

Subsection (h)(2) is new and was added to reinforce that the redacting of confidential portions of the recording takes place before a copy is given to anyone for listening or listening and viewing.

Subsection (h)(3) is new and provides that someone listening to or viewing a recording may not have a device with him or her that is capable or copying the recording.

Subsection (i)(1) is derived from former Rule 16-406 d. The Subcommittee has added some people to the list of those who have a right to a copy of the recording, including the Chief Judge of the court of Appeals, the County Administrative Judge, the Circuit Administrative Judge having supervisory authority over the court, the presiding judge in the case, and Bar Counsel. The Subcommittee has added some conditions for a stenographer or transcription service designated by the court to prepare an official transcript if the recording is of a proceeding closed pursuant to law or from which safeguarded portions have not been redacted, including that the transcript may not be prepare for or delivered to any person not entitled to a copy of the recording.

Subsection (i)(2) is new and was added to provide limitations on the use of a

recording when someone views or listens to it.

Subsection (i)(3) is new and provides a penalty for misuse of a recording.

The Chair told the Committee that Rule 16-503 is basically the counterpart to Rule 16-501. Sections (a) through (g) are basically the current Rules, Rules 16-404, 16-405, and 16-406. In section (g), the language "of a party" will be deleted to conform to the change to Rule 16-501. The same two alternatives that were in Rule 16-501 are also in Rule 16-503. One is that the person who so requests can have a copy of the audio recording; the other is that the person can listen to the audio recording in the courthouse. Both alternatives would be sent to the Court of Appeals. Mr. Michael asked whether the choices of the Committee would be communicated to the Court. The Chair inquired if anyone on the Committee felt that the circuit court Rule should be different from the District Court Rule. No one expressed that view.

The Chair noted a problem that had been discussed in the Subcommittee. There will be a more difficult implementation in the circuit court than in the District Court in terms of tagging testimony. Who will be responsible for the tagging? It could be anyone who the judge tells to do so, including the court reporter (if there is one). The court clerk could also take care of it.

There being no comment on Rule 16-503, by consensus, the Committee approved Rule 16-503 as presented.

The Chair presented Rule 16-504, Administration of Circuit Court Recording Process, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 500 – RECORDING OF PROCEEDINGS

Rule 16-504. ADMINISTRATION OF CIRCUIT COURT RECORDING PROCESS

(a) Regulations and Standards

The Chief Judge of the Court of Appeals, by administrative order, shall prescribe regulations and standards regarding the court recording process and the person responsible for recording proceedings in the courts of the State. The regulations and standards may include:

(1) the selection, qualifications, and responsibilities of persons recording court proceedings;

(2) preparation, typing, and format of transcripts;

(3) charges for transcripts and copies;

(4) preservation and maintenance of reporting notes and records, however recorded;

(5) equipment and supplies utilized in reporting; and

(6) procedures for filing and maintaining administrative records and reports.

Cross reference: Rules 16-501, 16-502, and 16-503.

(b) Number of Court Reporters or Persons Responsible for Recording Court Proceedings – Supervision

Each circuit court shall have the number of court reporters and persons responsible for recording court proceedings recommended by the County Administrative Judge. In a county with more than one court reporter, the County Administrative Judge shall designate one as supervisory court reporter, who shall serve at the pleasure of the County Administrative Judge. The Chief Judge of the Court of Appeals shall prescribe the duties of the supervisory court reporter.

(c) Supervision of Court Reporters

Subject to the general supervision of the Chief Judge of the Court of Appeals, the County Administrative Judge shall have the supervisory responsibility for the court reporters or the persons responsible for recording court proceedings in that county. The County Administrative Judge may delegate supervisory responsibility to the supervisory court reporter or a person responsible for recording court proceedings, including the assignment of court reporters or other persons responsible for recording court proceedings.

Cross reference: Rule 16-1006 (g) [current Rule reference] provides that backup audio recordings made by any means, computer disks, and notes of a court reporter that have not been filed with the clerk or are not part of the official court record are not ordinarily subject to public inspection.

Source: This Rule is derived from former Rule 16-404.

Rule 16-504 was accompanied by the following Reporter's note.

Rule 16-504 is derived from former Rule 16-404. Section (a) is derived from former Rule 16-404 b. Section (b) is derived from former Rule 16-404 c. Section (c) is derived from former Rule 16-404 d. The Subcommittee has added a cross reference to current Rule 16-1006 (g).

The Chair said that Rule 16-504 was taken from current Rule 16-404 with style changes. In section (b), the language "and approved by the Chief Judge of the Court of Appeals" was deleted. It ought to state: "determined by the County Administrative Judge" instead of "recommended by the County Administrative Judge." The Chair remarked that he assumed local funding would be needed to fund these positions. By consensus, the Committee approved the change suggested by the Chair.

By consensus, the Committee approved Rule 16-504 as amended.

The Chair suggested that Chapter 600, Extended Coverage of Court Proceedings, can be held until next month. Not much in Chapter 600 has been changed. Section (b) of Rule 16-604, Request to Allow Extended Coverage, is new. It is explained in the Reporter's note. It is necessary to explain why extended coverage is being requested. There is a policy issue for the Committee to decide. It is set out in the drafter's note after subsection (a)(2) of Rule 16-601, Definitions. The issue is who can do the extended coverage. The drafter's note indicates that when extended coverage first came in, everyone understood that the "news media" included the newspapers, radio stations, and television stations. Now, the term is not meaningful. Bloggers and social networks have complicated this.

The Chair did not believe that the intent of the Court of Appeals or of the Rules Committee was to let anyone do extended coverage by simply saying that the person is part of the news media. The recommendation of the Subcommittee is to limit

subsection (a)(1) to newspapers of general circulation or to a television or radio station. The language "operating under a license from the Federal Communications Commission" has been added. He was not sure whether this would be approved. The intent was to put some kind of limitation on this.

The Vice Chair inquired if this would include cable television. The Chair answered that this is one of the issues to be determined. The Vice Chair remarked that CNN is a better news source than some of the television stations. Mr. Klein noted that there are "radio stations" on the web that call themselves "radio stations." The Chair commented that the Subcommittee also tried to limit subsection (b)(2), which addresses preparation of an educational film or recording. What does this mean? Anyone can aver that he or she is part of the educational community. The Subcommittee limited this to a film or recording relating to the Maryland legal or judicial system and intended for instructional use in an educational program offered by a public or accredited educational institution.

The Vice Chair referred to the issue of who the media is. When he had worked with the General Assembly, bills were considered that tried to amend the media's privilege statute. They tried to address the bloggers, and it was rejected. It may be helpful to look at that definition. The Reporter noted that this was considered when Rule 16-110, pertaining to cell phones, was discussed. It is difficult to allow the persons, who another department, such as the Executive Department, was letting in, to

become the media covering various topics. Who had been credentialed could not have been plugged into Rule 16-601. The Chair said that this topic should be deferred, since no one representing the media was present. The Reporter pointed out that anyone who had an interest in these Rules had been notified. Rule 16-504 was deferred.

Agenda Item 2. Consideration of proposed amendments to Rule 5-803 (Hearsay Exceptions: Unavailability of Declarant Not Required)

The Chair presented Rule 5-803, Hearsay Exceptions: Unavailability of Declarant Not Required for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-803 to add a new subsection (b)(8)(D) regarding the admissibility of reports made pursuant to a certain statute regarding abuse of a child or vulnerable adult and to make stylistic changes, as follows:

Rule 5-803. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(b) Other Exceptions

(1) Present Sense Impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment

Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) Recorded Recollection

See Rule 5-802.1 (e) for recorded recollection.

(6) Records of Regularly Conducted Business Activity

A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or

condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Cross reference: Rule 5-902 (b).

Committee note: Public records specifically excluded from the public records exceptions in subsection (b)(8) of this Rule may not be admitted pursuant to this exception.

(7) Absence of Entry in Records Kept in Accordance with Subsection (b)(6)

Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) Public Records and Reports

(A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) Facts or opinions contained in a report made pursuant to Code, Family Law Article, §4-505 (e) may be admitted at a final protective order hearing conducted pursuant to Code, Family Law Article, §4-506 if (i) that evidence would otherwise be admissible under applicable **[rules of evidence] [evidence law]**, or (ii) the parties, after having a fair opportunity to review the report, consent to the admission. Committee note: If necessary, continuances should be liberally granted in order to provide the parties a fair opportunity to review the report and to prepare for the hearing.

~~(D)~~ (E) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

Committee note: This section does not mandate following the interpretation of the term "factual findings" set forth in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). See *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581 (1985).

(9) Records of Vital Statistics

Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Cross reference: See Code, Health General Article, §4-223 (inadmissibility of certain information when paternity is contested) and §5-311 (admissibility of medical examiner's reports).

(10) Absence of Public Record or Entry

Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) Records of Religious Organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) Statements in Ancient Documents

Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) Market Reports and Published Compilations

Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably relied upon by the public or by persons in particular occupations.

(18) Learned Treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History

Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries or General History

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) Reputation as to Character

Reputation of a person's character among associates or in the community.

(22) [Vacant].- There is no subsection 22.

(23) Judgment as to Personal, Family, or General History, or Boundaries

Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the

matter would be provable by evidence of reputation under subsections (19) or (20).

(24) Other Exceptions

Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee note: The residual exception provided by Rule 5-803 (b)(24) does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.

It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804 (b). The residual exception is not meant to

authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under this subsection, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Source: This Rule is derived as follows:
Section (a) is derived from F.R.Ev. 801 (d)(2).
Section (b) is derived from F.R.Ev. 803.

Rule 5-803 was accompanied by the following Reporter's note.

Code, Family Law Article, §4-505 (e) requires the court and the local department to take certain actions if, during a temporary protective order hearing, the court finds reasonable grounds to believe that a child or a vulnerable adult has been abused. Specifically, the court must forward to the local department a copy of the petition and temporary protective order and the local department must investigate the alleged abuse and send to the court a copy of the report of its investigation by the date of the final protective order hearing. The statute is silent regarding the admissibility of the report and its contents.

The Civil Law and Procedure Committee of the Maryland Judicial Conference has been studying the admissibility of these reports in trial courts across the State. The Committee conducted a survey of trial judges at the 2011 Maryland Judicial Conference. The survey disclosed that the reports are admitted under widely different standards of admissibility. For example, at least one court admits the reports based on the assumption that the statutory authority calling for referral to the local department necessarily implies that the report should be admitted, while in other courts admissibility may depend upon whether the parties object or

whether the author of the report is present for cross-examination.

A group consisting of the Family/ Domestic Subcommittee, a member of the Evidence Subcommittee, and consultants reviewed the results of the survey and a research memorandum prepared by the Executive Director of Legal Affairs and Special Assistant to the Director of Legal Affairs. The memorandum analyzes the evidentiary rules and case law and concludes that the rules of evidence should apply to the reports and a party should therefore be able to object to their admission on this basis. By way of example, a party may wish to object because the report contains hearsay or multiple levels of hearsay, or contains an expert opinion without a proper foundation. A court should also consider, when appropriate, a party's objection based upon the trustworthiness of the report.

The group agreed with this analysis and decided to recommend a Rule to the Rules Committee that makes clear that the reports do not enjoy any special or relaxed evidentiary standards, but should be treated just like any other evidence presented at a hearing. The amendment to Rule 5-803 (b)(8)(D) provides that otherwise inadmissible facts and opinions in the report are admissible only with the consent of the parties after having an opportunity to review the report. The group decided in favor of requiring the parties to provide affirmative, informed consent, rather than authorizing the court to automatically admit the report unless there is an objection, because the majority of the parties in protective order cases are self-represented and may not know that there is a right to withhold consent or may be confused about the process of objecting. The group discussed the concept of informed consent and its meaning in the context of the proposed amendment, but decided that it would not be appropriate to include in the Rule a definition or a mandatory litany regarding consent.

> The group also recommends adding a Committee note explaining that continuances should be liberally granted. This is because the parties often see the report for the first time at the hearing and may need time to refute any factual inaccuracies and to otherwise prepare for the hearing in light of the report.

The Chair told the Committee that there is a statute, Code, Family Law Article, §4-505 (e), which provides that in any domestic violence case at the temporary ex parte stage, if there is an indication of the abuse of a child, the court must refer the matter to the Department of Social Services (DSS), which has to prepare a report that is sent to the court. The question is what happens then. The judges are not consistent as to whether they will even let the parties see the report or say anything about it or as to what happens to it. They are not consistent as to whether it is admissible.

The Chair said that the Family/Domestic Subcommittee and a member of the Evidence Subcommittee proposed the language in subsection (b)(8)(D) of Rule 5-803. This provides that the facts or opinions contained in the report can be admitted at the final protective order hearing if the evidence is otherwise admissible, or the parties consent to the admission. The Committee note is important, because these reports are often filed a day or two before the hearing, and no one has seen them, so continuances should be liberally allowed to provide the parties an opportunity to review the report and prepare for the hearing. The Rule

provides that there is no hearsay objection to this; it is under the public records exception.

Mr. Sykes asked the meaning of the language "otherwise admissible." The Chair responded that it could be that the "expert" is not really one. Someone could challenge the qualifications of the expert. Mr. Sykes questioned whether this means that it is not excludable on other grounds. The Chair replied affirmatively. Mr. Sykes suggested that the Rule could state this. If it is hearsay, on that basis, it should not be admitted. Subsection (b)(8)(D) of Rule 5-803 gets around the hearsay. Mr. Carbine said that the Rules have a formula, which is "unless otherwise admissible," and this is standard drafting. He did not see a problem with the proposed language. The Chair commented that everything under the hearsay exceptions does not get admitted. It has to be relevant and reliable. The Chair noted that the bracketed language provides the choice between the applicable rules of evidence or the common law evidence rules. Mr. Carbine suggested that subsection (b)(8)(D) could end with the word "admissible."

Judge Weatherly said that her understanding from the last Subcommittee meeting was that the new provision still anticipates that the social worker for the DSS Child Protective Service would have to be in court to present the report unless the parties, having had a fair opportunity to review it, consent to its admission. This will be very difficult. In domestic violence proceedings by statute, an initial order is signed based upon

complete hearsay with no notice to the other side where only one person is in front of the judge. In a case that involves allegations of abuse to a child (which can be physical or sexual), once the court issues a temporary protective order, it goes to the DSS. In Prince George's County, this could never be done in seven days, because of being so understaffed. Many times they only get four or five days' notice depending upon whether there was a weekend included, and they need additional time. In some of these cases, an order was passed that had removed a child from the custody of a parent or prohibited a parent who had visitation rights from seeing the child. The domestic violence statute requires the next hearing in seven days. The Chair remarked that this assumes the respondent has been served.

Judge Weatherly commented that because all of this procedure happens so fast, the hearing is set for seven days later. Frequently, both sides show up in court, but there is a last-minute request from the DSS to give them more time to do the report. Often, the request is granted. Then another hearing is set for seven days later. Frequently, the day before the hearing or the morning of the hearing, the report is faxed over and is available to the court. It comes from the Prince George's County family support services. One aspect that is different is that Judge Weatherly always gives the report to the parties whether or not they are represented.

The Chair pointed out that some of Judge Weatherly's colleagues will not permit the parties to see the report. Judge

Weatherly said that within courts, there have been differences, and certainly, there have been differences from county to county and circuit to circuit. She remarked that this is only part of what Child Protective Services does -- they are involved with CINA cases, foster care, and other reports of abuse. If someone reports child abuse, because he or she is worried about the neighbor's child, the person who reports the abuse does not do a report when DSS is finished. In the situation referred to in the Rule, the court gets a report back. Judge Weatherly expressed her concern about the ability of Child Protective Services to staff these hearings and have the authors of the Report available. They will have to be in for every hearing heard on a particular day, or there will be a reversion to liberal continuances. A child may have been removed from a parent for several weeks with no contact. The parent could be told that the case can go forward that day, but if it does, the report is not available to the parent.

The Chair inquired what happens if the court wants to postpone or continue the final hearing for seven days, and the respondent objects. Does the court postpone the hearing anyway? Does the temporary order stay in effect? Judge Weatherly answered affirmatively. The order has a termination date on it. When that date arrives, the court would have to reissue the order. It can be reissued for nonservice or for a continuance. The judge could decide to continue the matter on the merits but change something in the arrangement that was recommended by Child

Protective Services. The judge can modify the order even though the case is not being dismissed.

Judge Weatherly said that the vast majority of the cases involve unrepresented litigants on both sides. Sometimes, there is one attorney, and in very few cases there are two attorneys. The Subcommittee had discussed that there should be a litany for the court to give if a party has to consent. The party would be told that he or she has the right to object, and the court would read the report only if the party consented. Who would withhold consent? It might happen if the report finds that the parent abused the child, or if a report tells the petitioner that there is no basis for his or her petition. It is likely if the person has figured out that the author of the report will not be in court. It is a great cost for the DSS to ask social workers to take their time out to appear in court.

Judge Weatherly observed that she had never seen a social worker from DSS come into court on a domestic violence case. The Chair pointed out that the statute is relatively new. Judge Weatherly responded that attorneys have always been able to subpoena. The District Court in Prince George's County has 10 times as many cases as the circuit court. She and her colleagues have been very concerned with the financial impact on the Office of the Public Defender. Public defenders may be required to be available night and day for purposes of representing people in their bond review cases. Rule 5-803 will have a huge financial

impact on the DSS. They are mandated to take many actions within certain time frames.

The Chair inquired what Judge Weatherly would suggest. She answered that the reports should be admitted, and the court should be able to read them. The parties should get a copy, and if the respondent wants to subpoena a social worker to come in, the respondent would have to understand that the temporary order would stay in effect. There may be an additional delay to get the social worker in. The Chair said that in terms of the appearance of the social worker, it is essentially an authentication issue. Judge Weatherly noted that she knew from the custody cases she had heard the kinds of questions that arise. If someone gets a negative report against his or her client, the attorney can ask questions. The attorney would want to make the point that this report is not necessarily exhaustive. The social workers are very crucial people in this process. Every physician is not required to come into court to testify, because if that were the case, physicians would be hesitant to treat people. She and her colleagues were concerned with public defenders having to be up 24 hours a day to do this.

Judge Weatherly noted that the DSS Department of Child Protective Services had had no idea that this Rule was being proposed. When they found out about it, the local people in her county were very concerned about having to bring an author in. About 10% of these cases are self-filed, but in Prince George's County, there are 16,000 domestic violence cases a year. The

Chair asked how many of them involve children. Judge Weatherly answered that an estimate would be about 10% of those cases, which is not a small number. The domestic violence statute requires that the report be done quickly. Invasive orders are being issued based upon sneak attacks with no opportunity to cross examine. Only about one-third of domestic violence petitions result in a final protective order.

The Chair inquired if Judge Weatherly was in favor of the proposed new language. Judge Weatherly responded that part (i) would require an opportunity to be present. Initially, the Subcommittee had looked at some additional language that provided that the report is admissible, but, upon objection, the parties could bring in the author or another witness to refute it. Other language was discussed, which indicated that the facts and opinions were admissible over objection only to the extent that the author was available to come in. The Chair said that the intent was that this only addresses the hearsay problem, but it may be inadmissible if there is some other objection. It may be because a party would like the author to come in to court, or it may be for some other reason. Judge Weatherly remarked that one of the reasons this issue had been discussed was that it was unclear whether these reports were going to be admitted. If the reports are going to be required, the Rule should provide for what happens to them.

The Chair noted that the proposed Juvenile Rules have similar kinds of provisions pertaining to these reports in

juvenile and custody cases as well as in presentence investigations. The statutes and the Rules are inconsistent as to who can see these reports and when the reports have to be presented. All of this is going to be considered. Judge Weatherly added that the judges need guidance on this. The Chair said that the statute requires that the reports are to be done but are to be considered by the court. Judge Weatherly said that someone will come into court and state that they had spoken with a family member, but that person is not present. Is this hearsay? The Chair responded that the Court of Appeals has a case before it now on this issue.

Ms. Potter inquired if the Conference of Circuit Court Judges had considered this. The Chair answered that they had not seen this proposal. Judge Pierson pointed out that the Civil Law Committee of the Judicial Conference had seen the proposal. The Chair said that he was going to meet with them the following week. Judge Weatherly added that the Civil Law Committee had looked at the cases pertaining to custody evaluations involving home studies.

The Chair suggested that Rule 5-803 could be deferred until the June meeting. It should not be held too long, because with the circuit judges in disagreement over this issue, and more than 30,000 domestic violence cases coming up every year, it needs to be resolved. The Subcommittee may need to discuss it further. The Reporter noted that the Rules Committee did not know what the Civil Law Committee had done.

Judge Pierson commented that he had an issue concerning the language of Rule 5-803. What is a "fact?" Evidence rules usually refer to "statements of fact" and not "facts." If someone said something, is that a "fact" for purposes of this Rule? Mr. Carbine remarked that an exception to the hearsay rule should refer to "statements." Judge Pierson expressed the opinion that the Rule is unnecessary. It is all covered by the public records exception in subsection (b)(8) of Rule 5-803. The Chair said that Judge Pierson could be correct if all of his colleagues could agree as to what it means. The problem, which came from the circuit court judges, is that they do not agree. The Chair pointed out that the statute requires the reports by the DSS and requires that the court consider them. Some judges are treating them as inadmissible as evidence. One judge had told the Chair that the judge reads the reports, and puts them into the record. He will allow the parties to look at the report, and then the judge takes the report back.

Judge Weatherly commented that she had spoken with judges who will not read the reports unless a representative of the DSS is in the courtroom. In some counties, the representatives often come into court. The Chair noted that one judge apparently will not read the reports unless the parties agree. Judge Weatherly expressed the view that judges should not be motivated by reading the newspaper headlines, but every so often, she does not read the report, because the parties did not agree to it, and she will deny the relief, because the case was not proved by clear and

convincing evidence. The child will then be returned and may end up being harmed.

The Chair said that Rule 5-803 would be held until June, so that the issue can be raised with the Conference of Circuit Judges, although he was not expecting to find a consensus. Judge Weatherly added that she would contact the DSS regarding this, and she would ask them what the costs might be.

Agenda Item 3. Consideration of a proposed amendment to Rule 2-214 (Intervention)

The Chair presented Rule 2-214, Intervention, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 200 - PARTIES

AMEND Rule 2-214 to authorize the filing of a response that is not a pleading with a motion to intervene, as follows:

Rule 2-214. INTERVENTION

(a) Of Right

Upon timely motion, a person shall be permitted to intervene in an action: (1) when the person has an unconditional right to intervene as a matter of law; or (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability

to protect that interest unless it is adequately represented by existing parties.

(b) Permissive

(1) Generally

Upon timely motion a person may be permitted to intervene in an action when the person's claim or defense has a question of law or fact in common with the action.

(2) Governmental Interest

Upon timely motion the federal government, the State, a political subdivision of the State, or any officer or agency of any of them may be permitted to intervene in an action when the validity of a constitutional provision, charter provision, statute, ordinance, regulation, executive order, requirement, or agreement affecting the moving party is drawn in question in the action, or when a party to an action relies for ground of claim or defense on such constitutional provision, charter provision, statute, ordinance, regulation, executive order, requirement, or agreement.

(3) Considerations

In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure

A person desiring to intervene shall file and serve a motion to intervene. The motion shall state the grounds therefor and shall be accompanied by a copy of the proposed pleading <u>or motion</u> setting forth the claim or defense for which intervention is sought. An order granting intervention shall designate the intervenor as a plaintiff or a defendant. Thereupon, the intervenor shall promptly file the pleading <u>or motion</u> and serve it upon all parties.

Source: This Rule is derived as follows:
Section (a) is derived from the 1966 version of Fed. R. Civ. P. 24 (a).
Section (b)
Subsection (b)(1) is derived from former Rule 208 b 1.
Subsection (b)(2) is derived from former Rule 208 b 2.
Subsection (b)(3) is derived from the last sentence of the 1966 version of Fed. R. Civ. P. 24 (b).
Section (c) is derived from the 1966 version of Fed. R. Civ. P. 24 (c) and former Rule 208 c.

Rule 2-214 was accompanied by the following Reporter's note.

Rule 2-214 currently directs a person to file a proposed *pleading* with a motion to intervene.

Rule 1-202 (u) defines pleading as a complaint, counterclaim, cross-claim, third-party complaint, answer, answer to a counterclaim, answer to a cross-claim, answer to a third party complaint, a reply to an answer, or a charging document as used in Title 4.

An amendment is proposed because a person may wish to intervene for the purpose of filing a response that is not a pleading. For example, an intervenor may wish to file a motion to dismiss based on lack of standing.

Mr. Sullivan told the Committee that he wanted to suggest a change to Rule 2-214 (c). The Chair noted that the words "or motion" had been proposed for addition to section (c). Mr. Sullivan responded that this change makes sense, since the definition of the term "pleading" does not include a motion. Mr. Carbine noted that it should also include a response to a motion. Sometime in the next few years, the Committee should

take a look at the definitions. An intervenor may not be intervening on a complaint, but only on a motion that someone else has filed, and the person wants to respond to that motion. Mr. Sullivan remarked that it should cover responses, also. The Chair cautioned that if the word “response” is added, but not the word “reply,” it may cause a problem. Judge Pierson pointed out one has to file a motion before a reply can be filed.

Mr. Carbine moved to add the words “or response” to section (c) after the word “motion” and before the word “and.” The motion was seconded, and it carried by a majority vote.

By consensus, the Committee approved Rule 2-214 as amended.

The Chair said that discussion of the Court Administration Rules would be continued at the June meeting. The Attorneys Subcommittee is about 2/3 of the way through the revision of the Attorneys’ Rules. These should be ready by September to go to the full Committee.

There being no further business before the Committee, the Chair adjourned the meeting.