COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland, on October 2, 2009.

Members present:

Hon. Alan M. Wilner, Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Hon. Ellen L. Hollander
Hon. Michele D. Hotten
Harry S. Johnson, Esq.
hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Hon. John L. Norton, III
Scott G. Patterson, Esq.
Hon. W. Michele Pierson
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Jason Hessler, Esq., M.S.B.A. Board of Governors
Joseph I. Cassily, Esq., State's Attorney Office
Brian L. Zavin, Esq., Office of the Public Defender
Carlos Acosta, Esq., Deputy State's Attorney for Prince George's County
Scott D. Shellenberger, Esq., Office of the State's Attorney for Baltimore County
Angelita Plemmer, Office of Communications and Public Affairs
Hon. Alexandra N. Williams
Michael P. Vach
Benton Grimm
Robert Taylor, Esq., Office of the Attorney General
John McCarthy, Esq., State's Attorney Office
Hon. Diane O. Leasure, Circuit Court for Howard County
Richard Montgomery, Director, Legislative Relations, M.S.B.A.
Mary Ann Burkhart, Esq., Office of the State's Attorney for Baltimore City
Sharon R. Holback, Esq., Office of the State's Attorney for Baltimore City

The Chair convened the meeting. He announced that the 162nd Report had been heard by the Court of Appeals at an open hearing on September 9, 2009. With two exceptions, the Rules in the Report were adopted by the Court without any substantive change. The Report contained two major sets of Rules, those pertaining to the death penalty and those pertaining to DNA testing of evidence.

The two rules that were not adopted were proposed Rule 2-507.1, which would have provided that whenever two attorneys in a single case request a postponement of the case, the court would have to grant it, and a rule that codified a concurring opinion by the Honorable Glenn T. Harrell addressing inconsistent verdicts in criminal cases.

The only change that the Court made was in one of the Rules pertaining to DNA testing, which required that the petition by the prisoner-defendant had to state the factual basis of the assertion that the testing process the defendant wants is generally accepted in the scientific community (the Frye-Reed test). The Court struck the words "factual basis." Other than that, the entire Report was adopted.

Agenda Item 1. Consideration of a Cell Phone and Electronic Device Policy

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The Chair presented Rule 18-XXX, Cell Phones and Other Electronic Devices, for the Committee's consideration.

CELL PHONE AND ELECTRONIC DEVICE POLICY
PROPOSAL FOR CONSIDERATION

ADD new Rule 18-XXX, as follows:

Rule 18-XXX CELL PHONES AND OTHER ELECTRONIC DEVICES

(a) Definition

In this Rule:

(1) Electronic Device

"Electronic device" includes a cell phone, computer, and any other device that is capable of transmitting or receiving messages or information by electronic means or that, in appearance, purports to be a cell phone, computer, or such other device.

(2) Local Administrative Judge

"Local administrative judge" means the county administrative judge in a circuit court and the district administrative judge in the District Court.

(3) Court facility

"Court facility" means the building in which a circuit court or the District Court is located.

(b) In general

Except as otherwise provided in sections (d) and (e) of this Rule, a person may not bring any electronic device into any court facility occupied by a circuit court or the District Court.

(c) Notice

Notice of this prohibition shall be:

(1) posted prominently outside each entrance to the court facility and each

security checkpoint within the court facility;

(2) included prominently on all summons and notices of court proceedings;

(3) included on the main judiciary website and the website of each court; and

(4) disseminated to the public by any other means approved in an administrative order of the Chief Judge of the Court of Appeals.

(d) Confiscation of devices

The local administrative judge may adopt a written policy under which, as an alternative to prohibiting an electronic device from being brought into the court facility, the electronic device may be confiscated and retained by security personnel or other court personnel until the owner leaves the court facility, provided that no liability shall accrue to the security personnel or any other court official or employee for any loss or misplacement of or damage to the device.

(e) Exemptions

Subject to the provisions of section (f) of this Rule, section (b) of this Rule does not apply to electronic devices that are the property of:

(1) the court;

(2) judges and other officials or employees of the court who present appropriate identification approved by the local administrative judge;

(3) officials and employees of any State or local government agency that occupies space within the court facility who present appropriate identification approved by the local administrative judge;

(4) attorneys who present appropriate identification approved by the Court of

Appeals;

(5) jurors who present appropriate identification approved by the local administrative judge;

(6) law enforcement officers who present appropriate identification approved by the local administrative judge; and

(7) other persons who present appropriate identification and written permission from a judge of the court.

Cross reference: See Rule 18-501

(f) Presence of Devices in Jury Deliberation Room and Courtroom

(1) An electronic device may not be brought into any jury deliberation room.

(2) Except as permitted by the local administrative judge or the presiding judge in a case, an electronic device may not be brought into any courtroom. The local administrative judge, by general administrative order, may permit persons included within a category set forth in section (e)(2), (4), (5), (6) or (7) of this Rule to bring an electronic device into a courtroom.

(3) If an electronic device is permitted in a courtroom, the device (A) must remain off and may not be used to receive or transmit information, unless otherwise permitted by the presiding judge; and (B) is subject to any other reasonable limitation imposed by the presiding judge. A willful violation of paragraph (2) of this section or this paragraph, including any reasonable limitation imposed by the presiding judge, may be punished by contempt.

(4) An electronic device that is used in violation of this section may be confiscated and retained by security personnel or other court personnel subject to further order of the court or until the owner leaves the building. No liability shall accrue to the

security personnel or any other court official or employee for any loss or misplacement of or damage to the device.

(g) Rule 18-501

To the extent of any conflict between this Rule and Rule 18-501, Rule 18-501 shall prevail.

Source: This Rule is new.

The Chair told the Committee that this item was for discussion purposes only today. The principle issue is whether there should be a uniform policy on bringing cell phones and other electronic devices into the courthouses or parts of the courthouses. The General Court Administration Subcommittee was divided on that issue, but the majority was inclined to make no change in the current policy leaving the decision to the various circuit and district administrative judges. Everyone agreed that the issue should be presented to the full Committee for discussion.

The Conference of Circuit Judges had formally recommended that there be no uniform policy with respect to cell phone usage in the courthouse. The Chair had asked Judge Bell whether in light of this, he wanted the Rules Committee to nonetheless consider the issue, and his response was “yes.” This is not to say that the Court will necessarily adopt any particular policy or that the Committee should. It is an issue that should be discussed.

The Chair said that the draft Rule in front of the Committee

is to focus discussion. It is not intended that the Rule will be voted on but to give an indication as to how a uniform rule might look and what it might contain. Various reference materials have been distributed, some with the agenda and some as handouts. An important one is the October 30, 2008 memorandum from the Honorable Ben C. Clyburn, Chief Judge of the District Court of Maryland attached to which is a list of the policies in the various courts of the District Court. (See Appendix 1). The Chair commented that he did not think that the policies have changed since that time. A memorandum written by the Chair's law clerk was handed out today with respect to what the circuit courts are doing. (See Appendix 2). This was based on telephone calls that the clerk had made to either administrative judges or court administrators in each of the 24 circuit courts. There is a memorandum from the Maryland State Bar Association with an excerpt from their Bar Bulletin from March, 2009 setting out their perspective on cell phones in the courthouse. (See Appendix 3). Also before the Committee is the U.S. District Court policy, and there is a September, 2008 memorandum with a synopsis of what other states' policies are. (See Appendix 4).

The Chair remarked that he wanted to begin by presenting this issue from the point of view of the Subcommittee. What is being addressed are cell phones, laptop computers, blackberries, and any other device capable of transmitting or receiving messages or information by electronic means. Also being addressed is anything that has the appearance of one of these

items. There are devices that look exactly like cell phones but are guns and not cell phones. The broad considerations are that these devices, particularly cell phones, are now as common as women's purses and men's wallets. Most people have them on their person. The Chair's law clerk had cited a statistic that 90% of people in the United States have cell phones. This year, 2009, it is expected that 167 million cell phones will be manufactured and distributed. This is how prevalent they are. They are not only useful, but with the disappearance of pay phones, they are almost necessary.

The other side of this is that the cell phones can create some very serious security issues when they are brought into a courthouse. They can be used as weapons, either directly or to detonate explosive devices that are placed elsewhere. They can be used as cameras, and the statistics indicate that about 90% of all cell phones have a camera attached to them that can take still photos and also have video recording capability. They can be used to take photos of jurors, undercover informants, witnesses, court personnel, etc. They can record and transmit testimony to sequestered witnesses or to identify witnesses. They can obviously disrupt court proceedings if they ring in the courtroom.

The Chair noted that the security personnel have commented on what items come into the courthouse. It is amazing what people try to bring into the courthouse. The Chair said that the question is if there is a proper balance between the need for

people to have cell phones, and the security issues that they present. The current situation in Maryland which can be seen from the list of District Court policies and the handout addressing the circuit court policies is that no uniformity exists. There may be a little more uniformity than appears. However, there may not be uniformity even within the same county in some cases. It appears that in the District Court, 13 courts allow cell phones, and 15 do not, except that five allow employees to bring the phones in. Eleven courts allow police and attorneys to bring them in. Four of the courts purport to allow cell phones but not camera phones, but the reality is that nearly all cell phones currently are camera phones. On the Eastern Shore of Maryland, cell phones are banned but not laptops.

The Chair said that the updated report written by the Chair's law clerk shows that the circuit courts are the same way -- no consistency in their policies. Many that purport to allow cell phones generally do not allow them if the phones have cameras which in effect means that they are not allowed. The same disparity seems to exist nationwide. Among the courts that allow the cell phones in the building, all prohibit their use in the courtroom, and some do not allow them to be brought into the courtroom, even though they are allowed to be brought into the building, at least not without permission from a judge. There is no indication as to how this is policed and who would be watching over this, especially with text messaging going on.

The Chair explained that there are several options: (1) do

nothing and let each court continue to decide for itself what will be allowed (no uniform policy), (2) have a uniform policy allowing cell phones in the courthouse, (3) have a uniform policy allowing them but banning their use in courtrooms or with some restrictions, (4) have a uniform policy banning them, and if they are brought in, they would be taken away until the owner leaves, (5) have a uniform policy banning the phones from the courthouse with exceptions for various categories of people, coupled with allowing them in, but not in courtrooms for those who are allowed to bring them in at all. This last one seems to be what most courts prefer, although they differ on where the lines are drawn. The proposal before the Committee for discussion is essentially the fifth option; however, the exceptions make the ban a partial one. The policy of allowing certain people to bring them in, but not others, requires that some lines have to be drawn.

The Chair said that one issue to consider is who comes into the courthouses. There are court officials and employees, employees of government agencies who share space in the courthouse (for example, the Office of the State's Attorney), and there may be others as well. Some District courts share space with other State and local government agencies that are not connected to the courts. Those employees may be bringing cell phones into the courthouses. Another group consists of attorneys who come into the courthouses. In the circuit courts, there are jurors in the courthouses. Then there is anybody else who comes in. This may include law enforcement personnel, such as police

officers, as well as litigants, witnesses, and anyone who has some business with the court, including those filing papers or just visiting.

The Chair pointed out that the other issue is whether a case can be made for allowing persons in the first four categories, such as employees, officials, etc. to bring devices into the courthouse as long as they have some proper identification. To some extent, most of the courts are in accord with this. Some courts whose policy is to limit people from bringing them in do not allow anyone who has to go through security to bring the phones into the courthouse. This would exclude employees and anyone that the sheriff is able to recognize.

If there is a balance, it tends to be in the favor of the persons in the first four categories and law enforcement personnel. The courthouse is their workplace, and they may need these devices to deal with personal situations, especially if there are no pay phones in the courthouse. The employees are not supposed to be using court phones for personal business. It is not likely that these people will be security threats. In many courthouses, they do not have to go through the metal detectors. One could argue that the people in the first four categories should be able to bring cell phones in. The problem is the visitors. Is the balance the same as to them as it is for attorneys and employees? They do not have the same kind of identification issue by the court that the other people have, such as law enforcement personnel. The courthouse is not the

workplace of these visitors, and they have not been pre-cleared by anyone. They are not easily identifiable.

The Chair stated that this is the basic issue. If there is not to be a total ban, where is the line to be drawn, and if a line is to be drawn, should each court be allowed to draw a different line? This is the first major issue before the Committee. In the proposal, particularly in sections (b) and (e), there is one possible policy, not necessarily the best. The second policy consideration is that if these devices are banned, whether there should be public notice of this, so people do not arrive at the courthouse only to find that they cannot bring in their cell phones. Most people would agree that a ban on these items would require notice. Section (c) of the proposal provides one possibility as to how to give notice.

The third policy consideration is whether, even if there is a uniform policy, there should be some local option in terms of how to enforce that policy. For example, one could take the position that if the phones are going to be banned for any particular group, which is most likely to be the visitors, the phones are not allowed to be brought into the building at all. This is one possibility. Another is that the phones can be brought in, but the security staff will take them away and keep them until the owner leaves. With good reasons most sheriffs do not like this option. It would be better not to make the cell phone owners run back to the car, hide the phones in the bushes, or bury them in the ground (which some people are actually

doing). Even with a uniform policy as to whether someone can have a cell phone in the courthouse, there are some possibilities as to how to enforce this. The fourth consideration if that if the cell phones are allowed in the courthouse, what the policy should be with respect to the phones in courtrooms and jury deliberation rooms. Section (f) tries to address this.

Mr. Klein commented that he had read the materials with great interest, and he thought that the spreadsheet was surprising in terms of how the policies are all over the map. His view was this issue demands a uniform policy. He said that he thought that the draft Rule was good. He neither understood nor liked the policy of allowing certain categories of people to be able to bring the phones into the courthouse, but section (f) provides that the phones cannot be brought into the courtroom unless it is by local rule. As an attorney, it does not make sense that he can bring a cell phone through the front door but not through the door where he has to do his job. He added that he would favor a rule where for all of the categories of people listed in the Rule or some subset of them who are allowed to get the phone through the front door, including attorneys, judges, the staff, and probably law enforcement personnel ought to be able to bring the phones into the courtroom. Once a phone is in the courtroom, that is the point where the judge should get the discretion as to when the phone can be turned on. If it is turned on, it may have to be on vibrate mode or something else that will not upset the decorum of the court. It makes no sense

to allow the phones in, yet no one knows what the policies are going to be.

Mr. Patterson remarked that anyone who practices in different courts would need some guidance as to what the cell phone policy is. The reality is that all of the courthouses are different. They are shaped differently, they contain different functions, they have varying levels of inclusion as far as the operation of county governments. He referred to the point that the courthouse can be a workplace for people who have absolutely nothing to do with the courts. Setting aside the District Court for the moment, because the courthouses are all different, one would have to depend on each individual administrative judge in each circuit, to come up with what is going to work for that facility depending on the configuration. If there is going to be a uniform rule, that rule might be that members of the bar would be allowed to have the phones. To facilitate the administration of justice, it is not helpful if an attorney is in court and the case is rescheduled; then when the judge asks the attorney about another date, the attorney's calendar, which is a PDA and is also a cell phone, is out in his or her car. The attorney would not be able to answer the judge until he or she went out to the car to get the information from the cell phone. The judge needs to know at the time the question is asked. There should be a standardized policy applying to attorneys who are appearing in court, so that they can bring in the phones under the conditions that there is no sound emitted, the attorney is not using a

camera function, and it is not subject to verification that it is only a PDA or a PDA telephone. It is difficult to come up with a rule that would be fair to all of the people in the State in all of the 24 jurisdictions as to who is allowed to bring the cell phones into the courthouse.

The Chair asked if Mr. Patterson's point was that attorneys should be able to bring the phones into every courthouse, and Mr. Patterson answered affirmatively, noting that there are always exceptions to the rule. Employees of the court may not need their cell phones in the courtroom. There is a difference between the courthouse and courtroom. The Chair inquired as to whether Mr. Patterson's opinion was that employees should be able to bring the phones into the courthouse. Mr. Patterson responded affirmatively. He added that he would allow attorneys to bring the phones into the courtroom assuming that they would not disrupt the proceedings. The Chair questioned as to whether jurors should be allowed to bring phones into the courthouse. Mr. Patterson responded that he had discussed this issue with Mr. Johnson earlier. The question is when is a juror a juror. In his county, when someone appears for jury duty, he or she checks in and receives a badge that reads "juror," even though technically, someone is not a juror until he or she is selected.

The Chair pointed out that the jurors are serving under compulsion. Mr. Patterson agreed, and he noted that the jurors can be identified by the badges they wear. The mother, who is a juror and who is worried about her child in day care, needs to

have a telephone, so that she can be reached. It is an enormous problem. There has to be some sort of mechanism to be able to leave the cell phones with security personnel. It is difficult to expect a potential juror who may be in the courthouse for an entire day or longer to have no communication with the outside world. The Chair commented that Mr. Patterson's view is that jurors would be allowed to bring in the cell phones subject to limitations as to what they can do in the courtroom. Mr. Patterson clarified that he did not think that jurors should be allowed to bring their cell phones into the courtroom, only into the courthouse. The Chair remarked that Mr. Patterson's point was that employees, attorneys, and jurors could bring the phones in. Mr. Patterson said that people who are in the courthouse in an official capacity dealing with the case should be able to bring in the cell phones.

The Chair asked about whether State's Attorneys should be able to bring phones in. Mr. Patterson reiterated than anyone in the courthouse in an official capacity should be able to bring them in. The Chair inquired whether the State's Attorneys' secretaries should be able to bring in their cell phones. They are employees of the State's Attorney's office, but not of the court. Mr. Patterson commented that if an attorney has a paralegal with him or her, there is no difference between the attorney and the paralegal. The Chair pointed out that a State's Attorney's secretary may not be in the courthouse for a particular case. Mr. Patterson noted that their office may nor

may not be in the courthouse. The Chair asked if the secretaries should be allowed to bring in their cell phones if they work in the courthouse. Mr. Patterson answered that they should be allowed to, because they are courthouse employees. The Chair then inquired as to whether law enforcement officers should be allowed to bring their cell phones into the courthouse. Mr. Patterson answered affirmatively depending on whether they are in the courthouse in their official capacity. If a law enforcement officer is in the courthouse for his or her divorce proceedings and not on behalf of the government, the officer should not have a cell phone. The Chair told Mr. Patterson that his view was exactly what the proposed Rule provides. Mr. Patterson expressed the opinion that the judges have to decide the policy of cell phones in the courtroom. It is difficult to have a uniform policy across the State.

Mr. Maloney commented that he questioned the authority of the Court of Appeals to adopt a policy that is this broad. The courthouse in Prince George's County is owned by the Prince George's County Building Authority, which leases certain portions of it to the District Court on a 30-year lease. Many county and State agencies are also in the courthouse, including the Department of Assessments and Taxation as well as the Department of Parole and Probation. The Circuit Court of Prince George's County happens to be one of the tenants in the courthouse. It may be beyond the authority of the Court of Appeals to pass a rule by its rule-making authority to control a building owned by

a local government that is largely occupied by a number of other non-court agencies and to immunize certain employees for certain conduct pertaining to cell phones. The Chair commented that if this is the Court's opinion, it will not adopt a rule. They have the constitutional authority to address practice and procedure in the courts. Mr. Maloney clarified that this is in the courts, but not the courthouses. He reiterated that there is a big difference. The Administrative Office of the Courts strives for uniformity. His view was that this is a case where the local culture and practice has successfully dealt with these issues on a county by county basis. The Chair responded that apparently this is not the case, because the attorneys have been saying that they can bring the cell phones into some courthouse, but not in others. Some have cases in circuit court and in District Court on the same day either in the same courthouse or two courthouses that are a block apart, and they can bring the phones into one, but not the other.

Mr. Maloney remarked that the solution to this problem is that the administrative judges should sit down together and agree to honor the yellow bar card carried by attorneys. The Chair said that if there is a constitutional impediment to the Court adopting a uniform rule, then they will obviously not do so. Assuming the Court has the authority to adopt a rule, should they do so and what should the rule provide? Mr. Maloney remarked that the local governments will not be in favor of this. The Chair responded that not all of the District Courts are in local

government buildings, but Mr. Maloney observed that some are. There is a happy medium in Prince George's County where the administrative judges and the county employees have worked out a suitable cell phone policy. The big problem is that the yellow bar card does not work in every courthouse. The Chair noted that in one county, attorneys from that county can come in using the card, but not attorneys from nearby counties.

Judge Norton told the Committee that this subject was on the agenda of the Administrative Judges Committee of the District Court many times. Many of Mr. Patterson's points had been raised. There are many different situations that the administrative judges were responding to, including both the physical plants of the different courthouses, and the number of clerical or security personnel that could store or could not store cell phones. Another issue was the type of dockets. If 120 people are coming in to the District Court in one hour for speeding tickets, the idea of collecting the phones and then giving them back within that amount of time and for that amount of people is unworkable. It could shut down the clerk's office. Another consideration is that in some counties, more people get to the courthouse by using public transportation. Most courts have evolved into their current circumstance which satisfies most people. On the Eastern Shore of Maryland where the philosophy is more draconian, shortly after the first month of cell phone prohibition, everyone got used to the policy, and few, if any, complaints were received. It is difficult to write one rule to

fit all of the various situations around the State. He agreed with Mr. Maloney that there is some disparity how the State bar code is applied. That would be a good subject for discussion, administratively and not by rule.

The Chair pointed out that Chief Judge Clyburn in his letter of October 30, 2008 came out in favor of the uniform rule. Judge Norton remarked that Judge Clyburn's view was to ban all phones. The Chair disagreed, noting that his policy allows attorneys and employees to bring in phones. Whoever does not have to go through the metal detector at the door to the courthouse can bring in his or her cell phones. Mr. Michael commented that an expert witness from out of state may have just arrived at the courthouse with a power point presentation on the witness' laptop. The Chair responded that someone can ask the judge for permission to bring such an item into the courthouse. Judge Norton remarked that every day witnesses or others bring in cell phones as evidence. This is specifically authorized in Judge Norton's county.

The Chair reiterated that the prime issue is whether there should be a uniform rule, and not what the rule should state. Mr. Patterson remarked that he has a problem with Judge Clyburn's statement that the District Court would support a bright line rule banning cell phones in all court facilities statewide. This is simplistic based on the problems of to whom this applies. Judge Clyburn's ban would apply to attorneys, and this would provide for judicial inefficiency. Mr. Johnson noted that the

Maryland State Bar Association ("MSBA") had requested that the Conference of Circuit Court Judges look at what they had proposed, and he inquired as to whether the Conference has made any comment on this issue. Judge Diane Leasure, Chair of the Conference answered that the Conference addressed this issue and virtually unanimously decided that no uniform policy was needed, because there are differences among the courthouses. One of the issues discussed by the Conference that has not come up today is the perception of fairness. Jurors have businesses that they are running. Some litigants are self-represented. The attorney can bring in his or her blackberry, but a person who is self-represented must go out to the car to get his or her blackberry. All of this was discussed by the Conference. Because there are such differences, the Conference was in agreement. The Conference is comprised of the eight circuit administrative judges and an elected representative from each of the eight circuits.

Mr. Johnson shared the same concern as Judge Norton, which is that in some jurisdictions, people have to take public transportation to get to the courthouse. It may be appropriate to leave one's cell phone in the car, but in many places, people do not have a car with them. It is important to be careful, because a rule could have a disparate impact on people who were not even thinking about this when they brought their cell phone to the courthouse. Another issue is juror satisfaction, which has been discussed frequently. It could be a problem for a juror

who cannot call the day care facility to check on the juror’s child. Mr. Johnson expressed his sympathy for attorneys who cannot bring in their laptop computers, because he has been in the situation where he was told by security personnel that he could not bring his laptop into the courthouse even though the judge had previously said that it was permitted. Judge Leasure said that in the cell phone policies she has seen, usually the administrative judge always permits somebody to bring a device into the courthouse, and she does not know of any judges who would not allow an attorney to bring a laptop in. What makes the situation difficult is the technology available. For $130, one can buy a pen that takes photographs. Guns that look like cell phones are a significant issue. The administrative judge in each of the circuit courts is in the best position to know what should occur within the confines of that particular courthouse.

The Chair stated that a legitimate fear exists on the part of many jurors and witnesses about being identified, particularly in criminal cases that are drug-related or that pertain to gang activity. This is a real problem. Virtually all of the cell phones have cameras. Ms. Smith commented that the focus should be on what one can bring into the courtroom rather than what one can bring in the front door. If attorneys are allowed to bring their phones into the courtroom, the administrative officials at each courthouse could work on making whatever arrangements are necessary at the front door. The sheriffs are concerned about the front door as it relates to the courtroom. If what is to be

protected is the courtroom and the area outside the courtroom, which are important for jurors, could that be addressed in the Rule? The other would flow depending on the jurisdiction.

Mr. Jason Hessler told the Committee that he was at the meeting on behalf of the Board of Governors of the MSBA. He had worked with Andrew Radding, Esq. and Craig Little, Esq. on developing a policy on cell phones in the courthouse. The Board of Governors voted to support this proposed Rule with the exception of subsection (f)(2) which gives authority to the local administrative judges to disallow cell phone use. The Board of Governors believes that cell phones, PDA's, and other devices are key to an attorney's practice, and it is necessary to have these devices in the courtroom. Many good points were made in today's discussion. He has received e-mails from practitioners on this issue. Some are concerned about access to justice which means that all people should be allowed to bring cell phones into the courthouse. This is not the position of the Board of Governors who are mainly concerned with attorneys being able to practice law, run their businesses, and have their cell phones in the courtroom.

Judge Alexandra Williams said that she was the Administrative Judge of the District Court in Baltimore County and her clerk and bailiff were with her at today's meeting. Three and a half years ago, Baltimore County was one of the first courts to get involved when it was discovered that using a cell phone, someone was taking a photograph of a judge, the police

officer, and the witness in a case. With the endorsement of Judge Clyburn, cell phones were banned from the Baltimore County District Court in all three of its locations with some exceptions. It is a work in progress. In the Towson courthouse, about 1,000 people come into the building each day. Anyone who comes through the metal detector is not allowed to bring in a cell phone. Security personnel have seen people enter the courthouse who have the pens that are able to take photographs. Their metal detectors can identify them as cameras. If someone has a bar card, is an employee, or is a member of law enforcement (who do not use their two-way radios as frequently as they use their phones), that person is allowed to bring his or her cell phone in, because those individuals do not enter the courthouse through the metal detector. With regard to the issue of the perception of fairness, attorneys as officers of the court are in a different posture than pro se litigants.

Judge Wilner commented that the biggest problem that Baltimore County has is how to convey information to the public who comes into the building. The perception is that one can bring in a cell phone, but there are exceptions to this. The only notice that individuals get is being told to contact one's local court to find out what its cell phone policy is. It would be helpful for the public to know what they can or cannot do, so there is no concern about the person who takes the bus to the courthouse arriving with a cell phone and then has no place to keep it. For this reason, a uniform policy would be very

beneficial, because people would not be turned away or told to go across the street and pay money to the restaurant located there to hold the person's cell phone until he or she leaves the courthouse.

Judge Hollander expressed the view that the discussion today has been worthwhile. Cell phones are currently a way of life, and the thought of preventing people from being able to keep a cell phone handy while they are in the courthouse is unrealistic. So many reasons exist as to why someone needs to be able to have access to a phone. However, the issues of security cannot be ignored. Today a proposed rule on anonymous jurors is on the agenda, and at the same time, a situation may be created where people can come into a courthouse and photograph jurors and witnesses or record testimony, which is a frightening thought. The situation is not black and white. Judge Hollander agreed that cell phones are a way of life, but that does not mean that it is a solution to how to regulate their use in the courtroom.

Mr. Maloney remarked that the only reason that he had heard to ban cell phones was that people may take photographs or make a video recording in the courtroom. The irony is that one can pay a minimal amount to the clerk and get an audio recording the dissemination of which is governed by rules. The Chair cautioned that this is available after the case is over. That person ought to know that he or she is facing a felony charge for taking the photograph or making a videotape. Judge Hollander added that some of the people who are involved in criminal cases in the

Court of Special Appeals will not be intimidated by a law prohibiting the taking of photographs in the courtroom.

The Chair said that another action that could be a problem is texting out information to sequestered witnesses about witnesses in the courtroom or to confederates about what they are wearing, what they look like, who they are, or what their testimony is. Even if there is a prohibition against not being able to have the phone in one's hand people can text even if the phone is in one's pocket. Judge Hollander remarked that she had attended an argument in the U.S. Supreme Court, and when she tried to take notes while in the public gallery, the marshal came over and told her that she was not allowed to take notes.

Mr. Klein commented that he wanted to put a little perspective on this issue. To the extent that the issues of physical security are being considered many people get on airplanes and are allowed to bring in cell phones and laptops. This is a sort of false argument. There should not be an outright ban on cell phones for the reasons of security. The Chair asked Mr. Klein if he had ever seen what sheriffs collect from people coming into the courthouse. Mr. Klein replied that his point was not that everything will pass a metal detector if not collected but that more people fly on planes every day than go through the courthouses, or the numbers are at least similar, and the travelers' cell phones, PDA's, and laptops are not taken away. The Chair noted that taking photographs of other passengers in an airplane is not a major security concern. Mr.

Klein responded that this is a different reason. He reiterated that his view is that the fire alarm/bomb angle of this is not persuasive as a reason for an outright ban on cell phones. Mr. Patterson noted that there is not as much of a criminal element of people on airplanes.

Master Mahasa inquired if it would be helpful to look at this from a different angle which is how to protect the population that is in need of protection. Would the constitutional challenges be overwhelming? Instead of being worried about the cell phones, the focus could be concern over the protection of people in the courtroom. The Chair stated that there is more uniformity in practice than what initially appears. Howard County is supposed to ban everything, but in reality, they do not. What they do may not be very different in reality than a jurisdiction that requires the public to go through a metal detector, and either they are permitted in, or they are not. If someone is not required to go through the metal detector, the cell phones can be brought in.

Judge Leasure said that in Howard County, everyone goes through the metal detector, including employees. Their notices clearly state what their policy is. They have not had any issues with cell phones nor any complaints. People get used to whatever the policy is in that jurisdiction, and there will always be exceptions. Delegate Vallario commented that in the District Court, the bailiff announces that if anyone has a cell phone, it must be turned off. If the phone rings, it will be confiscated.

This policy seems to work fairly well. One rarely hears a phone ring, but if it does, the bailiff takes it away from the owner at least during the remaining portion of the proceedings. Delegate Vallario did not support a complete ban on cell phones in the courthouse. His view was that it may be helpful to pass a law with penalties for their use. It is difficult to write a rule to cover all situations. However, the policy should be that no phones can be turned on in the courtroom. The Chair noted that this is uniform throughout the State. He did not know of any county that allows cell phones to be on in the courtroom, unless the judge gives permission.

Judge Williams told the Committee that the bailiff with whom she works has some comments to make. The Baltimore County District Court had an initial policy stating that cell phones had to be turned off in the courtroom. Mr. Grimm, the bailiff, said that he supervised the 38 bailiffs in Baltimore County. At one time, this had been the policy, but often, they would see people ducking down behind the benches in the courtroom to use their phone. The bailiffs are not able to leave the area of the courtroom where the judge is to check on people. People would walk out of the courtroom using their cell phones. He had heard that after one case, someone walked out of the courtroom, speaking on the phone and asking the person on the other end if he or she had received the testimony in the case. Apparently, the cell phone had been on and had transmitted the testimony to someone outside of the building. Mr. Grimm had personally gotten

into a physical altercation with someone who had a phone. He asked the person with the phone to leave the building, and the person was very resistant. There are many points of view on this issue. In Baltimore County, attorneys and law enforcement personnel are allowed to have phones in the courthouse. They hold the phones of attorneys' clients. The issue is not the phone itself, but how it is used or abused. Any problem with a cell phone that requires a security person to get involved diverts that person's attention from who is coming in the front door of the courthouse. The courthouse has an exit door that allows people to come in when someone leaves, and this requires the attention of security personnel. There have been shootings that occurred right near the front door. Every item that is taken from someone has to be returned to the owner. Someone has to divert his or her attention to returning the item.

Mr. Maloney noted that many courthouse still have pay phones. Mr. Grimm remarked that there should be phones for people to use in the courthouse. Judge Norton added that in his county, people are allowed to use phones at no charge. Mr. Patterson asked where cell phones that are taken away are stored and identified. Mr. Grimm replied that a log book is kept in which the owner's name, telephone number, a description of the item, the name of the security person who took the item, etc. is recorded.

The Chair stated that the first issue, and maybe the only one to determine today, is whether the Rules Committee should

proceed to attempt to develop a uniform rule on this issue, but not what the content should be, or whether the rule should be, as it currently is, each administrative judge determine his or her own policy. As the administrative judges change, the policy may change. If the answer is to leave the situation as it is, that will end the discussion. If the answer is to try to develop and perhaps codify what seems to be more common than uncommon, the Subcommittee can do this and present a proposal.

Mr. Sykes responded that the Committee should give some thought to the possibility of a more limited uniform rule. It could be uniform as to who is permitted to bring cell phones into the courthouse and into the courtroom, such as attorneys. It would not be a ban, but an affirmative statement that certain groups can bring in cell phones and other electronic devices into the courtroom. This would solve Mr. Klein's problem of being unable to come into a particular courthouse or courtroom, because that jurisdiction has a rule with which he is unfamiliar.

The Chair inquired if Mr. Sykes is advocating a rule providing for who can bring in cell phones, the implication being that the others cannot or that there is a local option. Mr. Sykes responded that there would not be an implication that the others cannot bring in the phones. The Chair asked if those people allowed to bring the phones in would be attorneys and courthouse employees, and Mr. Sykes answered affirmatively. The Chair questioned as to whether jurors would be allowed to bring the phones into the courthouse. Mr. Sykes replied that this is a

policy question. He could not answer if this should be uniform or left up to the individual administrative judges. The Chair inquired about law enforcement personnel, and Mr. Sykes responded affirmatively. The Chair summarized that Mr. Sykes' view was that certain groups can bring the phones into the courthouse, with no implication that others cannot. Mr. Sykes clarified that this would be left up to the administrative judges.

Senator Stone expressed the opinion that each jurisdiction has its own unique circumstances. Baltimore City should not be compared with counties on the lower Eastern Shore as far as cell phone policy. He moved that the policy on cell phone usage in the courthouse should be left up to the administrative judges in each county. The motion was seconded. Mr. Patterson pointed out the problem of letting the people in the State know what the policy is, so that they do not keep coming to the courthouse with a cell phone. He suggested that a way to address this is for the Court of Appeals to adopt a rule that provides that cell phones in courthouses are not permitted except for certain authorized people, and that the administrative judge can be contacted for more information. The proposed draft Rule could be given to each administrative judge for some standardized guidance. It is important to publicize the policy on cell phones to avoid the situation where someone who came to the courthouse by public transportation has no place to store the cell phone. The classes of people who are not a problem and need cell phones, such as attorneys, can be the authorized persons under the administrative

judge's edict. As far as the jurors, in some counties, a juror waits in the jury waiting area to be called. In smaller jurisdictions, there may be only one courtroom, and there is no jury assembly place except for the courtroom where they sit to wait to be selected. This emphasizes that all facilities are different, and the individual jurisdictions should be allowed to address their individual circumstances.

The Chair said that Mr. Patterson's suggestion is not the motion on the floor. The Chair called for a vote on the motion. The motion carried on a vote of eleven in favor, 5 opposed. Mr. Sykes asked if the cell phone policy should be handled by an administrative order of the Chief Judge of the Court of Appeals. It does not belong in the Maryland Rules of Procedure. The Chair responded that the Court can take any action it deems appropriate, but the Committee will not send up any recommendation. Mr. Sykes inquired if the Chair will report to the Court of Appeals the results of the Committee's deliberation. The Chair answered that he would report only if asked. He expressed the view that the Committee will have to address this issue at some point. It may involve safety issues. Senator Stone agreed, but he reiterated that his motion was that the administrative judges determine the policy.

Agenda Item 3. Consideration of proposed amendments to: Rule 4-263 (Discovery in Circuit Court), Rule 4-262 (Discovery in District Court), Rule 4-331 (Motions for New Trial), and Rule 4-342 (Sentencing - Procedure in Non-Capital Cases)

The Chair told the Committee that the next two agenda items were proposals from the Criminal Rules Subcommittee. Since the chair of that Subcommittee had not arrived yet, the Rules would be presented by Mr. Patterson, a member of the Subcommittee.

Mr. Patterson presented Rule 4-263, Discovery in Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to add a definition of "provide" and to add a sentence clarifying that requests for discovery and motions for discovery or to compel discovery are to be filed, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

(a) Applicability

This Rule governs discovery and inspection in a circuit court.

(b) Definitions

In this Rule, the following definitions apply:

(1) Defense

"Defense" means an attorney for the defendant or a defendant who is acting without an attorney.

(2) Defense Witness

"Defense witness" means a witness whom the defense intends to call at a hearing or at trial.

(3) Oral Statement

"Oral statement" of a person means the substance of a statement of any kind by that person, whether or not reflected in an existing writing or recording.

(4) Provide

"Provide" material or information means to give or send it in the most practicable way, including by mail, e-mail, facsimile transmission, or hand-delivery unless otherwise agreed to by counsel or provided by rule.

~~(4)~~ (5) State's Witness

"State's witness" means a witness whom the State's Attorney intends to call at a hearing or at trial.

Cross reference: For the definition of "State's Attorney," see Rule 4-102 (k).

~~(5)~~ (6) Written Statement

"Written statement" of a person:

(A) includes a statement in writing that is made, signed, or adopted by that person;

(B) includes the substance of a statement of any kind made by that person that is embodied or summarized in a writing or recording, whether or not signed or adopted by the person;

(C) includes a statement contained in a police or investigative report; but

(D) does not include attorney work product.

(c) Obligations of the Parties

(1) Due Diligence

The State's Attorney and defense shall exercise due diligence to identify all

of the material and information that must be disclosed under this Rule.

(2) Scope of Obligations

The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

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

(d) Disclosure by the State's Attorney

Without the necessity of a request, the State's Attorney shall provide to the defense:

(1) Statements

All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(2) Criminal Record

Prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant;

(3) State's Witnesses

The name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, together with all written statements of the person that relate to the offense charged;

(4) Prior Conduct

All evidence of other crimes, wrongs, or acts committed by the defendant that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404 (b);

(5) Exculpatory Information

All material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged;

(6) Impeachment Information

All material or information in any form, whether or not admissible, that tends to impeach a State's witness, including:

(A) evidence of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608 (b);

(B) a relationship between the State's Attorney and the witness, including the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness;

(C) prior criminal convictions, pending charges, or probationary status that may be used to impeach the witness, but the State's Attorney is not required to investigate the criminal record of the witness unless the State's Attorney knows or has reason to believe that the witness has a criminal record;

(D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another statement made by the witness or with a statement made by another witness;

(E) a medical or psychiatric condition or addiction of the witness that may impair the witness's ability to testify truthfully

or accurately, but the State's Attorney is not required to inquire into a witness's medical, psychiatric, or addiction history or status unless the State's Attorney has information that reasonably would lead to a belief that an inquiry would result in discovering a condition that may impair the witness's ability to testify truthfully or accurately;

(F) the fact that the witness has taken but did not pass a polygraph examination; and

(G) the failure of the witness to identify the defendant or a co-defendant;

Cross reference: See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. U.S.*, 405 U.S. 150 (1972); *U.S. v. Agurs*, 427 U.S. 97 (1976); *Thomas v. State*, 372 Md. 342 (2002); *Goldsmith v. State*, 337 Md. 112 (1995); and *Lyba v. State*, 321 Md. 564 (1991).

(7) Searches, Seizures, Surveillance, and Pretrial Identification

All relevant material or information regarding:

(A) specific searches and seizures, eavesdropping, and electronic surveillance including wiretaps; and

(B) pretrial identification of the defendant by a State's witness;

(8) Reports or Statements of Experts

As to each expert consulted by the State's Attorney in connection with the action:

(A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy

all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(9) Evidence for Use at Trial

The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial; and

(10) Property of the Defendant

The opportunity to inspect, copy, and photograph all items obtained from or belonging to the defendant, whether or not the State's Attorney intends to use the item at a hearing or at trial.

(e) Disclosure by Defense

Without the necessity of a request, the defense shall provide to the State's Attorney:

(1) Defense Witness

The name and, except when the witness declines permission, the address of each defense witness other than the defendant, together with all written statements of each such witness that relate to the subject matter of the testimony of that witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a State's witness is not required until after the State's witness has testified at trial.

(2) Reports or Statements of Experts

As to each defense witness the defense intends to call to testify as an expert witness:

(A) the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(3) Character Witnesses

As to each defense witness the defense intends to call to testify as to the defendant's veracity or other relevant character trait, the name and, except when the witness declines permission, the address of that witness;

(4) Alibi Witnesses

If the State's Attorney has designated the time, place, and date of the alleged offense, the name and, except when the witness declines permission, the address of each person other than the defendant whom the defense intends to call as a witness to show that the defendant was not present at the time, place, or date designated by the State's Attorney;

(5) Insanity Defense

Notice of any intention to rely on a defense of not criminally responsible by reason of insanity, and the name and, except when the witness declines permission, the address of each defense witness other than the defendant in support of that defense; and

Committee note: The address of an expert witness must be provided. See subsection (e)(2)(A) of this Rule.

(6) Documents, Computer-generated Evidence, and Other Things

The opportunity to inspect, copy, and photograph any documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the defense intends to use at a hearing or at trial.

(f) Person of the Defendant

(1) On Request

On request of the State's Attorney that includes reasonable notice of the time and place, the defendant shall appear for the purpose of:

(A) providing fingerprints, photographs, handwriting exemplars, or voice exemplars;

(B) appearing, moving, or speaking for identification in a lineup; or

(C) trying on clothing or other articles.

(2) On Motion

On motion filed by the State's Attorney, with reasonable notice to the defense, the court, for good cause shown, shall order the defendant to appear and (A) permit the taking of buccal samples, samples of other materials of the body, or specimens of blood, urine, saliva, breath, hair, nails, or material under the nails or (B) submit to a reasonable physical or mental examination.

(g) Matters Not Discoverable

(1) By any Party

Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product or (B) any other

material or information if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

(2) By the Defense

The State's Attorney is not required to disclose the identity of a confidential informant unless the State's Attorney intends to call the informant as a State's witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant.

(h) Time for Discovery

Unless the court orders otherwise:

(1) the State's Attorney shall make disclosure pursuant to section (d) of this Rule within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213, and

(2) the defense shall make disclosure pursuant to section (e) of this Rule no later than 30 days before the first scheduled trial date.

(i) Motion to Compel Discovery

(1) Time

A motion to compel discovery based on the failure to provide discovery within the time required by section (h) of this Rule shall be filed within ten days after the date the discovery was due. A motion to compel based on inadequate discovery shall be filed within ten days after the date the discovery was received.

(2) Content

A motion shall specifically describe the information or material that has not been provided.

(3) Response

A response may be filed within five days after service of the motion.

(4) Certificate

The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

(j) Continuing Duty to Disclose

Each party is under a continuing obligation to produce discoverable material and information to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

(k) Manner of Providing Discovery; Material Not to be Filed with Court

(1) By Agreement

Discovery may be accomplished in any manner mutually agreeable to the parties. The parties shall file with the court a statement of their agreement.

(2) If No Agreement

In the absence of an agreement, the party generating the discovery material shall (A) serve on the other party copies of all written discovery material, together with a list of discovery materials in other forms and a statement of the time and place when these materials may be inspected, copied, and photographed, and (B) promptly file with the court a notice that (i) reasonably identifies the information provided and (ii) states the date and manner of service. On request, the

party generating the discovery material shall make the original available for inspection and copying by the other party.

(3) Not to be Filed with the Court

Except as otherwise provided in these Rules or by order of court, discovery material shall not be filed with the court. This section does not preclude the use of discovery material at trial or as an exhibit to support or oppose a motion. Requests for discovery or motions for discovery or to compel discovery and any responses thereto shall be filed with the court.

(l) Retention

The party generating discovery material shall retain the original until the earlier of the expiration of (i) any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court.

(m) Protective Orders

(1) Generally

On motion of a party or a person from whom discovery is sought, the court, for good cause shown, may order that specified disclosures be denied or restricted in any manner that justice requires.

(2) In Camera Proceedings

On request of a party or a person from whom discovery is sought, the court may permit any showing of cause for denial or restriction of disclosures to be made in camera. A record shall be made of both in court and in camera proceedings. Upon the entry of an order granting relief in an in camera proceeding, all confidential portions of the in camera portion of the proceeding shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

(n) Sanctions

If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Source: This Rule is new and is derived in part from former Rule 741 and the 1998 version of former Rule 4-263.

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

Two amendments to Rule 4-263 (b) are proposed.

A new definition of "provide" is added to clarify that whenever discovery material and information are to be "provided," the material and information are to be given or sent via whatever method is most practicable.

In at least one county in Maryland, the clerk's office regards requests for discovery as discovery material that is not to be filed and is refusing to allow the filing of these requests. Since requests for discovery are not discovery material and are intended to be placed in the file of a criminal case, the Criminal Subcommittee recommends adding a sentence to subsection (k)(3) of Rule 4-263 to clarify that requests for discovery, motions for discovery or to compel discovery, and any responses to these are to be filed with the court.

The Rules Committee had approved a change to subsection (b)(1), the definition of "defense." The Subcommittee felt that the change to the definition did not clarify that the word "defense" also applies to corporate defendants who are not represented and did not mean what the Rules Committee intended. The Subcommittee suggests that subsection (b)(1) not be changed.

Mr. Patterson explained that it had appeared that the changes to Rule 4-263 were complete, but some issues have arisen. Subsection (b)(4) is the addition of a definition of the word "provide." In some jurisdictions, there have been some disputes as to how discovery materials are being transmitted. At the time Rule 4-263 was discussed and then proposed and adopted, the underlying premise of why the Rule was being changed was for full and complete openness and to eliminate trial by surprise as much as possible on both sides. It utilizes standards set forth by the American Bar Association. This is the simplistic concept behind the change to the Rule. Certain jurisdictions have been arguing over how discovery is to be shared. The addition of the word "provide" in the Rule is merely trying to point out that information should be shared in any fashion that it can be. Adding a definition of the word "provide" does not change the meaning of the Rule, but makes it clearer as to the intent of why the changes were there in the first place. The first issue that is before the Committee is whether to adopt the definition. This will apply in Rule 4-262, Discovery in District Court as well.

Judge Pierson asked what kind of dispute had been generated

over the issue of how discovery is to be shared. Mr. Patterson replied that at the last Subcommittee meeting, Mr. Karceski had explained to him that the issue had arisen as to whether discovery material had to be picked up or delivered. The definition may not delineate how that happened, but it shows the intent of what should be done without the arguments. This was happening in at least one jurisdiction. Judge Pierson remarked that if the definition is intended to resolve childish squabbles, it will give rise to another set of arguments over what is the most practicable way of transmitting the information.

Mr. Maloney noted that this is a problem in the District Court. In some jurisdictions, if an attorney files a discovery motion, a letter will come back automatically from the State's Attorney asking for $5.00 and telling the attorney to come to the office to pick it up. Often, the attorney comes in to pick up the material, and it is not there. Then the attorney has to file a motion to get the material. This is different than typical discovery in civil practice, where an attorney is required to actually provide the material to the other side. This is also inconsistent with what the reciprocal obligations are for the defense. When the Rules were adopted, the defense was given many discovery obligations, and the defense has to "provide" discovery. If an attorney sent a letter to the State's Attorney informing him or her that the materials requested are available, and someone can pick them up at a certain time for $5.00, it would cause problems. The definition of the word "provide" has

to be equal for both sides, and it has to apply consistently. The definition in the Rule does not answer the question of what the word "provide" means. The State's Attorneys will argue that their volume is so high, it is not necessary for them to have to give this information.

Mr. Patterson disagreed with Mr. Maloney, noting that the definition states that the word "provide" means to give or send which implies that it does not mean "come get it." Mr. Maloney pointed out that the language is "in the most practicable way." He suggested that a Committee note could be added that would clarify this. Mr. Patterson commented that "in the most practicable way" means that if it is more practicable to send it by mail than by e-mail, then it should be mailed. Telling the other side to pick it up may be the most practicable way. Some of the State's Attorneys and Public Defenders have a box in the office. They put the discovery materials in the box and go back and forth across the street to get the material. This method seems to work for them. Mr. Maloney observed that one's office may not be across the street from the other side. Mr. Patterson agreed, but he noted that under the definition in the Rule, defense counsel must be given any discovery due him or her. It does not mean that the State's Attorney has to tell defense counsel to pick the material up. Mr. Maloney noted the problem of the language "in the most practicable way." The State's Attorney may tell the defense to come pick the material up, but if defense counsel in Prince George's County has a case in

Worcester County, he or she may have to drive 5 hours round-trip for four pages of discovery.

The Chair commented that this issue first arose as a result of a phone call that he had received. His first thought was that some of the discovery material is *Brady* material (required by *Brady v. Maryland*, 373 U.S. 83 (1963)). Even if it is not, it is now required by State law to be turned over. At least with respect to documents, this requirement cannot be satisfied by simply stating that someone can come and look at the material. That is what triggered this problem. What the Rule means is that material which as a practical matter can be sent must be sent. Sometimes in District Court, it is easier to e-mail information. The parties could agree that one will stop by at the other's office to get the material. If there is not an agreement to do this, whoever has the obligation must turn the material over. Mr. Cassilly noted that the material is not necessarily only paper. There are videos, DVD's, audiovisual recordings, etc. Many State's Attorneys do not have the technical capability to copy these items, and mailing these items is very expensive. Even if the State's Attorney mails it, often the defense attorney calls back because he or she does not have the capability to play the video or recording and would like to come to the State's Attorney's office and play the video or recording there. Making available or providing audiovisual photographs may not be sufficient.

Mr. Cassilly said that his office gets hundreds of digital photographs, and he and the others in his office are not in a position to make copies of them. There are certain times where "providing" information may mean that it can be made available, but the custodian does not have the ability to copy it. It may need to be brought to court and played on a laptop computer. The State's Attorneys heard a recent presentation of the change to a paperless court system in criminal cases. Mr. Cassilly remarked that his office is hoping to buy a digital scanner since the trend is towards digital rather than paper material. It may be necessary to e-mail someone a digital attachment if there is no way to mail it. He was not clear as to why there is an issue. They did have a dispute with the Public Defender, who had filed a motion to compel. It went to the District Court where the judge decided how to effectuate giving the discovery. The courts and parties have the discretion to work out differences. If the parties cannot agree, then one of them can file a motion to compel, and the administrative judge can pass a rule. To write a rule that anticipates technological evidence is counter-productive.

Judge Hollander remarked that she thought that the word "practicable" was supposed to address these issues. Her recollection from the meeting was that there had been some gamesmanship in some jurisdictions. Some prosecutors felt that they were fulfilling their obligation by making the material available in their office when it could easily have been mailed.

Sometimes the attorneys would have to travel to get the information and preferred to have it sent to them. She did not think that the quarrel related to the problems with the non-paper materials to which Mr. Cassilly had referred. When it is not practical to send materials, it is not required.

Mr. Karceski, Chair of the Subcommittee, who had arrived at the meeting, commented that many of the issues raised by Mr. Cassilly were addressed in Rule 4-263 (d), Disclosure by the State's Attorney. Subsection (d)(9) of that Rule states: "The opportunity to inspect, copy, and photograph all documents, computer-generated evidence..., recordings, photographs, or other tangible things...". Something that will cause a problem as pointed out by Mr. Cassilly falls more under this category than under subsection (b)(4), which more often than not refers to paper documents. In some jurisdictions, photographs are provided on a disk, and it does not seem to cause any problems. It may be that these jurisdictions have the proper equipment with which to play the disks. Mr. Cassilly remarked that the police in his county are doing more and more reports on computers and not on paper. To get a report, he has to download it to transfer the electronic version to the court. The defense attorney may say that he or she does not have e-mail, and the report must be printed and sent out, but at this time, Mr. Cassilly's office has an agreement with the Public Defender that all discovery materials are e-mailed. If an attorney does not have e-mail, then Mr. Cassilly produces paper copies and sends them to that

attorney. It is not clear from the direction technology is going that filing a motion to compel would not accomplish what someone may want without having to pass rules to try to anticipate every set of circumstances.

Mr. Maloney suggested that the following language could be added to subsection (b)(4): "Inspection may be permitted in the event of or because of tangible evidence or electronic format provision of which is not practicable." Mr. McCarthy acknowledged that Mr. Maloney's comment indicated flexibility. From his standpoint as a prosecutor, the Rule does not seem to be as flexible. He thought that this problem arose in a couple of isolated jurisdictions. In a jurisdiction like Montgomery County, where there are about 25,000 cases in District Court, the letters referred to by Mr. Maloney pertaining to the discovery from the State or Montgomery County Police to the defense attorneys in the individual cases have been issued for years. The county has not received many complaints about this. There is a huge financial price tag that comes along with this, and it is not as flexible as the language suggested by Mr. Maloney. Statewide, there were 17,739 domestic violence cases, 305,000 traffic cases, and 185,000 criminal cases prosecuted in the District Court last year. Adding these cases together, the rules will apply to 507,000 cases. Mr. Scott Shellenberger, the State's Attorney for Baltimore County, who had the benefit of listening to the discussion about the Rule last year, had made some adjustments as to how to provide discovery in his office.

He had hired new employees at a cost of $25,000 - 30,000. He had sent out discovery in almost 10,000 cases, and his office had sent out 300,000 pages of material.

Mr. McCarthy said that he was not sure how Mr. Shellenberger was addressing Mr. Cassilly's issue about videotapes and cameras. Nearly all the police cars in some jurisdictions have cameras; in some jurisdictions, a few have them. In the ones with cameras, nearly all of their traffic stops potentially result in a videotape to view. Who will make those videotapes? Who will pay for them? What is that procedure going to be? There may be unintended consequences and financial ramifications that come with some of these obligations. Even when he read the proposed language in the Rule defining the word "provide," he thought that the letters issued in Montgomery County could comply with the language. He suggested that the language should mean that the State's Attorney or his or her authorized agent should provide the information, because sometimes it comes from the State police or the county police. The Rule should clearly reflect that any information coming from the police or from the State's Attorney would honor the obligation.

Mr. Maloney inquired about the situation where the State's Attorney gets a letter from the defense stating that the defense discovery is available for inspection at their law offices in LaPlata, and that the State's Attorney could come down there to take a look. The Chair said that this is an issue that was raised at the Subcommittee meetings. If the State's Attorney can

satisfy the discovery requirement by simply telling the defense attorney that if he or she wants the material, it is available for inspection at the Office of the State's Attorney, the same would hold true if it were the defense making the material available. Mr. Karceski remarked that he had prepared a motion for discovery which states what Mr. Maloney had previously described, but it was stated as "if you will not show me your discovery materials, I will not show you mine." If that were the case, then financially, the State's Attorneys' offices would be unable to function, because they would have to hire 500 extra people.

The Chair pointed out the constitutional overlay on this issue when it involves *Brady* material, and now if there is a duty to turn over material, it must be turned over. Mr. McCarthy said that he was speaking on behalf of Montgomery County and the State's Attorney's Association. He was not trying to suggest that they do not want to honor their *Brady* or their discovery obligations. There needs to be some flexibility to address some of the concerns raised earlier by Mr. Cassilly as well as some of the concerns that Mr. McCarthy himself had raised depending on who is actually physically handing the paper over to the other side. If the paper is handed to someone by the State or county police, is that provided for under this Rule? He could imagine that some judges would say that it is not provided for. Mr. Karceski had referred to subsection (d)(9) concerning inspection

of photographs and documents. He could see a circuit court judge reading proposed subsection (b)(4) of the Rule and deciding that the offer to come and look at the discovery material does not satisfy the Rule, because the party did not supply what he or she was supposed to supply. Mr. Maloney's suggested language would be important to clear up this problem.

The Chair commented that Mr. Karceski had referred to subsection (d)(9) earlier, but this is evidence to be used at trial. If it is used at trial, the person offering the evidence has to provide the opportunity to inspect, copy, and photograph. The information that precedes this seems to be more in the form of e-mails or paper. Obviously, a bag containing an illegal drug cannot be sent. Subsections (d)(9) and (d)(10) address the opportunity to inspect, but this may require the defense attorney to come to the State's Attorney's office or to the police department.

Mr. Shellenberger referred to the discussion about cell phones in which it was determined that some issues are better handled at a local level. If a procedure has been working for 30 years in a jurisdiction, such as Montgomery County or Baltimore City, it should remain, and if something is not working, an attorney can go to the judge. Why is it necessary to change the Rule and disturb the procedures in these counties? Last year, he had opposed this change in the Rule. As a result of his losing the argument, he had to hire an extra person who copies District Court discovery all day long. He asked Mr. Maloney how often

does he not get his four-page police report for $5.00. Mr. Maloney replied that it is a matter of convenience. A major part of the job of the State's Attorney is to provide discovery. It is not a burden, it is a main function of the job. Mr. Shellenberger stated that as Mr. McCarthy had said earlier, it is not the intention of the State's Attorney to refuse to send *Brady* material. This does not seem to be a circuit court problem. What is being discussed is a typical case of Driving While Under the Influence of Alcohol for a first-time offender with a four-page standard police report. The defense attorney can read this the day before the trial and know whether the report is valid. If someone can send $5.00 to the police and get the report, why is it necessary to hire someone to make so many photocopies? Mr. Shellenberger expressed the view that there needs to be some flexibility.

Mr. Maloney responded that paying the $5.00 is not the problem; it is the letter that tells the attorney to come and get the discovery. This may require an inordinate amount of time. Mr. Karceski added that it becomes a parochial issue, also. It is not a problem if the attorney is located a few blocks from the State's Attorney, but that office could be on the other side of the State from the defense attorney.

Mr. Shellenberger reiterated that there has to be flexibility. The District Court in Baltimore City is trying to complete the cases within 30 days. How could they meet this

obligation? He had been a defense attorney for 13 years and went to District Court with no discovery material at all but had figured out how to try the case. If someone's rights were going to be violated, the judge would give him a postponement. This will be a completely unfunded mandate that will burden some offices. Mr. Karceski responded that he agreed that some jurisdictions handle this issue differently. At the Subcommittee meeting, he had provided an answer to discovery from one of the jurisdictions. It is unworkable that a defense attorney has to call and make an appointment to get this basic information. This is one extreme. Mr. Shellenberger's point may be that he is the other extreme, possibly doing more than he even should be doing. Each jurisdiction should not be chartering its own course. The procedures should be uniform.

Judge Hollander commented that some of the tenor of the discussion make it sound as if this is a "sea change." Her recollection from the discussion at the Subcommittee was that this change was intended to make it clear that the person who is obligated to produce discovery cannot unilaterally decide that everyone who is interested in the discovery must come and get it. Someone whose office is in Montgomery County may be working on a case in Baltimore County and would be required to come to Baltimore County to get the discovery material. Some people may want to have the material mailed or e-mailed rather than be required to travel across the State to pick up a few pages of documents, which apparently does happen in some jurisdictions.

Mr. Sykes expressed the opinion that the word "practicable" depends on whose point of view it is. The State's Attorney may think that the most practicable alternative is for the defense to look at the discovery material, but this is not practicable for the defense. The word "practicable" is not a good term.

The Chair suggested that the word could be changed. He explained that the backdrop for this is the fact that the obligation is on the State's Attorney to turn over discovery material, not an invitation to come look at it unless it is physical evidence that cannot be sent. The State's Attorney may not even have the evidence; the police may have it. If the State's Attorney has it and can mail, e-mail, deliver, or fax it, the law requires that this be done. He could not imagine the U.S. Supreme Court holding that no *Brady* material has to be turned over, and the pro se defendant can simply look at it at the State's Attorney's office.

Mr. Patterson noted that situations will come up where a dispute arises as to whether the method of discovery is the most practicable. This is why judges are there to resolve such disputes. The instances of this will probably be minimal. Most of the situations will take care of themselves. When a dispute does come up, it will provide guidance for how to address it the next time it arises. There will be fewer and fewer issues as time passes. The word "practicable" is appropriate, because most cases will resolve themselves. When it does not, it will be

adjudicated.

Judge Norton remarked that it is impossible to comply with this Rule in District Court in traffic or criminal offenses. Many of the cases where someone is charged with driving a rental car without permission, driving while uninsured, or writing a bad check, or with any offense that has a punishment of 60 days in prison, are dropped in court. There are not many surprises when the attorneys come to court. It would be difficult for the judge if most State's Attorneys are procuring police reports in all of those cases. There are thousands of these cases every day. In a typical day, his court has 30 a morning. Discovery does occur in real criminal cases. In all of the other cases, there were no complaints despite the fact that all of the Public Defender's demand this information, so that there is a demand in virtually every single case for the discovery material. By and large, most people are not generating issues to the court about being prejudiced by the lack of demand. Occasionally, in a handful of cases, the court has to address this. For most of the material, a quick ten-minute review indicates if there is anything to the case or if it is basically the garden-variety version of the case. It is unrealistic to think that all of the offices are going to be able to comply with the cases that they are technically supposed to comply with. It is almost a physical impossibility.

Mr. Maloney noted that the problem is that the attorneys are required to provide the discovery material, and they are required

to provide it in advance, not on the day of trial. It is not an issue of copying, it is an issue of mailing, because some do not want to mail the material. Mr. Karceski remarked that in the District Court, approximately 50% of cases are handled by the Office of the Public Defender ("OPD"). According to the Rule, by agreement, the material can be provided any way the attorneys choose to do it. Usually, the offices of the State's Attorney and of the Public Defender are near each other, and they can go back and forth easily to pick up discovery material. The cases with a private attorney are the cases that are at issue. Mr. Patterson referred to Judge Norton's comment about District Court. The first item being considered today is a definition of the word "provide" in the circuit court rule. The second item is whether or not to relate back that definition of "provide" to the circuit court rule. If there is a difference, maybe the second definition should not be related back. The discussion now is the definition in the circuit court rule.

Mr. Maloney suggested that the language of subsection (b)(4) be amended to provide that discovery inspection may occur where because of the nature of the evidence, such as electronic or tangible, mailing it or otherwise providing it is impracticable. The motion was seconded. Judge Pierson expressed the concern that if the attorneys cannot agree on how discovery is to be provided, they will not agree on what is the most practicable method. A clearer way to structure the Rule is to state: "Unless otherwise ordered by the court or agreed to by the parties,

‘provide’ material...”. This is the civil rule which allows discovery material to be mailed, e-mailed, or delivered to the attorney’s office. Other language could be added to take care of the inspection issue. Mr. Maloney accepted this amendment. He agreed that the discovery could be sent by mail, e-mail, or delivery. Discovery by inspection may occur only when because of the nature of the evidence, such as tangible or electronic, it would be impractical not to do so. Judge Pierson added that this is in essence what is stated in subsections (d)(9) and (d)(10). Mr. Sykes said that subsection (b)(4) would have to be amended to read, as follows: “Unless otherwise agreed to by counsel or provided by rule, ‘provide’ material or information contained in written or electronic documents means to give or send the document by mail, e-mail, facsimile, or hand delivery whichever is most practicable...”. Mr. Klein expressed the view that the language “whichever is most practicable” is not necessary.

Judge Pierson suggested that the language could be that, unless otherwise ordered by the court or agreed to by the parties, to provide discovery one must deliver it or mail it to the post office address of the attorney. The Chair inquired about providing by e-mail or facsimile. Judge Pierson answered that these could be included. The Chair noted that what Judge Pierson was suggesting was basically what is set out in subsection (b)(4) except for eliminating the phrase “in the most practicable way.” Judge Pierson said that he did not like the use of the word “give,” because its meaning is not clear. He

suggested that the word “transmit” or the word “send” might be preferable. The Reporter explained that the word “give” is used to cover the hand-delivery aspect. Judge Pierson expressed the view that the word “transmit” is better. Mr. Maloney agreed and added that the amendment of the inspection provision is important, because it will indicate only where inspection is allowed.

The Chair asked if the amended language would read: “Unless otherwise agreed to by counsel, provided by rule, or ordered by the court, ‘provide’ means to give or to send the material by mail, e-mail, facsimile transmission, or hand-delivery.” Mr. Klein said that he thought that the word “give” is not being used. The Chair responded that the word “transmit” would be used. Judge Pierson stated that the language would be “deliver or transmit.” The Chair pointed out that there may be pro se litigants. Mr. Karceski noted that if someone does not have access to e-mail, the discovery would have to be sent to the appropriate address. Mr. McCarthy reiterated that the issue here is District Court cases, not those in circuit court. The number of cases where there are significant documents is relatively small. The amended Rule does not change current practice.

The Chair said that the proposed language is still not certain. Mr. Maloney told the Committee that his suggested language was: “Discovery by inspection may be permitted only where because of the nature of the evidence, such as tangible or electronic, it would be impractical not to do so.” The Chair

commented that the language of the Rule has to be precise. His view of the revised language was the following: "Unless otherwise agreed to by the parties [this would include pro se litigants], by rule, or by order of the court, 'provide' means to send or to deliver by mail, e-mail, facsimile transmission, or hand-delivery." The Assistant Reporter agreed that this was the suggested language, but she pointed out that Mr. Maloney had proposed some further language. He added that the language was: "The State may require a party to inspect or obtain discovery from the office only where the nature of the evidence would make it impracticable to mail or send it." Mr. Karceski said that it should not be limited to only the State, and Mr. Maloney corrected the language to provide that a party may require another party to inspect or obtain discovery. It is clear that the occasions in which discovery by inspection would be required should be limited. He expressed the view that subsection (b)(4) should contain two sentences. Mr. Sykes noted that there would have to be two subsections.

The Chair asked Mr. Maloney if his idea was that the exception would cover both subsections. Mr. Maloney responded that his suggestion was that someone would have to go to get the material only if it were electronic or tangible evidence. The Reporter questioned as to whether this is already covered by the way the Rule is structured. The language "provide information or material" has to be by facsimile, mail, or e-mail, but the way the Rule is structured, the opportunity to inspect is already

covered. The second sentence is not needed. Or is something more covered by the second sentence? Mr. Maloney replied that the message of this subsection is that one can only be required to come to someone's office to obtain discovery when because of the nature of the evidence, it cannot be transmitted.

The Chair noted that subsection (d)(9) only covers evidence for use at trial, and it may not cover *Brady* material. Subsection (d)(10) addresses the property of the defendant. Judge Pierson pointed out that subsection (d)(8)(B) refers to the opportunity to inspect written reports of experts. Mr. Maloney commented that the purpose of the amendment is to limit the use of the inspection for all kinds of other discovery. This is why it is important. The Reporter asked Mr. Maloney to repeat his suggested second sentence. He responded that the new language is: "A party may provide discovery by inspection only where the nature of the evidence would make it impracticable to send or deliver by mail, e-mail, facsimile transmission, or hand-delivery." The Chair observed that the language "except as provided by rule" would have to be added to this. Mr. Maloney agreed with the Chair. Senator Stone remarked that the ability to look at the State's file should not be limited. In Baltimore County, the State's Attorney sends nearly everything in the file. The Chair said that both sentences in subsection (b)(4) would be subject to the "except as otherwise provided..." language. The Chair called for a vote on the motion to add a second sentence to

subsection (b)(4), and it carried by a majority vote. Mr. Maloney suggested the addition of a Committee note that would explain what is electronic or tangible evidence that is subject to inspection. By consensus, the Committee agreed to this addition.

Mr. Karceski told the Committee that the second item to be discussed in Rule 4-263 was subsection (k)(3). This change is being proposed as a result of a problem with one of the circuit courts holding that motions for discovery need not be filed with the court. When the Committee had discussed this portion of the Rule, their sense had been that the actual answer to discovery would not become part of the file but that the discovery process, a motion for discovery, would become part of the file in the clerk's office. To clarify what should be incorporated into the court file, the language that is proposed to be added is the third sentence of subsection (k)(3) which reads: "Requests for discovery or motions for discovery or to compel discovery and the responses thereto shall be filed with the court." The original language remains in the Rule. This indicates that the actual discovery material, encompassing answers to discovery that are the most voluminous portion of discovery, would not have to be filed with the court. Mr. Johnson noted that this is confusing, because the caption is "Not to be Filed with the Court." A sentence is being added that provides what is to be filed with the court. He suggested that subsection (k)(3) could be the language that is being proposed. To follow this, a section could

be added that provides what is not to be filed with the court. The Chair remarked that the caption could be "Filing with the Court." Mr. Bowen suggested that subsection (k)(3) be made into two parts. The first would cover what is filed with the court, the second would cover what is not filed with the court. Mr. Johnson remarked that this is what he was suggesting. By consensus, the Committee agreed with this suggestion. The Chair stated that the Style Subcommittee can draft this.

The Chair asked if there is anything left in Rule 4-263 that requires a motion. Mr. Patterson replied that there is a motion to submit for an examination or to take DNA swabs. There may be a motion to compel because the party is not getting the discovery material automatically. Mr. Cassilly commented that years ago, the OPD and his office worked out what they called the "paperwork reduction act." The Office of the Public Defender files a blanket copy of their discovery and their "boilerplate" language with Mr. Cassilly's office, and his office had agreed that their entrance of appearance would constitute the filing of all of these other motions. It saves the OPD from filing huge amounts of paper, and it saves the State's Attorney's office hours and hours of filing. The requests for discovery are all boilerplate; he has never seen a customized request based on the issues of the case. Since much of the discovery material is mandatory for the State to file anyway, requiring additional motions for discovery, unless they are customized motions, serves no purpose. The Chair said that his question was where in the Rules is a motion

required, and Mr. Patterson had answered that it would only be required if someone is asked to submit to an examination to take body samples. Since revised Rule 4-263 went into effect, his office sends a one-page document entitled "Notice of Compliance with Demand for Discovery" which tells the court that the State has filed discovery and sent it to counsel for the defendant in compliance with their demand for discovery, but they do not put any of the answers or any other material in the court file.

The Chair commented that his question was to clarify that the only reference to a request or a motion is in subsection (f)(1) and (2). This is a request by the State's Attorney for the defendant to appear for providing fingerprints, etc. or a motion filed by the State's Attorney for the taking of DNA samples. Mr. Cassilly explained that his concern was that adding the proposed language would generate a flow of paper that up until this time was not needed. The Chair asked for clarification. Mr. Cassilly replied that the defense may somehow feel obligated to file requests for discovery. The Chair responded that the requests referred to are the requests of the State's Attorney. Mr. Cassilly said that the way he reads subsection (k)(3), this falls under general procedure, not under the requests of the State's Attorney. The Chair expressed the opinion that in circuit court, the defense does not have to request anything. Mr. Cassilly agreed, but he pointed out that adding the sentence to subsection (k)(3) seems to create an issue that does not exist. Why is the language being added to the Rule

when it is already taken care of? Ms. Smith answered that according to Dennis Weaver, the clerk of court in Washington County, the local OPD was contesting the fact that since the term "discovery material" was not defined, they were interpreting the Rule to mean that they now have to file all requests for discovery. Mr. Weaver had suggested that this should be similar to the civil rule where the term is defined.

Mr. Karceski said that he wanted to respond to Mr. Cassilly's comments. The Rule is attempting to set out what actions are not necessary. Mr. Cassilly's reading of the proposal only applies if one is filing for discovery, and that should be incorporated into the court file. Subsection (k)(1) of the Rule provides that discovery may be accomplished in any manner mutually agreeable to the parties. The State and the defense can do this any way they choose to do it. If they work out some agreeable means of accomplishing discovery, the Rule provides that a statement of the agreement should be filed. If subsections (k)(1) and (k)(3) are read together, this should address Mr. Cassilly's concerns.

Mr. Cassilly reiterated that his point was that another requirement should not be added to the Rule. Mr. Taylor told the Committee that he was an attorney in the Office of the Attorney General. Speaking as an appellate attorney, he pointed out that if something is not in the record, it does not exist. When he read the memorandum from one of the clerk's offices stating that they were not filing motions for discovery, because they

interpret the Rule to mean that they do not have to put them in the record, that concerned the attorneys in his office. He does not read this Rule to require people to suddenly have to file motions that they never had to file before. However, if someone files something, it needs to be in the record. The attorneys in his office do not need to know what the actual discovery was that was exchanged, but they need to know the language of the request, and if there had been a dispute, or a motion, or something similar. Some items need to be requested, such as certain records of DNA labs. From an appellate standpoint, it would be better if the clerks' offices were including the requests for discovery or motions for discovery or to compel discovery in the record.

The Chair commented that he thought that any motion had to be in the record. Ms. Smith explained that they are in the record, but some attorneys were including materials with the motion instead of only the notices. The Chair asked if anyone had a motion to do anything other than what the Subcommittee had recommended. Mr. Sykes moved that there should be an amendment that would provide that requests to the court or motions for discovery or to compel discovery be filed, to make clear that interrogatories are not being required to be filed with the court. An interrogatory is a request for discovery. This should be limited to requests to the court. There was no second to the motion.

The Chair said that he was not certain that what Mr. Sykes

had said was true. Subsection (f)(1) indicates that this refers to a request to the defendant, not a request to the court. The Rule provides that if the State wants to take the defendant's photograph, fingerprints, etc., a request needs to be filed, and then the defendant has an obligation to permit it. The court is not involved. Mr. Cassilly had said that his concern was that by using the word "request," it would mean that defendants will start to file formal requests for discovery when it is not necessary to do so. The Chair suggested that a way to change the Rule could be to limit the requests to what is provided for in subsection (f)(1). Are there any other requests?

Judge Pierson remarked that this raises a theoretical question of whether the automatic obligations of the Rule encompass all of the discovery obligations. There is a request for something that is not limited. He hypothesized some type of *Brady* material that is not covered by any of this Rule. The Chair stated that *Brady* material is clearly covered by the Rule. No request for this material is needed. Judge Pierson noted that if the defense attorney has some item that he or she thinks is *Brady* material, and it is not literally within the terms of this Rule, there could be a request for this. The Chair responded that the Rule provides for a motion to compel if the defense feels that the State has not turned over material that the defense thinks should be turned over. Mr. Karceski remarked that if the State either does not know about or chooses to not address

a *Brady* issue, and the defense asks for the material, if it is not turned over, the defense would certify that it was not received or file another motion to compel or file a second motion for discovery. Judge Pierson remarked that he was not suggesting that there be a change to the Rule, but he was considering whether there is anything else not covered by the Rule.

The Chair asked if there were any other motions to change what the Subcommittee had proposed. None were forthcoming, so by consensus, the change to the Rule was approved as presented by the Subcommittee with the amendments adopted by the full Committee.

Mr. Karceski presented Rule 4-262, Discovery in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-262 to add a definition of the word "provide" to section (b), to require that requests pursuant to subsection (d)(2) and (f)(1) and section (e) be made in writing, to change section (i) by deleting language pertaining to a statement that a request for discovery and response need not be in writing, and by adding language to allow the court to grant a delay or continuance to permit inspection or discovery if pretrial compliance with a request for discovery was impracticable, and to change section (j) to add language clarifying that requests or motions for discovery are to be filed with the court, as follows:

Rule 4-262. DISCOVERY IN DISTRICT COURT

(a) Applicability

This Rule governs discovery and inspection in the District Court. Discovery is available in the District Court in actions that are punishable by imprisonment.

(b) Definitions

In this Rule, the terms "defense," "defense witness," "oral statement," "provide," "State's witness," and "written statement" have the meanings stated in Rule 4-263 (b).

Cross reference: For the definition of "State's Attorney," see Rule 4-102 (k).

(c) Obligations of the Parties

(1) Due Diligence

The State's Attorney and defense shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule.

(2) Scope of Obligations

The obligations of the State's Attorney and the defense extend to material and information that must be disclosed under this Rule and that are in the possession or control of the attorney, members of the attorney's staff, or any other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case.

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

(d) Disclosure by the State's Attorney

(1) Without Request

Without the necessity of a request,

the State's Attorney shall provide to the defense all material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged and all material or information in any form, whether or not admissible, that tends to impeach a State's witness.

Cross reference: See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. U.S.*, 405 U.S. 150 (1972); *U.S. v. Agurs*, 427 U.S. 97 (1976); *Thomas v. State*, 372 Md. 342 (2002); *Goldsmith v. State*, 337 Md. 112 (1995); and *Lyba v. State*, 321 Md. 564 (1991).

(2) On Request

On written request of the defense, the State's Attorney shall provide to the defense:

(A) Statements of Defendant and Co-defendant

All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(B) Written Statements of State's Witnesses

As to each State's witness whom the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony, those written statements of the witness that relate to the offense charged and are (i) signed by or adopted by the witness or (ii) contained in a police or investigative report, together with the name and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009(b), the address of the witness;

(C) Searches, Seizures, Surveillance,

and Pretrial Identification

All relevant material or information regarding:

(i) specific searches and seizures, eavesdropping, or electronic surveillance including wiretaps; and

(ii) pretrial identification of the defendant by a State's witness;

(D) Reports or Statements of Experts

As to each State's witness the State's Attorney intends to call to testify as an expert witness other than at a preliminary hearing:

(i) the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(ii) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(iii) the substance of any oral report and conclusion by the expert;

(E) Evidence for Use at Trial

The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial; and

(F) Property of the Defendant

The opportunity to inspect, copy, and photograph all items obtained from or belonging to the defendant, whether or not the State's Attorney intends to use the item

at a hearing or at trial.

(e) Disclosure by Defense

On written request of the State's Attorney, the defense shall provide to the State's Attorney:

(1) Reports or Statements of Experts

As to each defense witness the defense intends to call to testify as an expert witness:

(A) the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert; and

(2) Documents, Computer-generated Evidence, and Other Things

The opportunity to inspect, copy, and photograph any documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the defense intends to use at a hearing or at trial.

(f) Person of the Defendant

(1) On Request

On written request of the State's Attorney that includes reasonable notice of the time and place, the defendant shall appear for the purpose of:

(A) providing fingerprints,

photographs, handwriting exemplars, or voice exemplars;

(B) appearing, moving, or speaking for identification in a lineup; or

(C) trying on clothing or other articles.

(2) On Motion

On motion filed by the State's Attorney, with reasonable notice to the defense, the court, for good cause shown, shall order the defendant to appear and (A) permit the taking of buccal samples, samples of other materials of the body, or specimens of blood, urine, saliva, breath, hair, nails, or material under the nails or (B) submit to a reasonable physical or mental examination.

(g) Matters Not Discoverable

(1) By any Party

Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product or (B) any other material or information if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

(2) By the Defense

The State's Attorney is not required to disclose the identity of a confidential informant unless the State's Attorney intends to call the informant as a State's witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant.

(h) Continuing Duty to Disclose

Each party is under a continuing obligation to produce discoverable material

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

(i) Procedure

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

(j) Material Not to be Filed with the Court

Except as otherwise provided in these Rules or by order of court, discovery material shall not be filed with the court. This section does not preclude the use of discovery material at trial or as an exhibit to support or oppose a motion. Requests for discovery or motions for discovery and any responses thereto shall be filed with the court.

(k) Retention; Inspection of Original

The party generating discovery material shall retain the original until the expiration of any sentence imposed on the defendant and, on request, shall make the original available for inspection and copying by the other party.

(l) Protective Orders

On motion of a party or a person from whom discovery is sought, the court, for good cause shown, may order that specified disclosures be denied or restricted in any manner that justice requires.

(m) Failure to Comply with Discovery Obligation

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

Source: This Rule is new.

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

The proposed amendments to Rule 4-262 incorporate into the District Court discovery Rule the amendment to the "Definitions" section of Rule 4-263, the addition of a definition of "provide."

Amendments to subsections (b)(2) and (f)(2) and sections (e) and (i) require that certain discovery requests be made in writing and that discovery materials be provided in writing, with discovery completed before the hearing or trial to the extent practicable. To conform to changes made to Rule 4-263, section (i) has been changed to require that requests or motions for discovery and any responses thereto shall be filed with the court. If pretrial compliance with a discovery request was impracticable, the court may grant a delay or continuance to permit inspection or discovery. The Rules Committee concluded that specific deadlines for requesting and providing discovery would not be compatible with District Court practice, and therefore declines to recommend the addition of discovery deadlines to Rule 4-262.

Mr. Karceski explained that the proposed change to Rule 4-262 was in section (b), and it was to add a reference to the word "provide." The point had been made earlier in the discussion

that the definition of the word is different in this Rule than in Rule 4-263. Mr. Karceski expressed the opinion that the definition is the same. The Chair commented that it has been worked out that the definition is the same. Mr. Karceski pointed out that in subsection (d)(2), the word "written" is proposed to be added. Mr. Shellenberger had said that many of the requests were by telephone, and they were being made at the last moment. They were causing a great deal of difficulty, and there were some dismissals because of non-compliance. Mr. Shellenberger had suggested and the Subcommittee had agreed that the request should be written. *Brady* material must be given without request, but the proposal is that there be a writing. It does not have to be a formal motion, and it could be written in any format, such as in a letter. The Subcommittee agreed with Mr. Shellenberger. It appears that some attorneys are taking advantage of the situation. Requiring a written request addresses that problem.

The Chair commented that this raises the issue referred to by Judge Pierson earlier. Does a request have to be filed with the court? Mr. Karceski replied that this will be addressed later. There has to be a change to section (i) of the Rule. The Subcommittee decided to remove the sentence that reads: " A request for discovery and responses need not be in writing and need not be filed with the court." The new language addresses the completion of discovery in a timely fashion. If it cannot be completed in a timely fashion, then the court in its discretion

may allow a delay or continuance. The reason for this change is because of the shorter timetable in District Court cases. This section allows for a continuance, and then section (j) provides that requests for discovery or motions for discovery and any responses shall be filed with the court. A motion for discovery can be filed in the District Court. The State's Attorney must also file his or her request in writing.

Judge Love inquired whether requests for discovery have to be filed with the court. Mr. Karceski answered that the Subcommittee is proposing that these requests must be filed with the court. Judge Love commented that in the District Court, on the date of trial there will occasionally be a dispute between the State and the defense as to whether the State, for example, ever received the request for discovery. If there is a copy of it in the file with a certificate of service, this usually solves the problem.

By consensus, the Committee approved the changes to Rule 4-262 as presented.

Mr. Karceski presented Rule 4-331, Motions for New Trial, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-331 by changing section (e) to add a timeliness requirement and a requirement that a motion filed under this

Rule establishes a prima facie basis for granting a new trial, as follows:

Rule 4-331. MOTIONS FOR NEW TRIAL

(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

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

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

(2) 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.

(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 date the court imposed sentence or the date it received a mandate issued by the Court of Appeals or the Court of Special Appeals, whichever is later;

(2) on motion filed at any time if a sentence of death was imposed and the newly discovered evidence, if proven, 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;

(3) on motion filed at any time if the motion is based on DNA identification testing or other generally accepted scientific techniques the results of which, if proven, 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) 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.

(e) Disposition

The court may hold a hearing on any motion filed under this Rule and shall hold a hearing on a motion filed under section (c) if, after reviewing the motion for a new trial and any response thereto, the court determines that a hearing was requested and if the motion (1) was timely filed pursuant to subsection (c)(1), if applicable, (2) satisfies the requirements of section (d), and ~~a hearing was requested~~ (3) in a light most favorable to the movant, establishes 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 from former Rule 770 and M.D.R. 770.

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

The Criminal Subcommittee proposes a change to section (e) to clarify that the court shall hold a hearing on a motion for a new trial filed on the ground of newly discovered evidence where the death penalty was not imposed and which is not based on DNA scientific identification evidence if the motion was timely filed and establishes a prima facie basis for granting a new trial.

The Subcommittee is working on a change to subsection (c)(3) so that it is consistent with changes made in DNA law.

Mr. Karceski told the Committee that the proposed change to Rule 4-331 is a result of a reported opinion by the Honorable Robert Zarnoch, a former member of the Rules Committee. The case is *Matthews v. State*, 187 Md. App. 496 (2009). It pertains to newly discovered evidence. Section (c) provides for the opportunity to request a new trial in three distinct situations. The second and third situations involve sentences of death and issues of DNA identification. Motions in these situations can be filed at any time. However, on a motion for a new trial under subsection (c)(1), the time to file a motion for a new trial is limited to one year after the court has imposed sentence on the defendant, or the date the court received the mandate issued by

the Court of Appeals or Court of Special Appeals, whichever is later. In the opinion, Judge Zarnoch pointed out that although there is a time limitation as to subsection (c)(1), section (d) states only that the motion must be in writing, detailed, and if filed under section (c), it must describe the newly discovered evidence and contain or be accompanied by a request for a hearing if a hearing is sought.

Mr. Karceski said that the current Rule in section (e) does not refer to the time deadline for filing a motion under subsection (c)(1). It provides that the court may hold a hearing on any motion filed under this Rule and shall hold a hearing on a motion filed under section (c) if the motion satisfies the requirements of section (d), and a hearing was requested. Section (e) does not refer to the timetable in subsection (c)(1).

The proposed revision is to section (e). The new language adds, as a condition to the requirement of a hearing on a motion filed pursuant to subsection (c)(1) that the motion was timely filed. The new language also adds, as a condition to the requirement of a hearing on a motion filed pursuant to any subsection of section (c), that the motion establish a prima facie basis for a new trial.

The Chair pointed out that some restyling of the new language is needed. By consensus, the Committee approved Rule 4-331 as presented subject to restyling.

Mr. Karceski presented Rule 4-342, Sentencing - Procedure in Non-capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 (i) to add language referring to the right to be represented by counsel, as follows:

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

. . .

(i) Advice to the Defendant

At the time of imposing sentence, the court shall cause the defendant to be advised of any right of appeal, any right of review of the sentence under the Review of Criminal Sentences Act, any right to move for modification or reduction of the sentence, <u>any right to be represented by counsel,</u> and the time allowed for the exercise of these rights. At the time of imposing a sentence of incarceration for a violent crime as defined in Code, Correctional Services Article, §7-101 and for which a defendant will be eligible for parole as provided in §7-301 (c) or (d) of the Correctional Services Article, the court shall state in open court the minimum time the defendant must serve for the violent crime before becoming eligible for parole. The circuit court shall cause the defendant who was sentenced in circuit court to be advised that within ten days after filing an appeal, the defendant must order in writing a transcript from the court reporter.

. . .

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

The Extra Legalese Group, a group of inmates confined in the Maryland Division of

> Correction whose purpose is to inform inmates of their possible post-sentence legal rights, has requested that Rule 4-342 (i) be amended to include language explicitly requiring either the court or counsel to advise all defendants of the right to counsel when someone files a motion for modification or reduction of sentence. The Criminal Subcommittee suggests adding a reference to the right to be represented by counsel to section (i) of Rule 4-342.

Mr. Karceski explained that a change to section (i) in Rule 4-342 has been proposed. The Extra Legalese Group, had sent in a letter, which indicated that when defendants are being advised of post-trial rights to appeal, review of sentence, three-judge panel, modification of sentence, etc., they are not always being told of their right to be represented. The Subcommittee felt that it would be appropriate to incorporate into the advice to the defendant subsequent to sentencing the fact that he or she has the right to be represented by counsel. By consensus, the Committee approved Rule 4-342 as presented.

The Chair said that at the court hearing on the 162nd Report, a glitch in the language of one of the criminal rules, Rule 4-322, Exhibits, Computer-generated Evidence, and Recordings was noted. This pertained to a recording that is not in a medium in public use which has to be preserved. The problem was corrected at the court hearing, and it was purely a style issue. The comparable civil rule, Rule 2-516, Exhibits and Recordings, was not corrected. The grammatical error should be corrected, so the two Rules conform. Judge Kaplan moved to correct Rule 2-516,

the motion was seconded, and it carried unanimously.

Agenda Item 2. Consideration of a proposed amendment to Rule 4-312 (Jury Selection) to add a new subsection (c)(1)(B), Anonymous Jury

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After the lunch break, Mr. Karceski presented Rule 4-312, Jury Selection, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-312 to add a new subsection (c)(1)(B) pertaining to an anonymous jury, to add a new cross reference, and to make stylistic changes, as follows:

Rule 4-312. JURY SELECTION

. . .

(c) Jury List

(1) Contents

(A) Generally

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

(B) Anonymous Jury

On written motion from a party accompanied by a statement under oath of

particularized reasons, the court may order that the names and street or box office addresses of prospective jurors not be disclosed during voir dire, and, subject to further order of the court, that the names and street or box office addresses of impaneled jurors not be disclosed at any time. Such an order may not be entered unless the court (i) finds, from the certified information presented, that there is strong reason to believe that disclosure of the names and street or box office addresses of the juror is likely to imperil the safety and security of the jurors; and (ii) instructs the jurors that, in order to protect their privacy, they will be identified only by juror number and zip code and that their names and street or box office addresses will not be disclosed. The court may not inform or suggest to the jury that this precaution is attributable to the defendant or any agent of the defendant. Cross reference: See *United States v. Thomas*, 757 F.2nd 1359 (N.Y. 1985).

. . .

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

The Maryland Circuit Judges Association suggests that the Maryland Rules of Procedure be amended to provide for anonymous jurors in cases where the trial court determines that there are strong reasons to believe that juror safety, juror fear, or jury tampering will be a problem during the trial.

The Criminal Subcommittee suggests adding language to Rule 4-312 to provide for an anonymous jury and adding a cross reference to *United States v. Thomas*, 757 F.2nd 1359 (N.Y. 1985), which pertains to the same issue and explains the federal court's balancing test to determine whether the impaneling of an anonymous jury is appropriate.

Mr. Karceski explained that the Subcommittee had proposed a

revision to Rule 4-312, but the Chair had pointed out that the proposed change may be lacking in the sense that it may not pass constitutional muster. The Chair had suggested changes to the proposal. The reason for changing the Rule is because some people are willing to go to great lengths, including intimidating witnesses and jurors, to prevail in a trial. In some cases, the names of jurors may be an issue. The number of these cases is very small. The Subcommittee discussed whether there should be a rule that would allow for the impaneling of an anonymous jury. This arose as a result of a letter from the Honorable Sean D. Wallace, judge of the Circuit Court of Prince George's County and the President of the Maryland Circuit Judges Association, asking the Rules Committee to consider this issue.

Mr. Karceski expressed the view that the Subcommittee's proposal is too open-ended, and the Chair's proposal, which was handed out today, is a better one. Mr. Karceski expressed the concern that there are a number of jurisdictions where jurors can be sent to more than one courtroom on a given day. A juror may not be selected for Case A, and then the juror would be sent to be considered for Case B. In the first courtroom, there is no problem with juror privacy, but this is not the case in the second courtroom. As part of the proposal, the Rule provides that to protect juror privacy, each juror will only be identified by his or her jury number. This is a policy that the Committee should consider applying in every case, and not only in a case where there is a reason to impanel an anonymous juror. Jurors

will be able to figure out why the procedures are different for certain cases.

Mr. Karceski said that the rule from Virginia is in the meeting materials, and although it is lengthy, it may provide some guidance. Section (A) refers to the assignment of a number to each juror, and the jurors are known throughout the case by that number only. Section (B) prohibits copying of jury panel information and requires that the information be returned to the court after the jury is impaneled. Mr. Karceski remarked that in his jurisdiction, all of the materials that pertain to the selection of jurors have to be returned. Section (C) addresses the motion and order of court. It states that the court or any party can raise the issue, and for good cause shown, the court can issue an order regulating disclosure of the personal information of jurors. It can be requested by counsel or by any person who the court deems is appropriate, or it can be strictly construed so that only the attorneys are able to see the information. There is a middle ground, which is that if the court feels that giving this information to some person, who has been hired to select the jury, may be appropriate, that person can also review the jurors' information. Virginia has a statute upon which the rule is based. The Chair had recently brought to Mr. Karceski's attention a case that is more recent than the case that is referred to in the meeting materials, which is *Thomas v. State*, 757 F. 2d 1359 (1985). He and the Chair had spoken about

opening this issue up for discussion to see how the Committee feels about it.

The Chair commented that a number of states have statutes and there is case law all over the county pertaining to anonymous juries. The *Thomas* case was not the first or the last to address this issue. A very informative case is *United States v. Ochoa-Vasquez*, 428 F. 3d 1015 (11th cir., 2005). There are not only 20 more years of history since *Thomas*, but the courts have set out the criteria for anonymous juries in case law. Including District Court cases and unpublished U.S. Court of Appeals cases, there are well over 100 cases on this point. If *Thomas* is shepardized, many cases come up. Regarding the Subcommittee's proposed Rule, the Chair expressed the concern that what the "good cause" standard means is not clear. The case law clarifies that there is a constitutional overlay to this issue. Does it destroy the presumption of innocence if the jury gets the impression that there is a problem with safety? *Thomas* and other cases indicate that there cannot be an anonymous jury in every case. It is necessary to have a basis for a finding that a problem exists with respect to a potential danger to or tampering with the jury. This is not only the fact that the jury has a number as opposed to a name, the issue also includes not disclosing the jury's names or addresses to anyone, even counsel in the case. Counsel gets the zip code and number of each juror, but not the street addresses or the names. Judge Wallace's

original proposal covered both civil and criminal juries. The Chair expressed some doubt as to whether this is necessary for civil cases.

Mr. Michael asked if grand juries would be included. The Chair replied negatively but added that they could be included. Mr. Michael pointed out that Colorado includes anonymous grand juries. The Chair remarked that the states have differing policies on this issue. The grand jury is already secret. Mr. Michael added that the defendant is not present when the grand jury meets. The Chair noted that privacy may be an issue for the petit jury. Jurors may be frightened. He asked Judge Hotten about her experience with this. Judge Hotten answered that she had run into this situation. The Chair said that some cases involve gangs and drug activity, and this could affect the willingness of the public to serve as jurors. Mr. Karceski responded that he agreed with most of the Chair’s comments but not with the statement that there are instances when even the attorneys should not be given the jurors’ personal information. Although the law in Virginia is not necessarily what should be followed, it does not allow for the information to be withheld from the attorneys in the case. A fundamental process of jury selection is that the attorneys are given the names of the jurors. As a defense attorney, Mr. Karceski stated that he would like to know the jurors’ names. As to the jurors’ fears, unfortunately, the way that this is handled can create fear. A policy where every jury is selected in the same fashion will not

cause jurors to be concerned about a particular case. In the voir dire, they will be given a factual statement as to what the case is about. As a part of this, jurors are asked if there is anything about this case that would prevent them from being able to sit in judgment and be impartial. The way that this is managed is very important, so that no one signals that this particular case is a special case, or that this defendant is a really bad person.

The Chair pointed out that the federal courts have said that there should not be an anonymous jury in every case. There are two different aspects to this. The Subcommittee's proposal only addressed one of these, which is voir dire. Another is to avoid retribution after the case by not disclosing the names and addresses of jurors who are impaneled, unless the court orders otherwise. Mr. Maloney inquired as to how the jury would know that they are anonymous. In Prince George's County, jurors are only referred to by their number. Their names are never mentioned. The parties know it, because they see it on the jury list. The Chair responded that in the case law, the judge tells the jury that their names and addresses are not going to be disclosed for privacy reasons. In the opinions, the courts address this. They look very carefully at what the judge told the jury to make sure that they do not get the impression that their names and addresses are not being given out because there is a problem with this particular defendant or his friends. Mr. Maloney remarked that it is not that the jury is anonymous, the

issue is that they are being told that they are anonymous.

Mr. Karceski commented that it makes no sense to tell the jurors that they are anonymous. If the judge makes a ruling that the names and addresses will not be revealed, and the jurors are to be identified by number, the litigants may not agree with this, but they will have to follow the order of court. The Chair observed that the jury is told that they are going to be referred to by number and they are only to refer to themselves this way. Mr. Karceski noted that this can be the procedure in every case. The Chair acknowledged that this part can be handled this way, but the question is whether the names and addresses of the jury are disclosed to the parties or counsel. The current Rule provides that street addresses may not be disclosed. It is a question of the names. This can be structured a certain way. There are four or five important cases, and they all focus on the fact that there is a constitutional issue, and the jury cannot be anonymous in every cases. This can affect peremptory challenges. The U.S. Supreme Court has not addressed this issue, except for an older case that left open the fact that a judge may permit identifying information to be disclosed, but it was not an issue in that case, so it was not a holding. The Committee was given a list of the statutes addressing this matter. Some of the states handle this by rule. The Subcommittee's language that allows the juror information to be kept confidential for good cause shown is not even permitted by *Thomas*.

Mr. Karceski commented that there is a federal statute, but there is no rule. The Chair said that 28 U.S.C. 1863 reads as follows: "...[a]mong other things such plan shall...fix the time when the names drawn from the qualified jury wheel shall be disclosed to the parties and to the public. If the plan permits these names to be public, it may nevertheless permit the chief judge of the district court or such other district court judge as the plan may provide to keep these names confidential in any case where the interests of justice so require." The cases get into the specific circumstances in which an anonymous jury is appropriate. He had not seen a federal rule cited in the cases. The Subcommittee could consider the cases on point, some of which are fairly recent. Mr. Karceski remarked that it appears that federal appellate courts have held or there may be rules that prohibit the identification of the name of a prospective juror even to counsel. Mr. Michael inquired if this is the intention of the proposed Rule. The Chair replied that anonymous truly means that.

Mr. Karceski commented that it is important to come up with a concept that everyone agrees with. No legislation in this State provides for this. What does the Committee feel would be appropriate? Should counsel not be allowed juror information? The Chair said that *Ochoa-Vasquez* provides that if the jury is anonymous, the names should not be disclosed. One of the issues that the defense raised on appeal is that this impinges on their

peremptory challenges. Mr. Michael remarked that the two issues he could identify were whether counsel should get the names of the jurors and, if so, whether the Rule would provide that counsel cannot share the names with his or her client. The Chair inquired as to how this could be enforced. Mr. Michael added that if the defendant is allowed to have the names of the jury, it defeats the purpose of the Rule.

Mr. Karceski commented that defense counsel could be allowed to know the name of the jurors but would be told that he or she cannot share the information with the defendant. If the defense counsel gets the names but cannot speak to his or her client about the names, this may be an issue for a peremptory challenge. Counsel cannot speak to the person who is most important, his or her client. Counsel would only know the jurors' numbers. The Chair pointed out that counsel would know the jurors' occupations, age, zip codes, and what part of the county they live in. The Subcommittee can discuss the possibilities for changing the Rule.

Mr. Karceski remarked that since the Rule will come back to the Committee, he would like to get some guidance as to how the Committee feels about this issue. The Chair responded that the Committee staff can do some investigation. There is already some information about similar statutes in other states. Some federal cases have been identified, most of which are in the Second Circuit, because that is where this issue first started. About half of the cases on point are in that circuit. It would be

useful to find out what the various jurisdictions do about this. There was an unreported Fourth Circuit case. Someone can call the U.S. District Court and ask if they have anonymous juries, and if so, ask whether counsel gets the names.

Mr. Karceski noted that the Honorable Richard D. Bennett, of the U.S. District Court for the District of Maryland, is the person to contact, because he recently decided *U.S. v. Byers*, 603 F. Supp. 2d 826 (2009), which involved an anonymous jury. Should the Subcommittee not only consider the anonymous jury aspect, but also start at the foundation, as Virginia has done, and provide that jurors should always be assigned a number? The Chair commented that the Rule could provide that in every case, jurors are referred to only by number. If the jury is to be anonymous where even counsel and the parties are not given the names, then in those cases, the information is totally blocked. This is not only for voir dire, it is also for after the conviction, where the former jurors can be targeted.

Mr. Maloney inquired as to what the jury is told. Mr. Karceski answered that the Rule could be written so that the jury is not told anything. The Chair added that this could be accomplished by assigning a number to each juror, so that in every case, the jurors are told that they will be addressed by number and that they are not to mention their name for privacy purposes. The jury does not have to be informed that counsel is getting their names. The problem is if the jury thinks that the

defendant and counsel are going to get the names. Judge Pierson observed that if the objective is to prevent jury tampering, it does not matter if the jurors know or not. There are two possible objectives: (1) to prevent someone from tampering with the jury (this can be accomplished by not giving out the names of the jurors) and (2) to make the jurors feel more comfortable. He said that he was not sure that this is what the federal anonymous jury cases are about.

The Chair noted that those cases are for the protection and security of the jurors. Judge Pierson remarked that the jurors can be protected, without their being told that they are anonymous. Judge Hotten added that the jurors can be told to identify themselves by their numbers, not their names, and it is not necessary to get into the rationale for this. The Chair pointed out that telling the jurors this would be appropriate as long as there is no implication that this is being done because the lives of the jurors are in danger in light of the defendant who is on trial.

The Chair suggested that the Subcommittee read the cases on point. Mr. Karceski commented that many of the procedures that have been suggested can be done very early on in the case, because every jury panel group listens to an instructional video before they are sent into the courtroom. This is preferable to the jurors being brought into the courtroom and told that the case is a triple murder, and their identities will not be revealed for protection. The Chair said that the jury

commissioner could tell the jury that this is part of orientation, but it may not be a good idea for the jury commissioner to give instructions to the jury.

Mr. Michael remarked that it would be easy to come up with a way to handle the jury, but the more difficult problem is not being able to give the attorney the information on the prospective jurors, so that the attorney can intelligently exercise peremptory strikes. If the defendant sees the name of a juror with whom he had a prior altercation, identifying such a person is part of the jury selection process. The Chair agreed and added that in Maryland, unlike in the federal system, peremptory challenges in voir dire are only permitted to disqualify for cause. Mr. Michael noted that an issue is what good cause is. Judge Pierson commented that what Judge Wallace was thinking was that an anonymous jury is similar to a federal anonymous jury, where no one gets the juror information. The Chair observed that this is what the federal cases on point involve. The Reporter cautioned that if a defendant chooses to represent himself or herself, that person's rights may be different from the defendant who chooses to have an attorney. The attorney could get the names, but a self-represented defendant may not. Mr. Karceski responded that to make the Rule logical, if attorneys and pro se defendants are not given the names of the jurors, they will have to be given more information that does not involve the name. The Chair reiterated that there would be no identifying information. Mr. Karceski noted that it

could be crucial to the outcome of any case to know the ethnicity of the persons who are sitting on the jury.

The Chair expressed the view that the Subcommittee's proposal was too broad. If the Rule requires good cause for an anonymous jury, that would allow it in every case. Mr. Karceski agreed that the proposal was too broad but said that he was not certain that the issue was ever raised that anonymity means that the attorneys get no information at all. The Chair noted that *Thomas* addresses this issue. The point in that case was that counsel felt that they could not exercise peremptory challenges without the necessary information. The court held that this is limited to certain situations where the judge makes a finding that disclosure could imperil the safety of the jury. Mr. Michael commented that a realistic solution to this problem of the information would be to identify the juror by number, as long as the attorney can talk to the juror to find out some information. This has not been done in Maryland for quite some time. Mr. Karceski said that even in a death penalty case, each juror can be brought out into the hallway, so that the attorney would know about each juror. If he had a choice between knowing as much information about the juror without his client present, or finding out nothing with the client, he would prefer the former.

The Chair noted that this may not be acceptable to the client. The Chair stated that if there is a guilty plea, the

defendant must be told that the plea means that the defendant is waiving his or her rights to pick a jury that counsel will help select. Mr. Karceski commented that if everything is anonymous, the attorney gets no information whatsoever. He knows the juror's occupation, zip code, and some other minor information. The Chair pointed out that this is the issue for the Subcommittee to consider. Mr. Karceski stated that one gets far more information in a death penalty case than in this kind of case. Mr. Maloney remarked that if the defendant gets the choice between a jury that is identified or an anonymous jury with the right of extended voir dire, he or she would choose expanded voir dire. The question is if the Court of Appeals will agree.

The Chair commented that this has not been the issue up to this point. So far the Court of Appeals has made it clear that voir dire is limited to questions relevant to challenges for cause. His understanding of the cases on this subject is that if the jury is anonymous, no one gets the information about them. The cases provide a history of jury-tampering, and the judge has to make a finding. Mr. Karceski stated that this will happen. The issue is figuring out the fairest way for it to happen. The motion should be filed long before the day of the trial. If the State or a party knows that they are going to opt for an anonymous jury, there should be a timetable. What may answer the question is that the anonymous jury means that the attorneys will not know the names of the potential jurors. At the very least, additional questions of each juror should be allowed on voir

dire. The attorney should be able to ask the ethnicity of the jurors.

The Chair responded that he did not know the answer to this. The Subcommittee needs to look at what the law is. If there is to be an anonymous jury, so that no one knows the names, addresses, and identifying features of the jury, the attorneys cannot start looking for identifying information on voir dire. If anonymity is the goal, the jury should not be able to be identified. Mr. Karceski remarked that if a defendant is determined to get information, he or she can probably do so. The defendant's friends can be in the courtroom and outside of the courthouse.

The Chair said that many of these cases involve not only anonymous juries, but sequestered juries. The government is asking for total protection for the jurors. Their names and identities are to be kept secret, and they are to be sequestered. It is because viable threats to the jury have been made or are likely to be made based on past experience. Mr. Karceski commented that despite all of the witness intimidation and the accompanying legislation that has taken place recently, no one has brought the issue of anonymous juries before the legislature. The Chair responded that the legislature could address this issue, because the legislatures in other states have done so. However, the Court of Appeals can address this by rule. Judge Hollander asked about the cases on this issue. The Chair answered that he had shepardized *Thomas* which was a Second

Circuit case from 1985. Since that time, there have been at least 100 cases on this issue, most of which are U. S. District Court cases. Some are U.S. Court of Appeals cases and some are State court cases. Master Mahasa asked the Chair which case he had mentioned previously. He replied that the case was *U.S. v. Ochoa-Vasquez* from the 11th Circuit. This was the best compendium of the cases. It would be helpful to call to see how these cases are handled by attorneys and pro se litigants.

Judge Hollander acknowledged the constitutional implications as to what the jury is told, but she asked if it is a bad idea to tell jurors that their identity is being protected in a particular case. It could discourage people's willingness to serve on a jury. The Chair said that he had read four or five of the U.S. Courts of Appeals cases. All address (1) under what circumstances can there be an anonymous jury, and all of the cases limit it, and (2) if there is an anonymous jury, what the jury is told. It would have to be sufficiently neutral so that the jury does not feel that this is something special because of this case. The courts make clear that the jury should not have the impression that they are anonymous because of the case they are hearing. If the jury is known only by number in every case, it would help this, because the jury cannot draw any conclusions. The jurors come in to the courtroom and are told at the beginning of voir dire that the case is a murder case, and they will get the impression that the case is very serious. They will want to

know about security. How is this handled? It would be important to let the jury know that they are anonymous to protect their privacy, but it is not because of the particular case. The matter will go back to the Subcommittee.

Mr. Karceski inquired if this issue could apply in civil cases. Someone could file a suit against a juror. The Chair responded that there may be some civil case where this could be an issue. It may be necessary if there were jury-tampering. Judge Wallace's proposal covered both criminal and civil cases. The Chair felt that the criminal area should be discussed first. Mr. Karceski remarked that it is obvious from the discussion that this is not going to be an easy issue to deal with. The Chair said that if a case were to be made to have anonymous jurors, it would clearly be in a criminal case. It may be appropriate for a civil case if some of the standards are the same, such as jury-tampering or bribing jurors. With the benefit of this discussion, the matter was referred back to the Subcommittee for further consideration.

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