

COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held via Zoom
for Government on Thursday, June 16, 2022.

Members present:

Hon. Alan M. Wilner, Chair
Hon. Douglas R.M. Nazarian, Vice
Chair

Hon. Vicki Ballou-Watts	Irwin R. Kramer, Esq.
Julia Doyle Bernhardt, Esq.	Victor H. Laws, III, Esq.
Hon. Pamela J. Brown	Dawne D. Lindsey, Clerk
Hon. Yvette Bryant	Bruce L. Marcus, Esq.
Hon. John P. Davey	Stephen S. McCloskey, Esq.
Mary Ann Day, Esq.	Hon. Paula A. Price
Alvin I. Frederick, Esq.	Scott D. Shellenberger, Esq.
Pamela Q. Harris, Court Administrator	Gregory K. Wells, Esq.
Arthur J. Horne, Esq.	Hon. Dorothy J. Wilson

In attendance:

Sandra F. Haines, Esq., Reporter
Colby L. Schmidt, Esq., Deputy Reporter
Meredith E. Drummond, Esq., Assistant Reporter
Heather Cobun, Esq., Assistant Reporter

Lisa Mannisi, Esq., Civil and Criminal Case Administrator, Anne
Arundel County Circuit Court
Hon. John Morrissey, Chief Judge, District Court
Sarah Parks, Court Business Services, JIS
Gillian Tonkin, Esq., District Court

The Chair convened the meeting. The Reporter advised that the meeting was being recorded and speaking will be treated as consent to being recorded.

Agenda Item 1. Consideration of proposed amendments to Rule 16-503 (In Circuit Court), Rule 16-504 (Electronic Recording of Circuit Court Proceedings), and Rule 16-502 (In District Court).

The Chair presented Rule 16-503, In Circuit Court, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURT ADMINISTRATION

CHAPTER 500 - RECORDING OF PROCEEDINGS

AMEND Rule 16-503, as follows:

RULE 16-503. IN CIRCUIT COURT

(a) Proceedings to be Recorded

(1) Proceedings in the Presence of Judge

All trials, hearings, testimony, and other judicial proceedings before a circuit court judge held either in a courtroom or by remote electronic means shall be recorded verbatim in their entirety, except that, unless otherwise ordered by the court, the person responsible for recording need not report or separately record an audio or audio-video recording offered as evidence at a hearing or trial.

Committee note: An audio or audio-video recording offered at a hearing or trial must be marked for identification and made part of the record, so that it is available for

future transcription. See Rules 2-516 (b) (1) (A) and 4-322 (c) (1) (A). Section (a) does not apply to ADR proceedings conducted pursuant to Rule 9-205 or Title 17 of these Rules.

(2) Proceedings Before Magistrate, Examiner, or Auditor

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

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

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

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

(b) Method of Recording

Proceedings may be recorded by any reliable method or combination of methods approved by the County Administrative Judge. If proceedings are recorded by a combination of methods, the County Administrative Judge shall determine which method shall be used to prepare a transcript.

(c) Only Official Recordings Permitted

Only official recordings of judicial proceedings taken in accordance with this Rule are permitted. All other recordings of judicial proceedings are strictly prohibited.

Cross reference: See Rule 2-804 (e) requiring proceedings held remotely to be recorded in accordance with this Rule.

Source: This Rule is derived in part from former Rule 16-404 (2016).

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

In light of *Soderberg v. Carrion*, 999 F.3d 962 (4th Cir. 2021), concerns have been raised about the operation of Rules 16-503 and 16-504, including (1) the interaction between Rule 16-504 (h) and Code, Criminal Procedure Article, § 1-201, and (2) what it means to "broadcast" a "criminal matter" for purposes of § 1-201 (a)(1).

The Rules Committee is asked to address whether the playing of an unaltered official recording of a criminal proceeding, made pursuant to Rule 16-503, and obtained by a person pursuant to Rule 16-504, falls within the definition of a "broadcast" as that term is used in Code, Criminal Procedure § 1-201(a)(1).

For the Committee's discussion and consideration, amendments to Rules 16-503 and 16-504 have been drafted. The Committee also may wish to consider whether amendments to other Rules, such as Rule 16-502, should be proposed.

The Chair explained that the proposed amendments were drafted after Chief Judge Fader requested that the Rules Committee review the operation of Rules 16-503 and 16-504. There is pending litigation in the U.S. District Court for the District of Maryland challenging the constitutionality of Code, Criminal Procedure Article, §1-201, which prohibits the recording or broadcasting of any criminal matter. The case was dismissed in 2020 (*Soderberg v. Carrion*, 2020 WL 206619 (D. Md.

Jan. 14, 2020)). In 2021, the U.S. Court of Appeals for the Fourth Circuit reversed the dismissal and remanded the case to U.S. District Court (*Soderberg v. Carrion*, 999 F.3d 962 (4th Ci. 2021)). The Chair explained that the U.S. District Court will have some discretion, but the 4th Circuit opinion requires the application of strict scrutiny on remand. The Chair asked for the current status of the *Soderberg* case. Ms. Bernhardt responded that there are cross motions for summary judgment pending in the U.S. District Court.

The Chair said that the amendments to Rule 16-503 add new section (c) to permit only official recordings of judicial proceedings. He asked the Committee if subsection (a)(1) should be amended to read that proceedings "shall be recorded verbatim in their entirety by a person authorized by the court for that purpose using equipment approved by the court." Judge Brown said that the language would clarify the issue and she did not see any harm. She moved to add the Chair's proposed language. The motion was seconded and approved by consensus.

The Chair presented Rule 16-504, Electronic Recordings of Circuit Court Proceedings, for consideration.

CHAPTER 500 - RECORDING OF PROCEEDINGS

AMEND Rule 16-504, as follows:

RULE 16-504. ELECTRONIC RECORDING OF
CIRCUIT COURT PROCEEDINGS

(a) Control of and Direct Access to
Electronic Recordings

(1) Under Control of Court

Electronic recordings made pursuant
to Rule 16-503 and this Rule are under the
control of the court.

(2) Restricted Access or Possession

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

(b) Filing of Recordings

Audio and audio-video recordings
shall be maintained by the court in
accordance with standards specified in an
administrative order of the Chief Judge of
the Court of Appeals.

(c) Court Reporters

Regulations and standards adopted by
the Chief Judge of the Court of Appeals
under Rule 16-505 (a) apply with respect to
court reporters employed in or designated by
a circuit court.

(d) Presence of Court Reporters Not
Necessary

Unless otherwise ordered by the court
with the approval of the administrative
judge if circuit court proceedings are
recorded by audio or audio-video recording,
which is otherwise effectively monitored, a
court reporter need not be present in the
courtroom.

(e) Identification Label

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

- (1) the name of the court;
- (2) the docket reference of each proceeding included on the recording;
- (3) the date on which each proceeding was recorded; and
- (4) any other identifying letters, marks, or numbers necessary to identify each proceeding recorded.

(f) Information Required to Be Kept

(1) Duty to Keep

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

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

(B) an exhibit list;

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

(2) Location of Exhibit List and Logs

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

(g) Safeguarding Confidential Portions of Proceeding

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

(h) Right to Obtain Copy of Audio Recording

(1) Generally

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

(2) Redacted Portions of Recording

Unless otherwise ordered by the County Administrative Judge, the custodian of the recording shall assure that all portions of the recording that the court has directed be safeguarded pursuant to section (g) of this Rule are redacted from any copy of a recording made for a person under subsection (h)(1) of this Rule. Delivery of the copy may be delayed for a period reasonably required to accomplish the redaction.

(3) Exceptions

Upon written request and subject to the conditions in section (h) of this Rule, the custodian shall make available to the following persons a copy of the audio

recording or, if practicable, the audio portion of an audio-video recording of proceedings that were closed pursuant to law or from which safeguarded portions have not been redacted:

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

(B) the County Administrative Judge;

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

(D) the presiding judge in the case;

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

(F) Bar Counsel;

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

(H) a stenographer or transcription service designated by the court for the purpose of preparing an official transcript of the proceeding, provided that (i) the transcript of unredacted safeguarded portions of a proceeding, when filed with the court, shall be placed under seal or otherwise shielded by order of court, and (ii) no transcript of a proceeding closed pursuant to law or containing unredacted safeguarded portions shall be prepared for or delivered to any person not listed in subsection (h) (3) of this Rule; and

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

(i) Broadcasting Audio Recordings of Criminal Trial Proceedings Prohibited

Pursuant to Code, Criminal Procedure Article § 1-201, broadcasting of audio recordings of criminal trial proceedings is prohibited. With respect to recordings of criminal trial proceedings obtained under section (h) of this Rule, "broadcasting"

means, during the pendency of the criminal trial proceeding that is the subject of the recording, electronic transmission of the recording by radio, television, the internet, or any telecommunications carrier network; posting or sharing the recording to any social media platform; duplicating the recording or playing the recording for the general public. Any person who violates this subsection may be subject to contempt.

~~(i)~~(j) Right to Listen to and View Audio-Video Recording

(1) Generally

Except for proceedings closed pursuant to law or as otherwise provided in this Rule or ordered by the Court, the authorized custodian of an audio-video recording, upon written request from any person, shall permit the person to listen to and view the recording at a time and place designated by the court, under the supervision of the custodian or other designated court official or employee.

Committee note: If space is limited and there are multiple requests, the custodian may require several persons to listen to and view the recording at the same time or accommodate the requests in the order they were received.

(2) Safeguarded Portions of Recording

Unless otherwise ordered by the County Administrative Judge, the custodian of the recording shall assure that all portions of the recording that the court directed to be safeguarded pursuant to section (g) of this Rule are not available for listening or viewing. Access to the recording may be delayed for a period reasonably necessary to accomplish the safeguarding.

(3) Copying Prohibited

A person listening to and viewing the recording may not make a copy of it or have in his or her possession any device that, by itself or in combination with any other device, can make a copy. The custodian or other designated court official or employee shall take reasonable steps to enforce this prohibition, and any willful violation of the prohibition may be punished as a contempt.

~~(j)~~ (k) Right to Obtain Copy of Audio-Video Recording

(1) Who May Obtain Copy

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

- (A) the Chief Judge of the Court of Appeals;
- (B) the County Administrative Judge;
- (C) the Circuit Administrative Judge having supervisory authority over the court;
- (D) the presiding judge in the case;
- (E) the Commission on Judicial Disabilities or, at its direction, Investigative Counsel;
- (F) Bar Counsel;
- ~~(G) unless otherwise ordered by the court, a party to the proceeding or the attorney for a party;~~

~~(H)~~ (G) a stenographer or transcription service designated by the court for the purpose of preparing an official transcript of the proceeding, provided that, (i) if the recording is of a proceeding closed pursuant to law or from which safeguarded portions have not been redacted, the transcript, when

filed with the court, shall be placed under seal or otherwise shielded by order of the court, and (ii) no transcript of a proceeding closed pursuant to law or containing unredacted safeguarded portions shall be prepared for or delivered to any person not listed in subsection (j) (1) of this Rule;

~~(I)~~ (H) the Court of Appeals or the Court of Special Appeals pursuant to Rule 8-415 (c); and

~~(J)~~ (I) any other person authorized by the County Administrative Judge.

(2) Restrictions on Use

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

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

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

(3) Violation of Restriction on Use

A willful violation of subsection (j) (2) of this Rule may be punished as a contempt.

(1) Broadcasting Video Recordings of Criminal Trial Proceedings Prohibited

Pursuant to Criminal Procedure Article § 1-201, broadcasting of video recordings of criminal trial proceedings is prohibited. With respect to recordings of criminal trial proceedings obtained under section (k) of this Rule, "broadcasting" means at any time the electronic transmission of the recording by television, the internet, or any telecommunications

carrier network; posting or sharing the recording to any social media platform; duplicating the recording or playing the recording for the general public. Any person who violates this subsection may be subject to contempt.

Cross reference: See Rule 16-505 (a) concerning regulations and standards applicable to court reporting in all courts of the State.

Source: This Rule is derived ~~form~~ from former Rules 16-404, 16-405, and 16-406 (2016).

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

See the Reporter's note to Rule 16-503.

The Chair called for comments on Rule 16-504. Ms. Harris said that new section (i) only prohibits broadcasting "during the pendency of the criminal trial proceeding." She explained that there are administrative orders in courts across the state which place language on copies of recordings stating that the recording is provided for verification of testimony only and the audio may not be broadcast. She asked if circuit courts should be providing recordings at all when a trial is ongoing. She also asked whether an appeal is considered part of the proceedings. Mr. Shellenberger said that he is concerned with the proposed language if it would permit a television news station to obtain a video recording of the testimony of a sexual

assault victim and broadcast it after the trial concludes. Chief Judge Morrissey commented that occasionally, individuals will take a picture of a judge without authorization and share audio of a hearing with the judge's photo. The court is authorized by the statute to initiate contempt proceedings against an individual who violates the law. Mr. Shellenberger said that the first sentence of new section (i) states that under Code, Criminal Procedure Article, §1-201, all broadcasting of a criminal trial proceeding is prohibited, but the second sentence implies that the prohibition ends once the case concludes. He argued that it will make it more difficult to convince victims and witnesses to testify if they learn that their testimony could be broadcast.

The Chair asked how the *Soderberg* opinion should be read. Ms. Bernhardt replied that the opinion says that if a person lawfully obtains a copy of a recording, the state needs a compelling interest to prevent the broadcast of that recording. Mr. Shellenberger pointed out that the Rules could be amended to stop the practice of providing recordings. Ms. Harris said that recordings have been provided for decades on varying types of media. She added that she does not think it is a good idea to halt the practice but agreed that it could be done. Mr. Shellenberger pointed out that the Criminal Procedure statute prohibits the recording or broadcast of criminal

proceedings. Chief Judge Morrissey said that the issue is with what individuals do with recordings once obtained from the court. He agreed with Mr. Shellenberger's concern about witness intimidation. Judge Ballou-Watts suggested deleting "during the pendency of the criminal proceeding that is the subject of the recording." Ms. Bernhardt responded that taking out that language does not change the status quo in light of the 4th Circuit opinion in *Soderberg*. She said that the Committee should make some kind of recommendation to the Court of Appeals for consideration.

Mr. Kramer said that witness intimidation is an important concern but pointed out that if trials and proceedings are recorded, that recording should be considered a public record. He added that the press generally has standards for avoiding showing faces and using names of victims of sexual assault and violence. Mr. Shellenberger responded that the recordings are available to the general public and can be shared widely on social media. Mr. Kramer acknowledged the issue but said that under the First Amendment, there is not much that can be done to restrict the broadcast of publicly available information. He said that the problem can be ameliorated by prohibiting the broadcast during the trial but after the trial concludes, there is less of an argument for the prohibition. Judge Ballou-Watts remarked that courtrooms are

open and the press and public are free to attend proceedings and share information about what occurs there. She asked for clarity on what constitutes the pendency of the proceeding - until the verdict, sentencing, etc. - and requested that the Rule be clear so that the public understands the policy. She said that high-profile cases can have a lengthy period between the verdict and sentencing. Judge Nazarian said that a clear demarcation point is "entry of judgment" which includes sentencing. He said that he cannot see how the current statute, as written, will survive a strict scrutiny analysis in the U.S. District Court. Mr. Shellenberger argued that protecting witnesses is a compelling state interest. He agreed with Judge Ballou-Watts' proposal to delete "during the pendency of the criminal proceeding that is the subject of the recording" and present it as an alternative to the current language in proposed new section (i). Judge Ballou-Watts said that if the Committee chooses to use "until entry of judgment" in one of the alternatives, it must be defined for laypeople to understand.

The Chair commented that it may be too early to make a Rule change to address the *Soderberg* case while it is still pending. Mr. Kramer suggested an amendment that codifies the 4th Circuit opinion by requiring a compelling state interest to stop the broadcast of a recording. Mr. Shellenberger said that he can argue for the compelling interest in individual cases.

Ms. Bernhardt said that the Committee is not likely to come to a consensus regarding what *Soderberg* requires in a way that can be embodied in a Rule. She said that she supports providing alternatives to the Court of Appeals. Judge Ballou-Watts suggested using "until entry of judgment" and defining that phrase. Mr. Kramer expressed concern about restricting the use of one medium - the recording - while permitting other forms of reporting about a trial. Judge Ballou-Watts said that the restriction is on using newer technology to immediately disseminate a recording. Mr. Shellenberger said that the press can report on proceedings freely and even obtain a recording and quote from it.

Mr. Laws commented that the issue might be more appropriate for discussion in a subcommittee. He said that the Rules already address some of the concerns raised regarding child witnesses and redaction. The Chair responded that there is some urgency to the matter because it was placed on the agenda at the request of the Chief Judge. Mr. Marcus suggested an expedited referral to a subcommittee to study the issues and make recommendations. He moved to refer Rules 16-503, 16-504, and 16-502 to the appropriate subcommittee for further discussion. The motion was seconded and approved by a majority vote.

The Reporter noted that Rule 16-502 was included in the materials because it could need changes in light of any proposed changes to the other Rules.

Agenda Item 2. Consideration of proposed amendments to Rule 1-202 (Definitions).

Mr. Wells presented Rule 1-202, Definitions, for consideration.

MARYLAND RULES

TITLE 1 - GENERAL PROVISIONS

CHAPTER 100 - CONSTRUCTION, INTERPRETATION,

AND DEFINITIONS

AMEND Rule 1-202 by updating a cross reference following section (k), as follows:

Rule 1-202. DEFINITIONS

. . .

(k) Holiday

"Holiday" means an "employee holiday" set forth in Code, State Personnel and Pensions Article, § 9-201.

Committee note: The "employee holidays" listed in Code, State Personnel and Pensions Article are:

(1) January 1, for New Year's Day;

(2) January 15, for Dr. Martin Luther King, Jr.'s Birthday, unless the United States Congress designates another day for observance of that legal holiday, in which case, the day designated by the United States Congress;

(3) the third Monday in February, for Presidents' Day;

(4) May 30, for Memorial Day, unless the United States Congress designates another day for observance of that legal holiday, in which case, the day designated by the United States Congress;

(5) June 19, for Juneteenth National Independence Day;

~~(5)~~(6) July 4, for Independence Day;

~~(6)~~(7) the first Monday in September, for Labor Day;

~~(7)~~(8) October 12, for Columbus Day, unless the United States Congress designates another day for observance of that legal holiday, in which case, the day designated by the United States Congress;

~~(8)~~(9) November 11, for Veterans' Day;

~~(9)~~(10) the fourth Thursday in November, for Thanksgiving Day;

~~(10)~~(11) the Friday after Thanksgiving Day, for American Indian Heritage Day;

~~(11)~~(12) December 25, for Christmas Day;

~~(12)~~(13) each statewide general election day in this State; and

~~(13)~~(14) each other day that the President of the United States or the Governor designates for general cessation of business.

. . . .

Rule 1-202 was accompanied by the following Reporter's note:

Proposed amendments to Rule 1-202 implement Chapter 64 (HB 227), 2022 Laws of Maryland. The statute adds Juneteenth National Independence Day to the State employee holidays in Maryland. The Committee note following section (k), which defines "holiday" in the Rules, is amended to include Juneteenth.

Mr. Wells informed the Committee that the proposed amendment adds Juneteenth National Independence Day to the list of state holidays listed in a cross reference following section (k). The change is necessitated by Chapter 64 (HB 227), 2022 Laws of Maryland. There being no motion to amend or reject Rule 1-202, it was approved

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