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 Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on June 17, 2010.

Members present:

Hon. Alan M. Wilner, Chair
Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Albert D. Brault, Esq.
Hon. Ellen L. Hollander
John B. Howard, Esq.
Harry S. Johnson, Esq.
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
Anne C. Ogletree, Esq.
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Sen. Norman R. Stone, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Jim Haigh, MACPA
George Wilbanks, East County Times
Scott Daugherty, The Capital
Ward B. Coe, Esq., Chair, Standing Committee on Pro Bono Legal Services
Brian L. Zavin, Esq., Office of the Public Defender, Appellate Division
Jason Hessler, Esq., Board of Governors, Young Lawyer Section, Maryland State Bar Association,
P. Tyson Bennett, Esq., Chair, Rules of Practice Committee, Maryland State Bar Association
Kalea Clark, Esq., Washington Post
James McLaughlin, Washington Post
Pam Q. Harris, Court Administrator, Circuit Court for Montgomery County
Suzanne James, Court Administrator, Circuit Court for Howard County
Michael S. Phelps, Washington Examiner
Hon. Dennis M. Sweeney, Circuit Court for Howard County (retired)

Alice Neff Lucan, Esq.
Rebecca Snyder, The Daily Record
Katy O'Donnell, Esq., Office of the Public Defender
Chris Flohr, Esq.

The Chair convened the meeting. He said that he was happy to announce that the Court of Appeals had reappointed all of the Committee members who were up for reappointment: the Vice Chair, Judge Norton, Judge Hollander, Ms. Ogletree, Mr. Brault, Mr. Johnson, Mr. Michael, and Mr. Leahy. The Court adopted the Title 14, Foreclosure Rules with only a couple of changes, most of which were inconsequential. One that was substantive was that the Court deleted the provision permitting a court to reject a mediated agreement that called for a stay or delay of the judicial proceeding. The Rule provides that if there is a mediated agreement, the court shall take reasonable steps to enforce the agreement. This was the most substantive change that the Court made.

The Chair noted that one item has been added to the agenda that needs quick action. The Chair presented Rule 16-901, State Pro Bono Committee and Plan, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 900 - PRO BONO LEGAL SERVICE

AMEND Rule 16-901 to delete the limitation on the number of members who may serve on Standing Committee on Pro Bono Legal Service; to provide that a maximum of three Circuit Court judges may serve on the

Standing Committee; to delete the requirement that there be three nominees for each Circuit Court position; to provide that a maximum of three District Court judges may serve on the Standing Committee; to delete the requirement that there be three nominees for each District Court position; to specify that the Legal Aid Bureau, Maryland Volunteer Lawyers Service; Pro Bono Resource Center, and one other pro bono referral organization have representatives on the Standing Committee; to delete the requirement that the representative from a legal services provider organization not serve on a Local Pro Bono Committee; to permit the Standing Committee to recommend appointments to the Court of Appeals; and to provide that the terms of Standing Committee members shall be three years and may be renewed; as follows:

Rule 16-901. STATE PRO BONO COMMITTEE AND PLAN

(a) Standing Committee on Pro Bono Legal Service

(1) Creation

There is a Standing Committee of the Court of Appeals on Pro Bono Legal Service.

(2) Members

The Standing Committee consists of ~~13~~ the following members appointed by the Court of Appeals~~, as follows~~:

(A) eight members of the Maryland Bar, including one from each appellate judicial circuit and one selected from the State at large;

(B) ~~a circuit court judge~~ a maximum of three Circuit Court judges selected from ~~among at least three~~ nominees submitted by the Conference of Circuit Judges;

(C) ~~a District Court judge~~ a maximum of three District Court judges selected from ~~at~~

~~least three~~ nominees submitted by the Chief Judge of the District Court;

(D) the Public Defender or a designee of the Public Defender;

(E) a representative ~~from a legal services provider organization who does not serve on a Local Pro Bono Committee~~ from the Legal Aid Bureau, Maryland Volunteer Lawyers Service, Pro Bono Resource Center, and one other pro bono referral organization; and

(F) a member of the general public.

(3) Terms; Chair

The ~~Court of Appeals shall fix the~~ term~~s~~ of ~~the~~ each member~~s~~ is three years. A member may be reappointed to serve one or more additional terms. ~~and~~ The Court of Appeals shall designate one of the members as the chair.

(4) Consultants

The Standing Committee may designate a reasonable number of consultants from among court personnel or representatives of other organizations or agencies concerned with the provision of legal services to persons of limited means.

(b) Duties of the Standing Committee

(1) Required

The Standing Committee shall:

~~(1)~~ (A) develop standard forms for use by the Local Pro Bono Committees in developing and articulating the Local Pro Bono Action Plans and making their annual reports;

~~(2)~~ (B) recommend uniform standards for use by the Local Pro Bono Committees to assess the need for pro bono legal services in their communities;

~~(3)~~ (C) review and evaluate the Local Pro Bono Action Plans and the annual reports of

the Local Pro Bono Committees;

~~(4)~~ (D) collect and make available to Local Pro Bono Committees information about pro bono projects;

~~(5)~~ (E) at the request of a Local Pro Bono Committee, provide guidance about the Rules in this Chapter and Rule 6.1 of the Maryland Lawyers' Rules of Professional Conduct;

~~(6)~~ (F) file with the Court of Appeals an annual report and recommendations about the implementation and effectiveness of the Local Pro Bono Action Plans, the Rules in this Chapter, and Rule 6.1 of the Maryland Lawyers' Rules of Professional Conduct; and

~~(7)~~ (G) prepare a State Pro Bono Action Plan as provided in section (c) of this Rule.

(2) Permitted

The Standing Committee may make recommendations to the Court of Appeals concerning the appointment and reappointment of its members.

(c) State Pro Bono Action Plan

(1) Generally

Within three years after the effective date of this Rule, the Standing Committee shall submit to the Court of Appeals a State Pro Bono Action Plan to promote increased efforts on the part of lawyers to provide legal assistance to persons of limited means. In developing the Plan, the Standing Committee shall:

(A) review and assess the results of the Local Pro Bono Action Plans;

(B) assess the data generated by the reports required by Rule 16-903;

(C) gather and consider information pertinent to the existence, nature, and extent of the need for pro bono legal

services in Maryland; and

(D) provide the opportunity for one or more public hearings.

(2) Contents

The State Pro Bono Action Plan may include a recommendation for increasing or decreasing the aspirational goals for pro bono publico legal service set forth in Rule 6.1 of the Maryland Lawyers' Rules of Professional Conduct. The Plan should include suggestions for the kinds of pro bono activities that will be most helpful in meeting the need for pro bono legal service throughout the State and should address long-range pro bono service issues.

Committee note: Examples of long-range issues that may be addressed include opportunities for transactional lawyers, government lawyers, business lawyers, and in-house counsel to render pro bono legal service; opportunities for pro bono legal service by lawyers who are unable to provide direct client representation; "collective responsibility" for pro bono legal service when a law firm designates certain lawyers to handle only pro bono matters; and encouraging pro bono legal service among law students and in the legal academic setting.

(d) Publication

The Clerk of the Court of Appeals shall cause the State Action Plan submitted by the Standing Committee to be published in the Maryland Register and such other publications as the Court directs and shall establish a reasonable period for public comment.

(e) Consideration by the Court of Appeals

After the comment period, the Court of Appeals shall hold a public hearing and take appropriate action on the Plan.

Source: This Rule is new.

Rule 16-901 was accompanied by the following Reporter's Note.

> The proposed amendments to Rule 16-901 are based on the recommendations of the Standing Committee on Pro Bono Legal Services.

The Chair explained that the proposed change to Rule 16-901 was requested by the Standing Committee on Pro Bono Legal Services and was endorsed by the Honorable Robert M. Bell, Chief Judge of the Court of Appeals. He had requested that the Rules Committee discuss the change, which expands the membership of the Standing Committee on Pro Bono Legal Services by adding up to two more circuit court judges, two more District Court judges, and three legal service providers. The Commission is allowed to make recommendations to the Court as to the new members. Ward Coe, Esq., who is Chair of the Standing Committee on Pro Bono Legal Services, was present at the meeting.

Mr. Coe told the Rules Committee that his Committee had been in existence for eight years and had the support of the judges. The judges could see the problems with lack of representation firsthand, and they provide great leadership to the bar, encouraging attorneys to provide pro bono services. If the Committee is limited to one circuit court judge, and a District Court judge is elevated to the circuit court, that judge has to go off the Committee. The same problem exists if a master who is on the Committee is elevated to the District Court. His Committee is interested in the proposed amendment being adopted,

so that they can keep on the Committee some of the judges who have been extremely helpful. The other significant change is the addition of representatives from the Legal Aid Bureau, the Maryland Volunteer Lawyers Service, and the Pro Bono Resource Center, who are the major players in this. It seemed a little strange that the Office of the Public Defender had a representative automatically in the Rule from its inception, but these other organizations did not, so the Committee asked for representatives from these organizations and from one other pro bono referral agency.

The Chair commented that the request from Chief Judge Bell came in only a few days ago. There was no opportunity to send this to the Subcommittee. A motion is necessary to approve the proposed changes. Mr. Michael moved to approve the changes to Rule 16-901, and the motion was seconded.

Mr. Johnson asked whether the terms of the members of the Standing Committee are staggered. Mr. Coe replied that they have not been staggered, but they will be. The proposed change includes three-year terms that will be staggered. The Vice Chair remarked that the Rule provides that a member can be reappointed to serve one or more additional terms, so any member could serve indefinitely. Mr. Coe agreed with the Vice Chair.

The Chair called for a vote on the motion, and it passed unanimously. The Chair said that Rule 16-901 would be sent to the Court of Appeals in the next report of the Rules Committee.

Agenda Item 1. Continued reconsideration of a State-wide Rule on cell phones applicable to all Maryland courts - New Rule 16-110 (Cell Phones and other Electronic Devices) - Amendments to Rule 16-109 (Photographing, Recording, Broadcasting or Televising In Courthouses)

The Chair presented Rules 16-110, Cell Phones and Other Electronic Devices, and 16-109, Photographing, Recording, Broadcasting or Televising in Courthouses, for the Committee's consideration.

CELL PHONE AND ELECTRONIC DEVICE POLICY
PROPOSAL FOR CONSIDERATION

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE,

JUDICIAL DUTIES, ETC.

ADD new Rule 16-110, as follows:

Rule 16-110. CELL PHONES AND OTHER ELECTRONIC DEVICES

(a) Definition

In this Rule:

(1) Electronic Device

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

Committee note: Cameras that operate mechanically and record images using film,

rather than digital technology, are included in the definition of "electronic 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 (1) the building in which a circuit court or the District Court is located, or (2) if the court is in a building that is also occupied by county or State executive agencies having no substantial connection with the court, that part of the building occupied by the court.

(b) Generally

(1) Subject to inspection by court security personnel and the restrictions set forth in this section and sections (c), (d), and (e) of this Rule, a person may bring an electronic device into a court facility.

(2) Upon a finding that the circumstances of a particular case raise special security or privacy issues that warrant a restriction on the possession of electronic devices, the local administrative judge of the presiding judge may enter an order limiting or prohibiting the possession of electronic devices by members of the general public in a courtroom or other designated areas of the court facility. The order shall provide for the collection of the devices and for their return when the individual who possessed the device leaves the courtroom or other area. No liability shall accrue to the security personnel or any other court official or employee for any loss or misplacement or damage to the device.

(c) Use of Electronic Devices; Restrictions

(1) Rule 5-615 Order

An electronic device may not be used to facilitate or achieve a violation of an order entered pursuant to Rule 5-615 (d).

(2) Photographs and Video

Except as permitted in accordance with Rule 16-109, recording or transmitting a visual image in or from a court facility is prohibited.

Committee note: The prohibition set forth in subsection (c)(2) of this Rule includes still photography and moving visual images.

(3) Phone Calls; Text Messages; Other Uses

Except in a courtroom, a jury deliberation room, or an area which, by order of the local administrative judge, the use of electronic devices is limited or prohibited, an electronic device may be used in a court facility for the purpose of sending and receiving phone calls and text messages and for any other lawful purpose not otherwise prohibited. The device shall be used in a manner that does not interfere with court proceedings or the work of court personnel.

Committee note: An example of a use prohibited by subsection (c)(3) is a loud conversation on a cell phone in a hallway near the door to a courtroom or in the Clerk’s office.

(d) In Courtroom

(1) Except with the express permission of the presiding judge or as otherwise permitted by this Rule or Rule 16-109, all electronic devices inside a courtroom shall remain off and no electronic device may be used to receive, transmit, or record sound, visual images, data, or other information.

(2) Subject to subsection (b)(2), the Court shall liberally allow the attorneys in a proceeding currently being heard and persons associated with the attorney to make reasonable and lawful use of an electronic

device in connection with the proceeding.

(e) Jury Deliberation Room

Except with permission from a judge of the court, an electronic device may not be brought into any room designated as a jury deliberation room.

Committee note: Because electronic devices may not be brought into any jury deliberation room, the administrative judge may require that jurors leave such devices in a place designated by the administrative judge, either in or outside the courtroom.

(f) Notice

(1) Notice of the provisions of sections (b), (c), (d), (e), and (g) fo this Rule shall be:

(A) posted prominently outside each entrance to the court facility and each security checkpoint within the court facility;

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

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

(2) Notice that the possession and use of cell phones and other electronic devices may be limited or prohibited in designated areas of the court facility shall be included prominently on all summonses and notices of court proceedings.

(g) Violation of Rule

An electronic device that is used in violation of this Rule 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. An individual who willfully violates this Rule or any reasonable limitation imposed by the local administrative judge or the presiding judge may be found in contempt of court and sanctioned in accordance with the Rules in Title 15, Chapter 200.

Source: This Rule is new.

Rule 16-110 was accompanied by the following Reporter's Note.

The Chief Judge of the Court of Appeals has requested that the Rules Committee transmit to the Court for its consideration a State-wide Rule on cell phones. The Committee considered draft proposals at its March 2010 and April 2010 meetings. Those proposals generally prohibited cell phones and other electronic devices from being brought into a court facility, with certain exceptions.

At the April meeting, the Committee voted to request a proposal that generally allows cell phones and other electronic devices to be brought into a court facility, with certain restrictions on the use of the devices once they are inside the facility. Proposed new Rule 16-110 has been drafted in accordance with the directive.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE,

JUDICIAL DUTIES, ETC.

AMEND Rule 16-109 to provide that possession of an electronic device in a court

facility is governed by Rule 16-110, as follows:

Rule 16-109. PHOTOGRAPHING, RECORDING, BROADCASTING OR TELEVISING IN COURTHOUSES

. . .

b. General Provisions.

1. Unless prohibited by law or this Rule, extended coverage of proceedings in the trial and appellate courts of this State is permitted in accordance with this Rule.

Committee note: Code, Criminal Procedure Article, §1-201 prohibits extended coverage of criminal proceedings in a trial court or before a grand jury.

2. Outside a courtroom but within a courthouse or other facility extended coverage is prohibited of persons present for a judicial or grand jury proceeding, or where extended coverage is so close to a judicial or grand jury proceeding that it is likely to interfere with the proceeding or its dignity and decorum.

3. Possession of ~~cameras and recording[s] or transmitting equipment, including camera-equipped cellular phones or similar handheld devices capable of capturing images, is prohibited in all courtrooms, jury rooms, and adjacent hallways except when required for extended coverage permitted by this rule or for media coverage not prohibited by this rule~~ an "electronic device" in a "court facility" as those terms are defined in Rule 16-110 is governed by that Rule.

4. Nothing in this Rule is intended to restrict in any way the present rights of the media to report proceedings.

5. Extended coverage shall be conducted so as not to interfere with the right of any person to a fair and impartial trial, and so as not to interfere with the dignity and

decorum which must attend the proceedings.

6. No proceeding shall be delayed or continued to allow for extended coverage, nor shall the requirements of extended coverage in any way affect legitimate motions for continuance or challenges to the judge.

7. This Rule does not apply to:

(i) The use of electronic or photographic equipment approved by the court for the perpetuation of a court record;

(ii) Investiture or ceremonial proceedings, provided, however, that the local administrative judge of a trial court and the Chief Judge of an appellate court shall have complete discretion to regulate the presence and use of cameras, recorders, and broadcasting equipment at the proceedings.

(iii) The use of electronic or photographic equipment approved by the court to take the testimony of a child victim under Code, Criminal Procedure Article, §11-303.

. . .

Rule 16-109 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 16-109 coordinates the Rule with proposed new Rule 16-110, so that Rule 16-109 does not appear to prohibit a possession that Rule 16-110 otherwise permits.

The Chair told the Committee that the Court of Appeals had asked them to submit a proposed uniform rule. The Court will ultimately decide what the rule should provide, or they may decide that there should not be a rule. The Committee considered a draft of a proposal at the April meeting. The Committee voted

to submit a rule allowing cell phones to be brought into the court facilities subject to certain limitations, conditions, and restrictions controlling their use rather than their possession in courtrooms and other designated places within the courthouse. In conformance with that policy decision of the Committee, Rule 16-110 was redrafted.

The Chair said that he would briefly review the changes. Section (a), which contains definitions, was not changed. Subsection (b)(1) is the general rule that allows these devices in, subject to inspection by the security personnel and the restrictions set forth in sections (c), (d), and (e). Subsection (b)(2) allows the administrative judge or the presiding judge to restrict the possession by members of the general public if the circumstances of a particular case raise special security or privacy issues. This was intended to account for those special situations in which security or privacy issues become paramount because of particular circumstances. If the court enters an order limiting or prohibiting the possession of electronic devices under subsection (b)(2), the order must provide somehow for the collection and return of these devices. That will ensure that this procedure is not followed very often.

The Chair said that section (c) addresses the use of electronic devices generally once they are in the courthouse. They cannot be used to facilitate a violation of a sequestration order; they cannot be used to take photographs. They can be used to send and receive information or for any other lawful purpose,

except in courtrooms, jury deliberation rooms, and other areas designated by the administrative judge. The devices cannot be used in a manner that would interfere with court proceedings. An example of this would be someone standing right outside of the courtroom talking loudly on the cell phone. Section (d) pertains to the use of electronic devices in the courtrooms. Except with permission of the court, the devices must remain off. The Rule has a provision that asks the court to liberally allow attorneys to use the electronic devices. The Committee had discussed this in April. Ms. Suzanne James, Court Administrator for Howard County, had commented that this liberal use also be afforded to the self-represented litigants. This is an issue that the Committee will have to resolve.

The Chair pointed out that section (e) clarifies that the devices cannot be brought into a jury deliberation room without permission of the court. Section (f) provides for notice of these requirements. They have to be posted, and some explanation should be given on summonses and other court notices that the possible use of these electronic devices may be limited or prohibited in designated areas. The Chair stated that section (g) addresses violations. It allows for the confiscation of electronic devices, and if the violation was willful, the judge would have the ability to find someone in contempt. The Chair noted that conforming amendments that address cameras in the courtroom have been proposed for Rule 16-109.

Mr. Klein inquired as to the meaning of the phrase in

subsection (b)(2) that reads “by members of the general public.” Who is this intended to include? Who is not a member of the general public? The Chair responded that the thought was that the phrase excluded employees, attorneys, and anyone from the groups that were discussed at the April meeting. Mr. Klein questioned whether this included law enforcement personnel. The Chair noted that the administrative judge or the presiding judge would decide who could have these electronic devices. The Vice Chair asked whether the phrase “by members of the general public” is needed. It may be clearer without that language. Mr. Klein moved to delete the language “by members of the general public,” the motion was seconded, and it carried unanimously.

The Vice Chair pointed out that the Committee note following subsection (a)(1) provides that an old-fashioned type of camera is within the meaning of the definition of the term “electronic devices.” However, the definition states that the term includes a cell phone, computer, camera, or any other device that is capable of transmitting or receiving, and an old-fashioned camera is not capable of this. To some extent, the Committee note conflicts with the language of subsection (a)(1). One alternative would be to delete the word “other,” which appears after the word “any” and before the word “device” in subsection (a)(1). The Reporter remarked that this is what was intended. Mr. Klein suggested that the words “or recording” could be added, so that the language would be: “...capable of transmitting,

receiving, or recording messages, images...". By consensus, the Committee approved this change.

Judge Pierson referred to the language in subsection (d)(2) that reads: "...the Court shall liberally allow the attorneys in a proceeding currently being heard and persons associated with the attorney to make reasonable and lawful use of an electronic device...". He said that he assumed that this is intended to cover laptops and other devices. However, since the term "electronic device" also includes cell phones, this is a command using the word "shall" as opposed to the word "may," and the reach is so broad, he asked if it would be better if the Rule stated that the court "may" allow the attorneys to use the electronic devices. He interpreted the word "shall" to mean that the court has to let an attorney do whatever the attorney wants to do. The Chair disagreed with this interpretation. He pointed out that this language is intended to cover cell phones. The prior discussion had raised the issue of an attorney needing a cell phone to check his or her schedule if a case is being postponed. It is not intended to allow attorneys sitting in the audience in a courtroom to use a cell phone.

Judge Pierson reiterated that the word "shall" should be replaced by the word "may." The Vice Chair commented that the word "may" connotes that there are many times when attorneys are not going to be allowed to use their cell phones in connection with a case that is before the court. The general rule should be that attorneys are allowed to use cell phones with some

restrictions based upon the particular case. Is there a better way to word this provision? The Reporter remarked that the intention of this provision was to liberally let the attorneys use their laptops, because they do not use paper files any more, instead of the judge deciding that he or she prefers a paper file to a laptop. It would also allow the attorney to check his or her schedule by using an electronic device. It is not meant for the attorney to sit at the trial table ordering pizza on a cell phone. Judge Pierson stated that this is exactly the meaning of the Rule that he was striving for. The Vice Chair noted that this is a matter of style. Rule Rule could provide as follows: "Subject to subsection (b)(2), attorneys in a proceeding currently being heard and persons associated with the attorney may make reasonable and lawful use of an electronic device in connection with the proceeding subject to the court ordering otherwise." Judge Pierson agreed with this suggested language. The Chair pointed out that this language could allow an attorney to use the cell phone to order pizza. Master Mahasa said that this would not be a reasonable and lawful use.

Mr. Howard expressed the opinion that the language is appropriate as it appears in the Rule. The words "shall liberally allow" do not mandate the use of the phone. When the language is "shall usually allow" or "shall generally allow," the adverb qualifies it in a way that makes it non-mandatory. He referred to Fed. R. Civ. P. 15, Amended and Supplemental Pleadings, which provides that the court shall freely allow

amendment of pleadings. The problem with using the word “may” is that it does not capture the adverb “liberally” that is important. The word “may” sounds discretionary without any guidance. Judge Pierson remarked that he had no problem with the language “liberal use shall be allowed,” which sounds less mandatory than “the court shall allow.”

The Chair explained that the idea of this language was that the court should be in charge of this exception to subsection (d)(1), which states that electronic devices cannot be used unless the court permits. Subsection (d)(2) is the exception stating that the court shall liberally allow attorneys to do this. If this is structured as has been suggested, this would mean that attorneys have the right to use cell phones without the court’s permission. The Vice Chair inquired if this means that there would have to be court permission in every case. She thought that generally the rule would be that attorneys can use their electronic devices during a case, and the court could disallow this in a particular case.

The Chair referred to the scenario of the attorney who uses the laptop while a case is proceeding or uses a cell phone to check on his or her schedule. The Vice Chair commented that in her experience, attorneys sit down at the trial table with cell phones on their person. The Chair asked if the phones are turned off, and the Vice Chair replied affirmatively. The Chair stated that an attorney can have the phone in the courtroom as long as the phone is turned off. It is when the attorney would like to

use the phone that complicates the process.

Mr. Patterson suggested a middle ground for the language of subsection (d)(2), which would be that the word "shall" should be changed to the word "should." The Vice Chair remarked that she was going to suggest that, also. The federal rule language uses the word "should" more and more. Mr. Patterson said that it connotes the idea of what the court should be able to do. It does not mandate the court to allow the electronic devices, and it does not indicate that the court may refuse to allow them for whatever reason. It is a question of how the phones are used, and it is a directive word to the court as opposed to a mandate or a prohibition. Mr. Patterson moved that the word "shall" be changed to the word "should," and the motion was seconded.

Ms. Smith asked whether self-represented litigants are being considered under this provision. The Chair responded that the problem is that it is not known who the self-represented litigants are. To accord them the same privilege as attorneys, who are officers of the court, is questionable. The Reporter noted that the judge can always permit a person to use a cell phone or a laptop. The Chair told the Committee that the issue of self-represented litigants with cell phones should be deferred. The Reporter noted that she could not think of any other Rule that uses the word "should" in the text of the Rules themselves. The word usually appears in the Committee notes only. The Vice Chair said that the language "should liberally" has a clear meaning. Mr. Klein asked whether the word

"ordinarily" could be used to indicate the proper meaning. The Chair asked if the word "ordinarily" should be substituted for the word "liberally." He added that there was a motion on the floor to substitute the word "should" for the word "shall." He called for a vote on the motion, and it failed on a vote of four in favor and seven opposed.

Mr. Klein moved that the word "liberally" should be changed to the word "ordinarily." The motion was seconded. The Vice Chair asked whether the word "ordinarily" has the same meaning as the word "liberally." She expressed the view that the word "liberally" means that this shall generally be true. The two words do not mean exactly the same thing. Judge Pierson remarked that since the two words do not have the same meaning, he was in favor of the word "ordinarily." Mr. Klein said that he had no problem with the word "liberally," so he withdrew his motion. Judge Pierson renewed the motion to substitute the word "ordinarily" for the word "liberally." The motion was seconded. Judge Hollander asked whether the motion would have to be rejected to go back to the original wording of the Rule. The Chair replied that if the motion carries, the word would be "ordinarily," but if it failed, the word would remain as "liberally." The Chair asked for a vote on the motion, and it failed. Mr. Michael inquired if the phrase "except for good cause shown" would be appropriate. The Chair said that the judges can handle this.

Mr. Johnson referred to the language in the Committee note

following section (e), which read: "...the administrative judge may require that jurors leave such devices in a place designated by the administrative judge...". He asked whether the words "or presiding judge" should be added after the words "administrative judge," since the presiding judge is allowed to make decisions about cell phones, and also, the administrative judge may not know anything about this. The Chair explained that the thought was that the administrative judge should be the one who requires that jurors leave the electronic devices in a place designated by the administrative judge. The cell phones cannot be brought into the jury deliberation room, and once the jurors have been impaneled, they cannot have them in the courtroom. The phones would have to be collected, because the jury goes back and forth into the deliberation rooms. There has to be a method for collecting the phones. The presiding judge could require that the phones be left on the clerk's table.

Mr. Johnson noted that his suggested change would not preclude the administrative judge from handling this, because the reference to the administrative judge would be left in the Rule. The Rule would provide that the administrative judge designates the area where the electronic devices go, but the administrative or the presiding judge may require the jurors to leave the electronic devices in a place designated by the administrative judge. The administrative judge would not necessarily know that jurors are in a particular courtroom or know when they are going to deliberate, so the presiding judge may want to have some

control over this. By consensus, the Committee agreed with Mr. Johnson's suggested change.

Mr. Brault said that he thought that the intent of the Rule was that when the jury goes to deliberate, they have to turn their cell phones in, but not every time they go into the jury room. In Montgomery County, the jurors carry their phones all through the trial, but when they go to deliberate, the judge directs that all of the phones be left with the bailiff or some other personnel. The jurors cannot take the phones in while they are deliberating. Is the Rule providing that one can never have a cell phone in a room where the jury goes all through the trial, or does this apply only when they deliberate? The Chair answered that this is a policy issue. The intent was that the electronic devices should not be in the jury deliberation room at all. Should this be restricted only to the time when the jury is actually deliberating? Mr. Brault remarked that if the phones are restricted any time the jury is in the deliberation room, this will change the longstanding practice in Montgomery County. Judge Pierson agreed, noting that the jury deliberation room is the same room they use all through the trial in Baltimore City.

The Chair inquired if the restriction should be limited to only when the jury is deliberating. Judge Pierson pointed out that another way to address this is by a Committee note defining a "jury deliberation room" as a room the jury uses after they retire to deliberate. The Chair cautioned that this restriction applies to the jury, but no one else should be bringing in

electronic devices into the jury deliberation rooms. The text of section (e) provides that the devices cannot be brought into the jury deliberation room at all. There is a danger that an electronic device can be used to broadcast proceedings. Mr. Brault referred to the language in the Committee note that reads: "...the administrative judge may require that the jurors leave such devices...". He did not think that the Rule contemplated someone bugging the jury rooms. The Chair said that this is what the text of section (e) is intended to cover. Mr. Brault added that if the Rule intends to prohibit jurors from keeping their electronic devices every time they go into the jury room, the devices will be sitting around the courtroom a fair amount of time. Judge Pierson commented that this could be covered by the phrase: "except with permission of the court."

Mr. Patterson asked what happens to the electronic devices when the jury goes in to deliberate. Mr. Brault answered that they are put on the table where all of the exhibits are. They are collected by the clerk or the bailiff and stored until the jury reaches a verdict, and the devices are given back to their owners. Mr. Patterson inquired why this cannot be done when the jurors are impaneled until after they deliberate. Mr. Michael answered that this would be cutting the jurors off from using e-mail during the course of the trial and during their breaks. Mr. Patterson asked if the purpose of the Rule is to prevent jurors from using the electronic devices improperly during the course of the trial or during the breaks. Mr. Michael remarked

that if the concern is that jurors are looking at information that they should not be looking at, it will not be solved by taking away the electronic devices, because the jurors usually look at the information at night when they are home. Most jurors are not bold enough to look at information right in front of court personnel. The Chair commented that each circuit court handles this a little differently.

Mr. Shellenberger expressed the opinion that it is impractical to constantly collect the phones as the jurors go in and out. Jurors often have so much down time. It is already an inconvenience for them to have to sit for jury duty for a number of days without access to their e-mail to conduct their business or communicate with their children. He suggested that at the end of the body of section (e), the language could be "...brought into any room designated as a jury deliberation room during deliberations." The intent is to prevent jurors from any unlawful communications during deliberations. If the jurors are going to search the internet, they will do so whether the judge instructs them not to or does not instruct them because they do not have their cell phone. The practical solution is to restrict the devices during jury deliberations. The Vice Chair moved that the words "during deliberations" be added at the end of section (e). The motion was seconded, and it passed unanimously. The Vice Chair said that the Committee note may need revision. Mr. Howard pointed out that the Committee note is no longer necessary. By consensus, the Committee agreed to delete the

Committee note.

Judge Pierson noted that subsection (f)(1)(A) states that notice of the provisions of sections (b), (c), (d), (e), and (g) shall be posted prominently outside of each entrance to the court and each security checkpoint. He agreed with the idea that there should be some notice, although he did not think that there was any other provision in the Rules of Procedure that pertains to the architectural makeup of court facilities. He expressed the concern that this language would make the courthouse look like Department of Defense facilities. He suggested that the Rule would be more flexible if it provided that notices shall be disseminated or posted by the court in such a manner as to convey the information. The Vice Chair suggested that the language could be "notice shall be posted prominently within the court facilities." This could be determined by the various courts.

The Chair commented that it may be preferable to post the notice outside of the court facilities. The Vice Chair remarked that probably most courts would do this anyway. Mr. Michael suggested that the language could be: "...posted prominently outside and within the court facilities." Mr. Brault expressed the opinion that plastering notices on the walls of the courthouse defaces the building. Ms. Ogletree pointed out that this could go in the same place where all of the other legal notices are placed. Mr. Brault said that he did not remember seeing notices on the outside wall of the courthouses that he has been in.

The Vice Chair suggested that the language could be: “the notice should be posted prominently at...”. Judge Pierson suggested the following language: “The court shall give notice of the provisions of this Rule in a manner designed to convey to the public...” or something similar to this. It can be left up to the courts to determine how to give notice. The Chair expressed the view that this is a little too vague. The notice should be posted prominently, so that people can see it. The Reporter said that several concepts are working together. Someone can leave the cell phone home if he or she does not like the fact that the court can restrict its use. One would have to be aware that if he or she violates the rules or if it were a particularly sensitive case, the cell phone could be confiscated. The public needs to have notice that if they were to bring in their phones, they would be subject to all of these restrictions. If the phone is confiscated, there needs to be a no-liability provision tied in with the notice. The Chair added that the intent was not to put the whole Rule into the notice.

Judge Norton questioned why the notice has to be on the exterior of the building if cell phones are allowed to be brought in. It is not like someone would have to bring the phone back to his or her car. Why is it not sufficient to post the notice at the security checkpoints? There are buildings where the court is just one of many tenants in it. No one needs to be notified about cell phones until he or she gets to the location of the court. It would be sufficient to place the notice at or near the

security checkpoint before the person enters the court facility. There is no purpose in putting the notice outside of the building. Judge Love suggested that the notice could be put "at each entrance." The Vice Chair moved that the language should be "...posted prominently at the court facility." The motion was seconded, and it passed on a majority vote.

The Vice Chair referred to subsection (c)(2), noting that the tagline reads "Photographs and Video." She then referred to the language that reads: "...transmitting a visual image...," and she asked if this language should be "...transmitting a photograph or video...". The Chair commented that the word "video" may not cover all of the digital devices. The Vice Chair suggested the language "photograph, video, or other visual image." By consensus, the Committee agreed to the Vice Chair's suggestion.

The Vice Chair noted the language in subsection (c)(3), which reads "...phone calls and text messages...," and she asked why the word "e-mail" was not part of this phrase. The Reporter reiterated that taking photographs is prohibited. Mr. Michael pointed out that expanding on this may require references to social networking, such as Twitter. He inquired if there is a definition for "electronic information" in the Rules. Mr. Klein answered that there is no definition, because it is too difficult to formulate. The Vice Chair agreed that it might be difficult to expand this too much, but it makes no sense to refer to "text messages" and not to "e-mail," which is very common. The Chair

suggested that the word “text” could be changed to the word “electronic.” By consensus, the Committee agreed with this suggestion.

The Chair said that Rule 16-110 was approved subject to the amendments that were made at the meeting. Judge Hollander observed that there was a typographical error in the Rule. The Reporter noted two typographical errors, one in subsection (f)(1), which is that the word “fo” should be the word “of” and one in subsection (b)(2), which is that the word “of” after the word “judge” and before the word “the” should be the word “or.”

The Chair asked if there was a motion to send Rule 16-110 and Rule 16-109 to the Court of Appeals. Mr. Michael moved to do so, the motion was seconded, and it passed with two opposed.

Agenda Item 2. Reconsideration of a proposed amendment to Rule 1-202 (Definitions), adding a definition of “newspaper of general circulation”

The Chair told the Committee that he had received a message from Alice Neff Lucan, Esq., who represents newspapers that are not paid subscription newspapers, asking to speak in May with respect to the Committee note that was in Rule 14-210, Notice Prior to Sale, one of the foreclosure rules. The definition of “newspaper of general circulation” had been taken out of the Rule, and it was put into a Committee note with the understanding that if a general definition were adopted for Title 1, the Committee note would be deleted. Ms. Lucan had asked to address the Committee with respect to this Committee note in Rule 14-210.

The Chair had told her that the Foreclosure Rules had to go to the Court as an emergency and would not be published for comment. No changes were going to be made to the Rules except for the changes required by the new statute, Code, Real Property Article, §7-105.1. He said that she and anyone else could address the Committee in June.

Ms. Lucan introduced her client, Michael Phelps, who had been in publishing in the U.S. for 40 years and had been responsible for launching The Washington Examiner in Washington, D.C. and a similar newspaper in Baltimore. The newspaper in Baltimore had folded, but The Washington Examiner continues to gather considerable strength especially in reporting. Ms. Lucan distributed the current edition to the Committee members. The newspaper is not a unique business model, but it is unusual, because it is free. It is distributed on Thursdays and Sundays to homes. It is distributed six days a week by hawkers and also distributors. There is no significant difference between The Washington Examiner and any paid newspaper that carries legal advertising in Maryland.

Mr. Phelps thanked the Committee for their time. He said that he had been in the newspaper business for not quite 40 years. He had worked in almost every job in the business, including as a reporter, news editor, managing editor, assistant to the publisher, and publisher.

Mr. Phelps said that The Examiner is an unusual newspaper. It really is a unique business model in a way. When he came into

the newspaper business, he had considered various types of newspapers including trade publications, real estate publications, and publications that printed community press releases and school lunch menus. When Philip Anchers decided that he wanted to start The Examiner, he went to Mr. Phelps' supervisor and asked him to come up with a superior model that works and serves advertisers like the Southwest Airlines of newspaper publishing.

Mr. Phelps commented that for years, he and other legacy newspaper publishers would assign major multi-million dollar research projects to research firms. What they heard was what readers wanted, but they ignored this, because they felt that they knew what was best. They were more high-handed with advertisers. Their relationship with advertisers had been confined to sending them a letter informing them of a rate increase. They did all of this because they could get away with it. With the advent of the web and the increase in the number of television stations, they no longer had this luxury. The legacy newspapers had lost many of their younger readers. The average reader of a metropolitan newspaper in this country is in his or her upper 50's. It became a mission to try to reach younger readers of ages 25 to 50.

The best way to accomplish this according to Mr. Phelps is by having free newspapers and delivering them to the readers by design and not by accident. His newspaper is delivered on Thursday and Sunday. He and his colleagues looked at the group

of 25-54 year-olds who read the newspapers. About 190,000 read them on Thursdays and about 230,000 on Sundays. Monday through Friday, they publish a street edition aimed at even younger readers, young urban professionals who ride the Metro. He felt that his newspaper compares favorably with The New York Post or The Chicago Sun-Times.

Mr. Phelps observed that his newspaper is about 65% advertising. Benjamin Franklin engineered a second-class permit many years ago to subsidize newspapers in this country, so that the public can be well-served, and the permit requires that the newspaper cannot exceed 75% advertising. His newspaper beat this standard handily and not just with wire copy. A look through the newspaper reveals that it has a substantial local news staff and local commentary staff. The newspaper published today reported that six of their local reporters who were in competition with The Washington Post, The Washingtonian, and other Washington media were honored with first, second, and third prize awards on Tuesday night from the Society for Professional Journalists. Last night at the Kennedy Center, he and his wife attended the Bradlee awards. Two of the winners of these awards were Michael Barone, who is the senior political commentator for The Examiner and Paul Gigot, the editor of the editorial page of The Wall Street Journal. These awards carry with them a $250,000 stipend.

Mr. Phelps said that he brought copies of today's Examiner for the Rules Committee to show them that, except for having no cover price, nor a second-class permit, he publishes a general

circulation newspaper, the kind with which everyone is familiar. It contains a great amount of news of local government which is located right up front in the paper, not after the national or international news. There is news from local entertainment, local business, and local weather. The Audit Bureau, which audits paid newspapers, allows for legacy newspapers to sell for as low as a penny. The legacy group newspapers can consist of as much as 75% advertising. What makes The Examiner different from The Washington Post, The Baltimore Sun, The Daily Record, or The Washington Times? After only a couple of years of publication, he and his staff have found that 90% of the people who get The Examiner say that they are reading it. The average reader read it about 4 out of 6 times a week.

The Chair noted that beginning at page 49 of today's Examiner, many of the legal notices seem to be from Virginia. Mr. Phelps responded that both Virginia and the District of Columbia allow free newspapers to publish legal notices. They have many satisfied customers in that particular category. Mr. Maloney pointed out that what is at the heart of this issue is Code, Article 1, §28, which seems to prevent The Examiner from being a newspaper of general circulation because it requires the newspaper to be sold. He had been told that representatives of The Examiner went to the General Assembly either last year or the year before to try to get that changed and were not successful. Mr. Phelps responded that he had not been successful and had been opposed by his own press association, whose board he serves on,

and by The Post, The Sun, and The Daily Record.

Mr. Maloney said that it appeared that Mr. Phelps was making an open appeal to the Rules Committee to disregard the statute based upon the separation of powers doctrine and the inherent power of the court to make its decision notwithstanding what the legislature has done. Mr. Phelps agreed that this was his point. He added that he believed in the separation of powers. It is the reason that our country is as great as it is, and it is the reason that the government works, because the courts do not necessarily do what the legislature wants them to do, and vice versa.

Mr. Maloney inquired if the representatives of The Examiner had abandoned their efforts to change the statute. Mr. Phelps answered that they will be back before the legislature next session to try again. Three years ago, the law in Virginia was changed to allow his newspaper to be categorized as a newspaper of general circulation. Mr. Johnson inquired whether Mr. Phelps had seen the letter from The Washington Post on this issue. Mr. Phelps responded affirmatively. Mr. Johnson quoted from page 2 of the letter: "...The Examiner's website, for example, explains to potential advertisers that its print circulation is not aimed at the general public but is delivered to 'carefully selected, high-sales potential households'...". This seems to be inconsistent with what Mr. Phelps had just told the Committee. It indicates that instead of a newspaper of general circulation, the audience that is targeted is high-sale potential households

in upscale neighborhoods. Mr. Phelps said that they aim their home delivery of newspapers to people that advertisers are trying to reach. The street edition of the newspaper is available on 1200 news racks and through 90 hawkers throughout the entire metropolitan area.

Mr. Maloney asked about delivery in Prince George's and Montgomery Counties. Based on Mr. Johnson's question, can it be presumed that in the more upscale Montgomery County neighborhoods, there would be home delivery, but in Prince George's County neighborhoods such as Seat Pleasant, Chillum, Hyattsville, and Fairmont Heights, there probably would not be home delivery of The Examiner? Mr. Phelps responded that he was not familiar with the geography, but his home delivery footprint matches up nicely with the paid circulation newspapers with which he competes. People who buy newspaper subscriptions in general are not low-income people. Mr. Maloney remarked that anyone who wishes to can subscribe to The Washington Post. What he had heard from Mr. Phelps was that there are a large number of neighborhoods that do not meet that demographic or economic profile who do not get home delivery of his newspaper. Mr. Phelps responded that this was correct. Mr. Maloney questioned as to where those neighborhoods are. Mr. Phelps replied that he did not have that information, but he would be able to obtain it later. He added that he was not that familiar with the Prince George's County neighborhoods.

Mr. Phelps said that when they had asked their readers why

they read The Examiner, the answer was that they liked it because it was free. They read it because it has local news and it was convenient and easy to get to. He referred to The Daily Record, which covers politics and business and publishes legal notices in Maryland. Is it a "newspaper of general circulation?" He cautioned about making assumptions. His newspaper is published six days a week. The Daily Record is published six days a week with a circulation of 15,000, which is roughly 10% of the daily circulation of The Examiner. The Vice Chair asked if he were referring to the paper copy of The Daily Record. Mr. Phelps replied affirmatively. The flag of The Daily Record indicates that it is aimed at business, law, and real estate communities like The Baltimore Business Journal or The Washington Business Journal. The Gazette is similarly aimed at politics and business and has a circulation of 20,000, which is about 1/7th of the daily circulation of The Examiner. There is not much information on sports and entertainment in either of the other newspapers.

Business journals, he said, do not seem to get legal notices, because people consider them to be a limited type of publication. The Washington Times has recently dropped local news, sports, entertainment, and information on schools. Its circulation is about 60,000, and the paper recently dropped out of the Audit Bureau circulation. The Washington market is about 5.1 million people. These other newspapers are focused on particular topic areas which take them out of the realm of general circulation. He added that he was not suggesting that

they should not be allowed to publish legal notices. However, he pointed out that because of the absence of one criterion on the part of his newspaper, he should not be eliminated from the opportunity to publish legal notices. The Committee should not rely on the fact that The Examiner is free. People get free news on the web, television, and radio. The only place people do not get news free any more is a paid-circulation newspaper. The exhibit he had showed that pertained to free newspapers in the State indicated that they are established and supported by leaders in the community. About 85% of the free newspapers in Maryland are owned by the Tribune Company or The Washington Post.

The Vice Chair inquired how one would differentiate The Examiner from the "junk" kinds of newspaper that come in the mail for free. The proposal is to allow newspapers that are not sold, but are free, to include legal advertising, such as foreclosure notices. How would The Examiner be distinguished from The Pennysaver which comes in the mail? Ms. Lucan replied that it is distinguished by referring to the rest of the statute in Maryland which describes what a newspaper is. It does not describe The Pennysaver, and in her brief, she has a citation that points this out very clearly. The Examiner and The Pennysaver cannot be described in the same category. She told the Committee that she had cited statutes in Virginia and in West Virginia, because they had been able to change the laws there that demonstrate how readership is proved, and the appropriate type of newspaper is obtained by describing it. For example, the newspaper employs a

full-time staff and publishes letters to the editor. Paragraph 5 of Code, Article 1, §28 can be marked out as well as the words "by sale" from paragraph 3, and this would be a description of a legitimate "newspaper of general circulation."

Mr. Phelps asked why his colleagues oppose his position. He referred to The Baltimore Sun, The Daily Record, The Washington Post, and The Washington Times and said that he would like to think that those newspapers are very concerned with affording due process to those people who are in danger of losing their homes, or it could be revenue-making that amounts to millions of dollars for those newspapers each year, an estimated billion dollars nationally for legal notices.

The reason that he wanted to publish Maryland foreclosure notices is because he believes that The Examiner has the appropriate characteristics to generate more notice to people who are down and out, because the papers are free and available from hawkers and from racks. They have been publishing legal notices for Virginia and the District of Columbia, and customers have been very satisfied. He has had no challenges to the legality of publishing the legal notices in his three newspapers. Legal notices of foreclosures enhance the competitive bidding of properties and because of that is a factor in determining home values. He said that he believed in a free marketplace and the freedom to compete. Those who oppose his petition do not believe in this. Of course, the revenue from the newspaper is affected. But this does not blight his cause nor that of the other papers.

The cause of The Examiner is the better one to reach more people. Other states have seen this, and Mr. Phelps expressed the hope that Maryland will catch up.

Mr. Patterson referred to Code, Article 1, §28, noting that the only part that is causing Mr. Phelps a problem is the requirement that a newspaper must be for sale. Mr. Phelps added that the requirement of a second-class permit is also a problem, because a second-class permit requires that the paper be for sale. Mr. Patterson observed that if the legislature eliminated the words "by sale" from the statute, it would also eliminate the second-class permit requirement. Without those two requirements, then The Examiner could publish legal notices. Mr. Phelps acknowledged this.

Mr. Klein inquired as to the circulation of The Examiner both at home and on the street. Mr. Phelps answered that his average daily circulation is 150,000, and on Thursday, the circulation is 190,000 at home, 100 single copies; on Sunday there are about 235,000 copies delivered at home and about 3500 single copies. The average street edition is a circulation of about 100,000. Master Mahasa asked if there is any way to determine how many of the papers are actually read. Mr. Phelps responded that they have employed an independent researcher to check readership. A couple of years ago, the readership was a little under 90%. The average of readership for free newspapers for the country is 77%.

Judge Norton inquired if there are other states that have

rules in conflict with the state law, which is what Mr. Phelps is asking the Rules Committee to approve. Ms. Lucan answered that she had not looked at how other states handle this issue. She had looked only at cases in Maryland, which are cited at the beginning of her brief. Those cases provide that the Court of Appeals has the power to control its Rules of Procedure. The post-memorandum challenge is to find a case on point. She had found a line of savings and loan cases which state that if there is a rule that is different from a statute, the rule prevails until the statute is changed. Judge Norton pointed out that the Committee has to make two policy decisions. One is whether it is a good idea to allow The Examiner to publish legal notices, and the second is whether the legislature has had its opportunity to make this decision.

Ms. Lucan commented that this is not simply a matter of making a policy decision. The point of Mr. Phelps' testimony was that there are changed circumstances. The free newspapers have evolved to the point that they are no different than the paid ones and may more effectively deliver notice to people than the paid newspapers do. The Washington Post is an excellent newspaper with broad circulation. Today a publisher of other newspapers is present and can talk to the Committee about the number of people he reaches in his community. He has a terrific ability to deliver notice about foreclosures. When Mr. Phelps read the description on the masthead of The Daily Record as to whom it circulates, it is upscale, affluent neighborhoods, but

this ignores the fact that The Washington Informer which circulates mostly to black people is one of the newspapers that would be allowed to carry legal notices if the Rule were changed. Mr. Phelps added that it is a distinguished, older, free newspaper in Baltimore. Ms. Lucan stated that she was not talking about a policy issue. The Committee and the Court should look at the changed circumstances whether the legislature considered it or not and decide whether there is an equal protection violation because the free newspapers do the job as effectively as the paid newspapers.

Mr. Phelps added that it is clear that the more competition there is, the less things cost. He had a chance to compare his rates to the rates of the other newspapers to which he had referred. Those people who have to pay for legal notices, whether it is the bank or a decedent's widow, are paying more than they have to if the marketplace is not competitive. Ms. Ogletree pointed out that it is the borrower who pays for foreclosure notices. Mr. Phelps remarked that whoever is paying would have to pay more in a non-competitive marketplace.

Mr. Brault inquired if Mr. Phelps and Ms. Lucan had contemplated litigation pertaining to their equal protection argument. Ms. Lucan answered that this had been contemplated, but it has not started. Mr. Phelps commented that he had met with the Attorney General about the matter, including possible litigation, and the Attorney General had suggested approaching the Rules Committee.

Mr. McLaughlin told the Committee that he was an attorney representing The Washington Post. He said that he had great respect for Mr. Phelps and for his newspaper. However, the fact that the statute explicitly includes an element requiring that a newspaper be for sale cannot be circumvented. The Court of Appeals cannot contradict a statute by implementing a rule of practice and procedure. The Chair responded that the Court can do so. Mr. McLaughlin said that he was not aware of any authority that would support this. The Chair added that the Court does not like to contradict statutes and tries not to, but it can do so if the matter involves practice and procedure in the courts.

Mr. McLaughlin noted that the legislature has authorized the Court of Appeals to adopt rules of practice and procedure that are consistent with the laws. Here, the statute expressly includes a sale element. It is inappropriate to ask the Rules Committee to revisit a legislative outcome that was contemplated by the legislature in the 2008 session. A bill was introduced in both the House and the Senate that would have removed the sale requirement from the definition of a "newspaper of general circulation." The Press Association testified in opposition to those bills which were ultimately not enacted.

Judge Hollander questioned as to what the rationale was that links the requirement that to be a newspaper of general circulation, it has to be sold. Mr. McLaughlin answered that a newspaper that is offered for sale to the general public can be

purchased by any member of the general public. Someone who wishes to receive The Examiner but is not living in a neighborhood that is served by The Examiner will not have access to the newspaper. Judge Hollander responded that her view is the opposite. A newspaper would be more likely to reach people when it is free than when it has to be paid for. Attorneys and business people are interested in The Daily Record, but it is a very small community, and the newspaper is fairly expensive. Many people do not even read newspapers. Why is it that it is more likely to be available if someone has to pay for the newspaper than if it is free? Mr. McLaughlin replied that anyone who is interested in it can avail themselves of it, such as through a subscription to The Washington Post. It is possible to receive it. Judge Hollander asked if it is not just as possible with something of the magnitude of The Examiner to be able to get it if someone would like it. Mr. McLaughlin answered that it is not impossible to get it, but the legislature has made a policy judgment that one element of the most effective means to access a newspaper is that it would be for sale.

Mr. Klein commented that he was struggling with the separation of powers argument. He grew up in Baltimore, then transplanted to Annapolis many years ago, and he has been a lifelong subscriber of The Baltimore Sun. Two weeks ago, he canceled his subscription, because in his view, the newspaper is not worth reading. He would prefer to get The Examiner at his home in Annapolis. He did not understand why being for sale has

anything to do with what a newspaper is. For purposes of notice to the public, the Court should be interested in reaching out to the public through the greatest number of avenues possible. The sale requirement is an artificial distinction that creates a trade barrier. The "sale" requirement is an impediment to giving notice. He had not heard an argument from the representatives of The Washington Post stating why he was wrong.

Mr. McLaughlin said that the policy issue is for the legislature to determine. The legislature has made a judgment, and this goes back to the separation of powers. The Chair stated that the Court of Appeals has constitutional authority to adopt rules of practice and procedure in the courts. Mr. McLaughlin remarked that if there is a constitutional challenge to this Rule, the appropriate mechanism for that challenge to be heard would be through a declaratory judgment or some other kind of litigation before the court. It is not an end run around the statutory provisions through the Rules Committee.

The Chair said that the Court can consider what it wants to do with practice and procedure in the courts in this State. If they feel that the legislature has somehow impeded what they deem appropriate, they can enact a rule that supersedes it. The legislature can come back and enact a statute that supersedes the rule, because they both have jurisdiction. The Vice Chair commented that the Committee, which has been involved in the rule-making process for a long time, believes that the Court of Appeals has the power to adopt a rule that differs from a

statute. Mr. McLaughlin said that he and his colleagues respectfully disagreed.

The Vice Chair noted that there is a great deal of case law that holds that the later adopted prevails. There is no need to argue this point, because the power to do this is different from the Committee's willingness to do it. She added that she has been on the Committee since 1980 and could recall the Committee recommending a rule that would make divorces easier and less expensive to obtain by summary judgment, which the Court adopted. The legislature was unhappy with this and immediately overturned that Rule. Her memory was that this major disagreement between the Committee and the General Assembly heightened the awareness of the Committee to avoid this kind of conflict. While the Court has the power to change the law and can do so if it chooses to, the Committee sparingly recommends to the Court of Appeals that it adopt a rule that is contrary to an existing statute.

Mr. Patterson remarked that Mr. McLaughlin's view was that the Court of Appeals does not have the authority to modify the law, and even if it does, it should follow what the legislature has said. Mr. McLaughlin agreed. Mr. Patterson inquired as to what the reasoning behind requiring a publication to be for sale as opposed to a newspaper, such as The Examiner, which seems in all respects to qualify, but for the fact that it is free. Mr. McLaughlin replied that a newspaper that is for sale is available to anyone who chooses to subscribe to it. Legal notices are more likely to reach the audience that the statute contemplates needs

to be reached through a newspaper that is for sale than through a free publication that is not for sale.

The Chair asked Mr. Phelps if he knew what the circulation of The Examiner was in Prince George's and Montgomery Counties. The Chair added that he was assuming that what Mr. Phelps was looking for based on what he had said is that if the change is made that Mr. Phelps had requested, The Examiner would qualify as a "newspaper of general circulation" at least in the Maryland suburban counties of Washington. Mr. Phelps answered that the circulation in those counties was about 90,000 for home delivery. The total circulation for D.C. and Maryland was 69,426 on Mondays, and on Thursdays, the total circulation was 155,000. The total for D.C. and Maryland on Sundays was 106,000. This did not include single copies. He did not have the statistics broken down by county, but he told the Chair that he would send him this information later.

Mr. Johnson commented that he would be interested in how the circulation breaks down by zip codes. What is on the website troubles him. He agreed with the argument that whether one likes The Washington Post or The Baltimore Sun, the opportunity to get it exists, but if The Examiner goes to "carefully selected, high-sales potential households" as the website provides, then this is not general circulation. He would like to see if there are neighborhoods in Prince George's or Montgomery Counties that are not upscale households that are getting home delivery of The Examiner.

Mr. Phelps pointed out that the home-delivered and street editions are different products. The street edition is available throughout Prince George's and Montgomery Counties for anyone who wants to get it, unlike the newspapers of his competitors which have to be purchased. Mr. Phelps stated that he had a far more egalitarian method of distribution than some of the other newspapers. He added that he would provide the locations of all of the racks, the hawkers, and the zip codes of The Examiner. Mr. Patterson inquired whether the edition of The Examiner that had been distributed at the meeting was the home or the street edition. Mr. Phelps replied that it was the home edition.

Master Mahasa remarked that she had known people who enjoy reading The Examiner. She asked how it had been distributed. Mr. Phelps responded that it had been distributed mainly through the racks and the hawkers. There had been some home delivery in Baltimore City, but most of it was outside of the city. Master Mahasa inquired if there had been any paid subscribers. Mr. Phelps answered that the newspaper had always been free. It was distributed to people whom the advertisers wanted to reach. It was tied to home ownership and to people who were the ages of 25 to 54. They had selected census block groups that had the predominance of those demographics present, and that is to whom the paper was delivered. The paper was closed down, because the advertisements did not pay enough. He had recommended to the owner of the newspaper to increase circulation in Washington and close down publication in Baltimore.

Judge Hollander inquired if Mr. Phelps thought that if he would have had revenue from these kinds of notices, he would have been able to revive the newspaper. Mr. Phelps responded that he would have revived the newspaper in Baltimore if the legislature had not turned down his request to change the law so that The Examiner could publish the notices. The Vice Chair asked whether the newspaper could be read online. Mr. Phelps replied affirmatively, explaining that the online reader is able to turn the pages electronically, and he noted that their website will have been visited by over three million visitors which is up from 180,000 in December of 2008. The Reporter inquired if the entire newspaper can be read online. Mr. Phelps answered in the affirmative.

Mr. Brault said that he had a question for Mr. McLaughlin about The Washington Post. Mr. Brault remarked that the cost of subscribing to The Post is getting more and more expensive. He recalled that it costs $68 for eight weeks. This is considerably more than it used to be. Is this affecting the number of people who are subscribing to this newspaper? Is The Post losing subscribers because their price is getting so high? Mr. McLaughlin answered that the price is getting high, because they are losing subscribers. Although the print circulation is down a little, it is still over 800,000 on Sundays and 600,000 weekdays. The owners of The Post reluctantly agreed to the increase in the newsstand price. Mr. Brault inquired if this is why the newspaper is thinner with not as much in it. Mr. McLaughlin

replied that the main reason that the newspaper does not have as much in it is because it has less advertising in it.

The Vice Chair commented that this discussion would be very different in 10 years, because as Judge Hollander had noted, mostly seniors prefer newspapers in print. The Vice Chair added that she reads all of her newspapers online and has done so for close to 10 years. She was sure that her daughter would never buy a newspaper. She pays for her online subscription to The Daily Record which is very inexpensive. The current discussion is necessary now, but it will become obsolete in the not-too-distant future.

Judge Norton remarked that newspapers are dying. He gets The Wall Street Journal delivered to his home six days a week for $9 a month. He agreed with the Vice Chair that in the near future, newspapers will only be online. There is clearly an evolution of what is occurring, and the question is when the Court is going to get involved, not whether. Mr. McLaughlin stated that he did not disagree with any of the discussion. He pointed out that these are determinations that the legislative body is best suited to make as a fact-finding body. It is not as if the legislature has not considered this issue in the past two years. It had been considered two years ago, as Mr. Phelps had acknowledged, when the legislature looked at the sale requirement.

The Chair said that the issue is whether the Committee should recommend to the Court of Appeals to adopt a rule that

would define the term “newspaper of general circulation” but would not include the requirement that it has to be for sale sent as second-class postage, on the theory that it would likely increase the efficacy of public notice. The Vice Chair is correct that the Court can do this if it chooses to, but the question is whether the Court should do so.

Ms. Lucan noted that Code, Real Property Article, §7-105.1 requires notice of a foreclosure to be published in a newspaper of general circulation in the county where the action is pending. There is definitely a requirement that the notice is published where it is needed. Ms. Ogletree responded that this is not exactly true. Alexander Jones, Esq., a former member of the Committee, had said that Somerset County had two newspapers. To obtain a liquor license, one would advertise in the other end of the county from where the person lived, so that no one saw the notice. This still happens. Ms. Lucan argued that subterfuge is different from being required by rule or statute. Ms. Ogletree stated that it had been required by rule or statute to be published in the newspaper in the county. In a friendly foreclosure, the mortgagor may not want the entire world to see it. Games can be played either way. Mr. Phelps commented that he understood this. The decision-makers who buy legal advertising will continue to buy whatever they bought in the past. The raw costs of advertising in The Daily Record are higher than in either his paper or The Post. Mr. Phelps expressed the view that people will try to make decisions based

on who they are trying to reach.

Mr. Haigh told the Committee that he was a government relations consultant to the Mid-Atlantic Community Papers Association who had also filed a brief. Just because a newspaper is free does not mean that one cannot get it by subscription. The Association was founded in 1955. Free newspapers are not necessarily a brand-new concept. Why did the legislature decide that these have to be sent by second-class mail? Fifteen years ago, it might have made sense that people only read what they pay for. From circulation audits and with the advent of many free papers in a digital world, this is not the case any more. In the past 10 or 15 years, the audits of free community newspapers have indicated that new standards have been adopted, and an entire industry has emerged with major advertisers. This is proof that the newspapers are doing what they should be doing, putting up a number of papers, and having a service that shows that readers are reading these free papers.

Mr. Haigh said that he was not aware of paid newspapers starting up in Maryland and in the rest of the country. Free newspapers have been starting up, but any time a paid paper is lost through consolidation or otherwise, that member of the market who publishes legal or public notice will not be replaced under the current laws, because it is not economically viable for a newspaper that relies on 80 to 85% of its revenues to come from advertising and 20% or less from subscription base. It needs to serve the broadest audience possible. It is simply not viable to

start up as a pay-to-read publication. There will not be publications in Maryland to replace any “for sale” newspapers that stop publishing.

The Vice Chair asked if Mr. Haigh had considered charging one cent for the newspaper so that it would fall within the language of the statute. Mr. Haigh replied that this would not fit within the laws as written, because the requirements for periodicals sent by U.S. second-class mail are that they do not have more than 75% advertising in more than half of the editions per year, and the publisher cannot charge less than half the price listed on the cover. The Vice Chair questioned as to where this is stated. Mr. Haigh responded that the Maryland statute uses the United States Postal Service as a proxy.

The Vice Chair inquired if Mr. Haigh was describing what it means to be “second-class matter.” Mr. Haigh answered affirmatively. The Association that he represents is under audits where the standards of the largest auditor of paid newspapers were 100% of the paid cover price, but 10 years ago it became 75% of the cover price, then 50% of cover price, then 25%. The Post Office requires more than a nominal rate, at least half of the cover price. The Vice Chair noted that Mr. Haigh’s point is that a free newspaper cannot fit within the definitions of the U.S. Postal Service, and he agreed. Mr. Klein inquired if the paper could establish a cover price of one cent. Mr. Haigh replied that the U.S. Postal Service requires a nominal fee, and this is open to other interpretations.

Ms. Lucan commented that the Post Office regulation appears in the Domestic Mail Manual. Section 700 pertains to what a periodical permit is. Mr. Phelps remarked that most metropolitan newspapers do not mail very many copies. The Audit Bureau of Circulations which audits the newspapers and which is the agency that big advertisers consult to find out the number of readers has stated that selling the newspapers for a penny makes them a paid newspaper. It would not work for the U.S. Post Office, but it works for the advertisers.

The Chair presented Rule 1-202, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 200 - CONSTRUCTION, INTERPRETATION, AND DEFINITIONS

AMEND Rule 1-202 to add a definition of "newspaper of general circulation" and to make stylistic changes, as follows:

Rule 1-202. DEFINITIONS

. . .

(r) Newspaper of General Circulation

"Newspaper of general circulation" means a newspaper as defined in Code, Article 1, §28.

~~(r)~~ (s) Original Pleading

"Original pleading" means the first pleading filed in an action against a

defendant and includes a third-party complaint.

~~(s)~~ (t) Person

"Person" includes any individual, general or limited partnership, joint stock company, unincorporated association or society, municipal or other corporation, incorporated associations, limited liability partnership, limited liability company, the State, its agencies or political subdivisions, any court, or any other governmental entity.

~~(t)~~ (u) Pleading

"Pleading" means a complaint, a counterclaim, a cross-claim, a third-party complaint, an answer, an answer to a counterclaim, cross-claim, or third-party complaint, a reply to an answer, or a charging document as used in Title 4.

~~(u)~~ (v) Proceeding

"Proceeding" means any part of an action.

~~(v)~~ (w) Process

"Process" means any written order issued by a court to secure compliance with its commands or to require action by any person and includes a summons, subpoena, an order of publication, a commission or other writ.

~~(w)~~ (x) Property

"Property" includes real, personal, mixed, tangible or intangible property of every kind.

~~(x)~~ (y) Return

"Return" means a report of action taken to serve or effectuate process.

~~(y)~~ (z) Sheriff

"Sheriff " means the sheriff or a deputy sheriff of the county in which the proceedings are taken, any elisor appointed to perform the duties of the sheriff, and, with respect to the District Court, any court constable.

~~(z)~~ (aa) Subpoena

"Subpoena" means a written order or writ directed to a person and requiring attendance at a particular time and place to take the action specified therein.

~~(aa)~~ (bb) Summons

"Summons" means a writ notifying the person named in the summons that (1) an action against that person has been commenced in the court from which the summons is issued and (2) in a civil action, failure to answer the complaint may result in entry of judgment against that person and, in a criminal action, failure to attend may result in issuance of a warrant for that person's arrest.

~~(bb)~~ (cc) Writ

"Writ" means a written order issued by a court and addressed to a sheriff or other person whose action the court desires to command to require performance of a specified act or to give authority to have the act done.

Source: This Rule is derived as follows:

. . .

Section (r) is new.

Section ~~(r)~~ (s) is derived from the last sentence of former Rule 5 v.

Section ~~(s)~~ (t) is derived from former Rule 5 q.

Section ~~(t)~~ (u) is new and adopts the concept of federal practice set forth in the 1963 version of Fed. R. Civ. P. 7 (a).

Section ~~(u)~~ (v) is derived from former Rule 5 w.

Section ~~(v)~~ (w) is derived from former Rule

5 y.
Section ~~(w)~~ (x) is derived from former Rule 5 z.
Section ~~(x)~~ (y) is new.
Section ~~(y)~~ (z) is derived from former Rule 5 cc.
Section ~~(z)~~ (aa) is derived from former Rule 5 ee.
Section ~~(aa)~~ (bb) is new.
Section ~~(bb)~~ (cc) is derived from former Rule 5 ff.

Rule 1-202 was accompanied by the following Reporter's Note.

> The issue of defining the term "newspaper of general circulation" arose in the context of Rule 14-210, Notice Prior to Sale, addressing publication of a notice in a foreclosure action. In order to clarify the meaning of the term, the General Provisions Subcommittee recommends (1) adding to Rule 1-202 a definition of the term "newspaper of general circulation," which refers to the definition in Code, Article 1, §28, and (2) amending Rules 6-208, 9-107, and 15-901 to either conform to this term or to clarify the location of circulation of the newspaper that is referred to in the Rule. With the addition of the definition, the Committee note in Rule 14-210 after section (a) is no longer necessary and is proposed to be deleted. Amendments to Rules 2-131, 2-221, 3-131, 3-221, 9-202, and 16-401 conform cross references in those Rules to the re-lettering of Rule 1-202.

The Chair explained that the proposal before the Committee to add a new section (r) to Rule 1-202 had been approved by the Committee in April. He asked if there were a motion to rescind this and make some other change. It would take a motion to reconsider this. The Vice Chair commented that many of the arguments she had heard today were motivated by money. The real motivation for the Committee is to recommend to the Court of

Appeals a rule that will truly notify the most people who should be getting notice of foreclosures. Her personal view was that The Examiner should be included within the definition of "newspaper of general circulation." She did not know how many other periodicals are being printed that would not fall within this definition because they are not of a high enough quality. Mr. Phelps said that what he was asking for was to free up the ad decision-makers. Mr. Haigh added that there would surely be litigation on the adequacy of the legal notice.

Mr. Johnson remarked that he had asked for the information on The Examiner, because he did not necessarily agree with Judge Hollander's view that the newspapers may reach a wider circulation due to the fact that they are free. He said that he would like to know if certain communities do not get this newspaper. This makes a difference in the equal protection argument and the other arguments that had been advanced. If the newspaper is targeted at certain communities for business reasons, this is understandable, but this does not aid the argument that The Examiner is trying to reach the broadest population of people with the notices. The Committee needs the information from Mr. Phelps before any attempt is made to supersede the legislation. Even though this is possible, it is a decision that has to be taken very seriously.

Mr. Patterson commented that he was very much swayed by Mr. Phelps and his counsel concerning The Examiner. He was not sure that the requirement that a newspaper be for sale was the only

impediment for The Examiner. The phrase "general circulation" may be an impediment, also, because he was not certain that it is a "general circulation" newspaper. He was influenced by the fact that the "for sale" portion of it should not be there. He expressed the opinion that the legislature could do a service by taking that portion of the law out. He was not particularly swayed by the argument of The Post's counsel that the Committee cannot circumvent the legislature. Although the Committee could make a recommendation to the Court of Appeals to supersede the statute, Mr. Patterson felt that the Committee should not do so. The legislation is fairly clear, and he could not see an overriding reason for the Committee to recommend to the Court of Appeals to override the legislation by establishing a rule that would allow this particular newspaper to qualify as a "newspaper of general circulation." If the Rules Committee were a legislative committee, Mr. Patterson would be in favor of changing the law.

Judge Hollander referred to Code, Article 1, §28. The definition in paragraph (4) which reads: "Has general circulation throughout the community where the publication is published...," means that it is available generally, which any of the publications that have been discussed today would be. It does not mean that the burden is on the newspaper to reach a particular person. The Daily Record has a very narrow, specific audience. It was not clear to Judge Hollander why The Daily Record would be regarded as a newspaper of general circulation

other than the fact that it can be purchased. She was not sure who would buy this newspaper other than someone who is in the field and has some knowledge of its existence. She added that she agreed with the concern expressed by the Vice Chair, but when she read paragraph (2) of the statute, it eliminates the throwaway kind of publication such as The Pennysaver, which would not fall within the umbrella of paragraph (2). The statute seems to be describing a publication that is a serious endeavor, something that covers news, current events, and editorials and does not embrace a publication such as The Pennysaver. She found paragraph (1), which is the requirement that the publication be at least four pages, very unusual and too easy a requirement to satisfy. She expressed her agreement with Mr. Klein's earlier statement that a requirement that a publication be for sale is not necessary. As a citizen, Judge Hollander felt that something had been lost, because The Examiner was not viable since it had not been for sale. She had trouble understanding the link between a newspaper being for sale and being a publication of "general circulation."

Ms. Potter referred to Mr. Maloney's earlier question of whether Mr. Phelps planned to go back to the legislature to try to get the law changed, and he had answered negatively. Mr. Phelps clarified that he had replied that he would not go back to the legislature this session. He had been before the legislature once two years ago, and at that time, they could not get the bill out of the committee. He did not want to lose two times in a

row. He said that he may or may not go back to the legislature.

Mr. Klein commented that conceptually he would be prepared to recommend to the Court of Appeals a rule that supersedes the current statute, but he would need more information before doing so, as Mr. Johnson had suggested. He remarked that he would like to hear from the paid newspapers on both sides at a later time on data and clearly articulated and supported arguments. Assuming that the goal is to reach the widest possible audience so that notice is effective, he would like to hear from the free newspaper why whatever the impediments are under the current regime should be eliminated and how Mr. Phelps or another representative of the free newspapers can demonstrate how the goal of notice would be served. He would like to hear from The Washington Post and the other paid newspapers the counter to this argument. He did not mean that the reason is that the legislature prohibits free newspapers. His interest would be to hear factually why society would be better served in terms of the notice goal of having a sale of the publication warranted.

Senator Stone said that he assumed that the bill came before his committee, but he was not sure because they did not have as thorough a hearing as there had been today. The free newspapers could possibly elaborate on their argument. The legislature deals with so many bills that it is difficult to remember this one. He was not certain that the arguments made today had been made before the legislative committee. Mr. Phelps responded that similar arguments had been made before the legislature. He had

spoken as did three other unaffiliated free newspaper publishers. They had been opposed by the Maryland Press Association, which had first said that they would remain neutral on this topic, because they had members that were both free and paid. Then they reversed that decision when they saw that the matter was going to come to a hearing before the legislative committee. The Newspaper Association of America, which is the largest daily newspaper association in the United States, sent its president to oppose the bill. That Association would allow free newspapers to be members if the free ones were owned by paid newspapers. This policy has changed because they had to lay off members, and they have solicited the membership of The Examiner.

The Chair noted that the Rules Committee had heard some figures with respect to Mr. Phelps' newspaper. The Chair said that he did not know whether there was a group or an association of free newspapers around the State, because he was not sure that a decision should be made based on one newspaper, which is only going to be in two counties. If Mr. Phelps is hoping to change the legislation, this group of free newspapers would have to go before the legislature and the Rules Committee with the data. Mr. Johnson had inquired about the circulation of The Examiner in Maryland, where the newspapers are, as to how many are circulated. The Vice Chair pointed out that this would apply to other newspapers as well. Ms. Ogletree added that this would apply to free newspapers in general. The Chair stated that it would be helpful to know this data. The Vice Chair said that she

would like to see as many examples of free newspapers that can possibly be provided, including those that might not meet the statutory definition. The Chair added that it would also be helpful to see comparable data with respect to the paid newspapers in the various counties, where they circulate, and who is buying them. The Rules Committee, which has two legislative members on it, would have that information and be able to make a sound judgment. He asked Mr. Phelps if this would be possible to do. Mr. Phelps answered affirmatively, noting that he was not a member of Mr. Haigh's association but that Mr. Haigh could provide the Rules Committee with that data. There are about six unaffiliated free newspapers in the State. In the meantime, Mr. Phelps stated that he would quickly provide the Rules Committee with the zip codes in Prince George's and Montgomery Counties in which The Examiner is circulated. He added that he could show the Committee where the newspaper racks are in both of those counties.

The Chair commented that The Sunpapers organization, for example, advertises that it informs a million people a week. He asked what "informs" means. The Vice Chair said that she wanted to hear the data that had been requested, but she noted that she would be personally reluctant to recommend to the Court of Appeals that it adopt a rule that differs from the statutory provision. However, the Committee has on numerous occasions, given the Court of Appeals both sides of an issue for the Court to decide. Ms. Ogletree added that the Committee has recommended

to its legislative members that the legislature take a look at certain issues. Senator Stone remarked that this matter was only considered two years ago. It ought to go back to the legislature. The Chair pointed out that the free newspapers are going to have to develop the information anyway. The Vice Chair said that the Rules Committee could be of assistance to the legislature in developing the information and providing it. The Chair commented that one of the problems with the 4000 bills put before the legislature each year in the 90-day session is the limited amount of time that any committee has to give real depth to the issues. Senator Stone remarked that the bill may have been before the Judicial Proceedings Committee. The Reporter inquired if the bill was in the Senate or the House. Mr. McLaughlin answered that it was in both.

Mr. Brault said that no one had mentioned who is a typical reader of legal advertisements. Mr. Phelps responded that he would guess that attorneys and realtors would read foreclosure notices. Mr. Brault noted that the people who read these ads would have to be people who are interested in the subject matter. A market of people would bid on houses that they know to be in foreclosure. He asked whether there is any data as to the readership of legal advertisements. Mr. Phelps answered that he had not seen any research on this. Mr. Maloney commented that with the internet, legal advertising is like welfare for newspapers. Why not allow the court to have a website where for a fee any advertiser can post a notice, and people can go online

to read them?

Mr. McLaughlin noted that there had been an effort in front of the legislature last session to create some county websites that would have that information. The legislature did not consider it, and no action has been taken. He reiterated that this is a judgment of the legislature. It is appropriate for the Committee to express its views to the legislature. Mr. Maloney remarked that if the Committee decides on the merits what legal advertising ought to be, it could recommend to the Court of Appeals that the courts establish a website, and for a sum of money, anyone can advertise on it. Everyone would know that they can look for legal notices there. Mr. McLaughlin responded that when the transaction falls through, the argument will be that regardless of what the court held, the sale did not meet the statutory criteria, and there will be endless litigation. The Chair commented that this is not about a fear of someone suing. It is a political question, not a legal question.

Mr. Maloney expressed the view that this seems to involve a statute and rule-driven subsidy to the newspaper industry. The most effective and least expensive way to get legal notice to people might be the creation of a website that advertisers can pay for to disseminate the information. Mr. Haigh said that he wanted to address some of the issues raised earlier by Mr. Johnson about redlining certain districts. In Maryland and across the country, when there are redlined districts in hyper-urban areas and in largely rural areas, it is likely that those

groups of people are going to be segregated. There are reasons that can be archived for this, and issues of tampering with PDF documents, but another reason is notice which has to be pushed at people. The idea of notice is to proactively get information out to people, not force them to go hunt for the information. Mr. Maloney asked Mr. Haigh if he felt that there is anyone who regularly reads a newspaper but does not have internet access. The Vice Chair remarked that there is an argument that when a publication is in print, someone may turn the page over and glance at it. If someone has to affirmatively go to the computer to look something up, this may not happen.

The Chair stated that this matter would be postponed. He said that the request for data is also addressed to the paid newspapers. Ms. Lucan asked the Chair what response time he was envisioning. The Chair answered that the Committee will not meet again until September. Mr. Phelps remarked that he could get the data to the Committee sooner than September. The Vice Chair noted that she would like to hear from the smaller, local, paid newspapers. Mr. Phelps and Ms. Lucan thanked the Committee for its consideration.

Agenda Item 3. Continued consideration of proposed amendments to Rule 5-804 (Hearsay Exceptions; Declarant Unavailable)

Mr. Michael presented Rule 5-804, Hearsay Exceptions; Declarant Unavailable, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-804 (b)(3) by deleting the language “to exculpate the accused” and adding the language “in a criminal case,” as follows:

Rule 5-804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability

"Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) refuses to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4) of this Rule, the declarant's attendance or testimony) by process or other reasonable means.
A statement will not qualify under section (b) of this Rule if the unavailability is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or

testifying.

(b) Hearsay Exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony

Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death

In a prosecution for an offense based upon an unlawful homicide, attempted homicide, or assault with intent to commit a homicide or in any civil action, a statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement Against Interest

A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered ~~to exculpate the accused~~ <u>in a criminal case</u> is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Cross reference: See Code, Courts Article, §10-920, distinguishing expressions of regret or apology by health care providers from admissions of liability or fault.

(4) Statement of Personal or Family History

(A) A statement concerning the declarant's own birth; adoption; marriage; divorce; legitimacy; ancestry; relationship by blood, adoption, or marriage; or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated.

(B) A statement concerning the death of, or any of the facts listed in subsection (4)(A) about another person, if the declarant was related to the other person by blood, adoption, or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

(5) Witness Unavailable Because of Party's Wrongdoing

(A) Civil Actions

In civil actions in which a witness is unavailable because of a party's wrongdoing, a statement that (i) was (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and was signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is offered against a party who has engaged in, directed, or conspired to commit wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness, provided however the statement may not be admitted unless, as soon as practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent makes known to the adverse party

the intention to offer the statement and the particulars of it.

Committee note: A "party" referred to in subsection (b)(5)(A) also includes an agent of the government.

(B) Criminal Causes

In criminal causes in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by Code, Courts Article, §10-901.

Committee note: Subsection (b)(5) of this Rule does not affect the law of spoliation, "guilty knowledge," or unexplained failure to produce a witness to whom one has superior access. See *Washington v. State*, 293 Md. 465, 468 n. 1 (1982); *Breeding v. State*, 220 Md. 193, 197 (1959); *Shpak v. Schertle*, 97 Md. App. 207, 222-27 (1993); *Meyer v. McDonnell*, 40 Md. App. 524, 533, (1978), rev'dd on other grounds, 301 Md. 426 (1984); *Larsen v. Romeo*, 254 Md. 220, 228 (1969); *Hoverter v. Director of Patuxent Inst.*, 231 Md. 608, 609 (1963); and *DiLeo v. Nugent*, 88 Md. App. 59, 69-72 (1991). The hearsay exception set forth in subsection (b)(5)(B) is not available in criminal causes other than those listed in Code, Courts Article, §10-901 (a).

Cross reference: For the residual hearsay exception applicable regardless of the availability of the declarant, see Rule 5-803 (b)(24).

Source: This Rule is derived from F.R.Ev. 804.

Rule 5-804 was accompanied by the following Reporter's Note.

The Criminal Subcommittee recommends a change to Rule 5-804 (b)(3). This was requested by the Office of the Public Defender, and it is based on an amendment to Fed.R.Ev. 804 (b)(3) that will go into effect

> December, 2010. The proposed amendment would require both sides in a criminal case to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against pecuniary or proprietary interest. Currently, the Rule requires only the defendant to make this showing. The Office of the Public Defender points out that under the current Rule, there is a risk of wrongful convictions based on unreliable statements against interest by unavailable witnesses who cannot be cross-examined. Unavailable State's witnesses' testimony should be subject to the same requirement of corroboration as that of defense witnesses.

Mr. Michael said that Mr. Karceski had spoken with representatives of the Office of the Public Defender and with several State's Attorneys about the proposed change to Rule 5-804, which is the addition of four words to subsection (b)(3) that had been proposed by the Office of the Public Defender: "in a criminal case." This resolves the issue raised by the Public Defender that without this addition, the Rule would be unfair. It appears that the State's Attorneys present agree with this proposed change. Professor Lynn McLain had written a six-page, single-spaced reply pertaining to this. The crux of her letter was that she felt that the amendment was not necessary, but she had no objections to it. Mr. Michael moved that the four words be added to the Rule. The Chair pointed out that this was a proposal of a subcommittee, so no motion is needed. It would take a vote to reject the proposal. Mr. Michael said that the position of the Subcommittee is to adopt the proposed change. The Chair asked if Mr. Zavin or Mr. Shellenberger wanted to

comment on this, and they answered that they did not. There being no further comments, the Chair stated that the proposed change to Rule 5-804 was approved.

Agenda Item 4. Consideration of proposed Rules changes recommended by the Criminal Subcommittee - Amendments to Rule 4-312 (Jury Selection), Amendments to Rule 4-263 (Discovery in Circuit Court), New Rule 4-281 (Striking of Death Penalty Notice) and Amendments to: Rule 4-102 (Definitions), Rule 4-216 (Pretrial Release), and Rule 4-242 (Pleas)

The Chair told the Committee that the next item for discussion was the "anonymous jury." The Committee had been given a proposal drafted by the Criminal Subcommittee. A number of issues were implicit in that recommendation -- some were a matter of style, some were a matter of substance. Once Mr. Karceski presents the draft Rule, the Committee can identify the issues associated with the proposed Rule and discuss them.

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)(2) requiring that jurors be addressed by number, to add a new subsection (c)(3) pertaining to an anonymous jury, to add a new Committee note, and to make stylistic changes, as follows:

Rule 4-312. JURY SELECTION

. . .

(c) Jury List

(1) Contents

Subject to subsection (c)(3) of this Rule, ~~Before~~ before the examination of qualified jurors, each party shall be provided with a list that includes each juror's name, ~~address~~ city or town of residence, zip code, age, ~~sex~~ gender, education, occupation, and 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 juror's street address or box number shall not be provided.

(2) Jurors Not to be Addressed by Name

Throughout a case, jurors are to be referred to by their juror number and not by their name.

(3) Anonymous Jury

(A) Not Applicable in Death Penalty Cases

Subsections (c)(3)(B), (C), and (D) do not apply in an action where the State has given notice under Code, Criminal Law Article, §2-202 (a) of its intention to seek a sentence of death.

(The Criminal Subcommittee has asked the Rules Committee to determine whether an anonymous jury should not be permitted in a death penalty case.)

(B) For Safety and Security of Jurors

On its own motion or on written motion of a party and after notice and a reasonable opportunity for the parties to be heard, the court may order that the name and

ALTERNATIVE #1

~~**, unless the action is in the Circuit Court for Baltimore City,**~~

ALTERNATIVE #2

, unless the action is in the Circuit Court for Baltimore City, the city or town of residence of prospective jurors not be disclosed in voir dire, and subject to further order of the court, that information regarding impaneled jurors not be disclosed at any time or disclosed only to the defendant and counsel. The order may not be entered unless the court finds from the evidence or information presented that there is strong reason to believe that disclosure of the name and the city or town of residence of the jurors is likely to imperil the safety and security of the jurors.

(C) To Prevent Jurors Being Influenced

If the court finds only that there is a likelihood that disclosure of the jurors' information would allow access to jurors for the purpose of influencing them during the pendency of the case, the court may order that the information be disclosed only to the defendant and counsel.

(D) Modification of Order to Restrict Disclosure of Juror Information

The court may modify the order to restrict disclosure of juror information at any time.

Committee note: In rare cases, a court may determine that a jury should be impaneled anonymously because of concerns of jury safety or tampering. See *United States v. Deitz*, 577 F.2nd 672 (6th Cir. 2009); *United States v. Quinones*, 511 F.3d 289 (2nd Cir. 2007). Courts have considered five factors in deciding whether the jury should be anonymous: (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial

process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. See *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005); *United States v. Ross*, 33 F.3rd 1507 (11th Cir. 1994). Although the possibility of a lengthy incarceration is a factor for the court to consider, on that basis alone, the court should not impanel an anonymous jury.

In order to minimize any prejudicial effects on the defendant and ensure that fundamental rights to an impartial jury and fair trial are not infringed, the court should allow expanded voir dire as necessary to compensate for the lack of information about jurors' names and addresses. Notwithstanding the provisions of this Rule, the court has the inherent power to protect prospective jurors, jurors, and the trial process when needed.

~~(2)~~ (4) Dissemination

(A) Allowed

A party may provide the jury list to any person employed by the party to assist in jury selection. With permission of the trial judge, the list may be disseminated to other individuals such as the courtroom clerk or court reporter for use in carrying out official duties.

(B) Prohibited

Unless the trial judge orders otherwise, a party and any other person to whom the jury list is provided in accordance with subsection ~~(c)(2)(A)~~ (c)(4)(A) of this Rule may not disseminate the list or the information contained on the list to any other person.

~~(3)~~ (5) Not Part of the Case Record; Exception

Unless the court orders otherwise, copies of jury lists shall be returned to the jury commissioner. Unless marked for identification and offered in evidence pursuant to Rule 4-322, a jury list is not part of the case record.

Cross reference: See Rule 16-1009 concerning motions to seal or limit inspection of a case record.

. . .

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

The Criminal Subcommittee suggests referring to jurors only by number throughout all jury trials. This will help protect jurors' identities and avoid the need to explain to jurors why, in certain cases, they are being referred to by number only.

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 Subcommittee also suggests adding language to Rule 4-312 to provide for an anonymous jury and adding a Committee note that (1) references several federal cases that set out factors for courts to consider in deciding whether the jury should be anonymous and (2) suggests that expanded voir dire be allowed if the jury is anonymous. The Subcommittee has proposed two different sets of alternatives for the Committee to decide upon. The first one is in subsection (c)(2)(A), which provides an exclusion for anonymous juries in death penalty cases. The second choice is whether the language in subsection (c)(2)(B) "unless the action is in the Circuit Court for Baltimore City" should be added to the Rule. This language had been proposed by the Chair because Baltimore City is an entire jurisdiction, and there are no other addresses with places other than

Baltimore within the city.

Mr. Karceski explained that the genesis of Rule 4-312 was a suggestion from the Maryland Circuit Judges Association to amend the Rule to provide for anonymous jurors. Two recent cases pertained to this issue and received notoriety. One was *United States v. Byers*, 603 F. Supp. 2d 826 (2009), which involved the execution of a witness in that case and it was a murder trial case from Baltimore County that was ultimately tried in U.S. District Court before the Honorable Richard D. Bennett. The Subcommittee had conversations with Judge Bennett's office. His law clerk provided the Subcommittee with a great deal of detail as to what the federal court did with respect to the selection of its jury which was an anonymous jury. The law clerk also supplied the Subcommittee with the basis of the law as it has evolved allowing for anonymous juries to be seated.

Mr. Karceski pointed out that the Committee note contains the basis of the factors that are to be considered in what are termed the "rare" cases where a court may determine that a jury should be impaneled anonymously. Unfortunately, there is a great amount of gang activity. This is the focal point to consider when anonymous juries are discussed. The gang activity may not be found in every county, but it certainly is found in Baltimore City and many of the counties. The gangs take their business very seriously, and they have no conscience about getting rid of someone who is a witness in a case. Mr. Karceski said that he

did not believe that the other factors are as prevalent as the gang factor. In Maryland, the organized crime situation is not much of a factor. It is the gang activity that moves this issue forward.

A second relevant case, the trial of Baltimore City Mayor Sheila Dixon, was presided over by the Honorable Dennis Sweeney, formerly of the Circuit Court for Howard County and now retired. In that case, the appointment of an anonymous jury was not for the safety or security of the jurors, but it was to prevent harassment of jurors. The intimidation of jurors in *Dixon* was more benign than in *Byers*, which involved life-threatening, safety, and security issues. *Dixon* was more about annoyance and harassment. Each day of the trial, people were outside of the courthouse, cheering for and against Mayor Dixon. A question arose as to whether these people on their own would try to seek out jurors to persuade them about facts, circumstances, or other issues. The people were not involved in the case or involved with the defendant. The Subcommittee discussed and decided that the Rule should be amended to allow for an anonymous jury. This term actually may be a misnomer, and this is an issue that will be discussed. The anonymity may go beyond the name of the juror.

Mr. Karceski drew the Committee's attention to subsection (c)(1) of Rule 4-312. This is the current Rule that would apply to all cases except cases where the jury is anonymous. That is the information that is submitted to the participants in the

case. This information is given to the attorneys and to the parties. With permission of the court, the information can be given to others. The information sheets will eventually be returned back to the court. Subsection (c)(2) is proposed to be added to the Rule. He had suggested this procedure because in federal criminal cases, jurors are not ever allowed to be referred to by their surnames; they are always referred to by number. This could serve a purpose in Rule 4-312, because one of the problems that the Subcommittee discussed at great length is how to handle an anonymous jury where the jurors understand that they are being referred to by number. They must realize that this means that they could be in some danger. This would not be very helpful to the defendant. The federal appellate courts affirmed that an explanation given to jurors stating that they were not to be concerned about being designated by number was appropriate. The jurors were given reasons for this designation. By designating everyone by a number rather than by name, the problem of the jurors being concerned is avoided, because in every case, no juror is referred to by his or her name.

Mr. Maloney commented that in civil cases, an attorney might address the jury in opening or closing argument by the following language: "Foreperson Jones and ladies and gentlemen of the jury." Would this no longer be allowed if this provision is added to the parallel civil rule, Rule 2-512, Jury Selection? Mr. Karceski answered affirmatively. Master Mahasa remarked that if the concern is anonymity, under subsection (c)(1), once a

party is given the name of a juror, all kinds of information is available from the Internet. Mr. Karceski acknowledged this, but he said that it is important to understand the Rule in its entirety. In most cases, the parties have the jurors' names, but in the cases where there is going to be an anonymous jury, no one would get the name from the very beginning of the case.

The Chair pointed out that this is one of the issues to be discussed -- whether in all cases, the embargo is to be total, or whether the judge has some discretion to state that in a particular case, the public does not get the juror information, but the attorneys and the defendant do get it, or the attorneys get the information, but the defendant does not. The embargo may not be total. Mr. Karceski remarked that as the Rule is being considered, it will be evident that the judge has some discretion as to how to handle the case. There will be a hearing on the matter to determine whether or not the jury should be anonymous. All of this takes place when the jury comes into the courtroom. The jurors would be recognized by number and not by name.

Mr. Klein inquired if the Rule intends for there to be anonymity even in voir dire at the bench. Mr. Karceski responded that this is what is intended. He was counsel in a recent federal trial, and Judge Bennett had to remind him to refer to the jurors by number and not by name. Mr. Karceski noted that an issue to determine in this Rule was whether anonymous juries should not be applicable in death penalty cases. The initial thought about this could be that if it is applicable in any case,

it should be applicable first and foremost in a death penalty case. That would be the kind of case where a danger to jurors could arise more so than in other cases. An alternative has been included in the Rule, and this provides that anonymous juries may apply in death penalty cases, or that they may not apply. Beyond the usual response was the response of the defense bar, and Katy O'Donnell, Esq. was present to represent the views of the Office of the Public Defender on this issue. Her view was that death penalty cases stand alone, and juries in those cases should never be anonymous. He asked Ms. O'Donnell to tell the Committee why she believed that death penalty cases should be excluded.

Ms. O'Donnell said that she had a number of points to make. The first point was that the first time the Subcommittee had discussed this issue where she was present, as soon as the issue of the death penalty came up, the Subcommittee almost immediately decided that it was appropriate to exempt those cases from the anonymous jury concept. Mr. Shellenberger, who had been present at that meeting, agreed that death penalty cases should be excepted out. In response to Mr. Karceski noting that some people's first response would be that death penalty cases are appropriate for anonymous juries, the initial reaction of the Subcommittee was just the opposite. One of her concerns was the possibility of prejudice to the defendant because of the assumption of jurors as to why they are being given a number instead of a name. It could not be more of a concern in any other case other than a death penalty case, the only case where

the jury has the responsibility to impose the death penalty on the defendant. If the jurors are given the impression that they have to be referred to by number instead of by name, and any of them determine that the reason for that is that the defendant is deemed to be dangerous, that has a serious and prejudicially damaging effect on the jury.

Mr. Karceski pointed out that this problem would be resolved if the language providing that all jurors are to be referred to by number and not by name is adopted. When there is a jury indoctrination, and the jurors watch a film or someone speaks to them, they will be told that regardless of whatever case they sit on, whether it is the lowliest misdemeanor or a very serious felony, they will be referred to by number during the trial.

Ms. O'Donnell remarked that as much as this is an overriding concern and will continue to be discussed in general, it is an even greater concern in capital cases. Death penalty cases are unique. An exemption from anonymous juries is warranted for practical reasons as well as reasons that are fundamental to the way Maryland looks at the imposition of the death penalty. The practical reasons include the fact that it is the only opportunity for a jury to impose a sentence in a case. As a result of this, the voir dire process is completely different. It is extremely extensive in a capital case, and it is a lengthy process.

Ms. O'Donnell said that she had been counsel in a case where jury selection took six days. The suggestion that a jury even

feels anonymous as a practical matter is not present. The questioning of the jurors is very lengthy. The jurors sit across from the defendant. At the end of the case when the sentence is imposed, the jury is given a verdict sheet, and they have to sign their names to this. This is part of the jury taking responsibility for the sentence that they have imposed. There is a requirement that each juror sign his or her name to that verdict sheet. These practical issues feed directly into the fundamental beliefs concerning the magnitude of this serious proceeding and the unique and different aspects of capital cases from any other case.

Ms. O'Donnell commented that death penalty jurisprudence is filled with cases stating that anything that suggests to a jury that they have less responsibility or less accountability for their verdict is against fundamental principles of capital litigation. This would be anything that diminishes the jurors' responsibility, such as arguments of State's Attorneys that the jurors' verdict is somehow watered down. If the jury is anonymous, allowing the jury to decide in secret to execute someone is completely contrary to the way Maryland has handled the administration of capital punishment. Ms. O'Donnell recognized that anonymous juries are allowed in the federal system. She expressed the view that it is problematic for them. She thought that litigation might be starting on this issue. Maryland has the right to provide additional safeguards and protections to ensure the integrity of this process, and it has

done so.

The Chair asked what would happen if in a particular death penalty case, information is developed that there is a significant and credible threat to the safety of one or more jurors, or there is the possibility of jury-tampering. The judge or the prosecutor has what he or she believes to be very good evidence that in this case, this is likely to happen if the jurors' names and identities are disclosed. He asked Ms. O'Donnell if her point was that even under these circumstances, an anonymous jury should not be allowed in death penalty cases. Ms. O'Donnell answered that this was not her point. The safety of the jurors is always a consideration. She added that she was trying to understand how this situation would arise from the outset in a way that one could determine that if the names were disclosed, the jury's safety was threatened.

The Chair asked Ms. O'Donnell to hypothesize that the police or someone else comes across evidence that is convincing that this is a clear danger in this case. What would she say to the judge in the case? Ms. O'Donnell responded that she was troubled by the fact that this concern must be balanced. What has been raised before and she raised again was the issue about the standard. The Chair said that this will be discussed. His question was whether there was going to be a complete exemption for anonymous juries from death penalty cases. Ms. O'Donnell replied that under the circumstances of capital litigation, there has to be a complete exemption. Under the Chair's theory, why

would an individual voir dire process be conducted? She had mentioned before that the defendant sits across the table from the juror. The Chair noted that the concern is not that the defendant will harm the juror.

Ms. O'Donnell remarked that the jurors fill out lengthy questionnaires. The questionnaires are sent out prior to the jury selection. The Chair asked if the jury would have to be sequestered under constant guard throughout the trial if the possibility of some sort of shield does not exist. Ms. O'Donnell answered that she did not think that this would be necessary. The judge has the power and the right to handle this in an extraordinary case.

The Chair asked if an anonymous jury would be the most logical alternative. Ms. O'Donnell said that she did not think that this proposal protects jurors in the situation described by the Chair unless the voir dire process is completely changed and limits the ability of the State and the defense to obtain information that they are customarily permitted to obtain during the voir dire process. Normally, the defense receives a jury list prior to the litigation for organizational purposes, because it is a massive production to put a jury in the jury box. Juror questionnaires are sent out routinely weeks, or in some jurisdictions, two months prior to the trial asking numerous questions. There is litigation on the issue of jurors writing back and stating that they cannot serve on the jury for whatever reason. She had personally reviewed some of these letters

written by hundreds of jurors who had vacations to take or had medical procedures to make sure that defense counsel agrees with the jurors being excused from this proceeding. It is a different type of litigation. She added that the Chair is suggesting that this is not the case.

The Chair clarified that he was not suggesting that, but he was only asking the question about the situation he had described where there is real concern and evidence to support a threat to the jury. Ms. O'Donnell replied that sequestration is always a possibility in an extraordinary case, but her primary answer was that the anonymous jury does not serve that purpose unless all of the other practices done in the State to ensure a fair and impartial jury sitting on a case are changed. Ms. Potter asked what difference it makes if the juror's name is not revealed when a juror fills out a questionnaire in a death penalty case. Master Mahasa referred to the comment regarding a juror's sense of responsibility for his or her actions. If the juror's name is known, it could have a chilling effect, because the juror may feel that since the defendant knows his or her name, the juror would be uncomfortable finding the defendant guilty.

Ms. O'Donnell responded that in the Maryland legal system, the assumption is usually the opposite. Because of the highly visible nature of the offenses the defendant is charged with, and the highly charged situation in the local community, the jurors are influenced the opposite way. They are assumed to be more likely to impose the death penalty. She reiterated that Maryland

has more protections than other state courts and the federal system. In this State, there is a constitutional right to remove a case automatically from the charging jurisdiction to another jurisdiction. It is not just a procedural right; it is a constitutional right that is based on the idea that jurors within the community would be influenced the exact opposite way that was suggested. What is necessary is to put in additional safeguards in a capital case to ensure the integrity of the process and the impartiality of these jurors. She and her colleagues assume the opposite. More protections are needed in death penalty cases and not less. She suggested that the deliberation process in a capital case is truly unique, not just because the jurors are imposing a penalty and not just because of the magnitude of the issue being discussed. Jurors are instructed in capital cases as in no other case to actually make individual determinations. This means that they are told that when they are thinking about aggravating evidence and mitigating evidence, aggravating evidence has to be determined unanimously, but they are personally and individually to decide mitigating evidence for themselves. This concept of individuality and individual responsibility is no greater anywhere than it is in a death penalty case.

Master Mahasa inquired as to why the jurors' names are necessary. Ms. O'Donnell answered that she was concerned that the idea of anonymity sends a message to the jury that they can somehow hide, and it diminishes in some way their feelings of

taking the individual responsibility that is required in a capital case. This is one aspect. In addition to all of the other practical aspects that she has been suggesting about the voir dire process, after the jury questionnaire, the jury list, and the extensive voir dire, it would be completely contrary for the jury to be anonymous. It almost does not make sense. Master Mahasa questioned how the availability of the jurors' names impacts their sense of duty. Ms. O'Donnell said that the concern is that jurors are influenced in one way or another by their names being given out. The origin of this seems to be a suggestion that the jurors were afraid, because their names were being given out. She suggested that the impact in a capital case would be exactly opposite. The jurors are concerned that their names not be given out, because the defendant will know them, and also it reduces them to someone who does not have to sign their name to the verdict sheet that may lead to the defendant's execution. Master Mahasa remarked that the verdict is after the fact.

Mr. Karceski pointed out that it is easier to decide that someone should be executed if the juror is known by number than if he or she is known by name. It is a sort of shield. Master Mahasa noted that the verdict sheet happens after the evidence, when the jury decides if the defendant is guilty or not guilty. Ms. O'Donnell said that the jury is aware during the deliberation process that each one would have to sign his or her jury number. Master Mahasa observed that this is at the end of the trial. By

that time if a defendant was inclined to influence jurors, it would be too late. Judge Hollander asked if Master Mahasa's point was that the Rule should require the jurors to sign their names on the verdict sheet. Master Mahasa replied that she approved of the jurors signing their names on the verdict sheet, because this is at the end of the entire proceeding. Her concern was the beginning of the proceeding.

The Chair stated that the Committee did not have to be concerned about the specific drafting at this point. This is one of eight or nine issues that the Committee will need to address. Based on the Committee's policy decisions on those issues, the Rule can be redrafted. Ms. Potter asked what the first issue would be. The Chair responded that one of the issues is whether there should be a blanket exception from anonymous juries for capital cases. This would mean that the judge should not be permitted to preclude the disclosure of the name and city or town of jurors in a capital case.

Mr. Shellenberger commented that whether or not the death penalty exception is approved, it is important to start having anonymous juries in Maryland. The Committee should not get too mired in the death penalty issue. Death penalty cases are rare. It would be preferable to discuss the other aspects of the Rule before this one is considered. He thought that a death sentence had not been imposed by a jury in the State in about five years. Anonymous juries are needed in the regular gang robbery cases.

After the lunch break, Mr. Karceski drew the Committee's

attention to subsection (c)(2)(B) of the version of Rule 4-312 that had been handed out at the meeting. The caption of this provision is "For Safety and Security of Jurors." The evolution of this provision is that initially when it was discussed by the Subcommittee, one running paragraph covered two situations, one of which was the safety and security of the jurors, and the other was jurors being influenced. The meaning of safety and security is understood. The proposal is to protect the juror from being harmed or threatened in some serious manner. The second part of subsection (c)(2)(C), "To Prevent Jurors Being Influenced," came out of Judge Sweeney's case, *Dixon*, in which the judge impaneled a jury. The judge's concern was that the persons who were waiting outside of the courthouse during the trial would do something such as try to talk to a juror to influence him or her, but not try to harm the juror. There are two different categories of situations involving the jurors. Each of those two categories addresses a way of handling the anonymity of the jurors who are selected.

Mr. Karceski explained that Alternatives 1 and 2 pertain to jurors in Baltimore City, which has no towns. Anyone who lives there has a "Baltimore" address. This is why an alternative is provided. This is not in the same in many other counties which have incorporated towns or cities within them. He drew the Committee's attention back to the separate issues of safety and security of jurors and preventing jurors from being influenced.

In the case of safety and security of jurors, there would be a procedure for the trial judge to follow in making a decision about the jurors' safety and security being threatened. If the judge decided that the safety of a juror or jurors was an issue, the names and places of residence of the jurors would not be disclosed in voir dire, and subject to further order of the court, that information regarding impanelled jurors would not be disclosed at any time or only disclosed to the defendant and counsel. These are the various ways that this can be handled by the trial judge to make a decision whether there should be a total exclusion or a partial exclusion. The defendant and counsel, in some situations, would be allowed the identity and town of residence of the jurors.

Mr. Karceski explained that the court cannot enter an order to exclude the information unless the court finds from information presented that there is a "strong reason to believe." One of the issues is to determine whether a "strong reason to believe" should be the standard. This language was derived from the federal case law and from the information that Judge Bennett had provided. This may not be the best choice of words to use in this Rule, but this is the reason why this standard was chosen as opposed to "preponderance of evidence" or another standard. It would be a strong reason to believe that the disclosure of this information is likely to impair the safety and security of the jurors or even only one juror.

Mr. Karceski pointed out that the second aspect of this is

what happened in *Dixon*. This was where a person not necessarily directly known or connected to the defendant on trial would take actions that could influence the jury during the pendency of the case. The language of subsection (c)(2)(C) that reads: "...the court may order that the information be disclosed only to the defendant and counsel" could pose a problem that is another matter for discussion. If the defendant is determined to be the cause of the juror or jurors being influenced and not someone who an outsider to the case, the court should have the discretion to prevent that information from being disclosed at all if it is an appropriate situation to do so.

Mr. Karceski noted that the order to restrict disclosure on juror information in subsection (c)(2)(D) may be modified at any time. This is the broad view of what is being proposed by the Subcommittee.

The Chair stated that before going through the draft of the Rule, it might be helpful to look at some of the issues that are presented by the draft. How the Committee addresses those issues will affect the drafting of the language. Some of these issues have already been discussed, such as whether there should be an exemption for death penalty cases. The Committee will need to address this issue. Another issue that was raised in the letter that the Honorable Sean Wallace sent to the Committee from the Conference of Circuit Judges is whether the ability to have "anonymous" juries should apply in civil cases as well. The view

of the Conference of Circuit Judges is that it should apply to civil cases. If the Committee chooses to adopt a criminal rule, it needs to consider whether a comparable rule in civil cases should also be adopted. One of the issues is how to draft a provision that gives flexibility to the judge in determining to what extent the restrictions apply and to whom they apply based on the circumstances in a given case.

The Chair said that with respect to the tampering aspect, if the judge finds there is a danger of tampering or security, whether no one gets this information or whether the judge should have more flexibility to determine in a given case that it is appropriate for counsel and the defendant to have the information, because it is more like the *Dixon* case, the juror information would not be totally embargoed -- only enough of an embargo that addresses the problem. How should the Rule handle this in terms of giving the judge the discretion to make the remedy fit the problem, as in any equity court? He explained that he was not giving any opinion on how to resolve the issues, he was listing them. The draft permits the court to do this on its own initiative. Is this a good idea, or should it be on motion by a party even if a party objects to it? Should the Committee choose the standard for restricting the juror information? It could be clear and convincing evidence or a preponderance of the evidence. It has to have terms that are within the boundaries of the law and have the meaning to describe

a substantive standard and the burden of getting there.

The Chair said that as the Committee goes through the draft, these are issues that have to be considered. Decisions made by the Committee will affect how Rule 4-312 is ultimately drafted. He suggested that subsection (c)(2), Jurors Not to be Addressed by Name, probably does not belong in section (c) and should be placed in section (b). Section (c) only addresses the jury list. This would apply right at the beginning of the case in voir dire and through the trial. The issues can be discussed while looking at the text of the draft, or the issues can be addressed separately.

The Vice Chair noted that subsection (c)(2) provides that at all times during the case, the jurors are to be referred to by their juror number and not by their name. However, subsection (c)(3)(B) provides that the court may order that the name of prospective jurors not be disclosed in voir dire. This seems inconsistent with the language of subsection (c)(2), because subsection (c)(3)(B) seems to indicate that the court may allow the names of jurors to be disclosed while subsection (c)(2) provides that the names of jurors can never be disclosed. The Chair commented that this goes beyond this disclosure; it also addresses what is on the jury list. The Vice Chair remarked that what is on the jury list is one issue, but in the next section, the Rule states that only on the court's own initiative or on written motion, the court may order that the names of jurors not be disclosed in voir dire. Mr. Karceski explained that the names

of the jurors are given to the parties, but will not necessarily go beyond that. Even in the minor case of theft of automobile hubcaps, the jurors would only be referred to by number throughout the case. The parties would receive a list that, in some jurisdictions, would have the name of the juror. Defense counsel or the State would get the list.

The Chair noted that there are two different issues. One is not having the names on the jury list at all. The Vice Chair pointed out that if the juror is only supposed to be referred to by his or her number, the list ought to conform to this requirement. Mr. Karceski expressed his disagreement with this, because his view was that even if it is not always apparent, there is information from the name that can be somewhat helpful to an attorney in a case. The Vice Chair hypothesized that the name is on the juror list. Subsection (c)(2)(B) does not refer to what is on the list, it refers to the use of the jurors' names during voir dire, which is already prohibited. Mr. Karceski responded that this is not always prohibited. It is not prohibited unless there is a hearing at which the judge makes the determination by whatever standard that the name should not be disclosed. The Vice Chair inquired why throughout the case, the jurors are known by number, and this is not already prohibited. Mr. Karceski said that regardless of whether the court ruled that there should be an anonymous jury, a juror would never be referred to by that juror's name. The Vice Chair noted that this would not only be in voir dire but in all of the rest of the

trial. Mr. Karceski remarked that this does not preclude an attorney from getting the jurors' names.

The Vice Chair commented that the Rule does not make sense. An attorney is already prohibited from using the name of the juror and can only use the juror's number. The only advantage of subsection (c)(2)(B) for the safety and security of the jurors is preventing a disclosure of the city or town of residence in some place other than Baltimore City. Mr. Karceski disagreed, pointing out that before the attorney gets the juror list with the juror name, a hearing will be held to determine whether the jury would be anonymous. If the judge makes this determination, then the attorney would not get the name of the jurors. The names would not be available until after the hearing has been held. The attorney would not get the list.

The Vice Chair said that the import of this is that the motion could be made up front, and if the motion is granted, then the jurors' names are not on the list. The Chair disputed this. This is one of the issues to decide -- whether to give the judge some discretion to tailor what is going to be on the list. The goal is to deal with the basic issues and then craft the Rule with the specific details. Should there be a one-size-fits-all remedy if there is evidence of tampering, for example, that no one gets the names, or should the judge be able to determine who, if anyone, gets the names and what the circumstances are?

Mr. Flohr told the Committee that he was the former president of the Maryland Criminal Defense Attorneys Association

and had been practicing for about 20 years as a criminal defense attorney. He referred to the Chair's statement that the issues regarding the Rule should be identified. Mr. Flohr said that he wanted to set forth his opinion that the Rule is not necessary. There is no equivalent federal rule. The clientele in federal court is very different. The State court deals with more gang activity and more of a systemic threatening, but this is rarely seen in federal court. A subtle message that will be sent if the amendments to the Rule are adopted is that this becomes a tool of the prosecutor's office. This will be a signal that this is something that the prosecutor can move for when now it is very rare, and it should be rare.

One of the issues that came up was why the name matters. He expressed his very strong opposition to not addressing the jurors by name. Referring to people by their number was brought up earlier in the discussion, and it caused laughter, because this is not the way to refer to people. It seems very unnatural. When he is the attorney in a criminal case picking a jury, he gets very little information to make an intelligent use of his strikes. If the small amount of time that he is up at the bench having a discussion with prospective jurors is taken away, and he has to refer to the jurors by number in a case involving a theft of hubcaps, it is unnatural. His ability to be able to draw out a small amount of information from the jurors would be prohibited. He disagreed with Mr. Karceski's comment that there should be a blanket no-name policy because of the danger. The

reason that it was added was because it was a compromise to doing so in cases such as death penalty cases. If the jurors are called by number, then they want to know why. This is why the Rule in its inception is problematic. It existed before. This will not open up the floodgates to finally permit the first anonymous jury. Judge Sweeney has had several such cases with the consent of counsel. This is before any rule was in existence. Although no Maryland case law is listed, the Committee note indicates that this is not based on a procedural rule, it is based on factors from case law. Judges have inherent authority to control their courtroom even if gang members are present.

Mr. Flohr referred to the Chair's comments about flexibility. Mr. Flohr and his colleagues are having problems with the concept of anonymous juries, because it is so difficult to do with so many variations. He was not in favor of a rule that would permit anonymous juries. However, the name of the juror is only one aspect of the case. There are bailiffs, sheriffs, and police to preserve the safety of jurors. It is very damaging to require counsel to refer to jurors by number. Referring to the foreperson by number may be appropriate. Attorney-conducted voir dire is available, but although he had requested it many times, he had never gotten it. He had been able to do this in New York, and he found it to be helpful.

The Chair noted that Mr. Flohr's argument is that there should not be a rule, and the judge can handle it. Mr. Flohr

responded that judges already have the power to do this. He referred to the issue of whether it is important to know the names of jurors. There are no jury questionnaires in non-capital cases. For the limited ability of counsel to go up to the bench, he disliked the idea of referring to the jurors by number. The Chair asked Mr. Flohr if he agreed that judges can do this now. Mr. Flohr answered affirmatively. It is not unlike the judge removing an unruly client from the courtroom. Similarly, if the court finds that a real danger to any party exists, whether it is to the juror or a witness, the court has the power to address this. The Committee should recognize that this should only be for a rare circumstance. Jurors do not always want to serve, but it is part of their civic duty. It is not meant to be easy to make a judgment on somebody's life.

The Chair said that this idea started in the federal system by case law. Federal District Court judges have been using anonymous juries in specific cases. Some of the cases went up to the U.S. Courts of Appeals; some were affirmed, and some were reversed. The federal courts have recognized constitutional issues in restricting names, especially from defense counsel and the defendant. The public also has a right to know. All of the courts have recognized the constitutional limits on anonymous juries. Some of the states are beginning to use this either by rule or by statute. The circuit court judges in Maryland are too busy to be able to read all of the federal cases on point especially when they need to act fairly quickly. The idea of

having a rule was to give guidance to the circuit court judges, providing them with a roadmap to avoid error causing retrial of the cases. To not have a rule because the judges can do this now is a recipe for reversal.

Mr. Flohr expressed his concern about the subtle, unintended consequence of the prosecution considering anonymous juries as a new tool. It certainly gives them the upper hand when they are creating the atmosphere. There can be many parts of a rule to try to prevent the jurors from feeling that something is going on. It is similar to trying to pretend that the jurors do not know that the defendant is locked up. After the cases are over, when he talks to jurors, they indicate that they knew that the defendant was incarcerated. Another issue for the Committee to consider is that now a judge has broad discretion to act. To keep information from counsel requires a high burden of proof. From the judge's point of view, when the Rule is set up, aside from the idea of giving the judges guidance, are they not being boxed in for an occurrence that happens rarely?

Mr. Shellenberger told the Committee that they should look at current Rule 4-312. Some judges in this State do not believe that they can do this under their inherent power. He read from section (c), entitled "Jury List," as follows: "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." Judge Sweeney believes that he

has inherent power to have an anonymous jury, which Mr. Shellenberger felt was correct, but many other judges read "shall be provided" to mean that they cannot have an anonymous jury. Because of the word "shall" in the current Rule, some action must be taken. The Subcommittee had been trying to set up a procedure where in every case in Maryland, jurors would no longer be referred to by name. Then when small and special cases arise, jurors will not be called by name, and some people, including the newspapers and the public, possibly the defendant, or the defendant and his or her counsel, will not know the jury's names, either. The burden of proof has to be met before this can take place. The draft language of the Rule may not be perfectly worded. The concept is that no one will use a juror's name again even in simple cases, but in other cases, the scope of what a judge can do will be to tailor each case as to who can have the jurors' names and who cannot.

Mr. Patterson noted that subsection (c)(2) is a reference to the jurors, not an address to the jurors. It is a matter of decorum and courtesy. It does not mean that an attorney at the bench has to address a juror as "Number 63." Decorum would dictate addressing the juror as "Mr. Juror or Ms. Juror." One would never call the judge by his or her last name only, a judge is addressed as "Judge _____" or simply as "Judge." An attorney would address his or her opponent as "Defense Counsel," not by his or her last name. The rule referring to addressing by name means disclosing the name, which is not the same as calling a

juror by number, which is dehumanizing.

The Chair pointed out that if a juror is being called to the bench, the judge would say, “Would juror #4 please approach the bench?” Mr. Karceski remarked that this happens now. Mr. Patterson added that when jurors come into the courtroom, they are assigned a number, and as they come to the bench, they are called up by number. It is accepted behavior, and it does not cause any negative feelings among jurors that he is aware of. Mr. Michael commented that when the jurors get to the bench, they are addressed by name, but before that happens, the jurors’ numbers are used to identify anyone who has a problem. They are brought up to the bench by their number. The Chair pointed out that this would change under the proposed Rule.

Mr. Patterson expressed the opinion that the proposed procedure should not cause any problems. He reiterated that one can speak politely to a juror by calling a male juror, for example, “Mr. Juror” and not using his number. He added that he did not understand the objection to that section of the Rule. The issue of whether the jury should be anonymous should really be on a case-by-case basis. Each case is different with different problems. What it boils down to is that someone must make a motion, and the court has to make a finding using whatever standard is chosen. Subsection (c)(2)(B) provides for the standard of “strong reason to believe.” This may not be the best standard. Maybe it should be “clear and convincing evidence” or “by a preponderance of the evidence.” The court is going to have

to make a determination that there is something that would require the imposition of an anonymous jury. The Chair commented that his understanding from reading the federal cases is that this determination is required. The ones that have been reversed were because the district court judge made no findings and had no real evidence that a problem existed. Usually in those opinions, the court lays out what the district judge had found.

Mr. Patterson pointed out that the Rule is being proposed to maintain the integrity of the system so as to not have jurors subjected to undue influence either by threat or safety, or if it is a case involving a large amount of money, it could be the prospect of bribing the jurors. It is to keep the judicial process clean and pure, the way that it should be. It may not always be that way, but for the most part, it is. There are exceptions. Depending on what the showing is at the hearing, and depending on what the issue is and the particular threat, the problem may escalate and become more critical. With all due respect to Ms. O'Donnell's opinion, the concept that capital cases should be excluded altogether is the opposite of the way that Mr. Patterson views this. This issue had been discussed at several Subcommittee meetings. He had not attended the one where Ms. O'Donnell had said that the Subcommittee was in agreement that death penalty cases should be excepted. If he had attended that meeting, he would not have agreed to this.

Mr. Patterson expressed the view that death penalty cases should not be excluded from using an anonymous jury. In those

cases, the scrutiny might even be higher. The last death penalty case he had prosecuted was one with no issue concerning security. There was no reason to hide the identities of the jurors. But there are other death penalty cases where this Rule may be applicable. The Rule should not provide that in all death penalty cases, juries should be anonymous, but the Rule should also not provide that in all death penalty cases, the juries can never be anonymous. It has to be determined on a case-by-case basis.

Mr. Patterson said that some friends of his who are defense attorneys had gone to Miami, Florida as special counsel in drug defense cases. They came back with stories about attorneys employed by the drug cartel to represent people, and the attorneys may not have used the same ethical and moral standards that defense attorneys that he knows would employ. His friends knew of defense attorneys who had disappeared because they had not done everything exactly as their clients had wanted them to do. This is a rare exception, but it is a situation where if there can be a showing, then in those rare exceptions, even the defense attorney should not know who the jurors are, so that the attorney cannot tell his or her client. His point is that anonymous juries may not be needed in every case, but it is a tool that can be used if a showing has been made that it is appropriate to be used in a given case.

This will be a judicial determination. To call an anonymous jury a “prosecution tactic” is not logical, because it is a

motion that has to be made before the trial. If no showing is made, there is no tactical advantage to be gained, because the jury will not be anonymous. The Rule may need some reworking, but it should ultimately be approved by the Committee. Mr. Karceski noted that in answer to the suggestion that there does not need to be a rule on anonymous juries, the consensus of the Subcommittee was that there should be a rule. Either the Subcommittee can redraft the Rule, or the Committee can redraft it today.

The Chair commented that Judge Sweeney was one of the leading experts on anonymous juries. Judge Sweeney responded that he may not have been an expert, but he had had some experience with anonymous juries. He clarified that at least four types of anonymous juries exist. Type 1 is where the judge, attorneys, defendant, and the public do not know the names of the jurors. Only the jury commissioner knows. Type 2 is where the judge knows, but the attorneys, the defendant, and the public do not know. Type 3 is where the attorneys and judge know the names, but the defendant and the public do not know. Type 4 is where the judge, attorneys, and the defendant know the jurors' names, but the public does not know.

Each of these requires a different decision to be made as to the need for each type. The discussion today indicates that these four different scenarios are not being considered. It would be a very rare case in Maryland, such as those suggested by Mr. Patterson, to not let the attorneys know the names of the

jurors, provided that the attorney confirmed that he or she would not share the information with the defendant. Judge Sweeney said that he had never prevented an attorney from knowing the jurors' names. However, such a case could arise. When anonymous juries are considered, it is important to keep in mind which of the four categories is being discussed.

Judge Sweeney told the Committee that he was not at the meeting on behalf of the Maryland Circuit Court Judges Association, although he is a member of it. He generally supports the opinions of the Association. He got into this topic from the view that judges have the inherent power to do this, and no rule is necessary. Many judges, for some of the reasons Mr. Shellenberger had mentioned, feel that they cannot have an anonymous jury unless a rule authorizes them to do so. Judges had called Judge Sweeney to ask him how to set up an anonymous jury. He explained the federal cases to those judges, expressing the opinion that judges in Maryland have as much inherent power to handle this as any federal judge has. Many of the judges replied that they did not see anything provided for in the Rules of Procedure, and they felt that they could not have an anonymous jury.

The Chair pointed out that if an anonymous jury is going to be used, it should be set up correctly. Judge Sweeney acknowledged the need to have a rule if that is what the decision is. If there is to be a rule, it needs to be fairly comprehensive, and it has to cover all four types of anonymous

juries. Once there is a rule, people will say that the Rules Committee and the Court of Appeals have constrained the inherent authority judges otherwise had. He read the last sentence of the Committee note at the end of section (d): "Notwithstanding the provisions of this Rule, the court has the inherent power to protect prospective jurors, jurors, and the trial process when needed." This may address that comment.

Judge Sweeney remarked that if there is going to be a rule pertaining to anonymous juries, it is important that it encompass all of the four categories. His concern in the *Dixon* trial was neither Ms. Dixon nor the attorneys. However, everyone in Baltimore City had an opinion about that case. People would come up to him on the street knowing that he was the trial judge, and they would tell him how the case should have been handled. Both attorneys and lay people did this. If the jurors' names became public during the course of the trial, he was convinced that people would approach the jurors to express their opinion. These people had no evil intent. They would have made a statement such as "Mayor Dixon hired me to work for the City, and she is a good person." That would seem like a reasonable action to those people.

Judge Sweeney said that he could have predicted this kind of public activity, and the attorneys agreed with the decision to withhold the names of the jurors. It was not a legal issue but a press issue. The press filed a motion to obtain the jurors'

names. Judge Sweeney agreed to release the names to the press after the trial was over. He said that he would hold a hearing the day after the trial and absent some other problem, he would release the names. The hearing was held, and he released the names. In many of these cases, the concerns are raised by the media. They have an absolute right to intervene and to take an appeal right away. The Court of Special Appeals and the Court of Appeals have been very receptive to the media about getting their appeals heard quickly. If the Rule does not encompass the entire body of potential anonymous jury issues, then it may be better to have no rule at all.

The Chair commented that besides discussing the four types of anonymous juries, it is important to address the different durations of the embargo. For prospective jurors, it is only relevant during voir dire. For impaneled juries, it could be for the length of the trial, or for some period of time after the trial ends, or forever. Judge Sweeney noted that if it were a safety and security issue where the concern is retaliation, the embargo would go on for a long time. His position on prospective jurors has always been that if they were not sworn in as jurors, their names are not able to be disseminated to anyone. Mr. Maloney inquired why. Judge Sweeney replied that it is necessary to look at section (c) of existing Rule 4-312. Jury lists are not supposed to be kept by counsel except by special order in an individual case. They are supposed to be returned to the commissioner, and the lists are not supposed to be placed in the

court file.

The Chair noted that the jury lists used to be placed in the court file. Judge Sweeney expressed the opinion that putting the list in the court file, especially if it was not sealed, was a breach of jurors' privacy. The lists go back to the jury commissioner after the trial is over. The judge does not have the list; it is not in the court file. Rule 16-1004, Access to Notice, Administrative, and Business License Records, provides that the jury commissioner does not have to disclose the information on the list unless it is about a juror or alternate who has been sworn in. Otherwise, the jury commissioner can deny a request for that inspection. The Vice Chair pointed out that some of this is also in current Rule 4-312.

Judge Sweeney said that in 2006, Rule 4-312 was rewritten. One important aspect was to increase the privacy for jurors. They often express a concern as to what will happen to them. They ask if their name is going to be in the newspaper. They worry that they will be harassed. The idea is to let them know that their personal information will be treated with respect.

Mr. Maloney inquired if there should be a separate rule for capital cases. Judge Sweeney answered that in his opinion, there should not be a separate rule. Or there could be a separate rule that allows anonymity. He could not imagine a case in Maryland where a judge would not allow an attorney to get the names of the jurors. People who handle capital cases are a select group. He trusts the people that he knows so that if they tell him that

they are not going to give information to the defendant, they will not do so. He thought that many of the concerns of the Office of the Public Defender would be taken care of if a presumption exists that the attorney gets the information, but the defendant, the public, and the media do not get it. He greatly respects The Washington Post and The Baltimore Sun, and he thinks that they have internal policies that state that the names and addresses of jurors will not be printed during the trial. During the *Dixon* trial, several web-bloggers were covering the trial. He knew of nothing under First Amendment law or access to records law that holds that there is a distinction between an official newspaper, and a random person who has a blog, or the people who covered the trial every day with a website such as the one entitled InvestigativeVoice.com. If information is given to The Washington Post or The Baltimore Sun, it would have to be given to random bloggers.

Mr. Karceski asked Judge Sweeney what the situation would be where the judge would know the juror information, but no one else would know. Judge Sweeney responded that there is no need for the judge to know. If he were the judge in a case where he did not trust the attorneys or the defendant, he would not want to know the names of the jurors so that he would not slip up and reveal them. There may be some need for the judge to have the names in case a security issue arises. If he were training judges as to anonymous juries, he would tell them if the

attorneys and the defendant do not get this information, the judge should not need it either. The information can remain with the jury commissioner.

The Chair commented that it would be helpful to coalesce what had been discussed. Some redrafting needs to be done on this Rule, so the Rule cannot be approved today. He asked for the Committee's view. Currently, the draft addresses safety and security of jurors as a basis for non-disclosure. The other issue is tampering, threats, inducements or other improper influencing. There could be another reason for an anonymous jury -- for purposes of pure privacy. As in the *Dixon* case, it would be to protect jurors from harassment that had nothing to do with harassment to try to influence the jury's verdict, although there is a fine line between those two issues. He asked whether the Committee had a view about authorizing anonymity, non-disclosure of names, for pure purposes of privacy.

Ms. Clark, who was an attorney representing The Washington Post and the Press Association, reiterated that the court has the inherent authority to protect jurors and to protect the trial process. However, to the extent that there is a rule, there are constitutional constraints on handling an anonymous jury that would need to be built into the rule. She expressed some serious concern about section (d) as it was currently drafted in terms of whether it would pass muster under the First Amendment. She was not sure that privacy concerns alone would be enough to satisfy

the First Amendment. The Chair inquired (1) if there were a legal basis, and (2) assuming one existed, if it is a good policy to permit anonymity for purposes of protecting privacy, such as protecting jurors from harassment by bloggers and people approaching jurors on the street as Judge Sweeney had described.

Mr. Michael asked if the Chair referred to the anonymity only as to the public as opposed to the attorneys and the parties. The Chair responded that this is one of the issues to be determined. What is the Rule trying to protect? The information does not necessarily have to be kept from the attorneys and the parties. The question is whether information should be embargoed from anyone solely for jury privacy. The Subcommittee had seen some evidence about jurors being targeted by commercial people. Judge Sweeney noted that since the Rule was changed, commercial people cannot get juror information. The Chair pointed out that they can if someone gives it to them. Judge Sweeney clarified that he meant that commercial entities cannot get juror information from the court.

Mr. Michael observed that the question is at the lowest level, if a basis exists upon which to prevent the public from having access to the names and addresses of the jurors. This is not including attorneys and the judge being prevented from access. Ms. Ogletree added that this would only be for the purpose of privacy. Mr. Klein inquired what the “purpose of privacy” means. The Chair replied that this came up months ago during the discussion on access to court records. Representatives

from the domestic relations bar and others were interested in shielding court records and identifying information about witnesses and others because of privacy. It had nothing to do with being harmed.

Judge Sweeney expressed his agreement that juror information cannot be embargoed only for privacy purposes. Ms. Clark remarked that this is one of the difficulties in drafting this Rule. There are constitutional implications for the defendant and First Amendment issues with respect to the public. This needs to be considered on a case-by-case basis. It is difficult to put this constitutional standard into a rule. It may be a good idea to clarify in the Rule that courts have the inherent authority to protect jurors, and the courts apply the constitutional standards. In considering the current Rule, she and her colleagues had some concerns as to whether the Rule would pass constitutional muster under the First Amendment.

Mr. Maloney expressed the view that a juror does not have a very strong privacy interest. The juror is performing a public function. When the jurors' names are being shielded from the public, it is not to protect the jurors' privacy. It is to protect the integrity of the process, so that people do not walk up to them and try to influence them, or it is to protect their safety. These are the interests that outweigh publicizing the jurors' names. The Rule has to reflect the non-privacy considerations, and Judge Sweeney is suggesting to escalate the standard depending upon the safety or the integrity of the

process.

Judge Sweeney added that it is a different standard, but it is a First Amendment issue rather than a Sixth Amendment one. The Chair commented that this issue has been raised. It will be necessary to know what the boundaries are. He asked if the Committee was of the view that non-disclosure in any of the categories is justifiable only for the purpose of protecting the safety and security of any of the jurors and protecting against tampering but not beyond those two reasons.

Master Mahasa inquired about one of the concerns addressed earlier in the discussion which is a heightened danger in a particular case. The Chair answered that Mr. Karceski had explained that this was the reason for referring to jurors only by number and not by name. Master Mahasa remarked that this would avoid a juror realizing that something is different about his or her case. The Chair noted that the Subcommittee's view is that this would apply in every case. Nothing would be special about referring to jurors by number. He clarified that his question was non-disclosure. Can what is otherwise disclosable be shielded? Currently, the names of jurors and other information is available.

Mr. Karceski said that the issue as set forth by Mr. Maloney is the consensus of the Subcommittee in terms of the privacy issue. It may not have been addressed as specifically as Mr. Maloney did at today's meeting. Their view was that the role of a juror is one's civic duty. Certain information can be made

public, but only if the exceptions apply that would not allow the information to be made public. Ms. Ogletree commented that she wanted to be sure that when tampering is one of the reasons, the integrity of the system is being considered as opposed to simply tampering. Tampering is not applicable to what happened in the *Dixon* case. It has to be broad enough to include maintaining the integrity of the system. The Vice Chair pointed out that in the Committee note after subsection (c)(3)(D), factor five is "extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment." This is different from influencing the jury. Mr. Maloney remarked that a TV film crew could be outside of a juror's home. Ms. Ogletree reiterated that she wanted to make sure that the integrity of the system is the goal of an anonymous and not just addressing tampering. Judge Pierson added that it would involve inappropriate contacts with jurors.

Judge Sweeney said that it is interesting to note that at the trial of Governor Rod Blagojevich of Illinois that is going on now in Chicago, the judge did exactly what Judge Sweeney had done in the *Dixon* case. The judge in Chicago had stated that he did not think that anyone involved in the trial would create any security problems for the jurors, but everyone in Chicago had an opinion about the case, and the judge decided to make the jury anonymous for that reason. A huge number of media organizations filed for the names of the jurors to be released. After

considering all of the requests, the judge denied them. It will be interesting to see if the case goes up on appeal to the Seventh Circuit on this issue. Judge Sweeney added that he hoped that this would happen.

A big concern is the social media aspect of this. Five hundred million people worldwide have a Facebook account. It is likely that at least half of the jurors have them. The biggest percentage of Facebook accounts is in the United States. Any juror under 35 years of age is likely to have one allowing for easy contact with jurors. These concerns are really coming to the fore, and many of the cases do not address this issue. Previously, it was more difficult to contact a juror, but now with Facebook, Twitter, and MySpace, it is very easy to reach someone.

The Chair noted that a consensus has been reached on what would justify the change to the Rule. He asked the Committee's view about whether a judge should be able to set up an anonymous jury on his or her own initiative without a motion by a party or even over a party's objection. Mr. Karceski explained the reason for the change to the Rule. The Subcommittee felt that there was the possibility where a call would be made to a judge or a judge's chambers with some accurate information that would imperil the security or safety of a juror. It may be that the word "motion" is not appropriate. The Chair said that the word "initiative" is more appropriate. Judge Sweeney pointed out that Judge Wallace emphasized in his letter that it is the judge's

responsibility in the system in Maryland to care for the jurors; it is not the prosecutor's primary responsibility. In a death penalty case, there may be a very high threshold for raising the issue about jurors' security. Because of so many issues to contend with, this issue may not be raised. The judge should be able to have some initiative after reviewing the case to ask that this be investigated rather than hoping that the prosecutor will take on the primary responsibility. The Chair asked if this is the consensus of the Committee. The Committee answered affirmatively.

Mr. Karceski said that Mr. Shellenberger had an opinion on the death penalty exclusion. Mr. Shellenberger noted that since the Rule is going back to the Subcommittee for more work, this issue can be discussed there.

The Chair asked if there were any other issues, other than drafting matters, that needed to be raised. Mr. Zavin told the Committee that he was an attorney in the Office of the Public Defender. He referred to the issue of referring to a juror by name or by number. At some point in the case, the jurors are potential jurors, and it would be very awkward to refer to them as "Mr. Juror" or "Ms. Juror." It would be dehumanizing to refer to them by number.

As far as a substantive matter that had been discussed, he had only heard so far that some anecdotal evidence existed that attorneys in Miami might have been misusing jury information, and some attorneys may be in with the Mob. He remarked that he was

not aware of any of this in Maryland. It is offensive to imply that defense counsel would give information to a defendant when counsel has been ordered not to do so. He asked the Committee to consider taking out the ability to not disclose juror information to defense counsel. Defense counsel should at least be aware of the information, and, as officers of the court, can be ordered not to disclose it to the defendant. The Rule refers to "defendant and counsel" in the conjunctive. It certainly does not set a separate standard as to when to give the information. If two gangs are in the courtroom, there has to be something more specific to that case. It is difficult to put this into the Rule. It had been pointed out that judges should not have to refer to case law to decide this issue. If this is not put into the Rule, judges will have to refer to case law.

Ms. O'Donnell inquired if the jurors are going to be told that they cannot disclose their names to each other. Some of the discussions about privacy issues touch on this. Once the jurors are chosen, they may be together for many weeks in a complicated case, but when they are sitting in any case, are they not allowed to share their names with each other? Can this be restricted? This is something to consider when the Rule is redrafted.

Ms. O'Donnell said that she had another issue to raise as to two of the categories articulated by Judge Sweeney. One involves defense counsel and the State not having the names of jurors. She was not sure that the right to investigate jurors could be taken away from defense counsel and the prosecution. They have a

right to investigate jurors to a certain degree. Some jurors do not always tell the truth during the voir dire process. She had run into cases where jurors had lied about their past criminal record, and they should have been disqualified. These kind of issues may be raised on post conviction, or they may be raised at the time of the trial. If counsel does not have the juror's name, he or she would not have the ability to research this. This would prevent counsel from being able to do his or her Sixth Amendment job, providing effective assistance of counsel to make sure that the jurors were qualified.

Mr. Maloney remarked that no one is aware of a situation in Maryland similar to the one in Miami that was referred to. Judge Sweeney noted that it may be necessary to articulate this in the Rule, because this does not come up very often. The judge may get a case where he or she feels the jury should be anonymous, and no one gets the juror information, but that is not really what is necessary. The information should only not be released to the public. If the judge does not understand how to handle this, he or she cannot run the case with due diligence. The Rule should set out how an "anonymous" jury should be handled. Mr. Maloney commented that the case should be so extraordinary that the judicial officer would have to find that giving the name to counsel as an officer of the court would jeopardize the safety and integrity of the process. Mr. Michael expressed the view that there would be no circumstances under which the counsel would not get the information. It is a

different issue if it is not disclosed to the party.

Judge Sweeney stated that the Rule should not provide that counsel always gets the information, because a situation could arise where it may be necessary to withhold the information from counsel. The Rule should presume that counsel gets the information unless some specific findings are made. Mr. Michael said that he would not want the Rule to give the judge the right to withhold from counsel the names and addresses of parties in a civil or criminal case. The Chair pointed out that this issue has not been addressed in civil cases. It may be easier to consider criminal cases and then later look at civil cases. Judge Sweeney observed that there is a concern in a civil case that would be extraordinarily rare in which someone is being sued or damage was caused by the person being injured when he or she was on a jury in a previous case. He would not like to see a criminal rule enacted, with the implication that it never applies in a civil case. The judge in a civil case can set up an anonymous jury under the judge's inherent authority. If a criminal rule sets out all of the parameters, and there is no parallel civil rule, it may imply that this cannot be done in a civil case. The Chair explained that the focus at this point is on the criminal rule. If the Committee can agree on a criminal rule, then they can consider a civil rule, rather than discuss both at the same time.

The Vice Chair suggested that when the Subcommittee considers the Rule again, they should give a stronger

consideration to the burden of proof. The current standard in subsection (c)(3)(B) “strong reason to believe” seems inappropriate. Her preference would be something similar to “clear and convincing evidence.” It is important to be sure that “tampering” has a standard for a burden of proof, because it currently does not have a standard. The burden of persuasion should be the same for both. Judge Sweeney agreed. One of the logistical problems is where the anonymous jury is initiated by the judge, and the State is holding back because they do not want to be seen as a proponent. What would this evidentiary hearing look like? The Chair asked who will provide the evidence if the judge is going to do this on his or her own initiative and needs evidence to make a finding sufficient to decide to make the jury anonymous. Judge Sweeney responded that what happened in the situations he had seen was if the judge raised the issue, the judge conferred with the attorneys. The judge told counsel that a problem had arisen. In the situations in which Judge Sweeney had been involved, the matter was worked out. The defense attorney was asked if he or she consented to the defendant not getting the information. If this worked out, then the situation was that no problem existed from the defendant’s point of view. A problem still could exist from the point of view of the media. It is a sticky wicket as to how the judge handles this.

The Vice Chair said that she would assume that if a high burden of proof can be met to indicate that anonymity is needed for purposes of safety and security of the jurors or due to

tampering, then during the trial, there are no First Amendment issues. Judge Sweeney disagreed, pointing out that the press will want the names and addresses of the jurors right away. The Vice Chair responded that Judge Sweeney's point is that under law there is a good argument that even though there is a high burden of proof and strong evidence that the jurors may be killed or tampered with, the judge may decide that anonymity is not appropriate. Judge Sweeney noted that the press may not win. They file a petition, but the court may disagree with it.

The Vice Chair pointed out that this is related to the quality of the evidence, assuming that the evidence shows that a juror may die or that the jury may be tampered with if the jury is not anonymous. Ms. Clark remarked that there is a presumptive right to access under the First Amendment and under the Maryland Rules. A standard has to be met before that information can be withheld. A compelling government interest must exist before the information can be withheld. The Vice Chair noted that saving the jury's life or preventing tampering would be a compelling interest. Ms. Clark observed that there are ways of tailoring the restrictions, such as releasing the information post-trial. Typically, The Washington Post does not interview the jury until after the trial.

Mr. Johnson asked about the issue of bloggers and others. Who is the press, and who is entitled to this information? Judge Sweeney replied that under the case law, no distinction can be made. The media has responsible standards for not

interviewing jurors and printing their names during the trial. Mr. Karceski said that the Rule is going back to the Subcommittee. He asked Judge Sweeney about the judge raising the issue of anonymity. What if the matter is taken to the parties, and neither party chooses to do anything about making the jury anonymous? The judge has the information about the security and safety of jurors being jeopardized or the possibility of tampering. Can the judge decide to make the jury anonymous anyway? Judge Sweeney responded that it would depend on how concerned the judge is. Mr. Karceski noted that if the judge is very concerned, he or she could not ignore it. The evidentiary hearing may be difficult to do.

Judge Sweeney referred to the *Dixon* trial. He had the agreement of counsel to make the jury anonymous. He was so convinced after seeing the press and the intensity of feeling in Baltimore City that the jurors would be contacted, and it would cause a big problem. If the prosecutor and defense counsel had objected, Judge Sweeney would have made the jury anonymous regardless. He would have had counsel put their objections on the record. He would have made his specific findings. In many of the federal cases, the judges do not make specific findings, they simply make a conclusion. Many of these issues arise the morning of the trial where the judge may not have the luxury of being able to read the cases to make a decision. Often the cases are very long, and the issue of the anonymous jury is only one of

many other issues in the cases.

Mr. Michael noted that the challenge is when the judge has to make the record. If the parties are in agreement, it is not a problem, as one of the parties can put on the evidence. If neither the defense counsel nor the State is willing to make the record, it is a difficult position for the judge. Judge Sweeney said that if this happened, at the hearing, he would tell counsel that if they agreed with the information Judge Sweeney had regarding the problems with the jury. As an example, the newspaper had many comments about the trial, more than usual, where everyone is expressing a strong view. Mr. Michael observed that this worked in *Dixon*, but what would happen if the judge gets the telephone call that someone is planning to harm a juror? The judge would then become the witness. The Vice Chair added that when publicity alone is what is likely to cause harassment or intimidation of jurors, that evidentiary standard should be a lesser one. Judge Sweeney remarked that this is why he was concerned about using the standard of "clear and convincing" evidence. It sounds like witness testimony and exhibits are in order, when it usually involves information that everyone already knows which may be compelling but is not evidence.

The Chair stated that Rule 4-312 would be referred back to the Criminal Subcommittee.

Consideration of proposed new Rule 4-281 and the amendments to Rules 4-263 and 4-102 was deferred to a latter meeting.

Mr. Karceski presented Rule 4-216, Pretrial Release, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 by adding Code references to section (c), as follows:

Rule 4-216. PRETRIAL RELEASE

. . .

(c) Defendants Eligible for Release Only by a Judge

A defendant charged with an offense for which the maximum penalty is death or life imprisonment or with an offense listed under Code, Criminal Procedure Article, §5-202 (a), (b), (c), (d), ~~or~~ (e), (f) or (g) may not be released by a District Court Commissioner, but may be released before verdict or pending a new trial, if a new trial has been ordered, if a judge determines that all requirements imposed by law have been satisfied and that one or more conditions of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community.

. . .

Rule 4-216 was accompanied by the following Reporter's Note.

The General Assembly enacted Chapter 184, Laws of 2010 (HB 1046), which prohibits a District Court commissioner from authorizing the pretrial release of a defendant who is a registered sex offender. The Subcommittee recommends adding to section (c) a reference to this new provision, Code,

Criminal Procedure Article, §5-202 (g), and also a reference to §5-202 (f) that lists other crimes with which a defendant has been charged and for which a District Court commissioner cannot authorize pretrial release.

Mr. Karceski explained that the legislature in Chapter 184, Laws of 2010 (HB 1046) created additional situations where a District Court commissioner cannot authorize the pretrial release of a defendant who is a registered sex offender. The Subcommittee recommends adding a reference to the statute in section (c) of Rule 4-216. By consensus, the Committee agreed to this addition.

Mr. Karceski presented Rule 4-242, Pleas, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-242 to change a Code reference in section (e), as follows:

Rule 4-242. PLEAS

. . .

(e) Collateral Consequences of a Plea of Guilty or Nolo Contendere

Before the court accepts a plea of guilty or nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the

> plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship, (2) that by entering a plea to the offenses set out in Code, Criminal Procedure Article, §11-701, the defendant shall have to register with the defendant's supervising authority as defined in Code, Criminal Procedure Article, §11-701 ~~(i)~~ (p), and (3) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.
>
> . . .

Rule 4-242 was accompanied by the following Reporter's Note.

> The General Assembly passed Chapter 175, Laws of 2010 (HB 936), which amended Code, Criminal Procedure Article, §11-701 pertaining to registration of sex offenders. The Criminal Subcommittee recommends changing the Code reference in section (e) to conform to the new statute.

Mr. Karceski explained that the legislature enacted Chapter 175, Laws of 2010 (HB 936), which amended Code, Criminal Procedure Article, §11-701 requiring a defendant convicted of being a sex offender to register. The Subcommittee recommends changing the Code reference in section (e) of Rule 4-242 to conform to the new statute. By consensus, the Committee agreed to this change.

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