COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Education and Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on June 21, 2012.

Members present:

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

Robert R. Bowie, Jr., Esq.
Albert D. Brault, Esq.
James E. Carbine, Esq.
Harry S. Johnson, Esq.
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, Esq.
Timothy F. Maloney, Esq.
Robert R. Michael, Esq.
Anne C. Ogletree, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Steven M. Sullivan, Esq.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.
Hon. Julia B. Weatherly
Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Cheryl Lyons-Schmidt, Esq., Assistant Reporter
Brian L. Zavin, Esq., Office of the Public Defender
George Butler, Jr., Esq.
David W. Weissert, Coordinator of Commissioner Activity, District Court of Maryland
David R. Durfee, Jr., Esq., Executive Director, Legal Affairs
Paul DeWolfe, Esq., Office of the Public Defender
Nathan Siegel, Esq.

The Chair convened the meeting. He stated that this was the last Committee meeting for Mr. Karceski, Mr. Klein, Ms. Potter, and Master Mahasa. Their terms will expire at the end of June and under the Court of Appeals new term-limit mandate, they are

not eligible for reappointment. The Court of Appeals hosted a lunch the previous day where they had received a certificate of appreciation. The Chair said that he and the Committee will miss each of them. They each have contributed enormously to the work of the Committee.

Mr. Klein told the Committee that after serving 18 years on the Committee, he had greatly valued his time as a member of the Committee. He added that he had been privileged to have the rest of the Committee as colleagues. His service was the best educational experience of his legal career. Ms. Potter thanked the staff of the Committee, particularly Ms. Cox, the administrative assistant, for all of their help.

The Chair introduced Cheryl Lyons-Schmidt, Esq., the new assistant reporter, who was replacing Kara Lynch. Ms. Lyons-Schmidt had been an intern for the Committee in 2007. She obtained a degree as a paralegal and worked in that capacity until she was admitted to the bar in 2008. She had been practicing law since 2008. The Chair noted that a few items had been added to the meeting agenda. He also stated that because four members are going off the Committee, and four more are being added, the subcommittee membership would have to be redone. He would send his proposal for the makeup of the subcommittees to the Committee for their input.

Agenda Item 1. Consideration of proposed amendments to: Rule 4-212 (Issuance, Service, and Execution of Summons or Warrant), Rule 4-217 (Bail Bonds), Rule 4-242 (Pleas), Rule 4-243 (Plea Agreements), Rule 4-262 (Discovery in District Court), Rule

4-263 (Discovery in Circuit Court), Rule 4-504 (Petition for Expungement When Charges Filed), Rule 4-509 (Appeal), Rule 15-1201 (Applicability), Rule 7-112 (Appeals Heard De Novo), Form 4-504.1 (Petition for Expungement of Records), Rule 11-601 (Expungement of Criminal Charges Transferred to the Juvenile Court), and Rule 4-501 (Applicability)

Mr. Karceski said that he echoed the sentiments of Mr. Klein and Ms. Potter about his service on the Committee. They were not leaving the Committee by choice. He had called a meeting of the Criminal Subcommittee a few weeks ago, because of the recent legislation that had been passed that would affect some of the Criminal Rules.

Mr. Karceski presented Rule 4-212, Issuance, Service, and Execution of Summons or Warrant, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-212 to add a cross reference after section (e), as follows:

Rule 4-212. ISSUANCE, SERVICE, AND EXECUTION OF SUMMONS OR WARRANT

. . .

(e) Execution of Warrant - Defendant Not in Custody

Unless the defendant is in custody, a warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the

> defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest. The defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest or, if the warrant so specifies, before a judicial officer of the circuit court without unnecessary delay and in no event later than the next session of court after the date of arrest. The court shall process the defendant pursuant to Rule 4-216 and may make provision for the appearance or waiver of counsel pursuant to Rule 4-215.
>
> Committee note: The amendments made in this section are not intended to supersede Code, Courts Article §10-912.
>
> Cross reference: See Code, Criminal Procedure Article, §4-109 concerning unserved warrants, summonses, or other criminal process for misdemeanor offenses.
>
> . . .

Rule 4-212 was accompanied by the following Reporter's note.

> The 2012 General Assembly enacted Chapter 525, Laws of 2012 (SB 496), which sets out a procedure for the invalidation and destruction of unexecuted warrants, summonses, and other criminal process. The Criminal Subcommittee recommends adding a cross reference after section (e) of Rule 4-212 to draw attention to the new statute.

Mr. Karceski explained that the proposed changes to Rule 4-212 were as a result of Chapter 525, Laws of 2012 (SB 496), which addresses unexecuted warrants, summonses, or other criminal process. The statute is rather lengthy, and it breaks down what can happen with warrants or summonses that are not executed for a

variety of reasons. This modifies Code, Criminal Procedure Article, §4-109. If a warrant, summons, or other criminal process remains unexecuted for a period of five years or longer, the police agency in the jurisdiction where the warrant or the summons was issued may ask the State's Attorney in that jurisdiction to request that the warrant, summons, or other process be invalidated and destroyed. The arrest warrant should be for a violation of probation, the failure of the defendant to appear in court, or for the failure to appear of a defendant who has been released on bail, but the warrant has been unexecuted for at least 10 years. If it were five or more years, the State's Attorney would then ask the court at the discretion of the court and of the State's Attorney, to decide whether the warrant should be invalidated. If presented to the court it would be invalidated, unless the court would agree with the State's Attorney, who would have the right to object because there is an ongoing investigation.

Mr. Karceski said that if the warrant, summons, or other process has remained unexecuted for seven years, the State's Attorney would have to go forward presenting this issue to the administrative judge. The court would then consider striking the warrant or the summons. As a result, there could be no arrest of that person. It does not end the prosecution or the issue at hand, which can be revived at a later time. It does not affect any pending criminal charge.

Mr. Karceski said that the Subcommittee had decided to place

a cross reference in Rule 4-212 after section (e). This is because the genesis of this matter goes forward from an action by a police agency as opposed to a normal motion or proceeding filed by an attorney in court. Mr. Sykes inquired whether the cross reference should also refer to "invalidation and destruction" of the unserved warrants, summonses, or other criminal process. By consensus, the Committee agreed to this change.

By consensus, the Committee approved Rule 4-212 as amended.

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

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-217 to add a cross reference after sections (c) and (d), as follows:

Rule 4-217. BAIL BONDS

. . .

(c) Authorization to Take Bail Bond

Any clerk, District Court commissioner, or other person authorized by law may take a bail bond. The person who takes a bail bond shall deliver it to the court in which the charges are pending, together with all money or other collateral security deposited or pledged and all documents pertaining to the bail bond.

Cross reference: Code, Criminal Procedure Article, §§5-204 and 5-205. See Code, Insurance Article, §10-309, which requires a signed affidavit of surety by the defendant

or the insurer that shall be provided to the court if payment of premiums charged for bail bonds is in installments.

(d) Qualification of Surety

(1) In General

The Chief Clerk of the District Court shall maintain a list containing: (A) the names of all surety insurers who are in default, and have been for a period of 60 days or more, in the payment of any bail bond forfeited in any court in the State, (B) the names of all bail bondsmen authorized to write bail bonds in this State, and (C) the limit for any one bond specified in the bail bondsman's general power of attorney on file with the Chief Clerk of the District Court. The clerk of each circuit court and the Chief Clerk of the District Court shall notify the Insurance Commissioner of the name of each surety insurer who has failed to resolve or satisfy bond forfeitures for a period of 60 days or more. The clerk of each circuit court also shall send a copy of the list to the Chief Clerk of the District Court.

Cross reference: For penalties imposed on surety insurers in default, see Code, Insurance Article, §21-103 (a).

(2) Surety Insurer

No bail bond shall be accepted if the surety on the bond is on the current list maintained by the Chief Clerk of the District Court of those in default. No bail bond executed by a surety insurer directly may be accepted unless accompanied by an affidavit reciting that the surety insurer is authorized by the Insurance Commissioner of Maryland to write bail bonds in this State.
Cross reference: For the obligation of the District Court Clerk or a circuit court clerk to notify the Insurance Commissioner concerning a surety insurer who fails to resolve or satisfy bond forfeitures, see Code, Insurance Article, §21-103 (b).

(3) Bail Bondsman

> No bail bond executed by a bail bondsman may be accepted unless the bondsman's name appears on the most recent list maintained by the Chief Clerk of the District Court, the bail bond is within the limit specified in the bondsman's general power of attorney as shown on the list or in a special power of attorney filed with the bond, and the bail bond is accompanied by an affidavit reciting that the bail bondsman:
>
> (A) is duly licensed in the jurisdiction in which the charges are pending, if that jurisdiction licenses bail bondsmen;
>
> (B) is authorized to engage the surety insurer as surety on the bail bond pursuant to a valid general or special power of attorney; and
>
> (C) holds a valid license as an insurance broker or agent in this State, and that the surety insurer is authorized by the Insurance Commissioner of Maryland to write bail bonds in this State.
>
> Cross reference: Code, Criminal Procedure Article, §5-203 and Rule 16-817 (Appointment of Bail Bond Commissioner - Licensing and Regulation of Bail Bondsmen). See Code, Insurance Article, §10-309, which permits payment in installments for the premiums charged for bail bonds.
>
> . . .

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

> The legislature enacted Chapter 244, Laws of 2012 (HB 742), which permits bail bondsmen to accept payment for the premium charged for a bail bond in installments. The Subcommittee recommends adding a cross reference after sections (c) and (d) of Rule 4-217 to draw attention to the new statute.

Mr. Karceski told the Committee that the proposed change to Rule 4-217 pertains to bail bonds on the installment plan. He

said that he believed that this had been going on for quite some time before the change to the law. Chapter 244, Laws of 2012 (HB 742) allows the bail bondsman to accept payment for a premium charge in installments provided that certain conditions are met. Certain books and records have to be kept and are subject to inspection. The bail bondsman must take the necessary steps to secure payment if the payment is not made as agreed to in the contract between the person who signs for the bail and the bail bond company.

A newer version of Rule 4-217 had been handed out at today's meeting. The original cross reference to be added to Rule 4-217 was placed at the end of the Rule. Mr. Karceski said that after discussing the matter with the Reporter and Ms. Libber, an Assistant Reporter, they made the decision to move the cross reference after section (c), Authorization to Take Bail Bond, and to expand the cross reference to be more specific regarding the issue of installments. The original cross reference had not been this specific. A second cross reference at the end of the Rule referred to the same issue. Mr. Karceski expressed the view that it was not necessary to repeat this at the end of Rule 4-217. He moved to delete the underlined language at the end of the Rule. The motion was seconded, and it passed unanimously.

By consensus, the Committee approved Rule 4-217 as amended.

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 add a Committee note after section (a), to add a new section (d) pertaining to conditional pleas, and to make stylistic changes, as follows:

Rule 4-242. PLEAS

(a) Permitted Pleas

A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. In addition to any of these pleas, the defendant may enter a plea of not criminally responsible by reason of insanity.

Committee note: It has become common in some parts of the State for defendants to enter a plea of not guilty but, in lieu of a normal trial, to proceed on an agreed statement of ultimate fact to be read into the record or on a statement of proffered evidence to which the defendant stipulates, the purpose being to avoid the need for the formal presentation of evidence but to allow the defendant to appeal from a judgment of conviction. That kind of procedure is permissible only if there is no material dispute in the statement of facts or evidence, and there are risks to both parties if the statement of facts or evidence is either insufficient or, conversely, removes any reasonable chance of an acquittal. *See Bishop v. State*, 417 Md. 1 (2010); *Harrison v. State*, 382 Md. 477 (2004); *Morris v. State*, 418 Md. 194 (2011). Parties to a criminal action in a circuit court who seek to avoid a formal trial but to allow the defendant to appeal from specific adverse rulings are encouraged to proceed by way of a conditional plea of guilty pursuant to section (d) of this Rule, to the extent that section is applicable.

(b) Method of Pleading

(1) Manner

A defendant may plead not guilty personally or by counsel on the record in open court or in writing. A defendant may plead guilty or nolo contendere personally on the record in open court, except that a corporate defendant may plead guilty or nolo contendere by counsel or a corporate officer. A defendant may enter a plea of not criminally responsible by reason of insanity personally or by counsel and the plea shall be in writing.

(2) Time in the District Court

In District Court the defendant shall initially plead at or before the time the action is called for trial.

(3) Time in Circuit Court

In circuit court the defendant shall initially plead within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213 (c). If a motion, demand for particulars, or other paper is filed that requires a ruling by the court or compliance by a party before the defendant pleads, the time for pleading shall be extended, without special order, to 15 days after the ruling by the court or the compliance by a party. A plea of not criminally responsible by reason of insanity shall be entered at the time the defendant initially pleads, unless good cause is shown.

(4) Failure or Refusal to Plead

If the defendant fails or refuses to plead as required by this section, the clerk or the court shall enter a plea of not guilty.

Cross reference: See *Treece v. State*, 313 Md. 665 (1988), concerning the right of a defendant to decide whether to interpose the defense of insanity.

(c) Plea of Guilty

The court may not accept a plea of guilty until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section ~~(e)~~ (f) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

(d) Conditional Plea of Guilty

(1) Scope of Section

This section applies only to an offense charged by indictment or criminal information and set for trial in a circuit court or that is scheduled for trial in a circuit court pursuant to a prayer for jury trial entered in the District Court.

Committee note: Section (d) of this Rule does not apply to appeals from the District Court.

(2) Entry of Plea; Requirements

With the consent of the court and the State, a defendant may enter a conditional plea of guilty. The plea shall be in writing and, as part of it, the defendant may reserve the right to appeal one or more issues specified in the plea that (A) were raised by and determined adversely to the defendant, and, (B) if determines in the defendant's favor would have been dispositive of the case. [The right to appeal under this subsection is limited to those pretrial issues litigated in the circuit court and set

forth in writing in the plea.]

Committee note: This Rule does not affect any right to file an application for leave to appeal under Code, Courts Article, §12-302 (e)(2).

(3) Withdrawal of Plea

A defendant who prevails on appeal with respect to an issue reserved in the plea may withdraw the plea.

Cross reference: Code, Courts Article, §12-302.

~~(d)~~ (e) Plea of Nolo Contendere

A defendant may plead nolo contendere only with the consent of court. The court may require the defendant or counsel to provide information it deems necessary to enable it to determine whether or not it will consent. The court may not accept the plea until after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the defendant is pleading voluntarily with understanding of the nature of the charge and the consequences of the plea. In addition, before accepting the plea, the court shall comply with section ~~(e)~~ (f) of this Rule. Following the acceptance of a plea of nolo contendere, the court shall proceed to disposition as on a plea of guilty, but without finding a verdict of guilty. If the court refuses to accept a plea of nolo contendere, it shall call upon the defendant to plead anew.

~~(e)~~ (f) 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 (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.

Committee note: In determining whether to accept the plea, the court should not question defendants about their citizenship or immigration status. Rather, the court should ensure that all defendants are advised in accordance with this section. This Rule does not overrule *Yoswick v. State*, 347 Md. 228 (1997) and *Daley v. State*, 61 Md. App. 486 (1985).

~~(f)~~ (g) Plea to a Degree

A defendant may plead not guilty to one degree and plead guilty to another degree of an offense which, by law, may be divided into degrees.

~~(g)~~ (h) Withdrawal of Plea

At any time before sentencing, the court may permit a defendant to withdraw a plea of guilty or nolo contendere when the withdrawal serves the interest of justice. After the imposition of sentence, on motion of a defendant filed within ten days, the court may set aside the judgment and permit the defendant to withdraw a plea of guilty or nolo contendere if the defendant establishes that the provisions of section (c) or ~~(d)~~ (e) of this Rule were not complied with or there was a violation of a plea agreement entered into pursuant to Rule 4-243. The court shall

hold a hearing on any timely motion to withdraw a plea of guilty or nolo contendere.

Committee note: The entry of a plea may waive technical defects in the charging document and waives objections to venue. See, e.g., Rule 4-202 (b) and *Kisner v. State*, 209 Md. 524, 122 A.2d 102 (1956).

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 731 a and M.D.R. 731 a.
Section (b)
Subsection (1) is derived from former Rule 731 b 1 and M.D.R. 731 b 1.
Subsection (2) is new.
Subsection (3) is derived from former Rule 731 b 2.
Subsection (4) is derived from former Rule 731 b 3 and M.D.R. 731 b 2.
Section (c) is derived from former Rule 731 c and M.D.R. 731 c.
Section (d) is new.
Section ~~(d)~~ (e) is derived from former Rule 731 d and M.D.R. 731 d.
Section ~~(e)~~ (f) is new.
Section ~~(f)~~ (g) is derived from former Rule 731 e.
Section ~~(g)~~ (h) is derived from former Rule 731 f and M.D.R. 731 e.

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

The Court of Appeals in *Bishop v. State*, 417 Md. 1 (2010) suggested that the Rules Committee consider whether to adopt a Rule providing for a conditional guilty plea similar to Fed. R. Crim. Proc. 11 (a). The Criminal Subcommittee had drafted an earlier version of Rule 4-242 containing a provision addressing conditional guilty pleas but decided to defer the proposed change until the legislature enacted a statute permitting them. After one or two failures, the 2012 legislature enacted Chapter 410, Laws of 2012 (HB 1031) authorizing conditional guilty pleas to be taken in accordance with the Maryland Rules. The Subcommittee made a few changes to its earlier draft and recommends

the adoption of the proposed changes to Rule 4-242.

Mr. Karceski explained that the proposed change to Rule 4-242 was a result of Chapter 410, Laws of 2012, (HB 1031). The legislature had agreed that there should be a conditional plea of guilty. Certain criteria are required, including that the plea must be in writing and pertain to pretrial issues that the defendant intends to appeal. An appeal from a final judgment entered following a conditional plea of guilty may be taken in accordance with the Maryland Rules. At present, a defendant who pleads guilty may not appeal from a conviction based on the guilty plea, except on certain very limited grounds. The intent of the statute is to allow the defendant who loses a pretrial motion to dismiss or to suppress evidence which, if granted, would be dispositive of the case, to please guilty and reserve for appeal the court's ruling on the motion. This conditional guilty plea must be not only knowing and voluntary but accepted by the court and agreed to by the State's Attorney.

Mr. Karceski said that a more recent version of Rule 4-242 had been handed out at the meeting. The Chair and some other people had looked at the proposed changes to Rule 4-242, and they had decided, as a style matter to divide it up into three sections.

Mr. Karceski observed that, if the defendant prevails on appeal, the case would be remanded to the circuit court, where the defendant would be allowed to withdraw the plea. When the

defendant does so, since it is dispositive of the case, it is likely that the case will be dismissed. The Rule is a judicial economy measure, but will probably not be used very often, because it requires too many people to agree to do it. However, applying the Rule may move forward a case that could take a week or two to try. It focuses the issue before the court, and the court provides the answer that will end the case one way or the other.

The Chair commented that he would add some context to this. The Court of Appeals had suggested that the Rules Committee consider this issue. The Court had had several cases in which defendants who had lost suppression motions entered a plea of not guilty but had agreed to proceed on some variety of an agreed statement of facts or evidence. The practice is varied. Attorneys on both sides and judges have been getting into trouble because of a misunderstanding and a misuse of that practice.

The Chair said that in an early case, there was an agreed statement of facts from which no other verdict but guilty could arise. The Court of Appeals held that this is the functional equivalent of a guilty plea, but the judge in the case did not go through the appropriate litany with the defendant to make sure that the plea was knowing and voluntary and the conviction was reversed on that ground. In other cases, the problem was that, although the case purported to proceed on an agreed statement of facts, the defendant actually contested some of the material facts, but the trial court ignored the contradiction and

convicted the defendant. The Court of Appeals reversed, pointing out that where the "agreed statement" is disputed in any material way, it cannot support a conviction because the contradiction raises credibility issues that cannot be decided without witnesses or documentation.

The Chair observed that this issue has been bounced around, and a number of cases had been reversed in the Court of Appeals and the Court of Special Appeals. When the Court of Appeals had the last of these cases about a year ago, they asked the Committee to consider looking at the conditional guilty plea approach in the federal system to try to solve this problem. The Committee had to wait a year until the legislature authorized appeals from conditional guilty pleas. There is still the issue that this Rule is not going to supplant the not-guilty-statement-of-facts, which will continue to be used. However, the thought was that in the context of Rule 4-242, which covers all pleadings, a Committee note should be added that would warn judges, more than anyone else, but also prosecutors and defense attorneys, that to use this other approach, it is necessary to make sure that the agreed statement is actually agreed to and not inconsistent.

The Chair commented that based on case law, there are also risks to people who use the not-guilty-statement-of-facts inappropriately. *Sutton v. State*, 289 Md. 359 (1981) pointed out that if there is an agreed statement of facts and no other

verdict than guilty can result from it, it is the functional equivalent of a guilty plea, and the record must demonstrate that the plea was knowing and voluntary. There is also the lurking problem when the agreed statement is one of ultimate fact of whether, by agreeing to chat and this excusing the State from the need to produce the evidence challenged by the pre-trial motion, the loss of the motion is moot. The case is moot. This is a problem for the defendant. The problem for the State is that if the evidence or facts stipulated to are legally insufficient and the appellate court reverses on that ground, the defendant cannot be retried under double jeopardy principles.

The Chair stated that the thought was to at least point out that if this procedure is to be used, the party has to be aware of the risks. This is the purpose of the proposed Committee note after section (a) in Rule 4-242. Section (a) is the only part of the Rule that refers to pleas of not guilty. There may be some question about the wording of this. It alerts people to the case law. One issue that has surfaced with respect to section (d) that was initially raised by Brian Kleinbord, Esq., an Assistant Attorney General, who was not able to attend today's meeting, was the bracketed language at the end of subsection (d)(2). The Office of the Public Defender (OPD) is opposed to this. This is another issue that will go before the Court of Appeals.

The Chair inquired if anyone had a comment on the Committee note at the end of section (a) of Rule 4-242. Mr. Johnson noted that the way the Rule is constructed, section (c) pertains to

guilty pleas, and section (d) pertains to conditional pleas of guilty. He suggested that the conditional plea of guilty should be in the list of permitted pleas in section (a). The Chair responded that the conditional plea is a guilty plea. Mr. Johnson asked why it was left out. Since it is separately in section (d), that indicates that it is something different than a guilty plea. The Chair said that it was left out because it is a kind of guilty plea. An *Alford* plea is a guilty plea; should that be included, also? Mr. Johnson questioned whether a plea of nolo contendere is a guilty plea. The Chair answered negatively. It is different because there is no finding of guilt.

Judge Pierson remarked that he objected to the Committee note after section (a). He expressed the opinion that it is inappropriate to put warnings to judges and to the bar in a Committee note. There are all sorts of risks that judges and the bar run, and all sorts of pleas that they do not know about. He added that he was not defending the practice of a not-guilty statement of facts which is used by some courts, although not in Baltimore City Circuit Court. It is a time-saving device in District Court in Baltimore City. He did not think that the Rules needed to be a textbook or practice guide. The Chair noted that a historical reason exists for having the note. Judges are supposed to know about the existing case law, but some apparently do not pay sufficient attention to it.

Ms. Ogletree expressed the view that the Committee note

serves a useful purpose, especially in the counties where people who are recent law school graduates are practicing law and do not understand exactly what they are doing when there is an agreed statement of facts in a case. Judge Pierson pointed out that case law discourages this practice. Ms. Ogletree responded that when an attorney has 45 District Court cases in one day, it is very difficult to handle them. Judge Pierson said that this case law affects every one of those 45 cases. Ms. Ogletree noted that there will be a number of appeals. This saves judicial time.

The Chair commented that in their opinions, the Court of Appeals and the Court of Special Appeals have become increasingly critical of trial judges who are finding verdicts based on the so-called "agreed statement of facts." Judge Pierson observed that these could be addressed in the bench book for judges. He reiterated that Rule 4-242 did not need the Committee note. The Chair agreed that the Committee note is not necessary, but the question was whether it would be of some use. The Vice Chair remarked that it would give more advice to circuit court judges. The Vice Chair added that as a Court of Special Appeals judge, he did not like to reverse circuit court judges where the judge slips up by not giving proper advisements. The Committee note would call attention to this. It may not solve all of the problems, but it will flag the issue for the bench. He expressed the opinion that the Committee note is a good idea.

The Chair said that the Committee note is not just directed to judges but to the attorneys who have to agree to the statement

of facts. They need to understand that they cannot proceed with this if the defendant is going to add something inconsistent to the statement of facts. Mr. Karceski asked whether the courts have held that this should not be done or whether the courts have decided that the procedure should be done a certain way. Judge Pierson replied that the courts have said that there are risks with this practice. The bench and the bar do not fully comprehend the risks.

Mr. Karceski expressed his agreement with Judge Pierson but noted that the courts are not saying that from this day forward, there cannot be any not-guilty statements of fact. The courts are holding that the way some of these are done is very convoluted and confusing. There is a proper way of doing these. It may not save time, but if there is an agreed-upon ultimate statement of facts between the parties, it not only allows them to go forward without a trial, but it also allows the defense attorney to argue the sufficiency of that statement of facts or a search contained within that statement of facts, if it is set up properly. Then an appeal can follow that is not an application for a writ of appeal. The method of trial using a statement of facts survives the opinions of the court. Some form of a Committee note makes sense. It is important that people understand that there is a way to do this, but it must be an agreed ultimate statement of facts.

Judge Pierson observed that the Rules are precise rubrics that must be followed. The Committee note is attempting to

provide for something different. It is not prohibiting an agreed statement of ultimate fact. It draws attention to the authority when someone is deciding whether to take this approach. The Chair said that the Rules have Committee notes throughout that are similar to this. Judge Pierson argued that many Committee notes could be added that would inform people how to practice law. The Chair acknowledged that it is not necessary to have this Committee note. The thought was that by following the direction of the Court of Appeals, the agreed statement of facts could work.

Judge Pierson remarked that he finds the practice just as annoying as the appellate courts do. What happens in the District Court is that there is a not guilty statement of facts, and the State's Attorney reads what is in the application and the statement of probable cause, never asking if the defendant agrees with it. Then the defendant states that he or she has three emendations to the statement of facts. The judge is not concerned with this, as he or she is more interested in moving the case off of the docket.

Mr. Karceski responded that he agreed with Judge Pierson's description, but it should not happen that way. Judge Pierson added that it happens more often that way than any other way. The Chair commented that in the District Court, if the case ends in a conviction, there is the right of a de novo appeal. This is not the case in the circuit court. Every one of the appellate cases came from the circuit court.

Mr. Karceski referred to the language in the seventh line of the Committee note after section (a) that reads: "...allow the defendant to appeal from a judgment of conviction...". He moved that the following language be added before it: "to allow the defendant to argue the sufficiency of the agreed facts or evidence...". In the Committee note, he suggested striking the language that reads, "...and there are risks to both parties if the statement of facts or evidence is either insufficient or, conversely, removes any reasonable chance of an acquittal." The language would read: "...to allow the defendant to argue the sufficiency of the agreed facts or evidence and to appeal from a judgment of conviction. That kind of procedure is permissible only if there is no material dispute in the statement of facts or evidence. *See Bishop v. State*...". The Reporter asked if the following cases that were cross referenced would remain in the Rule, and Mr. Karceski answered affirmatively. The motion was seconded.

Mr. Zavin, an Assistant Public Defender, expressed his concern that the language suggested by Mr. Karceski would be too limiting. The purpose of the agreed statement of facts is broader than sufficiency of the evidence.

The Chair called for a vote on Mr. Karceski's motion to amend the Committee note. The motion carried with two opposed. Judge Pierson suggested that in place of the language in the first line of the Committee note that reads: "common in some

parts of the State...," the language "...common in some courts..." should be substituted. By consensus, the Committee agreed to this change.

Mr. Carbine remarked that he echoed Judge Pierson's reservations about the Committee note. The Chair called for a vote on keeping the Committee note as amended, and the Committee decided in favor of keeping the note with three opposed.

The Chair said that sections (b) and (c) are in the current version of the Rule. Section (d) has new language. Mr. Sykes referred to the word in subsection (d)(3) that reads "determines," and he pointed out that it should read: "determined." By consensus, the Committee agreed with this.

The Chair commented that the next issue was the bracketed language at the end of subsection (d)(2). Mr. Sullivan explained that this change was suggested by the Criminal Appeals Division of the Office of the Attorney General, who had anticipated opposition from the OPD. Some defendants may seek to raise additional evidence other than what they had expressly preserved for the right to appeal. This Rule would require that only pretrial issues litigated in the circuit court and set forth in writing in the plea can be appealed. It seems reasonable and prophylactic to add this language and save the appellate courts from hearing issues that had not been already litigated. It alerts everyone involved that the appeal is limited to pretrial issues that have been litigated.

Mr. Zavin told the Committee that the opposition of the OPD

was qualified. Certain issues that can be raised in an appeal from a guilty plea such as involuntariness or an illegal sentence are not able to be raised in a conditional guilty plea. As long as a defendant can file an application for leave to appeal, the OPD would be less opposed to the conditional guilty plea. In terms of judicial economy, the better approach would be to allow appeals on the traditional grounds. Not just any grounds can be raised; it would have to be involuntariness of the plea, an illegal sentence, or a lack of jurisdiction by the court. These could be raised in a separate application for leave to appeal.

The Chair said that currently, someone would have to file an application for leave to appeal, which the Court of Special Appeals would either grant or deny. If they grant it, it would become a direct appeal. Mr. Zavin expressed the view that the Rule should be clear that someone can file an application for leave to appeal as well as an appeal from the conditional guilty plea. This may not be good for judicial economy, but at least the right to file an appeal still exists. The Chair pointed out that the Committee note after subsection (d)(2) of Rule 4-242 references the statute. Mr. Zavin expressed the opinion that the statute is somewhat ambiguous, and it is a new creature.

The Chair remarked that if the defendant enters a conditional guilty plea and wants to appeal the loss of a suppression motion, that is a direct appeal. If the defendant wants to complain that the guilty plea was involuntary or that the judge did not go through the litany to make sure that the

plea was knowing and voluntary, then the defendant would have to file an application for leave to appeal. If the Court of Special Appeals grants the application, presumably all would be consolidated into one appeal. Mr. Zavin reiterated that the Rule should be clear that the defendant can file both. The Chair said that he was not sure how many cases there are in which applications for leave to appeal are filed now pertaining to guilty pleas based on jurisdiction and involuntariness of the plea. Mr. Zavin responded that there are not an enormous number of them, but the number of conditional pleas is not great, either. Mr. Sykes asked if the problem would be solved if the Committee note had language added that would read: "but does not limit the right to file an application for leave to appeal...". Mr. Zavin said that the Committee note should suggest that the defendant has the right to file the application for leave to appeal.

The Chair asked what the Committee wanted to do about adding the bracketed language suggested by the Attorney General to subsection (d)(2). Mr. Sullivan moved to add the language, and the motion was seconded. Mr. Sullivan asked whether Mr. Kleinbord knew about the Committee note. The Chair answered that he was not sure whether Mr. Kleinbord know about it. The thought was to make clear that the conditional plea of guilty is not intended to supplant the statutory right to file an application for leave to appeal. He called for a vote on Mr. Sullivan's motion, and it carried with a majority vote.

Mr. Durfee suggested that a reference to a conditional guilty plea should be added to section (f) of Rule 4-242. The Chair pointed out that this was also suggested for section (a) of the Rule. Mr. Durfee noted that there are separate subsections in the Rule for guilty pleas and for pleas of nolo contendere. He expressed the view that conditional guilty pleas should be specifically referred to in section (f). The Chair noted that this follows the suggestion made by Mr. Johnson. By consensus, the Committee approved this change.

By consensus, the Committee approved Rule 4-242 as amended.

Mr. Karceski presented Rule 4-243, Plea Agreements, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-243 (c)(4) to correct an internal reference, as follows:

Rule 4-243. PLEA AGREEMENTS

. . .

(c) Agreements of Sentence, Disposition, or Other Judicial Action

(1) Presentation to the Court

If a plea agreement has been reached pursuant to subsection (a)(1)(F) of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State's Attorney

shall advise the judge of the terms of the agreement when the defendant pleads. The judge may then accept or reject the plea and, if accepted, may approve the agreement or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.

(2) Not Binding on the Court

The agreement of the State's Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.

(3) Approval of Plea Agreement

If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.

Committee note: As to whether sentence imposed pursuant to an approved plea agreement may be modified on post sentence review, see *Chertkov v. State*, 335 Md. 161 (1994).

(4) Rejection of Plea Agreement

If the plea agreement is rejected, the judge shall inform the parties of this fact and advise the defendant (A) that the court is not bound by the plea agreement; (B) that the defendant may withdraw the plea; and (C) that if the defendant persists in the plea of guilty or nolo contendere, the sentence or other disposition of the action may be less favorable than the plea agreement. If the defendant persists in the plea, the court may accept the plea of guilty only pursuant to Rule 4-242 (c) and the plea of nolo contendere only pursuant to Rule 4-242 ~~(d)~~ (e).

(5) Withdrawal of Plea

If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.

. . .

Rule 4-243 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-242.

Mr. Karceski noted that the only change to Rule 4-243 was a "housekeeping" change in subsection (c)(4). A reference to "Rule 4-242 (d)" should be changed to "Rule 4-242 (e)," because of the new section added to Rule 4-242. By consensus, the Committee agreed to this change.

By consensus, the Committee approved Rule 4-243 as presented.

Mr. Karceski presented Rules 4-262, Discovery in District Court, and 4-263, Discovery in Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-262 to add a Committee note after section (a), as follows:

Rule 4-262. DISCOVERY IN DISTRICT COURT

(a) Applicability

This Rule governs discovery and

inspection in the District Court. Discovery is available in the District Court in actions that are punishable by imprisonment.

Committee note: This Rule also governs discovery in actions transferred from District Court to circuit court upon a jury trial demand made in accordance with Rule 4-301 (b)(1)(B). See Rule 4-301 (c).

. . .

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

A circuit court judge suggested the addition of Committee note in Rules 4-262 and 4-263 to Rule 4-301 (c), which provides that discovery in an action transferred to a circuit court upon a jury trial demand is governed by Rules 4-262 or 4-263, depending on whether the demand is made (1) in writing and, unless otherwise ordered by the court or agreed to by the parties, filed no later than 15 days before the scheduled trial date, or (2) in open court on the trial date by the defendant and the defendant's counsel. The Rules Committee recommends adding a Committee note after section (a) of Rule 4-262 referring to Rule 4-301 (b)(1)(B) and after section (a) of Rule 4-263 referring to Rule 4-301 (b)(1)(A).

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to add a Committee note after section (a), as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

(a) Applicability

This Rule governs discovery and inspection in a circuit court.

Committee note: This Rule also governs discovery in actions transferred from District Court to circuit court upon a jury trial demand made in accordance with Rule 4-301 (b)(1)(A). See Rule 4-301 (c).

. . .

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

See the Reporter's note to Rule 4-262.

Mr. Karceski explained that it had been brought to the attention of the Criminal Subcommittee that some confusion exists regarding Rules 4-262 and 4-263, because of language contained in Rule 4-301, Beginning of Trial in District Court. There are two ways that a defendant in the District Court can request a jury trial. The first way is to file the request in writing with the court no later than 15 days before the scheduled trial date. The second way is for counsel or the defendant without counsel to request a jury trial on the day of the defendant's scheduled trial in the District Court. The case would be sent directly to the circuit court. Jurisdictions vary as to how they handle this second method. In some jurisdictions, if someone requests a jury trial on a Monday, the person will be at the circuit court on Tuesday and should be prepared to go forward with the jury trial. In some jurisdictions, if the defendant asks for a trial by jury on the day of trial, the defendant gets a summons to appear in the circuit court at some future time, which could be a week or

two later or even longer.

Mr. Karceski pointed out that the confusion is that discovery differs depending on how the demand for a jury trial is made. If it is done with the 15-day written notice, then Rule 4-263 - the circuit court discovery Rule - is applicable. If the demand is made on the day of trial, Rule 4-262 - the District Court discovery Rule - applies. Because the issue of the demand for a jury trial is found in Rule 4-301, there apparently has been some confusion.

Mr. Karceski said that the Subcommittee had proposed the addition of a Committee note to Rules 4-262 and 4-263 that draws attention to what Rule 4-301 provides regarding applicable discovery when a jury trial is requested. Judge Pierson noted that Rule 4-301 (c) already explicitly states: "In all other actions transferred to a circuit court upon a jury trial demand, discovery is governed by Rule 4-262." The proposed Committee note is for people who cannot be bothered to read Rule 4-301.

The Chair remarked that when he had first looked at the proposed changes, he thought that the statements about discovery probably do not belong in Rule 4-301, which is not a rule pertaining to discovery. However, this is where it is located.

By consensus, the Committee approved Rules 4-262 and 4-263 as presented.

Mr. Karceski presented Rule 4-504, Petition for Expungement When Charges Filed, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-504 to add a cross reference after section (a), as follows:

Rule 4-504. PETITION FOR EXPUNGEMENT WHEN CHARGES FILED

(a) Scope and Venue

A petition for expungement of records may be filed by any defendant who has been charged with the commission of a crime and is eligible under Code, Criminal Procedure Article, §10-105 to request expungement. The petition shall be filed in the original action. If that action was commenced in one court and transferred to another, the petition shall be filed in the court to which the action was transferred. If an appeal was taken, the petition shall be filed in the circuit court that had jurisdiction over the action.

Cross reference: See Code, Criminal Procedure Article, §10-104, which permits the District Court on its own initiative to order expungement when the State has entered a nolle prosequi as to all charges in a case in which the defendant has not been served. <u>See Code, Criminal Procedure Article, §10-105, which allows a person's attorney or personal representative to file a petition for expungement if the person died before disposition of the charge by nolle prosequi or dismissal.</u>

(b) Contents - Time for Filing

The petition shall be substantially in the form set forth at the end of this Title as Form 4-504.1. The petition shall be filed within the times prescribed in Code, Criminal Procedure Article, §10-105. When required by law, the petitioner shall file with the

petition a duly executed General Waiver and Release in the form set forth at the end of this Title as Form 4-503.2.

(c) Copies for Service

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

(d) Procedure Upon Filing

Upon filing of a petition, the clerk shall serve copies on the State's Attorney and each law enforcement agency named in the petition.

(e) Retrieval or Reconstruction of Case File

Upon the filing of a petition for expungement of records in any action in which the original file has been transferred to a Hall of Records Commission facility for storage, or has been destroyed, whether after having been microfilmed or not, the clerk shall retrieve the original case file from the Hall of Records Commission facility, or shall cause a reconstructed case file to be prepared from the microfilmed record, or from the docket entries.

Source: This Rule is derived from former Rule EX3 b and c.

Rule 4-504 was accompanied by the following Reporter’s note.

Chapter 359, Laws of 2012 (HB 187) was recently enacted by the legislature. It authorizes a decedent’s attorney or personal representative to file a petition for expungement on behalf of the decedent, if he or she died before the disposition of certain charges by nolle prosequi or dismissal. The Subcommittee recommends adding a cross reference after section (a) of Rule 4-504 to draw attention to the new statute.

Mr. Karceski explained that Chapter 359, Laws of 2012 (HB 187) changed Code, Criminal Procedure Article, §10-105, which provides that a person, who has been charged with the commission of a crime, including a violation of the Transportation Article for which a term of imprisonment may be imposed, or who has been charged with a civil offense, except a juvenile offense, as a substitute for a criminal charge, may file a petition for expungement of his or her record. The new legislation provides that an attorney or personal representative may file a petition, on behalf of the person, for expungement under this section if the person died before disposition of the charge by nolle prosequi or dismissal. The charge can be expunged upon the filing. The Subcommittee suggested that a cross reference to the statute be added after section (a) of Rule 4-504.

By consensus, the Committee approved Rule 4-504 as presented.

Mr. Karceski presented Rules 4-509, Appeal, and 15-1201, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-509 to add a Committee note pertaining to the right to file a petition for writ of error coram nobis, as follows:

Rule 4-509. APPEAL

(a) How Taken

Any party may appeal within 30 days after entry of the order by filing a notice of appeal with the clerk of the court from which the appeal is taken and by serving a copy on the opposing party or attorney.

(b) Notice

Promptly upon the disposition of an appeal, the clerk of the court from which the appeal was taken shall send notice of the disposition to the parties and to each custodian of records, including the Central Repository, to which an order for expungement and a compliance form were sent pursuant to Rule 4-508 (d).

Cross reference: Code, Criminal Procedure Article, §10-105 (g).

Committee note: The failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis. See Code, Criminal Procedure Article, §8-401.

Source: This Rule is derived in part from former Rule EX8 and is in part new.

Rule 4-509 was accompanied by the following Reporter's note.

The 2012 legislature enacted Chapter 437, Laws of 2012 (HB 1418), which stated that the failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis. The Criminal Subcommittee recommends adding a Committee note after section (b) of Rule 4-509 and after Rule 15-1201 to point out the new law.

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 1200 - CORAM NOBIS

AMEND Rule 15-1201 to add a Committee note at the end of the Rule, as follows:

Rule 15-1201. APPLICABILITY

The Rules in this Chapter govern proceedings for a writ of coram nobis as to a prior judgment in a criminal action.

Committee note: The Rules in this Chapter are not intended to apply to proceedings for a writ of coram nobis as to judgments in civil actions. The failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis. See Code, Criminal Procedure Article, §8-401.

Source: This Rule is new.

Rule 15-1201 was accompanied by the following Reporter's note.

The 2012 legislature enacted Chapter 437, Laws of 2012 (HB 1418), which stated that the failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis. The Criminal Subcommittee recommends adding a Committee note after Rule 15-1201 to point out the new law.

Mr. Karceski told the Committee that there is a history of appellate cases that ended with the fact that a coram nobis petition could not be filed unless the petitioner had exhausted his or her appellate remedies. This put a stop to many, if not

all, of the filings of coram nobis actions, which are often filed to seek a reversal of a conviction on constitutional grounds to prevent a person's deportation. The Chair added that a writ of coram nobis may be filed in a case where there is an enhanced sentence. Mr. Karceski noted that Chapter 437, Laws of 2012 (HB 1418) provides that it is not necessary to exhaust the appellate remedies to file a writ of coram nobis. Rule 4-509 has been withdrawn from the Rules to be discussed today, because it is not applicable. The Subcommittee has placed a Committee note in Rule 15-1201, which is in the chapter pertaining to coram nobis. The Committee note has the exact language of the statute, which is: "The failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis."

The Chair asked if anyone had a comment on Rule 15-1201. Mr. Sykes suggested that in place of the language "...shall not be construed as a waiver...," the language "...does not constitute a waiver..." should be added. Judge Pierson expressed the view that Rule 15-1201 should use the exact language of the statute. Mr. Sykes responded that this is a matter of style. The word "construed" is not appropriate. He moved to change the wording of the Committee note as he had suggested. The motion was seconded. The vote was 10 in favor and 10 opposed.

The Chair remarked that this is probably a matter of style. He inquired if anyone saw a difference between the language "may not be construed as" and the language "does not constitute."

Judge Pierson responded that the problem is with the word "construed." However, he noted that the waiver had been evolving over three decades. He did not think that two different formulations of this was a good idea.

Mr. Sykes asked Delegate Vallario if he objected to changing the statutory language in the Rule. Delegate Vallario replied that he did not object. What was intended was preserving the right to coram nobis review when someone pleads guilty. The Chair said that he understood that the statute was intended to overturn a decision of the Court of Appeals holding that failure to seek an appeal was a waiver of the right to file a petition for a writ of coram nobis. Judge Pierson noted that the statute conformed the waiver rule for coram nobis to the waiver rule for post conviction. There were exceptions to the waiver.

The Chair commented that since the vote was tied, he was going to break the tie in favor of the change proposed by Mr. Sykes.

By consensus, the Committee approved Rule 15-1201 as amended.

Mr. Karceski presented Rule 7-112, Appeals Held De Novo, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 100 - APPEALS FROM THE DISTRICT COURT

TO THE CIRCUIT COURT

AMEND Rule 7-112 (f)(4) to delete language referring to a "commissioner" and to add a sentence addressing the unavailability of a judge, as follows:

Rule 7-112. APPEALS HEARD DE NOVO

. . .

(f) Dismissal of Appeal; Entry of Judgment

(1) An appellant may dismiss an appeal at any time before the commencement of trial. The court shall dismiss an appeal if the appellant fails to appear as required for trial or any other proceeding on the appeal.

(2) Upon the dismissal of an appeal, the clerk shall promptly return the file to the District Court. Any statement of satisfaction shall be docketed in the District Court.

(3) On motion filed in the circuit court within 30 days after entry of a judgment dismissing an appeal, the circuit court, for good cause shown, may reinstate the appeal upon the terms it finds proper. On motion of any party filed more than 30 days after entry of a judgment dismissing an appeal, the court may reinstate the appeal only upon a finding of fraud, mistake, or irregularity. If the appeal is reinstated, the circuit court shall notify the District Court of the reinstatement and request the District Court to return the file.

(4) If the appeal of a defendant in a criminal case who was sentenced to a term of confinement and released pending appeal pursuant to Rule 4-349 is dismissed, the circuit court shall (A) issue a warrant directing that the defendant be taken into custody and brought before a judge ~~or commissioner~~ of the District Court or (B) enter an order that requires the defendant to appear before a judge ~~or commissioner~~. If a judge is not available on the day the warrant

> or order is served, the defendant shall be brought before a judge the next available business day. The warrant or order shall identify the District Court case by name and number and shall provide that the purpose of the appearance is the entry of a commitment that conforms to the judgment of the District Court.
>
> Source: This Rule is derived in part from former Rule 1314 and in part new.

Rule 7-112 was accompanied by the following Reporter's note.

> Communications from a clerk of the District Court of Maryland, the Chief Clerk for the District Court of Maryland, and the Coordinator of Commissioner Activity have indicated a problem with the wording of subsection (f)(4) of Rule 7-112. The Rule provides that if the appeal of a defendant in a criminal case, who was sentenced to a term of confinement and released pending appeal, is dismissed, the circuit court shall either issue a warrant directing that the defendant be taken into custody and brought before a judge or commissioner of the District Court or enter an order that requires the defendant to appear before a judge or commissioner, so that the original sentence can be imposed. The problem is that a commissioner has no authority to reimpose a sentence. Since a commitment order has already been issued, there is no need for the defendant to go before a commissioner. The Criminal Subcommittee recommends amending Rule 7-112 to clarify that the defendant is to be brought before a judge. If a judge is not available, the defendant will be brought before a judge the next available business day.

Mr. Karceski said that the Subcommittee recommended that the word "commissioner" be deleted from subsection (f)(4) of Rule 7-112. This Rule involves a dismissal of an appeal from the District Court. Subsection (f)(4) addresses the situation when a

defendant is released pending appeal. The current Rule contains the word "commissioner," providing that the circuit court either issues a warrant directing that the defendant be taken into custody and brought before a judge or commissioner or enters an order that requires the defendant to appear before a judge or commissioner.

Mr. Karceski explained that the problem is that a commissioner really has no authority to reimpose the sentence. Since a commitment order is already in place, there is no reason for the defendant to be required to go before a commissioner. What should happen is that upon the dismissal of the appeal, the court should issue a warrant directing that the defendant be taken into custody and brought before a judge or enter an order that requires the defendant to appear before a judge for reimposition of sentence. The words "or commissioner" should be stricken from subsection (f)(4). Then to take account of the situation where it is a holiday or a weekend, the Subcommittee recommended the underlined language, which provides that if a judge is not available on the day the warrant or order is served, the defendant shall be brought before a judge the next available business day.

The Chair inquired if the judge would have to be the same judge who had initially imposed the sentence. Mr. Karceski replied that currently in his experience, the same judge imposes the sentence. However, Mr. Karceski expressed the view that it does not need to be the same judge. Mr. Sullivan questioned

whether the word “available” is necessary. Is the intent not that it would be the next business day? Ms. Ogletree remarked that this would apply if the judge is in the county that day; some counties do not have a judge every day. Mr. Karceski noted that the intent of the underlined language was to address a weekend or a holiday when the courts are not in session. It may be better to use the language: “the next court session.” Ms. Ogletree agreed that this language would work where there is no judge in the county on a given day. The Chair cautioned that the “next court session” could be the same day. The Reporter suggested the language “the next day that the court is in session.” By consensus, the Committee approved this change.

By consensus, the Committee approved Rule 7-112 as amended.

Mr. Karceski presented Form 4-504.1, Petition for Expungement of Records, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

AMEND Form 4-504.1 to add a category for cases transferred to the juvenile court, as follows:

Form 4-504.1. PETITION FOR EXPUNGEMENT OF RECORDS

(Caption)

PETITION FOR EXPUNGEMENT OF RECORDS

1. (Check one of the following boxes) On or about _____, (Date)

I was [ ] arrested, [ ] served with a summons, or [ ] served with a citation by an officer of the _____

_____ (Law Enforcement Agency)

at _____,

Maryland, as a result of the following incident _____

_____

_____.

2. I was charged with the offense of _____

_____.

3. On or about _____ , (Date)

the charge was disposed of as follows (check one of the following boxes):

[ ] I was acquitted and either three years have passed since disposition or a General Waiver and Release is attached.

[ ] The charge was dismissed or quashed and either three years have passed since disposition or a General Waiver and Release is attached.

[ ] A judgment of probation before judgment was entered on a charge that is not a violation of Code*, Transportation Article, §21-902 or Code*, Criminal Law Article, §§2-503, 2-504, 2-505, or 2-506, or former Code*, Article 27, §388A or §388B, and either (a) at least three years have passed since the disposition, or (b) I have been discharged from

probation, whichever is later. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] A Nolle Prosequi was entered and either three years have passed since disposition or a General Waiver and Release is attached. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] The proceeding was stetted and three years have passed since disposition. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible

sentence of imprisonment.

[ ] I was convicted of a crime specified in Code*, Criminal Procedure Article, §10-105 (a)(9); three years have passed since the later of the conviction or satisfactory completion of the sentence, including probation; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

[ ] The case was transferred to the juvenile court pursuant to Code*, Criminal Procedure Article, §§4-202 or 4-202.2.

(Note: The expungement is only of the records in the criminal case, not those records in the juvenile court. See Code*, Criminal Procedure Article, §10-106.)

[ ] The case was compromised or dismissed pursuant to Code*, Criminal Law Article, §3-207, former Code*, Article 27, §12A-5, or former Code*, Article 10, §37 and three years have passed since disposition.

[ ] On or about _____ , I was granted
(Date)

a full and unconditional pardon by the Governor for the one criminal act, not a crime of violence as defined in Code*, Criminal Law Article, §14-101 (a), of which I was convicted. Not more than ten years have passed since the Governor signed the pardon, and since the date the Governor signed the pardon I have not been convicted of any crime, other than violations of vehicle or traffic

laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

WHEREFORE, I request the Court to enter an Order for Expungement of all police and court records pertaining to the above arrest, detention, confinement, and charges.

I solemnly affirm under the penalties of perjury that the contents of this Petition are true to the best of my knowledge, information and belief, and that the charge to which this Petition relates was not made for any nonincarcerable violation of the Vehicle Laws of the State of Maryland, or any traffic law, ordinance, or regulation, nor is it part of a unit the expungement of which is precluded under Code*, Criminal Procedure Article, §10-107.

_____ _____

(Date) Signature

_____

(Address)

_____

_____

(Telephone No.)

* References to "Code" in this Petition are to the Annotated Code of Maryland.

Form 4-504.1 was accompanied by the following Reporter's note.

> Several court clerks had requested that a cross reference to Rule 11-601 be added to Rule 4-504 and vice versa, so that it is clear that a petition for expungement of a criminal case that was transferred to the juvenile court is to be filed in the criminal case. To address this problem, the Criminal Subcommittee recommends that Form 4-504.1 be amended to refer to cases that have been transferred to the juvenile court. The 2012 legislature amended Code, Criminal Procedure Article, §10-106 by enacting Chapter 563, Laws of 2012 (SB 678), which allows expungements of criminal charges transferred to the juvenile court under Code, Criminal Procedure Article, §4-202.2 (transfer for sentencing). The language proposed for addition to Form 4-504.1 would refer to cases transferred to the juvenile court pursuant to Code, Criminal Procedure Article, §§4-202 or 4-202.2.
>
> The new paragraph of Form 4-504.1 replaces Rule 11-601. Therefore, Rule 11-601 is proposed to be deleted.

Mr. Karceski told the Committee that Chapter 563, Laws of 2012, (SB 678) authorizes a person to file and requires the court to grant a petition for expungement of a criminal charge that is transferred to the juvenile court under certain provisions of law. A juvenile is initially charged in criminal court, and the court decides that the case should be sent back to the juvenile court and not remain in the criminal court. Under that circumstance, the criminal charge can be expunged regardless of the outcome in the juvenile court. It is not an expungement of the juvenile court record or case, and it is not filed in the

juvenile court; it is filed in the criminal court from which the case was transferred. Up until now, Rule 11-601, Expungement of Criminal Charges Transferred to the Juvenile Court, had been in effect. The legislation changes the procedure. The Subcommittee's proposal is to delete Rule 11-601 and to add language to the list of methods that had disposed of charges in Form 4-504.1, providing that the case was transferred to the juvenile court. A note has been added indicating that the expungement is only of the records in the criminal case, not those in the juvenile court.

The Chair noted that the process works well when the criminal court waives its jurisdiction and transfers the case to the juvenile court for trial. However, Code, Criminal Procedure Article, §4-202.2 applies when the case has been tried in the criminal court, and the defendant has been acquitted of all charges that would require that the case be tried in the criminal court but convicted of a charge that could have been tried in the juvenile court, and it is sent there for disposition. There would be a record of conviction or at least a record of the finding of guilt in the criminal court, and the disposition in the juvenile court which imposes the sentence. The record of the trial in the criminal court is the guilty verdict of that one charge. Would that be expunged?

Mr. Karceski responded that he thought that it would be expunged. However, the alternate answer is that it would be decided by the appellate court. The Chair noted that under Code,

Criminal Procedure Article, §4-202.2, there would not be anything to decide. Mr. Karceski pointed out that if the juvenile winds up for sentencing in the juvenile court after a finding of guilt in the adult court, and moves for an expungement, the State can oppose the expungement. The Chair pointed out that there will be a record of the trial.

Mr. Karceski inquired what happens to that file when the juvenile case is disposed of in the juvenile court. Master Mahasa replied that it stays in the juvenile court until it is archived. It may be used for enhancement of penalties. The juvenile is committed to the Department of Juvenile Services. If there are appeals in the criminal court, the juvenile record can be looked at for enhancement of penalties. The Chair commented that this is mixing issues. In the juvenile court in a delinquency case, it is the disposition that creates a finding of delinquency. The court has to find that the child needs guidance, treatment, or rehabilitation. Even if the court, at an adjudicatory hearing, has found that the child committed a delinquent act, there cannot be a finding of delinquency until the second finding is made at a disposition hearing. The new procedure is peculiar, because there has been a criminal finding of guilt.

The Chair asked Mr. DeWolfe if he had any comments. Mr. DeWolfe responded that when there is a conviction in the juvenile court, the jurisdiction is removed from the criminal court. It becomes a juvenile case, and the disposition is in juvenile

court. It is not intended to be part of the adult criminal record. It is an issue of jurisdiction. Delegate Vallario remarked that if someone has been charged with armed robbery and is convicted of theft, and the decision is to sentence the person in the juvenile court, there is a conviction in both the adult as well as the juvenile court. The record in the adult court should be expunged.

By consensus, the Committee approved Form 4-504.1 as presented.

The Chair said that because Mr. DeWolfe and Delegate Vallario were present, Rules 4-216, Pretrial Release - Authority of Judicial Officer, and 4-216.1, Further Proceedings Regarding Pretrial Release, would be considered next.

Additional Agenda Item

The Chair presented Rules 4-216, 4-216.1, and 4-214 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 to add language regarding provisional representation by the Public Defender, as follows:

Rule 4-216. PRETRIAL RELEASE – AUTHORITY OF JUDICIAL OFFICER; PROCEDURE

(a) Arrest Without Warrant

If a defendant was arrested without a warrant, the judicial officer shall determine whether there was probable cause for each charge and for the arrest and, as to each determination, make a written record. If there was probable cause for at least one charge and the arrest, the judicial officer shall implement the remaining sections of this Rule. If there was no probable cause for any of the charges or for the arrest, the judicial officer shall release the defendant on personal recognizance, with no other conditions of release, and the remaining sections of this Rule are inapplicable.

Cross reference: See Rule 4-213 (a)(4).

(b) Communications with Judicial Officer

Except as permitted by Rule 2.9 (a)(1) and (2) of the Maryland Code of Conduct for Judicial Appointees or Rule 2.9 (a)(1) and (2) of the Maryland Code of Judicial Conduct, all communications with a judicial officer regarding any matter required to be considered by the judicial officer under this Rule shall be (1) in writing, with a copy provided, if feasible, but at least shown or communicated by the judicial officer to each party who participates in the proceeding before the judicial officer, and made part of the record, or (2) made openly at the proceeding before the judicial officer. Each party who participates in the proceeding shall be given an opportunity to respond to the communication.

Cross reference: See also Rule 3.5 (a) of the Maryland Lawyers' Rules of Professional Conduct.

~~(b)~~ (c) Defendants Eligible for Release by Commissioner or Judge

In accordance with this Rule and Code, Criminal Procedure Article, §§5-101 and 5-201 and except as otherwise provided in section ~~(c)~~ (d) of this Rule or by Code, Criminal Procedure Article, §§5-201 and 5-202, a defendant is entitled to be released before verdict on personal recognizance or on bail,

in either case with or without conditions imposed, unless the judicial officer determines that no condition 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.

~~(c)~~ (d) 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), (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.

(e) Initial Appearance Before a Judge

(1) Applicability

This section applies to an initial appearance before a judge. It does not apply to an initial appearance before a District Court commissioner.

(2) Duty of Public Defender

(A) Generally

Unless another attorney has entered an appearance or the defendant has waived the right to counsel for purposes of an initial appearance before a judge in accordance with this section, the Public Defender shall provide representation to an eligible defendant at the initial appearance.

(B) Provisional Representation

If the defendant's eligibility cannot be determined before the Public Defender begins representation, the Public Defender may represent the defendant provisionally. If the Public Defender provides provisional representation, the Public Defender shall enter an appearance in writing, stating that the appearance is limited to representation at the initial appearance. Provisional representation under this subsection shall be limited solely to the initial appearance and shall terminate automatically upon the conclusion of the proceeding. This subsection prevails over any inconsistent provision in Rule 4-214.

Cross reference: See Code, Criminal Procedure Article, §16-210 (c)(4).

(3) Waiver of Counsel for Initial Appearance

(A) Unless an attorney has entered an appearance, the court shall advise the defendant that:

(i) the defendant has a right to counsel at this proceeding;

(ii) an attorney can be helpful in advocating that the defendant should be released on recognizance or on bail with minimal conditions and restrictions; and

(iii) if the defendant is eligible, the Public Defender will represent the defendant at this proceeding.

(B) If the defendant indicates a desire to waive counsel and the court finds that the defendant knowingly and voluntarily waives the right to counsel for purposes of the initial appearance, the court shall announce on the record that finding and proceed pursuant to this Rule.

(C) Any waiver found under this section applies only to the initial appearance.

(4) Waiver of Counsel for Future

Proceedings

For proceedings after the initial appearance, waiver of counsel is governed by Rule 4-215.

Cross reference: For the requirement that the court also advise the defendant of the right to counsel generally, see Rule 4-215 (a).

~~(d)~~ (f) Duties of Judicial Officer

(1) Consideration of Factors

In determining whether a defendant should be released and the conditions of release, the judicial officer shall take into account the following information, to the extent available:

(A) the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction;

(B) the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

(D) any recommendation of an agency that conducts pretrial release investigations;

(E) any recommendation of the State's Attorney;

(F) any information presented by the defendant or defendant's counsel;

(G) the danger of the defendant to the alleged victim, another person, or the community;

(H) the danger of the defendant to himself or herself; and

(I) any other factor bearing on the risk of a wilful failure to appear and the safety of the alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

(2) Statement of Reasons - When Required

Upon determining to release a defendant to whom section (c) of this Rule applies or to refuse to release a defendant to whom section (b) of this Rule applies, the judicial officer shall state the reasons in writing or on the record.

(3) Imposition of Conditions of Release

If the judicial officer determines that the defendant should be released other than on personal recognizance without any additional conditions imposed, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set out in section (e) of this Rule that will reasonably:

(A) ensure the appearance of the defendant as required,

(B) protect the safety of the alleged victim by ordering the defendant to have no contact with the alleged victim or the alleged victim's premises or place of employment or by other appropriate order, and

(C) ensure that the defendant will not pose a danger to another person or to the community.

(4) Advice of Conditions; Consequences of Violation; Amount and Terms of Bail

The judicial officer shall advise the defendant in writing or on the record of the conditions of release imposed and of the

consequences of a violation of any condition. When bail is required, the judicial officer shall state in writing or on the record the amount and any terms of the bail.

~~(e)~~ (g) Conditions of Release

The conditions of release imposed by a judicial officer under this Rule may include:

(1) committing the defendant to the custody of a designated person or organization that agrees to supervise the defendant and assist in ensuring the defendant's appearance in court;

(2) placing the defendant under the supervision of a probation officer or other appropriate public official;

(3) subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

(4) requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer, including any of the following:

(A) without collateral security;

(B) with collateral security of the kind specified in Rule 4-217 (e)(1)(A) equal in value to the greater of $100.00 or 10% of the full penalty amount, and if the judicial officer sets bail at $2500 or less, the judicial officer shall advise the defendant that the defendant may post a bail bond secured by either a corporate surety or a cash deposit of 10% of the full penalty amount;

(C) with collateral security of the kind specified in Rule 4-217 (e)(1)(A) equal in value to a percentage greater than 10% but less than the full penalty amount;

(D) with collateral security of the kind specified in Rule 4-217 (e)(1) equal in

value to the full penalty amount; or

(E) with the obligation of a corporation that is an insurer or other surety in the full penalty amount;

(5) subjecting the defendant to any other condition reasonably necessary to:

(A) ensure the appearance of the defendant as required,

(B) protect the safety of the alleged victim, and

(C) ensure that the defendant will not pose a danger to another person or to the community; and

(6) imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, Criminal Law Article, §9-304 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation of Code, Criminal Law Article, §9-302, 9-303, or 9-305.

Cross reference: See Code, Criminal Procedure Article, §5-201 (a)(2) concerning protections for victims as a condition of release. See Code, Criminal Procedure Article, §5-201 (b), and Code, Business Occupations and Professions Article, Title 20, concerning private home detention monitoring as a condition of release.

~~(f) Review of Commissioner's Pretrial Release Order~~

~~(1) Generally~~

~~A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court. The District Court shall review the commissioner's pretrial release determination~~

and take appropriate action. If the defendant will remain in custody after the review, the District Court shall set forth in writing or on the record the reasons for the continued detention.

Cross reference: See Rule 4-231 (d) concerning the presence of a defendant by video conferencing.

(2) Juvenile Defendant

If the defendant is a child whose case is eligible for transfer to the juvenile court pursuant to Code, Criminal Procedure Article, §4-202 (b), the District Court, regardless of whether it has jurisdiction over the offense charged, may order that a study be made of the child, the child's family, or other appropriate matters. The court also may order that the child be held in a secure juvenile facility.

(g) Continuance of Previous Conditions

When conditions of pretrial release have been previously imposed in the District Court, the conditions continue in the circuit court unless amended or revoked pursuant to section (h) of this Rule.

(h) Amendment of Pretrial Release Order

After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of pretrial release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record. A judge may alter conditions set by a commissioner or another judge.

(i) Supervision of Detention Pending Trial

In order to eliminate unnecessary detention, the court shall exercise supervision over the detention of defendants

~~pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.~~

~~(j) Violation of Condition of Release~~

~~A court may issue a bench warrant for the arrest of a defendant charged with a criminal offense who is alleged to have violated a condition of pretrial release. After the defendant is presented before a court, the court may (1) revoke the defendant's pretrial release or (2) continue the defendant's pretrial release with or without conditions.~~

~~Cross reference: See Rule 1-361, Execution of Warrants and Body Attachments. See also, Rule 4-347, Proceedings for Revocation of Probation, which preserves the authority of a judge issuing a warrant to set the conditions of release on an alleged violation of probation.~~

~~(k)~~ (h) Title 5 Not Applicable

Title 5 of these rules does not apply to proceedings conducted under this Rule.

Source: This Rule is derived in part from former Rule 721, M.D.R. 723 b 4, and is in part new.

ADD new Rule 4-216.1, as follows:

Rule 4-216.1. FURTHER PROCEEDINGS REGARDING PRETRIAL RELEASE

(a) Review of Pretrial Release Order Entered by Commissioner

(1) Generally

A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody after a commissioner has determined conditions of release pursuant to Rule 4-216 shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court.

Cross reference: See Rule 4-231 (d) concerning the presence of a defendant by video conferencing.

(2) Counsel for Defendant

(A) Duty of Public Defender

(i) Generally

Unless another attorney has entered an appearance or the defendant has waived the right to counsel for purposes of the review hearing in accordance with this section, the Public Defender shall provide representation to an eligible defendant at the review hearing.

(ii) Provisional Representation

If the defendant's eligibility cannot be determined before the Public Defender begins representation, the Public Defender may represent the defendant provisionally. If the Public Defender provides provisional representation, the Public Defender shall enter an appearance in writing, stating that the appearance is limited to representation at the review

hearing. Provisional representation under this subsection shall be limited solely to the review hearing and shall terminate automatically upon the conclusion of the hearing. This subsection prevails over any inconsistent provision in Rule 4-214.

Cross reference: See Code, Criminal Procedure Article, §16-210 (c)(4).

(B) Waiver

(i) Unless an attorney has entered an appearance, the court shall advise the defendant that:

(a) the defendant has a right to counsel at the review hearing;

(b) an attorney can be helpful in advocating that the defendant should be released on recognizance or on bail with minimal conditions and restrictions; and

(c) if the defendant is eligible, the Public Defender will represent the defendant at this proceeding.

(ii) If the defendant indicates a desire to waive counsel and the court finds that the defendant knowingly and voluntarily waives the right to counsel for purposes of the review hearing, the court shall announce on the record that finding and proceed pursuant to this Rule.

(iii) Any waiver found under this Rule applies only to the review hearing.

(C) Waiver of Counsel for Future Proceedings

For proceedings after the review hearing, waiver of counsel is governed by Rule 4-215.

Cross reference: For the requirement that the court also advise the defendant of the right to counsel generally, see Rule 4-215 (a).

(3) Determination by Court

The District Court shall review the commissioner's pretrial release determination and take appropriate action in accordance with Rule 4-216 (f) and (g). If the court determines that the defendant will continue to be held in custody after the review, the court shall set forth in writing or on the record the reasons for the continued detention.

(4) Juvenile Defendant

If the defendant is a child whose case is eligible for transfer to the juvenile court pursuant to Code, Criminal Procedure Article, §4-202 (b), the District Court, regardless of whether it has jurisdiction over the offense charged, may order that a study be made of the child, the child's family, or other appropriate matters. The court also may order that the child be held in a secure juvenile facility.

(b) Continuance of Previous Conditions

When conditions of pretrial release have been previously imposed in the District Court, the conditions continue in the circuit court unless amended or revoked pursuant to section (c) of this Rule.

(c) Amendment of Pretrial Release Order

After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of pretrial release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record. A judge may alter conditions set by a commissioner or another judge.

(d) Supervision of Detention Pending Trial

In order to eliminate unnecessary

detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.

(e) Violation of Condition of Release

A court may issue a bench warrant for the arrest of a defendant charged with a criminal offense who is alleged to have violated a condition of pretrial release. After the defendant is presented before a court, the court may (1) revoke the defendant's pretrial release or (2) continue the defendant's pretrial release with or without conditions.

Cross reference: See Rule 1-361, Execution of Warrants and Body Attachments. See also, Rule 4-347, Proceedings for Revocation of Probation, which preserves the authority of a judge issuing a warrant to set the conditions of release on an alleged violation of probation.

(f) Title 5 Not Applicable

Title 5 of these rules does not apply to proceedings conducted under this Rule.

Source: This Rule is new but is derived, in part, from former sections (f), (g), (h), (i), (j), and (k) of Rule 4-216.

AMEND Rule 4-214 to add cross references following sections (a) and (d), as follows:

Rule 4-214. DEFENSE COUNSEL

(a) Appearance

Counsel retained or appointed to represent a defendant shall enter an appearance in writing within five days after accepting employment, after appointment, or after the filing of the charging document in court, whichever occurs later. An appearance entered in the District Court will automatically be entered in the circuit court when a case is transferred to the circuit court because of a demand for jury trial. In any other circumstance, counsel who intends to continue representation in the circuit court after appearing in the District Court must re-enter an appearance in the circuit court.

Cross reference: See Rules 4-216 (e)(2)(B) and 4-216.1 (a)(2)(A)(ii) with respect to the automatic termination of the appearance of the Public Defender upon the conclusion of an initial appearance before a judge and upon the conclusion of a hearing to review a pretrial release decision of a commissioner when the Public Defender is providing provisional representation.

. . .

(d) Striking Appearance

A motion to withdraw the appearance of counsel shall be made in writing or in the presence of the defendant in open court. If the motion is in writing, moving counsel shall certify that a written notice of intention to withdraw appearance was sent to the defendant at least ten days before the filing of the motion. If the defendant is

represented by other counsel or if other counsel enters an appearance on behalf of the defendant, and if no objection is made within ten days after the motion is filed, the clerk shall strike the appearance of moving counsel. If no other counsel has entered an appearance for the defendant, leave to withdraw may be granted only by order of court. The court may refuse leave to withdraw an appearance if it would unduly delay the trial of the action, would be prejudicial to any of the parties, or otherwise would not be in the interest of justice. If leave is granted and the defendant is not represented, a subpoena or other writ shall be issued and served on the defendant for an appearance before the court for proceedings pursuant to Rule 4-215.

Cross reference: Code, Courts Article, §6-407 (Automatic Termination of Appearance of Attorney). **See Rules 4-216 (e)(2)(B) and 4-216.1 (a)(2)(A)(ii) allowing a provisional limited appearance by the Public Defender in initial appearance proceedings before a judge and hearings to review a pretrial release decision of a commissioner.**

Source: This Rule is in part derived from former Rule 725 and M.D.R. 725 and in part from the 2009 version of Fed. R. Crim. P. 44.

The Chair pointed out a "housekeeping" matter for the Committee to consider. It involved one of the Rules changed as a result of *DeWolfe v. Richmond,* ___ Md. ___ (2012). There was a typographical error in subsection (f)(3) of Rule 4-216, Pretrial Release - Authority of Judicial Officer; Procedure. The reference to "section (e)" of the Rule should be to "section (g)."

By consensus, the Committee approved this correction to Rule 4-216 (f)(3).

The Chair told the Committee that Rules 4-216 and 4-216.1 had been available as handouts for the meeting. The context of the Rules was that when they had first been considered by the Committee, it was as a result of the Court of Appeals decision in *Richmond*, where the Court held that indigent defendants were entitled to representation by the OPD both at the initial appearance before a commissioner and at the bail review before a judge. As part of addressing this, the Rules Committee had proposed and sent to the Court of Appeals a provision that representation by the OPD at both of those proceedings was to be limited to that proceeding. The finding of eligibility for representation by the OPD was only as to those proceedings. The fact that the OPD had entered an appearance for the hearing before the commissioner and for the bail review did not put the OPD in the case for the entire case.

The Chair said that the Committee had been tracking the several bills introduced into the 2012 session of the General Assembly to modify the Court's decision, which were being changed constantly. When House Bill 261 was passed and signed by the Governor, the legislature had made it clear that the OPD does not represent indigents at the commissioner level but must represent them at bail review hearings or at the initial appearance if it is before a judge. The Committee sent a supplemental report to the Court, taking out the section providing for provisional representation before the commissioner, because the OPD was not

going to be representing people there at all. As to the bail review, Mr. DeWolfe had indicated that the OPD had hired enough people to be able to qualify defendants as indigent or not. By the time of the bail review, this could be done, so that there was no need for provisional representation. The OPD would make a decision that someone is or is not indigent. This is the way the Court of Appeals adopted the two Rules. Delegate Vallario has suggested that this was a mistake.

Delegate Vallario observed that the decision of the Court of Appeals had been that people have to be represented by an attorney in front of the commissioner. Then the Legislature reversed this, providing that someone should be represented by an attorney, but it is not necessary until the defendant is before a judge, which is common practice throughout the country. In Maryland, a defendant often gets two bond hearings within the first 24 hours of being arrested. First, the person goes before a commissioner, and if the person is not satisfied with his or her decision, the person can then go before a judge when the court is next open. This does not happen everywhere in the country.

Delegate Vallario said that the State wanted to keep the commissioner very much involved, primarily because 52% of the population that comes before a commissioner are released. The State could not afford to house them overnight and get them ready to go to court for the judge to release them the next day. If the OPD had been required to represent defendants in front of the

commissioner, it would have cost between 26 and 28 million dollars. The way the legislation ended up, it only cost between six and eight million dollars, which the legislature appropriated for the purpose of making sure that a person is represented in front of a judge.

Delegate Vallario noted that the bill took 13 weeks to get through the legislature. The Rules Committee had been monitoring it. At that time, the proposed Rules indicated that the OPD was entering into a case only on an interim basis, and the OPD attorney's appearance was stricken at the end of the bail review proceeding. The conclusion was that anyone who was in jail, had not made bail, and was taken before a judge was entitled to an attorney. The legislature concluded that based upon the Rule that had been decided upon by the Subcommittee, the representation was only for the initial purpose of the bond hearing.

The Chair said that this was correct. All during the legislative session, the Rules Committee did not know how the legislation was going to turn out. Delegate Vallario commented that based on that, the legislature did not put any strong language in the bill requiring the defendant to apply to the OPD for representation. The situation now is that the OPD goes to the jail early in the morning, qualifies the defendants by 9 o'clock a.m., and the OPD attorney is in the case from that moment until the end of the case. The defense bar has come down strongly in opposition to this. If the person remains in jail,

when he or she comes out 30 days later, the person will be represented by a Public Defender and will not have to apply for one.

Delegate Vallario observed that those defendants who are released, and a substantial number of people are released the next day when they go to court, or the bond is reduced to a point where they can afford bond, are obliged to apply to the OPD. The idea that there will be house calls in the jail to find out who wants to sign up is not really the case; the persons in jail are signed up. Whatever they have as assets makes no difference. They are all qualified. No one, who has ever appeared in front of a judge since June, states that he or she does not want an attorney. People cannot reach an attorney in the first 24 hours after they are arrested, but once that hearing is concluded, they would probably hire an attorney. This is no longer the case; the new system will encourage fraud on the State of Maryland because of the fact that everyone has an attorney.

Delegate Vallario cited as an example a situation where a client, who had a $200,000 bond, came to see him. The client made the bond, but the OPD had been representing him. A commissioner is not supposed to release anyone on a violation of a protective order, and in several other cases, such as possession of a gun. For example, a commissioner cannot release a felon who is driving with a gun in his or her car. The person would have to be brought before a judge and would be represented by a Public Defender. Delegate Vallario said that he had never

heard of a case where a Public Defender had asked to be removed from representing someone. He had also never heard of a defendant telling the Public Defender that he or she did not qualify for OPD representation. The defendant may hire an attorney, and the Public Defender then gets out of the case. The private bar is very upset at the idea that the OPD is getting in every case from the beginning until the end of the case.

Delegate Vallario suggested that if a person who has been arrested is released, the person should have to apply to obtain a Public Defender. The legislature had enacted a law providing that the defendant can give the OPD his or her Social Security number, which would allow the OPD to look at the defendant's tax returns to see what the defendant's income was for the past year. Even though it is an invasion into the tax records of the State, it is allowed. It is easier for the OPD to simply represent the person rather than have to review the person's records. Delegate Vallario expressed the opinion that the Committee should approve the Rule originally approved by the Subcommittee, keeping in place that the OPD representation is only for the first 24 hours after the person has been arrested. Anyone who would like a Public Defender after that should have to apply for one.

Mr. DeWolfe commented that the OPD only represents eligible persons as provided for by the statute, Code, Criminal Procedure Article, §16-204. Representation at bail review hearings is new to the OPD in most parts of the State. However in several jurisdictions, including Baltimore City, Montgomery County, and

Harford County, the OPD has been representing defendants at bail review hearings. Even at a bail review hearing, the statute does not allow the OPD to represent everyone. A determination that a person is eligible has to be made.

Mr. DeWolfe said that in those jurisdictions in which the OPD represented people at bail review, they had done an eligibility determination with the intake staff. The procedure involves several stages: (1) the defendant has to request a Public Defender and (2) the OPD intake process must determine that the defendant is eligible. The OPD will then represent the defendant if he or she is eligible. The reason that the OPD supported the recommendation of the Rules Committee and not Delegate Vallario's recommendation was there are cases in which someone by reason of being incarcerated is eligible for representation for that hearing, but the OPD makes a determination that a person who is employed or has assets, if released, would not be eligible. This does not apply to everyone; it applies to those people who are employed and that the OPD would determine not to be eligible. For this reason, it makes sense for the OPD to enter provisionally on those cases. However, if the OPD were required to enter provisionally in every case (they have 200,000) cases a year, it would double the amount of work for a huge percentage of those cases that they represent now.

Mr. DeWolfe said that after the legislation had been passed following the *Richmond* case, it had been mandated that by June 1,

2012, the OPD had added staff for representing their clients in the bail review hearings, but only for the clients that they had determined to be eligible. The reason Mr. DeWolfe would support the amendment to Rule 4-216 as written was that it provides that provisionally, the OPD may enter representation. If this does occur, the OPD shall enter an appearance in writing stating that the appearance is limited to representation at a bail review hearing. It is still up to the Public Defender to determine in whose case they will enter provisionally.

Ms. Potter asked what happens if, in the intake process, someone is found to not qualify for OPD representation and has no attorney. Mr. DeWolfe answered that the person would not be represented by the OPD at the bail review hearing. Ms. Potter asked if the person would have to be *pro se*, and Mr. DeWolfe responded that this would probably be what would happen. Mr. DeWolfe added that many people choose not to have a Public Defender, because the person has his or her own attorney or for whatever other reason. Those people often do appear *pro se*. It is a difficult process. The OPD had been criticized in a recent case by the Court of Appeals for not representing enough people at bail review hearings. Now they are being criticized by private attorneys for representing, in their minds, everyone. The OPD does not represent everyone. Mr. DeWolfe clarified that the OPD has too many cases. They do not want additional cases for people who are not eligible. Determining eligibility is not

an exact science, but the OPD can enter provisionally, and then for those cases that they determine would not qualify if the person were released, they would follow up with an investigation.

Mr. Sykes inquired how eligibility is determined by the intake staff when there is a 24-hour or less amount of time. Mr. DeWolfe replied that they have an intake manual. The interview process goes through several pages of the manual. It does not take a long time, but the criteria are set out in the statute, Code, Criminal Procedure Article, §16-210. Six separate criteria have to be considered to determine whether someone is eligible for OPD representation. Judge Weatherly added that the defendant is asked if he or she owns a home, a car, etc. Mr. DeWolfe noted that this is initially done by affidavit, but then they follow up with the person submitting records. Judge Weatherly remarked that in the first 24 hours, this is all that the OPD can do. Mr. DeWolfe commented that most courts across the State, including the federal courts, do this by affidavit.

Mr. Karceski noted that if a defendant is released by a District Court judge at the initial bail hearing under whatever theory of release, including recognizance or posting a bail, Delegate Vallario had proposed that the OPD is no longer in the case. Mr. Karceski asked what Mr. DeWolfe's problem was with this proposal. Mr. DeWolfe responded that in the vast majority of cases, those people are eligible. If someone is unemployed, in a drug program, or has no assets, the person would qualify. Even if a family member bails the person out, it does not mean

that the person can afford an attorney. It is not required by the statute, which provides that if the OPD determines eligibility, they may enter provisionally. This is what Rule 4-216 provides. It leaves it up to the OPD to determine who may enter provisionally. It does not require the OPD to enter provisionally. The Rule proposed by Delegate Vallario would go beyond the statute.

Mr. DeWolfe remarked that more importantly, Delegate Vallario's proposal would at least double the amount of work for the OPD. The intake interview is essentially the same in the office as it is in the jail. Many people, more than the majority, would be eligible whether they come into the office, so it is not necessary to require everyone to come back to the office. Some jurisdictions may have no public transportation for people to get to the office. It is putting an additional burden, not only on the office, but on the indigent defendant who has to be interviewed twice just to confirm that the defendant is eligible for OPD representation. The OPD will commit to requiring those people, who would not be eligible if they are released, to come in.

Mr. DeWolfe said that the OPD can make its determination up front that if the person gets released, he or she would not be eligible by reason of the fact that the person was employed; then the OPD would have to check later to determine if the person kept his or her employment. However, this does not apply to everyone. It is a relatively small percentage of the cases that come before

the District Court. The OPD does not have the resources and cannot require everyone who gets released to come back into court and request eligibility. It is not required by the statutory scheme of the OPD.

The Chair asked Mr. DeWolfe if he would be happy with putting back into Rule 4-216 the provision that had originally been there, which read: "...the Public Defender may represent the defendant provisionally." Mr. DeWolfe replied affirmatively. Delegate Vallario reiterated that he had problems with this. As an example, someone is in jail on Monday morning with a $50,000 bond. He is asked if he is working, and he replies that he is not working at the moment. Because of the $50,000 bond, he explains that he may be in jail for the next six months. If he is released, he still may be able to keep his job. The comment that this would double the work of the OPD is not so. The person would file an initial application.

Delegate Vallario noted that his point was that the application should be brought back to the office. That same person should have to go to the OPD and say that he had gotten out on bail and would still like the OPD to represent him. The OPD has already given him the services so far, and he would like to keep the services. To do so, he should have to come in to the OPD and fill out an application, noting what his status is as of that date. After release, every person who was in the jail is entitled to an attorney at the bail review hearing. If the person remains in jail, it is clear that the person is eligible

for OPD representation. Once the person is released, his or her status changes. It may be that the person's parents are going to help with hiring an attorney. At least the person should have to come into the OPD and fill out an affidavit to request the services of the OPD. The person is in a better position to know whether he or she still has a job. If the person does not apply, the person should not be represented by the OPD.

Mr. Karceski asked Mr. DeWolfe how the OPD arranges for people to sign an affidavit after release. Is the affidavit signed before the person is let out of jail? Mr. DeWolfe answered that it is signed before the person goes before the judge. Mr. Karceski said that he had misunderstood what Mr. DeWolfe had previously said. Mr. Karceski thought that Mr. DeWolfe had stated that the person signs the affidavit at a later time. Delegate Vallario noted that the eligibility is determined at the time the defendant gets out of jail. Mr. Maloney added that the documentation is given out later to the OPD. He asked what happens at that stage if there is a failure to docket. Mr. DeWolfe answered that in that case, they would ask their District Public Defender to look into the situation especially if it appears that the defendant has assets. Most of the people that they represent are poor and unemployed and do not have any assets. The people are interviewed before the bail hearing, and it is those people that they flag for further inquiry if they are released. The OPD represents the people who remain in jail generally throughout the case if it has been determined that they

are eligible. If the people get out of jail, those cases are flagged, and the people have to come back to the OPD to determine eligibility.

Mr. Maloney remarked that the cases that Delegate Vallario had referred to are those with emergency eligibility that is short-term. The defendant may be eligible for OPD representation, because he or she is not working due to being in jail. However, when the defendant gets out, he or she may be working again and become ineligible. What mechanism exists to capture those cases? Mr. DeWolfe responded that the OPD used to call it "not qualified if released." Under Rule 4-216, the case would be entered as "provisional representation." The cases would be flagged as potentially not eligible if the defendants get released, because of what the OPD learned in the eligibility interview. Mr. Maloney inquired how effective the screening process of the OPD is to ferret out those people who would be ineligible. Mr. DeWolfe replied that they make the process as effective as they can. What Delegate Vallario is proposing would be putting in a rule that goes beyond what the statute provides.

The Chair commented that if the issue comes down to whether the person is released or is employed and released, the OPD would know this at the end of the bail review hearing unless a bond is set that the defendant makes later. Mr. DeWolfe said that this does not get to the issue of eligibility. They would know eligibility before the bail review hearing by their criteria. There is the category of cases that they can identify as if

released, the person would not be eligible. This is the population which they would enter as "provisional representation." This would be required by the statute and Rule 4-216. Their objection was entering "provisional representation" for everyone. This would cover a huge number of cases.

The Chair remarked that there may be a way to address this: if the OPD were to enter a provisional appearance initially in every case, and the Rule would state that if the person is released, then the representation ends unless the person asks again to be represented. If the person is not released, then subject to any review that the OPD wishes to make, the representation would be for the entire case. Mr. DeWolfe responded that not everyone who gets released is ineligible. Most people who get released are on personal recognizance (for trespassing, drug possession etc.). Most of the OPD cases in District Court are for minor cases. The majority of the people who get released are interviewed and are found to be qualified. It is only a small population of people who would not be qualified by reason of their being employed.

Mr. Maloney asked about the possibility of the qualification process not happening at the bail review. Mr. DeWolfe replied that it would violate the statute. Mr. Maloney pointed out that it is difficult to have a full qualification at a bail review hearing, because the defendant is locked up. The defendant does not have access to documentation, and 90% of these people are qualified, anyway. The qualification process should be delayed

until after the bail review hearing.

Mr. DeWolfe said that the statute provides that the OPD can only represent eligible persons. Mr. Maloney pointed out that eligibility cannot effectively be figured out until after the person's bail determination. He expressed the view that this would solve the problem. What Mr. DeWolfe had indicated is that the OPD would like to avoid two qualifications. Qualifying 200,000 people twice is too much. If the OPD is representing 90% of the people at the bail review hearing, 100% may as well be represented.

The Chair said that this issue had been raised early on when this matter had first been discussed. The objection was made the other way -- that the OPD should not be representing everyone. What if Donald Trump or Ray Lewis were arrested? Mr. Maloney suggested doing a short prequalification and saving the true qualification for later. This would be substantial compliance with the statute. Everyone agrees that it is difficult to do a full eligibility analysis when someone has been detained. This prequalification would exclude Donald Trump.

Delegate Vallario remarked that if someone applies to be represented, some initial information has been given out. He had no problem if someone comes in to the OPD and asks that his or her representation be continued. In the history of the OPD service, they have never told the judge that the defendant makes too much money for the OPD to continue to represent him or her. The Chair disagreed with this statement. Delegate Vallario

argued that it is very rare. Once a Public Defender has entered an appearance, the judges are not inclined to discontinue the Public Defender's appearance.

The Chair commented that in the first case that arose on this issue, the OPD told the defendant that he was not eligible for OPD representation. The defendant went into court, telling the judge that the OPD would not represent him. He then asked the judge to appoint an attorney for him, because he was indigent. The judge agreed that he was indigent, and the judge appointed the OPD. The Court of Special Appeals affirmed this, and the Court of Appeals reversed, holding that it was for the Public Defender to determine whether they will represent someone, not the court. The Court of Appeals has gone back and forth on this issue. The last time they held that the judge can make the Public Defender get into the case, and then the statute was passed to overturn that decision. The legislature has had this issue before it in that context.

Mr. Bowie inquired if the OPD tries to determine eligibility after it has been granted. Mr. DeWolfe answered that they only do investigations on those cases that have potential problems. Delegate Vallario remarked that the OPD is not going to check on their clients after eligibility has been granted. Mr. DeWolfe said that in his 20-year association with the OPD, this has been the overriding issue every year going back as far as 40 years ago. Using the manual, their intake staff goes over these issues weekly, monthly, trying to fine-tune it to get it right. It is

very difficult, because they cannot please everyone. All they really can do is to comply with the statute. To require them to requalify everyone who has been released would violate the statute and would be too burdensome.

Mr. Bowie noted that Mr. DeWolfe had referred to an affidavit. Does this mean the OPD collects all of the intake information, and then the person who is to be represented signs an affidavit that it is true? Mr. DeWolfe replied that this is the way that it is done traditionally across the country. Mr. Bowie asked if there is any way to recoup the OPD's costs, if it turns out that the affidavit is not true, and the person has given misinformation to get free representation. Mr. DeWolfe responded that there is statutory language that allows the losses to be recouped in Code, Criminal Procedure Article, §16-210. What they usually do is to have the District Public Defender investigate and file a motion to remove. Then that person would need to get a private attorney. This has happened.

The Chair referred to a point made by Mr. Maloney. Under Rule 1-325, Filing Fees and Costs – Indigency, which addresses waiver of prepaid court costs, the waiver is based on affidavit. No one investigates. The judge either allows it or does not allow it. If the OPD made the representation decision at the bail review level based solely on the affidavit, but then reviewed it based on what has happened, the OPD would probably end up representing everyone except for the very rich. Mr. DeWolfe pointed out that some people get their relatively high-

paying jobs back when they get out of jail. This does happen. The OPD can terminate representation if there has been fraud. This is the real purpose of provisional representation in the statute, which is not new under the recent legislation. This is the original statute that was passed in 1971. It provides for provisional representation if the OPD cannot make a determination of eligibility by the time representation begins.

Delegate Vallario said that he had the Rule in front of him that had been approved by the Subcommittee. The Chair noted that this had been an earlier draft that had been sent to the Court of Appeals and approved by them before the legislation was enacted. Delegate Vallario commented that once the legislature had passed the bill, this version of the Rule was eliminated. The Chair observed that the feeling was that it was no longer necessary. Delegate Vallario noted that the Subcommittee had already adopted a Rule, which provided that any further representation by the Public Defender would depend on a timely application for such representation. This had been approved by the Rules Committee. Just because a bill had been passed does not mean that this version of the Rule is no longer necessary. The Subcommittee had supported this, and it should be in the Rule. Mr. DeWolfe explained that the earlier version had applied when provisional representation was necessary for commissioner hearings, which take place any time of the day or night. Delegate Vallario responded that the investigation before the commissioner would be the same as an investigation before the judge.

Mr. Karceski remarked that his understanding was that because of the nature of the bail review taking place at the next court session in 99% of cases, the OPD has a short window of time to see every person arrested in the State to determine eligibility. Members of the OPD staff go to every person who is locked up and ask the person if he or she would like to have a Public Defender. If the person answers negatively, then the clerk goes to the next person, even if the person refusing turns out to be eligible. Is the process that determines eligibility any different today than what it was a few months ago when eligibility was determined by a person who physically had to come to the OPD offices or by the OPD employee who had to go to the jail to see persons who have not made bail? Is it the same series of questions? Mr. DeWolfe replied affirmatively.

Mr. Karceski asked if the OPD generally takes the person at his or her word when the person answers the questions. Mr. DeWolfe responded that the person signs an affidavit, and then the person is told that if he or she is determined to be eligible, the person has to get the supporting documentation to the OPD. Mr. Karceski inquired whether the person being seen at the jail by the OPD has to bring the supporting documents to the OPD after the bail review hearing. Mr. DeWolfe answered affirmatively if the person has been determined to be eligible and if there is supporting documentation. If someone is homeless, there may be no documents for them to produce. But if the person is employed and has some assets that they list, then

they are asked for documentation.

Mr. Karceski commented that this process involves gamesmanship with people who are trying to get the Public Defender to represent them. The OPD has many good attorneys, some of whom may be better than some of the private bar. He personally knew of some people who obtained representation by the OPD when they should not have obtained it. It is very easy for someone to say that he or she is unemployed or homeless. If the person does not have the supporting documents to show one way or the other, Mr. Karceski said he was not sure how thorough the process is. If the process should be more thorough, and the person would have to come back to the OPD within a certain number of days, is there some way to work in that process after the bail hearing, so that the person has to appear at the OPD within a 10-day period? It would not have to be a total reinvestigation.

Mr. DeWolfe responded that under the statute, it is the decision of the OPD as to eligibility. If the legislature would like to give the determination of eligibility to the court or some other body, the OPD has no problem with it. They want to represent only people who are eligible. Their job is to represent people, not to collect money or to determine eligibility. They will follow the statute and put together the best possible procedures for determining eligibility. The statute does not require them to qualify people twice. The vast majority of people in jail will qualify anyway. The OPD agrees that there is a subset of people who, if they got out of jail,

would not qualify mostly because of employment. These are the people that everyone is concerned about. These are the people that the OPD should follow up with and determine their eligibility a second time. They are flagged at the initial interview as potentially not being qualified by reason of either assets or employment. It would be well beyond what the statute requires to make everyone come back to reapply for representation.

The Vice Chair asked if everyone would have to come back in anyway, because they would not have had the appropriate documentation when they were in jail. Mr. DeWolfe replied that they would have to come back to meet their attorneys for the intake process. The OPD has 130 intake workers across the State who are overworked. They have lost 50% of their staff over the past four years. It is a substantial burden that is not required by the statute. It would be duplicative, since most of the people would qualify.

The Chair observed that a substantial number of people may be clearly eligible, because they are homeless, unemployed, have no assets, etc., and it so indicates on their affidavits. Delegate Vallario remarked that it would cause no harm for them to go into the OPD and request their services. The Chair noted that it only would be to bring in some instrinsic evidence of what the person had put into his or her affidavit. Delegate Vallario responded that all he was asking for was requiring that the person has to come to the OPD and apply for representation.

They are often too lazy to come in to apply. The Chair said that if someone does not apply in time, the case would get postponed, because the person would not have an attorney.

Delegate Vallario remarked that the legislature passed a statute to make sure that everyone has an attorney at the bail hearing. They did not require that the OPD represent everyone who is locked up. Mr. Maloney commented that the reality of the marketplace is that when someone is put in jail, the person will be asked if he or she would like an attorney at the bail hearing. The person will answer affirmatively. If someone who is out on the street is given the choice between going to the OPD to file an application or going to a law office, some will choose the law office, and some will choose the Public Defender.

The Chair said that he was trying to see if there was a way to make this work practically. Mr. Maloney remarked that the Public Defender should not have to go through a two-application process. Judge Weatherly observed that the focus is not really on whether the person has time to go to the OPD. It is whether the Public Defender service, particularly in light of its shortage of staff, has to go through the qualification process twice. The Chair added that the OPD can make a decision for purposes of the bail review based on an application and an affidavit. The OPD will find that some of those people are not eligible. Most of them will be eligible based on the affidavit. The OPD has complied with the statute, making a decision of qualifying only on the affidavit. Some people will not be

qualified, but most will be. The question then is: what more should the person, who has been told that he or she is eligible based on the person's affidavit, have to do later? Delegate Vallario answered that these people should have to go to the OPD and apply for representation. It should not be that because someone is locked up, the person automatically has an attorney.

The Chair commented that some people will be denied bail and remain in jail, or bail is going to be set, and it is not known at that time whether the person will be able to make bail or not. The knowledge of whether the person is going to remain in jail may not be available immediately at the end of the bail review hearing. Delegate Vallario said that the people who are in jail are taken care of. The Chair asked if the OPD has the ability to know if they are going to remain in jail. Mr. DeWolfe responded that if someone is detained, then the person is assigned an attorney who will contact the client in the jail. If someone is released, the person will come in and see an attorney.

The Chair inquired if the OPD will know that someone has been released. What if the person makes bail 10 days later? Mr. DeWolfe replied that the attorney should know. He pointed out that nothing in the statute requires an eligible person to apply twice for representation. It would be burdensome. The defendants are generally poor people. In some jurisdictions, there is no public transportation to get to the Public Defender's office a second time. The statutory scheme provides that the OPD make the eligibility determination. They flag the cases where

someone appears to be ineligible. If the person is released, the OPD will require him or her to come in to their office. Nothing in the statute requires the OPD to determine the eligibility twice. The vast majority of the people will qualify.

Mr. Klein inquired whether this issue had been raised in the legislature when the statute was discussed. Delegate Vallario answered that the Subcommittee had proposed a version of Rule 4-216, which provided that the Public Defender would enter an appearance just for the purpose of a bail review hearing. For any further representation, the defendant would have to reapply. Any further representation by the Public Defender would depend on a timely application. Mr. DeWolfe noted that this had only applied to the hearing before the commissioner, not to the bail hearing before a judge.

Delegate Vallario remarked that in Montgomery County, if someone is locked up at 4:00 a.m., the person will see the commissioner at that time, and the hearing on the bond will be at 1:00 p.m. in front of the judge. Anyone who is in jail and cannot make the bond is eligible for representation by the OPD. The Chair pointed out that part of the statute was to create a task force to take a look at this entire procedure. When is their interim report due? Delegate Vallario responded that he was not sure, but he thought that it might be by the end of the year.

Mr. Maloney commented that there should be able to be a compromise. Mr. Leahy said that the concern seems to be that

people who are otherwise employed, but are in jail are misleading the intake workers by stating that they are not employed. The truth is that they are not employed at that time, because they are in jail. Hopefully, the intake workers are sophisticated enough to get to the truth. Mr. DeWolfe responded that this is not really the issue. The issue is whether the people who have been in jail can still have their jobs when they get out of jail. It may depend on how long the person has been detained. These are the people that the OPD needs to follow up with, because if they get their job back and have a steady income, the eligibility determination would change. Mr. Leahy asked if the OPD has a mechanism to flag these people, and Mr. DeWolfe replied affirmatively. It is a small number. Delegate Vallario emphasized that the number is very small.

Ms. Ogletree inquired if it would be possible to give the defendants a second affidavit form as they leave the courtroom telling them that they must certify within a certain number of days what their situation is. If that affidavit is not sent to the Public Defender, then the representation would be terminated. Delegate Vallario reiterated that all the defendant has to do is to walk in to the OPD. Ms. Ogletree said that if someone states that nothing has changed, the representation would continue. There would be a piece of paper necessary for the Public Defender to determine whether the person is still eligible. It would be the documentation that they would need, and it would serve the same purpose. Delegate Vallario stated that the same purpose can

be served by requiring the defendant to come to the OPD. Ms. Ogletree responded that she could understand this in a metropolitan area where it is easy for people to get to the OPD. However, in rural counties, it may be 30 miles to the county seat where the Public Defender's office is. Without transportation, the defendants could not get there.

Mr. Leahy asked how the defendant could talk to his or her attorney about the case if the person does not see the attorney. Ms. Ogletree noted that this is often a problem. Mr. Leahy remarked that it is difficult for an attorney to represent someone with whom he or she has not spoken. Ms. Ogletree commented that people expect the Public Defender to be there for them, whether or not the person has ever spoken with the attorney. This happens routinely in the rural counties. People have no way to get to the OPD.

The Chair stated that two different issues were being discussed. One was requiring the defendant to go to the OPD, which Ms. Ogletree had pointed out is a transportation issue. If there is representation, then the attorney goes to the jail to talk to the client. The Vice Chair asked if the defendant has an obligation to go see the Public Defender if the defendant is out of jail. The Chair answered that if the person had not qualified previously, he or she would have to apply. Mr. Karceski asked if someone from the OPD would come to the house of those people who are released, who live in rural counties, who have not qualified to be represented by the Public Defender, and who cannot get to

the Public Defender's office. This does not seem sensible. There is a qualification process, but it is not clear how it would take place for the person who lives 30 miles from the Public Defender's office. Ms. Ogletree said that the problem occurs after the people have been released. Mr. Karceski said that he was referring to the situation as it was historically in the past. Someone is arrested and gets released, and he or she lives 35 miles from the Public Defender's office.

Ms. Ogletree commented that she had done panel cases, and the situation was often that the attorney never saw the client until the day of the trial. Mr. Karceski inquired how someone would become eligible if the person had never answered a question about his or her eligibility. If someone lives 35 miles away, the person cannot be qualified, because he or she cannot get to the OPD. Ms. Ogletree responded that the person would be qualified ahead of time. Mr. Brault asked how these people could get to court for their trial. Ms. Ogletree answered that most of the time they do not come to the trial. They get picked up again for failure to appear, and the whole process starts all over again.

Delegate Vallario noted that 52% of the people who are released by the commissioner seem to be able to get to the OPD. Why should someone who is locked up and gets released not have to go to the OPD? The Chair answered that one difference is based on the statute; the Public Defender is not representing those people at the commissioner level and does not have to qualify

them at that point. What is left in the statute now is that the Public Defender is in at the bail review hearing. Previously under the *Richmond* decision in the Court of Appeals, the Public Defender had to represent the defendants at the hearings before the commissioner. This is no longer required. Delegate Vallario suggested that the 52% of people who are released can be given an application, which they can sign right as they receive it. The Chair pointed out that this is not the group the Committee had been discussing. They were addressing the people at bail review who have not been released by the commissioner.

Judge Weatherly expressed the opinion that the Rules Committee may not have the ability to approve a rule that directs the Public Defender to qualify or not qualify people. The OPD may feel that once they have spoken to someone in jail, there is no need to talk to the person again. Delegate Vallario said that he thought that the Committee has the absolute right to pass a rule that complies with the statute, which provides that someone has to have an attorney. But the rule can also provide that the person has to comply with the law by applying for representation. The application is very simple. For those in jail, there may be 50 people going to the bond hearing on Monday morning. There will be 50 applications, and all of them will be approved. Judge Weatherly said that the defendants can be asked the questions, so that the OPD can determine that no one is a Donald Trump. Could the OPD enter a provisional representation at a

bond hearing, re-enter the appearance for the trial, and state that they are satisfied with the interview that already took place?

The Chair asked if anyone else had a comment on the Rule. Mr. DeWolfe reiterated that the statute requires the OPD to make an eligibility determination. It does not require the OPD to do it twice.

By consensus, the Committee approved Rule 4-216 as presented.

The Chair called the Committee's attention to the version of Rule 4-216.1 that had been handed out at the meeting. The Chair said that the issue was choosing the Rules Committee's version or a version complying with Delegate Vallario's request that the Public Defender can only qualify provisionally. The Rules Committee version was subsection (a)(2)(A)(ii) of Rule 4-216.1. The footer at the bottom of this version read: "Rules 4-216, 4-216.1 and 4-214 - PostRulesOrder.- For R.C. 6/21/12." Delegate Vallario's alternative, which was a faxed copy from the House Judiciary Committee and encompassed subsections (a)(2)(A), (B), (C), (a)(3) and (4), was that at the bail review hearing, if the Public Defender qualifies a person for representation, it can only be provisionally. (See Appendix 1). The representation terminates at the end of that hearing. The person would have to then come in and requalify later. The Committee did not have to be concerned about the particular drafting. The issue was whether it can only be a provisional representation at a bail

review hearing, if the Public Defender qualifies a person for representation at that hearing. After that, the person would have to come back and qualify. The other version, the Rules Committee proposal, was the alternative proposal that would allow the Public Defender to determine whether a qualification at the bail review hearing is or is not provisional. The Rules Committee version put this in the hands of the Public Defender to make the determination.

Mr. Sykes referred to the burden on the Public Defender of needing two qualification procedures. He asked if this could be resolved by making it provisional representation and eligibility for that purpose determined by an affidavit and no more. The actual investigation as to eligibility would be done after the person is free. He or she would be in the position of anyone who wanted to have a Public Defender do the representation. The Chair responded that this was Delegate Vallario's position.

Mr. Sykes added that there could be a full investigation at the bail hearing. The Chair noted that there would not be any investigation other than the sufficiency of the affidavit. Mr. Maloney remarked that the defendant would fill out the paperwork, and the qualification process would occur later. This would address the concern of the Public Defender that there should not be two qualification procedures. Judge Pierson pointed out that the faxed version of Rule 4-216.1 permitted the Public Defender to either enter a general appearance or to enter a provisional appearance. He asked Delegate Vallario if he would be satisfied

with this version of the Rule. This was the original version of the Rule. Delegate Vallario disagreed, noting that the original version of the Rule was strictly provisional only. It was the Rule proposed by the Criminal Subcommittee at its February meeting. The representation by the OPD would be entered provisionally, and then the defendant would have to apply for further representation.

Judge Pierson pointed out that the language of subsection (a)(2)(A) of the version faxed by Delegate Vallario was: "Unless the Public Defender has entered a general appearance pursuant to Rule 4-214, or another attorney has entered an appearance, or the defendant has waived the right to counsel...the Public Defender shall provide provisional representation...". The Chair said that the language in the faxed version would have to be redrafted anyway. Judge Pierson commented that he wanted to clarify that the language in the faxed version was not what Delegate Vallario is asking for. Delegate Vallario answered affirmatively.

Mr. Brault remarked that he could remember when the Public Defender service was first created. The debate then was whether this was going to annihilate the private practice of criminal law. This debate went on for a long time. Unfortunately, the debate is still going on. This is the question of the survival of the small-time criminal practice of law. This does not apply to the attorneys who handle the large white-collar crime practices, but to the attorneys who handle the minor District Court cases. Will this kind of practice survive? This is what

Delegate Vallario is concerned with.

Delegate Vallario moved that the representation by the OPD would be provisional while the defendant is in jail. If a defendant would like further representation, he or she would have to apply to the OPD just like the other 52% of defendants who had been released. The Chair clarified that the motion was that all representation by the Public Defender at bail review is provisional. Delegate Vallario agreed. He added that if the person is released from jail, he or she would have to apply to the OPD for further representation. Mr. Johnson disclosed that he was on the board of the OPD. If all representation is provisional, this does not answer Delegate Vallario's question, because it does not address what the procedure is that follows after that. Mr. Johnson agreed with Judge Weatherly that the Public Defender by statute has a right to determine this. It is not up to the Rules Committee to determine. He was speaking against the motion.

Ms. Potter inquired if there was any other alternative other than the one proposed by Delegate Vallario. Mr. Leahy remarked that some of the other suggestions would be telling the Public Defender how to run its office. The Chair said that he assumed that if Delegate Vallario's motion carried, the Public Defender would decide representation based on an affidavit and not do any investigation at that point. They would represent everyone unless the affidavit shows on its face that the person is not eligible for OPD representation. The motion was seconded.

Mr. Klein expressed the opinion that this issue was all about money, resources, and fiscal issues that are properly the province of the legislature and not this Committee. For this reason, he would vote against the proposal, not because it is a bad idea, but because it is not the business of the Committee.

The Reporter addressed Ms. Potter's question concerning alternatives, pointing out that there are three options. One is the proposal of Delegate Vallario, one is the other proposal that was handed out today, and one is to do nothing. Mr. Sullivan asked Mr. DeWolfe if the OPD was satisfied with the language in the version of Rule 4-216.1 handed out with the Rules Committee footer on the bottom. Mr. DeWolfe replied affirmatively.

The Chair called for a vote on Delegate Vallario's motion. The motion carried on a vote of 10 in favor, nine opposed.

By consensus, the Committee approved the version of Rule 4-216.1 as proposed by Delegate Vallario. The Committee approved Rule 4-214 as presented.

The Chair clarified that the Rules Committee does not adopt anything other than a recommendation to the Court of Appeals. The Rules of Procedure are the Rules of the Court who will have to make the ultimate decision. Some of the discussion had referred to whether the Rules Committee has the power to do something. The power of the Committee is to make recommendations.

Master Mahasa told the Committee that her service on the Committee had been a wonderful experience, and she was leaving

unwillingly. It had been her pleasure to serve. The Chair responded that it had been a pleasure to have her on the Committee.

After lunch, the Chair said that before Rule 15-1001 was discussed, the first Rule in Title 16, Chapter 600 should be discussed.

The Chair presented Rule 16-601, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURT ADMINISTRATION

CHAPTER 600 - EXTENDED COVERAGE OF COURT PROCEEDINGS

Rule 16-601. DEFINITIONS

In this Chapter, the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(a) Extended Coverage

"Extended coverage" means the recording or broadcasting of court proceedings by the use of recording, photographic, television, radio, or other broadcasting equipment operated by:

(1) an authorized employee of a newspaper of general circulation or a television or radio station operating under a license from the Federal Communications Commission; or

(2) a person engaged in the preparation of an educational film or recording relating to the Maryland legal or judicial system and intended for instructional use in an educational program offered by a public or

accredited educational institution.

DRAFTER'S NOTE: When the current Rule was adopted, the term "news media" had a fairly well-understood meaning – a newspaper or radio or TV station. In light of current (and future) means of widely (or selectively) disseminating information by individual computers, that may no longer be the case. Extended coverage was never anticipated to be available to anyone from the public who had a camera or tape recorder. Unless the court wants to permit bloggers, etc. to have the same access as newspapers and radio and TV stations, the Rule may need to be more specific. The access afforded to persons preparing educational films also may need some tightening. The current language is troublesome in that it seems to give a judge unbridled discretion to allow A to film court proceedings but not B and thus base a decision on personal biases. If the basis for this access is an educational purpose, it might be best to tie it to an intended use in an educational program offered by a bona fide educational institution.

(b) Local Administrative Judge

"Local Administrative Judge" means the County Administrative Judge of a circuit court and the District Administrative Judge of the District Court.

(c) Party

"Party" means a named litigant of record who has appeared in the proceeding.

(d) Proceeding

"Proceeding" means any trial, hearing, oral argument on appeal, or other matter held in open court which the public is entitled to attend.

(e) Presiding Judge

(1) "Presiding judge" means a judge

designated to preside over a proceeding which is, or is intended to be, the subject of extended coverage.

(2) Where action by a presiding judge is required by this Rule and no judge has been designated to preside over the proceeding, "presiding judge" means the Local Administrative Judge.

(3) In an appellate court, "presiding judge" means the Chief Judge of that court or the senior judge of a panel of which the Chief Judge is not a member.

Source: This Rule is derived from former Rule 16-109 (a).

Rule 16-601 was accompanied by the following Reporter's note.

Rule 16-601 is derived from former Rule 16-109. Section (a) is derived from former Rule 16-109 a. 1. The Subcommittee has expanded the term "news media" to include an authorized employee of a newspaper of general circulation or licensed television or radio station.

Section (b) is substantially the same as former Rule 16-109 a. 2.

Section (c) is the same as former Rule 16-109 a. 3.

Section (d) is substantially the same as former Rule 16-109 a. 4.

Section (e) is derived from former Rule 16-109 a. 5.

The Chair noted that section (a) of Rule 16-601 defined the term "extended coverage." All of the definitions in the Rule were taken from the current Rule, Rule 16-109, with the exception of the definition of "extended coverage." Section (a) had been

rewritten to some extent. The drafter's note explains why. The Committee had recently asked whether there was a statute defining the term "news media." The statute is Code, Courts Article, §9-112. This statute addresses privileged communications, and it defines the term "news media" very broadly. It is not workable as a definition in Rule 16-601 (a). There are two questions. One is purely a style issue. The other is whether to narrow the concept of what the news media is, or leave it alone.

Mr. Siegel pointed out that the definition proposed in subsection (a)(1) would exclude most of the modern news media. The definition is limited to "an authorized employee of a newspaper of general circulation or a television or radio station operating under a license from the Federal Communications Commission...". The only tv or radio stations operating under a FCC license are ABC, CBS, NBC, and Fox. All other media do not operate under a license from the FCC, including such stations as CNN and MSNBC. The term "newspaper of general circulation" is a specific term that is derived from statutes that pertain to public posting and that are required to give effective public notice. Neither one of these is intended to define "news media." Many wire services, such as Associated Press, would be excluded from this definition.

Mr. Siegel said that the definition raises some problems and constitutional questions and as a practical matter, it is not used very much. It does not apply to criminal cases, and in civil cases, both parties have to consent. There will not be

many civil cases which the news media would be interested in broadcasting. Rather than adopt a definition that raises many difficult questions and might create some mischief in the sense that people would want to look to it for other purposes, his suggestion would be to simply refer to "the news media" in subsection (a)(1). In the extremely unlikely event that a blogger would want to record something, and somehow both parties to a case were to consent to it, this is a matter that an individual trial judge can sort out.

The Chair asked Mr. Siegel if he had any problem with subsection (a)(2) of Rule 16-601. Mr. Siegel answered that he did not have a problem with subsection (a)(2). Mr. Bowie moved that subsection (a)(1) read "the news media, or," the motion was seconded, and it carried by a majority vote.

The Chair said that Franklin Olmsted, Esq., who had been on the Code Revision Commission for a very long time, had a concern about "stuffed definitions." He had proposed that subsections (a) (1) and (2), however worded, do not belong in the definitions, because they are a matter of substance. If the Committee would like to move them, they could be moved to Rule 16-603, Extended Coverage Permissible. It was a style issue. The Vice Chair expressed the view that the definitions in subsections (a)(1) and (2) are not "stuffed," and that they should be left in Rule 16-601. By consensus, the Committee decided to leave them in Rule 16-601.

By consensus, the Committee approved Rule 16-601 as amended.

Agenda Item 2. Reconsideration of proposed amendments to Rule 15-1001 (Wrongful Death)

The Chair presented Rule 15-1001, Wrongful Death, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 1000 - OTHER SPECIAL PROCEEDINGS

AMEND Rule 15-1001 to add a Committee note following section (a), to reverse the order of sections (c) and (d), to add language to section (c) regarding **[conducting a bona fide and diligent search] [and making good faith efforts]** with respect to identifying, locating, and naming the plaintiffs, to add a specific form of notice to use plaintiffs, to change the procedure for service of the complaint and notice, to add new section (e) providing for a waiver by inaction, to add new section (f) concerning use plaintiffs identified after a complaint is filed, and generally to implement holdings of the Court in *University of Md. Medical Systems v. Muti*, ___ Md. ___ (2012), as follows:

Rule 15-1001. WRONGFUL DEATH

(a) Applicability

This Rule applies to an action involving a claim for damages for wrongful death.

Committee note: Under Code, Courts Article, §3-903 (a), if the wrongful act causing the decedent's death occurred in the District of Columbia or in another State or territory of the United States, a Maryland court must apply the substantive law of that

jurisdiction. Under Code, Courts Article, §3-903 (b), however, a Maryland court must apply the Maryland Rules of pleading and practice. This Rule sets forth the pleading and procedural requirements particularly applicable to a wrongful death action filed in a Maryland court and, subject to Code, Courts Article, §3-903 (a) statutory time limitations applicable to such actions. See Code, Courts Article, §3-904 (g).

Cross reference: See Code, Courts Article, §§3-901 through 3-904, relating to wrongful death claims generally. See Code, Courts Article, §5-806, relating to wrongful death claims between parents and children arising out of the operation of a motor vehicle. See also Code, Labor and Employment Article, §9-901 et seq. relating to wrongful death claims when workers' compensation may also be available, and Code, Insurance Article, §20-601, relating to certain wrongful death claims against the Maryland Automobile Insurance Fund. See also Code, Estates and Trusts Article, §8-103, relating to the limitation on presentation of claims against a decedent's estate.

(b) Required Plaintiffs

~~If the wrongful act occurred in this State, all~~ All persons who are or may be entitled by law to claim damages by reason of the wrongful death shall be named as plaintiffs whether or not they join in the action. The words “to the use of" shall precede the name of any person named as a plaintiff who does not join in the **[action][complaint]**.

~~(d)~~ (c) Complaint

~~In addition to complying with Rules 2-303 through 2-305, the~~ The complaint shall state the relationship of each plaintiff to the decedent whose death is alleged to have been caused by the wrongful act. The complaint also shall state that the party bringing the action **[conducted a bona fide and diligent search] [and made a good faith**

effort] to identify, locate, and name all individuals who might qualify as plaintiffs and have added as use plaintiffs all such individuals whose names and addresses are know to them. The court may not dismiss a complaint for failure to join all use plaintiffs if the court finds that the party bringing the action made such **[a bona fide and diligent search [and good faith effort]**.

~~(c)~~ (d) Notice to Use Plaintiff

The party bringing the action shall ~~mail~~ serve a copy of the complaint ~~by certified mail to any use plaintiff at the use plaintiff 's last known address. Proof of mailing shall be filed as provided in Rule 2-126.~~ on each use plaintiff pursuant to Rule 2-121. The complaint shall be accompanied by a Notice in substantially the following form:

[Caption of case]

NOTICE TO [Name of Use Plaintiff]

You may have a right under Maryland law to claim an award of damages in this action. You should consult Maryland Code, §3-904 of the Courts Article for eligibility requirements. Only one action on behalf of all individuals entitled to make a claim is permitted. If you decide to make a claim, you must file with the Clerk of the Circuit Court for _____ a written response to the complaint, stating that you elect to join the complaint, no later that the earlier of (1) the applicable deadline stated in §3-904 (g) of the Courts Article [“the statutory deadline”] or (2) 30 days after being served with the complaint and this Notice if you reside in Maryland, 60 days after being served if you reside elsewhere in the United States,

or 90 days after being served if you reside outside of the United States ["the served Notice deadline"]. You may represent yourself, or you may obtain an attorney to represent you. If the court does not receive your written response by the earlier of the applicable deadlines, the court may find that you have lost your right to participate in the action and claim any recovery.

If you decide to participate, you must present your claim in accordance with court rules, procedures, and orders.

(e) Waiver by Inaction

(1) Definitions

In this section and in section (f), "statutory deadline" means the applicable deadline stated in Code, Courts Article, §3-904 (a), and "served notice deadline" means the additional applicable deadline stated in the notice.

(2) Failure to Satisfy Statutory Time Requirements

An individual who fails to file a complaint or response by the statutory deadline may not participate in the action or claim an recovery.

(3) Other Late Filing

If a use plaintiff who is served with a complaint and Notice in accordance with section (d) of this Rule does not file a response by the served notice deadline, the use plaintiff may not participate in the action or claim any recovery unless, for good cause shown, the court excuses the late response unless the statutory deadline is not met.

(f) Subsequently Identified Use Plaintiff

Notwithstanding any time limitations contained in Rule 2-341 or in a scheduling

order entered pursuant to Rule 2-504, if, despite **[conducting a bona fide and diligent search] and [making a good faith effort]** to identify, locate, and name all use plaintiffs, a person entitled to be named as a use plaintiff is not identified until after the complaint is filed, but is identified by the statutory deadline, the newly identified use plaintiff shall be added by amendment to the complaint as soon as practicable and served in accordance with section (d) of this Rule and Rule 2-341 (d).

Source: This Rule is derived as follows:
Section (a) is derived from former Rule Q40.
Section (b) is derived from former Rule Q41 a.
Section ~~(d)~~ (c) is derived from former Rule Q42.
Section ~~(c)~~ (d) is new.
Section (e) is new.
Section (f) is new.

The Chair told the Committee that the basic parts of Rule 15-1001 had been approved by them in October, 2011, but the Committee had made some revisions. Several issues needed to be reconsidered. Mr. Michael had looked at the Rule a number of times, and the Chair and the Reporter had worked on it also. The Rule was back before the Committee for final approval. The first issue of concern was the Committee note that was after section (a). The intent of the Committee note was to call attention to the choice of law statute in Code, Courts Article, §3-903 (a) and (b), which basically provides that if the death was in another state, the substantive law of that state applies, but the Maryland court is to apply its own rules of procedure and pleading. On the theory that the substantive law of some other

state may be different than under Maryland law, this Committee note calls attention to it.

Mr. Michael said that he had a suggested change for the cross reference after section (a). He noted that Russell Butler, Esq., Executive Director of the Maryland Crime Victims' Resource Center, had suggested that a reference to "Chapters 239 and 240, Laws of 2012, (SB 453/HB 707)" should be added to the cross reference. Mr. Michael expressed the view that this would be a mistake. The statute itself is not very clear as to its meaning. The Chair commented that it was unnecessary to refer to the statute, because the new statute amends Code, Courts Article, §3-904 (g). What Mr. Butler was suggesting was to add a reference to the statute that extends the time if the death was a homicide. This is an amendment to Code, Courts Article, §3-904 (g), which is already referenced.

Mr. Michael agreed, but he expressed the opinion that another one of Mr. Butler's suggestions, an additional cross reference to "Code, Courts Article, §5-201 (a)," should be added, which for the first time, recognizes that a disability extends the statute of limitations. This is contrary to case law in *Waddell v. Kirkpatrick*, 331 Md. 52 (1993). The court specifically held that a child under age 18 is not under a disability for purposes of the three-year statutory requirement for filing a wrongful death claim, which does not make sense. However, this had been the law. The legislature corrected this

by amending Code, Courts Article, §5-201 (a) to include minors or any other person under a disability.

Mr. Michael said that in the cross reference, what is essentially being done is sending people to look at other statutes that are going to impact on this issue, particularly with regard to when this claim has to be brought. He suggested adding a sentence after the first sentence of the cross reference that would read: "See Code, Courts Article, §3-904 (g) for the statute of limitations generally, and see Code, Courts Article, §5-201 (a) for wrongful death claims involving minors, people under a disability, and actions arising from conduct that would constitute a criminal homicide." Pertaining to the estates and trusts aspect of this, there would be a six-month time frame within which one can file to be able to collect from the insurance policy. If someone waits longer than that, he or she can still file the wrongful death claim, but the person may not get the insurance proceeds. This does not affect how or when someone files. It is in the cross reference, but it does not pertain to a statute of limitations issue. Mr. Michael's first suggestion was the amendment to the cross reference. By consensus, the Committee agreed to amend the cross reference.

Mr. Michael noted that the Committee note could now be ended after the words: "death action filed in a Maryland court." The remainder of the note is not necessary, because the cross reference now addresses it. By consensus, the Committee agreed to this deletion. The Chair asked if anyone had a comment on

section (b). The first few words of section (b) were deleted, because it covered any wrongful death situation.

The Chair inquired if the last part of section (b) should be "join in the action" or "join in the complaint." If the person joins in the action, is he or she no longer a use plaintiff? Mr. Michael answered that if the person joins in the complaint, he or she would no longer be a use plaintiff. If the person joins in the action but does not amend themselves in, there could be a distinction. The Chair noted that the word at the end of section (b) should be "complaint." Judge Pierson commented that section (b) refers to the initial complaint, so it is joined in the action at that point in time. The Chair said that this would be if the person does not join in the initial complaint. Judge Pierson observed that when the complaint is filed, it states whether the person is joined in the action. The person may get into the action later, but he or she is not joining in the action now. Mr. Michael agreed with Judge Pierson that section (b) is a reference to the initial complaint.

The Chair asked if Judge Pierson favored using the word "complaint." Judge Pierson replied that he was in favor of the word "action." Mr. Michael agreed that the word "action" was better. By consensus, the Committee agreed that the last word of section (b) would be the word "action."

The Chair drew the Committee's attention to section (c). The bracketed language was left over from the last time the Rule had been discussed. Mr. Michael explained that the language was

taken from *UM Medical System v. Muti*, 426 Md. 358 (2012). This is what the Court of Appeals is requiring as the standard by which to measure whether the attorney has adequately tried to identify and locate use plaintiffs. The issue in *Muti* was whether the plaintiff's attorney had done his job in locating a use plaintiff who appeared at the last minute. The trial court threw out the entire case, for failure to name a use plaintiff. This language was put into the opinion, and it explains what the obligation of the plaintiff's attorney is with regard to conducting the search for use plaintiffs. The language "bona fide and diligent search" as well as "good faith effort" comes right out of *Muti*.

The Vice Chair noted that the language in the opinion is slightly different. It is: "a good faith and reasonably diligent search." Mr. Michael said that the language varies in the case, but he had no problem with the language pointed out by the Vice Chair. It is stated better than the language in the rule. Mr. Sullivan observed that the opinion restates this using the word "bona fide." Mr. Michael said that he had told the Committee that the opinion states this differently in different parts. The Chair inquired as to which language is better.

Mr. Sykes asked if it would be possible to have a diligent and bad faith search. The Chair noted that the search would have to be conducted in good faith and be reasonably diligent. Mr. Michael said that the earlier cases such as *Ace Am. Ins. Co. v.*

Williams, Williams v. Work, 418 Md. 400 (2011) addressed attorney misconduct. The attorney in that case was as unethical as anyone could be, including his claim that his first settlement with family won. He then began to represent the new family he found, but the first settlement he had effected was a fraudulent settlement. He used it to get around the first problem and represented the second family. There is a big concern about attorney conduct, and some of what is in the proposed Rules addresses what the obligation of the attorney is. The overarching issue is finding a mechanism to deal with the unknown use plaintiffs in the beginning of the case, because they are wreaking havoc on the attorneys who are trying to settle these cases when they are essentially forced into representing people with whom the attorney has no agreement. Personal injury attorneys have to represent people unknown to them, but the attorney is in effect representing these people to a limited extent. However, now *Muti* has held that there is no obligation toward them, but until *Muti* this was unclear. It is a very awkward situation for plaintiff attorneys. The Chair pointed out that the Rule only requires sending the use plaintiffs notice. Mr. Michael said that this is the reason that these Rules are necessary.

The Chair asked if the language "good faith and reasonably diligent search" should be added to Rule 15-1001. Ms. Potter referred to the language in section (c) that read: "... have

added as use plaintiffs all such individuals whose names and addresses are known to them." This does not address the issue concerning "Ricky," who was the adopted stepson in the *Muti* case. His identity was known, but his address was unknown. The problem is the word "address." Even if the attorney does not know someone's address, the attorney would have to add that person as a use plaintiff. Mr. Michael responded that Rule 1-301, Form of Court Papers, allows the attorney to indicate that the person's address is unknown. Ms. Potter noted that the cases require that the attorney identify any use plaintiff even if the person's whereabouts are unknown. Mr. Michael asked if Ms. Potter had a problem with the words "and addresses," and she replied affirmatively. Mr. Brault suggested that the wording could be "...and addresses if known." Ms. Potter suggested that the language "whose names and addresses are known to them." If the attorney knows the address, he or she will provide it. Mr. Klein asked if Rule 15-1001 should require that if known, the address should be given. If the attorney knows the address, he or she should put it on the complaint. The Chair remarked that notice has to be sent to the individuals who might qualify as use plaintiffs.

Mr. Sykes suggested that the wording could be "whose names are known, and, if known, addresses." Ms. Potter commented that the attorney should still identify an individual whose name may be known, but the person's address is not. The Chair pointed out

that the question comes up in section (d) as to where the attorney should send the notice. Ms. Potter remarked that the Rule should help any attorney in this situation. An attorney could know that there is an adopted stepson, but the attorney does not know where he is. This was the problem in *Muti*. The Chair reiterated that section (d) requires notice. The attorney could post notice on the courthouse door, or else an address is needed. Ms. Potter said that if the purpose of Rule 15-1001 is to help attorneys who know that a possible use plaintiff exists, but the person's whereabouts are unknown, the Rule should tell practitioners what their obligation is. Ms. Ogletree suggested that the attorney could get a court order allowing for substituted service. Judge Weatherly observed that people are not excluded if their addresses are not known. There is still an obligation to give the name. Ms. Potter remarked that the Rule requires service on potential use plaintiffs, but it is difficult to serve those people whose address is not known.

Judge Weatherly asked if the words "and addresses" had been eliminated from section (c). Mr. Klein suggested that a sentence could be added after this that would state that the address should be given if known. The Chair commented that the second sentence of section (c) begins with the obligation in the complaint to state that the attorney made an effort to identify and locate the possible use plaintiffs. He suggested that another sentence could be added providing that the attorney has

to state the names, and, if known, the addresses. Then in the next situation, the Rule should provide for some kind of substituted service if the whereabouts of these people are unknown. Ms. Potter asked if the court in *Muti* gave any kind of guidance on how to serve missing people. Mr. Michael responded negatively. The Chair added that the court did not have to give any guidance in *Muti*, because the missing stepson appeared.

Mr. Michael remarked that a substituted service provision was needed in section (d). He was not sure that anything was needed in section (c). The Chair responded that if Rule 15-1001 was going to be self-contained, then some language should be added as to what happens when the address is not known, because the attorney has an obligation to serve the use plaintiffs. Judge Pierson noted that section (d) provided that service is to be made pursuant to Rule 2-121 (Process – Service – In Personam). Rule 2-121 (c) provides that when proof is made by affidavit that good faith efforts to serve the defendant pursuant to section (a) of the Rule have not succeeded, the court may order any other means of service that it deems appropriate under the circumstances. This was already in section (d) of Rule 15-1001.

Mr. Klein suggested that the language could be "...conducted a good faith and diligent search to identify, locate, and name as use plaintiffs all individuals who qualify as use plaintiffs. The complaint shall also state the address of each use plaintiff that is known." The Chair asked if Mr. Klein intended to drop

the word “might” before the word “qualify.” Mr. Klein responded that he had not intended to drop the word “might.” His intent was to add the word “use” to modify the word “plaintiffs.” It would read “...to name as use plaintiffs all individuals who might qualify as use plaintiffs.” If the address is known, it would also have to be stated.

Mr. Michael suggested that the phrase “whose names and addresses are known to them” could be eliminated. Mr. Klein said that his proposal included taking this language out. The Reporter inquired how the address would be handled. Mr. Klein answered that the language would be: “The complaint shall state all known addresses of any use plaintiffs.”

The Reporter referred to the language previously discussed which was: “reasonable and diligent search.” She asked if it should be: “reasonable and diligent effort.” The Chair responded that it should be: “good faith and reasonably diligent effort.” By consensus, the Committee approved this language. The Vice Chair inquired if the wording should be “the last known address” instead of “all known addresses.” By consensus, the Committee agreed to change the language to “the last known address of each use plaintiff.”

Judge Pierson asked Mr. Michael if the defendant would be likely to raise the issue of whether the search was adequate for his or her own protection against later plaintiffs coming in. The reason Judge Pierson asked this question was because all the Rule required was an allegation from the plaintiff that they made

the effort to identify, locate, and name use plaintiffs. The plaintiff does not have to allege what he or she did to make this effort. The only requirement was that the plaintiff state that he or she made a good faith effort to find these people.

Mr. Michael responded that the plaintiffs will have to explain what efforts they made, particularly if there is a challenge. In view of the express concerns of the court in *Williams* about the protection of the rights of the use plaintiffs who are not represented, the plaintiff will have to show that he or she has made good faith efforts. Ms. Ogletree added that the plaintiff will have to get substituted service. Mr. Michael noted that the plaintiff can make a general allegation, and if anyone wants to raise an issue, it can be asked in an interrogatory or some other way. The Chair pointed out that for tax sales, it is necessary to allege in the complaint the efforts made to locate interested persons. Ms. Ogletree said that if the plaintiff gets substituted service, the affidavit that was filed to ask the judge to allow the substituted service gives the efforts starting with contacting relatives, tax records, etc.

Mr. Brault remarked that the biggest problem is not an exposure to a second lawsuit. It is not being able to settle the case. Although he had approached the problem from both directions, particularly from the defense viewpoint, if someone is defending a case with unknown use plaintiffs, and the defense wants to settle, because it is a bad case, the law now requires

that the case must go to trial, and it cannot be settled. What he and Mr. Michael had been working on when this issue was first considered was to make sure that a rule was drafted that would allow the parties to be defined and make the case subject to settlement.

Mr. Michael added that the rule would also move the issue up front in the case, instead of the attorney finding out on the day of trial, the day of settlement, or the day of the mediation conference that a use plaintiff exists somewhere. Mr. Brault noted that in theory, the only way the case can be resolved is to try it and tell the jury not to award any monetary damages. This is unacceptable, so it is important for both sides to make sure that the rules are drafted, so that the case can be disposed of.

The Chair pointed out that there may be a problem with this approach. If an attorney knows or has reason to suspect that other children, who could be use plaintiffs, exist, the attorney must try to find them. If an attorney did not know that the decedent had a child, that person could surface later anyway. The Chair was not sure whether in this kind of situation, some published notice would be needed, such as the kind in estates and trusts cases. Ms. Ogletree commented that this may already be necessary, because the legislature broadened the definition of "illegitimate child." It used to be that someone was only the illegitimate child of his or her mother, unless the father acknowledged the person or took one of four actions pursuant to Code, Estates and Trusts Article, §1-208.

Mr. Michael said that he did not think that there was anything that could be done with the Rule that would prevent a use plaintiff from appearing later as long as the person is within the time specified in the statute, either three years or under the extended disability provision, notwithstanding any notice that was posted or any order that was passed. The Chair observed that the question was whether some kind of publication might be useful with respect to the effort to locate. Ms. Ogletree referred to Rule 2-122, Process – Service – In Rem or Quasi In Rem, which is the substituted service rule. In property actions, the Rule requires posting the property, but otherwise it requires mailing to the last known address, posting, and publication, which can be waived if the plaintiff does not know where the defendant is.

Mr. Brault remarked that the tragedy is if no one knows about the person eligible to be a use plaintiff, and the person does not know enough to ask to join in the case. Even if the person did join, he or she may not be entitled to anything. The person cannot be financially dependent and cannot have any damage. Mr. Brault said that he was the attorney in a case where the father had not been seen for 23 years. This seems to be chasing a non-entity plaintiff. The Rule has to be set up, so that this problem can be eliminated from the case, allowing it to go forward.

Mr. Klein commented that he was not trying to create a burden. However, it is very common for parties to be asked to

state the basis on which they took some action. Whether it is the plaintiff or the defense side, parties get a great amount of work product protection. What would happen if someone were to be served with an interrogatory that asks the person to describe the bona fide reasonably diligent search effort to find the use plaintiffs? Mr. Michael responded that it cannot be done, because *Muti* holds that the attorney does not represent them. The opinion, which was written by the Honorable Lawrence Rodowsky, stated that the attorney does not represent the use plaintiffs. The attorney has obligations to them but does not represent them.

Mr. Klein said that his question was whether the plaintiffs would be better protected if the efforts to identify, locate, and name potential use plaintiffs were documented in the pleading, so that there is no issue later about this. Mr. Michael noted that some of these efforts would be ongoing. Mr. Brault remarked that one of the problems is going to be economics. How much money does an attorney have to spend to try to locate someone? Someone's last known address could be in Texas. Does the attorney have to hire a Texas attorney or a private investigator there? Mr. Michael commented that the validity of these efforts will depend on the trial judge. The Chair said that if Rule 15-1001 requires what some of the property rules require, which is to list what the plaintiff has done, it might forestall possible motions and interrogatories.

Mr. Brault inquired if the plaintiff would have to state that there are no known additional eligible parties. Or if the complaint is silent, is it taken for granted that there are no known use plaintiffs? The Chair observed that it is implicit from what has been stated in the complaint that any one named should be located and that the plaintiff has found no possible use plaintiffs. Mr. Michael pointed out that the issue is whether the plaintiff should be required to detail the efforts made. Ms. Ogletree noted that to get an order to post, it is necessary to detail the efforts made to locate someone.

The Chair asked what would be the down side to requiring detailing the efforts to locate. Mr. Michael answered that often the efforts are ongoing and not static. Would it be necessary to amend the complaint to include the additional steps taken to locate someone? Another down side is that there may be some attorney-client work product implications that occur, because this is a conflict situation. Every use plaintiff found dilutes the recovery of the people who hired the attorney. This is a difficult line to walk.

Mr. Michael expressed some concern about being required to detail in the complaint every effort to locate someone. The Chair inquired if requiring this would be helpful to the attorney. Mr. Michael answered that it would be helpful only if no one is found; otherwise, if anyone is found, the reward may have to be shared. The Chair pointed out that under *Muti*, this

is mandatory.

Mr. Zarbin remarked that a danger is that the plaintiff will be chastised. The plaintiff includes in the complaint whatever efforts he or she made to locate a person, and then someone will argue that what was put in is not true or that it is not sufficient. The Chair acknowledged this, but he pointed out that this would happen, anyway. The defendant is going to file interrogatories as to what efforts the plaintiff has made. Mr. Zarbin expressed the view that this would be preferable to being required to detail all the efforts made, which will lead to the plaintiff helping the other side attack him or her. He thought that the pleading should be fact-pleading, stating the facts, but not giving the efforts made to identify or locate. The Chair said that this was true, unless the plaintiff is going to post. Ms. Ogletree added that in that case, the efforts to locate would have to be detailed.

The Reporter inquired how the attorney could protect himself or herself against a young child filing at any point in time. Mr. Michael responded that the procedures in the Rule should be followed, but there are some outlier cases that will be problematic. For example, an attorney agrees to pay the policy limits, and then 10 years later, it is discovered that someone had been in a mental hospital or that there is a child that had been under a legal disability. The attorney who agreed to pay will require in releases that the plaintiff indemnify the insurance company defendant from any of these outlier people who

appear later. This is what the defense bar will end up doing in these cases. The cases are clear that access to the court for the person who appears later cannot be blocked.

The Chair asked if anyone had any other suggested changes other than the change to "good faith and reasonably diligent...". This appears several times, including in section (c) and section (f). This language has to be the same wherever it appears, hearing none the Chair drew the Committee's attention to section (d). He told the Committee that this provision had been rewritten since the last time the Committee had discussed this issue to call attention to Code, Courts Article, §3-904 for eligibility requirements to make clear that if someone decides to make a claim, a written response to the complaint has to be filed with the clerk. He asked if the response is that the person wants to join the complaint. Mr. Michael replied that the person has to indicate that he or she wants to join the complaint.

Mr. Brault inquired what happens if the person writes a letter stating that he or she would like to join in the lawsuit. The Chair noted that this backs up into the attorney representing the use plaintiff. Maybe the person should not join in the complaint but file one of his or her own. Ms. Potter observed that it would still be part of the same action. The person would go from being a use plaintiff to a plaintiff. Ms. Ogletree commented that the person would not join in the complaint but would join in the action.

Mr. Michael pointed out that wherever "Code, Courts Article,

§3-904 (g)" is referenced, "Code, Courts Article, §5-201 (a)" has to be referenced. These are the two provisions that govern the statute of limitations in these cases. He pointed out that the reference to "Maryland Code, §3-904 of the Courts Article" in the second sentence of the notice should be "Maryland Code, §3-904 (g) of the Courts Article." The Chair disagreed, explaining that Code, Courts Article, §3-904 applies to more than just the time to commence the action.

Mr. Brault asked if language should be included providing that the use plaintiff must file a motion to intervene, which is what *Muti* had stated was a way to place a claim. Ms. Potter noted that this was because the person was not a use plaintiff. Mr. Michael said that this was suggested as one way to place a claim, but not the only way. The more traditional way to place a claim is to file a motion to intervene.

Ms. Potter said that once the use plaintiff has been served, he or she may hire an attorney or be *pro se*. If the person is *pro se*, the person will write a letter saying he or she would like to join in the lawsuit. Ms. Potter agreed with Ms. Ogletree that it would not be joining in the complaint but in the action. If the person is *pro se*, one of the attorneys may call him or her to give more information. The person would probably eventually get an attorney.

The Chair pointed out that all that the original complaint states is that the person might be qualified as a use plaintiff.

It does not state that the person is or is not a use plaintiff. The plaintiff attorney is not representing this person. If the person wants to join, does the person not have to make allegations as though he or she were a true plaintiff? Mr. Leahy noted that the notice form states: "If you decide to participate, you must present your claim in accordance with court rules, procedures, and orders." The Chair asked how the person would do this. Judge Pierson replied that the person would file a motion to intervene, which should have the person's proposed pleading. The Chair asked if the Rule should state that the person must file a motion to intervene in accordance with the Maryland Rules.

Ms. Potter again referred to the *pro se* person who wants to join. Even if the person had filed a motion to intervene, the court will still include him or her in settlement discussions. The person cannot be excluded. Mr. Zarbin commented that the problem is if the use plaintiff comes to the plaintiff attorney who does not represent the use plaintiff, and before any damages can be awarded, the plaintiff attorney must get an agreement with all of the plaintiffs. They all must agree, or the court will have to divide up the money. Then there is likely to be an argument that this person or that person should have to pay a fair share of the expenses. The use plaintiff cannot simply write a letter and must take an affirmative action. Then the court would probably have to hold some type of pretrial conference to talk to the person if he or she does not have an

attorney. Ms. Ogletree suggested that a direction to seek legal counsel could be included in the notice.

The Chair suggested that the language in the third sentence of the notice that reads: "a written response to the complaint, stating that you elect to join the complaint" could be stricken. Instead the wording could be "...you must file with the Clerk of the Circuit Court for _____ a motion to intervene in accordance with the Maryland Rules by _____ [including a date.]" Mr. Brault expressed the opinion that this language was better.

Mr. Michael suggested that the wording should be "...you must file with the Clerk of the Court in which the action is pending...". The word "Circuit" would eliminate federal court, District Court, etc. The Chair asked if this Rule would apply to federal court, which has its own rules. Mr. Michael said that they follow Maryland procedure. Ms. Ogletree noted that this is in State court. In federal court, federal procedure and Maryland substantive law are followed. Mr. Michael agreed. There may not be many wrongful death cases filed in the District Court. The Chair asked if Mr. Michael had referred to federal District Court. Mr. Michael replied that he had meant to refer to both federal and State District Court. The cure is the same, which is to change the wording to "clerk of the court in which the action is pending." The Reporter inquired if there is a motion to intervene in District Court. Ms. Ogletree answered affirmatively.

The Chair read the revised wording of the notice in Rule

15-1001: “If you decide to make a claim, you must file with the clerk of the court in which the action is pending a motion to intervene in the action in accordance with the Maryland Rules.” Ms. Ogletree pointed out that this would not apply in federal court. If this wording is in the Rule, someone will file under the Maryland Rules in federal court. Judge Weatherly said that a case could be filed in a Maryland State court. Mr. Klein said that it would immediately be removed to federal court. Ms. Ogletree suggested the language “file a motion to intervene under the appropriate court rules.” The Chair asked what the concern is if the case is in federal court. The Reporter observed that this is a notice that is from the State courts. The case is in State court.

The Chair read what he had as the new language for the notice: “If you decide to make a claim, you must file with the clerk of the court in which the action is pending a motion to intervene in the action.” Should it also state “in accordance with the Maryland Rules?” Judge Pierson answered affirmatively. He guessed that most people would not follow the Rules, but some would. The Chair expressed the view that it is useful to keep in the language he had asked about. If someone intervenes in Maryland, and then the case is removed, the person is in the case. By consensus, the Committee agreed to change the language of the notice in section (d), so that it would read as follows: “If you decide to make a claim, you must file with the clerk of the court in which the action is pending a motion to intervene in

the action in accordance with the Maryland Rules."

The Chair told the Committee that Mr. Butler had proposed amendments to section (d). The Chair expressed the view that the amendments were not necessary. Mr. Michael added that the proposed amendments, which add statutory language, make the notice less clear. Judge Pierson suggested that the word "response" in the sixth sentence of section (d) should be changed to the words "motion to intervene." By consensus, the Committee agreed to this change. The same change would also be made to section (e). Mr. Brault suggested that the word "participate" in the last sentence of section (d) should be changed to the word "intervene." Judge Pierson expressed the view that this change should not be made.

The Chair drew the Committee's attention to section (e) of Rule 15-1001. Mr. Michael pointed out that in subsection (e)(2), the word "an" should be changed to the word "a." By consensus, the Committee agreed to this change. Mr. Michael asked if the reference in subsection (e)(1) to "Code, Courts Article, §3-904 (a)" should be to "Code, Courts Article, §3-904 (g)." The "statutory deadline" seems to refer to the statute of limitations. The Chair agreed that it should be "Code, Courts Article, §3-904 (g)." By consensus, the Committee agreed to this change. Mr. Michael noted that a reference to "Code, Courts Article, §5-201 (a)" should be added after the reference to "Code, Courts Article, §3-904 (g)." By consensus, the Committee agreed to this change.

The Chair inquired if the last sentence of section (d) was necessary. This has already been stated earlier in section (d). By consensus, the Committee agreed to delete this sentence.

The Reporter questioned whether Rules 2-214 and 3-214, Intervention, should be referenced in the notice in section (d) of Rule 15-1001 or whether the wording should simply be "in accordance with the Maryland Rules." Mr. Michael expressed the view that a specific reference to Rules 2-214 and 3-314 was not necessary. The Chair remarked that the use plaintiffs are often people who do not know or care that the decedent has died. Mr. Zarbin added that the opinions of people often change when they find out that money is involved.

The Chair said that the language of section (f) would be conformed to the changes in the other sections of Rule 15-1001. Mr. Brault asked if the language referring to the court's authority to dismiss had been deleted from section (c). Mr. Michael remarked that there is an implication that if someone fails to file a claim or to respond by the statutory deadline, he or she cannot participate in the action. Mr. Brault commented that he had thought that the draft Rule had a paragraph that provided that the court has the authority to dismiss use plaintiffs wjo waived their rights by failing to comply with the Maryland Rules. He was in a case that involved a motion to strike a claim.

The Chair asked whether subsection (e)(2) addresses this. It does not use the word "dismiss," but it does state that an

individual who fails to file a complaint or response by the statutory deadline may not participate in the action. There are two provisions. One is if the person does not file a timely motion, and the other is in section (c), which states that the court cannot dismiss a complaint for failure to join all use plaintiffs if the court finds that the party bringing the action made the good faith effort.

Judge Pierson inquired if the court can dismiss a complaint when the use plaintiff has failed to respond. Mr. Zarbin responded that it is implicit, but Mr. Brault has suggested that it may not be clear. Mr. Brault noted that the language in section (c) provides that the court may not dismiss; it does not state that the court shall not dismiss. He had thought that the Rule had stated: "If an individual fails to file a complaint or response by the statutory deadline...". The Chair pointed out that this refers to the three-year time limit to file a claim after the death of the injured person provided for in Code, Courts Article, §3-904 (g). This cannot be waived, except for what is provided for in Code, Courts Article, §5-201.

Mr. Brault explained that the situation would be that someone had filed a claim as a use plaintiff within the three-year time period. The Chair said that the use plaintiff has been named, but the use plaintiff then has to elect to participate. Mr. Brault responded that this cannot work. The plaintiff's attorney may get the case a week before the statute of limitations runs and finds out who the use plaintiffs might be.

The attorney files all their names the day before the statute runs. The way the Rule is written, the use plaintiffs cannot possibly intervene, because the statute has already run. Does this mean that there is no purpose in naming the use plaintiffs? He had thought that by their being named, they were protected under the statute and that then they would have to respond by intervening their claim as the use plaintiff still within the statutory time limits.

Mr. Michael commented that *Muti* addressed this kind of relation back. In the opinion, Judge Rodowsky made clear that the use plaintiff has to take action within the otherwise applicable statute of limitations, or he or she is out of the case. Mr. Brault remarked that the Rule may not be necessary if the statute has run. Mr. Michael agreed, noting that if the statute has run, the Rule would not save the use plaintiff. Ms. Potter observed that Mr. Brault's point was that the attorney should wait until the day before the statute runs. Mr. Brault asked why the use plaintiff should even be named, if the statute does not protect him or her. Ms. Potter said that she thought that by filing as a use plaintiff, the statute of limitations would be protected for the use plaintiff. Mr. Michael noted that this is not what is stated in *Muti*.

The Chair said that if the father dies, and the attorney, who is representing the mother and the two children, waits until two days before the three years is up to file the action, the

attorney will not be able to find use plaintiffs. The attorney waited three years to file the action. Can the court find that this is grounds that the attorney was not acting in good faith? Mr. Brault remarked that his view was that if the claim is made within the statutory time limit, the use plaintiff is eligible to obtain damages. If the attorney did nothing else, and the case goes to trial, the judge may tell the jury that there are certain relatives who can get damages, and the use plaintiffs can get them if the jury awards damages to them. It appears that the claim is made by the use plaintiff. Their claim has been filed on their behalf.

Mr. Michael pointed out that this is not what *Muti* holds. The problem with the philosophical issue raised by Mr. Brault is that the legislature has already spoken. They have made it a condition precedent that these claims must be filed within three years. There are no excuses for not filing. Mr. Brault responded that as soon as the use plaintiff is named, the claim is filed. Mr. Michael said that according to *Muti*, the use plaintiff is not a party to the claim until he or she takes some action.

Ms. Potter hypothesized that an attorney files four months before the statute has run. The attorney does not know the address of a use plaintiff, so he or she posts. The use plaintiff appears after the statute has run. Is the attorney guilty of malpractice, because he or she did not file early

enough or did not serve the use plaintiff more quickly? Mr. Michael answered that part of the *Muti* opinion states that the attorney does not represent the use plaintiff, although the attorney has an obligation to him or her. Because Mr. Michael has written and lectured about this issue, he gets many questions from attorneys. What Judge Rodowsky stated in *Muti* was that the plaintiff attorney does not represent the use plaintiffs. There is a statutory obligation to name and identify them, but they are not the clients of the plaintiff attorney. The use plaintiffs only become parties when they exercise their right to join the suit within the statute of limitations.

Ms. Potter asked if it would not be in the best interest of the plaintiff attorney's client to wait to file until the day before the statute of limitations runs. Mr. Michael said that his view was that the legislature had already taken care of this issue by stating that the three years is a contingent procedure that is not dependent on knowledge. Up until recently, even if the use plaintiff was a minor, it did not matter. The time frame was three years. Mr. Zarbin remarked that *Muti* was favorable to plaintiff attorneys.

Judge Pierson noted that *Muti* cited *Smith v. Potomac Edison Co.*, 165 F. Supp. 681 (D. Md. 1958) where the author, the Honorable Roszel Thomsen, allowed relation back. Judge Pierson suggested that in subsection (e)(3) of Rule 15-1001, the language at the end which reads: "unless the statutory deadline is not

met" should be eliminated, because it is not necessary. If it is barred by the statutory deadline, then the court cannot allow the use plaintiffs into the case. This avoids taking the position in the Rule that really is a matter of substantive law that is governed by *Muti.* The answer is one way or the other, but it is not necessary to state this in the Rule. The Chair responded that subsection (e)(3) is not the statutory deadline. This provision permits the court to waive the notice deadline.

Judge Pierson said that subsection (e)(2) raises this as well. The Chair commented that under subsection (e)(2), the use plaintiff is out of the case and cannot be named later. The question raised by Mr. Brault was why this is different than whether the person named as a use plaintiff is in the case if it is timely. Mr. Michael responded that he did not read *Muti* that way. In the opinion, Judge Rodowsky had made a clear distinction between a person who is named as a use plaintiff and a party. A party is someone who is involved in the action.

The Chair drew the Committee's attention to the language at the bottom of page 25 which read: "Even if Ricky had been identified as a use plaintiff when this action was filed, but did not "join" as a plaintiff within three years of Elliott's death, his identification as a use plaintiff would not permit him to join more than three years after Elliott's death." This indicates that even if someone is timely named as a use plaintiff, if he or she does not join within three years, the

person is out of the case. Mr. Michael remarked that the whole point of the notice is to inform the potential use plaintiff as quickly as possible, but Ms. Potter had noted that games can be played with this. The Chair said that this was implicit in *Muti*. The plaintiff or the plaintiff's attorney in the original complaint can delay filing the action until it is no longer possible for the use plaintiff to join.

Mr. Klein inquired whether the plaintiff attorney's client could sue him or her for malpractice, if the attorney did not delay filing the action. Mr. Michael replied that this is a touchy situation. He perceived that the legislative intent is that the deadline that must be met is a condition precedent to being able to bring the cause of action, which has to be done within three years after the death of the injured person. No extension is available for lack of knowledge, and before the amendment to the statute in Code, Courts Article, §5-201 (a), there was not an extension for disability. Even if someone was in the hospital in a coma, it did not matter. If the person did not file within three years, he or she lost the right to become part of the case.

Mr. Brault read from page 25 of *Muti*, which quoted from *Work* as follows: "...Rule 15-1001 (b) requires that all the statutory beneficiaries be made plaintiffs in a wrongful death action, whether or not they join. When they do not join in the action, they are identified as 'use plaintiffs' and the action proceeds

to their use or benefit. All known beneficiaries must be 'plaintiffs' under the rule...". The Chair drew the Committee's attention to the language in *Muti* on page 25 that he had cited previously. Mr. Michael said that he relied on this language when he gives speeches on this topic. It is a clear statement.

Mr. Brault expressed the opinion that this was troublesome. However, if this is going to be the law, why tell the potential use plaintiffs that they have 30, 60, or 90 days to file a claim? The Chair answered that they are being told, because there are two different deadlines, and they have to meet both. They have to file within three years, or they are totally out of the case, and the court cannot waive this. They also have to file within the 30, 60, or 90 days after service. If they do not do this, they are out of the case unless the court waives it. The court can waive this deadline, but not the statutory deadline. Judge Pierson reiterated his suggestion to change subsection (e)(3). To clarify the distinction between the notice deadline and the statutory deadline, a period could be added after the word response, and then the next sentence would read: "If the statutory deadline is not met, the court may not excuse the late filing." By consensus, the Committee agreed to this change.

Mr. Brault noted that the attorney does not need to name the use plaintiffs, if the case is filed right at the end of the statutory time period. Ms. Potter responded that the attorney needs to name them to satisfy the requirements of the Rule. Mr.

Brault pointed out that the notice tells the potential use plaintiff that he or she may be eligible, when the attorney knows that the person is not eligible. Ms. Potter reiterated that it may be in the client's best interest for the attorney to wait to file until the statute runs out, so that the client does not have to share the money awarded with more people. Mr. Brault noted that the potential use plaintiffs can sue the client for deliberately waiting to cheat the use plaintiffs out of their money. Judge Weatherly remarked that there are risks in waiting until the last minute.

Mr. Michael referred to the practical principle that if the case involves a use plaintiff whose existence was not known by anyone, what kind of claim has been lost? No jury will give an award to someone who has not been seen for 20 years or was not known to the rest of the family. Mr. Brault quoted from *Muti*, which had language from *Work* citing Black's Law Dictionary as follows: "In common law pleading, a 'use plaintiff'; is '[a] plaintiff for whom action is brought in another's name'." It makes no sense to require that someone has to name those who would be eligible when the person knows that they are not eligible. The attorney would have to tell them that they are eligible and give them 90 days to make a claim that they cannot make.

The Chair said that people who read *Muti* and Rule 15-1001, if adopted this way, may very well decide to hold the case as

long as they can. It may be difficult to hold it 10 years if the death was caused by an occupational disease as Code, Courts Article, §3-904 (g) provides for, but the three-year limitation is more doable. The attorney could put in the complaint that he or she made this diligent search and list the people who are use plaintiffs. However, since three years has gone by, the people are no longer eligible. The court can address it. The notice states that the motion can only be filed within the statutory time limit.

Mr. Brault responded that the language in the Rule is "name all individuals who might qualify as use plaintiffs," and he noted that the attorney could argue that the statute has run, so therefore there is no one who could be eligible. The Reporter commented that at the time the action was filed, the statute could not have run, or else the attorney could not have filed it. Mr. Brault said that the Rule would have to refer to those people for whom there is time to make an intervener's claim. They are being told to intervene, which takes time. The intervention has to be granted. The Chair agreed with Mr. Brault that a gap exists, and a clever plaintiff or attorney who holds the case and does not file until shortly before the statute runs can effectively squeeze out the use plaintiffs.

The Vice Chair suggested that the first sentence of section (d) could read: "The party bringing the action shall timely serve a copy of the complaint ...". This would add a timeliness element to eliminate the game-playing. The Chair responded that

this would not eliminate the game-playing. The Vice Chair said that it would suggest that the notice should be sent a reasonable time before the complaint is filed. Ms. Potter observed that the attorney may have timely filed the complaint thinking that he or she had the address of a use plaintiff, but it was not the correct address, and the attorney expended a great amount of time trying to serve the person. Even though the attorney filed timely, the time has run.

Judge Pierson commented that *Muti* could be read as applying to the decedent's adopted stepson, Ricky, as an omitted use plaintiff, because he was never named in the suit as a use plaintiff. The discussion about relation back begins on page 17 of the opinion. The Chair again pointed out the language at the bottom of page 25 of the opinion: "Even if Ricky had been identified as a use plaintiff when this action was filed, but did not 'join' as a plaintiff within three years..." he was out of the case. Judge Pierson inquired what "identified" means. Is this the same as being named in the complaint? The opinion indicates on page 24 that "Ricky" was not deliberately left out of the case.

The Chair observed that what is on pages 24 and 25 of the opinion is under the heading "Some Considered Dicta." Mr. Michael had made the point that appears on page 24, which is: "No party ... argues that Ricky should be deemed timely to have sued on the theory that, when the Mutis timely sued, they also

represented Ricky whom they should have identified as a use plaintiff." Judge Pierson said that on page 23, the opinion states that the Mutis never named Ricky as a use plaintiff. The Chair remarked that it does not matter, because no one can join the case after three years. He added that he had sat on the case, and he knew that this is what the court intended.

Ms. Potter expressed the opinion that Rule 15-1001 needed to be changed. The Chair commented that if the party waits too long to the end of the stated time period, effectively, the use plaintiff will be frozen out. Mr. Brault remarked that the notice would be interesting as it would state that the person should file his or her claim, so that it will then be dismissed for failure to file on time. The Chair asked if the Rule should provide that if the complaint is filed within seven days or within the running of the statute, the use plaintiffs do not have to be named. Mr. Brault responded that this is what the Rule will provide. No one will be eligible, because by the time the person gets the notice and is given the time required under the notice, the statute will have run. The Chair noted that this is a problem with the statute coupled with the one action.

Mr. Brault said that he had always thought that when an attorney files for a use plaintiff, the attorney files the claim for them, which is what *Muti* says. The definition of "use plaintiff" cited on page 24 from the definition in Black's Law Dictionary is: "In common law pleading, a 'use plaintiff' is '[a]

plaintiff for whom action is brought in another's name.'" The situation may be that there is a parent or legal guardian of a child, and a suit was brought, because the child was injured. That child is the use plaintiff. The mother brings the action on his or her behalf. The Chair noted that on the other side, the court did not want to impose on counsel for the named plaintiffs the duty of representing non-clients. Mr. Brault responded that in his view, this is a different issue. Whether the potential claim is there may be another lawsuit.

Ms. Potter observed that it is difficult to write a Rule that provides that the filing of a complaint as a use plaintiff satisfies the statute of limitations. The Chair said that this cannot be done in light of *Muti*. Ms. Potter remarked that if this one component of this situation could be fixed, there is no issue about someone who chooses not to intervene and is therefore out of the case. The Chair stated that if the Committee agreed to the Rule as it read, the Rule could be sent to the Court of Appeals with an explanation of what the implications of this are, which are really the implications of *Muti* itself. If someone waits too long to file, it could freeze out the possible claims of the use plaintiffs.

Ms. Potter noted that this could be in her client's best interest. There are cases in which a father has five kids, and the attorney represents four of them. One of them may have had a rift with the others and does not want to have anything to do

with the siblings or their attorney. There may be use plaintiffs who are entitled to money, but for whatever reason, they do not want representation. The Reporter pointed out that this fifth child could have gotten his or her own attorney and filed a separate suit that could have then been consolidated.

Mr. Klein said that the right result would be for the court to permit relation back. The situation now puts the plaintiff attorney in an impossible situation with his or her client. The Chair remarked that his recollection was that there was a motion for reconsideration filed in *Muti*, but it did not get to this issue. It was on a technical issue, which was corrected. Mr. Klein added that it is similar to a worker's compensation case. There is a period where the employer can file a claim, and if the employer does not file, then the employee can file a claim against a third party with an add-on to the statute of limitations. It is a matter of policy. The Chair noted that the relation-back ruling is not an issue of the statute of limitations. It is part of the right to sue. If someone does not have the right to sue, there is nothing to relate back. Mr. Klein observed that it may take legislation to solve this problem. It may be that no one cares about this, because use plaintiffs have no champion.

The Chair asked if anyone had any further changes to suggest. Mr. Brault answered that Rule 15-1001 should be left as is.

By consensus, the Committee approved Rule 15-1001 as amended. The Chair said that Rule 15-1001 would be sent to the Court of Appeals, and in the Report, it will be noted that there is a lurking issue.

The Chair told the Committee that it was too late in the day to consider the Court Administration Rules. They could wait until September. There being no further business before the Committee, the Chair adjourned the meeting.