

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

NOTICE OF PROPOSED RULES CHANGES

The Rules Committee has submitted its One Hundred Fifty-Sixth Report to the Court of Appeals, transmitting thereby proposed amendments to Rules 16-1002 and 16-1008 of the Maryland Rules.

The Committee's One Hundred Fifty-Sixth Report and the proposed amendments are set forth below.

Interested persons are asked to consider the Committee's Report and proposed rules changes and to forward on or before December 14, 2005 any written comments they may wish to make to:

Sandra F. Haines, Esq.
Reporter, Rules Committee
Room 1.517
100 Community Place
Crownsville, Maryland 21032-2030

ALEXANDER L. CUMMINGS

Clerk

Court of Appeals of Maryland

October 27, 2005

ONE HUNDRED FIFTY-SIXTH REPORT
OF THE
STANDING COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE

The Honorable Robert M. Bell,
Chief Judge

The Honorable Irma S. Raker
The Honorable Alan M. Wilner
The Honorable Dale R. Cathell
The Honorable Glenn T. Harrell, Jr.
The Honorable Lynne A. Battaglia
The Honorable Clayton Greene, Jr.,
Judges

The Court of Appeals of Maryland
Robert C. Murphy Courts of
Appeal Building
Annapolis, Maryland 21401

Your Honors:

The Rules Committee submits this, its One Hundred Fifty-Sixth Report, and recommends that the Court adopt, on an emergency basis, the proposed amendments to Rules 16-1008 and 16-1002.

The proposed amendments to Rule 16-1008 limit remote access to identifying information of victims and nonparty witnesses in criminal cases, other than identifying information of law enforcement officers, other public officials acting in their official capacity, and expert witnesses. The reasons for the proposal are summarized in the Reporter's Note to the Rule. The recommendation for emergency adoption of the Rule change is to provide for an effective date prior to the date on which the identifying information could be posted on the internet as part of the Judiciary's Public Data Warehouse.

The amendment to Rule 16-1002 is proposed for the purpose of clarifying that access to a case record by a party or counsel of record is not limited by the Rules in Title 16, Chapter 1000.

For the guidance of the Court and the public, following each proposed Rules change is a Reporter's Note describing the reasons for the proposal and any changes that would be effected in current law or practice. We caution that these Reporter's Notes were prepared initially for the benefit of the Rules Committee; they are not part of the Rules and have not been debated or approved by the Committee; and they are not to be regarded as any kind of official comment or interpretation. They are included solely to assist the Court in understanding some of the reasons for the proposed changes.

Respectfully submitted,

Joseph F. Murphy, Jr.
Chairperson

Linda M. Schuett
Vice Chairperson

JFM/LMS:cdc

MARYLAND RULES OF PROCEDURE
TITLE 16 - COURTS, JUDGES, AND ATTORNEYS
CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1008 to add a new subsection (a)(3)(B) to prevent remote access to [and electronic copying of] to certain information in criminal cases, as follows:

Rule 16-1008. ELECTRONIC RECORDS AND RETRIEVAL

(a) In General

(1) Subject to the conditions stated in this Rule, a court record that is kept in electronic form is open to inspection to the same extent that the record would be open to inspection in paper form.

(2) Subject to the other provisions of this Rule and any other law or any administrative order of the Chief Judge of the Court of Appeals, a custodian, court, or other judicial agency, for the purpose of providing public access to court records in electronic form, is authorized but not required:

(A) to convert paper court records into electronic court records;

(B) to create new electronic records, databases, programs, or computer systems;

(C) to provide computer terminals or other equipment for use by the public;

(D) to create the ability to inspect or copy court records

through remote access; or

(E) to convert, supplement, modify, or replace an existing electronic storage or retrieval system.

(3) (A) Subject to the other provisions of this Rule, a custodian may limit access to court records in electronic form to the manner, form, and program that the electronic system used by the custodian, without modification, is capable of providing. If a custodian, court, or other judicial agency converts paper court records into electronic court records or otherwise creates new electronic records, databases, or computer systems, it shall, to the extent practicable, design those records, databases, or systems to facilitate access to court records that are open to inspection under the Rules in this Chapter.

(B) Except for identifying information of law enforcement officers, other public officials acting in their official capacity, and expert witnesses, a custodian shall prevent (1) remote access to the name, address, telephone number, e-mail address, place of employment, and other identifying information of a victim or nonparty witness in a criminal case, [Optional additional language: and (2) electronic copying of information that is not subject to remote access].

Committee note: Under Rule 16-1006 (c), identifying information of victims and witnesses in a delinquency case is not open to public inspection.

(4) Subject to subsection (a)(3)(B) of this Rule and procedures and conditions established by administrative order of

the Chief Judge of the Court of Appeals, a person may view and copy electronic court records that are open to inspection under the Rules in this Chapter:

(A) at computer terminals that a court or other judicial agency makes available for public use at the court or other judicial agency; or

(B) by remote access that the court or other judicial agency makes available through dial-up modem, web site access, or other technology.

(b) Current Programs Providing Electronic Access to Databases

Any electronic access to a database of court records that is provided by a court or other judicial agency and is in effect on October 1, 2004 may continue in effect, subject to review by the Technology Oversight Board for consistency with the Rules in this Chapter. After review, the Board may make or direct any changes that it concludes are necessary to make the electronic access consistent with the Rules in this Chapter.

(c) New Requests for Electronic Access to or Information from Databases

(1) A person who desires to obtain electronic access to or information from a database of court records to which electronic access is not then immediately and automatically available shall submit to the Court Information Office a written application that describes the court records to which access is desired and the proposed method of achieving that access.

(2) The Court Information Office shall review the application

and may consult the Judicial Information Systems. Without undue delay and, unless impracticable, within 30 days after receipt of the application, the Court Information Office shall take one of the following actions:

(A) The Court Information Office shall approve the application if it determines that the proposal will not permit access to court records that are not subject to inspection under the Rules in this Chapter and will not involve a significant fiscal, personnel, or operational burden on any court or judicial agency, it shall approve the application. The approval may be conditioned on the applicant's paying or reimbursing the court or agency for any additional expense that may be incurred in implementing the proposal.

(B) If the Court Information Office is unable to make the findings provided for in subsection (c)(2)(A), it shall inform the applicant and:

(i) deny the application;

(ii) offer to confer with the applicant about amendments to the application that would meet the concerns of the Court Information Office; or

(iii) if the applicant requests, refer the application to the Technology Oversight Board for its review.

(C) If the application is referred to the Technology Oversight Board, the Board shall determine whether the proposal is likely to permit access to court records or information that are not subject to inspection under the Rules in this Chapter,

create any undue burden on a court, other judicial agency, or the judicial system as a whole, or create undue disparity in the ability of other courts or judicial agencies to provide equivalent access to court records. In making those determinations, the Board shall consider, to the extent relevant:

(i) whether the data processing system, operational system, electronic filing system, or manual or electronic storage and retrieval system used by or planned for the court or judicial agency that maintains the records can currently provide the access requested in the manner requested and in conformance with Rules 16-1001 through 16-1007, and, if not, what changes or effort would be required to make those systems capable of providing that access;

(ii) any changes to the data processing, operational electronic filing, or storage or retrieval systems used by or planned for other courts or judicial agencies in the State that would be required in order to avoid undue disparity in the ability of those courts or agencies to provide equivalent access to court records maintained by them;

(iii) any other fiscal, personnel, or operational impact of the proposed program on the court or judicial agency or on the State judicial system as a whole;

(iv) whether there is a substantial possibility that information retrieved through the program may be used for any fraudulent or other unlawful purpose or may result in the dissemination of inaccurate or misleading information concerning

court records or individuals who are the subject of court records and, if so, whether there are any safeguards to prevent misuse of disseminated information and the dissemination of inaccurate or misleading information; and

(v) any other consideration that the Technology Oversight Board finds relevant.

(D) If, upon consideration of the factors set forth in subsection (c)(2)(C) of this Rule, the Technology Oversight Board concludes that the proposal would create (i) an undue fiscal, personnel, or operational burden on a court, other judicial agency, or the judicial system as a whole, or (ii) an undue disparity in the ability of other courts or judicial agencies to provide equivalent access to judicial records, the Board shall inform the Court Information Office and the applicant in writing of its conclusions. The Court Information Office and the applicant may then discuss amendments to the application to meet the concerns of the Board, including changes in the scope or method of the requested access and arrangements to bear directly or reimburse the appropriate agency for any expense that may be incurred in providing the requested access and meeting other conditions that may be attached to approval of the application. The applicant may amend the application to reflect any agreed changes. The application, as amended, shall be submitted to the Technology Oversight Board for further consideration.

Source: This Rule is new.

REPORTER'S NOTE

After considering the request of the Maryland Crime Victims' Resource Center, Inc. and the Maryland State's Attorneys Association that Rule 16-1008 be amended to limit access to electronically stored information concerning victims and witnesses in criminal cases, the Rules Committee recommends proposed amendments to Rule 16-1008 that prohibit remote access to (and electronic copying of) this information.

Victims' representatives and prosecutors fear that remote access to victim and witness information in criminal cases would facilitate and increase the ease with which a person from anywhere in the world, using an internet search engine, could harass, harm, intimidate, stalk, or threaten victims and witnesses. The criminal justice system would be harmed by an increase in the already significant reluctance of victims and witnesses to report crimes and testify. Remote access would have a chilling effect on the reporting of rape and other crimes if a victim can forever be identified and stigmatized as a rape victim by a simple name search on the internet. Remote access also would easily allow the compilation of lists of particularly vulnerable victims, such as victims of elder fraud, making them more vulnerable to further victimization.

The Committee is persuaded that the potential for harm to victims, witnesses, and the criminal justice system by allowing remote access to victim and witness information in criminal cases is great, while any potential benefit is negligible.

The proposed amendments to Rule 16-1008 recognize the importance of the policy of presumptively open court records. Courthouse access to case records, whether in paper form or electronic form, is unchanged by the proposed amendments. Additionally, remote access to identifying information of police officers, other public officials acting in their official capacity, and expert witnesses is unchanged by the proposed amendments.

The definition of "remote access" set forth in Rule 16-1001 (k) includes the concept of electronic copying of a record "from a location other than the location where the record is stored." The definition is silent as to electronic copying that occurs at the location where the record is stored. To fill this gap, optional addition language, "and (2) electronic copying of information that is not subject to remote access," may be added to subsection (a)(3)(B). This language, not expressly debated by the Committee, is believed consistent with the intent of the Committee's proposed changes to the Rule. The additional language is intended to limit the "back door" internet posting of victim and witness information that is not posted by the

judiciary. Although even with the addition of this language, a person could go to every courthouse in Maryland, purchase paper copies of all available information not subject to remote access, scan the information into a computer, and post the information on the internet, the time and expense involved makes it highly unlikely that anyone would do so.

In its One Hundred Fifty-Fifth Report, the Committee has proposed amendments to Rules 4-262 and 4-263 that are intended to eliminate the inclusion of unnecessary discovery materials in case files and reduce the amount of material in the files for which redaction, sealing, or, in the context of the proposed amendments to Rule 16-1008, denial of remote access would be required. The Committee believes, however, that it is not possible to eliminate all such materials from case files. See e.g., Code, Criminal Law Article, §3-317, as to the content of certain charging documents. Therefore, the Committee recommends adoption of the proposed amendments to Rule 16-1008 set forth above.

MARYLAND RULES OF PROCEDURE
TITLE 16 - COURTS, JUDGES, AND ATTORNEYS
CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1002 to clarify that the Rules in Title 16, Chapter 1000 do not limit access to case records by parties and counsel of record, as follows:

Rule 16-1002. GENERAL POLICY

(a) Presumption of Openness

Court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to the Rules in this Chapter, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business hours, to inspect the record.

(b) Protection of Records

To protect court records and prevent unnecessary interference with the official business and duties of the custodian and other court personnel,

(1) a clerk is not required to permit inspection of a case record filed with the clerk for docketing in a judicial action or a notice record filed for recording and indexing until the document has been docketed or recorded and indexed; and

(2) the Chief Judge of the Court of Appeals, by administrative order, a copy of which shall be filed with and

maintained by the clerk of each court, may adopt procedures and conditions, not inconsistent with the Rules in this Chapter, governing the timely production, inspection, and copying of court records.

Committee note: It is anticipated that, by Administrative Order, entered pursuant to section (b) of this Rule, the Chief Judge of the Court of Appeals will direct that, if the clerk does not permit inspection of a notice record prior to recording and indexing of the record, (1) persons filing a notice record for recording and indexing include a separate legible copy of those pages of the document necessary to identify the parties to the transaction and the property that is the subject of the transaction and (2) the clerk date stamp that copy and maintain it in a separate book that is subject to inspection by the public.

(c) Records Admitted or Considered as Evidence

Unless the court expressly orders otherwise, a court record that has been admitted into evidence in a judicial action or that a court has considered as evidence or relied upon for purposes of deciding a motion is subject to inspection, notwithstanding that the record otherwise would not have been subject to inspection under the Rules in this Chapter.

(d) Fees

(1) In this Rule, "reasonable fee" means a fee that bears a reasonable relationship to the actual or estimated costs incurred or likely to be incurred in providing the requested access.

(2) Unless otherwise expressly permitted by the Rules in this Chapter, a custodian may not charge a fee for providing access to a court record that can be made available for inspection, in paper form or by electronic access, with the expenditure of less than two hours of effort by the custodian or other judicial

employee.

(3) A custodian may charge a reasonable fee if two hours or more of effort is required to provide the requested access.

(4) The custodian may charge a reasonable fee for making or supervising the making of a copy or printout of a court record.

(5) The custodian may waive a fee if, after consideration of the ability of the person requesting access to pay the fee and other relevant factors, the custodian determines that the waiver is in the public interest.

(e) New Court Records

(1) Except as expressly required by other law and subject to Rule 16-1008, neither a custodian nor a court or other judicial agency is required by the Rules in this Chapter to index, compile, re-format, program, or reorganize existing court records or other documents or information to create a new court record not necessary to be maintained in the ordinary course of business. The removal, deletion, or redaction from a court record of information not subject to inspection under the Rules in this Chapter in order to make the court record subject to inspection does not create a new record within the meaning of this Rule.

(2) If a custodian, court, or other judicial agency (A) indexes, compiles, re-formats, programs, or reorganizes existing court records or other documents or information to create a new court record, or (B) comes into possession of a new court record created by another from the indexing, compilation, re-formatting,

programming, or reorganization of other court records, documents, or information, and there is no basis under the Rules in this Chapter to deny inspection of that new court record or some part of that court record, the new court record or a part for which there is no basis to deny inspection shall be subject to inspection.

(f) Access by Judicial Employees, Parties, and Counsel of Record

The Rules in this Chapter address access to court records by the public at large, ~~and~~ The Rules do not limit access to court records by judicial officials or employees in the performance of their official duties, or to a case record by a party or counsel of record in the action.

Source: This Rule is new.

REPORTER'S NOTE

The proposed amendment to Rule 16-1002 makes clear that access to a case record by a party to the proceeding or counsel of record is not limited by the Rules in Title 16, Chapter 1000.