COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on April 8, 2016.

Members present:

Hon. Alan M. Wilner, Chair

A. Gillis Allen, II, Esq.
Robert R. Bowie, Jr., Esq.
Hon. Yvette M. Bryant
Hon. John P. Davey
Mary Anne Day, Esq.
Hon. JoAnn M. Ellinghaus-Jones
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Sen. H. Wayne Norman
Hon. Paul A. Price
Scott D. Shellenberger, Esq.
Steven M. Sullivan, Esq.
Dennis J. Weaver, Clerk
Robert Zarbin, Esq.
Thurman W. Zollicoffer, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
David R. Durfee, Jr., Esq., Assistant Reporter
Sherie B. Libber, Esq., Assistant Reporter
Brian L. Zavin, Esq., Office of the Public Defender
Roberta Warnken, Chief Clerk, District Court of Maryland
Timothy D. Haven, District Court Commissioners Office
Robert T. Hogan, District Court Commissioners Office
P. Tyson Bennett, Esq., Carney, Kelehan, Bresler, Bennett & Scherr, LLP
Hon. John P. Morrissey, Chief Judge, District Court of Maryland

The Chair convened the meeting, welcoming everyone. He said that the Reporter had notified the Committee by e-mail that the Court of Appeals has scheduled three hearing dates on the three parts of the 178th Report. On May 9, 2016 the Court of Appeals will consider the Supplement to Part I, which is a reorganization

and some revision of the Rules on court administration. On May 19, 2016 the Court will take up the Supplement to Part II of the 178th Report, which is a reorganization of all of the Rules pertaining to judges. On June 1, 2016 the Court will consider the Supplement to Part III, which is a reorganization and has some updating of all of the Rules pertaining to attorneys. There are over 1,000 pages in the three Parts. The Court was given two versions of each, one clean and the other a marked version showing deletions and additions from the current Rules. Each judge received six binders with a total of 2,300 pages.

The Chair said that the Committee had been sent minutes of the January, 2009; November, 2010; January, 2011; March, 2011; and March, 2014 Rules Committee meetings. He asked if anyone had comments on any of the minutes. None were forthcoming. By consensus, the Committee approved all five sets of minutes.

Agenda Item 1. Consideration of proposed new Rule 16-506 (Proceedings Before District Court Commissioners) and reconsideration of proposed new Rule 16-501 (Application of Chapter)

The Chair presented proposed new Rule 16-506, Proceedings Before District Court Commissioner, and the conforming amendments to new Rule 16-501, Application of Chapter, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 500 – RECORDING OF PROCEEDINGS

ADD Rule 16-506, as follows:

Rule 16-506. PROCEEDINGS BEFORE DISTRICT COURT COMMISSIONERS

(a) Applicability

This Rule applies to the recording of proceedings before a District Court commissioner on an audio recording device provided by the District Court.
Cross reference: For the recording of proceedings before a judge in the District Court, see Rule 16-502.

(b) Definition

In this Rule, "mute" means to cause an audio recording to be inaudible or unintelligible by the use of white noise or by any other means.

(c) Proceedings to be Recorded

Except as otherwise provided in section (d) of this Rule, all proceedings under Rules 4-213, 4-213.1, and 4-216 and any other proceeding at which an advice of rights is given to a person charged with a crime shall be recorded verbatim in their entirety.

(d) Recordings of Portions of Proceedings to be Muted

The following portions of a recording of a proceeding shall be muted:

(1) a communication pertaining to the disclosure of financial information regarding a defendant's eligibility for representation by the Public Defender, and

(2) a confidential, privileged communication between an attorney and the attorney's client.

(e) Control of and Direct Access to Audio Recordings

(1) Under Control of District Court

Audio recordings made pursuant to this Rule shall be under the control of the District Court. The recordings shall be made, filed, and maintained by the court in accordance with the standards specified in an administrative order of the Chief Judge of the District Court.

(2) Restricted Access or Possession

No person other than an authorized court official or employee of the District Court may have direct access to or possession of an official audio recording.

(f) Right to Obtain Copy of Audio Recording

Subject to section (d) of this Rule, the authorized custodian of an official audio recording shall make a copy of the audio recording available to any person upon written request and, unless waived by the court, upon payment of the reasonable costs of making the copy.

(g) Effect of System Malfunction or Unavailability of Recording

Except as otherwise provided in Rule 4-215, a malfunction of the audio recording system or the unavailability of an intelligible recording does not affect the validity of the determinations and actions of the commissioner at a proceeding otherwise required to be recorded pursuant to section (c) of this Rule.

Committee note:

(1) The requirement of making an audio recording under this Rule is in addition to, and not in substitution for, the requirement of a written record in Rule 4-216 (h).

(2) In order to permit a judge, acting under Rule 4-215, to rely on advice regarding the right to an attorney given to a defendant by a commissioner, the audio recording of that proceeding, if needed, must be accessible by the judge without undue delay.

(3) This Rule is not intended to affect Code, Courts Article, §10-922, declaring statements made during the course of a defendant's appearance before a commissioner pursuant to Rule 4-213 inadmissible against the defendant in a criminal or juvenile proceeding.

Source: This Rule is new.

Rule 16-506 was accompanied by the following Reporter's note.

The District Court has installed audio recording devices in all commissioners' offices to record certain proceedings before the commissioners. Under proposed new Rule 16-506, an audio recording will be made of all proceedings at which the commissioner gives an advice of rights to a person charged with a crime. This will provide an audio recording that can be reviewed and relied upon by a District Court judge in making a determination regarding a waiver of the right to counsel by the inaction of a defendant.

The General Court Administration Subcommittee has been advised that the recording system consists of a "passive" component, which makes a back-up recording whenever the system is on, and an "active" component, which records only when the commissioner directs that a specific proceeding be recorded. The Subcommittee also has been advised that the system uses white noise to "mute" or make inaudible or unintelligible both passive and

active recordings when it is desired that there be no recording of a portion of a proceeding.

To address concerns of prosecutors, the Office of the Public Defender, and a victim's rights advocate, the Subcommittee is not recommending the recording of (1) proceedings involving an interim protective order or peace order, or (2) proceedings pertaining to a criminal matter if the defendant has been neither arrested nor served with a charging document. The Subcommittee recommends "muting" any portion of a recorded proceeding that involves disclosure of financial information regarding a defendant's eligibility for representation by the Public Defender and any confidential, privileged communication between an attorney and the attorney's client.

Sections (e) and (f) of the Rule are based upon similar provisions in proposed new Rule 16-502 (c), (d), and (g)(1), except that provisions pertaining to making, filing, and maintaining the recordings are to be specified in an administrative order of the Chief Judge of the District Court, rather than in an administrative order of the Chief Judge of the Court of Appeals.

Section (g) provides that, except as otherwise provided in Rule 4-215, the validity of determinations and actions of a commissioner is not affected by a malfunction of the audio recording system or by the unavailability of an intelligible recording.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 500 – RECORDING OF PROCEEDINGS

AMEND Rule 16-501 by adding a reference to

recording proceedings before a District Court commissioner, as follows:

Rule 16-501. APPLICATION OF CHAPTER

The Rules in this Chapter apply to the recording of proceedings in the circuit and District courts by the respective courts and to the recording of proceedings before a District Court commissioner on an audio recording device provided by the District Court. See Chapter 600 for Rules governing the recording of court proceedings by other persons.

Source: This Rule is new.

Rule 16-501 was accompanied by the following Reporter's note.

Rule 16-501 is amended to conform to the proposed addition of new Rule 16-506, pertaining to the recording of proceedings before a District Court commissioner.

The Chair told the Committee that after the revisions to Rule 4-215, Waiver of Attorney - District Court, had been before them several months ago, it had been reported that by the end of this year, District Court commissioners will have recording equipment in all of their offices. A Rule had to be drafted to address this. There were a number of issues associated with commissioner recording equipment. Unlike the District Court or the circuit courts, where the recording equipment is turned on when the judge comes out to the bench, commissioners are in their offices 24 hours a day, seven days a week. The question is what should be recorded. When commissioners conduct

initial appearances, they give advice of rights to the defendants, and that certainly needs to be recorded. The commissioners are also conducting preliminary hearings at which the advice of rights is given.

The Chair commented that the commissioners also conduct initial domestic violence and peace order proceedings, applications for warrants, and applications for statements of charges. In some commissioners' offices, including Catonsville, the commissioner often has to leave his or her office, so that the defendant and the attorney can use the office to have a consultation. That consultation should not be recorded by the recording equipment.

The Chair noted that for drafting purposes, it was necessary to determine what should be recorded and accessible, what should be recorded but shielded or muted, and what should not be recorded at all. Proposed Rule 16-506 addresses this. The main part of the Rule starts with section (c), Proceedings to be Recorded. It is limited to those kinds of proceedings in which an advice of rights is given, including an initial appearance, a preliminary hearing, and any other proceeding where the advice of rights might be given, but nothing else.

The Chair said that what is to be recorded is the first decision to be made. Some things that are recorded should be shielded from general public access. The Subcommittee came up with two items that should be shielded. One is any communication pertaining to the

disclosure of financial information regarding the defendant's eligibility for representation by the Public Defender. At the moment, this is likely to be applicable only to whether the defendant qualifies for an attorney at the initial appearance. However, a bill is in the legislature that would require the commissioners to determine eligibility for an attorney for trial. It is unknown what will happen to that bill. This could be a big part of the proceeding that is not being recorded. The other item that should be shielded is any confidential, privileged communication between the attorney and the client if they happen to be using the commissioner's office for that purpose.

The Chair noted that sections (e) and (f) of proposed Rule 16-506 copy the comparable provisions that are already in place with respect to the District Court recordings. Recordings are under the control of the District Court, and there is restricted access to possession, but the public has a right to obtain a copy of the recording with the parts that have been redacted.

The Chair commented that two commissioners were present at the meeting. Some commissioners had assisted with drafting proposed Rule 16-506. The Chair asked if the commissioners wished to address the Committee.

Mr. Haven, a District Court commissioner, said that he and his colleagues had discussed what is to be recorded in the commissioners' offices. They understand that if the mute button is pushed, there

will be white noise on the tape. There is a passive recording, but it would only be white noise, and no conversation would be audible. Since the software has a tagging capability, when the commissioners get to that portion, they would tag it at the start of the eligibility discussion by pressing the mute button. No further redaction would be necessary.

The Chair commented that his understanding was that the commissioners are using the same CourtSmart system that the courts use. This system has two recordings, a master recording, which is active, and one which is passive. Will both recordings be muted? Mr. Haven responded affirmatively. With the active system, two actions must be taken. One is to click on the "record" button in the software on the desktop, and one is to click on the "mute" button.

Mr. Haven commented that the commissioners had discussed adding something to their software programs that would alert the commissioner to perform those actions. It would be a popup box that instructs the commissioner to turn on or off the "mute" button. The active system is only active when the "record" button is pushed. The passive system is always recording, and it will record anything from any of the stations. Many locations may have two or three stations plus a public window, but they are in a generally small area, so it is possible that there is bleed-through from another microphone. Therefore, the commissioners have to make sure that all of the devices are muted.

The Chair asked whether the passive system is running all of the time. Mr. Haven answered affirmatively, explaining that there will be 24 hours of white noise if nothing happens in that office on a given day. Mr. Haven said that his office has five commissioners, and each has a computer and a recording. It is stored on each individual commissioner's computer, and then the information follows. His understanding was that the information goes to the courthouse and the server for a period of time, and then it is downloaded onto a disk, because the server only has a certain amount of room. Then it will be archived forever.

Senator Norman inquired whether the disk would be all white noise. Mr. Haven answered that the passive system could be all white noise. Judge Morrissey explained that the information is stored electronically unless someone requests a recording of it. He and his colleagues are in discussions with the people who administer CourtSmart to develop the next generation of recordings that can be stored as a Uniform Resource Locator (URL), which specifies its location on a computer network and has a mechanism for retrieving it. This would provide the ability to have all of the reports available the next day on a URL, rather than on a disk.

Mr. Shellenberger inquired whether the language of section (f) of proposed Rule 16-506 should be changed to add the word "active" before the words "audio recording," so that the sentence would begin as follows: "[s]ubject to section (d) of this Rule, the authorized

custodian of an official active audio recording...". This is to make sure that the passive recording is never being copied. The Chair responded that the comparable District Court and circuit court Rules, which are Rule 16-406, Access to Electronic Audio and Audio-Video Recordings of Proceedings in the Circuit Court, and Rule 16-504, Recordings of Proceedings, do not have this language. It is the same issue, but it is exacerbated for the commissioners, because the recording is running 24 hours a day.

The Chair remarked that the updated proposed District Court and circuit court Rules, which are Rule 16-502, In District Court, and Rule 16-504, Electronic Recording of Circuit Court Proceedings, are before the Court of Appeals now. The Chair had been told that the passive recording is totally for backup, and nobody has access to it. If, for whatever reason, the active recording is not available, the passive recording could be used. Ms. Harris confirmed this.

The Reporter inquired whether the commissioner can hear that the white noise is on. Mr. Haven answered negatively, noting that the white noise is only on the recording. The Reporter pointed out that sometimes the circuit court will turn the white noise on, so that the people in the courtroom cannot hear the discussion at the bench. Mr. Weaver explained that this white noise is a function outside of the recording of the proceedings. Judge Morrissey added that there is a button that signifies when the proceedings are not being recorded. It is a blinking red light that warns that the device is not recording.

When Rule 16-506 is in place, the commissioners will be trained.

The Chair said that he and Judge Morrissey had had some discussions about when a case goes to the District Court, and there is an issue as to what the commissioner had previously told the defendant about his or her right to counsel. The commissioner has already checked a box indicating that the advice was given, and the defendant has signed that he or she heard the advice of rights. However, the defendant may tell the judge that the commissioner did not inform the defendant about certain rights. The recording would be available to the judge, so that he or she would know exactly what was said. Judge Morrissey commented that the Chair was correct. Typically during a court proceeding, if Judge Morrissey needed something like that, he would ask his court clerk to get a supervisor involved. The supervisor would burn the recording onto a disk at this point in time, and Judge Morrissey could listen to the disk. If the URL system becomes available, it would mean that he could go online and look up the recorded discussion.

Judge Morrissey referred to the Committee note after subsection (e)(1)(C) of Rule 4-215 on this topic, and he said that he did not like the fact that the note provides that if there is any genuine dispute about whether the advice was given, the court may not find compliance without listening to the recording. He expressed the concern that if an individual tells the judge that he or she lost the paper that indicated what advice had been given by the commissioner,

the language of the Committee note would force the judge to stop the proceedings and listen to the entire recording, rather than make the determination as to the validity of the defendant's claims. The way the Rule is worded, the judge could say that it was not a justifiable dispute, but Judge Morrissey expressed his preference for the language to be that the judge may refer to the recording to satisfy any reservations the judge may have without being required to. The Chair noted that because this is in Rule 4-215, it would be discussed later.

Judge Ellinghaus-Jones referred to subsection (d)(1) of Rule 16-506, and she suggested that the words "or appointed attorney" be added after the words "Public Defender" and before the word "and." The same language is also in the Reporter's note to Rule 16-506 in the third paragraph. By consensus, the Committee agreed with this change.

The Chair told the Committee that conforming amendments had been made to Rule 16-501.

By consensus, the Committee approved proposed Rule 16-506 as amended and Rule 16-501 as presented.

Agenda Item 2. Reconsideration of proposed Rules changes pertaining to Rule 4-215 (Waiver of Attorney - District Court) Deletion of current Rule 4-215 (Waiver of Counsel), New Rule 4-215 (Waiver of Attorney - District Court), New Rule 4-215.1 (Waiver of Right to Attorney - Circuit Court), and Conforming amendments to: Rule 4-202 (Charging Document - Content), Rule 4-212 (Issuance, Service, and Execution of Summons or Warrant), Rule 4-213 (Initial Appearance of Defendant), Rule 4-213.1 (Appointment, Appearance, or Waiver of Attorney at Initial Appearance), Rule 4-214 (Defense Counsel), Rule 4-216.1

(Review of Commissioner's Pretrial Release Order), Rule 4-347 (Proceedings for Revocation of Probation), Rule 15-205 (Constructive Criminal Contempt; Commencement; Prosecution), and Rule 16-207 (Problem-Solving Court Programs)

Mr. Marcus presented Rules 4-215, Waiver of Attorney - District Court; Deletion of current Rule 4-215, Waiver of Counsel; new Rule 4-215.1, Waiver of Right to Attorney - Circuit Court; Rule 4-202, Charging Document - Content; Rule 4-212, Issuance, Service, and Execution of Summons or Warrant; Rule 4-213, Initial Appearance of Defendant; Rule 4-213.1, Appointment, Appearance, or Waiver of Attorney at Initial Appearance; Rule 4-214, Defense Counsel; Rule 4-216.1, Review of Commissioner's Pretrial Release Order; Rule 4-347, Proceedings for Revocation of Probation; Rule 15-205, Constructive Criminal Contempt; Commencement; Prosecution; and Rule 16-207, Problem-Solving Court Programs, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

DELETE current Rule 4-215 and add new Rule 4-215, as follows:

Rule 4-215. WAIVER OF ATTORNEY - DISTRICT COURT

(a) Scope

This Rule applies to proceedings in the District Court.

(b) Definition

In this Rule, "trial" includes any hearing at which the defendant has a right to the assistance of an attorney, other than an initial appearance before a judicial officer pursuant to Rules 4-213 and 4-216.

(c) First Appearance Without Attorney

(1) Duty of Court

At the defendant's first appearance before a judge in the District Court without an attorney, the court shall:

(A) determine whether the defendant has received a copy of the charging document containing notice as to the right to an attorney and, if not, have a copy served on the defendant and direct the clerk to docket that event;

(B) inform the defendant of the right to an attorney, of the importance of having an attorney, of the right to representation by the Public Defender if the defendant qualifies as indigent, and, if the defendant claims to be indigent, of the need to contact the Office of the Public Defender immediately;

Committee note: The court's advice should include the assistance an attorney can provide in explaining to the defendant and arguing to the court legal issues that may arise; explaining the potential collateral consequences of a conviction; assisting in determining whether the defendant may be entitled to a jury trial and should ask for one; helping in the jury selection process if there is to be a jury trial; knowing how to present evidence for the defendant and object to evidence offered by the State that may be inadmissible; examining and cross-examining witnesses; and, if the defendant is convicted, arguing for a fair sentence.

(C) advise the defendant of each offense with which the defendant is charged in the charging document and the allowable penalties that may be imposed upon conviction, including

any mandatory or enhanced penalties;

Committee note: If the prospect of a mandatory or enhanced penalty depends on the proof of facts not then known to the court, such as the defendant's prior criminal record, the court should advise that the mandatory or enhanced penalty may apply if the predicate facts are shown.

(D) if the defendant indicates a desire to waive expressly the right to an attorney, conduct a waiver inquiry pursuant to section (d) of this Rule; and

(E) advise the defendant that, if the defendant appears for any subsequent trial in the action without an attorney, the court could determine that the defendant waived the right to an attorney by inaction and proceed with the trial with the defendant unrepresented by an attorney.

(2) Duty of Clerk

The clerk shall note compliance with this section on the docket.

(d) Express Waiver of Right to Attorney

(1) Assurance that Waiver is Knowing and Voluntary

If a defendant appears for trial unrepresented by an attorney and indicates a desire to waive the right to an attorney, the court shall conduct an examination of the defendant on the record. The court may not accept the waiver unless the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to an attorney.

Committee note: The court may find that a waiver is knowing based on the defendant's responses to the waiver inquiry – the advice by the court regarding the right to an attorney, the importance of having an attorney, and, if the defendant is indigent, the right of

representation by the Public Defender. The court may find that a waiver is voluntary based on the defendant's assurances that no coercion or inducements have been made in order to cause the defendant to forgo having an attorney and that the defendant is competent and not under the influence of any substances that would impair his or her ability to make an informed decision.

(2) Compliance with Section (c) of this Rule

As part of the waiver inquiry, the court shall comply with section (c) of this Rule and direct the clerk to record that compliance on the docket. At any subsequent appearance of the defendant before the District Court, the docket notation of compliance shall be prima facie proof of the defendant's express waiver of the right to an attorney.

(3) Effect of Waiver

After the court has found that the defendant has expressly waived the right to an attorney, the court may not grant a postponement to allow the defendant to obtain an attorney unless the court finds that it is in the interest of justice to grant a postponement.

(e) Waiver by Inaction

(1) Opportunity to Explain Absence of Attorney

(A) If a defendant appears without an attorney on the date set for trial and indicates a desire to have an attorney, the court shall first determine whether the record clearly shows compliance with (i) section (c) of this Rule by a District Court judge at a previous appearance by the defendant, or (ii) Rule 4-213 by a judicial officer at an initial appearance conducted pursuant to that Rule.

(B) If the record fails to show such compliance, the court may not find a waiver by inaction and shall comply with section (c) of this Rule.

(C) If the record shows such compliance, the court shall permit the defendant to explain his or her appearance without an attorney.

Committee note: Rule 4-213 (a)(3) requires that a judicial officer, at an initial appearance, advise the defendant of the right to an attorney in the manner set forth in section (c) of this Rule, and Rule 4-216 (h) requires that the judicial officer include in the record a certification of compliance with that requirement. Rule 16-506 requires that an initial appearance proceeding be electronically recorded. The intent of section (e) of this Rule is that the court ordinarily may rely on the judicial officer's certification of compliance, if it is in the file, but if there is any genuine dispute about whether the required advice was given, the court may not find compliance without listening to the recording.

(2) If Meritorious Reason

If the court finds a meritorious reason for the defendant's appearance without an attorney, the court shall continue the action to a later time and advise the defendant that, if an attorney does not enter an appearance by that time, the trial will proceed with the defendant unrepresented by an attorney.

(3) If No Meritorious Reason

If the court finds no meritorious reason for the defendant's appearance without an attorney, the court may determine that the defendant has waived the right to an attorney by failing or refusing to obtain one and may proceed with the trial.

(f) Demand for Jury Trial

If the defendant appears without an attorney on a date set for trial and demands a jury trial, the court shall comply with the requirements of section (c) of this Rule and, in a separate document, certify that compliance. The document shall be docketed and, if the demand

is granted, included in the record transmitted to the circuit court.

Committee note: In an MDEC county, the "separate document" required by section (f) may be electronic.

(g) Discharge of Attorney

(1) Opportunity to Explain

If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request.

(2) If Meritorious Reason

(A) Subject to subsections (g)(2)(B) and (C) of this Rule, if the court finds a meritorious reason for the defendant's request, the court shall permit the defendant to discharge the attorney, continue the action if necessary, and advise the defendant that if a new attorney does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by an attorney.

(B) If the discharged attorney had been assigned by the Office of the Public Defender, that Office declines to assign another attorney to represent the defendant, and the defendant remains indigent, the court shall appoint an attorney for the defendant at the cost of the State, unless the defendant expressly waives the right to an attorney in accordance with this Rule.

Cross reference: See *Dykes v. State*, 442 Md. 642 (2015); *State v. Westray*, 442 Md. 672 (2015).

(C) If the discharged attorney had not been assigned by the Office of the Public Defender, the court shall inform the defendant of the right to be represented by the Public Defender if the defendant qualifies as indigent and, if the defendant claims to be indigent, of the need to contact the Office of the Public

Defender immediately.

(3) If No Meritorious Reason

If the court finds no meritorious reason for the defendant's request, the court shall (A) inform the defendant that, if the attorney is discharged and the defendant does not have another attorney prepared to enter an appearance and proceed with trial, trial will proceed as scheduled with the defendant unrepresented by an attorney, and (B) comply with subsections (c)(1)(A) through (D) of this Rule unless the record shows compliance with that subsection at a previous appearance by the defendant before a District Court judge at a proceeding other than a bail review hearing under Rule 4-216.1. If the defendant still insists on discharging the attorney, the court shall permit the discharge and find that the defendant has waived the right to an attorney.

Committee note: Notwithstanding a defendant's express waiver of the right to an attorney, the court may, but is not required to, appoint a standby attorney to remain in court to provide assistance to the defendant upon the defendant's request and to be available if termination of self-representation becomes necessary. See *Harris v. State*, 344 Md. 497 (1997).

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is new.
Section (c) is derived from former Rule 723 b 1, 2, 3 and 7 and c 1.
Section (d) is derived from former Rule 723.
Section (e) is in part derived from former M.D.R. 726 and in part new.
Section (f) is new.
Section (g) is new.

Rule 4-215 was accompanied by the following Reporter's note.

The Committee proposes splitting Rule 4-215 -- new Rule 4-215, dealing with the waiver of the right to an attorney in the District Court, and new Rule 4-215.1, dealing with the

waiver of the right to an attorney in the circuit courts. The revisions that the Committee proposes would have lengthened Rule 4-215 to the point of making it too long and somewhat cumbersome. Also, for clarity, the Rule defines "trial" as including any hearing at which the defendant has a right to the assistance of counsel, other than a first appearance before a judicial officer pursuant to Rules 4-213 and 4-216.

Current Rule 4-215 (a)(4) requires that on a defendant's first appearance in court without counsel, the court "shall ...[c]onduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel." The duty is mandatory and advisements given by an Assistant State's Attorney are not sufficient. *Webb v. State*, 144 Md. App. 729, 743 (2002).

In contrast, under current Rule 4-215 (b), which governs express waivers of counsel when a defendant appears without counsel, the examination of the defendant may be "conducted by the court, the State's Attorney, or both," after which "the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel." In *Fowlkes v. State*, 311 Md. 586, 608-09 (1988), the Court held that a court could permit a defendant to discharge counsel pursuant to Rule 4-215 (e), when the trial court in making the required inquiry on whether the defendant was knowingly and voluntarily waiving the right to counsel, had the State's Attorney undertake a thorough waiver inquiry on the day of trial.

The Committee proposes eliminating the language in section (b) of the current Rule that allows the court or the State's Attorney to conduct the examination. It is the Committee's belief that the same considerations that require the trial court to conduct the examination itself at the first appearance without counsel, as reflected in section (a), should lead to the conclusion that the court itself should conduct the examination in section (c) on whether there is an express waiver. The Committee's proposal

has been written accordingly.

An Assistant Public Defender had pointed out an omission from the advice given by a court to a defendant who appears in court without an attorney. The advice pertains to the various ways that an attorney could assist the defendant. The additional recommended language is that an attorney can explain the potential collateral consequences of a conviction. This would be added to the Committee note after subsection (b)(1)(B) of Rules 4-215 and 4-215.1, and it would be added to the notice form contained in the charging document that is in Rule 4-202. This would require amending some District Court forms that have the notice form in them.

The provisions of new Rules 4-215 and 4-215.1 provide a process for creation of a record that can be relied on by a judge to show that a defendant has been advised by a judge at an earlier proceeding about waiver of the right to counsel. For example, Rule 4-215 (d)(2) requires that a District Court judge provide the advisements required by section (c) of the Rule, and then to "direct the clerk to record that compliance on the docket." The docket notation is prima facie proof of a defendant's express waiver of the right to an attorney. Rule 4-215 (e)(1)(A) requires the court to determine whether the record shows compliance with Rule 4-215 (c) by a District Court judge at a previous appearance by the defendant or compliance with Rule 4-213 by a judicial officer at an initial appearance conducted pursuant to that Rule is the defendant appears without an attorney on the date for trial and indicates a desire to have an attorney. Similarly, under Rule 4-215.1 (d)(2), a circuit court judge may rely on the record created earlier by a District Court judge or a circuit court judge that shows compliance. Furthermore, under Rule 4-215 (f), if a defendant appears in the District Court and demands a jury trial, the court shall comply with procedural requirements of section (c) of the Rule, and, on a separate document, certify that compliance. That document shall be docketed and included in the record transmitted to the

circuit court. A circuit court judge may find prior compliance by reviewing the record and finding that the District Court judge made the written statement after the defendant demanded a jury trial. See Rule 4-215.1 (e)(1)(B). By following these provisions, a court not only is assuring that the proper advisements are given, it also is creating a record that easily can be relied upon by a judge in a later District Court or circuit court proceeding. It is intended that these changes will promote judicial economy.

An issue had arisen as to who would pay for the cost of another attorney when a defendant discharges his or her attorney, who had been assigned by the Office of the Public Defender, and that office declines to assign another attorney to represent the defendant. *Sykes v. State*, 442 Md. 642 (2015) held that as long as the reason for the discharge was meritorious, and the Public Defender declines to assign another attorney, the trial court has the inherent authority to appoint another attorney for the defendant. The Criminal Subcommittee's view is that the State, not the county, has to pay the cost of the new attorney. This is indicated in subsections (g)(2)(B) of Rule 4-215 and (f)(2)(B) of Rule 4-215.1.

To harmonize the advice provisions in Rules 4-213, 4-213.1, 4-215, and 4-215.1, the Criminal Subcommittee recommends amending subsection (a)(2) of Rule 4-213 and section (c) of Rule 4-213.1 to conform them to the language of subsection (c)(1)(B) of Rules 4-215 and 4-215.1. Another recommendation is to modify the language of subsection (c)(1)(C) of Rules 4-215 and 4-215.1 to conform to language in Rule 4-213 (a)(2).

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

ADD new Rule 4-215.1, as follows:

Rule 4-215.1. WAIVER OF RIGHT TO ATTORNEY - CIRCUIT COURT

(a) Scope

This Rule applies to proceedings in a circuit court.

(b) Definition

In this Rule, "trial" includes any hearing at which the defendant has a right to the assistance of an attorney, other than an initial appearance before a judicial officer pursuant to Rules 4-213 and 4-216.

(c) First Appearance Without Attorney

(1) Duty of Court

At a defendant's first appearance in a circuit court without an attorney, the court shall:

(A) determine whether the defendant has received a copy of the charging document containing notice as to the right to an attorney and, if not, have a copy served on the defendant and direct the clerk to docket that event;

(B) inform the defendant of the right to an attorney, of the importance of having an attorney, of the right to representation by the Public Defender if the defendant qualifies as indigent, and, if the defendant claims to be indigent, of the need to contact the Office of the Public Defender immediately;

Committee note: The court's advice should include the assistance an attorney can provide in explaining to the defendant and arguing to the court legal issues that may arise; explaining the potential collateral consequences of a conviction; assisting in determining whether the defendant may be entitled to a jury trial and should ask for one; helping in the jury selection process if there is to be a jury trial; knowing how to present evidence for the defendant and object to evidence offered by the State that may be inadmissible, examining and cross-examining witnesses; and, if the defendant is convicted, arguing for a fair sentence.

(C) advise the defendant of each offense with which the defendant is charged in the charging document and the allowable penalties that may be imposed upon conviction, including any mandatory or enhanced penalties;

Committee note: If the prospect of a mandatory or enhanced sentence depends on the proof of facts not then known to the court, such as the defendant's prior criminal record, the court should advise that the mandatory or enhanced penalty may apply if the predicate facts are shown.

(D) if the defendant indicates a desire to waive expressly the right to an attorney, conduct a waiver inquiry pursuant to section (d) of this Rule; and

(E) advise the defendant that, if the defendant appears for any subsequent trial in the action without an attorney, the court could determine that the defendant waived the right to an attorney by inaction and proceed with the trial with the defendant unrepresented by an attorney.

(2) Duty of Clerk

The clerk shall note compliance with this section on the docket.

(d) Express Waiver of Right to Attorney

(1) Assurance that Waiver is Knowing and Voluntary

If a defendant who is not represented by an attorney indicates a desire to waive the right to an attorney, the court shall conduct an examination of the defendant on the record. The court may not accept the waiver unless the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to an attorney.

Committee note: The court may find that a waiver is knowing based on the defendant's responses to the waiver inquiry – the advice by the court regarding the right to an attorney, the importance of having an attorney, and, if the defendant is indigent, the right of representation by the Public Defender. The court may find that a waiver is voluntary based on the defendant's assurances that no coercion or inducements have been made in order to cause the defendant to forgo having an attorney and that the defendant is competent and not under the influence of any substances that would impair his or her ability to make an informed decision.

(2) Required Compliance with either Rule 4-215 (c) or Section (c) of this Rule

(A) Prior to making a finding that a defendant expressly waives the right to an attorney, the court shall review the record to determine prior compliance with either Rule 4-215 (c) or section (c) of this Rule.

(B) The court may find prior compliance by reviewing the record and making a finding that either (i) the defendant previously appeared in the circuit court and the record shows compliance with section (c) of this Rule; or (ii) the defendant previously appeared in the District Court on a charge not within the exclusive jurisdiction of the circuit court, made a demand for jury trial, and the District Court judge certified compliance with Rule 4-215 (c).

Cross reference: See Rule 4-215 (f) concerning

a certification of compliance with Rule 4-215 (c).

(C) If the record fails to show such compliance, the court shall comply with section (b) of this Rule as part of the waiver inquiry and direct the clerk to record the compliance on the docket.

(D) At any subsequent appearance of the defendant before the court, the docket notation of compliance shall be prima facie proof of the defendant's express waiver of the right to an attorney.

(3) Effect of Waiver

After the court has found that the defendant has expressly waived the right to an attorney, the court may not grant a postponement to allow the defendant to obtain an attorney unless the court finds that it is in the interest of justice to grant a postponement.

(e) Waiver by Inaction

(1) Opportunity to Explain Absence of Attorney

(A) If a defendant appears without an attorney on the date set for trial and indicates a desire to have an attorney, the court shall first review the record to determine prior compliance with either Rule 4-215 (c) or section (c) of this Rule.

(B) The court may find prior compliance by reviewing the record and making a finding that either (i) the defendant previously appeared in the circuit court and the record shows compliance with section (c) of this Rule; or (ii) the defendant previously appeared in the District Court on a charge not within the exclusive jurisdiction of the District Court, made a demand for jury trial, and the District Court judge certified compliance with Rule 4-215 (c).

Cross reference: See Rule 4-215 (f).

(C) If the record fails to show such compliance, the court may not find a waiver by inaction and shall comply with section (c) of this Rule.

(D) If the record shows such compliance, the court shall permit the defendant to explain why the defendant has appeared without an attorney.

(2) If Meritorious Reason

If the court finds a meritorious reason for the defendant's appearance without an attorney, the court shall continue the action to a later time and advise the defendant that, if an attorney does not enter an appearance by that time, the trial will proceed with the defendant unrepresented by an attorney.

(3) If No Meritorious Reason

If the court finds no meritorious reason for the defendant's appearance without an attorney, the court may determine that the defendant has waived the right to an attorney by failing or refusing to obtain one, and may proceed with the trial. If the defendant's appearance in the circuit court is pursuant to a demand for jury trial made in the District Court, the court may not find the defendant's appearance without an attorney to be non-meritorious unless the court finds that the defendant had a reasonable opportunity after the demand for jury trial was made to obtain an attorney.

Committee note: In some counties, the circuit court attempts to set jury trial demand cases in for trial very quickly. In those situations, although the circuit court may rely on an adequate advice of rights given by the District Court judge at the time the defendant made the demand for jury trial, it must take into account, in determining whether there is a meritorious reason for the defendant not having an attorney, whether the defendant had a reasonable opportunity to obtain an attorney prepared to try the case following the giving of that advice.

(f) Discharge of Attorney

(1) Opportunity to Explain

If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request.

(2) If Meritorious Reason

(A) Subject to subsections (f)(2)(B) and (C) of this Rule, if the court finds a meritorious reason for the defendant's request, the court shall permit the defendant to discharge the attorney, continue the action if necessary, and advise the defendant that if a new attorney does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by an attorney.

(B) If the discharged attorney had been assigned by the Office of the Public Defender, that Office declines to assign another attorney to represent the defendant, and the defendant remains indigent, the court shall appoint an attorney for the defendant at the cost of the State, unless the defendant expressly waives the right to an attorney in accordance with this Rule.

Cross reference: See *Dykes v. State*, 442 Md. 642 (2015); *State v. Westray*, 442 Md. 672 (2015).

(C) If the discharged attorney had not been assigned by the Office of the Public Defender, the court shall inform the defendant of the right to be represented by the Public Defender if the defendant qualifies as indigent and, if the defendant claims to be indigent, of the need to contact the Office of the Public Defender immediately.

(3) If No Meritorious Reason

(A) If the court finds no meritorious reason for the defendant's request, the court shall (i) inform the defendant that, if the

attorney is discharged and the defendant does not have another attorney prepared to enter an appearance and proceed with the trial, the trial will proceed as scheduled with the defendant unrepresented by an attorney, and (ii) unless the court finds prior compliance with either Rule 4-215 (c) or section (c) of this Rule, the court shall comply with subsections (c)(1)(A) through (D) of this Rule.

(B) The court may find prior compliance with either Rule 4-215 (b) or section (c) of this Rule by reviewing the record and making a finding that either (i) the defendant previously appeared in the circuit court and the record shows compliance with section (c) of this Rule; or (ii) the defendant previously appeared in the District Court, made a demand for jury trial, and the District Court judge made a written statement documenting compliance with Rule 4-215 (c).

Cross reference: See Rule 4-215 (f).

(C) If, after the court has complied with subsection (f)(3)(A), and, if applicable, subsection (f)(3)(B) of this Rule, the defendant still insists on discharging the attorney, the court shall permit the discharge and find that the defendant has waived the right to an attorney.

Committee note: Notwithstanding a defendant's express waiver of the right to an attorney, the court may, but is not required to, appoint a standby attorney to remain in court to provide assistance to the defendant upon the defendant's request and to be available if termination of self-representation becomes necessary. See *Harris v. State*, 344 Md. 497 (1997).

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is new.
Section (c) is derived from former Rule 723 b 1, 2, 3 and 7 and c 1.
Section (d) is derived from former Rule 723.
Section (e) is in part derived from former

M.D.R. 726 and in part new.
Section (f) is new.

Rule 4-215.1 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-215.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-202 to add language to the charging document, as follows:

Rule 4-202. CHARGING DOCUMENT - CONTENT

(a) General Requirements

A charging document shall contain the name of the defendant or any name or description by which the defendant can be identified with reasonable certainty, except that the defendant need not be named or described in a citation for a parking violation. It shall contain a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred. An allegation made in one count may be incorporated by reference in another count. The statute or other authority for each count shall be cited at the end of the count, but error in or omission of the citation of authority is not grounds for dismissal of the charging document or for reversal of a conviction.

A charging document also shall contain a notice to the defendant in the following form:

TO THE PERSON CHARGED:

1. This paper charges you with committing a crime.

2. If you have been arrested and remain in custody, you have the right to have a judicial officer decide whether you should be released from jail until your trial.

3. If you have been served with a citation or summons directing you to appear before a judicial officer for a preliminary inquiry at a date and time designated or within five days of service if no time is designated, a judicial officer will advise you of your rights, the charges against you, and penalties. The preliminary inquiry will be cancelled if a lawyer has entered an appearance to represent you.

4. You have the right to have a lawyer.

5. A lawyer can be helpful to you by:

(A) explaining the charges in this paper;

(B) telling you the possible penalties;

(C) explaining any potential collateral consequences of a conviction;

~~(C)~~ (D) helping you at trial;

~~(D)~~ (E) helping you protect your constitutional rights; and

~~(E)~~ (F) helping you to get a fair penalty if convicted.

6. Even if you plan to plead guilty, a lawyer can be helpful.

7. If you are eligible, the Public Defender or a court-appointed attorney will represent you at any initial appearance before a judicial

officer and at any proceeding under Rule 4-216.1 to review an order of a District Court commissioner regarding pretrial release. If you want a lawyer for any further proceeding, including trial, but do not have the money to hire one, the Public Defender may provide a lawyer for you. The court clerk will tell you how to contact the Public Defender.

8. If you want a lawyer but you cannot get one and the Public Defender will not provide one for you, contact the court clerk as soon as possible.

9. DO NOT WAIT UNTIL THE DATE OF YOUR TRIAL TO GET A LAWYER. If you do not have a lawyer before the trial date, you may have to go to trial without one.

Rule 4-202 was accompanied by the following Reporter's note.

See paragraph 5 of the Reporter's note to Rule 4-215.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-212 to update an internal Rule reference, 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 or 4-216.1 and may make provision for the appearance or waiver of counsel pursuant to Rule 4-215 or 4-215.1.

. . .

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

Amendments to Rules 4-212, 4-213, 4-214, 4-216.1, 4-301, 4-347, 15-205, and 16-207 are being proposed to reflect the proposed splitting of Rule 4-215 into Rule 4-215 and Rule 4-215.1, to apply to the District Court and circuit courts, respectively.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-213 by adding language to subsection (a)(2) referring to a certain type of penalty and by updating an internal Rule

reference in section (c), as follows:

Rule 4-213. INITIAL APPEARANCE OF DEFENDANT

(a) In District Court Following Arrest

When a defendant appears before a judicial officer of the District Court pursuant to an arrest, the judicial officer shall proceed as follows:

(1) Appointment, Appearance, or Waiver of Attorney for Initial Appearance

If the defendant appears without an attorney, the judicial officer shall first follow the procedure set forth in Rule 4-213.1 to assure that the defendant either is represented by an attorney or has knowingly and voluntarily waived the right to an attorney.

(2) Advice of Charges

The judicial officer shall inform the defendant of each offense with which the defendant is charged and of the allowable penalties, including any mandatory or enhanced penalties, if any, and shall provide the defendant with a copy of the charging document if the defendant does not already have one and one is then available. If one is not then available, the defendant shall be furnished with a copy as soon as possible.

(3) Advice of Right to Counsel

The judicial officer shall require the defendant to read the notice to defendant required to be printed on charging documents in accordance with Rule 4-202 (a), or shall read the notice to a defendant who is unable for any reason to do so. A copy of the notice shall be furnished to a defendant who has not received a copy of the charging document. The judicial officer shall advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived

counsel and proceed to trial with the defendant unrepresented by counsel.

Cross reference: See Rule 4-213.1 with respect to the right to an attorney at an initial appearance before a judicial officer and Rule 4-216.1 (b) with respect to the right to an attorney at a hearing to review a pretrial release decision of a commissioner.

(4) Advice of Preliminary Hearing

When a defendant has been charged with a felony that is not within the jurisdiction of the District Court and has not been indicted, the judicial officer shall advise the defendant of the right to have a preliminary hearing by a request made then or within ten days thereafter and that failure to make a timely request will result in the waiver of a preliminary hearing. If the defendant then requests a preliminary hearing, the judicial officer may either set its date and time or notify the defendant that the clerk will do so.

(5) Pretrial Release

The judicial officer shall comply with the applicable provisions of Rules 4-216 and 4-216.1 governing pretrial release.

(6) Certification by Judicial Officer

The judicial officer shall certify compliance with this section in writing.

(7) Transfer of Papers by Clerk

As soon as practicable after the initial appearance by the defendant, the judicial officer shall file all papers with the clerk of the District Court or shall direct that they be forwarded to the clerk of the circuit court if the charging document is filed there.

Cross reference: Code, Courts Article, §10-912. See Rule 4-231 (d) concerning the appearance of a defendant by video conferencing.

. . .

(c) In Circuit Court Following Arrest or Summons

The initial appearance of the defendant in circuit court occurs when the defendant (1) is brought before the court by reason of execution of a warrant pursuant to Rule 4-212 (e) or (f) (2), or (2) appears in person or by written notice of counsel in response to a summons. In either case, if the defendant appears without counsel the court shall proceed in accordance with Rule ~~4-215~~ 4-215.1. If the appearance is by reason of execution of a warrant, the court shall (1) inform the defendant of each offense with which the defendant is charged, (2) ensure that the defendant has a copy of the charging document, and (3) determine eligibility for pretrial release pursuant to Rule 4-216.

. . .

Rule 4-213 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-212 and the last paragraph of the Reporter's note to Rule 4-215.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-213.1 to add language to section (c), as follows:

Rule 4-213.1. APPOINTMENT, APPEARANCE, OR WAIVER OF ATTORNEY AT INITIAL APPEARANCE

. . .

(c) General Advice by Judicial Officer

If the defendant appears at an initial appearance without an attorney, the judicial officer shall advise the defendant that the defendant has a right to an attorney at the initial appearance, of the importance of having an attorney, and that, if the defendant is indigent, (1) the Public Defender will provide representation if the proceeding is before a judge, or (2) a court-appointed attorney will provide representation if the proceeding is before a commissioner.

. . .

Rule 4-213.1 was accompanied by the following Reporter's note.

See the last paragraph of the Reporter's note to Rule 4-215.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-214 to update an internal Rule reference, as follows:

Rule 4-214. DEFENSE COUNSEL

. . .

(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 or 4-215.1.

. . .

Rule 4-214 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-212.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216.1 to update internal Rule references, as follows:

Rule 4-216.1. REVIEW OF COMMISSIONER'S PRETRIAL RELEASE ORDER

. . .

(b) Attorney for Defendant

(1) Duty of Public Defender

Unless another attorney has entered an appearance or the defendant has waived the right to an attorney 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.

(2) Waiver

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

(i) the defendant has a right to an attorney at the review hearing;

(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.

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

(B) If, after the giving of this advice, the defendant indicates a desire to waive an attorney for purposes of the review hearing and the court finds that the waiver is knowing and voluntary, the court shall announce on the record that finding and proceed pursuant to this Rule.

(C) Any waiver found under this Rule is applicable only to the proceeding under this Rule.

(3) Waiver of Attorney for Future Proceedings

For proceedings after the review hearing, waiver of an attorney is governed by Rule 4-215 or 4-215.1.

. . .

Rule 4-216.1 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-212.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-347 to update an internal Rule reference, as follows:

Rule 4-347. PROCEEDINGS FOR REVOCATION OF PROBATION

. . .

(d) Waiver of Counsel

The provisions of Rule 4-215 or 4-215.1 apply to proceedings for revocation of probation.

. . .

Rule 4-347 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-212.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 200 - CONTEMPT

AMEND Rule 15-205 to update an internal Rule reference, as follows:

Rule 15-205. CONSTRUCTIVE CRIMINAL CONTEMPT; COMMENCEMENT; PROSECUTION

. . .

(e) Waiver of Counsel

The provisions of Rule 4-215 or 4-215.1 apply to constructive criminal contempt proceedings.

. . .

Rule 15-205 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-212.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURT ADMINISTRATION

CHAPTER 200 - GENERAL PROVISIONS – CIRCUIT AND DISTRICT COURTS

AMEND Rule 16-207 by adding reference to new Rule 4-215.1, as follows:

Rule 16-207. PROBLEM-SOLVING COURT PROGRAMS

. . .

(e) Acceptance of Participant into Program

(1) Written Agreement Required

As a condition of acceptance into a program and after the advice of an attorney, if any, a prospective participant shall execute a written agreement that sets forth:

(A) the requirements of the program;

(B) the protocols of the program, including protocols concerning the authority of the judge to initiate, permit, and consider ex parte communications pursuant to Rule 18-202.9 of the Maryland Code of Judicial Conduct;

(C) the range of sanctions that may be imposed while the participant is in the program, if any; and

(D) any rights waived by the participant, including rights under Rule 4-215 or 4-215.1 or Code, Courts Article, §3-8A-20.

Committee note: The written agreement shall be in addition to any advisements that are required under Rule 4-215 or 4-215.1 or Code, Courts Article, §3-8A-20, if applicable.

(2) Examination on the Record

The court may not accept the prospective participant into the program until, after examining the prospective participant on the record, the court determines and announces on the record that the prospective participant understands the agreement and knowingly and voluntarily enters into the agreement.

(3) Agreement to be Made Part of the Record

A copy of the agreement shall be made part of the record.

. . .

Rule 16-207 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-212.

Mr. Marcus explained that two opinions had been handed down by the Court of Appeals in August, 2015. One was *Dykes v. State*, 442 Md. 642 (2015), and the other was *State v. Westray*, 442 Md. 672 (2015). In *Dykes*, the Honorable Shirley M. Watts wrote a concurring opinion pertaining to the issues surrounding the waiver of right to counsel. In her concurring opinion, Judge Watts quoted *Garner v. State*, 183 Md. App. 122 (2008), an opinion by the Honorable Charles E. Moylan, Jr., who had been a Court of Special Appeals judge: "For a judge to traverse [Maryland] Rule 4-215 is to walk through a minefield. A miracle might bring one across unscathed. For mere mortals, the course will seldom be survived." Judge Watts commented that despite the fact that Rule 4-215 had been amended three times, the situation exists as a source of confusion for an indigent defendant entitled to appointed counsel, and she asked the Rules Committee to provide further information as to what a trial judge is to do after determining that a defendant has a meritorious reason for not having counsel present.

Mr. Marcus said that in an effort to respond to this concern, the drafts of two Rules were submitted, splitting Rule 4-215, so that the obligations of a District Court judge are addressed separately from those of a circuit court judge. A waiver of the right to counsel

must be knowing, intelligent, and voluntary. With the advice of rights given under Rule 4-213 to a defendant who comes into the system, whether it be on a statement of charges, warrant, or citation, the District Court commissioner makes sure that the defendant is aware of (1) what the charges and the potential penalties are, (2) the fact that an attorney should be consulted and, (3) in general, what it is that an attorney can do to help the defendant.

Mr. Marcus commented that the commissioner makes sure that the defendant has been given the charging document. In the first instance, the commissioner is supposed to verify that the defendant has been advised of these rights. In the event that the defendant does not have sufficient resources, then part of the notification is that he or she can be referred to the Office of the Public Defender ("OPD") for consideration as to whether the defendant is eligible to receive services through the OPD. Also, the defendant is to be notified that he or she has a right to secure counsel of the defendant's own choosing at his or her expense.

Mr. Marcus remarked that initially, the defendant is advised of his or her right to counsel. Often, however, a month or two later, the defendant comes to court and tells the judge that the defendant did not know that he or she had a right to an attorney. The paper that is attached to the statement of charges or the citation itself has it expressly written out as a part of what the court has approved. The trial judge may have some degree of skepticism as to the

truthfulness of the defendant in saying that he or she did not know about the right to counsel. Because this right is so fundamental and goes to the heart of the criminal justice system, it is important to make sure that the advice of rights is in writing.

Mr. Marcus noted that the District Court judge is responsible for making sure that those same rights are given again to the defendant with the acknowledgment of the defendant that he or she understands those rights, and that the defendant will be accountable for either securing counsel or potentially being viewed to waive the right to counsel because of the defendant's inactivity.

Mr. Marcus observed that Rules 4-215 and 4-215.1 provide what happens when the judge is in the posture of determining that the defendant through inaction or neglect or for whatever reason has waived the right to counsel. The question then is whether there is a meritorious reason for the defendant not to have counsel on the day he or she comes to court, and if there is no meritorious reason, what does the court do? The Honorable Robert N. McDonald wrote the opinion in *Dykes. Westray*, which was a per curiam decision handed down the same day as *Dykes*, had the opposite result. In *Westray*, the defendant's conduct was deemed to be a waiver of the right to counsel. In *Dykes*, the Court held that the defendant should have been given a successor attorney. In that case, the trial court went through the same kind of examination as in any criminal case. The defendant was told that he had the right to counsel. The defendant was not happy

with the Public Defender assigned to him. The judge said that the defendant's reason was meritorious, but the judge did not have a way to resolve the problem of getting new counsel. Since there was no way to resolve the problem, there would be no new counsel.

Mr. Marcus commented that the statute creating the OPD, now Code, Criminal Procedure Article, §16-201 et seq., became effective in 1971 and is the mechanism by which persons who are indigent secure counsel. Overriding *Dykes* is the inherent authority of the court to oversee the way that trials are held. Judge McDonald's opinion in *Dykes* recognized that the trial court had the ability to assign counsel. This does not refer to standby counsel, which is a separate issue. In the first instance, where there is a dispute that cannot be reconciled between the defendant and the OPD, the question arises as to whether the court is without power to address this. In Judge Watts' concurring opinion in *Dykes*, she commends Judge McDonald for his opinion, and she says that the Rules Committee needs to suggest a way for the trial court to provide a remedy for those situations where the determination is made as to whether or not the defendant has a meritorious reason for coming into court without counsel. What is it that the trial judge is supposed to do?

Mr. Marcus remarked that he had considered this issue. The situation is that the defendant comes into court without counsel. The judge uses whatever test trial judges use to determine whether or not what the defendant is saying has some truth to it. The

defendant may say that he or she needs to get an attorney, because the defendant previously had a Public Defender, but the defendant and the Public Defender did not agree, or there was some other problem. Whatever the reason, the trial judge may make a finding that there is a meritorious reason for the defendant not having an attorney, and the right to counsel is not waived. The judge has the ability to appoint counsel at the expense of the State.

Mr. Marcus said that the judge does not reach the point of making a determination as to a waiver of counsel or a meritorious reason for appearing without counsel unless and until the judge is satisfied that the defendant has been properly advised of all of the rights that Rules 4-213 and 4-215 require. The judge must determine whether the defendant received a copy of the charging document, inform the defendant of the right to counsel, and determine whether or not the defendant knows what the charges are, all of which emanate from the Sixth Amendment and its Maryland counterpart.

Mr. Marcus pointed out to the Committee some of the issues pertaining to Rule 4-215. One of the issues is the right of the defendant to know and understand what the potential penalties are. This is important, because Maryland has mandatory sentences in some instances and enhanced punishments in other instances. The judge does not know whether the defendant is a career criminal or has not criminal record. The question for the defendant from the judge might be to ask what the prior record of the defendant is. The judge may

need this information to explain what the defendant may be facing. This kind of question is an intrusion and should not be permitted, because the government may not be aware of the fact that the defendant is a career offender. If the defendant is asked this question in open court, the prosecutor realizes that the defendant is eligible for mandatory sentencing or is eligible for a mandatory minimum sentencing.

Mr. Marcus said that under Rule 4-215, the judge would tell the defendant the possible penalties for someone who is a repeat offender or who is subject to a mandatory sentence or an enhanced punishment. This is as opposed to engaging the defendant in an inquiry as to whether or not he or she would be eligible for the enhanced or mandatory sentencing.

Mr. Marcus commented that, with respect to a non-meritorious reason for not having an attorney, such as the charging document was stolen, etc., the trial judge is permitted under the revised Rule to act in exactly the same way that judges have always acted. The judge may find that the reasons set forth by the defendant are not believable. The judge can find that the defendant either through inaction or neglect or for another reason is responsible for not obtaining counsel, and therefore, the trial judge can determine that there has been a waiver.

Mr. Marcus remarked that the second issue, which probably happens more in District Court than in the circuit court, is where

the defendant comes back repeatedly. The District Court judge looks at the file and sees that the block on the file indicating that the defendant has been advised of his or her rights has been checked. This could mean that the defendant has been told that he or she has a right to an attorney, but has not been provided any additional information. The difficulty is that under Rule 4-215, the trial judge is responsible for making the determination as to whether there is a waiver. Under the Rule structure, the trial judge has the ability to conduct an independent inquiry and to do whatever the circumstances indicate.

Mr. Marcus expressed the view that Rule 4-215 is not changing current procedure. As Judge Watts had suggested, the Rule attunes trial judges to the idea that there is a separate process to determine whether there is a meritorious reason for not having counsel.

Having made the finding that it was meritorious, the recourse that is available to the trial judge, whether it is in the circuit court or the District Court, would be to appoint counsel if the OPD refuses to do so at State expense (this is a budgetary matter and is a matter for the legislature, not the Rules Committee nor the Court of Appeals). The way that Rule 4-215 is set up now is to further focus the trial judge, both in District Court and circuit court, on the need to make sure that the waivers are done in a more exacting way. Case law addressing the issue of waiver refers to it as a "precise rubric" to make sure that the defendant knows his or her rights. If the

defendant does not know this, there cannot be a knowing and voluntary waiver.

Mr. Marcus said that implicit in *Dykes* is the question of what constitutes a meritorious reason for not having counsel. He had thought about whether there is some formulaic way to articulate what is considered meritorious, and he concluded that it would be folly for the Rules Committee or the Court of Appeals to attempt to quantify or set forth what is meritorious, because every situation will be different.

The Chair commented that when he and the Reporter had started working on updating Rule 4-215, and the related Rules about two or three years ago, it was largely because the current Rule covers both District Court and circuit court, but there are differences in what can happen in each court. Most states have a simple rule that provides that the defendant must be told that he or she has a right to an attorney. What is being suggested for Maryland is a very complex Rule. There are 14 pages of single-spaced annotations after current Rule 4-215, and about 90% of them are reversals.

The Chair remarked that with the assistance of State's Attorneys, the OPD, and the Office of the Attorney General, the Chair and the Reporter started from scratch. They first split Rule 4-215 into two Rules, one for the District Court and one for the circuit court, to try to clarify some of the issues identified by case law buried in the 14 pages of annotations. The Rules include waiver by

inaction, which is the major problem, but they also include whether an express waiver is sufficient, and what the judge has to find on the record to support the finding of an express waiver. It has to be voluntary and knowing. What is "knowing" and "intelligent" got mixed up in some of the cases.

The Chair addressed what happens when the defendant wants to discharge his or her attorney. This is a separate process. The judge needs to make sure that the defendant understands what the consequences are when the defendant comes to court with an attorney that he or she wishes to discharge. The consequences may depend on whether the attorney is a Public Defender, because that Office may not agree to appoint another Public Defender. If the Public Defender is discharged, there may be standby counsel to help the defendant. Rules 4-215 and 4-215.1 address all of these issues. The Subcommittee tried to give the bench and the bar some guidance as to how to proceed. The Chair asked the judges present if they had any comments, since they are the ones directly affected by these Rules.

Judge Ellinghaus-Jones referred to the following language in subsection (e)(1)(A) of Rule 4-215: "...the court shall first determine whether the record clearly shows compliance with ... (ii) Rule 4-213 by a judicial officer at an initial appearance conducted pursuant to that Rule." Rule 4-213 addresses initial appearances but also preliminary inquiries. There should be a reference to a "preliminary inquiry" added to subsection (e)(1)(A)(ii) of Rule

4-215. Also, the fourth sentence of the sixth paragraph of the Reporter's note at the end of Rule 4-215 should have the reference to the "preliminary inquiry" added. By consensus, the Committee agreed to these changes.

Judge Ellinghaus-Jones said that the initial appearance occurs after an arrest; the preliminary inquiry occurs after service of a summons or a citation. It is the same advice for both proceedings, and it is the same record of the advice. Mr. Marcus referred to subsection (g)(3)(B) of Rule 4-215, which provides: "...comply with subsections (c)(1)(A) through (D) of this Rule unless the record shows compliance with that subsection at a previous appearance by the defendant before a District Court judge...". Is this the same as a preliminary inquiry?

Judge Ellinghaus-Jones answered that it could be, because some people do not go in front of a commissioner to be advised, so when they show up on their first trial date, the judge has to go through the advice, and this would be the initial appearance. In some jurisdictions, the judge would do a preliminary inquiry. Mr. Marcus added that in Montgomery County, the commissioner does preliminary inquiries. Judge Elllinghaus-Jones agreed, and she noted that preliminary inquiries may also occur in front of a judge.

Judge Ellinghaus-Jones pointed out a typographical error in the fourth sentence of the sixth paragraph of the Reporter's note to Rule 4-215. The word "is" should be the word "if." Mr. Sullivan pointed

out another typographical error in the second sentence of the seventh paragraph of the Reporter's note to Rule 4-215. The title of the case cited should be "*Dykes v. State*." By consensus, the Committee agreed to make those changes.

Judge Ellinghaus-Jones referred to the Committee note after subsection (e)(1)(C) of Rule 4-215 that Judge Morrissey had referred to earlier. The language at the end is: "... but if there is any genuine dispute about whether the required advice was given, the court may not find compliance without listening to the recording." She said that she and her colleagues would like to soften that language. She suggested that it read: "the court may verify compliance by listening to the recording." She was not comfortable with a Committee note telling a judge that he or she cannot do something.

The Chair explained that the reason for this language is that what the judge would have before him or her is the commissioner's written record including the page with the boxes that are checked. There is a signed statement by the defendant acknowledging receipt of the document. This is what the District Court judge can rely on to find a waiver by inaction. What if the defendant says that the commissioner had never told him about the enhanced penalties, etc.? The box on the page is checked indicating that the defendant had been given the advice, but the defendant tells the judge that he or she did not know about it. This is why the language in the Committee note was put in. If a recording exists, it will show whether the defendant

actually had been informed by the commissioner about the issue that the defendant has denied knowing about. If the judge is not required to listen to it, what is the point of the recording?

Judge Ellinghaus-Jones said that her concern with the language was that there would be so many requests for those recordings that it would slow the court proceedings down. Judge Price added that rather than go through what the Committee note requires, the judges will likely just allow another continuance. Judge Ellinghaus-Jones commented that this is tied into the Committee note after subsection (c)(1)(B), which provides what the court's advice should include. Mr. Dunn inquired whether it would be difficult to get the recording. Judge Ellinghaus-Jones answered that it should not be too difficult to get it.

Judge Morrissey remarked that this technology is being looked at, but he did not know when it would go into effect. From his experience in Prince George's County, when this situation arose, he would ask his clerk to ask the supervisor in charge of recordings to have a recording delivered to the courtroom. This would take anywhere from 15 to 30 minutes. Judge Ellinghaus-Jones noted that in smaller jurisdictions where there are only a few clerks in the office, and some may be out sick or on vacation, this has to be factored in. Mr. Dunn observed that the bigger the jurisdiction, the more recordings will be made.

The Chair commented that Judge Morrissey had a number of

questions about this. Hopefully, in the not-too-distant future, the trial judge will be able to get this recording off the judge's computer at the bench. The Chair said that in a case that he had referred to where the defendant denies hearing the advice, and the judge tells the defendant that the judge does not believe what the defendant said, or the judge disregards the defendant, and the judge finds that there was a waiver, the Chair was not sure how this would be addressed. He could see a future Court of Appeals opinion on this issue.

Judge Ellinghaus-Jones observed that what is being discussed is what happens in District Court. Most of the appellate cases are appeals from the circuit court. She did not mean that the right to an attorney in the District Court is less important, but her point was that there would not be an appeal from that issue, because all criminal appeals are de novo. She expressed her concern about the Committee note after subsection (c)(1)(B) of Rule 4-215 directing the court as to what the advice to the defendant should be. This would require the District Court to change all of its forms. The Chair responded that this was taken mostly from case law. This is what the Court of Appeals has said is implicit in the advice of rights. Judge Ellinghaus-Jones inquired whether there is going to be a corresponding change to Rule 4-213, Initial Appearance of Defendant, pertaining to commissioners. This is going to create an apparent conflict.

The Chair said that he did not think that there would be a

conflict if all the commissioner finds is a waiver for purposes of the initial appearance. This does not address jury trials. Judge Ellinghaus-Jones remarked that for District Court judges to be able to rely on advice given at the initial appearance or the preliminary inquiry, the advice would have to be changed to include all of the items listed in the Committee note after subsection (c)(1)(B) of Rule 4-215. Many of the items, such as the attorney helping in the jury selection process, are not a part of the advice given by the commissioner. The Committee note lists many more items as part of the advice.

The Chair referred to the point raised by Mr. Marcus, which was that if the defendant prays a jury trial without an attorney (assuming a jury trial is permissible), the defendant is getting his or her constitutional right to a jury trial but is losing the benefit of the double dip. The defendant does not know that if he or she does not pray a jury trial and is convicted or does not get the right sentence in the District Court, the defendant has another chance by appealing the case. The defendant is giving this up if he or she prays a jury trial. Judge Mosley commented that there may be defendants who pray a jury trial out of frustration, because they do not have an attorney, or they are trying to avoid the District Court judge assigned to their case. Whether the defendant had two chances or five chances, he or she does not want the judge who will hear the case.

Mr. Zarbin noted that there is one other category, examples of

which he had seen. It is where the judge has told the defendant that he or she has a right to an attorney. The judge says that he or she has read the charges, and if the judge finds the defendant guilty, the defendant will go to prison. The judge adds that the defendant may want to pray a jury trial to get away from the judge. The Chair observed that any system is subject to gaming. He asked Mr. Zavin whether he had any comments on this. Mr. Zavin inquired whether the last sentence of the Committee note after subsection (e)(1)(C) of Rule 4-215 could read as follows: "...ordinarily, the judge may not find compliance without listening to the recording." Mr. Zarbin agreed with Judge Price that the judge will not listen to the recording but will postpone the proceeding.

Judge Mosley remarked that there may be circumstances where the judge has to listen to the recording. She has had cases where the defendant did not hear the advice. The defendant thinks he or she is in jail, although the defendant actually is in the commissioner's office, and someone speaks very quickly to the defendant and then asks the defendant to sign the form indicating that the advice was given. The defendant did not understand what was said, but he or she signs the form. Some defendants do miss what was said to them. Even though the advice was told to them, they may not have heard it. Giving them the benefit of the doubt, they are telling the truth when they tell the judge that they did not hear the advice. There are circumstances where the judge really has a question about whether the defendant

understood the advice of rights, and the judge has to obtain the recording.

The Chair said that the judge can always do this. Mr. Zarbin said that at this point, the defendant and the judge will be at odds. The judge tells the defendant that the judge believes that the defendant is not telling the truth. Must the judge recuse himself or herself? If the Rule makes listening to the recording mandatory, this puts the judge in the position of telling the defendant that the judge has to decide whether the defendant is telling the truth, but the judge has already told the defendant that the judge did not believe him or her. The Chair explained that it started with the question of what is the purpose of having the recording at all. What other function would it have but to be evidence of what had been said? It is not necessary if the judge can rely on the commissioner checking the boxes and the defendant's signature.

Judge Morrissey told the Committee that he was interested in performance-based standards and accountability of judicial officers and judges. He was in favor of any part of technology that he can draw upon to enhance training and to monitor the commissioners. The District Court gets a lot of requests such as: why did the commissioner set this bond at such a high amount? Issues about the performance of commissioners can be monitored and addressed. If the commissioners are not performing appropriately, they can be trained in the areas that are problems. The Chair said that the recording

would be used for administrative purposes, and Judge Morrissey agreed.

Judge Ellinghaus-Jones said that her 25th anniversary of serving on the District Court had been the past Tuesday, and that her experience over the years has been that when she asks defendants whether the commissioner had advised them of the right to have an attorney, the defendants often answer affirmatively. When she asks the defendants whether the commissioner told them that if they show up in court without an attorney, they will have to proceed without one, they also answer affirmatively. Judge Ellinghaus-Jones then tells them that she has a document signed by the defendants, and the document tells the defendants to go see the Public Defender immediately. The document has the telephone number and the address of the Public Defender. When Judge Ellinghaus-Jones asked whether the defendants were told this, they answer affirmatively again. Then she asks what the defendants did about getting an attorney, and the answer is that they did not do anything, because they thought that they would wait until they got to court.

Judge Ellinghaus-Jones commented that like herself, many judges will almost never find a genuine dispute. The judges would have to listen to the recording, anyway. Some judges simply grant postponements without even worrying about it. Judge Ellinghaus-Jones expressed the opinion that the District Court judges will have to request too many of the recordings made in the

commissioners' offices. She was not in favor of the requirement in the Committee note after subsection (e)(1)(C) of Rule 4-215 providing that the judges have to listen to the recordings if there is a genuine dispute about whether the required advice was given. She suggested that this language be changed to: "...the court may verify compliance by listening to the recording." The motion was seconded, and it passed on a majority vote.

Judge Ellinghaus-Jones referred to the Committee note after subsection (c)(1)(B) of Rule 4-215. Judge Mosley had raised an issue about the note. She thinks that this is a setup for a writ of *coram nobis*. Judge Ellinghaus-Jones expressed the concern that this advice should also be included in Rule 4-213 if this is going to be what has to be said for the judges to find compliance. The Chair commented that the Committee note is not necessary, because it is not in the Rule now. Judge Ellinghaus-Jones remarked that any language that is as strong as that in the Committee note ought to be in the Rule itself, not in a Committee note.

The Chair asked if Judge Ellinghaus-Jones preferred that the language of the note be in the body of the Rule, or that it be deleted. Mr. Marcus remarked that related to the way Rule 4-215 is set up now, there is a problem if the Rule requires the court to give advice about all of the items in the Committee note. He said that he understands the requirement of the "precise rubric" and standardization. He referred to the notice in the uniform criminal citation form. Number

5. in the notice reads as follows: "A lawyer can be helpful to you by: (A) explaining the charges in this paper; (B) telling you the possible penalties; (C) helping you at trial; (D) helping you protect your constitutional rights: and (E) helping you to get a fair penalty if convicted." These are the items that are suggested in the Committee note. Each item has some basis in an opinion of the Court of Appeals. Certain cases discuss each of these items as being an element of notice.

If "explaining the charges" is included as an element, as a defense attorney, Mr. Marcus could allege that the court did not explain the charges to the defendant. In the day-to-day activity of the District Court, the judge is supposed to tell the defendant each count in the charging document. A defendant may have 16 charges against him. Is the judge going to go through each charge with the defendant? Mr. Marcus commented that it usually does not happen this way. Due process sometimes is what process is due under the circumstances. This may not be what the Constitution envisions. Whether the advice is on a citation, whether it is put on a notice that is attached to a statement of charges, or whether similar language is used, either in a Committee note or in the body of the Rule, there has to be a way for the trial judge to know what the guidelines are. If not, it is easy to overlook these items.

Mr. Marcus remarked that rather than put the advice language in the body of the Rule, it is easier to put it in a Committee note,

because it allows individuality. Each judge can do what he or she thinks that the circumstances require. If an attorney is charged with a crime, there is an obligation to give him or her advice of rights, but the attorney will easily understand this. However, if someone who is not really fluent in English, yet does not require an interpreter is given this advice, it could take a while to explain the situation to that person, and the person may still not understand. Mr. Marcus said that he was reluctant to go along with the Rule, because it could pose a problem. The Committee note allows the reader, the judge, and the defendant to be able to adapt to the circumstances in a way that the trial judge thinks is appropriate.

Mr. Zarbin suggested taking out the Committee note but giving the information in it to the Judicial Education Committee. The Chair noted that there are a number of ways to handle this. It could be put into the Benchbook, for example. What the appellate courts have found is that the judges know this, but in the heat of the moment, they forget one or more of these items. This becomes an issue on appeal. The defendant alleges that he or she was not told something.

Judge Ellinghaus-Jones expressed the concern that if the crime is driving without a license or something similar, it is not necessary to get into collateral consequences or jury trials when the subject is the necessity of an attorney. It would be onerous to do so.

Mr. Zavin remarked that the Committee note after subsection (c)(1)(B) of Rule 4-215 is aspirational. He did not think that case

law existed that provides that failure to find that each of the items was told to the defendant would result in a reversal of the case. There is some precedent in Rule 4-216 but that involves waiver of a jury trial. The Committee note sets forth what should be told to the defendant. Even though no specific inquiry is necessary, it is helpful to have that language in Rule 4-215, but it does not necessarily result in a reversal for the failure to mention one of those items. The Chair said that the intent of the Subcommittee was certainly not to set up a trap for judges. It was not intended to create more problems. The Committee note is not in the Rule now, so it could be taken out.

Judge Nazarian pointed out that another way to avoid the trap problem is to tie it to whatever language is in the appellate opinion. If the purpose of the Committee note is to try to capture what the cases have said, in place of using aspirational terms, the appropriate case could be cited.

The Chair responded that a judge is not going to start looking at a pile of books. Judge Nazarian explained that he meant that this would be in the Committee note. The language that begins "[t]he court's advice should include..." could be taken out. Judge Price inquired whether those cases had already been cited at the end of Rule 4-215. The Chair reiterated that currently there are 14 pages of annotations after the Rule. The Reporter noted that the cases are part of Michie's editorial process, and they do not appear in the West

or Rules Service Company's versions of the Rules. The Chair said that if the goal is to be aspirational, the language of the Committee note is worded as the court's advice "should" include. Judge Mosley suggested that if the wording is that the court's advice "may" include, it would mean that it is not limited to the kinds of advice listed in the Committee note. She reminds the defendants who are before her in the courtroom that there may be other collateral consequences. It is difficult to tell the defendant all of them. The wording of the note could be that the court's advice is "not limited to...." or something similar.

The Chair agreed with Judge Mosley about setting up a *coram nobis* case, particularly as to collateral consequences. This is when the defendants raise this issue many years later. That comes up if the judge does not tell the defendant about collateral consequences.

Judge Ellinghaus-Jones remarked that judges are bound by appellate decisions. She was not in favor of a Committee note stating that the judge has to take the actions listed in the Committee note. The Chair pointed out that the wording is that the court's advice "should include." This will result in judges never being able to find a waiver by inaction if the waiver is based on advice given by a commissioner, because the commissioners would not be advising the same things.

The Chair asked if it is known for sure whether commissioners are, in fact, giving the same advice to defendants. Mr. Marcus responded

that there is a form that is appended to the statement of charges. It is a "laundry list" that tracks the same kind of language that is on the uniform citation form. That form can be used to charge jailable offenses. In terms of the seriousness that is required for that advice, it is not that different than other jailable offenses that can be charged under a statement of charges. The concept is the same. The other part is that the District Court statement of charges and the document that goes with it are used in many cases to charge first degree murder. If a case comes into the court on a statement of charges, it will ultimately result in an indictment if it is a felony. If there is a first degree murder charge in District Court on a statement of charges, the advice of rights will be appended to it.

Mr. Shellenberger remarked that this will happen when it is a first trial date. The question is whether every defendant gets a postponement on the first trial date, because the prior advice given does not match the advice given at the first trial date. Can there be a waiver by inaction, particularly when the first trial date is four months after the crime was committed? This happens in Baltimore County. Judge Ellinghaus-Jones added that the first trial date may be six months later.

The Chair suggested that in place of the language in the Committee note after subsection (c)(1)(B) of Rule 4-215, the language of the uniform citation should be included. Judge Morrissey told the Committee that he was in charge of the uniform citation form. He and

his colleagues make a great effort to write it in a manner that is very understandable to anyone reading it. They had found that the more complicated that they make the language, the less people understand it. Judge Morrissey said that, as a District Court judge, often when he told a defendant that there were collateral consequences, the person's eyes glossed over. The language of the uniform citation form is preferable for the Committee note. It is amazing how many times if one word on the form is changed, groups of people complain.

The Chair asked Judge Morrissey whether he approved of the Committee note simply tracking what is on the uniform citation form. Judge Morrissey answered that this language is much broader, and he prefers it to the language currently proposed for the Committee note. After tracking what the legislature has done this past session, he expressed the opinion that one word needs to be changed on the uniform citation form, which will require that all of the forms be withdrawn and reprinted. If possible, it would be helpful to make any changes on the uniform citation form as a result of the discussions today at the same time as the changes that go into effect October 1. This would be beneficial to the District Court.

Judge Ellinghaus-Jones expressed her approval of the language of the Committee note tracking the uniform citation language, with the modification that will be required by the new statute. The Chair said that changes that need to be made can be anticipated. Judge

Morrissey responded that he is going to have to make changes. The Chair commented that the Committee note can track the changes. The Reporter remarked to Judge Morrissey that from the point of view of timing, she and the Chair were trying to coordinate Rule 16-506 with Rule 4-215. Judge Morrissey had indicated that he would like Rule 16-506 to go into effect as soon as possible. Judge Morrissey said that he could wait until October 1. If that is the date, he can make all the changes at once. The Chair said that the Rules that were considered at today's meeting could be sent to the Court of Appeals in the Committee's next report.

Judge Ellinghaus-Jones referred to subsection (g)(3) of Rule 4-215. This addresses when the defendant would like to discharge counsel, and the court finds a meritorious reason for the defendant's request. If the court finds no meritorious reason for the defendant's request, the court shall inform the defendant that if the attorney is discharged, and the defendant does not have another attorney ready to go, the trial will proceed. The problem could be the successor attorney's schedule. The trial will proceed as scheduled, and the court will comply with subsections (c)(1)(A) through (D) of Rule 4-215, which pertain to advice of counsel, unless the record shows compliance with that subsection at a previous appearance by a defendant before a District Court judge at a proceeding other than a bail review hearing under Rule 4-216.1. This is a much more stringent standard than the one in the other waiver

section, which is subsection (e)(1)(A), Waiver by Inaction, where the court can rely on advice given by a judicial officer at an initial appearance conducted pursuant to Rule 4-213. Waiver when the defendant discharges his or her attorney is much more stringent than the waiver when the defendant shows up the first time without an attorney.

Judge Ellinghaus-Jones suggested that both provisions, subsection (e)(1)(A) and subsection (g)(3) should have the same language. The language of subsection (g)(3) would be: "...unless the court finds compliance with (i) section (c) of this Rule by a District Court judge at a previous appearance by the defendant or (ii) Rule 4-213 by a judicial officer at an initial appearance conducted pursuant to that Rule." The Chair asked if the language now in subsection (g)(3) that reads "at a proceeding other than a bail review hearing under Rule 4-216.1" would be taken out. Judge Ellinghaus-Jones replied affirmatively.

Mr. Zavin pointed out that the Rule is addressing separate situations. One situation is where the defendant shows up without an attorney, and the person had shown up previously without an attorney. The other situation is when someone has had counsel and is now discharging the attorney. The Chair asked whether Mr. Zavin disagreed with Judge Ellinghaus-Jones' suggested language.

Mr. Shellenberger commented that the attorney may actually be present in court. He asked why it should be more stringent when the

defendant does not have an attorney as opposed to the situation where the attorney is present, but the defendant wants to fire the attorney. Judge Ellinghaus-Jones remarked that this situation occurs frequently, and this is the culture. The defendant has a Public Defender, and the defendant appears on the first trial date saying that he or she would like private counsel and needs to get a postponement.

The Reporter asked whether Judge Ellinghaus-Jones's suggestion was to use the language in subsection (e)(1)(A) of Rule 4–215. Judge Ellinghaus-Jones replied affirmatively, explaining that she would use the language in subsections (e)(1)(A)(i) and (ii). The Chair noted that in these situations, it is not a waiver by inaction. The defendant has an attorney who is present in court. The defendant is now complaining that the attorney is not paying attention to the defendant, is not helpful, etc. The judge decides that this is a good reason and finds it meritorious. Judge Ellinghaus-Jones responded that the court finding the discharge of the attorney meritorious is a different situation. The Chair added that unless the defendant has another attorney ready, the judge tells the defendant that he or she is going to trial without an attorney.

Judge Ellinghaus-Jones said that she thinks the discharge of the attorney is meritorious, it is a different situation. Usually what happens is that the defendants tell the judge that they want to hire private counsel. They do not really have a reason for being

unhappy with their Public Defender. If there is no other reason, this is not a meritorious reason for discharge of the attorney. Generally, when the judge tells the defendant that it is not a good reason, the defendant decides to keep the Public Defender. If the defendant insists on discharging the attorney, the judges advise that the proceeding will go forward, and the defendant will not have an attorney, because the defendant has been advised previously by a judge at a bail review or by a judicial officer. The Chair inquired whether this means that either the defendant retains the attorney who has appeared, or the defendant goes to trial without an attorney. Judge Ellinghaus-Jones responded that this is the way Rule 4-215 currently reads.

The Chair said that the situation often is that the attorney the defendant wants to discharge is an Assistant Public Defender or an attorney appointed by the OPD. The Public Defender informs the judge that the attorney had checked with his or her supervisor, and if the Assistant Public Defender who is present to represent the defendant is discharged, the Public Defender is not going to appoint another attorney. The Chair had read this scenario in trial transcripts.

The Chair asked the Committee how it wishes to proceed. Judge Ellinghaus-Jones moved that in subsection (g)(3)(B) of Rule 4-215, the language would read as follows: "...unless the record shows compliance with (i) section (c) of this Rule by a District Court judge at a previous appearance by the defendant, or (ii) Rule 4-213 by a

judicial officer at an initial appearance or preliminary inquiry conducted pursuant to that Rule." The following language would be deleted from subsection (g)(3): "at a previous appearance by the defendant before a District Court judge at a proceeding other than a bail review hearing under Rule 4-216.1."

The Chair suggested that the wording be: "at a previous appearance by the defendant before a judicial officer." Judge Ellinghaus-Jones agreed with this language, but she pointed out that the language "at a proceeding other than a bail review hearing under Rule 4-216.1" would have to be taken out. The Reporter commented that the commissioner is not complying with Rule 4-215. The commissioner is governed by Rule 4-213, and the language proposed by Judge Ellinghaus-Jones is necessary. The motion was seconded, and it passed on a majority vote.

Judge Ellinghaus-Jones observed that the language "the clerk shall note compliance" or "direct the clerk to record" appears in various places throughout Rule 4-215. In the District Court, the judge does all of the recording, not the clerk. Does this language contemplate doing something more than the judges already do? Section (f) has the language: "the court shall comply with the requirements of section (c) of this Rule, and in a separate document, certify that compliance." The court has to certify compliance in a separate document. The Chair explained that the reason for this was so that the circuit court could rely on it.

Judge Morrissey said that in the District Court, there is a docket sheet and a separate piece of paper that has the boxes to check. Either the judge does this, or the judge hands it to the clerk to take care of it. Judge Morrissey remarked that he was not concerned as to whether Rule 4-215 refers to the judge or to the clerk. Judge Ellinghaus-Jones commented that she was satisfied that this issue did not need to be addressed in the Rule.

By consensus, the Committee approved Rule 4-215 as amended.

Mr. Marcus told the Committee that proposed Rule 4-215.1 tracks the District Court Rule, but it has some differences as far as a jury trial is concerned. He said that he would not get into the issue of advice on what to do in the District Court as far as a jury trial prayer. This is a completely different issue that is unrelated to Rule 4-215.1. The Chair pointed out that the only difference is that a circuit court judge is not permitted to rely on the advice given by a District Court commissioner. This is in the current Rule. The Subcommittee's view is that this should remain in the Rule.

By consensus, the Committee approved Rule 4-215.1 as presented.

The Chair told the Committee that the remainder of the Rules contained conforming amendments to Rules 4-215 and 4-215.1.

By consensus, the Committee approved Rules 4-202, 4-212, 4-213, 4-213.1, 4-214, 4-216.1, 4-347, 15-205, and 16-207 as presented.

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