COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room ll00A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on April 16, 2004.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Alice Neff Lucan, Esq.
Carol D. Melamed, Esq.
Sally W. Rankin, Court Information Officer

The Chair convened the meeting. He said that Agenda Item 2 would be considered first.

Agenda Item 2. Consideration of Policy Questions concerning Access to Videotape and Audiotape Recordings of Court Proceedings (See Appendix 1)

The Chair said that the guests present for Agenda Item 2 were Alice Lucan, Esq., Carol Melamed, Esq., and Sally Rankin of the Administrative Office of the Courts Information Office. The Vice Chair told the Committee that a subcommittee dealing with the issue of access to court records met in March. One of the questions discussed was what the rule should be with respect to access to videotapes and audiotapes of court proceedings. Current Rule 16-406, Access to Videotape Recordings of Proceedings in the Circuit Court, allows no direct access to videotape recordings of court proceedings. A party to the action may obtain a copy of the recording. Persons other than parties may obtain a copy of a videotape after judgment has been entered in the case, if the requirements of section (d) of the Rule are met. Rule 16-404, Administration of Court Reporters, provides for audiotapes of proceedings but does not provide who has access to audiotapes. Rule VI of the District Court Administrative Regulations, Access to District Court Recordings, states that a party may be permitted to listen to the recording of a trial; a non-party is not entitled to listen to the audiotape but may be permitted to obtain a copy of it. However, the court may waive the provisions of the regulation and permit a non-party to listen to the recording of a case. Code, Criminal Procedure Article, §1-201, provides that a person may not record or broadcast any criminal matter that is heard in a trial court or before a grand jury.

The Vice Chair said that this issue has been discussed many

times, and now that the Court of Appeals has adopted Rules pertaining to access to court records, the related issues surface again. The Rules in new Title 16, Chapter 1000, Access to Court Records, adopted effective October 1, 2004, are in the materials for today's meeting. Rule 16-1006, Required Denial of Inspection--Certain Categories of Case Records, requires the custodian of court records to deny inspection of certain records. The Rule states, as follows: "Except as otherwise provided by law, the Rules in this Chapter, or court order, the custodian shall deny inspection of...[a] transcript, tape recording, audio, video, or digital recording of any court proceeding that was closed to the public pursuant to rule or order of court." The Committee note to the Rule provides that there may be other laws that shield other kinds of court records.

The Honorable Robert M. Bell, Chief Judge of the Court of Appeals, wrote a memorandum to the circuit court administrative judges in July of 2002 asking the judges to clarify how they handle access to videotape recordings of court proceedings. A copy of the memorandum is in the meeting materials. See Appendix 1. Also included in the meeting materials are the results of a survey of courts around the state pertaining to their procedures for recording court proceedings and several sets of minutes of Rules Committee meetings at which access to audiotapes and videotapes was discussed. See Appendix 1. The Subcommittee looked at some of these items before drafting its policy questions. These are listed in the memorandum to members of the

Rules Committee from the Reporter dated April 6, 2004, a copy of which is located in the meeting materials. See Appendix 1. Some of the discussion in the enclosed sets of Minutes reflect that the idea of including audiotapes in the Rules was considered. The Subcommittee believes that the two kinds of tapes should be treated the same in the Rules and that the District Court practice should remain as it is.

The Chair asked the Rules Committee for its opinion. Judge Heller commented that, unless televised proceedings of trials are allowed, there should be some distinction between audiotapes and videotapes. Transcripts of trials are available, and in Baltimore City, members of the media are permitted to view videotapes. Trials should not be allowed on television for security and other reasons. It is easier to disregard the fact that a proceeding is being videotaped (an innovation suggested by Judge Kaplan) as long as it will not be shown to the public. The Vice Chair explained that the Subcommittee does not recommend greater access to videotapes. The Rule is silent as to access to audiotapes. The Subcommittee is proposing that the access be the same as the access to videotapes.

Judge Missouri said that he supports the concept that there should not be a dichotomy in the way audiotapes and videotapes are treated. The Rules provide for controls in videotape and audiotape access. The Vice Chair added that the consensus of the Subcommittee is to agree with Judge Missouri. It would not be a good idea to see or hear on the evening news the testimony of a

witness. The Chair pointed out that there are situations where no transcript of a trial is available. The justification for videotaping trials is that the devices are cost-saving, since they substitute for a court reporter who would have to be present during the entire trial, even if he or she does not subsequently prepare a transcript of the proceedings. Videotaping is for the court's benefit; an interested person could be satisfied with a transcript of a trial. District Court cases are all audiotaped and may not be transcribed. If the case is appealed and there is a *de novo* trial in the circuit court, an attorney handling the case may benefit from finding out about the proceedings in the District Court. However, there is no transcript available.

Judge Dryden noted that Ms. Rankin was present at the Subcommittee meeting. Her research had indicated that a majority of the states have more access to audiotapes and videotapes than the extent of access that is being suggested for Maryland. Ms. Rankin added that the states are divided into three tiers, and Maryland is in the tier with the most limited access. Judge Dryden remarked that the new Rules in Title 16, Chapter 1000 permit greater access to court records. If there are problems in specific cases, the judge can restrict access. He added that in his experience, if the media requests access and the judge grants it, the media often loses interest.

Mr. Brault questioned as to whether the tape of a videotaped trial is transcribed for appeal purposes or whether the appellate

court views the videotape. The Chair responded that the Court of Special Appeals receives requests for its judges to view the tapes, and most of the requests are denied unless a good reason exists. The tapes are sent to a transcribing service, just as audiotapes are, and a transcriber prepares a written transcript. The original tapes remain in circuit court unless a request to transmit them to the appellate court is granted. Mr. Brault pointed out that in Montgomery County, anyone can purchase a copy of an audiotape at a counter in the clerk's office. One simply fills out a form and pays for the tape or for a portion of the tape from that day. The Vice Chair inquired as to whether any people other than parties order the tapes, and Mr. Maloney answered that this happens frequently. For example, an attorney in a related case may purchase the tape. Ms. Melamed commented that newspaper reporters often buy the audiotapes. The Vice Chair questioned as to whether the tapes are aired on television, and Ms. Melamed answered that they are not. Mr. Brault expressed the view that the Rules as to access should not be changed.

The Vice Chair said that the Subcommittee did not focus on the precise language of the new Rules that make videotapes and audiotapes open to inspection and copying unless the proceedings have been closed to the public. Ms. Potter noted that Rule 16-1002, General Policy, states that records are presumed to be open to the public for inspection and the Vice Chair added that Rule 16-1003, Copies, allows for the copying of records. The Chair added that the Rules are subject to other rules and statutes.

One reading these Rules could conclude that an audiotape of a criminal case may be played on the evening news.

The Vice Chair observed that Rule 16-406 may be superseded by Rule 16-1006. Ms. Melamed responded that she had worked with Judge Wilner on the Access to Court Records Rules, and she did not remember that the discussion had focused on this specific issue. The Vice Chair asked about audiotapes. Ms. Melamed answered that there is no rule dealing with circuit court audiotapes. The group working on the Access to Court Records Rules did not discuss particular problems with videotapes and never talked about the Rules translating into the use of cameras in the courtroom. Reporters use the tapes to ensure accurate reporting. She said that she would not like to see access to audiotapes decrease –- they are helpful both in the circuit courts and the District Court, and there have been no problems arising out of this access. The Chair pointed out that Code, Criminal Procedure Article, §1-201 prohibits the recording or broadcasting of criminal proceedings. Ms. Melamed noted that the statute supersedes the Rule. The Chair responded that the Rule should state this, and Ms. Melamed observed that the preamble to Rule 16-1006 begins with the language: "[e]xcept as otherwise provided by law."

Ms. Lucan observed that Rule 16-109, Photographing, Recording, Broadcasting or Televising in Courthouses, contains a definition of the term "extended coverage." It should include any broadcast use of any tape by the news media. The case of

Chandler v. Florida, 101 S. Ct. 802 (1981), held that a state may provide for radio, television, and still photography coverage of a criminal trial for public broadcast. Maryland can decide how to handle this, and Rule 16-109 can be modified. The Chair inquired as to what the Rule should provide. Ms. Lucan replied that extended coverage should apply to broadcast use, and Rule 16-109 should be rewritten to provide this. Judge McAuliffe remarked that there are constitutional problems with this approach. If a tape is legitimately in the possession of the press, it would be difficult to prohibit its broadcast. Ms. Melamed remarked that if there is no constitutional right to have the tapes, access to them could be conditioned on an agreement. Judge McAuliffe noted that limiting the right to use the tapes is troublesome in light of prior cases. If one possesses a tape, one has the right to control it. Ms. Melamed observed that in juvenile proceedings, one can get access to a tape conditioned upon not using the names of the parties. She said that she does not want to see access to tapes of proceedings restricted.

The Chair stated that there is another aspect to this issue. If one courtroom has audiotape equipment and another courtroom has a court reporter, one case record may be more accessible than the other. Court reporters were the sole means of recording trials for years, and there were no problems with this. The addition of recording equipment has created difficulties. The equipment was added for the convenience of the court. Installing and maintaining the equipment is less expensive than paying the

salary of a court reporter. Taping was not designed for any purpose other than allowing a transcript for appellate review to be prepared. If someone wants a transcript, let the person order one. Ms. Lucan noted that the press believes that the tapes should be available as part of the case record. The Chair responded that under that theory, bench notes also might be accessible to the public, which they are not.

The Chair observed that in a domestic relations case, the financial records are sealed by statute, but anyone can take notes as to the testimony. If the Rule provides that the case record includes the unredacted audiotape which is accessible to the public, then this would amount to releasing financial records in violation of the statute. Ms. Lucan commented that the ability of reporters to listen to and view tapes is important. Videotapes often make a better record, because they show facial expressions of those testifying and are available right away instead of the delay required to produce a transcript.

Ms. Lucan remarked that sometimes the staff of newspapers is limited, and there are not enough reporters to cover the various cases in the courthouse. If the reporters are able to listen to the tape, the case can still be covered. Listening to or viewing tapes later also ensures accuracy of reporting. Judge McAuliffe suggested that the media could listen to the audio portion of videotapes. The Chair added that accomplishing this depends on the court's equipment. Ms. Lucan stated that access to the tapes increases the public's knowledge of current events. The Chair

commented that assuming it is acceptable for the media to have access to the tapes, the reporters could listen to them and return them later in the day. Ms. Lucan pointed out that this would be difficult since the courthouse closes at a certain time in the afternoon. The Chair stated that many proceedings in the courthouse go beyond 4:30 p.m., and a reporter would be not be excluded from the courthouse. The Vice Chair remarked that if a reporter listens to eight hours of court proceedings and asks at 4:00 p.m. for the tapes, most likely he or she will be told to come back the next day.

The Vice Chair suggested that the issues presented today be divided into separate parts for a vote. Judge McAuliffe referred to Ms. Melamed's point that there have been no problems so far with unlimited access to the audio portion of trials, and he again suggested that this be available to the media. Mr. Klein added that every tape deck has connections to make this possible. Judge McAuliffe said that he is concerned about access to the video portion of the videotape. The legislature has already specifically prohibited the televising of criminal proceedings, and there are protections in Rule 16-109 as to other types of proceedings. There must be consent to the extended coverage, and a party may request no extended coverage. The presiding judge may terminate or limit the extended coverage. This cannot be done with a videotape that is made for the purpose of making a record of the proceedings. A videotape record of proceedings does not fit into the concept of Rule 16-109. However, unlimited

access to the audio portion of trials should be allowed.

Judge Norton reiterated that the administrative regulations of the District Court allow unfettered access to copies of any audiotapes of court proceedings. The problem that has arisen in the District Court is with requests for transcripts that are to be used for impeachment purposes in *de novo* appeals or other proceedings. The administrative regulation concerning audiotapes of proceedings is not causing any problems. The Chair asked if anyone can come to the District Court and request a tape. Judge Norton replied affirmatively, adding that the cost is minimal, and the tape will be available as soon as the clerk can make the copy. The Chair suggested that one approach would be to ensure that the circuit court provides audiotapes as the District Court does. The Vice Chair said that the recommendation of the subcommittee is to include references to audiotapes in Rule 16-406. This addresses the first question in the April 6, 2004 memorandum set forth in Appendix 1.

Mr. Brault suggested that audiotapes of court proceedings in the circuit court should be available to the public unless the court proceeding has been otherwise sealed. Judge Missouri questioned as to whether this would include court reporters' backup tapes. The Vice Chair answered that these would be excluded. Mr. Brault noted that in some circuit courts, an audiotape could be the official recording in lieu of a stenographic recording. The Chair stated that applicable

statutes, such as the rape shield statute, should be built into the Rule. Judge Heller requested that the minutes clarify that the Rule does not require that the audio portion of the proceeding must be extracted from the video portion. She suggested that the Rules should provide for this only if feasible. The Vice Chair clarified that the court will produce only what it is able to produce.

Judge Norton remarked that there may be a variance as to the amount of time it takes to produce copies, depending on the number of clerical employees available. Judge Dryden observed that a greater problem is the fact that, with current technology it takes longer to burn a compact disc than to make a tape copy. The Vice Chair pointed out that some jurisdictions may not have a tape system. The Chair said that a request for a videotape should not involve obtaining a copy of the tape but rather an opportunity to view the tape or a portion of it. Judge Heller commented that there have been no problems in Baltimore City allowing the public to view the videotapes, and it ensures the accuracy of reporting by the press.

The Chair told the Committee that he recalled that the Conference of Circuit Judges had resisted allowing tapes to be sold to the public. Judge Missouri added that the Conference did not want tapes of criminal cases to be accessible. The judges felt that this would compromise motions hearings and trials in some jurisdictions.

The Chair clarified that the consensus of the Committee

appears to be that the public should have access to copies of audiotapes, and the public, including reporters, should be able to watch videotapes. If there is a problem, the parties to the case or the court reporter may seek a protective order from the court. Judge Missouri added that the chief court reporter is considered the custodian. As Administrative Judge, Judge Missouri said that he can block access only if someone brings a problem to his attention. Rule 16-406 presents a logistical problem –- section c. provides that upon written request and the payment of reasonable costs, the authorized custodian of an official videotape recording shall make a copy of the recording, or any part of it, available. However, in reality, one may not necessarily get this on demand.

Judge Heller reiterated that the Rule does not require the separation of the audio portion from a videotape. Judge McAuliffe expressed the concern that when parties approach the bench out of the hearing of the jury, this should be out of the hearing of the public as well. For example, in a criminal case if the defendant is agreeing to assist the State in obtaining a conviction in another case, the defendant should be protected, and the record of this bench conference should not be available. Should the judge seal the record at this point? The Chair suggested that for an audiotape in a criminal case, the State or the defense attorney should be given the opportunity to object. Judge McAuliffe inquired as to whether it can be clarified in the Rule that one of the parties or the trial judge can mark the part

of the record that should not be accessible. Judge Heller commented that in Baltimore City, certain parts of the videotape are fast forwarded. Mr. Brault said that in Montgomery County, the operator of the tape machine is instructed to go off record by making a separate tape, which is then sealed. Judge Missouri agreed with Judge McAuliffe that the judge has to be attuned to protecting a witness whose life may be in danger, and this could be accomplished by sealing the record.

Ms. Potter questioned as to how the federal courts handle stopping the recording of court proceedings. Mr. Karceski responded that in the U.S. District Court in Baltimore, the stenographer has a tape recorder. A button can be pushed which deadens the sound. He expressed the concern that conversations between the attorney and the client may be recorded. The Vice Chair inquired as to how long audiotapes have been available in Montgomery County, and Mr. Brault answered that they have been available since 1984. Judge McAuliffe commented that there are separate microphones for separate channels on the tape. The original tape plays channel by channel. The copy is made from a conglomeration of all the inputs. The Chair commented that he had heard a conversation between an attorney and the client at an arraignment hearing on national television. Preventing this situation can be addressed by rule.

Mr. Brault observed that nothing can prevent a party from giving the audiotape of a trial to the press. The Vice Chair noted that subsection c. 2. of Rule 16-406 provides: “...a person

who receives a copy of a videotape recording pursuant to this section shall not (A) make or cause to be made any additional copy of the recording or (B) except for a non-sequestered witness or an agent, employee, or consultant of the attorney, make the recording available to any person not entitled to it pursuant to this section." The subcommittee wanted to ensure that copies of audiotapes are generally available. Anyone can listen to the audio potion of videotapes. A sub-issue is what to do if a tape is not available. Judge Heller asked about representatives of the press listening to the tapes. The Chair responded that access cannot be limited. These are policy questions. The Vice Chair suggested that the new Title 16, Chapter 1000 Rules could be changed. The Chair said that the subcommittee will work on this, and Ms. Lucan, Ms. Rankin, and Ms. Melamed can participate. Ms. Lucan remarked that plans are being made for judicial training sessions on the new Title 16, Chapter 100 Rules, and this should be part of the training. Ms. Rankin will organize the training. Ms. Rankin added that Chief Judge Bell is organizing an Implementation Committee on Access to Court Records. Access issues will be handled by the Judicial Institute as well. The Chair noted that the Conference of Circuit Judges will discuss these issues, also.

Mr. Dean told the Committee that he has had a request from the media to which he has not yet responded. The media has requested that he provide them with videotapes of evidence in pending trials. For example, one item is a tape of alleged

police brutality that will be admitted into evidence at trial. He is attempting to prevent giving the tapes pursuant to Rule 16-406 and Rule 3.8, Special Responsibilities of a Prosecutor. The Vice Chair questioned whether evidence in the possession of the State's Attorney that has not yet been admitted into evidence at trial is subject to the Public Information Act. Mr. Dean stated that there will be a hearing on this matter in a case in which the evidence will be presented at a suppression hearing, and, depending upon the outcome of that hearing, may later be admitted into evidence during the trial.

The Reporter commented that there may be confidential financial information or trade secrets discussed at a trial that should not be part of the recording. For drafting purposes, there should be a timeline in the Rule to give parties the opportunity to state what information they would not like revealed in the tape. Mr. Brault remarked that this can be done, but the attorneys should work it out. Often attorneys try to protect their clients' trade secrets. In Montgomery County, this is done by transferring to another tape. Ms. Melamed commented that several Rules Committee members had stated that the Montgomery County procedure for allowing access to audiotapes is working well. Is it necessary for the procedure to become more complicated? The Vice Chair pointed out that copies are available unless the court orders otherwise.

Mr. Michael stated that he was concerned as to what mechanism would be used to ensure that confidential information

would not be released to the public in an audiotape. Is it the attorney's responsibility to ask that a separate tape be used for the confidential information? The Chair suggested that language could be added to Rule 16-406 similar to the following: "If a portion of the proceeding that is being audiotaped or videotaped involves placing on the record matters that should not be open to the public and would not be stated in open court, appropriate safeguards should be placed on that portion of the record." This or similar language would alert the parties and the judge.

The Vice Chair commented that in Baltimore City, the troublesome testimony is skipped over. What happens when the public requests the skipped language? Judge Heller pointed out that subsection e. 5 of Rule 16-109 provides: "There shall be no audio coverage of private conferences, bench conferences, and conferences at counsel tables." Judge McAuliffe noted that it is difficult to prohibit this when making a record. The trial judge upon request or *sua sponte* may redact language. The clerk keeps a log and has the capacity based upon digital marking to go directly to the testimony to be omitted. The Chair clarified that this would be part of the record, but the portion would not be available by audiotape or videotape.

Judge Kaplan remarked that a large percentage of the criminal docket in Baltimore City consists of drug cases. When the defense attorneys and the prosecutors come to the bench, the judge pushes the bench conference button that turns off the

microphone to the courtroom. Judge Kaplan expressed the view that it would be dangerous to have this portion of the trial available by access to a videotape of the proceeding. The Vice Chair inquired as to whether the videotape would tape the bench conference. Judge Kaplan replied that it would. It could be dangerous for a witness in a drug case to have his or her face shown on television. The Chair clarified that the videotape cannot be shown on television; it is only available to be viewed in the courthouse. One cannot leave the courthouse with a copy of the videotape. Judge Kaplan said that he had no problem with the media viewing the tape in the courthouse, as long as no copies can be made. It is important to avoid a situation where a trial cannot proceed because the witness will not testify.

The Chair stated that there is agreement in substance as to the procedures for making tapes available to the public. The lurking danger is that the microphones will pick up privileged communications. The Vice Chair remarked that the new language for the Rule will include the following: (1) all copies of audiotapes (except court stenographers' back-up tapes) are public records and are available to the public, unless the court orders otherwise; (2) anyone may watch a videotape unless the court orders otherwise; and (3) the court shall ensure that non-public information is safeguarded. The Vice Chair added that notes and compact discs in the possession of the court reporters do not fall under this Rule, and Judge Dryden noted that the rules will be the same for the circuit courts and the District Court. The

Chair suggested that the Rules of other states be reviewed to see how the audiotape and videotape access concerns discussed by the Committee today, such as redaction of bench conference discussions, are addressed in other jurisdictions. Ms. Lucan stated that she would provide to the Committee information on this topic.

Agenda Item 1. Reconsideration of proposed Rules changes recommended by the Criminal Subcommittee: New Rule 4-355 (Preservation of Evidence) and Amendments to Rule 4-322 (Exhibits)

Judge Missouri presented Rule 4-355, Preservation of Evidence, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

ADD new Rule 4-355, as follows:

Rule 4-355. PRESERVATION OF EVIDENCE

(a) Computer-Generated Evidence

The party offering computer-generated evidence at any proceeding shall preserve the computer-generated evidence, furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal, and present the computer-generated evidence to an appellate court if the court so requests.

Cross reference: For the definition of "computer-generated evidence," see Rule

2-504.3.

Committee note: This section requires the proponent of computer-generated evidence to reduce the computer-generated evidence to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence and the technology available for preservation of that computer-generated evidence. No special arrangements are needed for preservation of computer-generated evidence that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer generated evidence. However, when the computer-generated evidence involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence must make other arrangements for preservation of the computer-generated evidence and any subsequent presentation of it that may be required by an appellate court.

(b) DNA Identification Evidence

The State shall preserve scientific identification evidence in conformance with the requirements of Code, Criminal Procedure Article, §8-201. The evidence shall be preserved for the duration of the defendant's sentence, including any consecutive sentence imposed in connection with the offense.

Cross reference: Rule 4-322.

Source: This Rule is new.

Rule 4-355 was accompanied by the following Reporter's Note.

Because of the recently added statute, Code, Criminal Procedure Article, §8-201, which provides that the State must preserve scientific identification evidence that the State has reason to know contains DNA

> material and that is secured in connection with certain offenses, the Criminal Subcommittee recommends the addition of a new Rule that would include a reference to the statutory provision and the provision pertaining to preservation of computer-generated evidence that had been previously located in Rule 4-322.

Judge Missouri explained that Code, Criminal Procedure Article, §8-201, was modified to provide that the State is required to preserve scientific identification evidence that the State has reason to know contains DNA material. The Criminal Subcommittee recommends the addition of new Rule 4-355. Section (a) of the new Rule transfers from Rule 4-322, Exhibits, a provision pertaining to the preservation of computer-generated evidence. Section (b) of the new Rule pertains to DNA evidence. The Vice Chair asked whether any changes had been made to section (a) of proposed new Rule 4-355, and Judge Missouri replied that there were none. He pointed out that a copy of an e-mail received from Russell Butler, Esq., had been distributed at the meeting. See Appendix 2. Mr. Butler referred to a comment from Robert Gibson, Director of Planning and Statistics for the Department of Public Safety and Correctional Services, who had asked for what length of time the evidence must be kept. Judge Missouri note that there should be a tickler file that tells the prosecutor when to dispose of the evidence. The Subcommittee did not consider this aspect when drafting the Rule. The view of the Subcommittee is that the evidence would be kept as long as necessary, even beyond the duration of the sentence.

The Vice Chair noted that the Code, Criminal Procedure Article, §8-201 (j) provides that the State may dispose of scientific identification evidence before the expiration of the time period presented in section (i) in certain circumstances. The reference in the Rule to the time period should be deleted. Judge Missouri agreed to the deletion, and the Committee agreed by consensus to take out the second sentence. The Chair said that the reference to the Code provision is sufficient. The Vice Chair suggested that the tagline to the new section should be "Scientific Identification Evidence," and the Committee, by consensus, agreed to this change.

The Vice Chair asked whether it is appropriate to combine the scientific identification evidence provision with the computer-generated evidence provision. The latter was placed in Rule 4-322, Exhibits, and it pertains to technical evidence that has been offered or admitted in evidence at a court proceeding. Scientific identification evidence is a much broader category and is related to investigation. An inference is created in section (b) that the evidence to be preserved is evidence that has been offered or admitted at a court proceeding, as opposed to evidence that has been collected regardless of whether it ever has been offered or admitted. The Chair suggested that this provision be placed in a new rule, which would be placed in Title 4, Chapter 600, Criminal Investigations and Miscellaneous Provisions. Judge Missouri expressed the view that the Rule should not be moved elsewhere. The Vice Chair questioned as to whether the statute

is already in effect, and Judge Missouri replied that it went into effect on October 1, 2003. Judge Missouri noted that Rule 4-641 is entitled "Criminal Investigation –- Applicability."

Judge McAuliffe expressed the opinion that the two sections of proposed new Rule 4-355 should remain together. If the second section is placed in Title 4, Chapter 600, it will be hidden. The Vice Chair commented that section (b) should be placed into a separate Rule. The Reporter suggested that the Rule could be numbered Rule 4-645. The Chair said that one would not look at the investigation section of the Rules to find out how to preserve evidence. The Rule should be placed near the Rules pertaining to sentencing. The Reporter remarked that the directives of section (b) concern only the State's Attorneys. The Rule could be placed anywhere in Title 4, and State's Attorneys would not overlook it. Mr. Dean added that the Rule pertains to evidence that has not been marked by the court and is in police custody. When the crime laboratories deal with the evidence, they have to preserve it. The Chair commented that the State has to preserve the evidence whether or not it has been received into evidence at the trial.

The Vice Chair said that the purpose of the statute is clear. The Style Subcommittee can draft the exact language and ascertain the placement of the Rule. The Chair added that the second sentence will be eliminated, and the language of the Rule will be redrafted to include the concept that the evidence must be preserved whether or not it has been offered or received into

evidence at trial. The Vice Chair commented that the Rule should not be a redrafting of the statute. She noted that the language "but only if the person was convicted" should be added to the Rule. The Reporter asked if the language "whether or not the evidence has been offered or received into evidence at trial" should be added to the Rule. The consensus of the Committee was that this language should be added. The Reporter inquired as to whether the cross reference to Rule 4-322 should be deleted. The consensus of the Committee was that it should be deleted.

Mr. Karceski suggested that the proposed Rule could be added into Rule 4-262, Discovery in District Court, and Rule 4-263, Discovery in Circuit Court, and the following language could be added to those Rules: "The State's Attorney shall furnish to the defendant any relevant material or information ... including scientific evidence to be preserved." There are certain items about which the client and counsel may not know. The onus would be on the State to (a) make them available and (b) ensure their preservation. The Reporter suggested that if language is added to Rules 4-262 and 4-263, the statute should be cross referenced in the Rules. Judge Dryden remarked that this would solve the notice problem. The Chair suggested that language referring to the continuing duty to disclose should be added. Judge Missouri commented that the placement of the language of proposed Rule 4-355 into Rules 4-262 and 4-263 should be discussed later when an issue referred by Mr. Brault to the Criminal Subcommittee, the duty of the State to disclose Brady material (referring to the

case of Brady v. Maryland, 373 U.S. 83 (1963)), is discussed by the full Committee. The Conference of Circuit Judges will discuss this at its May meeting, and afterwards the issue can be brought up to the full Committee. The Committee agreed with this suggestion by consensus.

Agenda Item 3. Consideration of proposed amendments to: Rule 2-241 (Substitution of Parties) and Rule 2-341 (Amendment of Pleadings)

Mr. Brault presented Rule 2-241, Substitution of Parties, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 200 - PARTIES

AMEND Rule 2-241 to add a new subsection (a)(6), as follows:

Rule 2-241. SUBSTITUTION OF PARTIES

(a) Substitution

The proper person may be substituted for a party who

(1) dies, if the action survives,

(2) becomes incompetent,

(3) transfers an interest in the action, whether voluntarily or involuntarily,

(4) if a corporation, dissolves, forfeits its charter, merges, or consolidates, ~~or~~

(5) if a public officer, ceases to hold office, or

(6) if a personal representative, trustee, guardian, or receiver, resigns or dies.

(b) Procedure

Any party to the action, any other person affected by the action, the successors or representatives of the party, or the court may file a notice in the action substituting the proper person as a party. The notice shall set forth the reasons for the substitution and, in the case of death, the decedent's representatives, domicile, and date and place of death if known. The notice shall be served on all parties in accordance with Rule 1-321 and on the substituted party in the manner provided by Rule 2-121, unless the substituted party has previously submitted to the jurisdiction of the court.

(c) Objection

Within 15 days after the service of the notice of substitution, a motion to strike the substitution may be filed.

(d) Failure to Substitute

If substitution is not made as provided in this Rule, the court may dismiss the action, continue the trial or hearing, or take such other action as justice may require.

Source: This Rule is derived as follows:
Section (a) is derived in part from former Rules 220, 222, and 240 and the 1963 version of Fed. R. Civ. P. 25 (a), (b), (c), and (d) and is in part new.
Section (b) is derived from former Rule 220 c, d and e.
Section (c) is new.
Section (d) is derived from former Rule 220 f.

Rule 2-241 was accompanied by the following Reporter's Note.

In response to a question by the Honorable John F. Fader, II asking why Rule 2-241 does not specify that a successor

> personal representative can be substituted in a case in which the predecessor personal representative, who has resigned, was a party, the Process, Parties, and Pleading Subcommittee recommends the addition of new subsection (a)(6) to Rule 2-241.

Mr. Brault explained that the Honorable John F. Fader, II, retired judge of the Circuit Court for Baltimore County, had questioned as to why Rule 2-241 does not specify that a successor personal representative can be substituted when the predecessor personal representative, who has resigned, was a party to a case. Mr. Brault suggested that in lieu of the proposed new language, the following language should be substituted: "if a personal representative, trustee, guardian, or receiver is replaced." The Vice Chair added that the new language should include the words "or dies." Mr. Bowen suggested that the new language should be "if a personal representative, trustee, guardian, or receiver resigns, is removed, or dies." The Committee agreed by consensus to Mr. Bowen's suggestion.

Ms. Potter suggested that a new subsection (7) be added to section (a) of Rule 2-241, "for good cause" that would serve as a catchall category. If a suit is filed against a group of insurers and afterwards the group changes its name, the Rule does not provide for substitution. The Vice Chair noted that the Rule provides that pleadings cannot be amended to include a new party unless another party remains. Judge McAuliffe pointed out that in the case referred to by Ms. Potter, it is simply a matter of the wrong name. The Vice Chair inquired if in Ms. Potter's case,

the company did not previously exist or if it was a matter of a misnomer. Ms. Potter answered that it was a misnomer. The Vice Chair said that in that situation, the pleading could be amended. The consensus of the Committee was that a catchall provision is not needed. The Committee approved the Rule as amended.

Mr. Brault presented Rule 2-341, Amendment of Pleadings, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-341 to add certain requirements concerning the highlighting of amendments to pleadings, as follows:

Rule 2-341. AMENDMENT OF PLEADINGS

(a) Prior to 15 Days of Trial Date

A party may file an amendment to a pleading at any time prior to 15 days of a scheduled trial date. Within 15 days after service of an amendment, any other party to the action may file a motion to strike setting forth reasons why the court should not allow the amendment. If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading or within 15 days after service of the amendment, whichever is later. If no new or additional answer is filed within the time allowed, the answer previously filed shall be treated as the answer to the amendment.

(b) Within 15 Days of Trial Date and Thereafter

Within 15 days of a scheduled trial date or after trial has commenced, a party may file an amendment to a pleading only by written consent of the adverse party or by leave of court. If the amendment introduces new facts or varies the case in a material respect, the new facts or allegations shall be treated as having been denied by the adverse party. The court shall not grant a continuance or mistrial unless the ends of justice so require.

Committee note: By leave of court, the court may grant leave to amend the amount sought in a demand for a money judgment after a jury verdict is returned.

(c) Scope

An amendment may seek to (1) change the nature of the action or defense, (2) set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended, (4) correct misnomer of a party, (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, (6) add a party or parties, (7) make any other appropriate change. Amendments shall be freely allowed when justice so permits. Errors or defects in a pleading not corrected by an amendment shall be disregarded unless they affect the substantial rights of the parties.

(d) Highlighting of Amendments

Unless otherwise ordered by the court, a party filing an amended pleading shall provide to all counsel and to the clerk (1) a clean copy of the amended pleading and (2) a copy of the amended pleading in which stricken material has been lined through or enclosed in brackets and new material has been underlined or set forth in bold-faced

type.

~~(d)~~ (e) If New Party Added

If a new party is added by amendment, the amending party shall cause a summons and complaint, together with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action, to be served upon the new party.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 320.
Section (b) is new and is derived in part from former Rule 320 e.
Section (c) is derived from sections a 2, 3, 4, b 1 and d 5 of former Rule 320 and former Rule 379.
Section (d) is derived from the 2001 version of L.R. 103 (6)(c) of the Rules of the District Court for the United States District of Maryland.
Section ~~(d)~~ (e) is new.

Rule 2-341 was accompanied by the following Reporter's Note.

Based on a suggestion from the Honorable Paul A. Hackner, the Process, Parties & Pleading Subcommittee recommends that Rule 2-341 be amended to require that a party filing an amended pleading highlight the changes made by the amendment. The Subcommittee recommends that the procedure track the procedure set forth in L.R. 103 (6)(c) of the Rules of the United States District Court for the District of Maryland.

The Subcommittee is divided as to whether a comparable amendment should be made to Rule 3-341 and requests that the Rules Committee address this matter as a policy issue.

Mr. Brault explained that the Honorable Paul A. Hackner, a Judge of the Circuit Court for Anne Arundel County, had suggested

that Rule 2-341 require that a party who files an amended pleading required to highlight the changes made by the amendment. The Process, Parties, and Pleading Subcommittee believes that Judge Hackner's idea is a good one. When there are changes to very long complaints or answers, it is difficult to tell what has been amended. The change to the Rule would require the person amending to highlight the amendments. Mr. Maloney expressed his agreement with Judge Hackner, but he suggested that there be a requirement that the court request the highlighting or that a party file a motion before the person amending has to highlight the changes. There are so many amended complaints that this may create a burden for practitioners.

Mr. Klein suggested that a threshold number of pages could be added. Mr. Shipley pointed out that there would be a filing space problem if both clean and marked copies of amended pleadings are filed. Mr. Brault suggested that the Rule could require the filing of only those parts of the pleadings that have been amended. Ms. Potter remarked that if an amended complaint is filed to bring in a new party, the entire complaint has to be filed. Mr. Brault said that the new party receives the amended pleading as do the remaining parties. Judge Missouri commented that Judge Hackner, as a Business and Technology Case management Program judge, sees many amended complaints. Ordinarily, in other cases, highlighting the amendments to pleadings is not as important. Even if the Rule provides that the court must ask for the highlighting, there will be still be a great amount of paper

to be filed.

The Chair pointed out that even without a Rule, a judge can ask for amendments to be highlighted. Mr. Bowen said that he does not think that it would be a problem to require the clean copy of the amended pleading to be filed in the clerk's office. The highlighted version would be for the convenience of the judge and the parties. The Chair asked if this change could be made in the Business and Technology rules. The Vice Chair answered that she preferred that the change be made to Rule 2-341, as proposed. This is similar to the local rule of the United States District Court for the District of Maryland, L.R. 103 (6)(c). She expressed the view that the highlighting should be automatic and not based on the court looking at each case. It is much harder to redline changes after the fact.

The Chair commented that there is no parallel rule in Title 3 applicable to the amendment of pleadings in the District Court of Maryland. Mr. Brault reiterated that what should have to be filed is a copy of the highlighted portion only, which would reduce the amount of paper filed. The Chair observed that the federal courts are computerized, and no papers are filed. Mr. Johnson inquired as to whether there will be electronic filing in Business and Technology cases. Judge Heller replied that there will be in the future. Mr. Sykes questioned whether the highlighted copy is part of the court record. Judge Heller responded affirmatively. Mr. Sykes noted that if the judge gets the highlighted copy, it may not get into the clerk's file.

Judge Heller explained that it would go into the official court file. The judge can ask for a courtesy copy, but the filed copy cannot be removed from the file. Mr. Bowen remarked that the highlighted copy is for the convenience of the court only and is not part of the clerk's file.

The Chair said that when the complaint is amended, a judge may not even have been assigned to the case yet, but in the federal court, a judge has already been assigned. Judge Heller observed that if the highlighted copy is in the court record, it will not be lost. The Vice Chair said that one judge may be assigned to the case to hear a motion to dismiss, but a motion for summary judgment may go to a different judge. Mr. Maloney commented that the proposed change would benefit counsel as well; otherwise, counsel would have to compare the original and the amended documents.

Judge McAuliffe expressed the opinion that subsection (d)(1) is not necessary. Mr. Klein suggested that the Rule could place the burden on the party filing an amended pleading to retain a highlighted copy of it, so that it is not lost. The procedure would be similar to that of the circuit court discovery rules. Mr. Brault suggested that if the highlighted copy is sent to the other party, a copy should go into the court file. Mr. Maloney noted that a 200-page clean copy could be 300 pages highlighted. This would add volumes to the court files. A judge can request the highlighted copy. In the Business and Technology rules, this could be a part of the scheduling order. Mr. Shipley asked

whether, instead of filing two copies, only the highlighted copy could be filed. The Reporter pointed out that this may be hard to read. The Chair noted that the trial should be based on the clean amended complaint. He suggested that proposed section (d) be moved to section (e) and that the attorney who is filing the amended pleading be required to provide all counsel with a copy of the highlighted amended complaint.

Mr. Bowen moved that the phrase "Unless otherwise ordered by the court ..." be changed to "If ordered by the court ...," and the rest of the language would remain. The motion was seconded. Mr. Sykes suggested that the word "ordered" be changed to the word "requested." Mr. Bowen agreed to this amendment of his motion, as did the person seconding the motion. The Reporter referred to the point made by the Vice Chair that ordering or requesting that a highlighted version be prepared after the amendments have been made can be difficult. Mr. Maloney noted that if the document is created on the computer in Microsoft Word, generating the highlighted copy is easier after the fact, if the attorney saved an electronic copy of the pleading before the changes were made. Mr. Klein remarked that in a single word processing file, generating the highlighted copy after the amendments to the document have been made is difficult. Mr. Johnson added that once the court orders the preparation of a highlighted copy, it is too late. The Chair commented that it is preferable to do the later work than to require everyone to file a highlighted copy of an amended pleading. Mr. Sykes withdrew

his amendment to change “ordered” to “requested.” The Chair stated that the language of Mr. Bowen’s motion is “if ordered by the court.”

Mr. Klein expressed his preference for an automatic procedure. The Vice Chair said that the Subcommittee version stands unless it is amended. The Chair called for a vote on Mr. Bowen’s motion. There were 10 in favor, and seven opposed. The Reporter suggested that in subsection (2) of section (d) the following language should be added “that portion of” so the wording of that subsection would be: “a copy of that portion of the amended pleading...”. The Committee agreed to this change by consensus. The Chair suggested that the order of sections (d) and (e) be reversed, and the Committee agreed by consensus to this suggestion.

Ms. Potter expressed the concern that the new provision will create a burden. Mr. Klein reiterated that it might be better to add in a threshold page limit. The Vice Chair noted that a clean copy also has to be filed. Judge McAuliffe inquired as to why this is so. Mr. Brault remarked that the Style Subcommittee can work this out. The Vice Chair observed that by using the word “ordered,” the court could issue a standing order which would supersede the Rule and become a local rule. The Rule should state what is expected rather than encourage different rules in different courts.

Mr. Maloney commented that this proposed change is only relevant in the Business and Technology cases, but it applies to

any pleading, answer, or cross-claim. Mr. Sykes moved for reconsideration of the vote. The motion was seconded. Judge Dryden suggested that the Subcommittee look at the Rule again. The Chair suggested that the Subcommittee check with the Conference of Circuit Judges as to whether the change should be made across the board or only in Business and Technology cases. Mr. Sykes recommended that the clerks be asked for their opinion. Mr. Bowen stated that a highlighted copy of amendments to pleadings should not be filed with the clerk's office. The Chair called for a vote on the motion to reconsider amending the Rule, and the motion passed unanimously. The Chair stated that the Rule will be reconsidered by the Process, Parties, and Pleading Subcommittee, and that the Conferences of Circuit Judges and Circuit Court Clerks would be consulted.

Agenda Item 4. Consideration of a "housekeeping" amendment to Rule 8-131 (Scope of Review)

The Reporter presented Rule 8-131, Scope of Review, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 8 - APPELLATE REVIEW IN THE COURT OF APPEALS AND COURT OF SPECIAL APPEALS

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 8-131 to delete a certain obsolete cross reference, as follows:

Rule 8-131. SCOPE OF REVIEW

(a) Generally

The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

~~Cross reference: Code, Courts Article, §3-832.~~

. . .

Rule 8-131 was accompanied by the following Reporter's Note.

The cross reference that follows section (a) of Rule 8-131 is proposed to be deleted in light of the repeal of Code, Courts Article, §3-832 by Chapter 414, Acts of 2001, effective March 1, 2002.

The Reporter explained that Code, Courts Article, §3-832, which had been applicable when the District Court was hearing juvenile cases in Montgomery County, has been repealed. One of the publishers of the Maryland Rules questioned whether there should be a general cross reference to all of the appellate provisions in the Courts Article, but this is not the way the Rules are structured. It is preferable to delete the provision. The Committee agreed by consensus to the deletion.

The Chair adjourned the meeting.