COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 1 & 2 of the Judiciary Education and Conference Center, 2009 Commerce Park Drive, Annapolis, Maryland on February 3, 2012.

Members present:

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

Albert D. Brault, Esq.
James E. Carbine, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Debbie L. Potter, Esq.
Kathy P. Smith, Clerk
Steven M. Sullivan, Esq.
Melvin J. Sykes, Esq.
Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kara K. Lynch, Esq., Assistant Reporter
Kelley O'Connor, Administrative Office of the Courts
Paul DeWolfe, Esq., Office of the Public Defender
Michele Nethercott, Esq., University of Baltimore Law Clinic
Hon. Shelia R. Tillerson Adams, Circuit Court for Prince George's County
Hon. Ben C. Clyburn, Chief Judge, District Court of Maryland
Scott D. Shellenberger, Esq., State's Attorney for Baltimore County
Brian L. Zavin, Esq., Office of the Public Defender
David Weissert, Coordinator of Commissioner Activity, District Court of Maryland
David R. Durfee, Jr., Esq., Executive Director, Legal Affairs
Robert Prender, Managing Commissioner, District Court Headquarters
Mary Lou McDonough, Department of Corrections
Gregory O. Harris, Department of Corrections, Prince George's County
Ms. Natalie Ellerder
Mr. John Archibald

Hon. Alexandra N. Williams
Julia Doyle Bernhardt, Esq., Office of the Attorney General
Hon. JoAnn M. Ellinghaus-Jones
Richard Montgomery, Director, Legislative Relations, Maryland State Bar Association
Kathleen Wherthey, Esq., Deputy Director, Legal Affairs
Angelita Plemmer, Director, Office of Communications and Public Affairs

The Chair convened the meeting. He introduced Robert Zarbin, Esq., as a newly appointed member of the Rules Committee. He is a trial attorney in Prince George's County and was appointed to fill the unexpired term of Linda Schuett, Esq. The Chair welcomed Mr. Zarbin to the Committee.

The Chair announced as well that Judge Zarnoch had been designated by the Court as the new Vice Chair of the Committee. With a touch of sadness, the Chair noted the death of the Honorable Francis M. Arnold on February 1, 2012. Judge Arnold had been a valued member of the Rules Committee from 1986 to 1991. He had served on the District Court for Carroll County from 1975 to 1980 and on the Circuit Court for Carroll County from 1980 to 1999.

Agenda Item 1. Consideration of proposed amendments to Rule 4-216 (Pretrial Release – Authority of Judicial Officer; Procedure) and proposed new Rule 4-216.1 (Further Proceedings Regarding Pretrial Release) and Conforming amendments to: Rule 4-202 (Charging Document - Content), Rule 4-213 (Initial Appearance of Defendant), Rule 4-214 (Defense Counsel), Rule 4-215 (Waiver of Counsel), Rule 4-231 (Presence of Defendant), Rule 4-263 (Discovery in Circuit Court), and Rule 4-349 (Release After Conviction)

The Chair presented Rule 4-216, Pretrial Release - Authority of Judicial Officer; Procedure, proposed new Rule 4-216.1,

Further Proceedings Regarding Pretrial Release; and conforming amendments to: Rules 4-202, Charging Document - Content; 4-213, Initial Appearance of Defendant; 4-214, Defense Counsel; 4-215, Waiver of Counsel; 4-231, Presence of Defendant; 4-263, Discovery in Circuit Court; and 4-349, Release After Conviction, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 to clarify section (a) regarding a finding of probable cause, to require a written record of certain determinations by the judicial officer, to add section (d) outlining the duties of the Office of the Public Defender and judicial officers with respect to a defendant's right to counsel, to add provisions concerning waiver of counsel, to allow attorneys to appear by remote electronic means under certain circumstances, to add section (g) requiring a judicial officer to make a written record of the proceeding, and to make stylistic changes, as follows:

Rule 4-216. PRETRIAL RELEASE <u>– AUTHORITY OF JUDICIAL OFFICER; PROCEDURE</u>

(a) Arrest Without Warrant

If a defendant was arrested without a warrant, the judicial officer shall determine whether there was probable cause for the arrest <u>and, as to each charge, make a written record of the determination</u>. If there was probable cause <u>for at least one charge</u>, the judicial officer shall implement the remaining sections of this Rule. If there was no probable cause <u>for any of the charges,</u>

the judicial officer shall release the defendant on personal recognizance, with no other conditions of release, and the remaining sections of this Rule are inapplicable.

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

(b) Defendants Eligible for Release by Commissioner or Judge

In accordance with this Rule and Code, Criminal Procedure Article, §§5-101 and 5-201 and except as otherwise provided in section (c) of this Rule or by Code, Criminal Procedure Article, §§5-201 and 5-202, a defendant is entitled to be released before verdict on personal recognizance or on bail, in either case with or without conditions imposed, unless the judicial officer determines that no condition of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community.

(c) Defendants Eligible for Release Only by a Judge

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

(d) Counsel

(1) Generally

For purposes of this section, an initial appearance before a judicial officer

shall be deemed to be a separate and distinct stage of a criminal action. It commences with the appearance of the defendant before the judicial officer and ends when a final order of the judicial officer is entered pursuant to sections (e) or (f) of this Rule.

(2) Duty of Public Defender

(A) Provisional Representation

Unless another attorney has entered an appearance or the defendant waives the right to counsel for purposes of the initial appearance in accordance with this section, an attorney designated by the Public Defender shall provisionally represent each eligible defendant at the initial appearance with respect to all issues relevant to the duties and determinations made by the judicial officer pursuant to sections (e) and (f) of this Rule. For purposes of this Rule, eligibility shall be determined at the time of the proceeding based on resources immediately available to the defendant at that time.

(B) Entry of Limited Appearance

If the Public Defender provides provisional representation, the attorney shall enter an appearance in writing, but if a written entry of appearance is impracticable under the circumstances, the judicial officer shall make a written record of the appearance and the name of the attorney. The appearance shall be deemed to be limited solely to the initial appearance before the judicial officer and shall terminate automatically upon the conclusion of that proceeding.

(C) Effect of Conflict with Rule 4-214

This section prevails over any inconsistent provision in Rule 4-214.

(3) Waiver

(A) Unless an attorney other than the Public Defender has entered an appearance,

the judicial officer shall advise the defendant that:

(i) the defendant has a right to counsel at the initial appearance and for any proceeding under Rule 4-216.1;

(ii) if the defendant is eligible, the Public Defender will represent the defendant at the initial appearance and in any proceeding under Rule 4-216.1, although a different attorney may be designated to represent the defendant in each proceeding; but

(iii) any further representation by the Public Defender will depend on a timely application for such representation by the defendant and a determination that the defendant is an indigent individual, as defined in Code, Criminal Procedure Article, §§16-101 (d) and 16-210 (b).

Committee note: Rule 4-213(a)(2) requires the judicial officer to advise the defendant of the right to counsel generally. In providing that advice, the judicial officer should explain that it pertains to the right to counsel for all proceedings after the initial appearance under this Rule and a review hearing under Rule 4-216.1.

(B) If the defendant indicates a desire to waive counsel, the judicial officer shall advise the defendant that the defendant may be facing immediate detention pending a review hearing before a judge at the next session of the court and that an attorney can be helpful in arguing that the defendant should be released immediately on recognizance or on bail with minimal conditions and restrictions. If, after such advice, the judicial officer finds that the defendant knowingly and voluntarily waives the right to counsel for purposes of the initial appearance, the judicial officer shall announce and record that finding and proceed pursuant to sections (e) and (f) of this Rule.

(C) Any waiver found under this Rule is

applicable only to the initial appearance under this Rule.

(4) Remote Appearance

(A) By State's Attorney

The State's Attorney may participate in the proceeding, but is not required to do so. When the physical presence of the State's Attorney is impracticable under the circumstances, the State's Attorney may participate in the proceeding by remote electronic means, provided that the equipment at the judicial officer's location and the State's Attorney's location is adequate to permit the State's Attorney to participate meaningfully in the proceeding.

(B) By Defense Attorney

When the physical presence of a defense attorney is impracticable under the circumstances, the attorney may consult with the defendant and participate in the proceeding by remote electronic means, provided that the equipment at the judicial officer's location and the defense attorney's location is adequate to permit the attorney to consult privately with the defendant and participate meaningfully in the proceeding.

(5) Ex parte Communications

Except as permitted by Rule 2.9 (a)(1) and (2) of the Maryland Code of Conduct for Judicial Appointees or Rule 2.9 (a)(1) and (2) of the Maryland Code of Judicial Conduct, ex parte communications between (A) the State's Attorney, an attorney for the defendant, or a law enforcement officer and (B) the judicial officer are prohibited.

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

Committee note: Rule 2.9 (a)(1) of both the Code of Conduct for Judicial Appointees and

the Code of Judicial Conduct permits ex parte communications for scheduling, administrative, and emergency purposes, so long as they do not address substantive matters, no party will gain a procedural, substantive, or tactical advantage as a result of the communication, and the judicial officer promptly notifies the other parties and gives them an opportunity to respond.

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

(1) Consideration of Factors

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

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

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

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

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

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

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

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

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

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

(2) Statement of Reasons - When Required

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

(3) Imposition of Conditions of Release

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

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

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

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

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

The judicial officer shall advise the defendant in writing or on the record of the conditions of release imposed and of the consequences of a violation of any condition.

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

~~(e)~~ (f) Conditions of Release

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

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

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

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

Drafter's note: At its January 2012 meeting, the Rules Committee approved amendments to current Rule 4-216 (e)(4) [relettered here as (f)(4)]. Revision of this subsection is unrelated to the emergency changes needed to implement *DeWolfe v. Richmond* and will be in a report submitted to the Court on a non-emergency basis.

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

(A) without collateral security;

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

cash deposit of 10% of the full penalty amount;

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

(D) with collateral security of the kind specified in Rule 4-217 (e)(1) equal in value to the full penalty amount; or

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

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

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

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

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

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

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

(g) Record

The judicial officer shall make a brief written record of the proceeding, including:

(1) if a State's Attorney entered an appearance, the name of the State's Attorney and whether the State's Attorney was physically present at the proceeding or appeared by remote means;

(2) if an attorney entered an appearance for the defendant, the name of the attorney and whether the attorney was physically present at the proceeding or appeared by remote means;

(3) if the defendant waived counsel, a confirmation that the advice required by subsection (d)(3) of this Rule was given and that the defendant made a knowing and voluntary waiver;

(4) confirmation that the judicial officer performed each duty specified in section (e) of this Rule and in Rule 4-213 (a);

(5) whether the defendant was ordered held without bail;

(6) whether the defendant was released on personal recognizance; and

(7) if the defendant was ordered released on conditions pursuant to section (f) of this Rule, the conditions attached to the release.

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

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

[Sections (f), (g), (h), (i), and (j) of this Rule have been amended and transferred to proposed new Rule 4-216.1]

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

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

In *DeWolfe v. Richmond* ____ Md. ____ (2012), the Court of Appeals held that, under the Public Defender Statute, indigent defendants are entitled to counsel at the initial appearance before a Commissioner [judicial officer] making a 4-216 bail determination, and at any subsequent District Court bail review hearing. *See also* Code, Criminal Procedure Article, §§16-101 through 16-403. In order to implement the Court's decision, amendments are proposed to Rule 4-216, Pretrial Release, and new Rule 4-216.1, Further Proceedings Regarding Pretrial Release, is proposed for adoption.

Amendments to Rules 4-216 and 4-216.1 outline the duties of the Office of the Public Defender ("OPD") and judicial officers with respect to the right to counsel during initial appearances and subsequent bail review hearings. The amendments to the Rules treat eligibility for OPD representation during the initial appearance and subsequent bail review hearing as separate from each other and from all other stages of the prosecution. Because it is usually not practicable for the OPD to conduct a full eligibility inquiry prior to those proceedings, and because of the equal protection concerns noted by the Court (see *DeWolfe*, footnote 25), the Rule provides for eligibility based upon the resources immediately available at the time of each proceeding. Further representation by the OPD is contingent upon a determination that the defendant is indigent as defined in Code, Criminal Procedure Article, §§16-101 (d) and 16-210 (b). Thus, representation by the OPD during these proceedings is both provisional and limited.

The State's Attorney may participate in the initial appearance and any subsequent bail review hearing, but is not required to do so. Any attorney who wishes to participate may do so by electronic means if physical presence is not practicable. If the defendant wishes to waive the right to counsel, the judicial officer or court shall conduct a limited waiver hearing, and any

waiver shall apply only to that proceeding.

Rule 4-216 makes clear that ex parte communications are not permitted between the judicial officer and either defense counsel or the State's Attorney, except as otherwise provided by Rule 2.9 of the Maryland Code of Conduct for Judicial Appointees and the Maryland Code of Judicial Conduct.

Section (g) of Rule 4-216 is entirely new. It requires the judicial officer to make a brief written record of the proceedings, which shall include whether any attorneys appeared (either physically or remotely), whether the defendant waived the right to counsel, and the outcome of the hearing.

Conforming amendments are made to Rules 4-202, 4-349, 4-231, and 4-263.

Cross references to Rules 4-216 and 4-216.1 are added to Rules 4-213, 4-214, and 4-215.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

ADD new Rule 4-216.1, as follows:

Rule 4-216.1. FURTHER PROCEEDINGS REGARDING PRETRIAL RELEASE

[showing changes from current Rule 4-216 (f), (g), (h), (i), and (j)]

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

(1) Generally

A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to ~~this~~ Rule 4-216 shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court. The District Court shall review the commissioner's pretrial release determination and take appropriate action in accordance with Rule 4-216 (e) and (f). If the defendant will remain in custody after the review, the District Court shall set forth in writing or on the record the reasons for the continued detention.

(2) Duty of Public Defender

(A) Provisional Representation

Unless another attorney has entered an appearance or the defendant waives the right to counsel for purposes of the review hearing in accordance with this section, an attorney designated by the Public Defender shall provisionally represent each eligible defendant at the review hearing. For purposes of this Rule, eligibility shall be determined at the time of the review hearing based on resources immediately available to the defendant at that time.

(B) Entry of Limited Appearance

If the Public Defender provides provisional representation, the attorney shall enter an appearance in writing, but if a written entry of appearance is impracticable under the circumstances, the court shall make a written record of the appearance and the name of the attorney. The attorney may, but need not be, the same attorney who represented the defendant at the initial appearance before a commissioner. The appearance shall be deemed to be a limited appearance solely for the purpose of the review hearing, and shall terminate automatically upon the conclusion of the

proceeding.

(C) Effect of Conflict with Rule 4-214

This section prevails over any inconsistent provision in Rule 4-214.

(3) Waiver

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

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

(ii) if the defendant is eligible, the Public Defender will represent the defendant for purposes of the review hearing; but

(iii) any further representation by the Public Defender will depend on a timely application for such representation by the defendant and a determination that the defendant is an indigent individual, as defined in Code, Criminal Procedure Article, §§16-101 (d) and 16-210 (b).

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

(B) If the defendant indicates a desire to waive counsel, the court shall advise the defendant that the defendant may be facing continued detention pending trial and that an attorney can be helpful in arguing why the defendant should be released on recognizance or on bail with minimal conditions and restrictions. If, after such advice, the court finds that the defendant knowingly and voluntarily waives the right to counsel for purposes of the review hearing, the court shall announce on the record that finding and proceed pursuant to this Rule.

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

(4) Remote Appearance

(A) By State's Attorney

The State's Attorney may participate in the review hearing, but is not required to do so. When the physical presence of the State's Attorney is impracticable under the circumstances, the State's Attorney may participate in the proceeding by remote electronic means, provided that the equipment at the court facility and the State's Attorney's location is adequate to permit the State's Attorney to participate meaningfully in the proceeding.

(B) By Defense Attorney

When the physical presence of a defense attorney is impracticable under the circumstances, the attorney may consult with the defendant and participate in the proceeding by remote electronic means, provided that the equipment at the court facility and the attorney's location is adequate to permit the attorney to consult privately with the defendant and participate meaningfully in the proceeding.

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

~~(2)~~ (5) Juvenile Defendant

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

~~(g)~~ (b) Continuance of Previous Conditions

When conditions of pretrial release have been previously imposed in the District Court, the conditions continue in the circuit

court unless amended or revoked pursuant to section ~~(h)~~ (c) of this Rule.

~~(h)~~ (c) Amendment of Pretrial Release Order

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

~~(i)~~ (d) Supervision of Detention Pending Trial

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

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

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

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

probation.

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

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

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

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

See the Reporter's note to Rule 4-216.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-202 (a) to require the notice in a charging document to include a notification regarding representation of eligible defendants by the Office of the Public Defender for purposes of the initial appearance and subsequent review hearing, 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, you have the right to have a judicial officer decide whether you should be released from jail until your trial.

3. You have the right to have a lawyer.

4. 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.

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

6. <u>If you are eligible, the Public Defender will represent you at your 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.</u> If you want a lawyer <u>for any further proceeding, including trial,</u> 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.

7. 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.

8. 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.

(b) Signature on Charging Documents

A citation shall be signed by a person authorized by law to do so before it is issued. An indictment or information shall be signed by the State's Attorney of a county or by any other person authorized by law to do so. A statement of charges shall be signed by a peace officer or by a judicial officer. A plea to the merits waives any objection that the charging document is not signed.

(c) Specific Requirements

(1) Citation

A citation shall contain a command to the defendant to appear in District Court when notified, and shall contain the signed promise of the defendant to appear when required, except in a citation for a parking violation. Failure of the defendant to sign the promise does not invalidate the citation.

(2) Indictment

An indictment shall conclude with the words "against the peace, government, and dignity of the State."

Cross reference: See Section 13 of Article IV of the Constitution of Maryland and *State v. Dycer*, 85 Md. 246, 36 A. 763 (1897).

(d) Matters not Required

A charging document need not negate an exception, excuse, or proviso contained in a statute or other authority creating or defining the offense charged. It is not necessary to use the word "feloniously" or "unlawfully" to charge a felony or misdemeanor in a charging document. In describing money in a charging document, it is sufficient to refer to the amount in

current money, without specifying the particular notes, denominations, coins, or certificates circulating as money of which the amount is composed.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 711 a and Rule 711 a.
Section (b) is derived from former M.D.R. 711 b 2 and Rule 711 c.
Section (c) is derived from former M.D.R. 711 b 1 and Rule 711 b.
Section (d) is derived from former Rule 711 d and e and M.D.R. 711 c and d.

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

See the Reporter's note to Rule 4-216.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-213 to add a cross reference following subsection (a)(2), 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) 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 mandatory 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.

(2) 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 Rules 4-216 (d) and 4-216.1 (a) with respect to counsel at an initial appearance before a judicial officer and at a hearing to review a pretrial release decision of a commissioner.

(3) 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.

(4) Pretrial Release

The judicial officer shall comply

with Rule 4-216 governing pretrial release.

(5) Certification by Judicial Officer

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

(6) 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.

(b) In District Court Following Summons

When a defendant appears before the District Court pursuant to a summons, the court shall proceed in accordance with Rule 4-301.

(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. If the appearance is by reason of execution of a warrant, the court shall inform the defendant of each offense with which the defendant is charged, ensure that the defendant has a copy of the charging document, and determine eligibility for pretrial release pursuant to Rule 4-216.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R.

723.

Section (b) is new.

Section (c) is derived from former Rule 723 a.

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

See the Reporter's note to Rule 4-216.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

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

Rule 4-214. DEFENSE COUNSEL

(a) Appearance

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

Cross reference: See Rules 4-216 (d) and 4-216.1 (a) with respect to the automatic

termination of the appearance of the Public Defender upon the conclusion of an initial appearance before a judicial officer and upon the conclusion of a hearing to review a pretrial release decision of a commissioner.

(b) Extent of Duty of Appointed Counsel

When counsel is appointed by the Public Defender or by the court, representation extends to all stages in the proceedings, including but not limited to custody, interrogations, preliminary hearing, pretrial motions and hearings, trial, motions for modification or review of sentence or new trial, and appeal. The Public Defender may relieve appointed counsel and substitute new counsel for the defendant without order of court by giving notice of the substitution to the clerk of the court. Representation by the Public Defender's office may not be withdrawn until the appearance of that office has been stricken pursuant to section (d) of this Rule. The representation of appointed counsel does not extend to the filing of subsequent discretionary proceedings including petition for writ of certiorari, petition to expunge records, and petition for post conviction relief.

(c) Inquiry into Joint Representation

(1) Joint Representation

Joint representation occurs when:

(A) an offense is charged that carries a potential sentence of incarceration;

(B) two or more defendants have been charged jointly or joined for trial under Rule 4-253 (a); and

(C) the defendants are represented by the same counsel or by counsel who are associated in the practice of law.

(2) Court's Responsibilities in Cases of Joint Representation

If a joint representation occurs, the

court, on the record, promptly and personally shall (A) advise each defendant of the right to effective assistance of counsel, including separate representation and (B) advise counsel to consider carefully any potential areas of impermissible conflict of interest arising from the joint representation. Unless there is good cause to believe that no impermissible conflict of interest is likely to arise, the court shall take appropriate measures to protect each defendant's right to counsel.

Cross reference: See Rule 1.7 of the Maryland Lawyers' Rules of Professional Conduct.

(d) Striking Appearance

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

Cross reference: Code, Courts Article, §6-407 (Automatic Termination of Appearance of Attorney). See Rules 4-216 (d) and 4-216.1 (a) providing for limited appearance by the Public Defender in initial appearance

proceedings before a judicial officer and hearings to review a pretrial release decision by a commissioner.

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

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

See the Reporter's note to Rule 4-216.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-215 to add a cross reference following section (e), as follows:

Rule 4-215. WAIVER OF COUNSEL

(a) First Appearance in Court Without Counsel

At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:

(1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.

(2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.

(3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.

(4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.

(5) If trial is to be conducted on a subsequent date, 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.

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

(b) Express Waiver of Counsel

If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.

(c) Waiver by Inaction - District Court

In the District Court, if the defendant appears on the date set for trial without counsel and indicates a desire to

have counsel, the court shall permit the defendant to explain the appearance without counsel. If the court finds that there is a meritorious reason for the defendant's appearance without counsel, the court shall continue the action to a later time, comply with section (a) of this Rule, if the record does not show prior compliance, and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds that there is no meritorious reason for the defendant's appearance without counsel, the court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the trial only if (1) the defendant received a copy of the charging document containing the notice as to the right to counsel and (2) the defendant either (A) is charged with an offense that is not punishable by a fine exceeding five hundred dollars or by imprisonment, or (B) appeared before a judicial officer of the District Court pursuant to Rule 4-213 (a) or before the court pursuant to section (a) of this Rule and was given the required advice.

(d) Waiver by Inaction - Circuit Court

If a defendant appears in circuit court without counsel on the date set for hearing or trial, indicates a desire to have counsel, and the record shows compliance with section (a) of this Rule, either in a previous appearance in the circuit court or in an appearance in the District Court in a case in which the defendant demanded a jury trial, the court shall permit the defendant to explain the appearance without counsel. If the court finds that there is a meritorious reason for the defendant's appearance without counsel, the court shall continue the action to a later time and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds that there is no meritorious reason for the defendant's appearance without counsel, the

court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing or trial.

(e) Discharge of Counsel - Waiver

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. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a) (1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Cross reference: See Rules 4-216 (d) and 4-216.1 (a) with respect to waiver of counsel at an initial appearance before a judicial officer and at a hearing to review a pretrial release decision of a commissioner.

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

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

See the Reporter's note to Rule 4-216.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-231 to add subsection (d)(1) referencing a defendant's right to counsel under Rules 4-216 (d) and 4-216.1 (a) and to make stylistic changes, as follows:

Rule 4-231. PRESENCE OF DEFENDANT

(a) When Presence Required

A defendant shall be present at all times when required by the court. A corporation may be present by counsel.

(b) Right to be Present - Exceptions

A defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248. Cross reference: Code, Criminal Procedure Article, §11-303.

(c) Waiver of Right to be Present

The right to be present under section (b) of this Rule is waived by a defendant:

(1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or

(2) who engages in conduct that justifies exclusion from the courtroom; or

(3) who, personally or through counsel,

agrees to or acquiesces in being absent.

(d) Video Conferencing in District Court

In the District Court, if the Chief Judge of the District Court has approved the use of video conferencing in the county, a judicial officer may conduct an initial appearance under Rule 4-213 (a) or a review of the commissioner's pretrial release determination under Rule ~~4-216 (f)~~ 4-216.1 (a) with the defendant and the judicial officer at different locations, provided that:

(1) the defendant's right to counsel under Rules 4-216 (d) and 4-216.1 (a) is not infringed;

~~(1)~~ (2) the video conferencing procedure and technology are approved by the Chief Judge of the District Court for use in the county;

~~(2)~~ (3) immediately after the proceeding, all documents that are not a part of the District Court file and that would be a part of the file if the proceeding had been conducted face-to-face shall be electronically transmitted or hand-delivered to the District Court; and

~~(3)~~ (4) if the initial appearance under Rule 4-213 is conducted by video conferencing, the review under Rule ~~4-216 (f)~~ 4-216.1 (a) shall not be conducted by video conferencing.

Committee note: Except when specifically covered by this Rule, the matter of presence of the defendant during any stage of the proceedings is left to case law and the Rule is not intended to exhaust all situations. By the addition of section (d) to the Rule, the Committee intends no inference concerning the use of video conferencing in other contexts.

Source: Sections (a), (b), and (c) of this Rule are derived from former Rule 724 and M.D.R. 724. Section (d) is new.

Rule 4-231 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-216.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 (h) to add a section reference to a reference to Rule 4-213, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

. . .

(h) Time for Discovery

Unless the court orders otherwise:

(1) the State's Attorney shall make disclosure pursuant to section (d) of this Rule within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213 (c), and

(2) the defense shall make disclosure pursuant to section (e) of this Rule no later than 30 days before the first scheduled trial date.

. . .

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

See the Reporter's note to Rule 4-216.

AMEND Rule 4-349 to conform an internal reference to the relettering of Rule 4-216, as follows:

Rule 4-349. RELEASE AFTER CONVICTION

(a) General Authority

After conviction the trial judge may release the defendant pending sentencing or exhaustion of any appellate review subject to such conditions for further appearance as may be appropriate. Title 5 of these rules does not apply to proceedings conducted under this Rule.

(b) Factors Relevant to Conditions of Release

In determining whether a defendant should be released under this Rule, the court may consider the factors set forth in Rule 4-216 ~~(d)~~ (e) and, in addition, whether any appellate review sought appears to be frivolous or taken for delay. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(c) Conditions of Release

The court may impose different or greater conditions for release under this Rule than had been imposed upon the defendant pursuant to Rule 4-216 before trial. When the defendant is released pending sentencing, the condition of any bond required by the court shall be that the defendant appear for further proceedings as directed and surrender to serve any sentence imposed. When the defendant is released pending any appellate review, the condition of any bond required by the court shall be that the defendant

prosecute the appellate review according to law and, upon termination of the appeal, surrender to serve any sentence required to be served or appear for further proceedings as directed. The bond shall continue until discharged by order of the court or until surrender of the defendant, whichever is earlier.

(d) Amendment of Order of Release

The court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 776 a and M.D.R. 776 a.
Section (b) is derived from former Rule 776 c and M.D.R. 776 c.
Section (c) is derived from former Rules 776 b and 778 b and M.D.R. 776 b and M.D.R. 778 b.
Section (d) is new.

Rule 4-349 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 4-216.

The Chair said that he would give an update on the issue that is before the Committee today, *DeWolfe v. Richmond*, No. 34, September Term 2011. The memorandum that had been sent out with the meeting materials was dated January 19, 2012. (See Appendix 1). Since then, there had been at least two new developments, legislative initiatives and motions for reconsideration filed in *Richmond* that have put a temporary hold on the issuance of the

mandate. Two bills have been introduced into the House of Delegates and two into the Senate. They all started as emergency bills, and three of them remain so. The intent of the bills as introduced was to confirm the statutory right of indigent people to representation by the Office of the Public Defender (OPD) at a bail review hearing before a District Court judge but to amend the Public Defender statute (Code, Criminal Procedure Article §§16-101 through 16-403), so as not to require Public Defender representation at an initial appearance before a judicial officer (although this usually means the commissioner).

The Chair told the committee that he had attended a four-hour briefing session held by the House Judiciary Committee on January 26, 2012, and Ms. Lynch, an Assistant Reporter, had attended a formal five-hour hearing on the two bills by that Committee on January 31, 2012. By invitation, the Chair had also attended an informal House Judiciary Committee strategy session on February 1, 2012. One of the bills, House Bill 112, had been amended to create a task force to study the entire structure and process for pretrial release decisions. The other bill, House Bill 261, co-sponsored by Delegate Joseph F. Vallario, Jr., as Chair of the Judiciary Committee, and a number of members of that Committee, also confirmed the right of indigents to representation by the OPD at the bail review part of the process but did not require public defenders to appear at the initial appearance before a commissioner.

The Chair noted that there were two Senate bills, one by

Senator Richard F. Colburn and the other by Senator Brian E. Frosh, that were due to be heard on February 8, 2012 in the Senate Judicial Proceedings Committee. The Judiciary has taken no position on any of these bills.

The Honorable Ben Clyburn, Chief Judge of the District Court, and a number of other people from the Judiciary had been at the Judiciary Committee briefing and hearing simply to answer questions but not to take a position on any of the bills. The Chair felt that the sentiment from the House Judiciary Committee, was a recognition that counsel is important at the initial appearance and that if the statutory right is repealed, the constitutional right may be back in the courts.

The Chair said that the Judiciary Committee expressed a real concern about the significant immediate cost and the logistical issues that are involved initially in implementing the *Richmond* decision. There was also much discussion as to whether the two-stage process, the initial appearance before a commissioner followed the next day or at the next court session by a kind of repeat performance before a judge, is the best and the most efficient way to address the right to a quick appearance before a judicial officer. It is a structural issue, and it was noted that Maryland appears to be almost unique in having this two-stage process. This concern is what led to the bill sponsored by Delegate McDermott, being amended to create a task force to study the issue.

The Chair said that the House Judiciary Committee sessions had been very thoughtful. The delegates were trying to understand the process and make the right decisions. The disagreement was over how to balance what they had thought was good policy in the sense of providing counsel at the earliest possible time on release decisions against the cost and the logistical problems of implementing that approach. There had been no movement yet on either of the House bills, although Delegate Vallario's bill was poised for movement and probably Delegate McDermott's bill as well. The Senate would begin hearing their bills next Wednesday.

The Chair commented that as to the motions to reconsider, the case before the Court of Appeals arose from a declaratory judgment entered by the Circuit Court for Baltimore City in a class action suit. The class was certified. The Honorable Alfred Nance had ruled that there was a right of representation for indigents by the Public Defender, and he based his ruling on five different grounds: (1) the Due Process clause of the 14th Amendment, (2) the Maryland analogue to this, Article 24 of the Declaration of Rights, (3) the 6th Amendment right to counsel, (4) the Maryland analogue to this, Article 21 of the Declaration of Rights, and finally (5) the Public Defender statute. All five of those grounds had been argued in the Court of Appeals on a bypass [of review by the Court of Special Appeals] from Judge Nance's decision. The Court decided that since there was a right of representation by the Public Defender under the Public

Defender statute, the Court did not need to reach and expressly did not reach the four constitutional bases found by the circuit court.

The Chair said that on February 1, 2012, the District Court defendants in the case had filed a motion to reconsider. The *Richmond* decision had been filed on January 3, 2012. Under Rule 8-606, Mandate, unless the court orders otherwise, the mandate normally issues 30 days after the opinion is filed, so it was due to be issued today, which was why this issue was being hurried up for consideration. The motion that was filed by the Attorney General on behalf of the District Court defendants pointed out that although the opinion of the Court of Appeals rested solely on the statute, the mandate that it appended at the bottom of the opinion, which is not the official mandate and is there to inform the clerk how the mandate should read, simply states: "Judgment Affirmed." The Attorney General pointed out in the motion to reconsider that this is incorrect and that the opinion is inconsistent with this mandate. The Attorney General noted that what should happen is that either the Court of Appeals should issue its own modified declaratory judgment to rest it solely on the statute or should remand the case to the circuit court for the circuit court to do so. When that motion was filed on February 1, 2012, it put the mandate on hold until that motion is resolved.

The Chair remarked that yesterday, the Public Defender filed

his own motion to reconsider. The Attorney General's motion did not ask the court to modify the opinion in any way, only to change the mandate. When the case had been argued in the Court of Appeals, the Public Defender's position was that there is a constitutional and statutory right to counsel at both of these proceedings, but that the Public Defender would be unable to comply with any mandate to that effect immediately for reasons of cost and logistics. The Public Defender had asked the Court to delay for six to nine months the implementation of any decision the Court would make in favor of a right to representation.

The Chair said that the Court of Appeals had addressed this request in the opinion. Two of the judges agreed that there should be a delay of at least six months to permit the Public Defender to comply, but five judges did not agree. In the opinion, the Court clearly decided that there was to be no delay in implementation other than the usual 30 days to issue a mandate. The motion for reconsideration filed by the Public Defender asked the Court to reconsider its decision not to delay the implementation. The Public Defender's motion requested that implementation be delayed either by delay of the issuance of the mandate or by delay of the effective date of the mandate for 180 days.

Prior to the filing of those motions, the Court had set a date for an open hearing on the Rules for the following Tuesday, February 7, 2012. With the filing of these motions creating an automatic stay on issuance of the mandate, the Court had

postponed the open hearing from February 7, 2012 to February 16, 2012, which was its next conference date. From the point of view of the Rules Committee and of the Court, what was critical was that whenever the Court issues the mandate and makes it effective, the Rules need to be in place that day. The situation cannot be that the mandate takes effect, but the Rules do not. There is no point, however, in the Rules taking effect until it is clear what the Court is going to do with respect to the motions for reconsideration and what the legislature is going to do.

The Chair told the Committee that none of this really affects what the Committee has to do today. If the legislature enacts one of these bills, other than the Task Force bill, and amends the Public Defender law so as not to require representation at the initial appearance before a commissioner, the Rules that are sent to the Court can be easily adjusted. It would be a matter of changing the language pertaining to the initial appearance, but leaving the language pertaining to the review hearing. Some other minor adjustments also may be necessary.

What the Committee must do today is address the points made in the opinion that require changes to the Rules, so that when the Court's mandate takes effect, the Rules can take effect, also. As the Chair had indicated in his memorandum, a copy of which was included in the materials for today's meeting, the Rules will be physically delivered to the Court today. They will

be posted on the Judiciary's website, so that there is transparency and notice of the hearing that is set for February 16, 2012.

Because of the time constraints, the Chair asked the members of the Committee and the interested persons to focus on the wording of the proposed Rules and not on broader policy issues. It was not for the Committee to decide those policy issues. The legislature was looking at a Task Force to do that. Even if the Committee could weigh in, it could not be done today. There are many complications affecting how this should be accomplished. The OPD and the District Court were running into the same issues.

The Chair inquired if anyone wanted to speak on the proposed Rules before the Committee deliberated. Judge Norton asked if the Chair could briefly describe the small group that had initially drafted the changes to the Rules. The Chair responded that, within several days after the *Richmond* decision came down, Mr. DeWolfe had hosted a meeting, at which most of the stakeholders were present. The OPD, the Governor's Office, the Attorney General's Office, some State's Attorneys, the Chair, the Reporter, some people from the detention centers, and representatives from the various police departments had been at the meeting. Some of the discussion had centered on how to proceed. There had been a consensus that a legal structure in the form of emergency rules had to be provided. Other issues had been discussed, also.

The Chair said that following that, a meeting was convened at which the OPD, including Mr. DeWolfe, State's Attorneys, District Court representatives, David Weissert, Coordinator of Commissioner Activity, the Honorable JoAnn Ellinghaus-Jones, a District Court judge from Carroll County, and representatives from the circuit court were in attendance. The proposals before the Committee today had been drafted by that group. There had not been enough time to send the matter to the District Court or the Criminal Subcommittees. What had been drafted as a result of that meeting had been sent to all of the stakeholders, whose comments had been requested. A few comments had been received.

The Chair asked if anyone else had a comment, and none was forthcoming. The Chair noted that from a style perspective, Rule 4-216 had been split. Part of it would now be in proposed new Rule 4-216.1. Rule 4-216 addressed the initial appearance before the commissioner. Proposed new Rule 4-216.1 addressed the review proceeding and whatever comes after.

The Chair drew the Committee's attention to Rule 4-216, Pretrial Release – Authority of Judicial Officer; Procedure. Section (a) of Rule 4-216 pertains to defendants who had been arrested without a warrant. The officer brings the person arrested to the commissioner, who must determine whether there was probable cause for the arrest. The underlined language in section (a) was added to clarify that the commissioner must make a determination as to each charge. It could be important for pretrial release purposes if the commissioner were to find no

probable cause for an armed robbery charge but probable cause for lesser offenses, such as theft or simple robbery. If there is no probable cause for any of the charges, the commissioner must release the person on his or her own recognizance. It does not wipe out the prosecution; it just simply releases the defendant.

The Chair noted that no changes had been made to sections (b) or (c) of Rule 4-216. Section (d) is new language. The Chair had explained the purpose of section (d) in the memorandum he had sent out. It is mainly to address the problem of what the Public Defender would look at to qualify someone for representation by the OPD. The decision was made that it would be necessary to look at the resources that the person has at the time of the arrest. It does not matter if later it turns out that he or she does not meet all of the qualifications for indigents, because the decision has to be made as to whether he or she can afford an attorney at the time of the arrest. This issue had not been debated very much.

Mr. Shellenberger told the Committee that he is the State's Attorney for Baltimore County. He said that he objected to subsection (d)(2)(A) of Rule 4-216, Provisional Representation. He expressed the view that a Rule should not tell the Public Defender who is eligible for representation and who is not. This is already covered by statute. He had discussed this at the Subcommittee meeting. He asked to be on record as stating that his opinion was that it may be dangerous for the Rule to tell the Public Defender basically that anyone who has money, but only has

$10 in his or her pocket when arrested, can qualify for representation.

The Chair explained that the basis for this was that the statute permits provisional representation by the Public Defender. The view of the drafters of the proposed changes to Rule 4-216 was that this is not inconsistent with the statute. Defendants are brought before the commissioner shortly after an arrest, there is a quick hearing, and the person brought in usually has no money with him. What standard can be used to determine whether the person arrested is eligible? That was the basis of the group's recommendation. It is also important to make clear that if the Public Defender does provisionally represent a person, the Public Defender is not then obligated to serve as counsel in the entire case. Rule 4-214 states that once an attorney enters an appearance, the attorney is in for the entire case unless the judge allows the attorney to withdraw. Rule 4-216 had to be clear that because this is a different standard for eligibility in terms of trial than for this appearance before the commissioner, the Public Defender's appearance would only be for the proceeding before the commissioner.

Judge Norton said that he was echoing somewhat Mr. Shellenberger's view. He referred to the last few words in subsection (d)(2)(A) of Rule 4-216 that read: "...eligibility shall be determined at the time of the proceeding based on resources immediately available to the defendant at that time."

Judge Norton expressed the opinion that there should be some averment under oath by the defendant that the defendant is indigent, rather than the defendant simply stating that he or she only has $10 at the time of the arrest. The Chair responded that his understanding from the discussion was that the Public Defender may require an affidavit as to the defendant's assets. If the defendant has $100,000 in the bank, then he or she may not be eligible for representation by the OPD.

Judge Norton noted that the words "immediately available" in subsection (d)(2)(A) of Rule 4-216 may be causing the problem. The Chair asked if anyone had a motion to amend this. Mr. Patterson moved to amend this language, and the motion was seconded. The Reporter questioned what the new language would be. Ms. Ogletree suggested that the word "immediately" be deleted. Judge Norton suggested the language "based on the resources of the defendant." If the person has $100,000 in the bank, the person is not eligible for OPD representation. If the person has $10 in the bank and nothing in his or her pocket, the person would be eligible.

The Chair commented that the discussion at the drafting session on this issue was that if the word "immediately" is dropped, or a period is added after the word "resources," the person may own a house, but it is certainly not available for the person to get an attorney at that time. That was the problem. An attorney would take the case of someone who has $100,000 in the bank. The Reporter remarked that tied to this problem is Mr.

Weissert's concern that the commissioner should not be determining who is eligible for representation by the Public Defender and who is not eligible. In some jurisdictions, such as in Western Maryland, commissioners are on call. What is contemplated later on is that not only is the commissioner on call, but the Public Defender would also be on call. The commissioner may not even call the Public Defender for someone who comes in with a great deal of money. However, there are logistical problems, which the commissioner's office may be able to speak to.

Mr. Shellenberger told the Committee that the entire basis of the Public Defender statute and *Richmond* is to provide representation to indigent defendants. The idea is to give attorneys to poor people. Why should the Rule allow giving attorneys to people who are poor only at that particular moment? Why can the Public Defender not decide who is eligible in this situation when it is done every day? This is not complicated. He suggested that the last sentence of subsection (d)(2)(A) could be stricken.

The Chair pointed out the problem was largely one of timing. The OPD statute requires an application, which is reviewed, and affidavits are filed. Ordinarily, there is time to assess eligibility, so that the OPD can determine if it will represent someone at trial. That is lacking in the case of an initial appearance. Mr. Shellenberger responded that the Rule seems to

state that even for people who can actually afford attorneys, if the time is not available to determine if they can afford an attorney or not, they will get free representation.

The Chair countered that someone would get OPD representation only if the person cannot afford an attorney at that proceeding. The question is what else can be done. If the question of indigency cannot be put into the context of what the existing situation is, these hearings will end up being delayed. Someone may be told that he or she is not eligible, because the person has a house or a car. Will the hearing before the commissioner be delayed until the person can find an attorney, which may be several days after the arrest, and meanwhile, the arrested person is in jail?

Judge Norton noted that if a Public Defender is not available, one can be called remotely, and the Public Defender would be brought into the case without even knowing if the person is eligible. The Chair commented that this issue had been discussed. Judge Clyburn remarked that the reality of the situation is that the commissioners go through a set process, and there will be a stop point where the commissioner will have to make a determination that the arrested person wants to be represented by counsel. It is important to note that these are cases where police officers are bringing people in off the street. Major security issues arise. The people who have been arrested cannot be detained in the commissioner's office for several hours while a call is made to find out if the person

arrested qualifies for representation by the OPD.

The same issue arose in Baltimore City for the Early Resolution Court, which is designed to handle cases where community service and drug education and treatment might be appropriate. In those cases, the Public Defender had agreed to provide provisional representation, so that the cases could be processed. There will be adequate time after that initial appearance for the Public Defender to make the full determination of eligibility. It is a discrete period of time that now only takes a half hour but could take three or four hours. This is the reasoning behind the proposal in the Rule.

Judge Pierson said that he did not understand how this procedure would work, because the commissioner is not going to make the determination of eligibility. It will be the Public Defender who makes it. Judge Pierson asked how the Public Defender will be on call. Will the Public Defender have to come to every initial appearance to make the eligibility determination? The Chair replied that the Public Defender will not necessarily have to do this, but this is a logistical issue, not a Rules issue. The statistic was that in about 7600 cases, the law does not permit the commissioner to release the defendant. The *Richmond* case only applies to the pretrial release part of what the commissioner does, so those cases may be different. Judge Pierson noted that it gets to the point where there is a question of release, the commissioner determines that

he or she may have to make that decision, but the commissioner is not going to make the decision as to eligibility for Public Defender representation. The Chair agreed. Judge Pierson added that the commissioner will call the Public Defender who will make the eligibility determination.

Judge Clyburn said that a system will be set up where the next on-call commissioner receives a call from the police officer, which then leads to the initial appearance. A process will be in place where there will be on-call panel attorneys or Public Defender attorneys. In the system, everyone will be moving toward that initial appearance at the same time. This will be worked out with the OPD. The Chair commented that this issue had been discussed at the drafting session in terms of whether that piece should be in the Rule. Everyone had agreed that it does not need to be in the Rule. The police would call the commissioner; the commissioner would call whichever Public Defender is on duty. In Baltimore City and in Montgomery and Prince George's Counties, the Public Defenders are already available, because those jurisdictions have central booking.

Mr. Patterson remarked that the commissioner's manual contains a list of items to inquire about when the defendant is brought before the commissioner. The commissioner interviews te defendant and records the information on a form. The form is put into a brown envelope and then into the file as a sealed document for use by the judge at a later time. It makes no sense that all of those items can be inquired about, but an inquiry cannot be

made as to the defendant's resources. If the defendant discloses information that would make him or her obviously not eligible for the services of the OPD, the commissioner would know that. The defendant could lie, which will come to light later. However, if the defendant answers the inquiries fully and honestly, the commissioner will know that the defendant has some resources, so that the defendant will not be entitled to a Public Defender.

The Chair pointed out that the commissioner does not make the decision as to eligibility. That has to be determined by the Public Defender. Mr. Patterson responded that this is an initial threshold question for the purposes of determining whether or not the Public Defender has to be called in the night of the arrest. It does not necessarily mean that the defendant will or will not be eligible. It is better to do this than to presume that if the defendant has only $10 in his or her pocket, the defendant will be eligible for representation by a Public Defender notwithstanding what his or her bank account contains or whether the defendant owns a piece of property. Commissioners have the ability to find out all sorts of information. They supposedly are going online doing record checks and finding out about the defendants' criminal backgrounds. It is not an onerous requirement for the commissioners to inquire as to financial resources to make an initial determination as to whether or not it looks as if the defendant will be eligible for OPD representation. It is a screening issue that should be simple for the commissioners.

The Chair remarked that there is no reason that the commissioners cannot do this, but it is the Public Defender who will make the ultimate decision. What standard is to be used in determining eligibility for that proceeding? Mr. Patterson responded that what is being discussed is not the ultimate decision, but the initial decision to contact the Public Defender. The Chair pointed out that Rule 4-216 does not permit the commissioner to take any of those actions.

Mr. Sykes observed that the Rule is stated in the passive voice. It applies provisional representation only when the defendant is eligible. It does not refer to who determines eligibility. The very fact that there has been so much discussion indicates that if the Public Defender is to decide eligibility, even on a temporary basis based on the defendant's immediately available resources, the Rule should so state. Mr. DeWolfe expressed the view that it would take a change in the statute, not in the Rule, because currently the Public Defender Act requires the Public Defender to make that determination. Mr. Patterson's suggestion may be well-taken, but it cannot be changed by rule. Mr. Weissert noted that the commissioner is not screening for eligibility or resources. The commissioner is asking questions that would demonstrate the defendant's ties to the community, such as employment and residence. The commissioners are not specifically asking questions about how much money the defendants have or how many resources they have available, because this information is not being looked for at

this stage of the process.

The Chair said that the OPD had recommended some changes to Rules 4-216 and 4-216.1 that address this issue at least in part. The Public Defender is expressly allowed to go through the full qualification if it is possible. If not, the Public Defender can represent the defendant provisionally. Judge Norton commented that he had asked Mr. DeWolfe if he believes that the language in subsection (d)(2)(A) of Rule 4-216 that reads: "eligibility shall be determined at the time of the proceeding based on resources immediately available to the defendant at that time" is consistent with the current Public Defender statute, or if it is an extension of that. Mr. DeWolfe had answered that to the extent that the statute provides provisional representation, this is consistent with that statute. Judge Norton remarked that since the purpose of today's meeting was to implement the Rules pertaining to the statute, he would withdraw his comment about the language "immediately available."

Ms. McDonough told the Committee that she is the Director of Corrections for Prince George's County. She said that she was confused as to when the arrestee is entitled to an attorney. She thought that the person was entitled to an attorney when he or she sees the commissioner. It appears that this is a two-step process. The person is brought before the commissioner, who asks him or her a list of questions without the person being represented by an attorney.

The Chair clarified that representation would be available

only for the pre-trial release part of the proceedings. Ms. McDonough inquired if the arrestee would be questioned by the commissioner, leave, and then come back with an attorney. The Chair responded that this was not correct. Section (a) of Rule 4-216 provides currently that if the person was arrested without a warrant, the commissioner first shall identify the defendant and determine if there was probable cause for the arrest. The *Richmond* opinion does not require counsel for this. It only requires counsel if the commissioner finds probable cause, because if not, the commissioner must release the defendant on his or her own recognizance. Only after the commissioner finds probable cause for the arrest, does the proceeding get to pretrial release, and under the Court of Appeals decision, this is where counsel is required.

Ms. McDonough observed that this can be a two-step process. The Chair noted that it is a two-step process now. Ms. McDonough responded that no attorney is present, so it really is a one-step process. The defendant only goes before the commissioner once. Without an attorney present, the commissioner decides if there was probable cause. Then an attorney will come in if there is probable cause. The Chair commented that probably if the defendant would like the attorney present for the entire proceeding, the attorney could be there. Ms. McDonough asked who decides whether an attorney will be present. The Chair answered that it is decided by the Public Defender. Ms. McDonough pointed

out that most detainees would want an attorney present to argue that there is no probable cause. The Chair noted that the opinion does not give the defendants a right to an attorney at that point.

Mr. Patterson pointed out that the discussion has been diverted from the issue at hand, which is whether or not to remove a sentence from subsection (d)(2)(A). Having listened to Mr. Weissert's commentary about what the commissioners can and cannot do, Mr. Patterson said that the problem is with the sentence that reads: "For purposes of this Rule, eligibility shall be determined at the time of the proceeding based on resources immediately available to the defendant at that time." Mr. Weissert had stated that the commissioner is not going to ask about the resources. How does this sentence make any sense?

The Chair replied that the Public Defender will ask about the resources. Mr. Patterson inquired how the commissioner would even know to call the Public Defender in the first place if the commissioner does not know whether the defendant is eligible for OPD representation. The Chair commented that this is a logistical issue. Mr. Patterson noted that another problem is the language in subsection (d)(2)(A) of Rule 4-216 that reads: "resources immediately available." What does this mean? Does it mean money in the defendant's pocket or under the defendant's mattress that the defendant's spouse can bring in?

The Chair answered that it means the money under the mattress if the Public Defender knows about it. Mr. Patterson

responded that the problem is that the last sentence of subsection (d)(2)(a) complicates this, and it causes more issues than it solves. If the eligibility is going to be determined by the Public Defender and not by the commissioner, then there is no way to know whether the Public Defender is going to decide that the defendant is eligible until the Public Defender gets to the proceeding in front of the commissioner. Is the Rule to be crafted so that the Public Defender has to come in on every case, or so that the OPD representation is as needed when proper? This particular sentence detracts from this.

Mr. Karceski commented that these problems would be worked out as the process developed. Mr. Karceski said that the problem that he sees, which had been raised by Mr. Sykes, is with the language in subsection (d)(2)(A) of Rule 4-216 that provides that eligibility shall be determined at the time of the proceeding. Whether or not the rest of the sentence remains in the Rule, it may not make a difference, because if eligibility is to be determined by Mr. DeWolfe and his representatives, then that is far as the Rule has to go. Mr. Karceski moved to change the last sentence of subsection (d)(2)(A) of Rule 4-216 to state only that eligibility is to be determined by the OPD. The motion was seconded.

The Chair asked the Committee if anyone objected to making this change to subsection (d)(2)(A) of Rule 4-216. Mr. Johnson said that he had no objection, but he had a question for Mr. DeWolfe about the use of the word “immediately.” Is that the

standard for the review of the criteria for eligibility for representation by the OPD? Mr. DeWolfe replied that it was not, and this was why they provided provisional representation. That representation would end immediately after the hearing, and then the defendant or client would be referred to the OPD for a full eligibility determination.

Mr. Johnson said that he had no problem with Mr. Karceski's suggestion, but Mr. Johnson expressed the view that the word "immediately" should be deleted from subsection (d)(2)(A), so that the language would be "...resources available to the defendant at that time." Judge Norton noted that the change already suggested by Mr. Karceski would be "... eligibility shall be determined by the Public Defender." The remainder of the sentence that now reads "...at the time of the proceeding based on resources immediately available to the defendant at that time" would be eliminated.

The Chair inquired what the motion on the floor was. Mr. Patterson answered that the first motion was to take the last sentence of subsection (d)(2)(A) of Rule 4-216 out. Mr. Karceski had moved to amend this by suggesting that it be taken out, and that it be replaced with the language: "For purposes of this Rule, eligibility shall be determined by the Public Defender." Mr. Karceski clarified that his suggested language was: "For purposes of this Rule, eligibility shall be determined by the Office of the Public Defender at the time of the proceeding." Mr. Sykes suggested that the language should be: "as of the time

of the proceeding." Mr. Karceski accepted this modification as did the person seconding the motion. The Chair called for a vote on the motion, and it carried with two opposed.

Mr. Sullivan referred to the language in the last sentence of subsection (d)(1) of Rule 4-216 that reads "a final order of the judicial officer." He expressed the opinion that this language needs to be amended, because he was not sure that a judicial officer is entitled to issue a final order. Sections (e) and (f) of Rule 4-216 do not refer to a final order. He suggested that the language could be "...when a judicial officer has made the determination pursuant to sections (e) and (f) of this Rule." By consensus, the Committee approved this change.

The Chair said that Brian Zavin, Esq., an Assistant Public Defender, had sent a letter with proposed amendments to Rule 4-216. The Chair asked Mr. Zavin if he still was requesting a change to subsection (d)(2)(A) in light of the changes that the Committee had just made to that provision. Mr. Zavin replied that he still wanted the changes that he had proposed to subsection (d)(2)(A). The first change he had requested was to add the words "represent and may" in the first sentence of subsection (d)(2)(A) after the word "shall" and before the word "provisionally." The sentence would then read: "...an attorney designated by the Public Defender shall represent and may provisionally represent each eligible defendant...". This would provide for the possibility that at some point, the Public Defender can do a full qualification. They were suggesting that

it does not have to be provisional representation and that they could have the option to fully represent the person. The second change that had been requested may not be necessary as it is implicit that the second sentence refers to provisional representation.

The Chair asked if anyone objected to adding the language proposed by the Public Defender with respect to the first sentence of subsection (d)(2)(A) of Rule 4-216, which was "represent and may." By consensus, the Committee approved this change. The Chair inquired about the proposed amendment to subsection (d)(2)(B), which was to add the language "stating that the appearance is limited" after the word "writing" and before the word "but," in the first sentence and to modify the second sentence by changing the first word from "the" to "an" and by adding the language "to provide provisional representation" after the word "appearance" and before the word "shall."

Mr. Zavin explained that the purpose of the amendment was that currently three jurisdictions are staffing bail review hearings, not the hearings before the commissioners. In at least one jurisdiction, the Public Defender does a full qualification before the bail review. The proposed language of subsection (d)(2)(B) of Rule 4-216 suggests that their entry of appearance has to be provisional and that it terminates at the end. If the Public Defender is doing a full qualification, the representation should not terminate at the end. The changes in subsection (d)(2)(B) would follow hand-in-hand with the proposed changes to

subsection (d)(2)(A). This would allow for a full qualification, if the Public Defender is able to do it, and if that happens, the appearance would not be terminated. By consensus, the Committee approved the change to subsection (d)(2)(B).

The Chair drew the Committee's attention to subsection (d)(3) of Rule 4-216, Waiver. Master Mahasa said that she had an issue that could be a matter of style. Is the language "[u]nless an attorney other than the Public Defender has entered an appearance" substantively different than the language "when the Public Defender has entered an appearance?" The Chair said that if another attorney has already entered an appearance, it is not necessary to go through the procedure in subsection (d)(3)(A). Master Mahasa explained that her question was whether the beginning language of subsection (d)(3)(A) could be changed to: "[w]hen the Public Defender has entered an appearance...". The Chair responded that if the Public Defender has entered an appearance, there would be no need for a waiver of counsel. The thought was that if another attorney has entered an appearance, then the defendant has counsel, and there would be no need to go through this waiver procedure. Mr. Brault added that this is also true if the Public Defender has already entered an appearance. Could the beginning of subsection (d)(3)(A) be: "[u]nless an attorney has entered an appearance..."? Judge Pierson commented that this gets back to the logistical issue of the two-step procedure, because this seems to contemplate that the person is going to go before the commissioner for advice on

waiver before the Public Defender has ever called or shown up.

The Chair inquired if there was a motion to strike the language "other than the Public Defender" from subsection (d)(3)(A). He asked Master Mahasa if that was what she had wanted to do. She responded that if Rule 4-216 were to state "[w]hen the Public Defender enters an appearance, the judicial officer shall advise the defendant...", it seems more direct. The current wording is equal to the wording she had just suggested. The Chair said that the wording she had suggested was inconsistent to this extent. If the Public Defender has already entered an appearance, the defendant is not told that he or she would be represented by the Public Defender. The thought regarding this provision was that, unless the person has another attorney, the commissioner tells the defendant that he or she has a right to counsel and that if the defendant is eligible, the Public Defender will represent him or her for this hearing. However, it would only be for this hearing, and then the defendant would have to qualify for further representation. Master Mahasa remarked that this anticipates that the defendant has an attorney already. Mr. Leahy reiterated that the language "other than the Public Defender" should be stricken.

The Chair asked why the defendant would be told that if the defendant is eligible, the Public Defender will represent him or her for this proceeding only, and then the defendant must qualify for further OPD representation if the Public Defender has already entered an appearance. Mr. Karceski commented that

deleting the suggested language would clarify the meaning of the sentence. Unless an attorney has entered an appearance, this is what the judicial officer must do. He moved that the language "other than the Public Defender" be deleted from subsection (d)(3)(A). The motion was seconded.

The Chair called for a vote on Mr. Karceski's motion to delete the language "other than the Public Defender" from subsection (d)(3)(A). The motion carried.

Mr. Sullivan pointed out that the concept of the defendant being eligible had dropped out, so as read, subsection (d)(3)(A)(i) would provide that every defendant is to be advised that he or she has the right to counsel. The Chair responded that every defendant has the right to counsel. Mr. Sullivan noted that *Richmond* addresses only the application of the Public Defender Act. The Chair disagreed, pointing out that Footnote 25 in the opinion provides that there is a clear right to counsel. If the defendant has a private attorney, he or she should be able to appear. It seems that in very few cases, private attorneys show up. There had been some discussion about this before the Judiciary Committee.

Judge Norton referred to subsection (d)(3)(B) of Rule 4-216. This involves the content of what the commissioner has to advise the defendant. He was not sure about the particular advice that the commissioners give currently about waiver of counsel or the benefit of counsel, but he expressed the view that it should be

replicated. He pointed out the language in subsection (d)(3)(B) that reads: "...the judicial officer shall advise the defendant that the defendant may be facing immediate detention pending a review hearing before a judge at the next session of the court ... ." He was not sure that this was the language that was currently being given, and he asked why it would be different.

The Chair responded that the problem is that the advice of right to counsel, as far as the Rules are concerned, appears only in Rule 4-215, Waiver of Counsel, which pertains to the initial appearance of the defendant in court. The judge advises the defendant about counsel. Rule 4-215 is much broader, because the judge has to tell the defendant that an attorney can be helpful in voir dire of the jury, arguing motions, objecting to evidence, dealing with sentencing, etc., none of which is relevant to Rule 4-216. Judge Norton remarked that currently there is a list of what the commissioner does regarding the defendant's existing rights to counsel. The Commissioners already advise defendants of their rights to counsel. The Chair noted that this is for purposes of trial. They give the rights listed in Rule 4-215. The Reporter added that the advice of right to counsel is also given pursuant to subsection (a)(2) of Rule 4-213, Initial Appearance of Defendant, which is pointed out in the Committee note after subsection (d)(3)(A) of Rule 4-216. What is in Rule 4-216 does not negate what is provided for in Rule 4-213 (a)(2).

Mr. Weissert told the Committee that the commissioners give the advice of rights under Rule 4-213. They tell the defendant

that he or she has the right to counsel, which would be helpful for the defendant's trial. Then, because under the current system, the commissioner does not know whether the defendant is going to elect counsel, a sheet is provided that the commissioners term "the important notice," which gives out OPD telephone numbers if the defendant elects a Public Defender and also qualifies for one. This notice is given to defendants in writing. When they leave with their paperwork, they have that information as well as their signed affirmation that they have heard and understand their rights to counsel. It would be prudent to give the advice of rights at the beginning and an ancillary advice of rights to address facing immediate detention without counsel. Mr. Weissert remarked that he did not know the exact language that would be in there, but it is intended to include these two types of advice.

Judge Norton inquired if there are two separate forms of advice. Mr. Weissert answered that it is an advice that emphasizes two areas, so that the advice is not lost in one reading of it and one recording of the written document. The Chair noted that this is in the context of the fact that any waiver of counsel is only good for that proceeding. It does not last beyond it. The intent was to target the advice to what the defendant is facing at that hearing, which is whether the defendant is going to be released, and if so, on what terms. The commissioner does not need to be concerned with the defendant's rights at trial, juries, etc. If the defendant wants

to waive counsel for this proceeding, the defendant should understand that an attorney could be helpful in arguing why the defendant should be released.

Judge Williams told the Committee that she is a District Court judge in Baltimore County. She expressed concern about the language in subsection (d)(3)(B). If the defendant indicates a desire to waiver counsel, the defendant is told that he or she may be facing detention. If, however, the defendant does not waive counsel, he or she definitely will be temporarily detained until a Public Defender is available. It is an untenable position for the defendant. It is guaranteed that if the defendant does not waive counsel, he or she will be temporarily detained. Judge Williams remarked that she would not like to see a defendant misled into believing that it is better to waive counsel then it is to have an attorney. Judge Pierson questioned what the real benefit is of permitting waiver under these circumstances. The Chair replied that the Constitution gives someone the right to waive counsel and proceed on his or her own.

Judge Pierson commented that in this context, another step is being built in, which is going to delay the proceedings. The Chair responded that the opinion of the Court of Appeals has to be addressed. The draft Rules attempt to implement what the Court decided is necessary and not to change the structure of this. Whether legislation passes or not, some of this structure will be needed. It is probably going to change over time as the Public Defender, State's Attorneys, the District Court, and the

jails work out their logistics. Later, the Rules may need to be modified somewhat. A Rule has to be in place, possibly as early as February 16, 2012.

Mr. Patterson said that there was an answer to Judge Pierson's question about what benefit there is to waive counsel. The commissioner may be willing to let the defendant out on $100 bail, but the commissioner would not able to do that if there is a requirement that the defendant has to have an attorney present. To be released, the defendant may be willing to pay the $100 and waive counsel. A waiver can work to a defendant's advantage if the commissioner is going to release him or her anyway. The Chair agreed that that could happen; the defendant has the right to waive if he or she so chooses.

Judge Norton pointed out that it is difficult to argue that the person would not be better off with counsel, but large numbers of people waive counsel in the District Court every day. They prefer to go ahead with the trial. To deprive them of that opportunity at the bail stage makes no sense.

Mr. Karceski commented that Judge Williams' point about the untenable position of a defendant seemed logical to him. He expressed the view that some of the language in subsection (d)(3)(B) had gone beyond what it was supposed to do. The language he referred to was "...that the defendant may be facing immediate detention pending a review hearing before a judge at the next session of the court...". Mr. Karceski moved that the language he had just referred to in subsection (d)(3)(B) should

be stricken. The provision would then read "... shall advise the defendant that an attorney can be helpful...". It is not necessary to address what happens if the defendant waives counsel, and that he or she may be in jail, but if the defendant asks for an attorney, there may be a wait until the attorney gets there. Ms. Ogletree added that the defendant may still be in jail. Mr. Karceski said that the person arrested should be told only what it is necessary to tell him or her. The language that he had suggested should be deleted may create a problem if left in the Rule. The motion was seconded.

Judge Ellinghaus-Jones, a judge of the District Court in Carroll County, told the Committee that she was the Chair of the Commissioner Education Committee. She expressed her agreement with Mr. Karceski. She asked if it would be more efficient to put in subsection (d)(3)(A) the language stating that the defendant should be advised that an attorney can be helpful. Subsection (d)(3)(A)(i) would remain the same, then subsection (d)(3)(A)(ii) would provide that an attorney can be helpful, and subsection (d)(3)(A)(ii) would become subsection (d)(3)(A)(iii). Subsection (d)(3)(B) could state that if the defendant indicates a desire to waive counsel, the judicial officer shall determine if the waiver is voluntary. This would avoid that heavy-handed statement indicating that if the defendant does not waive, the commissioner will lock him or her up.

The Chair said that Mr. Karceski's motion to strike the language: "...the defendant may be facing immediate detention

pending a review hearing before a judge at the next session of the court and...” should be addressed first. He called for a vote on the motion, and it carried.

The Chair asked if there was a motion to make the change suggested by Judge Ellinghaus-Jones, which was to move what was left in subsection (d)(3)(B) to be part of subsection (d)(3)(A)(ii). Mr. Karceski answered that he would make that motion, and it was seconded. The Chair inquired if there was any discussion on the motion. There being none, the Chair called for a vote on the motion, and it carried.

The Reporter noted that the second half of Judge Ellinghaus-Jones’ suggestion was to change the last sentence of subsection (d)(3)(B) of Rule 4-216 to provide that if a defendant indicates a desire to waive, then the judicial officer has to find that the defendant knowingly and voluntarily waived. By consensus, the Committee agreed to this change.

Ms. Potter referred to the sentence in subsection (d)(3)(B) of Rule 4-216, which provides that the defendant is to be told that an attorney can be helpful in arguing that the defendant should be released immediately on recognizance. She suggested that the word “asserting” would be preferable to the word “arguing.” It could read “... that an attorney could be helpful in asserting that the defendant should be released....”. The Reporter suggested that the word “arguing” could be changed to the word “advocating.” By consensus, the Committee agreed to this change.

The Chair drew the Committee's attention to subsection (d)(4) of Rule 4-216. This was intended to allow remote appearances by both sides, including State's Attorneys, Public Defenders, or any private counsel, assuming the equipment is available to do this. Mr. Sykes pointed out that sometimes the draft of the Rule refers to "remote appearance," sometimes to "electronic appearance," and sometimes to "remote electronic appearance." He asked about appearance by telephone. The Chair answered that appearance by telephone is acceptable. He did not know whether later in time an appearance could be effected by video or some other electronic means. The Reporter remarked that it could be by Skype, for example.

Mr. Sykes noted that the language in subsections (d)(4)(A) and (B) of Rule 4-216 that reads "... may participate in the proceeding by remote electronic means...", is not clear as to whether this is limited in any way. Video appearance could be considered electronic. The Chair agreed. Mr. Sykes expressed the opinion that it should be clear what type of appearance is being referred to, and that the different types should be as broad as possible. The Chair said that the intent was to make this as broad as possible provided that the equipment is available.

Judge Norton suggested that the language could be "by telephone and/or other electronic means." Mr. Brault commented that in the trial phase or for motions, the word "telephone" is used. The Chair pointed out that in Rule 7-208, Hearing, the

language used is “by video conferencing or other electronic means.” He suggested that the language for Rule 4-216 could be “by telephone or other electronic means.” By consensus, the Committee approved substituting that language for the language “remote appearance,” “electronic appearance,” “remote electronic appearance,” and “remote electronic means.”

The Chair drew the Committee’s attention to subsection (d)(5) of Rule 4-216, Ex parte Communications. This was an issue that had been addressed in the *Richmond* opinion. The Court of Appeals had been concerned about evidence of State’s Attorneys having private telephone communications with the commissioners concerning pretrial release decisions. This is absolutely prohibited by the Code of Judicial Conduct in Rule 16-813 and the Code of Conduct for Judicial Appointees in Rule 16-814, specifically in Rule 2.9, Ex Parte Communications. That is from the point of view of the commissioner. The communications are prohibited except for scheduling and administrative matters. Given the fact that there is evidence that this kind of communication is taking place, the thought was to put it in the Rule, which does not expand anything that is already the law. The Rule clarifies that this kind of communication is not allowed.

Judge Norton asked about the scenario at the commissioner stage where the State’s Attorney is not present, but the Public Defender is. What is the difference between that and the State’s

Attorney calling the commissioner? The Chair answered that in a civil case, for example, if the defendant does not appear in court, the judge proceeds with the plaintiff present. This is not an ex parte communication. Judge Norton inquired if an official waiver of the presence of the State's Attorney has to be found. The Chair replied that the State's Attorney does not have to be present. Judge Norton questioned whether the State's Attorney has to indicate that he or she will not be present.

The Chair replied that if the State's Attorney is notified and does not appear, the case can proceed. Mr. Patterson remarked that it may be difficult to notify the State's Attorney, and Judge Norton added that it may be 4 o'clock in the morning. The Chair commented that the police officer is going to call the commissioner and tell him or her that the police will be bringing someone over in twenty minutes. Unless the person arrested is at the Baltimore City Central Booking facility or a similar facity in another county, someone is going to call the State's Attorney's Office.

Master Mahasa remarked that she did not understand the structure of subsection (d)(5) of Rule 4-216 and asked why it could not read: "Except as permitted...., ex parte communications between the judicial officer and the State's Attorney, an attorney for the defendant, or a law enforcement officer are prohibited." The Chair answered that this is because it applies to judges, too. Master Mahasa explained that she was suggesting that subsection (d)(5)(B) of this section be eliminated and the

reference to the “judicial officer” put in the beginning. The Chair responded that if this is a pure style issue, it can be addressed. The point was that ex parte communications between the State’s Attorney and the defense counsel are not being prohibited. It is between any of them on the one hand, and the judicial officer on the other. Master Mahasa explained that her suggestion was to get rid of the divisions in subsection (d)(5) marked “(A)” and “(B),” so that it would read: “... between the judicial officer and the State’s Attorney, an attorney for the defendant, or a law enforcement officer ... are prohibited.” Mr. Johnson commented that this may not be consistent with what was just said about trying to distinguish between the litigants and the judicial officer. If the judicial officer is included in the list, then this distinction is not made. The Chair said that this was why it was separated.

Mr. Carbine observed that since this is an emergency rule, not every problem has to be solved. What is in subsection (d)(5) is already covered by another rule; is it necessary to state this twice? The Chair acknowledged that it is covered by another rule, but he noted that the problem is that the rule is not always being complied with. The Court of Appeals expressly addressed this issue in the opinion. Mr. Carbine remarked that he agreed with this concept, but in terms of emergency rules, it is not a good idea to draft a rule that would make the issue even more confusing and would undercut the existing ethical rule. Mr. Karceski told the Committee that the way it works in the real

world is that the police officer brings the person arrested to the commissioner in handcuffs, and many times the police officer tells the commissioner something about the case, the defendant, the fact that the police officer does not think that the defendant should be released, etc. The police officer may say any number of things. It is important to keep the Rule the way it is, because it states what has not been stated previously. He pointed out that subsection (e)(1)(D), which reads: "any recommendation of an agency that conducts pretrial release investigations" may belong in subsection (d)(5).

The Chair asked Mr. Weissert if the commissioners were getting information from the pretrial release agencies. Mr. Weissert responded negatively, explaining that statewide, the commissioners do not receive pretrial recommendations. The Chair noted that the pretrial recommendations go to the judge. Mr. Karceski observed that the Rule provides that this is one of the factors that a commissioner can consider. The Reporter noted that this Rule covers both judges and commissioners. Mr. Karceski said that this refers to commissioners. If there is going to be a rule on ex parte communications, all of the bases should be covered.

The Chair said that the Rule refers to the term "judicial officers" and not to the term "commissioners." He could not find any rule or statute that expressly refers to "commissioners." They refer to "judicial officers," which also means judges. Presumably, a judge could be acting in the shoes of a

commissioner. He asked if this ever happens. Judge Clyburn answered negatively. Mr. Weissert added that it could happen in a jurisdiction where there is only one commissioner, an emergency arises, and the commissioner is not available. Ms. Bernhardt observed that this could happen in circuit court. The Rule should be applicable to judges.

Judge Williams expressed the concern that this is a double-edged sword, because even though the Rule provides that the commissioner shall consider the recommendations of the State's Attorney and the defense attorney, currently, if a defense attorney were to show up at a bail hearing, unless the commissioner calls the State's Attorney to let him or her know that a hearing is taking place with a defense attorney present, this is an ex parte communication. Is it the intent of the provision to prohibit the commissioner from considering the statements of the defense attorney? The Chair responded that that was not the intent of the provision. Judge Williams acknowledged this, but she added that if the commissioner is directed that there can be no ex parte communication, he or she is precluded from communicating with the defense attorney, because the State is not present.

The Chair noted that this would be like assuming that if there is a civil proceeding and one side does not show up, the other side cannot say anything, which is not the case. Judge Williams explained that her point was that if the defense attorney has a client who is arrested, before dealing with

representation at the commissioner level, precluding the commissioner from taking any information because it is an ex parte communication is not appropriate. The Chair pointed out that counsel can appear remotely. The State's Attorney may be available by telephone. Judge Williams said that the commissioners should be told to call the State's Attorney's office to let someone know that a defense attorney is present before the commissioner for an initial appearance. If the State's Attorney wishes to appear, the commissioner should wait for the State's Attorney to get there, so that there is no ex parte communication. If the State's Attorney does not wish to appear, the commissioner must be allowed to proceed and consider what the defense attorney says.

Judge Ellinghaus-Jones remarked that she was certain that the Rule was not intended to prohibit the commissioner from considering recommendations from the defense attorney or the State's Attorney, but she expressed the concern that it would be interpreted that way. The Rule needs to be clarified, because it can be interpreted, as Judge Williams had said, that if the defense attorney shows up and the State's Attorney does not, this would be ex parte, because the State's Attorney is not there.

Mr. Karceski observed that these hearings are not scheduled, and this is the problem. He said that either the commissioners' offices will have to be staffed full-time by prosecutors and defense attorneys, or there will have to be some requirement that the State and the defense are notified somehow about these

proceedings. It is not as if there is a docket, or the attorney knows that there is going to be a bail hearing at a certain time, unless the police officer talks to the State's Attorney, and the defendant is able to call an attorney. The problem is whether the commissioner is going to look at this as an ex parte communication. The issue is how to get the word out that a bail hearing will be taking place.

Judge Clyburn said that logistically, the system will be set up so that the State's Attorney and the Public Defender get notice. The police officer will trigger the notice with respect to the parties. All of this will be worked out. Once the police officer calls and notice is triggered, State's Attorneys should not blaming commissioners about not getting notice, and defense attorneys should not be at the hearings alone, awaiting a response from the State's Attorney.

Judge Norton referred to the question about why this prohibition against ex parte communication has to be repeated just because of a few bad apples as opposed to handling it administratively. He asked whether this provision is necessary. Judge Clyburn responded that based on the complaints from State's Attorneys and defense counsel, it is a good idea to spell it out in the Rule, because there have been instances where some State's Attorneys think that the commissioners are an extension of the Office of the State's Attorney, but the fact is that the commissioners are not. They are independent judicial officers. It should be spelled out in subsection (d)(5) of the Rule that

relative to this proceeding, once the police officer triggers the proceeding, there can be no ex parte communications.

The Chair commented that this is not changing the current law. Under current law, there is an ethical rule that applies to judges and judicial officers. Apparently, there have been some violations of Rule 2.9. If it is a judge who violates the rule, he or she may have to go before the Judicial Disabilities Commission on an ethical charge. Subsection (d)(5) of ths Rule puts the issue up front, so that it is evident that this is prohibited. It gives a transparency to the process, so no one is unaware, as apparently some judicial officers are now, that this is prohibited. Mr. Patterson pointed out that the Chair had referred to "judges" and "judicial officers." Under the Rule, judicial officers are judges and commissioners. The Chair acknowledged this, but he explained that the ethical constraint on the judges is in the Code of Judicial Conduct. The ethical constraint on the commissioners is in the Code of Conduct for Judicial Appointees. The Codes are different, but the provisions pertaining to this issue are identical.

Mr. Patterson referred to Mr. Karceski's earlier comment that this provision should be all-inclusive. The way it is written, it is not all-inclusive, because someone is missing. The Rule lists the representative of the State, the State's Attorney; the defendant's representative, his or her attorney; and the complainant, the police officer, but the defendant should be listed there, also. The commissioner should not be having ex

parte communications with the defendant. If the defendant does not want an attorney, no defense attorney will be present. If the State's Attorney does not get called or is not there, the commissioner should wait until the State's Attorney indicates that he or she is not coming or until the State's Attorney appears before having any communications with the defendant.

The Chair responded that Rule 2.9 is identical in both Codes. It reads as follows: "A [judge/judicial appointee] shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judicial appointee out of the presence of the parties or their lawyers, concerning a pending or impending judicial matter...", and it lists the exceptions. The Chair said that he had always interpreted this provision to mean that if there is a proceeding, and one side does not show up, what the other side says is not an ex parte communication. Mr. Patterson commented that this is correct. If one side does not show up, after being notified (and these are unscheduled hearings, so notice has to be given) or indicates that they will not be coming, then they have waived their right to speak. He noted that his point had been that subsection (d)(5) should be amended, so that in subsection (A), the defendant should be added to the list, because the Code provision that the Chair had just read includes parties.

The Chair responded that he had no problem adding the defendant to the list. He asked if it is likely that the defendants will be calling the commissioners privately to tell

them that the defendant should be released. Mr. Brault commented that many kinds of communications pertain broadly to scheduling. He suggested that the language in subsection (d)(5) should be "ex parte communication regarding the merits of release...". The Chair noted that this is similar to the language in Rule 2.9. Mr. Brault expressed the view that similar language should be used in subsection (d)(5). What is prohibited is a communication on the merits of release. The Chair cautioned that Rule 4-216 should neither constrict nor expand what is in Rule 2.9. This is why subsection (d)(5) only referred to Rule 2.9, because it pertains to only what is provided for in Rule 2.9.

Judge Norton remarked that he could envision the State's Attorney getting a telephone call at 3 o'clock a.m. about an arrest. The State's Attorney may ask if the defendant had any weapons, if there were any injuries, if the arrest involved a domestic situation, and the answer is that the arrest involved two inebriated people in a bar. The State's Attorney could reply that he or she is not coming to the hearing before the commissioner. The commissioner and the State's Attorney are already talking about the facts in the case. Mr. Sullivan commented that although he did not want to expand Rule 2.9, what he had heard was that a certain amount of incidental communication takes place even if all of the participants are well-meaning. It is the nature of this "proceeding" which has now become a proceeding when previously it was not. To protect the participants and give them some confidence that what they do

is not running afoul of Rule 2.9, the language “except as permitted by Rule 2.9" could be added to subsection (d)(5). Or the language “or as otherwise necessary to implement this Rule” could be added. The Chair responded that once the latter language would be added, it trumps Rule 2.9, which is an ethical rule.

Mr. Sullivan expressed the view that if Rule 2.9 is going to be applied scrupulously to the hearing to which Rule 4-216 refers, Rule 2.9 is going to be violated fairly frequently. The Chair asked why. Mr. Sullivan replied that the parties will have to talk about substance. Rule 2.9 provides that one of the conditions of being able to have the communication is that nothing of substance should be discussed. Substantive communication would have to happen to get the ball rolling even if everyone is trying to be as ethical and upright as possible. Why not have the Rule acknowledge this?

The Chair asked Mr. Sullivan if he would apply this to the review hearing before the judge the next day. Mr. Sullivan answered negatively, explaining that a review hearing would have all of the normal accoutrements of a proceeding already in place, and everyone knows the expectations when appearing before a judge. However, the hearing before the commissioner is a new concept imposed on a system that is already heavily burdened. The Chair countered that the bail review hearing is also a new animal, because currently there is no right to counsel. He asked if the defense attorney or the State’s Attorney should be allowed

to call the judge in his or her chambers to discuss the case. Mr. Sullivan responded that the reality of what may be happening is that even if every participant does exactly what a well-meaning, educated, informed attorney, judicial officer, or police officer should do, some substantive issues are going to be discussed in the absence of the State's Attorney.

The Chair asked if Mr. Sullivan was suggesting that subsection (d)(5) trump Rule 2.9, even though Rule 2.9 does not allow substantive communication, and if it is violated, the judicial officer might be thrown out of office. Mr. Sullivan questioned whether it should not be acknowledged that it is not unethical for the participants to do what they have to do if that is what is necessary to implement what must occur at the hearing before the commissioner.

Mr. Zarbin commented that it seems that the people who are violating are looking for excuses to circumvent the Rule, which is not the purpose of the discussion today. If someone calls the State's Attorney and tells him or her that a defendant has been arrested and is in custody, the State's Attorney has to make the decision without any more information as to whether to come in or not. This is what happens to private attorneys. The purpose of the Rule is not to provide the State's Attorney with the merits of the case. It is to provide notice of the hearing, and the State's Attorney can decide whether to come in or not. To find out what the hearing is about, the defense attorney can come in, also.

Mr. Patterson pointed out that *Richmond* held that the right to counsel applies at the bail hearing. The case specifically holds that many of the commissioner's other actions do not require counsel. The reality is that the police officer comes in with the defendant in tow. The police officer tells the commissioner why charges should be filed against the defendant. The commissioner has to make a determination as to probable cause based on what the officer tells the commissioner. If the commissioner finds no probable cause, the case goes no further. If the commissioner finds probable cause, the commissioner takes some actions, and then the proceeding gets to the point where Rule 4-216 applies, which triggers the right to have an attorney at a critical stage under the statute.

Mr. Patterson commented that at this point, the commissioner has already heard some description of the alleged crime, because otherwise the commissioner would not know why the defendant was brought in. The commissioner has information about the nature of the crime and the seriousness of it that will trigger other events. This does not involve ex parte communications. If the defendant gets to the bail stage, then the commissioner makes telephone calls to the defense attorney or the Public Defender and to the State's Attorney. It is not an ex parte communication, it is based on why the defendant is there. From that point on, no communications can take place without the other side present, unless the other side has waived the right to be

there. He asked whether this answers Mr. Sullivan's concerns.

Mr. Sullivan commented that a judicial officer is going to make a determination of probable cause, which appears to be substantive. It does not sound like the situation fits squarely into the precise terms of Rule 2.9 (a)(1) and (2). He suggested that the Rule be crafted so that it is obvious that what Mr. Patterson had just explained does not constitute an ex parte communication. Mr. Weissert remarked that this depends on how the word "communication" is defined. The police officer does not tell the commissioner what the alleged crime was; the commissioner works off the four corners of the charging document, which had been the basis of the arrest. This is going to be filed with the court through the commissioner. The commissioners prefer not to ask the officers for any substantive information or facts about the case. They will read what is in the charging document, because that document provides the basis for the probable cause determination.

The Chair said that this point had been made to the drafting group -- the commissioners do not rely on testimony or oral communication with anyone, they just look at the charging document to determine if there was probable cause. Mr. Weissert observed that their notification process will become clearer as time goes on. It may be a pager system. The on-call commissioner gets a page that tells him or her that the police officer has arrested someone. The commissioner pages the appropriate parties to tell them that a hearing will be held.

This is the extent of what is known by anyone until the charging document actually arrives.

The Chair said that there are three choices. Subject to restyling, subsection (d)(5) could be left as it is, all of the new language could be taken out, or the new language could be redrafted. This is a policy question. Right now the Rule recites what the situation is, and it is honored in many respects. If the choice is to delete, it would be left to the appropriate disciplinary body to discipline someone when there is evidence of a violation of the current ethical rules. Ms. Potter asked if subsection (d)(5) could be taken out, and the Committee note remain. The Chair answered that this could be done.

Mr. Karceski moved that subsection (d)(5) remain in the Rule. The motion was seconded. The Chair noted that no motion was necessary for subsection (d)(5) to remain in the Rule. He asked if anyone wanted it to be removed, and one person answered affirmatively. He asked if anyone wanted the subsection to be amended, and one person answered affirmatively. The Reporter asked if the defendant should be added to the list of persons in subsection (d)(5). By consensus, the Committee approved the addition of the defendant to the list.

The Chair said that the next change to Rule 4-216 was in section (g). He told the Committee that section (g) had been added, because the Court, in its opinion, noted that there is a record made by the commissioner (although there may not be one, because the commissioners do not always include certain

communications, such as ex parte ones.) Section (g) was intended to lay out what the commissioner should have in a written record. There will not be a transcript of this. Judge Norton expressed his concern that a State's Attorney could accuse a commissioner of not notifying the State's Attorney. Somewhere, the commissioner should indicate that the State's Attorney had been notified. It could be added to the checklist of what the commissioner has to do. The Chair pointed out that this is not in the Rule. Judge Norton remarked that this could be added.

Mr. Patterson suggested that in subsections (1) and (2) of section (g), after the language "by remote means," the language "or elected not to appear" could be added. The Chair pointed out that it may not be that the State's Attorney "elected" not to be there but just did not show up. The Chair suggested that the fact that counsel on both sides were notified should be added as part of the record. By consensus, the Committee approved the Chair's suggestion. By consensus, the Committee approved Rule 4-216 as amended.

The Chair drew the Committee's attention to Rule 4-216.1. He explained that the contents of the Rule had been pulled out of Rule 4-216, which had been too lengthy, so that review hearings are in a separate rule. He assumed that to the extent that Rule 4-216.1 has the same language as Rule 4-216, Rule 4-216.1 should be conformed. The Committee agreed. The Chair noted that subsection (a)(1) has only minimal changes. The new language is in subsection (a)(2). He asked if anyone had additional comments

regarding Rule 4-216.1. None were forthcoming. By consensus, the Committee approved Rule 4-216.1 as amended.

The Chair said that after the meeting was adjourned, the necessary changes would be made to the Rules, and then they would be sent to those present at the meeting and to the Court of Appeals today. He asked that if anyone had any additional comments, they should be sent to the Reporter, so any necessary corrections could be made.

The Chair said that other Rules that required amendments to conform to the changes to Rules 4-216 and 4-216.1 were to be considered at today's meeting. One may present a problem, and that one was Rule 4-202. This would happen only if the Judicial Information Systems (JIS) had any problems with amending the charging documents. Rule 4-202 had been sent to JIS with a request for comments from them. If they respond with any problems, these would have to be addressed. The Chair asked if anyone had any changes to suggest to Rules 4-202, 4-213, 4-214, 4-215, 4-231, 4-263, and 4-349. No one had any changes to suggest. By consensus, the Committee approved Rules 4-202, 4-213, 4-214, 4-215, 4-231, 4-263, and 4-349 as presented.

Mr. Karceski said that he had a problem with Rule 4-216.1 (a)(1), which was not for consideration today. It arose in a recent case in which he had been the defense attorney. A person was arrested and taken before a commissioner, and a bail was set. The person arrested wanted to make the bail, but it was very high, and the person could not get the necessary property and

money together. This Rule requires a person such as this to go before the District Court judge, and in this case, the judge increased the bail. It does happen, although infrequently. Mr. Karceski asked the Committee to consider adding the language "at the defendant's election" after the words "The District Court" in the second sentence of subsection (a)(1). If the defendant is brought into court but does not want the hearing, the judge has to hear the matter and make a determination. The hearing before the District Court judge should not necessarily put the defendant in a worse position as to bail than the bail that the commissioner had set.

Judge Norton remarked that it was ironic that those people who had criticized the commissioners suddenly want to extol them. He disagreed with Mr. Karceski's suggestion. Many times, the court has more information or different information available than the commissioner had available in the middle of the night, and the judge can make a more informed decision as to bail.

Mr. Patterson said that if the defendant had been less than forthcoming with the commissioner and had received a lower bail than he or she should have received, then the information to which Judge Norton had referred should be allowed to come to light so that the judge can make a correct bail determination.

The Chair noted that this issue could not be considered today in view of the emergency nature of the proposed changes. This issue could be revisited at a later time. Mr. Carbine said that he personally had been extremely impressed with the job done

modifying these Rules under dire conditions in a short period of time.

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