COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held at the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland, on March 7, 2008.

Members present:

Hon. Alan M. Wilner, Chair
Linda M. Schuett, Esq., Co-Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. Ellen L. Hollander
Hon. Michele D. Hotten
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Frank M. Kratovil, Esq.
J. Brooks Leahy, Esq.
Hon. Thomas J. Love
Zakia Mahasa, Esq.
Robert R. Michael, Esq.
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Melvin J. Sykes, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Leigh Darrell, Rules Committee Intern
Hon. Neil Edward Axel
Brian L. Zavin, Esq., Office of the Public Defender
Gerard Volatile, Esq., Office of the State's Attorney for Baltimore City
John Joseph McCarthy, Esq., State's Attorney for Montgomery County
Paul H. Ethridge, Esq., Maryland State Bar Association, Inc.
Russell P. Butler, Esq., Executive Director, Maryland Crime Victims Resource Center
Joseph I. Cassilly, Esq., State's Attorney for Harford County
Frank R. Weathersbee, Esq., State's Attorney for Anne Arundel County
Scott D. Shellenberger, Esq., State's Attorney for Baltimore County
Lawrence C. Doan, Esq., State's Attorney for Baltimore City
Michele D. Nethercott, Esq., Office of the Public Defender
Timothy S. Mitchell, Esq.

Scott G. Patterson, Esq., State's Attorney for Talbot County, Maryland State's Attorneys Association
Linda Ridall, Montgomery County Police Department, Victim Services
Anne Litecky, Esq., GOCCP, Maryland State Board of Victim Services
Ellen Alexander, Director, Victim Services, Montgomery County Department of Police
Bedford T. Bentley, Esq., State Board of Law Examiners
Barbara Gavin, Esq., State Board of Law Examiners
Veronica P. Jones, Esq., Legal Officer, Court of Appeals
Glenn Grossman, Esq., Attorney Grievance Commission
Melvin Hirshman, Esq., Bar Counsel, Attorney Grievance Commission
David D. Durfee, Jr., Esq., Executive Director, Legal Affairs, Administrative Office of the Courts
Nancy S. Forster, Esq., Public Defender of Maryland

The Chair convened the meeting. He told the Committee that he was delighted to be back as Chair, and that he regards the Committee as the "brain trust" of the bar and bench. The Chair welcomed two new members, the Honorable Thomas J. Love of the District Court of Maryland for Prince George's County, and the Honorable Ellen L. Hollander, of the Court of Special Appeals, as well as Leigh Darrell, the current Rules Committee intern. The Chair then made the following announcements:

(1) With regret and solely by virtue of their well-deserved appointments to the Court of Special Appeals, Robert Zarnoch and Albert Matricciani will no longer be serving on the Committee. Traditionally, only one member is from the Court of Special Appeals, and, following Judge Joseph Murphy's appointment to the Court of Appeals, Judge Hollander was selected as his replacement from the Court of Special Appeals.

(2) Mr. Maloney is being inducted into the American College of Trial Lawyers, and Mr. Sykes will be given the Maryland State

Bar Association Senior Lawyer of the Year Award at its May 2008 dinner.

(3) A University of Baltimore Law Review symposium will being held on March 13, 2008 from 1:00 p.m. to 4:00 p.m. on the topic of advanced issues in electronic discovery. Mr. Klein and Judge Joseph F. Murphy, Jr. will be speakers.

(4) Because the Judicial Conference is being held from June 18-20, 2008, the Rules Committee meeting scheduled for June 20, 2008 has been changed to June 27, 2008.

(5) The 158th Report was adopted by the Court of Appeals, except for Categories 3 (discovery in criminal cases) and 10 (suspending lawyers in arrears on child support), which were deferred. In light of the concerns expressed by the Court at its December 3, 2007 hearing, the Chair requested, and the Court agreed, to have the Committee reconsider those proposals. They are Items 1 and 2 on the agenda for today.

Before turning to those Items, the Chair asked if there were any additions or corrections to the minutes of the September 2007 and November 2007 meetings that had been sent to the Committee. Judge Hollander pointed out a typographical error -- the word "to" is missing in the next to the last line on page 11 of the September 7, 2007 minutes. With that correction, the minutes were approved as presented.

The Chair noted that Item 1 has a sense of urgency. The Court plans to reconsider the criminal discovery Rules at an open meeting scheduled for April 7, 2008, at 2:00 p.m. To facilitate

the discussion, the Chair had sent a memorandum to the Committee members explaining the issues that need to be addressed. He expressed his thanks to Mr. Karceski, Ms. Haines, Ms. Cox, and Leigh Darrell for their help in preparing the lengthy materials for Agenda Item 1 that had to be prepared in a hurry.

Finally, the Chair said that those materials had been sent not only to the members of the Committee but also to all of the groups that participated in the drafting of the Rules. Anything that was not sent out with the meeting materials is available today. The Chair commented that he is trying to make the process of discussing changes to the Rules as open and transparent as possible. Anyone who signed up to speak today may do so. Agenda Items 1 and 2 must be completed today. They cannot be carried over; otherwise, there will be no opportunity to present them at the Court of Appeals open meeting on April 7, 2008, and that date will not be postponed.

The Chair asked the speakers to be brief and to avoid repetitive testimony. He apologized in advance for his own intervention in some of the language of the Rules.

Agenda Item 1. Reconsideration of proposed amendments to Rules 4-263 (Discovery in Circuit Court) and 4-262 (Discovery in District Court)

The Chair said that Mr. Karceski, as Chair of the Criminal Subcommittee, would be presenting Agenda Item 1. The Committee should look at the most recent e-mail sent on Wednesday, March 5,

2008. The version of Rule 4-263 that the Committee will discuss today is designated in the bottom left of the page as "Rule 4-263 Criminal Subcom. 2/08 - For R.C. 3/7/8 - REVISED." This version is the recommended language sent to the Court of Appeals in the 158th Report with the amendments proposed by the Criminal Subcommittee. The version of Rule 4-262 that the Committee will discuss today is designated in the bottom left of the page as "Rule 4-262 - For R.C. 3/07/08 - REVISED."

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

Rule 4-263, showing by strike-throughs and underlining the Criminal Subcommittee's proposed changes to the unmarked 158th Report version of the Rule.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in a circuit court shall be as follows:

(a) Obligations of the Parties

(1) Generally

Each party obligated to provide material or information under this Rule shall exercise due diligence to identify all of the

material and information that must be disclosed.

(2) Obligations of the Parties Extend to Staff and Others

The obligations of the parties under this Rule extend to material and information in the possession or control of ~~a~~ the party and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have a duty to report, to the party.

Query to Rules Committee: Should subsection (a)(2) be clarified as including counsel:

The obligations of the parties under this Rule extend to material and information in the possession or control of a party, counsel for the party, ~~and~~ staff members of the party and of the party's counsel, and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have a duty to report, to the party or counsel for the party.

This language has not been considered by the Criminal Subcommittee.

Cross reference: For the obligations of the State, see *State v. Williams*, 392 Md. 194 (2006).

(b) Definitions

In this Rule, the following definitions apply:

(1) Oral Statement

"Oral statement" of a person means the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

(2) Written Statement

"Written statement" of a person includes:

(A) any statement in writing that is made, signed, or adopted by that person; and

(B) the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by the person. The term is intended to include statements contained in police or investigative reports, but does not include attorney work product.

~~(b)~~ (c) Disclosure ~~Without Request~~ by the State

Except for the privileged work product of the ~~State's Attorney~~ State as defined in subsection ~~(d)(1)~~ (e)(1) of this Rule, without the necessity of a request, the State's Attorney shall ~~provide to the defendant~~:

(1) General Obligations

Provide to the defendant:

(A) All written and all oral statements of the defendant and of any codefendant that are within the possession or control of the State and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements;

(B) The names and, except as provided under Code, Criminal Procedure Article, '11-205 or Rule 16-1009 (b), the addresses of all persons known to the State to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the State and that relate to the subject matter of the offense charged. The State shall also identify the persons it intends to call as witnesses at trial;

~~(1) The name and, except as provided~~

~~under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the address of each person whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony and, as to all statements about the action made by the witness to a State agent: (A) a copy of each written or recorded statement by the witness, regardless of when made, and (B) a copy of all reports of each oral statement by the witness, or, if not available, the substance of each oral statement made before charges were filed in the circuit court;~~

~~(2)~~ (C) Any material or information in any form, whether or not admissible, in the possession or control of the State, including staff and others as described in subsection (a)(2) of this Rule, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged;

~~(3)~~ (D) Any material or information in any form, whether or not admissible, in the possession or control of the State, as described in subsection (a)(2) of this Rule, that tends to impeach a witness by proving:

Note to Rules Committee: In subsection (c)(1)(D)(i), the reference to "a prior conviction as permitted under Rule 5-609" is deleted in light of the broader scope of subsection (c)(1)(D)(iii).

~~(A)~~ (i) the character of the witness for untruthfulness, by establishing prior conduct as permitted under Rule 5-608 (b) ~~or a prior conviction as permitted under Rule 5-609~~;

~~(B) that the witness is biased, prejudiced, or interested in the outcome of the proceeding or has a motive to testify falsely, or~~

~~(C) that the facts differ from the witness's expected testimony~~; and

(ii) the relationship, if any, between the State and any witness it intends

to call at trial, including the nature and circumstances of any agreement, understanding, or representation between the State and the witness that constitutes an inducement for the cooperation or testimony of the witness; and

(iii) any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the State, any record of convictions, pending charges, or probationary status that may be used to impeach any witness to be called by the State at trial; and

~~(4)~~ (E) Any relevant material or information regarding: ~~(A)~~ (i) specific searches and seizures, wiretaps, or eavesdropping; ~~(B)~~ (ii) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial; and ~~(C)~~ (iii) pretrial identification of the defendant by a witness for the State.

Committee note: Examples of material and information that must be disclosed pursuant to subsections ~~(b)(2) and (3)~~ (c)(1)(C) and (c)(1)(D) of this Rule if within the possession or control of the State, as described in subsection (a)(2) of this Rule, include: each oral statement not otherwise memorialized made by a witness that is materially inconsistent with another statement made by the witness or with a statement made by another witness; ~~the~~ any medical or psychiatric condition of a witness, known to the State, that may impair his or her ability to testify truthfully or accurately; pending charges against a witness ~~for whom no deal is being offered at the time of trial~~ of which the State is aware or has reason to believe exists; the fact that a witness has taken but did not pass a polygraph examination; and the failure of a witness to make an identification **[Query to Rules Committee: Should "of a defendant or a co-defendant" be added here?]** ~~; and evidence that might adversely impact the credibility of the State's evidence~~. The due diligence

required by subsection (a)(1) does not require that ~~affirmative inquiry by the State with regard to the listed examples in all cases, but would require such inquiry into a particular area if information possessed by the State, as described in subsection (a)(2), would reasonably lead the State to believe that affirmative inquiry would result in discoverable information. Due diligence does not require~~ the State ~~to~~ (1) obtain a copy of the criminal record of a State's witness unless the State ~~is aware of the criminal record~~ knows or has reason to believe that the witness has a criminal record, ~~If, upon inquiry by the State, a witness denies having a criminal record, the inquiry and denial generally satisfy due diligence unless the State has reason to question the denial.~~ or (2) inquire into a witness's medical, psychiatric, or addiction history or status unless information possessed by the State, as described in subsection (a)(2), would reasonably lead the State to believe that an affirmative inquiry would result in discovering a condition that would impair the witness's ability to testify truthfully or accurately. See *Thomas v. State*, 372 Md. 342 (2002); *Goldsmith v. State*, 337 Md. 112 (1995); *Lyba v. State*, 321 Md. 564 (1991). In any doubtful situation, either party may seek an in camera review pursuant to section (k) of this Rule.

Cross reference: See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. U.S.*, 405 U.S. 150 (1972); and *U.S. v. Agurs*, 427 U.S. 97 (1976).

~~(c) Disclosure Upon Request~~

~~(1) Disclosure By State~~

~~Upon request of the defendant, the State's Attorney shall provide to the defendant the information set forth in this section:~~

~~(A) Statements of the Defendant~~

~~As to all statements made by the~~

~~defendant to a State agent that the State intends to use at a hearing or trial, the State shall provide to the: (i) a copy of each written or recorded statement, and (ii) the substance of each oral statement and a copy of all reports of each oral statement~~;

~~(B) Statements of Codefendants~~

~~As to all statements made by a codefendant to a State agent that the State intends to use at a joint hearing or trial, the State shall provide to the defendant: (i) a copy of each written or recorded statement, and (ii) the substance of each oral statement and a copy of all reports of each oral statement;~~

~~(C)~~ (2) Reports or Statements of Experts

As to each expert consulted by the State in connection with the action ~~the State shall: (i)~~ (A) provide to the defendant the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion, and ~~(ii)~~ (B) produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison, and provide the defendant with the substance of any such oral report and conclusion;

~~(D)~~ (3) Evidence for Use at Trial

Produce and permit the defendant to inspect, copy, and photograph any documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State intends to use at the hearing or trial;

~~(E)~~ (4) Property of the Defendant

Produce and permit the defendant to inspect, copy, and photograph any item obtained from or belonging to the defendant,

whether or not the State intends to use the item at the hearing or trial.

~~(2)~~ (d) Disclosure by Defendant

Policy Issue: Either subsection (d)(1)(A) OR subsections (d)(1)(C) and (D) should be included in this Rule. The Criminal Subcommittee's recommendation is deletion of subsection (d)(1)(A). What is the recommendation of the Rules Committee?

(1) Except for the privileged work product of defense counsel as defined in subsection (e)(1) of this Rule, without the necessity of a request, the defendant shall:

(A) Witnesses

Provide the names and, except when they decline permission, the addresses of all persons whom the defendant intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of that witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a witness for the State is not required until after the witness has testified at trial.

(B) Reports of Experts

As to each expert the defendant expects to call as a witness at a hearing or trial: (i) provide to the State the expert=s name and address, the subject matter on which the expert is expected to testify, the substance of the findings and the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion, and (ii) produce and permit the State to inspect and copy all written reports made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison, and provide the State with the substance of any such oral report and conclusion.

~~(D)~~ (C) Character Witnesses

As to each witness the defendant expects to call to testify as to the defendant's veracity or other relevant character trait, provide the name and address of that witness.

~~(C)~~ (D) Alibi Witnesses

Upon designation by the State of the time, place, and date of the alleged occurrence, provide the name and address of each person other than the defendant whom the defendant intends to call as a witness to show that the defendant was not present at the time, place, and date designated by the State in its request.

Note to Rules Committee: The Criminal Subcommittee did not discuss this, but if subsection (d)(1)(A) is deleted, and the ABA Standard concerning discovery of affirmative defenses is to be incorporated into Rule 4-263, subsection (d)(1)(D) could be modified as follows:

(D) Alibi or Insanity Defense

If the defendant intends to rely upon a defense of alibi or insanity, the defendant shall notify the State of that intent and of the names and addresses of the witnesses who may be called in support of that defense.

(E) Documents, Computer-generated Evidence, and Other Things

Produce and permit the State to inspect, ~~and~~ copy, and photograph any documents, ~~any~~ computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the defendant intends to use at the hearing or trial.

(2) As to the Person of the Defendant

(A) Upon Request

Upon the State's request, the defendant shall appear within a time specified for the purpose of permitting the prosecution to obtain fingerprints, photographs, handwriting exemplars, or voice exemplars from the defendant, or for the purpose of having the defendant appear, move, or speak for identification in a lineup or try on clothing or other articles. Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of the appearance shall be given by the State to the defendant and the defendant's counsel.

(B) Upon Motion

Upon motion by the State, with reasonable notice to the defendant and defendant's counsel, the court shall, upon an appropriate showing, order the defendant to appear for the following purposes: (i) to permit the taking of specimens of blood, urine, saliva, breath, hair, nails, and material under the nails; (ii) to permit the taking of buccal samples and samples of other materials of the body; or (iii) to submit to a reasonable physical or medical inspection of the body.

~~(d)~~ (e) Matters Not Subject to Discovery

(1) By any Party

This Rule does not require the State or the defendant to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged work product of counsel or (B) any other matter if the court finds that its disclosure would entail a substantial risk of harm to any person that outweighs the interest in disclosure.

(2) By Defendant

This Rule does not require the State to disclose the identity of a confidential informant unless the State's Attorney intends to call the informant as a witness or unless the failure to disclose the informant's

identity would infringe a constitutional right of the defendant.

~~(e)~~ (f) Time for Discovery

Query to Rules Committee: With the deletion of the third and fourth sentences of the "Time for Discovery" section, the time for the defendant to provide discovery was deleted from the Rule. The Criminal Subcommittee did not discuss what this time should be. What should it be?

Unless the court orders otherwise, the time for discovery under this Rule shall be as set forth in this section. The State's Attorney shall make disclosure pursuant to section ~~(b)~~ (c) 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. The defendant shall make disclosure pursuant to section (d) of this Rule no later than _____. ~~Any request by the defendant for discovery pursuant to section (c) of this Rule, and any request by the State for discovery pursuant to section (e) of this Rule shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. The party served with the request shall provide the discovery within ten days after service.~~

~~(f)~~ (g) Motion to Compel Discovery

If discovery is not provided as requested or required, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters that have not been provided. A response to the motion may be filed within five days after service of the motion. The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the

resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

~~(g)~~ (h) Continuing Duty to Disclose

Each party is under a continuing obligation to produce discoverable material to the other side. A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

~~(h)~~ (i) No Requirement to File with Court; Exceptions

Except as otherwise provided in these Rules or by order of court, discovery material need not be filed with the court. If the party generating the discovery material does not file the material with the court, that party shall (1) serve the discovery material on the other party and (2) promptly file with the court a notice that (A) reasonably identifies the information provided and (B) states the date and manner of service. The party generating the discovery material shall make the original available for inspection and copying by the other party, and shall retain the original until the earlier of the expiration of(i) any sentence imposed on the defendant or (ii) the retention period that the material would have been retained under the applicable records retention and disposal schedule had the material been filed with the court. This section does not preclude the use of discovery material at trial or as an exhibit to support or oppose a motion. If the parties agree to provide discovery or disclosures in a manner different from the manner set forth in this Rule, the parties shall file with the court a statement of their agreement.

~~(i)~~ (j) Protective Orders

A party or a person from whom discovery is sought may petition the court for any protective order that justice

requires. For good cause shown, the court may order that specified disclosures be restricted.

(k) In Camera Proceedings

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of the showing, to be made in camera. A record shall be made of both in court and in camera proceedings. Upon the entry of an order granting relief following a showing in camera, all confidential portions of the in camera portion of the showing shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

~~(j)~~ (l) Sanctions

If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Source: This Rule is derived in part from former Rule 741 and is in part new.

Reporter's Notes as to changes from the 158th Report version of Rule 4-263

1. Section (b) is new and contains the substance of the definition of "statement" as provided in ABA Standard 11-1.3.

2. Section (c) reflects the position of the ABA that the State should provide all discovery in felony cases without the need for a request.

3. Subsections (c)(1)(A) and (B) are taken from ABA Standard 11-2.1(a)(i)-(ii).

4. Subsections (c)(1)(D)(ii) and (iii) are taken from ABA Standard 11-2.1 (a)(iii) and (vi).

5. Modifications to the Committee note that follows subsection (c)(1) include:

• in the first example, the addition of the word “material” and a revised description of the type of statement to which the example refers (“oral statement[s] not otherwise memorialized”),

• clarification of the examples as to the State’s knowledge and the due diligence requirement applicable to the State,

• the addition of case citations, and

• a reference to new section (k) concerning in camera proceedings.

6. All defense disclosure is contained in section (d). As with the State, and where applicable, disclosure must be made by the defense without request.

7. Subsection (d)(1)(A), which requires the defense to disclose the names, addresses, and written statements of witnesses, is taken from ABA Standard 11-2.2 (a)(i) with one addition: In Maryland, where a witness refuses to permit disclosure of his or her address, the State is not required to disclose that information. In subsection (d)(1)(A), the defense also is not required to disclose the address of a witness who does not want that information disclosed.

8. Subsections (d)(2)(A) and (B) are taken from ABA Standard 11-2.3 (a) and (b), with the addition of a reference to “buccal samples” and the deletion of Standard 11-2.3 (b)(iv).

9. Requirements as to time for discovery upon request under subsection (f) have been deleted as discovery must be filed without request. With the deletion, the Rule is silent as to the time for the defendant to provide discovery to the State. Added to section (f) is a provision requiring the defendant to provide discovery no later than _____.

10. The first sentence of section (h) is taken from the first sentence of ABA Standard 11-4.1 (c).

11. Section (k) is taken from ABA Standard 11-6.7.

Rule 4-262, showing by strike-throughs and underlining the proposed changes to the unmarked 158th Report version of the Rule.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-262, as follows:

Rule 4-262. DISCOVERY IN DISTRICT COURT

(a) Obligations of the Parties

(1) Generally

Each party obligated to provide material or information under this Rule shall exercise due diligence to identify all of the material and information that must be disclosed.

(2) Obligations of the Parties Extend to

Staff and Others

The obligations of ~~a party~~ the parties under this Rule extend to material and information in the possession or control of the party and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have a duty to report, to the party.

Cross reference: For the obligations of the State, see *State v. Williams*, 329 Md. 194 (2006).

(b) Definitions

In this Rule, the terms "oral statement" and "written statement" have the meanings stated in Rule 4-263 (b).

~~(b)~~ (c) Scope

Subject to section ~~(c)~~ (d) of this Rule and except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), discovery and inspection pursuant to this Rule is available in the District Court in actions for offenses that are punishable by imprisonment, and shall be as follows:

(1) Without the necessity of a request, ~~The State's Attorney~~ the State shall provide to the defendant ~~any~~ the material or information specified in Rule 4-263 ~~(b)(1)(A), (b)(2), and (b)(3)~~ (c)(1)(C). ~~Committee note: Examples of material and information that must be disclosed pursuant to subsections (b)(2) and (3) of Rule 4-263 if within the possession or control of the State, as described in subsection (a)(2) of this Rule, include: each statement made by a witness that is inconsistent with another statement made by the witness or with a statement made by another witness; the medical or psychiatric condition of a witness that may impair his or her ability to testify truthfully or accurately; pending charges against a witness for whom no deal is being offered at the time of trial; the fact that a~~

~~witness has taken but did not pass a polygraph examination; the failure of a witness to make an identification; and evidence that might adversely impact the credibility of the State's evidence. The due diligence required by subsection (a)(1) does not require affirmative inquiry by the State with regard to the listed examples in all cases, but would require such inquiry into a particular area if information possessed by the State, as described in subsection (a)(2), would reasonably lead the State to believe that affirmative inquiry would result in discoverable information. Due diligence does not require the State to obtain a copy of the criminal record of a State's witness unless the State is aware of the criminal record. If, upon inquiry by the State, a witness denies having a criminal record, the inquiry and denial generally satisfy due diligence unless the State has reason to question the denial.~~

(2) Upon request of the defendant, the ~~State's Attorney~~ State shall produce and permit the defendant to inspect, copy, and photograph: (A) any relevant material or information regarding pretrial identification of the defendant by a witness for the State and specific searches and seizures, wiretaps, or eavesdropping; (B) all written and all oral statements of the defendant and of any co-defendant that are within the possession or control of the State and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements; ~~(B)~~ (C) all written statements of any other person that are within the possession or control of the State and that relate to the subject matter of the offense charged; ~~a copy of each written or recorded statement, and the substance of each oral statement made by the defendant or a co-defendant to a State agent that the State intends to use at trial or at any hearing other than a preliminary hearing; (C)~~ (D) each written report or statement made by an expert whom the State expects to call as a witness at a hearing, other than a preliminary hearing, or trial; ~~(D)~~ (E) any documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings,

photographs, or other tangible things that the State intends to use at the hearing or trial; and ~~(E)~~ (F) any item obtained from or belonging to the defendant, whether or not the State intends to use the item at the hearing or trial.

(3) Upon request of the State, the defendant shall permit any discovery or inspection specified in subsections ~~(c)(2)(A), (B), and (E)~~ (d)(1)(B), (d)(1)(E), and (d)(2) of Rule 4-263.

Committee note: This Rule is not intended to limit the constitutional requirement of disclosure by the State. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. U.S.*, 405 U.S. 150 (1972); and *U.S. v. Agurs*, 427 U.S. 97 (1976).

~~(c)~~ (d) Matters Not Subject to Discovery

(1) By any Party

This Rule does not require the State or the defendant to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged work product of counsel or (B) any other matter if the court finds that its disclosure would entail a substantial risk of harm to any person ~~outweighing~~ that outweighs the interest in disclosure.

(2) By Defendant

This Rule does not require the State to disclose the identity of a confidential informant unless the ~~State's Attorney~~ State intends to call the informant as a witness or unless the failure to disclose the informant's identity would infringe a constitutional right of the defendant.

~~(d)~~ (e) Procedure

The discovery and inspection required or permitted by this Rule shall be completed before the hearing or trial. A request for discovery and inspection and response need not be in writing and need not be filed with

the court. If a request was made before the date of the hearing or trial and the request was refused or denied, the court may grant a delay or continuance in the hearing or trial to permit the inspection or discovery.

~~(3)~~ (f) Protective Orders

A party or person from whom discovery is sought may petition the court for any protective order that justice requires. For good cause shown, the court may order that specified disclosures be restricted.

~~(4)~~ (g) Failure to Comply with Discovery Obligation

The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

~~(e)~~ (h) No Requirement to File With Court; Exceptions

Except as otherwise provided in these Rules or by order of court, discovery material need not be filed with the court. If the party generating the discovery material does not file the material with the court, that party shall (1) ~~serve~~ provide the discovery material ~~on~~ to the other party, (2) make the original available for inspection and copying by the other party, and (3) retain the original until the expiration of any sentence imposed on the defendant. This section does not preclude the use of discovery material at trial or as an exhibit to support or oppose a motion.

Source: This Rule is new.

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

The proposed amendments to Rule 4-262 track the proposed amendments to Rule 4-263 to the extent the Committee believes

desirable in the District Court.

Section (c) of Rule 4-262 is moved to the beginning of the Rule and relettered (a)(1). The amended language of section (a) tracks the language of the comparable amendments to Rule 4-263, verbatim. A cross reference to *State v. Williams*, 392 Md. 194 (2006) is added following subsection (a)(2).

Section (b) incorporates into Rule 4-262 the definitions of "oral statement" and "written statement" set forth in Rule 4-263.

In section (c), as stated in the Reporter's note to Rule 4-263, references to Code, Criminal Procedure Article, §11-205 and Rule 16-1009 are added.

Subsection (c)(1) requires the State to comply with the obligations of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny by providing to the defendant, without the necessity of a request, the material and information specified in Rule 4-263 (c)(1)(C).

Subsection (c)(2), concerning disclosure by the State upon request of the defendant, is amended by the addition of the substance of Rule 4-263 (c)(1)(A), concerning statements of the defendant and any co-defendant, and Rule 4-263 (c)(1)(E)(i) and (iii), concerning searches and seizures, wiretaps, eavesdropping, and pretrial identification of the defendant. In addition, the amendment adds to Rule 4-262 (c)(2) the substance of Rule 4-263 (c)(3), Evidence for Use at Trial, and Rule 4-263 (c)(4), Property of the Defendant.

In addition to the reference to *Brady*, references to three additional opinions of the U.S. Supreme Court are proposed to be added to the Committee note following section (c).

Also added to the Rule is a new section (d), which is derived verbatim from Rule 4-263 (e), Matters Not Subject to Discovery, as amended.

> New section (f) adds to Rule 4-262 the protective order provisions of Rule 4-263 (j).
>
> New section (g) adds to Rule 4-262 the last two sentences of Rule 4-263 (l).
>
> New section (h) is added for the reasons stated in the Reporter's note to Rule 4-263 (i). In subsection (h)(1), the phrase "provide the discovery material to" is used, rather than the phrase, "serve the discovery material on," which is used in the circuit court Rule. Due to the volume of cases in the District Court, State's Attorneys believe that the requirement of filing a notice that "reasonably identifies the information provided" and "states the date and manner of service," which is included in new section (i) of Rule 4-263, would be burdensome in Rule 4-262. The Committee agrees, and has excluded this requirement from the provisions of Rule 4-262 (e). Also omitted from section (e) of Rule 4-262 is the last sentence of Rule 4-263 (i), which requires the parties to file a statement of their agreement with the Court if they agree to provide discovery or disclosures in a manner different from the manner set forth in the Rule. Additionally, in Rule 4-262, the time that a party must retain original discovery materials that are not filed with the court is "until the expiration of any sentence imposed on the defendant," rather than the time period stated in Rule 4-263 (i).

Mr. Karceski stated that Rule 4-263 (Discovery in Circuit Court) would be discussed first, followed by Rule 4-262 (Discovery in District Court). Each section of the Rules would be discussed, one at a time.

Rule 4-263 (a)(1) requires the parties to exercise due diligence in identifying all of the material that must be disclosed. Subsection (a)(2) explains how far the parties'

obligations extend. The Rule that was formerly proposed and the version discussed today provide that the obligations extend to staff and others.

Mr. Karceski referred to the Chair's comments to Rule 4-263. The first one pertains to subsection (a)(2), which does not contain the word "counsel." The Chair would like the term "counsel for the parties" to be added. The Chair explained that most of the case law concerning the staff of the State's Attorney deals with how far knowledge extends beyond the realm of the prosecutor, reaching investigators and police. Normally, a reference to "parties" includes counsel. The language in subsection (a)(2) that reads "... staff members and any others who have participated" can be looked at in the context of the State's Attorney who is counsel for the State which is the party. The question is where this goes with respect to defense counsel, for example, the Public Defender. Who is the staff of the Public Defender? They have counsel, panel attorneys, investigators, social workers. It is a statewide organization, although the focus is usually on the Public Defender for the county. The Attorney General may be prosecuting the case. In the context of "staff," some consideration should be given to the meaning of the word with respect to the defense and to the Attorney General if he or she is prosecuting the case. If the defendant is corporate, does this refer to the staff of that party? The Chair said that he had no specific suggestion, but he expressed the opinion that this needs to be considered.

Mr. Kratovil responded that when this issue was discussed, the purpose was for the reciprocal requirement for disclosure. The belief was that if someone, such as an investigator for the Office of the Public Defender, had information pertaining to alibi witnesses, that individual, if he or she regularly reported to counsel, was required to turn over that information. The Chair inquired if this requirement extends outside the county, because the Office of the Public Defender is a statewide organization. Mr. Kratovil asked whether the language in subsection (a)(2) that reads: "...who have participated in the investigation or evaluation of the action and who regularly report, or with reference to the particular action have a duty to report to the party" narrows the requirement. The Chair questioned whether this would apply to anyone in the Attorney General's office. Mr. Kratovil replied that the language "the particular action" clarifies that this requirement pertains only to those people who participate in the particular case. The Chair pointed out that this provision could refer to everyone in the State's Attorney's office, whether they are in the particular case or not. Mr. Kratovil commented that the Committee had discussed this with reference to victims, witnesses, and witness-coordinators. Mr. Karceski reiterated that the language "who have participated in the investigation or evaluation of the action ..." has a limiting effect to a certain extent. The Vice Chair noted that the phrase "who either regularly report" is also limiting, although she pointed out that the commas in that

sentence may be misplaced.

The Chair stated that the case law may indicate that the term "staff members" is not limited to those who have participated in the case. Mr. Zavin, an Assistant Public Defender, explained that the language "any others who have participated" is noted in *Thomas v. State*, 168 Md. App. 682 (2006), 397 Md. 557 (2007) in which federal officials reported to the State during the investigation of the case. Mr. Zavin said that he understood the Chair's concerns about the defense obligations. Since defense disclosures are specifically limited later in the Rule, it may be useful to consider those provisions when they appear in the Rule. As an example, providing the names and addresses of alibi and character witnesses would not cause any problems.

The Chair asked if the term "staff members" applies only to other assistant State's Attorneys who have been involved in the case or to anyone in the Office of the State's Attorney. Master Mahasa pointed out that the case cited at the end of subsection (a)(2), *State v. Williams*, 392 Md. 194 (2006), is very broad and covers everyone. The Chair inquired about a case involving the Office of the Attorney General, which may have 400 lawyers.

Judge Matricciani commented that the intent of subsection (a)(2) of Rule 4-263 is to reach anyone who is involved in the investigation of the case. It does not include people who had nothing to do with the case. The Chair expressed his doubts, saying that this provision may apply to anyone within the Office

of the State's Attorney. Judge Matricciani pointed out that the language reads "a party and staff members and any others who participated ..." which limits the group to those who have participated. The Vice Chair expressed the opinion that it would be useless for this to apply to people who had nothing to do with the case. The Chair noted that *Williams* provides that anyone who works in the Office of the State's Attorney is included. Ms. Nethercott remarked that *Williams* concerned an agreement between a witness and one division of the Office of the State's Attorney, and the prosecutor trying the case knew nothing about the agreement. In that sense, it may not have involved a direct participation.

Mr. Brault expressed the view that the word "others" can cause trouble -- there could be a post conviction case based on someone who knew something. He suggested removing the word. The Reporter responded that the language in subsection (a)(2) has been in current Rule 4-263 for a long time as section (g) applying to the State's Attorney. Mr. Zavin had said that individual disclosures on the defense side are very limited and case specific, so this may not cause much of a problem.

The Chair pointed out the language of subsection (a)(2) that reads: "...extend to material and information in the possession or control of a party and staff members and others ...," and he asked who the party is. If it is the State's Attorney's office, the State is regarded as the party. If the material is in the possession of the Office of the State's Attorney, is this broader

than the language “who have participated”? Judge Hollander commented that she thought that the language “who have participated” qualifies the State and staff members. Mr. Karceski reiterated that the language “who have participated” was dealt with in *Thomas*. A federal agent had taken a statement from a witness that was not revealed until very late in the proceedings, causing problems. That is why this language was incorporated into the Rule. Mr. Kratovil agreed with Mr. Karceski, noting that the language as it relates to the State concerning the reciprocal requirement was added, and it provides that if the material is required to be turned over by the defense pursuant to the Rules, that requirement extends to the defendant and to anyone who participated in the case. The obligation was changed from applying to the State’s Attorney to applying to the parties.

Mr. Karceski suggested that the Committee consider adding the language “counsel for the party” to several places in subsection (a)(2). Mr. Sykes said that the Style Subcommittee can take care of this by making certain obligations extend only to people who have some knowledge of the case. How could this be administered if it applies too broadly? Each person heading the case would have to send out a bulletin that would state that if anyone has knowledge of the case, he or she must contact the person sending the bulletin. The obligation under the Rule should be limited to people who have something to do with the case. The Chair inquired if it is the view of the Committee that

the obligation extends even within the office of the prosecutor or the defendant only to those who have some knowledge or who have participated. Mr. Sykes answered affirmatively, explaining that otherwise it would be very difficult to administer the Rule.

Mr. Doan remarked that in *Williams*, the prosecutor who had been involved with the witness had not been involved in any way with the case at hand. The State's Attorney is charged with the obligation to disclose to the defense that the witness has received a benefit or a potential benefit in a case that is unrelated to the case at hand. Should that be discussed in the Rule? Mr. Kratovil responded that this is referred to in the Committee note after subsection (c)(1)(E). Mr. Doan expressed the view that if the witness has received some benefit, this fact should be disclosed to the defense. The Chair reiterated that the *Williams* case held that it must be disclosed to the defense the fact that people in the Office of the State's Attorney have knowledge about a witness in a case even though they have no knowledge about the case itself.

Mr. Kratovil questioned whether there is a way to incorporate the point that if the person is not someone who actively participated in the investigation but has exculpatory material in his or her possession, this material would have to be turned over. He acknowledged the Chair's point that the Rule requires that the information be within the knowledge of the person. He asked Mr. Karceski if he agreed that the Rule covers this. Mr. Karceski replied that he was not sure. The intent of

the language in the Rule is that this would not expand itself to the entire Office of the Attorney General, everyone who is part of the Office of the Public Defender, and the entire Office of the State's Attorney, because of the herculean task that it would cause for those agencies. The spirit of subsection (a)(2) is that it be limited, but a fair reading of the language of the Rule may not be limited, so it may be necessary to do something to rein it in. The Chair responded that the Style Subcommittee can further refine the language, but the question is how the Committee would like to do it.

Mr. Kratovil expressed the opinion that anything that is exculpatory must be turned over to the other side. The Committee note refers to this. There had been a lengthy discussion as to "pending charges." Ms. Ogletree commented that one way to limit the Rule would be to define the terms "investigation" and "evaluation" to include a witness to the case. It would refer not only to the action, but also to the witnesses who have something to do with that action. The Vice Chair noted that the language of the Rule is written broadly. The language "who have participated" or "who either regularly report or ... have a duty to report" only relates to the word "others." With respect to the obligation generally, it relates to the entire Office of the State's Attorney. To change it with respect to the witness issue would be very difficult. It creates a burden on the entire agency, but there seems to be no way to get around this. Mr. Sykes inquired whether the witness is included in subsection

(a)(2). Ms. Ogletree responded that the issue is whether the investigation and evaluation is only of the action itself, or if it includes all of the things that go on with respect to that action, such as the witnesses and the alibis. The Chair noted that *Williams* and *Thomas* both pertained to exculpatory material as defined in *Brady v. Maryland*, 373 U.S. 83 (1963), referred to as "Brady material." *Williams* seems to hold that anyone in the Office of the State's Attorney who knows about this is covered.

Judge Matricciani asked whether the concept is that the prosecutor of the case who is part of a large office is obligated to learn if his or her witnesses are involved in other cases in the office. This is analogous to conflicts of interest in a law firm where a lawyer takes on a case, and one of the lawyer's partners has represented the other side. The lawyer who took the recent case has the obligation to identify the conflict, or that lawyer can be in violation of an ethical requirement. Judge Hollander remarked that in a large jurisdiction, such as Baltimore City, it would be impossible for the assistant State's Attorneys to do this. They would not have the resources to figure this out, because the requirement is so broad.

The Chair cautioned about the holding in *Williams*. Mr. Kratovil commented that the Rule may not be able to capture all of the possible situations. Ms. Ogletree pointed out that the way to capture them is to refer to "Brady material" in the Rule, since all of the information being discussed seems to be this type of material. Master Mahasa noted that *Williams* refers to

more than just exculpatory material. The Vice Chair said that what has to be produced is referred to elsewhere in the Rule. Subsection (a)(2) only pertains to whom the obligation applies. Mr. Kratovil commented that the sections of the Rule dealing with exculpatory material would apply to the situation where, in a large jurisdiction, an Assistant State's Attorney in the District Court knows of a theft case about which the prosecutor in the circuit court has no knowledge. He expressed the opinion that the language limits the obligations to parties and counsel involved in the particular action.

Mr. Klein asked whether subsection (a)(2) is necessary given the content of subsection (a)(1). Mr. Karceski pointed out that current Rule 4-263 refers to what the State's Attorney must provide upon request and without request. He said that he did not know whether the Rule refers to the Office of the Attorney General, only to the Office of the State's Attorney. The current Rule does not discuss or define obligations of the parties. Implicit in the Rule is the concept that if there is information that should be turned over, it must be turned over. The Rule is broad, but it is intended to be broad, and it is clear what it covers. Mr. Karceski stated that he did not think that before providing discovery, the State's Attorney or the Attorney General has to interview every one of his or her assistants to find out if someone has information. Under the current Rule, if someone has information that should be turned over but does not do so, it still presents a problem, even without this provision. The

proposed Rule defines whose responsibility it is and what should be turned over. This is what the Court of Appeals had said that the Rule must do.

The Chair read the synopsis of *Williams*: "the State's duty and obligation to disclose exculpatory and mitigating material and information to the defense extended beyond the individual prosecutor assigned to the case and encompassed information known to any prosecutor working in the same office." This case followed a line of federal cases. He commented that the purpose of the Rule change is to provide guidance to State's Attorneys as to what has to be disclosed, so that these problems do not arise. If they do arise, it is usually after the conviction, and the only action the appellate court can take if it finds that there has been a *Brady* violation is to reverse the decision. The language has been added to the Rule to avoid this situation. His recollection was that *Williams* provides that the duty to disclose *Brady* material extends to everyone in the office of the prosecutor, even if any of those individuals did not work on the case. The prosecutors have to send out a notice to everyone in their office informing them of the witnesses in the prosecutor's case and asking them if they have any information pertaining to those witnesses.

Mr. Patterson noted that there are obligations other than *Brady* requirements in the Rule extending to staff members. Subsection (a)(2) does not apply solely to *Brady* requirements; it applies to the entire Rule. These are two different issues. The

Chair responded that one way to deal with this is to make a distinction that the duty to disclose materials constitutionally required to be disclosed extends to the party and staff members and to all others who have participated in the case, and that for everything else, the duty extends only to those who have participated. Mr. Shellenberger asked whether the State's Attorney has an obligation to send an e-mail to everyone in his or her office about the witnesses if he or she is trying a robbery case with many witnesses. This could entail sending out 10,000 e-mails, and it could require even more if the case were in Baltimore City. Mr. Kratovil reiterated that this issue as it relates to exculpatory information had previously been discussed. The Committee note contains reasonable language dealing with this issue. He suggested that if the Court is concerned about it, language could be added that would provide that nothing in this section would limit any requirements to turn over otherwise exculpatory information regardless of in whose possession it is. The Vice Chair expressed the view that this would make the provision broader than what it already is.

Mr. Karceski commented that the more this issue is discussed, the less that can be remembered as to how it was drafted. The Reporter had brought to his attention that section (g) of current Rule 4-263 is almost a template of the language in subsection (a)(2), except that it only refers to the State's Attorney. The proposed version adds a little more to it, but this provision has been in the Rule for many years. He expressed

some doubt that the language that has been added has broadened the provision. Current Rule 4-263 (g) reads as follows: "The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney." This is 90% of the language in proposed subsection (a)(2), and it applies not just to *Brady* but to the entire discovery process. He was not sure that any change is necessary. The Chair noted that section (g) of the current Rule is not like proposed subsection (a)(2). The Court of Appeals has read section (g) to mean that it extends to anyone in the State's Attorney's office. The Vice Chair remarked that the current draft is the same, but the Chair countered that it is not as clear.

Mr. Kratovil said that if the material is not required by *Brady* and does not fall within the specific requirements of information that has to be turned over, it does not apply anyway. It is either that parties have information that the Rule specifically requires to be turned over, or the information is exculpatory. Mr. Karceski acknowledged that parts of the proposed Rule have caused much dissension, but subsection (a)(2) did not. Anything that needs to be changed should be able to be handled by the Style Subcommittee. Mr. Sykes proposed that the term "party" should be deleted from the Rule, and it should

simply refer to the "prosecution" and the "defense." He added that the Style Subcommittee can look into this.

Mr. Brault remarked that the Rule seems limiting. If there is *Brady* material, and if someone works for the State and has pertinent information, it does not matter what that person's job is. The Rule seems to limit the source of *Brady* material to that which is in the control of certain designated people. The Chair agreed with Mr. Brault, but he pointed out that if the view of the State's Attorney is that no prosecutor other than the one handling the case has to turn over material, this is wrong. Even with the cross reference to *Williams* in the Rule, the question is whether anyone will read that case. Mr. Zavin noted that if the reference to "the prosecution" and "the defense" is added in place of the term "party," subsection (a)(2) will be almost identical to American Bar Association ("ABA") Standard 11-4.3 (a). (For the ABA Standards, see Appendix 1).

Mr. Mitchell suggested that subsection (a)(2) could be divided into two paragraphs -- the obligation of the State and the obligation of the defense. The obligation of the State could be written to be consistent with *Williams*, and the obligation of the defense could be consistent with the language in subsection (a)(2), limited to the attorneys, staff members, and others who have participated in the investigation. This would avoid the problem of the Public Defender in Montgomery County being required to know something that happened in Wicomico County.

The Vice Chair inquired whether there was an important

policy reason to change the focus of subsection (a)(2) from the obligations of the State's Attorney to the obligations of both parties, other than facial fairness. Mr. Kratovil replied that the change was based on reciprocal requirements. The Vice Chair then asked whether this should be changed back to applying only to the State's Attorney. Ms. Ogletree questioned whether it is intended to include the Attorney General. Mr. Karceski answered that it was intended to include the Attorney General. The Chair said that this is another issue to consider later. Mr. Kratovil noted that the language is broad enough to encompass the Attorney General. Mr. Sykes commented that this is why he suggested using the terms "prosecution" and "defense" and not the term "parties." The Chair noted that ABA Standard 11-4.3 (a) reads as follows: "The obligations of the prosecuting attorney and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office." Mr. Kratovil moved that subsection (a)(2) conform to the language of the ABA. The motion was seconded. The Reporter asked how *pro se* defendants would be covered.

Mr. Patterson commented that the ABA standard is clear and well written. Why would subsection (a)(2) be limited to using the language of the ABA as opposed to the entire Rule using the ABA language? The Chair replied that the Criminal Subcommittee recommends using the ABA language in some sections of the Rule,

but not all. Mr. Patterson noted that what is being discussed is amending subsection (a)(2), but consideration should be given to adopting the language of Standard 11-4.3 (a) and (b). The Chair asked if section (b) of the ABA standard is reflected in subsection (a)(1) of the proposed Rule. Mr. Patterson answered that it is not entirely there. Mr. Michael pointed out that Standard 11-4.3 also contains sections (c), (d), and (e). Mr. Sykes remarked that subsection (a)(2) spells out to whom the obligation to provide material or information extends. The remainder of the ABA Standard deals with the internal workings of the office, which is not needed here, because it may or may not be reciprocal. There are certain duties the prosecution has, including checking with other government agencies.

The Chair noted that there was a motion on the floor to amend subsection (a)(2) by adopting the language of ABA Standard 11-4.3 (a). He asked for a vote from the Committee, and the motion carried unanimously. The Chair inquired whether any other language from the ABA Standard should be added to section (a) of Rule 4-263. He pointed out that the Reporter had raised the issue of how to deal with *pro se* litigants if the Rule refers to "attorneys." Judge Matricciani pointed out that subsection (a)(1) refers to "each party." The Vice Chair stated that the Rule should refer to "the prosecution," "the defense," and "unrepresented parties." Ms. Ogletree suggested that language could be added that would provide that the obligations of defense counsel apply to *pro se* defendants. Mr. Kratovil expressed the

view that the Rule needs to be consistent. Subsection (a)(1) refers to "each party." Mr. Johnson asked whether the term "party" includes a *pro se* defendant. The Vice Chair replied that this term is included, but the decision has been made not to use the word "party" in subsection (a)(2). Mr. Sykes reiterated that using the terms "prosecution" and "defense" covers this situation.

The Reporter asked if subsection (a)(1) is to be left as it is, and subsection (a)(2) is to conform to the language of the ABA Standard but using the terms "prosecution" and "defense." Mr. Sykes said that subsection (a)(1) should also use the ABA language. Ms. Ogletree expressed her agreement with Mr. Sykes that these terms will apply to *pro se* defendants. She suggested that the Style Subcommittee should redraft section (a). The Vice Chair remarked that other issues may arise as the Style Subcommittee redrafts, but she understands what the Committee would like changed.

Mr. Karceski drew the Committee's attention to section (b) of Rule 4-263. He explained that this was taken directly from ABA Standard 11-1.3. It defines the terms "oral statement" and "written statement." The Chair has raised an issue concerning the language in section (b) that reads "of any kind" appearing in subsections (b)(1) and (2) -- what does this language mean? Mr. Karceski said that he thinks that this means anything, without limitation. It is taken directly from the ABA definition, and makes sense. It expands the definition very broadly. However,

as the Chair has pointed out, the ABA has commentaries to its Standards, and the one for Standard 11-1.3 gives an extensive commentary regarding terms "oral statement" and "written statement." The ABA definitions have been incorporated into the definitions in section (b) of Rule 4-263, and a reference to the ABA commentary may be helpful.

The Chair stated that he was not certain what the language "of any kind" actually means. He had looked at the ABA Commentary which explains what statements are and provides excellent guidance. The Committee note after subsection (c)(1)(E) could cross reference that language but not incorporate it. This is consistent with the case law that has arisen since the ABA Standards were adopted. The language appears in Standard 11-1.3 (a). It encompasses only existing writings and recordings and reflects the fact that the government has no obligation to memorialize the knowledge and recollection of particular witnesses. A cross reference to this Commentary may be helpful. The Vice Chair moved to add a cross reference in the Rule to the ABA Commentary to Standard 11-1.3 (a), the motion was seconded, and it passed unanimously.

The Vice Chair asked if there is a general sense that the Rule is trying to conform to the language of the ABA Standards whenever possible. Mr. Karceski answered that the intention is to blend the ABA language into the version of Rule 4-263 that was formerly proposed. The Subcommittee view was that the language in the earlier version satisfies many of the issues that have

arisen, but some of the ABA language can be helpful.

Mr. Karceski drew the Committee's attention to section (c) of Rule 4-263. The language "Without Request" has been stricken, because the position of the ABA is that all disclosures by the State are to occur without the necessity of a request by the defendant. There no longer is a need for the defendant to file the formal written discovery request that has been used by defendants in Maryland for many years to obtain certain types of material and information from the State. The obligations of the State are spelled out in section (c). Section (c) begins by excluding work product from disclosure. "Work product" is defined in subsection (e)(1), which is located at the top of page 11. The State is generally obligated to provide all oral and written statements, as previously defined in section (b), of the defendant and the co-defendant that are within the possession and control of the State and relate to the subject matter of the offense charged and any documents relating to the acquisition of such statements. One of the issues raised by the Chair is the meaning of the word "document." Someone is arrested and is in a room being questioned, and the interview is being videoed on the DVD format, so it is both an audio and a video recording. It probably is not incorporated into the definition of the word "document."

The Chair suggested that the language "and recordings" could be added to subsection (c)(1)(A) after the word "documents" and before the word "relating." Mr. Karceski noted that the

definition of "written statement" in subsection (b)(2) incorporates recordings. He expressed his concern that it may not be sufficient to have this reference only in the definition, and he agreed with the Chair that it should be put into the Rule itself. The Chair questioned whether there have been any problems with prosecutors turning over police audiotapes or videotapes. Mr. Brault remarked that with the onset of electronic discovery, all electronically stored information is included. Mr. Michael added that when the electronic discovery rules were recently discussed and drafted, a very extensive definition of electronically stored information was developed. Mr. Klein said that Rule 2-422, Discovery of Documents and Property, provides the litany of items that one must produce that are classified as electronically stored information. There is no definition of that term nor any definition of the word "document." Mr. Michael inquired whether electronically stored information has any applicability to Rule 4-263. Mr. Karceski replied that he did not know of any such case. Mr. Michael then asked about e-mails, and Judge Matricciani questioned as to text messages. Mr. Karceski responded that there was a case in Baltimore City involving text messages.

The Chair suggested that the addition of the language "and recordings" to subsection (c)(1)(A) would fill any gap. Mr. Klein asked whether this is covered in the definition of the term "oral statement," which contains the language "whether or not reflected in the existing writing or recording." The Chair

clarified that this refers to documents relating to the acquisition of statements. The Vice Chair pointed out that there are two different issues being discussed. One is to broaden the definition of the word "document" to include recordings which can be accomplished by adding the Chair's suggested language to subsection (c)(1)(A). Mr. Karceski suggested that another word could be substituted for the word "document." The Vice Chair expressed the opinion that the Chair's suggestion would solve the problem. Mr. Karceski told the Committee that the language of subsection (c)(1)(A), except for the Chair's suggested addition, is taken from ABA Standard 11-2.1 as is the language in subsection (c)(1)(B) excluding the language "except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b)." Mr. Klein asked what the intent of the last sentence of that subsection is and whether it includes rebuttal witnesses, since they had been included in the language that is shown as stricken. Mr. Karceski responded that while the ABA Standards are very good and provide some excellent information, they are not really a rule, but more a concept. Subsection (c)(1)(B) was taken directly from the parallel ABA Standard and does not include rebuttal witnesses, although it should. He thanked Mr. Klein for bringing this to the Committee's attention.

Mr. Shellenberger remarked that the proposed version of Rule 4-263 is an improvement from the current Rule. However, the current Rule requires the State to identify the witnesses it intends to call. The Rule is being broadened in subsection

(c)(1)(B) to require the State to identify all persons known to the State to have information concerning the event. He expressed concern about this because of several issues. One is that there could be a situation where a confidential informant talks to the police who acquire enough information to do a search and seizure where contraband is found. The confidential informant is out of the substance of the case. Notwithstanding the issue of the liability of the informant that is covered by another area of the law, the informant is not necessary to the substance of the case. A second issue is that many cases are based on an anonymous telephone call to the police, or a call from someone who the police know, but the caller wishes to remain anonymous. If the police then develop enough forensic evidence, so that the defendant is found guilty, then the difference between a person being called as a witness and a person who has information about the case is delineated by *Brady*. The language of the current Rule referring to persons who the State intends to call as witnesses is preferable, excepting *Brady* or exculpatory material which are separate obligations. As a practical matter, State's Attorneys are having trouble getting witnesses to come to court let alone disclosing the identities of people who are not needed in court. Why increase the risk of danger to those people by disclosing their identities if they are not needed to be witnesses in court?

Judge Matricciani suggested that the Rule could exclude disclosing the names of people who provide anonymous information.

Mr. Volatile said that very often a person will say that he or is she was not a witness, but then the person will tell the name of a witness. The Rule may have a chilling effect. The State's Attorney not only has no witnesses, he or she does not have the people who will say where the witnesses are if the State is obligated to disclose the names of those who have the information but are not witnesses themselves. Mr. Doan commented that the spirit of the Rule is covered when the State's Attorney has to disclose the witnesses he or she intends to use, the witnesses who will rebut an alibi, and any obligation that the State's Attorney has under *Brady* to disclose. When the *Brady* obligation is coupled with the obligation to disclose who the State's Attorney intends to call as witnesses at the trial, this would be all of the witnesses relevant to the inquiry. To go any broader than this would require the State's Attorney to turn over people who are tangential witnesses.

Judge Matricciani asked Mr. Doan whether the police would have to turn over information that they obtained from going door to door after a crime has been committed. Mr. Doan answered that potentially, under the revised language of the Rule, the information would have to be disclosed. However, he pointed out that it would almost be impossible. If 24 out of 25 of the people the police spoke with say they know nothing, but one gives the name of another individual who does know something, would the name of that 25th person have to be turned over, also?

Mr. Karceski questioned whether Baltimore City already gives

out all of this information about canvassing the neighborhood. Mr. Doan replied that it is given out only if the State's Attorney intends to call the witnesses at trial. The practice in Baltimore City is to turn that information over, but it is in the reports that the State's Attorney receives. It is not necessary for them to go farther to investigate to find out if there any witnesses who have knowledge.

The Chair asked Mr. Doan if his view of proposed Rule 4-263 is that it would require the State's Attorney to investigate to find witnesses with knowledge. Mr. Doan responded that if it is passed, the practical application of the Rule, would result in litigation on the issue of whether the State's Attorney knew about someone who had information about a case. The Chair pointed out that the language of subsection (c)(1)(A) of Rule 4-263 applies only to persons known to the State to have information. Mr. Shellenberger's issue is that this goes beyond those witnesses the State intends to call at trial. Mr. Doan said that Mr. Karceski had noted that the practice in Baltimore City goes further than what the Rule currently requires. The Chair told Mr. Doan that it appeared that he was suggesting that the State would be obligated to investigate further. Mr. Kratovil commented that he did not recall much discussion previously about the language in subsection (c)(1)(A) of Rule 4-263. He added that he had no problem with retaining the language from the current Rule. He moved that the language of the current Rule replace the language in subsection (c)(1)(A), and the motion

was seconded.

Mr. Mitchell told the Committee that he was the former president of the Criminal Defense Attorneys Association and was at the meeting to represent that Association. He expressed the opinion that the discussion indicates that the Committee is losing sight of the purpose of the revised Rule, which is to make the discovery process fairer. The State's Attorneys seem to be arguing that they do not want to be obligated to do more work. The Committee should keep in mind the purpose of amending the Rule. If the State is aware of a witness who has information, but the State has chosen not to probe further into what that witness may know and does not disclose the existence of the witness, at some point later, the defense may discover the same witness and find out that the information the witness has is exculpatory. If the Rule is limited to witnesses that the State intends to call, this is counter to the purpose of promoting a fairer process. Subsection (c)(1)(B) should remain the same as it was presented today.

The Vice Chair inquired why, if this is an issue of fairness, the defense does not have to disclose the names and addresses of the witnesses that the defense knows about as opposed to those that they intend to call. Mr. Mitchell said that he had attended one of the Criminal Subcommittee meetings at which this issue was discussed. He had pointed out that the process is not fair, because the State has the advantage of greater resources than the defense has, and the State has control

over the evidence. Earlier attempts were to make everything equal, so that whatever the State does, the defense has to do. The Chair commented that the discussion has not reached this point yet. Mr. Karceski drew attention to Mr. Kratovil's motion to change subsection (c)(1)(B) of Rule 4-263 back to the way it reads in the current Rule. Mr. Karceski read the language of the version of the Rule that was the predecessor to the current draft: "...all statements about the action made by a witness to a state agent: (A) a copy of each written or recorded statement by the witness, regardless of when made, and (B) a copy of all reports of each oral statement by the witness...". This is the language from an older version of the Rule. He asked Mr. Kratovil what his suggested change was. Mr. Kratovil answered that his suggestion was to use the language in the older version that reads as follows: "...the name, and except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009, the address of each person whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony...".

Mr. Karceski pointed out that the remainder of subsection (b)(1) of this version of the Rule is also important. He added that what Mr. Kratovil is proposing will be even broader than the language of the latest version of the Rule, because it incorporates oral and written statements. He expressed the opinion that the language in the current draft taken from the ABA makes sense. What the Rule is requiring is what is already

taking place. Different jurisdictions handle this issue in different ways, but, for the most part, those jurisdictions who have representatives at the meeting today are giving this information to the defense anyway. Mr. Kratovil's motion may require the State to do more.

Judge Hollander commented that she shared the concerns of Mr. Shellenberger that the phrase from the current version of the Rule that reads: "...all persons known to the State to have information concerning the offense charged" would have a chilling effect. There may be a problem with people coming forward in a criminal investigation, and they may not necessarily have information that would be useful at trial, but they could help the State find people who have information. If the information is *Brady* material, it has to be disclosed anyway. People contacted by the State may have serious and legitimate concerns about coming forward. They may make disclosures with the belief that they will be protected, but they will not be. To suggest that prosecutors turn over this information anyway, is not necessarily true, because it varies from jurisdiction to jurisdiction. The language is too broad.

Mr. Kratovil said that he would modify his motion. He was not suggesting incorporating all of the language in section (b) of the previous version of the Rule. He proposed the following language: "...the names and, except as provided under Code, Criminal Procedure Article, §11-205 or Rule 16-1009 (b), the addresses of each person whom the State intends call as a witness

at the hearing or trial to prove its case in chief or to rebut alibi testimony, together with all written statements of any such person that are within the possession or control of the State and that relate to the subject matter of the offense charged...". Mr. Shellenberger commented that State's Attorneys are in favor of fairness. They do not want the Rule expanded, however, to require disclosure of anyone who knows anything. Mr. Mitchell argued that if an investigator speaks with someone who refuses to tell what he or she knows, that person may actually be an essential witness. Considering minor examples loses the idea of fairness. He pointed out a stylistic problem in the beginning of section (c) in the language "...without the necessity of a request, the State's Attorney..." and asked if the words "State's Attorney" should be "... State...". The Chair responded that this will be changed to "the prosecutor."

Mr. Kratovil remarked that the issue of broadening subsection (c)(1)(A) had not previously caused much discussion. The Chair said that Mr. Kratovil's motion is to use the language of the Rule as it appeared in the 158th Report to the Court of Appeals. The Vice Chair inquired as to what other states do and as to how many other states conform to the language of the ABA. The Chair answered that Colorado has adopted the language of the ABA, and there may be one or two other states that adopted the language. The ABA adopted the Standards in 1994, and they have been awaiting adoption by various states. Mr. Kratovil noted that he had attended a Subcommittee meeting at which he had

brought research showing how some of the other states stood on this issue. The vast majority required the prosecution to turn over witnesses intended by the state to testify but are no broader than that.

The Chair stated that the motion is to eliminate the requirement from the Rule that the State must turn over anyone who the State does not intend to call as a witness and who does not have *Brady* material. Ms. Nethercott commented that the problem is that *Brady* materials are not identified. The effort was to codify this. In post conviction review in cases concerning *Brady* materials, witness statements that contain *Brady* information may be those of witnesses whom the State decided not to call but who have relevant information. That will be what is potentially the exculpatory interest of the defense. The word "relevant" restricts this sufficiently. If this is changed back, and reciprocal discovery obligations on the defense are added, this is being tilted even further. The Chair cautioned that this issue will be discussed when it comes up in the Rule. Everyone should keep in mind that there is no mandate from the Court of Appeals to adopt the ABA Standards, but each departure from the Standards should be explained.

The Chair called the question as to Mr. Kratovil's motion to modify subsection (c)(1)(B) of Rule 4-263. Mr. Karceski pointed out that if this passes, the last sentence of the subsection would be deleted. The motion carried with a vote of ten in favor, six opposed.

Mr. Brault remarked that the initial focus on changing the Rule was to attempt to define *Brady* material. The philosophical debate is whether to require the State to disclose anyone who may potentially have information. This is not required in civil discovery. When the form interrogatories were discussed, the Committee observed it is not necessary for a lawyer to prove his or her opponent's case in a civil matter. Standard General Interrogatory No. 1 requires a party to identify any person and Standard General Interrogatory No. 3 requires a party to identify any document that supports a position the party is making.

Mr. Karceski pointed out that the language of subsection (c)(1)(B) that reads "...that relate to the subject matter of the offense charged" could also be written without the words "the subject matter of." Now that the proposed language of this provision has been changed from the ABA language, will there be further problems with arguments about whether something relates to the subject matter of the offense charged? He questioned as to whether this is an issue that the government decides, and it may not be a *Brady* issue. He moved that the language "the subject matter of" should be deleted from the Rule. The motion was seconded, and it passed unanimously.

Mr. Bowen pointed out the language in section (c) that reads "... privileged work product ... as defined in subsection (e)(1) ...". He said subsection (e)(1) merely gives examples of attorney work product, but it does not define it, and the cross reference to it adds nothing. He suggested that the language "as

defined in subsection (e)(1)" should be deleted. By consensus, the Committee agreed to this deletion.

Mr. Butler told the Committee that he and some other people in attendance wanted to raise some issues for the Committee to consider. He said that there are now in both law enforcement and prosecutor's offices, victim-witness assistant units that provide services to crime victims. This is not attorney work product. He and others are very concerned that under the broad language of subsection (c)(1)(A), the notes taken by the victim-witness assistant unit staff will have to be turned over to the defendant. This will have a chilling effect. If the notes were *Brady* material, they would have to be turned over, but generally, they are not. The Chair asked to which language in the Rule Mr. Butler was referring, and Mr. Butler answered that the language is: "...together with all written statements of any such person that are within the possession or control of the State and that relate to the offense charged." The victim-witness coordinators are employees of the State, or they are within the domain of the police who regularly report to the State's Attorney's office. Statements made to a victim-witness coordinator are not part of the traditional investigation of a case, and these units probably arose after the ABA standards were written. This could chill victims from receiving services, or the State or law enforcement from providing the services, or the coordinators will not take notes. Mr. Butler said that Ellen Alexander, Director of the Montgomery County Police Department Victim-Witness Assistance

Unit, will explain this more fully.

Judge Love noted that subsection (c)(1)(B) of Rule 4-263 requires the State to produce only written witness statements that have been signed. Mr. Butler disagreed, explaining that subsection (b)(2)(B) defines a "written statement" as "the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by the person...". This means that any oral statement made by a person that is memorialized somehow would have to be turned over. The Vice Chair added that this is true only if the victim is going to be a witness.

Ms. Alexander said that she wanted to explain what the traditional role of the victim-witness assistant is. They are not expected to look for any information to help the investigation of a case. They read very little about the case, only enough to know what has occurred and what services a victim may need, whether it is emotional, financial, or physical. They write some information down. Occasionally, victims will tell these assistants about past incidents unrelated to this particular crime. They rarely encourage victims to provide information that could be used in the particular case, because that is not their role. They are not trained to issue *Miranda* (*Miranda v. Arizona*, 384 U.S. 436 (1966)) warnings, but they do warn victims that if what they say could result in criminal charges, such as perjury, the victims should not proceed, or the assistants will have to report it.

The Chair asked the prosecutors whether the notes taken by a victim-witness coordinator of an oral statement made by the victim that were not *Brady* material would be Jencks Act (18 U.S.C.A. §3500) material that the prosecutor would have to turn over after the victim testified. Mr. McCarthy replied that it probably is Jencks material that would have to be turned over. He added that in Montgomery County, there is open file discovery, so witness statements would normally be provided. The Chair pointed out that the victim-witness coordinators are both in the police department as well as the State's Attorney's office. Notwithstanding whether there is a distinction between the police department and the State's Attorney's office and considering only the latter, when the people in that office interview witnesses and make records of the oral statements, is this Jencks Act material? Mr. McCarthy answered affirmatively. The ABA clearly intends to make Jencks Act material discoverable. If it has to be turned over, then the coordinator has to tell this to the witness, or if the witness testifies, the material will have to be turned over. Very seldom do the victims and the coordinators get into the substance of the case. The conversations are more typically about the services that are being given to the victim. The Chair commented that the statement has to relate to the offense. Mr. McCarthy agreed, noting that the State's Attorneys in Montgomery County advise their coordinators not to engage in conversations relating to the offense charged. Although it seldom arises, the answer to the Chair's question is that it

would be Jencks material if the conversation is about the offense charged.

Mr. Kratovil expressed the opinion that the language in subsection (c)(1)(B) of Rule 4-263 is a reasonable compromise, particularly considering previous language in older drafts. Previous drafts of the Rule required that everything had to be memorialized, so that every single oral statement that was made by a victim-witness coordinator would have had to have been memorialized and then turned over. The newer language requires that statements that are memorialized, *Brady* comments, and those that are related to the case would have to be turned over. Mr. Karceski quoted from the ABA Commentary to Standard 11-1.3 (a): "... the term 'written statement' ... goes beyond the comparable term in the Jencks Act ... The drafters ... concluded that this definition is unduly narrow ...".

The Chair remarked that he thought the ABA did go beyond Jencks to the extent that it would require disclosure of witnesses and statements that have anything to do with the offense whether or not they were going to be called as witnesses, but, as the Committee has decided, if it is limited to people who will be called as witnesses, this is pure Jencks material. Mr. Volatile said that if the victims are talking about emotional damages, they are not talking about the facts of the crime, but how they feel about it. Does the Committee agree that this does not relate to the offense charged and would not have to be turned over, because it is for treatment and is not fact-specific? The

Chair responded that the language of the Rule does not necessarily address this, but the Committee note after subsection (c)(1)(E) will deal with this. Mr. Kratovil noted that the statements that would have to be turned over are those that are recorded in some manner which would then fall under subsection (c)(1)(B) and have to relate to the offense charged.

The Chair asked if there was a motion to change the language of Rule 4-263. Master Mahasa remarked that the Committee note may clarify the concerns that have been expressed. The Chair commented that Mr. Volatile's statements about the psychiatric or medical condition lead to the question of whether these would fall under *Brady*. Mr. Karceski said that before this question is discussed, someone had pointed out to him that the phrase "the subject matter of" has to be deleted from subsection (c)(1)(A), to conform to the removal of the same language from subsection (c)(1)(B). By consensus, the Committee agreed to this deletion.

Mr. Karceski noted that subsection (c)(1)(C) of Rule 4-263 pertains to *Brady* material. The Chair had asked if it is necessary to retain the language that reads: "...including staff and others...". The Chair responded that this can be handled by the Style Subcommittee. Mr. Karceski drew the Committee's attention to subsection (c)(1)(D)(i) in which the language "or a prior conviction as permitted under Rule 5-609" has been deleted, because the language in subsection (c)(1)(D)(iii) covers this. Rule 5-609 is entitled "Impeachment by Evidence of Conviction of Crime." The Criminal Subcommittee decided to strike the language

that appears after subsection (c)(1)(D)(i) labeled as subsections (B) and (C), because it was too broad and too difficult to deal with, or it was *Brady,* in any event. Deleted subsection (C) is difficult to deal with, and the Committee note after subsection (c)(1)(E) pertains to this when it refers to materially inconsistent statements.

Mr. Karceski told the Committee that subsection (c)(1)(D)(ii) applies to deals that are struck with witnesses by the State or by the government and the need to turn that information over to defense counsel. Subsection (c)(1)(D)(iii) is the record of prior criminal convictions, pending charges, or probationary status of the defendant or co-defendant and insofar as known to the State any such records that may be used to impeach a State's witness. This is taken from ABA Standard 11-2.1 (a)(vi).

Mr. Karceski asked for any comments as to the beginning language of subsection (c)(1)(D). Mr. Klein said that since he does not practice criminal law, he is looking at the Rule strictly as an outside observer. He remembered the previous debate about the language that has been deleted which read: "that the facts differ from the witness's expected testimony" in terms of what is or is not material. He inquired where the Committee note after subsection (c)(1)(E) fits into the structure of subsection (c)(1)(C) or (D). Mr. Kratovil responded that the Committee note relates to what is under subsections (C) and (D). Mr. Klein asked if relates to subsection (C), as it does not seem to fall under subsection (D), because it is not character

evidence under subsection (D)(i), relationship evidence under subsection (D)(ii), nor prior criminal records under subsection (D)(iii). Mr. Kratovil said that it falls under subsection (C). Mr. Karceski inquired if Mr. Klein is suggesting that the Committee note not only give examples but be connected back to subsection (C). A reading of the examples in the Committee note makes it clear that they relate back to subsection (C).

The Vice Chair commented that Mr. Klein's point is that the language of the Committee note does not mesh with the language of the Rule itself. The Chair added that the examples in the Committee note are more like subsection (D) which pertains to impeachment. Mr. Klein expressed the view that something needs to be added to the Committee note, and the Vice Chair agreed.

The Chair stated that at this point, the discussion was focusing on the introductory language in subsection (D) of Rule 4-263. In subsection (D)(i), the language "or a prior conviction as permitted under Rule 5-609" has been stricken as too limiting, because Rule 5-609 only pertains to impeachment for certain kinds of convictions. Subsection (D)(iii) with respect to defendants refers to "all convictions." The thought was that as to defendants and co-defendants, all prior convictions should be turned over by the State, not just the convictions available under Rule 5-609. The Chair had told Mr. Karceski previously that there is no reference to convictions or other conduct that might be admissible under section (b) of Rule 5-404, Character Evidence Not Admissible to Prove Conduct; Exceptions; Other

Crimes. Section (b) of Rule 4-263 allows evidence of other crimes, wrongs, or acts of a person to be admitted, not to prove the character of a person to show conforming actions, but for proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. If the State has any of this evidence, it can be admitted for these purposes. Mr. Karceski suggested that in place of the stricken language in subsection (D)(i) that referred to Rule 5-609, language could be added referring to Rule 5-404 (b). The Chair remarked that it is a style matter as to where the reference should go, but it should be added to the Rule. By consensus, the Committee agreed to add a reference to Rule 5-404 (b).

Mr. Cassilly told the Committee that his problem with subsection (D)(i) is that subsections (D)(ii) and (iii) are taken from the ABA, but subsection (i) is not in the ABA Standards. This creates problems as to what is the character of the witness for untruthfulness. If a businessman is doing something that could be underhanded or illegal, Mr. Cassilly's view is that it is a civil matter, such as a breach of contract, that he would not get involved with. He asked, however, if the same businessman's house is burglarized, is Mr. Cassilly obligated to turn over to the defense that he had received a complaint from someone who had a contract with the businessman alleging that he was "dirty dealing" on the contract.

The Chair inquired if that would be admissible under section

(b) of Rule 5-608, Evidence of Character of Witness for Truthfulness or Untruthfulness. Mr. Cassilly answered that he did not know, but he expressed the concern as to what would come out on post conviction. Defense counsel could argue that a civil client could come forward and state that he or she got a civil judgment, and if the prosecutor had taken action, the person would be in jail. Now the prosecutor is charged with knowledge of these allegations that are not substantiated. Prosecutors investigate many allegations of child abuse that turn out to be unfounded. If one of those cases is pending in the prosecutor's files, would he or she or have to turn those over?

Mr. Cassilly expressed the opinion that subsection (d)(i) is very broad. The Chair remarked that it is no broader than Rule 5-608 (b). If someone could impeach the witness with this, it is *Brady* material. Mr. Cassilly said that the obligation is on him to turn over information and decide whether it is admissible as impeachment evidence. Is an allegation of child abuse or a theft conviction impeachable? The Chair replied that a theft conviction is admissible as impeachment evidence.

Mr. Cassilly stated that his office gets complaints of criminal behavior that they screen and often find to not be valid. Even assuming that in his hypothetical situation, the businessman breached a contract, it is a civil matter. Would the prosecutor be obligated to turn this over in a criminal case involving the businessman? If a high school teacher or minister had child abuse charges filed against him or her that the

prosecutor cannot prove, is the prosecutor obligated to turn over those allegations?

The Chair suggested that if it is admissible under Rule 5-608 (b) showing a character trait for untruthfulness, and the prosecutor makes the wrong choice, the case may have to be tried over and over again. Mr. Cassilly commented that the language of subsection (D)(i) is so broad that anything in the prosecutor's files regarding anyone's history, even criminal convictions that have a cutoff of 15 years, are not cut off under this language. A prosecutor cannot use a criminal conviction that is on appeal but must turn over rank allegations of illegal conduct that may not be able to be proved beyond a reasonable doubt. He expressed the opinion that the reason this provision is not in the ABA is because it is enormously broad.

In responding to Mr. Cassilly's problem, Ms. Forster pointed out the language in subsection (c)(1)(D) that reads: "...tends to impeach a witness by proving...". If the issue is a rank allegation, then the character of the witness for untruthfulness cannot be proved. Mr. Mitchell remarked that going one step beyond this, the purpose of this Rule is to promote fairness. If the State's Attorney is wondering if he or she should turn over this information, hopefully, he or she would err on the side of disclosing. Anything that cannot be proved cannot be used at trial. The questions being raised today, which are very specific, do not focus on the purpose of the Rule. A judge can determine these issues on a case-by-case basis. The Chair noted

that this provision has already been approved by the Committee in the 158th Report. The Subcommittee proposes to leave this the way the Committee had approved it.

Mr. Kratovil suggested that the word “State’s” be added in subsection (c)(1)(D) after the word “a” and before the word “witness.” Mr. Cassilly asked why this should be limited to State’s witnesses. The Vice Chair inquired if this change would mean that if there is information that tends to impeach a defense witness, this would not have to be turned over. Mr. Kratovil replied affirmatively, but he clarified that the concern is making sure that if the State has information about its own witnesses, this should be turned over to the defense. The Chair stated that when the Committee note is discussed, there is language in it providing that there is no obligation to check criminal records unless one has information that would indicate that there is a criminal record. Mr. Kratovil moved that the word “State’s” be added to modify the word “witness” in subsection (c)(1)(D). The motion was seconded. The Vice Chair commented that in civil practice, if a lawyer has information that tends to impeach a witness from the other side, the lawyer may choose not to turn this over. Mr. Cassilly remarked that most of the time, the prosecutor does not know who the defense witnesses are. Mr. Kratovil said that the defense is concerned about the State’s requirement to turn over its witnesses.

The Chair called the question on the motion to limit subsection (c)(1)(D) to prosecution witnesses. The motion

carried on a vote of 11 in favor, four opposed.

The Vice Chair commented that if there are problems with that issue from the defense perspective, none had been stated. Mr. Brault expressed the view that it is work product to impeach the other side. Mr. Mitchell said that he was confused, because section (c) pertains to the disclosure by the State, but the issue being discussed is the character of the witness. He said that this has been clear for years, and it should not limit the witnesses the State intends to call.

The Chair drew the Committee's attention to the stricken language that had been labeled "(B)" in subsection (c)(1)(D)(i). The Subcommittee proposed to strike this language. The Subcommittee also proposed striking out what is labeled as "(C)" in the same subsection.

Turning to subsection (c)(1)(D)(ii), the Chair asked if there were any comments to this provision, which was taken from ABA Standard 11-2.1 (a)(iii). The Vice Chair expressed the opinion that the beginning language which reads: "...the relationship, if any, between the State and any witness it intends to call at trial..." is very broad. The Chair noted that this language is discussed in the ABA Commentary to the Standard and in federal case law. It deals with the cooperators, confidential informants, and anyone who makes a deal with the State. The Chair stated that this provision is explained in the ABA Commentary. A cross reference to the Commentary could be added to the Rule. Mr. Karceski said that if the word

“relationship” is bothersome, the language could be changed to “any agreement, understanding, or representation,” which appears later in the same provision. He questioned whether it accomplishes the same thing. It could be redrafted by the Style Subcommittee. The Vice Chair responded that it may not be stylistic.

Judge Matricciani commented that he had heard cases in which there were informants being paid on a regular basis. Years later, they were involved in a different case, and the defense lawyer would want to know that they had a prior relationship with the State. Mr. Karceski agreed that the language of the Rule would have to include this. If the Rule refers to the Commentary, the change may not be necessary.

The Vice Chair inquired whether there is anything that the defense would want to know about the relationship between the State and the witness other than this agreement, understanding, or representation between the State and the witness that constitutes an inducement for the cooperation or testimony of this witness. Mr. Patterson noted that the operative portion of that provision is the language “that constitutes an inducement...”. If there was a prior relationship that did not have anything to do with the testimony in the current case, then it is irrelevant. The prior relationship could have been because the person was a former employee and has nothing to do with the inducement of testimony. Mr. Kratovil suggested that no change be made.

Mr. Michael referred to the language in subsection (c)(1)(D)(ii) of Rule 4-263 that reads "...any agreement, understanding, or representation between the State and the witness that constitutes an inducement...," and he suggested that this could read "...could constitute...," so that it does not sound as if the prosecutor will be making the judgment as to what constitutes an inducement. Mr. Sykes suggested that the wording should be "...may constitute...," and the Committee agreed by consensus to this suggestion.

Mr. Karceski drew the Committee's attention to subsection (c)(1)(D)(iii) of Rule 4-263. Mr. Cassilly expressed his concern about the "pending charges" of a witness. Since discovery obligations are continuing, how can a State's Attorney continue to check on whether a witness has pending charges? To the extent that the witness is considered to be important from the standpoint of the defense, the ability to check pending charges is just as available to the defense through public access terminals as it is to the State. Mr. Karceski responded that this issue has been discussed previously, and it is not true that the defense has the same ability to check on pending charges as the State has. The language of the Rule is "...insofar as known to the State ...". This means that the State cannot be willfully blind in what it sets out to do with respect to these records. Is it necessary to check everyday to find out if there is a pending charge against a witness? The Committee considered this and decided to use the ABA language. Mr. Karceski expressed

the view that this is not unduly burdensome. This refers only to witnesses who will be called at trial and not to those who have any knowledge of the charge. Mr. Kratovil added that language has been added to the Committee note after subsection (c)(1)(E) pertaining to records.

Mr. Weathersbee remarked that he had previously raised the issue concerning the record of criminal convictions. He obtains records through a Criminal Justice Information System (CJIS) terminal. He is not allowed to turn over the information he receives from the terminal to anyone who is not a criminal justice unit, including defense counsel. He used to try to turn over the criminal record of the defendant to the defense, but the State Police and the Central Repository for Criminal Histories told him that he was not permitted to do so, or his access to the records would be cut off. Although the ABA and the Rules Committee has discussed turning over records of convictions, Mr. Weathersbee inquired as to how those records are to be obtained if it cannot be done through a CJIS terminal, which is covered in Code, Criminal Procedure Article, §10-226, and by the regulations that have been formulated by the State Police to govern the access to criminal histories.

The Chair stated that what is being discussed is impeachment material that has to be turned over pursuant to *Brady*. This is required by the United States Constitution. Mr. Weathersbee said that he was concerned about the requirement that he cannot use the terminals in his office. Ms. Forster said that she had to do

research on the Central Repository, because it does not consider the Office of the Public Defender to be a criminal justice agency. There is an exception to the prohibition about an ongoing case that the information can be turned over to defense counsel or to the Office of the Public Defender. Mr. Weathersbee responded that he was not aware of it. Ms. Forster promised to send it to him. The Chair commented that he did not have an answer to Mr. Weathersbee's problem. How can this be resolved if the Constitution requires that it be turned over? Judge Hollander asked if this exempts a fact-sustained decision for a juvenile, which is not a conviction, regardless of whether it can be used for impeachment. The Chair answered that the Rule refers only to a criminal conviction and not to a juvenile proceeding. Judge Hollander questioned whether a juvenile record would have to be turned over, and Mr. Karceski replied negatively.

Mr. Weathersbee told the Committee that he had a second issue to bring up regarding the language "probationary status" in subsection (c)(1)(D)(iii) of Rule 4-263. He said that he has no method to find out about the probationary status of a defendant. Judge Hollander noted that the Rule provides that this is only applicable insofar as known to the State, but Mr. Weathersbee explained that the language "insofar as known to the State" only refers to the witness, but not to the defendant or to the co-defendant. The Chair stated that the language in subsection (c)(1)(D)(iii) comes from the requirement in the beginning language of subsection (D) that reads: "[a]ny material or

information... in the possession or control of the State...". Mr. Zavin commented that constitutionally, the State has to disclose the probationary status if it is known to the State.

Mr. Sykes pointed out a problem with the phrase "insofar as is known to the State." In subsection (a)(1), the Rule requires that parties shall exercise due diligence to identify all of the material and information that must be disclosed. The question will arise as to what is due diligence in each circumstance. Mr. Kratovil responded that the Committee note should address this. The Vice Chair expressed the opinion that the language "insofar as known to the State" should be deleted from subsection (iii). One only knows what one has an obligation to affirmatively learn or the knowledge one already has. This phrase is not necessarily applicable only to the second clause in (iii). The Chair suggested that this subject be held until the Committee note is discussed.

Mr. Karceski drew the Committee's attention to subsection (c)(1)(E). There being no comment, Mr. Karceski drew the Committee's attention to the Committee note. He explained that the note has been changed. The additions are underlined, and the deleted language is shown by strikeouts. There is a reference to the information disclosed pursuant to subsections (c)(1)(C) and (c)(1)(D). Subsection (c)(1)(C) refers to *Brady* information, and subsection (c)(1)(D) is the witness's character for untruthfulness. The Chair had made an earlier reference to Rule 5-404 (b), but the Reporter clarified that it is not necessarily

going to go into the Committee note. The Style Subcommittee will add it into the Rule. The Vice Chair pointed out that the first example set out in the Committee note is “each oral statement not otherwise memorialized made by a witness that is materially inconsistent with another statement made by the witness or with a statement made by another witness.” The word “materially” is not in the body of the Rule. The Rule in subsection (c)(1)(D) provides “...[a]ny material or information ... that tends to impeach a witness...”.

The Chair said that the point raised in the earlier Court of Appeals hearing was brought up previously today by Mr. Shellenberger. If the witness stated that the car was green, and the car had nothing to do with the offense, except for being mentioned at the trial, and at some other point in the proceedings, the witness said that the car was emerald, this distinction is not material. The question came up as to what would happen if the witness said that the car was green, and then later said that the car was white. Is this relevant to the offense? The discussion went on as to whether it is a burden on the prosecutor to turn over material that requires a guessing game as to whether it is inconsistent or not or whether it has any relevance. The thought was that adding the word “material” would narrow down the obligation on the part of the prosecutor who does not have to provide any information that would possibly have anything to do with the case.

The Vice Chair explained that she was not arguing the

substance of this language, but she was pointing out that the Committee note should not have language that seems to restrict the language in the Rule itself. The Chair pointed out that the language in the Committee note consists of examples of things that would tend to impeach but is not intended to set out the standards for disclosing material. Mr. Klein observed that unless an example falls under subsection (c)(1)(D)(i), the character of the witness for untruthfulness, the way subsection (D) is structured provides that the material has proven one of three things: character, a deal with the State, or a record of prior criminal convictions. A prior inconsistent statement, unless it is the character of the witness for untruthfulness, is not one of these three.

Mr. Karceski explained that subsection (c)(1)(C), which appeared after subsection (c)(1)(D)(i) and read "that the facts differ from the witness's expected testimony" was stricken, because the Subcommittee agreed that it was too broad. The Committee note seems to be hooked to this provision, but it is no longer in the Rule. The stricken provision would encompass every oral statement that would be made throughout the course of the case investigation. This is how the Committee note is tied in and how the word "material" was added. Mr. Kratovil remarked that what it comes from is the ongoing discussion as to whether to include language that would provide that all oral statements are to be memorialized. The language is a compromise reiterating that an oral statement that was not memorialized would still have

to be turned over if it were material.

Mr. Karceski suggested that since what Mr. Klein had pointed out makes sense, the language that was stricken in subsection (c)(1)(C) should be put back into the Rule using it in a different way under what is material. The Chair said that it could go in the Rule under the category of "prior inconsistent statement." Mr. Doan proposed that the old subsection (c)(1)(C) could be added as subsection (c)(1)(D)(iv) as a branch of exculpatory material used for impeachment. Mr. Klein noted that this is a form of impeachment evidence that is not listed in subsection (c)(1)(D), so it is excluded. Mr. Doan remarked that *Brady* material has been broken down into that related to guilt or innocence and that related to impeachment. This language would be another form of impeachment.

Master Mahasa inquired whether the State determines what is material. Mr. Kratovil reiterated that the point of this language was to try to capture the compromise between requiring everything to be memorialized or what tends to impeach to be turned over. Mr. Karceski answered Master Mahasa's question affirmatively. The Chair added that most of the time the State initially determines discovery. If the State guesses wrong, the court makes the decision. Mr. Kratovil suggested that the language in the Committee note that reads: "each oral statement not otherwise memorialized made by a witness that is materially inconsistent with another statement made by the witness or with a statement made by another witness" could be placed under

subsection (c)(1)(D) as a new subsection (iv). The Chair questioned as to whether this should be limited to oral statements. Mr. Kratovil replied that the Rule already requires all written statements. He moved the addition of the language from the Committee note into the Rule, and the motion was seconded.

Mr. Mitchell told the Committee that his organization has a problem with the word “materially.” It results in the State defining what is material. Using the Chair’s example of the color of a car, green vs. emerald may not be material, but green vs. gray may go to the perception of the witness to recall clearly what he or she saw. The addition of the word “material” limits too much the amount of information or material that will be disclosed. The Chair inquired how the inconsistency is impeachable, if it is not material. Mr. Mitchell inquired as to why the Rule should limit the amount of potentially inconsistent statements. When the defense looks at an emerald as opposed to a green car, it will realize that this will not be something so substantial that the defense could use it. The defense would know that there is some inconsistency by the witness, and the green vs. emerald issue could go to impeach a witness who cannot remember accurately what took place. It is an error to give the State the right to determine what is material. It would take away from the purpose of changing the Rule, which is to make the procedure fair.

The Chair asked if there were a motion to delete the word

“material.” Master Mahasa inquired whether there is a better word to substitute. The Vice Chair noted that the importance of the word could be argued all over the Rule. She referred to the language in subsection (c)(1)(D) that reads “[a]ny material or information in any form...that tends to impeach a witness...”. Is it only what materially intends to impeach a witness, or is it everything that tends to impeach a witness? Generally in discovery, one side is not given the ability to decide what is or is not important. She moved to delete the word “material,” and the motion was seconded.

Mr. Brault remarked that this issue is similar to impeachment on a collateral matter. He has debated the meaning of the word “collateral” in many cases, and it is a slippery slope. Mr. Kratovil said that the purpose of the word “material” in the Rule was to make it clear that not every oral statement has to be turned over. Ultimately, the State is in control of what information is turned over. If the State does not abide by the Rule and is not turning over exculpatory information, there are consequences. The Subcommittee agreed to include the word “material,” because it is a reasonable compromise. The Vice Chair clarified that if the witness says the car was green, and later says it was gray, the State gets to determine what is important and what is not in terms of what has to be disclosed. She asked Mr. Kratovil if he would decide that it is material if the witness first said that the car was green, and later said that it was gray. Mr. Kratovil answered that it could be

depending on the facts. Mr. Doan inquired whether if a witness gives a license plate number and the color of the vehicle, and then later changes the color, how this could be relevant. Judge Matricciani replied that a witness can be impeached for his or her recollection as well as for truthfulness. Mr. Doan pointed out that without the word "material," the State will have to turn over every single conversation. The Vice Chair added that there are inconsistencies in every conversation. Mr. Doan noted that it is virtually impossible to talk with a witness on separate occasions about the same topic without something being different from the prior conversation. Mr. Kratovil responded that if this is done, it will be what was already determined by the Subcommittee and elsewhere that the State should not be required to do which is to memorialize every single oral statement. The Vice Chair noted that it requires memorialization of an oral statement that is inconsistent with another oral statement.

The Chair commented that what had been discussed in the Subcommittee meeting was that if there is a pure difference in language between one statement and another, it has to be turned over if the State's Attorney does not believe that it is impeachable. There are always differences in language. Master Mahasa again inquired if there is a more appropriate word than "materially." Mr. Doan remarked that he thought that the word "materially" came from *Brady*. In the early stages of drafting the new Rule, the tension between the constitutional *Brady* vs. discovery *Brady* arose. Constitutional *Brady* allows one to look

at a transcript of the case and find out what should have been turned over and put it in with the record, so it is easy to tell if a certain statement would have made a difference or not. In this situation, "materially" meant that the outcome could have been different if this information had been known. If it did not make a difference, then it would not have been considered "material." The question is what is meant by the word "material." In the old setting, before one had to turn over statements that were not considered exculpatory under *Brady*, they had to be turned over automatically under the case law for the defense attorney to decide whether there was something that the defense thought was useful and not look foolish on cross examination. Under the current version of the Rule, the State has to turn over everything to the defense, so that they can determine if they will look foolish by using it. The State would have to turn over every conversation, and this is a monumental task.

Mr. Kratovil pointed out that the reason this language is not in the ABA Standards is because it is not a Jencks Act statement, and if it is not material, it is not *Brady*. If the Rule is to go beyond what is required by the ABA and what is required by case law, to be *Brady* material it has to be materially inconsistent and not a Jencks statement. The Vice Chair pointed out the exculpatory material section, which is subsection (c)(1)(C), and asked if this refers only to information that is material. Mr. Karceski responded that the

word “material” does not appear as an adjective. He added that this was discussed at a Subcommittee meeting, and all of the people at that meeting are present today, except for Mr. Maloney. He acknowledged the concerns being expressed today as to the State making the decisions. He expressed the opinion that the Rule cannot be written any other way, because it causes all of the statements that would not otherwise be memorialized to become memorialized. The great majority of these statements, maybe as much as 98%, would not be *Brady* material or relevant, impeachable matters that were material to the issue. The Subcommittee is comfortable with using the word “material.” If there is a concern, it may not always come to fruition, but it could be a defendant’s best defense. The Vice Chair added that the defense has to know about it. Mr. Karceski reiterated that it may not come into the public domain, but things that are material have a way of becoming known. He would like to have a degree of confidence that the State will do what it has to do in these matters.

The Chair called the question on the motion to delete the word “material.” The motion failed on a vote of three in favor.

Master Mahasa inquired again about changing the word “material” to some other word or phrase. Ms. Ogletree suggested “substantially inconsistent.” Judge Matricciani replied that a phrase such as “factually inconsistent” will not satisfy the State. Mr. Michael pointed out that there is a long-standing history associated with the word “material.”

Mr. Klein commented that there had not been a vote on Mr. Kratovil's motion to move the language of the Committee note into the body of the Rule. The Chair said that the language that would be moved reads "each oral statement not otherwise memorialized made by a witness that is materially inconsistent with another statement made by the witness or with a statement made by another witness." The Style Subcommittee will determine where to place this language. The Chair asked for a vote on the motion, and it passed unanimously.

Mr. Karceski told the Committee that the next issue for discussion is the language in the Committee note that reads: "...any medical or psychiatric condition of a witness, known to the State, that may impair his or her ability to testify truthfully or accurately...". The Subcommittee had discussions about the next phrase in the note that reads "pending charges against a witness of which the State is aware or has reason to believe exists...", and they chose to incorporate the language. The Chair pointed out that on the next page of the Committee note, item (2) relates to this. The Vice Chair asked where this issue falls within the items listed under subsection (c)(1)(D), which are (1) the character of the witness for untruthfulness (to which inconsistent material will be added), (2) the relationship between the State and a witness, and (3) any record of prior convictions. The Chair suggested that in the beginning of subsection (c)(1)(D) the words "by proving" could be changed to "including" and then examples given, because anything impeachable

has to be disclosed whether it falls under one of these categories or not.

The Vice Chair noted that the entire discussion about whether something materially differs is erased, because now the only relevant standard is "any material or information that tends to impeach a witness." Mr. Karceski observed that subsection (c)(1)(C) does not use the word "impeach." It uses the words "exculpate," "negate," or "mitigate." However, impeachment is certainly part of *Brady*. Mr. Doan expressed the view that the Committee note is limited by the examples it gives. Subsection (c)(1)(D) could be changed by putting a period after the words "impeach a witness" and putting the remainder of this provision in the Committee note. The Chair cautioned that a Committee note does not have the same significance as a rule. He reiterated that the words "by proving" could be changed to "including" with the remainder of the Rule consisting of examples.

The Vice Chair moved that subsection (c)(1)(D) of Rule 4-263 read as follows: "Any material or information in any form, whether or not admissible, that tends to impeach a witness of the State:...". The motion was seconded. Mr. Johnson asked whether the language in the Committee note would be added as another item. The Chair responded that subsection (c)(1)(D) would include those provisions labeled "(i)," "(ii)," "(iii)," and "(iv)" that were already approved. Mr. Johnson inquired if there would be a subsection (v). The Chair answered that anything in the Committee note that the Committee would like to be in the

text of the Rule would be added to subsection (c)(1)(D). The Committee approved the Vice Chair's suggested change unanimously.

The Chair stated that the next provision to consider in the Committee note is the language concerning "any medical or psychiatric condition of a witness..." coupled with the language "[t]he due diligence required by subsection (a)(1)...". The Vice Chair commented that aside from the due diligence issue, the point of the Committee note is try to limit what has already been said. It seems odd to state that the prosecutor only has to disclose if he or she knows it. There is nothing peculiar about a psychiatric or medical condition, but its disclosure is conditioned upon only if the prosecutor knows about it.

The Chair explained that the prosecutors had expressed the concern about whether they have to inquire if there is a witness, possibly a victim, who had made a statement, and the prosecutor would like to use that witness in the trial. Is it necessary for the prosecutor to ask the witness about any medical, psychiatric, or drug addiction history? The answer may be "yes" or "no" depending on what the prosecutor already knows.

The Vice Chair noted that the concern arises because of the language of the Rule itself in subsection (c)(1)(D)(i) that says the prosecutor must disclose information that tends to show the character of the witness for untruthfulness. Mr. Kratovil commented that the issue is what it means in terms of possession. This is what the Committee note addresses; the issue is that if the State has possession, it must turn it over. Possession means

that it is in the hands of the prosecutor, or that he or she has good reason to know that it exists.

The Vice Chair said that her point is that the Committee note cannot redefine what is already in the Rule. The Chair stated that the Committee already voted to put the Committee note examples into the Rule. Mr. Klein clarified that the vote was to put some of the examples in the body of the Rule, but the Committee would then consider which ones to include. The Chair affirmed that the motion was that anything that the Committee would let stand in the Committee note would be elevated to the Rule. The Vice Chair commented that her vote did not include putting everything in the Committee note into the body of the Rule. Mr. Klein reiterated that the Committee has not yet discussed the specific line items in the Committee note.

The Vice Chair questioned why the statement in the Committee note about the medical or psychiatric condition of a witness is necessary. Ms. Ogletree replied that it may be important. The Vice Chair asked if the Committee feels that this should be in the Rule itself. Mr. Kratovil and Ms. Ogletree responded affirmatively. The Chair stated that what is important is only the material that may impair the ability of the witness to testify truthfully or accurately which must be disclosed. The Vice Chair inquired if this would be another example in the list in the Rule, and the Chair answered that it would be.

Mr. Cassilly told the Committee that there is a problem with the victim-witness assistants to which Mr. Butler had referred to

earlier. In Mr. Cassilly's jurisdiction, the assistants help victims submit claims to the Criminal Injuries Compensation Board and take information from the victims such as the amount of physicians' bills and the names of the counselors who have worked with the victims. He himself does not receive this information, and he does not need it. This information comes in with diagnostic codes or one-word diagnoses. Mr. Cassilly said that he does not want to be forced to interpret whether this diagnosis means that it will have an impact on the victim's ability to testify. If this kind of information has to be turned over, the victim-witness units may as well be closed, and the victims would have to be told to deal directly with the Criminal Injuries Compensation Board. The prosecutor's office would have to tell the victims that anything that they reveal would have to be turned over to the defense. The Chair asked what Mr. Cassilly would do if he learned at the time of the alleged crime that the witness was hallucinating. Mr. Cassilly responded that this would have something to do with the victim's perception at the time of the crime, and it is not what he is talking about. The Chair stated that the courts have made clear that this only pertains to witnesses who are unable to testify accurately.

Mr. Cassilly remarked that the language seems to indicate that anything that could be used to impeach a witness must be disclosed. This throws a broad net that says that any interpretation of a witness's mental illness would be included to impeach the witness. The Chair reiterated that this is only if

the information impairs the ability of the witness to testify. Mr. Cassilly responded that this requirement is one of the reasons why Article 47 of the Maryland Declaration of Rights has language protecting victims of crime and providing that they are to be treated with respect by the State. The Chair countered that the prosecutor does not have to ask the witness unless the prosecutor has information about it. Mr. Cassilly reiterated that his office is getting the information from victim-witness units to assist the victims to file claims for injuries.

Mr. Mitchell expressed the view that there should not be a dispute about this provision. Mr. Cassilly is saying that it is better to err on the side of protecting the person with the medical condition as opposed to revealing the truth about the alleged crime. This Rule and the Court of Appeals have consistently stated that it is more important to reveal the truth, rather than be concerned about a medical condition that could embarrass someone. If that medical condition impairs the witness's perception, it is more important that it be disclosed. The Chair agreed with Mr. Kratovil who had said that information of this character has to be disclosed. The question is whether the State's Attorney has some obligation to search for this information. The language of the Committee note tries to balance protection for the victims by stating that the prosecutor does not have to search for the information unless he or she knows of something that would suggest that an inquiry of this kind would provide this information.

Mr. Kratovil observed that it may be easier to get through this Committee note if subsection (c)(1)(D) of Rule 4-263 were modified to make clear that all of the items enumerated under this provision are not all of the items related to impeachment. The Vice Chair reiterated that the word "including" has been added to indicate this. Mr. Kratovil asked whether the Rule should contain every possibility listed in the Committee note or simply the main categories, leaving the remainder in the Committee note. The Vice Chair expressed her agreement with the concept of either putting them in the Rule or not having them in the Committee note. The Chair pointed out that there are court cases that provide that these items either have to be disclosed or do not have to be disclosed.

The Vice Chair moved that the language in the Committee note that reads: "any medical or psychiatric condition of a witness, known to the State, that may impair his or her ability to testify truthfully or accurately" be added to subsection (c)(1)(D) as (v). The motion was seconded. Judge Hotten noted that if this is adopted, the scope of the Rule will be narrowed. The Vice Chair argued that the scope would not be narrowed, because all this section says is that the State has to provide any information in any form, whether or not admissible, that tends to impeach a witness. Judge Hotten inquired whether there could be a global example such as information or material that would impair the witness's ability to testify truthfully or accurately. This would be the overriding umbrella that would cover the

examples in the Committee note.

Mr. McCarthy remarked that some victim advocate groups had spoken with him and were afraid that confidential information regarding psychiatric conditions would be disclosed and embarrass victims. Another issue is whether an experienced prosecutor would know that someone has Post Traumatic Stress Disorder (PTSD). Is truth and veracity a feature associated with PTSD? What about someone who has depression? The Rule lists disclosure of medical or psychiatric conditions, but there is modifying language which provides that due diligence does not require the prosecutor to research this. Will that modifying language in the Committee note remain in the Rule? The Vice Chair replied affirmatively. The language pertaining to due diligence can remain as part of the Committee note. Mr. McCarthy suggested that since the "medical and psychiatric condition" language is being elevated to the body of the Rule, the "due diligence" language that accompanied it should also be elevated. Mr. Kratovil agreed that there should be a separate section dealing with due diligence. Mr. Sykes pointed out that subsection (a)(1) of the Rule already pertains to due diligence. He cautioned that a Rule cannot be modified by a Committee note.

Mr. Karceski suggested that if the categories are listed, the word "including" means that it is not limited to what is listed. It would be better to use the language of subsection (c)(1)(D) of the current version of the Rule and end with the language "impeach a witness." He asked whether the Committee

note can give examples of what is described in subsection (D). The list would not include everything, but it would give insight into what is meant by "impeaching." Mr. Kratovil proposed that there be subsections (i),(ii), (iii), and maybe (iv) in the Rule. Mr. Karceski clarified that his suggestion is to take out all of the examples from the Rule. Any list in the Rule will never be complete.

Mr. Kratovil pointed out that a middle ground would be that, in many cases, there will be prior convictions or a deal with the State. His idea would be to have the major categories left in the Rule. The wording of the ending of subsection (c)(1)(D) could be "including, but not limited to ..." and then list the three or four major categories, with a Committee note for the remaining ones. The Chair cautioned that if this suggestion were adopted, the Committee note would not attach itself to anything in the Rule. All of the examples should be in the Committee note, or all should be in the Rule. Mr. Kratovil agreed that the examples should be listed in the Rule, but he suggested that the "due diligence" clause should be added there as well.

The Chair said that the Subcommittee is recommending the inclusion of the language now in the Committee note that reads "The due diligence required by subsection (a)(1) does not require that the State (1) obtain a copy of the criminal record of a State's witness unless the State knows or has reason to believe that the witness has a criminal record or (2) inquire into a witness's medical, psychiatric, or addiction history or status

unless information possessed by the State ... would reasonably lead the State to believe that an affirmative inquiry would result in discovering a condition that would impair the witness's ability to testify truthfully or accurately." The substantive question is whether to include it. Where to put it is another issue. The Chair asked if there was a motion to substantively strike that language.

The Vice Chair remarked that she thought that the "no duty to inquire" language had remained in the Committee note was because if what goes into the Rule is the concept that if all the State has to provide is any known medical or psychiatric condition that could impair a witness's ability to testify truthfully, then the Committee note is simply describing what the word "known" means. It is explanatory as Committee notes are supposed to be. She said that her view was that it could stay in the Committee note as long as subsections (c)(1)(C) and (D) are in the Rule.

Mr. Karceski commented that the Committee is voting on the contents of Rule 4-263 before looking at the full picture. It may be difficult to vote on each item individually, because sometimes one is hinged to another. It may be more helpful to talk about the various possible changes and then vote on them. The Vice Chair said that she would modify her motion to move the language in the Committee note that reads: "...any medical or psychiatric condition of a witness, known to the State..." into the Rule coupled with the language that begins: "...[t]he due

diligence required by subsection (a)(1) does not require that..." somewhere into the Rule as well in a place to be determined later. Mr. Kratovil suggested that the motion on the floor relating to placing the "medical or psychiatric condition of a witness" language in the Committee note into the Rule as subsection (c)(1)(D)(v) should be withdrawn. He asked whether the Committee is in agreement that the specific examples in the Committee note already agreed upon should be moved into the Rule. The Vice Chair responded that her understanding was that the Committee had already agreed to this. Mr. Klein inquired whether the language in the Committee note that reads: "...pending charges against a witness of which the State is aware or has reason to believe exists..." is already covered in the Rule. The Vice Chair replied that this language will be discussed next.

The Chair called the question on the vote to put the "medical or psychiatric condition" language that is now in the Committee note into the Rule keeping the "due diligence" language in the note. The Vice Chair clarified that her original motion was to move the language in the Committee note that reads: "any medical or psychiatric condition of a witness, known to the State that may impair his or her ability to testify truthfully or accurately" into the body of the Rule. The motion carried unanimously. The Chair inquired if there were any substantive opposition to the "due diligence" language remaining in the Rule subject to a decision as to where to place it. No opposition was voiced, so the Chair stated that the language will remain

somewhere in the Rule.

After the lunch break, due to Mr. Karceski's absence, Mr. Kratovil drew the Committee's attention to the language in the Committee note that reads "...pending charges against a witness of which the State is aware or has reason to believe exists...". He pointed out that this language had been changed. It formerly read: "...pending charges against a witness for whom no deal is being offered at the time of trial...". The reason for the change was a concern, particularly in the large State's Attorneys' offices, that if there were a witness in District Court who had a pending charge against him or her of which the circuit court prosecutor was not aware, the prosecutor would be responsible to know that and turn that information over. This language was a compromise.

Mr. Klein inquired whether this concept has already been incorporated into subsection (c)(1)(D)(iii). The Chair stated that some examples of this are (1) pending charges in another county or federal charges that the State's Attorney would not know about and (2) pending charges in District Court that the State's Attorney should know about. Mr. Klein asked what the effect would be on (iii) if the language about "pending charges" in the Committee note is moved into the body of the Rule. The Vice Chair responded that the language of the Committee note is not necessary, and she suggested that it be deleted. By consensus, the Committee approved this deletion.

Mr. Kratovil drew the Committee's attention to the language

in the Committee note that reads: "...the fact that a witness has taken but did not pass a polygraph examination...". The Vice Chair remarked that the Committee had agreed to retain only those examples that are very basic ones that should attract attention. She questioned as to whether the "polygraph" example is one of these. The Chair said that *Wood v. Bartholomew*, 516 U.S. 1 (1995) held that there is no need to turn over this type of evidence if, under state law, the results of a polygraph examination would be inadmissible. In an earlier case, *Patrick v. State*, 329 Md. 24 (1992), the Court of Appeals held the other way. The Public Defender had cited *Patrick* for the proposition that the failure of a lie detector test had to be disclosed but did not cite *Wood*, which held that it did not. Mr. Kratovil remarked that he had raised the issue of whether the polygraph examination is admissible if it is viewed as unreliable. The Subcommittee's view is that there is no harm in turning it over. The Vice Chair suggested that it be moved into the text of the Rule. By consensus, the Committee agreed with this suggestion.

Mr. Kratovil drew the Committee's attention to the language in the Committee note that reads: "...the failure of a witness to make an identification...". The Chair said that he had a question about this as noted in the bolded language. Who is the person being identified? He assumed that this refers to an identification of a defendant or a co-defendant, and if so, this should be included. Mr. Bowen inquired why a co-defendant is

included, if the person identifying may not have seen the co-defendant. The Chair said the issue is to whom the prosecution has to disclose this. If there are two defendants, and if a co-defendant is a defendant, the prosecution also has to disclose this to the latter. The Reporter suggested that the added language should be "of the defendant or a co-defendant." The Style Subcommittee can redraft this language.

The Chair inquired if there are any other proposed amendments to subsection (c)(1)(D) of Rule 4-263. Mr. Kratovil said that the Committee was satisfied with the "due diligence" language from the Committee note. This resulted from concerns as to whether there is an affirmative duty of the State to check records or to check into the psychological background of witnesses. The Vice Chair asked about whether the Committee note would cite the examples, but the Reporter pointed out that the note has been deleted, with its relevant portions going into the body of the Rule. Mr. Kratovil remarked that the Committee should decide where the "due diligence" language will be placed. The Vice Chair suggested that it go in after section (a). The Reporter questioned whether it should go into the Rule or be in a Committee note. Mr. Sykes suggested that it be put in subsection (a)(1), which states that there is a duty to exercise due diligence. The language from the Committee note can be added as an exception. Mr. Kratovil commented that this refers to two of the specific enumerated examples of impeachable information. The "due diligence" language was in its previous location, because it

related to the two examples that were in the Committee note. The Chair asked if that language should be put under subsection (c)(1)(D). Judge Love remarked that what is in subsection (c)(1)(D) does not necessarily require due diligence.

The Vice Chair commented that language could be added to subsection (c)(1)(D)(iii) that would provide that the State need not obtain a copy of the criminal record unless the State knows or has reason to believe that the witness has a record. The Chair added that this would also apply to the inquiry into the witness's medical, psychiatric, or addiction history. This would go into the Rule. Mr. Sykes pointed out that a cross reference would need to be added to subsection (a)(1) providing the exceptions to due diligence. Mr. Kratovil asked where the Committee note language would be placed. The Reporter replied that the suggestion has been made to put into the particular section of subsection (c)(1)(D) that the examples in the Committee note apply to. Mr. Brault questioned whether the "due diligence" language will be repeated in each part of subsection (c)(1)(D). Mr. Klein responded affirmatively.

The Chair said that Judge Hollander had raised a question about the last sentence of the Committee note. Mr. Kratovil remarked that previously the "due diligence" language was a more general statement about the lack of a requirement to affirmatively seek the information. Now this is being changed to apply only to the two examples that are in the Committee note. He added that he was still uncertain as to where the language

relating to those two examples would go. The Vice Chair responded that the language from the Committee note that begins "... [t]he due diligence required by subsection (a)(1)..." will be taken out. The Chair pointed out that it will go into subsection (c)(1)(D)(iii). The Vice Chair added that this provision will have language added that will read "except that the State need not obtain a copy of the criminal record of a State's witness unless the State knows or has reason to believe that the witness has a criminal record." This will also apply to the new subsection dealing with the medical or psychiatric condition of a witness. Judge Matricciani asked whether the case citations at the end of the Committee note will be deleted. The Chair said that they can be put into a cross reference in the body of the Rule. The Reporter inquired whether the last sentence of the Committee note is to be deleted. The Vice Chair answered affirmatively.

Mr. Kratovil drew the Committee's attention to subsection (c)(2), Reports or Statements of Experts. Mr. Patterson noted that the obligations of the prosecution and the defense are not the same. He said that he was not sure why the Subcommittee and the Committee chose the word "consulted" in the phrase "...each expert consulted by the State in connection with the action..."as opposed to the phrase in subsection (d)(1)(B) that reads "...each expert the defendant expects to call as a witness at a hearing or trial...". ABA Standard 11-2.1(a)(4) reads: "[a]ny reports or written statements of experts made in connection with the

case...” which is very straightforward language but does not use the word “consulted.” The Vice Chair pointed out that the language in subsection (d)(1)(B) is not limited to experts to be called at trial. Mr. Patterson reiterated that there is a variance between the State’s obligation and the defense obligation, and he asked why this is so, and why there is a variance from the ABA language. Mr. Klein observed that the ABA Standard is limited to experts to be called at trial for the defense, so the ABA makes the same distinction between the experts for the prosecution and the experts for the defense. Mr. Kratovil added that current Rule 4-263 makes the same distinction. The Chair commented that the language of subsection (c)(2), except for the language shown as stricken, was already approved by the Committee in the 158th Report.

Mr. Brault remarked that in dealing with *Brady* material, if the State consults with an expert who delivers information that would exculpate the defendant, this has to be turned over, whereas the defense does not have to turn over anything. Mr. Patterson expressed the view that the word “consulted” can mean many things. The State could go to an expert to get information on a field of science that the State does not know about. The prosecutor may need to be educated to prepare his or her case. This type of consultation would not affect the trial. The Vice Chair noted that this may be work product. The Chair said that regardless of whether it is work product, there is no harm in turning over this information. The Vice Chair asked why the Rule

does not use the ABA language for both the obligations of the prosecution and the defense. There is good reason to use that language. Mr. Doan replied that there is case law that pertains to the meaning of the word "consultation." He said that his view is that preparing for the case is not a "consultation," but getting information about the factual scenario of the case is. The prosecutor will either use the witness at trial, or there will be *Brady* material.

Mr. Kratovil stated that there are two issues being considered. One is whether the requirements of the Rule are reciprocal. He had made the argument before that the requirements are reciprocal, but the defense had correctly pointed out that this is not appropriate. Neither the ABA, the current Rule, nor the proposed Rule sets up reciprocal requirements. The second issue is the specific language of "consultation." The Vice Chair remarked that she had not been aware that the word "consultation" had caused any problems, but she suggested modifying the Rule to retain the language that is in subsections (c)(2) and (d)(1)(B), but use the structure of the ABA language in both. Mr. Kratovil noted that the language of the current Rule is: "[p]roduce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State...". This is the same language as in the proposed Rule.

Mr. Mitchell expressed the opinion that the language of the proposed Rule is appropriate. There are two different issues

being discussed. The Vice Chair stated that the first issue has already been handled. Mr. Mitchell noted that he agreed with the idea that a consultation by the State for the purpose of learning to prepare for the case does not have to be disclosed, but if a consultation happens in connection with the case, it has to be disclosed. Mr. Patterson pointed out that the proposed Rule is not the same as the existing Rule, because the existing Rule is limited to producing reports, while the proposed Rule is not so limited.

The Chair inquired whether Mr. Patterson had any problem with the ABA language, and Mr. Patterson answered that he had no problem with that language. The Vice Chair moved to track the ABA language but to include the list of items that are in the proposed Rule, such as the "substance of the expert's findings and opinions, and a summary of the grounds for each opinion...". Mr. Klein commented that if the word "consult" is not used, it is impossible to keep the list of items in the Rule. The Vice Chair explained that the way it would work is that the ABA language would apply to all experts, but with respect to the ones called for trial, the extra language in the proposed Rule would apply. Mr. Klein pointed out that there has to be some connection between the expert and the State. The Chair said that this is in the possession of the State.

Mr. Kratovil questioned whether anyone has a problem with Rule 4-263 as it reads now. Mr. Brault remarked that in reality, plaintiff lawyers speak to a physician and ask that there be no

written report. If the physician's opinion is that the lawyer has no case, then the lawyer finds a different expert. If the Rule requires only written reports, the disclosure that the State has "shopped" for a written report but did not get a written one until it was favorable will be eliminated. The Rule should require the disclosure of both oral and written reports. Mr. Doan said that the State is not allowed to "shop" for an expert, get an unfavorable report, and bury it, whether it is oral or written. Mr. Patterson added that the language of the ABA is "any reports or written statements," so this implies that a report can also be oral. The Vice Chair stated that the language of the Rule as it now reads is appropriate.

The Chair asked if there were any comments. There being none, Mr. Kratovil drew the Committee's attention to subsections (c)(3) and (4). There were no comments to those provisions.

Mr. Kratovil drew the Committee's attention to section (d), Disclosure by Defendant. He explained that subsection (d)(1)(A) was the most debated by the Subcommittee and the Committee. Several months ago, he had presented parallel rules from all of the other states, and the majority of those states had reciprocal requirements for the defense to turn over the names and addresses of witnesses just as the prosecution has to turn this over. The last time the Committee discussed the Rule, they decided that the defense would have to turn over the names and addresses of character witnesses as well as alibi witnesses whose information already had to be turned over. He reiterated his position that

it is fair to require the defense to turn over the names and addresses of its witnesses prior to trial.

Judge Matricciani asked when the information would be turned over to the State. The Chair responded that this will be dealt with, because it is not turned over by request. Later on in the Rule, there is a note. As the full Committee had previously decided in the 158th Report, the Subcommittee voted not to include subsection (d)(1)(A) but to require only the disclosure of character witnesses, experts, and alibi witnesses. They did not consider including the disclosure of lay witnesses or insanity witnesses, which are required to be disclosed in the ABA Standard. The language of subsection (d)(1)(A) is taken from ABA Standard 11-2.2 (a)(i). The ABA commentary to that Standard makes clear that this is a *quid pro quo*. The Rules Committee was not persuaded to adopt this language, and the Subcommittee decided not to adopt this at its recent meeting. If this language is not included in the Rule, then subsections (d)(1)(C) and (D) would have to be included. The issues to be determined are whether to add subsection (d)(1)(A). The idea is to advance Jencks statements, so that the State would have to turn over witness statements up front, and the defendant would have to do the same thing. The Committee felt that the State should do this, but the defense should not. The concern is that this could result in defense witnesses being harassed.

The Chair said that whatever decision the Committee makes regarding subsection (d)(1)(A), it will be presented to the Court

of Appeals, which will then decide whether to include it in the Rule. The Court will be interested in hearing what the Committee thought about this. No matter what the decision is today, prior to the Court hearing, both sides will send in letters explaining their positions. Mr. Kratovil reiterated that not only do the majority of the states require the defense to disclose their witnesses, the ABA also requires it. There have been discussions today about fairness. He stated that he does not see the harm in allowing the State to know who the defense witnesses are. The chance of there being many witness statements is slim, but at least the State has the opportunity to know who the witnesses are. It would allow the State to do some background research on the witnesses. The purpose of revising Rule 4-263 is to allow the finder of fact to make the best decision. The best way to do this is to pattern it after the civil arena and allow the finder of fact to have as much information as possible. It is wrong to favor one side. When Mr. Kratovil had presented this argument previously, there were two arguments made against it. One is that the State has all the resources, and the other is the issue of harassment neither of which Mr. Kratovil has found to be very persuasive. He moved to add the language presented in bold in subsection (d)(1)(A) into the Rule. The motion was seconded.

Mr. Klein questioned whether the defense has an obligation to turn over character and alibi witnesses, regardless of whether subsection (d)(1)(A) exists. Mr. Kratovil responded that there is an obligation to turn over alibi witnesses, and this is

already in the Rule. Character witnesses were proposed in the last version of the Rule. Master Mahasa inquired as to whether there is any kind of overriding constitutional principle that would limit parity. The Chair replied that the defense does not have to turn over anything that would violate the defendant's Fifth Amendment rights. Master Mahasa asked what the rationale is for requiring the defendant to disclose alibi witnesses. The Chair answered that the defendant did not have to turn over anything, except later alibi witnesses, but the State did not have to turn over witness statements either until the witness testified, which was a result of the Jencks Act. The State did not have a discovery obligation until the witness testified. In 1994, the ABA required the State to disclose witness statements up front as discovery, rather than as Jencks material, and the defense to do the same. The ABA Commentary indicates that this was done as a balance or a tradeoff.

Ms. Nethercott explained that one of the rationales underlying the difference in the obligations between the State and the defense is that the State is the initiating party. By the time the State has charged someone in circuit court, it is aware of the relevant information. However, there is no way the State could know who the defendant is going to claim he or she was with at the time. The State would not be able to know who the defendant was going to bring in as an expert to talk about insanity or another defense, but as to the rest of the information, it should already be within the knowledge of the

State. When the defense is then required to disclose witnesses, it is basically a telegraphing of the defense strategy. If the State has investigated, it should already know about the witnesses.

Mr. Patterson told the Committee that he is the State's Attorney for Talbot County, but he had come to the meeting as President of the Maryland State's Attorneys' Association. There are 24 heads of State's Attorneys' Offices throughout the State, but only one head of the Office of the Public Defender. The Association has been tracking the status of Rules 4-262 and 4-263, particularly the issue concerning the ABA Standards, even before the last Court of Appeals hearing on the Rules, which then generated the remand of the Rules to the Rules Committee to consider the ABA Standards. Standard 11-1.1 sets out the objectives for the remaining Standards. The objectives are to: (1) promote a fair and expeditious disposition of the charges, (2) provide the defendant with sufficient information to make an informed plea, (3) permit thorough preparation for trial and minimize surprise at trial, (4) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, and constitutional issues, (5) minimize the procedural and substantive inequities among similarly situated defendants, (6) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and

reducing the number of separate hearings, and (7) minimize the burden upon victims and witnesses. The ABA then states that to achieve these objectives, there should be a full and free exchange of appropriate discovery, simpler and more efficient procedures, and procedural pressures for expediting the processing of cases.

Mr. Patterson remarked that Mr. Mitchell said many times during today's discussion that the purpose of changes to the Rules is for fairness. The reason the Standards exist is that cases are no longer tried by surprise. The goal is to get to the truth, so that justice may be served. The point made by Ms. Nethercott that the defense may be forced to reveal their strategy is exactly what the Standards are trying to avoid -- trial by surprise. In a given case, the defendant may have been with a group of people at the time the crime occurred, and the group, while unknown to the prosecution because the defendant has no obligation to disclose this, has relevant information that may affect whether the case should go to trial. If the purpose of discovery is to try to reveal the truth, what is the rationale for the defense to withhold this information? The Standards promote justice. Standard 11-2.2 should be adopted in this Rule.

Judge Matricciani agreed with Mr. Patterson, noting that it would be ideal if everything in a criminal case is done up front. No matter how the Rule is written, the defense will always identify witnesses at trial. If a trial judge uses this Rule to exclude the defense witnesses, will he or she be affirmed on

appeal? Mr. Kratovil said that the witnesses are not going to be precluded from testifying. It will be an issue for post conviction. It will provide an upfront requirement that the witnesses have to be disclosed, and it will provide that the State has an opportunity to review the information that is obtained. The Chair commented that there have been some cases in the Court of Appeals where there have been sanctions issued against a defendant. Although trial judges have discretion, the cases take a dim view of excluding defense witnesses when a postponement is available.

Mr. Mitchell observed that there is a disparity between resources available to the State and those available to the defense. The State has experts who can analyze drugs, guns; they have access to DNA experts. They have widespread resources that most of the time a defendant cannot afford. The Rules will bring this up to a little more fairness. The Vice Chair asked why the defense cannot disclose the names of its witnesses before trial. The witnesses that will affect the trial are alibi witnesses and character witnesses. These pertain to whether the State can meet its burden of proof. Mr. Mitchell remarked that beyond that, he could not see what interest the State would have in other witnesses. The Chair hypothesized a witness who would state that he was present at the time the crime was committed, but he did not fire the shots, and he named the one who did shoot. This is not an alibi witness. Mr. Kratovil commented that separating out one's personal interest in this and considering the Chair's

scenario, in terms of the trier of fact being able to determine the truth, the fact that this witness's information has not been disclosed ahead of time dramatically affects the impact on the trier of fact.

The Chair reiterated that the issue will go before the Court of Appeals. The Vice Chair inquired whether the Committee will vote on it, and the Chair replied that there will not be a vote. It will go before the Court with a statement by the Committee that it should stay in, or it should come out. The Vice Chair referred to Mr. Mitchell's comment that the alibi and character witnesses are important to the State, and she asked if Mr. Mitchell meant that the other witnesses are not important to the State or to the defense. Mr. Mitchell answered that this relates to the burden of proof. The use of a character witness is appropriate because it shows that the witness is not who the party putting the witness forth says that the witness is. The Vice Chair asked again why it is a problem for the defense to disclose all witnesses. Mr. Mitchell responded that there could be a witness who is favorable to one side or to the other side. The identity of this person is disclosed to the State who then sends out someone with a badge to closely converse with this witness. The person gets nervous and decides not to testify at trial. The Vice Chair referred to the scenario of the defendant sending out someone with a gun to threaten a State's witness. Mr. Mitchell responded that the remedy for that is that the State can prosecute the person who threatens the State's witness.

The Chair stated that there is a motion on the floor to add the bolded language back into the Rule. The Vice Chair asked Mr. Karceski why he would not want to disclose his witnesses before the trial. Mr. Karceski replied that the simple answer is that he would probably not have many witnesses to disclose. The true answer is that there is a burden of proof. There should be parity, but including the bold language in subsection (d)(1)(A) leans the seesaw in a direction that heavily favors the State. When witnesses' names or names and addresses are given, the State will find out who they are and where they are. Notwithstanding the issue of witness intimidation, more importantly, what a defense requirement to provide names of witnesses would do is to assist the State in proof that it does not otherwise have. The defendant does not ever have to testify or offer a defense, but if the defendant publicizes the names of his or her witnesses, the State will have that information and will be able to turn that information in a direction that is to their advantage. It would give the State knowledge of the defendant's defense before the case begins. The State has the burden of going forward. The defendant has no burden, and for the defendant to be required to give this information ahead of time is unfair.

Mr. Kratovil responded that any constitutional requirement for the defense not to have to turn information over is taken into consideration in these Rules. He reiterated that the issue is what will allow the trier of fact to reach a fair and appropriate decision. This is the whole point of discovery.

Taking into consideration the Chair's example, can anyone dispute the fact that if there is a shooting, and, at the last minute a witness says that the defendant did not shoot the gun, the witness's name should be turned over prior to trial? Mr. Karceski responded that he would explain why it should not be turned over. When a defense attorney defends a client, he or she sits back and listens to what the State's case is going to be. Even though there are many things an attorney can do to prepare a case, much of what is done is a "by the seat of one's pants" approach. It is not like preparing a civil case where every question has been answered before the trial even begins. There is an indictment which may have 20 counts in it. There may be some information that a witness can provide that would apply to the proof of some of those charges, but not all of those charges. If the State's Attorney prosecutes the case, and the witnesses do not establish enough evidence at the end of the case to carry all of these charges forward, and the case fails, that witness may have helped in proving some, but not all, of the issues. The change to the Rule would result in giving the State's Attorney all of the information for the State's Attorney to do with as he or she chooses. Although it may seem unfair for the State's Attorney not to be given this information, in reality, it is fair, because the defense has no burden of proof.

The Chair called the question of adding subsection (d)(1)(A) instead of subsections (d)(1)(C) or (D) to the Rule. The motion failed on a vote of four in favor. The Vice Chair said that this

will be presented to the Court of Appeals with an explanation that it is not the Committee's recommendation.

Mr. Karceski presented subsection (d)(1)(B), noting that there are no suggested changes to this provision. The Chair stated that subsections (d)(1)(C) and (D) are suggested for addition in the event that subsection (d)(1)(A) is not included, which is what the Committee had decided. The defendant would have to disclose character witnesses and alibi witnesses. The question in the second version of subsection (D) is whether the defense has to disclose witnesses in support of an insanity defense. Mr. Karceski remarked that it was the Chair's suggestion to consider the insanity defense witnesses. Mr. Karceski expressed the opinion that this is a good idea, because once this defense is on the table, there should be a fair and equal trade of the names and addresses of the witnesses who are going to go forward. The State would have to list them anyway, and at this point, the defense would have to list them as defense witnesses if this is going to be the defense. It is pled before the trial begins. The Chair asked if the ABA includes this, and Mr. Karceski replied that this is in ABA Standard 11-2.2 (c). Mr. Johnson inquired as to whether there is a time frame for notifying the State. The Chair said that there is a time frame, but it would be discussed later.

The Vice Chair noted that in other sections, the language "except when they decline permission" is included before the words "the addresses," and she asked why this language is not in

subsection (d)(1)(C) and (D). Mr. Karceski replied that it is because this language is not in the ABA version, and it was inadvertently left out of these provisions. Any witness, whether a State or a defense witness, should have that option. The Chair inquired as to whether a statute covers these affirmative defenses. Mr. Karceski responded that case law requires the defense to give the names and addresses of alibi witnesses, but any defense witness who does not want to give out his or her address should have the same ability as a State's witness to decline to do so. The Vice Chair remarked that if the Committee had agreed to subsection (d)(1)(A), it has the language about declining permission to give addresses.

Mr. Cassilly asked if the statements of the witnesses are included, since the State is limited to getting the information about character, alibi, and insanity witnesses. The State will need to know what the alibi was to prepare the case. Also, the defense should provide evidence regarding the credibility of the witnesses. If the defense knows that the witness has a mental health or medical condition that would affect his or her ability to testify truthfully, or some other character trait that would be admissible to affect the truthfulness of the testimony, the defense should have to provide that to the State.

The Chair asked if there was a motion to add this to the Rule. Mr. Kratovil moved to add this, and the motion was seconded. Mr. Kratovil questioned whether the three types of witnesses listed in subsections (d)(1)(C) and (D) should be moved

to subsection (A), adding the rest of the language that appears in subsection (A) particularly as it relates to the issue of statements. The Vice Chair commented that this does not refer to experts, and she added that she did not see why the defense would have to turn over witness statements, since the State could talk to the witnesses in person. Mr. Sykes pointed out that the State may or may not talk to a witness.

The Chair called the question on the motion to add written statements to subsections (d)(1)(C) and (D). The motion failed on a vote of six in favor, nine opposed.

Mr. Karceski drew the Committee's attention to subsection (d)(1)(E) of Rule 4-263. The Chair asked if this provision would exclude documents that inculpate the defendant. The Vice Chair questioned as to whether the phrase "...that the defendant intends to use at the hearing or trial" is intended to modify all of the items in subsection (E) or just the last listed items. The Chair replied that it modifies all of the items in that provision. The Vice Chair remarked that these would not be inculpatory.

Mr. Karceski drew the Committee's attention to subsection (d)(2)(A). This is taken from the language in ABA Standard 11-2.3 (a) and (b). One of the Chair's questions is whether the proposed Rule limits the language "having the defendant appear, move, or speak for identification in a lineup or try on clothing or other articles" to occurring only at a lineup. The Chair asked whether someone could give a voice exemplar other than in

the context of a lineup. Judge Matricciani inquired as to why the Rule refers to a "lineup," and the Chair answered that this is in the ABA Standard. He commented that he does not see why a voice exemplar has to be given only at a lineup. Mr. Michael asked how this is done now.

Mr. Karceski said that the Chair's question is a good one. Is this allowed by bringing the defendant and the victim into the police station? It may be problematic, because it may telegraph to the victim that this is the person who committed the crime as opposed to putting the defendant in a lineup where there are four or five other people present. The Chair noted that "buccal samples" have been added to subsection (d)(2) (B). Mr. Kratovil said that Mr. Shellenberger had requested this addition.

The Vice Chair asked about the language in that provision that reads "upon motion," because the Rules often use the language "upon good cause shown." Mr. Karceski responded that this is taken from the ABA language. Mr. Leahy inquired as to why subsection (iv) in ABA Standard 11-2.3 (b) that reads: "to participate in other reasonable and appropriate procedures" was not included in subsection (d)(2). The Reporter answered that the Subcommittee felt that this language was unclear. The Chair added that this provision is too broad. Mr. Kratovil inquired as to whether the language "upon motion" should be changed to "upon good cause shown." Mr. Michael responded that the Style Subcommittee can consider this issue.

Mr. Karceski drew the Committee's attention to section (e).

He pointed out that this applies to both the prosecution and the defense. He said that he thought that this language is the same as it was in the 158th Report. There is a question as to whether in subsection (e)(1) after the words "its disclosure," language should be added that would provide that it is not constitutionally required. The Reporter told the Committee that if this change is made, subsection (e)(1) would read as follows: "...any other matter if the court finds that its disclosure is not constitutionally required and would entail a substantial risk of harm to any person that outweighs the interest in disclosure." By consensus, the Committee agreed to this change.

Mr. Karceski drew the Committee's attention to subsection (e)(2) of Rule 4-263. If the confidential informant can be proven to be an integral part of the event, such as a sale of drugs where the confidential informant participates in the sale with the defendant, the State would have to divulge the informant's identity. If the State elects to call the informant as a witness, the State would have to divulge the person's identity. The Vice Chair inquired as to why the tagline reads "By Defendant" as opposed to "By State." The Reporter responded that the Style Subcommittee will consider this.

Mr. Karceski drew the Committee's attention to section (f) of Rule 4-263. The time stated in the existing Rule for the State's Attorney to make disclosure is 30 days after the earlier of the appearance of counsel or the first appearance of the defendant pursuant to Rule 4-213, but there is no time for the

defendant to make disclosure. The added sentence has a blank to fill in. The Committee has to decide what an appropriate time would be. Should it be a similar period of time as the time for disclosure of the State's Attorney?

The Chair asked whether the time for the defendant should be somewhat later than the time for the State, because their defense may depend upon what they learn from the State. He suggested that it could be 30 days after the State's discovery. Mr. Karceski added that it could be 30 days after the State has completed its discovery. The Chair commented that the discovery is ongoing. Mr. Kratovil suggested that the time frame could be a certain number of days before the initial trial date is set. Judge Hollander said that it should be a certain number of days after the State is obligated to produce its discovery.

Ms. Ogletree noted that someone had already indicated that the defendant has less time to find out about everything. Mr. Sykes pointed out that there is a continuing duty to disclose. Mr. Karceski expressed the view that there should be a specific date to avoid any game-playing. Mr. Mitchell said that he agreed that the date of the defense disclosure should be later than when the State completes discovery. Taking into consideration the suggestions set forth today, it could be 30 days after the State has completed discovery or a certain number of days before trial, assuming the State has completed its discovery within that certain number of days before trial.

The Chair commented that completing the discovery could be a

problem, particularly with respect to DNA evidence that may be difficult to obtain. The discovery may not be completed until that evidence is available. Mr. Karceski responded that there is a statute that provides the appropriate time frames. Mr. Kratovil added that the statute is Code, Courts and Judicial Proceedings §10-915, which states that a party seeking to use DNA evidence must notify the other party or parties at least 45 days before the criminal proceeding and must provide the evidence to the other party or parties at least 30 days before the proceeding. Mr. Doan suggested that the Rule could state that the defendant shall make disclosure at least 45 days before the trial. The Chair said that discovery would not be completed until the DNA results have been obtained and turned over to the other side. Mr. Karceski remarked that if the case seems to hinge on DNA evidence, and it comes back negative, the defense may not want to give out the names of the alibi witnesses, because the State may not even have a case. A piecemeal exchange may prove to be difficult.

The Chair proposed that the time should be a certain number of days before the first scheduled trial date. Judge Matricciani moved that the time be 30 days before the first scheduled trial date. The motion was seconded. The Vice Chair noted that the point being raised could happen even 30 days before the first scheduled trial date. Mr. Kratovil stated that even if it is not done 30 days before trial, unless it is something significant, the State is not going to raise it anyway. If it is significant,

the State will ask for additional time. In the vast majority of cases, it will not be a problem.

The Chair called the question on the motion that the defense disclosure shall be made no later than 30 days before the first scheduled trial date. The motion carried with one opposed.

Mr. Karceski drew the Committee's attention to section (g) of Rule 4-263. He added that this has not been changed from the language that is currently in the Rule.

Mr. Karceski drew the Committee's attention to section (h) of Rule 4-263. He said that this is substantially the same as what is in the Rule now.

Mr. Karceski drew the Committee's attention to section (i) of Rule 4-263. There are some issues associated with this provision, including preservation of the evidence, the length of time, what should be preserved, what can be substituted. Hopefully, there will be some discussion and suggestions regarding these. Master Mahasa inquired about the language in section (i) that reads "[i]f the party generating the discovery material does not file the material with the court, that party shall (1) serve the discovery material on the other party and (2) promptly file with the court a notice...". If the party files the material with the court, does this mean that the party who filed is not required to serve the other party? Mr. Karceski answered that the party filing a report has to serve the other party, but he acknowledged that the language of the Rule implies that the party does not have to. The Vice Chair pointed out that

section (a) of Rule 1-321, Service of Pleadings and Papers Other than Original Pleadings, provides that anything a party files must be served on the other parties. Master Mahasa expressed the opinion that the language in section (i) of Rule 4-263 is somewhat ambiguous.

The Vice Chair commented that Rule 4-263 has been discussed so many times that it is difficult to remember how it has progressed. She asked why the language stating that it is not necessary to file discovery materials was not included. The Chair pointed out that this was discussed from the perspective of victims in the rules pertaining to access to court records, because any discovery filed with the court will be in a court record which could be accessible to the public. Mr. Michael reiterated that Rule 1-321 takes care of this situation, so no mandatory language is necessary. If a party files something in court pursuant to Rule 1-321, whatever is filed has to be given to the other parties to the case. The Chair suggested that a cross reference to Rule 1-321 could be added at the end of section (i). The Vice Chair said that a preliminary issue is if the first sentence were revised to state "...discovery material shall not be filed with the court...," it could follow the language of subsection (d)(2) of Rule 2-401, General Provisions Governing Discovery.

The Chair inquired why filing of discovery material in section (i) is optional. The Vice Chair noted that someone can ask the court to allow the filing of discovery materials for a

good reason. This is true in the civil arena, also. This is a very unusual occurrence.

The Vice Chair moved to change the language in the first sentence of section (i) from "need not" to "may not." Master Mahasa asked if the next phrase which reads: "[i]f the party generating the discovery material does not file the material with the court" would be deleted, and the Vice Chair replied that it would be deleted. Mr. Sykes remarked that there may be more than one party. The Vice Chair reiterated that the language of Rule 2-401(d)(2) would be tracked. Mr. Sykes suggested that in criminal cases, everyone should get a copy. The Vice Chair responded that in civil cases, she serves interrogatories on everyone. Mr. Sykes pointed out that section (i) refers to "the other party." The Reporter said that in each individual case, there are two parties, the defendant and the State.

Judge Hollander questioned what the period is that the applicable records would have to be retained. The Chair responded that Code, Criminal Procedure Article, §8-201 provides for preservation of biological evidence that contains DNA for the time of the sentence plus any consecutive sentence imposed. Judge Matricciani suggested adding a cross reference to that statute. The Chair pointed out that the statute only applies to biological evidence. Judge Hollander asked how this would work. It is difficult to keep the record for the length of someone's life sentence. The Chair responded that there are two issues. The one referred to by Judge Hollander was raised by Mr. Maloney

in the Subcommittee meeting regarding the burden on defense counsel to hold on to the case file. The other issue is how long the State's Attorney has to keep the evidence? There may be an appeal and a retrial, a post conviction, a habeas corpus followed by a coram nobis, etc. The Vice Chair inquired as to why the Rule does not address this.

Mr. Doan remarked that Baltimore City has a very serious problem with storage. The Chair said that one of the issues is with documents. In court files, there is a retention process in which the files, after a certain number of years, are sent to the State Archivist, who scans them into a computer and discards the paper files. The information contained in the files is preserved in electronic form forever. The Chair questioned whether a similar system could be devised for the discovery material. Mr. Brault noted that in one of the Maryland Rules of Professional Conduct, Rule 1.15, Safekeeping Property, there is a five-year requirement for a lawyer to hold clients' papers.

The Chair observed that one possibility for the defense is to build into the Rule that if the defense would like to get rid of the file, it would have to be retained at least until the time for appeal expires. The defense would notify the State offering the material to them, and telling them if they do not want the material, the defense will get rid of it. Judge Hollander asked about a case where the defense lawyer does not want the material, the State does not want it, but the defendant is in jail and he or she believes that there could still be a reversal, and the

defendant wants to keep the evidence. The Chair said that the defendant is entitled to retain the evidence.

The Chair asked if there were any proposed changes to section (i). Master Mahasa said that there is a suggestion to change the words "need not" to "may not." The Reporter noted that the Title 2 Rules use the language "shall not." Mr. Sykes remarked that the general style of the Rules is to use the language "may not." The Vice Chair noted that the discovery rules use "shall not." The Reporter clarified that this will read exactly like the language in Rule 2-401 (d)(2) to the extent that it can be conformed.

The Chair drew the Committee's attention to section (k) of Rule 4-263. Mr. Karceski explained that this language is taken from ABA Standard 11-6.7. The Vice Chair noted that the word "person" may give standing to more people than is intended. Mr. Karceski agreed and said that it was not intentional. The Reporter asked if this allows the victim to demonstrate any medical or psychiatric result. Mr. Karceski responded that this is done through the prosecution. The Chair commented that he was not certain about that. Mr. Karceski stated that it was not the intention of the Subcommittee that victims would become party-litigants to the proceedings. Any changes that can be made to prevent this should be suggested. Judge Matricciani referred to the language in section (j) that reads: "[a] party or a person from whom discovery is sought...". The Reporter responded that this language is definitely related to victims' rights. The

Chair suggested that the language of section (j) could be used in section (k). The Vice Chair questioned as to why section (k) uses the word "request" instead of the word "motion." The Reporter replied that this was taken from the ABA Standard and will have to be restyled.

Mr. Karceski told the Committee that Rule 4-264, Subpoena for Tangible Evidence Before Trial in Circuit Court, uses the language: "On motion of a party, the circuit court may order the issuance of a subpoena commanding a person to produce for inspection and copying at a specified time and place before trial designated documents, recordings, photographs, or other tangible things, not privileged, which may constitute or contain evidence relevant to the action...". The Chair noted that this refers to third parties, and Mr. Karceski responded that this was why he referred to it. The Chair pointed out that the language "a party or a person from whom discovery is sought" is parallel to the contempt rules. Mr. Karceski explained that the third party has a right to object to that pursuant to this Rule. The Chair asked whether there was any objection to striking the word "person" in section (k) and substituting the language "any party or person from whom discovery is sought" in its place.

The Vice Chair expressed the opinion that the in camera proceedings provision comes up from nowhere. Can it be tied to the previous section? The Chair noted that in camera proceedings are separate from protective orders in the ABA, although it looks like it should be in the same place.

The Reporter suggested that the first two sentences of section (k) could pertain to protective orders. The Vice Chair asked whether the concept of in camera proceedings is anywhere else in the Rules. She suggested folding section (k) into section (j). This may be a stylistic issue. Mr. Johnson questioned whether this is simply an issue of style, noting that a protective order can be much broader than what the in camera proceeding pertains to, because a protective order can relate to any issue of discovery for whatever reason, whereas an in camera may only pertain to avoiding disclosure of certain issues. The Vice Chair pointed out that the second line of section (k) states that someone is going to show that something should be denied or regulated. The Chair asked if there were any motions regarding section (k), and there were none.

Mr. Karceski drew the Committee's attention to section (l) of Rule 4-263. He said that months ago, the last sentence was added. The Chair inquired as to whether section (l) as it appears in the meeting materials is what was sent to the Court in the 158th Report, and Mr. Karceski replied affirmatively.

The Chair stated that the Rule contains no provisions for depositions. There is a separate Rule on this issue, Rule 4-261, Depositions. He wanted to pointed out to the Committee that ABA Standard 11-5.2 is entitled Discovery Depositions. The Subcommittee decided not to include it in Rule 4-263.

Mr. Mitchell said that he wanted to comment on section (l) and reiterate what Ms. Forster had said in a letter to the Rules

Committee. One of the problems that he has heard from lawyers in Baltimore City, although he had not experienced it directly, is repeated violations of discovery obligations, yet the judges are unwilling to issue meaningful sanctions. There should be some extra teeth in the sanctions provision, so that there would be a more substantial sanction for repeated violations. The Chair said that Ms. Forster's letter pointed this out, and she mentioned it at the court hearing. This is more a matter of education, both for prosecutors and judges. The latter can be educated through the Judicial Institute. As a practical matter, it is difficult to handle. Mr. Mitchell remarked that if it becomes more of an issue, it will be raised. Mr. Volatile observed that some judges in the District Court in Baltimore City have dismissed cases because of discovery violations. The Chair responded that the judge has the right to do so. Ms. Nethercott commented that under the existing Rule, there is a provision for a deposition under special circumstances. The Chair responded that this is the *de bene esse* rule in section (g) of Rule 4-261. This is to preserve testimony.

By consensus, the Committee approved Rule 4-263 as amended.

Mr. Karceski presented Rule 4-262, Discovery in District Court, for the Committee's consideration.

Mr. Karceski told the Committee that it is not necessary to revisit the decisions already made in the discussion of Rule 4-263. In many respects, Rule 4-262 is simply a template and often an exact duplicate of the circuit court Rule. Subsections (a)(1)

and (2) are exactly the same as in the other Rule. This was discussed this morning. The changes that were made to Rule 4-263 will be made in these provisions.

Mr. Karceski drew the Committee's attention to section (b). The definitions are the same for both Rules, and the Rule refers back to the definitions in Rule 4-263. Judge Axel expressed the view that the definitions should be set out in section (b), so that someone would not have to go back and forth between the two Rules. Mr. Karceski responded that he would be agreeable to this, but he asked whether the Rules ever refer back to other Rules. The Reporter answered that this does happen. The Chair remarked that there is no harm in adding in the definitions. It simply means adding a few more paragraphs. The Reporter noted that the person who is making the disclosures is usually the State's Attorney, who should be knowledgeable about this. She said that the Rules tend to have more details if it is a Rule that *pro se* parties are likely to use. Mr. Karceski told the Committee that this Rule was not discussed at the Subcommittee meeting, because there was not enough time. He and the Reporter had put together this latest version of the Rule.

Mr. Karceski drew the Committee's attention to section (c). This states that the Rule applies to charges that are punishable by a term of imprisonment, and it involves discovery matters, except those that are not subject to discovery that are set out in section (d) of the Rule. It recognizes that witnesses' addresses if requested under Code, Criminal Procedure Article,

§11-205 or Rule 16-1009 (b) do not have to be provided. Subsection (c)(1) pertains to the State's obligation without any request on the part of the defense, and that applies only to the *Brady* issue which is in Rule 4-263 (c)(1)(C). This has to be given regardless of request.

Mr. Karceski said that the information and material listed in subsection (c)(2) are given by the State's Attorney at the request of the defendant. In many jurisdictions, a trial date is scheduled 30 days after the case is charged. It would be impossible for the State to give this information out in every case. This is why the request was added to this part of the Rule. All of the Committee note in this section of the Rule was left out, because it is not necessary in the District Court Rule. The Committee note at the end of subsection (c)(3) will be relied upon. In subsection (c)(2), there are a number of things that the State has to produce and permit the defendant to inspect, copy, and photograph: pretrial identification of the defendant by a State's witness, specific searches and seizures, wiretaps, or eavesdropping, all written and oral statements of the defendant or co-defendant that relate to the subject matter of the offense charged (the words "subject matter" should be deleted to conform to the changes in Rule 4-263), any documents relating to the acquisition of the statements. The Chair said that all of this will be conformed to Rule 4-263. The reason that subsection (C), all written statements of any other person, was added was in place of a list of all of the witnesses by name and address.

Mr. Volatile commented that all written statements includes those in police reports. Since in the boilerplate discovery, this will be requested, it will cause a burden. The case is to be heard in 30 days, but the State's Attorney does not get the paperwork for at least 10 days, leaving only 20 days before the trial date. He said that they cannot get police reports. They are not available until 60 to 90 days after the occurrence. The Chair responded that there is nothing to be done if they are not available. Mr. Volatile said that this will then require a postponement. The reports are not normally given to them. The Chair suggested that the language could be "... all written statements of any other person that are within the possession or control of the State at the time the request is received...". The problem is the legal fiction that the State is considered to possess what the police possess. Some counties have 90 days and some have six months before the case is heard. They could be responsible for copying thousands of police reports each month. The Chair pointed out that the language that was in the Rule in the 158th Report was stricken in favor of this language. Mr. Johnson remarked that subsection (c)(2) provides that the defendant is permitted to inspect and copy, so it does not require the State's Attorney to make the copies. The production part may not be addressed by the Rule, but this aspect is.

Mr. Mitchell observed that the remedy to this problem is to get the police department to do its job and provide the State's Attorney's office with their reports. The requirements should

remain the same, but it might be helpful for the State's Attorney's office to work with their respective police departments. Mr. Kratovil said that although he has tried to change this, there is still a *de novo* trial. One of the arguments for having a clear distinction between the District and circuit courts is the *de novo* trial. He agreed that if statements had been made, they should have to be turned over, but he noted that the practical side is that the situation is very different in a jurisdiction such as Queen Anne's County as opposed to Prince George's County where, when he worked there, the State's Attorneys only had a statement of probable cause in every case. Since this was not in the existing Rule, and there is a provision for turning over the statements of the defendant, is subsection (c)(2)(C) necessary? Mr. Volatile commented that the police reports are not always identical.

The Chair said that there does not seem to be any objection to the substance of requiring this. The comments made today indicate that with respect to items in the police report, it would be helpful to obtain those. The practical issue seems to be that in some jurisdictions, it is difficult to get them. Mr. Mitchell observed that appropriate sanctions could encourage the police to turn over their reports. Mr. Kratovil suggested limiting the definition of "written statement" as opposed to "oral statement" that is embodied in a report. That would mean physically having written statements of a witness as opposed to an oral statement that is contained in a police report. It would

be a middle ground -- if one physically had written statements of a witness as opposed to an oral statement that is contained in a police report.

The Chair asked if there were a motion to change subsection (c)(2) of Rule 4-262. Mr. Karceski asked Mr. Kratovil if he was suggesting that the language should be "a statement of that person that is either signed or adopted by that person." Mr. Kratovil replied that the definition of written statement is in two parts. Subsection (A) is "any statement in writing that is made, signed, or adopted by that person" and (B) is "the substance of a statement of any kind...," which is what is being discussed. The compromise would be incorporating subsection (b)(2)(A) of the definition of "written statement" in Rule 4-263 (which will be added to Rule 4-262), but excluding from that definition subsection (b)(2)(B). Mr. Karceski agreed with this suggestion. Mr. Kratovil moved to exclude the definition in Rule 4-263 (b)(2)(B) from Rule 4-262. The motion was seconded and passed unanimously.

By consensus, the Committee approved Rule 4-262 as amended.

The Chair stated that the rest of the agenda items will be heard at the Rules Committee meeting on April 11, 2008. He thanked the Committee for their patience in going through the Rules discussed today.

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