COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on January 5, 2007.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Frank M. Kratovil, Jr., Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, Esq.
Hon. Albert J. Matricciani
Robert R. Michael, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Melvin J. Sykes, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Elizabeth B. Veronis, Esq., Legal Officer, Court of Appeals
Jonathan Bromberg, Esq.
Jeffrey M. Axelson, Esq.
Hon. Glenn T. Harrell, Jr.
Melvin Hirshman, Esq., Bar Counsel, Attorney Grievance Commission
John DeBone, Esq., Attorney Grievance Commission
Paul H. Ethridge, Esq., Chair, Rules of Practice Committee, Maryland State Bar Association
Russell P. Butler, Esq., Executive Director, Maryland Crime Victims Resource Center
Paul D. Raschke, Esq., Office of the Attorney General
Patricia Yevics, Maryland State Bar Association
Richard Montgomery, Director, Legislative Relations, Maryland State Bar Association
Cookie Pollack, Judicial Information Systems
David Durfee, Esq., Administrative Office of the Courts

The Chair convened the meeting.

Agenda Item 1. Consideration of proposed amendments to Rule 1.15 (Safekeeping Property) of the Maryland Lawyers' Rules of Professional Conduct

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Mr. Brault presented Rule 1.15, Safekeeping Property, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

AMEND Rule 1.15 to add a new paragraph (b) pertaining to maintenance by lawyers of certain funds and property of clients and third persons, as follows:

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained pursuant to Title 16, Chapter 600 of the Maryland Rules. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and of other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) The following books and records shall be maintained for funds and property received and disbursed for clients or for third persons:

(1) an identification of all trust accounts maintained, including the name of the bank or other depository, account number, account name, date account opened, and an agreement with the bank establishing each account and its interest-bearing nature.

(2) a check register for each account that chronologically shows all deposits and checks, as follows:

(A) each deposit entry must include the date of the deposit, the amount, the identity of the client(s) or third person for whom the funds were deposited, the purpose of the deposit, and the source of the funds, and

(B) each check entry must include the date the check was issued, the payee, the amount, the identity of the client or third person for whom the check was issued (if not the payee), and the purpose of the check;

(3) a record for each client matter in which the lawyer receives trust funds. For every trust account transaction, a lawyer must enter on the appropriate client record: the date of receipt or disbursement; the amount and source of each deposit; the amount of each disbursement; the payee and check number (for disbursements); the purpose of the transaction; and the balance of funds remaining in the account in connection with the client matter. A lawyer shall not disburse funds from a trust account that would create a negative balance in connection with an individual client matter;

(4) a separate record of nominal funds of the lawyer held in each trust account to cover bank charges and fees as permitted by Rule 16-607 b;

(5) a monthly trial balance of the records identifying each client matter, the balance of funds held in connection with each client matter at the end of each month, and the total of all the client and third-person balances. No balance for a client matter or for funds maintained for a third person may be negative at any time;

(6) a monthly reconciliation of the checkbook balance, the client record trial balance total, and the adjusted bank statement balance. The adjusted bank statement balance is computed by adding outstanding deposits and subtracting outstanding checks from the month-end bank statement balance;

(7) bank statements, canceled checks, or copies of canceled checks if they are provided with the bank statements, and duplicate deposit slips. Cash fee payments must be documented by copies of receipts countersigned by the payor. All disbursements must be by check or by wire transfer. If a withdrawal is made by wire transfer, a lawyer must create a written memorandum authorizing the transaction, signed by the lawyer responsible for the transaction. The wire transfer must be entered in the check register and include all the identifying information listed in subsection (b)(2)(B) of this Rule;

(8) the checkbook register, the trial balance of the records, and the reconciliation report of any lawyer who maintains trust accounts by computer only. The lawyer must print hard copies of these items on a monthly basis. The checkbook register must contain all the information identified in paragraph (b)(2) of this Rule. Electronic records should be backed up regularly by an appropriate storage device;

(9) a record of all property, specifically identified, other than funds held in trust for clients or third persons; and

(10) records documenting timely notice to clients and third persons of all receipts and disbursements of their funds to and from each trust account.

COMMENT

Paragraph (b) sets forth minimum record-keeping requirements. The records required to be kept permit the lawyer, clients, and

third persons to be assured that funds and property are being maintained by the lawyer consistent with the care required of a professional fiduciary. The frequency of the backup procedure required for electronic records should be directly related to the volume of activity in the trust account.

~~(b)~~ (c) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for the purpose.

~~(c)~~ (d) Unless the client gives informed consent, confirmed in writing, to a different arrangement, a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

~~(d)~~ (e) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

~~(e)~~ (f) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some

other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any record keeping rules established by law or court order.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Paragraph ~~(c)~~ (d) of Rule 1.15 permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer. Unless the client gives informed consent, confirmed in writing, to a different arrangement, the Rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d).

[4] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[5] Paragraph ~~(c)~~ (f) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[6] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

Model Rules Comparison.-- Rule 1.15 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of the addition of paragraph (b), changes to Rule 1.15 ~~(c)~~ (d), the addition of Comment [3], and the omission of ABA Comment [6].

Rule 1.15 was accompanied by the following Reporter's Note.

At the annual Maryland Judicial Conference held in May of 2006, the Court of Appeals met with representatives of the Attorney Grievance Commission to discuss issues of concern, one of which was the frequency of complaints against attorneys involving Rule 1.15 of the Maryland Lawyers' Rules of Professional Conduct. Because the Rule currently offers little or no specific guidance as to what constitutes proper

> record-keeping for attorneys, the Honorable Glenn T. Harrell, Jr., Judge of the Court of Appeals; Melvin Hirshman, Esq., Bar Counsel; Glenn M. Grossman, Esq., Deputy Bar Counsel; and David D. Downes, Esq., Chairman of the Attorney Grievance Commission drafted the proposed amendment to Rule 1.15 to provide a more detailed description of proper record-keeping.
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> Incorporated into the proposed Rule change are the following modifications suggested by the Attorneys Subcommittee of the Rules Committee: (1) changing the word "ledger" to "record" throughout the Rule to make clear that the required records may be maintained electronically and that paper ledger books are not required; (2) adding to paragraph (b)(4) a reference to Rule 16-607 b; (3) in paragraph (b)(8), changing the frequency of the required "hard copy" print-out of records from "contemporaneously with the making of the computer entry" to "on a monthly basis;" (4) moving from the Comment into paragraph (b)(8) a sentence pertaining to backing up electronic records; and (5) making stylistic changes.

Mr. Brault told the Committee that the Honorable Glenn T. Harrell, Jr., a member of the Court of Appeals, had suggested that language be added to Rule 1.15 detailing the requirements of attorneys for maintaining trust accounts. Mr. Brault said that he and the other members of the Attorneys Subcommittee agree that the additional language is a good idea, because of the large number of charges of professional misconduct involving improperly kept trust accounts. The proposed language sets out procedures that are not onerous and will be useful to follow to avoid disciplinary action. Some concern has been expressed that the new language uses too many accounting terms. The Montgomery

County Bar Association has proposed some changes to the Subcommittee's draft, which is the version in the meeting materials. The Association's letter has been distributed at today's meeting. (See Appendix 1).

The Subcommittee made some changes to the draft proposed by Judge Harrell. The Subcommittee eliminated the word "ledger," replacing it with the word "record," because "ledger" appears to limit record-keeping to paper records. Also, the original proposal appeared to require that the attorney personally make entries on the ledger. In most firms, that function is performed by a bookkeeper. The criminal defense bar had expressed some concern about language that reads: "... the source of the funds...," which is proposed to be added to subsection (b)(2)(A). There have been federal cases in which the U.S. Attorney traced the source of funds used to pay attorneys to criminal sources, and the attorneys were forced to forfeit the money. The Rule should not require that the attorney conduct an investigation on behalf of the government as to how the client obtained funds. One suggestion to solve this problem is to replace the word "source" with the language "person who provides funds." As defined in the Rules of Procedure, the word "person" includes individuals and other entities.

Judge Harrell said that his transmittal letter, which is included in the meeting materials for today, explains the need for the addition to Rule 1.15. See Appendix 2. He expressed his agreement with the changes proposed by the Montgomery County Bar

Association and noted that the Solo and Small Firm Practice Section of the Maryland State Bar Association ("M.S.B.A.") has endorsed the changes to Rule 1.15. Mr. Axelson, co-chair of the Ethics Committee of the Montgomery County Bar Association, told the Rules Committee that he had prepared the proposal for changes to the Attorneys Subcommittee's version of Rule 1.15 (b). He suggested that archaic terms, such as "ledger" and "checkbook" be removed from the Rule. He stated that he agrees with members of the criminal defense bar that the language concerning the source of funds needs to be clarified. Mr. Bromberg, the chair of the Solo and Small Firm Practice Section of the M.S.B.A., commented that the Board of Governors of the M.S.B.A. will discuss the proposed changes to Rule 1.15 in February. He expressed his agreement with the changes proposed by the Montgomery County Bar Association.

The Vice Chair observed that the beginning language of section (b) refers to "funds and property," but the rest of the new language only refers to "funds." She suggested that the Rule should apply to "funds and other property." By consensus, the Committee agreed to this suggestion. Also in section (b), the words "books and" should be deleted. By consensus, the Committee agreed to this deletion. The language in the same section which reads "property received and disbursed" should only be "property received," because any property received, whether or not it is disbursed, must be held for safekeeping. Mr. Brault responded that the Rules deal with property received and disbursed. The

Vice Chair expressed the opinion that the words “and disbursed” are too limiting. Mr. Sykes suggested that section (b) read as follows: “Records must be maintained for the receipt and disbursement of property for clients.” Mr. Brault noted that this language follows the recommendation of Judge Harrell in subsection (b)(1). By consensus, the Committee agreed to this change. Mr. Bowen suggested that the language: “date account closed” be added to subsection (b)(1) after the language “date account opened.” By consensus, the Committee agreed to this addition.

Mr. Axelson noted the suggestion of the Montgomery County Bar Association in subsection (b)(2) to delete the words “check register” and replace them with the word “record” that would encompass both paper and computer records. Mr. Brault remarked that he was in agreement with this change, and by consensus, the Committee approved of the change. Mr. Axelson commented that in subsection (b)(2), the proposed change from the word “checks” to the word “payments” encompasses not only payments by check but also payments by wire. Mr. Sykes suggested that the word should be “disbursements,” and the Committee agreed by consensus to this change.

Mr. Axelson commented that the language used in the Montgomery County Bar Association’s draft of subsection (b)(2)(A) reads: “the identity of the person from whom the funds were received” in light of the federal cases about the “source of funds” to which Mr. Brault had referred. The Chair asked whether

the Criminal Defense Attorneys Association had looked at the proposed language. There may be situations in which people provided money on behalf of a client, but did not want his or her identity recorded. This language would require the person receiving the money to interrogate the person who provided the money. The Vice Chair questioned as to why this language is necessary. Judge Norton answered that in criminal cases, the defendant's mother or grandmother may provide money to pay the fee. Ms. Ogletree added that it is not uncommon in divorce cases, for a family member to pay on behalf of one of the parties. The Vice Chair inquired as to why it is necessary to identify that the grandmother paid the attorney's fees. Judge Dryden replied that it may be an issue later in the case as to whom the money must be returned if the entire retainer is not used. The Chair commented that it is important for an attorney to comply with subsection (b)(2)(A), so that there is no disagreement as to whether money should be returned to the client, the client's grandmother, or some other person.

Mr. Brault observed that there may be ethical considerations when a lawyer receives fees from someone other than his or her client. The Chair said that if a lawyer is required to make a record of the identity of the person who paid the lawyer's fees, the lawyer would be in violation of the Rule if his or her secretary was not working the day the money was paid, and a substitute neglected to get the identification. Mr. Brault noted that another part of the Rule requires a lawyer who receives cash

to write a receipt. The identity of the donor could be determined from the receipt. Cash payments can cause problems. The Chair pointed out that there could be a "John Doe" receipt. A lawyer should not be obligated to interrogate the person who pays money on behalf of a client to determine the identity of the person. Mr. Axelson pointed out that the language from the first draft of Rule 1.15 requiring the person who gave the money to countersign was eliminated. Mr. Hirshman remarked that the payment is on behalf of the client, not the person who delivers it. Any funds left over would be returned to the client. The Reporter commented that in business or real estate transactions, there may be many sources of funds. If the transaction falls apart, it is important to know where to return the money. If the money is to be returned to someone other than the client, the lawyer should make a notation as to whom it is to be paid.

Judge Dryden averred that investigations into a lawyer's missing funds may be complicated if it is not known who brought in the cash. The Chair stated that the client usually knows this. He inquired as to why the lawyer has to write this down. How often is there a debate as to what fees a criminal lawyer received as opposed to whether the lawyer earned the fee? Mr. Hirshman responded that the debate is usually the latter. The Chair questioned the meaning of the language "identify...the source of the funds." Mr. Sykes remarked that identifying the source is not necessary to achieve the purpose of the Rule which is to promote the safekeeping of property. Mr. Leahy suggested

that the Rule require the purpose of the payment.

Mr. Axelson noted that the original draft of the changes to the Rule referred to the retainer. Mr. Brault commented that the Office of Bar Counsel has its own view of what a retainer is. Bar Counsel sees it as money paid in advance toward the lawyer's fees, which must be held in trust by the lawyer. The Rule should distinguish retainers from fees. Mr. Leahy reiterated that the lawyer should indicate the purpose of every check that comes in or goes out. Mr. Brault pointed out that Montgomery County suggested a change to subsection (b)(2)(B) -- the deletion of the language "Each check entry must include the date the check was issued," substituting the language "A record of the date a payment was issued." The Chair questioned whether the language should be, "the date the check was issued." Mr. Hirshman replied that this is covered by the record of the date a payment was issued. Mr. Axelson added that this would be in the ordinary course of business. Mr. Brault said that a payment is the same as a disbursement.

The Vice Chair remarked that if a payment is made to an expert witness, the record should show that it was made on behalf of the client. All checks from the trust account should be for the benefit of the client and not for anyone else. It should be evident from the records the reason for the payment. Mr. Brault responded that he was not sure it is necessarily evident. He had seen cases in the District of Columbia where persons involved in a personal injury case borrowed money while waiting for the case

to settle. In this situation, the lawyer has to honor the debt to the third party. The Vice Chair commented that once the lawyer receives the proceeds from a settlement, the lawyer has to pay the debts. Although the check is not directly to the client, it is a payment on behalf of the client. The check would state that it is written from a trust account owned by a certain person, but it is not written to the client. How would this be handled?

The Chair asked Mr. Hirshman if the language in subsection (b)(2)(A) that reads "or third person" is necessary. The Vice Chair said that what needs to be identified is the person who benefits from the trust account. Mr. Leahy pointed out that there may be multiple clients. The Chair expressed the view that the language "the identity of the client for whom the funds were deposited" is sufficient. Ms. Ogletree observed that the name of the client is on the check. The Chair suggested that the language of the Rule could be "...the identity of the client and the purpose of the check...". The Reporter remarked that the reference to the "third person" should remain in the Rule. The Chair responded that there is no benefit to leaving it in, and it may be onerous for lawyers. He said that what needs to be identified is every proper disbursement made on behalf of the client. Mr. Bromberg pointed out that in a real estate transaction, the funds may be used to pay a repair bill. Ms. Ogletree added that it is not uncommon for funds to be escrowed at settlement and used for repairs made after settlement. Any

remaining funds are then disbursed to the seller of the property. Judge Harrell observed that a lawyer who handles estates may receive and hold funds to be disbursed to numerous heirs. The Vice Chair suggested that the language "or third person" be retained in subsection (b)(2)(A).

The Chair commented that it may not necessary to create a separate record of to whom funds are paid by a check, because the identity of the payee is on the check. Mr. Leahy noted that subsection (b)(2)(B) provides that the payee must be listed in the check entry. Mr. Sykes noted that the reference to the "record" in subsection (b)(3) implies that there has to be a separate document. He suggested that the language should be "a record showing...". The Chair suggested that this be put into the Comment after the Rule to clarify what the "record" means. Mr. Brault hypothesized a situation in which after the death of a lawyer, it is discovered that the lawyer had embezzled money. Money from the lawyer's estate could be escrowed to cover the embezzlement, but there is no specific client. The money would be paid to claimants in accordance with a court order. The language "third person" would be appropriate in this situation. The Chair stated that the check can constitute the record. There is no need to create separate docket entries to document that checks were issued on a certain day. Judge Dryden suggested that the meaning of the word "record" be added to the Comment. The Chair added that the definition will have to be broad enough to cover everything relevant.

The Chair pointed out that the language "...and source..." will be eliminated from subsection (b)(3). Judge Dryden asked whether the word "client" will be removed from that same provision, since there may not be a client, and the Chair replied affirmatively. Mr. Brault observed that the draft of subsection (b)(3) proposed by the Montgomery County Bar Association should be the one in the Rule. The Chair stated that the last sentence of subsection (b)(3) is the most important command. It should be moved to a more prominent position, such as at the beginning of the section, or it should be self-standing. By consensus, the Committee agreed to move the last sentence of subsection (b)(3) to a more prominent location.

Mr. Sykes pointed out that the heading in section (b) that reads "the following books and records" does not relate to the statement about the lawyer not disbursing funds from a trust account in subsection (b)(3). The Chair responded that the new language should be renumbered. Mr. Bowen commented that many lawyers do not write the checks themselves. He suggested that in place of the language that reads "...the lawyer must enter on the appropriate record...," the following language should be substituted: "...the record must show...". By consensus, the Committee approved this change.

Turning to subsection (b)(4), Mr. Brault said that the requirement of nominal funds to be kept in the trust accounts can be tricky. Subsection b. 2. of Rule 16-607, Commingling of Funds, allows a lawyer to maintain a balance in a trust account

using the lawyer's own funds. Problems arise when a lawyer is out of trust. The Chair asked if the Rules should require a minimum amount to be in the trust account. Mr. Hirshman responded that a specific amount should not be in Rule 1.15. Mr. Brault suggested that this could go into Rule 16-607. Mr. Bromberg remarked that the phrase "nominal funds" should be replaced by the phrase "a reasonable amount."

Mr. Michael inquired as to what amount Bar Counsel thinks is enough funds for the account, as opposed to too many funds. Mr. Hirshman replied that large amounts in the account suggest commingling by the lawyer. Mr. Michael remarked that what seems to be a large amount may not be for a lawyer under certain circumstances. Mr. Hirshman added that the funds have to be disbursed within a reasonable time. The Chair asked if leaving the money in the trust account for 30 days would be a violation of the ethical rules. Mr. Hirshman answered that 30 days is too long. Mr. Sykes noted that if the lawyer earned the money that was placed in the account, it could be appropriate to leave that money in the account for a period of time to be certain that a check placed into the account is not dishonored and there is no overdraft in the account. Mr. Brault commented that he would be leery of leaving earned fees in the trust account. He said that he also would be leery of holding the client's money to avoid attachment by a judgment creditor, to dodge income tax, or to prohibit a former spouse from accessing the money.

The Chair inquired as to whether a separate record means

that it is separate from the books, other records, and checks. Mr. Hirshman said that the required information must be identifiable and accessible. The Vice Chair questioned as to whether it is necessary for the lawyer to document the entries from the client and from his or her own funds in a check register and on a separate paper. Mr. Sykes remarked that the records identify the amounts. The Chair suggested that subsection (b)(6) be reviewed to address some of these issues.

The Vice Chair pointed out that Rule 16-607 b. 1 refers to an exception for fees, service charges, and any required minimum balance. Subsection (b)(4) refers to only "bank charges and fees." Does this include the required minimum balance that is allowed by Rule 16-607 b. 1? The Chair suggested that subsection (b)(4) could refer to "separate records of funds of the attorney held in each trust account." The Vice Chair said that she disliked the word "separate." The Reporter suggested that subsection (b)(4) read as follows: "a record that identifies funds of the lawyer held in each trust account as permitted by Rule 16-607 b." By consensus, the Committee agreed to this suggestion.

Mr. Bowen pointed out that the Montgomery County draft added language to subsection (b)(6) that states that the adjusted bank statement is computed by adding outstanding deposits. He noted that there is no such thing as an outstanding deposit. He expressed the view that it would be better to refer to "deposits that are subsequent to the date of the statement." Mr. Sykes

suggested that the language could be “adding subsequent deposits and subtracting outstanding checks.” By consensus, the Committee agreed to this suggestion. Mr. Bowen commented that this should be separated into record-keeping and computation language.

Mr. Brault questioned as to why subsection (b)(5) refers to “monthly” records. The Subcommittee had proposed that this period of time be three months. It requires too much work to prepare this on a monthly basis. Mr. Bowen expressed the opinion that it is appropriate to do this monthly. Ms. Potter commented that the second sentence of subsection (b)(5) is the most important one. The Vice Chair inquired as to what the difference is between subsections (b)(5) and (b)(6). Mr. Axelson replied that subsection (b)(5) describes what records to keep, and subsection (b)(6) describes how to compute the adjusted bank statement balance, but he acknowledged that there is some repetition. Mr. Michael suggested that the second sentence of subsection (b)(5) become the first sentence.

Mr. Michael asked whether subsection (b)(5) requires that another record be created. Mr. Bowen had referred to the importance of monthly accounting, but this does not mean starting a new record. Subsection (b)(6) pertains to account reconciliation that is the equivalent of creating a record stating that the lawyer did what he or she is supposed to do. Mr. Bowen reiterated that it is important to reconcile monthly. Mr. Axelson said that both subsections (b)(5) and (b)(6) may not be needed. The Vice Chair remarked that a lawyer cannot do what

(b)(6) requires unless what (b)(5) requires is done. The Chair suggested that (b)(5) could be deleted. All of the client matter balances add up to the total, and the reconciliation is of the total. The Vice Chair suggested that (b)(5) be moved into (b)(6), which could require a monthly reconciliation of all trust accounts and then include the list of items in (b)(5). Mr. Sykes noted that the last sentence of (b)(5) states that no balance for a client matter or for funds maintained for a third person may be negative. He said that this makes it clear that only a positive balance should be included, but this is not enough, because some trust funds may have a negative balance. Mr. Brault pointed out that subsection (b)(3) states that a lawyer shall not disburse funds from a trust account that would create a negative balance. Mr. Axelson remarked that if a lawyer owes money to a client, it could create a negative balance. The Chair observed that each individual account may not in and of itself cause problems, but when all of the accounts are added up, there may be shortages. Mr. Bromberg responded that if each individual account has enough funds in it, the gross amount of all of the accounts should not be negative. The Chair said that even though an individual client matter is not out of trust, language should be added to the Rule to provide that a lawyer cannot use the defense that he or she cannot identify any specific client who is owed money. Mr. Brault suggested that in the last sentence of subsection (b)(3), the word “an” should be changed to the word “any.” By consensus, the Committee agreed to this change.

The Chair asked Mr. Hirshman about lawyers who are not out of trust with regard to an individual client, but may be out of trust with regard to all clients. Mr. Hirshman replied that this is the subject of *Attorney Grievance Commission v. DiCicco*, 369 Md. 662 (2002). Mr. Brault remarked that if all of a lawyer's clients would like to be paid at the same time, and the lawyer does not have the funds to do so, the lawyer is out of trust. The Vice Chair added that under this scenario, there would be a negative balance as to at least one client. The Chair suggested that the Rule be drafted to prohibit lawyers from being out of trust as to all clients. Judge Dryden added that the Rule should prohibit creating a negative balance as to individual clients and all client matters in the aggregate.

The Chair referred to *Sherman v. State*, 288 Md. 636 (1980), in which the issue of whether a lawyer is entitled to take money from a client's escrow account was discussed. In the case, the fact that the escrow account was never below the amount at issue in the criminal charge was used as a defense. Mr. Hirshman added that the defendant in that case received an indefinite suspension for commingling his funds with the funds of his clients. Judge Harrell commented that in *DiCicco,* the hearing judge found that the respondent did not intentionally misappropriate funds, but he may have been negligent, and he was proven to be out of trust. He remarked that the proposed change to subsection (b)(3) to prohibit a lawyer from creating a negative balance in connection

with an individual client matter or all client matters in the aggregate covers all bases.

Ms. Potter inquired as how many of these cases involve intentionally misusing client funds. The Chair suggested that the word "knowingly" could be added to the last sentence of subsection (b)(3). Mr. Sykes noted that there must be enough funds in the account to cover the total amount due to every client. The Chair suggested that the following language could be added: "No funds from a trust account shall be disbursed that would create a negative balance with regard to all matters in the aggregate or with respect to any client matter." By consensus, the Committee agreed to this change.

Mr. Brault observed that in subsection (b)(7), cash fee payments must be documented by copies of receipts countersigned by the payor. Mr. Axelson asked whether this language should be deleted. The Chair responded that cash fee payments must be documented. Some do not get to the bank. The Vice Chair remarked that a lawyer may put cash in the trust account, which is separate from the lawyer's own property. Mr. Axelson pointed out that subsection (b)(3) covers this. The Vice Chair asked about the relationship of the bank statement to the first sentence of subsection (b)(7) which infers that cash payments go into the trust account. Mr. Brault observed that the deposit slips show cash payments. The Vice Chair pointed out that subsection (b)(3) requires the lawyer to keep records for deposits and disbursements.

The Chair reiterated that cash payments must be documented. It may not be necessary to retain the sentence pertaining to cash payments in subsection (b)(7), since subsection (b)(3) covers it. He referred to *Winters v. State*, 301 Md. 214 (1984), involving a lawyer who pocketed cash payments and did not document them. It is proper to instruct lawyers to document when they receive cash payments, but it is not necessary to include this requirement in subsection (b)(7). Mr. Brault suggested that the sentence in subsection (b)(7) pertaining to receipts countersigned by the payor be deleted, and the Committee agreed by consensus to this suggestion. Mr. Klein observed that subsection (b)(7) refers to "wire transfer," and he asked why the Rule does not use the broader term "electronic transfer." Mr. Axelson remarked that the latter term is more consistent with practice. Mr. Brault suggested that the references to "wire transfer" be changed to "electronic transfer," and the Committee agreed by consensus to this change.

Mr. Bowen suggested that the fourth sentence of subsection (b)(7) be changed to read: "If a withdrawal is made by electronic transfer, a written memorandum authorizing the transaction shall be created and shall identify the lawyer responsible for the transaction." By consensus, the Committee agreed to Mr. Bowen's language.

The Vice Chair pointed out that an electronic transfer is a disbursement and must be recorded. Mr. Axelson remarked that

this could be initiated over the telephone, by e-mail, or by fax. Mr. Sykes suggested that the last sentence of subsection (b)(7) read as follows: “There shall be a record of every electronic transfer, which shall include all the identifying information...”. By consensus, the Committee agreed to this change.

Mr. Brault noted that the Montgomery County draft revised subsection (b)(8). Mr. Axelson explained that many records kept are paperless. Creating a paper record is superfluous. Electronic records should be maintained so that they can be printed upon request. There is no need to create a paper record for each transaction. The suggested new language for subsection (b)(8) is derived from the language of other states. The records must be backed up, so that a lawyer cannot complain that the records are unavailable due to the hard drive of the computer breaking.

Mr. Klein commented that there should be a time limit for retaining the electronic records. Mr. Axelson suggested that the limit could be five years from the date of the transaction. The Vice Chair suggested five years from the termination of the representation. The Chair asked the Committee if they were in agreement that the Montgomery County version of subsection (b)(8) should be substituted for what is currently in the meeting materials, and by consensus, the Committee approved the substitution. Judge Dryden remarked that lawyers should back up their records on a monthly basis. Mr. Axelson suggested that the

last sentence of subsection (b)(8) should be put into a Committee note.

The Vice Chair questioned as to how far back in time the records go. Mr. Bowen said that corporate clients may have to keep their records for 60 years. Mr. Brault commented that records should be kept until the statute of limitations has run. Mr. Hirshman noted that the banks keep records for five years. The Chair suggested that section (a) of the Rule could provide that a lawyer keep records for five years after termination of the representation or five years after creation of the record, whichever is earlier. Mr. Bromberg suggested that the time period be at least five years after the record was created.

Mr. Axelson pointed out that the new version of subsection (b)(8) refers to the entire record. The Vice Chair observed that it is possible that electronic records cannot be tracked. Mr. Klein agreed that the time frame in the Rule for retaining records should be five years after the record is created. Mr. Brault noted that client files can be shredded five years after the file has been closed, although his office waits until 10 years later to destroy the files.

The Vice Chair remarked that once a file is closed, it becomes the property of the client, and she gives the file to the client. However, she keeps the file as long as necessary to defend any malpractice claim. Mr. Brault commented that most clients do not want the files returned to them. Mr. Axelson said that he works out an agreement with the client so that he can

destroy the files. Judge Matricciani observed that there could be post-judgment litigation. Ms. Ogletree pointed out that the client has already consented to the destruction of the file. Mr. Klein expressed the view that there has to be a time restriction in the Rule. The Chair suggested that the Rule embrace the general concept that records should be preserved and on reasonable request be furnished in paper form. Mr. Sykes expressed the opinion that the records should be preserved for at least five years after their creation and this change should be made to the last sentence of section (a). By consensus, the Committee agreed with this suggestion.

The Chair drew the Committee's attention to subsection (b)(9). The Vice Chair pointed out that since subsection (b)(1) begins with the following language: "an identification of all trust accounts...," subsection (b)(9) could begin in a similar manner: "an identification of all property... other than funds...". Mr. Sykes suggested that subsection (b)(9) could begin: "a record showing all property other than...". By consensus, the Committee agreed to Mr. Sykes's language.

Ms. Potter inquired as to the meaning of subsection (b)(10). Mr. Axelson answered that this is a notice to clients and third persons that their money has been used for some purpose. Mr. Bromberg added that it could be a record of disbursements from a settlement check. Mr. Brault remarked that there have been disciplinary cases in which lawyers kept clients' settlement funds. The Chair commented that the Rule could impose a

disclosure obligation on the lawyer to give monthly notice to clients about the status of their cases. Mr. Bromberg suggested that the notice could be "timely," not monthly, but the Chair questioned what "timely notice" is. Mr. Sykes said that it would be difficult to notify the client each time that the lawyer pays the client's medical bills or makes any other disbursement. Mr. Hirshman observed that the client must know if the lawyer is spending the client's money for any reason. Mr. Brault expressed the opinion that no time period should be set in the Rule for notification; it depends on the nature of the case. The Vice Chair remarked that settlement checks are often payable to the lawyer.

The Chair questioned whether the lawyer must notify the client each time that the lawyer takes an action to write a check after the lawyer has already informed the client that the lawyer would take that action. The Vice Chair pointed out that it is not too burdensome to let the client know, for example, that the lawyer has paid the expert witnesses in the case. The Chair questioned as to why the lawyer must notify third parties as subsection (b)(10) requires. Mr. Hirshman answered that the lawyer has a fiduciary responsibility to do so. Mr. Brault said that a lawyer may tell the client that the lawyer will disburse the client's money, but if the lawyer fails to do so, the client could get sued for not paying his or her bills. The Chair added that the lawyer would be in trouble notwithstanding subsection (b)(10).

Mr. Klein commented that in a mass tort case, there may be administrative settlements. The lawyer may receive one check payable in trust for 100 people. This would generate the obligation to notify 100 people. The Vice Chair remarked that this is overly burdensome. The Chair added that if there is a $10,000 retainer, and the lawyer withdraws $1000 of it because the lawyer earned it, the language of the Rule would mean that the lawyer would be under the obligation to tell the client that $9000 is left. Mr. Hirshman responded that the lawyer would be under the obligation to give the client the opportunity to object to the lawyer's withdrawal. The Chair said that the obligation to notify the client does not belong in Rule 1.15. The Reporter noted that the provision would be more appropriate as a Comment to Rule 1.4., Communication. The Vice Chair suggested that subsection (b)(10) be deleted, and the Committee agreed to this deletion by consensus.

The Chair asked about the status of the proposed law that provides that if a settlement check is over a certain amount of money, the insurance company must notify the plaintiff that the check was issued. Mr. Michael replied that this bill has never been passed by the legislature. Mr. Hirshman added that several states already have this law. The Vice Chair inquired about the meaning of the term "client matter" in subsection (b)(3). Mr. Axelson replied that a lawyer could receive a retainer of $10,000 from a client for the lawyer to handle several matters for the client. The client would authorize the lawyer to pay out money

from that fund. The term “client matter” could be defined as a working relationship of the lawyer with the client. The Vice Chair commented that the term does not need to be defined. A lawyer may be involved in three different subjects, but it is one client matter. The Chair said that the term “client matter” includes individual cases and groups of cases. A lawyer may group cases for purposes of the trust account.

The Chair suggested that subsection (b)(3) could begin: “a record for each client on whose behalf the lawyer receives trust funds.” Mr. Axelson commented that the word “client” has been stricken, so that subsection (3) would begin: “a record for each matter...”. Mr. Axelson said that the wording of this subsection is taken from the language of the parallel rule in New York. It provides a safe harbor, so that a lawyer is not required to keep records in a specified manner. The Vice Chair remarked that a definition of the word “record” could be added to the Comment.

The Vice Chair said that she did not like the word “accurate” in subsection (b)(12) of the Montgomery County Bar Association draft. The word “accurate” already appears in paragraph [2] of the Comment. She asked if the language “entries shall be made at or near the time of the act...” should be added to the Comment instead of remaining in subsection (b)(12). Mr. Axelson said that the language of the New York law “kept by them in the regular course of their practice” provides a safe harbor for lawyers. Mr. Brault pointed out that the word “ledger” appears in subsection (b)(12), and this has been changed to the

word “record.” The Comment can state that “the record can be kept in any of the following forms,” and then use the language of the New York law.

The Vice Chair commented that the use of the word “should” in the new Comment is appropriate as long as the backup procedure is accurate. Master Mahasa observed that the proposed language of Rule 1.15 provides a mechanism for a new lawyer to understand what is required for safekeeping property. Judge Harrell said that once the Rule is approved, it would not be effective until January 1, 2008. It can be presented and explained at the M.S.B.A. convention in June. It will also be explained at “road shows” which will go to each county around the State and go into the curriculum in the law schools and the Maryland Institute for the Continuing Professional Education of Lawyers (MICPEL). Mr. Axelson added that the Solo and Small Firm Section of the M.S.B.A. gives a course each year, and this can be one of the items presented. Judge Harrell remarked that the appropriate vendors will be invited to present at the various training sessions. Mr. Brault noted that when the Rules were revised in 1984, similar presentations were conducted around the State to explain the changes to the Rules. Some presentations were videotaped and distributed to county bar associations. Anyone could get access to the video. The Vice Chair said that the new Rule will make starting a law practice easier. The Rule may be changed some when it is styled. The Chair thanked the consultants who were present at the meeting for their help. He

also thanked Judge Harrell for attending the meeting. Mr. Axelson thanked the Committee members for their consideration of this matter.

Agenda Item 3. Consideration of proposed amendments to Rule 16-308 (Court Information System)

Judge Norton presented Rule 16-308, Court Information System, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 300 - CIRCUIT COURT CLERKS' OFFICES

AMEND Rule 16-308 b 2 to delete language requiring the clerk to provide certain criminal record information to the Motor Vehicle Administration and to add language requiring the Judicial Information Systems to provide the information pursuant to an Administrative Order of the Chief Judge of the Court of Appeals, as follows:

Rule 16-308. COURT INFORMATION SYSTEM

a. Report of Docketing and Disposition of Cases

The clerk shall promptly transmit to the Administrative Office of the Courts in a manner prescribed by the State Court Administrator the data elements concerning the docketing and disposition of criminal, juvenile and civil cases as may be designated by the State Court Administrator.

b. Reporting and Transmittal of Criminal History Record Information

1. The Administrative Office of the Courts shall transmit to the Central Repository of Criminal History Record Information of the Department of Public Safety and Correctional Services the data elements of criminal history record information on offenses agreed to by the Secretary of the Department of Public Safety and Correctional Services and the Chief Judge of the Court of Appeals or his designee for purposes of completing a criminal history record maintained by the Central Repository of Criminal History Record Information.

2. Transmittal of Reports of Dispositions

(a) ~~Within 15 days after~~ As directed by Administrative Order of the Chief Judge of the Court of Appeals, Judicial Information Systems shall report to the State Motor Vehicle Administration the conviction, forfeiture of bail, dismissal of an appeal or an acquittal in any case involving a violation of the Maryland Vehicle Law or other traffic law or ordinance, or any conviction for manslaughter or assault committed by means of an automobile, or of any felony involving the use of an automobile~~, the clerk of the court shall forward to the State Motor Vehicle Administration a certified abstract of the record on a form furnished by the State Motor Vehicle Administration~~.

(b) When a defendant has been charged by citation and a conviction is entered by reason of his payment of a fine or forfeiture of collateral or bond before trial, the conviction is not a reportable event under Code, Criminal Procedure Article, §10-215 (a)(10).

c. Inspection of Criminal History Record Information Contained in Court Records of Public Judicial Proceedings

Unless expunged, sealed, marked confidential or otherwise prohibited by statute, court rule or order, criminal history record information contained in court records of public judicial proceedings is subject to inspection by any person at the

times and under conditions as the clerk of a court reasonably determines necessary for the protection of the records and the prevention of unnecessary interference with the regular discharge of the duties of his office.

Cross reference: See Code, Courts Article, §§2-203 and 13-101 (d) and (f), Criminal Procedure Article, §§10-201, 10-214, 10-217, and State Government Article, §§10-612 through 10-619.

Cross reference: For definition of court records see Rule 4-502 (d).

Committee note: This Rule does not contemplate the reporting of parking violations.

Source: This Rule is former Rule 1218.

Rule 16-308 was accompanied by the following Reporter's Note.

Rule 16-308 b 2 (a) requires the clerk of the court to furnish certain information from criminal records pertaining to traffic violations and motor vehicle crimes to the Motor Vehicle Administration ("MVA"), which is required to report the information to the federal government. In responding to a request by a circuit court clerk concerning possible compliance problems with the Rule, the Office of the Attorney General pointed out that the Rule needs to be modified, because the time period during which the MVA must forward the information to the federal government has been changed from 15 days to 10 days, effective October 1, 2008, and the Rule needs to conform to this. The General Court Administration Subcommittee recommends that the reporting requirements be included in an Administrative Order of the Chief Judge of the Court of Appeals, which can require the Judicial Information Systems to effectuate all of the reporting requirements and can easily be modified to conform to further changes in the time period.

Judge Norton explained that Kathy P. Smith, Clerk of the Circuit Court for Calvert County, had asked the Office of the Attorney General whether her office was in compliance with subsection (b)(2)(a) of Rule 16-308. An Assistant Attorney General, Bruce L. Benshoof, Esq., suggested in his answer that subsection (b)(2)(a) should be revisited by the Rules Committee. The Rule requires the clerk to convey information concerning criminal traffic violations to the Motor Vehicle Administration ("MVA"), which then has to report this information to the federal government within 15 days. On October 1, 2008, the MVA will have to report the information to the federal government within 10 days, and the Rule must be conformed to this change. At the General Court Administration Subcommittee meeting at which the Rule was discussed, the Rules Committee Chair suggested that the reporting requirement be effected pursuant to an administrative order of the Chief Judge of the Court of Appeals, which can require the Judicial Information Systems ("JIS") to report the necessary information and can be easily modified to conform to further changes in reporting requirements. Mr. Durfee expressed his agreement with the proposed changes to the Rule. He told the Committee that Mr. Benshoof was not able to attend the meeting today. Mr. Durfee said that he was in favor of the flexibility the administrative order would provide, so that it would not be necessary to have a change to the Rule each time the reporting requirements change. However, the problem implementing the Rule would still exist, even if it is changed. Proper reporting

depends on the clerk, and it is difficult to enforce compliance. Ms. Pollock commented that in 2005, there were criminal convictions for automobile crimes that were not being reported in a timely fashion. By October of that year, employees of JIS met with representatives of the MVA to put into place an electronic process for reporting the required information. The clerks use a variety of electronic systems to do the reporting, and it is difficult to guarantee compliance. JIS can send only what is transmitted to it.

By consensus, the Committee approved the Rule as presented. The Chair stated that the Chief Judge of the Court of Appeals will draft the appropriate order. It is better to effectuate the reporting requirements in an order. Ms. Pollock expressed her agreement with the Chair. He thanked Ms. Pollock and Mr. Durfee for attending the meeting.

Agenda Item 4. Consideration of proposed Rules changes recommended by the Appellate Subcommittee: Amendments to: Rule 8-204 (Application for Leave to Appeal to Court of Special Appeals), Rule 8-111 (Designation of Parties; References), and Rule 1-326 (Proceedings Regarding Victims and Victims' Representatives)

After the lunch break, the Vice Chair presented Rule 8-204, Application for Leave to Appeal to Court of Special Appeals, for the Committee's consideration.

CHAPTER 200 – OBTAINING REVIEW IN COURT OF SPECIAL APPEALS

AMEND Rule 8-204 to add the language "or delinquent acts" to the cross reference after section (a), to change the word "trial" to the words "criminal or juvenile" in subsection (b)(1)(B), to add the words "or juvenile" in the Committee note after subsection (b)(1)(B), and to add children and liable parents to the list of persons filing responses to applications for leave to appeal in subsection (c)(4), as follows:

Rule 8-204. APPLICATION FOR LEAVE TO APPEAL TO COURT OF SPECIAL APPEALS

(a) Scope

This Rule applies to applications for leave to appeal to the Court of Special Appeals.

Cross reference: For Code provisions governing applications for leave to appeal, see Courts Article, §3-707 concerning bail; Courts Article, §12-302 (e) concerning guilty plea cases; Courts Article, §12-302 (g) concerning revocation of probation cases; Criminal Procedure Article, §11-103 concerning victims of violent crimes or delinquent acts; Criminal Procedure Article, §7-109 concerning post conviction cases; Correctional Services Article, §10-206 et seq. concerning inmate grievances; and Health-General Article, §§12-117 (e)(2), 12-118 (d)(2), and 12-120 (k)(2) concerning continued commitment, conditional release, or discharge of an individual committed as not criminally responsible by reason of insanity or incompetent to stand trial.

(b) Application

(1) How Made

An application for leave to appeal to the Court of Special Appeals shall be filed in duplicate with the clerk of the lower court. The application shall be filed

within 30 days after entry of the judgment or order from which the appeal is sought, except that an application for leave to appeal with regard to bail pursuant to Code, Courts Article, §3-707 shall be filed within ten days after entry of the order from which the appeal is sought.

(2) Time for Filing

(A) Generally

Except as otherwise provided in subsection (b)(2)(B) of this Rule, the application shall be filed within 30 days after entry of the judgment or order from which the appeal is sought.

(B) Interlocutory Appeal by Victim

An application with regard to an interlocutory appeal by a victim pursuant to Code, Criminal Procedure Article, §11-103 alleging that the ~~trial~~ criminal or juvenile court denied or failed to consider a victim's right may be filed at the time the victim's right is actually being denied or within 10 days after the request is made on behalf of the victim, whether or not the court has ruled on the request.

Committee note: Code, Courts Article, §11-103 (c) provides that the filing of an application for leave to appeal by a victim does not stay other proceedings in a criminal or juvenile action unless all parties in the action consent to the stay.

(C) Bail

An application for leave to appeal with regard to bail pursuant to Code, Courts Article, §3-707 shall be filed within ten days after entry of the order from which the appeal is sought.

(3) Content

The application shall contain a concise statement of the reasons why the judgment should be reversed or modified and shall specify the errors allegedly committed by the lower court.

(4) Service

If the applicant is the State of Maryland, it shall serve a copy of the application on the adverse party in compliance with Rule 1-321. Any other applicant shall serve a copy of the application on the Attorney General in compliance with Rule 1-321. If the applicant is not represented by an attorney, the clerk of the lower court shall promptly mail a copy of the application to the Attorney General.

(c) Record on Application

(1) Time for Transmittal

Within (A) five days after the filing of an application by a victim for leave to file an interlocutory appeal pursuant to Code, Criminal Procedure Article, §11-103, (B) 30 days after the filing of an application for leave to appeal in any other case, or (C) such shorter time as the appellate court may direct, the clerk of the lower court shall transmit the record, together with the application, to the Court of Special Appeals.

(2) Post Conviction Proceedings

On application for leave to appeal from a post conviction proceeding, the record shall contain the petition, the State's Attorney's response, any subsequent papers filed in the proceeding, and the statement and order required by Rule 4-407.

(3) Habeas Corpus Proceedings

On application for leave to appeal from a habeas corpus proceeding in regard to bail, the record shall contain the petition, any response filed by the State's Attorney, the order of the court, and the judge's memorandum of reasons.

(4) Victims

On application by a victim for leave to appeal pursuant to Code, Criminal Procedure Article, §11-103, the record shall contain (A) the application; (B) any response to the application filed by the defendant, a child or liable parent under Code, Criminal Procedure Article, §11-601, the State's Attorney, or the Attorney General; (C) any

pleading regarding the victim's request including, if applicable, a statement that the court has failed to consider a right of the victim; and (D), if applicable, any order or decision of the court.

(5) Other Applications for Leave to Appeal

On any other application for leave to appeal, the record shall contain all of the original papers and exhibits filed in the proceeding.

Cross reference: Code, Courts Article, §3-707.

(d) Response

Within 15 days after service of the application, any other party may file a response in the Court of Special Appeals stating why leave to appeal should be denied or granted, except that any response to an application for leave to appeal with regard to bail pursuant to Code, Courts Article, §3-707 or with regard to an interlocutory appeal by a victim pursuant to Code, Criminal Procedure Article, §11-103 shall be filed within five days after service of the application.

(e) Additional Information

Before final disposition of the application, the Court of Special Appeals may require the clerk of the lower court to submit any portion of the stenographic transcript of the proceedings below and any additional information that the Court may wish to consider.

(f) Disposition

On review of the application, any response, the record, and any additional information obtained pursuant to section (e) of this Rule, without the submission of briefs or the hearing of argument, the Court shall:

(1) deny the application;

(2) grant the application and affirm the

judgment of the lower court;

(3) grant the application and reverse the judgment of the lower court;

(4) grant the application and remand the judgment to the lower court with directions to that court; or

(5) grant the application and order further proceedings in the Court of Special Appeals in accordance with section (g) of this Rule.

The Clerk of the Court of Special Appeals shall send a copy of the order disposing of the application to the clerk of the lower court.

(g) Further Proceedings in Court of Special Appeals

(1) Generally

Further proceedings directed under subsection (f)(5) of this Rule shall be conducted pursuant to this Title and as if the order granting leave to appeal were a notice of appeal filed pursuant to Rule 8-202. If the record on application for leave to appeal is to constitute the entire record to be considered on the appeal, the time for the filing of the appellant's brief shall be within 40 days after the date of the order granting leave to appeal.

(2) Further Proceedings in Interlocutory Appeals of Denial of Victims' Rights

If the order granting leave to appeal involves an interlocutory appeal by a victim pursuant to Code, Criminal Procedure Article, §11-103, the Court may schedule oral argument without the submission of briefs and shall consider the application and any responses in lieu of briefs.

Cross reference: See Rule 4-252 (h)(2)(B) for cases involving appeals taken by the State from a decision of a trial court granting a motion to suppress evidence in crimes of violence.

Source: This Rule is derived as follows:

Section (a) is new.
Section (b) is derived from former Rules 1093 a, 1095 a 1, 2 and 4, and 1096 a 1, 2, and 4.
Section (c) is derived from former Rules 1093 b, 1095 a 3, and 1096 a 3.
Section (d) is new.
Section (e) is derived from former Rules 1093 c, 1095 b, and 1096 b.
Section (f) is new.
Section (g) is derived from former Rules 1093 d, 1095 c, and 1096 c.

Rule 8-204 was accompanied by the following Reporter's Note.

The case of *Lopez-Sanchez v. State*, 388 Md. 406 (2005) held that a victim of a crime that is not a violent crime because it was committed by a juvenile may not file an application for leave to appeal to the Court of Special Appeals. The 2006 legislature enacted Chapter 260, Acts of 2006 (SB 508), which amended Code, Criminal Procedure Article, §11-103 by extending the right to file an application for leave to appeal to a victim of a delinquent act that would be a crime of violence if committed by an adult. The Appellate Subcommittee recommends changing Rules 1-326, 8-111, and 8-204 to conform to the new legislation.

The Vice Chair explained that the changes to Rule 8-204 conform to a statutory change. Code, Criminal Procedure Article, §11-103 was amended by extending the right to file an application for leave to appeal to a victim of a delinquent act that would have been a crime of violence if committed by an adult. The suggested changes are in the cross reference after section (a), in subsection (b)(2)(B), in the Committee note after subsection (b)(2)(B), and in subsection (c)(4). Judge Matricciani inquired as to whether the victim is allowed to challenge the sentence of the defendant. Mr. Butler answered that the victim can challenge

a violation of the victim's rights and also the restitution that was awarded. Judge Matricciani asked whether the victim can challenge errors in the trial, and Mr. Butler responded that the victim is not a party to the merits of the trial and is only an interested party regarding the violation of his or her rights as a victim. By consensus, the Committee approved the Rule as presented.

The Vice Chair presented Rule 8-111, Designation of Parties; References, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

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

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 8-111 to add a new section (c) pertaining to victims and victims' representatives and to add a new cross reference after section (c), as follows:

Rule 8-111. DESIGNATION OF PARTIES; REFERENCES

(a) Formal Designation

(1) No Prior Appellate Decision

When no prior appellate decision has been rendered, the party first appealing the decision of the trial court shall be designated the appellant and the adverse party shall be designated the appellee. Unless the Court orders otherwise, the parties to a subsequently filed appeal shall be designated the cross-appellant and cross-appellee.

(2) Prior Appellate Decision

In an appeal to the Court of Appeals from a decision by the Court of Special Appeals or by a circuit court exercising appellate jurisdiction, the party seeking review of the most recent decision shall be designated the petitioner and the adverse party shall be designated the respondent. Except as otherwise specifically provided or necessarily implied, the term “appellant" as used in the rules in this Title shall include a petitioner and the term “appellee" shall include a respondent.

Cross reference: See Rule 8-305 for designation of parties in cases certified pursuant to the Maryland Uniform Certification of Questions of Law Act.

(b) Alternative References

In the interest of clarity, the parties are encouraged to use the designations used in the trial court, the actual names of the parties, or descriptive terms such as “employer," “insured," “seller," “husband," and “wife" in papers filed with the Court and in oral argument.

(c) Victims and Victims’ Representatives

Although not a party to a criminal or juvenile proceeding, a victim of a crime or a delinquent act or a victim’s representative may: (1) file an application for leave to appeal to the Court of Special Appeals from an interlocutory or a final order under Code, Criminal Procedure Article, §11-103 and Rule 8-204; or (2) participate in the same manner as a party, regarding the rights of the victim or victim’s representative.

Cross reference: See Rule 1-326 for service and notice to attorneys for victims and victims’ representatives regarding the rights of victims and representatives.

Source: This Rule is derived as follows:
Section (a) is derived in part from former Rule 827 and in part new.

Section (b) is derived from FRAP 28 (d).
Section (c) is new.

Rule 8-111 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendments to Rule 8-204.

The Vice Chair told the Committee that the proposed changes to the Rule are similar to the changes to Rule 8-204 and are being suggested as a result of the statutory change to Code, Criminal Procedure Article, §11-103. By consensus, the Committee approved the Rule as presented.

The Vice Chair presented Rule 1-326, Proceedings Regarding Victims and Victims' Representatives, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-326 to add a reference to Title 8 in section (a), as follows:

Rule 1-326. PROCEEDINGS REGARDING VICTIMS AND VICTIMS' REPRESENTATIVES

(a) Entry of Appearance

An attorney may enter an appearance on behalf of a victim or a victim's representative in a proceeding under Title 4, Title 8, or Title 11 of these Rules for the purpose of representing the rights of the victim or victim's representative.

(b) Service of Pleadings and Papers

A party shall serve, pursuant to Rule 1-321 on counsel for a victim or a victim's representative, copies of all pleadings or papers that relate to: (1) the right of the victim or victim's representative to be informed regarding the criminal or juvenile delinquency case, (2) the right of the victim or victim's representative to be present and heard at any hearing, or (3) restitution. Any additional pleadings and papers shall be served only if the court directs.

(c) Duties of Clerk

The clerk shall (1) send to counsel for a victim or victim's representative a copy of any court order relating to the rights of the victim referred to in section (b) of this Rule and (2) notify counsel for a victim or a victim's representative of any hearing that may affect the rights of the victim or victim's representative.
Committee note: This Rule does not abrogate any obligation to provide certain notices to victims and victims' representatives required by statute or by other Rule.

Cross reference: See Maryland Declaration of Rights, Article 47; Rules 16-813, Maryland Code of Judicial Conduct, Canon 3B (6)(a); and Rule 16-814, Maryland Code of Conduct for Judicial Appointees, Canon 3B (6)(a). For definitions of "victim" and "victim's representative," see Code, Courts Article, §3-8A-01 and Code, Criminal Procedure Article, Title 11.

Source: This Rule is new.

Rule 1-326 was accompanied by the following Reporter's Note.

See the Reporter's note to the proposed amendments to Rule 8-204.

The Vice Chair explained that the change to the Rule is to conform to the same statute as the previous Title 8 Rules. By consensus, the Committee approved the Rule as presented.

Agenda Item 2. Reconsideration of proposed amendments to Rules 16-813 (Maryland Code of Judicial Conduct) and 16-815 (Financial Disclosure Statement)

Judge Norton presented Rule 16-813, Maryland Code of Judicial Conduct, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-813 to add a new paragraph (5) to Canon 4C concerning disclosure by a former judge approved for recall, to add new language to Canon 4F permitting a former judge who is approved for recall for temporary service to conduct alternative dispute resolution proceedings in a private capacity with certain restrictions, to add a Committee note, and to make the entire Code other than Canon 4 (c)(1) - (4) applicable to former judges approved for recall, as follows:

Rule 16-813. MARYLAND CODE OF JUDICIAL CONDUCT

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CANON 4

Extra Judicial Activities

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C. Charitable, Civic, and Governmental Activities

(1) Except when acting in a matter that involves the judge or the judge's interests, when acting as to a matter that concerns the administration of justice, the legal system, or improvement of the law, or when acting as otherwise allowed under Canon 4, a judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official.

COMMENT

As suggested in the Reporter's Notes to the ABA Model Code of Judicial Conduct (1990), the "administration of justice" is not limited to "matters of judicial administration" but is broad enough to include other matters relating to the judiciary.

(2) Except as otherwise provided by law and subject to Canon 4A, a judge may accept appointment to a governmental advisory commission, committee, or position.

COMMENT

A judge may not accept a governmental appointment that could interfere with the effectiveness and independence of the judiciary, assume or discharge an executive or legislative power (Maryland Declaration of Rights, Article 8), or hold an "office" under the constitution or other laws of the United States or State of Maryland (Maryland Declaration of Rights, Articles 33 and 35).

Committee note: The Judicial Ethics Committee notes that the supremacy clause of U.S. Constitution Article IV may allow service in reserve components of the armed forces that otherwise might be precluded under this Code, such as service as a judge advocate or military judge. However, the Attorney General, rather than the Judicial Ethics Committee, traditionally has rendered opinions with regard to issues of dual or incompatible offices.

(3) A judge may represent this country, a state, or a locality on ceremonial occasions or in connection with cultural, educational, or historical activities.

(4) (a) Subject to other provisions of this Code, a judge may be a director, member, non legal adviser, officer, or trustee of a charitable, civic, educational, fraternal or sororal, law related, or religious organization.

COMMENT

See the Comment to Canon 4B regarding use of the phrase "subject to other provisions of this Code." As an example of the meaning of the phrase, a judge permitted under Canon 4C (4) to serve on the board of an organization may be prohibited from such service by, for example, Canon 2C or 4A, if the organization practices invidious discrimination or if service on the board otherwise causes a substantial question as to the judge's capacity to act impartially as a judge or as to service as an adviser.

(b) A judge shall not be a director, adviser, officer, or trustee of an organization that is conducted for the economic or political advantage of its members.

(c) A judge shall not be a director, adviser, officer, or trustee of an organization if it is likely that the organization:

(i) will be engaged regularly in adversary proceedings in any court; or

(ii) deals with people who are referred to the organization by any court.

COMMENT

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine whether it is proper to continue a relationship with it. For example, in many jurisdictions, charitable organizations are more frequently in court now than in the past or make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(d) (i) A judge shall not participate personally in:

(A) solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise appellate or supervisory jurisdiction; or

(B) a membership solicitation that reasonably might be perceived as coercive or, except as permitted in Canon 4C (4)(d)(i)(A), is essentially a fund-raising mechanism.

(ii) A judge shall not participate as a guest of honor or speaker at a fund-raising event.

(iii) Except as allowed by Canon 4C (4)(d), a judge shall not use or lend the prestige of judicial office for fund-raising or membership solicitation.

(iv) A judge may:

(A) assist an organization in planning fund-raising;

(B) participate in the investment and management of an organization's funds; and

(C) make recommendations to private and public fund-granting organizations on programs and projects concerning the administration of justice, the legal system, or improvement of the law.

COMMENT

As a director, member, non-legal adviser, officer, or trustee of an organization that is devoted to the administration of justice, the legal system, or improvement of the law or for a not-for-profit charitable, civic, educational, fraternal or sororal, or religious organization, a judge may solicit membership and encourage or endorse membership efforts for the organization, as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor who is in a position of control or influence. A judge may be listed as a director, officer, or trustee of an organization but must not engage in direct, individual solicitation of funds or memberships in person, by telephone, or in writing, for that organization, except in the following cases: (1) a judge may solicit, for funds or memberships, other judges over whom the judge does not exercise appellate or supervisory authority; (2) a judge may solicit, for membership in an organization described above, other persons if neither those persons nor persons with whom they are affiliated are likely to appear before the court on which the judge serves; and (3) a judge who is an officer of an organization described above may send a general membership solicitation mailing over the judge's signature.

Use of an organization's letterhead for fund-raising or membership solicitation does

not violate Canon 4C (4) if the letterhead lists only the judge's name and office or other position in the organization. A judge's judicial office also may be listed if comparable information is listed for other individuals. A judge must make reasonable efforts to ensure that court officials, the judge's staff, and others subject to the judge's direction and control do not use or refer to their relationship with the judge to solicit funds for any purpose, charitable or otherwise.

Although a judge is not permitted to be a guest of honor or speaker at a fund-raising event, Canon 4 does not prohibit a judge from attending an event if otherwise consistent with this Code.

(5) A former judge approved for recall for temporary service under Maryland Constitution, Article IV, §3A shall disclose the judge's charitable activities if the judge is presiding over a case in which a possible conflict of interest for the judge could arise.

Cross reference: As to ~~exemption for~~ former judges approved for recall, see Canon 6C.

D. Financial Activities

(1) A judge shall not engage in business or financial dealings that:

(a) reasonably would be perceived to violate Canon 2B; or

(b) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

COMMENT

Canon 4D (1)(b) is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the

potential for recusal. A judge also should discourage members of the judge's family from engaging in dealings that reasonably would appear to exploit the judge's judicial position. With respect to affiliation of relatives of the judge with law firms appearing before the judge, see the Comment to Canon 3D (1)(d) relating to recusal. Participation by a judge in business and financial dealings is subject to the general prohibitions in Canon 4A against activities that cause a substantial question as to impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation also is subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Canon 2B against misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See the Comment to Canon 4B regarding use of the phrase "subject to other provisions of this Code."

(2) Subject to other provisions of this Code, a judge may hold and manage investments, including real estate, and engage in other remunerative activities except that a full time judge shall not hold a directorship or office in a bank, insurance company, lending institution, public utility, savings and loan association, or other business, enterprise, or venture that is affected with a public interest.
~~Cross reference: As to exemption for former judges approved for recall, see Canon 6C.~~

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E. Fiduciary Activities

(1) (a) Except as provided in Canon 4E (1) and then only subject to other provisions of this Code and statutes, a judge shall not serve as a fiduciary.

(b) A judge may serve as a fiduciary for a member of the judge's family.

(c) A judge who has served as a trustee of a trust since December 31, 1969, may continue to do so as allowed by law.

(2) A judge shall not agree to serve as a fiduciary if it is likely that, as a fiduciary, the judge will be engaged in proceedings that ordinarily would come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or in a court under the appellate jurisdiction of the court on which the judge serves.

(3) The restrictions that apply to personal financial activities of a judge also apply to the judge's fiduciary financial activities.

COMMENT

The Time for Compliance provision of this Code (Canon 6D) postpones the time for compliance with certain provisions of Canon 4E in some cases.

Committee note: Code, Estates and Trusts Article, §§5-105 (b)(5) and 14-104 prohibit a judge from serving as a personal representative or trustee for someone who is not a spouse or within the third degree of relationship (although a judge serving as trustee as of 12/31/69 is allowed to continue in that capacity). Neither the 1987 Maryland Code of Judicial Conduct nor any other Maryland law explicitly prohibits a judge from serving as any other type of fiduciary for anyone.

~~Cross reference: As to exemption for former judges approved for recall, see Canon 6C.~~

F. Service as Arbitrator or Mediator

(1) A judge shall not act as an

arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

(2) A former judge who is approved for recall for temporary service under Maryland Constitution, Article IV, §3A may conduct alternative dispute resolution proceedings in a private capacity if the judge:

(A) discloses to the parties in each judicial proceeding over which the judge presides: (i) the judge's professional association with any entity that is engaged in offering alternative dispute resolution services, whether or not the entity also is engaged in the practice of law, (ii) whether the judge is being utilized, or has been utilized within the past year, to conduct an alternative dispute resolution proceeding by any party, attorney, or law firm involved in the case pending before the judge, and (iii) any negotiations or agreements for the future provision of alternative dispute resolution services between the judge and any of the parties or counsel to the case;

(B) recuses himself or herself from a judicial proceeding in which the judge's impartiality might reasonably be questioned because of alternative dispute resolution services engaged in or offered by the judge;

(C) does not advertise, solicit business, associate with a law firm, or participate in any other activity that directly or indirectly promotes the judge's alternative dispute resolution services;

(D) does not conduct alternative dispute resolution proceedings in a private capacity in any case in which the judge is currently presiding; and

(E) does not preside over any case involving any party, attorney, or law firm that is utilizing, or within the previous year has utilized, the judge to conduct an alternative dispute resolution proceeding unless all parties consent in writing or on the record.

COMMENT

The purpose of Canon 4F (2) is to ensure that the impartiality of a former judge who is approved for recall is not subject to question. Although the former judge in a private capacity may act as a mediator, arbitrator, or other provider of alternative dispute resolution services, attention must be given to relationships with lawyers and law firms that may require disclosure or disqualification. These provisions are intended to prohibit the former judge from soliciting lawyers to use the former judge's alternative dispute resolution services when those lawyers are or may be before the former judge in proceedings where the former judge is acting in a judicial capacity. Canon 4F (2) does not prohibit a former judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties, nor does it prohibit a former judge from presiding over the same type of case in which the judge conducts alternative dispute resolution in the circuit where the services are provided.

Committee note: The inadvertent failure of a former judge approved for recall to make the disclosures required by Canon 4F (2) does not affect the integrity of the judicial proceeding in which the failure occurred, nor does it provide a basis per se for reversal of a judgment.

COMMENT

Canon 4F does not ~~preclude~~ prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties. If by reason of disclosure made during or as a result of a conference, a judge's **impartiality** might reasonably be questioned, the judge should not participate in the matter further. See Canon 3D (1).

~~Cross reference: As to exemption for former judges approved for recall, see Canon 6C.~~

G. Practice of Law

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CANON 6

Compliance

A. Courts

This Code applies to each judge of the Court of Appeals, the Court of Special Appeals, a circuit court, the District Court, or an orphans' court.

B. Construction

Violation of any of the Canons by a judge may be regarded as conduct prejudicial to the proper administration of justice within the meaning of Maryland Rule 16-803 (j), as to the Commission on Judicial Disabilities.

Committee note: Whether a violation is or is not prejudicial conduct is to be determined by the Court of Appeals of Maryland. Maryland Constitution, Article IV, §4B gives that Court the authority to discipline any judge upon recommendation of the Commission on Judicial Disabilities. This disciplinary power is alternative to and cumulative with the impeachment authority of the General Assembly.

C. Former Judges

This Code, other than paragraphs (1) - (4) of Canon 4C (Charitable, Civic, and Governmental Activities), ~~D(2) (Financial Activities), E (Fiduciary Activities), and F~~

~~(Service as Arbitrator or Mediator),~~ applies to each former judge of one of those courts who is approved for recall for temporary service under Maryland Constitution, Article IV, §3A.

Cross reference: As to approval of a former judge for recall, see Code, Courts Article, §1-302.

D. Time for Compliance

An individual to whom this Code becomes applicable shall comply immediately with all provisions of this Code except: Canon 2C (Avoidance of Impropriety and the Appearance of Impropriety), Canon 4D (2) (Financial Activities), and Canon 4E (**Fiduciary** Activities). The individual shall comply with Canons 2C and 4D (2) and E as soon as reasonably possible, and shall do so in any event as to Canon 2C within two years and as to Canon 4D (2) and E within one year.

Source: . . .

Canon 4.

Canon 4F is derived from Maryland Code (1987), Canon 4H, with the addition of the reference to unauthorized performance of "judicial functions in a private capacity," in accordance with ABA Code (2000), Canon 4F and Canon 5F of the Florida Code of Judicial Conduct. The Comment to Canon 4F is derived from the Comment to Maryland Code (1987), Canon 4F, ~~and~~ the first sentence of the Commentary to ABA Code (2000), Canon 4F, and the Commentary to Canon 5F of the Florida Code of Judicial Conduct.

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Canon 6.

Canon 6A is derived from Maryland Code (1987), Canon 6A, with the Committee note omitted.

Canon 6B is derived from Maryland Code (1987), Canon 6B, with substitution of "Canons" for "any of the provisions of this Code of Judicial Conduct" to clarify that a judge can be charged only with violating a Canon and not a Comment or Committee note.

Canon 6C is derived from Maryland Code (1987), Canon 6C, but with ~~Canon 4D (4)~~ the entire Code other than Canon 4C (1)-(4) made applicable to recalled judges.

Canon 6D is derived from ABA Code (2000), Canon 6F.

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Rule 16-813 was accompanied by the following Reporter's Note.

Upon remand from the Court of Appeals, the General Court Administration Subcommittee of the Rules Committee has reconsidered proposed amendments to Canon 4F of the Code of Judicial Conduct. The Court of Appeals had directed the Committee to examine the policies of Florida regarding recalled judges acting as mediators and arbitrators and present the Court with Rules that conform to these policies. The Subcommittee proposes that language based on the Florida Rule be added to Canon 4F. The Subcommittee recommends following most of Florida's Canon 5F 2, except for allowing a former judge approved for recall to preside over cases in the same circuit in which the judge conducts alternative dispute resolution, which is not permitted in Florida, and limiting the period to within one year for the judge to be prohibited from presiding over cases involving any party, attorney, or law firm that is or has utilized the judge as a mediator or arbitrator, instead of the three-year limit in Florida.

Judge Norton explained that proposed revisions to Canon 4 of

Rule 16-813 were transmitted to the Court of Appeals, which remanded the Rule to the Rules Committee. It then was reconsidered by the General Court Administration Subcommittee. The main issue regarding the Rule is the circumstances under which retired judges may be recalled to serve as judges as well as to conduct alternative dispute resolution ("ADR") proceedings in a private capacity. The Court of Appeals had discussed the way that this is handled in Florida, which allows a retired judge who has been recalled for service to conduct ADR proceedings when disclosure to the parties to the ADR proceeding about the judge's judicial activities is made. The Rule was sent back so that the Subcommittee could look at this and other features of the Florida rule.

Judge Norton said that paragraph (5) of Canon 4C pertaining to disclosure of the charitable activities of a former judge approved for recall was not discussed at the Court of Appeals conference. The amended language is a result of a letter to the Court of Appeals jointly submitted by the Honorable Ellen M. Heller and the Honorable Kathleen O'Ferrall Friedman, both retired judges of the Circuit Court for Baltimore City. In the letter, a copy of which is in the meeting materials, the judges expressed their concern that the language of Canon 4C (4)(d)(i) could interfere with a recalled judge serving on the board of directors of a university, hospital, or other charitable organization which, of necessity, engages in fund-raising. (See Appendix 2). The view of the Subcommittee is that a retired judge

who is eligible for recall should be able to participate in charitable activities. Any possible conflict of interest can be addressed by disclosure by the judge of those activities. The Subcommittee's proposed language appears as a new paragraph (5) of Canon 4C. In conjunction with the amendment to Canon 4C, paragraphs 1 -4 of Canon 4C are exempted from the proposed change to Canon 6C that makes the entire Code of Judicial Conduct applicable to retired judges approved for recall. Judge Norton pointed out that the language proposed for deletion after Canon 4C (5) and 4D and after the Comment to Canon 4E relates to proposed changes to Canon 6C.

Judge Norton stated that the language proposed to be added to Canon 4F is derived from the language of the Florida Rule, Canon 5F, a copy of which is in the meeting materials. The Florida Rule provides that a retired judge may not preside over a case involving any party, attorney, or law firm that is utilizing or has utilized the judge as a mediator within the previous three years. The Subcommittee proposes that this time period be one year. Florida prohibits a retired judge who provides ADR services from presiding over the same type of case the judge mediates in the circuit where the ADR services are provided. The Subcommittee felt that this prohibition is not necessary as long as the judge discloses his or her ADR activities.

Judge Matricciani pointed out that Judge Heller and Judge Friedman are active in non-profit organizations that need to raise funds. He expressed the opinion that former judges who are

eligible for recall should be able to participate in this type of charitable fund-raising. The Chair suggested that proposed new paragraph (5) of Canon 4C could read as follows: "A former judge approved for recall shall not preside over a case in which a possible conflict of interest could arise." The Vice Chair noted that Canon 4F (2)(B) provides that a former judge should recuse himself or herself from a judicial proceeding if the judge's impartiality could be reasonably questioned due to ADR services engaged in or offered by the judge. Canon 4C (5) could track this language. Mr. Michael inquired as to who decides about the recusal -- is it automatic or do the litigants decide? Judge Norton remarked that there may be a conflict of interest unrelated to the judge's ADR or charitable activities.

Ms. Veronis noted that Canon 3D pertains to recusal by a judge, and Canon 3E states that if recusal is required by Canon 3D, the judge may disclose on the record the reason for the recusal. After disclosure of any reason for the recusal other than as required by Canon 3D (1)(A) (i.e., the judge has a personal bias or prejudice concerning a party or a party's lawyer or extra-judicial knowledge of a disputed evidentiary fact concerning the proceeding), the parties and lawyers may agree that the judge need not recuse himself or herself. The Chair suggested that the concepts of disclosure and recusal in Canons 3D and E could be built into Canon 4F (2)(B). The Vice Chair added that the language in Canon 3E, providing that after disclosure, the parties may agree that the judge need not recuse

himself or herself, could be included in Canon 4F (2)(B).

The Chair suggested that Canon 4C (5) could begin as follows: "A former judge approved for recall for temporary service under Maryland Constitution, Article IV, §3A may participate in charitable activities...". Language could be added stating that the judge must comply with the recusal requirements found in Canons 3D and 3E. The Vice Chair noted that the Canons may not allow judges approved for recall to participate in charitable activities. Judge Matricciani observed that the concern is about a former judge subject to recall who also heads a charitable organization that is involved in fund-raising. Judge Dryden remarked that even if a judge heads such an organization, he or she would be in compliance with the existing Rules as long as the judge does not appear to be asking for money for the organization. The Vice Chair commented that the word "charitable" may not be clear enough. The Reporter said that currently Canon 4C does not apply to the situation presented by Judges Heller and Friedman. The Court of Appeals has indicated that it would like all of the Canons to apply to all judges, including former judges approved for recall.

The Chair suggested that the provisions pertaining to charitable activities could be separated into the general provision that applies to all judges and the exceptions to it. A judge may participate in charitable, civic, and governmental activities provided that the judge complies with recusal requirements. Judge Matricciani added that it is important that

former judges be out in the community performing charitable activities. Judge Kaplan expressed the view that retired judges approved for recall should not be directly involved in fund-raising. Judge Dryden questioned as to whether retired judges should be able to do the same charitable activities as active judges. The Chair commented that paragraphs 1 - 4 of Canon 4C do not apply to a former judge who has been approved for recall. A Committee note could be added that would highlight the fact that a judge must make the disclosure required by Canons 3D and 3E.

The Reporter asked if new paragraph 4C (5) should be movedinto Canon 6, the recusal language also added. The Vice Chair inquired as to whether this would allow a retired judge to directly solicit a possible donor on behalf of a charity. The Chair responded that this would not be allowed for any donor who is before the judge in a legal proceeding. Master Mahasa remarked that this restriction is the same for retired and active judges. Judge Norton suggested that a cross reference to the "non-recusal by agreement" language in Canon 3E could be added to the new language in Canon 6. The Chair said that this cross reference will be built in, and the Committee agreed by consensus to this change.

Mr. Klein pointed out that paragraph (2)(C) of Canon 4F provides that a retired judge is not permitted to conduct ADR if the judge advertises his or her ADR services. The Vice Chair asked whether, because of the First Amendment, a Rule is allowed to prohibit advertising. The Chair remarked that there is no

constitutional right for a judge to be recalled for temporary service. Mr. Klein noted that a mediator has to have a way to let the public know that his or her services are available. Judge Matricciani said that judges may conduct ADR alone or as part of an organization, such as the McCammon Group, that uses retired judges to conduct ADR proceeding.

The Chair suggested that paragraph (2)(B) of Canon 4F be rewritten to add that if the judge's impartiality might reasonably be questioned because of ADR services engaged in or offered by the judge, the judge must comply with the requirements of Canon 3D. He also suggested that paragraph (2)(C) be deleted. By consensus, the Committee agreed with this deletion. The Chair suggested that because the Canon 3D/3E approach to disclosure and recusal is being used, paragraph (2)(E) should be deleted from Canon 4F. By consensus, the Committee agreed to this deletion. Judge Norton said that the language of Canon 3E pertaining to non-recusal by agreement also will be added to Canon 4F. The Chair noted that Canon 3E requires compliance with Canon 3D. A Committee note could be added giving examples of situations in which recusal under Canon 3D is appropriate.

Mr. Klein pointed out that the Florida Rule, Canon 5F, provides that a retired judge may be associated with entities that are solely engaged in offering ADR services, but may in no other (emphasis added) way advertise, solicit business, or associate with a law firm. The proposed language in Canon 4F eliminates the word "other." The Chair commented that the judge

must disclose whether or not the entity engaged in offering ADR services is also engaged in the practice of law. The Vice Chair inquired as to whether a retired judge is able to work in a law firm and then preside over cases in court. Judge Kaplan replied that if a retired judge joins a law firm, then the judge may not preside over cases as a substitute judge. Judge Matricciani observed that there are groups of lawyers in limited liability partnerships and limited liability corporations who do not litigate and may have ADR professionals on their staffs. The Chair observed that the Court of Appeals has to approve the judges who are recalled for service. These judges cannot also practice law or be affiliated with a law firm.

The Vice Chair suggested that the language in paragraph (2)(A) of Canon 4F that reads "whether or not the entity also is engaged in the practice of law" should be deleted, because it implies that it is appropriate for the former judge approved for recall to practice law. By consensus, the Committee agreed to this deletion. Mr. Sykes suggested that the word "exclusively" should be added to paragraph (2)(A) in subsection (i) after the word "engaged" and before the word "in." Mr. Klein pointed out that Florida uses similar language. By consensus, the Committee approved this addition.

Mr. Michael remarked that the written response of John McCammon of The McCammon Group to questions posed by the Reporter, a copy of which response was distributed at today's meeting, indicated that some members of the Group occasionally

sit as recalled judges. (See Appendix 3). Mr. Brault said that the retired judges in Maryland may be at a disadvantage as compared to the retired judges in the District of Columbia and Virginia, depending on what their judicial canons provide. Mr. Michael noted that a former Maryland judge has advertised his ADR services in the Maryland Bar Journal. Judge Norton observed that this is allowed under the current Canons.

The Vice Chair noted that paragraph (2)(C), (D), and (E) of Canon 4F will be deleted. The Reporter questioned whether paragraph (2)(D) should be eliminated. Judge Matricciani responded that paragraph (2)(D) should be retained. Mr. Michael added that there is a potential for mischief if a judge were to conduct ADR in a private capacity in a case in which the judge has been presiding.

The Vice Chair suggested that the Comments after Canon 4F should be revised and combined into one. The Chair referred to the Committee note placed between the two Comments that states: "The inadvertent failure of a former judge to make the disclosures required by Canon 4F (2) does not affect the integrity of the judicial proceeding in which the failure occurred, nor does it provide a basis per se for reversal of a judgment." The Vice Chair expressed the concern that the Committee note may be inaccurate. The same principle applies to both retired and active judges. Judge Matricciani asked how "inadvertency" would be determined. The Chair suggested that the note be removed. The matter can be left to case law to

determine. By consensus, the Committee agreed to delete the Committee note. By consensus, the Committee approved Rule 16-813, as amended.

Judge Norton presented Rule 16-815, Financial Disclosure Statement, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-815 to require that a former judge approved for recall for temporary service file a certain financial disclosure statement, as follows:

Rule 16-815. FINANCIAL DISCLOSURE STATEMENT

a. For purposes of this Rule, former judge means a former judge approved for recall for temporary service under Maryland Constitution, Article IV, §3A.

~~a.~~ b. Every judge and each former judge shall file with the State Court Administrator an annual financial disclosure statement on the form prescribed by the Court of Appeals. When filed, a financial disclosure statement is a public record.

~~b.~~ c. Except as provided in paragraph ~~c~~ d of this Rule:

1. The initial financial disclosure statement shall be filed on or before April 15, 1987 and shall cover the period beginning on January 1, 1986 and ending on December 31, 1986.

2. A subsequent statement shall be filed annually on or before April 15 of each year

and shall cover the preceding calendar year or that portion of the preceding calendar year during which the judge held office.

3. A financial disclosure statement is presumed to have been filed unless the State Court Administrator, on April 16, notifies a judge that the judge's statement for the preceding calendar year or portion thereof has not been received.

~~c.~~ d. If a judge or other person who files a certificate of candidacy for nomination for an election to an elected judgeship has filed a statement pursuant to §15-610 (b) of the State Government Article, Annotated Code of Maryland, the person need not file for the same period of time the statement required by paragraph ~~b~~ c of this Rule.

~~d.~~ e. The State Court Administrator is designated as the person to receive statements from the State Administrative Board of Election Laws pursuant to §15-610 (b) of the State Government Article.

~~e.~~ f. Extension of Time for Filing.

1. Except when the judge or the former judge is required to file a statement pursuant to §15-610 (b) of the State Government Article, Annotated Code of Maryland, a judge or former judge may apply to the State Court Administrator for an extension of time for filing the statement. The application shall be submitted prior to the deadline for filing the statement, and shall set forth in detail the reasons an extension is requested and the date upon which a completed statement will be filed.

2. For good cause shown, the State Court Administrator may grant a reasonable extension of time for filing the statement. Whether ~~he~~ the State Court Administrator grants or denies the request, the State Court Administrator shall furnish the judge or former judge and the Judicial Ethics Committee with a written statement of ~~his~~ the State Court Administrator's reasons, and the facts upon which this decision is based.

3. A judge or former judge who is dissatisfied with the State Court Administrator's decision may seek review by the Judicial Ethics Committee by filing with the Committee a statement of reasons for the judge's or former judge's dissatisfaction within ten days from the date of the State Court Administrator's decision. The Committee may take the action it deems appropriate with or without a hearing or the consideration of additional documents.

~~f.~~ g. Failure to File Statement - Incomplete Statement.

1. A judge or former judge who fails to file a timely statement, or who files an incomplete statement, shall be notified in writing by the State Court Administrator, and given a reasonable time, not to exceed ten days, within which to correct the deficiency. If the deficiency has not been corrected within the time allowed, the State Court Administrator shall report the matter to the on Judicial Ethics Committee.

2. If the Committee finds, after inquiry, that the failure to file or the omission of information was either inadvertent or in a good faith belief that the omitted information was not required to be disclosed, the Committee shall give the judge or former judge a reasonable period, not to exceed 15 days, within which to correct the deficiency. Otherwise, the Committee shall refer the matter to the Commission on Judicial Disabilities. If a judge or former judge who has been allowed additional time within which to correct a deficiency fails to do so within that time, the matter shall also be referred to the Commission on Judicial Disabilities.

~~g.~~ h. This rule applies to ~~any~~ each judge of a court named in Canon 6 A who has resigned or retired in any calendar year, with respect to the portion of that calendar year prior to ~~his~~ the judge's resignation or retirement, and to each former judge with respect to the previous calendar year.

Source: This Rule is former Rule 1233.

Rule 16-815 was accompanied by the following Reporter's Note.

> In conjunction with proposed amendments to Rule 16-813, Rule 16-815 is proposed to be amended to require that a former judge approved for recall for temporary service under Maryland Constitution, Article IV, §3A file a financial disclosure statement for the previous calendar year. Stylistic changes also are made.

Judge Norton told the Committee that the change to Rule 16-815 requiring former judges approved for recall for temporary service to file a financial disclosure statement is being recommended in conjunction with the proposed amendments to Rule 16-813. By consensus, the Committee approved Rule 16-815 as presented.

The Chair adjourned the meeting.