COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Rooms UL4 and 5 of the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on October 13, 2017.

Members present:

Hon. Alan M. Wilner, Chair

H. Kenneth Armstrong, Esq.
Robert R. Bowie, Jr., Esq.
Hon. Yvette M. Bryant
James E. Carbine, Esq.
Hon. John P. Davey
Mary Anne Day, Esq.
Christopher R. Dunn, Esq.
Ms. Pamela Q. Harris
Victor H. Laws, III, Esq.
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Sen. H. Wayne Norman
Hon. Paula A. Price
Hon. Margaret M. Schweitzer
Steven M. Sullivan, Esq.
Gregory K. Wells, Esq.
Thurman W. Zollicoffer, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Susan Macek, Esq., Assistant Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kim Klein, Esq., Anne Arundel County Circuit Court
Margaret H. Phipps, Register of Wills for Calvert County
Grace G. Connolly, Register of Wills for Baltimore County
Steve Anderson, Esq., Maryland State Law Library
Hon. Wendy A. Cartwright, Prince George's County Orphans' Court
Thomas J. Dolina, Esq., Bodie, Dolina, Hoggs, Friddell & Grenzer, P.C.
Benjamin Woolery, Esq.
Kathleen H. Meredith, Esq., Maryland State Bar Association
Jeffrey Shipley, Esq., State Board of Law Examiners
Ms. Sidonie Becton, Law Clerk
Michele J. McDonald, Esq., Office of the Attorney General, Courts and Judicial Affairs

The Chair convened the meeting. He introduced the new Assistant Reporter, Susan L. Macek. He said that she had attended Boston University, received a master's degree from the University of Massachusetts, did doctoral work at the University of Maryland, and graduated from the University of Maryland School of Law. She had been an intern for then-Chief Judge of the Court of Appeals Robert M. Bell and served as a law clerk for Judge Michael Reed, both when he was on the Circuit Court for Baltimore City and when he was appointed to the Court of Special Appeals.

The Chair announced that the 194th Report was approved by the Court of Appeals on October 10, 2017. The Rules in that Report will take effect on January 1, 2018. The Report included the Rules on wage liens and guardianships. Action on Rule 19-304.4 (Respect for Rights of Third Persons) and a conforming amendment to Rule 19-304.2 (Communications with Persons Represented by an Attorney) was deferred pending further study by the Committee. He explained that the proposed amendment to Rule 19-304.4, which is the ethical Rule addressing attorneys who receive information that was sent inadvertently, reinserted language that had been unintentionally omitted during a past revision of the Rule. The Committee had suggested restoring that language, but the Court decided to defer action until the

Committee could consider the interplay between Rule 19-304.4 and various discovery and subpoena Rules.

The Chair said that he had an update on two other matters that may impact the Committee. He said that he has been working for some time now with Baltimore City Circuit Court Administrative Judge W. Michel Pierson on that court's asbestos docket. An estimated 30,000 cases are waiting to be resolved in that court. The Chair explained that some of those cases have been tried or settled, but at least one defendant is in bankruptcy and cannot be proceeded against. As a result, the court cannot enter final judgments in cases that are resolved. The Chair said that there have been several discussions with Judge Pierson, and the Chair and the Reporter have met with attorneys on both sides. As a result of those discussions, there are some proposals that may resolve this problem and permit final judgments to be entered with respect to all the matters that are settled. The issues regarding bankrupt parties would be kept alive somewhere else. The Chair said that he and the Reporter have drafted proposed Rules, which Judge Pierson approved. There will be a second meeting with the attorneys to see how they react to the proposals.

Senator Norman commented that there will be a briefing on October 17, 2017, in the Maryland Senate Judicial Proceedings Committee on the asbestos backlog in Baltimore City. He said

that he would ask Sen. Bobby Zirkin, Chair of the Senate Judicial Proceedings Committee, to call the Chair of the Rules Committee. Mr. Zollicoffer noted that Judge Pierson is scheduled to appear at that briefing at 1 p.m. The Chair said that he would appear if Sen. Zirkin would like for him to do so. The Chair added that there are several different issues with asbestos cases; he and the Reporter have been focused on what to do with the cases that are resolved but judgments cannot be entered because of a defendant in bankruptcy.

The Chair said that the second matter he wanted to update the Committee on was practice by foreign attorneys. The Committee had started working on this several years ago at the request of Chief Judge Barbera, then the Maryland State Bar Association ("the MSBA") became involved. The MSBA created a special committee, which then created a special task force that has written a report. The Chair said that he and the Reporter met with the task force and some changes are going to be suggested. An Attorneys and Judges Subcommittee meeting is scheduled for November 15, 2017, to discuss the proposals. The original referral from Chief Judge Barbera was prompted by the Conference of Chief Justices' endorsement of recommendations by the American Bar Association ("the ABA") permitting certain kinds of practice by attorneys who are barred only in a foreign country but not in a U.S. state. Most of the other states have

adopted some of the ABA recommendations, and the Subcommittee will consider joining those states.

Agenda Item 1. Reconsideration of a proposed new Rule 1-105 (Official Record of Legal Material)

The Chair presented proposed new Rule 1-105, Official Record of Legal Material, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 1 – GENERAL PROVISIONS

CHAPTER 100 – APPLICABILITY AND CITATION

ADD new Rule 1-105, as follows:

Rule 1-105. OFFICIAL RECORD OF LEGAL MATERIAL

(a) Applicability; Definitions

This Rule applies to legal material of which the Court of Appeals is the official publisher under Code, State Government Article, Title 10, Subtitle 16 (Maryland Uniform Electronic Legal Materials Act). In this Rule, (1) "decision" means an opinion or order of the Court of Appeals or the Court of Special Appeals, (2) "MDEC action" has the meaning stated in Rule 20-101, and (3) the definitions in Code, State Government Article, §10-1601 shall apply.

Cross reference: See Rule 8-605.1, concerning designation for reporting of opinions of the Court of Special Appeals.

(b) Maryland Rules

The official record of the Maryland Rules is the paper record maintained by the Clerk of the Court of Appeals pursuant to Rule 16-802. The paper or electronic version of a Rule posted on the Judiciary website or contained in a ~~commercially~~ published codification of the Maryland Rules **[approved by the Court of Appeals]** may be cited in accordance with Rule 1-103 as evidence of the text of the Rule.

Committee note: The Maryland Rules of Procedure maintained by the Clerk of the Court of Appeals consists of multiple bound volumes of the Rules Orders issued by the Court, together with the text of the Rules adopted in those Orders. They constitute the most authoritative version of the Rules, as adopted in those Orders. Those volumes do not constitute a code of the Rules, however, but are comparable to the Session Laws enacted by the General Assembly, and, where Rules have been amended or repealed, may not constitute a practical source for determining the current or former version of any particular Rule. That is why the text of a Rule as it appears on the Judiciary website or in ~~commercially~~ published codified form **[approved by the Court of Appeals]**, may be cited as evidence of the Rule. In the event of any dispute regarding the accuracy of the online or codified version, the text of the Rule as it appears in the relevant Rules Order(s) will prevail. Compare Code, Courts Article, §10-201.

(c) Decisions

(1) In a Non-MDEC Action

The official record of a decision of the Court of Appeals or Court of Special Appeals in a non-MDEC action is the paper slip opinion or order filed with the Clerk of that Court. The decision may be cited as provided in subsection (c)(3) of this Rule.

(2) In an MDEC Action

(A) The Administrative Office of the Courts, in consultation with the Office of the Attorney General and the Division of State Documents of the Office of the Secretary of State of Maryland, shall develop for approval by the Court of Appeals protocols for the authentication, preservation, and security of legal material that comply with the requirements of Code, State Government Article, Title 10, Subtitle 16. If the Court is satisfied that the protocols comply with the statutory requirements, the Court shall enter an administrative order (i) approving the protocols and requiring their implementation and periodic monitoring by the Administrative Office of the Courts, and (ii) setting a date upon which the official record of a decision of the Court of Appeals or Court of Special Appeals in an MDEC action shall be the electronic record of the decision filed in the MDEC system.

(B) Notwithstanding the provisions of Rule 20-301, prior to the effective date established in the Court's administrative order, the official record of a decision of the Court of Appeals or the Court of Special Appeals shall be the paper slip opinion or order filed with the Clerk of that Court. Regardless of whether the official record of a decision in an MDEC action is in electronic or paper form, the decision may be cited as provided in subsection (c)(3) of this Rule.

(3) Citation of Decisions

(A) A ~~document contained~~ decision as reported in the Maryland Reports~~,~~ or the Maryland Appellate Reports~~, or other commercially produced bound volume of decisions~~ may be cited as evidence of the text of ~~a~~ the decision. The citation shall state the name of the case, the date of filing of the decision, and the volume and page number of the Maryland Reports or Maryland Appellate Reports in which the

decision appears. ~~If no bound volume containing the decision exists, a document posted on the Judiciary website or contained in a commercially produced electronic or paper compilation of decisions may be cited.~~

(B) A decision that is published in any other commercial or governmental publication **[approved by the Court of Appeals]** may be cited as evidence of the text of the decision, provided that, if the decision also has been reported in the Maryland Reports or Maryland Appellate Reports, the citation also shall contain the volume and page number of the Maryland Reports or Maryland Appellate Reports in which it appears.

(C) If the decision is not, or has not yet been, reported in the Maryland Reports or the Maryland Appellate Reports, the decision may be cited as it appears on the Judiciary website.

~~Committee note: The second sentence of subsection (c)(3) of this Rule is intended to provide an interim method of citing a decision prior to its inclusion in a bound volume.~~

Cross reference: See Md. Constitution, Art. IV, §16 and Code, Courts Article, §§13-201 through 13-204 regarding the reporting of appellate decisions.

Source: This Rule is new.

Rule 1-105 was accompanied by the following Reporter's note:

New Rule 1-105 is proposed in light of the enactment of Chapter 554 (Senate Bill 137), effective October 1, 2017, codified as Code, State Government Article, §§10-1601 through 10-1611. This new subtitle, the "Maryland Uniform Electronic Legal Materials Act," addresses electronic publication of

state legal materials, including issues of authentication. Specifically, the subtitle enumerates the "official publisher" of legal materials (e.g., the Department of Legislative Services is official publisher of the Maryland Constitution) and prescribes certain requirements if an electronic record is to be designated as official.

Proposed Rule 1-105 applies only to legal materials for which the Court of Appeals is the official publisher under the Act. This includes the Maryland Rules and reported "decisions" of the Court of Appeals and the Court of Special Appeals. In section (a) of the Rule, "decision" is defined to mean an order or opinion of either appellate court.

Section (b) clarifies that the official record of the Maryland Rules is the paper record maintained by the Clerk of the Court of Appeals. It also permits the text of a Rule as it appears on the Judiciary website or in a published codified form [approved by the Court of Appeals] to be cited as evidence of the text of the Rule, in accordance with Rule 1-103.

Section (c) addresses the official record of decisions of the Court of Appeals and the Court of Special Appeals in relation to the implementation of MDEC. For now, in both non-MDEC and MDEC actions, the official record of a decision of the Court of Appeals and the Court of Special Appeals is the paper slip opinion or order filed with the Clerk of the respective Court. Subsection (c)(2), however, specifies that the paper slip opinion or order filed with the Clerk in MDEC actions only remains the official record until protocols for electronic authentication, preservation, and security are developed. Once protocols are approved and implemented, the Court of Appeals will set a date upon which the official record of decisions in MDEC actions shall be the electronic record.

> Subsection (c)(3) addresses citation of appellate decisions.
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> Subsection (c)(3)(A) permits a decision published in the Maryland Reports or the Maryland Appellate Reports to be cited as evidence of the text of the decision and requires a traditional citation format, including volume and page number of the Report in which the decision appears.
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> Subsection (c)(3)(B) permits citation of decisions published in other commercial or governmental publications [approved by the Court of Appeals] to be cited as evidence of the text of the decision, but with restriction. If a decision also was reported in the Maryland Reports or Maryland Appellate Reports, citation of the decision must also include the volume and page number of the Report in which the decision appears.
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> If a decision is not, or has not yet been, reported in the Maryland Reports or the Maryland Appellate Reports, subsection (c)(3)(C) allows the decision to be cited as it appears on the Judiciary website.

The Chair said that proposed new Rule 1-105 was recently before the Committee. The Rule was prompted by a statute passed by the General Assembly in 2017: the Maryland Uniform Electronic Legal Materials Act (Chapter 554, Laws of 2017 (SB 137)). The act has been adopted in 16 states and requires the publishers of legal material, which is a defined term in the statute, to determine whether the official record of those documents is to be paper or electronic. If it is electronic, the act requires the official publisher to make sure that the material is authentic, preserved, and remains accessible. Six of the 16

states have applied the act to the judicial branch, and Maryland is one of them. The law took effect on October 1, 2017. As far as the Maryland Judiciary is concerned, the law applies to reported decisions of the Court of Appeals and the Court of Special Appeals and to the Maryland Rules. It makes the Court of Appeals the official publisher of all of those.

The Chair noted that he had briefed the Court of Appeals on the statute several months ago. The judges did not want to take on the role of making sure that these items are authentic, preserved, and secure. The 16 states that have adopted this law were contacted. Twelve of them did not know of the existence of the law and had not done anything about it. Some gave feedback that they were taking some actions to implement the law. Colorado has been trying to come up with protocols for three years. Minnesota sent their protocols. The Maryland statute applies to reported opinions and the Rules, but the Maryland Electronic Courts Initiative ("MDEC") affects these discussions. The MDEC Rules make the electronic record the official record. The Court of Appeals really did not want to have to manage all of this, so the Chair and the Reporter have tried to draft a Rule that will address the statute.

The Chair told the Committee that one issue is what the official record is, and the other issue is what can be cited. Rule 1-105 (a) pertains to applicability. In the second

sentence of section (a), the previous draft had the word "dispositive" before the words "opinion or order." The Committee had discussed this and opted to delete the adjective "dispositive." This draft reflects that change. At the appellate level, "dispositive opinion or order" would not include orders for extending the time for filing a brief, orders postponing oral argument, and other orders having nothing to do with the actual decision in the case. The Chair remarked that his understanding was that the appellate court clerks keep a record of these kinds of orders, but they never get put back into the circuit court record. The only items added to the circuit court record are the opinion of the appellate court and any dispositive order.

Judge Nazarian commented that he was not sure what goes back to the circuit court from the Court of Special Appeals. The Chair responded that when he was on the Court of Special Appeals, most of the record stayed in that court and did not go back to the circuit court. Mr. Marcus remarked that he did not think that the motions practice in the appellate court is reflected in the circuit court file. Only the opinion and mandate go back to the circuit court. The Reporter noted that the term "legal material" in section (a) of Rule 1-105 refers to material that is reported. The Chair pointed out that the

statute pertains only to "legal material," and that is published decisions only.

The Chair said that the last time that Rule 1-105 was considered, the Committee discussed what the "official record" is. Should there be any difference between reported decisions and unreported decisions? The Chair reiterated that in prior discussions, the Committee deleted the word "dispositive" from section (a), which had modified the words "opinion or order." This made the terms "opinion or order" much broader.

The Chair pointed out that section (b) of Rule 1-105 pertains to the Maryland Rules. The actual official version of the Maryland Rules is not what is in the commercially published Rule books; it is in 27 bound volumes that Bessie Decker, the Clerk of the Court of Appeals, maintains. Twenty-four volumes are in the Court's vault and three are in a file cabinet. The volumes consist of the text of the Rules as actually adopted by the Court of Appeals with the Rules orders attached. The problem is that the volumes look like session laws passed by the General Assembly, which constitute the official statutes. It is difficult to find a specific law and would be impossible to go through the session laws that date back to 1634 to figure out what the statutory law of Maryland is. It is the same with the Rules. It would be difficult to go through the 27 volumes that Ms. Decker has to figure out what the current Rule is.

The Chair explained that section (b) of Rule 1-105 provides that the official record is the paper record maintained by the Clerk of the Court of Appeals pursuant to Rule 16-802 (Promulgation of Rules). The paper or electronic version of a Rule posted on the Judiciary website or contained in a published codification may be cited as the Rule. There is a difference between what can be cited and what the official Rule is. A former version of section (b) had the word "commercially" before the words "published codification of the Maryland Rules." Steven Anderson, who is the State Law Librarian, had objected to that limitation. He thought that one day the State might publish the Maryland Rules. This would eliminate all annotations that appear after the Rules in the commercially published codification.

The Chair referred to the underlined, bolded language in section (b) of Rule 1-105. If someone is going to cite the published codification, it should be one that has been approved by the Court of Appeals. He asked the Committee's view on those two changes, dropping the word "commercially" and adding the language "approved by the Court of Appeals." Mr. Carbine commented that the Committee was in agreement about the two changes. The Reporter clarified that the approved changes were to take out the word "commercially" from section (b) and add the

language "approved by the Court of Appeals" to it. By consensus, the Committee agreed to these two changes.

The Chair said that he had identified an issue in subsection (c)(2) of Rule 1-105. Subsection (c)(1) provides that the official record of a decision of the Court of Appeals or the Court of Special Appeals in a non-MDEC action is the paper slip opinion or order filed with the Clerk. It is different in an MDEC action because the decision will be in electronic form, which implicates the statute. This means that the protocols for preservation, authentication, and security will be needed. This responsibility will likely fall to the State Court Administrator.

The Chair read part of the second sentence of subsection (c)(2)(A) of Rule 1-105: "[i]f the Court is satisfied that the protocols comply with the statutory requirements." He said that he thought about adding the language "and are otherwise acceptable" after the word "requirements," because the Court may want to make a change from what the State Court Administrator comes up with, but not a change in policy. This would allow the Court to amend. By consensus, the Committee agreed with the addition of this language.

Ms. Harris asked whether she would be required to work with the Attorney General and the Division of State Documents. The Chair answered that she is not required to do this. That

language was a suggestion by Mr. Anderson. The statute also applies to the Department of Legislative Services ("DLS"), which is the official publisher of the Maryland Code and the House and Senate Journals. If DLS ever decide to make an electronic version of the Code or the Journals the official record, it will need to have these protocols. The Chair said that he spoke with Director of Legislative Services Warren Deschenaux and learned that that DLS has no current plans to make the electronic version the official record and is not doing anything about protocols. However, the statute also applies to the Attorney General with respect to opinions of the Attorney General. It does not apply to advice letters.

The Chair remarked that he did not know whether the Attorney General has given much thought to this. Only four opinions were published last year, so this is not a major issue, but if the Attorney General ever decides to make the electronic version of opinions the official version, these protocols will also be needed. The one entity that is key is the Division of State Documents, because it is the official publisher of the Code of Maryland Regulations ("COMAR") and the Maryland Register, which is totally online now. The Division of State Documents will have to develop the protocols.

The Chair told Ms. Harris that the idea is to have some consistency in terms of the protocols unless there is a reason

not to do so. Ms. Harris responded that she did not know what the protocols were going to look like. Each agency has different systems, and she did not know whether the protocols would mesh. The Chair asked whether she was requesting to take out the language from subsection (b)(2) that read "in consultation with the Office of the Attorney General and the Division of State Documents of the Office of the Secretary of State of Maryland." Ms. Harris moved to strike that language, and the motion was seconded and passed by a majority vote.

Mr. Armstrong referred to the deletion of the word "commercially" in section (b) of Rule 1-105. He said that in subsection (c)(3)(B), the word "commercial" appears again modifying the word "publication." He asked whether the wording should be "any other publication." The Chair responded that this is another option. The concern was that someone would cite to some Maryland Rules or an opinion on Facebook or other social media. He asked Mr. Armstrong if he wanted to move to strike the word "commercial." Mr. Armstrong replied that it might not be consistent with the striking of the word "commercially" in section (b).

The Chair commented that he was not sure that the government is publishing opinions now. About 20 years ago, there was a move to have the State, and not a commercial entity, publish the appellate opinions. Some other states did this. It

would be a very different citation. The Court of Appeals had considered doing this and rejected it. The Chair did not think that this idea has been presented since. Mr. Anderson confirmed this.

Mr. Anderson explained that the reason the word "commercially" was stricken was because of the fear that anybody can publish the Rules without any oversight by the Court of Appeals. The Chair added that this would also apply to court opinions as well. Mr. Anderson remarked that as amended, the Rule permits the Court to say with some certainty that the opinions and the Rules will be acceptable and authoritative. Ms. Harris commented that an example of this is that there have been law firms who are putting the Case Search link on their website and telling the public to check to see if their case is listed, and if so, to contact the law firm. As these are discovered, they are being shut down. Mr. Armstrong said that he did not feel strongly about deleting the word "commercial" from subsection (c)(3)(B).

The Chair told the Committee that the question was whether to add the language "approved by the Court of Appeals" to subsection (c)(3)(B) of Rule 1-105 for the reason that Ms. Harris gave. By consensus, the Committee agreed to add this language.

The Chair said that the official citation has an interplay with provisions in the Maryland Constitution and the Maryland Code. Article IV, §16 of the Constitution requires that a provision be made by law for publishing reports of all causes argued and determined in the Court of Appeals and in the intermediate courts of appeal which the judges shall designate as proper for publication. The legislature has adopted a statute, Code, Courts Article, §13-204, which creates the position of State Reporter. The Clerk of the Court of Appeals acts as the State Reporter. All published reported opinions of both courts must go through the Clerk's assistant, who reads through them to look for typographical errors, etc. The statute requires that the Clerk "let the necessary contracts for publishing the Maryland Reports, containing opinions of the Supreme Court of Maryland, and the Maryland Appellate Reports, containing opinions of the Appellate Court of Maryland." He noted that the contracting is actually done by the procurement office in the Administrative Office of the Courts ("AOC"). Those are the official reports, which, pursuant to the contract, are published by Thompson-Reuters, which also publishes them on Westlaw and in the Atlantic Reporter. For purposes of citation, any commercial or government publication approved by the Court of Appeals can be cited, but if the case appears in the Maryland Reports or the Maryland Appellate Reports, the volume and the

page as it appears in those reports have to be used. The Atlantic cite can be added, but the citation has to have the Maryland Reports volume and page number to be official.

The Chair raised another issue. If a case has not yet found its way into the Maryland Reports or Maryland Appellate Reports, which would include the advance sheets around one month after the opinion is issued, then the only citation would be to the slip opinion as it appears on the Judiciary website. Judge Nazarian pointed out that Westlaw and LexisNexis pick up both the reported and the unreported opinions from the Court of Special Appeals. They do not publish all of the unreported ones, but they publish many of the cases. The Chair noted that the citation would begin as "WL" or some other citation to the commercial reporter. These opinions are available on the Judiciary website as well. Sometimes, there are changes in an opinion between the time it is filed and the time it gets into any of the reports. Any typographical errors are picked up, and motions for reconsideration occasionally are filed. Rule 1-105 has a cross reference to the Maryland Constitution and to Code, Courts Article, §§13-201 through 13-204 at the end of the Rule.

Judge Nazarian noted that Rule 1-104 (Unreported Opinions) addresses the ability to cite or not cite unreported opinions, but the way proposed Rule 1-105 reads creates confusion. Subsection (c)(3)(B) reads: "A decision that is published in any

other commercial or governmental publication may be cited as evidence of the text of the decision..." Subsection (c)(3)(C) reads: "If the decision is not, or has not yet been, reported in the Maryland Reports or the Maryland Appellate Reports, the decision may be cited as it appears on the Judiciary website." Judge Nazarian said that since May of 2015, all unreported opinions are posted on the Judiciary website. However, many of them are on Westlaw. To the extent that this provision could be read to mean that an unreported opinion that is published in any other commercial service may be cited as evidence of the text of the decision, it might be preferable to add the language "approved by the Court of Appeals" to limit it.

The Chair commented that if the concern is the relationship between Rule 1-105 and Rule 1-104, subsections (c)(3)(B) and (C) of Rule 1-105 could begin with the language "subject to Rule 1-104." Judge Nazarian agreed with this suggestion. He was concerned that Rule 1-105 could create some confusion and the addition of the language suggested by the Chair would provide clarity. The Chair pointed out that some of the opinions referred to in subsection (c)(3)(B) can be cited for certain purposes. The revised version of this provision would say how these opinions are cited. By consensus, the Committee agreed to the proposed changes to subsections (c)(3)(B) and (c)(3)(C) of Rule 1-105.

The Reporter expressed the view that it is important to be careful about "mixing apples and oranges" in proposed Rule 1-105. The first sentence states that the Rule applies to "legal material of which the Court of Appeals is the official publisher." This is a narrow, defined universe of reported decisions of the Court of Appeals. The unreported opinions are an expansion of what is in the legislation. If this is the intention, the Rule can be drafted that way. Currently, the Rule starts off with a small universe, and it is expanded at the end when the unreported opinions are addressed. When the Rule was drafted, it was intended to include the materials that were eventually going to be a reported decision but have not yet made it into the reporters.

Mr. Laws asked whether it would be better to add a cross reference at the end of the Rule instead of the language in subsection (c)(3)(B). The cross reference would state that what is evidence of the law is different from what can be cited for precedent. The Chair said that another possibility is to change section (a) to apply to the Maryland Rules and to opinions and orders of the Maryland Court of Appeals and Court of Special Appeals. The Reporter said that this would sweep in minor orders. The Chair noted that this is the way it is now. Ms. Harris added that the word "dispositive" that had modified the words "opinions and orders" had been taken out.

The Reporter observed that if the Rule has an overarching applicability and it references "legal material," and the definition of "legal material" in the statute, the word "dispositive" is automatically out based on the term "legal material." An order that is going to be in the Maryland Reports is covered. This is the kind of order that is intended to be covered. All of the minor orders are not reported decisions of the Court of Appeals or the Court of Special Appeals.

Ms. Harris expressed the opinion that the word "dispositive" should be put back in the Rule. The Reporter pointed out that the statute refers to "reported decisions." Those are only dispositive. Judge Nazarian commented that a motion to dismiss an appeal, if granted, is dispositive, but that is a one-sentence order. He noted that the Committee discussed this at length at the last meeting. The Committee did not disagree with the premise, but recognized a distinction between "dispositive" and "reported" orders and opinions. The Reporter responded that not bringing in everything – and not creating an ambiguity that inadvertently brings in everything – is what she had intended.

The Chair commented that this Rule would not have been necessary except for the statute, although it may have been needed eventually because of MDEC. He said that the Reporter pointed out the narrowness of the first sentence of section (a)

of proposed Rule 1-105. The Reporter observed that the second sentence of section (a) encompasses the definitions of the statute. The Rule refers to the word "decision," but the statute refers to "reported decision." She expressed concern about inadvertently broadening the scope of the Rule.

The Chair noted that when Rule 1-105 had been discussed, the Committee's decision was to make the Rule broader than the statute, because the Committee could not think of a legitimate distinction concerning the official record of the court between reported and unreported opinions. The official record of a reported opinion is going to be electronic under MDEC. Why should it be different for unreported opinions? Unreported opinions are binding on the circuit court. It may not be precedent in another case, but the opinion certainly is binding on the circuit court in that case. The Reporter said that the unreported opinions are already in MDEC and are covered as the official record in an MDEC case under the Title 20 Rule. The Chair pointed out that more than half the state is already on MDEC.

The Reporter reiterated that she did not want an inadvertent drafting ambiguity to surface. The Chair told the Committee that Rule 1-105 needs to go to the Court soon. The statute took effect on October 1, 2017. So far, the Court has not designated what constitutes the official record except in

MDEC counties, where, by Rule, the electronic version is designated as the official record. Currently, the Court does not have any protocols in place. Rule 1-105 would give the Court a grace period for keeping paper as the official version until an electronic version is available. The Reporter observed that the Rule could be split. The Rule could provide that the citation aspect of it pertains to everything. The Chair suggested that language could be added to section (a).

The Chair asked the Committee how to proceed. Judge Mosley said that she needed some clarification. She asked why the citation aspect of the Rule had to be changed. The Chair responded that there is a disparity now regarding opinions in MDEC and non-MDEC counties. Rule 20-301 (Content of Official Record) makes the electronic record in an MDEC case the official record, and the statute places certain responsibilities on the Court when an electronic record is designated as the official record. Currently, under Title 20, the official record of any opinion or order of the appellate courts is the electronic version.

Judge Mosley remarked that what seems confusing to her is trying to make two points in one Rule. The Chair noted that the thought was that once the issue of what the official record is has been decided, then what can be cited has to be determined. With the Rules, to say that the official record is what the

Clerk of the Court of Appeals keeps at that court is not helpful. The slip opinions, whether in electronic or paper form, are going to be the official record. Ms. McBride asked whether Rule 1-105 can simply refer to Rule 1-104 on the issue of citation. The Chair answered affirmatively, pointing out that this has to do with what can be cited. The language "subject to Rule 1-104" could be added.

Ms. Day asked whether the term "decision" has not already been defined in section (a) as an opinion or order of the Court of Appeals or the Court of Special Appeals. The Chair responded that this is what the Committee had decided the previous time Rule 1-105 was discussed. Ms. Day remarked that the definition is already in the Rule, so she did not understand what the problem was. Ms. McBride commented that there may be some confusion between Rules 1-105 and 1-104. Judge Nazarian responded that the confusion issue has been covered. The more fundamental question is whether the official record is going to be limited to dispositive rulings, which seems to be what Ms. Harris would prefer, or whether it includes any decision, which is what the Committee chose at the last meeting.

The Chair said that there was no objection to adding the language "subject to Rule 1-104" to Rule 1-105. There are two issues to decide. One is whether the word "dispositive" should be added back before the words "opinion or order." The other is

whether the first sentence of section (a) of Rule 1-105 should be broadened to refer to "orders, decisions, and Rules," rather than only a specific reference to the statute. If so, there would be a cross reference to the statute. Judge Mosley commented that when all counties are online with MDEC, the change to Rule 1-105 can be made, but for right now, the Rule as drafted makes sense. The Chair agreed, pointing out that when MDEC is statewide, subsection (c)(1) of Rule 1-105 can be deleted.

Mr. Armstrong moved that the word "dispositive" not be added to Rule 1-105. The Chair explained that it would require a motion to add the word, because the Committee has already approved the Rule. No motion was forthcoming.

The Chair asked whether the Committee approved of changing the first sentence of section (a) of Rule 1-105 to make it apply to decisions. The Reporter added that this is in the context of citations. She read the list of changes: the word "commercially" has been taken out of section (b); the language "approved by the Court of Appeals" has been added to section (b) and to the Committee note after section (b); the consultation with the Office of the Attorney General and the Division of State Documents has been taken out of section (c); and the language "and are otherwise acceptable" has been added to subsection (c)(2)(A) after the word "requirements.

The Reporter asked whether the language "subject to Rule 1-104" is going to be added to proposed Rule 1-105. The Chair answered that it would be added to subsections (c)(3)(B) and (C). The Reporter said that the list of changes would include the language "approved by the Court of Appeals," which will be added to subsection (c)(3)(B), but the word "commercial" will remain in that provision. By consensus, the Committee agreed with these changes.

By consensus, the Committee approved Rule 1-105 as amended.

Agenda Item 2. Consideration of proposed amendments to: Rule 19-202 (Application for Admission) and Rule 19-213 (Admission of Out-of-State Attorneys by Attorney Examination – Procedure)

The Chair presented Rules 19-202, Application for Admission, and 19-213, Admission of Out-of-State Attorneys by Attorney Examination, Procedure, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 200 – ADMISSION TO THE BAR

AMEND Rule 19-202 by deleting from section (a) the requirement that the application be accompanied by a Notice of Intent to Take a Scheduled Bar Examination

and by moving the cross reference following section (a) to follow subsection (c)(2)(A), as follows:

Rule 19-202. APPLICATION FOR ADMISSION

(a) By Application

An individual who meets the requirements of Rule 19-201 or had the requirement of Rule 19-201 (a)(2) waived pursuant to Rule 19-201 (b) may apply for admission to the Bar of this State by filing with the Board an application for admission~~, accompanied by a Notice of Intent to Take a Scheduled General Bar Examination,~~ and the prescribed fee.

~~Cross reference: See Rule 19-204 (Notice of Intent to Take a Scheduled General Bar Examination).~~

(b) Form of Application

The application shall be on a form prescribed by the Board and shall be under oath. The form shall elicit the information the Board considers appropriate concerning the applicant's character, education, and eligibility to become an applicant. The application shall require the applicant to provide the applicant's Social Security number and shall include an authorization to release confidential information pertaining to the applicant's character and fitness for the practice of law to a Character Committee, the Board, and the Court. The application shall be accompanied by satisfactory evidence that the applicant meets the pre-legal education requirements of Rule 19-201 and a statement under oath that the applicant is eligible to take the examination. No later than the first day of September following an examination in July or the fifteenth day of March following an examination in February, the applicant shall cause to be sent to the Office of the State Board of Law Examiners an official

transcript that reflects the date of the award to the applicant of a qualifying law degree under Rule 19-201, unless the official transcript already is on file with the Office.

(c) Time for Filing

(1) Without Intent to Take Particular Examination

At any time after the completion of pre-legal studies, an individual may file an application to determine whether there are any existing impediments, including reasons pertaining to the individual's character and the sufficiency of pre-legal education, to the applicant's qualifications for admission.

(2) With Intent to Take Particular Examination

(A) Generally

An applicant who intends to take the examination in July shall file the application no later than the preceding May 20. An applicant who intends to take the examination in February shall file the application no later than the preceding December 20.

Cross reference: See Rule 19-204 (Notice of Intent to Take a Scheduled General Bar Examination).

(B) Acceptance of Late Application

Upon written request of the applicant and for good cause shown, the Board may accept an application filed after the applicable deadline prescribed in subsection (c)(2)(A) of this Rule. If the Board rejects the application for lack of good cause for the untimeliness, the applicant may file an exception with the Court within five business days after notice of the rejection is transmitted.

(d) Preliminary Determination of Eligibility

On receipt of an application, the Board shall determine whether the applicant has met the pre-legal education requirements set forth in Rule 19-201 (a) and in Code, Business Occupations and Professions Article, §10-207. If the Board concludes that the requirements have been met, it shall forward the application to a Character Committee. If the Board concludes that the requirements have not been met, it shall promptly notify the applicant in writing.

(e) Updated Application

If an application has been pending for more than three years since the date of the applicant's most recent application or updated application, the applicant shall file with the Board an updated application contemporaneously with filing any Notice of Intent to Take a Scheduled General Bar Examination. The updated application shall be under oath, filed on the form prescribed by the Board, and accompanied by the prescribed fee.

(f) Withdrawal of Application

At any time, an applicant may withdraw an application by filing with the Board written notice of withdrawal. No fees will be refunded.

Committee note: Withdrawal of an application terminates all aspects of the admission process.

(g) Subsequent Application

An applicant who reapplies for admission after an earlier application has been withdrawn or rejected pursuant to Rule 19-203 must retake and pass the bar examination even if the applicant passed the examination when the earlier application was pending. If the applicant failed the examination when the earlier application was

pending, the failure shall be counted under Rule 19-208.

Source: This Rule is derived from former Rule 2 of the Rules Governing Admission to the Bar of Maryland (2016). Section (b) is derived in part from former Rule 6 (d).

Rule 19-202 was accompanied by the following Reporter's note:

"Housekeeping" amendments to Rule 19-202 are proposed at the request of the State Board of Law Examiners.

Because an application for admission may be filed without an accompanying Notice of Intent to Take a Scheduled General Bar Examination, a reference to the Notice of Intent is deleted from section (a). With that deletion, the cross reference to Rule 19-204 (Notice of Intent to Take a Scheduled General Bar Examination) is moved from following section (a) to following subsection (c)(2)(A).

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 200 – ADMISSION TO THE BAR

AMEND Rule 19-213 by changing the deadline for filing a petition to take the attorney examination from "at least 60 days before the scheduled attorney examination" to May 20 for a petition to take the July attorney examination and December 20 for a petition to take the February attorney examination, as follows:

Rule 19-213. ADMISSION OF OUT-OF-STATE ATTORNEYS BY ATTORNEY EXAMINATION – PROCEDURE

. . .

(c) Time for Filing

~~The petition shall be filed at least 60 days before the scheduled attorney examination that the petitioner wishes to take.~~ An applicant who intends to take the attorney examination in July shall file the petition no later than the preceding May 20. An applicant who intends to take the attorney examination in February shall file the petition no later than the preceding December 20. On written request of the petitioner and for good cause shown, the Board may accept a petition filed after the deadline. If the Board rejects the petition for lack of good cause for the untimeliness, the petitioner may file an exception with the Court within five business days after notice of the rejection is transmitted.

Cross reference: See Board Rule 2.

. . .

Rule 19-213 was accompanied by the following Reporter's note:

At the request of the State Board of Law Examiners, the deadline for filing a petition to take the attorney examination is proposed to be changed from a "floating" date of "at least 60 days before the scheduled examination that the petitioner wishes to take" to fixed deadlines of May 20 for the July attorney examination and December 20 for the February attorney examination. These dates coincide with the filing deadlines for the Maryland General Bar examination.

The Chair told the Committee that the proposed changes to Rules 19-202 and 19-213 were requested by the State Board of Law Examiners ("SBLE"). He asked Jeffrey Shipley, Secretary and Director of the SBLE, to explain the requested change.

Mr. Shipley addressed the Committee. He said that the SBLE had asked for two changes. Currently, there are separate filing deadlines for the general bar examination and the out-of-state attorney examination. The deadlines for the out-of-state attorney exams move around on the calendar because they are set so that the petition to take the exam is filed 60 days prior to the scheduled exam. The general bar exam is given on the Tuesday preceding the last Wednesday of July and the last Wednesday of February. The first proposed amendment would set the filing deadlines for the out-of-state attorney examination on a date certain: May 20 preceding a July exam and December 20 preceding a February exam.

The other request is a housekeeping matter. In the 178th Report to the Court, the Rules Committee had approved the concept of removing a provision of Rule 19-202 that allows an applicant to file an application without sitting for a specific bar examination. The Court of Appeals rejected this, but a requirement that an application be accompanied by a Notice of Intent to Take a Scheduled General Bar Examination, which had been added in conjunction with the removal of the provision

allowing someone to file an application without sitting for a specific exam, was inadvertently left in the Rule and should be deleted.

The Chair asked whether these changes had been considered by the Attorneys and Judges Subcommittee. The Reporter replied that the proposed change to Rule 19-202 had been through the Subcommittee but not the proposed change to Rule 19-213. Ms. Harris moved to approve the changes to both Rules, as they were presented in the meeting materials. The motion was seconded and approved by a majority vote.

Agenda Item 3. Consideration of proposed amendments to Rule 7-402 (Procedure)

Judge Nazarian presented Rule 7-402, Procedures, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 – APPELLATE AND OTHER JUDICIAL

REVIEW IN CIRCUIT COURT

CHAPTER 400 – ADMINISTRATIVE MANDAMUS

AMEND Rule 7-402 by replacing the word "complaint" in sections (a) and (b) with the word "petition," as follows:

Rule 7-402. PROCEDURES

(a) ~~Complaint~~ Petition and Response

An action for a writ of administrative mandamus is commenced by the filing of a ~~complaint~~ petition, the form, contents, and timing of which shall comply with Rules 7-202 and 7-203. A response to the filing of the ~~complaint~~ petition shall comply with the provisions of Rule 7-204.

(b) Stay

The filing of the ~~complaint~~ petition does not stay the order or action of the administrative agency. The court may grant a stay in accordance with the provisions of Rule 7-205.

(c) Discovery

The court may permit discovery, in accordance with the provisions of Title 2, Chapter 400, that the court finds to be appropriate, but only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or extreme circumstances that occurred outside the scope of the administrative record, and a remand to the agency is not a viable alternative.

(d) Record

If a record exists, the record shall be filed in accordance with the provisions of Rule 7-206. If no record exists, the agency shall provide (1) a verified response that fully sets forth the grounds for its decision and (2) any written materials supporting the decision. The court may remand the matter to the agency for further supplementation of materials supporting the decision.

(e) Memoranda

Memoranda shall be filed in accordance with the provisions of Rule 7-207.

(f) Hearing

> The court may hold a hearing. If a hearing is held, additional evidence in support of or against the agency's decision is not allowed unless permitted by law.
>
> Source: This Rule is new.

Rule 7-402 was accompanied by the following Reporter's note:

> The proposed amendment to Rule 7-402 substitutes the word "petition" for the word "complaint" in order to clarify the document that initiates an action for a writ of administrative mandamus. This comports with the language of Rules 7-202 and 7-203, both of which are referenced in section (a) of this Rule.
>
> The Appellate Subcommittee was advised of persistent confusion between commencing an action for a writ of administrative mandamus and commencing an action for a common law writ of mandamus. An administrative mandamus proceeding is initiated by the filing of a petition, while a common law mandamus proceeding is initiated by the filing of a complaint. The Subcommittee's recommended amendment addresses this problem, insofar as the problem stemmed from the language of Rule 7-402.

Judge Nazarian said that Judge Robert Zarnoch, a retired judge of the Court of Special Appeals and former member of the Committee, had identified a discrepancy in the labeling of the document that initiates administrative mandamus and traditional mandamus. This was discussed by the Appellate Subcommittee, which agreed to reconcile the terminology as Judge Zarnoch

proposed in his letter, which is included in the meeting materials. This is a change to sections (a) and (b) of Rule 7-402. The word "petition" has been substituted for the word "complaint" in those two sections of the Rule, because a petition initiates an action for a writ of administrative mandamus.

The Chair noted that this was a Subcommittee recommendation. There being no motion to amend or reject the proposed changes to Rule 7-402, they were approved as presented.

Agenda Item 4. Consideration of a proposed new Title 17, Chapter 600 (Proceedings in Orphans' Court) and Conforming amendments to: Rule 1-101 (Applicability) and Rule 17-101 (Applicability)

Mr. Laws informed the Committee that the Probate/Fiduciary Subcommittee looked at the proposal to institute Alternative Dispute Resolution ("ADR") in the Orphans' Court. The Rules to implement this are before the Committee. The Subcommittee heard from several orphans' court judges and registers of wills in Prince George's and Baltimore Counties who had reported some success with ADR.

Mr. Laws presented Rule 17-601, Definitions; Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 600 – PROCEEDINGS IN ORPHANS' COURT

ADD new Rule 17-601, as follows:

Rule 17-601. DEFINITIONS; APPLICABILITY

(a) Definitions

In this Chapter:

(1) to the extent relevant, the definitions in Rule 17-102 shall apply, except that "ADR" includes only mediation and settlement-conferencing; and

(2) "Chief Judge" means the Chief Judge of the Orphans' Court for the county in which the court is located, except that, in Harford and Montgomery Counties, "Chief Judge" means the County Administrative Judge.

Committee note: Rule 17-102 (a) and (d) include within the definition of "ADR" arbitration and neutral fact-finding. The Committee believes that it is inappropriate for the court to order parties to resort to those forms of ADR, especially if the results of such a referral are intended to be binding. Such a referral may constitute an improper delegation of the statutory duties and responsibilities of the orphans' courts and registers of wills with respect to the administration of estates. Accordingly, ADR referrals are limited to mediation and settlement-conferencing.

(b) Applicability

The Rules in this Chapter apply only to actions and matters pending in an orphans' court after the filing of a petition seeking the resolution of a matter by the court.

Committee note: Examples of the kinds of disputes that may be referred by the court to ADR are those relating to the validity of a will, the appointment or removal of a personal representative, exceptions to an inventory or account, attorneys' fees, personal representative's commissions, claims against the estate, or the distribution of estate property. It is not the intent of these Rules to have orphans' court judges referring to ADR matters arising in the course of administrative probate that are within the jurisdiction of registers of wills or to preclude parties from engaging in ADR or reaching agreements on their own without intervention of the court.

Source: This Rule is new.

Rule 17-601 was accompanied by the following Reporter's note:

The Director of the Maryland Judiciary's Mediation and Conflict Resolution Office requested that Rules be drafted providing for Alternative Dispute Resolution in the Orphans' Courts. This originated from the requests of several Orphans' Court judges. Mediation has already been used in some of the Orphans' Courts around the State, and the judges felt that a set of Rules would be helpful. The Rules were drafted based on the ADR Rules in Title 17, Chapter 200, Proceedings in Circuit Court, with modifications adapted to the Orphans' Courts. Some of the concepts in Chapter 300, Proceedings in the District Court, and Chapter 400, Proceedings in the Court of Special Appeals were also used. Several Orphans' Court judges weighed in on the content of the proposed new Rules.

Rule 17-601 adopts the definitions of Rule 17-102, excluding arbitration and

neutral fact-finding as part of ADR. The Committee note after subsection (a)(2) explains this. A definition of the term "Chief Judge" was added, because of the differences in Orphans' Court procedure in Harford and Montgomery Counties.

Section (b) and the Committee note following were added to clarify which actions and matters pending in Orphans' Court can be referred to ADR.

Mr. Laws explained that Rule 17-601 provides the definitions and applicability for the Chapter 600 Rules. Only mediation and settlement conferencing may be conducted in the orphans' court, not other kinds of ADR that may be used in other courts. The Committee note after section (a) provides that referral to arbitration and neutral fact-finding in the orphans' courts might be an improper delegation of the statutory duties and responsibilities of the orphans' courts and Registers of Wills with respect to the administration of estates. Section (b) makes it clear that ADR is only applicable for certain types of matters pending in an orphans' court after the filing of a petition seeking the resolution of a matter by the court. Mr. Laws noted that this may be too narrow. "Petition" is a term that is defined in the Rules. Section (e) of Rule 6-105 (Definitions) defines the term "petition" broadly.

The Chair asked whether something could go to the orphans' court from administrative probate other than exceptions or a

petition. Mr. Laws responded that most motions in orphans' courts seem to be called "petitions." There are petitions for attorneys' fees and for personal representative commissions. Disallowance of claims allows a claim to be filed in the orphans' court or in a court of law. The word "petition" is defined in Rule 6-105 (e) as an application to the court for an order and includes a motion permitted to be filed pursuant to Title 6. This may cover everything.

Mr. Laws asked whether any of the guests present for Agenda Item 4 had any comments. Prince George's County Orphans' Court Judge Wendy Cartwright addressed the Committee. She said that most of the motions that come from administrative probate are letters that are written by *pro se* litigants. Those letters are treated as motions. Eighty percent of the litigants in orphans' courts do not have an attorney. A motion is a broad petition and is based on what is requested in a letter. Judge Cartwright asked that the wording of the Rule not be too narrow; it should allow for anything that is requested regarding a probate estate.

The Chair asked Judge Cartwright if she would regard a letter as a petition. Judge Cartwright answered that she would if it was written by a *pro se* litigant. It may be a request for the removal of the personal representative. The *pro se* litigants will not put the requests in the form of a petition, because they do not know how to do that. Judge Cartwright

explained that she and her colleagues must read every letter sent by a *pro se* litigant to find out what the person is asking for.

Mr. Armstrong asked whether the language "after the filing of a petition" should be taken out of section (b). Mr. Laws answered in the negative, noting that some matters are not contested. If that language comes out, then the Rules would apply to anything pending in the orphans' court. Mr. Carbine commented that the word "petition" as defined in Rule 6-105 (e) is broad enough to cover everything. It is an application to the court for an order and includes a motion permitted to be filed pursuant to Title 6. A cross reference to that definition could be added, but if the definition includes any letter that comes into the court, it may be much too broad.

Mr. Laws suggested that the language "exception, or other objection" be added to section (b) after the word "petition." If someone is objecting to something that is uncontested, it could become appropriate for ADR. Judge Cartwright pointed out that the certificate of service is an issue when there are *pro se* litigants who do not do the certificates correctly. Calvert County Register of Wills Margaret Phipps commented that the registers are not supposed to accept papers without a certificate of service. Filing a letter is not compliant with the Rules. The Chair said that ADR will only take place if

something is properly before the court. If it is not properly before the court, the court would not send it for mediation. Mr. Laws moved to broaden the meaning of "petition" to include exceptions, or other objections. The motion was seconded and approved by a majority vote.

By consensus, the Committee approved Rule 17-601 as amended.

Mr. Laws presented a handout version of Rule 17-602, Authority to Order ADR, for the Committee's consideration.

HANDOUT

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 600 – PROCEEDINGS IN ORPHANS' COURT

ADD new Rule 17-602, as follows:

Rule 17-602. AUTHORITY TO ORDER ADR

(a) Non-fee-for-service

An orphans' court may order the parties in a matter pending before the court to participate in a non-fee-for-service mediation or settlement conference proceeding. Unless agreed to by the parties, the order may not require participation in more than two sessions not exceeding in the aggregate four hours in length.

(b) Fee-for-service

An orphans' court may order the parties in a matter pending before the court to participate in a fee-for-service mediation or settlement conference proceeding~~, but any party may choose not to participate~~. The order **(1)** shall specify the maximum fee or hourly rate that may be charged, **(2)** ~~and,~~ unless the parties agree otherwise, may not require participation in more than two sessions not exceeding in the aggregate four hours in length, **(3) be accompanied by a form notice of non-participation, (4) state that any party may choose not to participate by signing the notice of non-participation and returning it to the court within ten days after service of the order, and (5) state that, if any party timely returns a notice of non-participation, the order will be rescinded and the ADR proceeding will be cancelled.**

~~Committee note: Rule 17-202 (f)(5) makes clear that a circuit court may not require a party to a general civil action to engage in a fee-for-service ADR proceeding over the party's objection. The Rule permits the court to enter an order referring a civil case to ADR on a fee-for-service basis, subject to the ability of a party to opt out by filing a written objection to the Order within 30 days. That approach was approved largely for practical reasons due to the number of cases likely to be referred to ADR. Orphans' courts have far fewer cases that may be suitable to court-referred mediation or settlement conferencing, and a larger percentage of the parties in those courts are likely to be self-represented. The approach of section (b) of this Rule, and to some extent section (a), is based on the premise that ADR is likely to be more acceptable and more successful if, in lieu of being inaugurated by a form Order that an unrepresented party may have difficulty understanding, a judge explains up front how that process works and how it can be beneficial to the parties and enters an~~

~~**order unless one or both of the parties choose not to participate.**~~

(c) Exception

An orphans' court may not order parties to participate in a mediation or settlement conference if a "no contact" order has been issued pursuant to Code, Family Law Article, Title 4, Subtitle 5, Code (domestic violence), Courts and Judicial Proceedings Article, Title 3, Subtitle 15 (peace order), or any other law, in favor of one of the parties and against another party.

Committee note: A "no contact" order also may be issued in proceedings other than those mentioned in section (c), such as a criminal or juvenile delinquency case as a condition of pretrial release, probation, or parole.

(d) Requiring Record of Agreement

(1) Generally

An order referring a matter to mediation or settlement conference shall require that any agreement be in writing and signed by the parties.

(2) Agreements Relating to Distribution of Assets or Allocation of Liabilities

An order referring a matter to mediation or settlement conference shall require that any agreement that may cause the distribution of an estate asset or allocation of a liability to be made in a manner inconsistent with a will or law otherwise applicable to the distribution or allocation be in writing, signed by the parties, filed with the court, and referenced in each account that includes the distribution or allocation.

Cross reference: See *Brewer v. Brewer*, 386 Md. 183, 195-96 (2005) ("If the account shows a distribution inconsistent with the Will and there is no adequate documentation

attached to it to explain the inconsistency, the Register [of Wills] cannot complete a proper audit and the court cannot properly approve the account.")

(e) Designation of ADR Practitioner

(1) Generally

The order shall designate an individual to conduct the mediation or settlement conference (A) agreed to by the parties, or (B) in the absence of such an agreement, from a list of qualified individuals maintained by the court pursuant to Rule 17-603.

(2) Discretion in Designation

In designating an individual under subsection (e)(1)(B) of this Rule, the court is not required to choose at random or in any particular order from among the qualified individuals on its lists. The court should endeavor to use the services of as many qualified individuals as practicable, but the court may consider, in light of the issues and circumstances presented by the action or the parties, any special training, background, experience, expertise, or temperament of the available prospective designees.

Committee note: Nothing in these Rules ~~**precludes**~~ **is intended to preclude** the parties from participating in a collaborative law process as long as the parties all agree to it.

Source: This Rule is new.

Tom Dolina, a liaison from the Maryland State Bar Association ("MSBA"), addressed the Committee. He said that one issue that he and his colleagues wanted to address was the consistency of the opt-out provision in Rule 17-602. When there

is a non-fee-for-service mediation under section (a) of the Rule, there is no opt-out provision. He said that this matters where an attorney has entered an appearance. It is problematic for a non-fee-for-service mediation because the people in a fee-for-service mediation have a 30-day opt-out. He and his colleagues are in favor of the ADR concept, but it is very difficult for there to be a successful mediation when one party does not want to participate. It is important to enhance the integrity of the mediation process by having cooperative parties.

Benjamin Woolery, Secretary of the MSBA Elder Law Section, addressed the Committee. He said that he had spoken with Mr. Dolina as a member of the MSBA but was present at the meeting on behalf of the Prince George's County Bar Association. The Bar Association asked that the Committee change section (a) of Rule 17-602 so that it has an opt-out provision as section (b) does.

The Chair told the Committee that the distinction between sections (a) and (b) is based on the Rules in Chapter 17, Title 200 (Proceedings in Circuit Court). When Rule 17-202 (General Procedure) was first proposed to the Court of Appeals, there was no opt-out provision for either non-fee-for-service or fee-for-service mediation. At the time, the Court rejected this where the ADR was fee-for-service, allowing an opt-out for it. He noted that the composition of the Court has changed totally

since that time, but this issue has never been revisited. Rule 17-602 was copied from the circuit court Rule. The Chair did not know if a question had ever been raised in the Court of Appeals as to whether there should be a non-opt-out if an attorney is involved, as opposed to an opt-out when an attorney is not involved. At the time, the Court felt that a judge should not force someone who is properly in court and is entitled to a judicial resolution one way or the other to have to pay a mediator. This is a policy question, initially for the Committee and ultimately for the Court as to whether there should be an opt-out for non-fee-for-service referrals.

Mr. Laws said that the Subcommittee debated this issue. Some were in favor of adding the opt-out provision, and others were not. The Subcommittee voted that a maximum of two sessions, totaling four hours, was not excessive, and an opt-out should be required if the orphans' court chooses to force litigants to go to a non-fee-for-service ADR proceeding.

The Reporter asked if everyone had the handout version of Rule 17-602 that had was emailed prior to the meeting. The Chair explained that based on what the Committee did the last time it considered Rule 17-602, the long Committee note that follows section (b) of the Rule should have been deleted. It addressed something that the Committee had rejected. This raised a question that the Chair had discussed with the

Reporter: What is the process for opting out? The Rule is silent on how this is to be done.

The Chair said that the Committee wanted the court to have the ability to enter an order without first having to get the consent of the parties. The initial version of the Rule was that the parties had to consent. The Rules Committee's view was that the Court should be able to issue an order, and the person would then be able to opt out. Rule 17-202 has a procedure to do this, but in the orphans' court, where so many of the people are *pro se*, the decision was made to avoid requiring them to jump through procedural hoops. He said that the Subcommittee chose to provide that if the court is going to order the parties to go to mediation, then in the order, the parties must be told that they can opt out. An opt-out form would be attached to the order so that the *pro se* litigant does not have to draft his or her own form. All the litigant has to do is to sign the form and send it back. This would make it easier to opt out if someone chose to do so.

Mr. Laws moved to adopt the handout version of Rule 17-602, except for the striking of the language "but any party may choose not to participate" at the end of the first sentence of section (b). The motion was seconded. Mr. Laws expressed the opinion that it is important to highlight that parties have the right to opt out, especially since so many are unrepresented.

The Chair commented that if the language is deleted, it leaves the inference that the court can order ADR. Parties may not read the order permitting them to opt out. The specifics in the second part of section (b) providing a way for a party to opt out are helpful. The Chair pointed out that this is a different issue than the one raised by Mr. Dolina and Mr. Woolery. Mr. Laws reiterated that his motion was to leave in the language that had been stricken from the first sentence of section (b) and to add the underlined language in subsection (b)(3). The Chair called for a vote. The Committee approved the motion by majority vote.

The Chair said that the next issue was the point made by Mr. Dolina and Mr. Woolery as to whether there should be an opt-out for non-fee-for-service ADR. Senator Norman asked why an opt-out would not be appropriate for non-fee-for-service ADR if it is appropriate for fee-for-service ADR. He hypothesized a situation where an attorney is being paid to argue a case and does not want his client to go to mediation. The attorney has already been paid by the client to go to court. The mediation will not be the same day that the case was scheduled. Senator Norman agreed with Mr. Dolina that people should be able to opt out of non-fee-for-service ADR. Judge Mosley remarked that this is a pure policy issue. There is a reason for the distinction. Fee-for-service ADR is different from non-fee-for-service ADR.

The Chair commented that the arguments that were discussed regarding ADR in circuit court were that a person had a right to be present at the ADR session and that fee-for-service ADR is an extra expense that may be onerous for people. On the other hand, an argument was also made that even for non-fee-for-service ADR, someone may have to take a day off from work and arrange to attend, which is a cost. The Court of Appeals decided that there would be no opt-out for non-fee-for-service ADR, but there would be one for fee-for-service ADR. When the District Court ADR Rules were drafted, this was not an issue, because there is no fee-for-service ADR in that Court.

Mr. Bowie remarked that someone may have been forced to pay several hundred dollars an hour for an attorney. The Chair responded that if the attorney is going to participate in the ADR, this would be true. However, with limited representation, this may be able to be circumvented. Ms. McBride said that this is done now in many jurisdictions; a settlement conference may be required, which means that there would be extra time in court. This is not unprecedented. She did not think that there was anything in the Rule that would prohibit someone from filing a motion to challenge the participation in the ADR if it will be onerous. Judge Price observed that typically, ADR is used by the court for *pro se* litigants. Most of the time, the case would be ordered to ADR.

Judge Cartwright noted that the purpose of ADR is not only to address the growing *pro se* population but also rising litigation costs. Many of the cases in the orphans' court involve out-of-state complex litigation, including caveats and extensive claims. Many people cannot afford the litigation. People want the right to have their issues heard in court, but they are upset when they get the bill for services rendered by the attorney. The orphans' court often has cases where people ask for their attorney's bill to be reevaluated. The point of ADR is to give people the chance to solve their problems before they go through a lengthy caveat proceeding, regardless of whether or not it is with an attorney. The better way to proceed may be to go to a two-hour mediation.

Judge Cartwright added that she and her colleagues are having some success with caveat cases going to mediation. All they can do now is to ask people to consent to the ADR. The judges would like to be given the right to order ADR as part of the caveat process. The attorneys would like to have a chance to settle the case once they have completed discovery. The caveat procedure is time-consuming and costly. The parties can go to an ADR session and settle a caveat case that may go for three days in court, and this does not even count the preparation time of the attorneys. She said that the proposed Rules are not trying to disqualify cases by telling litigants

that if they do not have an attorney, they do not have to go to mediation. If there is an attorney in a case, mediation would not be required, and an opt-out should be allowed. If a request is filed, the judges will honor it. An estates and trusts attorney should know how to write a motion to ask the court to excuse the ADR referral for certain reasons. A *pro se* person may tell the court that the person cannot get along with his or her siblings, and mediation would not be useful.

Judge Cartwright expressed the view that the courts should be given the chance to screen and make the decision whether to order mediation. An attorney should be able to file a motion asking for an opt-out. She said that she did not agree with the request of the MSBA that there should be an opt-out for non-fee-for-service ADR. Dismissing ADR because someone has an attorney is not fulfilling the purposes of ADR. The point is to avoid expensive litigation. She added that the cost of a mediation is money well spent.

The Chair asked Mr. Dolina whether his comment was that an opt-out should be allowed for non-fee-for-service ADR generally or only where there is an attorney in the case. Mr. Dolina responded that the MSBA would be satisfied with an opt-out for a non-fee-for-service mediation where an attorney is involved. He said that Judge Cartwright made the point very clearly that *pro se* litigants may benefit from a mandatory, non-opt-out free

mediation. He explained that he and his colleagues are trying to allow for some deference to the attorney's evaluation of the case. One of the duties of an attorney is to explain all of the elements of a case, including litigation, ADR processes, etc.

Mr. Dolina said that he would not like to have costs skyrocketing for litigants because they cannot access ADR services. He noted that he is the former Chair of the ADR Section of the MSBA and takes ADR very seriously. However, he said that he prefers not to force people into a mediation setting where the parties cannot cooperate. He would not like to spend four hours on a mandated non-fee-for-service ADR.

The Chair pointed out that non-fee-for-service ADR is not mandated. Mr. Dolina said that there is a recommendation to put litigants in non-fee-for-service ADR. The Chair remarked that if a case has four heirs and legatees arguing about something, and one has an attorney and the other three do not, the attorney could decide that mediation is not appropriate and prevent all four individuals from participating in ADR. Mr. Dolina responded that the goal is to have consistency. He added that he did not understand the different treatment of non-fee-for-service ADR and fee-for-service ADR. He and his colleagues would like the opt-out provisions to be consistent. If a party in a non-fee-for-service ADR has an attorney, he or she is spending money as well.

The Chair stated that the theory of court-annexed ADR from the very beginning was that it was cost-effective. There is a cost for ADR, whether it is fee-for-service or not. However, statistically the experience has been that it actually saves money. A caveat case may cost $200 to mediate, but if the family involved goes through a judicial proceeding, this could mean complicated litigation which may not stop at the orphans' court. Often a caveat case goes to the circuit court and beyond.

Mr. Carbine noted that if no one moves to further modify Rule 17-602, it will not be changed. The Chair remarked that suggestions for change from the MSBA are being entertained. Mr. Wells observed that the compromise would be a motion to allow an opt-out for good cause shown. This way the policy is not being violated, and also it would be consistent with Judge Cartwright's view. The Chair inquired whether this would apply in the non-fee-for-service ADR. Mr. Wells answered affirmatively.

The Chair asked whether there were any other comments or motions to change Rule 17-602. Mr. Wells moved that section (a) of the Rule be amended to allow the ability of a party to file a motion to opt out of ADR for good cause shown. The motion was seconded. Mr. Carbine said that it was his understanding that the Subcommittee draft is consistent with the general rule on

mediation. The motion would carve out an exception for the orphans' court. Mr. Carbine added that he had heard good arguments on both sides, but he did not think that an exception should be carved out for the orphans' court. The ADR procedures should be consistent. He said that in his practice, he has settled cases through mediation. The only way the case could go to mediation was when he told the clients that they must participate. It does not always work, but it works well enough that it is helpful to him as an attorney to tell his clients that they must go to mediation.

Senator Norman commented that as an attorney, he has to represent his client, and he wants to do a good job for the client. He tells his clients how he is going to proceed in their case. Attorneys have an obligation to represent their clients. Hopefully, if the case has attorneys on both sides, they would try to resolve the issue economically and amicably. Any attorney can agree to sit down and talk to the opposition. Senator Norman said that he tries to get cases settled. However, he does not like being told that he will go to mediation. Ms. McBride remarked that attorneys know that filing a motion is an option. Sections (a) and (b) are two different procedures. She expressed the view that Rule 17-602 should be left as it is now. If there is an extraordinary circumstance,

the orphans' court would not object to the parties opting out of the mediation.

The Chair stated that the motion is to permit an opt-out in a non-fee-for-service referral on motion for good cause shown. The motion failed on a vote of seven in favor, ten opposed.

Mr. Laws said that he wanted to point out a few other features of Rule 17-602. Section (c) provides that ADR may not be ordered if a "no contact" order has been issued pursuant to various statutes. Subsection (d)(2) provides that an order referring a matter to mediation or a settlement conference must require that any agreement that would change the distribution of an estate asset or the allocation of a liability in a manner that is inconsistent with a will or law would have to be in writing, signed by the parties, filed with the court, and referenced in a subsequent account. This was added to address a problem that arose out of *Brewer v. Brewer*, 386 Md. 183 (2005), which held that there must be some explanation with any distribution that is inconsistent with a will or law.

Mr. Laws noted that section (e) of Rule 17-602 addresses who can be designated to conduct the ADR proceeding. Subsection (e)(1)(A) provides that the parties may agree upon an individual to conduct the ADR. In the absence of agreement, the person conducting the ADR is to be chosen from a list of qualified individuals maintained by the court pursuant to Rule 17-603.

The Chair commented that there was a proposal before the Judicial Council involving a standard form for applying to be an ADR practitioner so that there are not different forms for the different counties and courts. Ms. Harris remarked that the Council is looking at many different forms.

Judge Bryant referred to section (c) of Rule 17-602. She observed that, in a family law context, in there is a genuine issue as to domestic violence, individuals are not ordered to participate in ADR. The exemption from ADR does not depend upon the existence of a "no contact" order. She asked whether the Subcommittee had considered this. Mr. Laws responded that the Subcommittee had not considered a lower threshold than a "no contact" order.

Judge Bryant noted that Rule 9-205 (Mediation of Child Custody and Visitation Disputes) provides in subsection (b)(2) that if a party or a child represents to the court in good faith that there is a genuine issue of abuse, the court may not order mediation. Judge Bryant added that she did not feel strongly about this issue, but she wanted to know where the line will be drawn. Mr. Laws responded that the person could ask the orphans' court to opt out due to family conflicts. In an estate setting, there should not be too much of an issue where children are concerned.

The Chair asked whether Judge Bryant wanted to make a motion to change anything. She answered that she had wanted to know if this issue had been considered. The Chair pointed out that Rule 17-602 (c) does provide that mediation cannot be done if there is a "no contact" order. Judge Cartwright observed that there is emotional strife and trauma in many cases. This is common in family courts, but most people do not realize that probate courts are number two in having emotional strife. She said that orphans' court judges are very sensitive to issues regarding family dynamics. There have been cases where parties are willing to go to mediation, but then they change their minds.

Judge Cartwright said that her point was that the courts are monitoring cases and carefully deciding which cases are not suitable for mediation. She has found that if she orders parties to attempt to settle their differences, it may work. But if there is no order to mediate, they will not even try and they will keep fighting. These are cases with large, complex litigation. She said that Mala Malhotra-Ortiz, Esq., Director of the ADR Division of the Court of Special Appeals, has said that by the time cases get to that Court, there is a substantial amount of fighting between family members. If the goal is to try to spare people all of this trauma and expense, mediation at the orphans' court level can be very beneficial. If the parties

know up front that mediation will not be successful, they can inform the judge. The parties cannot say later that there was no attempt to save them money.

Mr. Marcus remarked that he believed that everyone had espoused the virtues, merits, and correctness of having a comprehensive and successful ADR program. He said that the issue that the Committee must grapple with is consistency in the way the Rules address the ability of the court to order people to participate in mediation. Consistency should exist throughout the court system unless there is some special reason not to have consistency. Mr. Marcus said that he had looked at the circuit court and District Court ADR Rules (Rule 17-202 and Rule 17-302, respectively). These Rules provide that the court has a right to order parties and attorneys to go to non-fee-for-service mediation. If the court can order ADR in the District Court and the circuit court, the policy should be consistent in all of the courts. He suggested that the language that exists in the other Rules and that provides that the court can order ADR should be the same in Rule 17-602.

Mr. Carbine referred to Judge Bryant's comments on domestic violence orders. He said that he liked the way section (c) reads because it is clear. Satellite litigation should not be encouraged. Judge Mosley said that she was also in agreement with the language. She asked how cases that do not have a "no

contact" order are handled. Would it be on a case-by-case basis? Mr. Carbine pointed out that writing an order would be difficult. He said that he had a case where, at the request of his client, a security guard patrolled the building where the mediation was taking place. Judge Mosley observed that the Rule should be set up so that if someone has a valid reason, the court should not require ADR.

The Chair said that if there is a "no contact" order, the decision about not going to ADR is clear, because the parties are not supposed to be in the same room together. It is standard for mediation that if the court becomes aware of a significant imbalance in negotiating skills, or if one side has a dominance that would make mediation inappropriate, the court is not supposed to order it. He pointed out that if the mediator identifies this type of dynamic, the mediation should be terminated, because it will not result in a fair agreement. If the court does not know this and orders parties into non-fee-for-service mediation, and the mediator does see this kind of imbalance, he or she is supposed to terminate the mediation.

The Chair called for further discussion on the handout version of Rule 17-602. There being no further motion to amend or reject the proposed Rule, it was approved as amended.

Mr. Laws presented Rule 17-603, Qualifications of Court-designated ADR Practitioners, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 600 – PROCEEDINGS IN ORPHANS' COURT

ADD new Rule 17-603, as follows:

Rule 17-603. QUALIFICATIONS OF COURT-DESIGNATED ADR PRACTITIONERS

(a) Court-designated Mediators

A mediator designated by the court pursuant to Rule 17-602 (e)(1)(B) shall:

(1) unless waived by the parties, be at least 21 years old;

(2) have completed at least 40 hours of basic mediation training in a program meeting the requirements of Rule 17-104 or, for individuals trained prior to January 1, 2013, former Rule 17-106;

(3) be familiar with the rules, statutes, and procedures governing wills, the administration of estates, the authority of orphans' courts and registers of wills, and the mediation program operated by the orphans' court;

(4) complete in each calendar year four hours of continuing mediation-related education in one or more of the topics set forth in Rule 17-104;

(5) abide by any mediation standards adopted by the Court of Appeals; and

(6) submit to periodic monitoring of court-ordered mediations by a qualified mediator designated by the Chief Judge.

(b) Court-designated Settlement Conference Presiders

> An individual designated as a settlement conference presider shall:
>
> (1) be a member in good standing of the Maryland Bar and have at least three years of experience in the active practice of law;
>
> (2) be familiar with the rules, statutes, and procedures governing wills, the administration of estates, the authority of orphans' courts and registers of wills, and appropriate settlement conference procedures; and
>
> (3) have conducted at least three settlement conferences as a judge, senior judge, or magistrate, or pursuant to a designation by a Maryland court.
>
> Source: This Rule is new.

Rule 17-603 was accompanied by the following Reporter's note:

> Rule 17-603 is derived from Rule 17-304 with changes in the qualifications that apply to court-designated mediators and settlement conference presiders in the orphans' courts, such as familiarity with the rules, statutes, and procedures governing wills, the administration of estates, the authority of orphans' courts and registers of wills, and the orphans' court mediation program. Court-designated settlement conference presiders must be familiar with the same subjects as mediators and must have conducted at least three settlement conferences as a judge, senior judge, magistrate or pursuant to a designation by a Maryland court.

Mr. Laws told the Committee that Rule 17-603 addresses the qualifications for mediators or neutrals appointed by the court

to preside over settlement conferences. A mediator does not have to be an attorney but must be at least 21 years old and have 40 hours of mediation training. He or she must be familiar with matters of probate and must take four hours of continuing mediation-related education in each calendar year. The mediator must abide by the mediation standards adopted by the Court of Appeals.

Mr. Laws said that he was not certain about the meaning of subsection (a)(6), which refers to "periodic monitoring of court-ordered mediations by a qualified mediator designated by the Chief Judge." It seems that some mediators must report to other mediators. The Chair responded that subsection (a)(6) came from the Rules pertaining to mediation in the circuit court. In circuit court proceedings, the mediators asked for that provision to be added so that a mediator who is designated by the court knows what he or she is doing. Monitoring of mediations is one way to accomplish this. This same provision is found in Rule 17-206 (Qualifications of Court-designated ADR Practitioners Other than Mediators), which applies to civil cases in the circuit court. Mr. Laws asked whether it is like peer review among the mediation community. The Chair answered that is somewhat like that. Mr. Laws said that some of the requirements had been eliminated, so that some of the smaller

counties could have success in getting people to be facilitators or mediators.

Mr. Laws said that the requirements for settlement conference presiders are somewhat different. The presider must be an attorney who is familiar with the subject matter and who has conducted three settlement conferences as a judge, senior judge, or magistrate or pursuant to a designation by a Maryland court.

By consensus, the Committee approved Rule 17-603 as presented.

Mr. Laws presented Rule 17-604, Procedure for Approval, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 600 – PROCEEDINGS IN ORPHANS' COURT

ADD new Rule 17-604, as follows:

Rule 17-604. PROCEDURE FOR APPROVAL

(a) Application

(1) Generally

An individual seeking designation to conduct mediation or settlement conference proceedings shall file an application with the Chief Judge of the Orphans' Court from which the individual is willing to accept referrals. The application shall be substantially in the form approved by the

Chief Judge. An individual may apply for designation to conduct both mediations and settlement conferences but shall file a separate application for each. The Chief Judge may select a designee to accept and maintain the applications.

Committee note: The Committee recommends that the Chief Judges of the orphans' courts attempt to develop a uniform application form that can be used throughout the State.

(2) Documentation

The application shall be accompanied by documentation that the applicant meets the requirements of Rule 17-603 (a) or (b), as relevant, and may include documentation of the applicant's approval to conduct mediations or settlement conferences in other orphans' courts of the State.

(b) Action on Application

After such investigation as the Chief Judge finds appropriate, the Chief Judge shall notify the applicant of the approval or disapproval of the application and the reasons for any disapproval.

(c) Lists

(1) Generally

The Chief Judge shall maintain lists of individuals who have been approved for designation to conduct mediations or settlement conferences, which shall be available to the public and to the other orphans' courts of the State.

(2) Removal

After notice and a reasonable opportunity to respond, the Chief Judge may remove an individual from a list for failure to maintain the required qualifications or for other good cause.

Source: This Rule is new.

Rule 17-604 was accompanied by the following Reporter's note:

> Rule 17-604 is derived from Rules 17-207 and 17-304 with modifications that would apply to approval of ADR practitioners in Orphans' Court cases.

Mr. Laws explained that Rule 17-604 pertains to applications seeking designation to conduct mediation or settlement conference proceedings. Each jurisdiction might have a separate application form. The form would be approved by the Chief Judge of the Orphans' Court. There is no other way it could work until there is a statewide ADR facilitator form. At the Subcommittee meeting, the point was raised that some of the counties may not be interested in having ADR programs. Mr. Laws suggested that some kind of introductory clause could be added to Rules 17-604 and 17-605 indicating that it applies only where the orphans' court for that county decides to institute an ADR program.

Mr. Laws noted that section (b) provides that after the applications are filed, the Chief Judge shall notify applicants whether they are approved. Subsection (c)(1) provides that the Chief Judge shall maintain lists of individuals who have been approved for designation to conduct mediations or settlement conferences.

Mr. Laws noted that the Chief Judge may approve or disapprove an application for designation as an ADR practitioner under Rule 17-604, and the Chief Judge may remove an individual for failure to maintain the required qualifications or for other good cause.

Judge Bryant asked what reasons a court could give for disapproval of an application. Mr. Laws answered that the Subcommittee had not really discussed this. Judge Bryant remarked that sometimes when a court gives explanations, it could be problematic. Mr. Laws noted that mediators are public officials, and the judge would have to express some reason. It would be a hedge against arbitrary and capricious disapprovals. The Chair pointed out that the Chief Judge would need to be careful in making the decision, because it is an administrative function, not a judicial one, and judges have no absolute immunity for those decisions.

Mr. Laws presented Rule 17-605, Fee Schedules, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 – ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 600 – PROCEEDINGS IN ORPHANS' COURT

ADD new Rule 17-605, as follows:

Rule 17-605. FEE SCHEDULES

(a) Authority to Adopt

The Chief Judge shall develop and adopt maximum hourly rate fee schedules for court-designated individuals conducting mediation or settlement conference proceedings. In developing the fee schedules, the Chief Judge shall take into account the availability of qualified individuals willing to provide those services and the ability of litigants to pay for them.

(b) Applicability of Fee Schedules

The fee schedules adopted by the Chief Judge apply only to an individual designated by the court to conduct a mediation or settlement conference and not to an individual selected by the parties.

(c) Compliance

A court-designated mediator or settlement conference presider subject to a fee schedule may not charge or accept a fee for that service in excess of that allowed under the fee schedule. A violation of this Rule shall be cause for removal of the individual from the lists.

Source: This Rule is new.

Rule 17-605 was accompanied by the following Reporter's note:

Rule 17-605 is derived from Rule 17-208 with minor modifications so that it applies to fee schedules for ADR practitioners in the Orphans' Court.

Mr. Laws explained that Rule 17-605 provides that the Chief Judge shall adopt hourly rate fee schedules for mediators and settlement conference facilitators. Any charge over and above that would be prohibited. Mr. Laws moved to add introductory language to Rules 17-604 and 17-605 that would limit the application of the Rules to only orphans' courts for the counties that decide to institute an ADR program. The Chair inquired how it would apply otherwise. Mr. Laws replied that if Rules are instituted that provide that the Chief Judge shall take certain actions, the Chief Judge should not be required to do it if there is no ADR program in that jurisdiction. Mr. Laws said that he did not think that there was any language in the Chapter 600 Rules providing that a court may forego ADR programs. The Subcommittee had been informed that some of the counties have no interest in this where others such as Prince George's and Baltimore counties have had great success. The motion was seconded, and it carried on a majority vote.

The additional language providing that Rules 17-604 and 17-605 apply only to jurisdictions that choose to have ADR would be added to the beginning of section (a) of each Rule.

By consensus, the Committee approved Rules 17-604 and 17-605 as amended.

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