COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held at the Wakefield Valley Golf and Conference Center, 1000 Fenby Farm Road, Westminster, Maryland, on October 11, 2002.

Members present:

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

F. Vernon Boozer, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Hon. John F. McAuliffe
Hon. William D. Missouri
Hon. John L. Norton, III
Debbie L. Potter, Esq.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Albert "Buz" Winchester, III, M.S.B.A., Office of Legislative Relations
Steven P. Lemmey, Esq., Investigative Counsel, Commission on Judicial Disabilities
Elizabeth B. Veronis, Esq.
P. Tyson Bennett, Esq.
Una M. Perez, Esq.

The Chair convened the meeting. He introduced the newest member of the Rules Committee, F. Vernon Boozer, Esq. The Chair welcomed Mr. Boozer and thanked him for serving on the Committee.

The Chair announced that on the previous Monday, October 7, 2002, the Court of Appeals considered the 151st Report. Most of the Rules in the Report were approved. The Court approved the

Rules pertaining to court interpreters but did not follow the Committee's suggestion that a relative or minor can serve as an interpreter, if it is in the interest of justice. The Court agreed with the consultants who had recommended that a minor or relative can never serve as an interpreter.

The Chair said that there was one extra item for the agenda, Rules 16-811, Client Protection Fund, 16-724, Service of Papers on Attorney, 16-753, Service of Petition, and 7-201, General Provisions, and he presented those Rules for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-811 to reflect the renaming of the Clients' Security Trust Fund of the Bar of Maryland as the Client Protection Fund of the Bar of Maryland, to provide for judicial review pursuant to the Rules in Title 7, Chapter 200, to renumber provisions, and to make certain stylistic changes, as follows:

Rule 16-811. ~~CLIENTS' SECURITY~~ CLIENT PROTECTION FUND OF THE BAR OF MARYLAND

~~a. Promulgation of Rule~~

~~This Rule, to be known as the "Clients' Security Fund Rule of the Court of Appeals of Maryland," is promulgated pursuant to Chapter~~

~~779, Laws of Maryland (1965).~~

~~Cross reference: See Code, BOP §§10-310 et seq.~~

~~b.~~ a. ~~Creation~~ Name, Operation, and Purpose ~~of Trust Fund~~

1. ~~Creation~~ Name

~~A trust fund, to be known as the "Clients' Security Trust~~ Effective July 1, 2002, the name of the Clients' Security Trust Fund of the Bar of Maryland, promulgated pursuant to Chapter 779, Laws of Maryland (1965), shall be changed to the "Client Protection Fund of the Bar of Maryland" ~~(hereinafter referred to as "the trust fund"), is hereby authorized and created~~ (the "Fund").

Cross reference: See Code, Business Occupations and Professions Article, §§10-310 et seq.

2. Operation

The ~~trust fund~~ Fund shall be operated and administered in accordance with this Rule by nine trustees, appointed as hereinafter provided. The trustees shall be known as the "Trustees of the ~~Clients' Security Trust~~ Client Protection Fund of the Bar of Maryland."

3. Purpose

The purpose of the ~~trust fund~~ Fund shall be to maintain the integrity and protect the good name of the legal profession by reimbursing, to the extent authorized by this Rule and deemed proper and reasonable by the trustees, losses caused by defalcations of members of the Bar of the State of Maryland or out-of-state attorneys authorized to practice in this State under Rule 15 of the Rules Governing Admission to the Bar, acting either as attorneys or as fiduciaries (except to the extent to which they are bonded).

~~c.~~ b. Appointment and Compensation of Trustees and Officers

1. Number

There shall be nine trustees appointed by ~~this~~ the Court of Appeals, eight to be members of the Bar of this State, and one who shall not be a member of the Bar.

2. Appointment

One trustee who is a member of the Bar of this State shall be appointed from each of the seven appellate judicial circuits. The eighth trustee who is a member of the Bar and the trustee who is not a member of the Bar shall be appointed at large. Each appointment shall be for a term of seven years.

3. Officers

The trustees shall from time to time elect from their membership a ~~chairman~~ chair, a treasurer, and such other officers as they deem necessary or appropriate.

4. Removal

A trustee may be removed by the Court at any time in its discretion.

5. Vacancies

Vacancies shall be filled by appointment by the Court for the unexpired term.

6. Compensation

The trustees shall serve without compensation, but shall be entitled to reimbursement from the ~~trust fund~~ Fund, if no other source of funds is available, for their expenses reasonably incurred in performance of their duties as trustees, including transportation costs.

~~d.~~ c. Powers and Duties of Trustees

1. Additional Powers and Duties

In addition to the powers granted elsewhere in this Rule, the trustees shall have the following powers and duties:

(i) To receive, hold, manage, and distribute, pursuant to this Rule, the funds raised hereunder, and any other monies that may be received by the ~~trust fund~~ Fund through voluntary contributions or otherwise.

(ii) To authorize payment of claims in accordance with this Rule.

(iii) To adopt regulations for the administration of the ~~trust fund~~ Fund and the procedures for the presentation, consideration, recognition, rejection and payment of claims, and to adopt bylaws for conducting business. A copy of ~~such~~ the regulations shall be filed with the Clerk of ~~this~~ the Court of Appeals, who shall mail a copy of them to the clerk of the circuit court for each county and to all Registers of Wills.

(iv) To enforce claims for restitution, arising by subrogation or assignment or otherwise.

(v) To invest the ~~trust fund~~ Fund, or any portion thereof, in such investments as they may deem appropriate, and to cause funds to be deposited in any bank, banking institution or federally insured savings and loan association in this State, provided however, that the trustees shall have no obligation to cause the ~~trust fund~~ Fund or any portion thereof to be invested.

(vi) To employ and compensate consultants, agents, legal counsel and employees.

(vii) To delegate the power to perform routine acts which may be necessary or desirable for the operation of the ~~trust fund~~ Fund, including the power to authorize disbursements for routine operating expenses of the ~~trust fund~~ Fund, but authorization for payments of claims shall be made only as provided in section ~~i~~ h (Claims) of this

Rule.

(viii) To sue or be sued in the name of the ~~trust~~ Fund without joining any or all individual trustees.

(ix) To comply with the requirements of Rules 16-713 (e), 16-714 (b), 16-724 (a), and 16-753.

(x) To designate an employee to perform the duties set forth in Rules 16-724 (a) and 16-753, and notify Bar Counsel of that designation.

~~(x)~~ (xi) To perform all other acts necessary or proper for fulfillment of the purposes of the ~~trust fund~~ Fund and its efficient administration.

2. Report and Audit - Filing

At least once each year, and at such additional times as the Court of Appeals may order, the trustees shall file with ~~this~~ the Court of Appeals a written report, which shall include the audit made pursuant to subsection 3 of section ~~j~~ i (Powers of Court of Appeals - ~~Audits~~ Arrange Audit) of this Rule of the management and operation of the ~~trust fund~~ Fund.

~~e.~~ d. Meetings and Quorum

1. Time

Meetings of the trustees shall be held at the call of the ~~chairman~~ chair or a majority of the trustees, and shall be held at least once each year, upon reasonable notice.

2. Number

Five trustees shall constitute a quorum. A majority of the trustees present at a duly constituted meeting may exercise any powers held by the trustees, except to the extent that this Rule provides otherwise.

~~f.~~ e. Payments to Fund

1. Definition

In this section, "local ~~Bar Association~~ bar association" means (A) in Baltimore City, the Bar Association of Baltimore City; or (B) in each county, the bar association with the greatest number of members who are residents of the county and who maintain their principal office for the practice of law in that county.

2. Payment Required as Condition of Practice; Exception

Except as otherwise provided in this section, each lawyer admitted to practice before ~~this~~ the Court of Appeals or issued a certificate of special authorization under Rule 15 of Rules Governing Admission to Bar, shall, as a condition precedent to the practice of law (as from time to time defined in Code, Business Occupations and Professions Article) in this State, pay annually to the treasurer of the ~~trust fund~~ Fund the sum, including ~~any~~ all applicable late charges, ~~this~~ the Court may fix. The trustees may provide in their regulations reasonable and uniform deadline dates for receipt of payments of assessments or applications for change to inactive/retired status. A lawyer on inactive/retired status may engage in the practice of law without payment to the ~~trust fund~~ Fund if (A) the lawyer is on inactive/retired status solely as a result of having been approved for that status by the trustees and not as a result of any action against the attorney pursuant to Title 16, Chapter 700 of these Rules and (B) the lawyer's practice is limited to representing clients without compensation, other than reimbursement of reasonable and necessary expenses, as part of the lawyer's participation in a legal services or pro bono publico program sponsored or supported by a local ~~Bar Association~~ bar association, the Maryland State Bar Association, Inc., an affiliated bar foundation, or the Maryland Legal Services Corporation.

3. Change of Address

It is the obligation of each lawyer to give written notice to the trustees of every change in the lawyer's resident address, business address, or telephone numbers within 30 days of the change. The trustees shall have the right to rely on the latest information received by them for all billing and other correspondence.

4. Due Date

Payments for any fiscal year shall be due on July 1st of each such year.

5. Dishonor

If any check to the ~~trust fund~~ Fund in payment of an annual assessment is dishonored, the treasurer of the ~~trust fund~~ Fund shall promptly notify the attorney of the dishonor. The attorney shall be responsible for all additional charges assessed by the trustees.

~~g.~~ f. Enforcement

1. List by Trustees of Unpaid Assessments

As soon as practical after January 1, but no later than February 15 of each calendar year, the trustees shall prepare, certify, and file with the Court of Appeals a list showing:

(i) the name and account number, as it appears on their records, of each lawyer who, to the best of their information, is engaged in the practice of law and without valid reason or justification has failed or refused to pay (a) one or more annual assessments, (b) penalties for late payment, (c) any charge for a dishonored check, or (d) reimbursement of publication charges; and

(ii) the amount due from that lawyer to the ~~trust fund~~ Fund.

2. Notice of Default by Trustees

(i) The trustees shall give notice of delinquency promptly to each lawyer on the

list by first class mail addressed to the lawyer at the lawyer's last address appearing on the records of the trustees. The notice shall state the amount of the obligation to the ~~trust fund~~ Fund, that payment is overdue, and that failure to pay the amount to the ~~trust fund~~ Fund within 30 days following the date of the notice will result in the entry of an order by the Court of Appeals prohibiting the lawyer from practicing law in the State.

(ii) The mailing by the trustees of the notice of default shall constitute service.

3. Additional Discretionary Notice

In addition to the mailed notice, the trustees may give any additional notice to the lawyers on the delinquency list as the trustees in their discretion deem desirable. Additional notice may include publication in one or more newspapers selected by the trustees; telephone, facsimile, or other transmission to the named lawyers; dissemination to local bar associations or other professional associations; posting in State court houses; or any other means deemed appropriate by the trustees. Additional notice may be statewide, regional, local, or personal to a named lawyer as the trustees may direct.

4. Certification of Default by Trustees; Order of Decertification by the Court of Appeals

(i) Promptly after expiration of the deadline date stated in the mailed notice, the trustees shall submit to the Court of Appeals a proposed Decertification Order stating the names and account numbers of those lawyers whose accounts remain unpaid. The trustee also shall furnish additional information from their records or give further notice as the Court of Appeals may direct. The Court of Appeals, on being satisfied that the trustees have given the required notice to the lawyers remaining in default, shall enter a Decertification Order prohibiting each of them from practicing law

in the State. The trustees shall mail by first class mail a copy of the Decertification Order to each lawyer named in the order at the lawyer's last address as it appears on the records of the trustees. The mailing of the copy shall constitute service of the order.

(ii) A lawyer who practices law after having been served with a copy of the Decertification Order may be proceeded against for contempt of court in accordance with the provisions of Title 15, Chapter 200 (Contempt) and any other applicable provision of law or as the Court of Appeals shall direct.

(iii) Upon written request from any Maryland lawyer, judge, or litigant to confirm whether a Maryland lawyer named in the request has been decertified and has not been reinstated, the trustees shall furnish confirmation promptly by informal means and, if requested, by written confirmation. On receiving confirmation by the trustees that a Maryland lawyer attempting to practice law has been and remains decertified, a Maryland judge shall not permit the lawyer to practice law in the State until the lawyer's default has been cured.

5. Payment

Upon payment in cash or by certified or bank official's check to the ~~trust fund~~ Fund by a lawyer of all amounts due by the lawyer, including all related costs that the Court of Appeals or the trustees may prescribe from time to time, the trustees shall remove the lawyer's name from their list of delinquent lawyers and, if a Decertification Order has been entered, request the Court of Appeals to rescind its Decertification Order as to that lawyer. If requested by a lawyer affected by the action, the trustees shall furnish confirmation promptly.

6. Bad Check; Interim Decertification Order

(i) If a check payable to the ~~trust~~

~~fund~~ Fund is dishonored, the treasurer of the ~~trust fund~~ Fund shall notify the lawyer immediately by the quickest available means. Within 7 business days following the date of the notice, the lawyer shall pay to the treasurer of the ~~trust fund~~ Fund , in cash or by certified or bank official's check, the full amount of the dishonored check plus any additional charge that the trustees in their discretion shall prescribe from time to time.

(ii) The treasurer of the ~~trust fund~~ Fund promptly (but not more often than once each calendar quarter) shall prepare and submit to the Court of Appeals a proposed interim Decertification Order stating the name and account number of each lawyer who remains in default of payment for a dishonored check and related charges. The Court of Appeals shall enter an interim Decertification Order prohibiting the practice of law in the State by each lawyer as to whom it is satisfied that the treasurer has made reasonable and good faith efforts to give notice concerning the dishonored check. The treasurer shall mail by first class mail a copy of the interim Decertification Order to each lawyer named in the order at the lawyer's last address as it appears on the records of the trustees, and the mailing of the copy shall constitute service of the order.

7. Notices to Clerks

The Clerk of the Court of Appeals shall send a copy of a Decertification Order and rescission order entered pursuant to this Rule to the ~~clerk~~ Clerk of the Court of Special Appeals, the clerk of each ~~Circuit Court~~ circuit court, the Chief Clerk of the District Court, and the Register of Wills for each county.

~~h.~~ g. Treasurer's Duties

1. Separate Account

The ~~trust fund~~ Fund shall be maintained by the treasurer in a separate account.

2. Disbursements

The treasurer shall disburse monies from the ~~trust fund~~ Fund only upon the action of the trustees pursuant to this Rule.

3. Bond

The treasurer shall file annually with the trustees a bond for the proper execution of the duties of the office of treasurer of the ~~trust fund~~ Fund in an amount established from time to time by the trustees and with such surety as may be approved by the trustees.

4. Other Duties

The treasurer shall comply with the requirements of Rule~~s 16-713 (e),~~ 16-714 (b)~~, 16-724 (a), and 16-753~~.

~~i.~~ h. Claims

1. Power of Trustees

The trustees are invested with the power to determine whether a claim merits reimbursement from the ~~trust fund~~ Fund, and if so, the amount of such reimbursement, the time, place, and manner of its payment, the conditions upon which payment shall be made, and the order in which payments shall be made. The trustees' powers under this section may be exercised only by the affirmative vote of at least five trustees.

2. No Rights in Fund

No claimant or other person or organization has any right in the ~~trust fund~~ Fund as beneficiary or otherwise.

3. Exercise of Discretion - Factors

In exercising their discretion the trustees may consider, together with such other factors as they deem appropriate, the following:

(i) The amounts available and likely to

become available to the ~~trust fund~~ Fund for payment of claims.

(ii) The size and number of claims which are likely to be presented in the future.

(iii) The total amount of losses caused by defalcations of any one attorney or associated groups of attorneys.

(iv) The unreimbursed amounts of claims recognized by the trustees in the past as meriting reimbursement, but for which reimbursement has not been made in the total amount of the loss sustained.

(v) The amount of the claimant's loss as compared with the amount of the losses sustained by others who may merit reimbursement from the ~~trust fund~~ Fund.

(vi) The degree of hardship the claimant has suffered by the loss.

(vii) Any negligence of the claimant which may have contributed to the loss.

4. Additional Powers of Trustees

In addition to other conditions and requirements the trustees may require each claimant, as a condition of payment, to execute such instruments, to take such action, and to enter such agreements as the trustees may desire, including assignments, subrogation agreements, trust agreements and promises to cooperate with the trustees in making and prosecuting claims or charges against any person.

5. Investigation of Claims - Assistance

The trustees may request individual lawyers, bar associations, and other organizations of lawyers to assist the trustees in the investigation of claims.

~~j.~~ i. Powers of Court of Appeals

1. To Change Rule

~~This~~ The Court of Appeals may amend, modify, or repeal this Rule at any time without prior notice, and may provide for the dissolution and winding up of the affairs of the ~~trust~~ Fund.

2. Judicial Review

A ~~claimant~~ person aggrieved by a final determination of the trustees ~~denying his claim~~ may~~, within 15 days thereafter, file exceptions in the Court of Appeals. The~~ seek judicial review of the determination pursuant to Title 7, Chapter 200 of these Rules. On any judicial review, the decision of the trustees shall be deemed prima facie correct and ~~the exceptions~~ shall be ~~denied~~ affirmed unless it is shown that the decision was arbitrary~~,~~ ~~or~~ capricious, ~~or~~ unsupported by substantial evidence on the record considered as a whole, ~~or was~~ not within the authority vested in the trustees, ~~or was~~ made upon unlawful procedure, or ~~was~~ unconstitutional or otherwise illegal. ~~In any case in which the Court does not deny the exceptions, it may, with or without a hearing, vacate the decision of the trustees and remand the matter thereto for further proceedings, including where appropriate the taking of additional evidence, as may be specified in the Court's remand order.~~

3. Arrange Audit

The trustees shall arrange for auditing of the accounts of the ~~trust fund~~ Fund by state or private auditors, and ~~this~~ the Court of Appeals may at any time arrange for such an audit to be made. The cost of any such audit shall be paid by the ~~trust fund~~ Fund if no other source of funds is available.

4. Interpret Rule

The trustees may apply to ~~this~~ the Court of Appeals for interpretation of this Rule and for advice as to their powers and as to the proper administration of the ~~trust~~ Fund. Any final order issued by ~~this~~ the Court in response to any such application

shall finally bind and determine all rights with respect to the matters covered therein.

Source: This Rule is former Rule 1228.

Rule 16-811 was accompanied by the following Reporter's

Note.

Rule 16-811 is proposed to be amended to change the name of the "Clients' Security Trust Fund of the Bar of Maryland" to "Client Protection Fund of the Bar of Maryland" in accordance with Chapter 33 (HB 115), Acts of 2002. Conforming amendments are also made to Rules 16-713, 16-714, 16-722, 16-724, 16-742, 16-753, 16-760, 16-772, 16-775, 16-781, and Bar Admission Rules 12, 13, 14, and 15.

Two substantive changes to Rule 16-811 also are proposed.

New subsection c 1 (x) is added to the Rule to provide for the designation of an employee of the Fund, rather than the treasurer of the Fund, to perform the duties set forth in Rules 16-724 (a) and 16-753. Subsection g 4, pertaining to the "other duties" of the treasurer, is amended to conform to the change to subsection c 1 and to delete an incorrect reference to Rule 16-713 (e). Conforming amendments to Rules 16-724 and 16-753 also are proposed.

Subsection i 2 is amended to revise the procedure for judicial review of a final determination of the trustees. The revision provides that a "person aggrieved by a final determination by the trustees" -- which could include the alleged defalcator as well as the claimant -- may seek judicial review of the determination. The revised procedure for review is the procedure set forth in Title 7, Chapter 200 of the Rules. Conforming amendments to Rule 7-201 also are proposed.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 200 - JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

AMEND Rule 7-201 to add certain language concerning the Client Protection Fund of the Bar of Maryland, as follows:

Rule 7-201. GENERAL PROVISIONS

(a) Applicability

The rules in this Chapter govern actions for judicial review of (1) an order or action of an administrative agency, where judicial review is authorized by statute, and (2) a final determination of the trustees of the Client Protection Fund of the Bar of Maryland.

(b) Definition

As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, commissioner, official, the Maryland Tax Court, or other unit of the State or of a political subdivision of the State and the Client Protection Fund of the Bar of Maryland.

Committee note: Regarding the inherent power of a court, in the absence of a statute authorizing judicial review, to review actions by an administrative agency that are arbitrary, illegal, capricious, or deny a litigant some fundamental right, see Criminal Injuries Compensation Board v. Gould, 273 Md. 486, 501 (1975), Board of Education of Prince George's County v. Secretary of Personnel, 317 Md. 34, 44 (1989), and Silverman v. Maryland Deposit Insurance Fund, 317 Md. 306, 323-326 (1989).

Source: This Rule is derived from former Rule B1.

Rule 7-201 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 7-201 adds language to the Rule to provide that the rules in Title 7, Chapter 200 govern actions for judicial review of a final determination of the trustees of the Client Protection Fund of the Bar of Maryland.

The Chair explained that the Court of Appeals had remanded Rule 16-811 to the Committee to consider the issue of providing a mechanism for judicial review of decisions of the Client Protection Fund. Mr. Titus noted that this matter is a high priority because of a recent case where a prison inmate, who was unhappy with a decision of the Fund, filed a petition seeking review. The Court was concerned as to how this should be handled, especially considering that the Court of Appeals building does not have adequate security for prisoners. The Court referred to the case of Shell Oil v. Supervisor, 276 Md. 36 (1975), which held that an appellate court cannot be given jurisdiction in a matter *ab initio*. The Court directed the Rules Committee to revise the existing subsection pertaining to judicial review. The Appellate Subcommittee recommends that the Rule refer to a review under Title 7, Chapter 200, which is the procedure for review of a decision of an administrative agency. The specific language recommended by the Subcommittee is in the materials distributed today. Judge McAuliffe pointed out that the language, which provides that the decision of the trustees

shall be deemed *prima facie* correct unless it is shown that the decision was arbitrary or capricious, is being retained to let claimants know that it is difficult to win an appeal.

Judge McAuliffe commented that the Subcommittee also recommends a change to Rule 7-201. The Client Protection Fund feels strongly that it is not an administrative agency. As drafted, the new language in Rule 7-201 does not answer the question of whether or not the Fund is an administrative agency. The Rule makes it clear that review of the Fund's decisions is governed by the Rules in Title 7, Chapter 200. Judge McAuliffe asked whether it is redundant to make changes to both sections of Rule 7-201. The Reporter answered that the change has to be made in both sections. Section (a) needs the new language, because the review is not "authorized by statute." Section (b) is a definition of the term "administrative agency," which is used in other rules throughout the Chapter.

The Reporter said that Richard Reid, Esq., Chair of the Client Protection Fund, had attended the Subcommittee meeting at which this was discussed and indicated that he was not in agreement with the proposed changes. His view is that decisions of the Fund are discretionary and should not be subject to review. At the Court of Appeals conference on Monday, the Chair had explained the proposed changes to the Court, and three of the judges seemed to be in agreement.

Mr. Sykes expressed the view that the two sections of Rule 7-201 are inconsistent. Section (a) indicates that the Client

Protection Fund is not an administrative agency, but section (b) defines the Fund as an administrative agency. If the Fund is classified as an administrative agency, why is the change to section (a) necessary? Mr. Titus responded that the Title 7, Chapter 200 Rules, which are the former B Rules, are designed to govern judicial review that is authorized by statute, not the inherent power of judicial review. The statute does not provide for judicial review of the decisions of the Client Protection Fund. His view is that there is no reason why the Court cannot promulgate a rule to govern other types of review, such as the inherent power. Mr. Sykes commented that the Client Protection Fund conforms to all of the requirements of an administrative agency, including the fact that it holds hearings and maintains records of the proceedings. Mr. Titus said that Mr. Reid had told the Subcommittee that he disagrees with the suggested changes. He had explained that most of the Fund's decisions are based on a paper review. Judge Heller inquired as to whether there is a transcript of the proceedings. Mr. Titus answered in the negative and remarked that he prefers a procedure created by rule, rather than an *ad hoc* review with evidence coming in that had not been reviewed by the agency.

Judge McAuliffe expressed the opinion that the Fund is not an administrative agency. He asked whether section (b) goes too far. Section (a) is appropriate, but he suggested that section (b) could be modified to read, "where the term is used, 'administrative agency' shall include the Client Protection

Fund." Mr. Reid had previously told the Subcommittee that the creation of the Fund was based on an initiative of the Maryland State Bar Association, and the original Rule pertaining to the Fund contained no appeal provision. The Court of Appeals added a provision that would allow oversight of the trustees' decisions, and the Rule was made retroactive. Judge McAuliffe stated that he would not like to see the gratuitous Fund evolve into an administrative agency subject to the Administrative Procedure Act ("APA").

Mr. Titus suggested that the new language of section (b) could read as follows: "...and, for the purposes of this Chapter only, shall include the Client Protection Fund of the Bar of Maryland." Judge Heller commented that she understood the concerns being expressed, but she questioned as to why section (b) has to be changed. Mr. Titus answered that the language "the agency" is used throughout the Chapter. To make the Chapter work, the Fund has to be made an "agency". Judge Heller suggested that a Committee note could be added which would state that the new language provides a procedural mechanism to review Fund decisions, but it is not meant to deem them to be administrative agency decisions pursuant to the APA.

Mr. Zarnoch pointed out that this is not an APA matter, because the APA applies only to executive branch agencies and not to judicial branch agencies. He had no problem with the comment suggested by Judge Heller, but he expressed the view that it is not necessary. The Subcommittee was divided as to whether the

Fund is an administrative agency. Mr. Titus noted that the proposed changes do not address the question of whether or not the Fund is an administrative agency. The Chair added that the proposed changes are in response to the request of the Court of Appeals. The Reporter inquired as to whether the changes suggested by Mr. Titus should be included. The Chair responded that this is not necessary.

Mr. Sykes commented that this is a matter for the legislature to handle. The proposed changes may be generating more lawsuits. The Chair commented that the Committee note after section (b) that is already in the Rule addresses the inherent power of a court to review actions by an administrative agency. Mr. Sykes noted that this raises problems as to whether the Fund is an administrative agency. If the legislature were to address the issue of judicial review of actions of the Fund, it might avoid the difficulties inherent with providing for the review by Rule. The Chair responded that the legislature should not be involved. Judge McAuliffe added that a Rule has the force of law.

Mr. Titus noted that under the proposed changes, once the matter has gone to a circuit court judge, it could only go to the Court of Appeals by *certiorari*. This will solve the problem of inmates being in the Court of Appeals building. The Chair stated that the problem is solved by the new language in Rules 7-201 and 16-811.

The Reporter asked if the Committee is in agreement with the

addition to Rule 16-811 of subsection (c)(1)(x), which provides that the trustees may designate an employee to perform the duties set forth in section (a) of Rule 16-724, Service of Papers on Attorney, and Rule 16-753, Service of Petition. The Committee agreed to this change by consensus. The Committee approved Rules 16-811 and 7-201 as presented.

Mr. Titus presented Rules 16-724, Service of Papers on Attorney, and 16-753, Service of Petition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-724 for conformity with recent legislation and to change the designation of the person upon whom service may be made under certain circumstances, as follows:

Rule 16-724. SERVICE OF PAPERS ON ATTORNEY

(a) Statement of Charges

A copy of a Statement of Charges filed pursuant to Rule 16-741 shall be served on an attorney in the manner prescribed by Rule 2-121. If after reasonable efforts the attorney cannot be served personally, service may be made upon the ~~treasurer~~ employee of the ~~Clients' Security Trust~~ Client Protection Fund of the Bar of Maryland designated by the Fund, who shall be deemed the attorney's agent for receipt of service. The ~~treasurer~~ Fund's employee shall send, by both certified mail and ordinary mail, a copy of the papers

so served to the attorney at the address maintained in the ~~Trust~~ Fund's records and to any other address provided by Bar Counsel.

(b) Service of Other Papers

Except as otherwise provided in this Chapter, other notices and papers may be served on an attorney in the manner provided by Rule 1-321 for service of papers after an original pleading.

Committee note: The attorney's address contained in the records of the ~~Clients' Security Trust~~ Client Protection Fund of the Bar of Maryland may be the attorney's last known address.

Cross reference: See Rule 16-753 concerning service of a Petition for Disciplinary or Remedial Action.

Source: This Rule is in part derived from former Rule 16-706 (BV6) and in part new.

Rule 16-724 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-811.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-753 for conformity with recent legislation and to change the designation of the person upon whom service may be made under certain circumstances, as follows:

Rule 16-753. SERVICE OF PETITION

A copy of a Petition for Disciplinary or Remedial Action filed pursuant to Rule 16-751, and the order of the Court of Appeals designating a judge pursuant to Rule 16-752, shall be served on an attorney in the manner prescribed by Rule 2-121 or in any other manner directed by the Court of Appeals. If after reasonable efforts the attorney cannot be served personally, service may be made upon the ~~treasurer~~ employee of the ~~Clients' Security Trust~~ Client Protection Fund of the Bar of Maryland designated by the Fund, who shall be deemed the attorney's agent for receipt of service. The ~~treasurer~~ Fund's employee shall send, by both certified mail and ordinary mail, a copy of the papers so served to the attorney at the address maintained in the ~~Trust~~ Fund's records and to any other address provided by Bar Counsel.

Source: This Rule is in part derived from former Rule 16-709 (BV9) and in part new.

Rule 16-753 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-811.

Mr. Titus explained that the proposed changes are in conjunction with the addition of subsection (c)(1)(x) to Rule 16-811. The Committee approved the changes to Rules 16-724 and 16-753 as presented.

Agenda Item 1. Reconsideration of proposed amendments to Rule 8.2 (Judicial and Legal Officials) of the Maryland Lawyers' Rules of Professional Conduct

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The Chair presented Rule 8.2, Judicial and Legal Officials,

for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - THE MARYLAND RULES OF

PROFESSIONAL CONDUCT

AMEND Rule 8.2 (b) and the accompanying Comment to conform them to the language of proposed revised Canon 5B of Rule 16-813, Code of Judicial Conduct, as follows:

Rule 8.2. JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is seeking judicial office is subject to the provisions of Canon 5C (4) and Canon 5D of Rule 16-813, Maryland Code of Judicial Conduct. A candidate for judicial office: ~~position shall not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he shall not announce in advance his conclusions of law on disputed issues to secure class support, and he shall do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.~~

(1) shall maintain the dignity appropriate to the judicial office that the lawyer seeks and act in a manner consistent with the independence and integrity of the judiciary;

(2) shall not act as a leader or hold an office in a political organization;

Cross reference: For the definition of

"political Organization," see the Terminology Section of Rule 16-813, Maryland Code of Judicial Conduct.

(3) shall not make a speech for a political organization, publicly endorse or make a speech for a candidate for non-judicial office, or have his or her name on the same ticket as a candidate for non-judicial office;

(4) shall not allow any other person to do for the candidate what the candidate is prohibited from doing;

(5) shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; and

Committee note: Rule 8.2 (b)(5) does not prohibit a candidate from making pledges or promises respecting improvements in court administration.

(6) shall not misrepresent his or her identity or qualifications, the identity or qualifications of an opponent, or any other fact.

A candidate for a judicial office may response to personal attacks or attacks on the candidate's record as long as the response does not otherwise violate this Rule.

COMMENT

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to

defend judges and courts unjustly criticized.

Code Comparison.-- With regard to Rule 8.2 (a), DR 8-102 (A) provides that "A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102 (B) provides that "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

~~Rule 8.2 (b) is identical to Canon XXIX of the Canons and Rules of Judicial Ethics, which is applicable to judges who are candidates for judicial office. Although the~~ The Maryland Disciplinary Rules have no counterpart to Rule 8.2 (b), ~~DR 8-103 of the Model Code, adopted by the ABA after the Code was adopted in Maryland,~~ which is the same~~, as Rule 8.2 (b)~~ in substance, as Canon 5B of Rule 16-813 (Maryland Code of Judicial Conduct).

Rule 8.2 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 8.2 conform section (b) to the standards pertaining to candidates for judicial office set forth in proposed revised Canon 5B of Rule 16-813 of the Maryland Code of Judicial Conduct.

The Chair explained that after the Rules Committee approved the changes to Rule 8.2, Mr. Zarnoch sent a memorandum to the Reporter stating that he was dissenting from the decision to conform Rule 8.2 to Canon 5 of the Maryland Code of Judicial Conduct. (See Appendix 1). Mr. Zarnoch noted in the memorandum that while the changes to Canon 5 that restrict the political activity of a judge running for election or reelection to judicial office may be appropriate, imposing similar restrictions on an attorney campaigning for judicial office is

unconstitutional. Some of the changes to Rule 8.2 are appropriate.

M. Peter Moser, Esq., an expert on judicial ethics, also sent correspondence on this topic. (See Appendix 2). Mr. Moser is in agreement with the admonition against making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office, which is subsection (b)(5) of Rule 8.2. This is more of a limit on conduct rather than on speech. However, the prohibition against holding an office in a political organization or endorsing a candidate for non-judicial office cannot be imposed on a private individual, but can be imposed on a judge as a public employee. Imposing such restrictions on private individuals is clearly unconstitutional. An alternative to changing Rule 8.2 would be to place these prohibitions in a code of fair election practices for judicial candidates as non-binding advisory goals. This would be aspirational, similar to the Pro Bono Rules, and it might have a deterrent effect.

Judge McAuliffe suggested that subsections (2) and (3) of Rule 8.2 (b) be deleted. The Chair asked about the first sentence of section (b), and Mr. Zarnoch replied that it should also be deleted. Judge McAuliffe suggested that subsection (4) should be moved to the end of the list in section (b). Mr. Zarnoch commented that subsections (5) and (6) are less of a problem than subsections (2) and (3). Judge McAuliffe moved that subsections (2) and (3) be deleted, and subsection (4) be moved

to the end of section (b). The motion was seconded. The Chair pointed out that the first sentence of section (b) refers to Canon 5C (4) and Canon 5D of Rule 16-813, both of which include subsections (2) and (3) of Rule 8.2 (b). The first sentence of section (b) should be eliminated. Judge McAuliffe amended his motion to also delete the first sentence of section (b). The amendment was seconded.

The Reporter noted that the reference to Canon 5C (4) should not be deleted, because it pertains to the date on which a lawyer files a certificate of candidacy and not to the actions of subsections (2) and (3) of Rule 8.2. Judge McAuliffe amended his motion to retain that part of the first sentence of section (b) which refers to Canon 5C (4), and the amendment was seconded. Section (b) would begin as follows: "Canon 5C (4) provides that a lawyer becomes a candidate for judicial office when..." citing the language of that canon. The Chair called for a vote on the motion as twice amended, and it passed unanimously.

Agenda Item 3. Consideration of proposed amendments to Rule 3-731 (Peace Orders)

Judge Dryden presented Rule 3-731, Peace Orders, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE — DISTRICT COURT

CHAPTER 700 - SPECIAL PROCEEDINGS

AMEND Rule 3-731 to conform to a certain Constitutional amendment and legislation, as follows:

Rule 3-731. PEACE ORDERS

Proceedings for ~~a temporary peace order and~~ a peace order are governed by Code, Courts Article, Title 3, Subtitle 15. A petition for relief under that statute shall be in substantially the following form:

(Caption)

PETITION FOR ~~PROTECTION AND TEMPORARY~~ PEACE ORDER

(Note: Fill in the following, checking the appropriate boxes. ***IF YOU NEED ADDITIONAL PAPER, ASK THE CLERK.)***

1. I want protection from _____.
Respondent

The Respondent committed the following acts against _____

_____,
Victim

within the past 30 days on the dates stated below.

(Check all that apply)

☐ kicking ☐ punching ☐ choking ☐ slapping

☐ shooting ☐ rape or other sexual offense (or attempt)

☐ hitting with object ☐ stabbing ☐ shoving

☐ threats of violence ☐ harassment ☐ stalking

☐ detaining against will ☐ trespass

☐ malicious destruction of property

☐ other _____

The details of what happened are: *(Describe injuries. State the date(s) and place(s) where these acts occurred. Be as specific as you can):*

_____

_____

_____

2. I know of the following court cases involving the Respondent and me:

Court	Kind of Case	Year Filed	Results or Status (if you know)
_____	_____	_____	_____
_____	_____	_____	_____

3. Describe all other harm the Respondent has caused you and give date(s), if known.

_____

_____

_____

4. I want ~~the court to order~~ the Respondent to be ordered:

☒ NOT to commit or threaten to commit any of the acts listed in paragraph 1 against _____
Name

☐ NOT to contact, attempt to contact, or harass _____

_____
Name

☐ NOT to go to the residence(s) at _____
Address

☐ NOT to go to the school(s) at _____

_____
Name of school and address

☐ NOT to go to the work place(s) at _____

_____

☐ To go to counseling ☐ To go to mediation

☐ To pay the filing fees and court costs

☐ Other specific relief: _____

I solemnly affirm under the penalties of perjury that the contents of this Petition are true to the best of my knowledge, information, and belief.

_____ _____

Date Petitioner

NOTICE TO PETITIONER

Any individual who knowingly provides false information in a Petition for ~~Protection and Temporary~~ Peace Order is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 90 days or both.

Source: This Rule is new.

Rule 3-731 was accompanied by the following Reporter's Note.

> The proposed amendment to Rule 3-731 conforms the Rule to Chapters 587 and 235 (HB 6 and HB 663), Acts of 2002, the provisions of which are contingent on ratification by the voters in the November 2002 election. The Constitutional amendment and amendments to Code, Courts Article, Title 3, Subtitle 15, allow a District Court Commissioner to issue an "interim peace order" under certain circumstances when the District Court clerk's office is not open for business. Only a judge may issue a "temporary peace order" or a "final peace order." Code, Courts Article, §3-1509 (b) requires that the Court of Appeals adopt a form for a petition under the Subtitle. The form set forth in the Rule is revised so that it is applicable to the interim peach order that may be issued by a Commissioner as well as to the two forms of peace orders that may be issued by a judge.

Judge Dryden explained that Chapters 587 and 235 (HB 6 and HB 663), Acts of 2002, amended the Constitution of Maryland and Code, Courts Article, Title 3, Subtitle 15 to allow a District

Court Commissioner to enter an interim peace order when the court is not in session. These provisions are contingent on ratification by the voters in the November 2002 election. This will require changing the Peace Order form by striking language in the first paragraph and the caption of the Petition form as well as section 4. of the Petition and the Notice to Petitioner at the end of the Rule. The new procedure allows a person to ask for an "interim peace order" issued by a Commissioner, who then sets the matter in for a hearing before the court. Only a judge can make the decision to issue a "temporary peace order" or a "final peace order." The Vice Chair asked about the contingency based on the election. Judge Dryden answered that if the referendum does not pass, the Rule does not change. The Committee approved the Rule as presented, contingent upon the passing of the referendum.

Agenda Item 4. Consideration and reconsideration of certain proposed rules changes pertaining to Title 17, Alternative Dispute Resolution: Amendments to Rule 17-104 (Qualifications and Selection of Mediators), Proposed new Rule 17-105.1 (Neutral Experts), Amendments to Rule 17-107 (Procedure for Approval), Amendments to Rule 17-108 (Fee Schedules), and Amendments to Rule 17-109 (Mediation Confidentiality)

The Vice Chair stated that at the September 2002 meeting, the Committee approved changes to several rules in Title 17 and remanded some Title 17 Rules to the ADR Subcommittee for further change. Only the Rules whose changes were not approved are in the package of Alternative Dispute Resolution (ADR) Rules in today's meeting materials.

The Vice Chair presented Rule 17-104, Qualifications and Selection of Mediators, for the Committee's consideration.

MARYLAND RULES

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-104 to change the language in subsection (a)(3) broadening the scope of continuing mediation-related education and to add a new section (c) providing for additional qualifications for mediators in the Business and Technology Case Management Program, as follows:

Rule 17-104. QUALIFICATIONS AND SELECTION OF MEDIATORS

(a) Qualifications in General

To be designated by the court as a mediator, other than by agreement of the

parties, a person must:

(1) unless waived by the court, be at least 21 years old and have at least a bachelor's degree from an accredited college or university;

Committee note: This subsection permits a waiver because the quality of a mediator's skill is not necessarily measured by age or formal education.

(2) have completed at least 40 hours of mediation training in a program meeting the requirements of Rule 17-106;

(3) complete in every two year period eight hours of continuing mediation-related education in ~~a program meeting the requirements of~~ one or more the topics set forth in Rule 17-106;

(4) abide by any standards adopted by the Court of Appeals;

(5) submit to periodic monitoring of court-ordered mediations by a qualified mediator designated by the county administrative judge; and

(6) comply with procedures and requirements prescribed in the court's case management plan filed under Rule 16-203 b. relating to diligence, quality assurance, and a willingness to accept a reasonable number of referrals on a reduced-fee or pro bono basis upon request by the court.

(b) Additional Qualifications - Child Access Disputes

To be designated by the court as a mediator with respect to issues concerning child access, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) have completed at least 20 hours of training in a family mediation training program meeting the requirements of Rule

17-106; and

(3) have observed or co-mediated at least eight hours of child access mediation sessions conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

(c) Additional Qualifications - Business and Technology Case Management Program Cases

To be designated by the court as a mediator of Business and Technology Program cases, other than by agreement of the parties, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) within the two years preceding application for approval pursuant to Rule 17-107 have completed as a mediator at least five non-domestic circuit court mediations or five non-domestic non-circuit court mediations of comparable complexity (A) at least two of which are among the types of cases that are assigned to the Business and Technology Case Management Program or (B) in addition to having co-mediated, on a non-paid basis, two cases from the Business and Technology Case Management Program with a mediator already approved to mediate these cases;

(3) agree, once approved as a mediator of Business and Technology Case Management Program cases pursuant to Rule 17-107, to serve as co-mediator with at least two mediators each year who seek to meet the requirements of subsection (c)(2) of this Rule; and

(4) agree to complete any continuing education training required by the Circuit Administrative Judge or that judge's designee.

~~(c)~~ (d) Additional Qualifications - Marital Property Issues

To be designated by the court as a

mediator in divorce cases with marital property issues, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;

(2) have completed at least 20 hours of skill-based training in mediation of marital property issues; and

(3) have observed or co-mediated at least eight hours of divorce mediation sessions involving marital property issues conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

Source: This Rule is new.

Rule 17-104 was accompanied by the following Reporter's Note.

Rachel Wohl, Esq., Executive Director of the Maryland Mediation and Conflict Resolution Office, raised the issue of the wording in subsection (a)(3) of Rule 17-104 of the eight hour continuing mediation education requirement for mediators. The current language indicates that the eight hour training sessions must cover the same topics as are required by the 40-hour basic training for mediators. The provision was intended to be broader and include a wide variety of continuing self-improvement training for mediators. The ADR Subcommittee is proposing language change in subsection (a)(3) to achieve this goal.

Because of the complexity of cases in the Business and Technology Case Management Program, the Rules Committee proposes adding a new section (c) to Rule 17-104 that sets forth additional qualifications for mediators of cases in that Program. The list of additional qualifications is based on the recommendations of the Implementation Committee of the Business and Technology Case Management Program.

The Vice Chair explained that subsection (a)(3) had previously provided that continuing mediation-related education had to meet the requirements of Rule 17-106, Mediation Training Programs. This had been interpreted to mean that the educational program had to include every aspect of Rule 17-106. Each course in continuing mediation-related education should not have to address all of the topics listed in Rule 17-106. A course could address only one topic or several topics of Rule 17-106. The Committee agreed by consensus to the change in subsection (a)(3). The Vice Chair said that the remaining changes in the Rule have been approved by the Committee subject to being styled. The Committee approved the Rule as presented.

The Vice Chair presented Rule 17-105.1, Neutral Experts, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

ADD new Rule 17-105.1, as follows:

Rule 17-105.1. NEUTRAL EXPERTS

(a) Definition

A "neutral expert" means a person who has special expertise to provide impartial technical background information, an impartial opinion, or both in a specific area.

(b) Selection

When a court-appointed alternative dispute resolution practitioner or one or both of the parties believe that it would be helpful to have the assistance of a neutral expert, the practitioner may select a neutral expert, with the consent of the parties and at their expense, to be present at or participate in the mediation at the request of the practitioner.

(c) Confidentiality

(1) Mediation Proceedings

In a mediation, the provisions of sections (a) and (e) of Rule 17-109 apply to the neutral expert.

(2) Other Alternative Dispute Resolution Proceedings

In all other alternative dispute resolution proceedings, the parties and the alternative dispute resolution practitioner may require the neutral expert to enter into a written agreement binding the neutral expert to confidentiality. The written agreement may include provisions stating that the expert may not disclose or be compelled to disclose any communications related to the alternative dispute resolution proceeding in any judicial, administrative, or other proceedings. Communications related to the alternative dispute resolution proceeding that are confidential under an agreement allowed by this subsection are privileged and not subject to discovery, but information otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use related to the alternative dispute resolution proceeding.

Source: This Rule is new.

Rule 17-105.1 was accompanied by the following Reporter's Note.

> Based on a recommendation by the Implementation Committee of the Maryland Business and Technology Case Management Program that cases in the Program be allowed to use neutral experts, the ADR Subcommittee is proposing that the use of neutral experts be allowed in any alternative dispute resolution proceeding and that a new Rule be added to Title 17, which would contain a definition of the term "neutral expert," a procedure for selecting the expert, and a provision pertaining to the confidentiality of the expert's communications.

The Vice Chair explained that initially the term "neutral expert" was placed in Rule 17-102, Definitions. The Rules Committee had discussed previously whether the neutral expert is subject to confidentiality. The Committee had decided to include a reference to the neutral expert in all proceedings, not just mediation. The Subcommittee changed the definition of "neutral expert" slightly by adding the adjective "impartial." Section (b) has been changed to provide that if the alternative dispute practitioner or one or both of the parties would like the assistance of a neutral expert, the practitioner selects one with the consent of the parties and at their expense. Subsection (c)(1) was included in an earlier draft. Subsection (c)(2) is new. It requires the neutral expert to enter into an agreement binding the expert to confidentiality.

Judge McAuliffe asked if the consent of the parties in section (b) refers to consent to the concept of a neutral expert or consent to the particular expert. The Vice Chair answered that it means consent to both the concept and the particular

expert. Mr. Sykes suggested that the last phrase of section (b) could read as follows: "... the practitioner may, at the expense of the parties, select a neutral expert whom the parties approve." The Vice Chair responded that she is willing to further restyle this provision. The Committee approved Rule 17-105.1 as presented, subject to being restyled.

The Vice Chair presented Rule 17-107, Procedure for Approval, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-107 to add references to clerks and judges in the Business and Technology Case Management Program and to add a Committee note, as follows:

Rule 17-107. PROCEDURE FOR APPROVAL

(a) Application

A person seeking designation to conduct alternative dispute resolution proceedings pursuant to Rule 2-504 shall file an application with the clerk of the circuit court <u>and/or with the clerk of the Business and Technology Case Management Program</u> from which the person is willing to accept referrals. The application shall be substantially in the form approved by the State Court Administrator and shall be accompanied by documentation demonstrating that the applicant has the qualifications required by Rule 17-104, if the person is applying for designation as a mediator, or Rule 17-105 (a), if the person is applying for designation to conduct alternative

dispute resolution proceedings other than mediation. The State Court Administrator may require the application and documentation to be in a form that can be stored in a computer.

(b) Approved Lists

After any investigation that the county administrative judge and/or the Business and Technology Case Management Program Judge chooses to make, the county administrative judge and/or the Business and Technology Case Management Program Judge shall notify each applicant of the approval or disapproval of the application and the reasons for a disapproval. The clerk shall prepare a list of mediators found by the county administrative judge and/or the Business and Technology Case Management Program Judge to meet the qualifications required by Rule 17-104 and a separate list of persons found by the county administrative judge and/or the Business and Technology Case Management Program Judge to meet the qualifications required by Rule 17-105 (a) for conducting other alternative dispute resolution proceedings. Those lists, together with the applications of the persons on the lists, shall be kept current by the clerk and be available in the clerk's office to the public.

Committee note: The list of mediators approved pursuant to Rule 17-104 (c) to mediate cases referred from the Business and Technology Case Management Program should include information about the mediators' qualifications, experience, background, and any other information that would be helpful to litigants selecting an individual best qualified to mediate a specific case.

(c) Removal from List

After notice and a reasonable opportunity to respond, the county administrative judge and/or the Business and Technology Case Management Program Judge shall remove a person from a list if the person ceases to meet the applicable

qualifications of Rule 17-104 or Rule 17-105 (a) and may remove a person for other good cause.

Source: This Rule is new.

Rule 17-107 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 17-107 provide the Business and Technology Case Management Program the same authority to manage ADR practitioners in its program as the County Administrative Judges presently have. Since the mediator requirements for the Business and Technology Case Management Program are more stringent, it is appropriate that the program maintain its own lists and monitor its own program.

(NOTE: Judge Murphy requests that Judge Heller be invited to the Style Subcommittee meeting when this Rule is styled.)

The Vice Chair explained that Rule 17-107 had been previously approved, subject to a reconsideration as to who should be designated as the individual who handles the Business and Technology Case Management Program administration. Judge Heller said that she thought that the Committee had agreed that it would be the county administrative judge or his or her designee. The Vice Chair remarked that this has to be sorted out. The Business and Technology Case Management Program consultants would like the circuit administrative judge to be assigned to these tasks. Judge Kaplan had expressed the view that other than the Business and Technology Case Management Program, all other references should be to the county

administrative judge.

Judge Heller commented that there are two issues to be decided. One is whether the ADR Rules should refer to the county or to the circuit administrative judge. The other is whether the current language in Rule 17-107 which reads "and/or the Business and Technology Case Management Program Judge" is redundant. The language "and/or" creates a problem. The Chair stated that consistent with the recommendation of the Business and Technology Task Force, the circuit administrative judge is the one who handles administrative ADR matters for the Business and Technology Case Management Program; the other administrative ADR matters are handled by the county administrative judges. The Style Subcommittee will redraft the definitional section of the ADR Rules to avoid the use of the language "and/or." The Vice Chair commented that the Rule can provide up front that the word "judge" refers to the circuit administrative judge when the matter pertains to the Business and Technology Program, and to the county administrative judge when the matter pertains to anything else.

Judge Missouri remarked that the circuit administrative judge designates the Business and Technology judges. The Vice Chair pointed out that section (b) of Rule 17-107 provides that the county administrative judge and/or the Business and Technology Case Management Program Judge shall notify each applicant of the approval or disapproval of the application to conduct ADR proceedings. She inquired as to whether Judge

Missouri had a preference as to who notifies the applicants. Judge Missouri replied that either judge could notify the applicant. The Vice Chair suggested that after the language which reads "and/or the Business and Technology Case Management Program Judge" the following language could be added: "or that judge's designee." Judge Heller expressed her agreement with this suggestion. The Reporter clarified that with Business and Technology cases, the wording would be: "the circuit administrative judge or that judge's designee" and with other cases, the wording would be: "the county administrative judge or that judge's designee." The Committee agreed by consensus to these changes.

The Vice Chair inquired as to whether the fee schedules referred to in Rule 17-108, Fee Schedules, would use the same distinction as to circuit and county administrative judges. The Reporter asked about the clerk of the Business and Technology Program. Is the Business and Technology clerk an employee of the Clerk of the circuit court? Judge Heller responded that this varies from jurisdiction to jurisdiction. In Baltimore City, the Business and Technology clerk is called a "coordinator" and is hired by the bench. He or she is not an employee of the Clerk's office. The Chair asked to whom the Rule should refer. The Reporter replied that in Rule 17-107 (a), the Style Subcommittee could define the term "clerk."

The Vice Chair suggested that the language which reads "and/or with the clerk of the Business and Technology Case

Management Program" should be deleted. Judge Heller expressed the view that the language should remain in the Rule. The Vice Chair explained that if this language stays in the Rule, it is difficult to determine where to file the application. The Committee agreed by consensus to delete the language. The Committee approved the Rule as amended, subject to changes by the Style Subcommittee.

The Vice Chair presented Rule 17-108, Fee Schedules, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-108 to change "county administration judge" to "circuit administrative judge" and to add a certain Committee note, as follows:

Rule 17-108. FEE SCHEDULES

Subject to the approval of the Chief Judge of the Court of Appeals, the ~~county~~ circuit administrative judge of each circuit court may develop and adopt maximum fee schedules for persons conducting each type of alternative dispute resolution proceeding other than on a volunteer basis. In developing the fee schedules, the ~~county~~ circuit administrative judge shall take into account the availability of qualified persons willing to provide those services and the ability of litigants to pay for those services. A person designated by the court, other than on the agreement of the parties, to conduct an alternative dispute resolution proceeding under Rule 2-504 may not charge or

accept a fee for that proceeding in excess of that allowed by the schedule. Violation of this Rule shall be cause for removal from all lists.

Committee note: A fee schedule may set a different maximum rate for each type of alternative dispute resolution ("ADR") proceeding and may include different rates for the same type of proceeding depending upon the complexity of the action and the qualifications required of the ADR practitioner who conducts the proceeding.

Source: This Rule is new.

Rule 17-108 was accompanied by the following Reporter's Note.

Rule 17-108 currently gives authority to the county administrative judge to set fee schedules for persons conducting alternative dispute resolution ("ADR") proceedings, subject to the approval of the Chief Judge of the Court of Appeals. The Rules Committee recommends that fee schedules be set instead by the circuit administrative judge, subject to the Chief Judge's approval. The proposed change is intended to facilitate a uniform approach to fee schedules within each circuit, generally, and in particular with respect to ADR proceedings in cases assigned to the Business and Technology Case Management Program.

A Committee note is proposed to be added to make clear that the rates in the fee schedule may be based not only on the type of ADR proceeding but also on the complexity of the action and the qualifications of the ADR practitioner.

The Vice Chair stated that Rule 17-108 should have the same distinction as Rule 17-107 regarding the designation of the circuit or county administrative judge depending on whether it

pertains to the Business and Technology Case Management Program. Judge Kaplan agreed. The Committee approved the Rule subject to changes by the Style Subcommittee to make the Rule parallel to Rule 17-107.

The Vice Chair presented Rule 17-109, Mediation Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

AMEND Rule 17-109 to add the phrase "or otherwise participating in the mediation" to sections (a) and (b) and to add a Committee note following section (e), as follows:

Rule 17-109. MEDIATION CONFIDENTIALITY

(a) Mediator

Except as provided in sections (c) and (d) of this Rule, a mediator and any person present or otherwise participating in the mediation at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(b) Parties

Subject to the provisions of sections (c) and (d) of this Rule, (1) the parties may enter into a written agreement to maintain the confidentiality of all mediation communications and to require any person present or otherwise participating in the mediation at the request of a party to maintain the confidentiality of mediation communications and (2) the parties and any person present or otherwise participating in

the mediation at the request of a party may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(c) Signed Document

A document signed by the parties that reduces to writing an agreement reached by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise.

Cross reference: See Rule 9-205 (d) concerning the submission of a memorandum of the points of agreement to the court in a child access case.

(d) Permitted Disclosures

In addition to any disclosures required by law, a mediator and a party may disclose or report mediation communications to a potential victim or to the appropriate authorities to the extent that they believe it necessary to help:

(1) prevent serious bodily harm or death, or

(2) assert or defend against allegations of mediator misconduct or negligence.

Cross reference: For the legal requirement to report suspected acts of child abuse, see Code, Family Law Article, §5-705.

(e) Discovery; Admissibility of Information

Mediation communications that are confidential under this Rule are privileged and not subject to discovery, but information otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

Committee note: A neutral expert appointed pursuant to Rule 17-105.1 is subject to the provisions of sections (a) and (e) of this Rule.

Source: This Rule is new.

Rule 17-109 was accompanied by the following Reporter's Note.

> The Implementation Committee of the Maryland Business and Technology Case Management Program recommended the addition of a definition of "neutral expert" with language clarifying that the expert is to be bound by confidentiality requirements.
>
> The proposed amendment to Rule 17-109 adds to section (a) and (b) the phrase "or otherwise participating in the mediation" to encompass the situation where a neutral expert provides technical background information in conjunction with the mediation, but is not present during the mediation. The proposed Committee note following section (e) draws attention to the applicability of section (a) and (e) to neutral experts.

The Vice Chair explained that language has been added to Rule 17-109 because of the potential for a mediator to consult with an expert who is not present during the mediation. The Committee note, which originally appeared after section (a) has been moved to the end of the Rule. The Committee approved the Rule as presented.

Agenda Item 5. Consideration of proposed amendments to Rule 2-501 (Motion for Summary Judgment)

Mr. Klein presented Rule 2-501, Motion for Summary Judgment, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-501 by adding language to and deleting language from section (b), as follows:

Rule 2-501. MOTION FOR SUMMARY JUDGMENT

(a) Motion

Any party may file at any time a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if filed before the day on which the adverse party's initial pleading or motion is filed.

(b) Response

The response to a motion for summary judgment shall ~~identify with particularity the material facts that are disputed. When a motion for summary judgment is supported by an affidavit or other statement under oath,~~ (1) set forth a separate statement of each material fact as to which it is contended there exists a genuine issue to be tried and (2) as to each fact identify the specific document, discovery response, or deposition testimony (by page or line) which it is alleged establishes the issue. The response may be served no later than 30 days after service of the motion for summary judgment and supporting affidavit. ~~an~~ An opposing party who desires to controvert any fact contained in ~~it~~ the record may not rest solely upon allegations contained in the pleadings, but shall support the response by an affidavit or other written statement under oath.

(c) Form of Affidavit

An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

(d) Affidavit of Defense Not Available

If the court is satisfied from the affidavit of a party opposing a motion for summary judgment that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit, the court may deny the motion or may order a continuance to permit affidavits to be obtained or discovery to be conducted or may enter any other order that justice requires.

(e) Entry of Judgment

The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. By order pursuant to Rule 2-602 (b), the court may direct entry of judgment (1) for or against one or more but less than all of the parties to the action, (2) upon one or more but less than all of the claims presented by a party to the action, or (3) for some but less than all of the amount requested when the claim for relief is for money only and the court reserves disposition of the balance of the amount requested. If the judgment is entered against a party in default for failure to appear in the action, the clerk promptly shall send a copy of the judgment to that party at the party's last known address appearing in the court file.

Cross reference: Section 200 of the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C. Appendix, §520, imposes specific requirements that must be fulfilled before a default judgment may be entered.

(f) Order Specifying Issues or Facts Not in Dispute

When a ruling upon a motion for summary judgment does not dispose of the entire action and a trial is necessary, the court, on the basis of the pleadings, depositions, answers to interrogatories, admissions, and affidavits and, if necessary, after interrogating counsel on the record, may enter an order specifying the issues or facts that are not in genuine dispute. The order controls the subsequent course of the action but may be modified by the court to prevent manifest injustice.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 610 a 1 and 3.
Section (b) is new.
Section (c) is derived from former Rule 610 b.
Section (d) is derived from former Rule 610 d 2.
Section (e) is derived in part from former Rules 610 d 1 and 611 and is, in part, new.
Section (f) is derived from former Rule 610 d 4.

Rule 2-501 was accompanied by the following Reporter's Note.

As a method of encouraging judges to grant more motions for summary judgment, the Trial Subcommittee recommends the addition of language to section (b) which states more affirmatively that the response to a motion for summary judgment must contain specific references to facts which show a genuine dispute. This language is derived from Nebraska Local Rule 56.1 (b). The Subcommittee also recommends deleting the introductory language of the second sentence of section (b), because the Subcommittee feels that the requirement to cite to specific facts in the record that demonstrate a genuine dispute should apply even when the motion for summary judgment is not supported by a statement under oath.

Mr. Klein told the Committee that he would present some legislative history behind the changes to Rule 2-501. The Trial and Discovery Subcommittees worked jointly on the Rule in response to the invitation of the Court of Appeals in the case of Pittman v. Atlantic Realty, 359 Md. 513 (2000), which pertained to "sham affidavits." The Rules Committee approved changes to Rule 2-415, Deposition–Procedure, concerning substantive changes to deposition testimony, including a time frame for accomplishing these changes. The Trial Subcommittee's intent in changing 2-415 and 2-501 is to conform Maryland practice to federal practice and to curtail the use of eleventh hour "sham affidavits" in summary judgment practice. In examining summary judgment, the Subcommittees and the Rules Committee in general are of the opinion that, with some judges, summary judgment has become the less favored stepchild and is not perceived as a valuable case management tool. The Rules Committee, however, believes that summary judgment is a valuable case management tool, like alternative dispute resolution and differentiated case management, and it should not be given second class status.

The Subcommittee could not address the issue of encouraging the bench to grant summary judgments -- this is a matter for judicial education. However, the Subcommittee could address the problem of judges considering motions for summary judgment with so much supporting material that it would be like trying to find a "needle in a haystack" or a "go fish" expedition. The Subcommittee looked at a case management order used by the

Honorable Frederick N. Smalkin, Judge of the U.S. District Court for the District of Maryland. The language of the order requires specificity by a party opposing a motion for summary judgment, by requiring details of the documents or testimony demonstrating a genuine dispute of material fact. The Subcommittee looked at parallel rules in other states. Some went farther than the Rule drafted by the Subcommittee, requiring a clear articulation of the facts in dispute, the location in the record, and a specific form to be used by the party opposing summary judgment. The Subcommittee did not go that far. The proposed language is borrowed conceptually from the Local Rules of the United States District Court for the District of Nebraska. It is clear, concise, simple, and easy to execute. The current Rule requires a party to identify the material facts in dispute. The new language requires a separate statement of each material fact that is disputed and identification of the specific document or testimony which provides the basis establishing the disputed fact.

Mr. Klein noted that the existing Rule requires a party to submit an affidavit only if the moving party submits testimony under oath. In some cases, a party moves for summary judgment based on the absence of an element of the claim or defense. It is impossible to cite to the absence of an element. A judge may have to read through 500 pages to find nothing. If someone contends that an element is missing, the opponent has to identify in the record where the element is located to defeat the motion

for summary judgment. The hope of the Subcommittee is that by making incremental changes to the summary judgment procedure, it will signal a renewed interest in summary judgment as a valuable tool in managing a busy court docket.

The Vice Chair commented that when the Rules were revised twenty years ago, the attempt was made to keep time periods as similar as possible. In the circuit court, all motions have a response time of 15 days (or 18 if they are mailed). She questioned as to why Rule 2-501 provides for a response within 30 days. Mr. Klein answered that his personal view is that 15 days would be an appropriate time for a response. Some people feel that at an important stage in a case, there may be a need for transcripts, and 15 days may not be adequate to prepare the transcript.

Mr. Titus remarked that he was in agreement with the proposed change, but the last sentence of the new language should be deleted. There should not be a different time period for the response. If more time is needed, Rule 1-204, Motion to Shorten or Extend Time Requirements, can take care of it. The last sentence presumes that there will be a supporting affidavit, but the Rules do not require it. Otherwise, the proposed change is beneficial. The Vice Chair noted that if the last sentence of the proposed language is deleted, the response time would be the same as for any motion.

Ms. Potter expressed the view that the addition to the Rule of setting forth a separate statement of fact will provide a

useful tool. Judge Heller observed that it is confusing to start with a new time frame, especially since motions to dismiss may become motions for summary judgment. Adding time would affect hundreds of cases. Baltimore City is trying to reduce delay and does not need any time periods added to cases. Other than the time extension, the proposal is excellent and would assist state judges the way federal judges are assisted in focusing on identifying items of dispute in a case.

Judge Heller inquired as to why the Subcommittee deleted the first sentence of section (b). Mr. Klein responded that this language is redundant. Judge Heller pointed out that section (d) of Rule 7-207, Memoranda, which pertains to appeals from an administrative agency, states: "A person who has filed a response but who fails to file an answering memorandum within the time prescribed by this Rule may not present argument except with the permission of the court." There is precedent to include in the Rule that if there is no timely response, the court has discretion as to whether a late response will be allowed. The Chair said that this can be handled by Rule 2-311, Motions.

Judge Kaplan asked about changing the time period for a response from 30 to 15 days. The Chair pointed out that Mr. Titus suggested deleting the sentence which provides the 30-day time period. Mr. Klein agreed with this suggestion, but he commented that the response should be in writing. Mr. Titus said that if the word "file" is used, this will indicate that the response has to be in writing. The Chair suggested that in place

of the language in section (b) which reads "set forth," the word "file" could be used. Mr. Klein observed that if the sentence is deleted, the Rule needs to clarify that the response must be in writing. The Vice Chair suggested that the language could be changed to read as follows: "...the response filed must state...". Mr. Titus commented that the idea of core exchange did not stay in existence and has reemerged as pattern interrogatories. Thirty days is too long as a response time. Since motions to dismiss may become motions for summary judgment, the deadline for both should be the same.

Mr. Klein suggested that the Rule should not be sent back to the Trial Subcommittee. He suggested that section (b) begin as follows: "The response to a motion for summary judgment shall be filed and shall (1) set forth....". This would be subject to being restyled. Judge Missouri asked about the language "by page or line" and suggested that it should read "by page and line." The Committee agreed to Judge Missouri's change by consensus.

The Chair inquired if the proposed changes to Rule 2-501 address the issue of "sham affidavits." Mr. Klein answered that these changes do not address that issue. It is addressed by the proposed amendments to Rule 2-415, Deposition–Procedure, that were approved at an earlier meeting. The amendments allow a window of time to correct deposition testimony. Mr. Klein pointed out that mere allegation does not defeat a motion for summary judgment. The Chair said that the last sentence of section (b) provides that a party may not rest solely upon the

allegations in a pleading, but must support the allegation by affidavit or written statement under oath. The Vice Chair noted that the new language in section (b) only pertains only to the response. This may be too narrow, but the Style Subcommittee can apply the new language to both the motion and the response.

The Chair said that the Committee needs to come to a consensus as to the substance of the proposed changes. The Vice Chair commented that section (e) of Rule 2-501 was modified many years ago to change the language "pleadings, depositions, answers to interrogatories, admissions, and affidavits" to the language "motion and response." The "laundry list" language implied that the court had to look at everything to determine whether a genuine dispute of material fact existed. The intent of the amendment was to limit the court from having to "go fishing." Mr. Titus added that since discovery materials are no longer filed, the party needs to append any pertinent materials to the response.

The Vice Chair inquired as to whether the language "separate statement" in subsection (b)(1) means that there has to be a separate document filed. The Chair suggested that the language could be: "...file a statement that sets forth separately each material fact...". The Vice Chair observed that as to each fact, the document containing the fact must be identified. She asked if the word "exhibit" could be substituted for "document." Judge Kaplan responded that the document is not necessarily an exhibit. The Vice Chair suggested that the term could be:

"document of record." The Chair said that a document is identified by attaching it to the response. The Vice Chair added that it must be in the court file. Mr. Klein suggested that the language could read: "(2) as to each fact identify and attach the specific document...". The Reporter suggested that the language could read as follows: "...identify and attach the pertinent part of the specific document...".

The Vice Chair noted that the proposed language only applies to the response to the motion for summary judgment, and she asked if it should also apply to the motion. Ms. Perez commented that she had been a former Reporter to the Committee, and she has now been appointed to a Maryland State Bar Association committee which will be a liaison with the Rules Committee. She pointed out that the Nebraska Rule from which the proposed changes are derived imposes the same obligation on the moving party as on the responding party. Mr. Klein answered that the Subcommittee had discussed this and had concluded that they were in favor of the approach of Judge Smalkin. One cannot attach a document if it does not exist. Mr. Klein stated that the change to Rule 2-501 provides a method to put everything relevant before the judge.

Mr. Titus observed that requiring motions for summary judgment to follow the procedures set forth in section (b) for responses may not be a good idea. Every motion for summary judgment should not be burdened with the requirements of section (b). The Chair suggested that the last sentence of section (b) should be deleted. Ms. Perez pointed out that Rule 2-311 (d),

Motions, already provides "A motion or a response to a motion that is based on facts not contained in the record or papers on file in the proceeding shall be supported by affidavit and accompanied by any papers on which it is based." A cross reference to Rule 2-311 could be added. The Vice Chair commented that it may be confusing to be directed to refer to Rule 2-311. It is important to clarify that the supporting documentation to the allegations contained in the pleadings must be attached, or there must be a clear reference as to where it is in the file. Judge Heller remarked that most complaints are not made under oath, and parties must realize that they cannot rely on what is in the complaint. The last sentence of section (b) is very important. Mr. Klein reiterated that he would like the last sentence of section (b) to remain in the Rule.

The Chair noted that the current version of Rule 2-501 provides: "When a motion for summary judgment is supported by an affidavit or other statement under oath, an opposing party who desires to controvert any fact contained in it may not rest solely upon allegations contained in the pleadings...". The Vice Chair said that if the last sentence of section (a) is juxtaposed with the new language, it fits in with the idea that the court cannot enter a judgment unless it has otherwise admissible evidence before it. Mr. Titus commented that if a plaintiff makes allegations in the complaint and files a motion for summary judgment, but there is no response, summary judgment is an appropriate remedy. If there is a default and liability is

determined, an affidavit in support has to be filed with the motion for summary judgment. The Vice Chair remarked that a summary judgment by default cannot be granted without the court looking to see which allegations are true. Ms. Potter observed that section (e) of Rule 2-501 addresses summary judgment in the instance of default.

Ms. Perez said that the purpose of the changes to the Rule is not clear. The goals seem to be identification of the facts in dispute and of how the opposing party controverts a fact that had been alluded to in the motion. The Chair commented that the proposed language solves the problem. A motion for summary judgment is based on the defendant's contention that the plaintiff cannot generate a legitimate jury question. The issue is what kind of affidavit the defendant should file. An affidavit of nothing makes no sense. The affidavit can state that the party requested information in discovery and that no information was given. Traditionally, no affidavit is filed if an element cannot be proven. Mr. Klein stated that the intent of the Subcommittee is to not require the moving party to file an affidavit or a statement under oath if the basis of the motion is an absence of material fact.

Mr. Titus asked about the language in the phrase in section (b) which reads "genuine issue to be tried." The federal rule terminology is "establishing a genuine dispute." The Chair suggested that the language in subsection (b)(2) should be changed from "which it is alleged establishes the issue" to "that

establishes the dispute." The point that a motion can be based on the absence of evidence needed to get the case to the jury can be made in a Committee note or in the Rule. The Chair suggested that the sentence at the end of section (a) could read, "The motion does not have to be supported by affidavit unless filed before the day on which the adverse party's initial pleading or motion is filed." The language from the second sentence now in Rule 2-501 (b) which begins, "When a motion for summary judgment is supported by an affidavit or other statement under oath, an opposing party who desires to controvert..." could be added at the end of section (a). Mr. Klein cautioned that there is an argument that if a motion for summary judgment is filed with no affidavit, then the party opposing has no obligation to come up with admissible evidence to demonstrate that there is a dispute. The addition of the Chair's language implies that no affidavit filed by one party means the other party does not have to file anything to demonstrate that there is a genuine dispute.

The Vice Chair asked why the general motions rule does not already cover this. Mr. Klein replied that the language in Rule 2-501 has an educational purpose. Judge Dryden added that Rule 2-501 will be self-contained but consistent with general motions practice. It can do no harm to keep this in Rule 2-501, also. Ms. Potter questioned as to whether it is necessary to itemize the list in section (f). The Vice Chair responded that this was inadvertently left in when the parallel language was taken out of section (e), and the language should be taken out. It should

read as follows: "... the court may enter an order specifying the issue or facts...".

The Chair proposed that section (b) of Rule 2-501 should contain the following language: "When a motion for summary judgment is based upon the contention that the adverse party cannot produce evidence sufficient to generate a genuine dispute to be tried ... ." Mr. Klein agreed with the Chair's suggestion. The Chair commented that in those situations in which there is no evidence to satisfy one of the elements or the other party brought in inadmissible evidence, the responding party can move for summary judgment on the grounds that there is no evidence to support the contention. The Committee agreed by consensus to this change.

Mr. Klein said that section (b) would be changed to begin as follows: " The response to a motion for summary judgment shall be filed and shall (1) set forth....". The Reporter suggested that the language should be "... shall be in writing and shall set forth... ." The Committee agreed by consensus to the Reporter's change. Mr. Klein asked if there were any changes to subsection (b)(2). Judge Heller expressed the view that this provision is not necessary, because it is covered by Rule 2-311. The Chair noted that there was a suggestion that subsection (b)(2) begin as follows: "(2) as to each fact identify and attach the specific document....". Judge Heller observed that the second sentence of Rule 2-311 (c) states: "A party shall attach as an exhibit to a written motion or response any document that the party wishes the

court to consider in ruling on the motion or response....". Mr. Klein commented that if the court wants to make sure that the appropriate documentation is attached, subsection (b)(2) should remain in the Rule, to avoid the necessity of having to turn to Rule 2-311 for guidance. Judge Missouri remarked that Rule 2-501 is an educational tool for judges and lawyers, and it should be as self-contained as possible.

The Reporter suggested that the language in subsection (b)(2) should be ".... as to each fact, identify and attach the relevant portions of the specific document....". The Committee agreed by consensus to this change. The Committee approved the Rule as amended.

Agenda Item 6. Consideration of proposed amendments to Rule 1-202 (Definition) or Rule 1-322 (Filing of Pleadings and Other Papers) in light of Beyer v. Morgan State, 369 Md. 335 (2002)

The Vice Chair presented Rules 1-202, Definitions, and 1-322, Filing of Pleadings and Other Papers, for the Committee's consideration.

ALTERNATIVE 1

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 200 - CONSTRUCTION, INTERPRETATION, AND DEFINITIONS

AMEND Rule 1-202 to add a definition of "to file," as follows:

Rule 1-202. DEFINITIONS

. . .

(j) File, to

"To file" means to place a pleading or other written paper in the official custody of the court. A paper filed electronically in compliance with Rule 16-307 or 16-506 is a written paper for the purpose of applying these rules.

~~(j)~~ (k) Guardian

. . .

~~(k)~~ (l) Holiday

. . .

~~(l)~~ (m) Individual Under Disability

. . .

~~(m)~~ (n) Judge

. . .

~~(n)~~ (o) Judgment

. . .

~~(o)~~ (p) Levy

. . .

~~(p)~~ (q) Money Judgment

. . .

~~(q)~~ (r) Original pleading

. . .

~~(r)~~ (s) Person

. . .

~~(s)~~ (t) Pleading

. . .

~~(t)~~ (u) Proceeding

. . .

~~(u)~~ (v) Process

. . .

~~(v)~~ (w) Property

. . .

~~(w)~~ (x) Return

. . .

~~(x)~~ (y) Sheriff

. . .

~~(y)~~ (z) Subpoena

. . .

~~(z)~~ (aa) Summons

. . .

~~(aa)~~ (bb) Writ

. . .

Source: This Rule is derived as follows:

. . .

Section (j) is new.
Section ~~(j)~~ (k) is derived from former Rule 5 m.
Section ~~(k)~~ (l) is new.
Section ~~(l)~~ (m) is derived from former Rule 5 r.
Section ~~(m)~~ (n) is derived from former Rule 5 n.
Section ~~(n)~~ (o) is derived from former Rule 5 o.
Section ~~(o)~~ (p) is new.
Section ~~(p)~~ (q) is new.
Section ~~(q)~~ (r) is derived from the last sentence of former Rule 5 v.

Section ~~(r)~~ (s) is derived from former Rule 5 q.

Section ~~(s)~~ (t) is new and adopts the concept of federal practice set forth in FRCP 7 (a).

Section ~~(t)~~ (u) is derived from former Rule 5 w.

Section ~~(u)~~ (v) is derived from former Rule 5 y.

Section ~~(v)~~ (w) is derived from former Rule 5 z.

Section ~~(w)~~ (x) is new.

Section ~~(x)~~ (y) is derived from former Rule 5 cc.

Section ~~(y)~~ (z) is derived from former Rule 5 ee.

Section ~~(z)~~ (aa) is new.

Section ~~(aa)~~ (bb) is derived from former Rule 5 ff.

Rule 1-202 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 1-202 overrules the holding in Beyer v. Morgan State, 369 Md. 335 (2002) that allows a motion for summary judgment to be filed orally. The amendment makes clear that when a rule, such as Rule 2-501 (a), requires that a pleading or paper be "filed," the pleading or paper must be in writing and placed in the official custody of the court.

ALTERNATIVE 2

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 300 - GENERAL PROVISIONS

AMEND Rule 1-322 to make clear that a paper or pleading that is filed must be in writing and placed in the official custody of the court, as follows:

Rule 1-322. FILING OF PLEADINGS AND OTHER PAPERS

(a) Generally

~~The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with~~ Whenever these rules require the filing of a pleading or paper with the court, the pleading or paper must be in writing and is filed by placing the pleading or paper in the official custody of the court. The pleading or paper is in the official custody of the court when delivered to the clerk of the court, except that a judge of that court may accept the filing, in which event the judge shall note on the papers the filing date and forthwith transmit them to the office of the clerk. No filing of a pleading or paper may be made by transmitting it directly to the court by electronic transmission, except pursuant to an electronic filing system approved under Rules 16-307 or 16-506.

(b) Photocopies; Facsimile Copies

A photocopy or facsimile copy of a pleading or paper, once filed with the court, shall be treated as an original for all court purposes. The attorney or party filing the copy shall retain the original from which the filed copy was made for production to the court upon the request of the court or any party.

Cross reference: See Rule 1-301 (d), requiring that court papers be legible and of permanent quality.

Source: This Rule is derived in part from F.R.C.P. 5 (e) and Rule 102 1 d of the Rules of the United States District Court for the District of Maryland and is in part new.

Rule 1-322 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 1-322

> overrules the holding in Beyer v. Morgan State, 369 Md. 335 (2002) that allows a motion for summary judgment to be filed orally. The amendment makes clear that when a rule, such as Rule 2-501 (a), requires that a pleading or paper be "filed," the pleading or paper must be in writing and placed in the official custody of the court.

The Vice Chair explained that Rule 2-501 (a) provides that a party makes a motion for summary judgment by filing it. She stated that in the case of Beyer v. Morgan State, 369 Md. 335 (2002), the Court of Appeals held that a motion for summary judgment may be filed orally. However, the Court pointed out that an oral motion for summary judgment provides no other opportunity for the other party to respond. The proposed rules changes are intended to reenforce the concept, which is used in Rules drafted during and after the 1984 revision, that something which is "filed" must be in writing. If a motion is made orally, there is nothing tangible to "file.".

Judge McAuliffe suggested that the word "overrules" in the Reporter's note be changed to "is prompted by" because the former word is too harsh. The Reporter stated that she would make this change. The Vice Chair noted that the proposed amendments would require a written motion in all summary judgment cases. There are two alternative methods to accomplish this goal. One is to amend Rule 1-202 by adding a definition of the word "file." The other is to amend Rule 1-322 to explain what a filing of a pleading or paper entails. The Vice Chair commented that neither method involves a change to Rule 2-501. The Reporter added that

if only Rule 2-501 were amended in response to Pittman, this would mean that other Rules in which the word "file" is used would have to be changed, also.

The Chair commented that a situation could arise where, in a minor case, such as a "slip and fall," an attorney forgot to file a written motion for summary judgment. On the day of the trial, the judge should not have to refuse the oral motion, because it was not in writing. If the judge is forced to go forward with a jury case, it is a waste of jury resources. It might be more efficient for the jury to hear a serious criminal case. The Vice Chair reiterated the lack of opportunity for the other party to respond to an oral motion for summary judgment. The Chair noted that in some situations when someone simply forgot to file the motion, and it is clear that the plaintiff is entitled, it would be beneficial for the judge to consider an oral motion. The Vice Chair observed that the scheduling order provided for in Rule 2-504, Scheduling Order, addresses the date for filing a motion for summary judgment. Judge Heller expressed the opinion that the motion should be in writing, and the Vice Chair expressed the same preference. The Chair argued that the judge should not be locked into considering only a written motion.

The Vice Chair pointed out that if the judge postpones a minor case to allow time for a written motion for summary judgment, the case can be set for a few days later, and the judge can hear the more important case in the meantime. Judge Heller remarked that in a significant case, a member of the bar has the

responsibility to file a written request for summary judgment. Judge McAuliffe said that he preferred the change to Rule 1-322.

Judge Heller said that she was concerned about a party being allowed to file a motion for summary judgment "at any time." The Pittman case provides that a motion for summary judgment can override the deadline in a scheduling order. The Reporter suggested that section (a) of Rule 2-501 could include the following language: "Subject to the provisions of a scheduling order, a party may file a motion for summary judgment at any time." Judge McAuliffe suggested that the language "at any time" be taken out. The Chair said that there could be a Committee note which would respond to the potential due process contentions as well as to the problem pointed out by The Honorable John F. Fader of the Circuit Court of Baltimore County in his letter of August 23, 2002. (See Appendix 3).

Judge McAuliffe moved that the language "at any time" be deleted from section (a) of Rule 2-501. The motion was seconded and passed unanimously. Judge McAuliffe suggested that Rule 1-322 should be changed as proposed to clarify what "filing" means. The Committee agreed by consensus to this suggestion. Judge McAuliffe moved that the proposed new language read as follows: "... require the filing of pleadings, motions, or other papers with the court ...". The motion was seconded and passed unanimously.

Agenda Item 7. Consideration of a proposed amendment to Rule 15-502 (Injunctions - General Provisions)

The Vice Chair presented Rule 15-502, Injunctions - General Provisions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 500 - INJUNCTIONS

AMEND Rule 15-502 to delete from section (e) the phrase "or on the record," as follows:

Rule 15-502. INJUNCTIONS – GENERAL PROVISIONS

(a) Exception to Applicability - Labor Disputes

Rules 15-501 through 15-505 do not modify or supersede Code, Labor and Employment Article, Title 4, Subtitle 3 or affect the prerequisites for obtaining, or the jurisdiction to grant, injunctions under those Code sections.

(b) Issuance at Any Stage

Subject to the rules in this Chapter, the court, at any stage of an action and at the instance of any party or on its own initiative, may grant an injunction upon the terms and conditions justice may require.

(c) Adequate Remedy at Law

The court may not deny an injunction solely because the party seeking it has an adequate remedy in damages unless the adverse party has filed a bond with security that the court finds adequate to provide for the payment of all damages and costs that the

adverse party might be adjudged to pay by reason of the alleged wrong.

(d) Not Binding Without Notice

An injunction is not binding on a person until that person has been personally served with it or has received actual notice of it by any means.

(e) Form and Scope

An order granting an injunction shall (1) be in writing or ~~on the record~~, (2) set forth the reasons for issuance; (3) be specific in terms; and (4) describe in reasonable detail, and not by reference to the complaint or other document, the act sought to be mandated or prohibited.

(f) Modification or Dissolution

A party or any person affected by a preliminary or a final injunction may move for modification or dissolution of an injunction.

Cross reference: For enforcement of an injunction, see Rule 2-648.

Source: This Rule is derived from former Rules BB71, 76, 77, 78, and 79.

Rule 15-502 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 15-502 deletes from section (e) the phrase, "or on the record."

This change conforms the Rule to the "separate document" requirement of Rule 2-601 (a), which is applicable when the injunction is a judgment. Even when an injunction is interlocutory, an appeal may be taken as provided in Code, Courts Article, §3-303, and it is therefore preferable that all orders granting injunctions be in writing, rather

than dictated into the record.

The Vice Chair explained that the proposed change conforms the Rule to the requirement that a judgment must be on a separate piece of paper. Judge Heller noted that an injunction and the reasons for issuance are not necessarily written. Judge McAuliffe commented that within section (e), numbers (1), (3), and (4) are in writing as part of the order. Number (2) is not contained in the order. The Vice Chair suggested that the wording could be that the reasons for issuance may be in writing or set forth on the record. Mr. Sykes remarked that if someone takes an immediate appeal and cannot obtain a transcript, the order would contain a concise statement of the reasons. The Vice Chair noted that if the order did not have this statement, it would cause problems on appeal, because there would be no reasons stated for the appellate court to consider.

Judge Heller pointed out that in a case involving the size of the City Council of Baltimore City, the case was filed and the matter decided within a week. A hearing was held on Wednesday; the Court of Appeals made its final decision on Friday morning. It would have been difficult for the judge to have written out the entire decision. The appellate court only needed an order. The Chair suggested that subsection (2) be deleted from section (e). Judge Heller expressed the view that the reasons for issuance should be required. Mr. Titus suggested that the Rule could provide that the reasons for issuance can be stated in

writing or on the record. The Chair suggested that subsection (e)(2) should be moved and become the first sentence of section (e). It should read as follows: "the reasons for issuance or denial of the injunction shall be in writing or on the record." The Committee agreed by consensus to the Chair's suggestion and to the deletion of the language "or on the record" from subsection (e)(1).

After the lunch break, the Vice Chair presented Rule 2-649, Charging Order, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-649 to conform the language of a certain Committee note to the language of the Committee note that follows Rule 2-124, as follows:

Rule 2-649. CHARGING ORDER

(a) Issuance of Order

Upon the written request of a judgment creditor of a partner, the court where the judgment was entered or recorded may issue an order charging the partnership interest of the judgment debtor with payment of all amounts due on the judgment. The court may order such other relief as it deems necessary and appropriate, including the appointment of a receiver for the judgment debtor's share of the partnership profits and any other money that is or becomes due to the judgment debtor by reason of the partnership interest.

(b) Service

The order shall be served on the partnership in the manner provided by Chapter 100 of this Title for service of process to obtain personal jurisdiction. The order may be served in or outside the county. Promptly after service of the order upon the partnership, the person making service shall mail a copy of the request and order to the judgment debtor's last known address. Proof of service and mailing shall be filed as provided in Rule 2-126. Subsequent pleadings and papers shall be served on the creditor, debtor, and partnership in the manner provided by Rule 1-321.

Committee note: ~~Although this Rule does not preclude service upon a partner who is also the person whose partnership interest is being charged, the validity of such service in giving notice to the partnership is subject to appropriate due process constraints.~~ If a person served pursuant to this Rule is a plaintiff as well as a person upon whom service on a defendant entity is authorized by the Rule, the validity of service on the plaintiff to give notice to the defendant entity is subject to appropriate due process constraints.

Source: This Rule is new.

Rule 2-649 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 2-649 conforms the language of the Committee note that follows the Rule to the language of the Committee note that follows Rule 2-124, which was included in the One Hundred Forty-Ninth Report of the Rules Committee.

The Vice Chair explained that the amendment to Rule 2-649 conforms the language of the Committee note following the Rule to the language of the Committee note following Rule 2-124, Process -- Persons to be Served. The Committee approved the amendment to

the Committee note by consensus. The Committee approved the Rule as presented.

Agenda Item 2. Consideration of proposed amendments to: Rule 3.5 (Impartiality and Decorum of the Tribunal) of the Maryland Lawyers' Rules of Professional Conduct and Canon 2B of proposed revised Rule 16-813, Maryland Code of Judicial Conduct

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The Chair presented Rules 3.5, Impartiality and Decorum of the Tribunal, and Rule 16-813, Maryland Code of Judicial Conduct, Canon 2B, Avoidance of Impropriety and the Appearance of Impropriety.

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND RULES OF PROFESSIONAL CONDUCT

ADVOCATE

AMEND Rule 3.5 to add a new subsection (a)(8), as follows:

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(2) before the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with anyone known to the lawyer to be on the list from which the jurors will be selected for the trial of the case;

(3) during the trial of a case with which the lawyer is connected, communicate outside

the course of official proceedings with any member of the jury;

(4) during the trial of a case with which the lawyer is not connected, communicate outside the course of official proceedings with any member of the jury about the case;

(5) after discharge of a jury from further consideration of a case with which the lawyer is connected, ask questions of or make comments to a member of that jury that are calculated to harass or embarrass the juror or to influence the juror's actions in future jury service;

(6) conduct a vexatious or harassing investigation of any juror or prospective juror;

(7) communicate ex parte about an adversary proceeding with the judge or other official before whom the proceeding is pending, except as permitted by law; ~~or~~

(8) discuss with a judge potential employment of the judge if the lawyer or a firm with which the lawyer is associated has a matter that is pending before the judge; or

~~(8)~~ (9) engage in conduct intended to disrupt a tribunal.

(b) A lawyer who has knowledge of any violation of section (a) of this Rule, any improper conduct by a juror or prospective juror, or any improper conduct by another towards a juror or prospective juror, shall report it promptly to the court or other appropriate authority.

COMMENT

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Maryland Canons and Rules of Judicial Ethics, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

With regard to the prohibition in subsection (a)(2) of this Rule against communications with anyone on "the list from which the jurors will be selected," see Rules 2-512 (c) and 4-312 (c) of the Maryland Rules of Procedure.

Code Comparison.--With regard to Rule 3.5 (a) and (b), DR 7-108 (A) provides that "before the trial of a case a lawyer . . . shall not communicate with . . . anyone he knows to be a member of the venire . . . ." DR 7-108 (B) provides that "during the trial of a case . . . a lawyer . . . shall not communicate with . . . a juror concerning the case." DR 7-109 (C) provides that a lawyer shall not "communicate . . . as to the merits of the cause with a judge or an official before whom the proceeding is pending except . . . upon adequate notice to opposing counsel . . . (or) as otherwise authorized by law."

With regard to Rule 3.5 ~~(a)(8)~~ (a)(9), DR 7-106 (C)(6) provides that a lawyer shall not "engage in undignified or discourteous conduct which is degrading to a tribunal."

Rule 3.5 was accompanied by the following Reporter's Note.

Lawyers' offers of employment to judges was the subject of House Bill 1398 (cross filed with Senate Bill 875) in the 2002 legislative session. When HB 1398 was withdrawn by its sponsor, the thought was that perhaps this topic could be addressed by

rule, rather than by legislation.

The Attorneys Subcommittee recommends that Rule 3.5 of the Maryland Lawyers' Rules of Professional Conduct be amended to prohibit a lawyer from discussing potential employment of a judge before whom the lawyer or the lawyer's firm has a pending matter. The Subcommittee also recommends an addition to Canon 2B of proposed revised Rule 16-813, Maryland Code of Judicial Conduct, that expressly mentions employment offers and opportunities and requires that the judge not allow judicial conduct to be improperly influence or appear to be improperly influenced by such offers or opportunities.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Canon 2B of proposed revised Rule 16-813, Maryland Code of Judicial Conduct, by adding a certain provision concerning employment offers and opportunities, as follows:

Rule 16-813. MARYLAND CODE OF JUDICIAL CONDUCT

. . .

CANON 2

Avoidance of Impropriety and the Appearance of Impropriety

A. A judge shall avoid impropriety and the appearance of impropriety. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

COMMENT

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The obligation to avoid impropriety and the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the obligation is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in this Code. Actual improprieties under this standard include violations of law, other specific provisions of this Code, or other court rules. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired. See also the Comment to Canon 2C.

Committee note: The Comment to Canon 2A is based on the Commentary to ABA Code (2000), Canon 2A, with the omission of the second sentence, as to avoiding impropriety and appearance of impropriety.

The Judicial Ethics Committee has held

that neither judicial nor non-judicial activities of a judge should raise questions as to improper favoritism, partiality, or influence due to familial or social connections, indebtedness, such as might arise through referral of business to family or friend, political endorsement, acceptance of gifts, fund-raising, or entrepreneurial activities.

B. A judge shall not allow judicial conduct to be improperly <u>influenced or appear to be improperly</u> influenced by family, political, social, or other relationships <u>or by employment offers or opportunities</u>. A judge shall not lend or use the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence judicial conduct. A judge shall not testify voluntarily as a character witness.

COMMENT

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage, such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge also must avoid lending or using the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a **member**

of the judge's family. As to the acceptance of awards, see Canon 4D (5)(c) and Comment.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may serve as a reference or provide a letter of recommendation based on the judge's own **knowledge.** A judge must not initiate, however, a personal communication of information to a sentencing judge or a corrections or probation officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of judicial office in support of the party for whom the judge testifies. A judge may, however, testify when properly subpoenaed.

Committee note: The Comment to Canon 2B is based on the Commentary to ABA Code (2000), Canon 2B, with the omission of the third sentence of the second paragraph, as to retaining control over advertisement of publications, which was considered impracticable.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of national origin, race, religion, or sex.

COMMENT

Membership of a judge in an organization that practices invidious discrimination on the basis of national origin, race, religion, or sex gives rise to perceptions that the judge's impartiality is impaired. It is therefore inappropriate for a judge to continue to hold membership in an organization that the judge **knows**, or

reasonably should **know**, practices and will continue to practice such invidious discrimination so as to give rise to the perception that the judge's impartiality is impaired. Membership in an organization would not be prohibited unless that membership would reasonably give rise to a perception of partiality. Certain organizations – such as congregational brotherhoods, sisterhoods, or bowling leagues – may well be restricted to persons belonging to the particular congregation and therefore to those sharing a particular religious belief, but it is unlikely that membership in such an organization would cause people reasonably to believe that the judge is partial.

Whether an organization practices and will continue to practice that kind of invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined merely from an examination of an organization's current membership rolls but may depend on (1) the nature and purpose of the organization, (2) any restrictions on membership, (3) the history of the organization's selection of members, and (4) other relevant factors such as that the organization is dedicated to the preservation of cultural, ethnic, or religious values of legitimate common interest to its members, or that it is, in fact and effect, an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership, on the basis of national origin, race, religion, or sex, individuals who otherwise would be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of national origin, race, religion, or sex, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2A and gives the

appearance of impropriety. In addition, it would be a violation of Canon 2 for a judge to arrange a meeting at a club that the judge **knows** practices invidious discrimination on the basis of national origin, race, religion, or sex, in its membership or other policies, or for the judge to use such club regularly. Moreover, public manifestation by a judge of the judge's **knowing** approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canon 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in all other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

Committee note: The Comment to Canon 2C is derived from the Commentary to ABA Code (2000), Canon 2C, with the addition of the second through fourth sentences , the latter two being derived from part of the Committee Note to the 1989 version of Canon 2. Additionally, the citations following the seventh sentence have been omitted.

Source: Canon 2 is derived from ABA Code (2000), Canon 2.

Rule 16-813, Canon 2B, was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 3.5 of the Maryland Lawyers' Rules of Professional Conduct.

The Chair explained that when House Bill 1398, which pertained to lawyers' offers of employment to judges, was withdrawn by its sponsor during the 2002 legislation session, the thought was that this topic could be addressed by rule. The Attorneys Subcommittee discussed this topic at a recent meeting and drafted changes to Rule 3.5 and Canon 2B. The Vice Chair asked if there is any existing provision that would address this issue. Mr. Titus answered that current Canon 2B is too general to address this. The amendments would expressly address the topic. The Reporter said that she had spoken with Pamela White, Esq., a member of the committee appointed by the Honorable Robert M. Bell and chaired by the Hon. Lawrence F. Rodowsky, to consider changes to the Rules of Professional Conduct for attorneys, in light of recent changes to the American Bar Association Model Rules. Ms. White had said that the Rules Committee should move forward on the proposed changes to the Rule 3.5. The Reporter had requested, through Elizabeth Veronis, Esq., any comments that the Judicial Ethics Committee wished to make concerning the proposed change to Canon 2B, and no comments were received.

The Rules Committee agreed by consensus to the changes to the two Rules. The Rules were approved as presented.

Agenda Item 8. Consideration of proposed new Rules: Rule 16-830 (Court Records) and Rule 16-831 (Access to Court Records)

The Chair presented Rules 16-830, Court Records, and 16-831, Access to Court Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

ADD new Rule 16-830, as follows:

Rule 16-830. COURT RECORDS

(a) Definition

The term "court records" includes: (1) documents, information, or other things that are collected, received, or maintained by a court in connection with a court case, and (2) indexes, calendars, orders, judgments, or other documents and any information in a case management system created by the court that is related to a court case. The physical form of court records includes paper or electronic.

(b) Exclusions

The term "court records" does not include: (1) records, such as public land and license records, that are maintained by a court but are not connected with a court case; (2) notes, drafts, and other work products prepared by a judge, or for a judge by court staff; or (3) information gathered, maintained, or stored by a governmental agency or other entity to which the court has access but which does not become part of the court record as defined in section (a) of this Rule.

Source: This Rule is new.

Rule 16-830 was accompanied by the following Reporter's Note.

> In March 2001, the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, appointed the Committee on Access to Court Records to study this subject in light of the impact technological innovations, such as electronic court records, may have made on it. One of the Committee's recommendations is to continue the policy that court records are generally open to the public. To effectuate this policy, the General Court Administration Subcommittee is suggesting the formulation of a new rule that will clarify what is included in the term "court records" and what is excluded.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

ADD new Rule 16-831, as follows:

Rule 16-831. ACCESS TO COURT RECORDS

> A person who seeks access to court records must comply with the provisions of Code, State Government Article, §§10-611 through 10-628.

Source: This Rule is new.

Rule 16-831 was accompanied by the following Reporter's Note.

> In light of the recommendation of the

> Committee on Access to Court Records to continue the policy that court records are generally open to the public, the General Court Administration Subcommittee is proposing a Rule which will earmark the appropriate statutes pertaining to the accessibility of court records.

The Chair explained that Rule 16-830 contains a list of what is included as a court record and a list of exclusions. The genesis of these Rules is that Julia Andrew, Esq., Assistant Attorney General, who represents the clerks and the courts, was concerned about some requests for court records, particularly pertaining to the databases that serve the court system. Ms. Andrew, working with the Administrative Office of the Courts, proposed regulation of court records, which was not well-received by the media. Because of the controversy, the Committee on Access to Court Records was appointed. The Honorable Paul E. Alpert, a retired judge of the Court of Special Appeals was appointed chair. The Committee's Report, containing seven recommendations, is included in the materials for today's meeting. (See Appendix 4).

Judge Heller pointed out that Code, State Government Article, §10-611 defines the term "public record." The Vice Chair added that the definition of "court record" in the Model Rule from the Model Policy on Public Access to Court Records is similar to the definition in proposed new Rule 16-830. (See Appendix 5). Judge Heller asked if access to court records is different than access to other public records. The Chair replied

in the affirmative. The Vice Chair inquired if the Public Information Act can be changed by court rule. Ms. Veronis pointed out that Code, State Government Article, §10-615 (2)(iii) provides that a custodian shall deny inspection of a public record if the inspection would be contrary to the rules adopted by the Court of Appeals.

The Vice Chair remarked that in Anne Arundel County, there has been some criticism of the court system that too many aspects of court records are kept private, while other governmental entities open more records to the public. The County provides to the public internal county policies produced pursuant to the Public Information Act. Under this definition, internal court policies are not producible. Subsections (b)(1) and (b)(2) exclude court records not connected with a court case and the work product of judges. Mr. Titus questioned as to why land records are excluded. Mr. Klein asked if information on the juror pool is public. The Chair answered that once the jury list goes into the court file, it is public. Mr. Titus inquired if the jury information is public before the list goes into the file. Judge Norton questioned as to whether judges' e-mails are considered public. The Vice Chair responded that this is a difficult question to answer under the Public Information Act. It may depend on the subject of the e-mail. The Court of Appeals has the power under state law to regulate what the court system produces under the Act. The court system may have to limit producing its records to the public more than

other governmental entities limit production, and this may result in more criticism.

The Chair said that for the purposes of the discussion, the Committee should consider the definition in the Report of the Committee on Access to Court Records. Two issues should be considered. One is that certain writings of judges which are transmitted to other judges should not be disclosed just because they can be accessed. Secondly, those who want information from the court generally want the court to do all the work in getting the information. The clerk should not have to gather all of the information. The Rule needs to clarify that the judicial branch of the government does not have to do the research.

Judge McAuliffe observed that on page 9 of the Report, the Committee recommends that requests for data compilations from court records should be granted. This does not seem to be consistent with the Committee's definition of "court records" which provides that any information in a case management system created by the court that is related to a case is a court record. The Vice Chair noted that the Committee's definition distinguishes court records from data compilations and bulk data. Judge McAuliffe pointed out that on page 9, the Committee states that requests for bulk data should be granted. Judge Norton remarked that he reads the Rule to mean that compilations of data have to be producible. Judge Heller asked if the public can be charged for information from the database management program. The Vice Chair commented that the public is charged for copies of

records.

The Chair asked if the Rules Committee would like the Rules to be sent back to the General Court Administration Subcommittee. Judge Alpert and Ms. Andrew could be invited to discuss the issues involved. The Assistant Reporter added that Ms. Sally Rankin of the Court Information Office also should be included. The Vice Chair noted that on page 5 of the Report, the second sentence under "Recommendations" states: "As an initial clarification, the Committee recognizes that the Judiciary maintains records other than those defined by the Committee as 'court records' (for example, public land and license records) and does not intend to preclude access to those records in any of its Recommendations."

The Chair stated that the Rules would be remanded to the Subcommittee and that Ms. Rankin, Ms. Andrew, and Judge Alpert would be invited to the meeting.

The Chair adjourned the meeting.