COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Room #3, Judiciary Training Center, 2009 Commerce Park Drive, Annapolis, Maryland, on Friday, March 10, 2006.

Members present:

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

Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Hon. Ann N. Sundt
Stacy LeBow Siegel, Esq.
S. Ann Brobst, Esq., State's Attorney Office for Baltimore County
Kelly J. Keegan, Law Clerk, State's Attorney Office for Baltimore County
Linda Etzold, A.O.C.
Pamela Ortiz, Esq., Executive Director, Family Administration, A.O.C.
Sally Rankin, Court Information Officer
Paul H. Ethridge, Esq., Maryland State Bar Association, Inc.
Carol D. Melamed, Esq.
Hon. Sally D. Adkins

The Chair convened the meeting.

Agenda Item 1. Consideration of proposed amendments to: Rule 4-642 (Secrecy) and Rule 16-819 (Court Interpreters)

The Chair presented Rule 4-642, Secrecy, and Rule 16-819, Court Interpreters, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 600 - CRIMINAL INVESTIGATIONS AND MISCELLANEOUS PROVISIONS

AMEND Rule 4-642 to state who may be present during grand jury proceedings and to add certain provisions concerning the appointment of an interpreter in a grand jury proceeding, as follows:

Rule 4-642. SECRECY

(a) Court Records

Files and records of the court pertaining to criminal investigations shall be sealed and shall be open to inspection only by order of the court.

(b) Hearings

Hearings before the court relating to the conduct of criminal investigations shall be on the record and shall be conducted out of the presence of all persons except those whose presence is necessary.

(c) Grand Jury - Who May be Present

(1) While the Grand Jury is in Session

The following persons may be present while the grand jury is in session: one or more attorneys for the State, the witness being questioned, interpreters when needed, and any stenographer appointed pursuant to Code, Courts Article, §2-503.

(2) During Deliberations and Voting

No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating

or voting.

(3) Selection, Oath, and Compensation of Interpreter

Upon request by the State's Attorney, the Court shall appoint an interpreter for a witness or juror in a grand jury proceeding in accordance with Rule 16-819 (d)(1). Before acting as an interpreter in a grand jury proceeding, the interpreter shall make oath as provided in Rule 16-819 (d)(3). Reasonable compensation for the interpreter shall be paid by the State.

~~(c)~~ (d) Motion for Disclosure

Unless disclosure of matters occurring before the grand jury is permitted by law without court authorization, a motion for disclosure of such matters shall be filed in the circuit court where the grand jury convened. If the moving party is a State's Attorney who is seeking disclosure for enforcement of the criminal law of a state or the criminal law of the United States, the hearing shall be ex parte. In all other cases, the moving party shall serve a copy of the motion upon the State's Attorney, the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and such other persons as the court may direct. The court shall conduct a hearing if requested within 15 days after service of the motion.

Source: This Rule is new.

Rule 4-642 was accompanied by the following Reporter's Note.

New subsections (c)(1) and (c)(2) proposed to be added to Rule 4-642 are patterned after Fed. R. Crim. P. 6 (d). Proposed new subsection (c)(3) adds to the Rule provisions concerning the appointment of an interpreter to serve in a grand jury proceeding, the oath that the interpreter must take, and compensation for the interpreter.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-819 (d)(3) to require that an interpreter who serves in a grand jury proceeding take an oath of secrecy, as follows:

Rule 16-819. COURT INTERPRETERS

. . .

(d) Selection and Appointment of Interpreters

. . .

(3) Oath

Upon appointment by the court and before acting as an interpreter in the proceeding, the interpreter shall solemnly swear or affirm under the penalties of perjury to interpret accurately, completely, and impartially and to refrain from knowingly disclosing confidential or privileged information obtained while serving in the proceeding. <u>If the interpreter is to serve in a grand jury proceeding, the interpreter also shall take and subscribe an oath that the interpreter will keep secret all matters and things occurring before the grand jury.</u>

. . .

Rule 16-819 was accompanied by the following Reporter's Note.

Rule 16-819 (d)(3) is proposed to be amended to add an oath of secrecy for interpreters in grand jury proceedings. The language of the proposed amendment is

patterned after Code, Courts Article, §2-503 (b)(1), which requires that stenographers for grand juries take an oath of secrecy.

The Chair introduced S. Ann Brobst, Esq. of the Baltimore County State's Attorneys Office. Ms. Brobst said that her law clerk, Kelly Keegan, had researched the topic of whether Maryland, by rule or court order, permits interpreters to be present in grand jury proceedings. Ms. Brobst remarked that she was surprised that this issue had not arisen earlier and more frequently. The need for a change to Rule 4-642 became evident after a case that arose in Baltimore County when two bodies that had been stabbed many times were discovered in Arbutus. The dead men were identified as two aliens from El Salvador, and the slaying appeared to be related to a gang with origins in Latin America. Witnesses in the case were reluctant to cooperate because they feared retribution from the gang and because some Hispanic (and Asian) people may distrust the police as a result of problems in the home countries. Furthermore, many of the witnesses in the Baltimore County stabbing case spoke only Spanish.

Ms. Brobst explained that generally, a witness is issued a summons to appear before the grand jury. The proceedings are secret, attended only by the grand jurors, the witness, a State's Attorney, and a court stenographer. If the witness does not speak English, the case may not be able to go forward, because the grand jury and the witness will not be able to communicate.

Because of this problem, Ms. Brobst had asked the Chair to request a change to the Rules to allow interpreters to be present in grand jury proceedings. The problem is not case-specific, but much broader, because of the increasing numbers of Spanish-speaking citizens and aliens and the increasing number of victims of crime and of domestic violence. Often the women who are victims of domestic violence are reluctant to come forward. There also is a problem with crime in the deaf community. A change to the Rules could fix the problems with communication between witnesses and the grand jury due to language differences.

The Vice Chair expressed the opinion that the concept of allowing interpreters into the grand jury is a good idea. However, she pointed out that the first sentence of proposed new section (c)(3) refers only to Rule 16-819 (d)(1), Certified Interpreters Required; Exceptions, but excludes a reference to subsection (d)(2), Inquiry of Prospective Interpreter. She asked if the reference to the inquiry was deliberately excluded. The Reporter answered that the mechanism set forth in subsection (d)(2) would be difficult to incorporate into a grand jury setting. The Vice Chair inquired as to whether a judge is present in the grand jury proceedings to conduct the inquiry of the prospective interpreter. Ms. Brobst replied that no judge is present. Judge Heller noted that in Baltimore City, there is a grand jury judge who would be able to conduct the inquiry of the prospective interpreter in the courtroom with no jurors present.

Judge McAuliffe suggested that the first sentence of subsection (d)(3) of Rule 4-642 read as follows: "Upon request by the State's Attorney, the court shall appoint an interpreter for a witness or juror in a grand jury proceeding in accordance with Rule 16-819 (d)." The second sentence would not be necessary, and the third sentence would remain in the Rule to indicate that the interpreters would receive reasonable compensation by the State. The Vice Chair pointed out that Rule 16-819 (f), Compensation of Court Interpreters, is different than the third sentence of Rule 4-642 (c)(3). Ms. Brobst commented that the interpreters are paid by the Office of the State's Attorney. The Vice Chair noted that section (f) of Rule 16-819 refers to Code, Criminal Procedure Article, §§1-202 and 3-103. The Reporter said that these provisions do not pertain to the grand jury. Ms. Etzold explained that the State pays for all interpreters. The Chair asked if the authority for this is statutory. Ms. Etzold said that the State pays when the interpreters are hired. The source of this authority is in the statutes. Judge Kaplan added that this applies to all interpreters.

The Chair suggested that the last sentence of subsection (c)(3) of Rule 4-642 should be deleted, because it is covered elsewhere. The prior sentence remains in the Rule, and the reference in the first sentence to "Rule 16-819 (d)(1)" should be changed to "Rule 16-819 (d)." By consensus, the Committee approved these changes. Ms. Brobst commented that in her

jurisdiction, the State's Attorneys do not get court approval to use interpreters. The prosecutors call to get an interpreter from the list approved by the court. Judge Heller noted that one of the proposed changes to the Rules asks the court to appoint an interpreter. The Chair said that the right of the judiciary to intrude in grand jury proceedings is limited. It would be wrong for a judge to refuse to allow an interpreter in the proceedings. This would run the risk of interfering with the independence of the grand jury. The Rule should provide that if the State wants an interpreter, the judge should appoint one. The Vice Chair observed that an interpreter who is on the court list is automatically qualified to be appointed. No judge would have to be involved in the appointment.

Mr. Sykes asked whether there is a preliminary determination as to whether the interpreter has any connection with the witness or the case. The Chair replied that subsection (d)(2) of Rule 16-819 provides for this. The Chair noted that the new language of subsection (c)(3) of Rule 4-642 states: "[u]pon request by the State's Attorney, the court shall appoint an interpreter for a witness or juror in a grand jury proceeding...". The interpreter may be a relative, if the witness is more comfortable with this. The Rule should simply authorize an interpreter to be present in a grand jury proceeding and not get into the details of how to go about this. The Vice Chair pointed out that section (d)(1) of Rule 16-819 sets out a priority system of how the court is to choose an interpreter. She inquired as to why interpreters in

the grand jury are different than other court interpreters. Ms. Brobst responded that a murder could take place during the weekend, and the grand jury would meet about it on Monday. A witness may speak a dialect with which few people are familiar. There is very little time available to obtain an interpreter. The Rule allows an outside person to interpret, but it creates a preference for a certified interpreter. The Chair said that the decision should be left up to the State's Attorney. He suggested that the first sentence of subsection (c)(3) of Rule 4-642 should read as follows: "If the State's Attorney determines that an interpreter is needed, the State's Attorney shall request that the court appoint an interpreter for a witness or juror in a grand jury proceeding, and the court shall grant that request." The Vice Chair recommended that the interpreter be chosen from the court list of interpreters.

Mr. Karceski pointed out that there is a problem if the witness is the linchpin of the indictment, and the interpreter is a person known to the witness. This could put the interpreter in a difficult situation and result in a biased interpretation. The court or the State's Attorney may pick the interpreter with the best of intentions. The Chair commented that there should not be a hearing every time as to whether the interpreter is appropriate. The Rule simply needs to authorize an interpreter to be present in the grand jury proceedings, so an indictment is not dismissed due to a non-English-speaking witness being unable to communicate with the grand jury.

Judge McAuliffe suggested that the first sentence of subsection (c)(3) provide that the court shall appoint an interpreter who is qualified pursuant to Rule 16-819. Judge Spellbring proposed an exception to this: unless the State proves good cause as to why an interpreter cannot qualify pursuant to Rule 16-819. The Vice Chair remarked that there had been a lengthy discussion in the Rules Committee at the time the Rules pertaining to court interpreters were drafted as to whether interpreters related by blood to the witnesses should be permitted. Because the Committee was divided on this issue, it was raised with the Court of Appeals, which decided against allowing a relative to interpret. Judge McAuliffe commented that an interpreter should qualify under Rule 16-819 or pass muster under the requirements of section (d) of that Rule. The Vice Chair observed that the first sentence of subsection (c)(3) of Rule 4-642 does not have to refer to section (d) of Rule 16-819 as long it references the Rule itself. The Chair pointed out that section (d) provides that the court determines the need for an interpreter.

The Vice Chair noted that the oath taken by grand jury interpreters is different from the oath taken by other court interpreters. She questioned whether the reference to "Rule 16-819 (d)(3)" could be omitted if Rule 4-642 is amended to refer to Rule 16-819 (d), generally. She asked whether the third sentence of subsection (c)(3) has been deleted, and the Chair replied that it has. The Vice Chair inquired as to whether it is clear that

the State pays for the costs of an interpreter. She suggested that the Style Subcommittee look at the Code when the language pertaining to compensation of interpreters is determined.

The Chair pointed out that section (d) of Rule 16-819 pertains not only to the requirements for interpreters, it also provides that the court has the obligation to make a diligent effort to obtain the services of a certified interpreter or one who is eligible for certification. Ms. Etzold explained that there is one list of interpreters for all of the jurisdictions in the State. The Chair remarked that the list inadvertently could contain interpreters with criminal records. Ms. Etzold responded that her office is doing background checks on the interpreters on the court list, and those who are not qualified will be removed. The Vice Chair observed that the State's Attorney can pick someone from the list. Judge Dryden said that the State's Attorney may not find someone that quickly. Judge McAuliffe noted that section (d) sets out the priority system for choosing an interpreter. Judge Heller observed that the court list makes it easy for a judge to locate an interpreter if the language is commonly spoken. However, if the language is a dialect that is not usually spoken in this area, there may be no interpreter on the court list, and a family member may have to interpret. There can be problems if an adult child interprets for a parent -- the child can put words in the parent's mouth. Judge Heller agreed with Mr. Karceski that there needs to be an inquiry as to the relationship of the interpreter to the witness.

The Chair said that section (d) does not establish the qualifications for being an interpreter. The court is commanded to undertake procedures with respect to the appointment of an interpreter. The Vice Chair remarked that Judge McAuliffe had suggested that subsection (c)(3) of Rule 4-642 should refer to appointing a qualified interpreter under Rule 16-819 (d). The judge should try to find a certified interpreter. Section (d) also provides that a person related by blood or marriage to a party or to the person who needs an interpreter may not act as an interpreter. Judge McAuliffe suggested that subsection (c)(3) provide that the interpreter be certified or approved in accordance with section (d) of Rule 16-819. The Vice Chair added that the reference to section (d) in its entirety will include the inquiry of a prospective interpreter in subsection (d)(2).

The Chair suggested that the first sentence of subsection (c)(3) of Rule 4-642 read as follows: "If the State's Attorney requests that an interpreter be appointed for a witness or juror in a grand jury proceeding, the court shall appoint an interpreter." By consensus, the Committee agreed to this suggestion.

Ms. Brobst observed that court reporters can come in to the grand jury room as long as they take an oath of secrecy. Judge McAuliffe noted that the intent of the changes to the Rules is to apply the same principles to an interpreter. He questioned as to whether the prosecutor has to be restricted in each case by requiring that the court appoint the interpreter. Is it

necessary to involve the judge? The real problem is if there is no court interpreter on the list, and the grand jury proceeding takes place on the Monday after the Saturday on which the crime is committed. Ms. Brobst commented that if the witness cooperates with the police, the proposed changes to the Rule are not needed. The witness can give a statement to a police officer, with an interpreter present. The police officer can then present the witness's statement to the grand jury, because hearsay is not prohibited. However, if the witness is reluctant, the proposed Rules changes are important. Judge McAuliffe reiterated that if no certified interpreter is available, the State can pick whoever works out the best.

The Chair commented that an interpreter's presence on the court list is not a guarantee that the person is the best one for the particular case. The point of the Rule change is to ensure that an indictment is not dismissed because an interpreter is in the grand jury room. The Vice Chair added that the investigation must be as accurate as possible. There may be no control over the qualifications of an interpreter who is not on the list. Ms. Brobst remarked that the indictment is subject to attack by the defense attorney. Judge Spellbring observed that the judge handling the case can be asked to see what the judge did to make a diligent effort to use a certified interpreter. Judge Kaplan noted that if the State's Attorney needs an interpreter, the State's Attorney can pick one from the list. If one is not available, the State's Attorney can apply to the grand jury judge

or to another judge to get approval for a non-certified interpreter. Each court keeps a copy of the list of certified court interpreters.

Mr. Karceski suggested a compromise -- the State's Attorney can use any interpreter as long as a stenographic transcript is made of the grand jury proceedings. The Chair said that the proceedings could be recorded. Mr. Karceski responded that any kind of memorialization of the proceedings would be sufficient. Ms. Brobst commented that the court reporter cannot take down a language that he or she does not know. Mr. Michael suggested that subsection (c)(1) of Rule 4-642 should simply provide that who may be present while the grand jury is in session. The Chair observed that a reference to Rule 16-819 would incorporate by reference many unnecessary principles. He suggested that subsection (c)(3) read as follows: "If the State's Attorney requests that an interpreter be appointed for a witness or juror in a grand jury proceeding, the court shall appoint an interpreter. When an interpreter is present in the grand jury, the testimony that is interpreted will be recorded on video or audio." The Vice Chair asked why the court has to be involved. If the State's Attorney determines that an interpreter is needed, the State's Attorney can bring in an interpreter who is on the court list. If the person is not on the list, then the proceedings will be recorded. Mr. Brault commented that the police may have already interpreted the witness's statement and given the statement to the grand jury. Ms. Brobst reiterated

that when the witness cooperates, the witness does not have to appear before the grand jury. Judge Kaplan noted that what goes to the grand jury is one-sided -- it is what the State presents. Judge Dryden observed that if the testimony is recorded, it would solve the problem of an incompetent or biased interpreter.

Judge Heller pointed out that the statement from the grand jury proceedings may be used as an inconsistent statement pursuant to Rule 5-802.1, Hearsay Exceptions – Prior Statements by Witnesses. Mr. Karceski added that the statement can be used if it is recorded. Judge Heller remarked that the issue may be that the witness avers that the statement was misinterpreted. The Chair suggested that taping the proceedings solves the problem for everyone, whether it is for impeachment or for other purposes at trial.

The Chair suggested that subsection (c)(1) should read as follows: "The following persons may be present while the grand jury is in session: one or more attorneys for the State, the witness being questioned, interpreters when needed, provided that an audio recording is made of testimony given in the presence of an interpreter, and any...". By consensus, the Committee agreed with this change.

By consensus, the Committee approved the Rules as amended.

Agenda Item 2. Reconsideration of certain proposed Rules changes pertaining to Access to Court Records. Amendments to Rule 16-1002 (General Policy), Rule 16-1006 (Required Denial of Inspection - Certain Categories of Case Records), and Rule 9-203 (Financial Statements)

Judge Heller presented Rule 16-1002, General Policy, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGE, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1002 to clarify that section (c) applies to certain court records, as follows:

Rule 16-1002. GENERAL POLICY

(a) Presumption of Openness

Court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to the Rules in this Chapter, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business hours, to inspect the record.

(b) Protection of Records

To protect court records and prevent unnecessary interference with the official business and duties of the custodian and other court personnel,

(1) a clerk is not required to permit inspection of a case record filed with the clerk for docketing in a judicial action or a notice record filed for recording and indexing until the document has been docketed or recorded and indexed; and

(2) the Chief Judge of the Court of Appeals, by administrative order, a copy of which shall be filed with and maintained by

the clerk of each court, may adopt procedures and conditions, not inconsistent with the Rules in this Chapter, governing the timely production, inspection, and copying of court records.

Committee note: It is anticipated that, by Administrative Order, entered pursuant to section (b) of this Rule, the Chief Judge of the Court of Appeals will direct that, if the clerk does not permit inspection of a notice record prior to recording and indexing of the record, (1) persons filing a notice record for recording and indexing include a separate legible copy of those pages of the document necessary to identify the parties to the transaction and the property that is the subject of the transaction and (2) the clerk date stamp that copy and maintain it in a separate book that is subject to inspection by the public.

(c) Records Admitted or Considered as Evidence

Unless a judicial action is not open to the public or the court expressly orders otherwise, ~~a~~ court record<u>s</u> that ~~has been admitted into evidence in a judicial action or that a court has considered as evidence or relied upon for purposes of deciding a motion is~~ <u>consist of (1) exhibits that are attached to a motion that the court has ruled upon and (2) exhibits for trial marked for identification, whether or not offered in evidence, and if offered, whether or not admitted, are</u> subject to inspection, notwithstanding that the record otherwise would not have been subject to inspection under the Rules in this Chapter.

<u>Cross reference: Rule 2-516.</u>

(d) Fees

(1) In this Rule, "reasonable fee" means a fee that bears a reasonable relationship to the actual or estimated costs incurred or likely to be incurred in providing the requested access.

(2) Unless otherwise expressly permitted by the Rules in this Chapter, a custodian may not charge a fee for providing access to a court record that can be made available for inspection, in paper form or by electronic access, with the expenditure of less than two hours of effort by the custodian or other judicial employee.

(3) A custodian may charge a reasonable fee if two hours or more of effort is required to provide the requested access.

(4) The custodian may charge a reasonable fee for making or supervising the making of a copy or printout of a court record.

(5) The custodian may waive a fee if, after consideration of the ability of the person requesting access to pay the fee and other relevant factors, the custodian determines that the waiver is in the public interest.

(e) New Court Records

(1) Except as expressly required by other law and subject to Rule 16-1008, neither a custodian nor a court or other judicial agency is required by the Rules in this Chapter to index, compile, re-format, program, or reorganize existing court records or other documents or information to create a new court record not necessary to be maintained in the ordinary course of business. The removal, deletion, or redaction from a court record of information not subject to inspection under the Rules in this Chapter in order to make the court record subject to inspection does not create a new record within the meaning of this Rule.

(2) If a custodian, court, or other judicial agency (A) indexes, compiles, re-formats, programs, or reorganizes existing court records or other documents or information to create a new court record, or (B) comes into possession of a new court record created by another from the indexing, compilation, re-formatting, programming, or reorganization of other court records,

documents, or information, and there is no basis under the Rules in this Chapter to deny inspection of that new court record or some part of that court record, the new court record or a part for which there is no basis to deny inspection shall be subject to inspection.

(f) Access by Judicial Employees

The Rules in this Chapter address access to court records by the public at large and do not limit access to court records by judicial officials or employees in the performance of their official duties.

Source: This Rule is new.

Rule 16-1002 was accompanied by the following Reporter's Note.

The Access Rules Implementation Committee appointed by Chief Judge Bell issued its final report on August 29, 2005. One of the issues listed in the report that may require final action was the need for clarification in section (c) of Rule 16-1002 that court records admitted into evidence become subject to public inspection unless a judicial action is closed to the public. The General Court Administration Subcommittee recommends the addition of language to section (c) that clarifies that court records that consist of exhibits attached to a motion that the court has ruled upon and exhibits for trial that are marked for identification become subject to public inspection unless a judicial action is closed to the public. This clarifies when court records become open to public inspection and limits accessibility when judicial actions are closed, so that the privacy of the actions are not undermined.

Judge Heller explained that there had been some confusion as to the meaning of section (c), and the version in the meeting materials is the recommendation of the General Court

Administration Subcommittee. The Vice Chair commented that the revised language adds in the idea that court records are not accessible if the case is closed to the public. Mr. Brault asked if section (c) should begin: "[u]nless a judicial action or record is not open to the public...". Judge Heller replied that sealed records are not accessible pursuant to subsection (j)(1) of Rule 16-1006, Required Denial of Inspection – Certain Categories of Case Records.

The Vice Chair pointed out that section (c) of Rule 16-1002 overrules other provisions through the language of the last phrase, "...notwithstanding that the record otherwise would not have been subject to inspection under the Rules in this Chapter." The Chair said that a benefit of the proposed change is that it allows an opportunity for those who would like protection to get it from the court. Unless the court decides that a record is sealed, once the court rules on the motion to which the record is appended, the record is accessible. If a party asks that all exhibits be marked for identification two weeks ahead of time, when the judge issues the decision, an attorney can request for the exhibits to be sealed. This protects against the danger that records would be open before a party has the chance to ask for closure. Judge Heller noted that the language in the first sentence which reads, "...or the court expressly orders otherwise..." takes into account that the court has expressly decided to close the records.

The Vice Chair commented that the addition of the language

"[u]nless a judicial action is not open to the public" is confusing. Once the record is admitted into evidence, it becomes public and open for inspection unless the court states that it is not. Judge Heller said that certain hearings and proceedings are closed. The Vice Chair suggested that the language of Rule 16-1006 (j)(1) could be used in section (c) of Rule 16-1002. Ms. Melamed remarked that the cross reference at the end of section (c) defines what is part of the record. The Chair pointed out the danger that in a serious domestic or business litigation case, the parties may not want the documents in the record to be seen by competitors or people with ill intentions. He said that he is in favor of the idea that the record would be open, unless the court decides that it is not, and that the records are protected in a timely manner. The judge as the presiding officer decides what will and will not be shielded.

The Reporter asked if the proposed language clarifies the meaning of the Rule. Ms. Melamed replied that the ambiguity is cleared up. The Chair inquired if the clerks will understand the Rule. Mr. Shipley answered that there still may be some ambiguity. Judge Heller remarked that it will be easier for the clerks because the exhibits will be identified. The clerks can look for the court order. Mr. Shipley responded that complying with the Rule may be more difficult than that. A judge may open a sealed record in a case, but overlook resealing it. It is very hard to tell what the court relied upon in ruling on a motion. It is easier to know what the court looked at in the courtroom,

but the clerk reviewing the file may not be able to determine which exhibits the court relied upon in deciding a pretrial motion. The Subcommittee had discussed whether the Rule should only refer to court proceedings.

The Chair pointed out that motions for summary judgment include exhibits. The motion is filed, and three days later, confidential material is in the hands of the other party or the press. If the judge's ruling on the motion is the line of demarcation as to what in the record is open, is it the docketed ruling by the judge or the oral ruling that is relevant?

Judge Heller noted that subsection (b)(1) of Rule 16-1002 provides that: "a clerk is not required to permit inspection of a case record filed with the clerk for docketing in a judicial action...until the document has been docketed...". Judge McAuliffe commented that when a judge opens a sealed envelope, it should be resealed and the items inside marked as to what has been inspected. The Chair added that this could be communicated to judges as part of their training. By consensus, the Committee approved the Rule as presented.

Judge Heller presented Rule 16-1006, Required Denial of Inspection – Certain Categories of Case Records, and Rule 9-203, Financial Statements, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1006 to add a new section (k), as follows:

Rule 16-1006. REQUIRED DENIAL OF INSPECTION - CERTAIN CATEGORIES OF CASE RECORDS

Except as otherwise provided by law, court order, or the Rules in this Chapter, the custodian shall deny inspection of:

(a) All case records filed in the following actions involving children:

(1) Actions filed under Title 9, Chapter 100 of the Maryland Rules for:

(A) Adoption;

(B) Guardianship; or

(C) To revoke a consent to adoption or guardianship for which there is no pending adoption or guardianship proceeding in that county.

(2) Delinquency, child in need of assistance, and child in need of supervision actions in Juvenile Court, except that, if a hearing is open to the public pursuant to Code, Courts Article, §3-8A-13 (f), the name of the respondent and the date, time, and location of the hearing are open to inspection.

(b) The following case records pertaining to a marriage license:

(1) A physician's certificate filed pursuant to Code, Family Law Article, §2-301, attesting to the pregnancy of a child under 18 years of age who has applied for a marriage license.

(2) Until a license is issued, the fact that an application for a license has been made, except to the parent or guardian of a party to be married.

(c) In any action or proceeding, a case

record concerning child abuse or neglect.

(d) The following case records in actions or proceedings involving attorneys or judges:

(1) Records and proceedings in attorney grievance matters declared confidential by Rule 16-723 (b).

(2) Case records with respect to an investigative subpoena issued by Bar Counsel pursuant to Rule 16-732;

(3) Subject to the provisions of Rule 19 (b) and (c) of the Rules Governing Admission to the Bar, case records relating to proceedings before a Character Committee.

(4) Case records consisting of Pro Bono Legal Service Reports filed by an attorney pursuant to Rule 16-903.

(5) Case records relating to a motion filed with respect to a subpoena issued by Investigative Counsel for the Commission on Judicial Disabilities pursuant to Rule 16-806.

(e) The following case records in criminal actions or proceedings:

(1) A case record that has been ordered expunged pursuant to Rule 4-508.

(2) The following case records pertaining to search warrants:

(A) The warrant, application, and supporting affidavit, prior to execution of the warrant and the filing of the records with the clerk.

(B) Executed search warrants and all papers attached thereto filed pursuant to Rule 4-601.

(3) The following case records pertaining to an arrest warrant:

(A) A case record pertaining to an arrest warrant issued under Rule 4-212 (d)

and the charging document upon which the warrant was issued until the conditions set forth in Rule 4-212 (d)(3) are satisfied.

(B) Except as otherwise provided in Code, State Government Article, §10-616 (q), a case record pertaining to an arrest warrant issued pursuant to a grand jury indictment or conspiracy investigation and the charging document upon which the arrest warrant was issued.

(4) A case record maintained under Code, Courts Article, §9-106, of the refusal of a person to testify in a criminal action against the person's spouse.

(5) A presentence investigation report prepared pursuant to Code, Correctional Services Article, §6-112.

(6) A case record pertaining to a criminal investigation by a grand jury or by a State's Attorney pursuant to Code, Article 10A, §39A.

Committee note: Although this Rule shields only case records pertaining to a criminal investigation, there may be other laws that shield other kinds of court records pertaining to such investigations. This Rule is not intended to affect the operation or effectiveness of any such other law.

(f) A transcript, tape recording, audio, video, or digital recording of any court proceeding that was closed to the public pursuant to rule or order of court.

(g) Backup audio recordings made by any means, computer disks, and notes disk of a court reporter that are in the possession of the court reporter and have not been filed with the clerk.

(h) The following case records containing medical information:

(1) A case record, other than an autopsy report of a medical examiner, that (A) consists of a medical or psychological report

or record from a hospital, physician, psychologist, or other professional health care provider, and (B) contains medical or psychological information about an individual.

(2) A case record pertaining to the testing of an individual for HIV that is declared confidential under Code, Health - General Article, §18-338.1 or §18-338.2.

(3) A case record that consists of information, documents, or records of a child fatality review team, to the extent they are declared confidential by Code, Health - General Article, §5-709.

(4) A case record that contains a report by a physician or institution concerning whether an individual has an infectious disease, declared confidential under Code, Health - General Article, §18-201 or §18-202.

(5) A case record that contains information concerning the consultation, examination, or treatment of a developmentally disabled person, declared confidential by Code, Health - General Article, §7-1003.

(i) A case record that consists of the federal or Maryland income tax return of an individual.

(j) A case record that:

(1) a court has ordered sealed or not subject to inspection, except in conformance with the order; or

(2) in accordance with Rule 16-1009 (b), is the subject of a motion to preclude or limit inspection.

(k) As provided in Rule 9-203 (d), a case record that consists of a financial statement filed pursuant to Rule 9-202.

Source: This Rule is new.

Rule 16-1006 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 9-203 (d).

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY, CHILD SUPPORT, AND CHILD CUSTODY

AMEND Rule 9-203 to limit the applicability of current section (d) to certain financial statements, to provide that a party may make a motion to seal a financial statement that has been rules upon by the court for the purpose of deciding a motion or marked for identification at trial, and to add a certain cross reference, as follows:

Rule 9-203. FINANCIAL STATEMENTS

. . .

(d) Inspection of Financial Statements

(1) Generally

Except as provided in subsection (d)(2), inspection of a financial statement filed pursuant to the Rules in this Chapter is governed by Code, State Government Article, §10-617 (a) and (f). A party who does not want the financial statement open to public inspection pursuant to subsection (d)(2) may make a motion at any time to have it sealed.

Cross reference: See Rule 16-1002 (c) and Rule 16-1009.

(2) When Financial Statements are Open to Inspection

A financial statement is open to inspection if it is an exhibit that is attached to a motion that has been ruled upon by the court, or if it has been marked for identification at trial, whether or not offered in evidence, and if offered, whether or not admitted.

. . .

Rule 9-203 was accompanied by the following Reporter's Note.

After the Rules on Access to Court Records went into effect, Chief Judge Robert M. Bell appointed members to the Access Rules Implementation Committee. Following many meetings of the Committee and various subcommittees within it, a final report was issued August 29, 2005. The Committee listed the issues that may require further action along with appropriate recommendations for action. One of the issues suggested for further action is how to handle access to financial statements required in family law actions pursuant to Rule 9-203. The General Court Administration Subcommittee discussed this issue and recommends adding language to section (d) of Rule 9-203 to clarify that unless or until a financial statement attached as an exhibit to a motion that has been ruled upon by the court or has been marked for identification at trial, inspection of it is governed by Code, State Government Article, §10-617 (a) and (f), which does not permit inspection of public records containing information about the finances of an individual. The Subcommittee also recommends adding language to section (d) of Rule 9-203 that provides that a party who wants continued confidentiality of a financial statement may make a motion to seal the record.

Judge Heller explained that the Subcommittee proposes that case records consisting of financial statements in spousal or

child support cases required by Rule 9-202, Pleading, and provided for in Rule 9-203, should be added to the list of categories in Rule 16-1006 as to which the custodian of records shall deny inspection. New subsection (d)(2) provides that financial statements attached to a motion that has been ruled upon by the court or marked for identification at trial are open to inspection. Ms. Melamed said that section (k) of Rule 16-1006 alerts people to the closure of financial statements. The new language in section (d) of Rule 9-203 provides that a party can move to seal the financial statement and repeats the language added to section (c) of Rule 16-1002.

The Chair pointed out that if the judge grants the motion to seal, the record remains sealed and does not become open just because the court ruled upon the motion. The language in section (d) may not make this clear. Ms. Melamed observed that the first sentence of section (d) indicates that the financial statement is not open to public inspection until it becomes part of the record. The Chair said that the way the Rule is worded, once the statement is offered into evidence, it is open even if the judge sealed it five minutes before. Mr. Brault suggested that subsection (d)(2) begin with the language, "unless previously sealed." Ms. Melamed noted that ordinarily a court would not order the statement to be sealed; it is automatically sealed. Judge Heller said that this needs to be clarified. The Vice Chair suggested that subsection (d)(2) be moved to subsection (d)(1) as the second sentence. Judge Heller responded that the

Style Subcommittee can revise and reorganize the Rule.

By consensus, the Committee approved the amendments to Rule 16-1006 (k) as presented and Rule 9-203 (d) subject to restyling.

Agenda Item 3. Consideration of proposed new Appendix: Maryland Guidelines of Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access, and proposed amendments to: Rule 1.14 of the Maryland Rules of Professional Conduct (Client With Diminished Capacity) and Rule 2-504 (Scheduling Order) - See Appendix 1.

Mr. Brault told the Committee that sometimes the lines are blurred as to whether an attorney appointed to represent a child is to function as an advocate of the child's wishes or a guardian *ad litem*. An attorney acting as an arm of the court may have a panoply of duties. Because of recent litigation, a question has arisen as to whether an attorney acting under court appointment should be protected for malpractice claims to the same extent that the court would be. In *Fox v. Wills*, 151 Md. App. 31 (2003), the Court of Special Appeals upheld the trial court's determination that the court-appointed attorney for a child obtains a level of immunity as an arm of the court. In the subsequent Court of Appeals case, *Fox v. Wills*, 390 Md. 620 (2006), the Court held that there is no authority under Code, Family Law Article, §1-202 for an attorney appointed pursuant to that section to function as a guardian *as litem* for the child. The Court also held that no statute exists in Maryland that would provide immunity to an attorney appointed to represent a child under that Code provision.

Even before *Wills*, circuit court judges in Maryland were concerned about loose ends surrounding the appointment of attorneys to represent children. They drafted the "Maryland Standards of Practice for Court-Appointed Lawyers Representing Children in Custody Cases," which were approved and adopted by the Conference of Circuit Judges at its September 19, 2005 meeting. The Attorneys Subcommittee of the Rules Committee discussed the standards and decided that the word "standards" should be eliminated due to malpractice litigation concerns. The Subcommittee suggests that the document be renamed, the "Maryland Guidelines of Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access." The Subcommittee, with the assistance of the Honorable Ann N. Sundt, of the Circuit Court for Montgomery County, and other consultants, made changes to the language, most of which were stylistic, resulting in a better document.

Mr. Brault commented that he is a commissioner for the Uniform Laws Commission. A Uniform Act for Children in Child Custody Cases will be voted on in July. He was not sure of the contents of the Act, but he will attend the meeting and find out.

Delegate Kathleen M. Dumais of Montgomery County is sponsoring House Bill 700, a bill creating immunity for court-appointed counsel representing children in custody, visitation, and support cases. The bill was favorably received in the House Judicial Proceedings Committee. Under the bill, the attorney would have immunity from civil liability, except for acts or omissions

committed with willful or reckless disregard for the best interests of the represented child. The fear is that attorneys representing children will resign or refuse to take the appointment because of an onslaught of litigation following the *Wills* case.

The Chair introduced Judge Sundt, Stacy Siegel, Esq., and Pamela Ortiz, Esq., Executive Director of Family Administration for the Administrative Office of the Courts. Judge Sundt noted that the *Wills* case was an invitation for the legislature to take action. The Honorable Audrey J.S. Carrion, of the Circuit Court for Baltimore City, had called Judge Sundt to say that many members of the Maryland Volunteer Attorneys who had been working *pro bono* as guardians *ad litem* are asking to be relieved of their duties, because they feel vulnerable to being sued. *Wills* does not acknowledge any difference in the roles of child counsel. House Bill 700 refers to the "Standards," renamed "Guidelines" which provide for three separate roles that child counsel may be appointed to perform. The legislation requires the court to specify the role and duties of the child's lawyer in accordance with the Guidelines. The Guidelines fill in the gaps that intentionally were left in the statute.

The Chair said that the problem is that if *pro se* litigants sue attorneys falsely, the appropriate redress for the attorney is Rule 1-341, Bad Faith – Unjustified Proceeding, but often the *pro se* litigant is "judgment-proof," and cannot pay any damages.

Ms. Ortiz remarked that she has spoken with many attorneys who represent children, and they are torn about whether to continue doing this. Often someone is appointed as a "best interest" attorney, a term defined in Guideline 1.1, and then the court converts the attorney to a "child advocate" attorney. The attorney must then advocate for the wishes of the client, which often are not in the child's best interest. The attorney becomes torn about whether to withdraw from the case.

Ms. Ortiz commented that notwithstanding the issue of immunity, it is important for the legislature to restore the ability of the court to be able to appoint a "best interest" attorney. The Guidelines address the quality of the representation. The committee that wrote the standards intentionally omitted a reference to immunity, because the *Wills* case was pending. There is a tremendous disparity between the role of guardian *ad litem* and the role of an advocate, and the Guidelines shed light on this.

Ms. Siegel asked the Rules Committee to endorse the Guidelines. She noted that the victims in the cases being discussed today are the children, but not from any negligence in the practice of law. Usually the guardian *ad litem* is the "best interest" attorney who effects a settlement and helps the child. Custody work on the part of an attorney can be very traumatic. There always will be an unhappy party, which increases litigation. The attorneys should be given qualified immunity, but not blanket immunity. The Vice Chair expressed the opinion

that the Guidelines are excellent as were the earlier Guidelines for CINA and CINS cases. Mr. Brault remarked that just as attorneys have letters of retention in which the role and duties of the attorney are outlined, an appointing court should outline the role and duties of the appointed attorney.

The Chair suggested that the Committee look over the Guidelines. If the legislature passes House Bill 700, then the Guidelines can be modified to fit into the requirements of the law. If the bill does not pass, then the Guidelines can become part of the Rules of Procedure. After Mr. Zarnoch reports as to what bills passed during the 2006 session, the Committee can recommend what actions to take vis-a-vis the Guidelines.

The Chair observed that section (c) of House Bill 700 provides:

> "Notwithstanding any other provision of law, a lawyer appointed by the court to represent a child under this section is immune from civil liability to any party other than a represented child."

A lawyer would have no duty to any other party or to third parties. Ms. Ortiz told the Committee that this version of the bill is a result of meeting with Delegate Dumais, Judge Sundt, and herself as well as with opponents to the statute, including the attorney in the *Wills* case who represented the mother of the child. The original language protected the attorney from suit by the parents and the child. Ms. Ortiz expressed a preference for that language. The Vice Chair asked if statutes in other states provide similar immunity. Ms. Ortiz said that only a handful of

states provide statutory immunity. In many states, guardians *ad litem* have quasi-judicial immunity.

Mr. Brault expressed the view that the Guidelines are excellent. The information from the judicial committee as well as the consultants was very helpful. The Reporter did an excellent job making the changes to the Guidelines following the Subcommittee discussion. The Chair remarked that the Honorable William D. Missouri, Chair of the Conference of Circuit Judges, will be apprised of the decisions by the Rules Committee.

The Vice Chair said that she had some minor changes to suggest. In the "Introduction and Scope" section, the word "should" appearing twice should be changed to the word "does." The Vice Chair asked about the term "best interest" attorney. Judge Sundt responded that a better definition might be: "A lawyer appointed by the court as its agent for the purpose of protecting a child's best interests." She noted that any reference to the lawyer being an arm or officer of the court would relate to the concept of immunity. She commented that ordinarily, the role of the child advocate is not protected. Under the Uniform Laws, the child advocate attorney assumes the risk. The Vice Chair observed that in granting immunity, the bill does not differentiate between the types of attorney.

Mr. Brault said that he wanted to respond to the Vice Chair's suggestion to delete the word "should" in the "Introduction and Scope" section of the Guidelines and replace it with the word "does." He explained that some of the language of

the "Introduction and Scope" section was borrowed from paragraph 20 of the "Preamble and Scope" section of the Maryland Lawyers' Rules of Professional Conduct, which reads as follows: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." If the change is made to the Guidelines, then it also should be made to the language of the "Preamble and Scope" section of the Maryland Lawyers' Rules of Professional Conduct. He questioned whether the Court would be willing to adopt the proposed change, in that it has disavowed this statement from paragraph 20 in the cases of *Post v. Bregman*, 349 Md. 142 (1998) and *Son v. Margolius*, 349 Md. 441 (1998).

Judge Sundt questioned as to whether the requirement that the "best interest" attorney inform the court of the child's position, even if the attorney does not agree with the child, should be moved from Guideline 2.2 and placed in Guideline 1.1. The Vice Chair commented that the definition incorporates all of the important aspects of what the "best interest" attorney is. The Chair suggested that Guideline 1.1 could be moved to the "Duties" section of the Guidelines. The Reporter responded that she had separated the definitions from the duties of each type of attorney. The Vice Chair suggested that the second sentence of Guideline 2.2 which reads, "...the attorney should ensure that the child's position is made a part of the record..." should be added to Guideline 1.1, because of its importance. Judge Sundt

suggested that the language be repeated in Guidelines 1.1 and 2.2.

The Vice Chair expressed the opinion that the tagline for section 2., "Duties," should be changed. One possibility could be entitling section 2. "Responsibilities." She inquired as to the meaning of the statement in the Guidelines that the attorney determines whether the child has considered judgment. Ms. Ortiz replied that the list of factors is identical to the list in the CINA Guidelines.

The Chair suggested that the third paragraph of Guidelines 3, Conflicts of Interest, should be moved out of the Guidelines and incorporated into the Maryland Lawyers' Rules of Professional Conduct. He also suggested that Guideline 7, Appointment, should be redrafted as a separate Rule.

The Chair said that the Guidelines will come before the Rules Committee again, including consideration of the good ideas for changes that were suggested at today's meeting. At that time, the Committee will know whether House Bill 700 passed.

Agenda Item 5. Reconsideration of certain proposed Rules changes pertaining to the Commission on Judicial Disabilities: Amendments to Rule 16-804 (Commission), Amendments to Rule 16-805 (Complaints; Preliminary Investigations), New Rule 16-805.1 (Judicial Inquiry Board), and Amendments to Rule 16-806 (Further Investigation)

Judge Heller explained that the Honorable Sally D. Adkins, Chair of the Commission on Judicial Disabilities, has suggested changes to the Commission Rules. Before the Rules Committee

today is a letter dated March 7, 2006, from Steven P. Lemmey, Esq., Investigative Counsel, written following a meeting of the General Court Administration Subcommittee. See Appendix 2. The meeting materials for today's meeting include a letter from Judge Adkins dated November 1, 2005 explaining the rationale for the proposed changes to the Rules. See Appendix 3. The Commission proposes a two-tiered system, creating a Judicial Inquiry Board to perform investigative functions before the Commission performs the adjudicative function. The Board would oversee the work of Investigative Counsel and would make recommendations to the Commission.

Judge Heller presented Rule 16-804, Commission, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-804 to add language to section (e) providing for telephone or video conferences, as follows:

Rule 16-804. COMMISSION

(a) Chair and Vice Chair

The Commission shall select one of its members to serve as Chair and another to serve as Vice Chair for such terms as the Commission shall determine. The Vice Chair shall perform the duties of the Chair whenever the Chair is disqualified or otherwise unable to act.

(b) Interested Member

A member of the Commission shall not participate as a member in any proceeding in which (1) the member is a complainant, (2) the member's disability or sanctionable conduct is in issue, (3) the member's impartiality might reasonably be questioned, (4) the member has personal knowledge of disputed evidentiary facts involved in the proceeding, or (5) the recusal of a judicial member would otherwise be required by the Maryland Code of Judicial Conduct.

Cross reference: See Md. Const., Article IV, §4B (a), providing that the Governor shall appoint a substitute member of the Commission for the purpose of a proceeding against a member of the Commission.

(c) Executive Secretary

The Commission may select an attorney as Executive Secretary. The Executive Secretary shall serve at the pleasure of the Commission, advise and assist the Commission, have other administrative powers and duties assigned by the Commission, and receive the compensation set forth in the budget of the Commission.

(d) Investigative Counsel; Assistants

The Commission shall appoint an attorney as Investigative Counsel. Before appointing Investigative Counsel, the Commission shall notify bar associations and the general public of the vacancy and shall consider any recommendations that are timely submitted. Investigative Counsel shall serve at the pleasure of the Commission and shall receive the compensation set forth in the budget of the Commission. Investigative Counsel shall have the powers and duties set forth in these rules and shall report and make recommendations to the Commission as directed by the Commission. As the need arises and to the extent funds are available in the Commission's budget, the Commission may appoint additional attorneys or other persons to assist Investigative Counsel.

Investigative Counsel shall keep an accurate record of the time and expenses of additional persons employed and ensure that the cost does not exceed the amount allocated by the Commission.

(e) Quorum

The presence of a majority of the members of the Commission, either in person or via telephone or video conference, constitutes a quorum for the transaction of business, except for a hearing, provided that at least one judge, one lawyer, and one public member are present or participate in the telephone or video conference. Other than adjournment of a meeting for lack of a quorum, no action may be taken by the Commission without the concurrence of a majority of members of the Commission.

(f) Record

The Commission shall keep a record of all proceedings concerning a judge.

(g) Annual Report

The Commission shall submit an annual report to the Court of Appeals, not later than September 1, regarding its operations and including statistical data with respect to complaints received and processed, subject to the provisions of Rule 16-810.

(h) Request for Home Address

Upon request by the Commission or the Chair of the Commission, the Administrative Office of the Courts shall supply to the Commission the current home address of each judge.

Cross reference: See Rules 16-803 (a) and 16-810 (a)(1).

Source: This Rule is derived from former Rule 1227A.

Rule 16-804 was accompanied by the following Reporter's

Note.

> The Honorable Sally D. Adkins, Chair of the Commission on Judicial Disabilities, requested a modification to Rule 16-804 to provide for telephone and video conferences for the Commission. This will facilitate more participation by Commission members who may have problems driving to meetings in distant locations or attending meetings in bad weather.

Judge Heller explained that a change to section (e) is proposed, which would allow members of the Commission to meet via telephone or video conferences. Judge Adkins told the Committee that it seems inefficient to make the Commission members drive to Annapolis if a meeting can be held via the telephone. By consensus, the Committee approved the Rule as presented.

Judge Heller presented Rule 16-805.1, Judicial Inquiry Board, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

ADD new Rule 16-805.1, as follows:

Rule 16-805.1. JUDICIAL INQUIRY BOARD

(a) Composition of Judicial Inquiry Board

> The Commission shall appoint a Judicial Inquiry Board consisting of two judges, two attorneys, and three public members who are neither attorneys nor judges. The Commission may remove or replace members of the Judicial Inquiry Board at any time.

No member of the Commission may serve on the Board. A member of the Board may not receive compensation for serving in that capacity but is entitled to reimbursement for expenses reasonably incurred in the performance of official duties in accordance with standard State travel regulations.

(b) Review of Recommendations of Investigative Counsel

The Judicial Inquiry Board shall review the recommendations of Investigative Counsel. At least one judge, one attorney, and one public member shall be present when the Board meets. The chair of the Board shall be a lawyer or a judge.

(c) Meeting with Judge

The Board may meet informally with the judge and discuss private disposition, including a reprimand, deferred discipline agreement, or warning, pursuant to Rule 16-807.

(d) Report to Commission

The Board shall submit a report to the full Commission which shall notify Investigative Counsel and the judge of the Board's recommendation. The report shall include one of the following recommendations: (1) authorization of a further investigation; (2) dismissal of any complaint and termination of the investigation with or without a warning; (3) the offer of a private reprimand or deferred discipline agreement; or (4) upon a determination of probable cause, the filing of charges, unless the Board determines that there is a basis for private disposition under the standards of Rule 16-807. The report shall be transmitted to the Commission within 45 days after the date the Board received Investigative Counsel's recommendations, unless upon the Board's request, the Chair of the Commission extends the time for another 30 days. If the Board does not issue its report within the specified time, the matter shall be referred to the Commission. The information

transmitted by the Board to the Commission shall be limited to what the Board has determined would be likely to be admitted at a plenary hearing.

(e) Filing of Objections

Investigative Counsel and the judge must file any objections to the Board's report within 15 days of the date on the notice unless the parties agree otherwise. The parties may not object to the recommendation by the Board to authorize a further investigation.

(f) Review of Board's Recommendations

The Commission shall review the recommendations of the Board. If the parties agree, the judge may appear before the Commission. The Commission shall dispose of the matter pursuant to Rule 16-807, if the Commission decides to dismiss the case with or without a warning, to issue a private reprimand, or to enter into a deferred discipline agreement. If the Commission finds probable cause to believe that the judge has a disability or has committed sanctionable conduct, the Commission shall proceed pursuant to Rule 16-808, unless it determines that there is a basis for private disposition under the standards of Rule 16-807.

Source: This Rule is new.

Rule 16-805.1 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 16-805.

Judge Heller explained that Rule 16-805.1 is a proposed addition to the Rules pertaining to the Commission on Judicial Disabilities. She suggested that sections (a) and (b) of the new Rule be moved to a new Rule 16-804.1, entitled "Judicial Inquiry

Board," because Rule 16-805.1 seems to be located in the wrong place. Judge Adkins expressed her agreement with this suggestion. Judge Heller noted that in the March 7, 2006 letter, changes to section (b) of Rule 16-805.1, which would now be Rule 16-804.1, are proposed. The tagline of section (b) is "Review of Recommendations of Investigative Counsel." The changes appear on page 3 of the letter. They include adding language to provide that the Board shall monitor the investigations by Investigative Counsel and that the Chair of the Board shall be appointed by the Chair of the Commission. The new language also provides that the Board may meet either in person or by telephone and that the Executive Secretary of the Commission shall keep minutes of the Board meetings. Judge Heller also pointed out that the Rule allows the Board to authorize a further investigation. Reconciliation of this provision with the proposed time constraints for the Board to make its recommendation to the Commission should be discussed.

The Chair inquired as to how a Commission member is removed. Judge Adkins answered that the Commission had discussed whether the Chair of the Commission should be the one to remove a member and how strong the Chair should be. The Chair (of the Rules Committee) commented that one method would be to provide that the Court of Appeals would remove a member. He suggested that language could be added to section (a) of the new Rule numbered 16-804.1 that would provide that the Chair or the Commission by a majority vote could remove a member. Judge Heller added that

this would be consistent with the reference to "a majority of the members of the Commission" in section (e) of Rule 16-804. By consensus, the Committee agreed to this change.

Judge Heller presented Rule 16-805, Complaints; Preliminary Investigations for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-805 to add language to subsection (e)(2) and to section (f), as follows:

Rule 16-805. COMPLAINTS; PRELIMINARY INVESTIGATIONS

(a) Complaints

All complaints against a judge shall be sent to Investigative Counsel. Upon receiving a complaint that does not qualify as a formal complaint but indicates that a judge may have a disability or have committed sanctionable conduct, Investigative Counsel shall, if possible: (1) inform the complainant of the right to file a formal complaint; (2) inform the complainant that a formal complaint must be supported by affidavit and provide the complainant with the appropriate form of affidavit; and (3) inform the complainant that unless a formal complaint is filed within 30 days after the date of the notice, Investigative Counsel is not required to take action, and the complaint may be dismissed.

(b) Formal Complaints

Investigative Counsel shall number and open a file on each formal complaint received and promptly in writing (1) acknowledge

receipt of the complaint and (2) explain to the complainant the procedure for investigating and processing the complaint.

(c) Dismissal by Investigative Counsel

If Investigative Counsel concludes that the complaint does not allege facts that, if true, would constitute a disability or sanctionable conduct and that there are no reasonable grounds for a preliminary investigation, Investigative Counsel shall dismiss the complaint. If a complainant does not file a formal complaint within the time stated in section (a) of this Rule, Investigative Counsel may dismiss the complaint. Upon dismissing a complaint, Investigative Counsel shall notify the complainant and the Commission that the complaint has been dismissed. If the judge has learned of the complaint and has requested notification, Investigative Counsel shall also notify the judge that the complaint has been dismissed.

(d) Inquiry

Upon receiving information from any source indicating that a judge may have a disability or may have committed sanctionable conduct, Investigative Counsel may open a file and make an inquiry. Following the inquiry, Investigative Counsel shall (1) close the file and dismiss any complaint in conformity with section (b) of this Rule or (2) proceed as if a formal complaint had been filed and undertake a preliminary investigation in accordance with section (d) of this Rule.

Committee note: An inquiry may include obtaining additional information from the complainant, reviewing public records, obtaining transcripts of court proceedings, and communicating informally with the judge.

(e) Preliminary Investigation

(1) If a complaint is not dismissed in accordance with section (c) or (d) of this Rule, Investigative Counsel shall conduct a

preliminary investigation to determine whether there are reasonable grounds to believe that the judge may have a disability or may have committed sanctionable conduct. Investigative Counsel shall promptly inform the Commission that the preliminary investigation is being undertaken.

(2) Upon application by Investigative Counsel and for good cause, the Chair of the Commission may authorize Investigative Counsel to issue a subpoena to obtain evidence during a preliminary investigation.

(3) Unless directed otherwise by the Commission for good cause, Investigative Counsel shall notify the judge before the conclusion of the preliminary investigation (A) that Investigative Counsel has undertaken a preliminary investigation into whether the judge has a disability or has committed sanctionable conduct; (B) whether the preliminary investigation was undertaken on Investigative Counsel's initiative or on a complaint; (C) if the investigation was undertaken on a complaint, of the name of the person who filed the complaint and the contents of the complaint; (D) of the nature of the disability or sanctionable conduct under investigation; and (E) of the judge's rights under subsection (e)(4) of this Rule. The notice shall be given by first class mail or by certified mail requesting "Restricted Delivery - show to whom, date, address of delivery" addressed to the judge at the judge's address of record.

(4) Before the conclusion of the preliminary investigation, Investigative Counsel shall afford the judge a reasonable opportunity to present, in person or in writing, such information as the judge chooses.

(5) Investigative Counsel shall complete a preliminary investigation within 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90-day period and for good cause, the Commission shall extend the time for completing the preliminary investigation for

an additional 30-day period. For failure to comply with the time requirements of this section, the Commission may dismiss any complaint and terminate the investigation.

(f) Recommendation by Investigative Counsel

Within the time for completing a preliminary investigation, Investigative Counsel shall report to the Judicial Inquiry Board the results of the investigation in the form that the Commission requires. The report shall include one of the following recommendations: (1) dismissal of any complaint and termination of the investigation, (2) the offer of a private reprimand or a deferred discipline agreement, (3) authorization of a further investigation, or (4) the filing of charges.

Source: This Rule is derived from former Rule 1227B.

Rule 16-805 was accompanied by the following Reporter's Note.

The Honorable Sally D. Adkins, Chair of the Commission on Judicial Disabilities, requested that the Rules Committee consider modifying the review process by the Commission to include a review of Investigative Counsel's recommendations by a separate Board. Review by a separate Board would alleviate the problem of decisions being made by only a portion of the Commission. The "panelization" model was recommended by the ABA, and several other states use some version of it. To add a Board review procedure to the Rules pertaining to the Commission on Judicial Disabilities, the General Court Administration Subcommittee recommends amending Rules 16-805, 16-806, and adding a new Rule 16-805.1 pertaining to the "Judicial Inquiry Board," which would set out the procedures for the Board to review Investigative Counsel's recommendations

before the full Commission hears the matter.

Judge Heller explained that a change has been suggested for subsection (e)(2) that would add the words "Chair of the" before the word "Commission," so that the Rule provides that the Chair of the Commission authorizes Investigative Counsel to issue a subpoena. In the March 7 letter, Judge Adkins has requested that the word "Commission" in the first line of subsection (e)(3) be changed to the word "Board," so that it is the Board that would direct Investigative Counsel otherwise when he or she had intended to notify the judge about the preliminary investigation.

Judge Heller said that in the letter, Judge Adkins has requested a change to subsection (e)(5), so that it is the Board, rather than the Commission, that extends the time for Investigative Counsel to finish the preliminary investigation. Also, as expressed in the letter, Judge Adkins has requested the addition of a subsection (e)(6) that would provide that the Board may authorize Investigative Counsel to conduct a further investigation. Judge Heller questioned as to whether the Board should authorize a further investigation or whether the Commission should do so. Subsection (e)(5) provides that the investigation by Investigative Counsel must be completed within 90 days after the investigation is started. For good cause, the Commission can extend the time for completing the preliminary investigation for an additional 30-day period. This would add up to 120 days. The Board's right to authorize a further

investigation may be running against time deadlines.

Judge Adkins remarked that the extra 30 days would provide at the most a 120-day time period. She suggested that the second sentence of subsection (e)(5) could go into subsection (e)(6). The Chair noted that the word "Board" replaces the word "Commission" in subsection (e)(5). Judge Heller expressed the view that the 120-day time period in subsection (e)(5) is ambiguous. Judge Adkins suggested that the language concerning the extension of time should be put into subsection (e)(6). Judge Heller commented that the Rule should be clear that under no circumstances should there be more than 120 days for a preliminary investigation. The Chair observed that if there is a failure to comply with the time restrictions, no automatic sanction is provided. The Rule must express clearly that a delay does not mean that the charge will be dismissed.

Judge Heller agreed that the language pertaining to the extension of the preliminary investigation could go into subsection (e)(6). Judge McAuliffe inquired as to why proposed subsection (e)(6) is necessary at all. Judge Adkins responded that subsection (e)(5) covers what was provided for in subsection (e)(6), so the latter will not be needed. Judge Heller reiterated that the preliminary investigation will take no more than 120 days. The Chair noted that section (f) begins with the language: "[w]ithin the time for completing a preliminary investigation...," and suggested that the language be changed to "Upon completion of ...".

Judge Heller hypothesized that on the 121st day after the preliminary investigation is begun but not completed, a judge could commit a crime, and if there is no sanction for a delayed preliminary investigation, Investigative Counsel could recommend to the Board that a further investigation take place. Judge Heller questioned as to whether there should be a time limit in the Rule. The Chair responded that there is a danger if there is no time limit in the Rule. Judge McAuliffe pointed out that Rule 16-806, Further Investigation, contains time limits. Judge Adkins commented that it is risky to have a penalty of dismissal.

Judge Heller said that she is satisfied that the maximum for the preliminary investigation is 120 days. Judge Adkins noted that to investigate complaints, it is frequently necessary to view the transcript of the case. Often, the time required for the court reporter to prepare the transcript is a source of delay. The Chair pointed out that section (c) of Rule 16-806 provides that Investigative Counsel must complete a further investigation within 60 days. The Commission may extend this time period. Judge McAuliffe added that this extension has to be for a specified reasonable time. Judge Heller stated that subsection (e)(6) would not be added to Rule 16-805, and the change to section (f), which provides that Investigative Counsel reports the results of the preliminary investigation to the Judicial Inquiry Board, is acceptable. She suggested that what is currently section (b) of Rule 16-805.1 should be placed in Rule 16-805 as a new section (g) that will also include the

changes proposed by Judge Adkins from the March 7 letter. Judge Adkins observed that section (b) of Rule 16-805.1 covers more than the preliminary investigation, which is part of the title of Rule 16-805. Judge Heller noted that section (f) of Rule 16-805 is entitled "Recommendation by Investigative Counsel," and what is now section (b) of Rule 16-805.1 would logically be placed following section (f). Section (c) of Rule 16-805.1 would become section (h), and section (d) would become section (i) of Rule 16-805.

The Chair pointed out that the end of Rule 16-806 should be moved. Judge Heller noted that what is currently Rule 16-805.1 (d) has some changes proposed in the March 7 letter. One of the changes is a new sentence which reads as follows: "This may include hearsay if the declarant is available to testify." The Chair expressed the view that the sentence is not appropriate. He suggested that the prior sentence should read: "The information transmitted by the Board to the Commission shall be limited to a proffer of evidence that the Board has determined would be likely to be admitted at a plenary hearing." He also suggested that the sentence pertaining to hearsay should be deleted. Judge Adkins said that she consented to these changes. By consensus, the Committee agreed to these suggestions.

Judge Heller suggested that section (e) of Rule 16-805.1 become section (j) of Rule 16-805. She expressed the view that the last sentence of section (e) should be eliminated. Judge Adkins observed that either side can object to the Board

recommendation to authorize a further investigation. By consensus, the Committee agreed to delete the last sentence of section (e) and move section (e) to section (j) of Rule 16-805.

Judge Heller said that there is a proposed change to section (f) of Rule 16-805.1 as presented in the March 7 letter. The Chair asked whether the Commission would ever turn down the request of the judge to be allowed to appear before it. Judge Adkins responded that the appearance of the judge could result in the Commission prejudging the matter. After public charges are filed, the argument could be made that the Commission had heard too much. The Chair cautioned that the Rule should protect against prejudice. Judge Adkins remarked that she did agree with the inference that the Commission would prejudge because of the appearance of the judge before it. The Vice Chair pointed out that the proposed addition of the words "and the Commission" does not really protect against prejudice directed at the judge. Judge McAuliffe observed that the agreement of the Commission can be a condition required before a judge can appear in front of the Commission. The Chair suggested that the following language should be added to section (f) of Rule 16-805.1: "If the parties agree, the Commission may permit the judge to appear before the Commission on terms and conditions established by the Commission." By consensus, the parties agreed to this change and approved the Rule as amended.

Judge Heller presented Rule 16-806, Further Investigation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-806 to change the word "Commission" to "Judicial Inquiry Board" in sections (a), (c), and (d) and to add new language to subsection (b)(1), as follows:

Rule 16-806. FURTHER INVESTIGATION

(a) Notice to Judge

Upon approval of a further investigation by the ~~Commission~~ Judicial Inquiry Board, Investigative Counsel promptly shall notify the judge (1) that the ~~Commission~~ Board has authorized the further investigation, (2) of the specific nature of the disability or sanctionable conduct under investigation, and (3) that the judge may file a written response within 30 days of the date on the notice. The notice shall be given (1) by first class mail to the judge's address of record, or (2) if previously authorized by the judge, by first class mail to an attorney designated by the judge. The Commission, for good cause, may defer the giving of notice, but notice must be given not less than 30 days before Investigative Counsel makes a recommendation as to disposition.

(b) Subpoenas

(1) Upon application by Investigative Counsel and for good cause, the Chair of the Commission may authorize Investigative Counsel to issue a subpoena to compel the attendance of witnesses and the production of documents or other tangible things at a time and place specified in the subpoena. Promptly after service of the subpoena and in addition to any other notice required by law, Investigative Counsel shall provide to the judge under investigation notice of the

service of the subpoena. The notice to the judge shall be sent by first class mail to the judge's address of record or, if previously authorized by the judge, by first class mail to an attorney designated by the judge.

(2) The judge or the person served with the subpoena may file a motion for a protective order pursuant to Rule 2-510 (e). The motion shall be filed in the circuit court for the county in which the subpoena was served or, if the judge under investigation is a judge serving on that circuit court, another circuit court designated by the Commission. The court may enter any order permitted by Rule 2-510 (e). Upon a failure to comply with a subpoena issued pursuant to this Rule, the court, on motion of Investigative Counsel, may compel compliance with the subpoena.

(3) To the extent practicable, a subpoena shall not divulge the name of the judge under investigation. Files and records of the court pertaining to any motion filed with respect to a subpoena shall be sealed and shall be open to inspection only upon order of the Court of Appeals. Hearings before the circuit court on any motion shall be on the record and shall be conducted out of the presence of all persons except those whose presence is necessary.

Cross reference: See Code, Courts Article, §§13-401 - 403.

(c) Completion

Investigative Counsel shall complete a further investigation within 60 days after it is authorized by the ~~Commission~~ Judicial Inquiry Board. Upon application by Investigative Counsel made within the 60-day period and served by first class mail upon the judge or counsel of record, the Commission, for good cause, may extend the time for completing the further investigation for a specified reasonable time. The Commission may dismiss the complaint and terminate the investigation for failure to

comply with the time requirements of this section.

(d) Recommendation by Investigative Counsel

Within the time for completing a further investigation, Investigative Counsel shall report the results of the investigation to the ~~Commission~~ Judicial Inquiry Board in the form that the Commission requires. The report shall include one of the following recommendations: (1) dismissal of any complaint and termination of the investigation with or without a warning, (2) the offer of a private reprimand or a deferred discipline agreement, or (3) the filing of charges.

(e) Referral to Judicial Inquiry Board

The Judicial Inquiry Board shall review the recommendations of Investigative Counsel in accordance with the provisions of sections (d) and (e) of Rule 16-805.1, except that the Board may not recommend authorization of a further investigation.

(f) Review of Judicial Inquiry Board's Recommendations

The Commission shall review the recommendations of the Judicial Inquiry Board. The Commission shall dispose of the matter pursuant to Rule 16-807, if the Commission decides to dismiss the case with or without a warning, to issue a private reprimand, or to enter into a deferred discipline agreement. If the Commission finds probable cause to believe that the judge has a disability or has committed sanctionable conduct, the Commission shall proceed pursuant to Rule 16-808, unless it determines that there is a basis for private disposition under the standards of Rule 16-807.

Source: This Rule is in part derived from former Rule 1227C and is in part new.

Rule 16-806 was accompanied by the following Reporter's Note.

See the Reporter's Note to Rule 16-805.

Judge Heller told the Committee that sections (e) and (f) are not necessary. Section (d) can also be deleted, because its contents appear elsewhere in the Commission Rules. By consensus, the Committee agreed to delete sections (d),(e), and (f) from the Rule.

By consensus, the Committee approved the Rule as amended.

The Chair stated that the Rules would be sent to the Style Subcommittee. After they have been styled, the Committee could review them again, if necessary.

Agenda Item 4. Consideration of Proposed Responses to two Issues referred to the Attorneys Subcommittee: Use of the word "rescind" in Rule 16-903 (Reporting Pro Bono Legal Services) and Rule 16-811 (Client Protection Fund of the Bar of Maryland) and Rule 8.2 (Judicial and Legal Officials) of the Maryland Lawyers' Rules of Professional Conduct and the First Amendment

---

Mr. Brault told the Committee that the Court of Appeals had questioned the meaning of the word "rescind" as it relates to orders reinstating attorneys to the practice of law after having belatedly paid assessments and penalties due to the Client Protection Fund and in orders reinstating lawyers who had belatedly filed a *Pro Bono* report. Alexander Cummings, Clerk of the Court of Appeals of Maryland had asked the Reporter to convey the Court's question to the Rules Committee. See Appendix 4.

The Attorneys Subcommittee considered the question, and they drafted a letter to Mr. Cummings. See Appendix 5. The letter, a copy of which is included in the meeting materials, explains what the Subcommittee believed the meaning of "rescind" to be. The Chair said that the letter will be sent from the Rules Committee, signed by Mr. Brault as chair of the Attorneys Subcommittee, to Mr. Cummings.

Mr. Brault said that also included in the meeting materials is a letter from J. Michael Conroy, Esq., President of the Maryland State Bar Association (MSBA), referring to the case of *Attorney Grievance Commission v. Brandes,* 388 Md. 620 (2005). The case involved a question as to whether there could be a constitutional violation when a lawyer is sanctioned under section (a) of Rule 8.2, Judicial and Legal Officials, of the Maryland Lawyers' Rules of Professional Conduct for making a statement in a legal proceeding about a judge that is either an opinion or based on factual averments that have not been shown to be false. The issue was not considered by the Court of Appeals, because the lawyer who was the subject of the proceeding consented to disbarment, rendering the case moot. Mr. Conroy forwarded to the Rules Committee a copy of the *amicus* brief that the MSBA filed in the case and asked the Committee to consider the issue presented in the case, despite the outcome, because it may be of constitutional proportions. See Appendix 6. Andrew Baida, Esq., attended the Attorneys Subcommittee on February 10, 2006 and led a discussion of Rule 8.2 as it relates to the facts

of the *Brandes* case. Mr. Brault then drafted a letter to Mr. Baida stating the position of the Subcommittee, which is that given the differing cases on "reckless disregard" and "without a good faith basis," the Subcommittee was unable to come up with language that would further define or clarify the Rule. See Appendix 7. The letter also asks the MSBA for any changes it suggests. The Chair stated that the letter will be sent to Mr. Baida by the Committee.

The Chair adjourned the meeting.