COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judiciary Training Center, 2011-D Commerce Park Drive, Annapolis, Maryland on April 21, 2006.

Members present:

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

F. Vernon Boozer, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Timothy F. Maloney, Esq.
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Melvin J. Sykes, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Hee Smith, Rules Committee Intern
Hope G. Gary, AOC, Executive Director, Foster Care Administration
Dawn Oxley Musgrave, Esq., Adoptions Together
Erica LeMon, Esq., AOC, Family Administration
Rhonda Lipkin, Esq., Public Justice Center
Paul H. Ethridge, Esq., Chair, MSBA Rules of Practice Committee
Hon. Maurice W. Baldwin, Jr.
Steven P. Lemmey, Esq., Investigative Counsel, Commission on Judicial Disabilities
Hon. Sally D. Adkins, Chair, Commission on Judicial Disabilities

The Chair convened the meeting.

Agenda Item 1. Consideration of proposed revisions to the **forms** contained in proposed revised Title 9, Chapter 100 (Adoptions and Guardianships that Terminate Parental Rights): Amendments to Rule 9-102 (Authority; Consents; Requests for Attorney or Counseling), New Rule 9-102.1 (Forms), and Amendments to Rule 9-106 (Appointment of Attorney - Investigations) (See Appendix 1)

Ms. Ogletree told the Committee that changes had been proposed for the Rules pertaining to adoption and guardianship to conform to statutory changes, and the consultants who helped the Subcommittee in drafting the changes were concerned about the consent forms. The consultants, headed by Rhonda Lipkin, Esq., then redrafted the forms to make them less confusing.

Ms. Lipkin explained that last spring a new law passed that changed the laws pertaining to adoptions and guardianships. She had participated in the revision of the Rules to conform them to the new law. Also participating were Hope Gary, Esq., Erica LeMon, Esq., and Dawn Musgrave, Esq., who were present at the meeting today. Ms. Lipkin said that new Rule 9-102.1, Forms, has been added. This contains 10 forms, five of which are for parental consent, two of which are for child consent, and three of which are attorney affidavit forms. The current forms have the instructions for filling them out mixed in with the form. Many people do not fill out some sections of the form, because parts of the forms are unclear. The revised forms have separate instructions, except for one of the child consent forms. The forms are separated as to the various types of the six proceedings covered in the statute. These are guardianship to

local department, private agency guardianship, adoption through local department, private agency adoption, independent adoption with termination of parental rights, and independent adoption without termination of parental rights.

Ms. Lipkin continued that when children who are 10 years of age and over are adopted, they have to consent. There are two different child consent forms. When an adoption is through a public or private agency, the child is represented by an attorney, as required by statute. The attorney reviews the consent form with the child. Since representation by counsel is not required in an independent adoption, the form and the instructions are simpler. However, the instructions and form may still not be easy to understand, and the statute provides that children should be able to consult an attorney. There are also three affidavit forms for attorneys to fill out. These are for consents of a parent to guardianship to the local department or to a private agency, consents of a parent to adoption through a local department and an independent adoption, and consents of a child to adoption through a local department as well as to a private agency and independent adoption.

The Chair questioned whether the General Assembly passed any other statutes that would require further changes to the Rules. Ms. Lipkin replied that conforming to 2006 legislation required that a few minor changes be made to the Rules, and these have already been submitted. The Chair noted that the instructions are part of the form, and he inquired as to whether it is

necessary to file them with the court in every case. This would use a lot of paper and file space. Ms. Lipkin answered that the instructions end, and then the form begins on the next page. The parents keep the copy of the instructions. The Chair commented that if the instructions are not part of the form, there needs to be a verification that the parents were presented with the instructions. He suggested that a line be added to the front of the consent form that would state that the person signing acknowledges that he or she has read and understood the instructions. This would avoid a problem later on when the parent avers that he or she did not understand the instructions. Ms. Lipkin asked whether it would solve the problem to add to the consent form a statement that the person acknowledges that he or she reviewed the instructions. The Chair answered that this may be adequate. Mr. Sykes remarked that if the attorney signs that he or she has reviewed the form, this is additional proof. The Chair observed that this is only useful where an attorney is involved. Ms. Musgrave noted that the agency she works for, Adoptions Together, uses something similar to indicate that the parent understood the instructions.

Mr. Brault said that attorneys who file affidavits may have potential liability. Ms. Lipkin responded that the attorney affidavit has been part of the law for a long time. It is commonly used when the parent is a minor. Mr. Brault asked if the attorney is court-appointed, and Ms. Lipkin answered that the attorney is court-appointed when the adoption is public, but not

private. Mr. Brault inquired as to whether the case of *Fox v. Wills*, 390 Md. 620 (2006), in which the Court of Appeals held that court-appointed lawyers representing children are not immune from civil liability, is relevant and he inquired as to whether there is reluctance among attorneys to be appointed in these cases. The Chair questioned as to whether House Bill 700 that provided for immunity from civil liability for court-appointed lawyers for children passed. Mr. Maloney responded that the bill passed, but the portion providing for civil immunity for court-appointed lawyers for children was stricken from the bill. The statute provides for "child advocate" attorneys and "best interest" attorneys. Ms. Lipkin pointed out that the *Wills* case and House Bill 700 pertain to child custody and child access cases. There are different statutory provisions pertaining to guardianship and adoption cases, and there is an Appendix to the Maryland Rules, the Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Cases, applicable to child counsel in these types of cases.

The Chair asked what the Rules Committee would like to do regarding filing the instructions with the consent form. Ms. Ogletree suggested that the instructions could be attached as an exhibit. Ms. Lipkin added that the person who signs the consent could file an attachment stating that he or she read and understood the instructions. The Chair said that this signature line could be located at the bottom of the instruction sheet.

By consensus, the Committee agreed to include this attachment.

The Vice Chair said that she was unclear as to the meaning of the last sentence of section (b) of Rule 9-101, Definitions and Scope. The last sentence reads as follows: "Where multiple citations to statutes in those subtitles are listed, the applicable statute is that which appears in the subtitle applicable to the proceeding." The Vice Chair asked where the subtitles are listed. Ms. Lipkin replied that an example would be in section (a) of Rule 9-102, Authority; Consents, which has multiple citations of subtitles listed. The Assistant Reporter suggested that the language "in these Rules" could be added after the word "listed." The Chair suggested that the words "in those subtitles" could be deleted.

Ms. Lipkin commented that the citations direct the reader to the appropriate section of the Annotated Code. The Vice Chair expressed the view that the second sentence in Rule 9-101 (b) does not clearly explain how the citations work. Ms. Musgrave suggested that the sentence be removed. The Chair recommended that language could be added to the Committee note explaining that where the statute pertains to only one kind of proceeding, the Rule is applicable only to that kind of proceeding. Mr. Sykes observed that the Committee note could state which statute is relevant and what it applies to. Ms. Lipkin proposed that whenever the statute covers the proceeding, the Rule should simply refer to the statute, rather than state what the statute provides. The Vice Chair noted that the cross references are

already in the Rules. Ms. Ogletree reiterated Mr. Sykes's point that the Rule should specify which subtitle is appropriate, so that the practitioner can determine which form is necessary.

The Vice Chair asked if the requirements for revoking a consent to a private agency guardianship or an independent adoption in Rule 9-102 (b)(1)(B)(i) must all be met. Ms. Ogletree answered affirmatively. Ms. Lipkin added that the second consent must be given on the record, and not only in written form, so that the judge can ensure that the consent is voluntary. The Vice Chair inquired as to whether this can be revoked. Ms. Ogletree responded that the consent has already been revoked in writing. The judge questions the person who revoked on the record, and the revocation is immutable. Ms. Musgrave remarked that the parent gives consent, then revokes the consent, then may want to consent again. This prevents the parent from being able to revoke a second time. Mr. Sykes remarked that there could have been a previously revoked consent, and someone filed an objection that may have well-founded. This is not the same as never having consented. The Vice Chair suggested that in part (3) of subsection (b)(1)(B)(i), the word "second" be added before the word "consent." She also suggested that the word "was" be added before the word "given." By consensus, the Subcommittee agreed to these changes.

Mr. Brault questioned as to whether the statute covers consent. Ms. Ogletree responded in the affirmative. Mr. Brault expressed the view that the Rule is parroting the statute on

substantive law. Ms. Ogletree explained that the Rules were designed to help practitioners who do not specialize in adoption law. The Chair commented that having a 20-page Rule to deal with a 10-page statute may not be the best way to solve the problem of lawyers who are not very familiar with the law. When an evidence rule is covered by a statute, the Rule provides that the issue is "governed by," naming the appropriate statute. Ms. Lipkin said that she agreed with that approach. If the statute changes, and the Rule paraphrases it, the Rule will lag behind. Ms. Ogletree reiterated that the Subcommittee was trying to give some guidance to the general practitioner who handles an occasional adoption.

The Vice Chair agreed that the other way to design the Rules is to state that the subject "is governed by," naming the parallel statute. Ms. Ogletree pointed out that each Rule could be broken down by proceeding. Mr. Brault noted that the current form of proposed changes to Title 9, Chapter 100 will add to the size of the Rule books. The Chair's suggestion to cite to the applicable statute, instead of spelling it out in the Rule, will help alleviate this problem. The Vice Chair noted that all of the new language in the Rules would be eliminated. Ms. Ogletree explained that the forms of consent had to be changed. The Subcommittee believed that the forms were confusing and had asked the consultants to simplify help them. The consultants did a very good job revising the forms, and the Chair agreed.

Ms. Potter inquired as to whether the forms would be available in the clerks' offices around the State. Ms. Ogletree

replied that the forms have not yet been approved by the Court of Appeals, but once they are, they will be in the Rule book. Ms. Potter asked if the Rules could provide that the forms are available in the clerks' offices.

Ms. Lipkin said that Rule 9-105, Show Cause Order; Disability of a Party; Other Notice, contains the service requirements for the show cause order that are specified by the statute. It is unusual for statutes to specify notice requirements. The Vice Chair questioned as to whether the language of the Rule is the precise language of the statute. She pointed out that subsection (b)(1)(B) provides: "[i]f a court is satisfied that service of the show cause order could not be made on a parent...," while subsection (b)(2)(B) provides: "[i]f a court is satisfied that after reasonable efforts in good faith, a petitioner... could not make service of the show cause order on a parent..". Ms. Lipkin responded that these are two different scenarios. The first one involves service by a public agency, while the second one is service by a private person. She added that the statute is divided into sections pertaining to the type of guardianship or adoption it is. The Vice Chair commented that it could be argued that in the first case, there is no need to make reasonable efforts to serve the show cause order.

The Reporter asked how many provisions are in the Rules, but not in the statute. Ms. Lipkin answered that the form of the petition, the show cause order, the accounting, and the form of the objection are some of the items not in the statute. The

statute is very procedure-oriented. Ms. Ogletree remarked that the Subcommittee did not feel strongly about repeating the contents of the statute as opposed to citing the statutory reference. The latter method would shorten the Rules. The forms would stay in the Rules, together with the instructions. Ms. Lipkin's original draft of the Rules used the shortened format.

The Vice Chair commented that under the current law, an agency is entitled to revoke consent. Subsection (b)(2)(B) of Rule 9-102 contains an exception for the way an individual revokes consent. Ms. Musgrave pointed out that subsection (b)(2)(B) of Rule 9-102 should be deleted, and the underlined language at the beginning of subsection (b)(2)(A) also should not appear in the Rule. The Vice Chair inquired as to the meaning of the language "if applicable" in subsection (b)(4). Ms. Musgrave answered that if someone attempts revocation of a prior consent, the court may, but is not required to, hold a hearing. The Chair asked what the result would be if the person attempts to revoke but is not entitled to revoke. Ms. Musgrave responded that if one is entitled to revoke, a hearing would be held, but if one is not entitled to revoke, no hearing is necessary.

The Vice Chair suggested that language be added to subsection (b)(4) providing that a hearing would be held if the person who attempts to revoke is entitled to revoke. Mr. Sykes suggested that subsection (b)(4) could begin as follows: "[i]f a consent is validly revoked pursuant to this Rule....". Ms. Musgrave commented that the statute does not address what happens

if someone is not entitled to revoke but attempts to revoke. Ms. Lipkin added that the statute also does not address the court's determination of temporary custody as provided by the Rule. The Chair suggested that subsection (b)(4) should begin as follows: "[i]f a person who is entitled to revoke consent revokes consent, the court shall schedule...". By consensus, the Committee agreed to this change.

The Chair said that it makes sense that the court can rule without a hearing when a person who is not entitled to revoke the consent to an adoption attempts to revoke anyway. The Vice Chair remarked that the issue may be whether the person is entitled to revoke or not. Ms. Ogletree observed that it may be necessary to determine temporary custody in a hearing whether or not a revocation is valid. The Vice Chair inquired as to whether there should be a hearing in every case. Ms. Ogletree suggested that a Subcommittee meeting be scheduled to consider the various alternatives. Notices and time limits could be flagged based on the type of proceeding. The Rules could be brought back in May or June.

The Vice Chair said that she had some other questions. On page 94, she suggested that the language in subsection (b)(2)(A)(xiv) of Rule 9-103 (Petition) that reads "and, except for adoptions under Subtitle 3, Part IV" should be deleted. Ms. Lipkin commented that when the Rules are redrafted, the statute will be referenced at this point. The Vice Chair asked whether notice to consenting persons is provided for in the statute, and

Ms. Lipkin replied affirmatively. The Vice Chair inquired as to whether the reference to “Rule 2-121" in section (c) of Rule 9-105, Show Cause Order; Disability of a Party; Other Notice, is ambiguous, because subsection (a)(2) of Rule 2-121 is not applicable. Ms. Lipkin pointed out that the time for service is not in the statute. One provision in section (a) of Rule 2-121 that allows service of process to be made by leaving a copy of the complaint with a resident of suitable age at the house of the person to be served is not permitted in the new statute. However, the time period for service has to be in the Adoption Rules. Ms Ogletree suggested that section (c) of Rule 9-105 needs to be modified. The Vice Chair commented that the reference to “Rule 2-121" should be deleted. The Chair suggested that the language of the Rule could specifically exclude subsection (a)(2) of Rule 2-121. The Vice Chair expressed the view that sections (c) and (d) cannot simply refer to Rule 2-121. By consensus, the Committee agreed to delete the references to “Rule 2-121.”

The Chair said that the portions of the Rules that are self-standing need to be identified. The Rules should not rewrite what is provided for in the statute. The Rules should contain express references to the statute where it is applicable. Where the statute is silent, the Rules will expressly provide the necessary procedures. The Chair thanked the consultants for all of their hard work on the Adoption and Guardianship Rules and forms.

Agenda Item 2. Continued reconsideration of proposed amendments to certain Rules pertaining to the Commission on Judicial Disabilities: Rule 16-804 (Commission), Rule 16-805 (Complaints; Preliminary Investigations), and Rule 16-806 (Further Investigations)

Mr. Lemmey told the Committee that Judges Adkins and Baldwin were present to discuss the proposed changes to the Judicial Disabilities Commission Rules. The Reporter noted that a revision to the Rules was distributed at the meeting. Judge Norton said that he had not been present at the March 10, 2006 Rules Committee meeting at which the Rules were last discussed. Since that meeting, additional changes have been proposed. The Reporter explained that the newest changes are shown in bold print.

Judge Adkins 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 (f) 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 Adkins pointed out that the change to section (e) that provides for the Commission to meet by telephone conferences does not apply to public hearings. Mr. Klein remarked that he was not present at the March Rules Committee meeting and was not certain if the exception for a public hearing referred to a difference in what constitutes a quorum for hearings as opposed to transacting other business. Judge Adkins responded that the idea of the Commission was that if a meeting was needed on one issue, it would not be necessary for all of the members of the Commission to drive to Annapolis to meet. The meeting could be held by telephone. However, a public hearing should not be held by telephone. The Vice Chair pointed out that two different sentences are needed in section (e) to differentiate that the exception is for a public hearing and not for a quorum.

The Reporter suggested that the Style Subcommittee can rewrite section (c) to provide that the quorum requirements are the same for all meetings of the Commission. For a public

hearing, members must be physically present. Other business may be transacted by telephone or video conference. By consensus, the Committee agreed to this suggestion.

Judge Adkins presented Rule 16-804.1, Judicial Inquiry Board, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

ADD new Rule 16-804.1, as follows:

Rule 16-804.1. 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 by majority vote 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.

Source: This Rule is new.

Rule 16-804.1 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 Commission's review process to include a preliminary assessment of complaints and Investigative Counsel's

reports and recommendations by a separate Board whose members are appointed by the Commission. The purpose of the Board is to decrease Commission involvement in the investigatory process and facilitate early resolution of complaints under the standards of Rule 16-807. The General Court Administration Subcommittee recommends amending Rules 16-804, 16-805, and 16-806, as well as adding new Rule 16-804.1 pertaining to the "Judicial Inquiry Board," to set out the operating procedures for the Board.

Judge Adkins explained that the new Rule clarifies the concept of and establishes the Judicial Inquiry Board. The Vice Chair asked whether there is money in the Judicial Disabilities Commission's budget to allow for the creation of a Judicial Inquiry Board. Mr. Lemmey replied that the Judicial Inquiry Board would serve without compensation, and there is money in the budget for expenses, which can be used for the Board's expenses. By consensus, the Committee approved the Rule as presented.

Judge Adkins 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 change an internal Rule reference in section (d), to add language to subsections (e)(1), (e)(2), and (e)(3) and to section (f), to change the word "Commission" to the word "Board" in subsection (e)(5), and to add sections (g), (h), (i), (j), (k), and (l), 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)~~ (e) 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 **Board or** 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 Board **or 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~~ Board 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~~ Upon completion of 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,

(4) authorization of any other lawful disposition of the case consented to by the judge and subject to the approval of the Commission, or ~~(4)~~ **(5)** the filing of charges.

(g) Review of Recommendations of Investigative Counsel

The Judicial Inquiry Board shall monitor the investigations by and 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 member of the Board and shall be appointed by the Chair of the Commission. The Inquiry Board may meet in person or by telephone conference and shall have the Executive Secretary of the Commission attend and keep minutes of the Board meetings.

(h) Further Investigation

The Judicial Inquiry Board may authorize a further investigation to be conducted pursuant to Rule 16-806.

(i) Meeting with Judge

The Board may meet informally with the judge and discuss private disposition, including a reprimand, deferred discipline agreement, ~~or~~ **dismissal with** a warning, pursuant to Rule 16-807**, or any other lawful disposition of the case consented to by the judge and subject to the approval of the Commission**.

(j) Report to Commission

The Board shall submit a report to the Commission which shall notify Investigative Counsel and the judge of the Board's recommendation. 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) **entering into** a private reprimand or deferred discipline agreement; **(3) any other lawful disposition of the case consented to**

by the judge and subject to the approval of the Commission; or ~~**(3)**~~ **(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 Board shall not recommend a dismissal with a warning, a private reprimand, or a deferred discipline agreement unless the respondent judge has consented to this remedy. 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, which may proceed using the report and recommendation of Investigative Counsel. 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. The Chair of the Board may consult with the Chair of the Commission in making the determination as to what information is transmitted to the Commission.

(k) Filing of Objections

Investigative Counsel and the judge must file **with the Commission** any objections to the Board's report within 15 days of the date on the notice unless the parties **and the Chair of the Commission** agree otherwise.

(l) Commission Review of Board's Recommendations

The Commission shall review the recommendations of the Board. If the parties and the Commission agree, the Commission may permit the judge to appear before the Commission on terms and conditions established by 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, to enter into a deferred discipline agreement, **or to lawfully dispose of the case otherwise with the judge's consent**. 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 derived from former Rule 1227B.

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

See the Reporter's Note to Rule 16-804.1.

Judge Adkins said that the words "Board or" have been added to subsection (e)(1) to indicate that Investigative Counsel may inform either the Board or the Commission that a preliminary investigation is being undertaken. The Chair inquired as to whether Investigative Counsel would be able to choose which one to notify, and Judge Adkins replied in the affirmative. Mr. Lemmey remarked that he had previously pointed out a potential problem in subsection (e)(3), which provides that Investigative Counsel shall notify the judge before the conclusion of the preliminary investigation that Investigative Counsel has undertaken a preliminary investigation and the details of why the investigation was undertaken. The problem is that in the cases with a totally frivolous complaint, it may be unnecessary to ever tell the judge about the investigation. Mr. Lemmey said that in

many cases, after a complaint is filed, Investigative Counsel or one of his staff reviews the transcript and determines that the complaint is without merit. There is no reason to notify the judge about the complaint and ensuing investigation which consists of the review of the transcript. There is no reason to upset the judge by the notification. Mr. Lemmey suggested that "shall" be changed to "may" in subsection (e)(3). The Vice Chair inquired as to why there would be a preliminary investigation in a frivolous case. Mr. Lemmey responded that it is not always obvious that the case is frivolous. Sometimes, the complaint alleges racial bias on the part of the judge, and the matter must be reviewed. This is accomplished by opening a preliminary investigation. The Vice Chair noted that this scenario is not covered by section (c) of the Rule. Mr. Lemmey agreed, explaining that this part of the procedure is under the aegis of the Commission. The Chair suggested that when the case goes to the Commission, it could be sent with a request to the Commission to refrain from notifying the judge about the investigation.

Mr. Johnson noted that the first phrase of subsection (e)(3) is: "[u]nless directed otherwise by the Board or Commission for good cause...". This gives the Board or the Commission the ability to decide not to notify the judge. Mr. Lemmey agreed with Mr. Johnson but said that he is still uncomfortable with the word "shall" in subsection (e)(3). The Chair asked Mr. Lemmey if he reports to the Commission after he takes some action following the filing of a complaint, and the case immediately

goes into the investigative phase, but after the investigation, he finds no reason to go further. Mr. Lemmey answered that the Commission is asked to support this position. Judge Adkins pointed out that a timing problem exists. Mr. Lemmey may come to the Commission before the end of the time period for the preliminary investigation to recommend dismissal of the complaint. If the Commission agrees, the dismissal does not take effect until Mr. Lemmey has notified the judge. The Vice Chair commented that there is the potential ability pursuant to subsection (e)(3) for Investigative Counsel not to notify the judge. However, under subsection (e)(4), the judge will be notified. She expressed the view that it should not be necessary to inform the judge.

The Reporter asked Mr. Lemmey what activities he performs in the inquiry stage. He responded that he contacts witnesses, but not the judge. The Vice Chair questioned the meaning of the word "inquiry." The Chair suggested that the Committee note after section (d) should be changed to begin as follows: "[a]n inquiry may include obtaining additional information from the complainant and potential witnesses, reviewing...". Judge Adkins suggested that the word "or" be substituted for the word "and," so that the end of the Committee note would read: "...proceedings, or communicating informally with the judge." The Vice Chair pointed out that section (d) allows Investigative Counsel to receive information from any source. The Chair suggested that the beginning of subsection (e)(3) should read as follows: "Except

when Investigative Counsel recommends dismissal of the complaint, unless directed otherwise by the Board or Commission, Investigative Counsel...". The reference to "for good cause" would be removed. The Vice Chair remarked that the premise of subsection (e)(1) is that the entire preliminary investigation only applies if the case is not dismissed in accordance with sections (c) or (d). The Chair said that there may be little difference between the preliminary investigation and the inquiry. If Investigative Counsel recommends dismissal, it is not necessary to notify the judge. If something else is recommended, the judge will be notified, unless the Judicial Inquiry Board or the Commission instructs Investigative Counsel otherwise.

Mr. Johnson observed that section (c) pertains to dismissal of the complaint only, but not dismissal when other information is considered, such as a transcript. The Vice Chair commented that dismissal pursuant to section (c) is similar to dismissal pursuant to a demurrer under the Rules that were in effect prior to the 1984 Rules revision. She added that under section (d), if Investigative Counsel obtains other information and concludes that the complaint is not meritorious, Investigative Counsel shall close the file and dismiss the case. Investigative Counsel is given discretion, and the case can be kept out of the preliminary investigation phase. The language of section (d) is satisfactory, except that the reference to "section (b)" is incorrect and should be changed to "section (c)." By consensus, the Committee agreed to this change.

The Chair asked Mr. Lemmey why he felt that there must be an express change to the Rule. Mr. Lemmey answered that the process in section (d) is a quick one. If the matter cannot be resolved quickly, he would need to gather more information during a preliminary investigation. Sometimes, the cases fall between the dismissal in section (c) and the inquiry in section (d). The Chair suggested that the Committee note after section (d) could be put into the body of section (d) at the end of the first sentence. Mr. Lemmey disagreed, stating that while this solves his initial problem, it creates more problems. The Vice Chair remarked that any change to the Rule should be based on current practice.

Mr. Karceski inquired as to whether there is any timetable for the inquiry. Mr. Lemmey replied that there is not. Judge Adkins pointed out that an inquiry can take 90 days, and then a preliminary investigation could be another 90 days. She expressed the view that these cases should be handled quickly. The Vice Chair suggested that either the Rule provide that the cases should be moved through the system very quickly, or the Rule should have a time limit. Judge Adkins said that she had not discussed this matter with the Commission. If there is no time limit in a rule, agencies tend to slow down. The Vice Chair inquired if the time limit for the inquiry should be 30 days. Mr. Johnson commented that section (d) provides that upon receiving information from any source regarding a judge, Investigative Counsel may open a file. No time limit is stated

for opening the file. Mr. Klein noted that if Investigative Counsel opens a file, whether this is the correct thing to do or not, and then at the end of the day, Investigative Counsel recommends dismissal, language would be needed in subsection (e)(3) to provide that Investigative Counsel does not have to notify the judge. The Chair questioned as to at what point an inquiry turns into a preliminary investigation. If there is a preliminary investigation, and Investigative Counsel recommends dismissal, Mr. Lemmey has stated that he would be in violation of the Rule if he does not notify the judge. The Chair reiterated that his solution is to add the language "except when Investigative Counsel recommends dismissal of the complaint" to the beginning of subsection (e)(3). Judge Adkins said that she liked this suggestion.

The Vice Chair commented that if there has not been a preliminary investigation, but Investigative Counsel believes that there may be some merit to the complaint, the judge should be informed. The Chair added that if a complaint is going to be dismissed, the judge does not need to know. A judge would not need to know if a particular attorney complained, because the judge may have to consider recusal every time the attorney later appears before the judge. Judge Dryden remarked that the counter-argument is that if an unrepresented person is a frequent litigant, and that person believes that the judge knows that he or she had complained about the judge, it might be better for the judge to be aware of this fact. The Chair responded that the

complainant could be informed that the case is being dismissed without the judge being notified about the complaint. Judge Dryden remarked that this would solve the problem.

The Chair said that the inquiry should allow Investigative Counsel flexibility to do more than simply read a complaint and dismiss it. Investigative Counsel should be able to listen to a tape or read a transcript of the proceedings. If a review of the complaint and the transcript results in no misconduct found, the judge should not be notified.

The Vice Chair observed that if Investigative Counsel conducts a preliminary investigation and believes that the case should be dismissed, but the Commission disagrees, the preliminary investigation could be started over again. Judge Adkins asked about the time requirements. The Vice Chair noted that the initial 90-day period already has expired at this point. Judge Adkins said that the 30-day extension would then begin. The Commission tells Investigative Counsel to do more investigating for 30 more days. The Chair commented that the time periods are appropriate.

The Vice Chair questioned whether the Rule could eliminate telling the judge about anything. The Chair answered that the judge has a right to get involved and present his or her own information. Judge Adkins remarked that at the end of the preliminary investigation, if public charges are likely to be filed, the judge needs to know. The Vice Chair expressed the opinion that the Rule is appropriate as written. If there is

some evidence of wrongdoing on the part of the judge, he or she needs to know. The Chair commented that the Rule currently provides that if a preliminary investigation is undertaken on the basis of a complaint, the judge is told in the middle of the preliminary investigation when nothing is found. The Rule should give express permission for Investigative Counsel to be excused from notifying the judge when the recommendation on the basis of a preliminary investigation is to take no action. Mr. Sykes noted that there is a problem if the Board does not agree with the recommendation of Investigative Counsel. The time to give the judge notice is when there is no dismissal by the time the preliminary investigation is completed. Then the judge would be able to present his or her side of the case. If the inquiry is inconclusive, and the proceedings go beyond it, the judge needs to know about the complaint, even if the preliminary investigation ultimately results in a finding of no misconduct.

The Chair commented that Mr. Lemmey has asked for permission to avoid notifying the judge before the conclusion of the preliminary investigation. The Vice Chair inquired as to when the Board would say no notice is necessary if there is no evidence of wrongdoing after a preliminary investigation. The Chair responded that Investigative Counsel could tell the Board that he or she is involved in a preliminary investigation and ask the Board not to notify the judge at that time. Language could be added to section (e) allowing Investigative Counsel to conclude the preliminary investigation without notifying the

judge. The Vice Chair suggested that subsection (e)(4) be modified. The language "unless directed by otherwise by the Board or the Commission" would be added to the beginning. There would be a provision added that would allow the Commission to decide whether or not the judge needs to be notified and given a chance to present his or her side of the matter. The Chair responded that this would not solve the problem. Mr. Johnson suggested that subsection (e)(4) should allow for dismissal of the complaint if, after the preliminary investigation is undertaken, the facts do not warrant the case going forward. The Chair suggested that language could be borrowed from section (d).

The Vice Chair said that a new subsection (e)(3) could be added and could read as follows: "During the preliminary investigation, Investigative Counsel may recommend to the Board or the Commission that the complaint can be dismissed without notifying the judge that a preliminary investigation has been undertaken." The Chair observed that it would be a useful addition to not tell the judge that he or she has been the subject of an inquiry. The Vice Chair moved to add a new subsection (e)(3), the motion was seconded, and it passed with two opposed.

The Reporter inquired as to whether current subsection (e)(4) should be modified. Mr. Sykes suggested that subsection (e)(4) should be modified to add language providing that Investigative Counsel may conclude the preliminary investigation with dismissal. Ms. Ogletree suggested that the following

language could be added to the beginning of subsection (e)(4): "Except when Investigative Counsel recommends dismissal...". Mr. Sykes proposed that the new language be "Except when the preliminary investigation results in dismissal...". The Chair suggested that the new language should be "Except when Investigative Counsel has recommended dismissal of the complaint and the Board has accepted the recommendation ...". By consensus, the Committee agreed to this change.

The Reporter questioned as to whether the words "potential witnesses" should be added to the Committee note after section (d) and whether the text of the amended note should be placed in section (d). The Chair replied in the affirmative. By consensus, the Committee also agreed.

Mr. Lemmey remarked that possible dispositions are discussed in section (f). It is important to have in the Rule the ability of the Board or Commission to devise other lawful, viable ways to resolve the case, which is accomplished by the new language of subsection (f)(4). As an example, if a judge who is being investigated is willing to retire in 60 days, this could be a disposition. Some states suspend the judges from working, but in Maryland, only the Court of Appeals can do this. Judge Adkins added that it is done by consent. The Chair asked if a letter of apology would be permissible. Judge Adkins observed that judges have bad days, but some are so bad as to deserve remedial action. The Chair commented that it makes sense to give the Commission all the tools it needs. The judge does not have to agree with

the sanction. Ms. Potter questioned the use of the word "lawful." The Chair answered that the word is needed -- dispositions cannot be unlawful. Judge Adkins remarked that this could create problems. The Vice Chair noted that Rule 16-807, Disposition Without Proceedings on Charges, provides for the same dispositions as in section (f), including dismissal, private reprimand, and a deferred discipline agreement. Mr. Sykes pointed out that certain dispositions are subject to the ultimate decision of the Court of Appeals. No Rule should purport to give the Commission jurisdiction. It is the Court of Appeals that has the jurisdiction. The word "lawful" takes care of that.

The Chair inquired as to whether the Court of Appeals ever suspends judges. Mr. Sykes replied that this would be up to the Court. In attorney discipline cases, even if an attorney agrees to a disbarment, the action of the Court of Appeals is still required. Mr. Maloney remarked that he was not sure that the Court of Appeals could suspend judicial power. The Chair said that the Court can remove a judge, but he questioned whether the Court could suspend the judge. Mr. Sykes noted that there are some limitations on the power of the Commission even with the agreement of the judge. The word "lawful" does not cause any harm, and leaving it out could cause problems. The Vice Chair expressed the view that the addition of the word "lawful" may cause problems, although she said that she has no problem with the concept trying to be achieved. The word is not consistent with the structure of the Rules. Rule 16-807 provides for the

same dispositions as Rule 16-805, but the word "lawful" does not appear in Rule 16-807. The Chair suggested that it be added to that Rule, also.

Mr. Maloney noted that Article IV, §4B of the Maryland Constitution provides that the Commission can recommend "other appropriate disciplining of a judge," and he asked the meaning of that phrase. Judge Adkins responded that the Constitution gives the Commission "the power to issue a reprimand and the power to recommend to the Court of Appeals the removal, censure, or other appropriate disciplining of a judge, or in an appropriate case, retirement." She said that under the general language of appropriate discipline, she would assume that this includes suspension. Mr. Sykes asked whether the Commission can take other actions, besides dismissal, private reprimand, and deferred discipline. Judge Adkins answered that the language of the Constitution would allows a public reprimand without the approval of the judge. The Vice Chair observed that proposed new subsection (f)(4) implies that this would only be authorized with the consent of the judge. Judge Adkins responded that there should be flexibility to resolve the matter without the filing of charges. However, in the event that the judge does not consent at this stage, the next step is the filing of charges.

The Chair questioned the proposed addition of a form of discipline that is whatever the judge may consent to. The Constitution does not provide for this. Mr. Sykes said that the use of the word "lawful" may require action by the Court of

Appeals.

Mr. Lemmey told the Committee that he was withdrawing his request for inclusion in the Rule of this addition form of discipline by consent. The matter can be raised and reconsidered at another time, but the addition of the Judicial Inquiry Board to the Rules is more important at this time. Judge Adkins commented that along with Mr. Lemmey and Judge Baldwin, she had been looking at section (i) of Rule 16-805. Their opinion is that section (i) could be shortened to end with the words "private disposition." The Chair suggested that section (i) could end with the word "judge" the first time that it appears. Judge Adkins expressed the view that it is preferable to include "and discuss private disposition." The Chair suggested that section (i) could read as follows: "The Board may meet informally with the judge for purposes of discussing an appropriate disposition." By consensus, the Committee agreed to this suggestion.

Mr. Lemmey asked whether the phrase with the language "any other lawful disposition" added in various parts of the Rule will be retained. The Chair replied that this language has been deleted. Judge Adkins drew the Committee's attention to section (j). The Chair noted that subsection (j)(3) has been deleted. Judge Adkins pointed out that the language of subsection (j)(2) has been changed to "entering into" rather than "offering." The judge needs to consent before a private reprimand or deferred discipline agreement can be offered. This is done at the

Commission level, not the Board level. By consensus, the Committee agreed to the changes to part (2).

Judge Adkins said that section (k) has been changed. The bolded language clarifies that the judge must file any objections with the Commission, and the Chair of the Commission has been added as a necessary party to consent to the filing of objections at a time other than the time period listed in the Rule. By consensus, the Committee agreed to these changes. By consensus, the Committee approved Rule 16-805 as amended.

Judge Adkins 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 add the words "Judicial Inquiry Board" or "Board" to sections (a) and (c), and to add new language to subsections (b)(1) and (d), as follows:

Rule 16-806. FURTHER INVESTIGATION

(a) Notice to Judge

Upon approval of a further investigation by the **Judicial Inquiry Board or the** Commission, Investigative Counsel promptly shall notify the judge (1) that the **Board or the** Commission 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 **Board or 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 **Judicial Inquiry Board or the** Commission. 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 Board or the Commission 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) any other lawful disposition of the case consented to by the judge and subject to the approval of the Commission, or ~~(3)~~ (4) the filing of charges.

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

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

Note.

See the Reporter's Note to Rule 16-804.1.

Judge Adkins explained that the Judicial Inquiry Board has been added as an entity that can approve a further investigation. Under the new arrangement, the Board probably will make most of the approvals unless it fails to act properly or timely. The Chair noted that in subsection (d)(2), the words "the offer of" should be changed to the words "entering into," similar to the change in section (j) of Rule 16-805. By consensus, the Committee agreed to the changes in the Rule. Judge Adkins thanked the Assistant Reporter for her help in drafting the changes to the Rules.

Agenda Item 3. Consideration of a certain policy issue concerning Rules 2-519 (Motion for Judgment) and 2-532 (Motion for Judgment Notwithstanding the Verdict) (See Appendix 2)

Mr. Sykes presented a policy issue concerning Rules 2-519, Motion for Judgment, and 2-532, Motion for Judgment Notwithstanding the Verdict, for the Committee's consideration. See Appendix 2.

Mr. Sykes explained that in *General Motors v. Seay*, 388 Md. 341 (2005), the Court of Appeals referred a policy question to the Rules Committee. The case involved a litigant who filed a motion for judgment pursuant to Rule 2-519 at the close of the plaintiff's case-in-chief. After the plaintiff's rebuttal

testimony, the defendant did not renew the motion. After a jury verdict in favor of the plaintiff, the defendant moved for a Motion Notwithstanding the Verdict ("JNOV"), which the trial court granted. The Court of Special Appeals held that the right to file the motion for JNOV was relinquished when the defendant failed to renew the motion following rebuttal testimony. The Court of Appeals held that the trial court erred in granting the motion and that strict compliance with the procedural requirements of Rules 2-519 and 2-532 is necessary.

The Court of Appeals referred the matter to the Rules Committee to determine whether Rules 2-519 and 2-532 should be modified to allow trial judges the discretion to excuse minor procedural faults, in the interest of justice. The Judgments Subcommittee considered this issue and concluded that no changes should be made to the Rules. The Rules are precise rubrics, and when courts try to circumvent them, it causes trouble. The Subcommittee felt that any remedy it could propose would be worse than the disease of an occasional harsh result. These Rules are clear, and they are precise rubrics to be followed. A discretionary JNOV could favor one side. Although the Subcommittee is sympathetic to the situation in the *Seay* case, its members feel it is not a good idea to tinker with the Rules on this issue.

Mr. Maloney commented that the lawyer who failed to follow the Rules was from another state. Mr. Brault noted that the

federal circuits are split on this issue. He expressed his agreement with Mr. Sykes that no change should be made to the Rules. The Chair stated that this issue can be revisited when the Committee discusses *pro se* litigants in jury trials. The issue is whether the judge can grant a judgment when the *pro se* litigant fails to move for judgment. The Judicial Ethics Committee recently filed an opinion stating that a judge cannot raise the defense of statute of limitations on behalf of a *pro se* litigant. Judge Norton expressed the view that there is a distinction between procedural and substantive law. He opined that although it is a breach of the Maryland Code of Judicial Conduct to raise defenses on behalf of *pro se* litigants, granting judgment to a *pro se* litigant when no motion for judgment is made may not necessarily be improper, depending on the circumstances.

By consensus, the Committee decided that no change to Rules 2-519 and 2-532 is recommended.

The Chair stated that Agenda Item 4 would be continued until September.

Agenda Item 5. Consideration of draft amendments to: Rule 16-811 (Client Protection Fund of the Bar of Maryland) and Rule 16-903 (Reporting Pro Bono Legal Service)

The Reporter presented Rules 16-811, Client Protection Fund of the Bar of Maryland and 16-903, Reporting Pro Bono Legal Service, for the Committee's consideration.

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-811 to change certain terminology, as follows:

Rule 16-811. CLIENT PROTECTION FUND OF THE BAR OF MARYLAND

. . .

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 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 Fund, that payment is overdue, and that failure to pay the amount to the 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 trustees 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 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~~ enter an order that terminates the Decertification Order and restores the lawyer to good standing. 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 Fund is dishonored, the treasurer of the 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 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 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~~ each Decertification Order and ~~rescission~~ order that terminates a Decertification Order and restores the lawyer to good standing entered pursuant to this Rule to the Clerk of the Court of Special Appeals, the clerk of each circuit court, the Chief Clerk of the District Court, and the Register of Wills for each county.

. . .

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

At the request of Chief Judge Bell, amendments to Rules 16-811 and 16-903 have been drafted to substitute the terminology, "enter an order that terminates the Decertification Order and restores the lawyer to good standing," for the terminology, "rescind its Decertification Order as to that lawyer."

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 900 - PRO BONO LEGAL SERVICE

AMEND Rule 16-903 to change certain terminology, as follows:

Rule 16-903. REPORTING PRO BONO LEGAL SERVICE

. . .

(e) Enforcement

(1) Notice of Default

As soon as practicable after May 1 of each year, the Administrative Office of the Courts shall give notice of the failure to file a report to each defaulting lawyer. The notice shall (A) state that the lawyer has not filed the Pro Bono Legal Service Report for the previous calendar year, (B) state that continued failure to file the Report may result in the entry of an order by the Court of Appeals prohibiting the lawyer from practicing law in the State, and (C) be sent by first class mail. The mailing of the notice of default shall constitute service.

(2) Additional Discretionary Notice of Default

In addition to the mailed notice, the Administrative Office of the Courts may give additional notice to defaulting lawyers by any of the means enumerated in Rule 16-811 g 3.

(3) List of Defaulting Lawyers

As soon as practicable after July 1 of each year but no later than August 1, the Administrative Office of the Courts shall prepare, certify, and file with the Court of Appeals a list that includes the name and address of each lawyer engaged in the practice of law who has failed to file the Pro Bono Legal Service Report for the previous year.

(4) Certification of Default; Order of Decertification

The Administrative Office of the Courts shall submit with the list a proposed Decertification Order stating the names and addresses of those lawyers who have failed to file their Pro Bono Legal Service Reports for the specified calendar year. At the request of the Court of Appeals, the Administrative Office of the Courts also shall furnish additional information from its records or give further notice to the defaulting lawyers. If satisfied that the Administrative Office of the Courts has given the required notice to each lawyer named on the proposed Decertification Order, the Court of Appeals shall enter a Decertification Order prohibiting each of them from practicing law in the State.

(5) Mailing of Decertification Order

The Administrative Office of the Courts shall mail by first class mail a copy of the Decertification Order to each lawyer named in the Order. The mailing of the copy of the Decertification Order shall constitute service.

(6) ~~Rescission~~ Restoration to Good Standing

If a lawyer files the outstanding Pro Bono Legal Service Report, the Administrative Office of the Courts shall request the Court of Appeals to enter an order ~~rescinding its Decertification Order as to~~ that terminates the Decertification Order

and restores the lawyer to good standing. Upon entry of ~~a Rescission Order~~ an order that terminates a Decertification Order and restores the lawyer to good standing, the Administrative Office of the Courts promptly shall furnish confirmation to the lawyer.

(7) Notices to Clerks

The Clerk of the Court of Appeals shall send a copy of each Decertification Order and ~~Rescission Order~~ order that terminates a Decertification Order and restores the lawyer to good standing entered pursuant to this Rule to the Clerk of the Court of Special Appeals, the Clerk of each circuit court, the Chief Clerk of the District Court, and the Register of Wills for each county.

. . .

Rule 16-903 was accompanied by the following Reporter's Note.

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

The Reporter told the Committee that Alexander L. Cummings, Esq., Clerk of the Court of Appeals, had sent a memorandum directing the Rules Committee to look at the use of the word "rescind" in orders of the Court of Appeals 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 the required *pro bono* report. The Attorneys Subcommittee had considered this issue, and Mr. Brault, the Subcommittee Chair, drafted a letter expressing the Subcommittee's opinion that the word "rescind"

means that the order restricting the attorney from practicing law was void *ab initio*, as opposed to being terminated prospectively only.

After a recent Court of Appeals conference on other Rules, the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, told the Reporter that the Court would like a change in the terminology of the Rules and its orders. The Court does not agree with the concept of the word "rescind," as applied in this situation. The Reporter consulted with a judge of the Court, who worked with her to prepare draft amendments to Rules 16-811, Client Protection Fund of the Bar of Maryland, and 16-903, Reporting Pro Bono Legal Service. The drafts are included in the materials for today's meeting. The view is that decertification is the equivalent of a suspension, and a lawyer should not be practicing while decertified. This borders on barratry, and Bar Counsel should be able to prosecute attorneys who practice in violation of a decertification order. *Nunc pro tunc* reinstatement is inappropriate. The contempt provisions of the Rules are not sufficient to address the problem of decertified lawyers continuing to practice. Mr. Karceski inquired as to whether all defendants represented by attorneys who have been decertified would be entitled to a new trial if convicted. The Chair noted that there was a case in Baltimore County in which the Office of the Public Defender sent a non-attorney to a lineup. The individual represented himself to be an attorney.

The Court of Appeals reversed the conviction of the defendant because he was represented by this person. Mr. Karceski pointed out that the using the word “rescind” as opposed to the word “terminate” may make a difference. Mr. Maloney remarked that the Court of Appeals would want to reserve the right to discipline attorneys who engage in the practice of law during a period of suspension. The revised language does not state this. Mr. Brault observed that in the District of Columbia, a non-attorney misrepresented himself as an attorney. The person was not even college-educated. All of the cases he handled were reversed on appeal, and a new trial was awarded. Mr. Karceski made a good point questioning if all cases handled by a decertified attorney in which the defendant was convicted would have to be tried again automatically.

The Chair suggested that the consequences to litigation in which a decertified lawyer represents a party should be researched before a decision is made. It would be helpful to look at how other states handle this. The Vice Chair asked if the orders suspending attorneys terminate by their terms on a specific date. Mr. Karceski responded that some of the orders do. Some of the orders include language allowing leave to reapply. He added that failure to pay dues by an attorney should not be grounds for reversing a conviction in which the attorney represented a defendant. The Chair stated that there are cases which hold that a defendant is not entitled to a new trial because the defense attorney was suspended during the trial. He

said that this matter will be reconsidered by the Committee after it is researched.

The Chair adjourned the meeting.