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 Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland, on June 23, 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
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. John L. Norton, III
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Hon. William B. Spellbring, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
James Willett, Jr., Rules Committee Intern
Anne J. Smith, Esq.
Cookie Pollock, AOC
Brian L. Zavin, Esq., Office of the Public Defender
David Weissert
Courtney Bennett, Esq., MCASA/SALI
Shea McSpaden, Esq.
Elizabeth B. Veronis, Esq.
Russell Butler, Esq.
Kathy Morris
Linda Mack
Eric Lieberman, Esq., The Washington Post
Clifton E. Files, AOC
Michaele Cohen, Maryland Network Against Domestic Violence
Sally Rankin, Court Information Office

The Chair convened the meeting.

Agenda Item 1. Consideration of proposed amendments to Rule 16-1007 (Required Denial of Inspection – Specific Information in Case Records)

The Chair presented Rule 16-1007, Required Denial of Inspection - Specific Information in Case Records, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 1000 - ACCESS TO COURT RECORDS

AMEND Rule 16-1007 to add a new section pertaining to shielding of victim and witness identifying information, as follows:

Rule 16-1007. REQUIRED DENIAL OF INSPECTION - SPECIFIC INFORMATION IN CASE RECORDS

(a) Generally

Except as otherwise provided by law, the Rules in this Chapter, or court order, a custodian shall deny inspection of a case record or a part of a case record that would reveal:

~~(a)~~ (1) The name, address, telephone number, e-mail address, or place of employment of a person who reports the abuse of a vulnerable adult pursuant to Code, Family Law Article, §14-302.

~~(b)~~ (2) Except as provided in Code, State Government Article, §10-617 (e), the home address or telephone number of an employee of the State or a political subdivision of the State.

~~(c)~~ (3) Any part of the social security or Federal Identification Number of an

individual, other than the last four digits.

~~(d)~~ (4) Information about a person who has received a copy of a sex offender's or sexual predator's registration statement.

(b) Shielding Victim and Witness Identifying Information

(1) Applicability

This section applies to the shielding of victim and witness identifying information in (A) a criminal action, (B) an action under Code, Family Law Article, Title 4, Subtitle 5 (domestic violence), and (C) an action under Code, Courts Article, Title 3, Subtitle 15 (peace orders).

Cross reference: See Code, Criminal Procedure Article, §11-205 concerning certain restrictions on the release of information in criminal actions.

(2) Request

A complainant, victim, victim's representative, or witness may request that identifying information relating to a victim or witness, other than a witness who is a law enforcement officer, other public official or employee acting in an official capacity, or expert witness, be shielded from public inspection. The request shall (A) be in writing, (B) state the reason for the request, and (C) be filed with the court or a District Court commissioner. As far as practicable, the request shall be presented on a form available from the court or District Court commissioner.

(3) Determination; Shielding

If the court or commissioner determines that to protect the safety of the victim or witness the request should be granted, the court or commissioner shall grant the request. If the request is granted, a custodian shall shield from public inspection the name, address, telephone number, date of birth, e-mail address, and

place of employment of the victim or witness. Notice of the granting of a request to shield shall be included with the warrant, summons, or order served upon the defendant or respondent or, if the request is granted after service, mailed to the defendant or respondent by the clerk. The notice shall include a statement that a motion to terminate or modify the shield may be filed in accordance with Rule 16-1009.

(4) Duration

The shield remains in effect until terminated or modified by order of court.

Source: This Rule is new.

Rule 16-1007 was accompanied by the following Reporter's Note.

Amendments to Rule 16-1007 are proposed to be adopted on an emergency basis.

Recently adopted amendments to Rule 16-1008, effective July 1, 2006, provide for denial of remote access to victim and witness identifying information contained in court records in electronic form. However, there are no comparable provisions applicable to paper records or electronic records in the courthouse.

The procedures set forth in current Rule 16-1009, which require a person who seeks shielding of an otherwise open record to file a motion with the court and the court to hold an adversary hearing on the motion, can be cumbersome with respect to shielding identifying information to enhance the safety of victims and witnesses and complying with certain statutory provisions. See Code, Courts Article, §3-1503; Code, Criminal Procedure Article, §11-205; and Code, Family Law Article, §4-504.

The procedures set forth in the proposed amendments to Rule 16-1007 allow the court or a District Court commissioner to shield

certain information based on a request by or behalf of a victim or witness whose identifying information is sought to be shielded, without the necessity of a motion or adversary hearing.

Proposed new section (b) applies to the shielding of victim and witness identifying information in criminal actions (misdemeanors as well as felonies) and actions under statutes pertaining to domestic violence and peace orders.

Under subsection (b)(2), a written request, including reasons for the request, is filed with the court or a District Court commissioner to initiate the shielding. Although the request may be filed by a complainant (such as a police officer), victim, victim's representative, or witness, only identifying information pertaining to victims and certain witnesses may be shielded under section (b). The list of types of witnesses ineligible for shielding under the section tracks the list of types of witnesses as to whom there is no automatic shielding of remote access to identifying information under Rule 16-1008 (a)(3)(B)(i).

If the court or commissioner determines that to protect the safety of the victim or witness the identifying information should be shielded, the request is granted. If it is granted, a custodian must shield from public inspection the name, address, telephone number, date of birth, e-mail address, and place of employment of the victim or witness. The list of identifying information to be shielded tracks the description of identifying information shielded from remote access under Rule 16-1008 (a)(3)(B).

Under subsection (b)(3) of the proposed amendment to Rule 16-1007, notice of the granting of the request to shield is given to the defendant or respondent, together with a statement that a motion to terminate or modify the shield may be filed in accordance with Rule 16-1009.

Under subsection (b)(4) of the proposed amendment, the shield remains in effect until terminated or modified by a court order.

The Reporter told the Committee that the Honorable Alan M. Wilner, a member of the Court of Appeals, had been in contact with the Chair and her regarding the proposed changes set forth in the draft of Rule 16-1007. Recently adopted amendments to Rule 16-1008, Electronic Records and Retrieval, provide for denial of remote access to victim and witness identifying information contained in court records in electronic form, but there are no similar provisions applicable to paper or electronic records in the courthouse. The proposed new language in Rule 16-1007 states that a complainant, victim, victim's representative, or witness may request that identifying information relating to a victim or witness, other than a witness who is a law enforcement officer or other public official, be shielded from public inspection. David Weissert, Coordinator of Commissioner Activity for the District Court, had drafted a form that could be used to make the request, and Russell Butler, Esq., had suggested some amendments to the proposed language of the Rule.

Mr. Butler said that he supported the proposed changes to the Rule. He had spoken with Mr. Weissert about his concerns. He expressed the opinion that subsection (b)(2) should provide that the District Court commissioner should inform the person about the right to request shielding. Mr. Weissert had suggested that this could be provided for in an administrative order. Mr.

Butler distributed to the Committee a draft of the Rule that incorporates changes he suggests. (See Appendix 1). He noted that his suggested draft also provides in subsection (b)(2)(B) that if a person other than a victim or a victim's representative files an application for a statement of charges, a petition alleging domestic violence, or a petition seeking a peace order, the person filing shall notify the victim, victim's representative, or witness regarding the right to file a request to shield identifying information. The concern is that the person who is not aware of the right to request a shield will not file one even if it is needed.

Mr. Weissert explained that the commissioners have a long history of advising people in court about shielding information. He had spoken with Judge Wilner about the possibility of shielding cases through the commissioner. This procedure could be officially implemented by administrative order of the Chief Judge of the District Court. A notice of the right to request a shield could be added to the back of the statement of charges form. The proposed form of a request for shielding information is in the meeting materials for today. (See Appendix 2). The Chair commented that the procedure where the commissioner informs the person in front of him or her that there is a right to request shielding sufficiently protects identified witnesses. If a police officer files the statement of charges based on information from a witness, the proposal by Mr. Butler would mean that the police officer would notify the appropriate people about

the right to request a shield. It is difficult to pass a rule controlling police officers. The Chair suggested that a rule be drafted that would conform to the procedure currently being followed. He asked if all police officers are informing victims and witnesses, and Mr. Weissert replied that he was not certain if this was the procedure in all of the jurisdictions around the State.

Mr. Klein pointed out that the word "including" should be placed before the list in subsection (b)(3) of items that may be shielded. Additional types of identifying information may be recorded in the future, such as capturing a person's driver's license number, that is not currently part of the list. Eric Lieberman, Esq., who is counsel to The Washington Post told the Committee that he is replacing Carol Melamed, Esq., who will be retiring. He expressed the concern that the proposed amendments to Rule 16-1007 are overbroad so as to severely limit access. Judge Norton noted that the Maryland Public Information Act, Code, State Government Article, §10-611 defines "personal information" as "...information that identifies an individual including an individual's address, driver's license number or any other identification number; medical or disability information, name, photograph or computer generated image, Social Security number, or telephone number." He agreed with Mr. Klein that the word "including" should be added in before the list in subsection (b)(3).

Ms. Morris told the Committee that federal law is specific

as to who is entitled to get access to someone's driver's license number. Security guards and private investigators are exempt from certain restrictions on obtaining information. Ms. Morris expressed her opposition to completely closing access to court records. She said that she works as a private investigator and needs access to some information. She requested that an exemption for licensed private investigators and security guards be added to Rule 16-1007. The Chair suggested that the Rule could be changed to provide that the custodian of the records is to deny inspection of the case record or part of the record if allowing inspection would violate a law. This would avoid superseding any laws and provide appropriate protection. Ms. Morris remarked that it is important to understand that there may be lawful and legitimate reasons, such as to protect public safety, to have access to records. She expressed concern about the possibility that custodians of records will deny access across the board. Sometimes agencies do a pre-employment check on possible employees and need to see court records to make sure that the potential employee has no criminal record.

The Chair noted that section (a) begins with the language "[e]xcept as otherwise provided by law...". The Rule would not prohibit someone from getting information that the person is entitled to by law. The Chair remarked that he could not guarantee that the custodian would not have a different interpretation. Ms. Morris reiterated that access to certain information is needed for pre-employment background checks. The

Chair observed that a potential employee can waive the protection.

The Vice Chair pointed out that section (a) provides that the custodian denies inspection, but she asked if section (b) shields information not covered by section (a). The Chair replied affirmatively, noting that section (b) pertains to the shielding of victim and witness information. The Vice Chair said that section (b) is not covered by the introductory phrase of section (a): "[e]xcept as otherwise provided by law." The Chair asked Mr. Shipley how his office handles requests from potential employers for personal information. Mr. Shipley answered that he had never had this kind of request. He added that the Administrative Office of the Courts ("AOC") uses driver's license numbers and social security numbers for background checks on potential employees.

The Vice Chair questioned as to how the law pertaining to this works. Ms. Morris responded that the Driver's Privilege and Protection Act, 18 U.S.C.A. §§2721 to 2775, exempts licensed private detectives and security agencies from the restrictions on access to driver's license information. This kind of exemption could be added to Rule 16-1007. The Chair pointed out that driver's license information can be obtained from the Motor Vehicle Administration, and the Rules of Procedure do not control this agency. Ms. Morris expressed the opinion that since the Maryland and federal governments saw the need for private detectives and security agencies to have access to certain types

of information, the Rules should follow this.

Mr. Lieberman stated that he is concerned about the open-ended aspect of the Rule. Subsection (b)(4) provides that a shield remains in effect until the court terminates it.

Ms. Morris noted that on October 1, 2006, a new law will go into effect providing that victims should be contacted by using a post office box, so their address will not be in records in the Office of the Attorney General. The Chair said that use of the post office box will help in protecting the victim, although he cautioned that it will not solve all of the problems, because some people will not know about this. A statute or rule cannot solve all of the problems. Ms. Morris remarked that she had never heard of a case where a victim was located from court records by an abuser. She herself had been the victim of abuse, and she expressed the view that a determined abuser can locate the victim and does not need court records to accomplish this. The Chair responded that the Rules do not have to make it easy for the abuser to locate a victim.

Mr. Butler explained that subsection (b)(2) of his version of Rule 16-1007 is new. It provides that the commissioner or clerk would inform the victim or victim's representative about the right to file a request to shield identifying information if the victim or representative files an application for a statement of charges, a petition alleging domestic violence, or a petition seeking a peace order. However, if a person other than a victim or representative of the victim files an application for a

statement of charges or a petition alleging domestic violence or seeking a peace order, the person filing the document would notify the victim, representative of the victim, or witness about the right to file a request to shield identifying information. The Chair stated that notification is essential. He suggested that the following language be added to the Rule: "When reviewing an application for a statement of charges, a petition alleging domestic violence, or a petition seeking a peace order, the judicial officer shall inform the applicant or petitioner of the right to file a request to shield identifying information."

Judge Norton pointed out that the commissioner receives the papers during the time that the court is not open. During the day when the court is open, the clerk receives the papers that are filed. It would be helpful for the court if those who are filling out the papers are advised that when they are in the courtroom, they can request shielding, so that the judge can answer any questions, instead of filling out the forms at a later time. He expressed his agreement with Mr. Butler that this issue should be addressed on the front end. Mr. Shipley suggested that a joint form for the District Court and the circuit courts could be used. The Chair said that there could be a place on the form informing the person filling it out of the right to request that identifying information be shielded.

Ms. Potter commented that the victim could be comatose in the hospital when the police officer files the statement of charges, and the victim would not know about the right to request

a shield. She asked if the clerk could add a sentence on the trial date notice about the right to shield, but the Vice Chair responded that this would be too late. Ms. Potter remarked that the victim should be able to request shielding at any time. She expressed the concern that in Mr. Butler's draft, the notice could go to the police officer, not the victim. Mr. Butler suggested that the applicants could be asked whether they have informed the victim or witness, and if not, then the clerk could do so.

The Chair observed that at 2 o'clock a.m., there is no clerk, and the commissioner on duty functions as the clerk. Mr. Weissert remarked that the form filled out at that time would be placed in the file that goes to the court. The Chair suggested that the Rule could provide that if the judicial officer grants the petition, the judicial officer should determine if there are individuals whose information should be shielded. There is no prohibition against a commissioner shielding information just because the person whose information it is did not request the shielding. The person could be in a coma, or the police could be too busy to let the person know that his or her name and other information were on the charging document. This procedure need not be driven by request only.

Mr. Michael inquired as to why the Rule does not provide that all information is shielded subject to a good cause showing for disclosure. The Chair answered that this concept had been suggested to the Court of Appeals as a waiting period for the

judge to sort out which information could be disclosed. The Court rejected this concept but said that the statutory provision of shielding after a request should be followed. The Vice Chair noted that the Honorable Alan M. Wilner, a member of the Court of Appeals, who had drafted the rules pertaining to access to court records, had expressed the opinion that safety, not privacy, of victims and witnesses is what the rules must address. Delegate Vallario noted that other statutes provide for shielding of personal information, and he suggested that this concept is applicable to victims and witnesses in cases where there is fear of retaliation.

Judge McAuliffe proposed a compromise between Mr. Butler's version of the Rule and the version in the meeting materials. Section (a) and subsection (b)(1) of Mr. Butler's version would remain in the Rule, and subsection (b)(2)(B) would be changed to read: "If a person other than a victim or a victim's representative files an application..., the clerk or judicial officer shall request that the clerk notify the victim, victim's representative, or witness ...". Mr. Shipley pointed out that the clerk does not always know who the witnesses in the case are. Very few applications list the witnesses. Mr. Butler suggested that the application for a statement of charges could include a witness list, because this information will be required later for issuing subpoenas. Mr. Shipley responded that if there is only a witness's name, but no address, it would be difficult for the clerk to locate the witness. The Chair suggested that the clerk,

judicial officer, or judge could make the request to shield. If the names are not on the statement of charges, but the witnesses will be summoned, they deserve protection.

Ms. Morris remarked that the Rule has not addressed the problem of false reports. There is a new program that provides penalties for filing false reports. The Chair stated that Code, Criminal Law Article, §9-501 pertains to penalties for filing false reports to law enforcement officers. He asked how the Rule would need to be changed to conform to this. Mr. Karceski commented that in a District Court case, the defendant who comes before the commissioner is given a statement of charges in which the information about the witnesses has been shielded. The District Court discovery rules do not provide for questions about who the witnesses will be. How can the defense attorney defend the defendant on the statement of charges with no witness information? Judge McAuliffe responded that the Rule should shield information from public inspection, but not from inspection by the defendant. Mr. Weissert noted that in domestic violence cases, the commissioner enters the information, and although the statute requires shielding, the computer may print out shielded areas. A similar problem exists in the criminal system, where information is shielded by the person entering the information on the computer, but the shielding does not appear on paper. Judge McAuliffe pointed out that the information would have to be redacted. Mr. Weissert remarked that the application is filled out by hand, but the information on the statement of

charges would have to be redacted. Mr. Karceski observed that the judge who allows the petition to go forward and hears all of the information is not necessarily the judge who hears the case. Judge McAuliffe said that if the statement of charges is redacted, it may be a deficient charging document.

The Chair commented that the problem is that the system is not geared to apply to each kind of proceeding -- it is "one size fits all." Judge McAuliffe remarked that even if the record is redacted for remote access, the case file is still available. The Chair explained that the computer system operates in a certain way. It is difficult to change the rules to harmonize exactly with the system. Judge Heller commented that if the State believes that the victim or witness information should be shielded, the court can issue a protective order. She asked if the file would be put into an envelope under seal if the system redacts the statement of charges and the system is changed to identify the sensitive information. Mr. Shipley replied affirmatively. A court order would be needed. In a domestic violence case, if a protective order is modified, it is difficult to certify that the plaintiff was notified if there is no address due to shielding.

The Vice Chair pointed out that section (f) of Rule 16-1002 (General Policy) was recently amended to include language that states that parties and attorneys should receive all information in the original documents. The Chair noted that the right to request shielding applies to everyone. Mr. Butler told the

Committee that Code, Criminal Procedure Article, §11-205 evolved from the case of *Coleman v. State*, 321 Md. 586 (1991), which held that when the State seeks a protective order for witnesses, the State has the burden of showing good cause. Mr. Butler was involved in drafting the statute, which provides that if the State, victim, or witness to a felony so requests, the address or telephone number of victims or witnesses may be withheld, unless a judge determines that good cause has been shown for the release of the information. The Chair said that the problem is that the State has the right to get a protective order, but the information may already be on the statement of charges. This is less of a problem in circuit court where there is more formal discovery. Judge Norton observed that the domestic violence and peace order statutes provide that addresses may be withheld. The Rule provides that the name of the witness or victim may be withheld, which is not logical, because in a protective order or peace order, the respondent needs to know from whom he or she is ordered to stay away.

The Vice Chair commented that if the court or the commissioner determines that the safety of the victim or witness is at issue, their personal information should be shielded. The Chair said that the Rule prohibits public access to the information, but it is not designed to prevent the defendant from finding out with what he or she is charged. He suggested that subsection (b)(1) be combined with subsection (a)(1) of Rule 16-

1007. Mr. Lieberman expressed the view that before information is withheld, a determination of the need for safety should be made. The Vice Chair remarked that she presumed that subsection (a)(1) would not apply to domestic violence and peace order proceedings. The Chair agreed that this was true. The Reporter asked if it would be necessary to include criminal proceedings, and the Chair answered that criminal proceedings could be deleted, because they have their own special provisions.

Mr. Karceski questioned as to whether the respondent is not going to be told to stay away from certain addresses under some or all circumstances. The Chair responded that the issue being discussed is public access. Mr. Sykes inquired as to what this would accomplish. If what is being discussed is public access, often the real threat to the victim or witness is from the defendant. The Chair commented that shielding from the defendant is covered by other rules. He noted that Rule 16-1009, Court Order Denying or Permitting Inspection of Case Record, provides that a party may file a motion to seal. He suggested that Rule 16-1007 refer to the "information ordered sealed or shielded pursuant to Rule 16-1009." Rule 16-1007 would contain an express statement that the public is not entitled to see information that is ordered shielded or sealed pursuant to Rule 16-1009. That Rule could be modified to provide that information shielded or sealed would remain so until the court orders otherwise. As suggested by Judge McAuliffe, language could be added requiring the applicant, if he or she is not the victim, to notify

interested persons of the right to request shielding or sealing. Rule 16-1009 could have language added that would state that the application form shall notify the applicant of the right to request shielding. Also, per the suggestion by Judge Norton, language could be added that would provide that if the applicant is not the victim or the victim's representative, the clerk or judicial officer shall require that the applicant notify the victim or the victim's representative of the right to request a shield. The shield would remain in effect until terminated by order of court.

Judge Dryden noted that the judicial officer may request a shield, and he asked whether the State's Attorney can do so. The Chair answered that the State's Attorney may also request a shield. If the judicial officer determines from the applicant or on his or her own motion that a shield is necessary, it will be put into place. The problem of how the system responds to the command to shield cannot be solved in the Rules.

Mr. Shipley asked if names could be shielded, and the Chair replied affirmatively. Mr. Shipley pointed out that if there is no name, it is difficult for the clerk to locate the case. Ms. Pollock, who works at Judicial Information Systems for the AOC, told the Committee that the complainant's address is hidden in court records, but to do a case search, the name must be in the record. The Vice Chair suggested that Rule 16-1007 could provide that information would be withheld unless the judge determines that it should be released. Code, Criminal Procedure Article,

§11-205 is already cross referenced, but is this consistent with the changes to the Rule? The Rule actually supersedes the statute, and the cross reference is not an accurate description.

Ms. Potter inquired as to whether the Court of Appeals would like a notice procedure included in the Rule. The Chair remarked that the information would be shielded on request. If the request is not made at the beginning of the case, the information will be disseminated.

The Chair said that Judge Wilner had been interested in modifying Rule 16-1009. The Reporter commented that Judge Wilner would be willing to modify other rules to achieve the same goal. The Chair suggested that the beginning of section (b) of Rule 16-1009 read as follows: "Upon the filing of a petition alleging domestic violence under Code, Family Law Article, Title 4, Subtitle 5 or seeking a peace order under Code, Courts Article, Title 3, Subtitle 15 or upon the filing of a motion to seal or otherwise limit...". Judge Heller noted that this should be subject to subsection (c)(3) of the same Rule. The Chair commented that the person entitled to shielding can be heard if the court orders that the record can be inspected. For five days, no inspection of the record is allowed. Judge Heller inquired as to whether it is practical for petitioners to file a written motion to extend the five-day period. The Chair answered that they can be informed of this option on the form itself. Rule 16-1009 (b) could be divided into two categories -- one would be "generally" and the other would cover petitions for

domestic violence, protective orders, and peace orders. It would provide that if the victim or victim's representative files a petition alleging domestic violence or seeking a peace order and requests the shielding of identifying information and the judicial officer grants the request, the shield remains in effect until terminated or modified by further order of court. Rule 16-1009 applies to remote access, also. A reference to Code, Criminal Procedure Article, §11-205 should be added to section (b). Judge Heller suggested that §11-205 be placed in a separate section of the Rule.

Mr. Karceski noted that the Rule does not provide for the respondent to get the identifying information. The Chair explained that the concept is that Rule 16-1007 relates to orders entered pursuant to Rule 16-1009. The phrase "in a case record" could be added to subsection (b)(1) of Rule 16-1007. Section (b) of Rule 16-1009 which is entitled "Preliminary Shielding" would provide that where a request to shield has been filed by a person entitled to request relief under §11-205 of the Criminal Procedure Article, an applicant for a domestic violence protection order, or a person seeking a peace order, and the request is granted, the shield would remain in effect until terminated or modified by further order of court. By consensus, the Committee agreed with these changes.

Mr. Lieberman pointed out that Judge Wilner narrowly tailored the rules pertaining to access to court records, but Code, Criminal Procedure Article, §11-205 refers to any felony or

delinquent act that would be a felony if committed by an adult. It would be better to provide in the Rule that the request for shielding should be based on a determination of the applicant's safety being at risk. Judge Heller noted that this restriction already appears in subsection (c)(2) of Rule 16-1009.

The Chair stated that it would be preferable if the Rule does not supersede §11-205 of the Criminal Procedure Article. The Rule has to provide that if the request is made, and the judicial officer grants it, the shield stays in place until further order of court. This is the way the Court of Appeals would like the Rule to be changed. The Court can add standards if it chooses to do so. By consensus, the Committee approved the Rule as amended.

Agenda Item 5. Proposed amendments to Rule 16-1006 (Required Denial of Inspection – Certain Categories of Case Records) recommended by the General Court Administration Subcommittee

---

Judge Norton told the Committee that the General Court Administration Subcommittee had been asked to look at Rule 16-1006, Required Denial of Inspection - Certain Categories of Case Records, to see if any changes should be made to conform to Chapter 412, Acts of 2006 (HB 1625), which added another category of public records that are confidential -- records containing personal information about an individual with a disability or an individual perceived to have a disability. Judge Norton spoke with Mr. Lieberman about the revised version of the Rule in the

meeting materials that was not drafted by the Subcommittee. Mr. Lieberman asked if the discussion of the Rule could be tabled until it is discussed by the Subcommittee. The Chair said that when the Subcommittee discusses the Rule, any interested persons will be invited.

Agenda Item 2. Consideration of proposed Rules changes recommended by the Criminal Subcommittee: Amendments to: Rule 4-261 (Depositions); Addition of cross references and Committee notes amending: Rule 4-217 (Bail Bonds), Rule 4-342 (Sentencing – Procedure in Non-capital Cases); Rule 4-345 (Sentencing – Revisory Power of Court); and Rule 4-347 (Proceedings for Revocation of Probation)

Mr. Karceski presented Rule 4-261, Depositions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-261 by adding a new subsection (b)(2) and renumbering subsection (b)(1) to provide for depositions of expert witnesses, as follows:

Rule 4-261. DEPOSITIONS

(a) Availability in District Court

In District Court a deposition may be taken only with the consent of the State and the defendant and upon order of court.

(b) Availability in Circuit Court

(1) Generally

In a circuit court the parties may agree, without an order of court, to take a deposition of a witness, subject to the right of the witness to move for a protective order under section (g) of this Rule. Without agreement, the court, on motion of a party, may order that the testimony of a witness be taken by deposition if satisfied that the witness may be unable to attend a trial or hearing, that the testimony may be material, and that the taking of the deposition is necessary to prevent a failure of justice.

(2) Expert Witnesses

A party may apply to the court for permission to take the deposition of an expert. If the court is satisfied that the required disclosure of the expert pursuant to Rule 4-263 was inadequate or that the expert may be unable to attend a trial or hearing, the court shall permit the deposition to be taken. The court shall exercise discretion as to who will pay for the costs of the deposition. If possible, the deposition shall be supervised by a retired judge.

(c) Contents of Order for Deposition

An order for a deposition shall state the name and address of each witness to be examined and the time, date, and place of examination. It shall also designate any documents, recordings, photographs, or other tangible things, not privileged, that are to be produced at the time of the deposition. An order for a deposition shall include such other matters as the court may order, including any applicable provision of section (g) of this Rule.

(d) Subpoena

Upon entry by the court of an order for a deposition or upon request pursuant to stipulation entered into under section (b) of this Rule, the clerk of the court shall issue a subpoena commanding the witness to appear at the time, date, and place designated and to produce at the deposition any documents, recordings, photographs, or other tangible

things designated in the order of court or in the stipulation.

(e) How Taken

The procedure for taking a deposition shall be as provided by Rules 2-401 (f), 2-414, 2-415, 2-416, and 2-417 (b) and (c).

(f) Presence of the Defendant

The defendant is entitled to be present at the taking of a deposition unless the right is waived. The county in which the action originated shall pay reasonable expenses of travel and subsistence of the defendant and defendant's counsel at a deposition taken at the instance of the State.

(g) Protective Order

On motion of a party or of the witness and for good cause shown, the court may enter any order that justice requires to protect the party or witness from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the deposition not be taken;

(2) That the deposition be taken only at some designated time or place, or before a judge or some other designated officer;

(3) That certain matters not be inquired into or that the scope of the examination be limited to certain matters;

(4) That the examination be held with no one present except parties to the action and their counsel;

(5) That the deposition, after being sealed, be opened only by order of the court; or

(6) That a trade secret or other confidential research, development, or commercial information not be disclosed or be

disclosed only in a designated way.

(h) Use

(1) Substantive Evidence

At a hearing or trial, all or part of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the court finds that the witness: (A) is dead, or (B) is unable to attend or testify because of age, mental incapacity, sickness, or infirmity, or (C) is present but refuses to testify and cannot be compelled to testify, or (D) is absent from the hearing or trial and that the party offering the deposition has been unable to procure the witness' attendance by subpoena or other reasonable means, unless the absence was procured by the party offering the deposition.

(2) Impeachment

At a hearing or trial, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness to the extent permitted by the rules of evidence.

(3) Partial Use

If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce at that time any other part that in fairness ought to be considered with the part offered, so far as otherwise admissible under the rules of evidence, and any party may introduce any other part in accordance with this Rule.

(4) Objection to Admissibility

Subject to Rules 2-412 (e), 2-415 (g) and (j), 2-416 (g), and 2-417 (c), an objection may be made at the hearing or trial to receiving in evidence all or part of a deposition for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

(i) Joint Defendants

When persons are jointly tried, the court, for good cause shown, may refuse to permit the use at trial of a deposition taken at the instance of one defendant over the objection of any other defendant.

Source: This Rule is derived as follows:
Section (a) is new.
Section (b) is derived from former Rule 740 a and j.
Section (c) is derived from former Rule 740 c.
Section (d) is derived from former Rule 740 d.
Section (e) is derived from former Rule 740 e.
Section (f) is derived from former Rule 740 f.
Section (g) is derived from former Rule 740 g.
Section (h) is derived from former Rule 740 h.
Section (i) is derived from former Rule 740 i.

Rule 4-261 was accompanied by the following Reporter's Note.

The Criminal Subcommittee recommends the addition of new language to Rule 4-261 providing for depositions of expert witnesses, because of problems noted in some cases where experts for the State are not cooperating fully with requests for discovery of their testimony by the defendant.

Mr. Karceski explained that the Criminal Subcommittee is proposing a change to Rule 4-261 providing for depositions of expert witnesses. He said that Mr. Zavin, an Assistant Public Defender, was present to speak about the Rule.

Mr. Zavin told the Committee that he and Nancy Forster, Esq., Public Defender for the State of Maryland, had some

concerns about the changes to the Rule. He asked if the discussion could be postponed to give the Office of the Public Defender some more time to frame their concerns and suggest some other changes. Mr. Karceski commented that the Rule could be discussed today and then revisited with the input of the Office of the Public Defender. The Vice Chair pointed out that Rule 4-263, Discovery in Circuit Court, requires in sections (b) and (d) that reports of experts must be turned over to the other side. She suggested that this Rule could be expanded to cover how to turn over reports and other aspects related to this. Mr. Karceski expressed the view that the last sentence of proposed subsection (b)(2) should be taken out. Requiring supervision by a retired judge is demeaning to the criminal bar. The Chair said that the Rule will be considered again at a later meeting.

Mr. Karceski presented Rule 4-217, Bail Bonds, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-217 to add a cross reference after subsections (d)(1) and (d)(2), as follows:

Rule 4-217. BAIL BONDS

. . .

(d) Qualification of Surety

(1) In General

The Chief Clerk of the District Court shall maintain a list containing: (A) the names of all surety insurers who are in default, and have been for a period of 60 days or more, in the payment of any bail bond forfeited in any court in the State, (B) the names of all bail bondsmen authorized to write bail bonds in this State, and (C) the limit for any one bond specified in the bail bondsman's general power of attorney on file with the Chief Clerk of the District Court.

Cross reference: For penalties imposed on surety insurers in default, see Code, Insurance Article, §21-103 (a).

(2) Surety Insurer

No bail bond shall be accepted if the surety on the bond is on the current list maintained by the Chief Clerk of the District Court of those in default. No bail bond executed by a surety insurer directly may be accepted unless accompanied by an affidavit reciting that the surety insurer is authorized by the Insurance Commissioner of Maryland to write bail bonds in this State.
Cross reference: For the obligation of the District Court Clerk to notify the Insurance Commissioner concerning surety insurers who fail to resolve or satisfy bond forfeitures, see Code, Insurance Article, §21-103.

(3) Bail Bondsman

No bail bond executed by a bail bondsman may be accepted unless the bondsman's name appears on the most recent list maintained by the Chief Clerk of the District Court, the bail bond is within the limit specified in the bondsman's general power of attorney as shown on the list or in a special power of attorney filed with the bond, and the bail bond is accompanied by an affidavit reciting that the bail bondsman:

(A) is duly licensed in the jurisdiction in which the charges are pending, if that jurisdiction licenses bail

bondsmen;

(B) is authorized to engage the surety insurer as surety on the bail bond pursuant to a valid general or special power of attorney; and

(C) holds a valid license as an insurance broker or agent in this State, and that the surety insurer is authorized by the Insurance Commissioner of Maryland to write bail bonds in this State.

Cross reference: Code, Criminal Procedure Article, §5-203 and Rule 16-817 (Appointment of Bail Bond Commissioner - Licensing and Regulation of Bail Bondsmen).

. . .

Rule 4-217 was accompanied by the following Reporter's Note.

Chapter 586, Acts of 2006 (HB 833) was enacted by the 2006 General Assembly. It provides that a surety insurer that is removed by the District Court from the list of eligible surety insurers because of failure to timely resolve or satisfy one or more bail bond forfeitures is subject to certain penalties. It also requires the District Court clerk to notify the Insurance Commissioner in writing of the name of any surety insurer who fails to resolve or satisfy all bond forfeitures in default by the District Court deadline. The Criminal Subcommittee recommends that a cross reference to the new statute be added after subsections (d)(1) and (d)(2).

Mr. Karceski explained that Chapter 586, Acts of 2006 (HB 833) was enacted by the 2006 General Assembly to resolve some problems with surety insurers. Any surety removed by the District Court from the list of eligible sureties due to failure to timely resolve or satisfy one or more bail bond forfeitures will be subject to certain penalties. The new law also provides

that the District Court clerk must notify the Insurance Commissioner in writing of the name of any surety insurer who fails to resolve or satisfy all bond forfeitures in default by the District Court deadline. The Criminal Subcommittee proposes that a cross reference to the new statute be added after subsections (d)(1) and (d)(2) of Rule 4-217. By consensus, the Committee agreed with this suggestion.

Mr. Karceski presented Rules 4-342, Sentencing - Procedure in Non-capital Cases, and 4-345, Sentencing -- Revisory Power of Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 to add a cross reference after section (g), as follows:

Rule 4-342. SENTENCING - PROCEDURE IN NON-CAPITAL CASES

. . .

(g) Reasons

The court ordinarily shall state on the record its reasons for the sentence imposed.

Cross reference: For factors related to drug and alcohol abuse treatment to be considered by the court in determining an appropriate sentence, see Code, Criminal Procedure Article, §6-231. <u>For procedures to commit a defendant who has a drug or alcohol dependency to a treatment program in the Department of Health and Mental Hygiene as a</u>

condition of release after conviction, see Code, Health General Article, §8-507.

. . .

Rule 4-342 was accompanied by the following Reporter's Note.

The 2006 General Assembly enacted Chapter 338, Acts of 2006 (HB 656) which modified Code, Health General Article, §8-507 to allow a court to commit a defendant with a drug or alcohol dependency to a treatment program in the Department of Health and Mental Hygiene as a condition of release after conviction or at any time the defendant voluntarily agrees to participate in treatment even if a sentence of incarceration is in effect and a detainer is lodged. Previously these two conditions prohibited the commitment. The law now allows the defendant to begin treatment after he or she is no longer incarcerated and any detainer has been removed. The Criminal Subcommittee recommends that a cross reference to the modified statute be added to Rule 4-342. Because the law allows the commitment even if the defendant did not timely file a motion for reconsideration under Rule 4-345, or the defendant timely filed the motion but the motion was denied, the Subcommittee recommends the addition of a Committee note to Rule 4-345 explaining this variation from the procedures in that Rule.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-345 to add a Committee note after subsection (e)(2), as follows:

Rule 4-345. SENTENCING -- REVISORY POWER OF COURT

. . .

(e) Modification Upon Motion

(1) Generally

Upon a motion filed within 90 days after imposition of a sentence (A) in the District Court, if an appeal has not been perfected or has been dismissed, and (B) in a circuit court, whether or not an appeal has been filed, the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence.

Cross reference: Rule 7-112 (b).

(2) Notice to Victims

The State's Attorney shall give notice to each victim and victim's representative who has filed a Crime Victim Notification Request form pursuant to Code, Criminal Procedure Article, §11-104 or who has submitted a written request to the State's Attorney to be notified of subsequent proceedings as provided under Code, Criminal Procedure Article, §11-503 that states (A) that a motion to modify or reduce a sentence has been filed; (B) that the motion has been denied without a hearing or the date, time, and location of the hearing; and (C) if a hearing is to be held, that each victim or victim's representative may attend and testify.

Committee note: The court may commit a defendant who is found to have a drug or alcohol dependency to a treatment program in the Department of Health and Mental Hygiene as a condition of release after conviction or at any time the defendant voluntarily agrees to participate in treatment, even if the defendant did not timely file a motion for consideration, or the defendant timely filed

a motion for reconsideration, which was denied by the court. See Code, Health General Article, §8-507.

. . .

Rule 4-345 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 4-342.

Mr. Karceski told the Committee that a new statute, Chapter 338, Acts of 2006 (HB 656) allows a court to commit a defendant in a criminal case with a drug or alcohol dependency to a treatment program in the Department of Health and Mental Hygiene as a condition of release after conviction or at any time the defendant voluntarily agrees to participate in treatment even if a sentence of incarceration is in effect and a detainer is lodged. Before the new law, these two conditions prohibited the commitment. The Criminal Subcommittee recommends that a cross reference to the new statute be added to Rule 4-342. Because the new law allows the commitment even if the defendant did not timely file a motion for modification or filed a timely motion for modification that was denied, the Subcommittee recommends adding a Committee note to Rule 4-345 explaining that despite the procedures set out in that Rule, the defendant also may have the right to be committed to a dependency treatment program.

Judge Heller questioned whether the new statute means that the defendant could be released early from his or sentence. Mr. Karceski replied affirmatively. The Chair said that the legislature wanted to give the sentencing judge further revisory

power, even though the 90-day period provided by the Rule for revising the sentence has elapsed, so that defendants can get into drug or alcohol treatment. Mr. Sykes pointed out that the words "consideration" and "reconsideration" in Rule 4-345 should be "modification," to track the language of section (d) of the Rule. By consensus, the Committee approved the amendments to Rule 4-342 as presented and Rule 4-345 as modified by Mr. Sykes's suggested change.

Mr. Karceski presented Rule 4-347, Proceedings for Revocation of Probation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-347 to add a cross reference after subsection (e)(1), as follows:

Rule 4-347. PROCEEDINGS FOR REVOCATION OF PROBATION

. . .

(e) Hearing

(1) Generally

The court shall hold a hearing to determine whether a violation has occurred and, if so, whether the probation should be revoked. The hearing shall be scheduled so as to afford the defendant a reasonable opportunity to prepare a defense to the charges. Whenever practicable, the hearing shall be held before the sentencing judge or, if the sentence was imposed by a Review Panel

pursuant to Rule 4-344, before one of the judges who was on the panel. With the consent of the parties and the sentencing judge, the hearing may be held before any other judge. The provisions of Rule 4-242 do not apply to an admission of violation of conditions of probation.

Cross reference: See *State v. Peterson*, 315 Md. 73 (1989), construing the third sentence of this subsection. For procedures to be followed by the court when a defendant may be incompetent to stand trial in a violation of probation proceeding, see Code, Criminal Procedure Article, §3-104.

(2) Conduct of Hearing

The court may conduct the revocation hearing in an informal manner and, in the interest of justice, may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses. The defendant shall be given the opportunity to admit or deny the alleged violations, to testify, to present witnesses, and to cross-examine the witnesses testifying against the defendant. If the defendant is found to be in violation of any condition of probation, the court shall (A) specify the condition violated and (B) afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

Cross reference: See *Hersch and Cleary v. State*, 317 Md. 200 (1989), setting forth certain requirements with respect to admissions of probation violations, and *State v. Fuller*, 308 Md. 547 (1987), regarding the application of the right to confrontation in probation revocation proceedings. For factors related to drug and alcohol abuse treatment to be considered by the court in determining an appropriate sentence, see Code, Criminal Procedure Article, §6-231.

Source: This Rule is new.

Rule 4-347 was accompanied by the following Reporter's Note.

> The 2006 General Assembly enacted Chapter 353, Acts of 2006 (HB 795) amending Code, Criminal Procedure Article, §3-104, which requires a court to determine whether a defendant is competent to stand trial in a violation of probation proceeding if the defendant appears to be incompetent. The Criminal Subcommittee recommends that a cross reference to the amended statute be placed after subsection (e)(1) of Rule 4-347.

Mr. Karceski explained that Chapter 353, Acts of 2006 (HB 795) was passed in 2006 and requires a court to determine whether a defendant is competent to stand trial in a violation of probation proceeding if the defendant appears to be incompetent. The Subcommittee recommends adding a cross reference to the new statute at the end of subsection (e)(1) of Rule 4-347. By consensus, the Committee agreed with the addition of the cross reference.

Additional Agenda Item.

Mr. Karceski presented Rule 4-246, Waiver of Jury Trial - Circuit Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

> AMEND Rule 4-246 by adding a Committee note after section (b), as follows:

> Rule 4-246. WAIVER OF JURY TRIAL – CIRCUIT COURT

(a) Generally

In the circuit court a defendant having a right to trial by jury shall be tried by a jury unless the right is waived pursuant to section (b) of this Rule. If the waiver is accepted by the court, the State may not elect a trial by jury.

(b) Procedure for Acceptance of Waiver

A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until it determines, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that the waiver is made knowingly and voluntarily.

Committee note: Although the law requires no specific litany for the court to use in determining the voluntariness of a defendant's waiver of a jury trial, it is preferable for the court to follow Section 1-1105 of the Maryland Trial Judges' Benchbook, Model Spoken Forms, as a guideline in making this determination. See *Kang v. State*, ___ Md. ___ (No. 59, September Term, 2005, filed June 2, 2006) and *Abeokuto v. State*, 391 Md. 289 (2006).

(c) Withdrawal of a Waiver

After accepting a waiver of jury trial, the court may permit the defendant to withdraw the waiver only on motion made before trial and for good cause shown. In determining whether to allow a withdrawal of the waiver, the court may consider the extent, if any, to which trial would be delayed by the withdrawal.

Source: This Rule is derived from former Rule 735.

Rule 4-246 was accompanied by the following Reporter's Note.

> In the cases of *Kang v. State*, ___ Md. ___ (No. 59, September Term, 2005, filed June 2, 2006) and *Abeokuto v. State*, 391 Md. 289 (2006), the Court of Appeals declined to require a litany for the trial court to use in determining the voluntariness of a jury trial waiver, but expressed its preference for judges to make a specific inquiry into voluntariness. To achieve this goal, Rule 4-246 is proposed to be amended by the addition of a Committee note after section (b) referencing the model form in the Maryland Trial Judge's Benchbook for an inquiry into the voluntariness of a jury trial waiver and referencing the two recent cases.

Mr. Karceski told the Committee that Mr. Zavin had sent a five-page letter noting problems with the draft of Rule 4-246. (See Appendix 3). The Criminal Subcommittee had not worked on the draft of the Rule, as it was prepared for the Committee's review on an emergency basis. The change is being proposed as a result of *Abeokuto v. State*, 391 Md. 289 (2006), involving a waiver of the right to a jury at a capital sentencing proceeding. The Court held that the waiver was inadequate, because the defendant was not asked whether he had been experiencing any side effects from any anti-psychotic medication he was taking. In *Abeokuto* and in *Kang v. State*, 393 Md. 97 (2006), the Court held that there is no specific litany a judge must use to ascertain whether a waiver of a jury trial or a jury for a sentencing proceeding is valid. However, the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, had sent a letter requesting that the Rules Committee review the issue, on an emergency basis, to determine the feasibility of codifying the Court's preference

for a specific inquiry into voluntariness. (See Appendix 4). The way this is handled varies from jurisdiction to jurisdiction throughout the State.

Mr. Zavin told the Committee that there are two prongs to the determination of a valid waiver. One is whether the decision to waive is knowing, and the other is whether the decision is voluntary. The Chair stated that the Criminal Subcommittee will consider this matter, and Mr. Zavin will be invited to participate along with others who practice in this area. Judge Dryden asked whether the Maryland Trial Judges' Benchbook is being considered for revisions. The Chair replied that every so often sections of the benchbook are revised. The Reporter pointed out that the letter indicated that this is an emergency matter. Mr. Brault inquired as to who writes the benchbook. Ms. Veronis answered that a Committee has been working on revising it. The Reporter asked if the 1999 version is the most recent, and Ms. Veronis replied that it is. Mr. Karceski commented that he was not sure how fast the Court of Appeals would like this issue to be determined. He expressed the view that the fact that no specific litany is required has been the law and should continue to be the law, because it is difficult to have a template of questions that have to be asked in every case. He noted that the first phrase in the proposed Committee note is appropriate, but he suggested that after the word "trial," the language should be changed to "questions asked must determine whether the waiver is knowing and voluntary."

The Chair pointed out that in the *Abeokuto* case, the waiver of the jury trial was appropriate, but the Court held that for purposes of deciding whether to waive the right to sentencing by a jury, the trial judge should have asked the defendant again whether he was under the influence of the medication that he might or might not have been taking. There was no debate about the appropriateness of the questions -- it was whether or not the questions should have been followed up. In *Kang*, the defendant supposedly had a language problem. The Chair asked if in either of those decisions the Court said in dicta that judges should follow the judges' benchbook, because if so, their language could be used in the Committee note. The benchbook, however, has arguable deficiencies. On the other hand, if the Court simply pointed to two cases that they decided, then it would be useful to look at the benchbook questions to fill in what may be missing. Judge Spellbring responded that he did not remember the Court of Appeals in either of its decisions referring to the benchbook. Judge Heller suggested that if that language is not in the cases, then the first sentence of the Reporter's note to Rule 4-246 could be used. Judge Dryden added that the law has always been that the waiver must be knowing and voluntary. Judge Spellbring remarked that he did not see why this matter is an emergency. The Chair stated that he would notify Chief Judge Bell that the Committee discussed this issue, and that since information from the Office of the Public Defender was received,

there will be a meeting of private defense counsel, representatives from the Office of the Public Defender, and prosecutors to try to come up with satisfactory language.

Mr. Karceski said that when his clients have waived a jury, he was not sure that they have ever been asked if they were under the influence of medications. If a defendant pleads guilty, he or she is always asked that question, which should be asked in both situations.

Agenda Item 3. Consideration of proposed amendments to Rule 2-201 (Real Party in Interest) and Rule 3-201 (Real Party in Interest) recommended by the Process, Parties, and Pleading Subcommittee

---

Mr. Brault presented Rules 2-201 and 3-201, Real Party in Interest, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 200 - PARTIES

AMEND Rule 2-201 to add a cross reference at the end of the Rule, as follows:

Rule 2-201. REAL PARTY IN INTEREST

Every action shall be prosecuted in the name of the real party in interest, except that an executor, administrator, personal representative, guardian, bailee, trustee of an express trust, person with whom or in whose name a contract has been made for the benefit of another, receiver, trustee of a bankrupt, assignee for the benefit of creditors, or a person authorized by statute

or rule may bring an action without joining the persons for whom the action is brought. When a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Maryland. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. The joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Cross reference: For the ability to file papers in a case in the name of "John Doe," see *Doe v. Shady Grove Hospital*, 89 Md. App. 351 (1991).

Source: This Rule is derived from former Rule 203 a, b, and c and the 1966 version of Fed. R. Civ. P. 17 (a).

Rule 2-201 was accompanied by the following Reporter's Note.

The Honorable Alan M. Wilner, Judge of the Court of Appeals, suggested that the Rules Committee consider the addition of a general "John Doe" rule concerning the right of a party to proceed anonymously. This issue was discussed in *Doe v. Shady Grove Hospital*, 89 Md. App. 351 (1991). In that case, the court held that papers filed in a case may be filed in the name of "John Doe" if protecting the confidentiality of a party's identity serves a compelling government interest or provides a necessary right to privacy. The Process, Parties, and Pleading Subcommittee felt that it was not necessary to include in the Rules the factors set out by the Court in *Doe* because this type of filing is not a common occurrence but decided that a cross reference to the *Doe* case added at the end of Rules 2-201 and 3-201 would be an appropriate way to indicate an exception to those Rules which both require actions to be prosecuted in the name of the real party in interest.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 200 - PARTIES

AMEND Rule 3-201 to add a cross reference at the end of the Rule, as follows:

Rule 3-201. REAL PARTY IN INTEREST

Every action shall be prosecuted in the name of the real party in interest, except that an executor, administrator, personal representative, guardian, bailee, trustee of an express trust, person with whom or in whose name a contract has been made for the benefit of another, receiver, trustee of a bankrupt, assignee for the benefit of creditors, or a person authorized by statute or rule may bring an action without joining the persons for whom the action is brought. When a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Maryland. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. The joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Cross reference: For the ability to file papers in a case in the name of "John Doe," see *Doe v. Shady Grove Hospital*, 89 Md. App. 351 (1991).

Source: This Rule is derived from former M.D.R. 203 and the 1966 version of the Fed. R. Civ. P. 17 (a).

Rule 3-201 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-201.

Mr. Brault explained that the question to be considered is if there should be modifications to the Rules to allow a procedure for a plaintiff to bring an action anonymously. One of the interns at the Rules Committee wrote a memorandum on the subject, a copy of which is in the meeting materials. (See Appendix 5). The Process, Parties, and Pleading Subcommittee recommends that a cross reference to the case of *Doe v. Shady Grove Hospital*, 89 Md. App. 351 (1991) be added to Rules 2-201 and 3-201. The case involved the governmental interest in protecting the right to privacy, outlining the use of fictitious names and in what circumstances they are appropriate. By consensus, the Committee approved the addition of the cross references to the two Rules.

Agenda Item 4. Consideration of proposed Rules changes recommended by the Judgments Subcommittee - Amendments to: Rule 2-532 (Motions for Judgment Notwithstanding the Verdict), Rule 2-533 (Motion for New Trial), Rule 2-534 (Motion to Alter or Amend a Judgment – Court Decision), and Rule 2-535 (Revisory Power); Addition of cross references amending: Rule 2-641 (Writ of Execution – Issuance and Content) and Rule 2-644 (Sale of Property Under Levy)

Mr. Sykes presented Rules 2-532, Motions for Judgment Notwithstanding the Verdict; 2-533, Motion for New Trial; 2-534, Motion to Alter or Amend a Judgment - Court Decision; and 2-535, Revisory Power, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-532 by adding a new sentence to section (b), as follows:

Rule 2-532. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) When Permitted

In a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion.

(b) Time for Filing

The motion shall be filed within ten days after entry of judgment on the verdict or, if no verdict is returned, within ten days after the discharge of the jury. If the court reserves ruling on a motion for judgment made at the close of all the evidence, that motion becomes a motion for judgment notwithstanding the verdict if the verdict is against the moving party or if no verdict is returned. A motion for judgment notwithstanding the verdict filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

Cross reference: See Rule 8-205 requiring notice to the Clerk of the Court of Special Appeals of information not disclosed in an information report regarding the filing of a motion under this Rule, or its withdrawal or disposition.

(c) Joinder With Motion for New Trial

A motion for judgment notwithstanding the verdict may be joined with a motion for a new trial.

(d) Effect of Failure to Make Motion

Failure to move for a judgment notwithstanding the verdict under this Rule does not affect a party's right upon appeal to assign as error the denial of that party's motion for judgment.

(e) Disposition

If a verdict has been returned, the court may deny the motion, or it may grant the motion, set aside any judgment entered on the verdict, and direct the entry of a new judgment. If a verdict has not been returned, the court may grant the motion and direct the entry of judgment or order a new trial. If a party's motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for new trial, if any, should the judgment thereafter be reversed on appeal.

(f) Effect of Reversal on Appeal

(1) When Judgment Notwithstanding the Verdict Granted

If a motion for judgment notwithstanding the verdict is granted and the appellate court reverses, it may (A) enter judgment on the original verdict, (B) remand the case for a new trial in accordance with a conditional order of the trial court, or (C) itself order a new trial. If the trial court has conditionally denied a motion for new trial, the appellee may assert error in that denial and, if the judgment notwithstanding the verdict is reversed, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) When Judgment Notwithstanding the Verdict Denied

If a motion for judgment

notwithstanding the verdict has been denied and the appellate court reverses, it may (A) enter judgment as if the motion had been granted or (B) itself order a new trial. If the motion for judgment notwithstanding the verdict has been denied, the prevailing party may, as appellee, assert grounds entitling that party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion. If the appellate court reverses the judgment, nothing in this Rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial should be granted.

Source: This Rule is derived as follows:
Section (a) is derived in part from former Rule 563 a and is in part new.
Section (b) is derived from FRCP 50 (b) and in part from former Rule 563 a 2.
Section (c) is derived from former Rule 563 a 3.
Section (d) is derived from former Rule 563 a 4.
Section (e) is derived from former Rule 563 b.
Section (f) is derived from former Rule 563 c and FRCP 50 (c) and (d).

Rule 2-532 was accompanied by the following Reporter's Note.

The Court of Appeals in *Tierco Maryland, Inc. v. Williams*, 381 Md. 378 (2004) had suggested that a saving provision for post-judgment motions may not be necessary, because the courts have treated the timeliness of post-judgment motions differently from the timeliness of appeals. However, in the (unreported) case of *Black v. Black* in the Court of Special Appeals of Maryland, No.30, September Term 2004, filed August 10, 2005, the court held that Rule 2-533 and Rule 2-534 motions filed after a judgment was signed by the judge but two days before the judgment was docketed did not stay the time for filing an appeal, and thus the appeal filed 39 days after the judgment was

docketed was not timely. The proposed amendments to Rules 2-532, 2-533, 2-534, and 2-535 eliminate confusion by making the Rule consistent with Rule 8-602 (d).

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-533 by adding a new sentence to section (a), as follows:

Rule 2-533. MOTION FOR NEW TRIAL

(a) Time for Filing

Any party may file a motion for new trial within ten days after entry of judgment. A party whose verdict has been set aside on a motion for judgment notwithstanding the verdict or a party whose judgment has been amended on a motion to amend the judgment may file a motion for new trial within ten days after entry of the judgment notwithstanding the verdict or the amended judgment. A motion for new trial filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

Cross reference: See Rule 8-205 requiring notice to the Clerk of the Court of Special Appeals of information not disclosed in an information report regarding the filing of a motion under this Rule, or its withdrawal or disposition.

(b) Grounds

All grounds advanced in support of the motion shall be filed in writing within the

time prescribed for the filing of the motion, and no other grounds shall thereafter be assigned without leave of court.

(c) Disposition

The court may set aside all or part of any judgment entered and grant a new trial to all or any of the parties and on all of the issues, or some of the issues if the issues are fairly severable. If a partial new trial is granted, the judge may direct the entry of judgment as to the remaining parties or issues or stay the entry of judgment until after the new trial. When a motion for new trial is joined with a motion for judgment notwithstanding the verdict and the motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for new trial if the judgment is thereafter reversed on appeal.

(d) Costs

If a trial or appellate court has ordered the payment of costs as a part of its action in granting a new trial, the trial court may order all further proceedings stayed until the costs have been paid.

Source: This Rule is derived as follows:
Section (a) is derived in part from FRCP 59 (b) and is in part new. It replaces former Rules 567 a and 690.
Section (b) is derived from former Rule 567 b.
Section (c) is derived from former Rules 567 c and 563 b 3.
Section (d) is derived from former Rule 567 e.

Rule 2-533 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 2-532.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE — CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-534 by adding a new sentence, as follows:

Rule 2-534. MOTION TO ALTER OR AMEND A JUDGMENT -- COURT DECISION

In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial. A motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

Cross reference: See Rule 8-205 requiring notice to the Clerk of the Court of Special Appeals of information not disclosed in an information report regarding the filing of a motion under this Rule, or its withdrawal or disposition.

Source: This Rule is derived from FRCP 52 (b) and 59 (a).

Rule 2-534 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 2-532.

AMEND Rule 2-535 by adding a new sentence to section (a), as follows:

Rule 2-535. REVISORY POWER

(a) Generally

On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

(b) Fraud, Mistake, Irregularity

On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Committee note: This section is intended to be as comprehensive as Code, Courts Article §6-408.

(c) Newly-discovered Evidence

On motion of any party filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533.

(d) Clerical Mistakes

Clerical mistakes in judgments,

orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 625 a.
Section (b) is derived from former Rule 625 a.
Section (c) is derived from former Rule 625 b.
Section (d) is derived from the 1948 version of Fed. R. Civ. P. 60 (a) and former Rule 681.

Rule 2-535 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 2-532.

Mr. Sykes told the Committee that the proposed changes to the Rules deal with the problem of orders of court that are announced in open court, but not docketed until sometime later. A motion or appeal is then filed between the time of the announcement and the docketing. In the appeal situation, there is an existing rule that a premature appeal filed after the order is announced but before the judgment is docketed will be deemed to have been filed after the entry of the judgment, but Michael Paul Smith, Esq. was counsel in a case in which a motion to alter or amend was filed in that interim period. He wrote a letter pointing out a problem with the post judgment rules. (See Appendix 6). In the unreported case, *Black v. Black*, No. 30,

September Term, 2004, filed August 10, 2005 (See Appendix 7), the Court of Special Appeals held that a motion for a new trial and to alter or amend the judgment that is filed prematurely would not delay the entry of final judgment and would not extend the time for noting an appeal. The result was that an appeal that was filed several days late, but within the time that the motion to alter or amend would have extended the time for noting the appeal, was not saved. The purpose of the Rules being proposed for change is to provide that these motions that are filed in the time between the announcement and the docketing of the judgment would be deemed to have been filed after the judgment is docketed. It would remedy the trap that had not been avoided under the current Rule. Mr. Sykes said that a question came up when he had discussed this matter with the Reporter. If one party files a motion for reconsideration during that period, and the other party files a notice of appeal during that period, then what is the relative priority between the order of appeal and the motion itself? The Rule does not deal with this directly, but Mr. Sykes expressed the view that although both should be deemed docketed after the judgment on the same day as the judgment, the motion for reconsideration would be considered to be filed first.

The Chair said that he thought that there had been a case in the Court of Special Appeals where the Court held that, in a similar situation, the circuit court retains jurisdiction to deal with the timely filing of the motion for reconsideration, and once that is disposed of, the appeal is then ripe for appellate

review. Mr. Sykes asked if that case dealt with this precise situation, and the Chair replied that it did not. Mr. Sykes suggested that a cross reference could be added as to the effect of filing the notice of appeal and the motion. The Chair responded that this is a good idea, because in domestic relations cases, this problem comes up very often. For example, the wife will file the motion for modification, and the husband will file the appeal. Sometimes the motion is filed before the appeal; sometimes, the notice of appeal is filed before the motion. He said that he thought that the Committee has addressed this issue previously. The Vice Chair commented that it is partially addressed in the appellate rules, because Rule 8-202, Notice of Appeal – Times for Filing, states:

> In a civil action, when a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be filed within 30 days after the later of (1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534. A notice of appeal filed before the withdrawal or disposition of any of these motions does not deprive the trial court of jurisdiction to dispose of the motion. If a notice of appeal is filed and thereafter a party files a timely motion pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be treated as filed on the same day as, but after, the entry of a notice withdrawing the motion or an order disposing of it.

The Chair said that a cross reference to Rule 8-202 (c) could be added to the Rules being discussed today.

The Vice Chair expressed the view that the case of *Tierco v.*

Willaims, 381 Md. 378 (2004), is a difficult one in terms of what it has done to the structure of post-judgment motions. The case was procedurally very complicated. It was a multi-party case, and someone had filed a post-judgment motion after a motion for summary judgment had been granted. There was the equivalent of a judgment as to the one party, but not as to all parties, and therefore, it was not a judgment, and the court said that even though it is defined as a judgment, that is not its meaning with respect to this multi-party situation. She expressed the opinion that the Committee ought to take a look at the multi-party situation. The proposed changes are not going to solve the problem. She remarked that the correct result was reached in the case, but the reasoning concerns her regarding the definition of "judgment," as opposed to "final judgment." In the past, there had been debates concerning whether there is a difference between the two terms. The Court now is saying that there is a difference. The Chair commented that it is "an appealable judgment" as opposed to a "final appealable judgment," but the Vice Chair responded that those terms are not used that way in the Rules of Procedure. This is an issue that should be addressed.

The Chair asked if the changes to the proposed Rules are appropriate. The Vice Chair noted that there may be a change needed to Rule 2-532, which provides that the motion must be filed within ten days after entry of judgment on the verdict, and

that has long been construed to mean that there must be a real judgment among all of the parties, or else it is not a judgment. The Chair stated that he would like the proposed changes to the post-judgment Rules to go forward, because the situation in the *Black* case happens often.

Mr. Brault pointed out a problem that he has run into. There is a jury verdict for a large amount of money, and unbeknownst to anybody, including the trial judge and all of the lawyers, the clerk never enters the judgment on the docket. Instead, the clerk writes on the docket "verdict for $____." Motions for Judgment Notwithstanding the Verdict or for a new trial are filed. Later the question comes up as to whether there is a judgment, and there is no judgment. In one of the cases, research indicated that in the transcript, the judge stated that the clerk will enter judgment on the record. The Vice Chair questioned as to whether there was a separate piece of paper embodying that statement, as Rule 2-601, Entry of Judgment, requires. Mr. Brault replied that there was no separate piece of paper. This was a violation of everything procedurally that the 1997 amendments to the Rule addressed. Lawyers in Mr. Brault's office filed a notice of appeal and an amended and new motion for a new trial, together with an order to enter the judgment *nunc pro tunc*. This matter is still pending a hearing in the trial court. He expressed the opinion that this is not an uncommon situation where the clerk, for some reason, enters a verdict,

instead of a judgment. Should the proposed new language in the Rules include the following language "or the announcement of a money verdict by a jury," so the new language would read: "A motion for ... filed after the announcement or signing by the trial court of a judgment or the announcement of a money verdict by a jury without entry on the docket but before..."? The Vice Chair asked for clarification of the situation described by Mr. Brault. Mr. Michael responded that when the jury comes back with a verdict, the judge tells the clerk to enter the judgment on the docket, and then the clerk does not do this. There is no separate piece of paper created to report the judgment. Mr. Michael noted that he has had the same experience. Judge Spellbring agreed that this is not uncommon. The Chair said that the lawyer would be protected on appeal, because if there is not strict compliance with Rules 2-601 and 2-602, Judgments Not Disposing of Entire Action, the Court of Special Appeals sends the case back. Mr. Brault commented that in his case, his law firm was not relying on the appeal, but they felt that they should get a new trial. It is an existing problem that can happen on any given day in any circuit court.

The Reporter asked Mr. Brault if he had a suggested modification to the language in the Rules. Mr. Brault reiterated that he would add the language "after the announcement of a jury verdict or the signing by the trial court of a judgment" before the word "but." Judge McAuliffe pointed out that the word "jury" is not necessary, and Mr. Brault agreed. Mr. Sykes suggested

that the language read: "A motion .... filed after the announcement or signing by the trial court of the judgment or the return of a verdict, but before entry of the judgment on the docket shall be treated...". This change would be made in the post-judgment Rules. By consensus, the Committee agreed to this change. The Chair noted that this change would be made to Rules 2-532, 2-533, and 2-535, but not to Rule 2-534 because it pertains only to court trials. The Chair stated that Rule 2-534 would not contain the most recent modifications, but it would be changed to read as it appears in the meeting materials. The Committee approved the Rules as amended.

Mr. Sykes presented Rules 2-641 (Writ of Execution - Issuance and Content) and 2-644 (Sale of Property Under Levy) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-641 to add a cross reference at the end of the Rule, as follows:

Rule 2-641. WRIT OF EXECUTION - ISSUANCE AND CONTENT

(a) Generally

Upon the written request of a judgment creditor, the clerk of a court where the judgment was entered or is recorded shall issue a writ of execution directing the sheriff to levy upon property of the judgment

debtor to satisfy a money judgment. The writ shall contain a notice advising the debtor that federal and state exemptions may be available and that there is a right to move for release of the property from the levy. The request shall be accompanied by instructions to the sheriff that shall specify (1) the judgment debtor's last known address, (2) the judgment and the amount owed under the judgment, (3) the property to be levied upon and its location, and (4) whether the sheriff is to leave the levied property where found, or to exclude others from access to it or use of it, or to remove it from the premises. The judgment creditor may file additional instructions as necessary and appropriate and deliver a copy to the sheriff. More than one writ may be issued on a judgment, but only one satisfaction of a judgment may be had.

(b) Issuance to Another County

If a judgment creditor requests the clerk of the court where the judgment was entered to issue a writ of execution directed to the sheriff of another county, the clerk shall send to the clerk of the other county the writ, the instructions to the sheriff, and, if not already recorded there, a certified copy of the judgment for recording.

(c) Transmittal to Sheriff; Bond

Upon issuing a writ of execution or receiving one from the clerk of another county, the clerk shall deliver the writ and instructions to the sheriff. The sheriff shall endorse on the writ the exact hour and date of its receipt and shall maintain a record of actions taken pursuant to it. If the instructions direct the sheriff to remove the property from the premises where found or to exclude others from access to or use of the property, the sheriff may require the judgment creditor to file with the sheriff a bond with security approved by the sheriff for the payment of any expenses that may be incurred by the sheriff in complying with the writ.

Cross reference: For execution of a judgment against the property of a corporation, joint stock company, association, limited liability company, limited liability partnership, or limited liability limited partnership for the amount of fines or costs awarded against it following its failure to appear after being served with a charging document, see Code, Criminal Procedure Article, §4-203.

Source: This Rule is derived as follows:
Section (a) is in part new and in part derived from former Rules G40 b 4, the last sentence of G49 a, and 622 e.
Section (b) is in part new and in part derived from former Rule 622 h 1 and 3.
Section (c) is new.

Rule 2-641 was accompanied by the following Reporter's Note.

The 2006 General Assembly enacted Chapter 534, Acts of 2006 (SB 736), which amended the law permitting the execution on a judgment against a corporation, defined to include a joint stock company and an association, that fails to appear on a charging document filed against it. The law currently also allows a sheriff to sell the property on which the execution has been issued. The amendment authorizes the law to also apply to limited liability company, which is defined in the amendment to include a limited liability partnership and a limited liability limited partnership. The Judgments Subcommittee recommends that a cross reference to the statute be added at the end of Rules 2-641 and 2-644 to put all of these entities on notice that their property may be executed upon civilly after a criminal judgment is issued against them.

AMEND Rule 2-644 to add a cross reference at the end of the Rule, as follows:

Rule 2-644. SALE OF PROPERTY UNDER LEVY

(a) By Sheriff

Upon request of the judgment creditor, the sheriff, without further order of court, shall sell property under levy in the manner provided by this Rule. No sale shall be made before 30 days after the levy or before disposition of an election made by the judgment debtor pursuant to Rule 2-643 (d). The sheriff may sell so much of the debtor's interest in the property under levy as is necessary to obtain the amount of the judgment and costs of the enforcement proceedings. The debtor's interest includes all legal and equitable interests of the debtor in the property at the time the judgment became a lien on the property.

(b) Notice of Sale

The sheriff shall give notice of the time, place, and terms of the sale. The notice shall be posted on the courthouse door or on a bulletin board in the immediate vicinity of the door of the courthouse and published in a newspaper of general circulation in the county where the property is located at least (1) ten days before the sale of an interest in personal property or (2) 20 days before the sale of an interest in real property. When the property under levy is perishable, the sheriff may sell the property with less notice or with no notice, if necessary to prevent spoilage and loss of value.

(c) Conduct of Sale

The sale shall be public and shall be held at the time and place given in the notice. The sale shall be for the highest cash offer, but the sheriff may reject all offers if they are unconscionably low and

offer the property for sale at a later time. When both personal property and real property have been levied upon under the same judgment, the sheriff upon written request of the debtor received prior to the first publication of notice of a first sale, shall sell the property in the order requested. Otherwise the order of sale shall be in the discretion of the sheriff.

(d) Transfer of Real Property Following Sale

The procedure following the sale of an interest in real property shall be as prescribed by Rule 14-305, except that (1) the provision of Rule 14-305 (f) for referral to an auditor does not apply and (2) the court may not ratify the sale until the judgment creditor has filed a copy of the public assessment record for the real property kept by the supervisor of assessments in accordance with Code, Tax-Property Article, §2-211. After ratification of the sale by the court, the sheriff shall execute and deliver to the purchaser a deed conveying the debtor's interest in the property, and if the interests of the debtor included the right to possession, the sheriff shall place the purchaser in possession of the property. It shall not be necessary for the debtor to execute the deed.

(e) Transfer of Personal Property Following Sale

Following the sale of personal property, the sheriff shall execute and deliver to the purchaser a bill of sale conveying the debtor's interest in the property. If the interests of the debtor include the right to possession, the sheriff shall deliver the property to the purchaser.

(f) Distribution of Proceeds

The sheriff may withdraw from the proceeds of the sale all appropriate unpaid sheriff's expenses and fees incident to the enforcement proceedings. Unless otherwise

ordered by the court, the sheriff shall distribute the balance of the proceeds of the sale, first to the judgment creditor in satisfaction of the amount owed under the judgment plus costs of the enforcement proceedings advanced by the creditor, and then, to the judgment debtor.

Cross reference: Code, Courts Article, §§11-510 and 11-511.

(g) Report to the Court

The sheriff shall file a report stating the property sold, the purchasers, the amount of the proceeds, and the distribution of the proceeds.

Cross reference: For sale of the property of a corporation, joint stock company, association, limited liability company, limited liability partnership, or limited liability limited partnership on an execution of a judgment against its property for the amount of fines or costs awarded against it following its failure to appear after being served with a charging document, see Code, Criminal Procedure Article, §4-203.

Source: This Rule is new.

Rule 2-644 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-641.

There being no comment by the Committee, the Rules were approved as presented.

Additional Agenda Item.

The Chair said that an additional Rule has been added to the agenda.

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

AMEND Rule 16-813 to make the entire Maryland Code of Judicial Conduct applicable to each former judge who is approved for recall, as follows:

Rule 16-813. MARYLAND CODE OF JUDICIAL CONDUCT

. . .

CANON 4

Extra Judicial Activities

. . .

C. Charitable, Civic, and Governmental Activities

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

COMMENT

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

(2) Except as otherwise provided by law and subject to Canon 4A, a judge may accept

appointment to a governmental advisory commission, committee, or position.

COMMENT

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

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

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

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

COMMENT

See the Comment to Canon 4B regarding use of the phrase "subject to other provisions of this Code." As an example of the meaning of the phrase, a judge permitted under Canon 4C (4) to serve on the board of an organization may be prohibited from such service by, for example, Canon 2C or 4A, if

the organization practices invidious discrimination or if service on the board otherwise causes a substantial question as to the judge's capacity to act impartially as a judge or as to service as an adviser.

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

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

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

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

COMMENT

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

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

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

(B) a membership solicitation that

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

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

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

(iv) A judge may:

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

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

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

COMMENT

As a director, member, non-legal adviser, officer, or trustee of an organization that is devoted to the administration of justice, the legal system, or improvement of the law or for a not-for-profit charitable, civic, educational, fraternal or sororal, or religious organization, a judge may solicit membership and encourage or endorse membership efforts for the organization, as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor who is in a position of control or influence. A judge may be listed as a director, officer, or

trustee of an organization but must not engage in direct, individual solicitation of funds or memberships in person, by telephone, or in writing, for that organization, except in the following cases: (1) a judge may solicit, for funds or memberships, other judges over whom the judge does not exercise appellate or supervisory authority; (2) a judge may solicit, for membership in an organization described above, other persons if neither those persons nor persons with whom they are affiliated are likely to appear before the court on which the judge serves; and (3) a judge who is an officer of an organization described above may send a general membership solicitation mailing over the judge's signature.

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

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

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

D. Financial Activities

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

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

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

COMMENT

Canon 4D (1)(b) is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for recusal. A judge also should discourage **members of the judge's family** from engaging in dealings that reasonably would appear to exploit the judge's judicial position. With respect to affiliation of relatives of the judge with law firms appearing before the judge, see the Comment to Canon 3D (1)(d) relating to recusal.

Participation by a judge in business and financial dealings is subject to the general prohibitions in Canon 4A against activities that cause a substantial question as to **impartiality**, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation also is subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Canon 2B against misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See the Comment to Canon 4B regarding use of the phrase "subject to other provisions of this Code."

(2) Subject to other provisions of this Code, a judge may hold and manage investments, including real estate, and engage in other remunerative activities except that a full time judge shall not hold a directorship or office in a bank, insurance company, lending institution, public utility, savings and loan association, or other business, enterprise, or venture that is affected with a public interest.

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

(3) A judge shall manage investments and other financial interests to minimize the number of cases in which recusal would be required. As soon as practicable without serious financial detriment, a judge shall dispose of those financial interests that might require frequent recusal.

(4) A judge shall neither use nor disclose, in financial dealings or for any other purpose not related to the judge's judicial duties, information that is acquired in his or her judicial capacity and that is confidential, privileged, or otherwise not part of the public record.

Cross reference: As to court records, see Title 16, Chapter 1000 of the Maryland Rules. As to prohibitions against, and penalties for, improper disclosure or use of information by government officials and employees, see Code, State Government Article, §§15-507 and 15-903. As to civil and criminal provisions governing improper disclosure of information, see, e.g., Code, State Government Article, §§10-626 and 10-627 (public records) and Code, Tax-General Article, §13-1018 (tax information).

(5) A judge shall not accept, and shall urge **members of the judge's household** not to accept, a bequest, favor, **gift**, or loan from anyone except for:

(a) contributions to a judge's campaign for judicial office that comply with Canon 5;

(b) a book, tape, or other resource material supplied by a publisher on a complimentary basis for official use, a **gift** incident to a public testimonial, or an invitation to a judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the administration of justice, the legal system, or improvement of the law;

(c) an award, benefit, or **gift** incident to the business, profession, or other separate activity of a spouse or other **member of the judge's household**, including an award, benefit, or **gift** for the use of both the household member and judge (as spouse or household member), if the award, benefit, or **gift** could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(d) ordinary social hospitality;

(e) a **gift** from a friend or relative, for a special occasion, such as an anniversary, birthday, or wedding, if the **gift** is fairly commensurate with the occasion and the friendship or relationship;

(f) a bequest, favor, **gift**, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require a recusal under Canon 3D;

(g) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(h) a fellowship or scholarship awarded on the same terms and based on the same criteria applied to other applicants; or

(i) any other bequest, favor, **gift**, or loan if: (1) the donor or lender is not a person whose interests have come or are likely to come before the judge and (2) the judge reports, on the judge's financial disclosure form, all bequests, favors, **gifts**, and loans required under Rule 16-815 to be reported.

COMMENT

However innocently intended, favors or **gifts** from persons not in a judge's immediate family may create an appearance that the judge could be improperly beholden to the

donor.

Similarly, a bequest, favor, **gift**, or loan to a **member of the judge's household** might be viewed as intended to influence the judge. Therefore, a judge must inform those household members of the relevant ethical constraints on the judge in this regard and discourage those household members from violating the constraints. However, a judge cannot reasonably be expected to **know** or control all of the business and financial activities of all **members of the judge's household.**

Canon 4D (5)(b) and (i) governs, respectively, acceptance of an invitation to a law-related function and of an invitation paid for by an individual lawyer or group of lawyers.

A judge may accept a public testimonial, or a **gift** incident thereto, only if the donor is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial or **gift** complies with other provisions of this Code. See Canons 2B and 4A (1).

A **gift** that is made to a judge, or a **member of the judge's household**, and is excessive in value raises questions about the judge's **impartiality** and the integrity of the judicial office and might require recusal of the judge. See, however, Canon 4D (5)(f).

E. Fiduciary Activities

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

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

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

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

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

COMMENT

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

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

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

F. Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

COMMENT

Canon 4F does not preclude a judge from

participating in settlement conferences. If by reason of disclosure made during or as a result of a conference, a judge's **impartiality** might reasonably be questioned, the judge should not participate in the matter further. See Canon 3D (1).

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

. . .

CANON 6

Compliance

A. **Courts**

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

B. **Construction**

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

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

C. **Former Judges**

This Code~~, other than Canon 4C (Charitable, Civic, and Governmental Activities), D(2) (Financial Activities), E (~~

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

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

D. **Time for Compliance**

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

Source: . . .

Canon 6.

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

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

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

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

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

Note.

The proposed amendments to Rule 16-813 implement a recommendation made by the Study Group on Recalled Judges that the entire Maryland Code of Judicial Conduct be made applicable to each former judge who is approved for recall.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

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

Rule 16-815. FINANCIAL DISCLOSURE STATEMENT

a. Every judge and each former judge approved for recall for temporary service under Maryland Constitution, Article IV, §3A shall file with the State Court Administrator an annual financial disclosure statement on the form prescribed by the Court of Appeals. When filed, a financial disclosure statement is a public record.

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

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

2. A subsequent statement shall be filed annually on or before April 15 of each year and shall cover the preceding calendar year or that portion of the preceding calendar year during which the judge held office or the former judge recalled for temporary service actually served.

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

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

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

e. Extension of Time for Filing.

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

2. For good cause shown, the State Court Administrator may grant a reasonable extension of time for filing the statement. Whether ~~he~~ the State Court Administrator grants or denies the request, the State Court

Administrator shall furnish the judge or former judge and the Judicial Ethics Committee with a written statement of ~~his~~ the State Court Administrator's reasons, and the facts upon which this decision is based.

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

f. Failure to File Statement - Incomplete Statement.

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

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

> g. This rule applies to ~~any~~ each judge of a court named in Canon 6 A who has resigned or retired in any calendar year, with respect to the portion of that calendar year prior to ~~his~~ the judge's resignation or retirement, and to each former judge approved for recall for temporary service with respect to that portion of each calendar year during which the former judge actually served.
>
> Source: This Rule is former Rule 1233.

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

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

The Reporter explained that this item originated from a letter from Chief Judge Bell stating that a majority of the Study Group on Recalled Judges had recommended to the Court of Appeals that Canon 6 be amended to delete the exemption as to certain recalled judges. (See Appendix 8). The letter asked the Rules Committee to prepare an amendment to Canon 6 making the entire Code of Judicial Conduct applicable to all judges approved for recall. The Reporter drafted the necessary changes, but she said that she has been advised by judges familiar with the Study Group's recommendations that the wording of the Reporter's note accompanying the proposed changes should be revised. She told

the Committee that Ms. Veronis could explain what the Study Group had actually recommended and how this Rule should be amended. The Reporter also received a communication from Ms. Veronis that provided that Rule 16-815, Financial Disclosure Statement, should be redrafted as well for the Court to consider whether all former judges who are approved for recall for temporary service need to file a financial statement. If a retired judge is approved for recall and is hearing cases, the question is whether 100% of the ethical canons should apply to that former judge. Currently, there are exemptions of certain Canons, which can be seen in the Compliance portion of Canon 6.

The Chair commented that some judges may not be happy about filing the financial disclosure statement, but he observed that if a lawyer wants to check on a judge, and he or she finds a retired, specially assigned judge who earned $250,000 from arbitration in which the opposing counsel participated, it may be a problem. He said that he did not think that any of the judges objected strenuously to filing a financial disclosure form. Ms. Veronis remarked that none of the judges had communicated to her any problem with filing the form. The Chair stated that the proposed changes to Rule 16-815 comply with the spirit of Chief Judge Bell's letter, and the Court can take a look at it. By consensus, the Committee approved the changes to Rule 16-815.

The Chair drew the Committee's attention to Rule 16-813, which he said was the more problematic Rule. He noted that there are several ways to approach the Rule. One is to change the

Reporter's note, because there was some confusion about what the Study Group actually recommended. The Committee can submit the Rule in compliance with Chief Judge Bell's request in his letter of June 6, 2006, because the Court will hold a hearing and hear from interested persons on how much, if any, of an adjustment there should be on the ability of a retired judge to be specially assigned to hear cases and at the same time, do some mediation, arbitration, alternative dispute resolution, etc. The Committee can look at the Rule making sure that it is in compliance with the requirement as to form and submit the Rule without the current Reporter's note, but with an adjusted Reporter's note saying to the Court that the Rule is presented to the Court to comply with Chief Judge Bell's request. The Chair expressed his preference for doing this.

Judge McAuliffe said that he had an issue with the proposed Rule. He said that he had read the Study Group's Report thoroughly, and he did not remember that they had recommended that recalled judges may not serve as arbitrators or mediators. The proposed change to the Rule takes away the exclusion for retired judges, so that it is not consistent with the recommendation of that group. He referred to section C. of Canon 6 under Compliance, pointing out that he had no problem with making the Code applicable to charitable, civic, and governmental activities, to financial activities, or to fiduciary activities, but he had a big problem with making the Code applicable to service as an arbitrator or mediator. He suggested that this

provision read: "This Code, other than Canon 4F (Service as Arbitrator or Mediator), applies to each former judge...". This would preserve the exclusion for recalled judges to serve as arbitrators or mediators. He and the Honorable Howard Chasanow, retired Court of Appeals judge, do a fairly large volume of medical malpractice and other mediations in the State, and Judge McAuliffe added that he feels that he makes a more valuable contribution by helping to dispose of many cases through mediation than as a recalled judge. If the proposed change to the Code is adopted as Judge Bell would like it even though the Study Group did not, Judge McAuliffe said that he probably would be required to give up sitting as a recalled judge, and he would not like to do that. Mr. Michael remarked that many insurance carriers will only use mediators who are retired judges, because the carriers are concerned that practicing lawyers will not have the objectivity to properly consider their defense claims. He cautioned that any amendment to the Rule should not contravene the public policy of Maryland that favors settlement of cases.

The Chair said that he agreed with Judge McAuliffe. Judge Heller noted that recalled judges can only sit for a specific amount of time. That means for a good part of the year, they would not be permitted to sit, yet they would also not be permitted to serve as mediators. The Chair said that the Honorable Joseph Manck, Administrative Judge of the Circuit Court for Anne Arundel County, had left a message stating that he was very concerned about what this Rule would do to the pool of

retired judges sitting in his county. Much discussion will be required before there is a final decision. Judge McAuliffe questioned as to why the Rules Committee has been asked to draft a Rule that is contrary to what the Study Group recommended. The Chair responded that the Committee is being asked to present the Court with a rule for their consideration. Judge McAuliffe recommended sending the Rule to the Court with the changes suggested today. The Chair suggested that Judge McAuliffe's language be put in with brackets, so that the Court can consider it as an alternative. Judge McAuliffe responded that his motion was to provide to the Court language that the Rules Committee recommends. The Court always has the alternative available. Mr. Brault seconded the motion. He said that he could not emphasize enough the role of the retired judge as mediator in the medical malpractice arena. Those cases are difficult to settle, and it often takes a retired judge to effect a settlement. He agreed with Mr. Michael that many carriers will only participate in mediations in which a retired judge is the mediator. Mr. Brault added that in many of his firm's cases, including commercial cases, the parties request a retired judge to mediate.

The Chair said that to ensure that the minutes are clear, section C. of Canon 6 only pertains to retired judges who are recalled for temporary service in the court system. There is still available the core of judges who do not wish to sit in the courtroom but are willing to conduct in mediation and arbitration privately. This Canon would not apply to those judges. The

Chair pointed out that many judges will serve as mediators and arbitrators and will also serve on recalled status. This is the problem, not the judge who never wants to sit in a courtroom again. Mr. Brault observed that the judges being discussed are the really excellent ones, good at mediation and good on the bench.

The Chair reiterated that there are several ways to approach this issue. One way is to comply with the request of the Court. The last paragraph of Chief Judge Bell's letter states that to facilitate further consideration, the Committee should prepare an amendment to Canon 6 making the entire Code applicable to all judges approved for recall. Judge McAuliffe pointed out that the second paragraph of Chief Judge Bell's letter states that a majority of the Study Group on Recalled Judges has recommended to delete the exemption, and Judge McAuliffe stated his belief that this is not correct. Another way is to consider the historical underpinnings for the request. The easiest way to handle this is to put Judge McAuliffe's language in a bracket and explain that the Committee wished to present this language because of a concern that highly qualified judges will not apply to be approved for recall. The Chair said that he would do whatever the majority of the Committee wanted to do.

Mr. Sykes expressed the opinion that the suggested change to the language of section C. should be made, and a note should accompany it that the Committee considered the original form of the request but recommends modification and then explain why.

The Chair agreed, stating that if the Court prefers the language in the other format, it can simply strike out the language suggested by the Committee. Judge Heller remarked that the explanation should indicate that the change is being proposed not only for the reasons discussed today, but because the Study Group did not necessarily endorse the change. The Chair responded that he was not certain as to what the Study Group recommended. The Reporter asked Ms. Veronis what the Study Group's recommendation actually was. Ms. Veronis answered that they recommended that the Code become applicable to retired judges who serve a certain number of days per year. Judge McAuliffe added that the Study Group put some limitations on how much a retired judge would be able to sit if the judge was doing arbitration and mediation work. They specifically considered it and specifically left this type of work available.

The Chair suggested that the Committee work on an alternative that is consistent with what a majority of the Study Group recommended. The change would be to the comment to Canon 4F. It could read: "Canon 4F does not apply to a former judge who serves as a specially assigned judge for less than _____ number of days a year." Mr. Sykes questioned whether it should be a three-month limitation. The Chair asked the Committee what an appropriate limitation should be. Ms. Veronis responded that it worked out to 123 days per year. The recommendation was half of the days authorized by Code, Courts Article, §1-302. The

Chair expressed his preference for leaving the number of days blank and letting the Court of Appeals decide the number. Some judges have full pensions; other judges have partial pensions because they did not serve the number of years required for a full pension. The Rule cannot be based on the assumption that every one of the judges who will be affected by this has a full pension. Most do, but many do not. If the Court wants to follow the Study Group's recommendation, it can put in an appropriate number. He asked Judge McAuliffe if that would be satisfactory, or if he prefers to maintain the current exemption of Canon 4F from the compliance provisions of Canon 6C, Former Judges. Judge McAuliffe replied that his motion is to maintain the current exemption. Mr. Brault offered to be the sponsor of the motion, and Mr. Michael also offered. Judge McAuliffe said that he was willing to be the sponsor. The Chair stated that the motion was jointly offered by Mr. Brault, Mr. Michael, and Judge McAuliffe.

The Vice Chair inquired as to how many days the Code allows a retired judge to sit. Judge McAuliffe answered that the total amount that a judge may be paid for sitting as a recalled judge is one-third of a current judge's salary. Judge Dryden commented that a recalled judge can sit every day. Judge McAuliffe agreed, but noted that the judge cannot get paid for sitting every day. Judge Dryden added that a retired judge cannot get paid more than a sitting judge. Mr. Sykes expressed the opinion that if a retired judge is sitting for a substantial period of time, he or she should not be also doing outside work such as mediation.

Judge Kaplan said that in Baltimore City, a retired judge can sit 180 days, but only be paid for something like 88 days. The Chair inquired as to who imposes the 180-day limit. Judge Kaplan replied that this is in the Code. Ms. Veronis added that the statute, Courts Article, §1-302, limits the total number of days that a recalled judge can sit. The Vice Chair asked if a judge ever sits without being paid. Judge McAuliffe noted that the Honorable Lawrence Rodowsky, retired judge of the Court of Appeals, and the Honorable Charles Moylan, retired judge of the Court of Special Appeals, sit half-time, and they are not paid for more than a third of the time. Mr. Sykes reiterated that he felt that if a retired judge is sitting so much that he or she is almost like a full-time judge, then the arbitration and mediation could conceivably interfere with the judge's judicial duties. Judge Kaplan commented that the retired judges in Baltimore City sit three or four days a week, and on one day of the week that they do not sit, they do mediation. Judge Norton remarked that if the judges abuse their position, they will not be called back.

The Chair asked for a vote on the motion on the floor. The motion carried by a majority vote, but the Chair noted that the vote was not unanimous, because his approach was to bracket the language suggested by Judge McAuliffe.

The Chair told the Committee that he regretted to inform them that this was Judge Heller's last official meeting as a member of the Rules Committee. Judge Murphy thanked Judge Heller for her service to the Committee, and the Committee gave her a

round of applause.

The Chair adjourned the meeting.