COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Rooms UL4 and 5 of the Judiciary Education and Training Center, 2011 Commerce Park Drive, Annapolis, Maryland on September 8, 2016.

Members present:

Hon. Alan M. Wilner, Chair

H. Kenneth Armstrong, Esq.
James E. Carbine, Esq.
Hon. John P. Davey
Christopher R. Dunn, Esq.
Hon. Angela M. Eaves
Hon. JoAnn M. Ellinghaus-Jones
Victor H. Laws, III, Esq.
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Hon. Paul A. Price
Scott D. Shellenberger, Esq.
Steven M. Sullivan, Esq.
Dennis J. Weaver, Clerk
Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
David R. Durfee, Jr., Esq., Assistant Reporter
Sherie B. Libber, Esq., Assistant Reporter

Hon. Anne L. Dodd, Orphans' Court for Howard County
William T. Lawrie, Esq., Office of the Attorney General
Ms. Calisa Smith, Court of Special Appeals
Michele Gagnon, Esq., Lyons, Doughty & Veldhuis PC/PA
D. Robert Enten, Esq., Gordon Feinblatt, LLC
Jeffrey B. Fisher, Esq.
Ms. Hilda Austin
Lauren E. Kitzmiller, Esq., District Court Headquarters
Tanya Bernstein, Esq., Commission on Judicial Disabilities
Hon. Alexander Wright, Jr., Chair, Commission on Judicial Disabilities
Carol A. Crawford, Esq., Executive Director, Commission on Judicial Disabilities
Phillip Robinson, Esq., Consumer Law Center, LLC
Gregory Hilton, Clerk, Court of Special Appeals

Allan J. Gibber, Esq., Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.
Charlotte K. Cathell, Register of Wills for Worcester County
Margaret H. Phipps, Register of Wills for Calvert County
Byron E. Macfarlane, Register of Wills for Howard County
Anne C. Ogletree, Esq.
Stephane Latour, Esq., Legal Affairs, Administrative Office of the Courts
Kim Doan, Esq., Circuit Court for Anne Arundel County, Office of Case Management
Leland Sampson, Executive Assistant, Administrative Office of the Courts
Faye D. Matthews, Deputy State Court Administrator, Administrative Office of the Courts
Michele J. McDonald, Esq., Office of the Attorney General, Courts and Judicial Affairs

The Chair convened the meeting. He welcomed everyone back from the summer break.

Agenda Item 1. Consideration of proposed revised Title 18, Chapter 400 (Judicial Disabilities and Discipline)

The Chair told the Committee that an earlier version of proposed revisions to Title 18, Chapter 400, the Rules on Judicial Disabilities and Discipline, had been before the Committee and had been approved. The Rules had been included in a Supplement to Part II of the 178th Report to the Court of Appeals. He explained that the draft had been worked out in collaboration with the Chair of the Judicial Disabilities Commission and Investigative Counsel, and it seemed that everything was as it should be. However, prior to the Court's hearing, some concerns were expressed by a few former members of

the Commission and the Inquiry Board, mostly on how to handle recommendations by Investigative Counsel that a complaint be dismissed. Under the current Rule, those recommendations went to the Inquiry Board for consideration and then to the Commission, which had the final say over whether the complaint should be dismissed. The draft Rule provided that those recommendations of dismissal of the complaint be sent directly to the Commission and not to the Board. There was some question whether that was a good policy. Prior to the Court hearing, when this issue surfaced, the Chair asked the Court to let the Rules Committee speak with the people who had raised these concerns, the current Chair of the Commission, and Investigative Counsel. The Court agreed to this. The current Rule was left unchanged but renumbered as part of the revision contained in the Report. After discussions at several meetings, a compromise was reached.

The Chair explained that the solution was to permit recommendations of outright dismissal of the complaint with no warning to go directly to the Commission. The judge is not going to complain about the outcome, so there would be no controversy. But if the recommendation of Investigative Counsel is to dismiss with a warning – there has been a suggestion to change this terminology – it would go to the Inquiry Board for consideration. There may be some question in that situation regarding whether dismissal is a proper disposition and what the

warning should say. Rather than the Commission getting directly involved up front, this is something that the Board should review first.

The Chair noted that as this issue was being resolved, some other issues came up. The Rules that are before the Committee today have additional changes, most of which are not substantive.

The Chair said that he would go through the changes to each Rule.

The Chair presented Rule 18-401, Commission on Judicial Disabilities – Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-401. COMMISSION ON JUDICIAL DISABILITIES - DEFINITIONS

~~In~~ The following definitions apply in this Chapter ~~the following definitions apply~~ except as otherwise expressly ~~otherwise~~ provided or as necessary implication requires:

(a) Address of Record

"Address of record" means a judge's current home address or another address designated in writing by the judge.

Cross reference: See Rule ~~18-409 (a)(1)~~ 18-410 (a) concerning confidentiality of a

judge's home address.

(b) Board

"Board" means the Judicial Inquiry Board appointed pursuant to Rule 18-403.

(c) Charges

"Charges" means the charges filed with the Commission by Investigative Counsel pursuant to Rule ~~18-407~~ 18-408.

(d) Commission

"Commission" means the Commission on Judicial Disabilities created by Art. IV, §4A of the Maryland Constitution.

(e) Commission Record

"Commission record" means all documents pertaining to the judge who is the subject of charges that are filed with the Commission or made available to any member of the Commission and the record of all proceedings conducted by the Commission with respect to that judge.

Cross reference: See Rule 18-402 (g).

(f) Complainant

"Complainant" means a person who has filed a complaint, and in Rule 18-404 (a)(1), (a)(3), and (a)(4), "complainant" also includes a person who has filed a written allegation of misconduct by or disability of a judge that is not under oath or supported by an affidavit.

(g) Complaint

"Complaint" means a written communication under oath or supported by an affidavit alleging that a judge has a disability or has committed sanctionable conduct.

(h) Disability

"Disability" means a mental or physical disability that seriously interferes with the performance of a judge's duties and is, or is likely to become,

permanent.

~~(i) Formal Complaint~~

~~"Formal complaint" means a written communication under affidavit signed by the complainant, alleging facts indicating that a judge has a disability or has committed sanctionable conduct.~~

~~Committee note: The complainant may comply with the affidavit requirement of this section by signing a statement in the following form: "I solemnly affirm under the penalties of perjury that the contents of the foregoing paper are true to the best of my knowledge, information, and belief." It is not required that the complainant appear before a notary public.~~

~~(j)~~ (i) Judge

"Judge" means (1) a judge of the Court of Appeals, the Court of Special Appeals, a circuit court, the District Court, or an orphans' court, and (2) a retired judge during any period that the retired judge has been approved ~~to sit~~ for recall.

Cross reference: See Md. Const., Art. 4, §3A and Code, Courts Article, §1-302.

~~(k)~~ (j) Sanctionable Conduct

(1) "Sanctionable conduct" means misconduct while in office, the persistent failure by a judge to perform the duties of the judge's office, or conduct prejudicial to the proper administration of justice. A judge's violation of any of the provisions of the Maryland Code of Judicial Conduct promulgated by Title 18, Chapter 100 may constitute sanctionable conduct.

(2) Unless the conduct is occasioned by fraud or corrupt motive or raises a substantial question as to the judge's fitness for office, "sanctionable conduct" does not include:

(A) making an erroneous finding of fact, reaching an incorrect legal

conclusion, or misapplying the law; or

(B) failure to decide matters in a timely fashion unless such failure is habitual.

Committee note: Sanctionable conduct does not include a judge's simply making wrong decisions - even very wrong decisions - in particular cases.

Cross reference: Md. Const., Art. IV, §4B (b)(1). For powers of the Commission in regard to any investigation or proceeding under §4B of Article IV of the Constitution, see Code, Courts Article, §§13-401 ~~to~~ through 13-403.

Source: This Rule is derived from former Rule 16-803 (2016).

The Chair said that Rule 18-401 has no substantive change from the version the Committee previously had seen and approved.

By consensus, the Committee approved Rule 18-401 as presented.

The Chair presented Rule 18-402, Commission, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-402. COMMISSION

(a) Chair and Vice Chair

The judicial member from the Court of

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

(b) ~~Interested Member~~ Recusal

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

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

(c) Executive Secretary

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

(d) Investigative Counsel; Assistants

(1) Appointment; Compensation

The Commission shall appoint an attorney as Investigative Counsel. Before appointing Investigative Counsel, the Commission shall notify bar associations and the general public of the vacancy and shall consider any recommendations that are timely submitted. Investigative Counsel shall

serve at the pleasure of the Commission and shall receive the compensation set forth in the budget of the Commission.

(2) Duties

Investigative Counsel shall have the powers and duties set forth in ~~these~~ the Rules in this Chapter and shall report and make recommendations to the Commission as required under these Rules or directed by the Commission.

(3) Additional Attorneys and Staff

As the need arises and to the extent funds are available in the Commission's budget, the Commission may appoint additional attorneys or other persons to assist Investigative Counsel. Investigative Counsel shall keep an accurate record of the time and expenses of additional persons employed and ensure that the cost does not exceed the amount allocated by the Commission.

(e) Quorum

The presence of a majority of the members of the Commission constitutes a quorum for the transaction of business, provided that at least one judge, one ~~lawyer~~ attorney, and one public member are present. At a hearing on charges held pursuant to Rule ~~18-407~~ 18-408 (i), a Commission member is present only if the member is physically present ~~in person~~. Under all other circumstances, a member may be physically present ~~in person~~ or present by telephone, video, or other electronic conferencing. Other than adjournment of a meeting for lack of a quorum, no action may be taken by the Commission without the concurrence of a majority of members of the Commission.

(f) General Powers of Commission

In accordance with Maryland Constitution, Article IV, §4B and Code, Courts Article, §13-401 through 13-403, and in addition to any other powers provided in the Rules in this Chapter, the Commission

may:

(1) administer oaths and affirmations;

(2) issue subpoenas and compel the attendance of witnesses and the production of evidence;

(3) require persons to testify and produce evidence by granting them immunity from prosecution or from penalty or forfeiture; and

(4) in case of contumacy by any person or refusal to obey a subpoena issued by the Commission, invoke the aid of the circuit court for the county where the person resides or carries on a business.

~~(f)~~ (g) Record

The Commission shall keep a record of all documents filed with the Commission and all proceedings conducted by the Commission concerning a judge, subject to a retention schedule determined by the Commission.

~~(g)~~ (h) Annual Report

~~The~~ Not later than September 1 of each year, the Commission shall submit an annual report to the Court of Appeals~~, not later than September 1,~~ regarding its operations ~~and including~~. The Report shall include statistical data with respect to complaints received and processed, ~~subject to the provisions of Rule 18-409~~ but shall not include material declared confidential under Rule 18-417.

~~(h)~~ (i) Request for Home Address

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

Cross reference: See Rules 18-401 (a) and ~~18-409 (a)(1)~~ 18-417 (a).

Source: This Rule is derived from former Rule 16-804 (2016).

The Chair said that Rule 18-402 addresses the Commission on Judicial Disabilities. Section (a) poses a policy question. Neither the Constitution, which created the Commission in Article IV, §§4A and 4B, nor Code, Courts Article, §13-401, that was passed by the legislature to implement that provision, provide for the existence of a Chair and Vice Chair of the Commission.

The Chair noted that the Commission consists of 11 individuals, all appointed by the Governor. There are three judges: one from the District Court, one from a circuit court, and one from the Court of Special Appeals. There are also three attorneys and five members of the public. With one exception, the member from the Court of Special Appeals has always been the Chair of the Commission. The one exception was that for a time, the Hon. Barbara Howe, who was a circuit court judge, was the Chair.

The Chair commented that the proposal before the Committee is to provide for the selection of the Chair and Vice Chair in the Rule. Section (a) states that the judicial member from the Court of Special Appeals will be the Chair and that the Vice Chair will be one of the other two judges.

The Chair explained that section (f) sets forth the general powers of the Commission. There is no substantive change in section (f). The powers are those that are provided for in the Constitution itself. The thought was that they should be in the

Rule for transparency and completeness. Sections (g) and (h) have some modifications, but they are mostly clarification and style changes.

By consensus, the Committee approved Rule 18-402 as presented.

The Chair presented Rule 18-403, Judicial Inquiry Board, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-403. JUDICIAL INQUIRY BOARD

(a) Creation and Composition

The Commission shall appoint a Judicial Inquiry Board consisting of two judges, two attorneys, and three public members who are not attorneys or judges. No member of the Commission may serve on the Board.

(b) Compensation

A member of the Board may not receive compensation for serving in that capacity but is entitled to reimbursement for expenses reasonably incurred in the performance of official duties in accordance with standard State travel regulations.

(c) Chair and Vice Chair

The Chair of the Commission shall designate a judicial member of the Board ~~who is a lawyer or judge~~ to serve as Chair of the Board and the other judicial member to

serve as Vice Chair. The Vice Chair shall perform the duties of the Chair whenever the Chair is disqualified or otherwise unable to act.

(d) Removal or Replacement

The Commission by majority vote may remove or replace members of the Board at any time.

(e) Quorum

The presence of a majority of the members of the Board constitutes a quorum for the transaction of business, so long as at least one judge, one ~~lawyer~~ attorney, and one public member are present. A member of the Board may be physically present ~~in person~~ or present by telephone, video, or ~~video~~ other electronic conferencing. Other than adjournment of a meeting for lack of a quorum, no action may be taken by the Board without the concurrence of a majority of members of the Board.

~~(f) Powers and Duties~~

~~The powers and duties of the Board are set forth in Rules 18-404 and 18-405.~~

~~(g)~~ (f) Record

The Board shall keep a record of all documents filed with the Board and all proceedings conducted by the Board concerning a judge. The Executive Secretary of the Commission shall attend the Board meetings and keep a record of those meetings in the form that the Commission requires, subject to the retention schedule established by the Commission.

Source: This Rule is derived from former Rule 16-804.1 (2016).

The Chair said that the same policy question addressed in Rule 18-402 exists in Rule 18-403 regarding the existence of the Chair and Vice Chair of the Judicial Inquiry Board. He said

that they should be judges and not public members or attorneys. This is provided for in section (c). Section (f) has amendments that are not substantive. They add the current practice for the record before the Board into the Rule.

By consensus, the Committee approved Rule 18-403 as presented.

The Chair presented Rule 18-404, Complaints; Initial Review by Investigative Counsel, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-404. COMPLAINTS; ~~PRELIMINARY INVESTIGATIONS~~ INITIAL REVIEW BY INVESTIGATIVE COUNSEL

(a) Procedure on Receipt of Complaint~~s~~

(1) Referral to Investigative Counsel

~~All~~ The Commission shall refer all complaints and other written allegations of misconduct or disability against a judge ~~shall be sent~~ to Investigative Counsel.

~~(c)~~ (2) ~~Dismissal by Investigative Counsel~~ Complaint that Fails to Allege Disability or Sanctionable Conduct

If Investigative Counsel concludes that ~~the~~ a complaint ~~does not~~ fails to allege facts that, if true, would constitute a disability or sanctionable conduct ~~and that there are no reasonable grounds for a preliminary investigation~~, Investigative Counsel shall (A) dismiss the complaint, and

(B) notify the Complainant and the Commission, in writing, that the complaint was filed and dismissed and the reasons for the dismissal. ~~If a complainant does not file a formal complaint within the time stated in section (a) of this Rule, Investigative Counsel may dismiss the complaint. Upon dismissing a complaint, Investigative Counsel shall notify the complainant and the Commission that the complaint has been dismissed. If the judge has learned of the complaint and has requested notification, Investigative Counsel shall also notify the judge that the complaint has been dismissed.~~

Committee note: Subsection (a)(2) of this Rule does not preclude Investigative Counsel from communicating with the complainant or making an inquiry under Rule 18-405 in order to clarify general or ambiguous allegations that may suggest a disability or sanctionable conduct. Outright dismissal is warranted when the complaint, on its face, complains only of conduct that clearly does not constitute a disability or sanctionable conduct.

(3) Written Allegation of Disability or Sanctionable Conduct not Under Oath or Supported by Affidavit

Except as provided by section (c) of this Rule, the Commission may not act upon a written allegation of misconduct or disability unless it is a complaint. ~~Upon receiving a complaint that does not qualify as a formal complaint but indicates~~ If a written allegation alleges facts indicating that a judge may have a disability or may have committed sanctionable conduct but is not under oath or supported by an affidavit, Investigative Counsel, if possible, shall~~, if possible: (1)~~ (A) inform the complainant ~~of the right to file a formal complaint~~ that the Commission acts only upon complaints under oath or supported by an affidavit, ~~(2)~~ (B) ~~inform~~ provide the complainant ~~that a formal complaint must be supported by~~ with an appropriate form of affidavit ~~and provide~~

~~the complainant with the appropriate form of affidavit~~, and ~~(3)~~ (C) inform the complainant that unless a ~~formal~~ complaint under oath or supported by an affidavit is filed within 30 days after the date of the notice, ~~Investigative Counsel is not required to take action, and the complaint~~ the matter may be dismissed.

(4) Failure to File Complaint Under Oath or Supported by Affidavit

If, after Investigative Counsel has given the notice provided for in subsection (a)(3) of this Rule or has been unable to do so, the complainant fails to file a timely complaint under oath or supported by an affidavit, Investigative Counsel may dismiss the matter and notify the complainant and the Commission, in writing, that a written allegation of misconduct or disability was filed and dismissed and the reasons for the dismissal.

Committee note: In contrast to dismissal of a complaint under Rule 18-405, which requires action by the Commission, Investigative Counsel may dismiss an allegation of disability or sanctionable conduct under this Rule when, for the reasons noted, the allegation fails to constitute a complaint. Subject to section (c) of this Rule, if there is no cognizable complaint, there is no basis for conducting an investigation.

(b) ~~Formal Complaints~~ Opening File on Receipt of Complaint

Investigative Counsel shall ~~number and~~ open a numbered file on each ~~formal~~ properly filed complaint ~~received~~ and promptly in writing (1) acknowledge receipt of the complaint and (2) explain to the complainant the procedure for investigating and processing the complaint.

~~(d)~~ (c) Inquiry

Upon receiving information from any source indicating that a judge may have a disability or may have committed

sanctionable conduct, Investigative Counsel may open a file and make an inquiry. An inquiry may include obtaining additional information from a complainant and any potential witnesses, reviewing public records, obtaining transcripts of court proceedings, and communicating informally with the judge. Following the inquiry, Investigative Counsel shall (1) close the file and dismiss any complaint in conformity with ~~section (c)~~ subsection (a)(2) of this Rule or (2) proceed as if a ~~formal~~ complaint had been properly filed and undertake ~~a preliminary~~ an investigation in accordance with ~~section (c) of this Rule~~ Rule 18-405.

Source: This Rule is derived from former Rule 16-805 (2016).

The Chair noted that the proposed changes to Rule 18-404 are mostly a clarification of the current procedure. A Committee note after subsection (a)(4) is intended to clarify the difference between dismissals of the complaint by Investigative Counsel and by the Commission. Investigative Counsel can dismiss a complaint on his or her own initiative if the complaint, on its face, does not allege either sanctionable conduct or a disability. The Commission can dismiss a complaint because there is no evidence to support it, which does happen. If the complaint is about something the judge said, the Commission will listen to the recording or review the transcript. If the recording or transcript shows that the judge did not say what was alleged, it is a reason to dismiss the complaint for lack of evidence. The Committee note points out

the difference between the two bases for dismissal.

By consensus, the Committee approved Rule 18-404 as presented.

The Chair presented Rule 18-405, Investigation by Investigative Counsel, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-405. ~~FURTHER~~ INVESTIGATION BY INVESTIGATIVE COUNSEL

~~(c)~~ (a) ~~Preliminary~~ Conduct of Investigation

(1) Duty to Conduct; Notice to Board and Commission

If a complaint is not dismissed in accordance with ~~section (c) or (d) of this~~ Rule 18-404, Investigative Counsel shall conduct ~~a preliminary~~ an investigation to determine whether there are reasonable grounds to believe that the judge may have a disability or may have committed sanctionable conduct. Investigative Counsel shall promptly inform the Board ~~or~~ and the Commission that the ~~preliminary~~ investigation is being undertaken.

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

~~(3) During a preliminary investigation, Investigative Counsel may recommend to the Board or Commission that the complaint be~~

~~dismissed without notifying the judge that a preliminary investigation has been undertaken.~~

~~(4) Unless directed otherwise by the Board or Commission for good cause, Investigative Counsel shall notify the judge before the conclusion of the preliminary investigation (A) that Investigative Counsel has undertaken a preliminary investigation into whether the judge has a disability or has committed sanctionable conduct; (B) whether the preliminary investigation was undertaken on Investigative Counsel's initiative or on a complaint; (C) if the investigation was undertaken on a complaint, of the name of the person who filed the complaint and the contents of the complaint; (D) of the nature of the disability or sanctionable conduct under investigation; and (E) of the judge's rights under subsection (c)(5) of this Rule. The notice shall be given by first class mail or by certified mail requesting "Restricted Delivery - show to whom, date, address of delivery" addressed to the judge at the judge's address of record.~~

~~(5) Except when Investigative Counsel has recommended that the complaint be dismissed without notifying the judge and the Board or Commission has accepted the recommendation, before the conclusion of the preliminary investigation, Investigative Counsel shall afford the judge a reasonable opportunity to present, in person or in writing, such information as the judge chooses.~~

~~(6) Investigative Counsel shall complete a preliminary investigation within 90 days after the investigation is commenced. Upon application by Investigative Counsel within the 90-day period and for good cause, the Board shall extend the time for completing the preliminary investigation for an additional 30-day period. For failure to comply with the time requirements of this section, the Commission may dismiss any complaint and terminate the investigation.~~

~~(f) Recommendation by Investigative Counsel~~

~~Upon completion of a preliminary investigation, Investigative Counsel shall report to the Board the results of the investigation in the form that the Commission requires. The report shall include one of the following recommendations: (1) dismissal of any complaint and termination of the investigation, with or without a warning, (2) entering into a private reprimand or a deferred discipline agreement, (3) authorization of a further investigation, or (4) the filing of charges.~~

~~(g) Monitoring and Review by Board~~

~~The Board shall monitor investigations by, and review the reports and recommendations of, Investigative Counsel.~~

~~(b)~~ (2) Subpoena~~s~~

~~(1)~~ Upon application by Investigative Counsel and for good cause, the Chair of the Commission may authorize ~~Investigative Counsel to issue~~ the issuance of a subpoena to compel the ~~attendance of witnesses and the production of~~ person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a time and place specified in the subpoena.

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

(3) Grant of Immunity

Upon application by Investigative Counsel and for good cause, the Commission may grant immunity to any person from prosecution, or from any penalty or forfeiture, for or on account of any transaction, matter, or thing concerning which that person testifies or produces evidence, documentary or otherwise.

Cross reference: See Md. Constitution, Art. IV §4B (a)(1)(ii) and Code, Courts Article,

§13-403.

Committee note: The need for a grant of immunity in order to compel the production of evidence may arise at any stage. Placing a reference to it here is not intended to preclude an application to the Commission in a later proceeding.

~~(a)~~ (4) Notice to Judge

(A) ~~Upon approval of a further investigation by the Board or Commission~~ Except as provided in subsection (a)(4)(C) of this Rule, before the conclusion of the investigation, Investigative Counsel ~~promptly~~ shall notify the judge ~~(1)~~, in writing, that ~~the Board or Commission~~ (i) Investigative Counsel has ~~authorized the further~~ undertaken an investigation into whether the judge has a disability or has committed sanctionable conduct; (ii) whether the investigation was undertaken on Investigative Counsel's initiative or on a complaint; (iii) if the investigation was undertaken on a complaint, the name of the person who filed the complaint and the contents of the complaint; ~~(2)~~ (iv) ~~of~~ the ~~specific~~ nature of the alleged disability or sanctionable conduct under investigation; and ~~(3) that the judge may file a written response within 30 days of the date on the notice~~ (v) the judge's rights under subsection (a)(5) of this Rule.

(B) The notice shall be given by ~~(1)~~ first class mail ~~to~~ or by certified mail requesting "Restricted Delivery – show to whom, date, address of delivery" and shall be addressed to the judge at the judge's address of record. ~~Or (2) if previously authorized by the judge, by first class mail to an attorney designated by the judge. The Board or Commission, for good cause, may defer the giving of notice must be given not less than 30 days before Investigative Counsel makes a recommendation as to disposition.~~

(C) Notice shall not be given under this Rule if (i) Investigative Counsel

determines, prior to the conclusion of the investigation, that the recommendation of Investigative Counsel will be dismissal of the complaint without a letter of cautionary advice, or (ii) as to other recommended dispositions, the Commission or Board, for good cause, directs a temporary delay of providing notice and includes in its directive a mechanism for providing the judge reasonable opportunity to present information to the Board.

(5) Opportunity of Judge to Respond

Upon the issuance of notice pursuant to subsection (a)(4) of this Rule, Investigative Counsel shall afford the judge a reasonable opportunity which, unless the Commission orders otherwise, shall be no less than 30 days, to present such information as the judge chooses.

~~(c)~~ (6) Time for Completion

Investigative Counsel shall complete ~~a further~~ an investigation within ~~60~~ 90 days after ~~it is authorized by the Board or Commission~~ the investigation is commenced. Upon application by Investigative Counsel ~~made~~ within the ~~60~~ 90-day period and ~~served by first class mail upon the judge or counsel of record,~~ for good cause, the Chair of the Commission~~, for good cause,~~ may extend the time for completing the ~~further~~ investigation for a ~~specified~~ reasonable ~~time~~ period. The Chair shall notify the Board of any extension granted. For failure to comply with the time requirements of this section, the Commission may dismiss ~~the~~ any complaint and terminate the investigation ~~for failure to comply with the time requirements of this section~~.

~~(d)~~ (b) Report and Recommendation by Investigative Counsel

(1) Duty to Make

~~Within the time for completing a~~ Upon completion of an investigation, Investigative Counsel shall make a report of the results of the investigation ~~to the~~

~~Board of the Commission~~ in the form that the Commission requires.

(2) Contents

Investigative Counsel shall include in the report or attach to it any response or other information provided by the judge pursuant to subsection (a)(5) of this Rule. The report shall include a statement that the investigation indicates probable sanctionable conduct, probable disability, both, or neither, together with one of the following recommendations, as appropriate:

~~(1)~~ (A) dismissal of any complaint, ~~and termination of the investigation, with or without a warning~~ without a letter of cautionary advice;

(B) dismissal of any complaint, with a letter of cautionary advice;

(C) a conditional diversion agreement;

~~(2)~~ (D) ~~entering into~~ a private reprimand ~~or a deferred discipline agreement~~;

(E) a public reprimand; or

~~(3)~~ (F) the filing of charges.

(3) Recipient of Report

(A) If the recommendation is dismissal of the complaint without a letter of cautionary advice, the report and recommendation shall be made to the Commission. Upon receipt of the recommendation, the Commission shall proceed in accordance with Rule 18-408 (a)(2).

(B) Otherwise, the report and recommendation shall be made to the Board.

Committee note: A complaint may be dismissed outright and without a letter of cautionary advice for various reasons, at different stages, and by different entities. Investigative Counsel may dismiss a claim on his or her own initiative, without opening a file, pursuant to Rule 18-404 (a). In that instance, no notice need be given to the

judge unless the judge has requested notice. If Investigative Counsel opens a file pursuant to Rule 18-404 (b) and performs an investigation under this Rule, Investigative Counsel may recommend dismissal without a letter of cautionary advice because, as a factual matter, there is insufficient evidence of a disability or sanctionable conduct. In that situation, if the Commission adopts the recommendation, there is no need for notice to the judge unless the judge has requested such notice. If the matter proceeds to the Board, the judge must receive notice, even if the ultimate decision is to dismiss the complaint.

(C) Subject to a retention schedule approved by the Commission, Investigative Counsel shall keep a record of the investigation.

Source: This Rule is derived from former Rule 16-805 (2016).

The Chair explained that Rule 18-405 is a reorganization of the current material. There are references to "preliminary" and "further" investigations, but there is only one investigation that is done by Investigative Counsel up front. When the Inquiry Board or the Commission gets the complaint, Investigative Counsel can be asked to conduct further investigation, which is provided for in Rule 18-407.

The Chair drew the Committee's attention to subsection (a)(6), which addresses the time for Investigative Counsel to complete an investigation. The proposal is to extend the time from 60 to 90 days, subject to reasonable extensions approved by the Commission. The reason for this is an increase in

complaints: in 2010, the Commission received 123 complaints; in 2016, it received 201 complaints – a 63 percent increase. The Commission asked for more time to complete the investigation.

The Chair said that in subsection (b)(2)(B), there is a reference to a "letter of cautionary advice," which is addressed in Rule 18-408, Dismissal of Complaint. The letter takes the place of a "dismissal with a warning," which cannot be done without the consent of the judge. Some judges have objected to this, in part because they may feel that they have not done anything wrong or they may be concerned that, despite the confidentiality provisions, this information may be publicly disclosed. The judge has a right to object, and this has not changed. The question was whether the word "warning" has a confrontational or punitive tone.

The Chair noted that research was done as to how this is handled in other states; most states have some kind of disposition equivalent to a dismissal with something attached to it. Some states use the word "warning," just as Maryland has done. Other states try to soften it somewhat and use terms such as "letter of advice," "letter of caution," etc. Rule 18-408 explains the intent of the proposal, which substitutes a "letter of cautionary advice" for the term "warning." A judge may feel more comfortable with this.

Mr. Shellenberger referred to subsection (a)(3) of Rule 18-405. He expressed his concern about the grant of immunity from

prosecution. The Chair responded that this is taken directly from the Constitution, and it was put in the Rule because very few people know about it. It has been used at least once. Article IV, §4B of the Constitution lists the powers of the Commission: to issue process, to compel the attendance of witnesses and the production of evidence, and to require persons to testify and produce evidence by granting them immunity from prosecution or from penalty or forfeiture.

Mr. Shellenberger asked whether it would be advisable in the Rule to suggest a consultation with the local State's Attorney before immunity from prosecution is granted. The Chair replied that the Constitution does not provide for this. Mr. Shellenberger remarked that the Constitution provides for the power; all the Rule would be suggesting is that the State's Attorney be consulted.

Mr. Shellenberger moved to add language to Rule 18-405 (a)(3) providing that the State's Attorney be consulted before immunity from prosecution is granted. Mr. Shellenberger commented that otherwise, the Commission has a tremendous amount of power and can overrule an elected official who is normally instilled with the power to make those decisions. The motion was seconded.

Judge Alexander Wright, Chair of the Commission, pointed out that one of the problems with requiring a consultation with the State's Attorney is confidentiality. This may be early on

in the investigation of a judge. Mr. Shellenberger responded that he deals with some very confidential issues. Judge Wright explained that the Commission is not allowed to tell anyone about the investigation of a judge. Mr. Zarbin noted that not all judges are elected, such as District Court judges. There are retention elections for the Court of Special Appeals. Many of the circuit court judges are elected. Mr. Shellenberger remarked that he and the 23 other State's Attorneys are elected, but the Commission was not elected by the citizens to decide which crimes will be prosecuted in their county and which will not.

The Chair said that the only history of this that he was aware of was when he prosecuted two judges shortly after the Commission was first created. It involved the wholesale fixing of parking tickets. When the story broke, there was outrage from the public and the Baltimore City State's Attorney empaneled a grand jury but enlisted the aid of private attorneys to help, because there were so many records. After many months, one person – who was not a judge – was indicted. The Court of Appeals struck the indictment because private attorneys who were not Assistant State's Attorneys should not have been presenting evidence to a grand jury. Nothing came of it. The Chair explained that the Maryland State Bar Association then decided to get involved, but then after looking into it, declined to act. The Commission had just been created and took this matter

on. No Investigative Counsel existed then, so the Chair had been appointed to that role. The parking tickets involved had no names on them. The only documentary evidence was the dockets. This was in the old Municipal Court of Baltimore City before the District Court was created. The dockets looked a little odd, because they showed the cases being tried. They showed people coming to court and pleading not guilty. Some of the names on the dockets were false; there was no way to connect the dots. The judges were saying that they did not know anything about it and that a clerk was keeping these dockets. The clerk refused to provide any evidence because she was afraid of being caught up in criminal charges and losing her job. The Chair was able to get immunity for her from the Commission. The Chief Judge of the District Court, which by then had replaced the Municipal Court, assured the clerk that she would not be retaliated against for cooperating. The clerk gave evidence that resulted in the removal of two judges from the bench. Without that immunity, the case would never have been able to proceed.

Mr. Shellenberger asked what would be wrong with contacting the local prosecutor to see if immunity from prosecution is a good idea. The Chair said that the prosecutor had already been in the case he had referred to, so that there had been no need to contact him. The Chair was not sure that the grant of immunity had ever been used since then. This case took place in

the late 1960s.

The Chair called for a vote on the motion to require contacting the prosecutor before granting immunity from prosecution. The motion failed with one member in favor.

The Chair drew the Committee's attention to subsection (b)(3), which contains a substantive change. Recommendations of outright dismissal with no cautionary letter would go directly to the Commission. For the information of the Rules Committee, Investigative Counsel prepared statistics on the last two fiscal years, 2015 and 2016. In those two years, there was a combined total of 186 recommendations for an outright dismissal that went to the Board, as required. The Inquiry Board could make its own determination, but in every case, it approved Investigative Counsel's recommendation. The recommendations then had to go to the Commission. There was no opposition to the proposed amendment, which streamlines the process.

By consensus, the Committee approved Rule 18-405 as presented.

The Chair presented Rule 18-406, Proceedings Before Board; Review by Commission, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL <u>DISABILITIES AND</u> DISCIPLINE

Rule 18-406. PROCEEDINGS BEFORE BOARD; REVIEW BY COMMISSION

(a) Review of Investigative Counsel's Report

The Board shall review the reports and recommendations made to the Board by Investigative Counsel.

~~(i)~~ (b) Informal Meeting with Judge; Peer Review

(1) Generally

The Board may meet informally with the judge ~~for the purpose of discussing an appropriate disposition~~.

(2) Peer Review

(A) As part of or in furtherance of that meeting, the Chair of the Board, with the consent of the judge, may convene a peer review panel consisting of not more than two judges on the same level of court upon which the judge sits to confer with the judge about the complaint and suggest options for the judge to consider. The judges may be incumbent judges or retired judges eligible for recall to that level of court.

(B) The discussion may occur in person or by telephone or other electronic conferencing but shall remain informal and confidential. The peer review panel (i) shall have no authority to make any findings or recommendations, other than to the judge; (ii) shall make no report to Investigative Counsel, the Board, or the Commission; and (iii) may not testify regarding the conference with the judge before the Commission or in any court proceeding.

Committee note: The peer review panel is not intended as either an arbitrator or a mediator but, as judicial colleagues, simply to provide an honest and neutral appraisal for the judge to consider.

~~(h)~~ (c) ~~Authorization of~~ Further Investigation

The Board may direct Investigative Counsel to make a further investigation ~~to be conducted~~ pursuant to Rule ~~18-405~~ 18-407.

~~(j)~~ (d) Board's Report to Commission

(1) Contents

~~Upon receiving~~ After considering Investigative Counsel's report and recommendation ~~concerning a further investigation or a preliminary investigation if no further investigation was conducted and subject to subsection (j)(2) of this Rule~~, the Board shall submit ~~to the Commission~~ a report ~~that includes~~ to the Commission. The Board shall include in its report the recommendation made to the Board by Investigative Counsel. Subject to subsection (d)(2) of this Rule, the report shall include one of the following recommendations:

(A) dismissal of any complaint, without a letter of cautionary advice pursuant to Rule 18-408 (a), and termination of ~~the~~ any investigation ~~with or without a warning~~;

(B) dismissal of any complaint, with a letter of cautionary advice pursuant to Rules 18-408 (b) and 18-414;

(C) a conditional diversion agreement pursuant to Rules 18-409 and 18-414;

~~(B)~~ (D) ~~entering into~~ a private reprimand ~~or deferred discipline agreement~~ pursuant to Rules 18-410 and 18-414;

(E) a public reprimand pursuant to Rules 18-411 and 18-414;

(F) retirement of the judge pursuant to Rules 18-412 and 18-414; or

~~(C)~~ (G) upon a determination of probable cause that the judge has a disability or has committed sanctionable conduct, the filing of charges~~, unless the Board determines that there is a basis for private disposition under the standards of Rule 18-406~~ pursuant to Rule 18-413.

(2) Condition and Limitation

(A) The Board may not recommend (i) a dismissal with a ~~warning~~ letter of cautionary advice if the judge has objected to that disposition pursuant to Rule 18-408 (b), or (ii) a conditional diversion agreement, a private reprimand, ~~or a deferred discipline agreement~~ a public reprimand, or retirement unless the ~~respondent~~ judge has consented in writing to ~~this~~ that remedy pursuant to the applicable Rules in this Chapter.

Committee note: A public reprimand or recommendation of retirement, without the consent of the judge, may be issued by the Commission only after the filing of charges and a hearing before the Commission.

~~(2) Limitation on Contents of Report~~ (B) The information transmitted by the Board to the Commission shall be limited to a proffer of evidence that the Board has determined would likely be admitted at a plenary hearing before the Commission. The Chair of the Board may consult with the Chair of the Commission in ~~making the determination as to what~~ determining the information ~~is~~ to be transmitted to the Commission.

(3) Time for Submission of Report

(A) Generally

Unless the time is extended by the Chair of the Commission, the Board shall transmit the report ~~to the Commission~~ within 45 days after the date the Board ~~receives~~ received Investigative Counsel's report and recommendation.

(B) Extension

Upon a written request by the Chair of the Board, the Chair of the Commission may grant ~~one 30-day~~ a reasonable extension of time for transmission of the report.

(C) Failure to File Timely Report

If the Board ~~does not~~ fails to issue its report within the time allowed, the Chair of the Commission and Investigative Counsel shall conform the report and recommendation of Investigative Counsel to the requirements of ~~subsection (j)(2)~~ subsections (f)(1) and (2) of this Rule and refer the matter to the Commission, which may proceed, using the report and recommendation of Investigative Counsel.

(4) Copy to Investigative Counsel and Judge

Upon receiving the report and recommendation, the Commission promptly shall transmit a copy of it to Investigative Counsel and, except for a recommendation of dismissal without a letter of cautionary advice, to the judge.

~~(k)~~ (e) Filing of ~~Objections~~ Response

Investigative Counsel and, except for a recommendation of dismissal without a letter of cautionary advice, the judge ~~shall~~ may file with the Commission ~~any objections to the~~ a written response to the Board's report and recommendation. Unless the Chair of the Commission, Investigative Counsel, and the judge agree to an extension, any response shall be filed within 15 days ~~of~~ after the date the Commission transmitted copies of the report and recommendation ~~unless~~ to Investigative Counsel~~,~~ and the judge~~, and the Chair of the Commission agree to an extension of the time for filing an objection~~.

~~(l)~~ (f) Action by Commission on Board Report and Recommendation

(1) Review

The Commission shall review the report and recommendation and any timely filed ~~objections~~ responses.

(2) Appearance by Judge

Upon written request by the judge, with a copy ~~provided~~ to Investigative Counsel, the Commission may permit the judge

to appear before the Commission on reasonable terms and conditions established by the Commission.

(3) Disposition

Upon its review of the report and recommendation and any timely filed responses and consideration of any evidence or statement by the judge pursuant to subsection (f)(2) of this Rule, ~~Unless~~ the Commission ~~authorizes~~ shall:

(A) direct Investigative Counsel to conduct a further investigation ~~in accordance with~~ pursuant to Rule ~~18-405~~ 18-407;

(B) remand the matter to the Board for further consideration and direct the Board to file a supplemental report within a specified period of time;

(C) enter a disposition ~~by the Commission shall be in accordance with Rule 18-406 or 18-407 (a), as appropriate~~ pursuant to Rule 18-408, 18-409, 18-410, 18-411, or 18-412;

(D) enter an appropriate disposition to which the judge has filed a written consent in accordance with the Rules in this Chapter, including a disposition under Rule 18-414 (a)(5); or

(E) direct Investigative Counsel to file charges pursuant to Rule 18-413.

Source: This Rule is derived from former Rule 16-805 (2016).

The Chair said that some detail as to what the Board does and what the Commission does has been added to Rule 18-406. Subsection (b)(2) is new. With the approval of the Commission and Investigative Counsel as well as the Chair of the Inquiry Board, a provision for a peer review process – like the Attorney

Grievance procedure – has been added. The Chair noted that the peer review process in Rule 18-406 is "lighter " than the Attorney Grievance process and is not intended to be a formal part of the disciplinary process. He suggested that the peer review process would probably be used in two circumstances: when there is either a recommendation of dismissal with a cautionary letter or a recommendation of a private reprimand and the judge objects. Judges have made these objections, and the thought was that if a judge could hear from two of his or her colleagues from the same level of court, it could be a useful reality check. The judge would have to consent to this process, and it would be totally confidential. The two peer review judges would not make any findings, nor would they be serving as arbitrators or mediators. They would just be there to talk to the judge and suggest options for the judge to consider.

Judge Ellinghaus-Jones commented that she and her colleagues had received an administrative order last week that changed the name of "retired judges" to "senior judges." Subsection (a)(2) would have to be changed to reflect this new terminology.

By consensus, the Committee approved Rule 18-406 as presented, subject to confirmation of the stylistic change pertaining to "retired judge."

The Chair presented Rule 18-407, Further Investigation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule ~~18-405~~ 18-407. FURTHER INVESTIGATION

(a) Notice to Judge of Investigation

Upon ~~approval of~~ a directive for a further investigation by the Board pursuant to Rule 18-406 (c) or by the Commission pursuant to Rule 18-405 (b)(3)(A) or 18-406 (f)(3), Investigative Counsel ~~promptly~~ shall promptly (A) provide the notice and opportunity to respond required by Rule 18-405 (a)(4) and (5) if such notice and opportunity have not already been provided, and (B) notify the judge ~~(1) that the Board or Commission has authorized the further investigation, (2) of the specific nature of the disability or sanctionable conduct under investigation, and (3) that the judge may file a written response within 30 days of the date on the notice. The notice shall be given (1) by first class mail to the judge's address of record, or (2) if previously authorized by the judge, by first class mail to an attorney designated by the judge. The Board or Commission, for good cause, may defer the giving of notice, but notice must be given not less than 30 days before Investigative Counsel makes a recommendation as to disposition~~ at the judge's address of record that the Board or Commission has directed a further investigation.

(b) Subpoenas

(1) Issuance

Upon application by Investigative Counsel and for good cause, the Chair of the Commission may authorize ~~Investigative Counsel to issue~~ the issuance of a subpoena to compel the ~~attendance of witnesses and the production of~~ person to whom it is

directed to attend, give testimony, and produce designated documents or other tangible things at a time and place specified in the subpoena.

(2) Notice to Judge

Promptly after service of the subpoena and in addition to any other notice required by law, Investigative Counsel shall provide to the judge ~~under investigation~~ notice of the service of the subpoena. The notice to the judge shall be sent by first class mail to the judge's address of record or, if previously authorized by the judge, by ~~first class mail to an attorney designated by the judge~~ any other reasonable method.

~~(2)~~ (3) Motion for Protective Order

The judge ~~or the~~, a person ~~served with~~ named in the subpoena, or a person named or depicted in an item specified in the subpoena may file a motion for a protective order pursuant to Rule 2-510 (e). The motion shall be filed in the circuit court for the county in which the subpoena was served or, if the judge under investigation ~~is a judge serving~~ serves on that ~~circuit~~ court, another circuit court designated by the Commission. The court may enter any order permitted by Rule 2-510 (e).

(4) Failure to Comply

Upon a failure to comply with a subpoena issued pursuant to this Rule, the court, on motion of Investigative Counsel, may compel compliance with the subpoena as provided in Rule 18-402 (f).

~~(3)~~ (5) Confidentiality

(A) Subpoena

To the extent practicable, a subpoena shall not divulge the name of the judge under investigation.

(B) Court Files and Records

Files and records of the court pertaining to any motion filed with respect

to a subpoena shall be sealed and shall be open to inspection only upon order of the Court of Appeals.

(C) Hearings

Hearings before the circuit court on any motion filed with respect to a subpoena shall be on the record and shall be conducted out of the presence of all ~~persons~~ individuals except those whose presence is necessary.

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

(c) Time for Completion of Investigation

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

(d) Report and Recommendation ~~by Investigative Counsel~~

(1) Duty to Make

Within the time allowed for completing ~~a~~ the further investigation, Investigative Counsel shall make a report the results of the investigation to the Board or ~~the~~ Commission, whichever authorized the further investigation, in the form ~~that~~ the Commission requires.

(2) Contents

Unless the material already has been provided to the recipient of the report, Investigative Counsel shall include in the

report or attach to it any response or other information provided by the judge pursuant to section (a) of this Rule or Rule 18-405 (a)(5). The report shall include a statement that the investigation indicates probable sanctionable conduct, probable disability, both, or neither, together with one of the following recommendations:

~~(1)~~ (A) dismissal of any complaint ~~and termination of the investigation, with or without a warning~~, without a letter of cautionary advice;

(B) dismissal of any complaint, with a letter of cautionary advice;

(C) a conditional diversion agreement;

~~(2)~~ (D) ~~entering into~~ a private reprimand ~~or a deferred discipline agreement, or~~;

(E) a public reprimand;

~~(3)~~ (F) the filing of charges; or

(G) retirement of the judge based upon a finding of disability.

Source: This Rule is derived from former Rule 16-806 (2016).

The Chair informed the Committee that the changes to Rule 18-407 are mostly for clarification. Section (c), pertaining to the time for completion of an investigation, addresses the situation where either the Inquiry Board or the Commission would like more information. The time for completing the investigation will be as specified by the Board or Commission, subject to extension by the Chair of the Commission. It does not necessarily have to be the same time in every case; it depends on how much more work Investigative Counsel has to do.

The Chair said that subsection (d)(2) refers to a "conditional diversion agreement" and also to the "retirement of the judge based upon a finding of disability." The conditional diversion agreement is simply a name change from the current term, "deferred discipline agreement," which is a misnomer. The premise of such an agreement is that if a judge enters it, the judge will comply with the conditions he or she has agreed to, and the case will be resolved. They are called "conditional diversion agreements," because that is what they are; they divert the case from a disciplinary one to a consensual one, where it hopefully is resolved.

By consensus, the Committee approved Rule 18-407 as presented.

The Chair presented Rule 18-408, Dismissal of Complaint, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule ~~18-406~~ 18-408. ~~DISPOSITION WITHOUT PROCEEDINGS ON CHARGES~~ DISMISSAL OF COMPLAINT

(a) ~~Dismissal~~ Without Letter of Cautionary Advice

(1) ~~Evidence Fails to Show Disability or~~

~~Sanctionable Conduct~~ Generally

If, after an investigation by Investigative Counsel, ~~The~~ the Commission ~~shall dismiss a complaint if, after an investigation, it~~ concludes that the evidence fails to show that the judge has a disability or has committed sanctionable conduct, it shall dismiss the complaint without a letter of cautionary advice. Unless the judge has requested in writing notice of any dismissal, the Commission ~~shall~~ need not notify the judge ~~and each~~ of the dismissal but shall notify the complainant ~~of the dismissal~~ and the Board.

(2) Upon Recommendation Pursuant to Rule 18-405 (b)(3)

If Investigative Counsel has recommended dismissal of the complaint without a letter of cautionary advice pursuant to Rule 18-405 (d)(3), without submission to the Board, the Commission may (A) accept the recommendation and dismiss the complaint, (B) refer the matter to the Board for its consideration, or (C) direct Investigative Counsel to undertake a further investigation pursuant to Rule 18-407.

~~(2)~~ (b) ~~Sanctionable Conduct Not Likely to be Repeated~~ With Letter of Cautionary Advice

(1) When Appropriate

If the Commission determines that any sanctionable conduct that may have been committed by the judge will be sufficiently addressed by the issuance of a ~~warning~~ letter of cautionary advice, the Commission may accompany a dismissal with ~~a warning against future sanctionable conduct~~ such a letter.

~~The contents of the warning are private and confidential, but the Commission has the option of notifying the complainant of the fact that a warning was given to the judge. At least 30 days before a warning is issued, the Commission shall mail to the judge a notice that states (A) the date on which it intends to issue the warning, (B) the~~

~~content of the warning, and (C) whether the complainant is to be notified of the warning. Before the intended date of issuance of the warning, the judge may reject the warning by filing a written rejection with the Commission. If the warning is not rejected, the Commission shall issue it on or after the date stated in the initial notice to the judge. If the warning is rejected, it shall not be issued, the proceeding shall resume as if no warning had been proposed, and the fact that a warning was proposed or rejected may not be admitted into evidence.~~

~~Committee note: A warning by the Commission under this section is not a reprimand and does not constitute discipline.~~

Committee note: A letter of cautionary advice may be appropriate where the conduct was marginally sanctionable or, if sanctionable, was not particularly serious, was not intended to be harmful, may have been the product of a momentary lapse in judgment or the judge being unaware that the conduct was not appropriate, and does not warrant discipline. The letter is intended to be remedial in nature, so that the judge will be careful not to repeat that or similar conduct.

(2) Notice to Judge

Before a dismissal with a letter of cautionary advice is issued, the Commission shall mail to the judge a notice that states (i) that the Commission intends to dismiss the complaint accompanied by a letter of cautionary advice, (ii) the content of the letter, (iii) whether the complainant is to be notified that such a letter was issued; (iv) that the judge has the right to object to the letter by filing a written objection with the Commission within 30 days after the date of the notice; (v) if a written objection is not filed within that time, the Commission may issue the letter as an accompaniment to the dismissal; and (vi) if a timely objection is filed, the proposed disposition will be regarded as withdrawn

and the matter shall proceed as if the proposed disposition was never made.

(3) Objection by Judge

The judge may object to the proposed dismissal accompanied by the letter of cautionary advice by filing a written objection with the Commission within the 30-day period stated in the notice. If a timely objection is not filed, the Commission may proceed with the proposed disposition upon the expiration of the time for filing an objection. If a timely objection is filed, the Commission shall not proceed with the proposed disposition, the proceeding shall resume as if no dismissal with a letter of cautionary advice had been proposed, and the fact that a dismissal with an accompanying letter of cautionary advice was proposed and withdrawn may not be admitted into evidence.

(4) Confidentiality of Content of Letter of Cautionary Advice

The contents of the letter are private and confidential, except that the Commission may notify the complainant that a letter of cautionary advice was given to the judge.

(5) Not a Form of Discipline

A letter of cautionary advice is not a reprimand and does not constitute a form of discipline.

Source: This Rule is derived from former Rule 16-807 (2016).

The Chair said that Rule 18-408 clarifies the practices of the Commission regarding dismissals. The Committee note after subsection (b)(2) refers to a "letter of cautionary advice," explaining its use.

By consensus, the Committee approved Rule 18-408 as

presented.

The Chair presented Rule 18-409, Conditional Diversion Agreement, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule ~~18-406~~ 18-409. CONDITIONAL DIVERSION AGREEMENT

~~(c)~~ (a) ~~Deferred Discipline Agreement~~ When Appropriate

The Commission and the judge may enter into a ~~deferred discipline~~ conditional diversion agreement if, after an investigation:

~~(A)~~ (1) the Commission concludes that the alleged sanctionable conduct was not so serious, offensive, or repeated as to warrant formal proceedings and that the appropriate disposition is for the judge to undergo specific treatment, participate in one or more specified educational programs, issue an apology to the complainant, or take other specific corrective or remedial action; and

~~(B)~~ (2) the judge, in the agreement, ~~(i)~~ (A) agrees to the specified conditions, ~~(ii)~~ (B) waives the right to a hearing before the Commission and subsequent proceedings before the Court of Appeals, and ~~(iii)~~ (C) agrees that the ~~deferred discipline~~ conditional diversion agreement may be revoked for noncompliance in accordance with the provisions of ~~subsection (c)(2)~~ section (b) of this Rule.

~~(2)~~ (b) Compliance

The Commission shall direct Investigative Counsel to monitor compliance with the conditions of the agreement and may direct the judge to document compliance. Investigative Counsel shall give written notice to the judge of the nature of any alleged failure to comply with a condition of the agreement. If after affording the judge at least 15 days to respond to the notice, the Commission finds that the judge has failed to satisfy a material condition of the agreement, the Commission may revoke the agreement and proceed with any other disposition authorized by these rules.

(c) Not a Form of Discipline

An agreement under this section does not constitute discipline or a finding that sanctionable conduct was committed.

~~(3)~~ (d) Confidentiality

The Commission shall notify the complainant that the complaint has resulted in an agreement with the judge for corrective or remedial action. ~~Unless the judge consents in writing,~~ Except as permitted in Rule 18-417, the terms of the agreement shall remain confidential and not be disclosed to the complainant or any other person unless the judge consents in writing. ~~An agreement under this section does not constitute discipline or a finding that sanctionable conduct was committed.~~

~~(4)~~ (e) Termination of Proceedings

Upon notification by Investigative Counsel that the judge has satisfied all conditions of the agreement, the Commission shall terminate the proceedings.

Source: This Rule is derived from former Rule 16-807 (2016).

The Chair explained that Rule 18-409 had not been changed, except for the terminology.

By consensus, the Committee approved Rule 18-409 as presented.

The Chair presented Rule 18-410, Private Reprimand, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule ~~18-406~~ 18-410. PRIVATE REPRIMAND

~~(b)~~ (a) When Appropriate

~~(1)~~ The Commission may issue a private reprimand to the judge if, after an investigation:

~~(A)~~ (1) the Commission concludes that the judge has committed sanctionable conduct that warrants some form of discipline;

~~(B)~~ (2) the Commission further concludes that the sanctionable conduct was not so serious, offensive, or repeated as to warrant formal proceedings and that a private reprimand is the appropriate disposition under the circumstances; and

~~(C)~~ (3) the judge, in writing on a copy of the reprimand retained by the Commission, ~~(i)~~ (A) waives the right to a hearing before the Commission and subsequent proceedings before the Court of Appeals and the right to challenge the findings that serve as the basis for the private reprimand, ~~(ii)~~ (B) consents to the reprimand, and ~~(iii)~~ (C) agrees that the reprimand may be admitted in any subsequent disciplinary proceeding against the judge to the extent that it is relevant to the charges at issue or the sanction to be imposed.

(b) Form of Discipline

A private reprimand constitutes a form of discipline.

(c) Confidentiality; Notice to Complainant

(1) Generally

Except as otherwise provided by subsection (c)(2) of this Rule and Rule 18-417, a private reprimand is confidential and shall not be disclosed unless the judge consents, in writing, to the disclosure.

(2) Notice to Complainant

Upon the issuance of a private reprimand, the Commission shall notify the complainant ~~of that disposition~~ that such a reprimand was issued but shall not disclose the text of the reprimand.

Source: This Rule is derived from former Rule 16-807 (2016).

The Chair said that the changes to Rule 18-410 are for clarification, but none of them are substantive. Mr. Laws asked whether the complainant is told about a conditional diversion agreement or private reprimand. The Chair replied affirmatively, but he added that the complainant is not told about the terms. Mr. Laws commented that the complaining public may find this to be inadequate. The Chair responded that this is the same as the current Rule.

By consensus, the Committee approved Rule 18-410 as presented.

The Chair presented Rule 18-411, Public Reprimand, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-411. PUBLIC REPRIMAND

(a) When Appropriate

The Commission may issue a public reprimand upon a finding by the Commission that (1) the judge has committed sanctionable conduct, (2) the conduct, by reason of its nature, repetition, or effect, is sufficiently serious as to make a private reprimand or a conditional diversion agreement inappropriate but not sufficiently serious to warrant the judge being suspended or removed from office.

(b) With or Without Consent

(1) A public reprimand may be issued with the written consent of the judge pursuant to subsection (b)(2) of this Rule or, after the filing of charges and a hearing, without the judge's consent.

(2) A consent by the judge shall be in writing and shall include a waiver of (A) the right to a hearing before the Commission and subsequent proceedings before the Court of Appeals, and (B) the right to challenge the findings that serve as the basis for the public reprimand.

(c) Publication

A public reprimand shall be posted on the Judiciary website and may be otherwise disclosed. A copy of the public reprimand shall be sent to the complainant.

(d) Form of Discipline

A public reprimand constitutes a form of discipline.

Source: This Rule is new.

The Chair said that section (a) provides guidance to the Committee, explaining when a public reprimand is appropriate. Section (b) provides that a public reprimand may be issued with the consent of the judge without the filing of any charges or by the Commission as discipline after charges are filed. The Reporter commented that the tagline for section (b) is also recommended to be changed to "Consent of Judge," for clarity.

By consensus, the Committee approved Rule 18-411 as amended.

The Chair presented Rule 18-412, Retirement, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule 18-412. RETIREMENT

(a) When Appropriate

Retirement of a judge may be an appropriate disposition upon a determination that (1) the judge suffers from a disability, as defined in Rule 18-401 (h), and (2) any alleged conduct that may otherwise be sanctionable conduct was predominantly the product of that disability and did not involve misconduct so serious that, if proven, would warrant suspension or removal of the judge from office.

(b) Effect

(1) Retirement under this Rule is permanent. A judge who is retired under this Rule may not be recalled to sit on any court, but the judge shall lose no other retirement benefit to which he or she is entitled by law.

(2) Retirement under this Rule does not constitute discipline.

Cross reference: See Md. Constitution, Art. IV, §4B (a)(2), authorizing the Commission to recommend to the Court of Appeals retirement of a judge "in an appropriate case." See also Rule 19-740 authorizing a comparable disposition for attorneys who have a disability.

Source: This Rule is new.

The Chair told the Committee that Rule 18-412 is an important new Rule. There is no real substantive change from the current law, but it fills a hole in the Rules. A judge can always retire voluntarily, either before or after a complaint is filed, hoping that retirement will end the matter, although it does not necessarily do that. The current Rules do not address this situation.

The Chair explained that the Constitution permits the Commission to recommend, and permits the Court of Appeals to impose, an involuntary, mandated retirement as a disposition "in an appropriate case." To the Chair's knowledge, this has never been done. However, the authority to do it exists in the Constitution. The question is what an "appropriate case" is. In the case the Chair had referred to earlier involving the

parking tickets in Baltimore City, the Court of Appeals, in its opinion, made a general reference to mandated retirement, but it was not appropriate in that case. It is more appropriate in a case where any otherwise sanctionable conduct is really a product of a disability rather than inexcusable misconduct on the part of a judge. Judge Wright, Chair of the Commission; the Honorable Robert A. Greenberg, Chair of the Inquiry Board; and Carol Crawford, Esq., Investigative Counsel, had agreed that the disability situation is the appropriate case for a retirement. The current Rules do not address this, and the thought was that they should.

The Chair commented that there may be cases where what the judge said or did or where the judge's persistent absences or inability to perform his or her judicial duties may be attributable to a mental, emotional, or other illness that is not likely to improve. Retirement, rather than something like a reprimand, suspension, or removal would serve the public purpose equally well and be much more fair and humane to the judge. It is not discipline. The Committee recognized that. The recommendation is to make this clear in the Rules. Rule 18-412 provides that it does not affect the judge's pension.

By consensus, the Committee approved Rule 18-412 as presented.

The Chair presented Rule 18-413, Filing of Charges; Proceedings Before Commission, for the Committee's

consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 - JUDICIAL DISABILITIES AND DISCIPLINE

Rule ~~18-407~~ 18-413. FILING OF CHARGES; PROCEEDINGS BEFORE COMMISSION

(a) Filing of Charges

(1) Direction by Commission

After considering the report and recommendation of the Board ~~or Investigative Counsel~~ submitted pursuant to Rule ~~18-404 (j),~~ 18-406 and any timely filed response, and upon a finding by the Commission of probable cause to believe that a judge has a disability or has committed sanctionable conduct, the Commission may direct Investigative Counsel to initiate proceedings against the judge by filing with the Commission charges that the judge has a disability or has committed sanctionable conduct.

(2) Content of Charges

The charges shall ~~(1)~~ (A) state the nature of the alleged disability or sanctionable conduct, including each Rule of the Maryland Code of Judicial Conduct allegedly violated by the judge, ~~(2)~~ (B) allege the specific facts upon which the charges are based, and ~~(3)~~ (C) state that the judge has the right to file a written response to the charges within 30 days after service of the charges.

(b) Service; Notice

The charges may be served upon the judge by any means reasonably calculated to give actual notice. A return of service of

the charges shall be filed with the Commission pursuant to Rule 2-126. Upon service, the Commission shall notify any complainant that charges have been filed against the judge.

Cross reference: See Md. Const., Article IV, §4B (a).

(c) Response

Within 30 days after service of the charges, the judge may file with the Commission an original and 11 copies of a written response or may file a response electronically in a format acceptable to the Commission.

(d) Notice of Hearing

Upon the filing of a response or, if no response is filed, upon expiration of the time for filing ~~if~~ one, the Commission shall notify the judge of the date, time, and place of a hearing. Unless the judge has agreed to an earlier hearing date, the ~~notice shall be mailed at least 60 days before the date set for the hearing~~ hearing shall not be held earlier than 60 days after the notice was sent. If the hearing is on a charge of sanctionable conduct, the Commission also shall notify the complainant and ~~publish~~ post a notice ~~in the Maryland Register~~ on the Judiciary website that is limited to (1) the name of the judge, (2) the date, time, and place of the hearing, and (3) ~~a statement that~~ the charges that have been filed and any response ~~by~~ from the judge ~~are available for inspection at the Office of the Commission~~.

Cross reference: See Rule ~~18-409 (a)(3)~~ 18-417 (a)(3), concerning the time for posting on the Judiciary website.

(e) Extension of Time

The Commission may extend the time for filing a response and for the commencement of a hearing.

(f) Procedural Rights of Judge

The judge has the right (1) to inspect and copy the Commission Record, (2) to a prompt hearing on the charges in accordance with this Rule, (3) to be represented by an attorney, (4) to the issuance of subpoenas for the attendance of witnesses and for the production of ~~designated~~ documents and other tangible things, (5) to present evidence and argument, and (6) to examine and cross-examine witnesses.

(g) Exchange of Information

(1) Generally

Upon request of the judge at any time after service of charges upon the judge, Investigative Counsel promptly shall (A) allow the judge to inspect the Commission Record and to copy all evidence accumulated during the investigation and all statements as defined in Rule 2-402 (f) and (B) provide to the judge summaries or reports of all oral statements for which contemporaneously recorded substantially verbatim recitals do not exist~~, and~~.

(2) List of Witnesses; Documents

Not later than 30 days before the date set for the hearing, Investigative Counsel and the judge shall ~~each~~ provide each ~~to the~~ other with a list of the names, addresses, and telephone numbers of the witnesses that each intends to call and copies of the documents that each intends to introduce in evidence at the hearing.

(3) Scope of Discovery

Discovery is governed by the applicable Rules in Title 2, Chapter 400 ~~of these Rules~~, except that the Chair of the Commission, rather than the court, may limit the scope of discovery, enter protective orders permitted by Rule 2-403, and resolve other discovery issues.

(4) Mental or Physical Examination

When disability of the judge is an issue, on ~~its own~~ the initiative of the Commission or its Chair or on ~~motion~~ request

for good cause, the Chair of the Commission may order the judge to submit to a mental or physical examination ~~pursuant to~~ in accordance with Rule 2-423.

(h) Amendments

At any time before the hearing, the Commission on ~~motion~~ request may allow amendments to the charges or the response. If an amendment to the charges is made less than 30 days before the hearing, the judge, upon request, shall be given a reasonable time to respond to the amendment and to prepare and present any defense.

(i) Hearing on Charges

~~(1) At a~~ The hearing on charges ~~the applicable provisions of Rule 18-405 (b) shall govern subpoenas.~~ shall be conducted in the following manner:

~~(2)~~ (1) ~~At the hearing,~~ Upon application by Investigative Counsel ~~shall present evidence in support of the charges~~ or the judge, the Commission shall issue subpoenas to compel the attendance of witnesses and the production of documents or other tangible things at the hearing. To the extent otherwise relevant, the provisions of Rule 2-510 (c), (d), (e), (g), (h), (i), (j), and (k) shall apply.

~~(3)~~ (2) The Commission may proceed with the hearing whether or not the judge has filed a response or appears at the hearing.

~~(4)~~ (3) Except for good cause shown, a motion for recusal of a member of the Commission shall be filed ~~not less than~~ at least 30 days before the hearing.

~~(5)~~ (4) ~~The~~ At the hearing, Investigative Counsel shall ~~be conducted in accordance with the rules of evidence in~~ present evidence in support of the charges.

(5) Title 5 of ~~these rules~~ the Maryland Rules shall apply.

(6) The proceeding~~s at the hearing~~ shall be recorded verbatim, either by electronic

means or stenographically ~~recorded~~, as directed by the Chair of the Commission. Except as provided in section (k) of this Rule, the Commission is not required to have a transcript prepared. The judge ~~may~~, at the judge's expense, may have the record of the proceeding transcribed.

(7) with the approval of the Chair of the Commission, the judge and Investigative Counsel may each submit proposed findings of fact and conclusions of law within the time period set by the Chair.

(j) Commission Findings and Action

(1) Finding of Disability

If the Commission finds by clear and convincing evidence that the judge has a disability ~~or has committed sanctionable conduct~~, it shall ~~either issue a public reprimand for the sanctionable conduct or~~ refer the matter to the Court of Appeals ~~pursuant to section (k) of this Rule. Otherwise, the Commission shall dismiss the charges filed by the Investigative Counsel and terminate the proceeding~~, whether or not the Commission also finds that the judge committed sanctionable conduct.

(2) Finding of Sanctionable Conduct

If the Commission finds by clear and convincing evidence that the judge has committed sanctionable conduct but does not find that the judge has a disability, it shall either issue a public reprimand to the judge or refer the matter to the Court of Appeals.

(3) Finding of No Disability or Sanctionable Conduct

If the Commission does not find that the judge has a disability and does not find that the judge committed sanctionable conduct, it shall dismiss the charges and terminate the proceeding.

(k) ~~Record~~ Duties of Commission on Referral to Court of Appeals

If the Commission refers the case to the Court of Appeals, the Commission shall:

(1) make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceeding, state its recommendations, and enter those findings and recommendations in the record ~~in the name of the Commission~~;

(2) cause a transcript of all proceedings at the hearing to be prepared and included in the record;

(3) make the transcript available for review by the judge and the judge's attorney ~~in connection with the proceedings~~ or, at the judge's request, provide a copy to the judge at the judge's expense;

(4) file with the Court of Appeals the entire hearing record, which shall be certified by the Chair of the Commission and shall include the transcript of the proceedings, all exhibits and other papers filed or marked for identification in the proceeding, and all dissenting or concurring statements by Commission members; and

(5) promptly mail to the judge at the judge's address of record notice of the filing of the record and a copy of the findings, conclusions, and recommendations and all dissenting or concurring statements by Commission members.

Source: This Rule is derived from former Rule 16-808 (2016).

The Chair said that Rule 18-413 has no substantive changes. It does make clear that at a hearing before the Commission, the judge can subpoena witnesses. The current Rule refers only to Investigative Counsel subpoenaing witnesses. Rule 18-413 also clarifies options for the Commission.

By consensus, the Committee approved Rule 18-413 as presented.

The Chair presented Rule 18-414, Consent to Disposition, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule ~~18-407~~ 18-414. CONSENT TO DISPOSITION

(a) Generally

At any time after completion of an investigation by Investigative Counsel, a judge may consent to:

(1) dismissal of the complaint accompanied by a letter of cautionary advice by failing to object pursuant to Rule 18-408 (b);

(2) a conditional diversion agreement pursuant to Rule 18-409;

(3) a private reprimand pursuant to Rule 18-410;

(4) a public reprimand;

(5) suspension or removal from judicial office; or

(6) retirement from judicial office pursuant to Rule 18-412.

(b) Form of Consent

(1) Generally

~~(1) After the filing of charges alleging sanctionable conduct and before a decision by the Commission, the judge and~~

~~Investigative Counsel may enter into an agreement in which the judge~~ Except for a consent by failure to object to a dismissal accompanied by a letter of cautionary advice, a consent shall be in the form of a written agreement between the judge and the Commission.

(2) If Charges Filed

If the agreement is executed after charges have been filed, it shall contain:

~~(1)~~ (A) ~~admits~~ an admission by the judge to all or part of the charges;

~~(2)~~ (B) as to the charges admitted, ~~admits~~ an admission by the judge to the truth of all facts constituting the sanctionable conduct or disability as set forth in the agreement;

~~(3)~~ (C) ~~agrees~~ an agreement by the judge to take any corrective or remedial action provided for in the agreement;

~~(4)~~ (D) ~~consents~~ a consent by the judge to the stated sanction;

~~(5)~~ (E) ~~states~~ a statement that the consent is freely and voluntarily given; and

~~(6)~~ (F) ~~waives~~ a waiver by the judge of the right to further proceedings before the Commission and subsequent proceedings before the Court of Appeals.

(3) If Charges Not Yet Filed

If the agreement is executed before charges have been filed, it shall contain a statement by the Commission of the charges that would be filed but for the agreement and the consents and admissions required in subsection (b)(2) of this Rule shall relate to that statement.

(c) Submission to Court of Appeals

The agreement requiring the approval of the Court of Appeals shall be submitted to the Court ~~of Appeals~~, which shall either approve or reject the agreement. Until approved by the Court of Appeals, the

agreement is confidential and privileged. If the Court approves the agreement and imposes the stated sanction, the agreement shall be made public. If the Court rejects the stated sanction, the proceeding shall resume as if no consent had been given, and all admissions and waivers contained in the agreement are withdrawn and may not be admitted into evidence.

Source: This Rule is new.

The Chair noted that Rule 18-414 has no substantive changes. It clarifies that a judge may consent to a disposition, either before or after charges are filed. It also clarifies what a judge may consent to.

By consensus, the Committee approved Rule 18-414 as presented.

The Chair presented Rule 18-415, Proceedings in Court of Appeals, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule ~~18-408~~ 18-415. PROCEEDINGS IN COURT OF APPEALS

(a) Expedited Consideration

Upon receiving the hearing record ~~file~~ pursuant to Rule ~~18-407~~ 18-413 (k), the Clerk of the Court of Appeals shall docket the case for expedited consideration.

(b) Exceptions

The judge may except to the findings, conclusions, or recommendation of the Commission by filing with the Court of Appeals ~~eight copies of~~ exceptions within 30 days after service of the notice of filing of the record and in accordance with Rule 20-405. The exceptions shall set forth with particularity all errors allegedly committed by the Commission and the disposition sought. A copy of the exceptions shall be served on the Commission in accordance with Rules 1-321 and 1-323.

(c) Response

The Commission shall file ~~eight copies of~~ a response within 15 days after service of the exceptions in accordance with Rule 20-405. The Commission shall be represented in the Court of Appeals by its Executive Secretary or such other ~~counsel~~ attorney as the Commission may appoint. A copy of the response shall be served on the judge in accordance with Rules 1-321 and 1-323.

(d) Hearing

If exceptions are timely filed, upon the filing of a response or, if no response is filed, upon the expiration of the time for filing it, the Court shall set a schedule for filing memoranda in support of the exceptions and response and a date for a hearing. The hearing on exceptions shall be conducted in accordance with Rule 8-522. If no exceptions are timely filed or if the judge files with the Court a written waiver of the judge's right to a hearing, the Court may decide the matter without a hearing.

(e) Disposition

The Court of Appeals may (1) impose the sanction recommended by the Commission or any other sanction permitted by law; (2) dismiss the proceeding; or (3) remand for further proceedings as specified in the order of remand.

Cross reference: For rights and privileges of the judge after disposition, see Md. Const., Article IV, §4B (b).

(f) Decision

The decision shall be evidenced by ~~the~~ an order of the Court of Appeals, which shall be certified under the seal of the Court by the Clerk ~~and shall be accompanied by an opinion~~. An opinion shall accompany the order or be filed at a later date. Unless the case is remanded to the Commission, the record shall be retained by the Clerk of the Court of Appeals.

Source: This Rule is derived from former Rule 16-809 (2016).

The Chair said that Rule 18-415 had no substantive changes. Mr. Durfee, an Assistant Reporter, noted that section (e) addresses disposition of the case. He asked whether retirement should be included as one of the dispositions. The Chair responded that section (e) provides for "any other sanction permitted by law." Mr. Durfee remarked that retirement may not be considered a sanction. The Chair suggested that the language could be "any other disposition permitted by law." By consensus, the Committee agreed with this change.

By consensus, the Committee approved Rule 18-415 as amended.

The Chair presented Rule 18-416, Suspension of Execution of Discipline, for the Committee's consideration.

Rule 18-416. SUSPENSION OF EXECUTION OF DISCIPLINE

(a) Authority

In imposing discipline upon a judge pursuant to the Rules in this Chapter, whether pursuant to an agreement between the judge and the Commission or otherwise, the Court of Appeals, in its Order, may suspend execution of all of part of the discipline upon terms it finds appropriate.

(b) Monitoring Compliance

(1) Unless the Court orders otherwise, the Commission shall monitor compliance with the conditions stated in the order. The Commission may direct Investigative Counsel to monitor compliance on its behalf.

(2) The Commission may direct the judge to provide to Investigative Counsel such information and documentation and to authorize other designated persons to provide such information and documentation to Investigative Counsel as necessary for the Commission to monitor effectively compliance with the applicable conditions.

(3) Upon any material failure of the judge to comply with those requirements or upon receipt of information that the judge otherwise has failed to comply with a condition imposed by the Court, Investigative Counsel shall promptly file a report with the Commission and send written notice to the judge that it has done so. The notice shall include a copy of the report and inform the judge that, within fifteen days from the date of the notice,

the judge may file a written response with the Commission.

(4) The Commission shall promptly schedule a hearing on the report and any timely response filed by the judge and report to the Court its findings regarding any material violation by the judge. The report shall include any response filed by the judge.

(5) If a material violation found by the Commission is conduct by the judge that could justify separate discipline for that conduct, the Commission may direct Investigative Counsel to proceed as if a new complaint had been filed and shall include that in its report to the Court.

(c) Response; Hearing

Within fifteen days after the filing of the Commission's report, the judge may file a response with the Court. The judge shall serve a copy of any response on the Commission. The Court shall hold a hearing on the Commission's report and any timely response filed by the judge and may take whatever action it finds appropriate. The Commission may be represented in the proceeding by its Executive Secretary or any other attorney the Commission may appoint.

Source: This Rule is new.

The Chair explained that Rule 18-416 is new. In two recent cases, the Court of Appeals has suspended a judge for a specific period and then suspended the execution of part of that time, with conditions. It is akin to probation but is not referred to as probation. Nothing in the Rules or in the orders that the Court issued in those cases provides for who is going to monitor compliance with the conditions and report to the Court if there

is non-compliance. A gap existed. The thought was that a Rule should be written that would provide for monitoring by the Commission, which can be delegated to Investigative Counsel. If there is any evidence that a judge is not complying with a condition, the Commission will hold a hearing and make findings of fact, which can then be presented to the Court. The Court will hold a hearing. This is similar to the procedure for the discipline of attorneys.

Mr. Weaver pointed out a typographical error in section (a). The word "of" should be the word "or," so that the phrase at the end of the sentence reads "all or part of the discipline." By consensus, the Committee agreed. The Reporter commented that the title of the Rule is "Suspension of Execution of Discipline." She suggested that the title be simply "Execution of Discipline." By consensus, the Committee agreed to this change. The Reported noted that there are additional amendments in this Rule which can be addressed by the Style Subcommittee.

By consensus, the Committee approved Rule 18-416 as amended.

The Chair presented Rule 18-417, Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 400 – JUDICIAL DISABILITIES AND DISCIPLINE

Rule ~~18-409~~ 18-417. ~~PUBLIC ACCESS~~ CONFIDENTIALITY

(a) Generally

Except as otherwise expressly provided by these rules, proceedings and information relating to a complaint or charges shall be either open to the public or confidential and not open to the public, as follows:

(1) Address of Record

The judge's current home address shall remain confidential at all stages of proceedings under these rules. Any other address of record shall be open to the public if the charges and proceedings are open to the public.

(2) Complaints ~~and~~; Investigations; Disposition Without Charges

~~All~~ Except as otherwise required by Rule 18-408, 18-409, and 18-410, all proceedings under Rules 18-404 ~~and 18-405~~ through 18-410 shall be confidential.

(3) Upon Resignation, Voluntary Retirement, Filing of a Response, or Expiration of the Time for Filing a Response

~~After the filing of a response to charges~~ Charges alleging sanctionable conduct, whether or not joined with charges of disability, ~~or expiration of the time for filing a response, the charges~~ and all subsequent proceedings before the Commission on ~~them~~ those charges shall be open to the public upon the first to occur of (A) the resignation or voluntary retirement of the judge, (B) the filing of a response by the

judge to the charges, or (C) expiration of the time for filing a response. If the charges allege only that the judge has a disability, the charges and all proceedings before the Commission on them shall be confidential.

(4) Work Product, Proceedings, and Deliberations

Except to the extent admitted into evidence before the Commission, the following matters shall be confidential: (A) Investigative Counsel's work product ~~and records not admitted into evidence before the commission, the Commission's deliberations, and records of the Commission's deliberations shall be confidential~~; (B) proceedings before the Board, including any peer review proceeding; (C) deliberations of the Board and Commission; and (D) records of the Board's and Commission's deliberations.

(5) Proceedings in the Court of Appeals

Unless otherwise ordered by the Court of Appeals, the record of Commission proceedings filed with that Court and any proceedings before that Court shall be open to the public.

(b) Permitted Release of Information by Commission

(1) Written Waiver

The Commission may release confidential information upon a written waiver by the judge.

(2) Explanatory Statement

The Commission may issue a brief explanatory statement necessary to correct any public misperception about actual or possible proceedings before the Commission.

(3) To Chief Judge of Court of Appeals

(A) Upon request by the Chief Judge of the Court of Appeals ~~or the Chief Judge of that Court~~, the Commission shall disclose to the ~~Court or the~~ Chief Judge:

~~(A) information about any completed proceeding that did not result in a dismissal, including reprimands and deferred discipline agreements; and~~

~~(B)~~ (i) ~~the fact that~~ whether a complaint is pending against the judge who is the subject of the request~~.~~; and

(ii) the disposition of each complaint that has been filed against the judge within the preceding five years.

(B) The Chief Judge may disclose this information to the incumbent judges of the Court of Appeals in connection with the exercise of any administrative matter over which the Court has jurisdiction. Each judge who receives information pursuant to subsection (b)(3) of this Rule shall maintain the applicable level of confidentiality of the information otherwise required by the Rules in this Chapter.

(4) Nominations; Appointments; Approvals

(A) Permitted Disclosures

Upon a written application made by a judicial nominating commission, a Bar Admission authority, the President of the United States, the Governor of a state, territory, district, or possession of the United States, or a committee of the General Assembly of Maryland or of the United States Senate which asserts that the applicant is considering the nomination, appointment, confirmation, or approval of a judge or former judge, the Commission shall disclose to the applicant:

(i) Information about any completed proceedings that did not result in dismissal, including ~~reprimands and deferred discipline agreements~~ conditional diversion agreements and private reprimands; and

(ii) The ~~mere~~ fact that a ~~formal~~ complaint is pending.

Committee note: A dismissal with a letter of cautionary advice does not constitute

discipline and is not disclosed under subsection (b)(5)(A)(i) of this Rule.

(B) Restrictions

~~When~~ Unless the judge waives the restrictions set forth in this subsection, when the Commission furnishes information to an applicant under this section, the Commission shall furnish only one copy of the material ~~and it~~, which shall be furnished under seal. As a condition to receiving the material, the applicant shall agree that (i) the applicant will not ~~to~~ copy the material or permit it to be copied; (ii) when inspection of the material has been completed, the applicant shall seal and return the material to the Commission; and (iii) the applicant will not ~~to~~ disclose the contents of the material or any information contained in it to anyone other than another member of the applicant.

(C) Copy to Judge

The Commission shall send the judge a copy of all documents disclosed under this subsection.

Cross reference: For the powers of the Commission in an investigation or proceeding under Md. Const., Article IV, §4B, see Code, Courts Article, §§13-401~~, 402, and 403~~ through 13-403.

(c) Statistical Reports

The Commission may include in a publicly available statistical report the number of complaints received, investigations undertaken, and dispositions made within each category of disposition during a fiscal or calendar year, provided that, if a disposition has not been made public, the identity of the judge involved is not disclosed or readily discernible.

Source: This Rule is derived from former Rule 16-810 (2016).

The Chair said that Rule 18-417 is mostly clarification. Subsection (b)(3) is new. The Court of Appeals had requested that the Chief Judge be able to request information about a particular judge or judges. The reasons that the Court would like this are (1) when considering senior judges for recall, the Court needs to know if the judge has anything pending that would prevent him or her from sitting, and (2) because the Chief Judge designates judges as Administrative Judges, she would like to know if there is any reason why a judge should not be so designated. Judges can also be appointed to committees, such as the Judicial Council. Rule 18-417 is very limited in scope. It allows the Chief Judge to make a request of the Commission without notifying the judge who is the subject of an inquiry and to share that information with the other members of the Court of Appeals.

By consensus, the Committee approved Rule 18-417 as presented.

The Reporter drew the Committee's attention to the letter from Judge Wright dated August 29, 2016 (See Appendix 1). Judge Wright had made some suggestions for changes to Rules 18-405 (b)(2), 18-406 (d)(1)(A), 18-407 (d)(1), 18-408 (a)(2), 18-413 (a)(1), and 18-414 (c). The Chair asked if anyone had a problem with those suggested changes, which are mostly clarifications. The Reporter said that she disagreed with the suggestion to change Rule 18-406 (d)(1)(A) by removing the phrase "and

termination of any investigation." That phrase should be retained, because there might not have been a complaint. It might have been on the initiative of Investigative Counsel. The language in the phrase closes the loop, and it should be left in.

By consensus, the Committee approved the changes to the Rules on Judicial Disabilities and Discipline suggested by Judge Wright, except for the change to Rule 18-406 (d)(1)(A).

Agenda Item 5. Consideration of proposed new Title 12, Chapter 800 (Action to Quiet Title) and a conforming amendment to Rule 1-101 (Applicability)

Mr. Dunn told the Committee that Agenda Item 5 is a proposed new Title 12, Chapter 800 to govern actions to quiet title. The Reporter's note to Rule 12-801 states that Code, Real Property Article, §14-108 authorizes a civil action to quiet title in the circuit court. The Maryland Land Title Association had reported that there were inconsistent procedures from county to county for these actions. Chapter 396, 2016 Laws of Maryland (HB 920) was enacted by the legislature to provide uniform procedures. Mr. Dunn informed the Committee that the Property Subcommittee, aided by former Committee member Anne Ogletree, Esq. and Assistant Reporter Libber, drafted Rules tracking the statute. Some of the contents of the statute have been reorganized in the Rules to make it more practicable.

Mr. Dunn presented Rule 12-801, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 800 - ACTION TO QUIET TITLE

Rule 12-801. DEFINITIONS

In this Chapter, the terms "claim," "holder," "property," and "security instrument" have the meanings set forth in Code, Real Property Article, §14-601.

Source: This Rule is new.

Rule 12-801 was accompanied by the following Reporter's note.

Code, Real Property Article, §14-108 authorizes the initiation of a civil action to quiet title in the circuit courts, but there had been no procedures provided to be followed in an action to quiet title. The Maryland Land Title Association had reported that inconsistent procedures were being used from case to case and county to county. The 2016 legislature enacted Chapter 396, Laws of 2016 (HB 920) to provide a uniform procedure for actions to quiet title. Proposed new Title 12, Chapter 800 is based on the procedures set out in the new statute.

Rule 12-801 is derived from Code, Real Property Article, §14-601.

Mr. Dunn told the Committee that the definitions in Rule

12-801 are taken directly from the statute, Code, Real Property Article, §14-601.

By consensus, the Committee approved Rule 12-801 as presented.

Mr. Dunn presented Rule 12-802, Scope, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 800 - ACTION TO QUIET TITLE

Rule 12-802. SCOPE

(a) Generally

An action may be brought under this Chapter to establish title to property pursuant to Code, Real Property Article, §14-108 and §14-601 *et seq.*

(b) Authority of Court

(1) Possession and Control

In an action under this Chapter, the court is deemed to have obtained possession and control of the property.

(2) Court Not Limited

This Chapter does not limit any authority the court may have to grant equitable relief that may be proper under the circumstances of the case.

Cross reference: See Code, Real Property Article, §§14-602 and 14-603.

Source: This Rule is new.

Rule 12-802 was accompanied by the following Reporter's note.

> The scope of actions to quiet title has been governed by Code, Real Property Article, §14-108, which has been in effect for many years. The scope has now been expanded by Code, Real Property Article, §14-601 et seq.

Mr. Dunn said that Rule 12-802 is taken from Code, Real Property Article, §§14-602 and 14-603.

By consensus, the Committee approved Rule 12-802 as presented.

Mr. Dunn presented Rule 12-803, Venue, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 800 - ACTION TO QUIET TITLE

Rule 12-803. VENUE

> An action to quiet title shall be filed in the circuit court for the county where the property lies or where any part of the property is located.
>
> Cross reference: See Code, Real Property Article, §§14-108. See Rule 12-102 for property located in more than one jurisdiction.
>
> Source: This Rule is new.

Rule 12-803 was accompanied by the following Reporter's note.

> Since the property at issue may be located in more than one county, the action to quiet title may be filed where any part of the property is located. The Property Subcommittee recommends the addition of a cross reference to Rule 12-102, because filing a lis pendens in one or more counties in which part of the property is located puts people on notice that an action to quiet title has been filed in a different county.

Mr. Dunn noted that Rule 12-803 pertains to venue, which is where the property lies and which may be in more than one county. A cross reference to Rule 12-102 has been added. He explained that filing a lis pendens in a county in which part of the property is located provides notice that an action to quiet title has been filed in a different county.

By consensus, the Committee approved Rule 12-803 as presented.

Mr. Dunn presented Rule 12-804, Complaint to Quiet Title, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 800 - ACTION TO QUIET TITLE

Rule 12-804. COMPLAINT TO QUIET TITLE

The complaint shall be signed and verified by the plaintiff and shall contain at least the following information:

(a) a description of the property that is the subject of the action, including its legal description and its street address or common designation, if any;

(b) the title of the plaintiff as to which a determination is sought and the basis of the title;

(c) if the title is based on adverse possession, the specific facts constituting the adverse possession;

(d) the names of all persons having adverse claims to the title of the plaintiff that are of record, known to the plaintiff, or reasonably apparent from an inspection of the property;

(e) the adverse claims asserted against plaintiff's title for which determination is sought;

(f) if the plaintiff admits the validity of any adverse claim, a statement to this effect;

(g) if the name of a person required to be named as a defendant is not known to the plaintiff, a statement that the name is unknown and, if applicable, a statement that there are persons unknown to the plaintiff who may (1) have a legal or equitable interest in the property or (2) assert that there may be a cloud on plaintiff's title;

(h) if the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, a statement by the plaintiff to this effect;

(i) if the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the name, age, and legal disability, if any, of the person in

being who would be entitled to assert the claim had the contingency on which the claim depends occurred before the commencement of the action, if known; and

(j) a prayer for a determination of the title of the plaintiff against the adverse claims.

Cross reference: See Code, Real Property Article, §§14-606, 14-608, and 14-609.

Source: This Rule is new.

Rule 12-804 was accompanied by the following Reporter's note.

The contents of a complaint in an action to quiet title are derived from Code, Real Property Article, §§14-606, 14-608, and 14-609, but the contents have been reorganized into one Rule according to the way complaints are generally filed. Requiring the plaintiff to state that there may be defendants whose claims are unknown, uncertain, or contingent provides the court with the knowledge that there may be people with possible claims to the property.

Mr. Dunn said that Rule 12-804 sets forth the required contents for a complaint to quiet title. This is derived from Code, Real Property Article, §§14-606, 14-608, and 14-609.

By consensus, the Committee approved Rule 12-804 as presented.

Mr. Dunn presented Rule 12-805, Joinder of Additional Parties, for the Committee's consideration.

Rule 12-805. JOINDER OF ADDITIONAL PARTIES

(a) Generally

The court on its own motion or on motion of any party may issue any appropriate order to require joinder of any additional parties that are necessary or proper.

(b) By Plaintiff - Deceased Defendants

(1) Personal Representative Known

If a person required to be named as a defendant pursuant to Rule 12-804 (d) is dead or is believed by the plaintiff to be dead, and the plaintiff knows of a personal representative, the plaintiff shall join the personal representative as a defendant.

(2) Personal Representative Unknown

If a person required to be named as defendant pursuant to Rule 12-804 (d) is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff shall state those facts in an affidavit filed with the court.

(3) Testate and Intestate Successors

If, by affidavit under subsection (b)(2) of this Rule, the plaintiff states that a person is dead, or is believed to be dead, the plaintiff may join as defendants "the testate and intestate successors of

_____

(Naming the decedent)

or _____,

(Naming the person believed to be deceased)

and all persons claiming by, through or

under _____

(Naming the decedent)

or _____."

(Naming the person believed to be deceased)

Cross reference: See Code, Real Property Article, §§14-610, 14-611, and 14-612.

(c) By Any Other Claimant

A person who has a claim to the property described in a complaint under this Chapter may appear in the proceeding.

Source: This Rule is new.

Rule 12-805 was accompanied by the following Reporter's note.

Rule 12-805 is based on Code, Real Property Article, §§14-610, 14-611, and 14-612, but these have been reorganized into one Rule containing all the joinder provisions.

Mr. Dunn explained that Rule 12-805 tracks the statutes, Code, Real Property Article, §§14-610, 14-611, and 14-612. The Chair noted that in section (a), instead of the language that reads: "the court on its own motion," the preferred language used in the Rules is "the court on its own initiative." This can be changed by the Style Subcommittee. Ms. Ogletree remarked that this language had been taken directly from the statute.

By consensus, the Committee approved Rule 12-805, subject to review by the Style Subcommittee.

Mr. Dunn presented Rule 12-806, Appointment of Attorney to Protect Individuals Not in Being or Whose Identity or Whereabouts is Unknown, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 800 - ACTION TO QUIET TITLE

Rule 12-806. APPOINTMENT OF ATTORNEY TO PROTECT INDIVIDUALS NOT IN BEING OR WHOSE IDENTITY OR WHEREABOUTS IS UNKNOWN

The court on its own motion or on motion of any party may issue an order for appointment of an attorney to protect the interest of any party to the same extent and effect as provided under Rule 2-203 with respect to individuals not in being or of any party whose identity or whereabouts is unknown.

Cross reference: See Code, Real Property Article, §14-614.

Source: This Rule is new.

Rule 12-806 was accompanied by the following Reporter's note.

Code, Real Property Article, §14-614 addresses the appointment of an attorney to protect the interest of any individual not in being. To afford greater due process, the Property Subcommittee has expanded this to include protecting the interests of any party whose identity or whereabouts is unknown.

Mr. Dunn said that the statute, Code, Real Property

Article, §14-614, refers to appointment of an attorney for an individual not in being. The Subcommittee recommends that, to comply with due process, this be expanded to include appointment of an attorney for individuals whose identity or whereabouts is unknown. The Reporter pointed out that the same stylistic amendment should be made for the court acting "on its own initiative."

By consensus, the Committee approved Rule 12-806, subject to review by the Style Subcommittee.

Mr. Dunn presented Rule 12-807, Notice to Holders Not Named as Defendants, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 800 - ACTION TO QUIET TITLE

Rule 12-807. NOTICE TO HOLDERS NOT NAMED AS DEFENDANTS

(a) Contents of Notice

At the time a complaint is filed, the plaintiff shall send each holder that is not named as a party in the action a copy of the complaint with exhibits as well as a statement that the holder is not a party in the proceeding, and that any judgment in the proceeding will not affect any claims of the holder. If the holder elects to appear in the proceeding, the holder will appear as a defendant and be bound by any judgment entered in the proceeding.

(b) By Certified and First-Class Mail

> The complaint and statement shall be sent by certified mail, return receipt requested, and by first-class mail to the holder at the address set forth in the security instrument for the holder's receipt of notices, or if no address for the holder's receipt of notices is set forth in the security instrument, at the last known address of the holder.
>
> Cross reference: See Code, Real Property Article, §14-605.
>
> Source: This Rule is new.

Rule 12-807 was accompanied by the following Reporter's note.

> Rule 12-807 is derived from Code, Real Property Article, §14-605. It requires that the plaintiff send notice to any holder (a mortgage, trustee, beneficiary, nominee, or assignee of record) who is not a party in the proceeding to protect the holder's interest. The statute requires notice to be sent by certified and first-class mail to the address in the security instrument or to the last known address of the holder if there is no address in the security instrument.

Mr. Dunn told the Committee that Rule 12-807 tracks the statute, Code, Real Property Article, §14-605.

By consensus, the Committee approved Rule 12-807 as presented.

Mr. Dunn presented Rule 12-808, Process, for the Committee's consideration.

Rule 12-808. PROCESS

(a) Service on Defendants Named in Complaint

Upon the filing of the complaint, the clerk shall issue a summons as in any other civil action. The summons, complaint, and exhibits shall be served in accordance with Rule 2-121 on each defendant required by the plaintiff to be named pursuant to Rule 12-804 (d).

(b) Service by Publication

(1) Generally

If, on affidavit of the plaintiff, it appears to the satisfaction of the court that the plaintiff has used reasonable diligence to ascertain the identity and residence of the persons named as unknown defendants and persons joined as testate or intestate successors of a person known or believed to be dead, the court shall order service by publication in accordance with Rule 2-122 of the Maryland Rules and the provisions of this Chapter.

(2) Exception

Subsection (b)(1) of this Rule does not authorize service by publication on any person named as an unknown defendant who is in open and actual possession of the property.

(3) Content and Posting of Order of Publication

If the court orders service by publication, the plaintiff shall:

(A) use the legal description of the property and its street address, or other common description, if any;

(B) not later than 10 days after the date the order is issued, post a copy of the summons and complaint in a conspicuous place on the property that is the subject of the action; and

(C) file proof that the summons has been served, posted, and published as required in the order.

Cross reference: See Code, Real Property Article, §§14-608, 14-615, and 14-616.

Source: This Rule is new.

Rule 12-808 was accompanied by the following Reporter's note.

Code, Real Property Article, §14-604 provides that the Maryland Rules apply to actions to quiet title, except to the effect that they are inconsistent with the provisions of Code, Real Property Article, Title 14, Subtitle 6, Actions to Quiet Title. The statute does not address process on defendants named in the complaint. Section (a) of Rule 12-808 is similar to the language of Rule 14-503, Process, pertaining to tax sales. Section (b) is derived from Code, Real Property Article, §§14-615 and 14-616. The Property Subcommittee noted that subsection (b)(3)(B) requiring the plaintiff to post a copy of the summons and complaint in a conspicuous place on the property that is the subject of the action not later than 10 days after the date the order is issued may not comport with the actual practice in some counties. The 10-day period may not be sufficient. This issue should be flagged for the legislature.

Mr. Dunn explained that one of the issues that arose in

implementing the statute was the time requirement in subsection (b)(3)(B). The Rule provides that not later than 10 days after the order of publication is issued, the plaintiff shall post a copy of the summons and complaint in a conspicuous place on the property that is the subject of the action. The question was whether 10 days is enough notice.

Ms. Ogletree explained that in some counties, the sheriff does not even get the order for publication for at least 10 days. Although the statute provides for 10 days, the reality is that this requirement will be violated and the legislature may want to review this provision. Mr. Dunn commented that the Committee does not have the authority to expand this time period. Judge Price inquired whether the judge would have authority by motion to extend this period. Ms. Ogletree reiterated that the statute provides for 10 days which, unfortunately, is not practical in some counties.

The Chair asked if the procedure in those counties could be modified to accommodate the 10-day period. Ms. Ogletree answered that she did not know. The Maryland Electronic Courts initiative ("MDEC") just became effective in Caroline County, and the orders are not being received until at least 10 days after they are signed. The attorneys do not even know about them. It is a practical issue, because in certain counties – and on the Eastern Shore in particular – Ms. Ogletree said that she has filed cases to get an order of publication signed, then

the clerk's office transmits them to the sheriff. The sheriff then has to send someone out to the property. The person may need directions to the property in order to post it. The 10-day period may not be enough; 15 days may be preferable. The Chair said that this can be pointed out to the General Assembly.

Mr. Zarbin asked whether language could be added to Rule 12-808 to the effect of "upon a showing of good cause," the court may extend the time period. He agreed with Judge Price that a court should have the authority to extend the time, especially if it is for good cause. It will not be easy to get the legislature to make this change. Mr. Dunn pointed out that the statute is mandatory, and if the trial court changes the time, it will be a direct violation of the statute. Mr. Zarbin said that he would argue that he was not given 10 days, so there is a violation. Either way, there will be a violation. The court should be given the authority to extend the time period.

Mr. Weaver asked whether the statute uses the phrase "after the date the order is issued." It is similar to a judgment, which is not entered until the clerk processes it. Could the word "issued" be changed to the word "entered"? This may help with the 10-day requirement. Ms. Ogletree replied that the order of publication is signed by the clerk, not the judge. The judge orders the publication, but the notice is signed by the clerk. The Chair said that this can certainly be brought to the attention of the General Assembly. If it is a matter of

practice and procedure, the Court of Appeals has the constitutional authority to trump this by Rule. The Court prefers not to do this. Judge Mosley remarked that she thought that this could be changed, but she asked what happens when there is a conflict between the court Rule and the statute. The Chair answered that the Court of Appeals will decide, but, in general, the later-enacted provision will prevail.

The Chair pointed out that there are two choices: leave Rule 12-808 alone and raise the issue for the legislature or recommend to the Court of Appeals that it consider some escape hatch. Mr. Carbine noted that it is the plaintiff who does the posting. Ms. Ogletree explained that the plaintiff pays for the posting, but the sheriff does the actual posting. Mr. Carbine responded that this is not what the Rule provides. Ms. Ogletree acknowledged this, but she added that it does not happen that way. The Rule pertaining to service, Rule 2-123, Process — By Whom Served, provides that the posting must be done by the sheriff. Someone can ask the court to have a private process server post the property. Ms. Ogletree reiterated that 10 days after the order of publication is issued is not sufficient for posting the property.

Mr. Zarbin suggested changing Rule 12-808 to provide for posting not later than 10 days after the order is provided to the sheriff. Mr. Carbine commented that the problem is that this is not what the statute provides. He suggested leaving the

Rule as it is, and it can be worked around. Mr. Marcus noted that it is not just a problem with the 10 days; the Rule also provides that the plaintiff shall post the property, which is not the general practice. He added that he would be reluctant to recommend that the Rule rewrite the statute; it exceeds the scope of how the Rule should be written. The Committee does not have the ability or authority to digress from the statute. Mr. Zarbin pointed out that the Court of Appeals has done so in the past.

Mr. Weaver remarked that Rule 2-123 provides that any service other than delivery, mailing, or publication shall be executed by the sheriff, unless the court orders otherwise. Mr. Carbine suggested that Rule 12-808 be left alone. The Chair said that the Rule should be left alone, but when it is discussed at the Court hearing, the Court should be told about this discussion, and the legislature will be alerted to address these problems.

By consensus, the Committee approved Rule 12-808 as presented.

Mr. Dunn presented Rule 12-809, Answer, for the Committee's consideration.

Rule 12-809. ANSWER

(a) Generally

An answer to a complaint under this Chapter shall be verified and shall set forth:

(1) any claim the defendant has to the property that is the subject of the action;

(2) any facts tending to controvert material allegations of the complaint; and

(3) a statement of any new facts constituting a defense to the plaintiff's claim.

(b) No Recovery of Costs

If the defendant disclaims any interest in the title of the property in the answer or allows judgment to be taken by default, the plaintiff may not recover costs.

Cross reference: See Code, Real Property Article, §14-607.

Source: This Rule is new.

Rule 12-809 was accompanied by the following Reporter's note.

Rule 12-809 is substantially the same as Code, Real Property Article, §14-607. If a defendant disclaims any interest in the title or allows judgment to be taken by default, the statute provides that the plaintiff may not recover costs.

Mr. Dunn said that Rule 12-809 tracks the statute, Code, Real Property Article, §14-607.

By consensus, the Committee approved Rule 12-809 as presented.

Mr. Dunn presented Rule 12-810, Hearing, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 800 - ACTION TO QUIET TITLE

Rule 12-810. HEARING

In all contested cases, the plaintiff shall submit evidence at a hearing to establish plaintiff's title. The court may receive any evidence offered supporting the claims of any defendant other than those defendants' claims admitted by the plaintiff in the complaint.

Cross reference: See Code, Real Property Article, §§14-612 and 14-617.

Source: This Rule is new.

Rules 12-810 was accompanied by the following Reporter's note.

Rule 12-810 is derived from Code, Real Property Article, §14-617. The Property Subcommittee has modified the statutory provision by adding that a hearing will be held in all contested cases as opposed to all cases. This comports with actual practice in many of the counties.

QUERY TO RULES COMMITTEE: A defendant who is alleging adverse possession has a right to a jury trial, but the plaintiff who files the action to quiet title does not. Should there be a right to a jury trial in all quiet title cases given the merger of law

and equity? Otherwise, the plaintiff is at a disadvantage.

Mr. Dunn explained that Rule 12-810 tracks the statutes, Code, Real Property Article, §§14-612 and 14-617. An issue had arisen regarding the hearing, which the Subcommittee discussed at length. A defendant who is alleging adverse possession has a right to a jury trial, but the plaintiff who files an action to quiet title does not. The question that came up at the Subcommittee meeting was whether a plaintiff should have a right to a jury trial in all actions to quiet title, given the merger of law and equity. It would seem that the plaintiff is at a disadvantage.

The Chair said that he did not know whether the Court of Appeals can decide who gets a jury trial by Rule. This is substantive law. The Court can interpret two articles of the Constitution, Article 5 (Application of Common Law and Statutes of England; Trial by Jury) and Article 23 (Trial by Jury). The Chair said that the way that he read the statute, particularly the pre-existing one, it provides that the action to quiet title is *in rem* and in equity. In the pre-existing statute, the words "in equity" had been stricken. The newer statute refers to a hearing before the court.

Ms. Ogletree commented that there is another issue pertaining to the hearing before the court: the practice in some areas around the State, particularly on the Eastern Shore,

is that the case is referred to an examiner, and then the court reviews it and either enters an order or not. To finesse the required hearing, Rule 12-810 was drafted to provide that in a contested case, there must be a hearing, meaning an adversarial hearing. There is still a hearing before an examiner who is a judicial officer, but the change essentially blurred the distinction between a hearing before an examiner and a court hearing, so that the practice of a hearing before an examiner could be continued. If there is a case where a part of a property was parceled out in 1903 and this is not known for 40 years, once everything is straightened out and no one objects, it is not necessary to waste the court's time on this by requiring a hearing. It is important to preserve this practice to the extent possible and still comply with the statute by requiring a hearing.

The Chair pointed out that this gets to the issue of whether there is a hearing, not whether the hearing is before a jury. Ms. Ogletree said that she did not understand why anyone in a real property case would want a jury. If there is a problem because of the way the property law developed, that can be addressed first, which is the case at law, and then there could be the case of the defense alleging adverse possession. Code, Real Property Article, §14-108 melded the two contests, but it still kept them in equity, so there was no jury. The issue is that when the defense was adverse possession, the

defendant could plead a jury, and this is still the case. The Chair asked whether there are cases on this when a person is claiming a right by adverse position and sues the title holder. This is an action for ejectment, and it is a law case where the claimant is entitled to a jury. On the other hand, it may be the title-holder who is suing to quiet title. Ms. Ogletree responded that this is the inequity, because both parties should have the right to a jury trial. The Chair commented that the person claiming adverse possession could file an action to quiet title. Ms. Ogletree said that it is the appropriate way to do it.

The Chair observed that the titleholder could sue to remove a cloud from a title, and the cloud is a claim of adverse possession. If he or she files an action to quiet title, it is an equity action. The person claiming adverse possession or a prescriptive right to an easement wants to join that defendant. If the person files a counterclaim for ejectment, then he or she gets a jury. However, if he or she does not do that, then it is an equity case.

Ms. Ogletree remarked that she had a case where she had filed an action to quiet title, and the other side filed for a prescriptive right to an easement and asked for a jury. The Chair said that what is in the statute does not preclude a jury trial as long as the person files an action for ejectment. Ms. Ogletree noted that the statute uses the word "claim" for both

the claim of an adverse possessor trying to get title and the claim of a titleholder who is being opposed by an adverse possessor. It is very confusing. To the extent possible, the Rules were drafted to try to clear this up.

The Chair asked whether it would be helpful to have a Committee note that would state that Rule 12-810 does not affect any right to a jury trial a party may have in an ejectment action. Ms. Ogletree replied that she thought that this would help. Mr. Dunn agreed that it would be useful. Mr. Sullivan commented that an action to quiet title could be combined with another action. Ms. Ogletree responded that the only action would be an action for ejectment. Historically, if someone is seeking possession but is not entitled to it, the person would file an action for ejectment. This does not work, because someone cannot have record title and file. There is another twist to this: a case held that to quiet title, the possession must be peaceable. One circuit court determined that if there is any kind of dispute between the parties, an action to quiet title is not available.

The Chair referred to *Higgins v. Barnes*, 310 Md. 532 (1987), which has been followed several times. That case arose shortly after the merger of law and equity when someone filed a counterclaim in an equitable action, the same claim, but the counterclaim was a law action. The Court held that if there was a right to a jury trial on the facts pertaining to the claim,

the judge is bound by the jury's verdict. The case has been cited a number of times. An example of what could happen is that someone comes in with a suit to quiet title in an ejectment action and prays a jury trial. He or she would get the jury. The other side appeals. The appellate court would decide it. It will get sorted out.

Mr. Dunn moved that a neutral Committee note as suggested by the Chair be added, the motion was seconded, and it passed by a majority vote.

By consensus, the Committee approved Rule 12-810 as amended.

Mr. Dunn presented Rule 12-811, Judgment, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 12 - PROPERTY ACTIONS

CHAPTER 800 - ACTION TO QUIET TITLE

Rule 12-811. JUDGMENT

(a) Recording

A judgment in an action under this Chapter shall be recorded in the land records of the counties in which any portion of the property is located.

(b) Indexing

The clerk shall index the judgment in accordance with Code, Real Property Article, §3-302, with the parties against whom the

judgment is entered as grantor, and the party in whose favor the judgment is entered as grantee.

Cross reference: Code, Real Property Article, §14-617. See Code, Real Property Article, §§14-618 through 14-621 for the effects of a judgment in an action to quiet title.

Source: This Rule is new.

Rule 12-811 was accompanied by the following Reporter's note.

Rule 12-811 is substantially the same as Code, Real Property Article, §14-617.

Mr. Dunn told the Committee that Rule 12-811 is derived from Code, Real Property Article, §14-617.

Mr. Weaver remarked that statutes that provide that an order shall be recorded in the land records cause confusion for clerks. Often this issue gets clarified by the Attorney General as to who does the recording, and then the clarification is lost. Mr. Weaver suggested that Rule 12-811 should have language added to the effect that the party in whose favor judgment is entered shall cause a copy of the judgment to be recorded in the land records. The question that comes up is whether the clerk automatically records the judgment for no fee, or whether someone has to pay for it.

Mr. Dunn noted that the language of Rule 12-811 comes directly from the statute. Mr. Sullivan observed that the Rule

should indicate that the judgment will be recorded in the regular way. Mr. Weaver asked whether a Committee note would be appropriate. The Chair inquired whether other Rules have language similar to Mr. Weaver's suggestion. Mr. Weaver answered that he could not think of another Rule, but he keeps the index for the land records, and this issue had come up before where the language of the Rule does not provide who is to record the judgment.

Ms. Ogletree said that inquisitions and condemnation cases are automatically recorded in the land records. This is the same issue. The Maryland Land Title Association wants to ensure that the judgment is recorded in the land records, so anyone searching the case can find it. Mr. Weaver commented that if this was the intent, the Rule should clarify that the clerk shall record the judgment.

Ms. Ogletree suggested that the prevailing party should record. Mr. Weaver agreed, but he explained that he had thought that the expectation was that the clerk shall automatically do the recording. Ms. Ogletree responded that the language of the statute leads to that conclusion. There is no language providing that the prevailing party should do the recording.

The Chair asked for a motion. Mr. Weaver moved that Rule 12-811 be amended to put the burden on the prevailing party to record the judgment. The motion was seconded. The Chair said that the Rule would read: "...the party in whose favor the

judgment is entered shall cause the judgment to be recorded."

The motion passed by majority vote.

By consensus, the Committee approved Rule 12-811 as amended.

Agenda Item 6. Consideration of a proposed amendment to: Rule 14-102 (Judgment Awarding Possession)

Mr. Dunn presented Rule 14-102, Judgment Awarding Possession, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 14-102 by adding a sentence to subsection (d)(4) addressing when a timely motion for judgment awarding possession is filed, as follows:

Rule 14-102. JUDGMENT AWARDING POSSESSION

. . .

(d) Service and Response

(1) On Whom

The motion and all accompanying documents shall be served on the person in actual possession and on any other person affected by the motion.

(2) Party to Action or Instrument

(A) If the person to be served was a party to the action that resulted in the

sale or to the instrument that authorized the sale, the motion shall be served in accordance with Rule 1-321.

(B) Any response shall be filed within the time set forth in Rule 2-311.

(3) Not a Party to Action or Instrument

(A) If the person to be served was not a party to the action that resulted in the sale or a party to the instrument that authorized the sale, the motion shall be served:

(i) by personal delivery to the person or to a resident of suitable age and discretion at the dwelling house or usual place of abode of the person, or

(ii) if on at least two different days a good faith effort was made to serve the person under subsection (d)(3)(A)(i) of this Rule but the service was not successful, by (a) mailing a copy of the motion by certified and first-class mail to the person at the address of the property and (b) posting in a conspicuous place on the property a copy of the motion, with the date of posting conspicuously written on the copy.

(B) Any response shall be filed within the time prescribed by sections (a) and (b) of Rule 2-321 for answering a complaint. If the person asserts that the motion should be denied because the person is a bona fide tenant having a right of possession under the Federal Protecting Tenants at Foreclosure Act of 2009 (P.L. 111-22), or Code, Real Property Article, § 7-105.6, the response shall (i) state the legal and factual basis for the assertion and (ii) be accompanied by a copy of any bona fide lease or documents establishing the existence of such a lease or state why the lease or documents are not attached.

(4) Judgment of Possession

If a timely response to the motion is not filed and the court finds that the

> motion complies with the requirements of sections (a) and (b) of this Rule, the court may enter a judgment awarding possession. If a timely response to the motion is filed, and the court finds that the motion complies with the requirements of sections (a) and (b) of this Rule, the court may hold a hearing.
>
> . . .

Rule 14-102 was accompanied by the following Reporter's note.

> The Chair of the Rules Committee pointed out that subsection (d)(4) of Rule 14-102 does not address the situation where a timely response to a motion for judgment awarding possession of the property is filed. The Property Subcommittee recommends the addition of a sentence to subsection (d)(4) permitting the court to hold a hearing if a timely response is filed, but the court finds that the motion complies with the requirements set out in Rule 14-216 (a) and (b).

Mr. Dunn explained that additional language is being proposed for subsection (d)(4) of Rule 14-102. The new language provides that if a timely response to the motion for judgment awarding possession is filed, and the court finds that the motion complies with the requirements of the Rule, the court may hold a hearing. Mr. Dunn noted that Russell R. Reno, Jr., Esq. had sent an e-mail expressing his concern about the word "may," because it means that the hearing is discretionary. The problem is that if one party asks for a hearing, the court cannot grant the motion without a hearing. The Chair added that this is the

case if the motion is a dispositive one.

Judge Eaves expressed the view that the added language is unnecessary. The Chair commented that a cross reference to Rule 2-311, Motions, could be added instead. Judge Eaves responded that this is all that is needed. By consensus, the Committee approved the addition of a cross reference to Rule 2-311 instead of the proposed new language. The Chair said that the cross reference would be placed at the end of Rule 14-102, and it would refer to Rule 2-311 (f).

By consensus, the Committee approved Rule 14-102 as amended.

Agenda Item 7. Consideration of proposed amendments to: Rule 14-211 (Stay of the Sale; Dismissal of Action) and Rule 14-305 (Procedure Following Sale)

Mr. Dunn presented Rules 14-211, Stay of the Sale; Dismissal of Action, and 14-305, Procedure Following Sale, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-211 by adding to the cross reference after subsection (a)(1), as follows:

Rule 14-211. STAY OF THE SALE; DISMISSAL OF ACTION

(a) Motion to Stay and Dismiss

(1) Who May File

The borrower, a record owner, a party to the lien instrument, a person who claims under the borrower a right to or interest in the property that is subordinate to the lien being foreclosed, or a person who claims an equitable interest in the property may file in the action a motion to stay the sale of the property and dismiss the foreclosure action.

Cross reference: See Code, Real Property Article, §§7-101 (a) and 7-301 (f)(1). See Rule 2-331; *Higgins v. Barnes*, 310 Md. 532 (1987); *Fairfax Savings, F.S.B. v. Kris Jen Ltd. Partnership*, 338 Md. 1 (1995); and Code, Real Property Article, §7-105.1 (m)(3) as to filing a counterclaim in a foreclosure proceeding.

(2) Time for Filing

(A) Owner-occupied Residential Property

In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of:

(i) the date the final loss mitigation affidavit is filed;

(ii) the date a motion to strike postfile mediation is granted; or

(iii) if postfile mediation was requested and the request was not stricken, the first to occur of:

(a) the date the postfile mediation was held;

(b) the date the Office of Administrative Hearings files with the court a report stating that no postfile mediation was held; or

(c) the expiration of 60 days after transmittal of the borrower's request for postfile mediation or, if the Office of Administrative Hearings extended the time to complete the postfile mediation, the expiration of the period of the extension.

(B) Other Property

In an action to foreclose a lien on property, other than owner-occupied residential property, a motion by a borrower or record owner to stay the sale and dismiss the action shall be filed within 15 days after service pursuant to Rule 14-209 of an order to docket or complaint to foreclose. A motion to stay and dismiss by a person not entitled to service under Rule 14-209 shall be filed within 15 days after the moving party first became aware of the action.

(C) Non-compliance; Extension of Time

For good cause, the court may extend the time for filing the motion or excuse non-compliance.

Cross reference: See Rules 2-311 (b), 1-203, and 1-204, concerning the time allowed for filing a response to the motion.

(3) Contents

A motion to stay and dismiss shall:

(A) be under oath or supported by affidavit;

(B) state with particularity the factual and legal basis of each defense that the moving party has to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action;

Committee note: The failure to grant loss mitigation that should have been granted in an action to foreclose a lien on owner-occupied residential property may be a defense to the right of the plaintiff to foreclose in the pending action. If that defense is raised, the motion must state specific reasons why loss mitigation

pursuant to a loss mitigation program should have been granted.

(C) be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the discovery of any specific supporting documents in the possession or control of the plaintiff or the secured party;

(D) state whether there are any collateral actions involving the property and, to the extent known, the nature of each action, the name of the court in which it is pending, and the caption and docket number of the case;

(E) state the date the moving party was served or, if not served, when and how the moving party first became aware of the action; and

(F) if the motion was not filed within the time set forth in subsection (a)(2) of this Rule, state with particularity the reasons why the motion was not filed timely.

To the extent permitted in Rule 14-212, the motion may include a request for referral to alternative dispute resolution pursuant to Rule 14-212.

. . .

Rule 14-211 was accompanied by the following Reporter's note.

The issue of whether counterclaims can be filed in mortgage foreclosure proceedings is a murky one. Two Court of Appeals cases have allowed it, *Higgins v. Barnes*, 310 Md. 532 (1987) and *Fairfax Savings, F.S.B. v. Kris Jen Ltd. Partnership*, 338 Md. 1 (1995); however, an unreported Court of Special Appeals opinion held that there can be no third-party practice in a foreclosure case. Code, Real Property Article, §7-105.1 (m)(3) states: "Nothing in this Subtitle precludes

the mortgagor or grantor from pursuing another remedy or legal defense available to the mortgagor or grantor." This would seem to allow the filing of a counterclaim.

To clarify this, the Property Subcommittee recommends adding a cross reference after Rule 14-211 (a)(1) to Rule 2-331, Counterclaim and Cross-claim, to the two reported Court of Appeals decisions, and to Code, Real Property Article, §7-105.1 (m)(3). To ensure that the filing of a counterclaim does not necessarily delay a decision in a foreclosure proceeding, the Subcommittee recommends adding language from Rule 2-602, Judgments Not Disposing of Entire Action, to Rule 14-305.

MARYLAND RULES OF PROCEDURE

TITLE 14 SALES OF PROPERTY

CHAPTER 300 - JUDICIAL SALES

AMEND Rule 14-305 by adding a new section pertaining to filing a counterclaim, as follows:

Rule 14-305. PROCEDURE FOLLOWING SALE

(a) Report of Sale

As soon as practicable, but not more than 30 days after a sale, the person authorized to make the sale shall file with the court a complete report of the sale and an affidavit of the fairness of the sale and the truth of the report.

(b) Affidavit of Purchaser

Before a sale is ratified, unless otherwise ordered by the court for good

cause, the purchaser shall file an affidavit setting forth:

(1) whether the purchaser is acting as an agent and, if so, the name of the principal;

(2) whether others are interested as principals and, if so, the names of the other principals; and

(3) that the purchaser has not directly or indirectly discouraged anyone from bidding for the property.

(c) Sale of Interest in Real Property; Notice

Upon the filing of a report of sale of real property or chattels real pursuant to section (a) of this Rule, the clerk shall issue a notice containing a brief description sufficient to identify the property and stating that the sale will be ratified unless cause to the contrary is shown within 30 days after the date of the notice. A copy of the notice shall be published at least once a week in each of three successive weeks before the expiration of the 30-day period in one or more newspapers of general circulation in the county in which the report of sale was filed.

(d) Exceptions to Sale

(1) How Taken

A party, and, in an action to foreclose a lien, the holder of a subordinate interest in the property subject to the lien, may file exceptions to the sale. Exceptions shall be in writing, shall set forth the alleged irregularity with particularity, and shall be filed within 30 days after the date of a notice issued pursuant to section (c) of this Rule or the filing of the report of sale if no notice is issued. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.

(2) Ruling on Exceptions; Hearing

The court shall determine whether to hold a hearing on the exceptions but it may not set aside a sale without a hearing. The court shall hold a hearing if a hearing is requested and the exceptions or any response clearly show a need to take evidence. The clerk shall send a notice of the hearing to all parties and, in an action to foreclose a lien, to all persons to whom notice of the sale was given pursuant to Rule 14-206 (b).

(e) If a Counterclaim is Filed

If a counterclaim has been filed in the proceeding, and the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment as to one or more but fewer than all of the claims or parties.

~~(e)~~ (f) Ratification

The court shall ratify the sale if (1) the time for filing exceptions pursuant to section (d) of this Rule has expired and exceptions to the report either were not filed or were filed but overruled, and (2) the court is satisfied that the sale was fairly and properly made. If the court is not satisfied that the sale was fairly and properly made, it may enter any order that it deems appropriate.

~~(f)~~ (g) Referral to Auditor

Upon ratification of a sale, the court, pursuant to Rule 2-543, may refer the matter to an auditor to state an account.

~~(g)~~ (h) Resale

If the purchaser defaults, the court, on application and after notice to the purchaser, may order a resale at the risk and expense of the purchaser or may take any other appropriate action.

Source: This Rule is derived from former Rule BR6.

Rule 14-305 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 14-211.

Mr. Dunn explained that the issue raised in Agenda Item 7 is whether a counterclaim may be filed in a mortgage foreclosure proceeding. The Property Subcommittee had lengthy discussions about this issue. The two Court of Appeals cases that provide that a counterclaim may be filed are cited in the Committee note, *Higgins v. Barnes*, 310 Md. 532 (1987) and *Fairfax Sav., F.S.B. v. Kris Jen Ltd. Partnership,* 338 Md. 1 (1995). An unreported Court of Special Appeals case held that no third-party practice is permitted in a foreclosure proceeding. The Subcommittee is recommending clarification of this issue by adding a cross reference that refers to counterclaims after subsection (a)(1) of Rule 14-211 and by adding a new section (e) to Rule 14-305.

Jeffrey Fisher, Esq. addressed the Committee. He said that notwithstanding the opinion of the Court of Appeals, there is no good place in a foreclosure proceeding for counterclaims, cross-claims, or third-party practice. However, the Court of Appeals trumps his view. He had advocated for clarification at the Subcommittee and had suggested the addition of language from Rule 2-602, Judgments not Disposing of Entire Action, pertaining to finality of judgments. If a counterclaim is pending, but the

judge has allowed the sale to go forward, the court can ratify the sale and make a final order, which can be appealed, so that title is assured and people can rely on it. Mr. Fisher commented that his issue is not so much with the cross reference but that he wants to make sure that the language of Rule 14-211 allows finality of the foreclosure ratification.

Philip Robinson, Esq., addressed the Committee. He said that the language from Rule 2-602 that Mr. Fisher had referred to is proposed to be added to Rule 14-305, Procedure Following Sale, as a new section (e). This creates the equity issue of what goes first. The circuit courts have different practices; Mr. Fisher's recommendation at the Subcommittee, concurred with by Mr. Robinson, was to add section (e) to Rule 14-305, which effectively allows the circuit court judge to determine what goes first. There is no reason to delay the foreclosure, and it can go forward.

Mr. Robinson remarked that the practicality of how this works is that he may file a motion pursuant to Rule 14-211 on behalf of his clients, most of the time stating that they will make monthly payments. Someone could file a counterclaim that he or she does not have the means to pay the bill. Sections (e) and (f) give the trial court the discretion to allow the party to proceed with his or her counterclaim, but the foreclosure process will not be forestalled.

The Chair asked whether this is covered by Rule 2-602. Mr.

Robinson replied that the reason Rule 2-602 was not incorporated into Rule 14-211 was that Mr. Fisher would argue whether it even applies, and there is a great amount of bad case law as to this issue. The Court of Appeals does not like it when decisions are overturned. Because of the case law, Mr. Robinson had suggested language without the reference to Rule 2-602, so that the bad case law cannot be argued later on. Those who represent homeowners as Mr. Robinson does and also Mr. Fisher and his colleagues would like to go forward with the proposal in the right circumstances.

Mr. Robinson commented that Rule 14-211 allows a great deal of discretion so that the trial judge can make the correct decision. If there is no sustainable solution, and the counterclaim is filed for delay purposes, the trial judge should be able to determine who goes first on the foreclosure, whether there is a just reason for a stay, or whether the counterclaim should be dismissed and foreclosure declared to be final. Then this issue can be appealed.

The Chair asked Mr. Robinson whether his thought was that the proposed language in Rule 14-305 would be interpreted in a more liberal fashion than the Court is interpreting Rule 2-602. Mr. Robinson replied that he would expect this. If Rule 2-602 is incorporated, it would invite the case law from that Rule. The Chair reminded Mr. Robinson that he had termed this "bad case law." Mr. Robinson expressed the view that the Court of

Appeals does not like those cases. The Chair responded that this is because the Court does not want cases to be appealed three times. Mr. Robinson remarked that the Chair had written decisions based on Mr. Robinson's cases, which held that because there was no final judgment, the appeal was not proper. Mr. Robinson said that the proposed changes to Rules 14-211 and 14-305 allow the trial court some discretion generally in a foreclosure proceeding.

Mr. Fisher said that foreclosure practitioners consider it an open issue as to how much the Title 2 Rules apply in Title 14. For that reason, he and his colleagues would want to see a solution to the problem in the Title 14 Rules as opposed to the Title 2 Rules being engrafted on the Title 14 Rules.

Mr. Dunn reiterated that the proposal is to add a new section (e) to Rule 14-305. Judge Nazarian commented that he could not understand how adding language to the cross reference in Rule 14-211 solves the problem of counterclaims. The interplay between the Title 14 Rules and the Title 2 Rules is a challenge. The cases start with an order to docket that is a collection of documents plus a streamlined response period. Judge Nazarian added that he did not read *Higgins v. Barnes* to clearly answer whether a counterclaim is possible. He did see it in *Fairfax v. Kris Jen*, but those cases long predate the amendments to the Title 14 Rules in 2010. An unreported Court of Special Appeals opinion cannot be cited, so it should not be

referred to in the Committee note for any purpose.

Judge Nazarian said that he was not inclined to recommend the proposed changes because the issue is more complicated than the suggested solution. The Court of Special Appeals sees cases involving claims that may or may not have had any merit, but they are being raised in such a manner that they can be dismissed on their face. Someone may have waited until after the period to file a motion to dismiss has run or until after the sale. This is a different problem, but it is difficult to understand the interplay between claims that bear on the elements of the lending relationship and how to put this into the streamlined foreclosure procedure. Judge Nazarian added that he did not think that he had ever seen a timely counterclaim that actually got litigated in a foreclosure case. It may be because the ones that are allowed do not turn into appeals. Judge Nazarian reiterated that he was struggling to understand why the addition of section (e) is a good idea.

The Chair asked what relationship proposed section (e) of Rule 14-305 had with the expanded cross reference in Rule 14-211. Mr. Laws said that it seemed that what is being suggested is to strike the expanded cross reference but leave the proposed new section (e) in Rule 14-305. Judge Nazarian responded that his view was that neither of these changes should be made. He explained that he was speaking personally and not on behalf of the Court of Special Appeals but that he was not in favor of the

idea of counterclaims in foreclosure proceedings. Mr. Laws expressed the view that the change was necessary in Rule 14-305. A foreclosure is an *in rem* proceeding to acquire title, but a counterclaim is an *in personam* proceeding, and this will direct courts how to proceed.

Judge Nazarian reiterated that the proposed changes are not a solution. A counterclaim is an avenue to allow challenges to the validity of the title to property. The suggested Rule changes are more complicated. The change to Rule 14-305 states that a counterclaim is allowed. Mr. Dunn responded that there are two Court of Appeals cases allowing for counterclaims. Judge Nazarian commented that one Court of Appeals case allows it, but the case is old. It was decided more than 20 years before the foreclosure law was changed. Mr. Dunn noted that someone could file a counterclaim, and the Rules would not address how to handle it. Judge Nazarian observed that the court could figure out what to do.

Mr. Robinson said that in 2008, Code, Real Property Article, §7-105 (m)(3) was amended. It reads as follows: "Nothing in this subtitle precludes the mortgagor or grantor from pursuing any other remedy or legal defense available to the mortgagor or grantor." This language has been incorporated into case law so that counterclaims in foreclosure proceedings are allowed. Mr. Robinson remarked that he had not asked for the proposed change. Different courts are applying this

differently. Adding language to the foreclosure Rules addressing counterclaims would result in a uniform practice.

The Chair commented that he thought that the cross reference would go in a Rule that allows a borrower to raise a defense. The legislature created new hoops that a foreclosure plaintiff has to jump through. The language of the statute may be read to permit a counterclaim. This can be raised as a defense. He was not sure what the language in the cross reference adds. There also is an issue about putting the language of Rule 2-602 in Rule 14-305.

Mr. Robinson said that some of the circuit courts are applying case law to the issue of counterclaims. The statute was amended by the legislature to allow counterclaims in foreclosure proceedings. He had no disagreement about third-party practice being excluded. He simply wanted to be able to tell his clients exactly how the procedure will work. Currently, the practice varies from county to county.

Mr. Dunn moved to strike the cross reference to Rule 14-211 and to leave the new language in Rule 14-305. The motion was seconded. Judge Nazarian asked how the new language in Rule 14-305 helps to solve the problem of counterclaims. Mr. Robinson answered that it gives the trial judge some discretion to make a decision about the counterclaim and not hold the foreclosure in abeyance. The Chair said that he looked at what Rules 14-211 and 14-305 do. Rule 14-211 provides a defense to the

foreclosure. The mortgagor can move to dismiss it, because the lender is not entitled to file it for whatever reason.

Mr. Robinson noted that under Rule 14-211, it is the first time that the homeowner appears in the case. If the counterclaim has not been filed when the motion to dismiss is filed, there is a good argument that the counterclaim is filed late. Judge Nazarian added that anything that was not raised in the response to the order to docket is precluded under *Fairfax*. Mr. Robinson observed that *Fairfax* provides that, theoretically, someone can file a counterclaim after a foreclosure. Judge Nazarian pointed out that more goes on procedurally in a foreclosure than in a regular civil case. A regular civil case has a much more stripped down procedure. He added that he was reluctant to go too far in a foreclosure case.

Mr. Carbine commented that he had lost a case where he had represented the foreclosing party and the defendant filed a counterclaim that the court permitted. The jury found against Mr. Carbine's client. The Court of Appeals is the decision-maker as to the right to a counterclaim. A Rule permitting a right to a counterclaim would be helpful. The Chair noted that it depends on what is asked for in the counterclaim. Some kinds of relief are not appropriate. Mr. Carbine expressed the opinion that this should be spelled out in the Rule. The Chair observed that the cross reference in Rule 14-211 does not spell out anything.

Mr. Carbine pointed out that a Rule on the subject would avoid the current ambiguity. The Chair expressed the view that the proposed language does not address the issue of whether counterclaims are permitted in foreclosure actions. Rule 14-211 is a defense Rule. The language proposed for Rule 14-305 starts with the word "if." Rule 14-305 pertains to the procedure following the sale. What is needed is for the Rule to state: "The court can in effect make an order of ratification final for purposes of the appeal." This suggests that if a counterclaim has been filed, the court can do this. The resolution would be that it is not allowed, but that may have not yet been decided. If it is allowed, is the counterclaim valid under the circumstances? A determination under Rule 2-602 permits an appeal from an order of ratification. Neither of the proposed changes to Rules 14-211 and 14-305 addresses this.

Mr. Marcus said that the Rule pertaining to counterclaims is Rule 2-331, Counterclaim and Cross-Claim. There is a series of requirements, such as when they are to be filed. If a party files a counterclaim or cross-claim more than 30 days after the time for filing the party's answer, any other party may object to the late filing. Mr. Marcus expressed the concern that the use of a counterclaim in Rule 14-305 is sloppy, because a counterclaim is defined in the Title 2 Rules, and it really does not fit into Rule 14-305. More clarification of what is intended here is necessary. If a counterclaim is filed, the

Rule suggests that it is permissible, and it is expressly legitimizing the use of a counterclaim proceeding. This would create even more confusion. He expressed his opposition to proposed section (e) of Rule 14-305. Mr. Zarbin asked why a motion could not take care of the situation where a counterclaim without merit is filed. The judge could rule on the motion. Mr. Carbine pointed out that the judge may not rule on the motion.

Judge Nazarian hypothesized that a foreclosure is filed with an order to docket and all of the accompanying papers. Within the appropriate time period, the homeowner files a motion to dismiss or to stay the foreclosure that includes allegations that the loan was procured or serviced in a manner inconsistent with elements of federal law. Usually what happens is that this is filed after the sale. The case goes to the Court of Special Appeals. There could be a colorable argument that pertains to the formation of the loan. This is a classic foreclosure defense. On the other hand, the foreclosure procedure specifically contemplates that this defense can be raised.

Judge Nazarian said that the Chair's earlier point was correct. The purpose of the procedure under Rule 14-211 is to allow defenses to a foreclosure action. It is an open question whether a federal law violation serves as a defense. Someone may also be entitled to statutory damages. Is the claim that flows from that same defense supposed to be adjudicated in the

life of the foreclosure case as a counterclaim in addition to other defenses? Judge Nazarian expressed the view that it is not supposed to be adjudicated. *Higgins* does not quite address this, but *Fairfax* allows the counterclaim. Judge Nazarian added that he could understand why Mr. Robinson would want to file a counterclaim to avoid the risk that not asserting the counterclaim, and whatever other issues flow out of that, would be precluded because it was not raised.

The Chair inquired how this issue arose. If there is a counterclaim alleging that the lender did something wrong, and the borrower is entitled to damages or some other form of relief, under the proposed amendments to Rule 14-305, the sale may be ratified. If the judge found some merit to the counterclaim, it would have to be because there is some defense. Mr. Fisher commented that some counterclaims are reasonably thoughtful and can stop the sale. The Chair responded that, in that situation, the judge will not ratify the sale.

Mr. Fisher said that 90% of counterclaims are filed by people who are trying to hang on to the property. At the Subcommittee meeting, Mr. Robinson spoke about different treatment of counterclaims by courts around the State. Mr. Robinson requested some clarification. Mr. Fisher continued that he was fine with the status quo. A counterpart to Rule 2-602 could be added to Rule 14-305 if the Rules Committee would add a Committee note acknowledging *Kris Jen*.

Mr. Zarbin suggested that the new language should be taken out of Rule 14-305, which pertains to judicial sales, and put it into Rule 14-211, because it pertains to foreclosures. The cross reference can then be eliminated from Rule 14-211. This way, the counterclaim consideration is not after the sale; it is part of the sale. The Chair commented that if clarifying the authority for filing counterclaims is the objective, then Rule 14-211 is the better place for the new language. Rule 14-305 is a Rule of ratification. The question is whether the Court of Appeals will agree with the proposed change. The Court does not like piecemeal appeals, generally, and will not like them in a foreclosure.

Judge Nazarian remarked that he could understand the structure of the revised proposed change, but he did not see what it accomplished. The counterclaim is filed in time to prevent the foreclosure from happening, or it fails, and the sale happens. He was not sure what the proposed amendment to Rule 14-305 does, because the order of the circuit court is to allow the foreclosure.

Mr. Zarbin commented that what usually happens is that the counterclaim has no merit, and the court will issue the order to sell the property. Judge Nazarian responded that if the counterclaim is raised in a timely motion to dismiss, the court will have to address it.

D. Robert Enten, Esq. addressed the Committee on behalf of

the Maryland Bankers Association. He expressed the view that this issue should go back to the Subcommittee for further discussion. Currently, a foreclosure may take up to 505 days. Maryland has the fourth-longest foreclosure procedure in the country, and including a counterclaim procedure could lengthen it. It would be helpful to get input from other foreclosure attorneys besides Mr. Fisher. This issue is not an emergency, and it should be deliberated further. Mr. Robinson said that the Subcommittee had expressed the view that the issue of counterclaims should be addressed promptly. His problem was what to tell the homeowner in a foreclosure proceeding. Homeowners should be able to have an opportunity to dispute the foreclosure proceeding.

The Chair said that it might be a good idea to refer this issue back to the Subcommittee. Judge Ellinghaus-Jones commented that she was looking at the entirety of Title 14. The only defense to a foreclosure is a motion to stay. It is a policy decision as to whether counterclaims in foreclosure proceedings should be allowed. If any change is made, it should be to Rule 14-211. The Chair noted that the issue could go back to the Subcommittee, and more stakeholders could be invited.

Judge Nazarian expressed the opinion that this should not go back to the Subcommittee, since there is no direction as to what would work. The foreclosure procedure can be streamlined under appropriate circumstances. As a judge, Judge Nazarian

said that he would like an appropriate hearing in an appropriate forum. He also stated that he is not convinced that counterclaims are permissible according to the cases cited.

Mr. Robinson noted that the Office of Administrative Hearings ("OAH") will not allow a counterclaim in a foreclosure case. The position of the OAH is that the statute does not allow it. Mr. Sullivan suggested that the Subcommittee could come up with an alternative for permitting counterclaims. If they are not allowed, the Rule should so state.

Mr. Zarbin moved that Rules 14-211 and 14-305 be remanded to the Subcommittee. The motion was seconded and passed by majority vote.

Agenda Item 8. Consideration of a proposed amendment to Rule 14-216 (Proceeds of Sale) and Policy Questions pertaining to section (b) (Deficiency Judgment) of that Rule

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Mr. Dunn presented Rule 14-216 (b), Proceeds of Sale, for the Committee's consideration.

MEMORANDUM

TO	:	Members of the Rules Committee
FROM	:	Members of the Property Subcommittee
DATE	:	August 30, 2016
SUBJECT	:	Policy Questions Pertaining to Rule 14-216 (b), Deficiency Judgment

Two issues have arisen with respect to Rule 14-216 (b), which require guidance by the Rules Committee as to how to address them.

The first issue is that often when a motion for a deficiency judgment is filed after a sale of property following a foreclosure proceeding, the circuit courts are granting the motions before 30 days, which is arguably the time provided for in section (b). There has been some disagreement as to whether the wording of the Rule requires a 30-day waiting period before the motion can be granted.

The second issue is whether notice to the person against whom a deficiency judgment is sought comports with due process. The last known address of the person against whom the deficiency judgment is sought could be the address of the property that was sold, and the person who is being notified is not likely to be living there. Posting notice on the property also may not allow the person to receive notice of the motion for a deficiency judgment.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-216, as follows:

Rule 14-216. PROCEEDS OF SALE

(a) Distribution of surplus

At any time after a sale of property and before final ratification of the auditor's account, any person claiming an

interest in the property or in the proceeds of the sale of the property may file an application for the payment of that person's claim from the surplus proceeds of the sale. The court shall order distribution of the surplus equitably among the claimants.

Alternative 1

(b) Deficiency Judgment

At any time within three years after the final ratification of the auditor's report, a secured party or any appropriate party in interest may file a motion for a deficiency judgment if the proceeds of the sale, after deducting all costs and expenses allowed by the court, are insufficient to satisfy the debt and accrued interest. If the person against whom the judgment is sought is a party to the judicial foreclosure action, a person who was served pursuant to Code, Real Property Article, §7-105.1 (h)(1) or (2), or a person who has appeared in the action, the motion shall be served in accordance with Rule 1-321. Otherwise, the motion shall be served in accordance with Rule 2-121 and shall be accompanied by a notice advising the person that any response to the motion must be filed within 30 days after being served or within any applicable longer time prescribed by Rule 2-321 (b) for answering a complaint. A copy of Rule 2-321 (b) shall be attached to the notice.

Alternative 2

(b) Deficiency Judgment

At any time within three years after the final ratification of the auditor's report, a secured party or any appropriate party in interest may file a motion for a deficiency judgment if the proceeds of the sale, after deducting all costs and expenses allowed by the court, are insufficient to satisfy the debt and accrued interest. ~~If the person against whom the judgment is sought is a party to the action, the motion~~

~~shall be served in accordance with Rule 1-321. Otherwise, the~~ The motion shall be served in accordance with Rule 2-121. ~~and~~ It shall be accompanied by a notice advising the person that any response to the motion must be filed within 30 days after being served or within any applicable longer time prescribed by Rule 2-321 (b) for answering a complaint. A copy of Rule 2-321 (b) shall be attached to the notice.

Source: This Rule is derived in part from the 2008 version of former Rule 14-208 and is in part new.

Mr. Dunn told the Committee that in Rule 14-216 (b), the time for filing a response to a motion for a deficiency judgment is 30 days after service of the motion. However, some circuit courts are granting motions before the 30-day period is up. The Property Subcommittee drafted two alternatives for amending Rule 4-216 (b). The Chair noted that the Rule provides for a response to a motion to be made within 30 days. How can the court rule on the motion before the response is due? Mr. Weaver said that he does not read the Rule that way. The 30-day period is applicable when the filer is not a party. If the filer is a party, the motion shall be served in accordance with Rule 1-321. It is treated as any other motion with a response time of 15 to 18 days.

The Chair commented that Alternative 1 of the proposed change to Rule 14-216 (b) refers to a party who was served. Mr. Weaver noted that the third sentence of Alternative 1 starts

with the word "otherwise," indicating that it refers to filers who are not parties. The response time for these people is not necessarily 30 days. Mr. Laws remarked that the language of Alternative 2 is streamlined. It removes the confusion and gives everyone 30 days to respond. A motion for a deficiency judgment is tacked onto an *in rem* proceeding. The borrowers may have moved. There are two problems with Rule 14-216 (b): first, the circuit court is jumping the gun and filing the judgment for deficiency before the borrower can be notified; and second, there is a lack of notice, because the borrowers may no longer be living in the house that is being foreclosed. Mr. Dunn pointed out that Alternative 2 addresses both problems. The Chair added that Alternative 2 gives everyone a minimum of 30 days to respond.

Mr. Laws moved to approve Alternative 2 of the proposed changes to Rule 14-216 (b). The motion was seconded and passed by majority vote.

By consensus, the Committee approved Rule 14-216 (b) with the language in Alternative 2.

Agenda Item 9. Consideration of a Policy Question Pertaining to a Declaration of Nonmonetary Status Procedure

Mr. Dunn presented a policy question regarding a procedure for the declaration of non-monetary status.

MEMORANDUM

TO : Members of the Rules Committee

FROM : Members of the Property Subcommittee

DATE : August 25, 2016

SUBJECT : Policy Question – Declaration of Nonmonetary Status Procedure

Should a procedure that is similar to the Declaration of Nonmonetary Status procedure in California be implemented in Maryland as a rule? This procedure applies when there is a default on a mortgage. A trustee who was named in the deed of trust and is a third party who would conduct the non-judicial foreclosure trustee sale, but is not alleged to have committed any wrongful acts is allowed to file the declaration to avoid participation in the lawsuit, liability for damages, and attorneys' fees.

Mr. Dunn explained that California has a statute that provides a procedure for a declaration of non-monetary status. This procedure applies when a trustee under a deed of trust is named in an action or proceeding in which the deed of trust is the subject, and the trustee has not committed any wrongdoing. The trustee may file a declaration of non-monetary status, which, if accepted, means that the trustee no longer will be required for anything further in the action or proceeding and will not be subject to any monetary awards. The Chair asked how many cases exist currently in which an allegation of wrongdoing is not made. Mr. Fisher responded that trustees are brought

into many lawsuits involving tax sales, etc. Some are accused of wrongdoing. He said that he and his colleagues would like to see a Rule similar to California's in Maryland.

The Chair inquired if the policy question is whether there should be a Rule on this. Mr. Dunn replied affirmatively. Mr. Robinson commented that often in circuit court cases, the trustees do not get involved. *Pro se* parties sue trustees all the time, and this can show up in a credit report.

The Chair said that this issue will be discussed by the Property Subcommittee.

Agenda Item 10. Consideration of proposed amendments to Rule 16-806 (Judicial Personnel System)

The Chair explained that there are two Rules to be discussed in Agenda Item 10. The Court of Appeals would like the Rules on a fast track.

The Chair presented Rule 16-806, Judicial Personnel System, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 – COURT ADMINISTRATION

CHAPTER 800 -- MISCELLANEOUS COURT ADMINISTRATION MATTERS

Rule 16-806. JUDICIAL PERSONNEL ~~SYSTEM~~ POLICIES AND PROCEDURES

(a) ~~Development by~~ Duty of State Court Administrator

(1) Generally

The State Court Administrator shall develop ~~one or more comprehensive~~ personnel ~~plans for all~~ policies and procedures applicable to employees ~~of the Judiciary~~ in the Judicial Branch of the State Government, other than judges~~. The plans may vary, as necessary, for different categories of Judiciary employees, but all individuals hired by or subject to supervision and discipline by a court, a judge, or other judicial unit shall be included in a plan,~~ and employees of the Orphans' Courts and the Registers of Wills, without regard to the source of the funding of their compensation.

~~(b)~~ (2) Content

~~(1)~~ (A) For all ~~Judiciary~~ such employees, ~~regardless of whether they are at-will employees, the plans shall include policies regarding:~~

~~(A) nepotism – the employment of relatives;~~

~~(B) whistleblower protection;~~

~~(C) rights under the Americans with Disabilities Act;~~

~~(D) rights under civil rights and anti-discrimination laws;~~

~~(E) disciplinary actions;~~

~~(F) grievances, including fair notice of how to present grievances;~~

~~(G) other employment;~~

~~(H) standards of conduct; and~~

~~(I) substance abuse.~~

~~(2) For employees who are not at-will employees, the plans shall contain clear and specific standards and procedures for selection, promotion, classification, transfer, demotion, and other discipline of employees and shall require authorization~~

~~from the State Court Administrator, or the Administrator's designee, to fill a vacancy. The State Court Administrator may review the selection, promotion, transfer, demotion, or other discipline of such employees to ensure compliance with the standards and procedures in the personnel plan.~~ the policies and procedures shall address the rights and responsibilities of employees and management in implementing applicable Federal and Maryland equal opportunity, anti-discrimination, anti-harassment, anti-retaliation, and anti-nepotism laws and provide for the reporting and redressing of violations.

(B) For employees who by statute or Rule are included in a State personnel system or are employed by Judicial units that are required by Rule to comply with personnel standards and guidelines promulgated by the State Court Administrator, the policies and procedures shall address such other matters as are commonly included in such personnel systems and that the State Court Administrator deems appropriate.

Cross reference: See Rules 16-401 and 16-801.

(b) Duty of County Administrative Judges

The county administrative judge shall develop personnel policies and procedures for employees of the circuit court which shall be consistent with the policies and procedures developed by the State Court Administrator under subsection (a)(2)(A).

(c) Approval by Chief Judge of the Court of Appeals

The State Court Administrator or the county administrative judge who developed the policies and procedures required by this Rule shall submit ~~the plans~~ them for consideration by the Chief Judge of the Court of Appeals. The ~~plans~~ policies and procedures shall take effect upon approval ~~and~~ as directed by the Chief Judge.

Source: This Rule is new.

The Chair said that Rule 16-806 has been a source of discussion for several years. There are five categories of judicial personnel: (1) employees in the Administrative Office of the Courts; (2) District Court employees; (3) circuit court clerks; (4) employees in agencies, such as the Board of Law Examiners, Judicial Disabilities Commission, Attorney Grievance Commission, and Client Protection Fund; and (5) employees of the circuit courts who serve at the pleasure of a judge or an administrative judge, including judges' secretaries, law clerks, magistrates, jury commissioners, and others who may be paid by the county but are essentially at-will employees who serve at the pleasure of a judge or the court.

The Chair explained that personnel plans are in place that apply to all judicial personnel, except for the last category. The plans cover hiring, promotion, discipline, grievance procedure, classification, etc. The problem with the last category is that circuit court employees are at-will. Other than Frederick County, which has its own plan, the rest of the State has no personnel plan for employees of the circuit court. Some administrative judges have their own policies. The employees serve at the pleasure of the judges and have no rights, except that the supervening federal and State Equal

Employment Opportunity ("EEOC") laws, anti-harassment laws, anti-discrimination laws, and anti-nepotism laws do apply.

The Chair noted that there is not much guidance on EEOC claims. The employees need to have some notice as to what their rights are and what they can do if there is a violation. Ultimately, the State Court Administrator will develop policies on supervening protective laws, which would apply to all employees, including otherwise at-will circuit court employees. The policies will be presented to the Court of Appeals for approval. They will be part of the broader personnel policies that cover circuit court employees. For the circuit court employees, the County Administrative Judge can develop whatever policies he or she wants that go beyond those developed by the State Court Administrator, as long as they are not inconsistent with the Court of Appeals policies.

Judge Davey commented that the County Administrative Judge for his county had asked him to appear before the Conference of Circuit Judges to discuss the split system in the circuit courts. Some employees are paid by the State, and some by the individual counties, especially in the seven largest counties. There are county personnel rules and procedures, as well as grievance procedures. He said that the Administrative Judges would like to look at Rule 16-806 and have the opportunity to comment.

Michele McDonald addressed the Committee. Ms. McDonald

said that she is Chief Counsel for Courts and Judicial Affairs in the Attorney General's Office. She said that the Hon. Sheila R. Tillerson Adams, of the Circuit Court in Prince George's County, had asked the Hon. John W. Debelius, III, Chair of the Conference of Circuit Judges, about Rule 16-806, and he had no objection to the Rule. Prince George's County employees are not subject to any of the county rules and procedures governing personnel actions; they serve at the pleasure of the judges. A major issue is that the only requirement across the board is for there to be policies for the various federal and State laws that apply, such as equal employment and anti-discrimination, harassment, and nepotism laws. These are standard policies with the judicial branch, but the circuit courts could have slightly different procedures. Judge Adams and Judge Debelius know about this, and Judge Debelius has addressed this.

Judge Davey said that Judge Adams had asked him to bring up this issue. The Chair noted that this is a matter of judicial administration that the Court of Appeals would like to have resolved quickly. The Chair said that he told the Hon. Mary Ellen Barbera, Chief Judge of the Court of Appeals, that this Rule would be in the next Report to the Court. This does not preclude the Conference of Circuit Judges or anyone else from commenting on the proposal. The Rule will be posted on the Judiciary website with a 30-day comment period. The Court of Appeals will hold an open hearing, and any judges who would like

changes will have an opportunity to ask for them. The Chair asked the Committee if there were any suggested changes.

Ms. McBride moved to approve Rule 16-806. The motion was seconded and passed by majority vote.

The Chair presented a "hand-out" version of Rule 16-105, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURT ADMINISTRATION

CHAPTER 100 – ADMINISTRATIVE STRUCTURE

AMEND Rule 16-105 by adding a cross reference following subsection (b)(10) and by replacing the word "plan" with the phrase "policies and procedures" in section (c), as follows:

Rule 16-105. CIRCUIT COURT - COUNTY ADMINISTRATIVE JUDGE

(a) Designation

After considering the recommendation of the Circuit Administrative Judge, the Chief Judge of the Court of Appeals shall designate a County Administrative Judge for each circuit court, to serve in that capacity at the pleasure of the Chief Judge. Except as permitted by Rule 16-104 (b)(1), the County Administrative Judge shall be a judge of that circuit court.

(b) Duties

Subject to the provisions of this Chapter, other applicable law, the general supervision of the Chief Judge of the Court of Appeals, and the general supervision of the Circuit Administrative Judge, the County

Administrative Judge is responsible for the administration of the circuit court, including:

(1) supervision of the judges, officials, and employees of the court;

(2) assignment of judges within the court pursuant to Rule 16-302 (Assignment of Actions for Trial; Case Management Plan);

(3) supervision and expeditious disposition of cases filed in the court, control over the trial and other calendars of the court, assignment of cases for trial and hearing pursuant to Rule 16-302 (Assignment of Actions for Trial; Case Management Plan) and Rule 16-304 (Chambers Judge), and scheduling of court sessions;

(4) preparation of the court's budget;

(5) preparation of a case management plan for the court pursuant to Rule 16-302;

(6) preparation of a continuity of operations plan for the court pursuant to Rule 16-803;

(7) preparation of a jury plan for the court pursuant to Code, Courts Article, Title 8, Subtitle 2 and implementation of that plan;

Cross reference: See Rule 16-402 (e).

(8) preparation of any plan to create a problem-solving court program for the court pursuant to Rule 16-207;

(9) ordering the purchase of all equipment and supplies for (A) the court, and (B) the ancillary services and officials of the court, including magistrates, auditors, examiners, court administrators, court reporters, jury commissioner, staff of the medical offices, and all other court personnel except personnel comprising the Clerk of Court's office;

(10) except as otherwise provided in section (c) of this Rule, supervision of and responsibility for the employment, discharge, and classification of court

personnel and personnel of its ancillary services and the maintenance of personnel files, unless a majority of the judges of the court disapproves of a specific action;

Cross reference: See Rule 16-806 (Judicial Personnel Policies and Procedures).

Committee note: Article IV, §9, of the Maryland Constitution gives the judges of any court the power to appoint officers and, thus, requires joint exercise of the personnel power.

(11) implementation and enforcement of all administrative policies, rules, orders, and directives of the Court of Appeals, the Chief Judge of the Court of Appeals, the State Court Administrator, and the Circuit Administrative Judge of the judicial circuit; and

(12) performance of any other administrative duties necessary to the effective administration of the internal management of the court and the prompt disposition of litigation in it.

Cross reference: See *St. Joseph Medical Center v. Turnbull*, 432 Md. 259 (2013) for authority of the county administrative judge to assign and reassign cases but not to countermand judicial decisions made by a judge to whom a case has been assigned.

(c) Circuit Judge's Personal Secretary and Law Clerk

Subsection (b)(10) of this Rule does not apply to a personal secretary or law clerk of a circuit court judge. Each judge has the exclusive right, subject to budget limitations, any applicable administrative order, and any applicable personnel ~~plan~~ policies and procedures, to employ and discharge the judge's personal secretary and law clerk.

(d) Delegation of Authority

(1) A County Administrative Judge may delegate one or more of the administrative duties and functions imposed by this Rule to

(A) another judge or a committee of judges of the court, including by designation of another judge of the court to serve as acting County Administrative Judge during a temporary absence of the County Administrative Judge, or (B) one or more other officials or employees of the court.

(2) Except as provided in subsection (d)(3) of this Rule, in the implementation of Code, Criminal Procedure Article, §6-103 and Rule 4-271 (a), a County Administrative Judge may (A) with the approval of the Chief Judge of the Court of Appeals, authorize one or more judges to postpone criminal cases on appeal from the District Court or transferred from the District Court because of a demand for jury trial, and (B) authorize not more than one judge at a time to postpone all other criminal cases.

(3) The administrative judge of the Circuit Court for Baltimore City may authorize one judge sitting in the Clarence M. Mitchell courthouse to postpone criminal cases set for trial in that courthouse and one judge sitting in Courthouse East to postpone criminal cases set for trial in that courthouse.

Source: This Rule is derived from former Rule 16-101 d (2016).

The Chair explained that the proposed amendments to Rule 16-105 are conforming ones to add reference to Rule 16-801 and the "policies and procedures" that will be developed. Rule 16-105 was approved by consensus.

The Chair said that there is an additional agenda item involving an amendment to the judicial leave Rule.

The Chair presented Rule 18-601, Judicial Leave, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 18 – JUDGES AND JUDICIAL APPOINTEES

CHAPTER 600 – MISCELLANEOUS PROVISIONS

Rule 18-601. JUDICIAL LEAVE

(a) ~~Definition of "Judge"~~ Scope of Rule; Definitions

~~In this~~ This Rule, ~~"judge" means a judge~~ applies to judges of the Court of Appeals ~~of Maryland~~, the Court of Special Appeals, a circuit court ~~or~~, and the District Court ~~of Maryland~~. In this Rule, (1) "qualifies" or "qualified" means when a judge, having received a commission, timely takes the oath of office and signs the appropriate test book; and (2) "Policy on Judicial Absences" means the policy on judicial absences approved in accordance with section (b) of this Rule.

(b) Policy on Judicial Absences

The State Court Administrator shall develop and submit to the Court of Appeals for its consideration and approval a Policy on Judicial Absences. Upon approval by the Court, the Policy shall be implemented.

~~(b)~~ (c) Annual Leave

(1) ~~In General~~ Generally

Subject to ~~the provisions of subsection (b)(2) and section (f)~~ sections (g) and (h) of this Rule, a judge is entitled to annual leave of not more than 27 working days. The leave accrues as of the first day of the calendar year, except that:

~~(1)~~ (A) during the first year of a judge's initial term of office, annual leave accrues at the rate of 2.25 days per month accounting from the date the judge qualifies for office, and

~~(2)~~ (B) during the calendar year in which the judge retires, annual leave accrues at the rate of 2.25 days per month to the date the judge retires.

~~(2) Calendar Year 2010~~

~~(A) Subject to the provisions of subsection (b)(2)(B) and section (f) of this Rule, in calendar year 2010 a judge is entitled to annual leave of not more than 17 working days. The leave accrues as of the first day of the calendar year except that (1) during the first year of a judge's initial term of office, annual leave accrues at the rate of 1.42 days per month accounting from the date the judge qualifies for office, and (2) during calendar year 2010, if the judge retires in that year, annual leave accrues at the rate of 1.42 days per month to the date the judge retires.~~

~~(B) For each day, up to ten days, that a judge contributes to the State of Maryland an amount equal to the average daily compensation, after federal and state tax and FICA withholdings, of a judge serving on the court or level of court on which the judge serves, based on a 22-day work month, as calculated by the State Court Administrator, the judge shall be entitled to one additional day of annual leave. The judge shall make the contribution prior to taking the additional day of annual leave in the manner determined by the State Court Administrator.~~

~~(3)~~ (2) Accumulation

~~If in any year a judge takes less than the full amount of annual leave the judge has accrued in that year, the judge may accumulate within any consecutive three year period, the difference between the leave accrued and the annual leave actually taken by the judge in any year during the period. However, no~~ A judge may accumulate and carry over not more than ten working days of unused annual leave ~~may be accumulated~~ in any one calendar year~~,~~ and ~~no~~

~~judge may accumulate~~ not more than 20 working days of unused annual leave in the aggregate.

~~(c)~~ (d) Personal Leave

(1) ~~In General~~ Generally

In addition to the annual leave ~~as~~ provided ~~above and except as otherwise provided in subsection (2) of this section~~ in section (b) of this Rule, a judge is entitled to six days of personal leave in each calendar year ~~and~~. Personal leave accrues on the first day of each calendar year. Any personal leave unused at the end of the calendar year is forfeited.

(2) First Calendar Year of Initial Term

During the first calendar year of a judge's initial term ~~of office~~, the judge is entitled to:

(A) six days of personal leave if the judge qualified for office in January or February;

(B) five days of personal leave if the judge qualified for office in March or April;

(C) four days of personal leave if the judge qualified for office in May or June; or

(D) three days of personal leave if the judge qualified for office on or after July 1;

(E) two days of personal leave if the judge qualified for office in September or October; or

(F) one day of personal leave if the judge qualified for office in November or December.

~~(d)~~ (e) Sick Leave

(1) Generally

In addition to the annual leave and personal leave as provided for in this Rule, a judge:

~~(1)~~ (A) subject to verification in accordance with the Policy on Judicial Absences, is entitled to unlimited sick leave for any period of the judge's illness or temporary disability that precludes the judge from performing judicial duties; and

~~(2)~~ (B) may take a reasonable amount of sick leave ~~(A)~~ (i) for the judge's medical appointments; ~~(B)~~ (ii) due to the illness or disability of family members; or ~~(C)~~ (iii) ~~due to~~ upon the birth of the judge's child, adoption of a child by the judge, or the foster care placement of a child with the judge, all subject to the ~~definitions,~~ procedures, conditions, and limitations~~, and procedures~~ in ~~an Administrative Order issued by the Chief Judge of the Court of Appeals~~ the Policy on Judicial Absences.

(2) Limitation

Sick leave used for the purposes allowed by subsection ~~(2) of this section~~ (e)(1)(B) of this Rule, together with annual leave and personal leave taken for ~~these~~ purposes~~,~~ of subsection (e)(1)(B) of this Rule may not exceed an aggregate total of 12 weeks for the calendar year. ~~The Chief Judge of the Court of Appeals shall issue an Administrative Order implementing this section. The Order shall be posted on the Judiciary's website and otherwise made publicly available.~~

Committee note: The authority of the Commission on Judicial Disabilities with respect to a disability as defined in Rule 18-401 (h) is not affected by this Rule.

~~(4)~~ (f) Consecutive Appointment

A judge who is appointed or elected as a judge of another Maryland court and whose term on the second court begins immediately following service on the first court has the same leave status as though the judge had remained on the first court.

~~(c)~~ (g) Termination of Judicial Service

A judge whose judicial service is terminated for any reason~~,~~ and who is not appointed or elected ~~or appointed~~ to another Maryland court without a break in service, loses any annual or personal leave unused as of the date of termination of service.

~~(f)~~ (h) ~~Discretion of Chief Judge or Administrative Judge~~ When Annual or Personal Leave May be Taken; Exercise of Discretion

(1) Generally

A judge's annual leave and personal leave shall be taken at the time or times prescribed or permitted:

(A) if the judge is a judge of an appellate court, by the chief judge of ~~the judge's appellate~~ that court;

(B) if the judge is a judge of ~~an appellate~~ a circuit court, by the Circuit Administrative Judge ~~of the judge's judicial circuit,~~; or

(C) if the judge is a judge of ~~a circuit court; or the Chief Judge of~~ the District Court, ~~if the judge is a judge of that court~~ by the Chief Judge of that court.

(2) Exercise of Discretion

In determining when a judge may take annual leave and for what period of time, the judge exercising ~~supervisory~~ administrative authority under this Rule shall be mindful of the necessity of retention of sufficient judicial staffing in the court or courts under the judge's ~~supervisory~~ administrative authority to permit at all times the prompt and effective disposition of the business of that court or those courts. ~~A~~ Subject to subsection (h)(3) of this Rule, a request for leave at a certain time or for a certain period of time may be rejected by the judge exercising ~~supervision under this Rule~~ administrative authority if the granting of the requested leave would prevent the prompt and effective disposition of business of that court or those courts~~, except that personal leave~~

~~requested for observance of a religious holiday may not be denied~~.

(3) Limitation on Discretion

Where a sufficient leave balance exists, annual or personal leave requested for observance of a religious holiday may not be denied.

Cross reference: See 100 Op. Att'y Gen. 136 (2015).

(i) Other Excused Absences

A judge's entitlement to any other excused absence, including administrative leave, shall be as prescribed in the Policy on Judicial Absences and shall be subject to the procedures, conditions, and limitations set forth in that document.

(j) Reports to State Court Administrator

Each judge shall report to the State Court Administrator in the manner and form and at the times specified by the State Court Administrator the leave taken by the judge.

~~(g)~~ (k) Supervision by Chief Judge of the Court of Appeals

The operation of this Rule is at all times subject to the supervision and control of the Chief Judge of the Court of Appeals.

Source: This Rule is derived from former Rule 16-104 (2016).

The Chair told the Committee that Rule 18-601 had been discussed for months. The Committee had approved a revision of the current Rule, which is out-of-date. The revision was submitted to the Court in 2013 in Part II of the 178th Report. At Chief Judge Barbera's request, the Rule was revised again, approved by the Committee last March, and included in the

Supplement to Part II. The Court did not act on it. A number of additional modifications have been made to the Rule since then. Also, an Attorney General opinion has been issued about judicial leave: 100 Op. Atty. Gen. 136 (2015).

The Chair said that other than orphans' court judges, State judges have six categories of leave: 27 days of annual leave; 6 days of personal leave; 11 State holidays (12 in election years); unlimited sick leave for their own illnesses and additional leave due to the illness or disability of family members, which together with the annual leave and the personal leave cannot exceed 12 weeks; and various forms of administrative leave. The proposed amendments do not change those details.

The Chair added that some controls exist over the types of leave. Administrative Judges can control when judges may take personal and annual leave to ensure that not too many judges are out at the same time. There are some controls over sick leave and administrative leave that are currently provided for in an Administrative Order of the Chief Judge dated January 21, 2010. The one major change proposed in the Rule is that the State Court Administrator, subject to approval by the Court of Appeals, will develop a policy on judicial absences to replace the Administrative Order.

Mr. Weaver pointed out that in subsection (d)(2)(C), the word "or" should be deleted, and in subsection (d)(2)(D), the

words "on or after July 1" should be deleted. By consensus, the Committee approved these changes.

Mr. Weaver said that he read subsection (e)(2) to mean that there is a limit of 12 weeks for a combination of parental and medical leave. He asked if that was what was meant. Subsection (e)(2) refers to subsection (e)(1)(B), which pertains to medical appointments. He questioned whether this should be a reference to subsection (e)(1)(B)(ii). The Chair was not sure. Faye D. Matthews, Deputy State Court Administrator, observed that sick leave is combined with family leave. The Chair added that the judge's own medical leave is not limited to 12 weeks. Mr. Weaver said that it seemed illogical to combine medical appointments with family leave. Ms. McDonald explained that family leave is not technically required, and it is counted in the aggregate with medical leave.

Ms. McBride moved to approve the proposed changes to Rule 18-601. The motion was seconded and passed by majority vote.

Agenda Item 2. Consideration of a proposed amendment to Rule 4-242 (Pleas)

Mr. Marcus presented Rule 4-242, Pleas, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 200 – PRETRIAL PROCEDURES

AMEND Rule 4-242 by adding to section (f) a reference to a plea of not guilty on an agreed statement of facts or on stipulated evidence, by deleting an obsolete sentence from the Committee note following section (f), by adding a cross reference after section (f), and by making stylistic changes, as follows:

Rule 4-242. PLEAS

(a) Permitted Pleas

A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. In addition to any of these pleas, the defendant may enter a plea of not criminally responsible by reason of insanity.

Committee note: It has become common in some courts for defendants to enter a plea of not guilty but, in lieu of a normal trial, to proceed either on an agreed statement of ultimate fact to be read into the record or on a statement of proffered evidence to which the defendant stipulates, the purpose being to avoid the need for the formal presentation of evidence but to allow the defendant to argue the sufficiency of the agreed facts or evidence and to appeal from a judgment of conviction. That kind of procedure is permissible only if there is no material dispute in the statement of facts or evidence. *See Bishop v. State*, 417 Md. 1 (2010); *Harrison v. State*, 382 Md. 477 (2004); *Morris v. State*, 418 Md. 194 (2011). Parties to a criminal action in a circuit court who seek to avoid a formal trial but to allow the defendant to appeal from specific adverse rulings are encouraged to proceed by way of a conditional plea of

guilty pursuant to section (d) of this Rule, to the extent that section is applicable.

(b) Method of Pleading

(1) Manner

A defendant may plead not guilty personally or by counsel on the record in open court or in writing. A defendant may plead guilty or nolo contendere personally on the record in open court, except that a corporate defendant may plead guilty or nolo contendere by counsel or a corporate officer. A defendant may enter a plea of not criminally responsible by reason of insanity personally or by counsel and the plea shall be in writing.

(2) Time in the District Court

In District Court the defendant shall initially plead at or before the time the action is called for trial.

(3) Time in Circuit Court

In circuit court the defendant shall initially plead within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213 (c). If a motion, demand for particulars, or other paper is filed that requires a ruling by the court or compliance by a party before the defendant pleads, the time for pleading shall be extended, without special order, to 15 days after the ruling by the court or the compliance by a party. A plea of not criminally responsible by reason of insanity shall be entered at the time the defendant initially pleads, unless good cause is shown.

(4) Failure or Refusal to Plead

If the defendant fails or refuses to plead as required by this section, the clerk or the court shall enter a plea of not guilty.

Cross reference: See *Treece v. State*, 313 Md. 665 (1988), concerning the right of a

defendant to decide whether to interpose the defense of insanity.

(c) Plea of Guilty

The court may not accept a plea of guilty, including a conditional plea of guilty, until 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, the court determines and announces on the record that (1) the defendant is pleading voluntarily, with understanding of the nature of the charge and the consequences of the plea; and (2) there is a factual basis for the plea. In addition, before accepting the plea, the court shall comply with section (f) of this Rule. The court may accept the plea of guilty even though the defendant does not admit guilt. Upon refusal to accept a plea of guilty, the court shall enter a plea of not guilty.

(d) Conditional Plea of Guilty

(1) Scope of Section

This section applies only to an offense charged by indictment or criminal information and set for trial in a circuit court or that is scheduled for trial in a circuit court pursuant to a prayer for jury trial entered in the District Court.

Committee note: Section (d) of this Rule does not apply to appeals from the District Court.

(2) Entry of Plea; Requirements

With the consent of the court and the State, a defendant may enter a conditional plea of guilty. The plea shall be in writing and, as part of it, the defendant may reserve the right to appeal one or more issues specified in the plea that (A) were raised by and determined adversely to the defendant, and, (B) if determined in the defendant's favor would have been dispositive of the case. The

right to appeal under this subsection is limited to those pretrial issues litigated in the circuit court and set forth in writing in the plea.

Committee note: This Rule does not affect any right to file an application for leave to appeal under Code, Courts Article, §12-302 (e)(2).

(3) Withdrawal of Plea

A defendant who prevails on appeal with respect to an issue reserved in the plea may withdraw the plea.

Cross reference: Code, Courts Article, §12-302.

(e) Plea of Nolo Contendere

A defendant may plead nolo contendere only with the consent of court. The court may require the defendant or counsel to provide information it deems necessary to enable it to determine whether or not it will consent. The court may not accept the plea until 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, the court determines and announces on the record that the defendant is pleading voluntarily with understanding of the nature of the charge and the consequences of the plea. In addition, before accepting the plea, the court shall comply with section (f) of this Rule. Following the acceptance of a plea of nolo contendere, the court shall proceed to disposition as on a plea of guilty, but without finding a verdict of guilty. If the court refuses to accept a plea of nolo contendere, it shall call upon the defendant to plead anew.

(f) Collateral Consequences of a Plea of Not Guilty on an Agreed Statement of Facts or on Stipulated Evidence, Plea of Guilty, Conditional Plea of Guilty, or Plea of Nolo Contendere

Before the court accepts a plea of not guilty on an agreed statement of facts or on stipulated evidence, a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship, (2) that by entering a plea to the offenses set out in Code, Criminal Procedure Article, §11-701, the defendant ~~shall~~ will have to register with the defendant's supervising authority as defined in Code, Criminal Procedure Article, §11-701 (p), and (3) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea. The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

Committee note: In determining whether to accept the plea, the court should not question defendants about their citizenship or immigration status. Rather, the court should ensure that all defendants are advised in accordance with this section. ~~This Rule does not overrule *Yoswick v. State*, 347 Md. 228 (1997) and *Daley v. State*, 61 Md. App. 486 (1985)~~.

Cross reference: For the obligation of the defendant's attorney to correctly advise the defendant about the potential immigration consequences of a plea, see *Padilla v. Kentucky*, 559 U.S. 356 (2010) and *State v. Prado*, Md. (2016).

(g) Plea to a Degree

A defendant may plead not guilty to one degree and plead guilty to another degree of an offense which, by law, may be divided into degrees.

(h) Withdrawal of Plea

At any time before sentencing, the court may permit a defendant to withdraw a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere when the withdrawal serves the interest of justice. After the imposition of sentence, on motion of a defendant filed within ten days, the court may set aside the judgment and permit the defendant to withdraw a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere if the defendant establishes that the provisions of section (c) or (e) of this Rule were not complied with or there was a violation of a plea agreement entered into pursuant to Rule 4-243. The court shall hold a hearing on any timely motion to withdraw a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere.

Committee note: The entry of a plea may waive technical defects in the charging document and waives objections to venue. See, e.g., Rule 4-202 (b) and *Kisner v. State*, 209 Md. 524, 122 A.2d 102 (1956).

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 731 a and M.D.R. 731 a.
Section (b)
Subsection (1) is derived from former Rule 731 b 1 and M.D.R. 731 b 1.
Subsection (2) is new.
Subsection (3) is derived from former Rule 731 b 2.
Subsection (4) is derived from former Rule 731 b 3 and M.D.R. 731 b 2.
Section (c) is derived from former Rule 731 c and M.D.R. 731 c.
Section (d) is new.
Section (d) is new.
Section (e) is derived from former Rule 731 d and M.D.R. 731 d.
Section (f) is new.
Section (g) is derived from former Rule 731 e.
Section (h) is derived from former Rule 731 f and M.D.R. 731 e.

Rule 4-242 was accompanied by the following Reporter's note.

> In light of *State v. Prado*, ___ Md. ___ (No. 100, Sept. Term, 2015, filed July 11, 2016) and *Padilla v. Kentucky*, 559 U.S. 356 (2010), Rule 4-242 is proposed to be amended by requiring compliance with section (f) of the Rule before the court accepts a plea of not guilty on an agreed statement of facts or on stipulated evidence. A cross reference citing *Padilla* and *Prado* is added, and an obsolete sentence in the Committee note after section (f) is deleted. Other changes are stylistic, only.

Mr. Marcus told the Committee that Rule 4-242 identifies the types of pleas that the court can accept. Under this Rule, there are two variations on a theme: trials on stipulated evidence and agreed statements of fact. In Southern Maryland, trials in the District Court were conducted in such a way that the defendant did not plead guilty, but instead, there was a bench trial with the defense attorney and the prosecutor. The prosecutor read into the record an agreed statement of facts. There was a perfunctory motion for judgment of acquittal by defense counsel, but it was the functional equivalent of a guilty plea.

Mr. Marcus said that as time went on, it became clear that the process was favorable in many respects to the defendant, because the defendant was not forced to make a judicial admission, since no guilty plea had been entered. However, the defendant would be subject to the punitive powers of the court.

The process seemed to work fairly well with one exception, which was that if the trials that were being held on agreed statements of facts or on stipulated evidence were in fact the functional equivalent of a guilty plea, then it was incumbent upon the court to advise the defendant of all the rights that could be surrendered in having this agreed statement of facts.

Mr. Marcus said that Prince George's County had a requirement that a judge who was presiding over a trial that was to be conducted on an agreed statement of facts or on stipulated evidence would have to advise the defendant of all of the rights that would be available to him or her if the matter had proceeded to go to trial. This would include the right to call witnesses, the right to be precluded from self-incrimination, etc. As part of the litany that trial judges use today by asking questions themselves or by delegating the responsibility to defense counsel, the court is required to make a finding that the defendant has knowingly, intelligently, and voluntarily agreed to participate in a trial on an agreed statement of facts, with full knowledge and acquiescence of the fact that the defendant would not be afforded the rights that would customarily be given in a full trial.

Mr. Marcus remarked that the issue currently is that, regarding those rights, there is an advisement to a defendant of a potential for immigration consequences. A conviction and, in some instances, a probation before judgment, may well have

implications for immigration status. The Court of Appeals held recently that a defendant who proceeds to a trial on an agreed statement of facts or on stipulated evidence must be made aware, as part of the litany that goes on before the case is called and evidence presented, of the potential for immigration consequences. Although the Committee note after section (f) of Rule 4-242 does not refer to it, it is worthwhile to mention that the advice on immigration consequences today is almost illusory because of the uncertain immigration policy in the United States.

Mr. Marcus commented that because of the lack of clarity on immigration policy, the Court of Appeals has said that the judge or the person who conducts the inquiry must make the defendant aware that there are various potential immigration consequences if the person is not a U.S. citizen. Other jurisdictions have a similar requirement, such as New Mexico where the level of information that is given to the defendant in *voir dire* has to be of a far more certain nature as to what kind of consequences there may be.

Mr. Marcus noted that the Court of Appeals decision in *State v. Sanmartin Prado*, 448 Md. 664 (2016) held that where it is absolutely clear that there will be immigration consequences, such as in a murder or rape case, it is not necessary to specify exactly the probability or certainty of what the immigration consequences may be, but only that they are a possibility. A

cross reference to *Sanmartin Prado* and to *Padilla v. Kentucky*, 559 U.S. 356 (2010) is suggested for addition after section (f) of Rule 4-242. Most judges currently tell noncitizens that there may be immigration consequences. A defendant who has not been made aware that a conviction or a finding may have implications for his or her immigration status has not been fully advised of his or her rights.

By consensus, the Committee approved Rule 4-242 as presented.

The Reporter said that after the lunch break, Agenda Items 3 and 4 would be discussed. Agenda Item 11, the reconsideration of Rule 1-204, would be deferred until the October meeting.

Agenda Item 4. Consideration of proposed amendments to: Rule 6-122 (Petitions), Rule 6-416 (Attorney's Fees or Personal Representative's Commissions), Rule 6-125 (Service), Rule 6-210 (Notice to Interested Persons), Rule 6-302 (Proceedings for Judicial Probate), Rule 6-317 (Notice to Interested Persons), Rule 6-431 (Caveat), Rule 6-432 (Order to Answer, Register's Notice and Service), and Rule 6-452 (Removal of a Personal Representative)

Mr. Laws presented Rule 6-122, Petitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 – SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 100 – GENERAL PROVISIONS

AMEND Rule 6-122 by adding language to the forms in sections (c) and (d) and by

making stylistic changes, as follows:

Rule 6-122. PETITIONS

. . .

(c) Limited Order to Locate Assets

Upon the filing of a verified petition pursuant to Rule 6-122 (a), the ~~orphans'~~ Orphans' Court may issue a limited order to search for assets titled in the sole name of a decedent. The petition shall contain the name, address, and date of death of the decedent and a statement as to why the limited order is necessary. The limited order to locate assets shall be in the following form:

IN THE ORPHANS' COURT FOR

(OR) _____, MARYLAND

BEFORE THE REGISTER OF WILLS FOR

IN THE ESTATE OF:

_____ LIMITED ORDER NO. _____

LIMITED ORDER TO LOCATE ASSETS

Upon the foregoing petition by a person interested in the proceedings and pursuant to Rule 6-122 (c), it is this _____ day of _____, _____ by the Orphans' Court for _____ (county), Maryland, ORDERED that:

1. The following institutions shall disclose to

_____

_____ the assets, and the values
(Name of petitioner)

thereof, titled in the sole name of the above decedent:

_____	_____
(Name of financial institution)	(Name of financial institution)
_____	_____
(Name of financial institution)	(Name of financial institution)
_____	_____
(Name of financial institution)	(Name of financial institution)

2. **THIS ORDER MAY NOT BE USED TO TRANSFER ASSETS.**

See Maryland Rule 6-122 (c).

(d) Limited Order to Locate Will

Upon the filing of a verified petition pursuant to Rule 6-122 (a), the ~~orphans'~~ Orphans' Court may issue a limited order to a financial institution to enter the safe deposit box of a decedent in the presence of the Register of Wills or the Register's authorized deputy for the sole purpose of locating the decedent's will and, if it is located, to deliver it to the Register of Wills or the authorized deputy. The limited order to locate a will shall be in the following form:

IN THE ORPHANS' COURT FOR

(OR) _____, MARYLAND

BEFORE THE REGISTER OF WILLS FOR

IN THE ESTATE OF:

_____ LIMITED ORDER NO. _____

LIMITED ORDER TO LOCATE WILL

Upon the foregoing Petition and pursuant to Rule 6-122 (d), it is this _____ day of _____ (month), _____ (year) by the Orphans' Court for _____ (County), Maryland,

ORDERED that:

_____, located at
(Name of financial institution)

_____ enter the
(Address)

safe deposit box titled in the sole name of _____

_____, in the presence of
(Name of decedent)

the Register of Wills _____ OR the Register's authorized deputy _____ for the sole purpose of locating the decedent's will and, if the will is located, deliver it to the Register of Wills OR the Register's authorized deputy.

_____
JUDGE

_____
JUDGE

_____
JUDGE

See Maryland Rule 6-122 (d).

Committee note: This procedure is not exclusive. Banks may also rely on the procedure set forth in Code, Financial Institutions Article, 12-603.

Rule 6-122 was accompanied by the following Reporter's note.

> During the pendency of the settlement of an estate, financial institutions may be asked to disclose certain assets relating to the estate or to allow the register of wills to look into a safe deposit box to locate a will. The forms in Rule 6-122 (c) and (d) formalize these requests. Because some financial institutions have not been honoring these requests, a register of wills asked that language be added to the forms indicating the source of the authority for making the request of the financial institution.

Mr. Laws told the Committee that the proposed changes are to the form in Rule 6-122, which directs a bank or a financial institution to locate assets, and to the form in the same Rule, which directs the bank or other financial institution to open a safety deposit box to locate a will during the probate of an estate. A Register of Wills had pointed out that some financial institutions are not complying with the forms. By adding the language "pursuant to Rule 6-122" to the form, it would improve the compliance by the banks or other financial institutions.

D. Robert Enten, Esq. addressed the Committee. He asked whether there had been any feedback from representatives of the financial institutions. Mr. Laws answered that he did not recall any feedback. Mr. Enten said that he did not believe that his client had looked at these proposed changes. He would be willing to go back to them immediately to get their response.

He added that he had been so focused on the foreclosure Rules that he had not been aware of the proposed changes to Rule 6-122.

Mr. Laws explained that the orders in Rule 6-122 are from the orphans' court directing a bank to help locate assets or a will. Hopefully, the compliance by the banks will improve by putting the reference to the Rule in the forms. Mr. Enten said that if the banks have a problem with this, he will send a letter to this effect. The Chair commented that it seemed that the banks were getting these forms and did not know what the authority is for the orphans' court to issue these orders. The fact that it is in a Rule should be enough, but the thought was it would be better to put a reference to the Rule in the forms.

Charlotte K. Cathell, Register of Wills for Worcester County, addressed the Committee. She explained that the problem that the Registers are running into is with the bigger banks. The Registers go into the banks to open a safe deposit box to locate assets, and the bank employees do not know what to do. They have to call their corporate headquarters, and the person in charge is not familiar with Maryland law, so there is a substantial delay. The community banks are more cooperative.

By consensus, the Committee approved Rule 6-122 as presented.

Mr. Laws presented Rule 6-416, Attorney's Fees or Personal Representative's Commissions, for the Committee's consideration.

AMEND the form in Rule 6-416, Consent to Compensation for Personal Representative and/or Attorney, by changing some of the terminology and by adding a sentence to address when consents have not been obtained, as follows:

Rule 6-416. ATTORNEY'S FEES OR PERSONAL REPRESENTATIVE'S COMMISSIONS

(a) Subject to Court Approval

(1) Contents of Petition

When a petition for the allowance of attorney's fees or personal representative's commissions is required, it shall be verified and shall state: (A) the amount of all fees or commissions previously allowed, (B) the amount of fees or commissions that the petitioner reasonably estimates will be requested in the future, (C) the amount of fees or commissions currently requested, (D) the basis for the current request in reasonable detail, and (E) that the notice required by subsection (a) (3) of this Rule has been given.

(2) Filing - Separate or Joint Petitions

Petitions for attorney's fees and personal representative's commissions shall be filed with the court and may be filed as separate or joint petitions.

(3) Notice

The personal representative shall serve on each unpaid creditor who has filed a claim and on each interested person a copy of the petition accompanied by a notice in the following form:

NOTICE OF PETITION FOR ATTORNEY'S FEES OR PERSONAL REPRESENTATIVE'S COMMISSIONS

You are hereby notified that a petition for allowance of attorney's fees or personal representative's commissions has been filed. You have 20 days after service of the petition within which to file written exceptions and to request a hearing.

(4) Allowance by Court

Upon the filing of a petition, the court, by order, shall allow attorney's fees or personal representative's commissions as it considers appropriate, subject to any exceptions.

(5) Exception

An exception shall be filed with the court within 20 days after service of the petition and notice and shall include the grounds therefor in reasonable detail. A copy of the exception shall be served on the personal representative.

(6) Disposition

If timely exceptions are not filed, the order of the court allowing the attorney's fees or personal representative's commissions becomes final. Upon the filing of timely exceptions, the court shall set the matter for hearing and notify the personal representative and other persons that the court deems appropriate of the date, time, place, and purpose of the hearing.

(b) Payment of Attorney's Fees and Personal Representative's Commissions Without Court Approval.

(1) Payment of contingency fee for services other than estate administration.

Payment of attorney's fees may be made without court approval if:

(A) the fee is paid to an attorney representing the estate in litigation under a contingency fee agreement signed by the

decedent or by a previous personal representative;

(B) the fee is paid to an attorney representing the estate in litigation under a contingency fee agreement signed by the current personal representative of the decedent's estate provided that the personal representative is not acting as the retained attorney and is not a member of the attorney's firm;

(C) the fee does not exceed the terms of the contingency fee agreement;

(D) a copy of the contingency fee agreement is on file with the register of wills; and

(E) the attorney files a statement with each account stating that the scope of the representation by the attorney does not extend to the administration of the estate.

(2) Consent in Lieu of Court Approval

Payment of attorney's fees and personal representative's commissions may be made without court approval if:

(A) the combined sum of all payments of attorney's fees and personal representative's commissions does not exceed the amounts provided in Code, Estates and Trusts Article, §7-601; and

(B) a written consent stating the amounts of the payments signed by (i) each creditor who has filed a claim that is still open and (ii) all interested persons, is filed with the register in the following form:

BEFORE THE REGISTER OF WILLS FOR ....., MARYLAND

IN THE ESTATE OF:

_____ Estate No. _____

CONSENT TO COMPENSATION FOR

PERSONAL REPRESENTATIVE AND/OR ATTORNEY

I understand that the law, Estates and Trusts Article, §7-601, provides a formula to establish the maximum total ~~compensation~~ commissions to be paid for personal representative's commissions ~~and/or attorney's fees without order of court~~. If the total compensation for personal representative's commissions and attorney's fees being requested falls within the maximum allowable ~~amount~~ commissions, and the request is consented to by all unpaid creditors who have filed claims and all interested persons, this payment need not be subject to review or approval by the Court. A creditor or an interested party may, but is not required to, consent to these fees.

The formula sets total compensation at 9% of the first $20,000 of the ~~gross~~ adjusted estate subject to administration PLUS 3.6% of the excess over $20,000. Based on this formula, the adjusted estate subject to administration known at this time is _____. ~~The~~ The total allowable statutory maximum commission based on the ~~gross~~ adjusted estate subject to administration known at this time is _____, LESS any personal representative's commissions and/or attorney's fees previously approved as required by law and paid. To date, $_____ in personal representative's commissions and $_____ in attorney's fees have been paid.

IF ALL REQUIRED CONSENTS ARE NOT OBTAINED, A PETITION SHALL BE FILED, AND THE COURT SHALL DETERMINE THE AMOUNT TO BE PAID.
Cross reference: See 90 Op. Att'y. Gen. 145 (2005).

Total combined fees being requested are $_____,

to be paid as follows:

Amount	To	Name of Personal Representative/Attorney
_____		_____
_____		_____
_____		_____
_____		_____

I have read this entire form and I hereby consent to the payment of personal representative and/or attorney's fees in the above amount.

Date	Signature	Name (Typed or Printed)
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

_____	_____
Attorney	Personal Representative
_____	_____
Address	Personal Representative
_____	
Address	

_____
Telephone Number

_____
Facsimile Number

_____
E-mail Address

Committee note: Nothing in this Rule is intended to relax requirements for approval and authorization of previous payments.

(3) Designation of Payment

When rendering an account pursuant to Rule 6-417 or a final report under modified administration pursuant to Rule 6-455, the personal representative shall designate any payment made under this section as an expense.

Cross reference: Code, Estates and Trusts Article, §§7-502, 7-601, 7-602, 7-603, and 7-604.

Rule 6-416 was accompanied by the following Reporter's note.

The Conference of Orphans' Court Judges has requested changes to the form "Consent to Compensation for Personal Representative and/or Attorney" found in Rule 6-416. The judges have noticed that when attorneys fill out the form, some fill in the blank intended for the total allowable statutory maximum by putting in the amount of the total gross estate.

The judges also pointed out that the form does not address what happens if a consent is not signed. The changes to the form are being proposed to address the concerns of the Conference.

The Probate/Fiduciary Subcommittee found that the term "adjusted estate subject to administration" is more accurate than the term "gross estate" and conforms to the language in Code, Estates and Trusts

> Article, §7-601. They recommended deleting the term "gross estate" and adding, in its place, the term "adjusted estate subject to administration."

Mr. Laws explained that Rule 6-416 contains a form pertaining to approval of compensation for the attorney and the personal representative in an estate pursuant to Code, Estates and Trusts Article, §§7-601 *et. seq.* The request to change the form originated with the Conference of Orphans' Court Judges. The judges had pointed out that people were filling out the form incorrectly; they were putting in the amount of the gross estate instead of the total allowable statutory maximum. When the Rule was presented to the Probate/Fiduciary Subcommittee, some of the consultants had suggestions that were included in the draft form to make it flow better and to clarify how to fill out the form.

Howard County Orphans' Court Judge Anne L. Dodd addressed the Committee. She added that some attorneys were filling out the forms incorrectly, not reading them very carefully. Also, the orphans' court judges needed to let people know what would happen if they did not sign the forms. Mr. Laws noted that a warning has been added to the form, stating that if all of the proper consents had not been given, the matter would go back to the orphans' court.

By consensus, the Committee approved Rule 6-416 as presented.

Mr. Laws presented Rule 6-125, Service; Rule 6-210, Notice to Interested Persons; Rule 6-302, Proceedings for Judicial Probate; and Rule 6-317, Notice to Interested Persons, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 – SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 100 – GENERAL PROVISIONS

AMEND Rule 6-125 (a) to delete a reference to a certain type of mail and to add other language, as follows:

Rule 6-125. SERVICE

(a) Method of Service – Generally

Except where these rules specifically require that service shall be made by ~~certified mail~~ another method, service may be made by personal delivery or by first class mail. Service by certified mail is complete upon delivery. Service by first class mail is complete upon mailing. If a person is represented by an attorney of record, service shall be made on the attorney pursuant to Rule 1-321. Service need not be made on any person who has filed a waiver of notice pursuant to Rule 6-126.

Cross reference: For service on a person under disability, see Code, Estates and Trusts Article, §1-103 (d).

(b) Certificate of Service

(1) When Required

A certificate of service shall be filed for every paper that is required to be served.

(2) Service by Certified Mail

If the paper is served by certified mail, the certificate shall be in the following form:

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____,
(month)

_____ I mailed by certified mail a copy of this paper to the
(year)

following persons:

_____
(name and address)

_____
Signature

(3) Service by Personal Delivery or First Class Mail

If the paper is served by personal delivery or first class mail, the certificate shall be in the following form:

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____,
(month)

_____ I delivered or mailed, postage prepaid, a copy of
(year)

this paper to the following persons:

_____.
(name and address)

_____
Signature

(c) Affidavit of Attempts to Contact, Locate, and Identify Interested Persons

An affidavit of attempts to contact, locate, and identify interested persons shall be substantially in the following form:

[CAPTION]

AFFIDAVIT OF ATTEMPTS TO CONTACT, LOCATE, AND IDENTIFY INTERESTED PERSONS

I, _____ am: (check one)

[ ] a party

[ ] a person interested in the above-captioned matter

[ ] an attorney.

I have reason to believe that the persons listed below are persons interested in the estate of _____

_____
(Provide any information you have)

Name	Relationship	Addresses
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

I have made a good faith effort to contact, locate, or identify the persons listed above by the following means:

_____

_____

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

_____ _____

Signature Date

(d) Proof

If no return receipt is received apparently signed by the addressee and there is no proof of actual notice, no action taken in a proceeding may prejudice the rights of the person entitled to notice unless proof is made by verified writing to the satisfaction of the court or register that reasonable efforts have been made to locate and warn the addressee of the pendency of the proceeding.

Cross reference: Code, Estates and Trusts Article, §1-103 (c).

Rule 6-125 was accompanied by the following Reporter's note.

A group of registers of wills have requested that the primary method of notice in probate proceedings be by first class mail instead of by certified mail. They point out that certified mail is extremely expensive and often comes back unsigned. First class mail may be more efficient in reaching people. The Code does not require certified mail, and probate proceedings are often non-adversial, so that certified mail is not necessary.

MARYLAND RULES OF PROCEDURE

TITLE 6 – SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 200 – SMALL ESTATE

AMEND Rule 6-210 to delete certain language pertaining to a certain obligation of the estate and a reference to a type of mail and to add language pertaining to another type of mail, as follows:

Rule 6-210. NOTICE TO INTERESTED PERSONS

Promptly after the personal representative files a notice of appointment pursuant to Rule 6-209, ~~at the expense of the estate~~ the register shall send by ~~certified~~ first class mail to each interested person a copy of that notice and a notice in the following form:

NOTICE TO INTERESTED PERSONS

In accordance with Maryland law, you are hereby given legal notice of the proceedings in a decedent's estate as more fully set forth in the enclosed copy of the newspaper publication or Notice of Appointment.

This notice is sent to all persons who might inherit if there is no will or who are persons designated to inherit under a will.

This notice does not necessarily mean that you will inherit under this estate.

Further information can be obtained by reviewing the estate file in this office or by contacting the personal representative or the attorney.

Any subsequent notices regarding this estate will be sent to you at the address to which this notice was sent. If you wish notice sent to a different address, you must notify me in writing.

_____
Register of Wills

_____
Address

_____

Cross reference: Code, Estates and Trusts Article, §§2-210 and 5-603 (b).

Rule 6-210 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 6-125.

MARYLAND RULES OF PROCEDURE

TITLE 6 – SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 300 – OPENING ESTATES

AMEND Rule 6-302 (b) to delete a certain time period and add another word, to delete language referring to a certain obligation of the estate and service on interested persons, to add a certain word, to delete a reference to a certain type of mail, and to add a reference to another type, as follows:

Rule 6-302. PROCEEDINGS FOR JUDICIAL PROBATE

(a) Service of Petition

A copy of a petition for judicial probate (Rule 6-301 (a)) shall be served by the petitioner on the personal representative, if any.

Cross reference: Code, Estates and Trusts Article, §5-401.

(b) Notice of Judicial Probate

~~Within five days~~ Promptly after receiving the names and addresses of the interested persons, ~~at the expense of the estate~~ the register shall ~~serve on the interested persons~~ send by ~~certified~~ first class mail to each interested person a Notice of Judicial Probate. The register shall publish the notice once a week for two successive weeks in a newspaper of general circulation in the county where judicial probate is requested. The notice shall be in the following form:

[CAPTION]

NOTICE OF JUDICIAL PROBATE

To all Persons Interested in the above estate:

You are hereby notified that a petition has been filed by _____ for judicial probate of the will dated _____ (and codicils, if any, dated _____) and for the appointment of a personal representative. A hearing will be held _____ on
(place)

_____ at _____.
(date) (time)

This hearing may be transferred or postponed to a subsequent time. Further information may be obtained by reviewing the estate file in the office of the Register of

Wills.

_____
Register of Wills

Cross reference: Code, Estates and Trusts Article, §§1-103 (a) and 5-403.

(c) Hearing

The court shall hold a hearing on the petition for judicial probate and shall take any appropriate action.

Cross reference: Code, Estates and Trusts Article, §5-404.

(d) Notice of Appointment

After a personal representative has been appointed and if no Notice of Appointment has been published, notice shall be in the form as set forth in Rule 6-311 and published as set forth in Rule 6-331 (a).

Cross reference: Code, Estates and Trusts Article, §5-403.

Rule 6-302 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 6-125.

MARYLAND RULES OF PROCEDURE

TITLE 6 – SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 300 – OPENING ESTATES

AMEND Rule 6-317 to delete language referring to a certain obligation of the estate and a certain type of mail, and to add language referring to another type of mail, as follows:

Rule 6-317. NOTICE TO INTERESTED PERSONS

~~At the expense of the estate, the~~ The register shall send by ~~certified~~ first class mail to each interested person a copy of the published Notice of Appointment as required by Rule 6-331 (b) and a notice in the following form:

NOTICE TO INTERESTED PERSONS

In accordance with Maryland law, you are hereby given legal notice of the proceedings in a decedent's estate as more fully set forth in the enclosed copy of the newspaper publication or Notice of Appointment.

This notice is sent to all persons who might inherit if there is no will or who are persons designated to inherit under a will.

This notice does not necessarily mean that you will inherit under this estate.

Further information can be obtained by reviewing the estate file in this office or by contacting the personal representative or the attorney.

Any subsequent notices regarding this estate will be sent to you at the address to which this notice was sent. If you wish notice sent to a different address, you must notify me in writing.

_____

Register of Wills

_____
Address
_____

Cross reference: Code, Estates and Trusts Article, §2-210.

Rule 6-317 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 6-125.

Mr. Laws said that Rules 6-125, 6-210, 6-302, and 6-317 pertain to notice to interested persons in a probate estate. The change to Rule 6-125 is stylistic. The language "another method" has been substituted for the term "certified mail." Rule 6-210 applies to notice in small estate proceedings. The proposed change is to substitute first class mail for certified mail for the mailing of the notice to interested persons about the appointment of a personal representative in a small estate proceeding.

Mr. Marcus remarked that the Subcommittee heard from a number of Registers and the Maryland Registers of Wills Association that certified mail notice is not effective and many of the certified mail return receipt postcards were coming back as undeliverable. They also expressed the view that certified mail is an unnecessary expense and that first class mail was just as likely to give actual notice to a person as certified mail. This change also would be made for notices of judicial

probate in Rule 6-302 and for notices to interested persons of the appointment of a personal representative in a regular estate in Rule 6-317. The Chair commented that there was significant debate in the Subcommittee about this change, particularly pertaining to notice to interested persons.

Allan Gibber, Esq. addressed the Committee. He said that he was not speaking on behalf of the bar but as an individual practitioner. He remarked that he has an interest in probate proceedings and is concerned about this proposed change. The probate process in Maryland has been an expedited process. Someone goes to the Register, presents his or her papers, and gets an appointment immediately as a personal representative. Once appointed, the person can take substantive actions, including going to the bank where the decedent had an account and selling the decedent's property.

Mr. Gibber said that the question is how to protect interested persons. Maryland provides for notice, which is the linchpin for this process. By giving notice, all of the interested persons who believe something is awry with the probate process can show up and file a piece of paper. There is no hearing and it is not a long process. The filing of the paper brings the proceeding to a screeching halt, and the powers of the personal representative are reduced. He or she cannot sell the property or do other things without specific permission.

Mr. Gibber noted that some jurisdictions, such as New York, take as long as six months for an estate to be probated. In Florida, it takes three months. It takes more like three minutes in Maryland. The interested persons are protected by notice. In 98% of the cases, everyone has accepted the appointment of the personal representative, there are no objections, and the process is completed.

Mr. Gibber explained that his concern was that a person who fails to respond to administrative probate for six months and does not show up may lose his or her rights in the proceeding. There are provisions in the Code extending that to 18 months. However, in practice, what that means is that someone has a substantive right that may be lost without the person getting any notice. Mr. Gibber acknowledged that notice is published, but he was not sure how effective that is. The process in Maryland involves getting notice to interested persons in the most efficient way possible. The Registers monitor this by the requirement of certified mail. Certified mail is a flawed system, as others have suggested, because much of the mail is not served correctly. Signatures come back on the return postcard that are not those of the correct person. It is not a perfect system.

Mr. Gibber expressed the concern that one flawed system is being substituted for another one, which he suggests may be even more flawed. The reason is that with regular mail, there is no

paper record of a mailing that did not end up with the right person. At least with certified mail, something comes back indicating that someone had looked at it. The court can review it and have an evidentiary paper trail as to what happened with the notice. The regular mail may not go where it is supposed to. The person who is supposed to get notice may never get it. There is no paper trail attached to it so that the Register can then follow up with the next step.

Mr. Gibber said that his objection is more with the mailing of the first notice to interested persons. The notice that is given to interested persons should be the best type of notice that they can get. His view is that certified mail is less flawed than regular mail. He added that he has less problem with the subsequent notices, such as to remove a personal representative, because the personal representative has been involved in the estate and is not an interested person who has not been involved in any prior notice. The personal representative's address will be known. It is that first notice, which is the trigger notice, that could result in a substantive loss of rights.

Mr. Gibber told the Committee that he also wanted to address the provisions for the proof of actual notice. Section (d) of Rule 6-125 in written in terms of no return receipt. This assumes certified mail. What happens if a letter mailed by first class mail comes back to the Register? This is the only

instance where the Register has some notice. The mail could come back as undeliverable, addressee unknown. Section (d) should be changed to address the situation where, if the first class mail is returned as not deliverable or if there is no return receipt from certified mail, then there would be an affidavit, so that the Register can follow up. The affidavit is not helpful in the circumstance in which the letter comes back, but there is no indication of why. This is not like the usual case where someone files a claim, and someone has an opportunity to respond. The filing of a petition vests substantive rights immediately in the personal representative. The only reason this can happen is because the interested persons who are not satisfied with the appointment, with the will, or with something that is happening with the probate of the estate can go to the court and divest the personal representative immediately. It is this balance that allows the administrative probate to be handled quickly and effectively. For this reason, Mr. Gibber suggested that the first notice in every estate has to be by certified mail even if the subsequent notices are by first class mail. Additionally, section (d) of Rule 6-125 should be expanded to address first class mail that is not delivered.

Mr. Enten remarked that there is a great deal of legislation in the General Assembly every year that pertains to estates and trusts. The Estates and Trusts Section of the Maryland State Bar Association is very active in responding to

these bills. He asked whether the Estates and Trusts Section commented on this proposal. The Chair responded that Mr. Gibber is a member of that Section. Ms. Cathell added that she and some of her colleagues are on two Subcommittees of the Estates and Trusts Section. Mr. Gibber noted that he had voiced the objection.

Byron E. Macfarlane, Register of Wills for Howard County, said that he was the President of the Maryland Registers of Wills Association. He had spoken at the Probate/Fiduciary Subcommittee meeting. Mr. Macfarlane said that he was speaking for himself and all of his colleagues, who had discussed this issue for well over a year. He added that he also had discussed the issue with members of the Estates and Trusts Section Council before bringing it to the attention of the Rules Committee.

Mr. Macfarlane remarked that he agreed with much of what Mr. Gibber had said. It is absolutely essential that interested persons in estates in Maryland that are being probated be given notice of the opening of the proceeding, their right to object to the appointment of the personal representative, their right to file a claim against the estate, and their right to challenge the will. The question is whether there is any greater certainty that they will receive that notice if it is sent by certified mail as opposed to first class mail. To Mr. Macfarlane and his colleagues, the answer is "no." The other jurisdictions that have an administrative probate process that

is similar to the one in Maryland are Delaware, Pennsylvania, and the District of Columbia. They have a similarly streamlined process, and they do not use certified mail. Mr. Macfarlane said that his counterpart in D.C. told him that this causes no problems. The certified mail requirement in Maryland is an anomaly; it is the only state that has a specialty probate court that uses certified mail throughout the probate process.

Mr. Macfarlane asked whether there is any real benefit to having certified mail. The Registers have confidence that if the method of mailing is changed, they will still be protecting their constituents. It is important that the constituents get notice. About one-third of certified mail comes back unclaimed, not undeliverable, because people know that certified mail is usually not good news. In those cases, the Registers know that the address is good, so they then send the person a notice by first class mail. Mr. Macfarlane said that he had never heard of an interested person complaining that he or she received the first class mail but never got the certified mail. Mr. Macfarlane pointed out that this means that one-third of all the interested persons in probate estates in Maryland are getting notice by first class mail. The Registers are asking that this be extended to everyone.

Mr. Macfarlane said that the protection that is supposedly being used now by certified mail is not valid, because one-third of the interested persons are not picking up the mail. The law

has many presumptions, one of which is that a piece of mail that is properly addressed, has a stamp on it, and is put into a U.S. Post Office mailbox will get where it is supposed to go. As Mr. Gibber had pointed out, there is a statutory remedy, which is that if someone did not get notice, he or she has the right to petition for judicial probate. All the person has to do is to write a letter to the Register of Wills, and a hearing will be set up. Safeguards already are in place. Mr. Macfarlane said that he and his colleagues will continue to make sure that people get the notice that is due to them. If, for any reason, someone does not get notice, the Registers will make sure that the person is given his or her rights as an interested person.

The Chair commented that there had been discussion in the Subcommittee that first class mail has a correction service. The Reporter added that the terminology is "address service requested." Ms. Ogletree remarked that the sender can ask for an address correction on the mail, and if it does not get to the intended address, the post office will send the item back to the original sender. The records are kept for one year. The Chair asked whether there is any cost, and Ms. Ogletree answered that it costs a few cents. The Chair asked whether this would be worth doing. Mr. Macfarlane said that one other important point is that the courts do not send notices of criminal proceedings to defendants by certified mail. First class mail is the general standard in the judicial process in Maryland whether it

is used by District Court or circuit court. Jury summonses are sent by first class mail.

The Chair inquired whether it would be worth sending the mail with a request for an address correction if the standard is changed to first class mail. Mr. Macfarlane answered in the negative, explaining that if it was a bad address, it will come back with a notation that the address is wrong. The Chair asked whether it would tell the sender that it was not delivered. Mr. Macfarlane replied that it would, and then the Register would follow up with the personal representative or with the attorney for the estate to get a good address. Mr. Weaver inquired how the Register would know that if the notice is sent first class mail without address correction. Ms. Cathell responded that the notice would come back as "unable to be delivered, forward to _____." Ms. Ogletree added that the notice would come back with a tear-off tab on the front of it with the new address if the address correction is requested.

Mr. Gibber commented that it is unknown how the change in mail method would work. There are many possibilities where a list of interested persons, which is so critical, is not accurate. Certified mail affords a greater chance that the mistake will be discovered. In his practice, he has heard many people complain that they did not know about the estate being probated or some other action associated with the probate process. The issue is the right to get notice. The more it is

known that the mail did not reach the addressee, the more due process is protected. The person could be losing substantive rights. There are cases in which someone got notice, but it was too late.

Ms. McBride remarked that she does not see the issue that way. Certified mail provides less notice, because other people, who are not the ones intended to receive it, could be signing for it. First class mail being received is a fairly accurate way to ensure delivery. Most people are getting the mail that they are supposed to get. It is more likely that someone will get notice earlier with first class mail than with certified mail. Someone who signs for certified mail may not even live at the place of delivery, or the person refuses to sign because he or she thinks that it may be bad news. Judge Price asked why it cannot be sent both ways. When she practiced law, she sent mail to people using both certified and first class mail. Ms. McBride answered that part of the reason is the expense involved.

Judge Price said that this involves people's estates where someone may not want an interested person to actually receive the notice, so the person may deliberately mis-state the address. She added that she had practiced estate law, and some negative events take place. The initial notice to interested persons should be sent by certified and regular mail. Any further mailings can be sent by first class mail. There should

be some evidence showing that the person doing the mailing attempted to mail the item both ways to get notice to these people. Even if it is expensive, the estate should be paying for it.

Mr. Laws pointed out that the statute, Code, Estates and Trusts Article, §1-103, which is in the meeting materials, does not require certified mail. However, the orphans' court can order service by restricted mail with return receipt requested, or the personal representative may elect to use that method. Also, the addresses of the interested persons are furnished by the personal representative. If the personal representative is determined to commit fraud, it will not matter whether the service is by regular or certified mail. The address may be bad. Judge Price noted that with certified mail, the Register can show that the personal representative attempted to send the notice. With regular mail, there is no receipt for it.

Mr. Macfarlane observed that certified mail costs about a quarter of a million dollars a year, and this does not include the time spent by the employees of the Registers to send it. In the larger jurisdictions, it is almost a full-time job. It is a huge administrative burden. Judge Price asked whether the Registers' fees could be increased. Mr. Macfarlane responded that this had been attempted. This past Session, this idea had been in legislation before the General Assembly, but it did not pass the Senate.

Mr. Weaver remarked that Mr. Macfarlane had said that the circuit court does not serve papers by certified mail. The clerk does not mail it, but in a civil case, Rule 2-121, Process — Service — In Personam, provides that the plaintiff or his or her attorney can serve personal delivery on someone over the age of 18 by certified mail. Guardianships might be a comparable situation. Under subsection (b)(2) of Rule 10-203, when a guardianship petition is filed, it is mailed to interested persons by first class mail and by certified mail. Mr. Gibber pointed out that the cost of certified mail is not to the Registers, because certified mail is paid for by the estate.

The Chair said that since this is a Subcommittee recommendation, it would take a motion to reject or amend it. Judge Price moved to amend the Rules so that the initial notice to interested persons would be sent by certified and first class mail. The motion was seconded, and it passed by a vote of seven to five. The Chair stated that the first notice to interested persons would continue to be by certified mail and first class mail. Mr. Laws noted that this would affect Rules 6-210 and 6-317. The Chair noted that certified mail is paid for by the estate, so the language "at the expense of the estate" that had been deleted from Rules 6-210, 6-302, and 6-317 would remain in the Rules.

Mr. Gibber pointed out that section (d) of Rule 6-125 only refers to the return receipt from certified mail as proof of

receipt. There should be a requirement of an affidavit for ordinary mail as to why it was returned. Section (d) should be amended to read: "[i]f first class mail is returned as not deliverable or if certified mail is required and no return receipt is received," then the affidavit would be required. In cases where mail comes back, an affidavit that reasonable efforts to locate and warn the addressee of the pendency of the proceeding have been made would be required.

Margaret H. Phipps, Register of Wills for Calvert County, said that she has a concern. When the Registers send notice by certified mail and it is returned, they immediately send notice by first class mail. It will be very burdensome for the Registers to send first class and certified mail together. The amount of time it will take to do the extra work seems to her to be wasteful, because if the certified mail comes back, the Registers will automatically send out the notice by first class mail.

The Chair asked whether the procedure for sending out first class mail when the card from the certified mail does not come back is in the Rule. Is it just a practice that the Registers do? Ms. Phipps said that the Rule requires that notice be sent by certified mail. Most of the return receipts come back quickly and can be tracked electronically. Each day the Registers put in their files a record of everyone who gets the notice. Some notices are sent with cards. If the certified

mail comes back without the electronic indication that it was received, the notice is then sent by regular mail. The Chair remarked that this is the practice of the Registers, but it is not required. Ms. Phipps acknowledged that. The Chair asked whether all the Registers follow up with regular mail when the certified mail is not received. Ms. Phipps answered affirmatively. She reiterated that sending both types of mail at the same time is burdensome.

Mr. Carbine moved to approve Mr. Gibber's suggested amendment to Rule 6-125 (d). The motion was seconded, and it passed by majority vote.

By consensus, the Committee approved Rules 6-125, 6-210, and 6-317 as amended. The Chair pointed out that Rule 6-302 will have to be amended, since the notice of judicial probate proceedings can be a first notice, and, if it is, it will be sent by certified mail. By consensus, the Committee approved Rule 6-302 as amended.

Mr. Laws presented Rules 6-431, Caveat, and 6-432, Order to Answer; Register's Notice and Service, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 – SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 – ADMINISTRATION OF ESTATES

AMEND Rule 6-431 to add language to section 1. of the form in section (e) after the line for date of the codicil, to add language to section 3. of the form in section (e) after the word "codicil," and to add another line for date of the will and language at the end of the first sentence of the form in section (f), as follows:

Rule 6-431. CAVEAT

(a) Petition

A petition to caveat may be filed by an heir of the decedent or a legatee in any instrument purporting to be a will or codicil of the decedent. The petition may challenge the validity of any instrument purporting to be the decedent's will or codicil, whether or not offered for or admitted to probate.

(b) Time for Filing

(1) Generally

Except as otherwise provided by this Rule, a petition to caveat shall be filed within six months after the first appointment of a personal representative under a will, even if there has been a subsequent judicial probate or appointment of a personal representative under that will. If another will or codicil is subsequently offered for probate, a petition to caveat that will or codicil shall be filed within three months after that will or codicil is admitted to probate or within six months after the first appointment of a personal representative under the first probated will, whichever is later.

(2) Exceptions

Upon petition filed within 18 months after the death of the decedent, a person entitled to file a petition to caveat may request an extension of time for filing the petition to caveat on the grounds that the person did not have actual or statutory

notice of the relevant probate proceedings, or that there was fraud, material mistake, or substantial irregularity in those proceedings. If the court so finds, it may grant an extension.

Cross reference: Code, Estates and Trusts Article, §§5-207, 5-304, 5-406, and 5-407.

(c) Contents

The petition to caveat shall be signed and verified by the petitioner and shall include the following:

(1) the name and address of the petitioner;

(2) the relationship of the petitioner to the decedent or the nature of the petitioner's interest in the decedent's estate upon which the petitioner claims the right to file the petition;

(3) the date of the decedent's death;

(4) an identification of the instrument being challenged including a statement as to whether it has been offered for or admitted to probate;

(5) an allegation that the instrument challenged is not a valid will or codicil of the decedent and the grounds for challenging its validity;

(6) an identification of the instrument, if any, claimed by the petitioner to be the decedent's last will, with a copy of the instrument attached to the petition or an explanation why a copy cannot be attached;

(7) a statement that the list of interested persons filed with the petition contains the names and addresses of all interested persons who could be affected by the proceeding to the extent known by the petitioner; and

(8) the relief sought, including a request for the probate of the instrument, if any, that the petitioner claims is the true last will or codicil of the decedent.

(d) Additional Documents

A petition to caveat shall be accompanied by a list of all interested persons who could be affected by the proceeding in the form prescribed by Rule 6-316, a Notice of Caveat in the form set forth in section (e) of this Rule, and a Public Notice of Caveat in the form set forth in section (f) of this Rule.

(e) Notice to Interested Persons of Caveat

A notice to interested persons of the filing of a caveat shall be in the following form:

[CAPTION]

NOTICE OF CAVEAT

As an interested person, you are notified that:

(1) A petition to caveat challenging the decedent's will dated _____ or codicil dated _____ or both has been filed with the court _____ by_____
(name of petitioner and relationship to decedent or

_____
other basis for interest in the estate)

(2) The present status of the will or codicil or both being challenged is:

[ ] admitted to probate on _____, or
(date)

[ ] offered for probate but not admitted; or not offered for probate.

(3) As to defense of the will or codicil or both by a personal representative:

[ ] The following person has been appointed personal representative:

_____
name(s) and address(es)

[ ] No person is serving as personal representative. A copy of the petition to caveat is enclosed.

(4) This caveat proceeding may affect adversely any rights you may have in the decedent's estate. Further information can be obtained by reviewing the estate file in the office of the Register of Wills or by contacting the personal representative or the attorney for the estate. If you want to respond, you must do so in writing filed with the court or with this office within 20 days after service of this notice or any extension of that period granted by the court. A copy of any response you file must be sent to the petitioner or the petitioner's attorney

_____
(name and address)

and to the personal representative or the personal representative's attorney.

Date: _____ _____
Register of Wills for

_____

_____
Address

_____
Telephone Number

(f) Public Notice of Caveat

A public notice of the filing of a caveat shall be in the following form:

[CAPTION]

PUBLIC NOTICE OF CAVEAT

To all persons interested in the above estate:

Notice is given that a petition to caveat has been filed by _____challenging the will dated _____ or codicil dated _____ or both. You may obtain from the Register of Wills the date and time of any hearing on this matter.

_____
Register of Wills

(g) Number of Copies

The petitioner shall file a sufficient number of copies of the petition to caveat and Notice of Caveat for the register to comply with Rule 6-432.

Rule 6-431 was accompanied by the following Reporter's note.

A register of wills requested that whenever the phrase "will or codicil" appears in Rules 6-431 and 6-432, it be changed to indicate that both can exist when an estate is being probated, and not just one or the other.

The Probate/Fiduciary Subcommittee recommends adding the language "or both" after the phrase "will or codicil." It is also recommended that another line be added to the Public Notice of Caveat form in

section (f) of Rule 6-431 so that when there are both a will and a codicil the date of each can be filled in.

MARYLAND RULES OF PROCEDURE

TITLE 6 – SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 – ADMINISTRATION OF ESTATES

AMEND Rule 6-432 to add language after the word "codicil" in sections (a) and (c) and to delete references to a certain type of mail and add references to another type, as follows:

Rule 6-432. ORDER TO ANSWER; REGISTER'S NOTICE AND SERVICE

Within five days after the filing of the petition to caveat, the Register shall:

(a) issue an Order to Answer requiring the personal representative appointed as a result of the probate of the will or codicil or both being challenged, if one is currently serving, to respond to the petition to caveat within 20 days after service;

(b) serve the Order together with a copy of the petition on the personal representative by ~~certified~~ first class mail, unless the petitioner requests service by the sheriff;

(c) serve on each interested person a copy of the Notice of Caveat by ~~certified~~ first class mail, and if no personal representative appointed under the will or codicil or both is currently serving, furnish with the notice a copy of the petition to caveat; and

(d) publish the Public Notice of Caveat once a week for two successive weeks in a newspaper of general circulation in the county where the petition to caveat is filed.

Rule 6-432 was accompanied by the following Reporter's note.

For proposed amendments requiring changes from certified to first class mail, see the Reporter's note to Rule 6-125. For proposed changes adding the words "or both" after the language "will or codicil," see the Reporter's note to Rule 6-431.

Mr. Laws told the Committee that a change has been proposed to the form in Rule 6-431, which accompanies a notice to interested persons of the filing of a caveat. It is a minor amendment. The form did not account for the fact that a person could file both a will and a codicil. The words "or both" have been added to the form indicating that both could be filed. The same change has been made to Rule 6-432, which pertains to the order that issues from the court to answer the petition to caveat. The words "or both" have been added to indicate that the challenge could have been to the will, the codicil, or both. Rule 6-432 also contains the change from mailing the order to the personal representative and to the interested persons by certified mail to first class mail, which is the same change made to the other Rules providing for notice. By this time, these people would have gotten the first notice.

Mr. Gibber commented that this may be the first notice to some of these individuals. The first filing may be for judicial probate. Both notice of the judicial probate and the filing of a caveat may be the first notice. If it is the first notice, it should be mailed by certified mail. A subsequent notice would be if the caveat was not filed initially but was filed after the administrative probate.

By consensus, the Committee approved Rules 6-431 and 6-432 as presented.

Mr. Laws presented Rule 6-452, Removal of a Personal Representative, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 6 - SETTLEMENT OF DECEDENTS' ESTATES

CHAPTER 400 - ADMINISTRATION OF ESTATES

AMEND Rule 6-452 to remove certain language requiring permission by a court, to change the type of mail sent to the personal representative, to add language providing for a certain type of mail to be sent to interested persons, and to delete language referring to other persons, as follows:

Rule 6-452. REMOVAL OF A PERSONAL REPRESENTATIVE

(a) Commencement

The removal of a personal representative may be initiated by the court or the register, or on petition of an interested person.

(b) Show Cause Order and Hearing

The court shall issue an order (1) stating the grounds asserted for the removal, unless a petition for removal has been filed, (2) directing that cause be shown why the personal representative should not be removed, and (3) setting a hearing. The order may contain a notice that the personal representative, after being served with the order, may exercise only the powers of a special administrator or such other powers as the court may direct. ~~Unless otherwise permitted by the court, the~~ The order shall be ~~served~~ sent to the personal representative by ~~certified~~ first class mail ~~on the personal representative~~, unless otherwise required by the Court, and shall be sent by first class mail to ~~all~~ each interested person~~s, and such other persons as the court may direct~~. The court shall conduct a hearing for the purpose of determining whether the personal representative should be removed.

Cross reference: Rule 6-124.

(c) Appointment of Successor Personal Representative

Concurrently with the removal of a personal representative, the court shall appoint a successor personal representative or special administrator.

(d) Account of Removed Personal Representative

Upon appointment of a successor personal representative or special administrator, the court shall order the personal representative who is being removed from office to (1) file an account with the court and deliver the property of the estate to the successor personal representative or special administrator or (2) comply with Rule 6-417 (c).

Cross reference: Code, Estates and Trusts Article, §6-306 (removal of personal representative) and Courts Article, §12-701 (no stay by appeal; power of successor).

Rule 6-452 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 6-125.

Mr. Laws explained that the change in Rule 6-452 is the change from mailing the order for the removal of a personal representative by certified mail to mailing by first class mail. The show cause order goes to the personal representative and to the interested persons. The personal representative's address is certainly known, and this is not the first notice that has gone to the interested persons, so ordinary mail would suffice.

By consensus, the Committee approved Rule 6-452 as presented.

The Chair told the Registers that the decisions of the Rules Committee will be transmitted to the court in a formal report along with other Rule changes. It will be posted on the Judiciary website for comment. It is usually a 30-day period for comment, and the notice states where the comments are to be sent. The Court of Appeals will then hold an open hearing on the Rules, and this is another opportunity to comment.

Agenda Item 3. Consideration of proposed amendments to: Rule 3-306 (Judgment on Affidavit), Rule 3-308 (Demand for Proof), Rule 3-509 (Trial Upon Default), Rule 3-701 (Small Claim Actions), and Rule 5-902 (Self-Authentication)

Mr. Armstrong explained that the changes to the Rules in

Agenda Item 3 stemmed from the Consumer Debt Collection Act, Code, Courts Article, §5-1201 et. seq. He told the Committee that he was going to take the Rules out of order. The first two sections of the statute are primarily definitional. The pivotal provision is Code, Courts Article, §5-1203 (b)(3), which sets forth in detail those items that must be produced in a consumer debt collection action. The language of that provision states that the debt buyer or a collector on behalf of a debt buyer "shall introduce the following evidence," and the evidence is then listed.

Mr. Armstrong presented Rule 3-509, Trial Upon Default, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 – CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 500 – TRIAL

AMEND Rule 3-509 (a)(1) to make it mandatory in assigned consumer debt collection actions for the court to require proof of liability and to apply certain statutory requirements for admission of documents, to reflect Chapter 579 of the 2016 Laws of Maryland, as follows:

Rule 3-509. TRIAL UPON DEFAULT

(a) Requirements of Proof

When a motion for judgment on affidavit has not been filed by the plaintiff, or has been denied by the court,

and the defendant has failed to appear in court at the time set for trial:

(1) if the defendant did not file a timely notice of intention to defend, the plaintiff shall not be required to prove the liability of the defendant, but shall be required to prove damages; except that for claims arising from consumer debt, as defined in Rule 3-306 (a)(3), when the plaintiff is not the original creditor, as defined in Rule 3-306 (a)(5), the court (A) ~~may~~ shall require proof of liability, (B) shall ~~consider~~ apply the requirements set forth in ~~Rule 3-306 (d)~~ Code, Courts Article, §5-1203 (b)(2), and (C) may also consider other competent evidence;

(2) if the defendant filed a timely notice of intention to defend, the plaintiff shall be required to introduce prima facie evidence of the defendant's liability and to prove damages. For claims arising from consumer debt, as defined in Rule 3-306 (a)(3), when the plaintiff is not the original creditor, as defined in Rule 3-306 (a)(5), the court shall ~~consider~~ (A) require proof of liability, (B) apply the requirements set forth in ~~Rule 3-306 (d)~~ Code, Courts Article, §5-1203 (b)(2), and (C) may also consider other competent evidence.

. . .

Rule 3-509 was accompanied by the following Reporter's note.

Amendments are proposed to Rule 3-509 to reflect the passage of Chapter 579 of the 2016 Laws of Maryland. Code, Courts Article, §5-1203 (b)(2) provides that "in addition to any other requirement of law or Rule, unless the action is resolved by judgment on affidavit, a court may not enter a judgment in favor of a debt buyer or a collector unless the debt buyer or collector introduces into evidence the documents specified in paragraph (3) of this

> subsection in accordance with the Rules of Evidence applicable to actions that are not small claims action brought under §4-405 of this Article." Rule 3-509 now provides that, in a case of consumer debt, a court "may" require proof of liability and shall "consider" the requirements set forth in Rule 3-306 (d), the section governing proof requirements for a judgment on affidavit. Code, Courts Article, §5-1203 (b)(2) removes any discretion when a judgment on affidavit has not resolved the matter. The amendments proposed to Rule 3-509 are intended to reflect the changes made by the statute.

Mr. Armstrong said that in light of the word "shall" used in the statute pertaining to the items that must be produced, subsection (a)(1)(A) has been amended to change the word "may" to the word "shall." Subsection (a)(1)(B) has been amended to change the word "consider" to the word "apply" and to refer to the statute, which has the list of items that must be produced, rather than to Rule 3-306 (d). Subsection (a)(2) has the same changes as subsection (a)(1).

By consensus, the Committee approved Rule 3-509 as presented.

Mr. Armstrong presented Rule 3-701, Small Claim Actions, for the Committee's consideration.

AMEND Rule 3-701 by adding to the cross reference following section (f) a citation to Code, Courts Article, §5-1203 (b)(2) to reflect Chapter 579, Laws of 2016, as follows:

Rule 3-701. SMALL CLAIM ACTIONS

(a) Applicable Rules

The rules of this Title apply to small claim actions, except as provided in this Rule.

Cross reference: Code, Courts Article, §4-405.

(b) Forms

Forms for the commencement and defense of a small claim action shall be prescribed by the Chief Judge of the District Court and used by persons desiring to file or defend such an action.

(c) Trial Date and Time

A small claim action shall be tried at a special session of the court designated for the trial of small claim actions.

Upon the filing of the complaint, the clerk shall fix the date and time for trial of the action. When the notice of intention to defend is due within 15 days after service, the original trial date shall be within 60 days after the complaint was filed. When the notice of intention to defend is due within 60 days after service, the original trial date shall be within 90 days after the complaint was filed. With leave of court, an action may be tried sooner than on the date originally fixed.

Cross reference: See Rule 3-307 concerning the time for filing a notice of intention to defend.

(d) Counterclaims - Cross-claims - Third-party Claims

If a counterclaim, cross-claim, or third-party claim in an amount exceeding the jurisdictional limit for a small claim action (exclusive of interest, costs, and attorney's fees and exclusive of the original claim) is filed in a small claim action, this Rule shall not apply and the clerk shall transfer the action to the regular civil docket.

Cross reference: Rule 3-331 (f).

(e) Discovery Not Available

No pretrial discovery under Chapter 400 of this Title shall be permitted in a small claim action.

(f) Conduct of Trial

The court shall conduct the trial of a small claim action in an informal manner. Except as otherwise required by law, Title 5 of these rules does not apply to proceedings under this Rule.

Cross reference: See Code, Courts Article, §5-1203 (b)(2) and Rule 5-101 (b)(4).

Source: This Rule is derived in part from former M.D.R. 568 and 401 a and is in part new.

Rule 3-701 was accompanied by the following Reporter's note.

Chapter 579 of the 2016 Laws of Maryland imposes requirements on the courts and parties in a "consumer debt collection action" unless the action is resolved by judgment on affidavit." Rule 3-306(d), which governs the requirements for judgment on affidavit when a claim arises from assigned consumer debt, already required that documents included with the affidavit had to be admissible under the business records exception. *Bartlett v. Portfolio Recovery Associates, LLC*, 438 Md. 255, 279-80 (2015). If the judgment on affidavit is denied, however, Courts Article §5-1203

(b)(2) requires that the documents specified in the statute be admissible in accordance with the rules of evidence set forth in Title 5 of the Maryland Rules, "even in a small claims action. The provision [was] not intended to require the application of those rules to any other evidence that may be offered by either party in a small claims action, or to otherwise affect Maryland Rules 5-101(b) or 3-701(f)." See Floor Report, Senate Bill 771, Senate Judicial Proceedings Committee (March 30, 2016) p.3. The addition proposed for section (f) is intended to reflect the limited exception for consumer debt actions.

Mr. Armstrong said that the only change to Rule 3-701 was to section (f). The current language states that the court shall conduct the trial of a small claim action in an informal manner. The new language is "except as otherwise required by law," and a cross reference to Code, Courts Article, §15-1203 (b)(2) has been added.

By consensus, the Committee approved Rule 3-701 as presented.

Mr. Armstrong presented Rule 5-902, Self-Authentication, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 – EVIDENCE

CHAPTER 900 – AUTHENTICATION AND IDENTIFICATION

AMEND Rule 5-902 by adding a Committee note following subsection (b)(1) to reflect

Chapter 579, Laws of 2016, as follows:

Rule 5-902. SELF-AUTHENTICATION

. . .

(b) Certified Records of Regularly Conducted Business Activity

(1) Procedure

Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803 (b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

Committee note: An objection to self-authentication under subsection (b)(1) of this Rule made in advance of trial does not constitute a waiver of any other ground that may be asserted as to admissibility at trial. Chapter 579 of the 2016 Laws of Maryland requires that a debt buyer in a consumer debt collection action introduce specified documents in actions that are not resolved by judgment on affidavit "in accordance with the Rules of Evidence applicable to actions that are not small claims actions brought under §4-405 of this Article." Code, Courts Article, §5-1203 (b)(2). Consequently, if the debt buyer intends to admit business records into

evidence in a small claims action without a live witness, the debt buyer must provide notice to the opposing party, in conformance with Rule 5-902 (b).

(2) Form of Certificate

For purposes of subsection (b)(1) of this Rule, the original or duplicate of the business record shall be certified in substantially the following form:

Certification of Custodian of Records

or Other Qualified Individual

I, _____, do hereby certify that:

(1) I am the Custodian of Records of or am otherwise qualified to administer the records for: _____
_____
(identify the organization that maintains the records), and

(2) The attached records

(a) are true and correct copies of records that were made at or near the time of the occurrence of the matters set forth by, or from the information transmitted by, a person with knowledge of these matters; and

(b) were kept in the course of regularly conducted activity; and

(c) were made and kept by the regularly conducted business activity as a regular practice.

I declare under penalty of perjury that the foregoing is true and correct.

Signature and Title: _____

Date: _____

Source: This Rule is in part derived from F.R.Ev. 902 and in part new.

Rule 5-902 was accompanied by the following Reporter's note.

> Chapter 579 of the 2016 Laws of Maryland requires that a debt buyer in a consumer debt collection action introduce specified documents in actions that are not resolved by judgment on affidavit "in accordance with the Rules of Evidence applicable to actions that are not small claims actions brought under §4-405 of this Article." Code, Courts Article, §5-1203 (b)(2). Before the enactment, a debt buyer in a small claims case did not need "to provide any notice that it intend[ed] to prove its case without any witnesses available for cross-examination." *Bartlett v. Portfolio Recover Associates, LLC*, 438 Md. 255, 298 n. 16 (2015) (McDonald, J., concurring and dissenting). As a result of Chapter 579, if the debt buyer intends to admit business records without a live witness, the debt buyer must provide notice to the opposing party, in conformance with Rule 5-902 (b).

Mr. Armstrong explained that language has been added to the Committee note after subsection (b)(1) of Rule 5-902. This addresses self-authentication of the documents that are being submitted under Code, Courts Article, §5-1203. The new language refers to the statute, incorporating changes made as a result of the statute.

By consensus, the Committee approved Rule 5-902 as presented.

Mr. Armstrong presented Rule 3-308, Demand for Proof, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 – CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 300 – PLEADINGS AND MOTIONS

AMEND Rule 3-308 to reflect Chapter 579, Laws of 2016, as follows:

Rule 3-308. DEMAND FOR PROOF

When the defendant desires to raise an issue as to (1) the legal existence of a party, including a partnership or a corporation, (2) the capacity of a party to sue or be sued, (3) the authority of a party to sue or be sued in a representative capacity, (4) the averment of the execution of a written instrument, or (5) the averment of the ownership of a motor vehicle, the defendant shall do so by specific demand for proof. The demand may be made at any time before the trial is concluded. If not raised by specific demand for proof, these matters are admitted for the purpose of the pending action. Upon motion of a party upon whom a specific demand for proof is made, the court may continue the trial for a reasonable time to enable the party to obtain the demanded proof.

Committee note: This Rule does not affect the proof requirements set forth in Code, Courts Article, §5-1203 (b)(2) and Rules 3-306 (d) and 3-509 (a) that are applicable to claims arising from consumer debt when the plaintiff is not the original creditor.

Source: This Rule is derived from former M.D.R. 302 a.

Rule 3-308 was accompanied by the following Reporter's note.

The proposed addition to the Committee note to Rule 3-308 makes clear that the

proof requirements of Code, Courts Article, §5-1203 (b)(2) are not waived by a failure to make a demand under Rule 3-308.

Mr. Armstrong explained that the change to Rule 3-308 is similar to the change made to Rule 5-902. The Committee note has been changed to refer not only to Rules 3-306 and 3-509 but also to the statute, Code, Courts Article, §5-1203 (b)(2).

By consensus, the Committee approved Rule 3-308 as presented.

Mr. Armstrong presented Rule 3-306 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 – CIVIL PROCEDURE – DISTRICT COURT

CHAPTER 300 – PLEADINGS AND MOTIONS

AMEND Rule 3-306 by adding a cross reference following section (d) to reflect Chapter 579, Laws of 2016, as follows:

Rule 3-306. JUDGMENT ON AFFIDAVIT

. . .

(d) If Claim Arises from Assigned Consumer Debt

If the claim arises from consumer debt and the plaintiff is not the original creditor, the affidavit also shall include or be accompanied by (i) the items listed in this section, and (ii) an Assigned Consumer Debt Checklist, substantially in the form prescribed by the Chief Judge of the District Court, listing the items and

information supplied in or with the affidavit in conformance with this Rule. Each document that accompanies the affidavit shall be clearly numbered as an exhibit and referenced by number in the Checklist.

(1) Proof of the Existence of the Debt or Account

Proof of the existence of the debt or account shall be made by a certified or otherwise properly authenticated photocopy or original of at least one of the following:

(A) a document signed by the defendant evidencing the debt or the opening of the account;

(B) a bill or other record reflecting purchases, payments, or other actual use of a credit card or account by the defendant; or

(C) an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant.

(2) Proof of Terms and Conditions

(A) Except as provided in subsection (d)(2)(B) of this Rule, if there was a document evidencing the terms and conditions to which the consumer debt was subject, a certified or otherwise properly authenticated photocopy or original of the document actually applicable to the consumer debt at issue shall accompany the affidavit.

(B) Subsection (d)(2)(A) of this Rule does not apply if (i) the consumer debt is an unpaid balance due on a credit card; (ii) the original creditor is or was a financial institution subject to regulation by the Federal Financial Institutions Examination Council or a constituent federal agency of that Council; and (iii) the claim does not include a demand or request for attorneys' fees or interest on the charge-off balance **[in excess of the Maryland Constitutional**

rate of six percent per annum.

Committee note: This Rule is procedural only, and subsection (d)(2)(B)(iii) is not intended to address the substantive issue of whether interest in any amount may be charged on a part of the charge-off balance that, under applicable and enforceable Maryland law, may be regarded as interest.]

Cross reference: See Federal Financial Institutions Examination Council Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903 - 36906 (June 12, 2000).

(3) Proof of Plaintiff's Ownership

The affidavit shall contain a statement that the plaintiff owns the consumer debt. It shall include or be accompanied by:

(A) a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the original creditor; and

(B) a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner, including the plaintiff.

Committee note: If a bill of sale or other document transferred debts in addition to the consumer debt upon which the action is based, the documentation required by subsection (d)(3)(B) of this Rule may be in the form of a redacted document that provides the general terms of the bill of sale or other document and the document's specific reference to the debt sued upon.

(4) Identification and Nature of Debt or Account

The affidavit shall include the following information:

(A) the name of the original creditor;

(B) the full name of the defendant as

it appears on the original account;

(C) the last four digits of the social security number for the defendant appearing on the original account, if known;

(D) the last four digits of the original account number; and

(E) the nature of the consumer transaction, such as utility, credit card, consumer loan, retail installment sales agreement, service, or future services.

(5) Future Services Contract Information

If the claim is based on a future services contract, the affidavit shall contain facts evidencing that the plaintiff currently is entitled to an award of damages under that contract.

(6) Account Charge-off Information

If there has been a charge-off of the account, the affidavit shall contain the following information:

(A) the date of the charge-off;

(B) the charge-off balance;

(C) an itemization of any fees or charges claimed by the plaintiff in addition to the charge-off balance;

(D) an itemization of all post-charge-off payments received and other credits to which the defendant is entitled; and

(E) the date of the last payment on the consumer debt or of the last transaction giving rise to the consumer debt.

(7) Information for Debts and Accounts Not Charged Off

If there has been no charge-off, the affidavit shall contain:

(A) an itemization of all money claimed by the plaintiff, (i) including principal, interest, finance charges, service charges, late fees, and any other

fees or charges added to the principal by the original creditor and, if applicable, by subsequent assignees of the consumer debt and (ii) accounting for any reduction in the amount of the claim by virtue of any payment made or other credit to which the defendant is entitled;

(B) a statement of the amount and date of the consumer transaction giving rise to the consumer debt, or in instances of multiple transactions, the amount and date of the last transaction; and

(C) a statement of the amount and date of the last payment on the consumer debt.

(8) Licensing Information

The affidavit shall include a list of all Maryland collection agency licenses that the plaintiff currently holds and provide the following information as to each:

(A) license number,

(B) name appearing on the license, and

(C) date of issue.

Cross reference: See Code, Courts Article, §5-1203 (b)(2) concerning the plaintiff's requirements if a judgment on affidavit under this section is denied.

. . .

Rule 3-306 was accompanied by the following Reporter's note.

A cross reference is proposed to amend Rule 3-306 to reflect Code, Courts Article, §5-1203 (b)(2), enacted as part of Chapter 579, Laws of 2016. That statute requires that in consumer debt collection actions, "unless the action is resolved by judgment on affidavit," the plaintiff debt buyer/collector must introduce specified documents into evidence "in accordance with the Rules of Evidence applicable to actions

> that are not small claims actions brought under §4-405 of [the Courts'] Article." Courts Article §5-1203 (b)(2). The provision [was] not intended to require the application of those rules to any other evidence that may be offered by either party in a small claims action, or to otherwise affect Maryland Rules 5-101 (b) or 3-701 (f). See Floor Report, Senate Bill 771, Senate Judicial Proceedings Committee (March 30, 2016) p.3. The proposed cross reference would draw attention to the new provision to give judges and parties guidance.

Mr. Armstrong pointed out that along with the Rules in Agenda Item 3, a memorandum by Mr. Durfee, an Assistant Reporter, was in the meeting materials on the issue of the Committee note following subsection (d)(2) of Rule 3-306 (See Appendix 2). This took up the vast majority of the discussion at the Subcommittee meeting, particularly as to the issue of interest on the charge-off balance. In subsection (d)(2)(B), the current version of the Rule has the language that is bracketed in the proposed Rule. The debate in the Subcommittee was whether this language should be deleted or included in the Committee note after subsection (d)(2)(B). The Subcommittee had a split of opinion as to whether this language should be included.

Assistant Attorney General William T. Lawrie, Esq., told the Committee that he is with the Consumer Protection Division and was previously the Litigation Counsel for the Commissioner on Financial Regulation. He had submitted the original proposal

to change Rule 3-306, including the additional Committee note and compromise language that had been discussed with the Chair. During the Subcommittee meeting, the issue came up about retaining the Committee note. He said that he would like to keep the Committee note. Regardless of any changes made to the Rule, the Committee note is still applicable to the State regulators in the Attorney General's Office.

Mr. Lawrie said that the position of the Attorney General's Office is that the proposed changes to Rule 3-306 are not required by the new statute. Although some parts of the statute apply to judgments on affidavit, such as not being able to file cases past the statute of limitations and the requirement that the debt buyers have to have all of the documents in their possession, most of the statute is targeted at what happens if judgment on affidavit is not granted. The requirements under the new statute for the documents that have to be submitted track the language of Rule 3-306 almost identically. The one exception is the provision being discussed today. This is the only difference between the statute and Rule 3-306 documentary requirements.

Mr. Lawrie continued that the argument for removing the provision in subsection (d)(2)(B) is to make sure that the documentary requirements track the same in the statute and the Rule. The charge-off interest information is not a requirement under the new statute; it was more for the convenience of the

parties and the courts. If someone files a notice of intention to defend, or if the court denies the judgment on affidavit, then the plaintiffs would either have to file a certified or otherwise authenticated copy of the terms and conditions or withdraw the request for interest. The only reason Mr. Lawrie and his colleagues had made the proposal to change Rule 3-306 was so that it would track the statute. There is no need to change the Rule because of the new statute.

Michele Gagnon, Esq., addressed the Committee. She asked for clarification as to what the Attorney General was seeking. It seemed that what Mr. Lawrie's office was asking for was that even when someone is only requesting interest at the rate of 6%, the constitutional rate, and not relying on the interest set up in the terms and conditions, it will be necessary to attach another 10 pages of documents, which the person is not relying on, to the one-page complaint.

Mr. Enten commented that the legislation was prompted by the Attorney General, and it was hotly contested. At the table were the debt buyers, banks, the Maryland collection bar, and the Attorney General's Office. The bill has many paragraphs with new language. Every word of the bill was negotiated. In subsection (b)(2) of Code, Courts Article, §5-1203 as it appears in Senate Bill 771, the key word is "introduce." The provision requiring someone to have the documents only applies if the documents are introduced. The fact that someone attached a

document to the complaint does not mean that it has been introduced into evidence. The notion of being "introduced" is something that is introduced at trial.

Mr. Enten noted that what is being addressed here is a case where there has been no trial and no notice of intention to defend. The statute and the Rule require that the party seeking the judgment have a copy of the terms and conditions in his or her possession. The attorney has to sign off. The party seeking the judgment has to sign the affidavit in support of the motion.

Mr. Enten remarked that the Hon. John P. Morrissey, Chief Judge of the District Court, had spent a great amount of time working on this bill, because he was very concerned that the bill could be very burdensome. The legislature was very careful not to require that the terms and conditions be attached to the complaint. The compromise was that if a notice of intent to defend is filed, then the plaintiff must introduce the required documents into evidence. The debt collectors do not care for the Committee note, but they are willing to let it remain. Mr. Enten and his colleagues do not have a problem if the Rule remains as it is, and the Committee note is retained.

Mr. Enten said that if the Assistant Attorney General wants to argue to the legislature that the terms and conditions have to be attached to the complaint to get a judgment on affidavit, then this can be discussed during the next session. Mr. Enten

said that he and his colleagues do not think that the procedure is burdensome. There is no reason to make the proposed change. It will raise questions when cases are tried and dismissed, because the plaintiff cannot get a judgment on affidavit. Where does the statute provide that the terms and conditions have to be attached to the complaint?

The Chair commented that when the Rules were rewritten a few years ago, there was no statute, and there was concern regarding credit card debt cases. The concern had been related to the charge-off balance, because that could include a large amount of interest. The compromise was that the interest is not being claimed, except for what is allowed under the Maryland Constitution, which is 6%. In subsection (b)(3)(ii) of the bill, as a condition of not having to attach the document evidencing the terms and conditions, there is no reference to the 6% interest. If the legislature provides that this can only be done if there is no claim for any interest, does this not trump the current Rule?

Mr. Enten pointed out that subsection (b)(3) of the statute states: "[a] debt buyer or collector acting on behalf of a debt buyer shall introduce the following evidence in a consumer debt collection action." Ms. Gagnon noted that subsection (b)(2) provides: "[i]n addition to any other requirement of law or rule...". Mr. Enten said that the language "unless the action is resolved by judgment on affidavit" has been added. He

remarked that to him and his colleagues, this has no application to affidavit judgments. This requirement clearly only applies if there has been a notice of intent to defend filed.

The Chair asked whether the 6% cannot be applied to judgment on affidavit, but only to a judgment after a trial. Ms. Gagnon responded that it is the opposite. Mr. Enten remarked that if a judgment on affidavit is granted, the terms and conditions do not have to be attached to the complaint. The plaintiff is only asking for 6%. If there is a notice of intention to defend, then the plaintiff must introduce a properly authenticated copy of the terms and conditions at trial to get any interest.

Mr. Lawrie commented that regarding the Committee note, substantively, he and his colleagues do not think that there should be any interest allowed on the entire charge-off amount. The charge-off amount consists of principal and any amount which, under the National Bank Act (12 U.S.C. §38), is interest. If someone wants to request pre-judgment interest, it can only be on the principal amount of the charge-off, not on the entire charge-off. This was the basis for the Committee note. The Chair pointed out that the Rule is not establishing any substantive right. There was a question about whether the creditor could claim any interest on the charge-off balance. Mr. Lawrie responded that this question still exists. That would be the basis for leaving the Committee note in.

Judge Ellinghaus-Jones noted that subsection (b)(3) of the statute provides that if it is not a judgment on affidavit, the debt buyer shall introduce certain items. Section (a) provides that a debt buyer cannot file a suit unless the debt buyer has all of the documents listed in subsection (b)(3). She remarked that if the terms and conditions are not attached, how would the judge know that the plaintiff has them? The plaintiff cannot file suit unless the plaintiff has the terms and conditions, but the terms and conditions do not have to be attached if the matter will be resolved on affidavit. If the case is being resolved on affidavit, how would the judge know that the plaintiff has the terms and conditions document, so that the judge can grant the interest requested?

Judge Ellinghaus-Jones expressed the opinion that for the sake of consistency, the Committee note should come out. She said that she is not comfortable with a Rule that provides that if the defendant does not contest it, the judge may grant interest without the terms and conditions having been attached to the complaint.

Ms. Gagnon remarked that if the plaintiff is only asking for interest at 6%, the constitutional rate, the terms and conditions are not necessary because they represent a different and much higher interest rate. Also, the statute provides that the plaintiff has to have the terms and conditions in his or her possession. If it is filed without this, the law is being

violated. The Attorney General can sue the attorney, and the Attorney Grievance Commission can become involved. If an attorney is only asking for 6%, it seemed irrelevant to have to provide 10 pages of a document that calls for 18%.

The Chair asked Ms. Gagnon if she agreed with Judge Ellinghaus-Jones that to file suit, the plaintiff has to have the terms and conditions document. Mr. Enten said that if the legislature had wanted to require that the terms and conditions had to be attached to the complaint, it could have provided that in the law. The bill specifically does not provide for this, because the bill was part of a compromise. Ms. Gagnon noted that the Consumer Financial Protection Bureau has brought actions against debt buyers and some law firms because they did not have the terms and conditions in their possession, a charge-off statement showing the balance, and a statement showing usage or payment. This is why the attorney has to have it in his or her possession but does not have to attach it.

Mr. Carbine asked if Rule 3-306 currently has the bracketed language in subsection (d)(2)(B) and in the Committee note. The Reporter answered affirmatively. Mr. Carbine moved to reject the Subcommittee's proposal to take out the bracketed language. The motion was seconded. The Chair said that the motion was to leave the Rule as it is. Judge Price asked whether this means that the document would not have to be attached provided that only 6% interest on the charge-off balance is being requested.

Mr. Durfee added that it also has to be a judgment on affidavit. Mr. Enten pointed out that there are other requirements. The debt must be from a credit card and the bank has to be subject to the Federal Financial Institutions Examination Council. The Chair remarked that this is strictly for credit card charge-offs.

The Chair called for a vote on the motion to reject the Subcommittee's proposal to take out the bracketed language in subsection (d)(2)(B) and the Committee note, and it passed by majority vote.

The Chair said that Rule 3-306 will remain unchanged.

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