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 Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on June 22, 2017.

Members present:

Hon. Alan M. Wilner, Chair

Hon. Yvette M. Bryant
James E. Carbine, Esq.
Mary Anne Day, Esq.
Christopher R. Dunn, Esq.
Hon. Angela M. Eaves
Hon. JoAnn M. Ellinghaus-Jones
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Victor H. Laws, III, Esq.
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Sen. H. Wayne Norman
Hon. Paula A. Price
Scott D. Shellenberger, Esq.
Dennis J. Weaver, Clerk

In attendance:

Sandra F. Haines, Esq., Reporter
David R. Durfee, Jr., Esq., Assistant Reporter
Sherie B. Libber, Esq., Assistant Reporter
Camilla Roberson, Esq., Public Justice Center
Debra Gardner, Esq., Legal Director, Public Justice Center
Tyler Duckett, Esq., University of Baltimore School of Law
Jack Karpinski
Timothy Haven, District Court Headquarters
Arthur Pham, District Court Headquarters
Michael Schatzow, Esq., Baltimore City State's Attorney Office
Sarah Harlan, Esq., Office of the Attorney General
Brian L. Zavin, Esq., Office of the Public Defender
Hon. John P. Morrissey, Chief Judge, District Court of Maryland
Hon. Norman Stone, District Court of Maryland
Roberta Warnken, District Court Headquarters
Nisa Subasinghe, Esq., Department of Juvenile and Family Services, Administrative Office of the Courts
Thomas B. Stahl, Esq., Spencer & Stahl, P.C.

The Chair convened the meeting. He told the Committee that he had three announcements. With sadness, he formally announced the death of Melvin Sykes last month at the age of 93. The Chair said that he was not sure how many of the current Rules Committee members had served with Mr. Sykes, who served on the Committee for 55 years from 1954 to 1973 and from 1978 to 2014. No one else has ever served that long or ever will. The Chair called Mr. Sykes an extraordinary person with an unparalleled intellect who was an incredible member of the Committee. Though he was a very quiet person, when Mr. Sykes spoke, everyone listened. The Chair expressed his condolences to Mr. Sykes' family and said that he will be missed.

The Chair also announced that Judge Ellinghaus-Jones will retire from the District Court next month, which terminates her membership on the Rules Committee. The Chair has asked Judge Ellinghaus-Jones to serve as a consultant to the Committee on matters in which she has an interest. The Committee will miss her.

The Chair also announced that a hearing on the 193rd Report was held on Tuesday, June 20, 2017. The Report was adopted by the Court of Appeals with only minor amendments. The Rules in that Report will take effect on August 1, 2017.

The Reporter told the Committee that if anyone did not receive the handouts for Rules 19-304.2 and 19-304.4, which were

added to the agenda, copies are available. She added that copies of the comment letter pertaining to Agenda Item 4 submitted by Debra Gardner, Legal Director of the Public Justice Center, are also available.

The Reporter announced that after 30 years of service in different capacities in the Judiciary – most recently as an Assistant Reporter to the Rules Committee – Mr. Durfee is retiring, effective July 31, 2017. She informed the Committee that on afternoon of July 31, there will be an opportunity to stop by the Rules Committee office to say goodbye to him. Mr. Durfee said that it has been a pleasure for him to work with the Committee. The Chair said that Mr. Durfee has been a very valuable member of the Rules Committee staff and he will be missed.

Agenda Item 1. Consideration of proposed amendments to Rule 4-202 (Charging Document – Content) and Rule 4-213.1 (Appointment, Appearance, or Waiver of Attorney at Initial Appearance).

The Chair presented Rules 4-202, Charging Document – Content, and 4-213.1, Appointment, Appearance, or Waiver of Attorney at Initial Appearance, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 200 – PRETRIAL PROCEDURES

AMEND Rule 4-202 by revising the notice contained in a charging document to direct a defendant who seeks Public Defender representation to contact a District Court commissioner, as follows:

Rule 4-202. CHARGING DOCUMENT - CONTENT

(a) General Requirements

A charging document shall contain the name of the defendant or any name or description by which the defendant can be identified with reasonable certainty, except that the defendant need not be named or described in a citation for a parking violation. It shall contain a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred. An allegation made in one count may be incorporated by reference in another count. The statute or other authority for each count shall be cited at the end of the count, but error in or omission of the citation of authority is not grounds for dismissal of the charging document or for reversal of a conviction.

A charging document also shall contain a notice to the defendant in the following form:

TO THE PERSON CHARGED:

1. This paper charges you with committing a crime.

2. If you have been arrested and remain in custody, you have the right to have a judicial officer decide whether you should be released from jail until your trial.

3. If you have been served with a

citation or summons directing you to appear before a judicial officer for a preliminary inquiry at a date and time designated or within five days of service if no time is designated, a judicial officer will advise you of your rights, the charges against you, and penalties. The preliminary inquiry will be cancelled if a lawyer has entered an appearance to represent you.

4. You have the right to have a lawyer.

5. A lawyer can be helpful to you by:

(A) explaining the charges in this paper;

(B) telling you the possible penalties;

(C) explaining any potential collateral consequences of a conviction, including immigration consequences;

(D) helping you at trial;

(E) helping you protect your constitutional rights; and

(F) helping you to get a fair penalty if convicted.

6. Even if you plan to plead guilty, a lawyer can be helpful.

7. If you are eligible, the Public Defender or a court-appointed attorney will represent you at any initial appearance before a judicial officer and at any proceeding under Rule 4-216.1 to review an order of a District Court commissioner regarding pretrial release. If you want a lawyer for any further proceeding, including trial, but do not have the money to hire one, the Public Defender may provide a lawyer for you. ~~The court clerk will tell you how to contact the~~ To apply for Public Defender representation, contact a District Court commissioner.

8. If you want a lawyer but you cannot get one and the Public Defender will not

provide one for you, contact the court clerk as soon as possible.

9. DO NOT WAIT UNTIL THE DATE OF YOUR TRIAL TO GET A LAWYER. If you do not have a lawyer before the trial date, you may have to go to trial without one.

. . .

Rule 4-202 was accompanied by the following Reporter's note:

Amendments to Rules 4-202 and 4-213.1 are proposed in conjunction with implementation of Chapter 606, Laws of 2017 (SB 714). Under the new statute, a District Court commissioner -- rather than the Office of the Public Defender -- determines whether an individual qualifies as indigent and eligible for representation provided by the Public Defender.

In Rule 4-202 (a), an amendment to the Notice contained on a charging document is revised to direct a defendant who seeks Public Defender representation to contact a District Court commissioner.

In Rule 4-213.1, subsection (d)(1)(A) is amended to reflect that the request and affidavit form used by a defendant seeking representation by the Public Defender is a form approved by Chief Judge of the District Court, rather than a form used by the Public Defender. Subsection (g)(1) is amended to reflect that District Court commissioners will make determinations of eligibility for provisional representation and final determinations of indigence.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 200 – PRETRIAL PROCEDURES

AMEND Rule 4-213.1 by deleting a reference to certain forms used by the Public Defender, by adding a reference to certain forms approved by the Chief Judge of the District Court, by adding a reference to a final determination of indigence made by a District Court commissioner, by deleting a reference to a determination of eligibility for provisional representation made by the Public Defender, and by adding a reference to a determination of eligibility for provisional representation made by a District Court commissioner, as follows:

Rule 4-213.1. APPOINTMENT, APPEARANCE, OR WAIVER OF ATTORNEY AT INITIAL APPEARANCE

(a) Right to Representation by Attorney

(1) Generally

A defendant has the right to be represented by an attorney at an initial appearance before a judicial officer.

(2) Attorney

Unless the defendant waives that right in accordance with section (e) of this Rule or another attorney has entered an appearance, if the defendant is indigent within the meaning of Code, Criminal Procedure Article, §16-210 (b) and (c):

(A) the defendant shall be represented by the Public Defender if the initial appearance is before a judge; and

(B) the defendant shall be represented by an attorney appointed by the court in accordance with section (b) of this Rule if the initial appearance is before a District Court commissioner, unless the Public Defender enters an appearance for the defendant.

(b) Appointment of Attorneys for Initial Appearance Before Commissioner

(1) Appointment

After consultation with the State and local bar associations and the Public Defender, the District Administrative Judges shall develop lists of attorneys willing to accept appointment to represent indigent defendants at initial appearances before District Court commissioners in the district on a pro bono basis or at fees equivalent to those paid by the Public Defender to panel attorneys. Attorneys shall be appointed from the lists as needed for specific proceedings or to be available for blocks of time.

(2) Processing of Invoices

Invoices for fees due to court-appointed attorneys shall be processed in accordance with procedures adopted by the State Court Administrator.

(c) General Advice by Judicial Officer

If the defendant appears at an initial appearance without an attorney, the judicial officer shall advise the defendant that the defendant has a right to an attorney at the initial appearance, of the importance of having an attorney, and that, if the defendant is indigent, (1) the Public Defender will provide representation if the proceeding is before a judge, or (2) a court-appointed attorney will provide representation if the proceeding is before a commissioner.

(d) Proceeding Before Commissioner

(1) Determination of Indigence

(A) If the defendant claims indigence and desires a court-appointed attorney for the proceeding, the defendant shall complete a request and affidavit substantially in the form ~~used by the Public Defender~~ approved by the Chief Judge of the District Court and,

from those documents and in accordance with the criteria set forth in Code, Criminal Procedure Article, §16-210 (b) and (c), the commissioner shall determine whether the defendant qualifies for an appointed attorney.

(B) If the commissioner determines that the defendant is indigent, the commissioner shall provide a reasonable opportunity for the defendant and a court-appointed attorney to consult in confidence.

(C) If the commissioner determines that the defendant is not indigent, the commissioner shall advise the defendant of the right to a privately retained attorney and provide a reasonable opportunity for the defendant to obtain the services of, and consult in confidence with, a private attorney.

(2) Inability of Attorney to Appear Promptly

The commissioner shall further advise the defendant that, unless the attorney, whether court appointed or privately retained, is able to participate, either in person or by electronic means or telecommunication, within a reasonable period of time, the initial appearance may need to be continued, in which event, subject to subsection (d)(3) of this Rule, the defendant will be temporarily committed until the earliest opportunity that the defendant can be presented to the next available judicial officer with an attorney present.

(3) If Initial Appearance Continued

If pursuant to subsection (d)(2) of this Rule, the initial appearance needs to be continued, the commissioner, before recessing the proceeding, shall proceed in accordance with this subsection.

(A) Arrest Without Warrant - Determination of Probable Cause

If the defendant was arrested without a warrant, the commissioner shall determine whether there was probable cause for the charges and the arrest pursuant to Rule 4-216 (a). If the commissioner finds no probable cause for the charges or for the arrest, the commissioner shall release the defendant on personal recognizance, with no other conditions of release. If the defendant is released pursuant to subsection (d)(3)(A) of this Rule, the Commissioner shall not make the determination otherwise required by subsection (d)(3)(B) of this Rule, but shall provide the advice required by subsection (d)(3)(C) of this Rule.

(B) Preliminary Determination Regarding Release on Personal Recognizance

Regardless of whether the defendant was arrested with or without a warrant, the commissioner shall make a preliminary determination regarding the commissioner's authority to release the defendant on personal recognizance and the appropriateness of such a release pursuant to Rules 4-216 and 4-216.1. If the commissioner's preliminary determination is that release on personal recognizance with no other conditions of release is authorized and appropriate, the commissioner shall release the defendant on that basis.

(C) Required Compliance Before Release of Defendant

Before releasing the defendant pursuant to subsection (d)(3)(A) or (B) of this Rule, the commissioner shall comply with the applicable provisions of Rules 4-213 and 4-216 (g).

(D) Preliminary Determination Not to Release

Upon a preliminary determination by the commissioner not to release the defendant on personal recognizance, the commissioner shall comply with the applicable provisions of Rule 4-216 (f) and

(g) and recess the proceeding. The commissioner's preliminary determination is without prejudice to the right of the defendant to seek release on personal recognizance when the proceeding resumes with the attorney present. If the proceeding resumes before the commissioner who made the preliminary determination not to release the defendant on personal recognizance, the commissioner, upon request of the defendant, shall recuse, and the proceeding shall be before another judicial officer.

(e) Waiver - Initial Appearance Before Judge or Commissioner

(1) If the defendant indicates a desire to waive the right to an attorney, the judicial officer shall advise the defendant (A) that an attorney can be helpful in explaining the procedure and in advocating that the defendant should be released immediately on recognizance or on bail with minimal conditions, (B) that it may be possible for the attorney to participate electronically or by telecommunication, and (C) that any waiver would be effective only for the initial appearance and not for any subsequent proceedings.

(2) If, upon this advice, the defendant still wishes to waive the right to an attorney and the judicial officer finds that the waiver is knowing and voluntary, the judicial officer shall announce and record that finding.

(3) A waiver pursuant to section (e) of this Rule is effective only for the initial appearance and not for any subsequent proceeding.

(4) Notwithstanding an initial decision not to waive the right to an attorney, a defendant may waive that right at any time during the proceeding, provided that no attorney has already entered an appearance.

(f) Participation by Attorney by

Electronic or Telecommunication Means

(1) By State's Attorney

The State's Attorney may participate in the proceeding, but is not required to do so. When the physical presence of the State's Attorney is impracticable, the State's Attorney may participate electronically or by telecommunication if the equipment at the judicial officer's location and the State's Attorney's location provides adequate opportunity for the State's Attorney to participate meaningfully in the proceeding.

(2) By Defense Attorney

When the physical presence of a defense attorney is impracticable, the attorney may consult with the defendant and participate in the proceeding electronically or by telecommunication if the equipment is at the judicial officer's location and the defense attorney's location provides adequate opportunity for the attorney to consult privately with the defendant and participate meaningfully in the proceeding.

(g) Provisional and Limited Appearance

(1) Provisional Representation by Public Defender

. Unless a District Court commissioner has made a final determination of indigence and the Public Defender has entered a general appearance pursuant to Rule 4-214, any appearance entered by the Public Defender at an initial appearance shall be provisional. For purposes of this section, eligibility for provisional representation shall be determined by ~~the Public Defender~~ a District Court commissioner prior to or at the time of the proceeding.

(2) Limited Appearance

Unless a general appearance has been entered pursuant to Rule 4-214, an appearance by a court-appointed or privately

retained attorney shall be limited to the initial appearance before the judicial officer and shall terminate automatically upon the conclusion of that stage of the criminal action.

(3) Inconsistency with Rule 4-214

Section (g) of this Rule prevails over any inconsistent provision in Rule 4-214.

Source: This Rule is new but is derived, in part, from amendments proposed to Rule 4-216 in the 181st Report of the Standing Committee on Rules of Practice and Procedure.

Rule 4-213.1 was accompanied by the following Reporter's note:

See the Reporter's note to Rule 4-202.

The Chair explained that the changes to Rules 4-202 and 4-213.1 implement Chapter 606, 2017 Laws of Maryland (SB 714). The law alters the authority and duty to determine indigence for purposes of representation by the Public Defender. The determination now will be made by the District Court commissioners.

The Chair explained that because of the new statute, he and the Reporter concluded that amendments to at least two Rules were necessary. Rule 4-202 addresses charging documents, and section 7 of the notice in the charging document advises defendants how to apply for Public Defender representation.

Instead of stating that the clerk will tell the defendant how to contact the Public Defender, the notice now will state that to apply for representation by the Public Defender, the defendant is to contact the District Court commissioner.

The Chair noted that in Rule 4-213.1, proposed amendments to subsection (g)(1) makes it clear that it is the District Court commissioner who makes the determination of indigence. The Reporter pointed out that in subsection (d)(1)(A), the form that was "used by the Public Defender" has been changed to the form "approved by the Chief Judge of the District Court." She said that Judge John Morrissey, Chief Judge of the District Court, had advised the Reporter that section 7 of the form in Rule 4-202 should reference Rule 4-216.2 rather than Rule 4-216.1. The Reporter said that the form will be changed.

The Chair pointed out that Rules 4-202 and 4-213.1 were not considered by the Criminal Rules Subcommittee, so a motion to approve them is necessary. Mr. Weaver moved to approve the Rules as presented, subject to the correction in the form raised by Judge Morrissey. The motion was seconded and passed unanimously.

Agenda Item 2. Consideration of proposed amendments to Rule 4-342 (Sentencing – Procedure), Deletion of Rule 4-343 (Sentencing – Bifurcated Procedure in Capital Cases) and Rule 5-606 (Competency of Juror as Witness).

The Chair presented Rules 4-342, Sentencing – Procedure; 4-343, Sentencing – Bifurcated Procedure in Capital Case; and 5-606, Competency of Juror as Witness, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-342 by changing the title of the Rule, by deleting section (a), by moving the cross reference following section (a) to the end of the Rule, by deleting language from new section (a), by deleting a part of a cross reference after new section (a), and by relettering the Rule, as follows:

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

~~(a) Applicability~~

~~This Rule applies to all cases except those governed by Rule 4-343.~~

~~Cross reference: For procedures pertaining to collection of DNA samples from an individual convicted of a felony or a violation of Code, Criminal Law Article, §§6-205 or 6-206, see Code, Public Safety Article, §2-504.~~

~~(b)~~ (a) Statutory Sentencing Procedure

When a defendant has been found guilty of murder in the first degree and the State has given timely notice of intention to seek a sentence of imprisonment for life without the possibility of parole, ~~but has not given notice of intention to seek the death penalty,~~ the court shall conduct a sentencing proceeding, separate from the

proceeding at which the defendant's guilt was adjudicated, as soon as practicable after the trial to determine whether to impose a sentence of imprisonment for life or imprisonment for life without parole.

Cross reference: Code, Criminal Law Article, §§2-201, ~~2-202 (b)(3),~~ 2-203, and 2-304.

~~(c)~~ (b) Judge

If the defendant's guilt is established after a trial has commenced, the judge who presided shall sentence the defendant. If a defendant enters a plea of guilty or nolo contendere before trial, any judge may sentence the defendant except that, the judge who directed entry of the plea shall sentence the defendant if that judge has received any matter, other than a statement of the mere facts of the offense, which would be relevant to determining the proper sentence. This section is subject to the provisions of Rule 4-361.

~~(d)~~ (c) Presentence Disclosures by the State's Attorney

Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing. If the court finds that the information was not timely provided, the court shall postpone sentencing.

~~(e)~~ (d) Notice and Right of Victim to Address the Court

(1) Notice and Determination

Notice to a victim or a victim's representative of proceedings under this Rule is governed by Code, Criminal Procedure Article, §11-104 (e). The court shall determine whether the requirements of that

section have been satisfied.

(2) Right to Address the Court

The right of a victim or a victim's representative to address the court during a sentencing hearing under this Rule is governed by Code, Criminal Procedure Article, §11-403.

Cross reference: See Code, Criminal Procedure Article, §§11-103 (b) and 11-403 (e) concerning the right of a victim or victim's representative to file an application for leave to appeal under certain circumstances. See Code, Criminal Procedure Article, §11-103 (e) for the right of a victim to file a motion requesting restitution.

~~(f)~~ (e) Allocution and Information in Mitigation

Before imposing sentence, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement and to present information in mitigation of punishment.

~~(g)~~ (f) Reasons

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

Cross reference: For factors related to drug and alcohol abuse treatment to be considered by the court in determining an appropriate sentence, see Code, Criminal Procedure Article, §6-231. For procedures to commit a defendant who has a drug or alcohol dependency to a treatment program in the Department of Health and Mental Hygiene as a condition of release after conviction, see Code, Health General Article, §8-507.

~~(h)~~ (g) Credit for Time Spent in Custody

Time spent in custody shall be credited against a sentence pursuant to Code, Criminal Procedure Article, §6-218.

~~(i)~~ (h) Advice to the Defendant

(1) At the time of imposing sentence, the court shall cause the defendant to be advised of: (A) any right of appeal, (B) any right of review of the sentence under the Review of Criminal Sentences Act, (C) any right to move for modification or reduction of the sentence, (D) any right to be represented by counsel, and (E) the time allowed for the exercise of these rights.

(2) At the time of imposing a sentence of incarceration for a violent crime as defined in Code, Correctional Services Article, §7-101 and for which a defendant will be eligible for parole as provided in §7-301 (c) or (d) of the Correctional Services Article, the court shall state in open court the minimum time the defendant must serve for the violent crime before becoming eligible for parole or for conditional release under mandatory supervision pursuant to Code, Correctional Services Article, §7-501.

(3) The circuit court shall cause the defendant who was sentenced in circuit court to be advised that within ten days after filing an appeal, the defendant must order in writing a transcript from the court reporter.

Cross reference: Code, Criminal Procedure Article, §§8-102 – 8-109.

Committee note: Code, Criminal Procedure Article, §6-217 provides that the court's statement of the minimum time the defendant must serve for the violent crime before becoming eligible for parole is for informational purposes only and may not be considered a part of the sentence, and the failure of a court to comply with this requirement does not affect the legality or efficacy of the sentence imposed.

~~(j)~~ (i) Terms for Release

On request of the defendant, the

court shall determine the defendant's eligibility for release under Rule 4-349 and the terms for any release.

~~(k)~~ (j) Restitution from a Parent

If restitution from a parent of the defendant is sought pursuant to Code, Criminal Procedure Article, §11-604, the State shall serve the parent with notice of intention to seek restitution and file a copy of the notice with the court. The court may not enter a judgment of restitution against the parent unless the parent has been afforded a reasonable opportunity to be heard and to present evidence. The hearing on parental restitution may be part of the defendant's sentencing hearing.

~~(l)~~ (k) Recordation of Restitution

(1) Circuit Court

Recordation of a judgment of restitution in the circuit court is governed by Code, Criminal Procedure Article, §§11-608 and 11-609 and Rule 2-601.

(2) District Court

Upon the entry of a judgment of restitution in the District Court, the Clerk of the Court shall send the written notice required under Code, Criminal Procedure Article, §11-610 (e). Recordation of a judgment of restitution in the District Court is governed by Code, Criminal Procedure Article, §§11-610 and 11-612 and Rule 3-621.

Cross reference: For procedures pertaining to collection of DNA samples from an individual convicted of a felony or a violation of Code, Criminal Law Article, §§6-205 or 6-206, see Code, Public Safety Article, §2-504.

Source: This Rule is derived as follows:

~~Section (a) is derived from former Rule 772 a.~~

Section ~~(b)~~ (a) is new.

Section ~~(c)~~ (b) is derived from former Rule 772 b and M.D.R. 772 a.

Section ~~(d)~~ (c) is derived from former Rule 772 c and M.D.R. 772 b.

Section ~~(e)~~ (d) is new.

Section ~~(f)~~ (e) is derived from former Rule 772 d and M.D.R. 772 c.

Section ~~(g)~~ (f) is derived from former Rule 772 e and M.D.R. 772 d.

Section ~~(h)~~ (g) is derived from former Rule 772 f and M.D.R. 772 e.

Section ~~(i)~~ (h) is in part derived from former Rule 772 h and M.D.R. 772 g and in part new.

Section ~~(j)~~ (i) is new.

Section ~~(k)~~ (j) is new.

Section ~~(l)~~ (k) is new.

Rule 4-342 was accompanied by the following Reporter's note:

Chapter 156, Laws of 2013 (SB 276) repealed the death penalty. *Bellard v. State*, ___ Md. ___ (No. 72, September Term, 2016, filed March 31, 2017) has now resolved an ambiguity that had been created Chapter 156. Rule 4-342 is proposed to be amended by deleting language referring to the death penalty and a reference to the Code that has been repealed. The language "in non-capital cases" is deleted from the title of the Rule.

Section (a) is deleted, because it states that Rule 4-342 applies to all cases except those governed by Rule 4-343, which is proposed for deletion in its entirety. A cross reference after section (a) is moved to the end of the Rule.

The newly relettered section (a) (former section (b)) is amended by deleting the language "but has not given notice of intention to seek the death penalty," because, under section 4. of Chapter 156,

any existing notice to seek the death penalty is considered withdrawn and replaced with an intention to seek life without the possibility of parole.

A cross reference after the newly relettered section (a) (former section (b)) is amended by deleting a reference to former Code, Criminal Law Article, §2-202, which has been repealed.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

DELETE Rule 4-343, as follows:

~~Rule 4-343. SENTENCING - BIFURCATED PROCEDURE IN CAPITAL CASES~~

~~(a) Applicability~~

~~. . .~~

~~(b) Statutory Sentencing Procedure; Bifurcation of Proceeding~~

~~. . .~~

~~(c) Presentence Disclosures by the State's Attorney~~

~~. . .~~

~~(d) Reports of Defendant's Experts~~

~~. . .~~

~~(e) Judge~~

~~. . .~~

~~(f) Notice and Right of Victim's Representative to Address the Court or Jury~~

~~. . .~~

~~(g) Allocution~~

~~. . .~~

~~(h) Phase I of Sentencing Proceeding~~

~~. . .~~

~~(i) Phase II of Sentencing Proceeding~~

~~. . .~~

~~(j) Deletions from Phase II Form~~

~~. . .~~

~~(k) Advice of the Judge~~

~~. . .~~

~~(l) Report of Judge~~

~~. . .~~

~~Source: This Rule is derived in part from the 2008 version of former Rule 4-343 and is in part new.~~

Rule 4-343 was accompanied by the following Reporter's note:

> Chapter 156, Laws of 2013 (SB 276) repealed the death penalty. *Bellard v. State*, ___ Md. ___ (No. 72, September Term, 2016, filed March 31, 2017) has now resolved an ambiguity that had been created by Chapter 156. Rule 4-343, which provides the sentencing procedure in capital cases, is proposed for deletion in its entirety.

MARYLAND RULES OF PROCEDURE

TITLE 5- EVIDENCE

CHAPTER 600 – WITNESSES

AMEND Rule 5-606 by deleting subsection (c)(2), as follows:

Rule 5-606. COMPETENCY OF JUROR AS WITNESS

. . .

(c) "Verdict" Defined

For purposes of this Rule, "verdict" means ~~(1)~~ a verdict returned by a trial jury ~~or (2) a sentence returned by a trial jury in a sentencing proceeding conducted pursuant to law~~.

. . .

Rule 5-606 was accompanied by the following Reporter's note:

> Chapter 156, Laws of 2013 (SB 276) repealed the death penalty, but created an ambiguity as to whether, after the State has given notice of intent to seek life imprisonment without the possibility of parole, a defendant who is convicted of first degree murder has the right to have a jury determine if that sentence is to be imposed. The Court of Appeals, in *Bellard v. State*, ___ Md. ___ (No. 72, September Term, 2016, filed March 31, 2017), resolved the ambiguity by holding that the defendant does not have such a right. As with all other criminal convictions under the laws of this State, the defendant's sentence is determined by the court, not by a jury.
>
> With the resolution of the statutory ambiguity, the language of Rule 5-606 (c)(2) is superfluous and, therefore, is proposed to be deleted.

The Chair explained that when the death penalty was repealed by the General Assembly, the legislature failed to make an amendment to one section of the Criminal Procedure Article that addressed the sentence of life without parole. As a

result, an ambiguity was created in the law as to whether a defendant who receives a notice from the State's Attorney of the intent to seek a sentence of life without parole has a right to a jury trial on that sentence. The Chair said that he had brought this to the attention of the legislature, but a bill to correct the ambiguity did not pass. The Committee could not recommend that the Court of Appeals repeal the relevant provisions in the sentencing Rules until this ambiguity had been resolved.

The Chair said that the Court of Appeals has provided a resolution in the judicial context in *Bellard v. State*, 452 Md. 467 (2017). The Court held that a defendant is not entitled to have a jury decide the sentence to be imposed when a sentence of life without parole is being sought. With this decision, Rule 4-343 can be repealed because it will not have any effect on life without parole and a conforming amendment can be made to Rule 4-342. The Reporter noted that an amendment has to be made to Rule 5-606 as well. The Chair pointed out that the intent is to get rid of the notion that the trial jury can sentence a defendant to life without parole. These amendments have not been approved by the Criminal Subcommittee, so it will take a motion to approve them.

Judge Price moved to approve the amendments to Rules 4-342, 4-343, and 5-606. The motion was seconded and it was approved

by a majority vote.

Agenda Item 3. Consideration of proposed amendments to Rules in Title 10 (Guardians and Other Fiduciaries) - Rule 10-108 (Orders), Rule 10-112 (Petition for Guardianship of Alleged Disabled Person), Rule 10-103 (Definitions), Rule 10-202 (Certificates and Consents), and Rule 10-301 (Petition for Appointment of a Guardian of Property).

Mr. Laws presented Rule 10-108, Orders, for the Committee's consideration.

NOTE TO RULES COMMITTEE: At its August 11, 2016 meeting, the Probate/Fiduciary Subcommittee recommended adding a cross reference to the Maryland Fiduciary Access to Digital Assets Act after subsection (a)(1) of Rule 10-108. This was inadvertently omitted when Rule 10-108 was considered and approved by the Rules Committee at its May 2017 meeting. The proposed addition is shown in boldfaced type on page 3.

MARYLAND RULES OF PROCEDURE

TITLE 10- GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 100 – GENERAL PROVISIONS

AMEND Rule 10-108 by adding the language "e-mail address, if available" to subsection (a)(1)(C); by adding the language "date by which proof of bond shall be filed with the court" to subsection (a)(1)(E); by adding a cross reference after subsection (a)(1)(E); by adding a cross reference after subsection (a)(1)(F); in subsection (a)(1)(G), by deleting language referring to the order reciting the powers and duties of

the guardian; by adding a new section (a)(1)(H) providing that, with certain exceptions, the order shall direct a guardian other than a public guardian to complete certain orientation and training programs; by adding a Committee note after subsection (a)(1)(H); by adding to a cross reference after subsection (a)(1); by adding a new subsection (a)(2) pertaining to confidential information; by adding a cross reference after subsection (a)(2); by adding a Committee note after subsection (a)(2); by deleting the language of section (b) providing that the court may issue letters of guardianship and by adding in its place language providing that an order constitutes letters of guardianship as it is used by certain Code provisions; by adding to the cross reference after section (b); and by making stylistic changes, as follows:

Rule 10-108. ORDERS

(a) Order Appointing Guardian

(1) Generally

An order appointing a guardian shall ~~state~~:

~~(1)~~ (A) ~~Whether~~ state whether the guardianship is of the property, ~~or~~ the person, or both;

~~(2)~~ (B) ~~The~~ state the name, sex, and date of birth of the minor or disabled person;

~~(3)~~ (C) ~~The~~ state the name, address, ~~and~~ telephone number, and e-mail address, if available, of the guardian;

~~(4)~~ (D) ~~Whether~~ state whether ~~or not~~ the appointment of a guardian is solely ~~as a result of~~ due to a physical disability, and if not, the reason for the guardianship;

~~(5)~~ (E) ~~The~~ state (i) the amount of the guardian's bond~~,~~ or that ~~the~~ a bond is waived and (ii) the date by which proof of

any bond shall be filed with the court;

Cross reference: See Rule 10-702 (a), requiring the bond to be filed before the guardian commences the performance of any fiduciary duties.

~~(6)~~ (F) ~~The~~ state the date ~~upon~~ by which any annual report of the guardian shall be filed; and

Cross reference: See Rule 10-706 (b).

~~(7)~~ (G) ~~The~~ state the specific powers and duties of the guardian and any limitations on those powers or duties~~. The order shall recite the powers and duties of the guardian~~ either expressly or by referring to the specific ~~paragraphs~~ sections or subsections of an applicable statute containing those powers and duties~~.~~; and

(H) except as to a public guardian, unless the guardian has already satisfied the requirement or the court orders otherwise, direct the guardian to complete an orientation program and training in conformance with the applicable *Guidelines for Court-Appointed Guardians* attached as an Appendix to the Rules in this Title.

Committee note: An example of an appointment as to which waiver of the orientation and training requirements of subsection (a)(1)(H) may be appropriate is the appointment of a temporary guardian for a limited purpose or specific transaction.

Cross reference: Code, Estates and Trusts Article, §§13-201 (b) and (c), 13-213, 13-214, ~~**15-102,**~~ 13-705 (b), ~~**and**~~ 13-708**, and 15-102 and Title 15, Subtitle 6 (Maryland Fiduciary Access to Digital Assets Act)**.

(2) Confidential Information

Information in the order or in papers filed by the guardian that is subject to being shielded pursuant to the Rules in Title 16, Chapter 900 shall remain

confidential, but, in its order, the court may permit the guardian to disclose that information when necessary to the administration of the guardianship, subject to a requirement that the information not be further disclosed without the consent of the guardian or the court.

Committee note: Disclosure of identifying information to financial institutions and health care providers, for example, may be necessary to further the purposes of the guardianship.

Cross reference: See Rule 16-907 (f) and (j) and Rule 16-908 (d).

(b) Letters of Guardianship

~~A court may issue letters of guardianship of the property which shall contain a list of any restrictions on the powers of the guardian.~~ An order appointing a guardian entered under this Rule constitutes "letters of guardianship" as that term is used in Code, Estates and Trusts Article.

Cross reference: Code, Estates and Trusts Article, §§13-215 and 13-217, and 13-219.

(c) Orders Assuming Jurisdiction over a Fiduciary Estate Other than a Guardianship

An order assuming jurisdiction over a fiduciary estate other than a guardianship shall state whether the court has assumed full jurisdiction over the estate. If it has not assumed full jurisdiction over the estate or if jurisdiction is contrary to the provisions in the instrument, the order shall state the extent of the jurisdiction assumed. The order shall state the amount of the fiduciary's bond or that the bond is waived.

(d) Modifications

The court may modify any order of a continuing nature in a guardianship or fiduciary estate upon the petition of an

interested person or on its own initiative, and after notice and opportunity for hearing.

Source: This Rule is derived as follows:
Section (a) is derived in part from Code, Estates and Trusts Article, §§13-208 and 13-708 and is in part new.
Section (b) is ~~derived from former Rule V77 c 3~~ new.
Section (c) is derived from former Rules V71 f 1 and f 2.
Section (d) is derived in part from former Rule R78 b and is in part new.

Rule 10-108 was accompanied by the following Reporter's note:

In Rule 10-108, subsection (a)(1)(C) is proposed to be amended so that the order appointing the guardian contains the guardian's e-mail address. This is important in counties in which MDEC is operating and is helpful in other counties as well. In subsection (a)(1)(D), the words "as a result of" are replaced by "due to." Language requiring the date by which proof of bond must be filed is added to subsection (a)(1)(E). A cross reference pertaining to the bond requirement is added after the subsection. Language that is duplicative or obsolete is deleted from subsection (a)(1)(G). Subsection (a)(1)(H) is added to comply with the proposed new Guidelines for Court-Appointed Guardians. A reference to the Maryland Fiduciary Access to Digital Assets Act is added to the cross reference after subsection (a)(1).

Subsection (a)(2) is added to conform to the Rules in Title 16, Chapter 900, with the addition of a provision permitting disclosure by the guardian when necessary, subject to a prohibition against further disclosure by the recipient of the information without permission of the

guardian or the court. Cross references to specific Rules in that Chapter reflect the revised numbering proposed in the 193rd Report of the Rules Committee, currently pending before the Court of Appeals. The Committee note after subsection (a)(2) is added to address the Work Group's concern that being unable to disclose identifying information would interfere with the guardian's ability to administer the guardianship.

There had been a suggestion to delete section (b), because courts do not use letters of guardianship, but the Committee believes that since "letters of guardianship" are still referred to in the Code, it would be better to provide in the Rule that an order appointing a guardian constitutes letters of guardianship.

Mr. Laws explained that in an earlier draft of Rule 10-108, the addition of a cross reference to the Maryland Fiduciary Access to Digital Assets Act (Code, Estates and Trusts Article, Title 15, Subtitle 6) after subsection (a)(1) was recommended, but it was never added. The amendment to Rule 10-108 puts that cross reference back.

There being motion to amend or reject the proposed amendment to Rule 10-108, it was approved as presented.

Mr. Laws presented Rules 10-112, Petition for Guardianship of Alleged Disabled Person, and 10-103, Definitions, for the Committee's consideration.

NOTE TO RULES COMMITTEE: Amendments to Rule 10-112 were approved by the Committee at the May 2017 meeting. To conform to Chapter

666, Laws of 2017, references to "confinement" are deleted from Rules 10-112 and 10-103.

MARYLAND RULES OF PROCEDURE

TITLE 10 – GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 100 – GENERAL PROVISIONS

AMEND Rule 10-112 by changing the word "jurisdiction" to the word "county" in Section 2. and by adding a "NOTE" pertaining to the use of the word "county"; by adding language and boxes to check pertaining to an alleged disabled person who may be a beneficiary of the Veterans Administration; by adding language to Section 6. pertaining to a request for certain information about a conviction of a crime; by changing the word "an" to the word "any" in Section 7.; in Section 8., by adding the words "and e-mail addresses, if known," by updating a cross reference, and by changing the term "Local Commission on Aging and Retirement Education" to "Director of the Local Area Agency on Aging"; by deleting the word "confinement" from Section 9.; by deleting the requirement at the end of the form that a facsimile number be provided; and by making stylistic changes, as follows:

Rule 10-112. PETITION FOR GUARDIANSHIP OF ALLEGED DISABLED PERSON

A petition for guardianship of an alleged disabled person shall be substantially in the following form:

[CAPTION]

In the Matter of _____ (Name of Alleged Disabled Individual)

In the Circuit Court for _____ (County)

_____ (docket reference)

PETITION FOR GUARDIANSHIP OF
ALLEGED DISABLED PERSON

Note: This form is to be used where the subject of the petition is an individual, regardless of the individual's age, who has a disability other than minority.

[ ] Guardianship of Person [ ] Guardianship of Property [ ] Guardianship of Person and Property

The petitioner, _____, _____, whose
(name) (age)

address is _____, and whose

telephone number is _____, represents to

the court that:

1. The alleged disabled person _____,

age _____, born on the _____ day of _____, _____,
(month) (year)

a [ ] male or [ ] female resides at _____

_____.

2. If the alleged disabled person does not reside in the ~~jurisdiction~~ county in which this petition is filed, ~~then~~ state the place in this ~~jurisdiction~~ county where the alleged disabled person is currently located _____

_____.

NOTE: For purposes of this Form, "county" includes Baltimore City.

3. The relationship of petitioner to the alleged disabled person is _____.

4. The alleged disabled person

[ ] is a beneficiary of the Veterans Administration and the guardian may expect to receive benefits from that Administration.

[ ] is not a beneficiary of the Veteran's Administration.

~~4.~~ 5. *Complete Section ~~4.~~ 5. if the petitioner is asking the court to appoint the petitioner as the guardian.*

(Check only one of the following boxes)

[ ] I have not been convicted of a crime listed in Code, Estates and Trusts Article, §11-114~~, or~~.

[ ] I was convicted of such a crime, namely _____

_____.

The conviction occurred in _____ in the _____
(year)

_____, but the following good cause
(name of court)

exists for me to be appointed as guardian: _____

_____

_____

_____.

~~5.~~ 6. *Complete Section ~~5.~~ 6. if the petitioner is asking the court to appoint an individual other than the petitioner as the guardian.*

The name of the prospective guardian is _____

_____ and that individual's age is _____. The relationship of that individual to the alleged disabled person is _____.

(Check only one of the following boxes)

[ ] _____ has not been convicted
(Name of prospective guardian)
of a crime listed in Code, Estates and Trusts Article, §11-114.

[ ] _____ was convicted of such a crime, namely _____ _____. The conviction occurred in _____ in the _____, but the
(year) (Name of court)
following good cause exists for the individual to be appointed as guardian: _____ _____.

~~6.~~ 7. If the alleged disabled person resides with petitioner, then state the name and address of ~~an~~ any additional person on whom initial service shall be made: _____ _____ _____ _____.

~~7.~~ 8. The following is a list of the names, addresses, ~~and~~ telephone numbers, and e-mail addresses, if known of all interested persons (see Code, Estates and Trusts Article, §13-101 ~~(j)~~ (k)):

	Name	Address	Telephone Number	E-mail Address (if known)
Person or Health Care Agent Designated in Writing by Alleged Disabled Person:	_____	_____	_____	_____
Spouse:	_____	_____	_____	_____
Parents:	_____	_____	_____	_____
	_____	_____	_____	_____
Adult Children:	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
Adult Grandchildren*****:	_____	_____	_____	_____
	_____	_____	_____	_____
Siblings*****:	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
Any Other Heirs at Law:	_____	_____	_____	_____
Guardian (If appointed):	_____	_____	_____	_____

Any Person Holding a Power of Attorney of the Alleged Disabled Person:	_____	_____	_____	_____
Alleged Disabled Person's Attorney:	_____	_____	_____	_____
Any Other Person Having Assumed Responsibility for the Alleged Disabled Person:	_____	_____	_____	_____
Any Government Agency Paying Benefits to or for the Alleged Disabled Person:	_____	_____	_____	_____
Any Person Having an Interest in the Property of the Alleged Disabled Person:	_____	_____	_____	_____
All Other Persons Exercising Control over the Alleged Disabled Person or the Person's Property:	_____	_____	_____	_____

A Person or Agency Eligible to Serve as Guardian of the Person of the Alleged Disabled Person (Choose A or B below):

A. ~~Local Commission on Aging and Retirement Education~~ Director of the Local Area Agency on Aging (if Alleged Disabled Person is Age 65 or over):	_____	_____	_____	_____
B. Local Department of Social Services (if Alleged Disabled				

Person is Under Age 65):

_____ _____ _____ _____

***** Note: Adult grandchildren and siblings need not be listed unless there is no spouse and there are no parents or adult children.

~~8.~~ 9. The names and addresses of the persons with whom the alleged disabled person resides or has resided over the past five years and the ~~length of time~~ approximate dates of the alleged disabled person's residence with each person are as follows:

Name	Address	Approximate Dates
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

~~9.~~ 10. A brief description of the alleged disability and how it affects the alleged disabled person's ability to function is as follows:

_____

_____

_____.

~~10.~~ 11. (a) Guardianship of the Person is sought because

_____
(Name of Alleged Disabled Person)

cannot make or communicate responsible decisions concerning health care, food, clothing, or shelter, because of mental disability, disease, habitual drunkenness, addiction to drugs, or other addictions. State the relevant facts:

_____

_____

_____.

(b) Describe less restrictive alternatives that have been attempted and have failed (see Code, Estates and Trusts Article, §13-705 (b)):

_____

_____

_____.

~~11.~~ 12. (a) Guardianship of the Property is sought because

_____ cannot manage property
(Name of Alleged Disabled Person)

and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs or other addictions, imprisonment, compulsory hospitalization, ~~confinement,~~ detention by a foreign power, or disappearance. State the relevant facts:

_____

_____

_____.

(b) Describe less restrictive alternatives that have been attempted and have failed (see Code, Estates and Trusts Article, §13-201):

_____

_____

_____.

~~12.~~ 13. If this Petition is for Guardianship of the Property, the following is the list of all the property in which the alleged disabled person has any interest including an absolute interest, a joint interest, or an interest less than absolute (e.g. trust, life estate):

Property	Location	Value	Sole Owner, Joint Owner (specific type), Life Tenant, Trustee, Custodian, Agent, etc.
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

~~13.~~ 14. The petitioner's interest in the property of the alleged disabled person listed in ~~12.~~ 13. is _____

_____.

~~14.~~ 15. If a guardian or conservator has been appointed for

the alleged disabled person in another proceeding, the name and address of the guardian or conservator and the court that appointed the guardian or conservator are as follows:

_____ _____
Name Address

_____
Court

~~15.~~ 16. All other proceedings regarding the alleged disabled person (including criminal) are as follows:

_____

_____
_____.

~~16.~~ 17. All exhibits required by the Instructions below are attached.

WHEREFORE, Petitioner requests that this court issue an order to direct all interested persons to show cause why a guardian of the

[ ] person [ ] property [ ] person and property of

the alleged disabled person should not be appointed, and (if applicable) _____ should not
(Name of prospective guardian)

be appointed as the guardian.

_____ _____
Attorney's Signature Petitioner's Name

_____
Attorney's Name

_____
Address

_____
Telephone Number

_____
~~Facsimile Number~~

_____
E-mail Address

Petitioner solemnly affirms under the penalties of perjury that the contents of this document are true to the best of Petitioner's knowledge, information, and belief.

_____
Petitioner's Name

_____
Petitioner's Signature

INSTRUCTIONS

1. The required exhibits are as follows:

   (a) A copy of any instrument nominating a guardian;

   (b) A copy of any power of attorney (including a durable power of attorney for health care) which the alleged disabled person has given to someone;

   (c) Signed and verified certificates of two physicians licensed to practice medicine in the United States who have examined the alleged disabled person, or of one licensed physician, who has examined the alleged disabled person, and one licensed psychologist or certified clinical social worker, who has seen and evaluated the alleged disabled person. An examination or evaluation by at least one of the health care professionals must have occurred within 21 days before the filing of the petition (see Code, Estates and Trusts Article, § 13-103 and §1-102 (a) and (b)).

(d) If the petition is for the appointment of a guardian of an alleged disabled person who is a beneficiary of the Department of Veterans Affairs, then in lieu of the certificates required by (c) above, a certificate of the Secretary of that Department or an authorized representative of the Secretary setting forth the fact that the person has been rated as disabled by the Department.

2. Attach additional sheets to answer all the information requested in this petition, if necessary.

Source: This Rule is new.

Rule 10-112 was accompanied by the following Reporter's note:

> Several changes to the Petition for Guardianship of an Alleged Disabled Person form set forth in Rule 10-112 are proposed. The changes track the changes to Rule 10-111, Petition for Guardianship of a Minor, and are proposed for the reasons stated in the Reporter's note to that Rule. In addition, in Section 8., the name of the "Local Commission on Aging and Retirement Education" is corrected to "Director of the Local Area Agency on Aging." In Section 9., deletion of the word "confinement" conforms the Rule to Chapter 666, Laws of 2017 (HB 81).

MARYLAND RULES OF PROCEDURE

TITLE 10 – GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 100 – GENERAL PROVISIONS

AMEND Rule 10-103 by deleting the word "confinement" from subsection (b)(2), as follows:

Rule 10-103. DEFINITIONS

. . .

(b) Disabled Person

(1) In connection with a guardianship of the person, "disabled person" means a person, other than a minor, who, because of mental disability, disease, habitual drunkenness, or addiction to drugs, has been adjudged by a court to lack sufficient understanding or capacity to make or communicate responsible decisions concerning himself or herself, such as provisions for health care, food, clothing, or shelter, and who, as a result of this inability, requires a guardian of the person.

(2) In connection with a guardianship of property, "disabled person" means a person, other than a minor, (A) who has been adjudged by a court to be unable to manage his or her property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, ~~confinement,~~ detention by a foreign power, or disappearance, (B) who has or may be entitled to property or benefits that require proper management, and (C) who, as a result of this inability, requires a guardian of the property.

. . .

Rule 10-103 was accompanied by the following Reporter's note:

Chapter 666, Laws of 2017 (HB 81) repealed "confinement" as a condition of disability for purposes of guardianship proceedings to protect an individual's property. The proposed amendment to Rule 10-103 (b)(2) conforms the Rule to the statutory change.

Mr. Laws explained that the legislature eliminated confinement as one of the grounds necessitating the appointment of a guardian. The proposal is to strike the word "confinement" from section 12 of the form of the petition for guardianship of an alleged disabled person. The word would also be stricken from the definition of "disabled person" in subsection (b)(2) of Rule 10-103.

By consensus, the Committee approved Rules 10-112 and 10-103 as presented.

Mr. Laws presented Rules 10-202, Certificates and Consents, and 10-301, Petition for Appointment of a Guardian of Property, for consideration.

NOTE TO RULES COMMITTEE: The Department of Family Administration suggested that the phrase "and orphans' courts" be deleted from the proposed amendments to Rules 10-202 and 10-301 that were approved by the Rules Committee at the May 2017 meeting because certificates of incapacity are only required for guardianship of alleged disabled persons and would not be filed in an orphans' court.

MARYLAND RULES OF PROCEDURE

TITLE 10 – GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 200 – GUARDIAN OF PERSON

AMEND Rule 10-202 (a) to delete language pertaining to the contents of certain certificates, to add a requirement that each certificate be substantially in the form approved by the State Court

Administrator, and to add certain requirements pertaining to posting and availability of forms, as follows:

Rule 10-202. CERTIFICATES AND CONSENTS

(a) Certificates

(1) Generally Required

Except as provided in subsection (a)(4) of this Rule, if guardianship of the person of a disabled person is sought, the petitioner shall file with the petition signed and verified certificates of (A) two physicians licensed to practice medicine in the United States who have examined the disabled person, or (B) one licensed physician who has examined the disabled person and one licensed psychologist or certified clinical social worker who has seen and evaluated the disabled person. An examination or evaluation by at least one of the health care professionals shall have been within 21 days before the filing of the petition.

(2) ~~Contents~~ Form

Each certificate required by subsection (a)(1) of this Rule shall ~~state: (A) the name, address, and qualifications of the person who performed the examination or evaluation, (B) a brief history of the person's involvement with the disabled person, (C) the date of the last examination or evaluation of the disabled person, and (D) the person's opinion as to: (i) the cause, nature, extent, and probable duration of the disability, (ii) whether institutional care is required, and (iii) whether the disabled person has sufficient mental capacity to understand the nature of and consent to the appointment of a guardian~~ be substantially in the form approved by the State Court Administrator, posted on the Judiciary website, and available in the offices of the clerks of the circuit courts **~~[and orphans' courts]~~**.

(3) Absence of Certificates

(A) Refusal to Permit Examination

If the petition is not accompanied by the required certificate and the petition alleges that the disabled person is residing with or under the control of a person who has refused to permit examination by a physician or evaluation by a psychologist or certified clinical social worker, and that the disabled person may be at risk unless a guardian is appointed, the court shall defer issuance of a show cause order. The court shall instead issue an order requiring that the person who has refused to permit the disabled person to be examined or evaluated appear personally on a date specified in the order and show cause why the disabled person should not be examined or evaluated. The order shall be personally served on that person and on the disabled person.

(B) Appointment of Health Care Professionals by Court

If the court finds after a hearing that examinations are necessary, it shall appoint two physicians or one physician and one psychologist or certified clinical social worker to conduct the examinations or the examination and evaluation and file their reports with the court. If both health care professionals find the person to be disabled, the court shall issue a show cause order requiring the alleged disabled person to answer the petition for guardianship and shall require the petitioner to give notice pursuant to Rule 10-203. Otherwise, the petition shall be dismissed.

(4) Beneficiary of the Department of Veterans Affairs

If guardianship of the person of a disabled person who is a beneficiary of the United States Department of Veterans Affairs is being sought, the petitioner shall file with the petition, in lieu of the two

certificates required by subsection (a)(1) of this Rule, a certificate of the Secretary of that Department or an authorized representative of the Secretary stating that the person has been rated as disabled by the Department in accordance with the laws and regulations governing the Department of Veterans Affairs. The certificate shall be prima facie evidence of the necessity for the appointment.

. . .

Rule 10-202 was accompanied by the following Reporter's note:

To enhance uniformity of practice and to provide judges with specific, detailed information pertaining to examinations and evaluations of alleged disabled persons, the Guardianship Work Group of the Domestic Law Committee of the Judicial Council is developing standardized forms for the certificates required by subsection (a)(1) of Rule 10-202. Because the professional credentials, the nature of the examination or evaluation the individual is licensed to perform, etc. are difference as to each type of professional [physician, psychologist, or social worker] authorized to perform the examination or evaluation, three separate forms are being developed.

A proposed amendment to subsection (a)(2) of the Rule replaces language pertaining to the contents of the certificate with the requirement that each certificate be "substantially in the form approved by the State Court Administrator, posted on the Judiciary website, and available in the offices of the clerks of the circuit courts." The proposed language follows the format of a recently adopted amendment to Rule 4-504 (b).

Rule 10-301 refers to the certificates

required by Rule 10-202. In conjunction with the proposed amendment to Rule 10-202, a Committee note following Rule 10-301 (d) also is proposed.

MARYLAND RULES OF PROCEDURE

TITLE 10 – GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 300 – GUARDIAN OF PROPERTY

AMEND Rule 10-301 by adding a Committee note following section (d), as follows:

Rule 10-301. PETITION FOR APPOINTMENT OF A GUARDIAN OF PROPERTY

. . .

(d) Required Exhibits

The petitioner shall attach to the petition as exhibits (1) a copy of any instrument nominating a guardian; (2) (A) the certificates required by Rule 10-202, or (B) if guardianship of the property of a disabled person who is a beneficiary of the United States Department of Veterans Affairs is being sought, in lieu of the requirements of Rule 10-202, a certificate of the Secretary of that Department or an authorized representative of the Secretary stating that the person has been rated as disabled by the Department in accordance with the laws and regulations governing the Department of Veterans Affairs; and (3) if the petition is for the appointment of a guardian for a minor who is a beneficiary of the Department of Veterans Affairs, a certificate of the Secretary of that Department or any authorized representative of the Secretary, in accordance with Code, Estates and Trusts Article, §13-802.

Committee note: Rule 10-202 (a)(1) requires that a certificate of a physician,

psychologist, or social worker be substantially in the form approved by the State Court Administrator, posted on the Judiciary website, and available in the offices of the clerks of the circuit courts ~~[and orphans' courts]~~.

. . .

Rule 10-301 was accompanied by the following Reporter's note:

See the Reporter's note to Rule 10-202.

Mr. Laws said that Rules 10-202 and 10-301 were previously approved by the Rules Committee. He informed the Committee that the Department of Family Administration suggested that the language "and orphans' courts" be deleted from subsection (a)(2) of Rule 10-202 and from the Committee note following section (d) of Rule 10-301. The change pertains to the forms for physicians' and psychologists' certificates used to certify that they have examined the person who is alleged to be need of a guardianship of the person of a disabled person. These certificates of incapacity are only required for guardianships of alleged disabled persons and would not be filed in an orphans' court because it has no jurisdiction.

There being no motion to amend or reject the proposed amendments to Rule 10-202 and 10-301, they were approved as presented

Additional Agenda Item

Mr. Frederick presented Rule 19-304.4, Respect for Rights of Third Persons (4.4), for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 300 – MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 19-304.4 by adding a new section (c) pertaining to obtaining information from third parties, by adding a Committee note following section (c), and by adding a new Comment [6], as follows:

Rule 19-304.4. RESPECT FOR RIGHTS OF THIRD PERSONS (4.4)

(a) In representing a client, an attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that the attorney knows violate the legal rights of such a person.

(b) An attorney who receives a document, electronically stored information, or other property relating to the representation of the attorney's client and knows or reasonably should know that the document, electronically stored information, or other property was inadvertently sent shall promptly notify the sender.

(c) In communicating with third persons, an attorney representing a client in a matter shall not seek information relating to the matter that the attorney knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. An attorney who receives information that is protected from

disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure **[to any tribunal in which the matter is pending and]** to the person entitled to enforce the protection against disclosure.

Committee note: If the person entitled to enforce the protection against disclosure is represented by an attorney, the notice required by this Rule shall be given to the person's attorney. See Rules 1-331 and 19-304.2 (4.2).

Query: Should the required notification to the tribunal, which had been in the Rule prior to April 1, 2017, be restored or deleted?

COMMENT

[1] Responsibility to a client requires an attorney to subordinate the interests of others to those of the client, but that responsibility does not imply that an attorney may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-attorney relationship.

[2] Section (b) recognizes that attorneys sometimes receive a document, electronically stored information, or other property that was inadvertently sent or produced by opposing parties or their attorneys. A document, electronically stored information, or other property is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document, electronically stored information, or other property is accidentally included with

information that was intentionally transmitted. If an attorney knows or reasonably should know that such a document, electronically stored information, or other property was sent inadvertently, this Rule requires the attorney promptly to notify the sender in order to permit that person to take protective measures. Whether the attorney is required to take additional steps, such as returning the document, electronically stored information, or other property, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document, electronically stored information, or other property has been waived. Similarly, this Rule does not address the legal duties of an attorney who receives a document, electronically stored information, or other property that the attorney knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document, electronically stored information, or other property" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving attorney knows or reasonably should know that the metadata was inadvertently sent to the receiving attorney.

[3] Some attorneys may choose to return a document or delete electronically stored information unread, for example, when the attorney learns before receiving it that it was inadvertently sent. Where an attorney is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the attorney. See Rules 19-301.2 and 19-301.4.

[4] Third persons may possess information that is confidential to another person under an evidentiary privilege or under a law providing specific confidentiality protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. An attorney may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege. Regarding current employees of a represented organization, see also Rule 19-304.2 (4.2).

Model Rules Comparison.—Sections (a) and (b) of Rule 19-304.4 ~~is~~ are substantially similar to the language of Model Rule 4.4 of the Ethics 2000 amendments to the ABA Model Rules of Professional Conduct. Section (c) substantially restores to the Rule Maryland language as it existed prior to a 2017 amendment.

Rule 19-304.4 was accompanied by the following Reporter's note:

Amendments to Rule 19-304.4, effective April 1, 2017, conformed it to Model Rule 4.4 of the Ethics 2000 amendments to the ABA Model Rules of Professional Conduct. The amendments deleted language from former section (b) that addressed certain responsibilities of an attorney when obtaining information from third persons, without adding comparable language elsewhere.

Proposed amendments to Rule 19-304.4 substantially restore the deleted language by adding a new section (c), a Committee note following section (c), and Comment [4].

A conforming amendment to Rule 19-304.2 also is proposed.

Mr. Frederick explained that the language that is now in proposed section (c) was unintentionally omitted when Rule 19-304.4 was amended effective April 1, 2017. He informed the Committee that Mr. Durfee wrote a memorandum explaining why the language should be put back into Rule 19-304.4. Mr. Frederick said that he agrees with Mr. Durfee's conclusion.

Mr. Frederick directed the Committee's attention to the question posed by the Reporter at the end of Rule 19-304.4 in the meeting materials: "Should the required notification to the tribunal, which was in the Rule prior to April 1, 2017, be restored or deleted?" Mr. Frederick said that he thought that it should be restored. The reason is that the term "tribunal" is defined in Rule 19-301.0 as significantly broader than a court of law. As an example, if someone were defending a judge before the Commission on Judicial Disabilities and there was an inadvertent disclosure, all counsel should notify the Chair of the Commission and the members as a matter of propriety. This would also apply to the Attorney Grievance Commission if someone were appearing before it. Both bodies are "tribunals" according to the definition. It would also apply to any administrative body.

Mr. Frederick moved to restore the deleted language. The motion was seconded and approved by a majority vote. The Reporter noted that an amendment to the cross reference to Rule

19-304.4 at the end of Comment 6 of Rule 19-304.2 is also required. By consensus, the Committee agreed to correct the cross reference.

Agenda Item 4. Reconsideration of a proposed new Title 15, Chapter 1400 (Liens for Unpaid Wages) - Rule 15-1401 (Applicability; Definitions), Rule 15-1402 (Notice to Employer – Requirements), Rule 15-1403 (Right of Employer to Contest Proposed Lien; Procedure; Consequence of Failure to Contest), Rule 15-1404 (Filing and Recording Wage Lien Statements), Rule 15-1405 (Extinguishment or Release of Lien), Rule 15-1406 (Enforcement of Lien).

The Chair explained that new Title 15, Chapter 1400 was before the Committee in May but was removed from the agenda. He said that the Subcommittee did significant work on these Rules. The Chair said that after the topic was removed from the May agenda, the Committee consulted with three attorneys who specialize in labor and employment law and who have experience with the relevant statutes. Committee staff also consulted with attorneys from the Public Justice Center and an Assistant Attorney General representing the Commissioner of Labor and Industry. The discussions at that meeting resulted in the Rules before the Committee today. He informed the Committee that Ms. Gardner from the Public Justice Center and Ms. Harlan from the Office of the Attorney General are in attendance to answer any questions.

Mr. Frederick drew the Committee's attention to the statute, Code, Labor and Employment Article, Title 3, Subtitle 11 (Lien for Unpaid Wages), which is included in the meeting materials. Mr. Frederick said that he was unaware of the existence of this statute until the Subcommittee looked at it, and no other attorney that he asked was aware of it. He acknowledged the laudable purpose behind the statute, which was enacted in 2013. The statute's purpose is to protect people from being taken advantage of by unscrupulous employers. The Subcommittee heard stories of employers who hired an individual for two weeks, fired the person without paying wages, and then hired someone else for two weeks and repeated the cycle. He said that the purpose of the statute is to give the unpaid employee a weapon to combat this practice.

The Chair explained that the legislation was passed unanimously by one chamber of the legislature and approved with a few votes against in the other. The Chair informed the Committee that the legislative file contained a collection of horror stories that were presented to the General Assembly. The term used is "wage theft."

Mr. Frederick told the Committee that he wanted to highlight some of the statutory provisions that will be relevant when the Committee sees the questions raised by the Subcommittee for the Committee's consideration. Code, Labor and Employment

Article, §3-1101 (b) defines "employer" to include "a person who acts directly or indirectly in the interest of another employer with an employee." He noted that this is a somewhat unusual definition. The Chair said that part of this definition was taken from statutes that have been around for many years, including the Federal Fair Labor Standards Act (29 U.S.C. §201 et. seq.).

Mr. Frederick drew the Committee's attention to Code, Labor and Employment Article, §3-1103 (c), which provides that the employer or employee may request an evidentiary hearing. Subsection (d)(1) provides that the court shall determine whether to issue an order establishing a lien for unpaid wages within 45 days after the date on which the complaint was filed. He explained that the employee has the burden of proof based on a preponderance of the evidence. He noted that these cases may be filed only in the circuit court; the District Court does not have jurisdiction. Section (e) states that if a circuit court issues an order to establish a lien for unpaid wages, the employee is entitled to court costs and reasonable attorney's fees. In Code, Labor and Employment Article, §3-1104, a lien for unpaid wages is established if the employee gives the employer notice and the employer is personally served in accordance with Rule 2-121. If the employer does not file a complaint within 30 days after a notice is served, there is a

lien by operation of law.

Mr. Frederick noted that Code, Labor and Employment Article, §3-1105 addresses the recordation of a lien. According to the statute, the clerk of the circuit court is to record the lien, but the clerk does not know how to record a lien created by operation of the law because the lien does not have a case number associated with it. The lien can be recorded against real or personal property, but the statute does not tell the people responsible for recordation what it is they are supposed to do and how they are supposed to do it. The Public Justice Center came to the Rules Committee for help clarifying the procedure. Section (f) provides for recordation as constructive notice of lien.

The Chair commented that the statute was not well drafted. The broad structure of the statute was taken from the Contract Lien Act (Code, Real Property Article, Title 14, Subtitle 2), which mostly is used to enforce condominium fees. Mr. Frederick added that under that statute, enforcement is clear because it involves the condominium or homeowners' association. It is not the same with Title 15, Chapter 1400 of the Rules, which provides an opportunity for mischief if it is not used in the intended way. He remarked that some unscrupulous people or crafty attorneys may try to use this for personal benefit.

Mr. Frederick presented Rule 15-1401, Applicability;

Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1400 – LIENS FOR UNPAID WAGES

ADD new Rule 15-1401, as follows:

Rule 15-1401. APPLICABILITY; DEFINITIONS

(a) Applicability

This Chapter applies to the establishment of liens for unpaid wages governed by Code, Labor and Employment Article, Title 3, Subtitle 11. To the extent that the Commissioner of Labor and Industry, acting pursuant to Code, Labor and Employment Article, §3-1109, acts on behalf of an employee, the Commissioner shall be regarded as the employee for purposes of filing, sending, and serving notices, pleadings, and other papers.

(b) Definitions

In this Chapter, (1) the definitions in Code, Labor and Employment Article, §3-1101 apply except as expressly otherwise provided or as necessary implication requires, and (2) "LE" means the Labor and Employment Article of the Maryland Code.

Committee note: LE §3-1101 (b) defines "employer" as "includ[ing] a person who acts directly or indirectly in the interest of another employer with an employee." That language also appears in the definition of "employer" in the Federal Fair Labor Standards Act (29 U.S.C. §203 (d)), the Maryland Wage and Hour Law (LE §3-401(b)), the Maryland Equal Pay Act (LE §3-301 (b)(2)), and the Maryland adoption, medical, and parental leave laws (LE §§3-801, 3-802, and 3-1201). The scope of that provision is defined, with respect to both multiple

> employers and corporate officers and supervisory personnel, in Federal and Maryland case law and regulations. See, for example, *McFeeley v. Jackson Street Entertainment*, 825 F.3d 235 (4th Cir. 2016); *Perez v. Sanford-Orlando Kennel Club*, 515 F.3d 1150 (11th Cir. 2008); *Newell v. Runnels*, 407 Md. 578 (2009); 29 C.F.R. §825.104. Under those interpretations, depending on the facts, it is possible that more than one entity as well as certain officers or supervisory employees of an entity may be regarded as employers or additional employers for purposes of the unpaid wages lien law. Each such person against whom a lien is sought must be separately identified in, and served with, all notices, pleadings, and other papers affecting the person.
>
> Source: This Rule is new.

Mr. Frederick drew the Committee's attention to the Committee note after section (b) of Rule 15-1401. The note explains how the Subcommittee recommends addressing the issue of who is an "employer" by providing a definition that will be of assistance to a tribunal. Mr. Frederick referred to the sentence of the Committee note which reads, "Under those interpretations, depending on the facts, it is possible that more than one entity as well as certain officers or supervisory employees of an entity may be regarded as employers or additional employers for purposes of the unpaid wages lien law." At the second meeting with the three experts who consulted with Committee staff, he said that none of them were concerned about the definition of "employer" as it operates in these cases.

The Chair pointed out that the term is very familiar to those experts because it is included in the Federal Fair Labor Standards Act and multiple Maryland wage laws. The problem is the lack of a basic definition of the word "employer." The definition only provides who is included. Conceivably, it could include companies, such as Target or Walmart, or a shift manager. The Subcommittee wanted to call attention to this so that the attorney is not looking to file a lien against the manager's property, although that could be appropriate in some instances. Mr. Frederick remarked that at the Subcommittee meeting, the example that scared him was the person who works at Walmart telling the employee to do a certain task. Arguably, the person giving the orders is the employer as well as Walmart itself. This could be misused in the situation of filing the lien.

The Chair said that superimposed on these issues is the fact that the statute provides for regulations to be issued by the Commissioner of Labor and Industry, which the Commissioner has done. The Chair said that he has been in touch with counsel to the Commissioner's office and if these Rules are adopted, whether in the form before the Committee or with amendments, the Commissioner will need to change some of the forms created by that office. He noted that the Commissioner has agreed to do this to harmonize with the Rules.

Mr. Frederick moved to approve Rule 15-1401 as presented. The motion was seconded and passed with a majority vote.

Mr. Frederick presented Rule 15-1402, Notice to Employer – Requirements, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1400 – LIENS FOR UNPAID WAGES

ADD new Rule 15-1402, as follows:

Rule 15-1402. NOTICE TO EMPLOYER – REQUIREMENTS

(a) Generally

To establish a lien for unpaid wages due and owing to an employee under LE Title 3, Subtitle 11, the employee shall serve on the employer a Notice to Employer of Intent to Claim Lien for Unpaid Wages that (1) complies with the requirements of section (b) of this Rule and with regulations adopted by the Commissioner of Labor and Industry, and (2) is under oath. The oath shall be in one of the forms set forth in Rule 1-304**[, except that an affidavit as to the amount of unpaid wages due and owing shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit].**

Query to Rules Committee: Should the affidavit requirement pertaining to the amount of unpaid wages due and owing be similar to the form of affidavit required in summary judgment proceedings [Rule 2-501 (c)], or is the general form of affidavit [Rule 1-304 – "Generally"] sufficient for all statements required to be included in

the Notice?

(b) Contents

In addition to any other information required by regulations of the Commissioner of Labor and Industry, the notice shall contain (1) the name, address, telephone number (if any), and e-mail address (if any) of the employee seeking the lien; (2) the name and address of the employer against whose property a lien is sought; (3) the dates of the employee's employment by the employer; (4) the dates for which wages are due and owing but were not paid; (5) the basis for the claim that wages were due and owing by the employer but were not paid; (6) the monetary amount of the lien sought; (7) a description of the real or personal property, or both, of the employer against which the lien is sought adequate to identify the property, the name of the owner, and the location of the property; and (8) notice to the employer of the employer's right to dispute the lien by filing a complaint in the circuit court for the county in which any of the listed property is located within 30 days after service of the notice.

Committee note: LE §3-1102 (3) requires that the notice to the employer "contain[s] the information required by the Commissioner of Labor and Industry under §3-1110 of this Subtitle to provide the employer with adequate notice of the wages claimed and the property against which the lien for unpaid wages is sought." The list in section (b) is taken almost verbatim from COMAR 09.12.39.02B.

(c) Service

The notice shall be personally served by any competent individual over the age of 18 years **[other than the employee]** on the employer pursuant to Rules 2-121 and 2-124, except that service may be made on the employer at the employer's place of

business. Service shall be made within the period of limitations prescribed in Code, Courts Article §5-101.

Query to Rules Committee: May the employee serve the Notice? Rule 2-123 (a), pertaining to service of process, prohibits service by a party. Proposed new Rule 15-1402 (c), however, pertains to service of a notice, rather than service of process. If the employee is permitted to serve the notice, a Committee note distinguishing service of the notice from service of process could be added to the Rule, as follows:

Committee note: Although Rule 2-123 (a) prohibits service of *process* by a party, service of a *notice* pursuant to section (c) of this Rule may be made by any competent individual over the age of 18 years, including the employee.

Source: This Rule is new.

Mr. Frederick explained that Rule 15-1402 contains the requirements for establishing a lien. He referred to the bold language in section (a). The question for the Committee the form of the affidavit. Is it going to comply with section (c) of Rule 2-501 (Motion for Summary Judgment), requiring personal knowledge of someone over the age of 18 years, or are the form requirements going to be more relaxed, which is the position of the Public Justice Center as noted in the letter distributed to the Committee? (See Appendix 1).

The Chair pointed out two issues regarding section (a) of Rule 15-1402. One is the form of the affidavit. Is it going to

be on knowledge, information, and belief totally? Is it going to be similar to a summary judgment affidavit on personal knowledge? Or is it going to be a mixture of the two? This would be knowledge, information, and belief as to everything but the allegation that these wages are due, which would be on personal knowledge. If the employer does not file a complaint challenging the allegation, then a lien is established. Mr. Frederick added that the complaint has to be filed in circuit court 30 days from the time that the notice is received. The group debated whether there should be a high standard of due process or "due process-lite," with the summary judgment affidavit supplying enough information for the court.

Mr. Laws suggested that the lower standard for the affidavit is appropriate. The Rules are likely to apply to non-attorney employees who have jobs, such as dishwashers, and who may not know who the responsible employer is, especially because of the definition in the statute, and may not know what property may be subject to lien. Those individuals cannot be expected to have personal knowledge of all of this information. If the higher standard is set, it could be too difficult to meet in a very high percentage of the cases. The employer will get the notice and will have the opportunity to rebut what is in the affidavit.

Senator Norman disagreed with Mr. Laws. He said that the

employer could get a letter and throw it away. A standard has been set. The bar should not be lowered for one side, but not for the other. Mr. Laws responded that the Contract Lien Act works the same way. The person who receives a notice throws it out at the recipient's peril.

Ms. Gardner addressed the Committee. She said that the standard for the employer's affidavit is "to the best of his or her knowledge, information, and belief." As to the other standard, Ms. Gardner agreed that personal knowledge for the entire affidavit – including ownership of the property – is highly inappropriate. She noted that, after working with the Subcommittee, she and her colleagues acquiesced in the idea that the summary judgment affidavit would be filed for the allegations of the wages due.

Ms. Gardner pointed out that the employer may file a challenge in circuit court without requesting a hearing. The employee then files a response, perhaps with an additional affidavit or not, but also does not have to request a hearing. The thought was that this situation is not so much like a default where knowledge, information, and belief would be sufficient to obtain the judgment but is more like a summary judgment situation. She explained that the court could more easily determine that the employee has met the burden of proof if the portion of the affidavit concerning the wages is based on

personal knowledge.

Ms. Gardner added that she and her colleagues also decided to acquiesce with regard to the proposal for a dual form of the affidavit with the understanding that the Department of Labor, Licensing and Regulation ("DLLR") would conform its forms. This will permit *pro se* employees who are working their way through this process to be able to navigate the system. The Chair said that he did not want to misrepresent the Commissioner's view on being willing to change the forms to conform to the new Rules as part of the Commissioner's regulations. He asked Ms. Harlan whether this was the case. Ms. Harlan responded that after the Subcommittee meeting, she met with the Commissioner, provided him with the background on this issue, and explained the situation. She said that the Commissioner understands and agreed that the forms would probably need to be changed once the Rules are adopted.

Mr. Shellenberger said that he wanted to make sure that there would be forms. A lay person is not able to access the system without forms. The Chair pointed out that the forms would come from the Commissioner's office. Mr. Marcus remarked that, on the issue of the difference in the affirmation, the potential exists that if there is a personal knowledge affirmation, a title has been impaired. If the employer against whom the lien is asserted alleges that the title to property has

been clouded based on the employee's affirmation that was on personal knowledge, the employer has essentially put the employee in a position where the employee may be subject to a claim for damages for slander to the title of the property that is now the subject of the lien.

Mr. Marcus expressed the view that notwithstanding problems with the statute, in suggesting Rules to the court, there has to be a relaxed standard as to the property that would be the subject of the lien. For personal knowledge, the person has to know what the wage claim is, but as to the property or anything having to do with the property, there could be a claim by some employer for slander of title against an employee who has now made a claim and allowed a lien to be filed. This would potentially impact that person's ability to alienate the property by selling or transferring it, because there is now a cloud on the title to the property.

Mr. Marcus commented that as to the property itself, it could be a disservice being done to the people who are supposedly benefitting from the statute if they are put in a position where they are subject to some retribution by the employer. The Chair asked whether Mr. Marcus favored "knowledge, information, and belief" as the standard in the affidavit other than as to the wages. Mr. Marcus answered affirmatively, noting that as to the wages, he did not see any

reason that someone who is claiming wages cannot say that the claim is on the claimant's personal knowledge. The person has to be able to swear to that information in a contested proceeding. As to the property, Mr. Marcus could see an entire series of problems with lenders, security interests, and other items, depending on how contested these proceedings become.

Mr. Frederick commented that, as to Mr. Marcus's comment about slander of title, judicial privilege may apply. In *Aron v. Brock*, 118 Md. App. 475 (1997), which involved a press conference on the stairs of the courthouse concerning a case, the statements made at that conference were deemed to be judicially privileged. Whatever is in the affidavit vis-à-vis the title would, under that case, ultimately be deemed to be privileged. When someone is acting under the statute and is potentially inviting someone to file a case, judicial privilege applies and therefore someone is not committing slander. Mr. Marcus acknowledged that there may be a privilege, but people should not be encouraged to make misrepresentations in a judicial forum about their level of knowledge.

The Chair said that he thought that the consensus in the group was to split the knowledge requirement so that personal knowledge should only apply to a statement about the exact amount someone is owed for a specific period of time. Anything else would be under the standard of "knowledge, information, and

belief." Mr. Carbine pointed out that slander and slander of title are two separate actions. Slander of title can be triggered by a judicial proceeding. The jury could find that the claim was made in bad faith or without substantial justification. He was not sure that a judicial immunity for defamation applies to a slander of title action. If someone files a frivolous foreclosure proceeding, it would be slander of title of the mortgagor. Likewise, if a frivolous wage claim is filed, it would be slander of the title of the employer.

Ms. Gardner remarked that she and her colleagues had already seen one slander counterclaim and one slander of title counterclaim with a lower standard for the affidavit. This is what people may choose to do. Mr. Marcus commented that he did not see a way around that issue, because the statute lends itself to it. He noted that Mr. Carbine had said that someone could file this action without substantial justification, and there should be the ability of the person against whom the lien is sought to oppose it. The person filing should be held accountable. The problem is how to sort out what has merit in the slander claims, as opposed to those that are sort of a "kneejerk" response.

Ms. Gardner noted that the statute and the proposed Rules also provide for sanctions for a frivolous claim. The Chair pointed out that this issue of the wording of the affidavit is

addressed in section (a) of Rule 15-1402. Ms. Gardner observed that what is important to fully effectuate section (a) is to add a cross reference to the website where the forms will be available. If people are going to be able to navigate this process using the Rules, especially with a dual form of affidavit, they need to know where to get the forms. It would be a reference to the title, such as "DLLR Wage Lien Law webpage."

The Chair explained that most of the people involved will be *pro se*, except for the cases taken by the Public Justice Center and the Legal Aid Bureau. The *pro se* litigants should not have to bounce back and forth between the Rules, COMAR regulations, and forms that are somewhere. Ms. Gardner said that this was her point – people need to be directed to where they can find the forms.

The Reporter told the Committee that it is problematic to add a cross reference to a website that is not controlled by the Judiciary. There are clues in the Rule for people to find out more information. Mr. Weaver inquired how it is anticipated that people will find out about this process in the first place. Would it be from the Rules, DLLR, or some other source? Ms. Gardner responded that there are a variety of ways for people to find out. One of the goals is to have a self-contained set of Rules, although it is arguable that this would not ordinarily be

addressed by court Rules. A wage lien is not ordinarily a judicial matter that would be before the court unless the employer challenges it. Any Rules made about a proceeding that is not actually before the court – and may never be – should have the information that people need to comply with the procedure.

The Chair commented that this is an access to justice issue. He did not think that Pamela Ortiz, Director of the Access to Justice Department, or any of her colleagues had discussed these Rules. The relevant form would be the form adopted by the Commissioner because the statute gives the Commissioner that authority. The question becomes to what extent the courts should be involved and who should have the forms available for people to use. This clearly is not a court proceeding, and the forms will not be in the clerk's office. Where are people going to get them? They are not likely to know where – or even what – DLLR is. He suggested that the Access to Justice Department can assist with implementation.

Ms. Harlan said that the Commissioner administers the Wage Payment and Collection Act – which also provides for an administrative wage order – but it is an entirely different process. The Commissioner does not use the wage lien tool as a collection tool; he uses other kinds of collection processes once there is a final order. Although the Commissioner does not

use the wage lien tool, his office gets many calls. People are referred to the website if they would like to use the wage lien tool. Many people start the complaint process with DLLR.

The Chair remarked that day laborers and dishwashers, who are asking to be paid, may not have computers to be able to tap into the DLLR website or any website. The Reporter pointed out that the Committee note after subsection (b)(1) of Rule 15-1402 references the appropriate COMAR citation, 09.12.39.02B. This provides the website for DLLR. If this is changed, presumably, the regulation would be changed. The Judiciary often changes aspects of its website. The Reporter added that she was reluctant to build in a citation to the website.

Mr. Marcus commented that there seem to be very few instances, if any, where the Rules have incorporated a website outside of the Judiciary. He could see where someone might ask for the incorporation of a website or some kind of direction, but opined that, for policy reasons, this should not be done. Either the agency or the advocates should be encouraged to publicize the availability of the forms and then put the actual Rule into the website. If there is a reference to the Rule featured prominently on the website, people should be able to get the necessary information.

The Chair reiterated that the form of notice that would be used in a wage lien case is not a court form. Mr. Marcus said

that the Rule should not promote or give the appearance of promoting any one advocacy group or any organization that is trying to enhance a position. The Chair said that other organizations, such as the Pro Bono Resource Center, have forms available. Mr. Weaver noted that when a Rule has a form in it, the language preceding the form will be "substantially in the following form." Could language be added to Rule 15-1402 (a)(1), which currently reads "complies with the requirements of section (b) of this Rule and with regulations adopted by the Commissioner of Labor and Industry," that would state "substantially in the form" and then add a form? The Chair pointed out that the form would have to be found. For the purposes of the Rule, it is important to include the oath requirement and not just leave that to the Commissioner to do. The Rule may need some language changes, but the Commissioner's forms must be available, because the statute instructs the Commissioner to promulgate forms.

Ms. Gardner said that she sensed from the discussion that a cross reference would not be appropriate. Judge Nazarian remarked that from the perspective of access by both employees and employers, it is worth writing to Ms. Ortiz and her colleagues in the Access to Justice Department. That office could make a video about how the system works for both employees and employers, including directing people to the appropriate

forms. The Chair noted that there may be a difference between the form of the complaint filed by the employer, because that triggers a judicial action. The notice does not trigger anything except a possible complaint from the employer. Ms. Gardner commented that DLLR provides a form for the complaint for the employer.

The Reporter asked if there was a consensus for Ms. Gardner's suggestion that the oath shall be "made to the best of the employee's knowledge, information, and belief," and this would be the body of most of the oath. However, as to the oath for the wages, it would be what is in the bolded language in section (a), which is, "shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." The Reporter remarked that if Rule 15-1402 simply refers to the oath that is in Rule 1-304, that could be confusing when all that is necessary is the "knowledge, information, and belief." If the Committee agrees, this change can easily be made.

Mr. Shellenberger asked whether two oaths are necessary. Someone has personal knowledge of the amount owed, but to the best of the person's knowledge, information, and belief, someone has a bank account at a certain bank. Mr. Shellenberger added that he was trying to conceptualize how this would work. The

two oaths would be based on different standards. The Chair commented that the form would set out the two oaths.

Judge Price inquired as to whether a person who is asking the court for a lien on a particular asset would have to provide the court with a bank account number or some identifiers, not just state that there is an account somewhere. She remarked that a lien against property is a serious remedy. Should the property not be identified? The Chair responded that subsection (b)(7) of Rule 15-1402 requires a description of the property with some particularity. Judge Price suggested that someone who can identify the property would have enough knowledge to sign an affidavit.

The Chair said that this was discussed at the lengthy work group meeting. The employee may know that the employer has a van, but the employee does not know whether the van is leased or owned and does not know the VIN number. Mr. Laws pointed out that to get a lien on a vehicle, one would have to get a Department of Motor Vehicles security interest filed. This information is not readily available. The Chair acknowledged that this is another issue, and the example may not have been the best. Mr. Laws expressed the view that it may be sufficient for the person to state that, on knowledge, information, and belief, the employer has a van or a bank account. The person cannot be expected to have personal knowledge. Judge Price

inquired how the judge can sign on the lien. Mr. Laws responded that it depends on whether the matter is contested.

Mr. Frederick remarked that it would be useful to look at the statute, which states that the lien is established by operation of law. The Chair cautioned the Committee to keep the process in mind: if the employer does not respond to the notice within 30 days, the employee can file a Wage Lien Statement. If the lien is against real property, the employee files the lien with the clerk of the circuit court in the county where the property is. If it is a lien against personal property, the statute provides that it is filed in the manner of security agreements, which are filed with the State Department of Assessments and Taxation according to Code, Commercial Law Article, Title 9, Subtitle 5. That will put a cloud on the title. This is all based on the notice that was sent, the employer's lack of response, and the Wage Lien Statement.

The Chair asked what happens next if no action is taken and the employee wants to collect on the lien. The employee would have to file a complaint or a petition with the court to enforce the lien. He said that if the employer did not file a complaint in response to the notice, this is the second way the process will end up in court: the employee files to enforce the lien. In the meantime, the problem is that the lien statement is filed, and it is a lien against the property by operation of

law.

Mr. Frederick pointed out that there is another possibility. If the van is getting old, and the employer would like to trade it in, the dealer tells the employer about the incumbrance. Ms. Gardner said that if the lien is posted, the employer pays. Mr. Frederick responded that this may be considered draconian. The Chair commented that this is the purpose of the statute. It is to give the employee a lien. This is not the same as the wage payment law, which requires a court proceeding that can be in the District Court. Someone can be awarded treble or double damages and attorneys' fees depending on the applicable statute, but it can be a lengthier process. The procedure in the Rules to implement the statute was intended to be very quick. Someone sends a notice, and if there is no response, the person files the lien statement and that ties up the property until someone else takes some action. The Chair agreed with Ms. Gardner that when the employer realizes that the lien exists, the employer has to do something. The only action that the employer may be able to take at that point is to pay the wages.

Ms. Gardner remarked that what she and her colleagues see more often is employers who raise bogus defenses, rather than employers who are unable to raise valid defenses. In most situations, there is no serious dispute; the employee simply has

not been paid. It does not appear that employers, including individual employers, have had difficulty in responding to *pro se* litigants. They do not always do so; they may ignore the notice. The Chair commented that the statute, which has been in effect for four years, provides for this. The Court of Appeals is not being asked to authorize this; it is in the province of the legislature.

Senator Norman commented that this is a huge issue. Someone may have cut the grass of a person who owns a pickup truck. If that individual does not pay the $300 to the person who cut the grass and matter goes to court, it will involve the circuit court, because the legislature provided that the circuit court hears this $300 case. Senator Norman expressed the view that this is ridiculous. In the District Court, someone can get the $300 judgment and for $15 can file a lien. The lien can be perfected in the circuit court. The legislature created this incredibly complex monster.

Judge Morrissey said that he would provide some history on the issue. He said that the Public Justice Center had reached out to Ms. Ortiz and the Access to Justice Department several years ago. The matter was forwarded to Judge Morrissey who referred it to one of the work groups under the District Court Chief Judge's Committee. That group came to the same conclusion that Senator Norman came to a few years ago: this is a matter

for the legislature. The District Court is not mentioned anywhere in the statute. The piece of paper that someone has and tries to use to file a writ cannot work in the District Court system. This is probably what the intent of the legislature was, but it is not what the legislation provides.

The Chair said that the letter from the Public Justice Center arrived in November. The attorneys commented that they were having difficulties enforcing the statute. When the Chair looked at the statute, he found several ambiguities in it. The Chair said that the Committee is trying to do the best it can to implement the statute. There are provisions in the current law for court proceedings. As Mr. Frederick noted, if a complaint is filed by the employer, the main issue has to be resolved within 45 days after the filing of the complaint, not service of the complaint. What happens if the complaint is not served for 60 days? Senator Norman said that he was not suggesting that nothing should be done; he was suggesting that since there are so many details that need to be adjusted, they should be resolved before the Rules are written.

The Chair said that the question relating to Rule 15-1402 pertains to the affidavit. Mr. Laws moved that the affidavit shall be made on knowledge, information, and belief, except for the issue of the amount of wages, which shall be made on the personal knowledge of the affiant. The motion was seconded and

it passed on a majority vote.

The Chair drew the Committee's attention to section (c) of Rule 15-1402. Mr. Frederick pointed out the query to the Rules Committee at the end of Rule 15-1402 asking whether the employee may personally serve the notice on the employer. The intention of the statute is to essentially give the employee leverage with regard to liens for unpaid wages. If the employee has to hire someone to serve the notice, this is an issue that is addressed by other Rules.

Judge Mosley asked whether the employee would have to hire someone or whether the employee could send a friend to serve the notice. The Chair commented that Rule 2-123 (Process – By Whom Served) prohibits a party from serving process. The item that Rule 15-1402 (c) requires to be served is not process. When the issue arose, it was not so much whether Rule 2-123 applied, but whether it could create a confrontation if the employee goes to the employer's house or place of business to serve the notice.

The Chair said that it may not be necessary to mention it, because Rule 2-123 does not apply, but he asked whether it would be helpful to state that the employee may serve this notice. It is just a notice. The employee can go to the employer's house, but this may not be a good idea. Mr. Frederick remarked that the Subcommittee, being peace-loving, felt that this was not a good idea. Judge Mosley agreed.

Mr. Carbine noted that there is another issue related to this. He said that he looked at the Rules, the COMAR provision, and the statute and found nothing addressing proof of service. This should be added, because the 30-day period for the employer to file a complaint starts with service. The employee may give notice to the employer, and the employer may deny receiving it. There should be an affidavit of service. However, where is it filed? Ms. Gardner said that the statute addresses this. It is required in the Wage Lien Statement. She thought that it was in the Rules and said that it might be in the regulations. It is also required in the response filed by the employee to the employer's complaint.

Ms. Gardner remarked that she wanted to address the comments made about confrontations. Sometimes, current employees initiate the wage lien. They are in contact with the employer every day. The employee can hand over the notice. This is a simple and inexpensive method of serving the notice. Even former employees may have gone to the employer's office multiple times asking for their last paycheck. The confrontations happen there, if there are any at all, allowing the employee to drop off the wage lien notice. This should not significantly alter the interactions between the two.

Mr. Shellenberger acknowledged Ms. Gardner's point, but he observed that there is a big difference between working for

someone and interacting with the person every day as opposed to handing him or her a piece of paper that states that a lien is being put on the person's car or other property. A Rule should not be created that is going to force people into a potential confrontation leading to a criminal charge. The employee should be allowed to ask someone else to deliver the notice to the employer.

The Chair commented that the problem with this is that the Rule currently does not prohibit the employee from personally serving the notice. Mr. Shellenberger expressed the opinion that the Rule should prohibit it. Mr. Carbine noted that the legislature has referred to Rule 2-121, which provides for certified mail. If the procedure could be done by certified mail, the employee could send a letter by certified mail to the employer, get the return receipt, and file an affidavit of service. This would be non-confrontational service.

Judge Bryant remarked that this would depend on the integrity of the person giving the notice. She said that she was the judge in a case involving a default divorce. A witness on the stand stated his address, and it was the address on the certified letter. The plaintiff had his wife "served" at his friend's house and the friend was foolish enough to give the right address. Judge Bryant said that she asked whether the wife lived at the witness's home. Judge Bryant said that she

thinks about this case and others like it when the issue of integrity of service comes up. It may be dependent on the integrity of someone who has something to gain. The independent person provides a second layer of verification to the court that the recipient actually received the document.

Ms. Gardner said that she did not know whether the Committee should propose that the Court of Appeals enact a Rule that is inconsistent with the statute on this point if the statute allows for service by the employee. The Court may not want to override the statute given the reasons for allowing service by the employee. The problem with the certified mail provision in Rule 2-121 is that it requires certified mail, restricted delivery. The Post Office routinely ignores the restricted delivery part and allows anyone to sign for the mail.

The Chair commented that another problem is the place of service. Rule 2-121 does not provide for service at the defendant's place of employment; it provides for service at the defendant's home and the papers can be left with any resident who is of suitable age and discretion. The work group discussed the best place for the employee to serve the notice to make sure that the employer gets it. The employee may not know where the employer lives but does know where the employer's place of business is. The other question was whether the employee can serve the notice or have someone else do it. Section (c) of

Rule 15-1402 provides that service is pursuant to Rule 2-121 and Rule 2-124, which govern who can be served. Language could be added providing that service may be made at the employer's place of business. That is not currently in Rule 2-121.

Mr. Frederick moved that the draft of Rule 15-1402 be approved as presented, with the language "other than the employee" left in section (c). The motion was seconded. Judge Nazarian pointed out that the statute provides in Code, Labor and Employment Article, §3-1102 that the notice to the employer is to be personally served in accordance with Maryland Rule 2-121. He suggested that the language in section (c) should be eliminated and replaced with the language of the statute. Everyone who spoke today made good points about the policy issue, but the statute governs.

The Chair said that what triggered the idea to add service at the place of business is that Rule 2-121 (d) provides that the methods of service provided in the Rule are in addition to and not exclusive of other means of service that may be provided by statute or rule. Judge Nazarian noted that one would then look at the other service rules. The Chair responded that Rule 2-121 is the main service Rule that applies.

Mr. Weaver said that from the viewpoint of the clerk, if the employee who wants to have something served comes to the clerk to find out what the options are, the employee would be

told that someone else must serve the document. If the employee is able to serve the document, Rule 15-1402 needs to provide for that, but the clerk would probably still tell the person that this cannot be done. The Chair noted that the clerk is not involved in this procedure. Mr. Weaver remarked that the employee could come to the clerk's office to ask about sending the notice.

Judge Nazarian pointed out that the statute requires personal service. This seems to narrow the range of what is available in Rule 2-121. Ms. Gardner observed that, historically, it has been personal service. Judge Ellinghaus-Jones pointed out that Ms. Gardner had commented that the employee routinely serves notice. Judge Ellinghaus-Jones said that if the employee is worried about safety, the employee can have someone else serve the notice. Judge Ellinghaus-Jones expressed her objection to adding the language "other than the employee" to section (c) of Rule 15-1402 because it will be a barrier to the employee. She observed that this part of the procedure, which seems to permit the employee to serve the notice, is working.

The Chair told the Committee that the motion is to approve Rule 15-1402 (c) as presented, which prohibits the employee from serving the notice. Judge Eaves remarked that, for the workplaces where it might be difficult for someone other than

the employee to serve notice, if the employee is already at the workplace, the employee should be able to serve the notice. The Chair called for a vote on the motion, which failed by a vote of seven in favor, eight opposed.

Judge Nazarian moved to delete section (c) of Rule 15-1402. The motion was seconded. The Chair asked whether the service requirement should be totally eliminated. Judge Nazarian responded that the statute, Code, Labor and Employment Article, §3-1102, provides that written notice is personally served on the employer in accordance with Rule 2-121. The Chair suggested that section (c) of Rule 15-1402 could state this. Judge Nazarian accepted this amendment to his motion. Section (c) would read, "Service shall be in the manner consistent with Rule 2-121."

Mr. Carbine commented that he still felt that language providing for proof of service should be added. The Reporter responded that there is no place to file it. This is an extra-judicial proceeding and the papers associated with it may never get to a court file. The Chair noted that the Wage Lien Statement requires the employee to attest that the notice was served. Mr. Carbine asked what the employer's options are if the employer has never been served and the employee files a Wage Lien Statement. The Chair responded that if the employee attempts to enforce the lien, the employer can file a complaint

with the court.

Mr. Carbine asked what would happen if the lien already has been established. The Chair said that the Subcommittee and the work group were concerned that the employee may not have served the employer, either deliberately or innocently. Mr. Carbine expressed the view that the employee should file an affidavit of service under oath with the Wage Lien Statement. Mr. Laws said that the employee should certify under the penalty of perjury that the notice was served. The employee should be required to keep a copy of what was served. The employer gets a piece of paper, but there is no requirement of proof of what the employee has done. Mr. Carbine pointed out that the affidavit should be contemporaneous with the service.

Ms. McBride inquired when the 30-day period for the employer to file a complaint begins to run. The Chair answered that it runs from the date notice is served on the employer. Mr. Carbine inquired how that date can be determined. Ms. Gardner responded that it is in the Wage Lien Statement that is made under oath. Ms. McBride commented that the statute provides that the complaint shall be filed within 30 days after notice is served on the employer. How does the court know when the notice was served? Should this be worded differently? Mr. Carbine noted that the affidavit does not state when notice was served. Ms. Gardner pointed out that there is a certificate of

service on the form. Mr. Carbine reiterated that it is not in the affidavit.

Judge Stone remarked that the lien arises by operation of law. He expressed the opinion that it really is not a process or a procedure for the courts and should not be put into a Rule. Mr. Marcus said that there is a constitutional requirement of due process, which is notice before someone's property is taken. He noted that all of the discussion pertains to questions about the statute. Judge Stone agreed, noting that the problems should not be addressed by the Judiciary. Mr. Marcus remarked that the problem will be raised when it goes before a judge, who will have to decide whether the employer was served.

Mr. Carbine observed that if the employer files a complaint, the matter becomes a judicial proceeding. Judge Stone said that if the employer files a complaint, the employer acknowledges service. The Chair responded that this is not necessarily the case. The employer may learn that a Wage Lien Statement has been filed pursuant to the statute but allege that there was no notice. That would be the employer's defense.

Judge Stone reiterated that the Judiciary should not have to get involved in an issue of requiring something to be filed that is not in a court proceeding. The Chair pointed out that the statute that the Committee is trying to implement requires that the notice be served on the employer in accordance with

Rule 2-121, within the statute of limitations period set forth in Code, Courts Article, § 5-101. He said that the proposed Rules seek to avoid *pro se* litigants having to bounce back and forth between the statute, regulations, websites, and Rules. The Reporter added that the idea to make Rule 15-1402 somewhat comprehensive was so that later, when a court has to deal with a contested matter, at least the employer was properly served.

Senator Norman said that he thought that Judge Nazarian had made a motion that this procedure should be done in accordance with the Rules governing service. Under the Rules, if a paper is served, it is accompanied by a proof of service that is under oath. This is part of the procedure set out in the Rules. The person who owns property could get a call from a bankruptcy attorney who tells the property owner there is a lien. He pointed out that it is necessary to check the proof of service to make sure that the property owner was served. The Chair agreed, but he noted that the question is where the documents would be filed. At the time of service, there is no court proceeding. Mr. Weaver said that a file could be created after the fact. An affidavit can be created affirming that the person did something 45 days ago.

Mr. Laws noted that the Contract Lien Act is supposed to be analogous to this process. That statute requires personal delivery of the papers and certified mail notice but no

certificate of service, because there is nowhere to file it until the statement of lien is filed later. At that point, the person serving states that the statute was complied with. Mr. Laws said that he was in favor of Judge Nazarian's motion. Ms. Gardner pointed out that the DLLR form has a certificate of service, which the Rules Committee thought should be under oath, but the form of oath may not be important if the employee is not going to be allowed to serve the notice.

Ms. Gardner said that she wanted to make a separate point that the motion on the table does not permit service at the employer's place of business, because this is not currently permitted under Rule 2-121. Judge Price observed that someone else other than the employer can be served at the employer's place of residence. Judge Nazarian commented that the papers cannot be left at the front desk of the employer's place of business. Judge Ellinghaus-Jones referred to the language in section (c) of Rule 15-1402 that reads, "service may be made on the employer at the employer's place of business," and she remarked that personal service is still required. Serving papers at the front desk is not a substitute for personal service.

The Chair said that the motion on the floor is that service should be pursuant to Rule 2-121. The Reporter asked whether the motion is to copy the language of the statute. Judge

Nazarian clarified that the motion was that the Rule would provide that personal service is to be made pursuant to Rule 2-121. Mr. Carbine remarked that he would not vote for the motion because Rule 2-121 does not provide for proof of service, which is found in Rule 2-126 (Process – Return). The Chair noted that this is a separate issue. He pointed out that Rule 2-124 (Process – Persons to be Served) provides that it may be a company that is being served. Mr. Carbine responded that this is in the Rule, not the statute. Mr. Weaver observed that the statute requires proof of service in a default situation when the statement of lien is recorded.

The Chair told the Committee that the motion on the floor was that section (c) of Rule 15-1402 would state that the notice shall be personally served in accordance with Rule 2-121.

Ms. Gardner pointed out that Rule 2-121 provides that personal service can be anywhere, but if the person is an individual employer, service can be accomplished by leaving a copy at a person's house or usual place of abode. What she and her colleagues were asking for was that under the court's authority pursuant to section (d) of Rule 2-121, the Court of Appeals could adopt a Rule that would allow for service on an individual employer at the place of business. This type of service applies to a corporation, but not to an individual employer under Rule 2-124. If someone is suing John Smith

Mowing, LLC., the business, as well as John Smith, the individual, John Smith can only be served at home, not at the place of business. Mr. Laws noted that one alternative is leaving the papers with a resident of suitable age and discretion. This is an alternative, not a restriction in Rule 2-121.

The Reporter reiterated that the motion is to use the statutory language in section (c) of Rule 15-1402. The motion passed by a majority vote.

By consensus, the Committee approved Rule 15-1402 as amended.

Mr. Frederick presented Rule 15-1403, Right of Employer to Contest Proposed Lien; Procedure; Consequence of Failure to Contest, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1400 – LIENS FOR UNPAID WAGES

ADD new Rule 15-1403, as follows:

Rule 15-1403. RIGHT OF EMPLOYER TO CONTEST PROPOSED LIEN; PROCEDURE; CONSEQUENCE OF FAILURE TO CONTEST

(a) Right to Contest Lien

Within 30 days after the employer is served with the notice pursuant to Rule 15-1402, the employer may contest the proposed lien by filing a complaint in the circuit court for any county where any of the

property identified in the employee's notice is located.

(b) Requirements of Complaint

A complaint shall include or be accompanied by:

(1) a copy of the notice that was served on the employer in accordance with Rule 15-1402;

(2) The date that the notice was served on the employer;

(3) the names and addresses of the employer and employee named in the Notice of Intent to Claim Lien for Unpaid Wages;

(4) an explanation of why the wages claimed by the employee are not due and owing by the employer;

(5) a statement of any other defense to the proposed lien for unpaid wages;

(6) a statement of whether the employer has an ownership interest in the property identified in the notice and the nature of the interest;

(7) an affidavit containing a statement of facts that support any defenses raised;

(8) a description of supporting documents with the supporting documents attached;

(9) if the employer wants a hearing, a separate request for hearing in bolded lettering at or near the caption of the complaint;

(10) a statement that within 10 days after service of the complaint, the employee may file (A) an answer to the complaint, (B) a motion to dismiss the complaint, or (C) a withdrawal of the Notice of Intent to Claim Unpaid Wages and may request a hearing as part of a response or in a separate document; and

(11) any other statement or information

required by regulation of the Commissioner of Labor and Industry adopted pursuant to Code, LE §§3-1104 and 3-1110.

(c) Service

The complaint shall be served on the employee pursuant to Rule 2-121.

(d) Response by Employee

Within ten days after being served with the complaint, the employee may file (1) an answer to the complaint, (2) a motion to dismiss the complaint, or (3) a withdrawal of the Notice of Intent to Claim Lien for Unpaid Wages and may request a hearing as part of a response or in a separate document. The court may not enter an order of default based upon an employee's failure to file a timely response to the complaint.

QUERY TO RULES COMMITTEE: Should a counterclaim by the employee -- or additional claims by the employer -- be expressly permitted or expressly prohibited in a wage lien action? Permitting such claims would allow all disputes between the parties to be decided in a single action, but could cause delays beyond the "45-day" decision deadline in Code, LE §3-1103 (d) and result in a more complicated procedure than the statute contemplates. Prohibiting such claims could result in multiple actions between the parties, motions for consolidation of those actions, and collateral estoppel issues. As drafted, Rule 15-1404 neither permits nor prohibits counterclaims and additional claims. Instead, subsection (g)(3) requires the court to enter an order in accordance with the court's case management plan if any issues remain open after determination of the lien. Is this "middle ground" sufficient?

(e) Hearing

If a request for a hearing is filed

by the employer or employee, the court shall hold a hearing no later than 30 days after the earliest of service of a complaint that includes a request or the filing of a timely request by the employee.

(f) Determination

Within 45 days after service of the complaint, the circuit court shall determine whether to issue an order establishing a lien for unpaid wages in accordance with LE §3-1103. The employee has the burden of proof to establish the employee's right to the lien based a preponderance of the evidence. If there are any issues raised by either party the resolution of which is not necessary to the determination of whether a lien should be established or the amount thereof, the court may defer determination of those issues.

DRAFTER'S NOTE: The Code, §3-1103 (d) requires a decision by the court "within 45 days after the date on which the complaint was filed" but fails to indicate a consequence for failure to meet that deadline. A decision may not be possible or feasible within 45 days from filing if there is any delay in serving the employee, especially if either party requests a hearing. There appear to be two ways to deal with this problem, each involving a departure from the statute. One is to have the 45 days date from service of the complaint rather than its filing; the other is to allow the court to postpone a decision upon a showing of good cause.

Because a time requirement for a judicial decision involves practice and procedure in the courts, the Court of Appeals has the power under Art. IV, §18 of the Md. Constitution to alter that deadline by Rule. The Court rarely exercises its power to supersede statutes, but there may be a need to do so in this instance.

(g) Order

(1) In Favor of Employer

If the court determines that the employee is not entitled to a lien in any amount for unpaid wages, it shall enter an order so stating. If the court determines that the employee's effort to establish a lien for unpaid wages was frivolous or made in bad faith, the court may award court costs and reasonable attorney's fees to the employer.

(2) In Favor of Employee

If the court determines that the employee is entitled to a lien in any amount, it shall enter an order (A) establishing the lien, (B) stating the amount of the lien and identifying each item of property that is subject to the lien, and (C) awarding such other relief as the court finds appropriate, including a stay of enforcement.

Cross reference: Rule 15-1403 (g)(2) is derived, in part, from LE §3-1103 (d)(2).

(3) Determination of Other Issues

If determination of the lien is not dispositive of all issues, the order shall direct that those issues be resolved in accordance with the court's case management plan.

(h) Consequence of Failure to File Timely Complaint

If the employer fails to file a timely complaint pursuant to section (a) of this Rule, the lien is established and the employee may record a Wage Lien Statement pursuant to Rule 15-1404.

Source: This Rule is new.

Mr. Frederick drew the Committee's attention to subsection (b)(10) of Rule 15-1403, which provides that one of the

requirements of the complaint is a statement by the employer that within 10 days after service of the complaint, the employee may file either an answer to the complaint, a motion to dismiss the complaint, or a withdrawal of the Notice of Intent to Claim Unpaid Wages. The reason that the 10-day time period was selected was because the statute requires the court to decide the matter within 45 days after service of the complaint. Mr. Frederick said that the Subcommittee tried to determine a way to provide due process and still comply with the statute, which resulted in the 10-day period. There is also a query to the Committee after section (d) as to whether a counterclaim by the employee should be allowed in a wage lien action.

The Chair commented that on the first issue, the work group realized that as a practical matter, in many cases, there is no way to comply with the statute. The statute does not state that the order is issued within 45 days; it provides that the judge has to decide whether to issue an order within 45 days. If the 45 days dates from the filing of the complaint, a problem arises if the employee has not been served within the 45 days. The court cannot enter a judgment if the employee has not been served within the 45 days. The statute must be superseded in one way or another. Either the date is 45 days from service, which allows due process, or the court must be allowed to extend the time for good cause. In either case, the statute is being

trumped. The work group felt that the better course was the first choice, making the time period 45 days from service. Ms. Gardner had expressed concern about giving the court unbridled discretion to extend the time, losing the benefit of the statute itself, because the court could extend the matter indefinitely.

Mr. Carbine remarked that at the Rules Committee meeting last month, the Committee established a precedent by inserting the word "ordinarily" in front of the word "shall." The Chair wondered if anyone had another solution to the problem of the timing. He noted that the question about the counterclaim is another issue that can arise from either party. The employer could seek to make a counterclaim in the complaint. Ms. Gardner said that she and her colleagues urge the court not to permit the employer to bring a claim that is unrelated to the wage lien that was filed, but the employee should be able to file a counterclaim under the wage law.

The Chair said that the two issues are whether the employer may file a counterclaim when filing a complaint to challenge the lien and whether the employee may file a counterclaim to the employer's complaint for treble damages. The Chair added that he was not sure this is needed for the lien law. Ms. Gardner remarked that this is not needed to get the lien. It is needed if the process that was simple and summary becomes a legitimate dispute.

The Chair asked how to comply with the 45-day time requirement if counterclaims are permitted. If a counterclaim is allowed for any issue that is extraneous to the employee's right to the lien, addressing it could require discovery and motions. The work group was not able to reach a decision on this. Should the employee be allowed to file a separate action? This triggers collateral estoppel and res judicata issues. Should the case be bifurcated and both sides be allowed to file whatever they wish to? Then the court would first address only the right to a lien, because some of the employer's defenses may be good but have nothing to do with whether the wages should be paid.

Judge Nazarian remarked that the process is similar to the one for foreclosures. Step one is the procedure, which is an enforcement procedure, not a merit procedure. In a foreclosure action, however, when a party provides the documentation to show that a debt is due and there has been a default, the action is on track for the bank to foreclose. If there is a doubt as to the validity of the debt, the procedure stops and the matter is litigated. The Chair noted that this does not have to be done in 45 days.

Judge Nazarian remarked that a motion to dismiss or stay is filed within 15 days. He agreed with the Chair about the time frame, but pointed out that, like the foreclosure procedure,

either the wage lien can be enforced, or it cannot. If there is no enforcement, then all that has been decided is that the lien cannot be enforced and the parties litigate the underlying obligation. A summary enforcement vehicle can be created if the wage debt is uncontested. It is not clear whether an employer can contest the right to a lien and win but have collateral estoppel as to whether the wages are owed. Judge Nazarian pointed out that the employer could claim lack of service or that the individual named and served with the notice is not the employer.

Mr. Frederick said that if a counterclaim is filed, the defense could be that the other party is trying to split a cause of action. There may be all sorts of unintended circumstances. The drafter's note after section (f) of Rule 15-1403 asks what would happen if the court does not decide the matter within 45 days. The Chair responded that the statute does not have a sanction for not deciding the matter within 45 days. However, a judge who does not comply may violate the first canon in the Code of Judicial Conduct, Rule 18-101.1 (Compliance with the Law) which states, "A judge shall comply with the law, including this Code of Judicial Conduct." A judge would not like to have this canon invoked.

Mr. Frederick moved to approve Rule 15-1403 as presented without the bolded language. The motion was seconded. Mr.

Weaver pointed out the language in section (d) that reads, "and may request a hearing as part of a response or in a separate document." He suggested that the language of subsection (b)(9) that reads, "a separate request for hearing in bolded lettering at or near the caption of the complaint," should be added to section (d). Mr. Frederick said that he accepted that change. Judge Bryant noted a typographical error in subsection (b)(2): the word "The" should not be capitalized.

The Chair called for a vote on the motion to approve Rule 15-1403 as amended. The motion carried on a majority vote.

Mr. Frederick presented Rule 15-1404, Filing and Recording of Wage Lien Statements, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1400 – LIENS FOR UNPAID WAGES

ADD new Rule 15-1404, as follows:

Rule 15-1404. FILING AND RECORDING OF WAGE LIEN STATEMENTS

(a) Generally

If the court issues an order pursuant to Rule 15-1403 establishing a lien or if the employer fails to file a complaint within 30 days after service of the notice served pursuant to LE §15-1402, the employee may file for recording a Wage Lien Statement as prescribed in this Rule.

(b) Time for Filing

A Wage Lien Statement shall be filed

within 180 days after (1) entry of an order issued pursuant to Rule 15-1403 (g)(2), or (2) if the employer failed to file a timely complaint pursuant to Rule 15-1403 (h), the thirtieth day following service of the Notice to Employer of Intent to Claim Wage Lien.

(c) Lien Against Real Property

A Wage Lien Statement that includes a lien against real property shall be in the form prescribed by the Commissioner of Labor and Industry and shall be filed with the Clerk of the Circuit Court for the county in which any portion of the property is located. The lien shall be recorded among the land records of the county.

Cross reference: See LE §3-1105 (c)(1) and COMAR 09.12.39.04.

(d) Lien Against Personal Property

A Wage Lien Statement that includes a lien against personal property shall be filed in the same manner, form, and place as a financing statement under Code, Commercial Law Article, Title 9, Subtitle 5.

Committee note: Section 9-501 of the Commercial Law Article requires financing statements to be filed with the State Department of Assessments and Taxation. Note §§9-509, 9-516, and 9-526 with respect to requirements that apply to the acceptance of financing statements.

(e) Priority

A lien for unpaid wages recorded under this Rule shall be considered a secured claim that has priority (1) if the lien was established by a court order pursuant to Rule 15-1403, from the date the order was docketed, or (2) if no complaint disputing the claim was filed, from the date the employee filed the Wage Lien Statement for recording.

Cross reference: See LE §3-1105 (f)

providing constructive notice of an unpaid wage lien from the date the Wage Lien Statement is recorded.

Mr. Frederick asked Mr. Weaver if he had any comments on Rule 15-1404. Mr. Weaver noted that the Rule specifies that the wage lien must be recorded among the land records if it is a lien on real property. This is agreeable to the clerks. As to the fee for recording the liens, in the costs schedule in Code, Courts Article, §7-202, there is an a $15 charge for recording liens. The costs schedule does not refer to wage liens, but the Administrative Office of the Courts has a summary chart that is available to the public with a detailed listing of costs of filing and the appropriate Rule references. This wage lien was added to that chart. The cost is $40 plus a $20 surcharge for condominium liens and homeowners' association liens. There is a provision for a charge of $15 for wage liens, and the clerks are guided by this.

The Chair asked whether these costs can be waived under Rule 1-325 (Waiver of Costs Due to Indigence – Generally). Mr. Weaver responded that he did not think that land record recording fees could be waived.

Mr. Frederick moved that Rule 15-1404 be approved as presented. The motion was seconded. Judge Stone pointed out an error in section (a) of the Rule. The reference to "LE §15-

1402" should be "Rule 15-1402." By consensus, the Committee agreed with this change.

Senator Norman remarked that the 30-day period following service of the Notice to Employer of Intent to Claim Wage Lien may not be sufficient. The Chair pointed out that the time period is 180 days after the 30th day. Senator Norman said that he did not read this provision that way. It states that the Wage Lien Statement shall be filed within 180 days after entry of an order pursuant to Rule 15-1403 or, if the employer failed to file a timely complaint pursuant to Rule 15-1403 (h), the 30th day following service of the Notice to Employer of Intent to Claim Wage Lien. The Chair reiterated that the lien becomes effective 180 days after the 30th day. Mr. Laws suggested that the language of subsection (b)(2) could be, "the 30th day after the time for employer response has elapsed." Mr. Laws added that he read this provision initially the same way as Senator Norman. Mr. Frederick accepted this amendment to his motion. By consensus, the Committee approved this amendment.

Mr. Weaver referred to the fee, and he asked whether it would help to avoid confusion for land records staff if section (c) stated that the fee for the recording of a wage lien is the same as the fee for recording a lien in the District Court. He said that when the law passed, this was the fee that was established, although it was not clear whether it was to go in

land records or lien records.

Judge Mosley asked about using the word "commensurate." The Chair commented that this may be too broad. It is not a judgment lien that is against all property. Mr. Weaver suggested that the wording could be "the fee established by the State Court Administrator." Ms. Harris noted that this may have to be approved by the Board of Public Works. Mr. Durfee observed that the costs schedule is set by the State Court Administrator if it is not otherwise provided by law. The schedule itself exempts from approval by the Board of Public Works the fees that are required by statute. The Chair responded that this is required by statute. Mr. Weaver said that the approved Board of Public Works costs schedule states that liens cost $15 to record. Ms. Harris pointed out that if the lien is filed in the land records, the person filing will be charged $40.

The Chair asked whether the court can set this by Rule when the statute provides the fees for filing liens. He did not think that there had ever been a Rule providing what a fee is. Mr. Shellenberger inquired whether the statute provides that the fee for recording the lien is $15. Senator Norman answered that it does not. The Chair commented that he understood the problem, but it must be fixed. Mr. Weaver remarked that the clerks have not known how to handle the wage liens. It would be

beneficial to make it clear to the clerks, especially because this is different from how other items are recorded. The Chair asked what the suggested language was. The Reporter replied that section (c) could be amended to add, "The fee shall be equal to the fee for recording a District Court judgment as a lien." Mr. Weaver said that an alternative wording would be that the fee would be the same as a fee for recording under the Contract Lien Act. By consensus, the Committee approved the wording, "The fee shall be equal to the fee for recording a District Court judgment as a lien."

Judge Price referred to subsection (e)(2) of Rule 15-1404, which reads, "if no complaint disputing the claim was filed, from the date the employee filed the Wage Lien Statement for recording." She asked whether this language could cause problems for title searchers. Should it read, "from the date it was recorded" and not "from the date it was filed for recording"? The Chair responded that it would be from the date it was recorded, because the clerk must record it; the employee cannot record it. Mr. Frederick pointed out that the language in the Rule is in the statute, Code, Labor and Employment Article, §3-1105 (e)(2). Judge Price said that when land records are searched, the filing is often done sporadically, and something cannot be found until it is recorded.

The Chair asked what happens when someone wants to record a

lien. The person hands it to the clerk in land records. It may be a day or a week before it is recorded. Does it relate back to when it is filed? Mr. Weaver noted that when something is filed in land records, the clerks do not always process the filings that came in that day. On the court side, clerks clock everything in whether it gets processed or not. The clerks know the date that the item came in. On the land records side, it is recorded when the clerk processes it, not when it is received. Often there are backlogs, so the Attorney General's advice has been that if documents are presented by someone who is standing at the counter in the clerk's office, those documents get priority over documents that come in the mail. The question about where e-recordings fall in the priority system just came up. Documents that are mailed may not be processed for a day or two. The clerks will not know the date that they received the document, only the date that the document was processed.

Mr. Frederick remarked that, at the height of the real estate boom, the people in the land records offices were overwhelmed. The Chair said that he recalled that the Rules Committee had evidence that in some counties, it was months before anything was recorded. When Title 16, Chapter 900 (Access to Court Records) was being drafted, the question came up as to whether anyone could see what was on the clerk's desk prior to it being indexed and recorded. The answer was that no

one could look at it. Mr. Frederick observed that those who are in the commercial business of insuring titles will take steps to protect themselves.

The Chair noted that the language of subsection (e)(2) is the statutory language. He called for a motion to approve Rule 15-1404 with the amendments to subsection (b)(2) and (c). The motion passed on a majority vote.

Mr. Frederick presented Rule 15-1405, Extinguishment or Release of Lien, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1400 – LIENS FOR UNPAID WAGES

ADD new Rule 15-1405, as follows:

Rule 15-1405. EXTINGUISHMENT OR RELEASE OF LIEN

(a) Extinguishment

If an employee fails to record a Wage Lien Statement within 180 days after the lien for unpaid wages is established, the lien shall be extinguished without prejudice.

(b) Release

If payment is made, or a bond is filed, for the full amount of the lien for unpaid wages, the employee shall file a release of the lien.

Query: Where is a bond filed and how is it released?

Source: This Rule is new.

Mr. Frederick referred to the statute, Code, Labor and Employment Article, §3-1105 (d)(2), which provides that a bond may be filed for the amount of wages and damages stated in the Wage Lien Statement. To release or extinguish the lien, the question to the Committee is whether language should be added to Rule 15-1405 noting what kind of bond can be filed and how it gets released, because the statute does not provide any guidance. Mr. Weaver said that this is an issue for the clerks because they will not know where to file the bond. If it is a default bond, there is no place to file it. Mr. Weaver had brought this issue up at the Subcommittee meeting, and the answer was that what is being discussed is an appeal bond. If this is the only time the issue of a bond comes up, then it might be helpful if the Rule could provide in section (b) that "if payment is made, or in the event of an appeal, a bond is filed."

Ms. Gardner commented that this is modeled on a similar provision in the Contract Lien Act, but the issue is clearer there. The Contract Lien Act only applies when an employer has filed a complaint. If the employer would like to file a bond pending the resolution, it will be a judicial proceeding. Mr. Weaver said that someone reading section (b) of Rule 15-1405 would think that a bond can be filed without filing a complaint. It should be clear, for the benefit of those persons and for the

clerks, that it is only when there is some action in the court that a bond can be filed to release the lien on the property.

Mr. Frederick remarked that the Contract Lien Act applies to condominiums and homeowners' associations where the property is known. In the wage lien situation, if payment is made or a bond is filed for the full amount of the unpaid wages, the employee must file a release of the lien. Mr. Frederick referred back to the example of someone going to a car dealer to trade in a car and the dealer finds out that a lien has been filed against the car. The person buying the car may decide to bond off the lien, as permitted by the statute. Where does one file the bond and how is it released?

Judge Price asked how one would find the employee to be able to release the lien. The Chair said that in the cases where there is a judicial proceeding, the owner can bond off the lien. Mr. Weaver commented that the intent was that there would only be a bond if a case is pending in the court. The way that section (b) of Rule 15-1405 is worded, it is not clear that there must be a case pending in court before a bond can be filed.

Mr. Laws pointed out that Title 1, Chapter 400 pertains to bonds. Would it be satisfactory if language were added providing that the court could approve a bond or other security under Rule 1-401 and establish a condition on which that bond

could be released? It would basically be on the merits of whether there is a valid wage claim or not. Mr. Frederick asked about cases where there was no court action. Mr. Laws responded that there would have to be a court action for there to be a bond. There must be some condition for the release of that bond.

Judge Eaves remarked that since the Rule addresses extinguishment or release of the lien, she would presume that the lien has been ordered. Mr. Frederick said that if the employer does not file within 30 days, the lien is established. The pragmatic side of this is that notwithstanding the Bail Bonds Act (Code, Criminal Procedure Article, §5-201 et seq.), he was not sure that any bonding company would sell a bond for $300 or anyone would be foolish enough to spend $300 to buy a $300 bond. There are very brilliant attorneys in Maryland in whose hands this statute can be used for reasons not intended by those people who supported it and who thought that it was a very useful statute. This is of great concern, because everybody has access to the statute, the Rule, an attorney, and a courthouse.

The Chair said that he had looked at the fiscal note for Chapter 540, Laws of 2013, (SB 758), and it does not refer to the bond. Judge Price noted that a cash bond should be able to be filed. Mr. Laws remarked that the Rule allows other security. An employer may have a $50,000 bond as a result of a

$700 wage lien. The employer would pay it into the court registry to bond off the lien by paying cash. Mr. Frederick pointed out that it is an unrecorded lien. Mr. Laws commented that it would have to accompany a complaint. Mr. Frederick remarked that the employer is being forced to file a complaint. The parties are going to settlement on the piece of property. The title company may put that money in escrow. Can the employee even be found and paid?

Judge Price expressed the view that instead of "the employee shall file a release of the lien," in section (b), the language should be "the lien shall be released." Mr. Weaver observed that this puts the burden on the clerk to decide whether the bond is sufficient to release the lien and mark it as released. Someone has to give the clerk a document showing that the lien is released.

The Chair pointed out that section (a) of Rule 1-402 (Filing and Approval) provides that every bond shall be filed with the clerk. Mr. Weaver said that the clerks used to have a bond record, but that was repealed by convincing the legislature that in today's world, a bond is filed in the case. The Chair noted that Rule 1-402 (g) also states that every approved bond shall be recorded by the clerk.

Mr. Laws said that his suggestion was to change section (b) to read, "If payment is made, or a bond or other security

pursuant to Title 1, Chapter 400 is filed in connection with an employer proceeding under Rule 15-1403, then the employee shall file a release of the lien." He moved that this change should be made. Mr. Shellenberger seconded Mr. Laws's motion. The Chair commented to Mr. Weaver that the clerks' association may be able to come up with a way to handle this. Mr. Shellenberger remarked that there must be a place to file. At least there will be a procedure if these Rules are approved. A problem exists, but it is not insurmountable.

Mr. Carbine noted that if the 30 days runs and no complaint is filed, the employee has 180 days to file a Wage Lien Statement. The Chair said that the lien could be against real property, and it would be filed with the clerk of the circuit court. If the lien is against personal property, it would be filed with the Maryland Department of Assessments and Taxation. Code, Commercial Law Article, §9-501 provides that a lien against personal property would be filed in the manner of security agreements, which are filed with the Department of Assessments and Taxation.

The Chair said that a motion with an amendment was on the floor. Judge Price referred to the idea that the employee would be filing the lien. She pointed out that in District Court, people do not file a notice of satisfaction when they get paid. Putting the onus on the employee to file the release of the lien

is not going to work. Mr. Weaver asked what happens when the employee does not file the release and the judgment debtor wants it marked "satisfied." Judge Price answered that it would be set for a hearing. Mr. Weaver inquired why the wage lien would be any different. A judgment creditor has the obligation to release the judgment when it is satisfied.

Judge Price reiterated that the language of section (b) of Rule 15-1405 should be that the bond shall be released, whether it is the employee or the court who releases it. Mr. Weaver remarked that someone might argue to the clerk that the clerk needs to release the lien.

Mr. Marcus suggested that in place of the language proposed by Mr. Laws for section (b) of Rule 15-1405, the section could say, "in a manner consistent with Title 1, Subtitle 400," because Title 15, Chapter 1400 only applies to civil actions. Mr. Laws accepted the amendment to his motion. Judge Mosley asked whether the last part of section (b) would remain the same. The Chair answered that this language is still in the Rule. There is a statute with respect to liens on real property that provides that if the mortgage is paid off and a release is not filed, a remedy is available. Mr. Laws noted that it is Code, Real Property Article, §7-106. Ms. Gardner said that she thought that there were similar remedies in the Rules.

The Chair called for a vote on the motion by Mr. Laws with

the amendments to it to refer to a bond "filed in a manner consistent with the Rules in Title 1, Chapter 400." The Committee approved the amendment by majority vote.

Mr. Shellenberger inquired whether the Committee had ever written a letter to the legislature advising of items that lawmakers might want to consider in light of the drafting of new Rules or the changing of Rules. The Chair replied that he had never written such a letter, but he had discussions with Senator Norman and hoped that the legislature would address some of the issues that have been discussed. The Rules may be a guidepost. The legislature may not agree with some of the policies, but at least there is something to work from.

The Reporter referred to the motion that had just passed, and she asked whether section (b) would be changed to read, "If payment is made, or a bond or other security is filed in a manner consistent with the Rules in Title 1, Chapter 400 in connection with a proceeding under Rule 15-1403." The Reporter asked whether the language "the employee shall file a release of the lien" had been changed. The Chair said that this is still in there, and the burden is still on the employee. The Chair noted that there are remedies if the employee does not file the release.

By consensus, the Committee approved Rule 15-1405 as amended.

Mr. Frederick presented Rule 15-1406, Enforcement of Lien, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 – OTHER SPECIAL PROCEEDINGS

CHAPTER 1400 – LIENS FOR UNPAID WAGES

ADD new Rule 15-1406, as follows:

Rule 15-1406. ENFORCEMENT OF LIEN

(a) Manner of Enforcement

Upon the entry of an order establishing a lien pursuant to Rule 15-1403 (g)(2) or a confirmatory order pursuant to section (b) of this Rule, the employee may enforce the lien in the manners set forth in Rules 2-641 through 2-647 or 3-641 through 3-647, as appropriate, except that the lien may be enforced only upon the property specified in the order and provided that the lien has not been extinguished pursuant to Rule 15-1404 (b)(2). Waiver of prepayment of costs for the enforcement proceeding is governed by Rule 1-325.

Cross reference: See LE §3-1106.

(b) Order Confirming Lien Established Pursuant to Rule 15-1403 (h)

(1) Generally

Upon the establishment and continued existence of a lien pursuant to Rule 15-1403 (h) through the timely filing of a Wage Lien Statement after the failure of the employer to file a timely complaint to contest the proposed lien, the employee may enforce the lien in the manner provided in section (a) of this Rule after obtaining a confirmatory order pursuant to this section.

(2) Petition for Confirmatory Order

(A) Generally

The employee may seek an order confirming the lien by filing a petition for such an order. Unless prepayment of costs is waived pursuant to Rule 1-325, the petition shall be accompanied by a filing fee in an amount equal to the fee for filing a garnishment proceeding in the court in which the petition is filed.

(B) Venue

If the petition seeks a confirmatory order enforcing the lien against real property, the petition shall be in the circuit court for the county where any part of the real property identified in the Wage Lien Statement is located. If the petition seeks a confirmatory order enforcing the lien against personal property, the petition shall be filed in the circuit court for the county where the property identified in the Wage Lien Statement is located. If the employee seeks to enforce the lien against both real and personal property, separate petitions may be filed, subject to transfer of the proceeding against personal property to the court where the proceeding against real property is pending.

(C) Contents

The petition shall be under oath and shall state or be accompanied by:

(i) the names and addresses of the employee and the employer;

(ii) the amount of the lien;

(iii) whether the lien remains in existence;

(iv) what, if any, payments have been made on the unpaid wages for which the lien was established;

(v) a copy of the Notice to Employer of Intent to Claim Lien for Unpaid Wages;

(vi) the date and manner of service of the Notice and proof of such service;

(vii) the failure of the employer to file a timely complaint to contest the proposed lien;

(viii) a copy of the Wage Lien Statement recorded pursuant to Rule 15-1404 and each place where that Statement was filed and recorded; and

(ix) an adequate description of each item of property against which the lien is sought to be enforced, including the nature of the item and where it is located.

(D) Service; Proof of Service

The petition shall be served on the employer in accordance with Rule 2-121. Proof of service shall be filed in accordance with Rule 2-126.

(3) Consolidation Upon Transfer

Upon any transfer pursuant to subsection (b)(2)(B) of this Rule, the cases shall be consolidated unless the court, for good cause, orders otherwise.

(4) Determination and Order

After an opportunity for a hearing if one is requested, the court shall determine whether the employee is entitled to enforcement of the lien. If the court determines that the employee is entitled to enforcement of the lien, the court shall enter an order confirming the lien. If the court determines that the employee is not entitled to enforcement of the lien, the court shall enter an order providing appropriate relief, which may include dissolving the lien.

(5) Recordation of Confirmatory Order

The employee may record a confirmatory order in any court in which enforcement of the lien is sought.

Source: This Rule is new.

Mr. Frederick explained that Rule 15-1406 was a product of the Subcommittee that was not modified by the work group. The Rule is the heart of what Ms. Gardner and the Public Justice Center were seeking in their letter. The wage lien arises by operation of law because the employer did not respond, 31 days have elapsed, and the employee has not been paid. If the employee goes to the clerk's office to record the lien that was created by operation of law, the clerk will have no idea how to handle it. The Subcommittee came up with the idea that since the lien arises by operation of law as provided by the statute, the judge can issue a confirmatory order, provided that the employee can demonstrate that all of the necessary steps were taken to create the lien.

Mr. Frederick said that in section (a), the Subcommittee included the last sentence, which provides that the waiver of prepayment of costs for the enforcement proceeding is governed by Rule 1-325. Subsection (b)(2)(A) of the Rule provides that the filing fee is equal to the fee for filing a garnishment proceeding in the court in which the petition is filed on the theory that this is enforcing a lien that is philosophically the same principle as enforcing a garnishment.

Mr. Frederick moved to approve Rule 15-1406 as presented.

The motion was seconded.

The Chair told the Committee that the work group had discussed the ability to enforce the lien in District Court by invoking the Title 3 garnishment procedure. The enforcement of the lien would be in the District Court even though the rest of the proceeding is in the circuit court. The judgment would have to be recorded for the circuit court to confirm the lien. Initially, Rule 15-1406 was drafted for enforcement under the Title 2 Rules. The Title 3 Rule was then added to section (a).

Judge Stone said that Judge Morrissey authorized him to speak for the District Court on this subject. The only issue that would affect the District Court would be the enforcement in District Court. Judge Stone said that he could not find anything that provides that a circuit court judgment can be enforced by using District Court process. Section (a), excluding the language referring to a confirmatory order, states the law as it is. The problem that many people have is with section (b). After considering all the Rules, it seems that the confirmatory order is a "fly in the ointment." Judge Stone expressed the view that the Judiciary would exceed its authority by establishing this process.

Judge Stone observed that the statute establishes two types of wage liens. One is by operation of law, and the second is by circuit court order when the employer files a complaint. The

legislature had to give the employer the opportunity to do that, or there would be no due process. The employer must be able to challenge the lien, otherwise anyone can file a paper stating that the employer owes money for wages. The legislature recognized that once these issues are litigated, there is either collateral estoppel or res judicata, as the Chair had pointed out earlier. The legislature wisely acknowledged that this process is in circuit court and, essentially, there is a trial on the issue of whether the employee is entitled to a lien. What is being litigated is the amount of wages and which property is the subject of the lien. These issues are being litigated between the parties in a court proceeding. Why should there be another court proceeding somewhere else at some other time? The legislature said that this can be enforced just like any other judgment. It is a judgment on the issues of wages and property.

The Chair commented that there is a gap. If the employer does not respond because of a lack of notice and the employee files the paper, because there was no response, how would the employer get an opportunity to argue? Judge Stone replied that this happens in any civil proceeding where there is a process problem. Somewhere down the line, the loser can file a motion to vacate the judgment or the lien based on lack of proper process. These are the exceptions to the Rule. The District

Court has these hearings all the time. The process server will say that service was made and after the judgment is entered the defendant says that the defendant was not served. The case is then set in for a hearing. Code, Labor and Employment, §3-1106 (a) provides that "An order for a lien for unpaid wages shall be enforced in the same manner as any other judgment under State law."

The Chair said that the problem with that provision is that it is not enforced like any other judgment. A judgment is a lien against all real property. This is a lien against specific real property or personal property identified in the notice. Judge Stone responded that this is a legislative issue. The Rule goes further and provides that in cases where the employer does not answer, the employee will be allowed to seek a confirmatory order, which will be turned into a Code, Labor and Employment, §3-1106 (a) order that can be enforced as a judgment. Where does the Judiciary have the authority to do this? The legislature could have done this, considering the res judicata and collateral estoppel issues if it did not, but it chose not to take one step further and address the situation of when the employer does not file a complaint.

Judge Stone remarked that it was not his intention to demean or to question the language of the proposed Rules. His point was that what Rule 15-1406 seems to do is to create a

cause of action out of thin air. The intention of the proposed Rules is to fill a gap, but this is not a procedural gap; this is substantive. People are being given rights that they do not have in the statute. This may need to be fixed, but it should be fixed by the legislature. Judge Stone expressed the opinion that the Court of Appeals does not have the authority to do this in its rulemaking capacity.

Mr. Frederick responded that he would explain the thought process of the Subcommittee. The idea is that although there is a statute, a problem exists with it. If someone has a lien by operation of law, currently there is no way to enforce it. Judge Stone may be correct, but it is up to the Court of Appeals to decide. What is being provided is an avenue that fills in a due process issue. The circuit court issues confirmatory orders all the time. The concept is that if the employer was not served, and the employee would like to enforce the lien, at least the employer should be given the opportunity to be heard. The Committee has no stake in this. The Subcommittee was trying to provide what was requested and give some guidance to a statute that has been in effect since 2013.

The Chair noted that a question had been raised. If an employee comes to the clerk's office seeking a writ of execution or a writ of garnishment, there is no case number. Mr. Weaver remarked that Judge Stone's point was that the legislature

provided that this lien can be established in Maryland. It is a lien against title. Ms. Gardner said that the intent was that the lien is enforceable as any other judgment. The language problem of the statute is "an order for a lien." It was not intended that liens by operation of law could not be enforced as other judgments. The Chair noted that the statute uses the word "order."

Judge Stone remarked that it is important to be very careful when looking at the legislative intent of a statute that is clear. One of the primary rules of statutory construction is that when the statute is clear on its face, one does not go beyond it. The statute refers to "order" and not to "confirmatory order." The Chair explained the rationale of the Subcommittee. The statute provides that an order for a lien can be enforced, not the lien. However, if the employer never filed a complaint, and the employee files the lien statement, there is no order. There will never be an order, and it cannot be enforced. Judge Stone said that it could be enforced the same as any other lien on a piece of property is enforced. When someone tries to sell the vehicle that has the lien against it, the lien is there.

The Reporter commented that when the Subcommittee was discussing this, members pointed out that it could be a lien on anything. If, for example, the lien is on the employer's file

cabinets, in all likelihood the employer is never going to sell the file cabinets. How does the employee ever get paid? Judge Stone replied that the fact that the legislature may have done something ineffective when something effective is already in place is an issue. The employee could sue the employer and get treble damages. The Chair pointed out that this is not what the legislature wanted to rely on. All that the Subcommittee did was to provide for an order to implement the statute as it is written. Judge Stone said that he had given the Committee the District Court's position. He thanked the Committee for inviting him to attend the meeting.

Mr. Laws remarked that he did not agree with Judge Stone that this subject is beyond the authority of the Committee and the Court of Appeals. The statutory language that is being discussed forces a proceeding on the court and on the parties that no one really wants. Mr. Laws expressed the view that it would not be that much of a leap to strike what is in Rule 15-1406 after section (a). The Rule could provide that enforcing an order or filing a statement of a lien should be pursuant to other post-judgment proceedings. The Reporter pointed out that there is no order. Mr. Frederick observed that other post-judgment proceedings would envision notice, service, an opportunity to be heard, and a court proceeding. Mr. Carbine said that he would like to see a petition that contained the

necessary information. Otherwise, there is a mystery lien turning into a judgment turning into a judicial sale with no detail.

Ms. Gardner noted that the Wage Lien Statement does include all the details. It identifies the property. However, the statute does refer to an "order for a lien." She and her colleagues had asked the Rules Committee to create a process to get an order. The question is how complicated that process should be. They strongly oppose the idea that it needs to be personally served. There already has been personal service.

Ms. Gardner said that she and her colleagues think that the Rules should focus on the efficiency of the process and sufficiency of service. She said that the employer should have to explain why the employer did not respond to the notice and waited until this time to complain. The Public Justice Center had suggested language for Rule 15-1406 that would limit it that way. Otherwise, a fairly simple second round of the process is exploding into a more complex second round of litigation. This is not consistent with the statute.

Judge Stone remarked that this is the problem with opening this door that the legislature chose not to open. What is being debated is public policy on a statute. The Judiciary generally does not take up those policy issues. The Committee is making a retroactive policy comment telling the legislature that they

made an error, so the Committee will fix it. This is the responsibility of the legislature. The Public Justice Center can go to the legislature to get what they need. Judge Stone added that he worries about the process when a door like this is opened.

The Chair told the Committee that there are multiple questions to determine. One is a motion to adopt the Rule as it was presented, adding the confirmatory order. If it is added, the next question is whether that proceeding should be limited to explaining why the employer did not complain before, which could be that the employer was never served.

Judge Ellinghaus-Jones asked that the District Court be excluded. The District Court has limited jurisdiction and it only has the authority granted to it by the legislature. Code, Courts Article, §4-201 sets out the jurisdiction. There is no procedure that allows the District Court to enforce a circuit court order. Rule 3-622 (Transmittal to Another County) provides that the District Court can enforce a judgment of the District Court in another county. Rule 3-631 (Enforcement Procedures Available) provides that judgments may be enforced by these Rules or by statute. Unless there is a Rule or a statute providing that the District Court can enforce a circuit court order, Judge Ellinghaus-Jones said that she did not see how the District Court can do it. It does not have general jurisdiction

or common law jurisdiction.

Judge Ellinghaus-Jones added that the statute refers to circuit court Rules. How can that one statement "enforced as any other judgment" bring in the District Court, when the entire statute only refers to circuit court? Statutory construction requires construing the entire statute as it exists. The entire statute only refers to circuit court. Senator Norman remarked that an attorney who has a District Court case would like a judgment so that the attorney can spend $15 and get a lien in the circuit court. In the matter being discussed today, there is a lien, but no judgment. What does a clerk in the District Court receive from the circuit court? What filing fee does the District Court receive from the circuit court? Senator Norman agreed with Judge Ellinghaus-Jones that this part of the process has not been discussed in the law. He expressed the view that the District Court should not be involved in these cases.

Mr. Carbine moved that Rule 15-1406 be changed to take out the reference to the Title 3 Rules, which was the point made by Judge Ellinghaus-Jones. Mr. Frederick seconded the motion.

Mr. Weaver suggested that, in subsection (b)(2)(A), the language "the fee for filing a garnishment proceeding" would be clearer in the costs schedule if it was "the fee for filing a request for issuance of a writ of garnishment in the circuit court." Mr. Frederick agreed to this change.

The Chair called for a vote on the motion to approve Rule 15-1406 with the amendments suggested by Judge Ellinghaus-Jones and Mr. Weaver. The motion carried on a majority vote. The Reporter said that the rest of the Rule would remain the same, except for any clarifications needed to indicate that the court referred to in Rule 15-1406 is the circuit court.

There being no further business before the Committee, the Chair adjourned the meeting.